Volume 65
Issue 2 *Dickinson Law Review - Volume 65, 1960-1961*

1-1-1961

Probate and the Contest of Wills in the Commonwealth of Pennsylvania: The Need for Reform

J. Pennington Straus

PROBATE AND THE CONTEST OF WILLS IN THE COMMONWEALTH OF PENNSYLVANIA: THE NEED FOR REFORM

BY J. PENNINGTON STRAUS*

Procedure for probate and contest of wills in Pennsylvania is entrenched in the archaic. The distinguished commission appointed by the Governor to revise the laws relating to the estates of decedents did little in its otherwise excellent codifications of 1917 to modernize these procedures; and in recent years, the Advisory Committee to the Joint State Government Commission, more numerous but no less distinguished in membership, perpetuated cumbersome antiquities with little change.

An English practitioner of the time of Charles II, or even of Henry VIII, would feel readily at home if he were called upon to probate the will of a 1960 Philadelphia decedent or to act as counsel in a current will contest. On the other hand, the English barrister or solicitor of today would be confounded by our Pennsylvania procedures.[1] Over a hundred years ago the English law, as a result of reforms recommended by a Royal Commission appointed in 1832, was completely altered, and there were telescoped into a single court, the High Court of Justice, the jurisdictions of the various courts and quasi-judicial bodies which theretofore had limited or general powers in the field of probate and estate administration.[2] Some of these modifications were followed in the United States. For example, the trend initiated by English reform has been followed and furthered by the Section of Real Property, Probate and Trust Law under whose auspices the Model Probate Code was drafted by Professor Lewis M. Simes of the Law School of the University of Michigan and Professor Paul E. Basye, now of the Law School of the University of California.[3] This Model Code has served as a guide to modernization in many jurisdictions and was studied, and in certain instances, followed by the Advisory Committee in drafting Pennsylvania's recent acts in the decedents' estates field. For the most part, however, Pennsylvania has clung, steadfast, to expensive, time-consuming, multi-

* A.B., University of Pennsylvania; LL.B., University of Pennsylvania; member of the Philadelphia, Pennsylvania, and American Bar Association; member of the Council of the Section of Real Property, Probate and Trust Law of Pennsylvania Bar Association; member and past Vice Chairman of the Council of the Section of Real Property, Probate and Trust Law of American Bar Association (past Director of the Probate Division).

1. This was revealed by experts in probate practice from the English Bar at the 1960 meeting of the Section of Real Property, Probate and Trust Law of the American Bar Association.

2. Report by the Commissioners to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) embodied in 20 & 21 Vict. c. 77, § 8, 240 (1857).

3. Simes & Basye, *Problems in Probate Law,* MICH. LEGAL STUDIES, 41-234 (1946).

hearing procedures that evolved through historical accident in the English law as long ago as the time of the Norman Conquest.[4]

Initially, probate and will contest procedures must be examined with recognition that the testamentary disposition of property after death is not an absolute right, is not a creature of "natural law," and is not guaranteed in either federal or state constitutions.[5] In *Irving Trust Co. v. Day*,[6] Justice Jackson summarized the constitutional status of the will as follows:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.[7]

The legislature of the State of Pennsylvania, in a long series of statutes, the most recent of which are the Wills Act of 1947,[8] the Fiduciaries Act of 1949,[9] the Orphans' Court Act of 1951,[10] and the Register of Wills Act of 1951,[11] has from the beginning of colonial history provided for the right of an individual to transmit by will his real and personal property, subject to the limitations and requirements contained in the pertinent acts. The legislature has with particular care directed the procedure by which a will, executed in accordance with statutory requirements, shall be probated. These requirements and procedures have had as their common guiding policy the protection of the will from captious attack. Pennsylvania, following English statutory antecedents, has, therefore, preserved the sanctity of the will offered for probate with a possibility of three de novo hearings:

(1) Before the Register of Wills on caveat prior to probate where no jury trial is permissible;[12]

(2) Before the Orphans' Court on appeal from probate or denial of probate by the Register to determine whether or not a substantial dispute of fact exists, such dispute being a prerequisite to a contestant's right to a jury trial (formerly and historically known as a hearing on the issue "devisavit vel non");[13] and

