LAWS OF INHERITANCE IN INDIANA BEFORE 1816

EARL FINBAR MURPHY

NEW YORK
LAW FORUM

VOLUME II JULY, 1956 NUMBER 3

LAWS OF INHERITANCE IN INDIANA BEFORE 1816

EARL FINBAR MURPHY

INDIANA prior to its admission as a state in 1816 knew five periods of rule, namely that of the French, of the British, of Virginia, of the old Northwest Territory, and of the Indiana Territory. The law of this period has been the subject of some study; and, yet, it has been a study not very fruitful in revealing the whats and whys contained in every legal order. Perhaps it has been due to a preoccupation with the law as it was written that has prevented any real understanding of the role played by law on the frontier.

The invariable assumption that has guided most writers of local Indiana legal history is that law is "the work of generations of men, perfected during the lapse of ages, the result of numberless strivings and much bitter experience. Those customs which, after long use, have been found good, are incorporated in those fundamental laws and so a code grows from year to year and from century to century."[1] It has never seemed to occur to such researchers that such a growth of the law did not transpire in Indiana until the second quarter of the nineteenth century and that the early statutes reflect almost nothing of life as lived on the frontier. The innate conservatism of the lawyers,[2] who drew up the early statutes, combined with the prohibitions of the Ordinance of 1787,[3] limiting the early lawmakers to the existing laws of the original states, produced a series of laws indistinguishable from those of the seaboard. The forms of

EARL FINBAR MURPHY is Assistant Professor of Law and Jurisprudence, Harpur College, State University of New York.

1 I MONKS, ESAREY AND SCHOCKLY (Eds.), COURTS AND LAWYERS OF INDIANA 1 (Indianapolis 1916), hereinafter cited as MONKS.

2 *Id.* at 2-3.

3 ORDINANCE OF 1787, ¶ 5, in EWBANK AND RIKER (Eds.), LAWS OF THE INDIANA TERRITORY, 1809-1816, 92-93 (Indianapolis 1934), Foreword by Paul V. McNutt; and INDIANA TERR. ACTS 1810, 4.

the law were rarely more than patterns to which the society of the frontier was to be fitted.

The field of law in which an alien pattern was most completely used was in the area of inheritance. Whether under the French, or the British, or the Virginians, or the government of the United States of America, it was not a local law of inheritance which was enforced but a law of inheritance which evolved elsewhere that was applied to local conditions.[4] Such laws were not simple, for they were not meant to meet simple situations; and the fact that such laws were often in simultaneous effect led not to the simple administration of justice on the frontier which American folklore has led us to expect, but to a complex probate system that was not effectively reorganized until 1843.[5] In approaching this problem, therefore, it is necessary to explore the varying streams of law which formed, either by statutory enactment or customary practice, the Indiana laws of inheritance by 1816, for in no other way than by such exploration can the law be fully understood.

I. THE FRENCH PERIOD

FRENCH settlement in what was to become the Indiana Territory began with the forays of La Salle down from Canada into the Illinois country beginning in the year 1680.[6] From Fort St. Louis, the base of operations he established on the Illinois river, he started subinfeudating his lieutenants with grants of land and seigneurial rights in the basin of that river. The surviving title deeds show a determined attempt to create the French feudal order in the new country, with the assumption by La Salle of the powers of a *tenant in capite* to all lands discovered or explored by him or under his direction.[7] One enfeoffment declared that "the custom of fiefs in the county provostry of Paris which shall be followed in this country" was the law and that "all cases which arise within the extent of the aforesaid lands shall be heard before the judge of the seigniory at Fort St. Louis."[8] Another also declared that the "custom of fiefs in the

[4] Cf. LAWS OF THE TERRITORY NORTH WEST OF THE RIVER OHIO (Philadelphia 1792); LAWS OF THE TERRITORY OF THE UNITED STATES NORTH WEST OF THE RIVER OHIO (Philadelphia 1794).

[5] Cf. INDIANA REVISED LAWS, 1831, and INDIANA REVISED STATUTES, 1843.

[6] I SMITH, THE HISTORY OF THE STATE OF INDIANA 11 (Indianapolis 1897).

[7] PEASE AND WERNER (Eds.), THE FRENCH FOUNDATIONS, 1680-1693, 228 (Springfield, Ill. 1934).

[8] *Id.* at 22, Grant to D'Autray, April 26, 1683.

provostry and viscounty of Paris, which shall be followed in this country" was the law.[9] This system did not long survive La Salle and perished with his immediate successors.[10] Whether or not it ever actually functioned and whether or not the seigneurial court at Fort St. Louis was ever created is doubtful, but it is possible to see here in the single power of lord and judge the origin of that judicial authority later exercised by the local commandants and which so puzled the American lawyers accustomed to an independent judiciary.[11]

The system which La Salle sought to create in the Illinois country was the system already established in Canada, since "from the beginning of the colony there ran in the minds of French officialdom the idea that the social order should rest upon a seigneurial basis."[12] The seigneurial system remained the economic order of the Canadas until the coming of the British,[13] for it was a reflection of the paternal organization of the French colonial system. Despite the elaborate table of organization running from the king himself,[14] it was the seigneurial order which touched the people more directly than anything else.[15] No separate structure of ecclesiastical courts grew up in New France nor did the canon law ever have any jurisdiction in the colony, despite the fact that the Church as seigneur of land often held seigneurial courts.[16] Access to the royal courts could be had only upon appeal from a seigneurial court.[17] But all this meant little in the face of the refusal of the seigneurs to set up seigneurial courts in any numbers[18] and in the face of an official policy which discouraged any litigation or public expression of private differences.[19] As a consequence the whole legal system stagnated or utterly decayed upon its inferior levels and left upon the people little positive impression.[20]

9 *Id.* at 28, Grant to Prudhomme, August 11, 1683.

10 *Id.* at 230, 264-266.

11 BURNET, NOTES ON THE EARLY SETTLEMENT OF THE NORTH WESTERN TERRITORY 283-284, note (Cincinnati 1847).

12 MUNRO, CRUSADERS OF NEW FRANCE, A CHRONICLE OF THE FLEUR-DE-LIS IN THE WILDERNESS 133 (New Haven, Toronto, Glasgow, London 1921), hereinafter cited as MUNRO, CRUSADERS.

13 MUNRO, THE SEIGNIORS OF OLD CANADA, A CHRONICLE OF NEW-WORLD FEUDALISM 148 (Toronto, Glasgow 1922), hereinafter cited as MUNRO, SEIGNIORS.

14 MUNRO, CRUSADERS 9.

15 *Id.* at 147-148.

16 MUNRO, SEIGNIORS, at 133-135; also MUNRO, CRUSADERS, at 128, 131.

17 MUNRO, CRUSADERS, at 150-152.

18 *Id.* at 152.

19 BURNET, *op. cit. supra* note 11, at 283.

20 MUNRO, CRUSADERS, at 224.

French settlement of a permanent nature in what was later Indiana was somewhat slow in getting under way. Since the French were primarily interested in trade with the Indians and only incidentally with the creation of agricultural settlements, the French posts were created in the midst of existing Indian towns.[21] Before 1717 the whole area had been attached to Canada, but with its opening to settlement it was transferred to Louisiana; and in spite of efforts to return it to the Canadian government, it remained under that remote jurisdiction until the extinction of French authority in North America.[22] But the royal government did not forget its subjects along the Wabash, however much it might neglect them, and the king appointed an *ecrivain principal,* or chief clerk, to judge all suits and disputes arising among the inhabitants.[23]

But what was the law that he was supposed to enforce? It was the same law which La Salle had directed his feoffees to use more than two generations earlier—the *Coutume de Paris.*[24] This was the common law of the territory in and about the city of Paris and it was the law preferred by the officials and merchants of the New World since Paris was their place of origin.[25] It had always been the law applied in Canada and since 1732 had been the official law of the Illinois country.[26]

But, despite its official sanction, it did not command the sole allegiance of the people. Although the upper classes might come from Paris, the majority of the settlers were from Normandy, so that the *Coutume de Normandy* was the popular code of law.[27] Perhaps, because of this confusion between rivals in law and because of the gradual absorption of the powers of seigneurial and other courts by the local commandants and *curés,* early Indiana writers concluded that the French were without courts, were not subject to legal

21 PHILBRICK, THE LAWS OF INDIANA TERRITORY 1801-1809, *Introduction,* xii (Indianapolis 1931), hereinafter cited as PHILBRICK.

22 PEASE AND JENISON, ILLINOIS ON THE EVE OF THE SEVEN YEARS WAR, 1742-1755, 61 (Springfield, Ill. 1940), Letter from Count de Maurepas to M. de Vaudreil, April 25, 1748; Letter of Comte de Maurepas to Comte de la Gallissoniere, April 25, 1748.

23 *Id.* at 78-79, Memoir of Louis XV to Sieur Michel, December 9, 1748; see, also, at 47, n. 1; at 48, n. 1; at 47-48, Letter of Comte de Maurepas to M. Joseph Buchet, December 11, 1747.

24 PEASE AND WARNER, *op. cit.,* note 22 at 30; II SMITH, *op. cit.,* note 6, 572; PHILBRICK, *op. cit.,* note 21, CCXV, n. 2.

25 MUNRO, SEIGNIORS, at 38.

26 II SMITH, *op. cit.,* note 6, 572.

27 MUNRO, SEIGNIORS, at 37; PHILBRICK, *op. cit.,* note 21, CCXV, n. 2.

process, and were ruled by arbitrary fiat alone.[28] These early writers had little curiosity about the customary French law for their very condemnations reveal evidence that the customary law was in force throughout the Illinois country—if in a somewhat composite and hand-hewn version. "The law of the land .... had been called rather grandiloquently the *Coutume de Paris*. Evidently no one knew what the 'customs' of Paris were, so the Commandant and the priest, who, together, had been the whole government of the French settlement for nearly a century, had administered the *Coutume de Pays*, or customs of the country, somewhat after the fashion of the [English] Common Law."[29] But why should these officials have administered affairs in conformity with the English common law? Because it was a more natural law, or because the common law of Paris, being much like it, their decisions could not help but appear to conform to the common law of England as well as of Paris? Might not one examine the laws of inheritance to see if they sustain the latter position as the more likely one and to see what conflict in this area existed between the code of the officials and the code of the people?

