

cal action one would expect in business anarchy and not in an industrial democracy based on a partnership between government and business.

#### CONCLUSION

Fortunately, the arbitration provisions of the Codes thus far adopted are in the main exhortatory and not mandatory. In so far as they encourage business men to arbitrate voluntarily in the proper cases, they will serve a useful purpose. In the event mandatory provisions are inserted, normal common law and statutory arbitration rules will not help enforce them. Mandatory general arbitration provisions in contracts will be enforced in only twelve states, and business will find that such enforcement robs it of the benefits which voluntary arbitration offers. Resort to the doctrines of "unfair competition" by courts to enforce arbitration provisions is unlikely. No one will dispute that legal reforms are necessary and that progress must be made in law to keep up with rapidly changing business conditions. To that task, lawyers should dedicate themselves. The task can be accomplished without the application of lynch law to business affairs. But to tie up a movement of legal reform (in which arbitration has a role) with a movement of business recovery seems likely to lead to confusion in which the needs of law will be neglected. Each deserves independent treatment.

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#### ANTE MORTEM PROBATE: AN ESSAY IN PREVENTIVE LAW

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THERE is recrudescent in American legal thought today something of the spirit of Jeremy Bentham, that Don Quixote of English law who, for his utilitarian Dulcinea, took pen and tilted at those venerable anachronisms which Blackstone had endowed with a specious rationale and found a place for in the eternal order of things. If this interpretation of the *Zeitgeist* is correct, one may, perhaps, be condoned for essaying to joust with that formidable forensic windmill, the will contest.

The function of our testamentary law is to provide an efficient procedure for the transmission of property upon death in accordance with the will of its owner. Since its employment is optional, it can discharge that function only if it is generally regarded as satisfactory by those who may use it. We have, of course, no statistically aseptic data as to the public's attitude, and probably we never shall have; yet that fact should not preclude an appraisal of such evidence as is available.

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To begin with, we know that, except for those occasional divorce proceedings which are not of the slot-machine variety, there is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest. There is evidence that the promoting of such contests is a fertile field for the champertous.<sup>1</sup> The tax which such proceedings levy upon estates subjected to them is frequently far more onerous than that exacted by the federal and state governments. Subject in many states to the vagaries of the trial by jury of issues affording little opportunity for judicial guidance, the result of any given case is exceedingly difficult of prediction. These facts are not hidden from the layman; indeed, he is fortunate to whom they have not been attested by painful personal or family experience. They corroborate the observation which Henry W. Taft of the New York Bar made at the close of an illuminating address on "Will Contests in New York": "Modern testators may say that death becomes for them 'armed with a new terror.'"<sup>2</sup>

It is of no consequence that one may avoid these evils by the simple expedient of dying intestate or by making absolute gifts of property before death. We cannot well learn how often these courses are followed by those who, rightly or wrongly, fear the litigation which testation may breed; but every instance where such a fear motivates either intestacy or donations which might otherwise have been postponed until death, calls in question the efficacy of our testamentary law.

The same can be said of those various devices which are so frequently resorted to as alternatives to the employment of a will to effect the distribution of an estate.<sup>3</sup> These include, to enumerate some of their more usual forms,<sup>4</sup> the conditional delivery of deeds, the absolute delivery of

<sup>1</sup> A recent and peculiarly shameless attempt of this sort is recounted in Will Contest Racket, 4 Mo. Bar Jour. 110 (1933).

<sup>2</sup> Taft, Will Contests in New York, 30 Yale L. Jour. 592 (1921). This address was one of a series sponsored by the Association of the Bar of the City of New York and may also be found in Lectures on Legal Topics (1924), 204.

<sup>3</sup> One must, of course, concede the existence of other motives for their utilization. Among these may be (1) the desire to escape administration costs, (2) the hope, usually forlorn, of evading inheritance taxation, and (3) the superstitious dread of executing an instrument so fraught with intimations of mortality.