---

4. ATKINSON, WILLS 2 (1937); 1 PAGE, WILLS §§ 13-22 (1941).
5. Tacks' Estate, 325 Pa. 545, 191 Atl. 155 (1937).
6. 314 U.S. 556 (1942).
7. *Id.* at 562. All states seem to follow the principles enunciated by the Supreme Court in the Irving Trust Co. case except Wisconsin, which singularly has concluded without other authority that the will is a right guaranteed inferentially in its constitution. In re Ogg's Estate, 262 Wis. 181, 54 N.W.2d 175 (1952).
8. PA. STAT. ANN. tit. 20, § 180.1 (1950).
9. PA. STAT. ANN. tit. 20, § 320.101 (1950).
10. PA. STAT. ANN. tit. 20, § 2080.101 (1960).
11. PA. STAT. ANN. tit. 20, § 1840.101 (1960).
12. PA. STAT. ANN. tit. 20, § 1840.206 (1960).
13. PA. STAT. ANN. tit. 20, § 2080.744-6 (1960).

(3) Before the Orphans' Court with jury trial to decide the facts where the court has determined that a substantial dispute does exist.[14]

In addition, there may be argument on exceptions before the court en banc and an appeal therefrom to the Pennsylvania Supreme Court.

When the historical origins of these procedures are understood, the need for reform becomes clear. The origins go back at least to 1066 when the Norman French lawyers brought about the enlargement of the jurisdiction and authority of Ecclesiastical Courts to include the devolution of personal property upon death (including testamentary succession), the appointment of personal representatives and litigation over the validity of wills.[15] The secular courts, variously known as the Court of King's Bench, Court of Common law, or Court of Common Pleas, had jurisdiction over freehold interests in realty, including jurisdiction to determine the validity of title, and other "common law rights."[16] As time passed, the Chancery Court emerged and grew in strength until it finally acquired a decisive jurisdiction in estate administration through the exercise of its extraordinary power of injunction.

Substantial restrictions were placed upon wills in the feudal period. These restrictions were followed by the later enactment of the Statutes of Uses[17] and the reforms of Henry VIII, *i.e.*, the Statutes of Wills.[18] But by the end of the seventeenth century, procedures had crystallized which remained substantially unchanged until the Reform Acts of 1857. These early procedures supplied the pattern copied by the English lawyers in the North American colonies.

Let us examine briefly the working of this system.[19] The Ecclesiastical

14. *Ibid.* See also, BLESSING, PRACTICE AND PROCEDURE IN THE ORPHANS' COURT (1954).

15. The Ecclesiastical Courts were divided into the Ordinary Court of the Diocese, the Peculiar, and the Province. The probate matters were before the "Ordinary" of the Diocesan Court and the Prerogative Court was one of the two sets of provincial courts under the jurisdiction of the Archbishop of York and the Archbishop of Canterbury. Holdsworth, *The Ecclesiastical Courts and their Jurisdiction,* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255 (1908); BURNS, ECCLESIASTICAL LAW 292, 296 (9th ed. 1842).

16. 1 PAGE, WILLS § 14 (1941); 3 ILL. L. REV. 347 (1909); MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 142 (1955).

17. 27 Hen. 8, c. 10 (1535). The Statutes of Uses attempted unsuccessfully to abolish the testamentary transfer by exercise of powers of appointment of equitable interests in land.

18. 32 Hen. 8, c. 1 (1540), 34 & 35 Hen. 8, c. 5 (1542). The Statutes of Wills made possible the testamentary transfer of title to real estate held in socage or knight's service by all persons except feme covert, infants and those lacking testamentary capacity.

19. English testamentary procedure is thoroughly discussed in Simes & Basye, *Problems in Probate Law,* MICH. LEGAL STUDIES (1946); Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction,* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255 (1908); Atkinson, *Brief History of Testamentary Jurisdiction,* 8 Mo. L. REV. 107 (1943).

Court had exclusive jurisdiction in the issuance of letters testamentary and letters of administration. It was, therefore, to the Ecclesiastical Court that the named executors made application for the probate of a will and for the issuance of letters of authority to administer the decedent's estate. However, it is significant that the Ecclesiastical Court might entertain probate in either "common" or "solemn" form. If there were no question of the validity of the will, the interested parties appeared before the Ordinary, as he was called, and on oath of the named executor that the will was valid and that the executor would administer the estate properly and in accordance with the law, the will was admitted to probate in "common form" and letters testamentary were issued. If, on the other hand, the validity of the will was challenged, either on the first application for probate or later, after probate in common form, the Ecclesiastical Court would require probate in "solemn form."