The differences and similarities of the customs of Paris and Normandy make interesting comparisons. In the execution of wills, under the common law of Paris formal testaments had to be signed and sealed by the testator before two notaries, or before the *curé* of his parish, or before the vicar general and one notary, or before one notary and three witnesses.[30] The witnesses had to be men over twenty-one years of age, legatees, and the will had to be made in their presence before the notary or *curé* or vicar general and published by the testator as his last will.[31] Such wills had to be registered to be valid and this practice was followed in the Illinois country by the French inhabitants as late as the Virginian period.[32] All persons of judgment could make a will for the benefit of another leaving all movables and certain kinds of immovables and inherited property.[33] Under the common law of Normandy concerning testamentary gifts, anyone over twenty-one years of age could make a will

[28] I MONKS, *op. cit. supra* note 1, 11; II, 805.

[29] *Id.* at I, 11.

[30] DE LAURIÈRE, TEXTE DES COUTUMES DE LA PREVOTE ET VICOMTE DE PARIS, art. 209, 341 (Paris, 1698), hereinafter cited as DE LAURIÈRE.

[31] *Id.* at 1-2, *Foreword.*

[32] *Id.* at 343, art. 290; ALVORD, CAHOKIA RECORDS, 1778-1790, 475 (Springfield, Ill. 1907), hereinafter cited as CAHOKIA RECORDS.

[33] DE LAURIÈRE, *op. cit.* at 344, art. 292; at 346, art. 293; at 349, art. 296.

before a *curé* or vicar or notary or court clerk (*tabellion*) and two witnesses, although holographic wills were valid.[34] An unmarried man over twenty-one without children could by testament dispose of his movables to whomsoever he chose, but a married man could only dispose of one third of his movables by will.[35] Nuncupative wills for soldiers, persons in time of plague, and persons at sea were not unknown to the custom of Normandy.[36]

But the greatest difference occurs in the laws of descent rather than in the matter of testamentary executions, for the limitations upon the privilege of making a will under the Norman law were much more strict than under the law of Paris. The custom of Paris, even though it made children the forced heirs of their parents, did not make inheritance a matter attaching to the blood, for it permitted heirship by one not related to the testator.[37] Under the law at Paris, the children took by descent equal shares of the estate except for lands held in fief or under other feudal limitation and the parents could not prefer one child over the others either by gift or testament;[38] and those who received more than their share had to return it so that all might share equally.[39] The collateral line inherited the same as the direct line but inheritance was limited to siblings and the children of siblings by the law of descent.[40]

On the other hand, in Normandy, the law of descent was much different from that obtaining in Paris. In the Norman province heirship did attach to the blood and heirs could not be created nor a part of the decedent's estate left to one not an heir at law.[41] In the direct line, upon the death of the parent, the first born son, whether the family was noble or common, passed in title to the succession of his father and mother to hold the estate for subsequent sharing with his younger brothers and sisters.[42] If he had predeceased them then his eldest son took his place, or, if he had no son, then his eldest

[34] DUCASTEL, TEXTE DE LA COUTUME DE NORMANDIE, 211-212, art. 502; 212, art. 503 (Rouen 1783), hereinafter cited as DUCASTEL.

[35] *Id.* at 214, art. 504, 505; 215, art. 507; 217, art. 514.

[36] *Id.* at 212-213, ORDONNANCE DE 1735.

[37] DE LAURIÈRE, *op. cit.* at 352, art. 298; at 354, art. 299; at 354-355, notes, citing Glanvil, lib. 7, cap. 1.

[38] *Id.* at 358, art. 302; art. 303, Act of 1293, Parloux aux Bourgeois.

[39] *Id.* at 361, art. 304; at 362, art. 305; at 362, art. 306.

[40] *Id.* at 357, art. 301; at 378, art. 319; Decree of Childebert of 595, 378, notes, 380, art. 320 and 383-386, arts. 322-324.

[41] DUCASTEL, *op. cit.* at 108, art. 215. For bastards, cf. 109, art. 219, Lettres du Prince.

[42] *Id.* at 116, art. 240.

daughter, by "prerogative d'ainesse," stepped up to stand as her father's representative.[43] If the deceased eldest son was childless then the second son took his place.[44] The eldest upon taking the succession had, by "droit d'ainesse" or "preciput," first choice upon the estate of his parent and was free to select the finest fief and goods.[45] This may be a survival from the ancient Norse law of the Vikings, being similar to the "aseterett."[46] After the eldest had made his selection, then the other sons by priority of age made their choices and if there was more than one fief in the estate no son could take more than one fief.[47] Upon the extinction of the direct line inheritance was permitted unto the seventh degree through males only, though if it came from either the paternal or maternal line solely that line alone could inherit it.[48] No last will, or gift *causa mortis,* or gift *inter vivos* could leave or give property beyond the table of heirs and all such attempts to do so were void; but excessive gifts within the limits of the said table were merely voidable within ten years of the donor's death at the option of an interested party.[49] Parents, if they left a will, were compelled to divide all their movables equally among their children.[50]

Basically, the purpose of both these laws was to provide for equal distribution of property among children, with the Norman law providing stricter limitations on the decedent's powers of devise and bequest than the Parisian. The greater concern of the Normans for keeping property within the family is revealed by the arrangement for succession through collaterals.

The probate procedures of the *Coutume de Normandy* were somewhat sketchy and inadequate, though perhaps their obvious origin in the medieval village would reveal them as more adequate for the frontier settlements in North America than the more advanced and sophisticated law of Paris.[51] The *Coutume de Paris* was imbued with

[43] *Id.* at 117, arts. 241, 242.
[44] *Id.* at 117, art. 243.
[45] *Id.* at 118-121, arts. 244-254.
[46] Skavang, *Review of Jon Skeie, Odelsretter Og Aseteretten,* 51 MICH. L. REV. 1251, 1252 (1952).
[47] DUCASTEL, *op. cit.* at 116, art. 240.
[48] *Id.* at 139, art. 314; at 139, art. 316, art. 317; at 122, art. 258.
[49] *Id.* at 208, art. 496; at 209, art. 500. Cf. 217, art. 514 with 217-218, arts. 515-516 and at 218, art. 516.
[50] *Id.* at 216, art. 511.
[51] For example, *Id.* at 112-115, arts. 225-238; at 110, art. 221 should be compared with DE LAURIÈRE, *op. cit.* at 349, art. 297; at 394, art. 332.

a mercantile knowledge, whereas the Norman was more concerned with the disposition of real property and the preservation of status, spending much effort upon gifts at marriage, gifts made in inducement of marriage, and gifts made in settlement of a daughter's interest in her parents' estate.[52]

The law that affected the French settlements in North America was not all contained in the *Coutumes;* but it was considerably supplemented, and even supplanted in particular instances, by various royal ordinances.[53] In addition, local customary practice was permitted, particularly in the matter of land tenure. The seigneurs held land from the crown by direct grant and in turn could make subenfeoffments to tenants beneath them, but only a small part of the land was so held. Most persons either received grants from local commandants, or from tribes of Indians, or simply exercised a mere use over the lands the crown claimed.[54] This confusion, combined with the careless attitude toward records in the French colonies, led to considerable legal confusion with the arrival of the law-conscious Anglo-Americans.

The official French rule of North America was ended by the Treaty of Paris in 1763, but the French settlers that were already upon the scene remained and preserved their peculiar institutions. They were to constitute for many generations a series of enclaves within an area that was rapidly converted from a wilderness to a preserve for the English common law—if a legocentric view may be pardoned. The influence of their law, as the influence of their customs, was an influence that had importance only so long as the French ethnic group maintained its relative importance within the larger community. As the latter expired so did all the reflections of it.

II. THE ANGLO-NORMAN PERIOD

AFTER some delay,[55] British courts were set up in the Illinois country under the British military commandant's control.[56] Though

[52] DUCASTEL, *op. cit.* at 131 *et seq.*

[53] PHILBRICK, *op. cit.* at CCXV, n. 2. DILLON, A HISTORY OF INDIANA * * * TO 1816, 39 (Indianapolis 1859), reprinting, Royal Ordinance of March, 1724, "Le Code Noir."

[54] I SMITH, *op. cit.*, 19, 240; ESAREY, A HISTORY OF INDIANA, 27 (3d ed. Fort Wayne 1924); BURNET, *op. cit.* at 307; PHILBRICK, *op. cit.* at LXV; BAKER, HISTORY OF KNOX AND DAVIES COUNTIES, INDIANA, 19 (Chicago, 1886).

[55] ESAREY, *op. cit.* at 34, 44-45; II MONKS, *op. cit.*, 805-806.

