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AMERICAN lawyers and laymen alike take for granted a system of probate of wills and administration of decedents' estates under the supervision of a single tribunal usually called a probate court. We are familiar with the setting up of the will, appointment of the personal representative, filing of bond and inventory by the latter, granting of allowances for support of the family, notice to creditors to present their claims, and settlement of accounts of the administration, all accomplished by this court's orders or under its scrutiny. While real property is deemed to pass directly to the heirs or devisees, it is often included in the inventory and in many states may be subject to possession or control of the personal representative in much the same way as personal property. Usually land may be sold to pay debts, and it is sometimes finally assigned to the beneficiaries, both by order of the probate court. The latter may and commonly does have jurisdiction over the whole administration of the entire estate.

Whence came this institution with such extensive powers? Surely not from any single English prototype of the seventeenth or eighteenth centuries. The testamentary jurisdiction of the English ecclesiastical courts was confined to the decedent's personalty and by this time was largely restricted to probating the will as an instrument disposing of goods and chattels or to the granting of letters of administration. The earlier powers of these tribunals over the subsequent phases of administration had fallen into decay and were largely taken over by chancery but that court only acted when someone initiated an action so that there were apt to be no further judicial proceedings after probate or grant of administration. Wills, in so far as they devised land, were proved like deeds in any common-law or equity litigation where the devisee's title came into question. Testamentary jurisdiction was thus divided in England between three tribunals and as a practical matter even the sum total of their powers was not equivalent to those of an American

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court of probate.[1] The latter is not simply a transplanted and dereligionized court christian. Rather it is an American institution having its origin and growth on American soil.

A close study of the history of courts of probate in every state would occupy much space, but the essential lessons can be grasped from a detailed examination of the development in a typical jurisdiction. The choice of a typical jurisdiction is always open to question. Massachusetts is selected for various reasons: it has a large amount of materials available in printed sources; its judicial history and testamentary law are broadly representative of the colonial states, particularly those in New England; it exercised great influence directly and indirectly upon the newly admitted states, especially in the greater Mississippi valley; finally, according to present lights its law of administration while not the most advanced is certainly representative of the best in probate court procedure. The course of development naturally divides itself into four parts; viz., the separate histories in Plymouth and Massachusetts Bay colonies, followed by that of the province of Massachusetts Bay, and finally that of the state and commonwealth of Massachusetts.

PLYMOUTH COLONY

The Great Patent of New England (1620),[2] authorizing the establishment of a council at Plymouth, England for the purpose of colonization in America, contains no express reference to the exercise of testamentary jurisdiction. The council was authorized to constitute "governors, officers and ministers" for the government of the colony who could establish orders and laws provided that these were not contrary to the laws of England. The charter of the colony of New Plymouth (1629), granted to William Bradford and his associates, made similar general provisions regarding government and laws.[3]

Among the earliest laws of the Plymouth colony were provisions in 1633 that wills and testaments should be proved before the gov-

[1] See Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 (1943); also notes 141, 143, 144 infra.

[2] THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 1, 8, 9 (1836). The Pilgrims sailed for America two months before the issuance of this charter. 1 ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY 117-125 (1896); ROSE-TROUP, THE MASSACHESETTS BAY COMPANY AND ITS PREDECESSORS 2, 3 et seq. (1930). But the double charter of 1606 to the London and Plymouth companies likewise contained no provision relative to testamentary jurisdiction. POORE, CHARTERS AND CONSTITUTIONS OF UNITED STATES 921-931, 1888-1893 (1878).

[3] THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 24-25 (1836).

ernor and assistants within one month after the decease; that a full inventory duly valued be presented before letters be granted; that in case of intestacy the widow or kin should present an inventory within one month; and if a single person die without kindred the governor should appoint someone to take an inventory and present the same on oath.[4] Several laws relating to the substantive side of succession were enacted within the next dozen years.[5] For the most part wills were proved, administrations granted, inventories received and other testamentary business transacted in the General Court along with legislative, administrative and other judicial business, though sometimes the subsidiary Court of Assistants handled the testamentary business[6] and occasionally it was referred by the former to the latter.[7] The records of these courts are always terse and usually meager, particularly at first. What we find there is what we might expect to find in a lawyerless, pioneer, religious community. There is the use of some legal terms such as might be expected by intelligent laymen, but there is no bothering about the English procedural or substantive law of succession. The details of the latter were doubtless unknown to the magistrates, but at any rate the word of God and the interests of the struggling settlement were paramount to these principles.

The records show not only the ordinary transactions which lie within the power of a court exercising testamentary jurisdiction but more or less unusual ones as well. In November 1633, we find the court ordering certain persons to administer insolvent estates as far as the estates will make good, the respective widows being acquitted of all creditors' claims.[8] These cases may have led to the enactment in the following January of laws authorizing lands to be sold to pay debts if the decedent's chattels are insufficient, reserving to the family

[4] Id. 32.

[5] Sale of land authorized to pay decedent's debts with something like a homestead exemption in favor of the family, id. 33 (1633); widow's share to be one-third of land for life and one-third of goods absolutely, id. 43 (1636); survivorship abolished in joint tenancies, id. 75 (1643); oral wills of land allowed in last sickness, id. 80 (1645); wife's consent necessary for sale of lands, id. 86 (1646). Under terms of the 1620 patent, land was to be held in free and common socage and not by knight's services, and might be granted by the council. Id. 10, 11-12.

[6] 1 RECORDS OF THE COLONY OF NEW PLYMOUTH 19, 78 (1855) (original dates 1633, 1638); 2 id. 27 (1641), 37 (1642), 50 (1643).

[7] 1 id. 17 (1633). Cf. PLYMOUTH SCRAP BOOK, edited by Pope, 128-129 (1918).

[8] 1 RECORDS OF THE COLONY OF NEW PLYMOUTH 19, 20 (1855) (original date 1633). See PLYMOUTH SCRAP BOOK, edited by Pope, 96 (1918) (original date 1671).

something in the nature of a homestead which creditors could not seize.[9] The first mention of an administrator's bond appears in 1643.[10] In the following year an assistant was authorized to take oaths of the witnesses to a will and of the executrix to the inventory so that these might be returned and recorded.[11] Court sanction was given for the delivery of the orphan's portion to the one who was put in charge of her, to be delivered to the child upon her marriage.[12] In 1645, the court allowed administrators to pay a certain debt, it appearing to be due.[13] The executor was ordered to bring in an account of his administration,[14] and another entry shows the acceptance of an administrator's account and his discharge by the court.[15] In 1648, the court directed that another person might act with the executrix in the supervision of the estate for the good of the children.[16] This is much like the overseer or adviser of the widow to be seen in Massachusetts Bay.

A more complete picture of the procedure may be gathered from certain documents consisting principally of inventories and administration bonds.[17] Land was usually included in the inventory,[18] though it was not always appraised,[19] and it was sometimes stated that the land was omitted altogether.[20] Most of the inventories were itemized in detail. As often as not, the true condition of the estate was reflected

[9] 1 RECORDS OF THE COLONY OF NEW PLYMOUTH 22 (1855) (original date 1634).

[10] 2 id. 53. See, however, 1 id. 19 (1633), and infra. p. 429.

[11] 2 id. 73 (1644).

[12] 2 id. 76 (1644), 89 (1645). See infra at note 59.

[13] 2 id. 89 (1645). See PLYMOUTH SCRAP BOOK, edited by Pope, 32-33 (1918) (original date 1684).

[14] 2 RECORDS OF THE COLONY OF NEW PLYMOUTH 109 (1855) (original date 1646).

[15] 2 id. 119 (1647).

