

1-1962

Creditors and the Will Contest

D. L. A. Kerson

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

D. L. A. Kerson, *Creditors and the Will Contest*, 14 HASTINGS L.J. 18 (1962).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol14/iss1/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Creditors and the Will Contest

By D. L. A. KERSON*

ALTHOUGH the law views an expectancy in an estate as merely that, it may be more substantial to the creditor of the heir-to-be. After the ancestor has died the creditor will often be shocked and disappointed to discover that there is a will disinheriting the debtor-heir and leaving his expectancy to some relative of the debtor who is beyond the creditor's reach. While the will may be valid, it may also be that the debtor-heir has substituted such a will in order to keep his inheritance from his creditors. In several cases the creditor has attempted to contest the will disinheriting his debtor. This has confronted the courts with the difficult problems caused by introducing the law of creditors' rights into the will contest. It is these problems that are the basis of this paper.

Historical Background and the California Code

Many of the conceptual difficulties involved in permitting a creditor to contest stem from the singular nature of probate and the right to contest. As these peculiarities are rooted deep in our legal history a few notes on that history will be helpful in understanding some of these problems.

At common law there was no will contest within the context of probate proceedings as we know it today. In the ecclesiastical courts, which had jurisdiction over the decedent's personalty, probate in the common form was an *ex parte* authentication of a testamentary document.¹ Within thirty years after probate in the common form the executor could be compelled to prove the will in the solemn form if a caveat was filed by an interested person.² At this time the will would have its "first and only real hearing on the issue of due execution."³

* A.B., LL.B., University of California. Member, California Bar. Law Clerk for Justice Raymond E. Peters, California Supreme Court.

¹ SIMES, *The Function of Will Contests*, in SIMES & BAYSE, PROBLEMS IN PROBATE LAW: A MODEL PROBATE CODE 682, 689 (1946); REPPY & TOMPKINS, HISTORY OF WILLS 112-14 (1928).

² "The bare possibility of an interest" would suffice at one time. *Kipping v. Ash*, 1 Rob. Ecc. 268, 163 Eng. Rep. 1035 (P. & D. 1845); *Dixon v. Allinson*, 3 Sw. & Tr. 571, 164 Eng. Rep. 1397 (P. & D. 1864); *In re Zimmerman's Will*, 104 Misc. 516, 172 N.Y. Supp. 80, (Surr.Ct. 1918).

³ SIMES, *op. cit. supra* note 1, at 690.

But since the ecclesiastical court had no jurisdiction over real property, its determination of due execution, even if in the solemn form, was not binding on the decedent's real estate. Title to real property vested at decedent's death in the devisee without probate. The will became a muniment of title and was "contested" by attacking the devisee's title in an action for ejectment or trespass.⁴ As any one favorable judgment established the will only *inter partes* the devisee could be subjected to a number of actions all putting in issue due execution.⁵

The unified probate proceeding was developed early in American history to obviate the problems created by the divided administration of estates. One goal of this proceeding was to replace the multiplicity of ejectment and trespass actions, needed to establish title taken under a will, with one conclusive adjudication.⁶ Since probate was now to be final and not subject to collateral attack, the contest was devised as the method of objecting to a will within the framework of the probate proceedings.

In California it has long been the law that title taken under a probate decree cannot be attacked collaterally in ejectment.⁷ Once a will is admitted to probate, absent a contest within the statutory period, its due execution is conclusively determined.⁸ Objections to the validity of a will can be raised either during the probate proceedings⁹ or, depending upon certain notice requirements, within six months thereafter,¹⁰ by any *interested* person. Whether a creditor can contest a will depends, of course, on whether he is an "interested person" as that phrase is used in sections 370 and 380 of the Probate Code.¹¹

While the courts have differed in their verbal formulation of the interest required to be an "interested person," they are agreed that

⁴ *Smith's Lessee v. Steele*, 1 Harr. & McH. 419 (Md. 1771); *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. App. 258, 98 N.E. 177 (1912); *Reppy & Tompkins*, *op. cit. supra* note 1, at 114.