[56] Thornton, *The General Court of the Northwest Territory,* in TAYLOR, THE BENCH AND BAR OF INDIANA, 20 (Indianapolis 1895), citing Proclamation of November 21, 1768 of the British military commandant and order of the court at Ft. Chartres, December 6, 1768.

the British had extended the common law of England to the Illinois country the judges they appointed were French and they continued to administer French law to the French inhabitants.[57] For a number of reasons the British failed to dominate the area with their institutions,[58] and the French continued to handle all matters not of a military nature according to their own customs.[59]

Upon this administrative cloud-cuckoo land, George Rogers Clark with his company of Virginians descended in 1778 and annexed the region to the Commonwealth of Virginia. One of the first steps the Revolutionary army took was to cause the French inhabitants to elect courts for the transaction of civil affairs, reserving appellate jurisdiction to General Clark.[60] By the close of October, 1778, "courts, resembling the county courts of Virginia and having both criminal and civil jurisdiction, were established at Cahokia and Kaskaskia."[61] The electoral system was not employed at such remote posts as Peoria, where the traditional union of military, civil, and judicial functions was maintained in the person of the commandant;[62] but that any elections were held was a very definite index to future Virginian intentions. The purpose behind this prompt introduction of democratic techniques was to wean the French away from their reliance upon military orders and to attach them to the American cause.[63]

Meanwhile, at Williamsburg, the Virginian legislature, upon hearing of the conquest of the northwest, passed an act organizing the county of Illinois, comprising all the territory north of the river Ohio; and the governor with the advice of the executive council, was authorized to appoint a county lieutenant or commandant-in-chief, during pleasure, who should have power to commission deputy commandants, militia officers, and commissaries as he should deem proper.[64] The first, and only, person ever to hold this office was John

[57] CAHOKIA RECORDS, lxii-lxiii, xxvii; ESAREY, *op. cit.* at 51; II SMITH, *op. cit.*, at 573.

[58] PEASE, THE LAWS OF THE NORTHWEST TERRITORY, 1788-1800, *Introduction,* xii (Springfield, Ill. 1925), hereinafter cited as PEASE, *Introduction;* PHILBRICK, *op. cit.* at lxv-lxvii; CAHOKIA RECORDS, at lvii.

[59] CAHOKIA RECORDS, lvii.

[60] JAMES (Ed.), GEORGE ROGERS CLARK PAPERS, 1771-1781, *Clark's Memoir, 1773-1779,* 235 (Springfield, Ill. 1912).

[61] *Id.* at lvii.

[62] PHILBRICK, *op. cit.,* lxv-lxvii.

[63] JAMES, *op. cit.,* Clark's Memoir, at 235, 248.

[64] I ENGLISH, CONQUEST OF THE COUNTRY NORTHWEST OF THE RIVER OHIO, 1778-

Todd, Jr., who was ordered by Governor Patrick Henry to consult the people, inculcate in them a love of liberty, and administer justice to them.[65]

Mr. Todd did not hesitate in beginning his mission all unaware that he would lose his life as a result of his promotion.[66] Soon after his arrival new elections were held; and George Rogers Clark took to the stump to exhort the French to take advantage of the privilege of electing their own court.[67] The elections, naturally, returned French men exclusively to the courts[68] and this was to be the basis of future accusations and recriminations by the American immigrants.[69] The function of these bodies was more that of administrative agencies rather than courts; and it was in the misuse of their power, by arrogating to themselves the old commandants' prerogative of land grants, that caused such bitter criticism.[70] But, however lax their management or corrupt their intentions, they never permitted the complete collapse of their powers, which some writers have claimed; and they carried on despite the lapse of the Virginian statute organizing the Illinois country.[71] Despite the burden of their duty in keeping order they also administered estates, received the probate of wills and transacted all the business of law courts relating to the management of inheritance laws.[72] It is in such matters as these and not in the larger field of title policy and Franco-American rivalry for ultimate supremacy that the courts made their day-to-day impression on the people of this isolated frontier. The examples of court proceedings in probate are not numerous, which indicates either an indifference or a reluctance to depend upon the courts by a people that for generations had relied upon the most informal kind of legal techniques. In fact, before the creation of the courts the French had privately settled up the affairs of decedents' estates without recourse

1783, AND LIFE OF GENERAL GEORGE ROGERS CLARK 248; II, 1037-1038 (Indianapolis and Kansas City 1896).

65 *Id.* at II, 1038; I, 249-252; I, 254-255, Letter from Governor Patrick Henry to Gen. George Rogers Clark, December 12, 1778.

66 I MONKS, *op. cit.* at 3. Todd was killed August 18, 1782, at the Battle of Blue Licks.

67 JAMES, *op. cit.* at 319.

68 *Id.* at ciii.

69 JAMES, GEORGE ROGERS CLARK PAPERS, 1781-1784, 193 (Springfield, Ill. 1926).

70 PHILBRICK, *op. cit.*, lxv-lxvii; II SMITH, *op. cit.*, 573; I MONKS, *op. cit.*, 3; THORNTON, *op. cit.*, 24; DILLON, *op. cit.*, 169.

71 ESAREY, *op. cit.* at 75; PEASE, *Introduction*, xiii.

72 CAHOKIA RECORDS and ALVORD (Ed.), KASKASKIA RECORDS, 1778-1790 (Springfield, Ill. 1909), hereinafter cited as KASKASKIA RECORDS.

to any formalities, but they did not refuse to relinquish such matters to the new institutions.[73]

On September 10, 1779, before the court at Cahokia appeared Marie Aubochon who had what amounts to a probate of the will of René Locat, which will the testator had made in his last sickness before a notary and five witnesses.[74] He left a life estate in all his property to his widow, Marie Aubochon, with the power of alienation vested in her and with a remainder over to his stepson in fee.[75] On October 5, 1780, M. Yacinte St. Cyr made his will before a notary; and he had it witnessed by four persons and admitted to the records of the court.[76] In it the testator revoked past wills, ordered his debts paid and any wrongs he had done righted, left two thousand livres to his godson, half of the rest of his estate to the poor and the remainder for prayers for his soul.[77] On September 1, 1788, M. Dorsière, on behalf of Gabriel Carré, testamentary attorney, offered for probate the will of James Moore, deceased.[78] This will is in English, though recorded in French, and uses terms of American law. It appoints three executors who are ordered to take over the property if waste is committed. The testator left one third of everything to his wife and divided up his library.[79] Early in 1788, the court appointed an administrator for the estate of Augustin Dubuque, who died intestate, so that the assets of the estate might be marshalled for the payment of debts.[80] On July 4, 1781, the will of Richard McCarthy was admitted to probate at the court of Kaskaskia.[81] This will is holographic, being both unwitnessed and unnotarized. In it the testator leaves everything to his wife and children in Canada.[82]

As is apparent, none of the French testators making wills had children, which implies that persons with offspring had no need for a will but were considered subject to the forced heirship provisions of the *Coutume de Paris*. Further, in all but one of these, Gabriel Carré served as testamentary attorney under the will;[83] and it may have

73 PHILBRICK, *op. cit.*, lxv-lxvii; I SMITH, *op. cit.*, 244; KASKASKIA RECORDS, 48-49; 123-124.
74 CAHOKIA RECORDS, 467-471.
75 *Id.* at 469.
76 *Id.* at 475.
77 *Ibid.* Gabriel Carré was testamentary attorney here too.
78 *Id.* at 519.
79 *Id.* at 517.
80 *Id.* at 513.
81 KASKASKIA RECORDS, 230-232.
82 *Ibid.* It was proven after the death of the executor.
83 *Ibid.*

been at his initiative that court proceedings were had upon these particular estates. Then too, only those who left estates unusually large for a poor frontier region would have probate upon their estates in any case, unless personal idiosyncrasy were involved. Whatever the reason, however, these cases reveal an activity in probate matters in the local courts until the setting up of the Northwest Territory.

Throughout the entire period of Virginian government, the French law was maintained, though modified somewhat to suit Virginian law,[84] and the *Coutume de Paris* was the law enforced. "The whole Virginia tradition was one of generous adjustment to the French tradition. The statute of December, 1778 which established government for the 'county of Illinois' provided for administration of the Custom of Paris."[85] The local inhabitants would rather have had the French language and law used exclusively in all court proceedings,[86] but the days of French ascendancy in the area were numbered. The coming of the Northwest Territory under the direct control of the central government was to inaugurate a radical change in the laws, customs, and population of the Illinois country and the Wabash lands; and the time of dual legal systems in all law matters was to be brought to an end, albeit gradually.

III. THE NORTHWEST TERRITORY

THE Ordinance of 1787, after an earlier attempt in 1784 that never materialized, undertook to provide an organic law for the vast region between the Pennsylvania border and north of the river Ohio.[87] Under the statute, the Congress of the Confederation appointed a governor and three judges who comprised in their individual persons and under their collective title of the General Court all the government there was in the territory—executive, legislative, and judicial.[88] It was in the nature of the territory as it was originally constituted that the basic difficulty lay. Few of the inhabitants were amenable to normal legal process as understood on the seaboard. The Indian population, approximately forty-five thousand in number, was subject to its chiefs and its aboriginal laws;[89] the French counted over

84 CAHOKIA RECORDS, lxii, lxiii.
85 PHILBRICK, *op. cit.*, ccxv, n. 2.
86 KASKASKIA RECORDS, 286-287, Petition, May 25, 1782.
87 BURNET, *op. cit.* at 37; PEASE, *Introduction,* xiii-xiv.
88 ORDINANCE OF 1787, ¶ 5, in EWBANK AND RIKER, *op. cit.* at 92-93.
89 BOND, THE CIVILIZATION OF THE OLD NORTH-WEST * * * 1788-1812, 3, n. 2 (New York 1934).

six thousand widely scattered people not desirous of changing their ways to suit an alien law;[90] and the few eastern settlers at this period were gathered in the company town of Marietta and operated free from the territorial government as a private corporation.[91] As to the local courts, they were in a deplorable condition, being unable to keep order, while the economies of the towns were in a state of disintegration.[92] To discuss probate matters concerning a region in a condition such as this may seem somewhat useless, but probate procedure was something the participants had to consider and so must we as students of their efforts.