[16] 2 id. 126 (1648). See notes 46, 61, infra. It was fairly common for English testators to name supervisors or overseers to advise and assist the executors. 2 PUBLICATIONS OF SURTEE SOC. 112-113 (1533); 116 id. 242-244 (1557); 16 SOMERSET RECORD SOC. 382-383 (1901) (case dated 1499); 21 id. 83-84 (1905) (case recorded in 1545); 40 id. 89-90 (1925) (case dated 1554); GRAS, ECONOMIC AND SOCIAL HISTORY OF AN ENGLISH VILLAGE 546, 547-548 (1930) (as to overseers in 1616 and 1656). As to the function and duties of these persons in the English law, see WENTWORTH, EXECUTORS, 4th ed., 13-14 (1656); 4 BURN, ECCLESIASTICAL LAW, 9th ed., 158 (1842).

[17] See generally PLYMOUTH SCRAP BOOK, edited by Pope, (1918).

[18] Id. 11-12 (1652), 25 (1682), 30 (1663) and others. See id. 88-89 (1670) where land was added by an assistant.

[19] Id. 122 (1676), 124-125 (1677).

[20] Id. 83-85, 86-87 (1669).

by including a statement of debts owed by the deceased,[21] and occasionally a statement of funeral expenses or debts incurred by the family after the death.[22] One inventory shows that the court by order found the amount of the debts.[23] Particularly in the later inventories the widow or personal representatives swore to the truth of the list and the appraisers, usually two in number, signed their names.[24] Most of the inventories after 1663 bear a certificate by the secretary of the court that it has been recorded in the *Book of Wills and Inventories*.[25]

Some of the earlier bonds show specifically that the administration is of lands as well as chattels,[26] though the later ones simply say the estate.[27] The form which became stereotyped was conditioned upon payment of debts and legacies (apparently whether or not there was a will) and the keeping of fair accounts and readiness to give in the same to the court when required and to save harmless the governor and the court.[28] Quite often it was contemplated that the estate might be insolvent and the obligation to pay debts was stated to be in equal proportions according to the amount of the estate.[29] Special provisions are sometimes found in the bond, such as the confirmation of specified lands by the eldest son as administrator to his younger brothers.[30] One bond was given in an ancillary proceeding where the deceased was resident in Boston and left land in Plymouth colony.[31] Another was given in case of sale of decedent's land ordered by the court.[32] What appear to be letters of administration are attached to two of the bonds.[33] In 1676 an assistant took the oaths of the witnesses to a will, it being in doubt whether a court would be held the next month and delay being possibly prejudicial to the estate.[34]

In 1671, the General Court rephrased and codified the existing law

[21] Id. 9 (1636), 18-19 (1680), 21-23 (1681), 24 (1663), 40-41 (1684), 42-43 (1684) and others.
[22] Id. 30-31 (1663), 34-35 (1664), 90-91 (1670).
[23] Id. 32-33 (1684).
[24] E.g., id. 88, 93-94, 95 (1670), 102-108 (1671).
[25] E.g., id. 93-94, 95 (1670), 102-108 (1671).
[26] Id. 10 (1649).
[27] E.g., id. 15 (1679), 24 (1663).
[28] E.g., id. 109 (1672).
[29] E.g., id. 96 (1671).
[30] Id. 111-112 (1673).
[31] Id. 13-14 (1679).
[32] Id. 14 (1658).
[33] Id. 81 (1669), 130-131 (1678).
[34] Id. 128-129 (1676).

of succession and also added certain new rules.[35] In case of intestacy the widow was given a third of the rents and profits of the land for life and a third part of the chattels after debts were paid. The normal distribution of the rest of the estate, real and personal, was in equal shares to the children, giving the eldest son a double portion. This is the biblical scheme of division. So far as land is concerned, it was contrary to the law of primogeniture, which made the eldest son the heir to all the land and it was also contrary to the custom of gavelkind which made all the sons equal heirs. It was not a new principle but appears to have been observed in Plymouth as early as 1627.[36] The court was given power for good cause to depart from the normal division, and lip-service was done to primogeniture by providing that the eldest son should not be instated of all the lands unless the court saw cause. As under the pre-existing law, land might be sold to pay debts if the goods were not sufficient for this purpose.

In 1685 the laws were again revised and show interesting developments regarding succession.[37] Something more nearly like the English distinction between the descent of land and the distribution of goods was now recognized, but some of the indigenous laws were preserved and certain new principles added. Entailed land passed according to the law of England, but land held in fee simple was divided, subject to the widow's dower, among the sons, giving the eldest a double portion. So far as land was concerned, there was no longer discretion in the court to vary the rule of inheritance. Some degree of equality between sons and daughters was obtained by means of separate flexible provisions for the distribution of personalty. After funeral charges and debts were paid the court might set aside a sum for the maintenance of small or helpless children. The remaining goods were distributed one-third to the widow and two-thirds to the children in equal shares, except that the eldest son received a double portion if the lands assigned to him did not amount to a double portion of the whole estate. There was a further provision that if no considerable personalty remained after debts were paid, so that the daughters would receive little or noth-

[35] THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 281-282 (1836).

[36] In 1627 a visitor to Plymouth wrote that intestate estates were divided equally among the children except that the eldest son was given a preference. Morris, "Primogeniture and Entailed Estates in America," 27 COL. L. REV. 24 at 43 (1927); Haskins, "The Beginnings of Partible Inheritance in the American Colonies," 51 YALE L. J. 1280 at 1281 (1942).

[37] THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 295-296, 299-301 (1836).

ing, the court might order the heir or heirs male to pay portions to the daughters in such manner, time and amount as the court saw fit, provided that the daughters should receive no more than a younger son received by descent and distribution.

Down to 1685, the General Court or the Court of Assistants continued to exercise testamentary jurisdiction. The revision of that year established county courts which, inter alia, were given power "to settle and dispose according to Law the estate of any Person, that dies Intestate within the County and to grant Letters of Administration and take the probate of Wills," and in case of necessity any two magistrates, the clerk of the county court being present, could take probate or grant administration out of court time. None of the changes of 1685 was long in effect, for in the following year Andros, the royal governor, took unto himself the exercise of testamentary jurisdiction, and in 1691 Plymouth was annexed to Massachusetts Bay colony under a new charter.

MASSACHUSETTS BAY COLONY

As may be observed from the foregoing, the law of England regarding succession did not take effect in Plymouth in spite of the provisions of the charter. No more did it take effect in the larger and richer colony of Massachusetts Bay. It has been pointed out in many places[38] that the common law in general was not followed in the early colonial period, and English statutes were not binding unless they were made expressly applicable to America.[39] There would be a particular stumbling block with respect to observing the scheme of testamentary jurisdiction. In England this had been in the ecclesiastical courts and there were no such courts in America. The ordinary or judge of the ecclesiastical court was the bishop of the established church or someone deputed by him.[40] While the Bishop of London was given spiritual authority under various colonial charters and sent commissaries to America, the assignments to the latter never included testamentary

[38] Hilkey, "Legal Development in Colonial Massachusetts," 37 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 144, 145 (1910) (Columbia University); MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 10 et seq. (1930); Reinsch, "The English Common Law in the Early American Colonies," 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907). Cf. Dale, "The Adoption of the Common Law by the American Colonies," 21 AM. L. REG. (N.S.) 553 (1882).

[39] Blankard v. Galdy, 4 Mod. 215, 87 Eng. Rep. 356 (1691); Memorandum on Appeal to King in Council, 2 P. Wms. 75, 24 Eng. Rep. 646 (1722); Sioussat, "The Theory of the Extension of English Statutes to the Plantations," 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416 (1907).

[40] GODOLPHIN, ORPHANS LEGACY 58, 59, 75 (1677).

jurisdiction.[41] As a practical matter at least, the Church of England had not even religious footing in Massachusetts. There the Puritan ministers were given considerable voice in the formulation of new laws and in other important affairs,[42] but the entire spirit of the Bay Colony was that they should not undertake such activities as testamentary jurisdiction.[43] All the circumstances clearly indicated that the latter must be vested somewhere in the lay court system. Apparently there was never any controversy about the matter, and it will be recalled that the settlers were of the same stamp as the men who abolished ecclesiastical jurisdiction during the Commonwealth in England and set up temporal courts of probate until the Restoration.