⁵ *SIMES*, *op. cit. supra* note 1, at 686.

⁶ *Wilson v. Gaston*, 92 Pa. 207 (1879); *Tompkins v. Tompkins*, 1 Story 547, 24 Fed. Cas. 40 (No. 14091) (C.C.D.R.I. 1841); *SIMES*, *op. cit. supra* note 1, at 696.

⁷ *Castro v. Richardson*, 18 Cal. 478 (1861).

⁸ *Estate of Plaut*, 27 Cal. 2d 424, 428-29, 164 P.2d 765 (1945); *Stevens v. Torregano*, 192 Cal. App. 2d 105, 13 Cal. Rptr. 604 (1961); *Estate of Caruch*, 139 Cal. App. 2d 178, 293 P.2d 514 (1956).

⁹ CAL. PROB. CODE § 370.

¹⁰ CAL. PROB. CODE § 380.

¹¹ The "interested person" requirement can be found in at least a dozen other Probate Code sections: Any "person interested" may resist an application for distribution (§ 1000); may not be injured by the decree of distribution (§ 1001) and is bound by distribution in accordance with the decree (§ 1003). Any "person interested" in the estate may compel the executor to file an accounting (§ 921) and may object to an accounting (§ 927); he may contest the validity of claims against the estate (§ 713), contest a petition for letters of

more than sentiment is needed to rise above the ranks of the intermeddler. The interest must be immediate, direct, and pecuniary,¹² and such "as may be impaired or defeated by the probate of the will, or benefited by setting it aside. . . ."¹³ Thus, one who shares in the estate of a decedent notwithstanding the will, such as a creditor¹⁴ or a pretermitted heir,¹⁵ is not interested and cannot contest. Similarly, a debtor of the estate¹⁶ or a distant relative cannot contest.¹⁷ But a legatee under a former will,¹⁸ the heir of an interested person,¹⁹ and even the State, if escheat conditions are present, do have sufficient interest to contest.²⁰

The Requisite "Interest" of Creditors in California

In this context, the California Supreme Court in 1951 was faced with determining whether the creditor of an heir had the requisite interest to contest a will which disinherited that heir.²¹ The facts in that case are as follows: Kazar Harootenian died leaving both real and personal

administration (§ 442) and can petition the court for the removal of an executor (§ 522). See also CAL. PROB. CODE §§ 810, 841, 758, 323, 970.

But the meaning of "interest" in the context of the will contest seems to be *sui generis*. Cases construing "interest" as used in these other code sections do not help in contest cases. For example, a creditor of the estate is an interested person under Probate Code section 927 (Estate of McMillin, 46 Cal. 2d 121, 292 P.2d 881 (1956); Estate of Mailhebauu, 218 Cal. 202, 22 P.2d 514 (1933); Tompkins v. Weeks, 26 Cal. 50 (1864)), but is never an interested person for purposes of will contests (Estate of Seaman, 51 Cal. App. 409, 196 Pac. 928 (1921); 3 ALEXANDER, WILLS 2038 (1918)).

¹² See, e.g., Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S.W. 38 (1912); *In re Davis' Will*, 182 N.Y. 468, 75 N.E. 530 (1905); 3 PAGE, WILLS 117 (rev. ed. 1961).

¹³ Estate of Land, 166 Cal. 538, 543, 137 Pac. 246, 248 (1913). See also Estate of Bily, 96 Cal. App. 2d 333, 215 P.2d 78 (1950); *In re Biehn's Estate*, 41 Ariz. 403, 18 P.2d 1112 (1933); Hermann v. Crossen, 160 N.E.2d 404, 408 (Ohio Ct. App. 1959); REMSEN, PREPARATION AND CONTEST OF WILLS 373 (1907).