The Ordinance of 1787 required the regulations of the new territory to be taken from "such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district."[93] Immediately, the problem arose as to whether this limited the General Court to adopting existing statutes of the original states or whether they could proclaim the common law of England part of the law of the Northwest Territory.[94] It was finally decided, with somewhat tentative finality,[95] that they possessed the power to make the common law of England the law in the western country.[96] The General Court next construed the word "laws" to include the case law of the original thirteen states as well as the statutory law, justifying this interpretation by the fact that conditions being different so must the laws be different.[97] Congress did not accept this interpretation and insisted that the General Court adopt an entire act or part of an entire act of one of the original states but that it could not create an act by piecing it together out of various acts of various states or various opinions by the various courts of the various states.[98] In the event, this had little practical effect, for the General Court went its own way and most of its acts were "muddled out of a much longer act" with the acquiescence of the local bar in the absence of any viable alternative.[99]

90 *Ibid.* Two thousand were still under the British at Detroit.

91 PEASE, *Introduction,* xix-xx.

92 PHILBRICK, *op. cit.,* xviii, n. 2; BOND, *op. cit.* at 64.

93 See note 88, *supra.*

94 I SMITH, THE ST. CLAIR PAPERS, 189 (Cincinnati 1882), hereinafter cited as THE ST. CLAIR PAPERS.

95 *Id.* at II, 78, n. 1.

96 *Id.,* I, at 189.

97 *Id.,* II at 72, n. 1, 72, 69; PEASE, *Introduction,* xxi.

98 III ANNALS OF CONGRESS, 480-481, 1395-1396; IV, 825, 830, 1214, 1227; PEASE, *Introduction,* xxiv-xxv; II THE ST. CLAIR PAPERS, 362.

99 PEASE, *Introduction,* xxix, xxvi; BURNET, *op. cit.,* 41, 63-64.

The governor, Arthur St. Clair, had decided views on the structure of the probate courts, as he possessed decided views upon most of the problems of the area. A Pennsylvania lawyer and judge, he had been trained in Scotland, served as an officer in the Revolution, and had been President-General of the United States.[100] With such a background he had few doubts concerning his ability to legislate for the frontier.

His requirements for effective probate administration as laid down in a memorandum were: (1) that a judge of probate give bond "for the due execution of his office and the delivery of the records undefaced to their successors," which may be a commentary upon the ethics of the period's judges; (2) that the bonds be entered of record; (3) that the record be kept in the office of the prothonotary or clerk of the common pleas if that office is established; (4) that a seal be provided for the probate court; (5) that on objection to the probate of an instrument purporting to be a will two judges of the common pleas should assist him in taking final accounts and making final distributions; (6) that appeals be allowed from the probate court; (7) that administrators be required to give bond; (8) that the order of persons entitled to be administrators be pointed out; (9) that some provision for nuncupative wills be made; (10) that letters of administration granted without bond be void and that the judge granting them be responsible; (11) that wills already probated be admitted without further proof; and (12) that letters granted in one county be good in another.[101] "Part of his suggestions on the probate bill were adopted, part ignored"[102] and much of this mixture of the basic and the trivial passed into the laws of inheritance of the new territory.[103] The various enactments of the General Court were put together in the Maxwell Code in 1795, a code "supposed to be so full and complete that but one short legislative session was held thereafter."[104] But Governor St. Clair, despite his major contributions to it, considered much of it simply void;[105] and the contemporary bar was of the opinion that it "formed a miserable apology for a code of statute laws."[106]

[100] PEASE, *Introduction,* xxxii; BURNET, *op. cit.* at 373.
[101] II THE ST. CLAIR PAPERS, 67, 68-69.
[102] PEASE, *Introduction,* xxii.
[103] II THE ST. CLAIR PAPERS, 187.
[104] BURNET, *op. cit.* at 41; BOND, *op. cit.* at 72.
[105] II THE ST. CLAIR PAPERS, at 438, 453; I, at 145.
[106] BURNET, *op. cit.* at 304.

As a consequence of the governor's agitation and the discontent of the local bar, the first General Assembly of the territory had its work cut out for it—work which it did in a cumbersome and incomplete series of laws that were not soon revised because of the expense.[107] But it did not disturb the laws of inheritance or the disposition of the affairs of the Probate and Orphans' courts; and it was to be through these laws that the system of the American immigrants concerning decedents' estates—among other matters—was to gradually replace the practices and customs of the French.[108]

The court system retained the General Court as the court of last resort[109] and set up circuit courts to be presided over by travelling members of the General Court.[110] Because of the hardships of travel the circuits were irregular and the western country was almost totally neglected.[111] To make up the deficiency local courts were also organized and they often made up in elaboration of statutory detail what they lacked in every other capacity.[112]

The county courts of common pleas were established in 1788 to be composed of not over five judges. "The judges so appointed and commissioned, or a majority of them shall . . . hear and determine all manner of pleas, actions, suits, and causes of a civil nature, real, personal, and mixed, according to the constitution and laws of the territory."[113] This court was replaced by the Justices of the Common Pleas in 1795 but the powers were the same.[114] These common pleas courts were the civil courts, usually made up of only three judges, because of the difficulty of finding men to fill them, of whom often only one was a lawyer.[115] Its counterpart was the court of quarter sessions of the peace, which dealt with petty crimes and misdemeanors, which also generally contained only one lawyer on its panel of judges.[116] But the early legislators were not satisfied

[107] *Id.* at 288, 310-311; PHILBRICK, *op. cit.* at cxi.
[108] BURNET, *op. cit.* at 384-385, 388.
[109] I MONKS, *op. cit.* 6-7.
[110] I, *id.* at 14, 8.
[111] I, *id.* at 8-9, 12, 14; BURNET, *op. cit.*, 36-37, 64-65, 68, 281, 282, note; BOND, *op. cit.* at 83.
[112] *Ibid.*
[113] Acts (N.W. Terr.) 1788, c. 2, 7 (orig.), 4 (rep.); Pt. 2, ¶ 2, 11 (orig.), 7 (rep.). See, also, Acts (N.W. Terr.) 1790, c. 15, § 1, 45 (orig.), 35 (rep.); c. 15, § 2, 45-47 (orig.), 35-37 (rep.).
[114] Acts (N.W. Terr.) 1795, §§ 15-18, 51-53 (orig.), 159-160 (rep.).
[115] I MONKS, *op. cit.*, 14.
[116] *Ibid.*; CAUTHORN, in BAKER, HISTORY OF KNOX AND DAVIES COUNTIES, INDIANA 173 (Chicago 1886).

with local courts of general jurisdiction, so courts of special jurisdiction in probate and guardianship matters were created in imitation of the more sophisticated legal systems of the eastern states.[117] These separate courts existed until their abolition as an economy measure in 1805 by the first session of the General Assembly of the Indiana Territory.[118]

The office of judge of probate in every county was created in 1788.[119] This functionary's powers were to render final decision in all matters not calling for a definitive sentence and final decree. Where a definitive sentence or final decree was needed he was required to call to his assistance two judges of the common pleas who would constitute with him the court of probate, an apparently *ad hoc* body. This court rendered a final decree by a majority vote.[120] In 1792, this officer was given extensive powers over matters of guardianship, including not only minors but also insane persons and spendthrifts, but in 1795 this additional authority was taken away and vested in an Orphans' court in order that different persons might handle decedents' estates and the interests of minor wards in those estates.[121] The Orphans' court was held at least once each session by the justices of the court of general quarter sessions of the peace for the purpose of holding a court of record to which all fiduciaries of property belonging to an orphan or underage person would be summoned to report and to whom the judge of probate must turn over his records for an examination. If upon hearing, any fraud or negligence was discovered, the Orphans' court was to so certify and the party grieved might bring suit to recover damages at common law.[122] It was further empowered to require administrators of intestates' estates to report to them and to compel the administrator to pay all the estate's debts, funeral expenses, and expenses of every sort set down by the government and to make a just and equal distribution. For testamentary dispositions, however, the Orphans' Court had to act as guided by the last will. In short, the Orphans' court was "peculiarly domestic," having special means to discover

117 Acts (Ind.) 1805, c. 19, § 10, 15-16 (orig.), 115-18 (rep.).
118 *Ibid.*
119 Acts (N.W. Terr.) 1788, c. 3, ¶ 1, 13-15 (orig.), 9-19 (rep.).
120 *Ibid.*, ¶ 2; PHILBRICK, *op. cit.*, cxlviii.
121 PHILBRICK, *loc. cit.*
122 Acts (N.W. Terr.) 1795, § 1, 81-82 (orig.), 181-182 (rep.), § 7, 85 (orig.), 185 (rep.).

the contents of an intestate's estate, with the widest discretion arising from its *ex parte* proceedings.[123]

The shortage of competent personnel to man these courts was always a pressing one. During the very early period when lawyers still came from the East where an academic education was necessary, both their general and legal educations were of a high order.[124] It was the generation that succeeded them, raised for the most part in Indiana, that was most ignorant of both culture and law.[125] By modern standards the county judges seem but semi-literate, there being no evidence of any of them having any schooling or owning or reading a single book; and "Governor St. Clair's utmost hope was that there should be one lawyer on the bench 'where their decisions are final'."[126] This does not mean that the courts were in the hands of irresponsible and negligible persons in the community, for the exact opposite was the case. "The judges were largely the economic and political magnates of their counties, the 'county gentry'; they had no other qualifications, educational or moral, in any noticeable degree."[127] So firm was their control of local affairs that a man as conservative as Governor St. Clair noticed that "a few wealthy proprietors held so many men debtors to them for lands that the independence of elections was endangered."[128] For this simple, if feudal, society the elaborate court system outlined above was devised—a system so elaborate that it was impossible to find enough competent persons to fill all of the vacancies, producing a most haphazard enforcement of the law.[129] In consequence, it is not impossible to presume that despite the large number of laws enacted for the regulation of the courts and the governance of the people "the scattered communities for which [they were enacted] governed themselves in about the way they actually did whatever the legislation provided for them."[130]

But the ignorance of the courts and many of the lawyers, and their inability to comprehend technicality, did not prevent the legislature from imposing the burden of technicality upon them.[131] Indeed,

123 THORNTON, *op. cit.*, 96-97.
124 BANTA, *When Lawyers Rode the Circuit,* in TAYLOR, *op. cit.* at 128.
125 PHILBRICK, *op. cit.*, clxii-clxvi.
126 *Id.* at cciv-ccv; II THE ST. CLAIR PAPERS, 415.
127 PHILBRICK, *op. cit.* at ccix.
128 PEASE, *Introduction,* xxxiv; II THE ST. CLAIR PAPERS, 402, 432.
129 PEASE, *Introduction,* xxv.
130 *Id.* at xxxvi; I MONKS, *op. cit.*, 15, PHILBRICK, *op. cit.*, xxv.
131 PHILBRICK, *op. cit.*, cxvii.

procedure was set out at considerable length in the statute book; and nowhere more thoroughly than for the field of inheritance.

