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The Origin, History and Jurisdiction of the Probate Courts in Massachusetts

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THE ORIGIN, HISTORY AND JURISDICTION OF THE PROBATE COURTS IN MASSACHUSETTS.

Presented for the Degree of Bachelor of Laws by Henry Burt Montague.

Cornell University 1895.
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DIVISION I.


Mr. Justice Holmes, in his work on the common law states that "in Massachusetts today, while on the one hand there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs."

In order to trace the rise and development of the Probate Court in the Commonwealth of Massachusetts, it is necessary to consider briefly the probate system as it existed in England prior to and at the time of founding the colony. The colonists brought with them the laws of England so far as these were adapted to their new circumstances, not hesitating, however, to reject whatever conflicted with their ideas. At an early day in England the jurisdiction over wills and their probate was exercised in the manorial, or county courts, the Bishop
sitting with the ealdorman or sheriff and hearing civil cases as well. Soon after the Norman invasion, under William the Conqueror, the ecclesiastical and temporal courts were separated. Norman laws and customs aided in effecting this separation. Following the Civil Law, the Normans entrusted testamentary matters to the curate or vicar of the parish where the testator had lived and died. The charge of wills now being vested by William in the ordinary or bishop, it seems certain that the King authorized the formation of ecclesiastical tribunals and that their jurisdiction included the probate of wills soon after the separation from the county courts. The reason for this was that none could be found better qualified to have such charge and care of his transitory goods after the death of the intestate, than the ordinary, who (a) all his life had care of his immortal soul."

Blackstone shows that the King favored the church because spiritual men were of better conscience than laymen. (b)

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(a) Hensloe's Case, 9 Coke, 38 b.
(b) II Bl. Comm. 494.
The trust vested in the ordinary was a conscientious one, for he was responsible to no one for his conduct. The common law is declared defective in Graysbrook v. Fox, because it did not allow the spiritual governor to be subject to temporal suit. The clergy in time abused their trust, appropriating the larger part of a decedent's estate without paying his debts. Such abuses inspired dread in the temporal courts and among the people and restraints began to be placed upon the clergy. The Magna Charta of John gave the church the supervision of the distribution and administration of the intestate's personality, "saving to every one the debts the decedent owed. This last clause was omitted from the Charter of Henry III., presumably through clerical influence. The statute of Westminster II. directed the ordinary to pay the decedent's debts so far as his goods will extend. By this statute of 31 Edward III. c. 11, the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary. Under the statute of 21 Hen. VIII. c. 5, the ordinary might appoint either the widow, or next  

(a) 1 Plowd. Rep. 275-77.
of kin, or both, as administrators. The statute of 22
and 23 Charles II. c. 10, and 29 Charles II. c. 30, known
as the statute of distributions, made the estate distribu-
table between the widow and next of kin, leaving with th
the administrator the third formerly taken by the
church. Finally, I James II. c. 17, this third was also
made distributable. The statutes noticed above lie at
the basis of the Massachusetts statutes and are law un-
less changed by later enactments.

The rules of the civil and canon law were the foun-
dation of the ecclesiastical law and many, by usage and
custom, rather than by legislative enactment, have been
incorporated into the common law of England. The point
where the power of the ordinary was weakest was that of
enforcing his decree when made. He could only excommu-
nicate the offender and this punishment became less ef-
fective with the people as knowledge increased. The ju-
risdiction over administrative matters remained in the
ecclesiastical courts until the Probate Act of 1857, 20
and 21 Vic. c. 77, by which the jurisdiction was vested
in a court of Probate. The old tribunals are supplanted
by a temporal court more in harmony with the English ju-
dicial system.
Part II. The Colony of Massachusetts Bay.
1628 - 1691.