¹⁴ Estate of Seaman, 51 Cal. App. 409, 196 Pac. 928 (1921); Burroughs v. Griffiths, 1 Lee 545, 161 Eng. Rep. 201 (1754); 3 ALEXANDER, WILLS 2038 (1918).

¹⁵ Estate of Sankey, 199 Cal. 391, 249 Pac. 517 (1926); Stevens v. Torregano, 192 Cal. App. 2d 105, 13 Cal. Rptr. 604 (1961).

¹⁶ Estate of Bily, 96 Cal. App. 2d 333, 215 P.2d 78 (1950).

¹⁷ Estate of Eskridge, 51 Cal. App. 2d 634, 125 P.2d 527 (1942) (niece); Estate of Cafrey, 5 Caf. Prob. Dec. 439 (1897) (grandniece).

¹⁸ Estate of Arbuckle, 98 Cal. App. 2d 562, 220 P.2d 950 (1950); Estate of Munfrey, 61 Cal. App. 2d 565, 143 P.2d 414, 144 P.2d 370 (1943); 3 PAGE, WILLS 123 (rev. ed. 1961).

¹⁹ Estate of Johnson, 31 Cal. App. 2d 251, 87 P.2d 900 (1939); *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360 (1937).

²⁰ Estate of McCabe, 219 Cal. 742, 29 P.2d 195 (1934); Estate of Peterson, 138 Cal. App. 443, 32 P.2d 423 (1934); 3 PAGE, WILLS 122 (rev. ed. 1961).

²¹ Estate of Harootenian, 38 Cal. 2d 242, 238 P.2d 992 (1951). Dictum in earlier cases was divided. Compare Estate of Kalt, 16 Cal. 2d 807, 108 P.2d 401 (1940) and Estate of Crooks, 125 Cal. 459, 58 Pac. 89 (1899) and Estate of Clute, 6 Caf. Prob. Dec. 511 (1899), with San Diego Trust etc. Bank v. Heustis, 121 Cal. App. 675, 10 P.2d 158 (1932).

property. His will, expressly disinheriting one of his sons, George, was admitted to probate. Complying with Probate Code section 380, George's minor son filed a contest. He alleged that he was a legatee under a prior valid will which was concealed by George and his sister, that the will admitted to probate was not the will of decedent, and that its execution did not comply with the requirements of the Probate Code. Jean, the separated wife of George, then intervened in the contest as a judgment creditor of George. The trial court dismissed the intervention on the ground that she was not an "interested person." The question before the supreme court then was, "whether a judgment creditor of a disinherited heir of the decedent is a person interested" under Probate Code section 380.²² With a division rare in its completeness the court answered this question in three opinions, each representing the views of just two justices.

The first opinion, written by Justice Shenk with Justice Schauer concurring, held that a judgment creditor could contest the will disinheriting his debtor-heir provided both that there was real property in the estate and also that the judgment creditor had obtained a lien on that real property. He reasoned that the existence of the real estate and judgment were necessary to give the creditor the "pecuniary interest" needed to contest. This interest is created by filing an abstract of the judgment, thereby creating a lien on any real property that the judgment debtor then has, or will thereafter acquire, in the county where recorded.²³ Since probate of a will disinheriting the heir would conclusively eliminate the judgment creditor's lien, Justice Shenk reasoned that the creditor must be permitted to contest the will in order to protect his lien.

This position is clearly supported by a majority of the courts which have passed on this question. They reason that as probate is an *in rem* action, binding on the world, anyone who might be damaged by it should have the opportunity to protect his interest by contesting the will.²⁴ The judgment creditor's beneficial interest is his judgment lien which attaches to any real property the debtor would inherit but for the will.²⁵ If the creditor of the heir is only a general creditor without

²² Estate of Harootenian, *supra* note 21, at 248, 238 P.2d at 995-96.

²³ CAL. CODE CIV. PROC. § 674.