Where probate was in solemn form, all parties in interest were required to be notified, and all parties were thereafter given the opportunity to come before the Ordinary and give testimony as to the validity or invalidity of the will. A decision would follow admitting the will to probate and issuing letters, or, on the contrary, holding that the will was invalid. The appeal of the losing party was taken from the Ordinary of the Ecclesiastical Court situated in the diocese where the decedent had died to the Prerogative Court of Canterbury or of York. The Prerogative Court then examined both facts and law in a hearing de novo. Proceedings before the Ecclesiastical and Prerogative Courts were initiated by petition and citation, as in our Orphans' Court, and decrees were enforceable by excommunication. If the defendant did not submit within forty days, the Ecclesiastical Court could so signify to the King's Bench Court where a writ "de excommunicando capiendo" issued to the sheriff and the defendant was imprisoned until he did submit.[20]

The Ecclesiastical Court had the further exclusive jurisdiction to administer the personal property of the decedent and to order its distribution in accordance with the terms of the will. However, the Ecclesiastical Court had no jurisdiction with respect to real property, and if a will undertook to dispose exclusively of interests in real estate, it could not be probated by the Ecclesiastical Court. In this event, there was no need for a personal representative since under the English law, still in effect in Pennsylvania, the devisee of the real property took title immediately upon the testator's death. On the other hand, if the will disposed of both personal property *and* real property, the Ecclesiastical Court had full authority to probate the will and

20. Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction,* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 311 (1908).

to issue letters testamentary, but its authority in administration was limited exclusively to the distribution of the personal estate.

In the majority of cases, then as now, wills offered for probate were not the subject of contest or dispute. Such cases were called "non-contentious" by the Ecclesiastical Court and administration proceeded in a routine manner. If, however, any question of title to real property or of rights under a contract arose in the administration of the estate, or if any aggrieved party felt that the Ecclesiastical Court was exceeding its jurisdiction, application could be made to the Court of King's Bench, which might, after de novo hearing, issue a writ of prohibition, effectively stopping all proceedings in the Ecclesiastical Court until the determination of the issues raised by the complainant.[21] It would appear that writs of prohibition were commonly issued; particularly so, since the Ecclesiastical Court developed a tendency to extend its limited statutory jurisdiction.

It can well be imagined that these two independent systems of courts with their distinctly different procedures and powers of enforcement of decrees would produce juridical deadlocks. Into this situation entered the Chancellor with his superior power of injunction. The difficulties can be illustrated best by a supposititious case. Suppose that a will devised both real and personal property, and assume that the heir at law was in possession of the real property, rather than the devisee. Assume further that a will was offered for probate in solemn form before the Ordinary who, after notice and hearing, had admitted the will to probate. This could then have been followed by an appeal to the Prerogative Court of the Archbishop of Canterbury or York, where a de novo hearing would result. At any point in the proceedings in the Ecclesiastical Court the heir might have obtained a writ of prohibition from the Court of King's Bench against the further administration of the estate, alleging the invalidity of the will. A hearing de novo would have developed at this juncture to produce evidence to sustain the writ. On the other hand, the devisee might have applied to the Court of King's Bench for a writ in ejectment. The trial held on either writ before a jury would be de novo on all law and facts.

However, the Court of King's Bench could only give a judgment that would be effective between the parties to the action at the time the action was brought, and consequently the threat of multiple subsequent suits would continue to be present. If the devisee won the verdict, he might very well thereafter proceed in Chancery by a bill to perpetuate testimony, upon which there could be based a perpetual injunction that would protect against harassment of subsequent suits at law. Before issuing such an injunction, however, the Chancellor would hold a de novo hearing.

21. Atkinson, *Brief History of Testamentary Jurisdiction,* 8 Mo. L. Rev. 107, 117 (1943).

Since we have assumed the will bequeathed personalty and devised realty, the heir could have proceeded in Chancery in the first instance, alleging invalidity of the will and seeking a permanent injunction against the devisee's entry on the land. The Chancery Court would thereupon have held a hearing de novo on the issue "devisavit vel non," and, if on the preliminary hearing the Chancellor had believed that there was a substantial dispute, the issue would have been referred to the Common Law Court for a trial before a jury on the validity of the will, *i.e.,* who had title to the real property. After a verdict of the jury and the judgment of the Common Law Court that the title was in the devisee, or in the heir, the Chancellor would have issued an appropriate perpetual injunction, and interference by the losing party would have been forever thereafter enjoined.