<sup>4</sup> Reference, in passing, should also be made to another device, the *in terrorem* clause, available to those testators who have reason to fear contests and are yet willing to make substantial gifts to those whose intentions they suspect. Its validity is denied in many states, and not without cause, for it is a dangerous weapon to place in the hands of the unscrupulous. Its use is conditioned in some other jurisdictions upon there being no reasonable cause for contest. See Note, 39 Harv. L. Rev. 628 (1926). The value of the latter solution as a deterrent is, at best, conjectural.

deeds containing conditions postponing operation until death, the placing of deeds or bearer securities where they may be accessible to intended beneficiaries, the creation of joint bank accounts and deposits in trust for others, the establishment of living trusts, and the making of gifts *mortis causa*. Some of these are open to litigation raising the very issues which render the will contest obnoxious. All of them run closely to that shadowy line which divides testamentary dispositions from those that are valid without benefit of testamentary formalities. Inevitably, therefore, they prompt those judicial inquiries to discover, *nunc pro tunc*, the specific legal intentions of departed laymen or, less frequently, that type of litigation which rises above the plane of the family quarrel to the more lofty level of doctrinal disputation and statutory construction.<sup>5</sup>

These struggles of the ill-advised to elude the Scylla of the will-contest and the Charybdis of intestate distribution constitute, to change metaphors in mid-sentence, an important aspect of the pathology of our testamentary law.<sup>6</sup> They have inspired the writing of learned monographs too numerous for citation which for the most part have been directed, as is the custom in such *post mortem* reports, to the question of whether the doctors erred. Why the cases arose and how they might have been prevented are not within the usual scope of disquisitions on the problem, to note a recurrent topic, of whether a deed may properly be said to have been "delivered" when placed in the hands of a third person or only upon the happening of the condition precedent to its operation. Without derogating from the value of such studies within the narrow confines of their objectives, one may well question the significance of their social contribution.

That the fear of the will contest may be exaggerated is not of great consequence; its existence is of chief significance. But is it ill-founded? The number of contested wills in proportion to the number offered for probate

<sup>5</sup> The intervention of the legislature in this field has been negligible although some effort has been made to improve the bank deposit problem, chiefly, it seems, for the benefit of the banks. See Scott, Trusts and the Statute of Wills, 43 Harv. L. Rev. 521, 545 (1930). That this legislation is not always efficacious is illustrated by the review of the Washington statutes in Oswald, The Legal Efficacy of Attempted Methods of Avoiding Probate, 5 Wash. L. Rev. 1 (1930).

<sup>6</sup> The cases are numerous. For example, under the single heading, "Deposit for delivery on death of grantor" (Deeds, § 60), the Decennial Digest for 1907 to 1916 lists 67 cases; the Digest for 1916 to 1926, 62; the Current Digests through 1932, 34. (*Quaere*, does the lower frequency in recent years evidence the perfecting of the law or the lower value of land?) There are, of course, many cases involving transactions of this character classified under other headings, and it should be remembered that appellate decisions are few in proportion to cases tried and to controversies settled out of court.

may not be large,<sup>7</sup> but that is a misleading index of the evil's extent. The threat of the *caveat* is potent to exact settlements. The position of the proponent is always vulnerable, for the very situation out of which the threat arises—the atypical distribution of an estate—is suggestive of some abnormality either in the testator himself or in his family relationships. Moreover, the fact that the devisees and legatees are “volunteers” renders them susceptible to offers for settlement. The unpleasantness of the litigation itself works for extra-judicial procedure. Some courts have hesitated to countenance such settlements,<sup>8</sup> but recognition is now generally accorded them. Indeed, in some states statutory machinery exists whereby the settlements arrived at may be subjected to judicial scrutiny and duly embodied in the estate records.<sup>9</sup>

There is no doubt that occasionally these settlements may effect a more equitable distribution of an estate than would the testator's wishes; but need one have recourse to psychological or sociological studies to prove that our Gonerils are more likely to be litigious than are our Cordelias? Moreover, the indulgent provisions in our intestate laws for “laughing heirs” encourages, as the Wendel case in New York painfully demonstrated,<sup>10</sup> the frequently profitable assaults on charitable bequests. The forced settlement, the will contest itself, and the makeshift substitutes for the will combine to justify a re-examination of the testamentary device with a view to devising a more satisfactory procedure.

We are wont to echo Justice Holmes' observation that our states may

<sup>7</sup> In Grant, *Law and the Family*, it is stated that “rather less than 1%” of wills offered for probate were disallowed in Massachusetts in a ten year period. The proportion of officially sanctioned compromises was about the same. The context indicates that the proportion of unsuccessful attacks was much greater. One may fairly assume that contests are more frequent among large estates.