The provisions concerning courts and laws in the charter of the colony of Massachusetts Bay (1628) did not differ materially from those of the Plymouth charter except that there was provision for four general courts annually and for monthly courts by the governor and assistants of the colony.[44] The early laws regarding courts provided for a General Court, Court of Assistants, and county courts presided over by magistrates.[45] At first there was no express mention of testamentary jurisdiction but the provisions were broad enough so that this might be regarded as within the jurisdiction of any of these courts.

In the very early colonial period the General Court granted probate and administration, received inventories and approved accounts of personal representatives along with its executive, legislative and other judicial business; indeed in some cases testamentary matters were brought before it throughout colony days.[46] As early as 1633 the Court

[41] Baldwin, "The American Jurisdiction of the Bishop of London in Colonial Times," 13 AM. ANTIQ. SOC. PROC. N. S. 179-221 (1901).

[42] LECHFORD, PLAIN DEALING OR NEWES FROM NEW-ENGLAND 25 (1642), reprinted in 3 MASS. HIST. SOC. COLL., 3d series, (1833). The Body of Liberties (1641) was largely the work of Nathaniel Ward, a minister at Ipswich. MORISON, BUILDERS OF THE BAY COLONY, c. 7 (1930).

[43] Hilkey, "Legal Development in Colonial Massachusetts," 37 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 55, 141, 142 (1910) (Columbia University). Even marriages were performed by the magistrates rather than the clergy. Id. at 129-131; LECHFORD, PLAIN DEALING OR NEWES FROM NEW-ENGLAND 39 (1642), reprinted in 3 MASS. HIST. SOC. COLL., 3d series, (1833).

[44] CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 1, 9 (1814).

[45] Id. 88-94. See also Hilkey, "Legal Development in Colonial Massachusetts," 37 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 29-50 (1910) (Columbia University).

[46] 1 RECORDS OF MASSACHUSETTS BAY, Shurtleff ed., 182 (1853) (inventory presented, 1636), 259 (administration and will, 1639), 278 (administration and sale

of Assistants granted administrations and within the next few years seems to have taken jurisdiction over most routine testamentary matters.[47] The law of 1636 establishing local courts, at first called quarter courts, did not expressly grant them testamentary jurisdiction.[48] In some cases, however, they exercised this as early as 1640.[49] In 1647, the county courts were given power to assign dower and one-third of the chattels to the widow except where the lands were in more than

of land, 1639), 292 (same, 1640); 2 id. 144, 145 (executor's account approved and executor discharged, 1645); 11 (settlement of intestate's estate between widow and minor daughter, 1642), 164 (same, estate, 1646), 275 (same, estate, 1649); 3 id. 176 (1854) (same, estate, 1649), 254 (petition to sell land to divide proceeds among children granted, 1651); 4 id. 377 (1854) (order of substitution for predeceased devisee, 1659); 5 id. 510 (1854) (matter referred to county court, 1686), 516 (same, 1686), 459 (order to sell land to pay debts, 1684), 452 (new overseers of will appointed on death of former, 1684), 361 (administrator's deed approved, 1682).

[47] 2 RECORDS OF THE COURT OF ASSISTANTS 34 (1904) (administration granted, 1633), 35 (same—three entries, 1633), 46 (inventory exhibited and date set for creditors to make demand or be barred, 1634), 48 (order to take inventory, 1634), 51 (estate divided for children's benefit, 1634), 52 (order to dispose of children and estate and take account of executor, 1635), 55 (inventory exhibited, 1635), 56 (administration granted and order re creditors, 1635), 57 (nuncupative will proved, 1635), 58 (administration granted and inventory returned, 1635), 59 (administration granted, 1635), 72 (inventory presented, 1637), 72 (will and inventory, 1637), 74 (order of division of chattels, 1638), 77 (inventory delivered, 1638), 77 (order for payment of legacy, 1638), 77 (administration granted, 1638), 77 (will presented and named executors "allowed," 1638), 81 (administration granted, 1639), 82 (same, 1639), 85 (will and inventory, 1639), 85 (*B* "gave in" account, 1639), 91 (*D* appointed to take an inventory and pay legacies and keep the rest until further order, 1639), 91 (son appointed administrator to have house—overplus of goods to lame daughter—will and inventory to be recorded, 1639), 97 (sale of land ordered for good of children, 1640), 98 (administration granted, 1640), 102 (will proved and appraisers sworn, 1640), 103 (administration granted and inventory exhibited, 1641), 109 (widow allowed to sell husband's land and goods toward payment of debts reserving her clothes and bedding, 1641), 115 (will and inventory sworn to, 1641), 122 (inventory and account approved, 1642), 125 (administration granted, 1642), 127 (same—two entries, 1642), 132 (legacies ordered paid, 1643), 133 (administration granted, 1643), 134 (will and inventory, 1643), 138 (inventory delivered, administration to eldest son who shall have double portion, 1644); 3 id. 34 (1928) (administration granted to widow who was ordered to pay debts as far as estate would go, 1653), 91 (order for distribution to minor child and widow, 1656), 128 (administration of goods and order to execute deed, 1660), 208 (appointment of committee to assign dower, 1671).

[48] 1 RECORDS OF MASSACHUSETTS BAY 169 (1853): "Theis Courts shall trie all civill causes, whereof the debt or damage shall not exceede [ten pounds]. . . ." (1636).

[49] See 1 PROBATE RECORDS OF ESSEX COUNTY 12 et seq. (1916). Cf. 1 RECORDS OF MASSACHUSETTS BAY 325 (1853): "these Courts to have the same power, both in civill and criminall causes, the Court of Assistants hath in Boston . . . provided, it shalbee lawfull to appeal from any of these Courts to Boston." (1641).

one county, in which case the Court of Assistants was to assign dower.[50] The county courts appear to have been given general testamentary jurisdiction in 1649.[51] From that time the business was ordinarily brought before the latter with appeal to the Court of Assistants. However, either as a matter of convenience or because of the novelty of the questions involved, some testamentary matters continued to be brought in the first instance to the Court of Assistants or the General Court. This can be explained in part as an exercise of prerogative power by the latter and in part by reason of the overlapping personnel—all assistants being members of the General Court, a smaller number acting with the governor on the Court of Assistants, and one or more presiding as magistrates at the county courts. Thus, except for a much earlier county court jurisdiction, the development of courts with relation to testamentary matters was generally similar to that in Plymouth.

The records of the General Court and the Court of Assistants are usually in abbreviated form; original documents and files have often been lost and have not generally been reduced to printed form. Enough can be pieced together,[52] however, to be assured of these things: (1) that all three courts exercising testamentary jurisdiction, when called upon at least, did all the things which were within the power of the ecclesiastical courts in England; (2) that, unlike the latter, they assumed jurisdiction over succession to land, which was included in the inventory and which passed or at least might pass to the personal representatives; (3) that while there were certain definite patterns in the substantive and procedural aspects of succession, there was also considerable discretion and flexibility with regard to both. Thus, the lame daughter might be given the overplus of the goods, or the shares of orphans delivered over to some person who was ordered to bring them up and to pay them fixed arbitrary sums in money or property when they became of age. In these respects also, the history of Plymouth was repeated in Massachusetts Bay.

[50] LAWS AND LIBERTIES OF MASSACHUSETTS 1648, pp. 17-18 (1929) (Huntington Library Publication). For an account of this code, see Matthews, "The Results of the Prejudice against Lawyers in Massachusetts in the 17th Century," 13 Mass. L. Q., No. 5, pp. 73, 90-94 (1928).

[51] CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 204 (1814); 2 RECORDS OF MASSACHUSETTS BAY 287 (1853).

[52] See 1 PROBATE RECORDS OF ESSEX COUNTY (1916), where proceedings in various estates are gathered together from several sources. For further explanation as to records and files in Essex and in the Suffolk County Court, see Haskins, "The Beginnings of Partible Inheritance in the American Colonies," 51 YALE L. J. 1280 at 1283 (1942); also see note 61, infra.