It was the duty of the judge of probate to "record last wills and testaments, and make entries of the granting of letters testamentary and letters of administration; [and] he shall receive, put on file, and carefully preserve all bonds, inventories, accounts, and other documents, necessary to be perpetuated in his office."[132] His duty to carefully preserve the bonds was perhaps emphasized most of all. All bonds in inheritance matters were made to the judge of probate, were held in trust for the person having an interest therein, and were for the benefit of any person injured by some failure or fraud during the probate proceedings.[133] Administrators had to give bond or their letters of administration were void; and guardians, also, were required to find sureties for the discharge of their trust and the certainty of their accounts.[134] A successor administrator had to make a new bond before his letters were issued, while a judge of probate could require additional security as he deemed proper if doubtful upon the security posted. Furthermore, if the judge failed to require a necessary bond he was personally liable for all damages incurred thereby; while if he failed to furnish copies of bonds to injured persons he was liable for treble damages "by action of debt, bill, plaint, or information, in any court of the Territory, where no essoin, protection or wager of law, or any more than one imparlance, shall be allowed"[135]—which feudal language must have had a powerful effect upon the uninstructed minds of the frontier judiciary. Where letters of administration were void because no bond had been given, the purported administrator was treated as *executor de son tort,* with all of the liabilities such a designation entails.[136] Because of the shortage of cash on the frontier some of the court charges for a time were payable in corn, but this practice was soon discontinued.[137]

The proving of wills was a relatively simple matter. All wills in writing devising land or hereditaments had to be proven by two

[132] Acts (N.W. Terr.) 1788, c. 3, ¶ 4, 14 (orig.), 10 (rep.).

[133] *Id.* at ¶ 5, 13-15 (orig.), 9-10 (rep.).

[134] *Id.* 1795, § 1, 90 (orig.), 188 (rep.); § 2, 82 (orig.), 182 (rep.); 1792, c. 11, § 4, 44 (orig.), 91-92 (rep.).

[135] *Id.,* 1795, § 16, 89 (orig.), 187-188 (rep.).

[136] *Id.,* § 2, 82 (orig.), 182-183 (rep.).

[137] *Id.,* 1792, c. 13, 74 (orig.), 116 (rep.). Cf. speech of Robert Dale Owen, II Debates of the Indiana Convention, 1850, 1277 col. 1 (Indianapolis 1850), arguing for paying state salaries in corn.

or more credible witnesses and once proven such devises served as conveyance of good title to real estate, as did bequests of personal property.[138] A nuncupative will, where the decedent's estate was over eighty dollars in value, had to be proven by two witnesses or more present at its making, who were there and then told by the testator that it was his last will. It had to be made in the testator's last sickness in his dwelling, or where he had been a resident for ten days before making the will except where taken sick away from home. After six months had passed from the speaking of the testamentary words no oral will could be proven unless reduced to writing within ten days of its being uttered, while fourteen days from the testator's death had to pass before it could be probated and process issued to call in the testator's widow and next of kin to contest it if they pleased.[139] Perhaps because of the uncertainty of frontier conditions and the general illiteracy of the population, the legislature was willing to give this broad scope to the nuncupative will, so generally distrusted by public policy. Besides, if any will within seven years of probate was shown to have been revoked or annulled in whole or in part, the party aggrieved could reverse the prior judicial process and take what was his.[140] Apart from this there was no limitation upon the making of claims by heirs and creditors of decedents, for the general statute of limitations did not encompass probate litigation.[141] As a result, certainty in the field of inheritance must have been a very problematical thing from the purely legal point of view, however comfortably custom may have adjusted the problem.

By comparison to the volume of legislation on court procedures, the laws on the disposition of estates seem slight in quantity; but, doubtless, they were sufficient. All children of intestates shared equally; and if one received an advancement during the intestate's life insufficient to assure him that equality required by statute, his share was to be increased until that equality was attained.[142] An intestate without descendants had his estate shared in equal moieties between his surviving spouse and his kin, although no kin beyond

138 Acts (N.W. Terr.) 1795, § 1, 148-149 (orig.), 232 (rep.).

139 *Id.*, § 3, 150 (orig.), 234 (rep.), §§ 4, 5, 151 (orig.), 234 (rep.).

140 *Id.*, § 2, 150 (orig.), 233 (rep.).

141 *Id.*, 1788, c. 10, 33-34 (orig.), 25-26 (rep.); *Id.*, 1795, 54-56 (orig.), 161-163 (rep.). Neither of these statutes mentions probate matters nor language that normally would include it.

142 *Id.*, 1795, § 4, 92-93 (orig.), 190 (rep.).

decedent's nephews and nieces were eligible.[143] Distribution of the decedent's personal estate could not be made until more than a year after his death; even after distribution the intestate's creditors could compel the distributees rateably to reimburse them.[144] If the intestate's estate was insolvent and his personalty insufficient to pay his debts, his real estate could be sold and the funds obtained applied to extinguish the debts, maintain his children, provide for putting the children out as apprentices, and to improve the remainder of the estate, if any.[145] The proceeds of an insolvent estate were to be divided proportionately among its creditors,[146] while the order of the payment for a solvent estate was as follows: (1) "funeral expenses and physic. Secondly, debts and duties to the Territory. Thirdly, judgments. Fourthly, debts due by recognizances. Fifthly, rents. Sixthly, obligations, bills penal, and protested bills of exchange. Seventhly, single bills. Eighthly, servants' and workingmen's wages. Ninthly, merchants' and traders' book debts, and promises by word, arrears of accounts, and such like."[147] Dower rights, however, were taken free of the deceased husband's debts and if the dower right interest in one third of the decedent's lands was not set off to the widow by the heirs within one month from demand she could sue to recover it,[148] though where the estate was entire the widow received one third of its value instead.[149] Under the laws of the Northwest Territory, dower and all other marital rights were extinguished by an absolute divorce so that there were no overhanging property interests surviving the divorce to complicate the rules of conveyancing and the procedure of the probate court.[150]

In the matter of guardianship the legislature tried several experiments that were not to be repeated until generations later and generally canvassed the law of guardianships extensively. Before the creation of the Orphans' courts it was the duty of the Judge of Probate to appoint a guardian for all minor orphans fourteen years of age or younger or to appoint a responsible person chosen by a minor over fourteen as guardian. This guardian had to account to the ward upon

143 *Ibid.*
144 *Id.*, § 5, 93 (orig.), 190-191 (rep.).
145 *Id.*, § 7, 93-94 (orig.), 191 (rep.).
146 *Id.*, 1798, 11 (orig.), 298 (rep.).
147 *Id.*, 1795, § 1, 155-156 (orig.), 237-238 (rep.).
148 *Id.*, § 1, 164-165 (orig.), 244 (rep.).
149 *Id.*, § 3, 165-166 (orig.), 245 (rep.).
150 *Id.*, § 4, 183 (orig.), 258-259 (rep.); from Mass. Acts, 1786, 10.

the ward's majority at twenty-one or sooner to the Judge of Probate if required by him.[151] If the Judge of Probate believed any fiduciary of a minor had acted in an irresponsible or neglectful manner or if he believed an executrix was about to remarry without securing the minor's portion, he could require additional security to assure payment to the minor upon his majority of his rightful portion.[152] The approach was not entirely negative, for investment of the principal by the guardian was encouraged, for if investments made under court approval failed he was not responsible. On the other hand, if he neglected investment opportunities he was liable to the ward for loss of potential increment[153]—indeed the parable of the faithless servant and his burying his talent. The guardian could put his ward out to a master as an apprentice upon request to the court, could give a final discharge of obligation to the ward's debtors, and could represent the ward in all further court proceedings without further administration.[154] No tutor, guardian, or master of a different religious persuasion from the minor's were to be put over him unless he, being of discretion, so chose, or unless the only persons of his persuasion available were of ill-repute or bad credit.[155] After creation of the Orphans' courts in 1795, the guardians' final reports were made to the new courts when the ward reached his majority; and if the court accepted the report the ward was required to release the guardian from his obligation.[156]

These were largely standard requirements for the protection of minor orphans, but in 1792 the General Court undertook to exercise authority over the affairs of lunatics, drunkards, and spendthrifts. If requested by relatives, or by the overseer of the poor in case of a pauper, it was the duty of the Judge of Probate to summon a jury of twelve to consider the sanity of the accused. If they found the accused to be an idiot, non-compos, or lunatic, or distracted and incapable of caring for himself, they were to certify the same to the judge who was to appoint one or more guardians of the person and estate, real and personal, of the insane ward.[157] In addition, where

151 Acts (N.W. Terr.) 1792, c. 11, § 1, 41-42 (orig.), 90 (rep.).
152 *Id.*, 1795, § 3, 83-84 (orig.), 183-184 (rep.).
153 *Id.*, §§ 4, 6, 84-85 (orig.), 184-185 (rep.).
154 *Id.*, § 7, 85-86 (orig.), 185 (rep.); § 10, 86-87 (orig.), 186 (rep.).
155 *Id.*, § 12, 87 (orig.), 186 (rep.).
156 *Id.*, § 11.
157 *Id.*, 1792, c. 11, § 2, 42-43 (orig.), 90-91 (rep.).