<sup>8</sup> Wisconsin has been especially reluctant. The cases are collected and discussed in 1 Page, *Wills* (2nd ed., 1928), 1048, 1053, §§ 630, 631.

<sup>9</sup> See, e.g., Mass. Gen. Laws (1921), c. 204, § 13, 15-18; Mich. Comp. Laws (Cahill's Ann. Supp. 1922), § 13818(4)-(7); N.Y. Cons. Laws (Cahill, 1930), c. 13, § 19.

<sup>10</sup> Miss Wendel, an elderly recluse whose family had amassed a fortune in New York realty, died in 1931, leaving the bulk of her fortune to charity. Her executors filed her will stating that she left no relatives. See *New York Times*, Mar. 24, 1931, p. 1. Some 2300 persons strove to establish themselves as entitled to join in the assault on her will. In June, 1933, four claimants, conceded to be relatives in the fifth degree, accepted \$2,000,000 in consideration of their agreement not to contest the will. They are believed to have agreed to share this sum with sixty or seventy relatives in the sixth, seventh, and eighth degrees. See *New York Times*, June 30, 1933, p. 19. In the course of the proceedings, one man was convicted for having fabricated a claim to be the son of the testatrix's brother, and recently Surrogate Foley referred the activities of six other claimants to the Grievance Committee of the Bar Association. See *New York Times*, July 7, 1933, p. 19.

furnish laboratories for legislative experimentation without noting at the same time how limited has been the exercise of this opportunity in the field of private law. English statutory precedents have been followed in many instances more blindly than have English decisions. Nowhere is this more apparent than with respect to testamentary legislation. The Statute of Frauds and the Wills Act have been our models,<sup>11</sup> and with them has come, as a matter of course, the grounds for *caveat* developed in English law. Yet in 1883 the Michigan legislature did attempt to cope with the problem of the contest. The effort was a clumsy one: the statute<sup>12</sup> provided for a petition by the testator to the probate court which was then to cite heirs and other persons named by the petitioner to a hearing at which the testamentary capacity and freedom of the testator were to be determined, and, if these were established, the judge was to decree the validity of the will. Appeal from his decision might be taken, and the power to revoke, alter, or amend the will thus established was expressly reserved. The statute was soon put to judicial test, and in an action of mandamus to vacate an order affirming the decree of the probate judge, the Supreme Court of Michigan held that the act authorized a proceeding without the scope of the judicial power and that therefore the courts could not be called upon to enforce it.<sup>13</sup>

Without examining the merits of the interesting question as to the doctrine of the separation of powers which the case poses, it is evident that the procedure was ill-designed to effect the end in view. Indeed, it invited will-contests and did so under such conditions as to insure the disruption beyond repair of the family participating. In those cases where the power to revoke or amend discouraged aggrieved parties from contesting, the statute seems to have afforded little assurance that an adequate inquiry would be made as to the validity of the will. Apparently the failure of this effort discouraged the proponents of remedial legislation; inertia wins many such easy victories. Yet the court was sympathetic to the desire to discourage "the *post mortem* squabblings and contests on mental condition which have made a will the least secure of all human dealings, and made it

<sup>11</sup> See Bordwell, *The Statute Law of Wills*, 14 Iowa L. Rev. 1, 172, 283, 428 (1928). The author remarks with reference to the English Statute of Frauds, the Statute of George II as to interested witnesses, and the Statute of Wills of 1837, "The content of these three statutes is what makes up the bulk of the wills acts in most of the United States" (p. 4). The holographic will is an American importation from the Continent.

<sup>12</sup> 1883 Mich. Pub. Stat., 17. The text of this act is set forth in Note, 24 Am. L. Reg. (N.S.) 794 (1885).