²⁴ It has been said that the basis of the will contest is the right to protect a property interest. Estate of Baker, 170 Cal. 578, 150 Pac. 989 (1915); Estate of Anthony, 127 Cal. App. 186, 15 P.2d 531 (1932); Estate of Clark, 94 Cal. App. 453, 271 Pac. 542 (1928).

²⁵ *In re Duffy's Estate*, 228 Iowa 426, 292 N.W. 165 (1940); *Smith v. Bradstreet*, 33 Mass. (16 Pick.) 264 (1834); *In re Langevin's Will*, 45 Minn. 429, 47 N.W. 1133 (1891); *Watson v. Alderson*, 146 Mo. 333, 48 S.W. 478 (1898); *In re Van Doren's Estate*, 119 N.J. Eq. 80, 180 Atl. 841 (1935); *In re Coryell's Will*, 4 App. Div. 429, 39 N.Y. Supp. 508 (Sup.

a lien on real property then he lacks the requisite interest to contest according to these cases.²⁶

In a concurring opinion to *Estate of Harootenian*, Justice Carter, speaking for himself and Justice Traynor, agreed that a lien creditor had the requisite interest to contest but did not feel that the rule should be so limited.²⁷ He conceded that there may be sound reasons for requiring the creditor to have established his claim before coming to the probate court, but severely criticized the lien requirement. In his opinion, "both a judgment creditor and a creditor of an heir who has brought an action and effected a valid attachment of the interest of the heir in his share of the assets of an estate has such an interest that he may contest a will which is so drawn as to deprive an heir of property that would have descended to him in the event of intestacy."²⁸

The dissenting opinion,²⁹ written by Justice Edmonds with Justice Spence concurring, stated that no creditor, whether a judgment, general, or lien creditor, should have standing to contest. The dissent stated that a person is "interested" for purposes of will contests if he is "one who, if the will of the testator were set aside, would receive directly, and not through any third person, a part of the property of the estate."³⁰ This opinion thus follows the minority view which holds that to permit a contest by the creditor would cause a flood of litigation, unjustifiable expenses for the estate in defending such claims, and great delay in settling decedents' estates.³¹

Implications of Estate of Harootenian

The net result of the three opinions in *Harootenian* seems to be that a general creditor has no interest to contest a will disinheriting his debtor, whereas a judgment creditor does, provided that the decedent's

Ct. 1896); *Bloor v. Platt*, 78 Ohio St. 46, 84 N.E. 604 (1908). See also *Seward v. Johnson*, 27 R.I. 396, 62 Atl. 569 (1905); *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212, 217 (1947); *Komorowski v. Jackowski*, 164 Wis. 254, 159 N.W. 912 (1916); *In re Dardis' Will*, 135 Wis. 457, 115 N.W. 332, 333 (1908); *Goods of White*, 31 L.R.Ir. 385, 387 (Ch.Div. 1893); Note, 2 WASH. & LEE L.REV. 166 (1940).

²⁶ *Smith v. Bradstreet*, 33 Mass. (16 Pick.) 264, 265 (1834); *Lee v. Keech*, 151 Md. 34, 133 Atl. 835, 836 (1926); *In re Coryell's Will*, 4 App. Div. 429, 39 N.Y. Supp. 508, 509 (Sup. Ct. 1896); *Matter of Brown*, 47 Hun. 360 (N.Y. Sup. Ct. 1888).

²⁷ 38 Cal. 2d at 251, 238 P.2d at 997-98.

²⁸ *Id.* at 252-53, 238 P.2d at 998.

²⁹ *Id.* at 253, 238 P.2d at 998.

³⁰ *Id.* at 256, 238 P.2d at 1000.