a person was wasting his estate in idleness so that he and his family might become a charge upon the public, the overseer of the poor (whether requested by friends or relatives or not) was to request the Judge of Probate and two judges of the common pleas, whom the Judge of Probate should call to assist him, to examine into the matter. If they determined the subject was a spendthrift, they were required to put a guardian over him.[158] The guardians of the insane, the spendthrifts, and drunkards were required to improve the ward's estate, to apply the proceeds to the care of the ward, the ward's family, and the ward's household, to settle accounts receivable, to sue and recover debts of the ward, to improve and divide the estate just as the ward might do if competent, to pay the ward's debts even to having power to sell the ward's real estate where the personal property was inadequate, and if the ward regained his powers to return the estate to him.[159] These provisions were not re-enacted in Maxwell's Code by the General Court three years later and it was not until 1852 in Indiana that a general statute covering guardianship of the insane was enacted, 1867 before a drunkards' guardianship act was passed, and 1911 before spendthrifts were once more subjected to the supervision of guardians.[160] If such statutes are necessary, or even merely useful, then the early enactment of them by the General Court shows either a prescience which subsequent legislators lacked or an ignorance of popular opinion in the matter of which later lawmakers were highly aware. It is impossible to tell at this distance which is the more accurate view, but neither can be discarded as invalid reasons for alternate legislative energy and sloth.

Curiosity on the origin of the statutes of the Northwest Territory has incited research for some time. Though required to "adopt" laws from the original thirteen states, scarcity of copies of those laws, their frequent inapplication, and their poor indexing combined to produce a tacit agreement in the General Court to observe the stricture more in the breach than otherwise.[161] However, insofar as

158 *Id.*, § 6, 44-45 (orig.), 92-93 (rep.).

159 *Id.*, § 3, 43-44 (orig.), 91 (rep.).

160 2 R. S. 1852, c. 14, § 1, 333 *et seq.*; Burns (1933); 2-201 *et seq.*, but see, PHILBRICK, *op. cit.*, cxxxi, citing Acts (Ind.) 1807, c. 23, 119 (orig.), 308 (rep.); Acts (Ind.) 1867, c. 48, § 1, 109; Burns (1933); 8-403 *et seq.*; Acts (Ind.) 1911, c. 218, § 1, 533; Burns (1933); 8-301 *et seq.*

161 PHILBRICK, *op. cit.*, ccvii-ccviii; but see I MONKS, *op. cit.*, 25.

the laws of inheritance are concerned there is little doubt as to their source. "Not only in number but in length the Pennsylvania acts make up the bulk of the code, and manifestly are its basis."[162] Though changes in terminology were made, the Pennsylvania acts on inheritance were transcribed almost verbatim.[163]

The Northwest Territory's statute for distributing intestate estates[164] was taken from a very early Pennsylvania act that included provisions requiring additional shares to children who had received inadequate advancements in the intestate's life so that their portion would be equal to the others, that no claim was good after seven years, that no distribution should be made for one year after decedent's death, and that lands could be sold to pay the decedent's debts.[165] The territorial act creating the Orphans' court was modeled closely upon the Pennsylvania institution of the same name and its enabling statute. In it the general court of quarter sessions of the peace held the Orphans' court and the duties of the respective Orphans' courts were the same.[166] Many other Pennsylvania laws were the same as those adopted into the laws of the Northwest Territory for the governance of decedents' estates. Letters of administration granted without bond were void and an alleged administrator under them *executor de son tort;*[167] the security on a bond could be increased by the court;[168] the provisions on loans of minor wards' money, the discharge of the guardian by the ward at his majority, the requirement of similar religious persuasion between guardian and ward;[169] the fact that bonds were for the uses of the persons to whom given;[170] and that due regard had to be paid testamentary requirements[171]—all were the same. Early Pennsylvania

[162] PEASE, *Introduction,* xxviii.

[163] *Id.,* xxvi-xxvii, even to errors, cf. Acts (N.W. Terr.) 1795, § 7, 85-86 (orig.), 185 (rep.).

[164] Acts (N.W. Terr.) 1795, § 4, 92-93 (orig.), 190 (rep.).

[165] Acts (Pa.) 1705, c. 21.

[166] Compare *Id.,* 1688, c. 189, c. 190; 1713, c. 3, with Acts (N.W. Terr.) 1795, § 1, 81-82 (orig.), 181-182 (rep.).

[167] Compare Acts (Pa.) 1713, c. 3, § 2, with Acts (N.W. Terr.) 1795, § 2, 82 (orig.), 182 (rep.).

[168] *Ibid.*

[169] Compare Acts (Pa.) 1713, c. 3, § 11, with Acts (N.W. Terr.) 1795, § 12, 87 (orig.), 186 (rep).

[170] Compare Acts (Pa.) 1713, c. 3, § 14, with Acts (N.W. Terr.) 1788, 13-15 (orig.), 9-10 (rep.) and Acts (Pa.) 1713, c. 3, § 13, with Acts (N.W. Terr.) 1795, § 13, 87-88 (orig.), 186-187 (rep.).

[171] *Ibid.*

acts, such as the estate act, were used in much abridged form,[172] but this was doubtless due to the effort of the General Court to hew statutes to frontier conditions and into conformity with local customs.[173] The early Pennsylvania statute setting out the order in which the decedent's debts were to be paid is much like the territorial act doing the same thing.[174] Some Pennsylvania acts, such as the one permitting executors and administrators to convey land on contracts made to convey by their decedents, were taken into the acts of the Northwest Territory only to be expanded by legislation subsequent to 1800.[175]

In point of fact, throughout the following period of the Indiana Territory, the laws of inheritance continued in force as taken from the Pennsylvania statutes, even though the bulk of the other legislation of that territory came from Virginia and Kentucky.[176] Except for the provisions for nuncupative wills in the Virginia acts,[177] the laws of inheritance of both the Northwest and Indiana Territories bore no relation to the Virginia acts on the subject, although there is a substantive similarity.[178] Since the Kentucky inheritance legislation was taken verbatim from Virginia,[179] it too was not the source, although the Kentucky law of guardianship is very similar.[180] But, though the substantive provisions do not disagree, they owe this uniformity more to the spirit of post-Revolutionary reform than to any looking to Virginia or the south by the Northwest or Indiana Territories for their probate law. Even in the case of the Virginia nuncupative will act and the Kentucky guardianship legislation where the appearances are most nearly alike, the choice of words and form is so at variance as to show at once that they could not be the point of origin of the Northwest Territory's inheritance acts. But a mere glance at the Pennsylvania acts shows they have been lifted, though

[172] Acts (Pa.) 1794, c. 231 with Acts (N.W. Terr.) 1795, § 4, 92-93 (orig.), 190 (rep.).

[173] EWBANK AND RIKER, *op. cit.*, 3; II THE ST. CLAIR PAPERS, 72-73, 371.

[174] Acts (Pa.) 1697, with Acts (N.W. Terr.) 1795, § 1, 155-156 (orig.), 237- 238 (rep).

[175] Acts (Pa.) 1792, c. 98 with Acts (N.W. Terr.) 1795, 267-268 (rep.); Acts (Ind.) 1805, c. 24, 20 (orig.), 120 (rep.); Acts (Ind.) 1807, c. 63, 421 (orig.), 521 (rep.) and c. 88, 497 (orig.) 576 (rep.).

[176] PHILBRICK, op. cit., cix-cx, cix, n. 3.

[177] Acts (Va.) 1792, c. 30, §§ 5-8; 1785, c. 61; 1748, c. 5, §§ 9-11; but see 1711, c. 2 and 1748, c. 5.

[178] *Ibid.*

[179] Acts (Ky.) 1797, c. 293 (I Littell), c. 105 (I Bradford).

[180] Acts (Ky.) 1797 (I Bradford 510).

occasionally abridged, to constitute the heart (and, indeed, most of the body as well) of the inheritance laws of the Northwest Territory, and, in turn, of the Indiana Territory, its successor.

IV. THE INDIANA TERRITORY

THE Indiana Territory succeeded the Northwest Territory in the latter's western reaches without a break.[181] Its organization was the result of the growth of population there and the current difficulties of communication; and the same factors that led to the creation of the Indiana Territory in 1800 caused Congress to carve out of it the Michigan Territory in 1805 and the Illinois Territory in 1809.[182] Briefly, the General Court of Indiana also had the job of administering Upper Louisiana in addition,[183] under French and Spanish laws[184] as well as a group of regulations adopted by them in 1804,[185] but they were relieved of this intolerable burden in 1805.[186] Political union for such widely spread regions was not as yet possible with communication still so primitive.

The officials of the new territory differed greatly from those in the previous territorial government, being for the most part Virginians, poorly educated though more in touch with frontier sentiment, and lacking much legal training for the most part.[187] But on the legislative side of the law of probate this had little effect if the source of the statutes themselves is indicative; and, whatever effect their shortcomings may have had upon probate administration or their political abilities upon the conduct of affairs in the territory has either little chance of discovery or little meaning for the course of probate procedure in the period.