We should expect to find just this on account of the training and character of the men who administered the law and formulated the colonial practices regarding succession. Thomas Lechford was the only man who attempted a professional practice in Massachusetts until well toward the end of the seventeenth century, and his stay was limited to three years between 1638 and 1641. He had considerable ability as a scrivener and drafted a few wills and routine papers relating to estates, but he had no influence upon the law or the judicial system.[53] It was the magistrates who were establishing these matters. Governor Winthrop and several other important colonists had studied law in the mother country and some of them had been active professionally there.[54] It is doubtful whether any of them had a professional acquaintance with the English testamentary law, and at any rate they were not inclined to ape the ecclesiastical or common-law systems. True, they employed the terms administrator, inventory and the like, but their orders, like their characters, were practical and independent rather than pedantic. When the English and early colonial practices seem to coincide, this was more probably due to the utility of the matter than to any desire to follow English precedent.

Considerable insight into the exercise of testamentary jurisdiction in early colonial days may be obtained from an unpublished judicial notebook[55] of William Pyncheon, an original member and assistant of

[53] See LECHFORD, PLAIN DEALING OR NEWES FROM NEW-ENGLAND (1642), reprinted in 3 MASS. HIST. SOC. COLL., 3d series, (1833). For examples of his professional activities in America regarding decedents' estates, see "Note-Book of Thomas Lechford, 1638-1641," 7 COLL. AM. ANTIQ. SOC. 16, 151, 171, 180, 199, 201, 206, 231, 294, 310-311, 323, 329, 353, 356, 377, 381, 414, 426, 427, 432, 433 (1885). Some of these items are powers of attorney to deal with estates left in England.

[54] See generally, WARREN, HISTORY OF THE AMERICAN BAR, c. 3 (1911); Matthews, "The Results of the Prejudice against Lawyers in Massachusetts in the 17th Century," 13 MASS. L. Q., No. 5, pp. 73, 90-94 (1928). Winthrop became a justice of the peace and was later admitted to the Inner Temple but his professional activities were probably largely confined to holding court leet on his father's manor, experiences much akin to his duties in the colonial courts. Cf. 1 WINTHROP, JOURNAL, Hosmer ed., 6, 8, 15 (1908); MORISON, BUILDERS OF THE BAY COLONY 53, 54, 64 (1930). Bellingham, who later became governor of Massachusetts, was once recorder of the borough of Boston in Lincolnshire, but he was unorthodox enough to perform his own marriage ceremony and then neglect to go off the bench when charged with this irregularity. 2 WINTHROP, JOURNAL 44, Hosmer ed., (1908). The litigation over his will went on for more than a century and consumed the entire estate. 29 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS xxvii, 229 (1933). For a picture of the activities of part-time attorneys in fact who were on the way to becoming lawyers in a somewhat later time, see id. xxiii-xxvii.

[55] In the Harvard Law Library. A portion of the manuscript copy has been transcribed by Ralph V. Rogers, Esq. Pyncheon is frequently mentioned in the colonial

the Massachusetts colony who in 1630 was selected magistrate by the inhabitants of the then remote settlement of Aguam, later Springfield. Until 1641, Pyncheon acted without any authority from the General Court and for many years Springfield was outside the orbit of the regular government of the colony. Still, what is found in his notebook is largely indicative of what was happening in the coastal settlements of the time. Interspersed with many entries of debt, slander, and criminal actions and of the regulation of town affairs are several items relating to succession. These include detailed inventories and appraisers' valuations of lands and chattels,[56] a record of a will at length,[57] orders of administrations,[58] and three examples of bonds given by the second husband of a widow to secure and define the interests of the children of the deceased husband upon their attaining majority.[59]

Pyncheon's notebook confirms what may be found in the regularly organized courts. Proof of wills, grants of administration and exhibition of inventories were apparently necessary in all cases. Generally, further matters were settled by agreement without coming again into court, but if there were doubt, dispute or special circumstances the court would determine the matter. In an early case the court appointed commissioners to settle the executor's account; after confirmation of the report, the executor was discharged.[60] Particularly in the division of small intestate estates there was the utmost judicial discretion and paternalism both as to the shares which each member of the family should receive and the time, form and manner of payment. The magistrates' notions of the welfare of the particular family seem to have been the sole criterion in many cases.

County court records[61] of a somewhat later period show much the

records. See also 1 HUTCHINSON, HISTORY OF MASSACHUSETTS BAY, Mayo ed., 10, 14, 16, 21, 87, 88, 96, 116, 188 (1936); 1 WINTHROP, JOURNAL, Hosmer ed., 14, 35, 70, 229, 288, 290 (1908); 2 id. 344.

[56] PYNCHEON, NOTEBOOK (Unpublished, Harvard Law Library) 16 (1641), 19 (chattels only, 1641); 67 (debts due others deducted, 1654), 80 (item "2 hoggs if found," 1659). Page references are to the corrected rather than original numbers.

[57] Id. 22 (1642).

[58] Id. 80 (1659).

[59] Id. 15 (1641), 20 (1642), 68 (to pay elder son 8 pounds and 4 pounds each to daughter and younger son, 1654).

[60] 2 RECORDS OF MASSACHUSETTS BAY 144-145 (1853) (case dated 1645). See also infra at note 95.

[61] "Records of the Suffolk County Court 1671-1680," 29 & 30 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1933). This contains a valuable introduction by Professor Zechariah Chafee, of which pp. lxv-lxx relate to decedents' estates. There are upwards of 250 entries regarding decedents' estates. Shortly after

same thing as the earlier ones. True, there were advances in the law for attorneys and lawyers began to appear in the colony. Lawyers' questions were raised and more lawyers' language used. Perhaps someone in Boston had a copy of *Swinburne on Wills* or *Wentworth on Executors*. We begin to hear of caveats and administrators *de bonis non* and such questions as whether the property of a deceased child inherited from the father must go to the latter's relatives or whether the mother's kin can take a share. While the English law was put forth in argument, it was disregarded in many particulars. The court still distributed land as well as chattels. The personal representative sued for land and seems to have exercised as much control over the realty as the personalty, though doubtless in many instances he left all the tangibles in the custody of the family. Sometimes an overseer was named in the will to assist the widow in the performance of duties as executrix. Committees were appointed to receive claims in insolvent estates, to set off dower and for special purposes. The court still exercised discretion as to division of the estate, though the eldest son usually received a double portion. In the case unprovided for by colonial statute, the collateral common-law heir might have had a talking point—enough to obtain a compromise decision—but he had to share the entire estate with the widow and a foster-son known to be near and dear to the intestate.

Legislation

There was a dearth of early colonial legislation regarding matters of property and succession, and what laws were passed were apt to be

this record begins, grants of administration become infrequent, probably due to the fact that by the law of 1672 this might be done by two magistrates in the presence of the recorder. See note 65, infra. Among typical and interesting entries are: 4 (overseer sues on testator's claim); 25 (committee to settle estate); 27 (administration granted); 79 (widow's normal share—third of chattels absolutely, third of land for life); 223 (widow's interest in land dependent on whether she remarries); 492 (widow permitted to sell house to maintain family with consent of her sureties); 596 (whole estate to widow, she to pay child 20 shillings when child becomes of age); 636 (executrix sues for trespass to land); 641 (all chattels to widow—all lands to children who must pay widow 10 pounds yearly); 676 (will construed on request of executors); 721 (account accepted and quietus); 787 (fine of 30 pounds for 6 months delay in bringing inventory); 848 (petition to general court referred to county court which gives all property to brother except household goods and 200 pounds to widow, there being no children); 887-888 (committee appointed for insolvent estate—all process to cease); 905 (executrix sued for land); 948-949 (inventory including land); 1010 (overseers to have charge without interference from executrix); 1017 (commingling of land and goods); 1168 (administrator ordered to account). For an interesting account of litigation over the Patten estate, see Chafee, "Professor Beale's Ancestor," HARVARD LEGAL ESSAYS 39 (1934).

indefinite or fragmentary. In part, the failure to legislate fully upon these subjects might have been prompted by the desire to conceal the fact that the English law was not being followed. To enact a law would subject the matter to the scrutiny of officers of the crown; to follow an unwritten practice or custom might escape notice. Statutory enactments contrary to English law would be literally in violation of the charter, while the following of a repugnant unenacted rule might not be. Another reason for failure to legislate was the desire of the magistrates to exercise discretion and thus keep matters in their own hands. The spelled-out word would tend to hamper their discretion.