From the foregoing briefest outline it is perfectly apparent that under the English procedure prior to 1857 will contests constituted litigation complications and hazards of magnitude. First, the probate in solemn form before the Ecclesiastical Court might have produced two separate hearings, one before the Ordinary and one before the Prerogative Court, both de novo. Secondly, there were the correlative de novo procedures by writ of prohibition before the King's Bench Court, or by ejectment before the King's Bench Court followed by a bill to perpetuate testimony before the Chancery Court. Thirdly, there was the possibility of a hearing de novo before the Chancery Court on the issue "devisavit vel non," followed by a further jury trial, also de novo, before the Common Law Court to decide the substantive issues, *i.e.,* the title to real estate, the validity of a contract, etc.

There was no provision in Penn's Charter for an Ecclesiastical Court, but most of the other procedural steps and tribunals involved in the English System were transplanted to Pennsylvania under different names. The representatives of the Colonial Governor or "Register General" probated wills, exercising thereby a jurisdiction parallel with and comparable to that performed by the Ecclesiastical Court.[22] Section 201 of the Register of Wills Act of 1951 repeats the 1917 Act and earlier acts when it gives the following exclusive jurisdiction to the Register: "Within the county for which he has been elected or appointed, the register shall have jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law." Here then is the language which continues in Pennsylvania practice the function of the Ecclesiastical Court which we never had by name; it is a perfect case of statutory derivation.

It is curious that in our state the Register, who inherited from the Ecclesiastical Court the right to probate a will in common form, did not also inherit from the Ecclesiastical Court the solemn form of probate procedure. Surrogate courts of some colonies did inherit this right. In Pennsylvania,

22. Eyster's Estate, 5 Watts. 132 (1836); see also FID. REV. 3 (August, 1952).

however, there was developed as early as 1713 a substitute procedure, the caveat, which was followed by the Register, or Register's Court.[23] But caveat was not as flexible as probate in solemn form, since the caveat had to be filed *before* the will was probated; otherwise, it was too late. A petition for probate in solemn form with its accompanying hearing could be introduced by the challenging party after the probate of the will in common form.

The Orphans' Court which took its name from the "Court of Orphans in the City of London" had very limited power at the time of its origin, being concerned with the property of minors and incompetents, and later, intestates. It was established as a court of record in 1713,[24] and was recognized in the Constitution of 1776 and in every later constitution of the Commonwealth. As it grew in authority, it took over certain functions which had been performed in England by both the Ecclesiastical Court and the Chancery Court. Namely, supervision of the personal representatives of a decedent in all matters relating to the administration of a decedent's estate, and the exercise of equity powers which it inherited from the Court of Chancery. With growth in power came its establishment as an appeal court from the decrees of the Register's Court or Register General, but the right to issue letters in the first instance remained at all times with the Register.

However, it was not until the Fiduciaries Act of 1949, the Register of Wills Act of 1951 and the Orphans' Court Act of 1951, that the Orphans' Court achieved its present status to pass upon all matters relating to the property of decedents, including the power to determine title to real estate. Prior to these recent acts, the Orphans' Court did not have jurisdiction to construe a will declaring the rights of parties in unsold real estate.[25] All such matters had to be referred to the Court of Common Pleas for determination, where a jury trial was in order.[26]

Consequently, before the recent revisions in Pennsylvania, a will contest in which real estate was the subject of a devise would have developed in almost the same way as in England prior to 1857. If a caveat had been filed, there would have been a hearing before the Register on the caveat resulting either in probate of the will or the denial of probate; and in either case, the losing party would have a right of appeal to the Orphans' Court. Under Sec-

23. See Comm. v. Brady, 3 S. & R. 309 (Pa. 1817), where it was held that the Register no longer had authority to enforce a citation to show cause why an inventory and account had not been filed, this authority having become the jurisdiction of the Orphans' Court. However, the ancient authority of the Register, under the Act of June 17, 1712, to entertain caveat procedure with respect to the validity of wills was confirmed.

24. 1 SMITH L. 81 (Pa. 1713).

25. 4 HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK § 8(c) (1959). The Price Act of 1853 and the Revised Price Act of 1917 gave the Orphans' Court authority to deal in, sell, mortgage, pledge and partition real property owned by a decedent or an incompetent.