<sup>13</sup> *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885). Cooley, C. J., and Campbell, J., filed separate opinions. The former noted an additional ground for invalidity, failure to provide for notice to the testator's wife.

doubtful whether in some regions insanity is not accepted as the normal condition of testators."<sup>14</sup> Moreover, the court suggested an alternative avenue of escape to the one which it had closed, pointing to the machinery for the acknowledgment of deeds as a device which might profitably be extended to testamentary dispositions.<sup>15</sup>

This suggestion is one still worthy of exploration, despite its half century of neglect.<sup>16</sup> Essentially a will is a conveyance of property in which, subject to the limitations on testamentary liberty thought necessary for the protection of widows and children, the effectuation of the testator's intention is the primary concern of the law. The informality of will-making under present statutes necessitates that ample opportunity be afforded for judicial scrutiny of the wills thus made; but if reasonable assurance can be had in the testator's lifetime that his intention is in fact represented by his will, there is no need for elaborate provision for its *post mortem* examination on behalf of disappointed claimants. In conveyances *inter vivos* considerable informality prevails, and the possibility of setting such transaction aside on grounds not dissimilar to those of the *caveat* continues; yet statutes for the acknowledgment of deeds and for private examination in cases of grants by married women<sup>17</sup> have materially augmented their certainty.

Probably we are not in a position to insist upon more elaborate ceremony in the execution of all wills; but that is no reason for not providing for greater formality, optional with the testator, if such formality can relieve him and his beneficiaries of the menace of the will contest. Let us, therefore, preserve the customary rules for the execution of wills and the grounds of contest, but in addition thereto, provide an alternative procedure along the following lines: A testator,<sup>18</sup> after the preparation of his

<sup>14</sup> Campbell, J., *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 242, 23 N.W. 28, 30 (1885).

<sup>15</sup> *Ibid.* The judge also referred with approval to the civil law procedure, discussed *infra*, p. 449.

<sup>16</sup> Only two proposals of a similar character have come to my notice. In a note in 50 Am. L. Rev. 742 (1916), H. C. Lewis of the District of Columbia Bar, urged that provision be made for *ante mortem* probate. His proposal bears considerable resemblance to the ill-fated Michigan statute which seems to have escaped his attention. Since the submission of this article, a second proposal for *ante mortem* probate has been published. See Redfearn, *Ante-Mortem Probate*, 38 Com. L. Jour. 571 (Oct., 1933). This proposal gains authority from the fact that it comes from the learned author of a treatise on Wills.

<sup>17</sup> These statutes are an outgrowth of the old English procedure of resorting to a collusive action, the fine, to enable *femes covert* to convey realty. A private examination by the court was relied on for assurance that the conveyance was freely made. See 3 Holdsworth, *History of English Law* (1927), 245.

<sup>18</sup> It might be deemed advisable to restrict the exercise of the suggested procedure to resident testators or, if extended to non-resident owners of local land, to require a greater number of witnesses. Cf. La. Civil Code (Dart, 1932), § 1578, summarized in note 30, *infra*.

will, should present it for "probate"<sup>19</sup> to a designated official of the probate court.<sup>20</sup> His will should be accompanied by an affidavit setting forth his heirs and next-of-kin and the extent, if any, to which they are dependent on him for support. His counsel or scrivener, if any, should also present an affidavit setting forth briefly the circumstances under which the preparation of the will was undertaken and the affiant's opinion as to the testamentary freedom and capacity of the testator. Affidavits should likewise be secured from, say, at least three persons, not interested in the will, stating the affiants' acquaintance with the testator and their opinions. After opportunity had been given the examining officer for scrutiny of the will and affidavits, provision should be made for a private hearing at which he would examine separately the testator and each of the affiants. The examination of the former could be directed especially toward the question of undue influence when the possibility thereof was revealed by strikingly unusual distribution of property. If the facts offered by the witnesses to establish their opinion on the point of capacity seemed inadequate and especially if their acquaintance with the testator did not afford them proper opportunity for observation, the will should not then be admitted to probate but an opportunity given to the testator to furnish better qualified witnesses at a further hearing.<sup>20a</sup>

If the hearing gave rise to substantial doubt as to the freedom or capacity of the testator, the examiner should deny probate, and no appeal

<sup>19</sup> This term has come to connote a *judicial* proceeding, and such the proposed procedure would not be. Nevertheless, it would discharge the same function as the conventional probate and there seems no advantage in a discriminatory terminology. In North Carolina, incidentally, the term "probate" is applied to the statutory procedure for the acknowledgment of deeds. See N.C. Code (Michie, 1931), c. 65, art. 1.