The earliest colonial law in the field was one which would not likely be subject to these dangers and objections. It was the act of 1639[62] requiring that records be kept of all wills, administrations and inventories. Here was an attempt to preserve the muniments of title to land in a way superior to that generally used in the mother country. Again, dangers of fire to the colonial buildings may have had something to do with the enactment. Regardless of its causes, the law undoubtedly had some effect in formulating and perpetuating the rule that probate was as effective and as necessary in the case of real property as it was for personal property. Records of wills would be made after they had been approved by the court exercising probate jurisdiction. It was therefore natural to look for and abide by the record to establish a devise.

Not all the forces operated to curtail legislative enactment. The masses demanded that the laws be reduced to writing for the sake of certainty and to stay the arbitrary hand of the magistrates. It was in response to this pressure that the earliest code, the Body of Liberties of 1641, was prepared. It had little to say about testamentary jurisdiction except the provision that when a husband had not left his wife a competent portion of his estate, upon complaint to the General Court, she should be relieved. The General Court was also authorized "upon just reason" to depart from the rule giving the eldest son a double portion and all daughters equal shares.[63] These rules were surely contrary to the laws of England in their like treatment of lands and

[62] CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 43 (1814).

[63] See Gray, "Remarks on the Early Laws of Massachusetts Bay; with the Code adopted in 1641 and called The Body of Liberties, now first printed," 8 MASS. HIST. SOC. COLL. 3d series, 216 at 229, 230 (1843), (Nos. 79, 81, 82). Cf. LAWS AND LIBERTIES OF MASSACHUSETTS 1648, pp. 17-18, 53-54 (1929) (Huntington Library Publication).

chattels and in the discretionary power vested in the court to depart from the normal allotment of shares.

According to an act of 1649, wills were required to be proved or letters of administration taken out at the next county court which would be held about thirty days after the decease, or a fine of five pounds per month suffered.[64] This provision was repeated in the compilation of general laws of 1672, and the county court was authorized to divide and assign intestate estates among the widow, children or other heirs.[65] Here again there was discretion to depart from the normal distributions, and lands and chattels were divided alike except that the widow's share in land was confined to a dower life interest. Land must be included in the inventory; administration was granted upon the entire estate and not merely upon chattels. It was also provided that two magistrates in the presence of the recorder or clerk of the county court might take proof of wills or grant administrations at any time and report the same to the next meeting of the court. Personal representatives were obliged to account to the county court for gifts or legacies bequeathed to colleges, schools or other public uses.[66] Clerks' fees were provided for recording wills and inventories and entering orders of administration.[67]

A colonial law of 1677 provided that in case of an insolvent estate the court should appoint commissioners who should divide the estate among creditors after posting notice directing that the latter prove their claims within one year or be barred unless they could find other estate not inventoried.[68] A law of 1862 empowered the county courts to allow the heir, executor or administrator to deed land of a decedent who had contracted to sell it in his lifetime.[69]

In 1685 the last colonial law[70] greatly broadened the testamentary jurisdiction of the county courts, which were given power to summon executors to exhibit under oath an inventory of all decedent's lands and chattels or to give bond for payment of all debts and legacies, under penalty of fines in case of refusal. Creditors and legatees could require

[64] 2 RECORDS OF MASSACHUSETTS BAY 287 (1853).

[65] COLONIAL LAWS OF MASSACHUSETTS 1672-1686, Whitmore ed., 157-158 (1890).

[66] Id. 9.

[67] Id. 130.

[68] Id. 250.

[69] Id. 296.

[70] Id. 333-334. See also id. 330-331 for a similar law passed in the previous year and repealed. The earlier law recites that the county court may "as the ordinary in England" summon the executor and require him to give bond, etc.

executors to render an account and might proceed in the county court to recover their claims by execution after adjudication by the court; trial by jury might be demanded as to issues of fact; appeal to the Court of Assistants was saved; there was also a saving clause permitting the recovery of debts and legacies by ordinary actions in the usual course of the law. This statute does not seem to have applied specifically to administrators, though the county court was given authority "likewise to hear and determine all cases relating unto wills and administrations, and to grant forth execution upon their judgment given therein."

However, this broad grant of power to the county courts was scarcely in effect before the colonial charter was vacated. In 1686 Joseph Dudley, being commissioned president of the council for New England, assumed to act as ordinary and took matters of probate and administration into his own hand. This was continued by Sir Edmund Andros, the royal governor, who arrived later in the same year. Andros imposed large fees upon estates of decedents, and, while commissions were sent to Plymouth and perhaps to other colonies, all final probates and administrations over fifty pounds had to be passed in Boston.[71] This centralization of power was not without some good effect, as Andros introduced the forms for proving wills, granting administration, etc., that were used in the English ecclesiastical courts. These forms or adaptations of them were retained after his time and resulted in great improvements over the previous loose practice.[72] Other English legal influences also came in with Andros and these were to receive added impetus with the rise of a professional bar in the eighteenth century. However, in spite of the more mature period to come, the colonial institutions of the seventeenth century left an indelible mark on what was to follow. Nowhere was this more true than in the law and practice with regard to succession.

PROVINCE OF MASSACHUSETTS BAY

The charter of 1691 by William and Mary united Plymouth and Massachusetts, and both territories were included within the new

[71] 3 COLONIAL RECORDS OF CONNECTICUT, 1687, pp. 423-424 (1855); 1 HUTCHINSON, HISTORY OF MASSACHUSETTS BAY, Mayo ed., 299, 304 (1936). Proceedings of the Council for 1687 indicate that testamentary matters were not brought before it. Toppan, "Andros Records," 13 AM. ANTIQ. SOC. PROC. N. S. 237-268, 463-499 (1901).

[72] WHITE, JURISDICTION AND PROCEEDINGS OF THE COURTS OF PROBATE IN MASSACHUSETTS 15-16 (1822).

province of Massachusetts Bay.[73] This charter allowed the General Court of the province to erect and constitute courts of justice, but declared that the power of granting probate and administration should be in the governor with the council or assistants.[74] Provincial laws set up the Superior Court of Judicature and courts inferior thereto,[75] but no legislation appears to have created courts of probate,[76] for under the charter the governor with his council was the ordinary or Supreme Court of Probate. However, it would not do to centralize all testamentary business for the entire province in one place; that was one of the complaints against the Dudley and Andros regimes. Without legislation the successive governors commissioned a deputy or surrogate in each county known as "judge of probate of wills and the granting of letters of administrations," sometimes—particularly later—called simply "judge of probate."[77] Registers were also appointed to attend to the records and clerical work, and probate offices were located in each county. There was now an office, whose sole business was of a testamentary character, but judges of probate were frequently also justices of the Superior Court of Judicature or of the inferior courts.[78] In 1719 it was enacted that judges of probate should have fixed days for holding courts.[79] Appeals were to the governor and council, both by virtue of statutory provisions[80] and by the principles under which the judges of probate were commissioned.

While no provincial law created the office of judge of probate or that of register, from the first there was provincial legislation as to the powers and duties of these officers as well as the substantive and procedural law of succession. Sometimes the acts indicated the forms and procedure to be followed in testamentary matters, but there were no

[73] CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 18 (1814).

[74] Id. 31-32.

[75] Id. 217-223 (1692).

[76] It is said that an early provincial act creating county courts of probate was negatived by the king as being contrary to the charter. See Wales v. Willard, 2 Mass. 120 at 124 (1806); Peters v. Peters, 8 Cush. (62 Mass.) 529 at 541 (1851): WASHBURN, JUDICIAL HISTORY OF MASSACHUSETTS 187 (1840). No trace of any such law has been found.