26. Rothermel v. Rothermel, 345 Pa. 139, 27 A.2d 33 (1942).

tion 17 of the Register of Wills Act of 1917 and prior acts, where a caveat had been filed the Register had the further authority, at the request of any interested party or on his own motion, to frame an issue and refer it on precept for trial to the Common Pleas Court. If, on the other hand, no caveat had been filed and the will had been admitted to probate, then at any time within a two year period after probate any party in interest could have appealed to the Orphans' Court. In this event, there would, of course, have been no hearing before the Register of Wills.

When the case was properly before the Orphans' Court on appeal, and the record had been duly certified by the Register, it became the duty of the Court to hold a hearing on the issue "devisavit vel non" precisely as the Lord Chancellor would have done in England in a similar situation on removal from the Ecclesiastical Court. If the Orphans' Court should have decided to award an issue, there would have followed a reference by the hearing judge to the Court of Common Pleas to try the issue. A jury would then be impaneled in the Common Pleas Court and a trial de novo held, a repetition of the pattern followed by the English Chancery Court which, after it had determined that a substantial dispute of fact existed, would have been obliged to refer the matter to the Common Law Court for jury trial.

It is the author's position that the revisions of 1949 and 1951 have not gone far enough. It is true that a substantial simplification is effected by giving the Orphans' Court the jurisdiction to determine questions of title to real estate and to impanel juries. But insofar as will contest procedure is concerned, there is no basic improvement in function since the jury trial de novo before the Orphans' Court after a finding that a substantial dispute of fact exists, is substituted for the jury trial de novo before the Court of Common Pleas. It is conceivable, of course, that under the present statutes, even when proceedings are commenced by caveat, the number of hearings may be held down to one before the Orphans' Court. Section 207 of the Register of Wills Act of 1951 gives the Register *authority* on his own motion, or the Orphans' Court upon *petition,* to cause the matter to be certified to the Orphans' Court for determination. The Register would, normally, while the validity of the will is being adjudicated, issue letters of administration pendente lite. Section 746(a)1 of the Orphans' Court Act of 1951 would thereafter permit the Orphans' Court on its own motion, or on motion of any party, after reasonable notice, to combine in one hearing, without jury, the determination of whether a substantial dispute of fact exists with a trial to determine the substantive issues. The Orphans' Court could also impanel a jury on the spot to try the substantive issues, including in this hearing a determination of which of the number of wills left by a decedent is valid. Rule 105 of the Orphans' Court of Philadelphia County, effective January 1,

1960, was drafted especially to cover this latter provision of the Orphans' Court Act which was incorporated in the amendment of 1956.[27]

It is repeated, however, that while it is possible under existing statutes and rules of court to have only one hearing in a will contest, the customs of lawyers and litigants being what they are, this result seldom, if ever, happens. It may be more likely to occur in the less populous counties, but in Philadelphia and other larger counties where the Register is well staffed with solicitors, counsel and other employees, the trend is in the other direction, namely, for the Register himself to hold the initial hearing in all caveat matters.[28] Furthermore, counsel who are contesting a will, or, in some cases, counsel defending the will, are inclined to take advantage of all the procedural steps presented under the statutes with the idea in mind of tiring out the other side or effecting a settlement before reaching the stage of jury trial on the fundamental issue. In the writer's experience, the negotiations for settlement, for which the lengthy and protracted procedures present an opportunity, may often last several years while the parties are going through some of the motions of getting the case in position for jury trial. Opportunity beckons to the unscrupulous to tie up the administration of an estate with a hope of shaking out a nuisance value settlement for a validly and properly disappointed heir.

RECOMMENDATIONS

The most logical remedy is, of course, the most radical. The first place to start might be with the Office of the Register of Wills, and if that office were abolished entirely, and the function of probate turned over to the Clerk of the Orphans' Court, there would be a simplification not only in procedure but a streamlining of county employee offices as well. In the event of such a reform, the Clerk of the Orphans' Court would be responsible for receiving the will for probate in common form, and would exercise the largely ministerial function of recording the will and issuing the letters testamentary. If there were any objection, then or later raised, the matter would be taken to the court for hearing on petition for citation and answer.