³¹ *Lockard v. Stephenson*, 120 Ala. 641, 24 So. 996 (1899); *Lee v. Keech*, 151 Md. 34, 133 Atl. 835 (1926); *Matter of Brown*, 47 Hun. 360 (N.Y. Sup. Ct. 1888); *In re Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040 (1895); *Bank of Tennessee v. Nelson*, 40 Tenn. (3 Head) 634 (1859); Note, 12 CORNELL L.Q. 247 (1927). See also *Collins v. Ahrens*, 189 Iowa 178, 176 N.W. 953 (1920); *Higgins v. Downs*, 101 App.Div. 119, 91 N.Y. Supp. 937 (1905).

estate contains real property and that the judgment creditor has filed an abstract of his judgment in the county where that real property is located.³² In the balance of this paper I shall discuss some of the questions left unanswered by the three opinions in *Harootenian*.

Requirement of a Judgment

First, the most obvious question concerns the propriety of the division created between general and judgment creditors for purposes of the will contest. Primarily the reason for this is the policy of keeping the probate court free of extraneous non-probate litigation.³³ As stated by Justice Carter, a judgment might be required because "the probate court is an inappropriate forum to litigate the question of whether the creditor is in fact such, and the heir, his alleged debtor, is not a party to the contest proceeding."³⁴

Permitting all creditors to contest is a position which has been rejected by most courts on the ground that it would unduly prolong probate proceedings and greatly increase the costs to the estate. They reason that even if the will were to be set aside, the general creditor would still have only a claim against the debtor; *i.e.*, he would have no interest in the estate devolving to the heir although his chances of collecting his debt might thereby be increased.³⁵ Only one court has permitted the general creditor to contest a disinheriting will, reasoning that a debtor-heir who allows an invalid will to be probated is in effect making a conveyance in fraud of his creditors. This fraudulent conveyance can be attacked only by permitting the creditor to contest the will.³⁶

Requirement of a Lien

But even once admitting that *Harootenian's* requirement of a judgment is sound, the insistence on a lien is questionable. The Shenk-

³² CAL. CODE CIV. PROC. § 674.

³³ "There is no provision in the Probate Code for determining the rights of attachment and judgment lien creditors in the heir's or legatee's share of the decedent's estate, and such creditors are not entitled to distribution in the probate proceeding, but may urge their claims in a separate suit." *McGee v. Allen*, 7 Cal. 2d 468, 471, 60 P.2d 1026, 1028 (1936). See also *Estate of Hart*, 51 Cal. 2d 819, 337 P.2d 73 (1959); *Estate of Dabney*, 37 Cal. 2d 672, 234 P.2d 962 (1951); *Noble v. Beach*, 21 Cal. 2d 91, 130 P.2d 426 (1942); *Voyce v. Superior Court*, 20 Cal. 2d 479, 127 P.2d 536 (1942); *Menzies v. Pulbrook*, 2 Curt. 845, 163 Eng. Rep. 605, 606 (1841).

³⁴ *Estate of Harootenian*, 38 Cal. 2d 242, 252, 238 P.2d 992, 998 (1951). *But see Note*, 2 WASH. & LEE L.REV. 166, 168-69 (1940).

³⁵ *In re Langevin's Will*, 45 Minn. 429, 47 N.W. 1133 (1891); *Watson v. Alderson*, 146 Mo. 333, 48 S.W. 478 (1898); *Matter of Brown*, 47 Hun. 360 (N.Y. Sup. Ct. 1888).

³⁶ *Brooks v. Paine's Ex'rs*, 123 Ky. 271, 90 S.W. 600 (1906); *Mullins v. Fidelity & Deposit Co.*, 30 Ky. L. Rep. 1077, 100 S.W. 256 (Ct.App. 1907); *Davies v. Leete*, 111 Ky. 659, 64 S.W. 441 (1901) (*dictum*).