[77] See CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 30, 290-291, 427, 451, 483, 496, 498, 515 (1814) for examples of the longer title appearing in the laws; cf. id. at 232, 253, 377, 390, 434, 483, 492, 515, 572, 592, 594, 628, 634, 695, 816, 825 for examples of the abbreviated title.

[78] Id. 451 (1727).

[79] Id. 427.

[80] Id. 232 (1692), 253 (1693), 426 (1719).

such thorough regulations as for common-law actions. For example, there were few legislative provisions regarding the necessity and manner of notice of proceedings before judges of probate.[81] How were these matters to be determined? Such things could not well have been governed by the common law of actions, for probate proceedings were of an entirely different nature. By analogy, the practice of the English ecclesiastical courts should have been applicable, for these were the tribunals which had general corresponding jurisdiction in the mother country.[82] Actually the analogy was tempered to some extent by both the statute law and the general conditions in the province, but a strong ecclesiastical court influence grew up and indeed still remains in Massachusetts probate procedure.

Soon after the beginning of the eighteenth century the General Court began to grant petitions for new trials, appeals and other relief which is today ordinarily thought of as purely judicial.[83] Among these were numerous petitions for the sale of a decedent's land, for the allowance of late claims, or other requests in connection with the administration of particular estates. The record first gives the substance of the petition and concludes with the order of the General Court. From our present viewpoint this is a strange phenomenon. These proceedings cannot be regarded as the exercise of the judicial power of the council under the charter, for the representatives and deputies also concurred; nor can they be regarded in the same light as the judicial action of the General Court in early colonial days for they take the form of resolves or private acts. Similar proceedings in other colonies have been called "legislative administration of estates,"[84] though in Massachusetts there was only partial administration by this method and there were very many parallel orders in cases not relating to decedents' estates. It is more reasonable to view this general pattern simply as one of the ways that the General Court exercised its broad powers without any attempt to categorize the method as legislative, judicial or administrative.[85] There

[81] See generally WHITE, JURISDICTION AND PROCEEDINGS OF THE COURTS OF PROBATE IN MASSACHUSETTS 21-28 (1822).

[82] See "Governor Pownall's Message to the Council upon the Jurisdiction of Judges of Probate," given in 1760 and contained in Quincy's Mass. Rep., App. 573-579 (1865).

[83] Many examples may be seen in the various volumes of Acts and Resolves of the Province of Massachusetts Bay. Typical examples collected by Melville M. Bigelow are found in 2 COL. L. REV. 536 (1902), 15 HARV. L. REV. 208 (1902).

[84] POUND, ORGANIZATION OF COURTS 79 (1940).

[85] As to the analogous intermingling of the various functions of government by the English Parliament, see MCILWAIN, THE HIGH COURT OF PARLIAMENT, passim, (1910).

was a considerable volume of this testamentary business which is recorded in the *Acts* and *Resolves* down to the close of the provincial period and indeed afterward,[86] though with commonwealth days it tends to disappear. As long as it continues, it seems to be an optional method of procedure to that of the ordinary judicial course, though perhaps it was usually employed only where there was doubt as to the power of the judge of probate to grant the relief, or unwillingness on his part to act in the desired manner. Probably the absence of any court exercising general equity jurisdiction helps to explain in part the frequency of these special orders of the General Court.

In England before this time, equity had very largely taken over all testamentary jurisdiction after probate or grant of administration.[87] The administration of decedents' estates in equity never gained foothold in Massachusetts.[88] This may be accounted for in two ways. Colonial and provincial laws and practices had established the jurisdiction in other courts and officials and their hands were not tied by inadequate means of enforcing their decrees as were the hands of the English ecclesiastical courts. There was no general inadequacy of remedy in the probate courts or their predecessors. Added to this is the fact that there were no separate courts of equity in Massachusetts and indeed equity powers were slowly doled out to the courts.[89] Probate courts were well established before equity jurisdiction as such was fully recognized in the state.

One of the earliest provincial laws[90] codified and improved much of the colonial law of succession. Lands and chattels alike still passed to the personal representative and ultimately to the heirs with a double

[86] 1 Laws of Mass. 1780-1807, p. 95 (1783, probate), 124 (1784, settlement of estate).

[87] Langdell, "A Brief Survey of Equity Jurisdiction," 4 HARV. L. REV. 99 (1890), 5 HARV. L. REV. 101 (1891). See also Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 117-122 (1943).

[88] Wilson v. Leishman, 12 Metc. (53 Mass.) 316 (1847); Southwick v. Morrell, 121 Mass. 520 (1877). See also 1 POMEROY, EQUITY JURISPRUDENCE, §§ 320, 346-348 (1881); 3 id., §§ 1152-1154; LEWHALL, SETTLEMENT OF ESTATES, § 37 (1937); infra at note 124.

[89] Woodruff, "Chancery in Massachusetts," 5 L. Q. REV. 370 (1889); cf. Wilson, "Courts of Chancery in America," 18 AM. L. REV. 226 (1884). See also POUND, SPIRIT OF THE COMMON LAW 53-54 (1921).

[90] 1 Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, pp. 43-45 (1869). Long after the approval of this law an unsuccessful attempt was made to declare void the intestacy provision as being in violation of the English law of primogeniture. The course of this famous case of Phillips v. Savage is fully treated in Haskins, "The Beginnings of Partible Inheritance in the American Colonies," 51 YALE L. J. 1280 at 1295, 1296 (1942).

share to the eldest son, the widow's interest in land being confined to a dower life interest. There was no longer authority to depart from the indicated division at the court's discretion.[91] Judges of probate were authorized to grant administrations, taking bonds after the manner of the English Statute of Distributions. It was made the judge's duty to require administrators to account, assign dower to the widow, and divide the remaining lands and chattels among those entitled thereto. Unless the parties agreed to a division of the lands, this had to be done by freeholders appointed by the court, or if physical division was impractical the whole tract might be allotted to the son, giving preference according to age, who was willing to pay the other children their shares according to the appraised value. The administrator was permitted to require bonds from distributees to pay debts which might afterward appear. Executors were required to prove wills within thirty days in the register's office of the county where the testator last dwelt; and, upon the refusal of the trusts by the executor named, the judge might grant letters *cum testamento annexo* to someone else. There was no law, however, allowing creditors or legatees to enforce payment of their just dues by order of the judge of probate as was provided in late colonial legislation.[92] A schedule of fees for various acts done by judges and registers was provided later in 1692.[93] There were fees for issuing citations to bring persons before the judge and for issuing a quietus or acquittance to the executor or administrator upon completion of the administration.[94] The latter was distinctly a practice of the English ecclesiastical courts.[95]

In 1696 judges of probate were given jurisdiction over the distribution of estates of persons who died insolvent,[96] and also to put

[91] See notes 61, 65, supra.

[92] See supra at note 70.

[93] 1 Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, p. 85 (1869).

[94] For the form of the latter, see FREEMAN, PROBATE AUXILARY 153 (1793). The particular device is not preserved in the present practice and in case of the executor there may be no equivalent protection. See Prescott, "A Defect in the Massachusetts Probate System," 7 HARV. L. REV. 32 (1893); Gage, "'Quietus': A Lost Probate Practice," 18 MASS. L. Q., No. 5, p. 67 (1933). Cf NEWHALL, SETTLEMENT OF ESTATES, §§ 209, 210, 212, 213 (1937).

[95] See 4 BURN, ECCLESIASTICAL LAW, 9th ed., 609 (1842); SWINBURNE, TESTAMENTS AND LAST WILLS, 6th ed., 469 (1743). Cf. supra at notes 15, 60.