<sup>20</sup> The probate judge might serve in those jurisdictions where such work would not unduly interfere with his other duties and where his action in this capacity would not raise a constitutional problem as to the separation of powers. Cf. *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885), *supra*, note 13. In many jurisdictions, probate work is not entrusted to a "constitutional" court. For example, in North Carolina it is handled in the first instance by the clerk of the Superior Court. See N.C. Code (Michie, 1931), § 1.

<sup>20a</sup> Recourse to psychiatric examination might be indicated in some situations. A detailed outline for such examination of testators is set forth in Hulbert, *Probate Psychiatry—A Neuro-Psychiatric Examination of Testator from the Psychiatric Viewpoint*, 25 Ill. L. Rev. 288 (1930). The suggested examination is to be made at the time of testation with a view to the utilization of the findings in the event of will contests. A means of insuring the admissibility of such evidence is suggested in a companion article, Stephens, *Probate Psychiatry—Examination of Testamentary Capacity by a Psychiatrist as a Subscribing Witness*, 25 Ill. L. Rev. 276 (1930). A statutory device with the same end in view is described in note 29, *infra*. The advantages which may be derived from such examinations would accrue more certainly if the proposed probate machinery were adopted. In that event, it would doubtless be found useful in the larger communities to accredit psychiatrists of recognized ability to the probate court. Fees for such service might be subject to regulation.

should be had from his decision.<sup>21</sup> The instrument might, however, be executed in the usual manner and propounded upon the death of the testator, subject to *caveat* on the usual grounds. If, however, the hearing established its validity to the reasonable satisfaction of the examiner, he should enter his acceptance thereon and the will, together with the accompanying affidavits, should then be officially sealed and deposited in a repository provided by the county, accessible, during the lifetime of the testator, only to him and to his attorney thereunto duly authorized.<sup>22</sup>

Such an instrument should be alterable or revocable only by similar proceedings,<sup>23</sup> by a properly executed will, or by operation of law on the usual grounds. Upon the death of the testator, access to it should be given to interested parties. Formal proof would not be necessary, but an order admitting it might be made in conformity with the usual practice. Some opportunity, however, should be granted to attack its probate on grounds similar in general to those available to one seeking to set aside a judgment. Thus want of jurisdiction, fraud or interest on the part of the examining officer, impersonation of affiants or substantial misstatements of fact (but not of opinion) in the affidavits, might properly be grounds for setting aside the probate, in which event the will might be offered for probate in the usual manner. Obviously, these grounds would seldom afford encouragement to those seeking to attack the will and would give them little leverage to pry a settlement from the estate.

The risk of occasional injustice would not be obviated; only the Utopian can hope for this. The procedure outlined would provoke deliberation, and

<sup>21</sup> Mandamus would lie, of course, where the examiner refused to consider the case, but in view of the non-judicial nature of the probate proceeding, its discretionary character, and the fact that the regular course of probate would still be open to the disappointed testator, there seems to be no advantage in permitting judicial review commensurate with the burdens which it would impose.

<sup>22</sup> The provisions for deposit would doubtless follow those in existence in England and many of the United States. See 15 and 16 Geo. 5, c. 49, § 172; Ark. Dig. Stat. (Crawford & Moses, 1921), § 10496; Kans. Rev. Stat. Ann. (1923), § 22-204-22-207; Maine Rev. Stat. (1930), c. 76, § 3; Md. Ann. Code (Bagby, 1924), art. 93, § 366; Mass. Gen. Laws (1921), c. 191, § 10-12; Mich. Comp. Laws (1915), § 13773-75; Minn. Stat. (Mason, 1927), § 8750; Neb. Comp. Stat. (1929), § 30-211-30-213; N.H. Pub. Laws (1926), § 1203; N.Y. Cons. Laws (Cahill, 1930), c. 13, § 30-33; N.D. Comp. Laws (1913), § 5656-58; Ohio Gen. Code Ann. (Page, 1931), § 10504-6-10504-9; Okla. Comp. Stat. (1921), § 11237-11239; S.D. Comp. Laws (1929), § 620-622; Utah Comp. Laws (1917), 6320; Wis. Stat. (1929), § 238-15.