27. PA. STAT. ANN. tit. 20, § 2080.746a(1) & b (1960).

28. The following official statistics of the Office of the Register of Wills of Philadelphia County are interesting:

Year	Wills Probated	Caveats Informal	Caveats Formal	Appeals
1955	3,829	211	12	33
1956	3,992	208	16	36
1957	4,046	169	8	36
1958	4,152	185	10	30
1959	4,027	193	14	26

It may be safely assumed, although no accurate figures are available, that in at least every case where the caveat was perfected, a formal hearing was held by the Register.

However, it is too much to expect the legislature lightly to abandon the Register of Wills office which has such ancient traditions and even a certain political importance. Therefore, the reforms which the writer is about to suggest assume the retention of the Register of Wills office with all of its present authority, except the right to hold a hearing on the caveat. This part of the procedure on will contests would and should be eliminated, and probate procedure streamlined and amended as follows:

(1) The caveat procedure should be retained as at present with the filing of an informal caveat to be perfected within a ten day period. It would thereafter be incumbent upon the proponent of the will to file a petition for probate with the Register, who would then certify the entire record to the Orphans' Court.

(2) In the event the proponent offered the will for probate and there were no prior caveat, probate in common form would proceed as it presently does, except it is suggested that the time for appeal from the grant of letters under such circumstances should be reduced from two years to one year after the first publication of notice of the grant of letters. As under present law, statutory permission might be given to the proponent on petition for citation to the Orphans' Court, the citation being served on all parties in interest, to obtain a shortening of the one year appeal period to not more than three months.

(3) Statutory procedure in the Orphans' Court should continue much as it does at present with one major amendment eliminating all reference to the determination of whether a "substantial dispute of fact" exists, the old "issue devisavit vel non." If a record were certified by the Register to the Orphans' Court after the filing of a caveat, no appeal papers would be necessary, although a bond would have been entered to perfect the caveat. On the contrary, if an appeal were taken within the specified one year or shorter period after probate in common form, the appellants should be required to file a bond to perfect the appeal as at present, and the Register would thus be cued to certify the record to the Orphans' Court.

(4) After the record was certified to the Orphans' Court either after caveat procedure or after appeal from the Register, it would be appropriate to continue the present practice of requiring the proponent of the will in the case of caveat, or the appellant otherwise, to file with the Orphans' Court a petition for citation on all parties in interest. Where the record certified consisted only of the caveat and the petition for probate, it would be appropriate for the proponent to petition for a citation on all parties to show cause why probate of the offered will should not be granted. Where the record was certified on appeal from the grant of letters by the Register, the appellant would file a petition with the Orphans' Court for citation to

show cause why the action of the Register should not be set aside. In either event, the citation would issue, service would be made as heretofore on all parties in interest, and on the return day of the citation, preferably a regular motion day, the court would fix a date for trial.

(5) In the petition for citation, or in the answer thereto, the parties would be required to request or to waive jury trial. If jury trial were waived, the court would, thereafter, hear evidence, and either sustain the Register or reverse the Register. If, on the other hand, jury trial were demanded, the verdict of the jury would be advisory only, and not binding on the judge.[29] As at present, the decree of the judge, whether trial were held with or without jury, would thereafter be final and subject to exceptions and argument before the court en banc prior to appeal to the supreme court.

The amendments outlined above could be achieved with very little redrafting. It is perhaps better not to make specific verbal recommendations. Suffice it to note that the principal sections needing treatment are sections 207 and 208 of the Register of Wills Act and sections 744, 745 and 746 of the Orphans' Court Act of 1951.

The Anglo-American common law has changed radically in many ways since the English Ecclesiastical Court obtained jurisdiction in the eleventh and twelfth centuries over the probate of wills, the issuance of letters and administration of personal property. Yet, the basic procedural patterns for probate and contest of wills in Pennsylvania have remained relatively static. It is time for us to line up our will contest procedure with the Model Probate Code. Anachronistic procedure is too expensive and time-consuming for present day justice.[30]

---

29. PA. STAT. ANN. tit 20, § 2080.745 (1960).

30. A case in point is the recent decision handed down January 4, 1961 by the Supreme Court of Pennsylvania in the Estate of Grace M. Hall, Nos. 56, 57 and 58, January Term, 1959, where the Court in a majority opinion of Chief Justice Jones overruled the Orphans' Court and held that the evidence warranted the granting of an issue and jury trial. A vigorous dissent was filed by Mr. Justice B. R. Jones which was joined in by Mr. Justice Bell and Mr. Justice Bok, and it is highly significant that the same court in January of 1960 had delivered an opinion written by Mr. Justice McBride which reached the opposite result.