In this sketch the colony at Plymouth will not be treated separately. So far as probate matters were concerned the two colonies were practically identical. The Charter of the Colony of Massachusetts Bay, granted in 1628, provided for an assembly known as the General Court consisting of the Governor, Assistants and Freemen. By the Charter's terms the court could establish laws and provide for officers of administration, but it was not intended to be the frame of government for a new state. The officers were "To apply themselves to take care for the best disposing and ordering of the general business and affairs of, for and concerning the said lands and premises hereby mentioned to be granted for the government of the people there". The colonists early felt the need of some court having jurisdiction over testamentary matters, and rejecting the idea of an ecclesiastical court, established courts resembling the early English County Court. These were first established in 1639.

Mr. Washburn in his "Judicial History of Massachu-
settts," thus outlines the early system. One or more mag-
istrates who resided in the county where the court was to sit, or such officials appointed by the General Court, proved wills, granted administration and the like and appeals lay from their decisions to the Court of Assistants. This appellate tribunal met four times in each year, at Salem, Ipswich, and twice in the Boston Meeting House. The clerks of the courts were "ex officio" recorders, and in the intervals between the sessions of the courts, aided by two magistrates, attended to the probate matters. It is interesting to note that these courts were also au-
thorized to "question and censure every person that should publish or maintain any heterodox or erroneous doc-
trine, according to the merit of his offence." This shows the ecclesiastical spirit at least, of the new courts. One of the earliest enactments, passed October 28, 1633, provided that "The wills and testaments of such as die be proved orderly before the Governor and Assist-
ants, within one month after the decease of the testa-
tor. A full inventory was to be presented with the will of all goods and chattels before administration would be granted. The wife or others nearest the intestate took this inventory. The Governor appointed persons to in-
ventory the estates of any who died unmarried, and such as were without friends. Also in 1633, it was decreed that the real estate should be sold to pay the debts when the personalty was insufficient.

(a) Hutchinson states that the colonists regarded real estate as mere "bona", following the civil law and did not confine themselves to any rules of distribution then in use in England. Following Deuteronomy, 21, 17, the eldest son was given a double portion, and where there were no sons, the daughters inherited as copartners. He says that "This law of Moses extended to real as well as to personal estate, and perhaps had as great weight as either the civil law or the peculiar circumstances of the new country." The family and estate were carefully considered — sometimes all the property passed to the administrator, or all was settled upon the widow or any relative who would undertake to provide for the family and pay certain sums to the children on attaining a majority or upon marriage. In general, the widow only took her dower. Fee simple estates descended to every

child, while in estates tail the heir at common law took to the exclusion of the other children. As early as 1639 it was decreed that records be kept of all wills, administrations and inventories. The court records did not attempt to keep the civil, criminal and probate matters separate.

The judges of the early day were men whose influence were very great. Many were educated as ministers and of these, Samuel Sewall was considered the most learned in the common law. William Pynchon controlled the whole administration of justice in the settlement at Springfield, from 1626 until 1650. He held courts in civil, criminal and probate matters, and appeals lay from his decisions to the court of assistants. He was disposed to exercise Equity power, sometimes to the sacrifice of legal forms. The closing years of this period found a royal governor, appointed by the King, in charge of affairs in Massachusetts. He was the Supreme Ordinary, but because of the hardships of travel to and from Boston, he appointed judges to act in his stead. A law passed in May, 1685, gave the magistrates of each county court,
full power and authority, "As the ordinary in England" to demand an inventory of the executor.

Governor Andros although tyrannical, made an improvement by introducing a regular system of forms in probate proceedings which hitherto had been uncertain. His fee for probate was fifty shillings and he gave personal attention to estates exceeding in value fifty pounds.