[96] 1 Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, pp. 251-252 (1869). A previous law—1 id. 48 (1692)—providing for administration of insolvent estates was negatived by the king because it did not prefer crown debts. For colonial law on the same subject and to the same general effect, see note 68, supra.

under oath persons who were suspected of embezzling decedents' goods.[97] In the same year provisions were made to reach a decedent's land for payment of his debts which could not be satisfied from the personalty, but this jurisdiction was given to the superior court, which authorized a sale of lands by the executor or administrator to satisfy the debts.[98] In 1703 it was provided that an executor should render a true inventory under oath within three months after probate, except that when he was the residuary legatee he could instead give a bond for payment of debts and legacies.[99] The same act declared that personal representatives should pay debts and legacies from specie, or in absence thereof expose the goods to creditors and legatees to take the same at the appraised value, and that judgment by creditors or legatees could be satisfied by levies upon the estate property. In 1710 judges of probate were directed to allow household goods to the widow and family although the estate was insolvent.[100]

In 1719 provision was made for three sworn appraisers in case of intestate estates.[101] A law of 1723 prohibited the granting of letters *de bonis non* unless either unadministered goods or unsatisfied debts exceeded five pounds.[102] The same act declared that thereafter administration should not be granted on real property, but that land should descend to the heirs who alone could sue for it. This was an important development; it reversed the early colonial practice that lands as well as chattels passed to the administrator or executor and adopted the distinction made by the English law. Henceforward while realty and personalty went ultimately to the same persons and in the same proportions except as to the widow's share, realty passed directly to the heir and personalty to the executor or administrator. However, unlike the ordinary in England, the judge of probate might exercise authority over land in certain respects and land continued to be included in the inventory.

By act of 1733 it was declared unnecessary to have the estate settled in more than one county although property existed in several counties.[103] Provision was made in 1743 for partition of devised lands

[97] 1 id. 252. As to later provincial laws, see 1 id. 431 (1700); 3 id. 640 (1753).

[98] 1 id. 254. A previous law, 1 id. 68 (1692), was negatived because it did not prefer crown debts. An act of 1719, 2 id. 1715-1741, p. 150 (1874), required representatives to give public notice of such sales. See also 5 id., 1769-1780, p. 47 (1886) (act passed in 1770).

[99] 1 id. 536. See also an act of 1759, 4 id. 1757-1768, p. 221 (1881), making it clear that the execution went also against the land.

[100] 1 id. 652.

[101] 2 id. 151.

[102] 2 id. 284.

[103] 2 id. 689.

by the judge of probate.[104] Judges of probate, by law of 1750, were given authority to assign real estate to one of the collateral next of kin, requiring him to satisfy the claims of the others, as in the case of children.[105] Executors were obliged to account to judges of probate after 1753 under the same penalties as in case of their refusal to exhibit inventories.[106] The same act provided that judges of probate might cite witnesses in any cause and punish for contempt, and that officers were obliged to serve the legal warrants and summonses of these judges.

Governor Pownall considered the jurisdiction of judges of probate in a special message to the council in 1760.[107] He stated that the authority to the judges of the various counties was delegated by the governor and council in whom power of probate and administration was vested by the provincial charter. His chief concern, however, was the standing of the governor and the council as a testamentary court which under the practice was confined to appellate business. He observed that both the nature of the court and its practice had been vague and that the court itself had no seal, records, rules, or common formalities; that it could be neither a common-law nor an ecclesiastical court and therefore must be a civil-law court and thus capable of delegating its authority; that the laws enforced therein should be the English ecclesiastical and chancery laws so far as the circumstances and provincial laws admitted. He concluded by ordering that appeals in testamentary matters be kept separate from other proceedings; that a register be appointed to keep the records; that a seal be provided; that the Supreme Court of Probate should meet twice a year; that the judges of probate should allow no appeals unless they were taken properly in due time and bonds given.

There is a dearth of legislation relating to succession in the last quarter century prior to the Revolution. Apparently routine matters had been worked out satisfactorily by the existing statutes. While Governor Pownall's message dealt principally with appellate aspects, it clarified both the position of judges of probate in the counties and also the general nature of the procedure which they should apply in the

[104] 3 id., 1742-1756, p. 48 (1878). For later provisions, see 3 id. 641 (1753), 4 id. 321, 400 (1760).

[105] 3 id. 495. See p. 444, supra.

[106] 3 id. 639. See supra at note 99.

[107] "Governor Pownall's Message to the Council upon the Jurisdiction of Judges of Probate," given in 1760 and contained in Quincy's Mass. Rep. App. 573-579 (1865).

absence of statutory provisions. Aside from the instances in which the local law or specific practices would prevail, the law of England was followed in the field of succession as in other matters of private law. In part the bar's professionalism was responsible for this; in part it was in accord with the colonial spirit which now enlisted the English customary law against the tyranny of parliament and the crown. However, the local law of testamentary jurisdiction was so important and persistent that the English law in many respects was no more than a gloss, albeit a vital one, upon the system which had developed in the colony and province.

Absence of printed court records and of reports except for the volume of Quincy leaves the account of the provincial period in an unsatisfactory state. We can only glean from the *Acts and Resolves* and from what is found thereafter the story of the actual administration of the testamentary law. We may be sure, however, that it was a period of transition in which mature procedural patterns were developed and rigidity took the place of free discretion. Some colonial practices disappeared entirely but others persevered and became permanent parts of the probate system.

STATE AND COMMONWEALTH OF MASSACHUSETTS

Early Years

During the period of the American Revolution the provincial laws relating to succession and the commissions of the judges of probate were continued. The latter were authorized to administer estates of persons who had absented themselves out of loyalty to the crown. There were many resolves passed by the General Court concerning particular estates of this nature and also particular estates of decedents. The first constitution of the commonwealth also continued the office of judge of probate in each county with appeals to the governor and council until the legislature should provide to the contrary.[108] Courts of probate were established by an act of 1784 which prescribed their jurisdiction and provided for appeals to the Supreme Judicial Court, constituted as the Supreme Court of Probate.[109]

In the course of the next few years a dozen separate but related acts dealt with the substantive and procedural aspects of succession. For the most part they merely brought together and repeated the pre-

[108] Mass. Constitution of 1780, c. 3, arts. 4, 5.

[109] 1 Laws of Mass. 1780-1807, p. 155. For upwards of twenty years, however, the Resolves of the General Court continued to be made with reference to particular estates in some cases. See supra at note 86.

existing provisions of the provincial law, often in identical language. It was made clear that land descended to the heirs, while personalty went to the personal representative and was distributed by him.[110] At first the double share was continued for the eldest son but after 1789 he was merely entitled to a share equal to that of the other children.[111] The probate court could decree division of land among the heirs,[112] but it was still the courts of common law who must license the sale of land in order to pay debts.[113] Although there was no express statute on the point, probate was necessary to establish a devise of land,[114] a principle contrary to the English law of the time but in harmony with colonial practices.

There was considerable clarification of doubtful parts of the provincial acts and also much elaboration of details. Some entirely new provisions appeared. Among them was the requirement that executors give bonds for faithful administration[115] and provisions for bringing suit upon a representative's bond.[116] The most important new feature was an act of 1789[117] providing that the personal representative must post and publish a notice of his appointment and request that creditors exhibit their claims to him; in ordinary cases creditors could not sue the executor within one year after his appointment but their claims against him were barred unless exhibited and sued upon within three years from the date of his giving bond. By amendment of 1792[118] the latter period was changed from three to four years. This is one of the earliest of somewhat similar statutes now existing in practically every state and commonly called nonclaim statutes.[119]

Forms of bonds and oaths are given in the statutes. Freeman's *Probate Auxiliary*, which was published in 1793, contains forms for all the usual proceedings in probate and administration and also the relevant statutory provisions. These forms are excellently constructed and

[110] Id. 124, 125 (1784).

[111] Id. 464.

[112] Id. 129 (1784).

[113] Id. 118 (1784).

[114] Shumway v. Holbrook, 1 Pick. (18 Mass.) 114 (1822), where the reporter's note refers to an unreported holding to the same effect thirty years before.

[115] 1 Laws of Mass. 1780-1807, p. 114 (1784).

[116] Id. 358 (1787). See also id. 430 (1788).

[117] Id. 459.

[118] 2 id. 526.