<sup>23</sup> Special provision might well be made for minor alterations or even for more substantial ones not affecting the testator's family without resort to the same procedure as that necessary for the original probate of the will. In such instances an affidavit by, and an examination of, the testator only might suffice. Certainly some flexibility in the machinery established would be indicated, but its achievement would call for carefully thought-out legislation.

the somewhat greater expense<sup>24</sup> and effort involved (for the testator, but not for his estate) would discourage too frequent application. The likelihood is that the official charged with the responsibility of passing on such applications for probate would grow skilled in detecting the incompetent and the victim of moral coercion.<sup>25</sup> The evidence before him would not have staled with time, nor would he be embarrassed by the death or forgetfulness of witnesses. No doubt when his examination revealed inequities, he would often find it possible to persuade a testator to readjust his distribution. Where he had reason to believe that the testator was being gulled by some unscrupulous individual or organization his decision might be suspended until the district attorney's office gave the beneficiary a clean bill of health. The obvious errors of law and expression which thwart so many testamentary intentions might be pointed out for correction. The pitfalls of the formalities of execution would be avoided. Without undertaking either the rewriting or perfection of the testamentary instruments submitted to him, the examiner could perform a service which in its value to beneficiaries and to the state and county in diminishing expensive litigation would many times exceed the cost of his office.<sup>26</sup>

If statutory precedents closely approximating this procedure exist, search has not revealed them.<sup>27</sup> An interesting analogy is afforded by statutes providing for the designation of heirs which in effect confer a

<sup>24</sup> A schedule of fees for this service graduated with some relation to the size of the estate involved would discourage resort to it where the ordinary procedure would serve as well.

<sup>25</sup> Judge Campbell, in the *Lloyd* case, 56 Mich. 236, 242, 23 N.W. 28, 30 (1885), said, with reference to the acknowledgment of wills, that where "such an acknowledgment is made before trustworthy officers, and in the enforced absence of all other persons, the security against incapacity and incompetency is quite as strong as can be found in a contest before a court or jury that never saw the testator. A man's incapacity, if it exists, will not easily escape the notice of his disinterested friends and neighbors, and when they certify to his competency and freedom of action with their attention called to their own responsibility in doing so, they are seldom mistaken."

The desirability of jury trials to determine the issue of capacity is questioned in Taft, *op. cit.*, *supra*, note 2, 600.

<sup>26</sup> Mr. Taft pointed out that 15 cases in which testators were held incompetent in New York County "occupied 190 days or nearly one entire year." Taft, *op. cit.*, *supra*, note 2, at 599:

"The very nature of will contests involving testamentary capacity is such that they require an investigation of the entire life history of the testator, and that protracts them for many days and sometimes many weeks. . . . The cost of such trials to both the state and decedents' estates is enormous." *Ibid.*, 603.

<sup>27</sup> In Lewis, *op. cit.*, *supra*, note 16, the statute, 36 Stat. 856 (1910), 25 U.S.C.A. § 373, conferring testamentary power upon Indians, subject to the examination and approval of their wills by the Secretary of the Interior, is cited as affording a precedent for *ante mortem* probate. A will thus approved may be cancelled within a year after the testator's death upon a showing of fraud in its procurement.

considerable testamentary power to be exercised through court proceedings.<sup>27a</sup> Statutes for the deposit of wills,<sup>28</sup> by the virtual elimination of claims of forgery and alteration where the facilities provided for are utilized, constitute a very limited step in its direction. In at least two states, however, provision is now made for the filing of affidavits, made at the time of the execution of the will and setting forth the facts which would be relevant at its probate.<sup>29</sup> A closer resemblance is to be found in the Louisiana statutes which in this field derive from the civil law. There a "nuncupative will by public act," the most formal of the Louisiana testaments,<sup>30</sup> need not be proved.<sup>31</sup> It is, however, open to attack

<sup>27a</sup> See Ark. Dig. Stat. (Crawford & Moses, 1921), § 3493-94; Ohio Gen. Code Ann. (Page, 1931), § 10503-12; Wis. Stat. (1929), § 296.41-2. The Ohio statute, which dates from 1854, seems the most satisfactory. It provides as follows:

"A person of sound mind and memory may appear before the probate judge of his county, and in the presence of such judge and two disinterested persons of his or her acquaintance, file a written declaration, subscribed by him, which must be attested by such persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place or residence of such persons specifically, to stand toward him in the relation of an heir-at-law in the event of his or her death. If satisfied that such declarant is of sound mind and memory, and free from restraint, the judge thereupon shall enter that fact upon his journal, and make a complete record of such proceedings. Thenceforward the person thus designated will stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock. The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born; and a certified copy of such record will be prima facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence."