At the head of the government as might be expected stood the General Court, possessed of wide judicial powers among other perquisites, though subsequent practice forced a restriction of these

181 PHILBRICK, *op. cit.*, ix.
182 BOND, *op. cit.*, 149, 209.
183 *Id.* at 149.
184 ESAREY, I MESSAGES AND LETTERS OF GOVERNOR WILLIAM HENRY HARRISON 96 (Indianapolis 1922), letter from James Madison to Governor Harrison, June 14, 1804; hereinafter cited as HARRISON.
185 LAWS FOR THE GOVERNMENT OF THE DISTRICT OF LOUISIANA (Vincennes 1804).
186 I HARRISON, *op. cit.*, 140-141.
187 PHILBRICK, *op. cit.*, xvii-xviii; I MONKS, *op. cit.*, 20; EWBANK AND RIKER, *op. cit.*, 6.

powers due to press of business.[188] Circuit courts held by one judge of the General Court annually in each county existed during the period of the General Court's ascendency, but they were primarily fact-finding agencies for the superior body.[189] During this early time the table of organization of county government was extremely elaborate and the courts of general quarter sessions of the peace and the courts of common pleas held numerous sessions; and since the two courts, despite their widely differing duties, were usually composed of the same persons, due to the shortage of competent men on the frontier, circumstances forced an economy upon the legal system which the law had not contemplated.[190] This passion for subdividing judicial authority caused the General Assembly, when chancery powers were granted to the General Court by Congress, to create the office of chancellor rather than handle equity cases by existing courts.[191]

In addition to these courts, the Judge of Probate, the Court of Probate, and the Orphans' court continued in existence.[192] No special statute was enacted to renew their lives, but they continued functioning until abolished in 1805. No reason, except tradition, was ever given as to why these functions relating to decedents' estates should be carved out of the common pleas court in a country so sparsely settled, but so it was. This division of judicial powers was not to be lasting, for the very reasons that the country was too sparsely settled to support it, the competent men too few to man it, and the cost too great to be borne. Therefore, all the powers possessed by the old Common Pleas, Quarter Sessions, and Orphans' courts, and Judge of Probate, were merged into a new Court of Common Pleas of three judges, two of whom constituted a court. There were six sessions annually, three reserved exclusively for the business of the former courts of Common Pleas and Quarter Sessions.[193] Though a salutary measure, it did not materially lessen the burden of the court system, and agitation for more extensive judicial reform continued to trouble the territory.[194] Further legislation led ultimately in 1814 to the for-

188 PHILBRICK, *op. cit.*, cxliii-cxliv, cxlv.
189 *Id.*, cxliv; I MONKS, *op. cit.*, 25.
190 *Id.*, I, at 28; PHILBRICK, *op. cit.*, cxlvii, n. 3.
191 I MONKS, *op. cit.*, 38.
192 *Id.*, II, 808-809; I, 33.
193 PHILBRICK, *op. cit.*, cliii; Acts (Ind.) 1805, c. 19, 15-16 (orig), 115-118 (rep.). See, also, BOND, *op. cit.*, 160.
194 ESAREY, *op. cit.*, 195.

mation of Circuit Courts which had conferred upon them "original jurisdiction in all causes, matters and things at law and shall have full power and cognizance of all actions, real, personal, and mixed, within their respective circuits, and shall likewise have full power and authority in their respective circuits to issue writs of mandamus", dower, certiorari, partition, view, quo warranto, habeas corpus, error, coram nobis, replevin, and ne exeat.[195] This last was the court system that was to function until statehood and which served as the model of the circuit court under the Constitution of 1816.[196]

The problem of what the law was continued to agitate the new territory of Indiana as it had its predecessor, the Northwest Territory. The provision in the Ordinance of 1787 which required the General Court to "adopt" only the laws of the original states was retained;[197] but few such laws were adopted and the bulk of those which were copied were copied from Virginia and Kentucky.[198] Since Kentucky was not an original state, such laws have been called illegal,[199] but contemporary opinion justified them on the grounds that the Ordinance of 1787 meant laws "similar" to those of the original states and Kentucky's laws being similar their adoption was legal.[200]

It is a debate that can never be settled. The laws of the Northwest Territory were always treated as of full force and effect in the Indiana Territory and the legislation of the younger government was supplementary only.[201] It was incumbent upon the new territory to consider itself bound by the laws of the Northwest Territory; and it was not merely a matter of choice or of assumption.[202] But the inherited laws were incomplete and in 1807 a revision of them was carried by the General Assembly of the Indiana Territory.[203] Though a mechanical revision, it was greatly superior to its predecessor in the fact that "its phraseology [was] far more direct and less cumber-

195 Acts (Ind.) 1814, c. 2, 4-10 (orig.), 517-522 (rep.); c. 20, § 1, 67-68 (orig.), 567-568 (rep.).

196 I MONKS, *op. cit.*, 55; Acts (Ind.) 1817, c. 13, 133.

197 PHILBRICK, *op. cit.*, cvi.

198 *Id.*, cix-cx.

199 I MONKS, *op. cit.*, 25; GROSS, ILLINOIS STATE BAR ASSOCIATION PROCEEDINGS 81 (1881).

200 *Report of the Judges of the Michigan Territory*, 8 MICH. PIONEER & HIST. COLL., 603-604 (1805).

201 PHILBRICK, *op. cit.*, civ.

202 *Id.*, cv, n. 1; Annals of Congress, 6th Cong., 1st Sess. (1498); I MONKS, *op. cit.*, 22; BANTA, 9 INDIANA MAGAZINE OF HISTORY, 240.

203 I MONKS, *op. cit.*, 84; I HARRISON, *op. cit.*, 156.

some", so that it was more easily understood.[204] The biggest problem was getting the law to the people, because of the expense of printing, of the people's poverty and illiteracy, and the fact that many of them knew only French.[205] It was a problem probably never overcome. Indiana Territory made up its statutes from the acts of the Northwest Territory (and through them of the English common law as of 4 Jac. I and of the additional legislation of the Indiana Territory under both the first and second grade of government.[206] Though it might not have been a popular legal system, it was the one that functioned until the coming of statehood.[207]

Certain of the statutes contained provisions remarkable for the time. Common Pleas could appoint, in its probate capacity, three commissioners to make deeds for the conveyance of land where the owner had sold it prior to his death but had made no deed and died intestate or made no provision for his executor to make the deed.[208] Commissioners were appointed only where the deceased had bound his heirs to give the deed, the heirs were minors or refused to make the deed, the bonds on which the transaction rested were recorded, and the transaction itself was without fraud.[209] Prior to this act the buyer in such a case had only "an equitable claim in such lands".[210] The purpose of the act, as determined from its use of the word "bonds", was to protect mortgagors under the old-style mortgage, wherein the mortgagor deeded his land to the mortgagee who, on payment of the mortgage, engaged to deed the property back to the mortgagor.[211] Today it is used to protect the buyer under a conditional sales contract or lease option agreement in case of the vendor's death.

Something to be less proud of was the divorce legislation and its effect upon dower. Divorce in the Indiana Territory at first extinguished dower and curtesy in the parties to divorce and restored the wife to all her "lands, tenements, and hereditaments", allowed her alimony from the "man's personal estate", having regard to what

204 PHILBRICK, *op. cit.*, cxii-cxiii.
205 *Id.* at cxiii.
206 PEASE, *op. cit.*, 253.
207 EWBANK AND RIKER, *op. cit.*, 809-810.
208 Acts (Ind.) 1805, c. 4, §§ 1-2, 4 (orig.), 93 (rep.).
209 *Ibid.*
210 *Id.*, § 1, 4 (orig.), 93 (rep.).
211 PHILBRICK, *op. cit.*, cxxii. Special acts had been used before, Private Acts (Ind.) 1807, c. 88, 497-499 (orig.), 576-578 (rep.).

personal property he came to by the marriage and his own ability.[212] This progressive policy was not destined to last due to the vigorous, if backward, opposition of Governor William Henry Harrison. He was opposed to the law empowering the General and circuit courts to grant divorces and believed that only the Legislature should grant them.[213] As a result, the General Assembly enacted a divorce law which operated only on behalf of the innocent party and left the guilty party still bound, "subject to all the pains and penalties which the law prescribed against a marriage whilst a former husband or wife is living".[214] A law designed more likely to leave loose ends unraveled and to foul up the closing of estates would be hard to invent. Such conservative attitudes also served to deny married women under coverture the power to devise their lands, although such action was in flat violation of the Ordinance of 1787, which had forbidden any statute to deny married women the power to devise their lands.[215] But this conservative spirit which hampered the married woman in this respect assured her that she should be certain of receiving her dower rights. A widow could demand her dower when it was not set over to her within one month, though where the estate was entire and no division could be made she received her dower rights from the income only and could not force a partition.[216] But beyond the bare protection of the old English law the General Assembly was not prepared to go at this time nor for years to come.[217]

The French and alien inhabitants were given a consideration at the early period that they were not to have long after statehood. The French system of weights and measures were used in trade and in the courts. The law on common fields was retained; and the French inhabitants under their peculiar common tenancy were permitted to share costs of diking, fencing, to appoint officers, to regulate grazing, to levy and apportion fines, and in short to act as an unincorporated association of agriculturalists.[218] Aliens were permitted to acquire, hold, assign, sell, or devise to citizens or other aliens land,

212 Acts (Ind.) 1807, c. 25, § 3, 140-142 (orig.), 323-325 (rep.).

213 I HARRISON, *op. cit.*, 232.

214 Acts (Ind.) 1813, c. 18, § 6, 79 (orig.), 357-358 (rep.). Compare ILLINOIS REV. STATS. (1949), c. 3, ¶ 173.

215 GROSS, *op. cit.*, 75; PHILBRICK, *op. cit.*, cxxix, n. 1.

216 Acts (Ind.) 1807, c. 221, 116-118 (orig.), 306-307 (rep.).

217 See Acts (Ind.) 1846, c. 108, 132.

218 Private Acts (Ind.) 1807, c. 90, 502-515 (orig.), 580-590 (rep.); Acts (Ind.) 1808, c. 8, 16-19 (orig.), 654-656 (rep.).

under the same terms as a natural-born citizen could, so long as the alien's country was not at war with the United States.[219] Though by no means cosmopolitan in outlook the region was probably less isolated in ideas than it was to be after statehood.