[119] See 10 R. I. COLONIAL RECORDS, edited by Bartlett, 13 (1865) (act of 1784); Vt. Stat. 1787, p. 59.

must have been of considerable service in formulating the details of the practice in the early years of the commonwealth.[120]

Modern Developments

While the basic principles of testamentary jurisdiction and procedure have not changed in Massachusetts during the last century and a half there have been many developments and some important changes. By act of 1862 probate courts were declared to be courts of record[121] and they have appropriate powers to enforce their decrees, which are as conclusive as those of other courts of record.[122] They have been given concurrent jurisdiction over testamentary trusts, and general equity powers when equitable questions arise in the course of administration.[123] They continue to have exclusive jurisdiction over the general settlement of estates.[124] When a personal representative is in doubt as to what to do, he may initiate proceedings to secure the advice of the probate court,[125] or he may take advantage there of the Declaratory Judgment Act.[126] The various proceedings are initiated by petition, and interested parties are notified of the hearing thereof by citation or by published notice.[127] Action with regard to the estate is in rem, provided that the required notice is given.[128] Realty is vested at once in the heirs or devisees,[129] while personalty goes to the executor or administrator, who may sell or pledge it without order of the

[120] See, however, WHITE, JURISDICTION AND PROCEEDINGS OF THE COURTS OF PROBATE IN MASSACHUSETTS 6, 31 et seq. (1822), complaining of the loose practice existing in the Probate Court of Essex County.

[121] Mass. Acts and Resolves, 1862, c. 68, p. 56.

[122] Mass. Gen. Laws (1932), c. 215, § 34; NEWHALL, SETTLEMENT OF ESTATES, §§ 11, 18-21 (1937); see also Alger, "Conclusiveness of Decrees of a Domestic Probate Court in Massachusetts," 13 HARV. L. REV. 190 (1899).

[123] Mass. Gen. Laws (1932), c. 215, § 6; NEWHALL, SETTLEMENT OF ESTATES, § 22 (1937).

[124] Allen v. Hunt, 213 Mass. 276, 100 N. E. 552 (1913): Rolfe v. Atkinson, 259 Mass. 76, 156 N. E. 51 (1927); Buttrick v. Snow, 277 Mass. 401, 178 N. E. 620 (1931). See supra at note 88.

[125] See NEWHALL, SETTLEMENT OF ESTATES, § 25 (1937) (as part of equity jurisdiction over estates concurrent with equity courts).

[126] Mass. Acts and Resolves, 1935, c. 247.

[127] NEWHALL, SETTLEMENT OF ESTATES, § 12 (1937).

[128] Bonnemort v. Gill, 167 Mass. 338, 45 N. E. 768 (1897); Anderson v. Qualey, 216 Mass. 106, 103 N. E. 90 (1913).

[129] Hooker v. Porter, 271 Mass. 441, 171 N. E. 713 (1930). Cf. Mass. Acts and Resolves, 1933, c. 129 (representative may now be authorized to take possession of land if personal property is insufficient to pay debts).

court.[130] The probate court can now license the personal representative to sell realty in order to pay debts or legacies if there is not sufficient personalty.[131] The periods within which creditors are forbidden to sue upon their claims and within which they must sue have been reduced to six months and one year respectively, and it is further provided that if the personal representative does not have notice of sufficient claims within six months to represent the estate as insolvent, he may pay the known creditors without personal liability to others of whom he has no notice.[132] Unlike most other states, the probate court does not as a matter of course pass upon the validity of claims (except in insolvent estates) until the representative has paid the same and rendered his account.[133] The decree of distribution protects the administrator and adjudges the rights of the parties if the required notice is given and there is no fraud or culpable negligence.[134] Suits upon representatives' bonds since 1922 can be brought in either the probate or superior courts.[135] Until 1920 appeals from probate court went to a single judge of the Supreme Judicial Court with trial de novo and with the possibility of a second appeal to the full bench, but appeals are now prosecuted directly to the full court in the first instance.[136] Clearly the probate court is no longer an inferior court but one of superior—though specialized—jurisdiction.

CONCLUSION

Many of the details of this history are of little present-day importance—at least in isolation. Taken together, however, they show the growth of an indigenous probate court system in America.[137] Of course there were always probates, administrators, executors and inventories, and there was a greater background of the English ecclesiastical

[130] Crocker v. Old Colony Railroad, 137 Mass. 417 (1884); Lyman v. National Bank of the Republic, 181 Mass. 437, 63 N. E. 923 (1902).

[131] Mass. Gen. Laws (1932), c. 202.

[132] Id., c. 197, §§ 1, 2, 9.

[133] NEWHALL, SETTLEMENT OF ESTATES, §§ 153, 154 (1937).

[134] Mass. Gen. Laws (1932), c. 206, §§ 21, 22; see NEWHALL, SETTLEMENT OF ESTATES, § 212 (1937). As to protection of the executor, see note 94, supra.

[135] Mass. Gen. Laws (1932), c. 205, § 7A.

[136] Id., c. 215, § 9 et seq.; see NEWHALL, SETTLEMENT OF ESTATES, § 250 (1937).

[137] For a similar conclusion as to the character of the early substantive law of succession, see Haskins, "The Beginnings of Partible Inheritance in the American Colonies," 51 YALE L. J. 1280 at 1315 (1942).

law after the withdrawal of the colonial charters. Dower was known from the first, though the common-law distinction between the descent of land and the distribution of personalty came much later. The overseer of the executrix disappeared and the discretionary shares to children gave way to a more mature system of family allowances. Still, many colonial innovations remained and provided a markedly different design of testamentary jurisdiction and procedure in the new country. For one thing, almost every proceeding having to do with succession might be carried on in a single Massachusetts court, while until 1857 this jurisdiction was divided between the English ecclesiastical, chancery and common-law courts,[138] and even today it is shared by the Probate and Chancery Divisions of the High Court of Justice.[139] Moreover, the uninvolved English estate has usually been settled without court interference after the initial stages, while complete supervision has come to be the rule in Massachusetts. There probate was effective and necessary as to devises of land long before[140] this became true in England.[141] The liability of land for satisfaction of decedents' debts, if it did not always exist in Massachusetts,[142] preceded the English statute[143] to that effect by many years. Indeed the whole process of regarding land as part of the decedent's estate was in marked contrast with the English law until the latter was changed within the last half century.[144]

[138] See Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 122-124 (1943).

[139] The Probate Division activity is confined to probate and grant of letters. Administration proceedings, when had, are carried on in the Chancery Division. Id. at 125-127.

[140] See supra at notes 62, 64, 65, 114.

[141] Probate of wills passing both personalty and realty was authorized by the Court of Probate Act of 1857, 20 & 21 Vict., c. 77, § 62 but probate of instruments devising land alone could not be granted until the Land Transfer Act of 1897, 60 & 61 Vict., c. 65, § 1 (3).

[142] See supra at notes 9, 26, 27, 35, 46, 47, 98. 5 Geo. II, c. 7 (1732) made land in the colonies liable for debts, but in view of the title of the act and the pre-existing colonial law it is probable that the act was passed merely to prevent American courts from disfavoring British suitors.

[143] Administration of Estates Act of 1833, 3 & 4 Wm. IV., c. 104. Of course at common law the heir was liable for bond debts made expressly binding on him, and by the Statute of Fraudulent Devises of 1691, 3 & 4 Wm. and Mary, c. 14, the obligee of such an instrument could reach the devisee of the land.

[144] By the Land Transfer Act of 1897, 60 & 61 Vict. c. 65, § 1 (1), real estate vests in the personal representative. This provision is continued in the Administration of Estates Act of 1925, 15 Geo. V, c. 23, §§ 1, 2, 13, 33 to 44.

It is beyond the scope of this paper to attempt to show how far this history was repeated in the other colonial states, or how far other states have borrowed from Massachusetts or from jurisdictions with a similar background. However, a moment's reflection upon the present scheme of administration in almost any state will indicate a greater similarity to the Massachusetts plan than to the English system of the eighteenth century. To this extent at least it will be recognized that the Massachusetts probate court system represents the peculiarly American way of dealing with the judicial aspects of succession to property upon death.