Schauer opinion held that it was only "a judgment creditor who has perfected a lien at the time the property would devolve to the heir if the will be set aside [who] is an interested person who may contest the will."³⁷ It was for the purpose of determining whether the contestant, admittedly a judgment creditor, in fact had a lien that the case was remanded. The lien requirement, although a requisite in a majority of the jurisdictions which have permitted a creditor to contest, was severely criticized in both the concurring and dissenting opinions in *Harootian*. Justice Edmonds, in the dissent, explained the "restriction that the contestant must be one having a judgment lien . . . [as meaning that] *if* the contest is successful, and *if* the real estate distributable to the debtor has not been sold during administration, and *if* that real estate is finally distributed to the debtor, the creditor then will have a property interest in the estate of the decedent."³⁸

The objections to the lien requirement are apparent. As the lien, created by recording an abstract of the judgment, attaches only to real property, both presently existing and after acquired, a judgment creditor will be unable to contest if the estate consists wholly of personalty, or if the real property is located in a county different from that in which the abstract of the judgment has been recorded.³⁹

Moreover, any such lien will be destroyed if the underlying real property is sold during administration of the estate. Although title vests in the heir or devisee immediately upon death,⁴⁰ that title is subject to the probate court's power to sell estate assets for administration purposes. A proper conveyance by the executor transfers "all the right, title, interest and estate of the *decedent* in the premises at the time of his death," thus terminating intervening rights.⁴¹ Although there is a suggestion in one California case that the creditor's lien might attach to the funds in the hands of the executor that were realized from the sale,⁴² the lien requirement remains, in the words of Justice Carter,

³⁷ 38 Cal. 2d at 250, 238 P.2d at 997.

³⁸ *Id.* at 254-55, 238 P.2d at 999.

³⁹ *Id.* at 252, 238 P.2d at 995; *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315 (1893); CAL. CODE CIV. PROC. § 674.

⁴⁰ CAL. PROB. CODE § 300; *Estate of Hills*, 176 Cal. 232, 234, 168 Pac. 20 (1917); *Carlson v. Lindauer*, 119 Cal. App. 2d 292, 259 P.2d 925 (1953); *Fountain v. Bank of America*, 109 Cal. App. 2d 90, 240 P.2d 414 (1952).

⁴¹ CAL. PROB. CODE § 786 (emphasis added); *Wood v. Curran*, 99 Cal. 137, 33 Pac. 774 (1893); *Cook v. De la Guerra*, 24 Cal. 237 (1864); *Carlson v. Lindauer*, 119 Cal. App. 2d 292, 259 P.2d 925 (1953); *Hamilton v. Elvidge*, 132 Cal. App. 21, 22 P.2d 239 (1933). *Accord*, *Nichols v. Lee*, 16 Colo. 147, 26 Pac. 157 (1891); *McDaniel v. Edwards*, 56 Ga. 444 (1876); *Oil Well Supply Co. v. Cremin*, 143 Okl. 57, 287 Pac. 414 (1930).

⁴² *Gutter v. Dallamore*, 144 Cal. 665, 79 Pac. 383 (1904). See also *Sears v. Mack's Assignees*, 2 Bradf. 394 (N.Y. Surr. Ct. 1853), *aff'd sub nom. Sears v. Burnham*, 17 N. Y. 445

“tenuous at best.”⁴³ But the most compelling reason to question the lien requirement is simply that it is without purpose. All judgment creditors, whether or not they possess a lien, have proved their claims and it is no more burdensome for the probate court to permit one of them to contest than another.⁴⁴

Levying Execution or Attachment: Two Possibilities

If the Sherk-Schauer opinion is followed and it is necessary that, to qualify as an “interested person” the creditor must have some kind of property interest to protect by contesting the will, then the question is raised as to whether recordation of a judgment is the sole way of acquiring this interest. Another method might be to levy a writ of attachment or execution upon the interest of the debtor-heir in decedent’s estate.⁴⁵ Some jurisdictions have permitted a creditor to attach the interest which would have descended to the debtor-heir if the ancestor had died without a will. By this attachment, the creditor becomes pecuniarily interested in the estate and acquires standing to contest the will which would deprive him of this interest.⁴⁶

Prior to 1923, California followed the common law rule which viewed property in the executor’s custody as being *in custodia legis* and unamenable to attachment by a creditor of an heir, legatee, or devisee.⁴⁷ But in 1923 statutory authority was enacted under which “the interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached”⁴⁸ Although this particular section only permits attachments of the heir’s interest in *personal property*,⁴⁹ his interest in *realty* is also subject to

(1858); *Yeaton v. Barnhart*, 78 Ore. 249, 150 Pac. 742, 746, *modified* 152 Pac. 1192 (1915); Note, 27 NOTRE DAME LAW, 659, 662 (1952).