The laws of the Indiana Territory in the matter of guardianship were taken almost verbatim from the earlier laws of the Northwest Territory, as were almost every one of the laws of inheritance. In addition guardians had certain powers not previously enjoyed. The guardian, with court approval, where the ward's estate was insufficient to keep the ward's property in repair, might sell the town property at public auction to the highest bidder on thirty days notice of the time and place of sale on such credit as the court should direct, payable with interest.[220] The General Assembly in the case of non-urban property could order it sold by special act, a procedure which would tend to make such sales extremely difficult and to make it possible for the legislature to continue to exercise functions it had generally delegated to the courts.[221] But whatever the formal protection of wards, the statutes were little enforced and such persons were, if poor, sold into bondage by the county.[222] Life on the frontier, in the final event, was always supremely practical.

The law on intestates' estates was also little changed, except that creditors got increased protection. No intestate's estate could be distributed for one year following his death and the distributee had to give security to return what they had received in order to pay their rateable portion of the decedent's debts upon suit by creditors.[223] If the deceased intestate left minor children and not enough money to both pay his debts and maintain his children, the administrator was required to sell the property for the payment of the debts and to apprentice the children to masters; and if the estate remained insolvent the court could order the lands of the minor heirs sold, reserving the mansion house and the most profitable part until the last.[224]

219 *Id.*, 1805, c. 5, 4-5 (orig.), 94-95 (rep.); 1807, c. 55, 391-392 (orig.), 500 (rep.).

220 *Id.*, 1807, c. 16, § 29, 83 (orig.), 281-282 (rep.), reenacting *Id.*, 1805, c. 13, 10-11 (orig.), 106-107 (rep.).

221 EWBANK AND RIKER, *op. cit.*, 64; Private Acts (Ind.) 1807, c. 87, 495-496 (orig.), 575-576 (rep.).

222 PHILBRICK, *op. cit.*, CXXX.

223 Acts (Ind.) 1807, c. 16, § 23, 78 (orig.), 278 (rep.).

224 *Id.*, §§ 26-27, 80-82 (orig.), 280-281 (rep.).

The law for testates' estates was somewhat more detailed. Formal written wills were proven by two or more credible witnesses upon oath or affirmation "or other legal proof" in the Territory within three years from the testator's death "any law, usage, or custom to the contrary notwithstanding".[225] This was probably in reaction to the extremely lax rules on limitation of challenge under the acts of the Northwest Territory. The clerk of the common pleas took proof of last wills and granted letters of administration and letters testamentary and who served as custodian of all documents filed in the course of an estate's administration. It also lay within his determination whether a grant of letters testamentary or of letters of administration with the will annexed was proper.[226] To a certain extent the clerk of the common pleas took the place of the old Judge of Probate, for he also issued bonds on letters of administration and subsequently to executors as well.[227] Apart from these changes the testamentary laws remained substantially the same, even to the law concerning the nuncupative will, which may seem strange to modern opinion, particularly when combined with the requirement to give effect to testamentary directions in all matters or things brought before a court concerning the same.[228]

Some addition was made to the legislation covering the operation of the administration of estates. Where an insufficient security was posted by the administrator or he proved irresponsible or without ability the court could require additional security upon objection of creditors; and if he stated, misapplied, embezzled, or permitted anyone else to do so, or if he neglected or refused to give bond, his letters could be revoked and a new administrator appointed, who might by trover or detinue recover all the goods of the estate from the former administrator.[229] Unless directed to the contrary by the will or a rule of court or order of the Common Pleas, all movable property of the decedent was to be sold by the executor or administrator by public vendue to the highest bidder on a credit of at least three months, in order to provide money to pay off the debts of the

225 *Id.*, 1813-1814, c. 34, § 4, 150 (orig.), 496 (rep.).

226 *Id.*, 1807, c. 16, § 24, 78-79 (orig.), 278 (rep.).

227 *Id.*, § 19, 75 (orig.), 275-276 (rep.); 1813-1814, c. 34, § 1, 148-150 (orig.), 494-496 (rep.).

228 *Id.*, 1807, c. 16, § 15, 73 (orig.), 274 (rep.). For the modern on nuncupative wills, see Acts (Ind.) 1953, c. 112, § 504, 315.

229 *Id.*, 1807, c. 16, § 23, 78 (orig.), 278 (rep.).

decedent that survived against his estate.[230] No suit for debt due by the decedent at his death could be brought against his executor or administrator until the expiration of one year from the granting of the first letters; but if the decedent had died with an execution against him, the parties in whose suit he stood charged or their personal representatives could recover in debt or damages against his executors or administrators by securing a new execution against the possessions of the decedent.[231] The executors or administrators, however, were not responsible for paying any debts of the estate themselves unless they had agreed to do so in writing;[232] and once seven years had passed from the date of a testator's death no will probated as his could be set aside, so that any legatee might rest with relative ease subject to disturbance only by dilatory creditors of the decedent.[233]

The public policies of the Indiana Territorial General Assembly could scarcely be called enlightened. At best they were pedestrian and at worst oppressive. To see a cause of action barred or to deprive anyone of his just recovery, however inconvenient it might prove to the one required to defend, was viewed with disfavor.[234] The generosity of appeals from the local courts to the General or circuit courts was also a marked part of the system.[235] Nor did the General Assembly hesitate to pass special acts relieving individual citizens from the requirements of the general law, which is never a practice designed to give much finality to the law. It was a period in transition, of marking time, and nowhere more so than in the law of decedents' estates.

V. CONCLUSION

WHAT effect did the territorial experience and the pre-territorial history have upon the legislation of the period following the admission of Indiana to the union as a state in 1816? Were the statutes of the Indiana Territory considered sufficiently encompassing to pro-

230 *Id.*, 1808, c. 7, § 1, 14-16 (orig.), 652-653 (rep.).

231 *Id.*, c. 7, § 3, 14-16 (orig.), 652-653 (rep.); 1807, c. 70, § 2, 451 (orig.), 542 (rep.).

232 *Id.*, 1810, c. 23, § 3, 44 (orig.), 129-130 (rep.), being a reenactment of 29 Car. II, c. 3 (1677).

233 Acts (Ind.) 1807, c. 16, § 33, 85 (orig.), 283 (rep.); § 23, 78 (orig.), 278 (rep.).

234 *Id.*, 1810, c. 9, 26-28 (orig.), 114-116 (rep.), a quite unusually comprehensive act, compare with *Id.*, 1807, c. 70, § 2, 451 (orig.), 542 (rep.).

235 *Id.*, 1807, c. 16 § 11, 72 (orig.), 273 (rep.); § 8, 69-70 (orig.), 272-273 (rep.); 1803, c. 8, § 1, 81-82 (orig.), 83 (rep.).

vide adequately for the people under their new dignity? Immediately the answer is Yes, but ultimately it is something less than that, though never an outright No.

The first Probate Code passed by the new state in 1818 reenacted the Revision of 1807 almost word for word, except "associate judges of the circuit court", who were laymen, was everywhere substituted for "court of common pleas", at least one of whom by practice was a lawyer, in the older act.[236] This was not destined to last. In 1824 a new Probate Code was adopted which was different in both language and form from its predecessor, though it was no more elaborate.[237] In turn it was replaced by the Probate Code of 1829, which was also an original piece of legislation, owing nothing to its predecessors, and being in some ways less forward looking than what came immediately before it. This remained substantially the law until replaced by the Revision of 1843.[239] The last represented a considerable expansion of the earlier law and was so different as to constitute a completely new departure in statutory enactment from the short and rather sketchy probate statute favored from territorial days. With it direct territorial influence may be said to definitely end. Unfortunately, it was not until the Constitution of 1851 that the General Assembly's power to pass local and special acts was extinguished and its ability to relieve favored persons from the rigors of its own general laws terminated.[240]

Prior to the Revision of 1843 change in the probate statutes came in piecemeal fashion[241] in answer to specific problems as they appeared. That the substantive law of descent and devise remained the same cannot, however, alter the fact that the period of statehood revealed a steady growth beyond and away from the rules of the territorial and earlier periods. Nor should this appear surprising in the light of the changing conditions throughout the state that the nineteenth century remorselessly imposed. Important as these earlier

236 *Id.*, 1817, c. 13, 133 *et seq.*; 1807, c. 16, 68 (orig.), 270 (rep.).

237 REVISED LAWS (Ind.) 1824, c. 79, 314.

238 Acts (Ind.) 1829, c. 26, 33. Compare it with REVISED LAWS, 1824, c. 79, § 25, 323; Acts (Ind.) 1829, c. 26, § 32, 45-46 with REVISED LAWS, 1824, c. 79, § 27, 324; Acts (Ind.) 1829, c. 26, § 35, 47 with REVISED LAWS, 1824, c. 79, § 3, 325.

239 REVISED STATUTES (Ind.) 1843, c. 30, 484 *et seq.* Probate procedure, *Id.*, 39, 665, was left unchanged from REVISED STATUTES (Ind.) 1838, c. 24, which had somewhat enlarged the earlier provisions.

240 IND. CONST., art. 4, § 22(3) (1851).

241 See REVISED LAWS (Ind.) 1830, c. 25; REVISED STATUTES (Ind.), 1838, c. 24, as well as Acts (Ind.) 1829, c. 26.

influences undoubtedly were, even though probably unknown and uncared for by the mass of the people, the more pressing demands of current problems, commanding solution, tended inevitably to drive the older period further and further out of the popular consciousness. This may well be the fate of all law, but, if its course is continuous in the history of a nation, or in a chain of related nations, even its remote sources ought to be examined. Objective exploration, if such be possible, is a necessity, whatever the difficulty; not merely so that the present law may be better understood, but so that the nature of the creation of law, or its imposition as was the case in Indiana, might be more closely investigated—perhaps someday even understood.