An heir so designated enjoys the same status as a child born in lawful wedlock under the Ohio provision for after-born or pretermitted heirs. Ohio Gen. Code Ann. (Page, 1931), § 10504-49.

<sup>28</sup> These acts are collected in note 22, *supra*. It is amusing to note that the English prototype (20 & 21 Vict. c. 77, 91) of this cautious gesture in aid of testators aroused the apprehension of Lord St. Leonards who criticized it in his "Handy Book on Property Law." Both the Irish Law Times and the Law Journal were moved to chide him gently for his fears, which they asserted had proved "visionary." See 9 Ir. L. T. 258 (1875); 10 L. J. 343 (1875).

<sup>29</sup> In 1923, the New York Decedent Estate Law providing for the deposit of wills was amended to permit the execution of affidavits by each subscribing witness to a will "setting forth such facts as he would be required to testify to in order to prove such will" and by certified medical examiners "certifying that the maker of said will was of sound mind at the time of its execution, together with any facts supporting such opinion." Such affidavits were to be written or attached to the will and filed therewith. N.Y. Cons. Laws (Cahill, 1930), c. 13, § 30.

In the 1932 revision of the West Virginia Code, a provision was added for the execution of similar affidavits by subscribing witnesses, but this was not accompanied by any provision for deposit. Perhaps for this reason, the revisers limited the use of such affidavits to cases where there was no contest of the will. W.Va. Code (Michie, 1932), § 4075. Its efficacy as a preventive of such contests is therefore negligible.

<sup>30</sup> The nuncupative will by public act is dictated by the testator to a notary in the presence of three or, if the testator is a non-resident, five witnesses. The will must be signed by the testator or if he is unable, the reason therefor must be set forth in the notarial act embodying the will. Witnesses must also sign. The entire transaction must be consummated at one time without interruption. La. Civil Code (Dart, 1932), §§ 1578-1580.

<sup>31</sup> La. Civil Code (Dart, 1932), § 1647. Exception is made where forgery is alleged.

on the ground of testamentary incapacity.<sup>32</sup> No will in Louisiana may be invalidated by reason of captation (undue influence),<sup>33</sup> but the significance of this provision is diminished by provisions barring persons likely to subvert the testator's will from sharing in his estate<sup>34</sup> and by the rigorous limitations upon the testator's testamentary power.<sup>35</sup> The nuncupative will by public act is surrounded by such formalities as militate against fraud and hasty will-making; but its very complexity sometimes proves the testator's undoing.<sup>36</sup> Moreover, it is essentially formal; the procedure does not include any inquiry into the facts which the will contest and the proposed examination tend to reveal. While, therefore, the Louisiana statutes (and their Continental prototypes) are inadequate to attain the end sought by this proposal, they do afford a needed reminder that the Statute of Frauds and the Wills Act do not exhaust the possibilities open to the legislator in this field.

Nor does the plan presented in this note. It is offered more as a demonstration that the diminution in our law of this ancient abuse is feasible than as a perfected outline for the necessary preventive legislation. Admit the evil and the possibility of its correction; the problem of mechanics will soon yield to thoughtful consideration. Responsibility for reform will then rest where rightfully it belongs: with the Bar and with the legislatures.

<sup>32</sup> See La. Civil Code (Dart, 1932), § 1475. Six cases appear in the Louisiana reports since 1913 in which nuncupative wills by public act were attacked on grounds of testamentary incapacity. In each of them the judgment below was for the proponent, and it was affirmed.

<sup>33</sup> La. Civil Code (Dart, 1932), § 1492 provides: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation."

<sup>34</sup> Physicians and ministers attending the deceased in his last illness are barred. La. Civil Code (Dart, 1932), § 1489. Those living in concubinage may not give to each other, *ibid.*, § 1481, and gifts to illegitimate children are restricted, *ibid.*, § 1483-1488.

<sup>35</sup> The doctrine of forced heirship prevails in Louisiana. See La. Civil Code (Dart, 1932); 3 Bl. Comm., tit. II, c. 3.

<sup>36</sup> Since 1913 there have been sixteen cases in which the question of the adequacy of the execution of a nuncupative will by public act has been carried to the Louisiana Supreme Court.