⁴³ 38 Cal. 2d at 252, 238 P.2d at 995.

⁴⁴ Note, 40 CALIF. L. REV. 449, 452 (1952); Note, 4 STAN. L. REV. 607, 611 (1952).

⁴⁵ Before the ancestor’s death the heir has, of course, only an expectancy which cannot be reached by his creditors. The right to contest is at this time even further remote, and cannot be levied upon by the creditor. In *re Beinhauer’s Estate*, 118 Misc. 527, 193 N.Y. Supp. 758 (Surr. Ct. 1922); 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 279 (rev. ed. 1940); GLENN, CREDITORS’ RIGHTS AND REMEDIES 24 (1915).

⁴⁶ *In re Sycle’s Estate*, 16 N.J. Misc. 23, 195 Atl. 857 (Orphans’ Ct. 1937) (attachment); *Bloor v. Platt*, 78 Ohio St. 46, 84 N.E. 604 (1908) (execution); *Seward v. Johnson*, 27 R.I. 396, 62 Atl. 569 (1905) (attachment).

⁴⁷ *Estate of Bennett*, 13 Cal. 2d 354, 366, 90 P.2d 84 (1939); *Estate of Nerac*, 35 Cal. 392 (1868); *In re Durel*, 10 F.2d 448 (9th Cir. 1926); *Barnes v. Treat*, 7 Mass. 271 (1811); *Whitehead’s Adm’r v. Coleman’s Ex’rs*. 31 Gratt. 784 (Va. 1879).

⁴⁸ CAL. CODE CIV. PROC. § 561; *Estate of Kalt*, 16 Cal. 2d 807, 108 P.2d 401 (1940).

⁴⁹ *Estate of Reinicke*, 44 Cal. App. 2d 271, 112 P.2d 311 (1941); *Estate of Troy*, 1 Cal. App. 2d 732, 37 P.2d 471 (1934).

attachment under other code provisions.⁵⁰ Furthermore, it has been held that the judgment creditor without a lien can employ the writ of execution as the writ of attachment is used under section 561 of the Code of Civil Procedure.⁵¹ While attachment could give the creditor the interest sufficient to contest, the lien acquired thereby is only contingent or potential pending the outcome of the proceeding.⁵² If judgment is not recovered within three years from the levy and before the probate court distributes the estate, the creditor's attachment lien terminates.⁵³ Thus, it is doubtful that the creditor will gain access to the debtor-heir's right to contest merely by attachment of the latter's interest in the estate unless judgment is recovered before the estate is closed.⁵⁴

Finally, the non lien-holding creditor may follow Justice Carter's suggestion and levy execution or attachment upon the very right to contest.⁵⁵ Whether this can be done depends upon how that right is to be characterized. If it is called a "cause of action," then Code of Civil Procedure section 688 expressly excludes it from execution. However, if the right to contest a will is viewed as some other type of property then it might well be subject to attachment and execution.⁵⁶

As suggested above,⁵⁷ the right to contest is a compromise created by merging common law and ecclesiastical probate practices and does not admit of easy characterization. Under present California law, the right to contest is "property" as that term is used in sections 541 and 688 of the Code of Civil Procedure. Several cases have held that the right to contest is "a right of property" for purposes of both survival⁵⁸

⁵⁰ CAL. CODE CIV. PROC. § 542 (2); *Reed v. Hayward*, 23 Cal. 2d 336, 144 P.2d 561 (1943); *Estate of Troy*, *supra* note 49, at 735. See also *McGee v. Allen*, 7 Cal. 2d 468, 60 P.2d 1026 (1936); *Horan v. Varian*, 204 Cal. 391, 397, 268 Pac. 637 (1928); *Martinovich v. Marsicano*, 150 Cal. 597, 89 Pac. 333 (1907).

⁵¹ CAL. CODE CIV. PROC. § 688; *Noble v. Beach*, 21 Cal. 2d 91, 130 P.2d 426 (1942); *Estate of Lind*, 1 Cal. 2d 291, 34 P.2d 486 (1934).

⁵² *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 175 P.2d 830 (1946); *Aigeltinger v. Einstein*, 143 Cal. 609, 616, 77 Pac. 669 (1904).

⁵³ CAL. CODE CIV. PROC. § 542 (a) and (b).

⁵⁴ 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* 262 (rev. ed. 1940); Note, 4 *STAN. L. REV.* 607, 610 (1952).

⁵⁵ *Estate of Harootenian*, 38 Cal. 2d 242, 238 P.2d 992 (1951); Note, 40 *CALIF. L. REV.* 449, 452-54 (1952).

⁵⁶ CAL. CODE CIV. PROC. § 688 provides in part that "All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law . . . are liable to execution." Section 541 of the same Code provides that all property of the defendant in this state which is not exempt from execution may be attached. See also 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* 262 (rev. ed. 1940).

⁵⁷ See text accompanying notes 1-6 *supra*.

⁵⁸ *Estate of Field*, 38 Cal. 2d 151, 238 P.2d 578 (1951); *Estate of Baker*, 170 Cal. 578, 150 Pac. 989 (1915).

and transferability⁵⁹ under Civil Code section 954. But even granting that the right to contest is property, the question remains as to whether it is a "cause of action or judgment as such" which section 688 excludes from execution. Justice Carter's opinion in *Harootenian*⁶⁰ implies that it is not, but it leaves unanswered this statement made by the court in *Estate of Baker*: "Broadly speaking, a contest of a will is in its essence an *action* for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant."⁶¹ Moreover, it is elementary that a will contest establishes only the validity of the will,⁶² and as "there is no provision in the Probate Code for determining the rights of attachment and judgment lien creditors in the heir's or legatee's share of the decedent's estate,"⁶³ it seems unlikely that the court would permit a *general* creditor to attach the debtor's right to contest. It is probable that *Estate of Harootenian* will be used as authority for the proposition that a creditor must at least have already reduced his claim to judgment before he may be heard contesting a will. For the full extent of its holding we can only await future cases.

⁵⁹ *Estate of Clark*, 94 Cal. App. 453, 271 Pac. 542 (1928); *cf.* *McKeon v. Bisbee*, 9 Cal. 137 (1858); *Bias v. Ohio Farmers Indemnity Co.*, 28 Cal. App. 2d 14, 81 P.2d 1057 (1938).

⁶⁰ 38 Cal. 2d at 252, 238 P.2d at 997.

⁶¹ *Estate of Baker*, 170 Cal. 578, 587, 150 Pac. 989, 993 (1915) (emphasis added). And see Edmonds, J., in *Estate of Harootenian*, stating that "The right to contest a will is simply a cause of action to invalidate a testamentary disposition which bars the contestant from sharing in the estate of the decedent." 38 Cal. 2d at 256, 238 P.2d at 1000.

⁶² *Estate of Plaut*, 27 Cal. 2d 424, 164 P.2d 765 (1945); *Voyce v. Superior Court*, 20 Cal. 2d 479, 127 P.2d 536 (1942); *Estate of Dalton*, 2 Cal. Prob. Dec. 97, 103 (1899).

⁶³ *McGee v. Allen*, 7 Cal. 2d 468, 471, 60 P.2d 1026, 1028 (1936); and cases cited in note 33 *supra*.