We have now reached the point when the colony becomes the province. Very much of the early legislation is uncertain owing to the imperfect records. But as Mr. Washburn said in 1840, "Massachusetts had been a distinct commonwealth long enough to have accumulated many of the elements of an unwritten or common law of her own. And these must be traced in the fading memorials of an earlier age,—in the origin of these institutions, social and political, which grew up to the meet the expanding wants of a young and vigorous commonwealth."(a)

(a) Judicial History of Massachusetts, p. 339.
Part III.—The Province of Massachusetts Bay.
1691-1780

Sir William Phipps arrived in Boston with a new charter May 14, 1692. He issued writs for a General Assembly which met the 8th of June following. The provisions of the charter relative to probate matters provided that "The governor perform all that was necessary for the probate of wills and the granting of administrations, concerning any interest or estate which any person shall have within our said province or territory." The governor and council being thus vested with the whole power on this subject, appointed judges of probate in each county who were surrogates of the governor. Thus the probate jurisdiction was taken from the common law courts and made independent of legislative control. The provincial legislature indeed attempted to reestablish the old county courts but this was negatived by the King. (a)

The probate court this time resembled a civil law court. It was not a common law court because its pro-

(a) Parsons, C. J., in Wales v. Willard, 2 Mass. 120.
cedings did not admit of trials and process. Nor was it an ecclesiastical or spiritual court being composed of laymen who did not enforce their decrees by excommunication or censure. A statute passed November 1st, 1692, provided that "Any person aggrieved at any order, sentence or decree, made for the settlement or distribution of any intestate estate might appeal unto the governor and council, every person so appealing giving security to prosecute the appeal with effect." Mr. Washburn states that appeals lay to the King in council where the amount of difference exceeded three hundred pounds.

The legislature from time to time passed laws recognizing the probate court and to some extent regulating its proceedings. Some of these enactments may be briefly considered. In 1692 the statute provided that children's shares should be equal, except the eldest son, then surviving, who was to have a double portion of the personal estate. The provision as to lands commences, "Whereas estates in these plantations do consist chiefly of lands which have been subdued and brought to improvement by the industry and labors of the proprietors with the assistance of their children, the younger children generally
having been longest and most serviceable to their parents in that behalf, who have not personal estate to recompense their labor: Be it enacted, etc., that every person -- -- -- shall have power to give and dispose and devise all his lands, tenements and hereditaments to and among his children and others as he shall see fit." Minors over fourteen years were allowed to choose their own guardians by statute passed Feb. 2, 1693. Those within that age had a guardian appointed by the government and all guardians were compelled to give bonds. Provision was made for insolvent estates in the laws passed Nov. 18, 1696. The insolvent's estate was to be distributed among all creditors in proportion, first paying debts due to the crown and the necessary expenses of the last illness and the funeral. Appeals lay to the governor and assistants of the court of chancery. Statute Dec. 5, 1719, required that letters of administration of intestate estates be taken out within thirty days and an inventory be taken by three suitable persons within three months. A statute, Nov. 23, 1726, required judges of probate to inquire concerning idiots or distracted persons and, if
necessary, to appoint a guardian over them. The next year probate judges were forbidden to act as judges or attorneys in other courts in any cause wherein they had passed decrees. This because several of the probate judges were also justices in a superior court or in a court of common pleas. The statute Oct. 3, 1730, gave the judge in the county where the testator lived the jurisdiction though the decedent owned lands in several counties. These statutes show that the importance of the probate court was steadily increasing and many principles were laid down which have been incorporated into the present system.

The probate court at this time had the jurisdiction possessed by the spiritual court in England. Governor Pownall, in 1760, stated "that the civil law so far as the circumstances and the laws of the provinces will admit ought to be the laws and rules of this court. This point being precisely determined, the rules and laws of these courts are fixed and known, things taken up by the courts and established by the experience of ages." Act-

(a) Quincy's Rep., p. 576.
ing on governor Pownall's suggestion, a register was appointed for the court, sworn to the faithful performance of his duties. A seal was also provided and appellate sittings decreed to be held twice in each year. It was further resolved that no judge of probate should admit of appeals unless the appeal was claimed, bond given and reasons of appeal filed as the law directed.

We are now reaching a time when the first law reports commenced in Massachusetts, but the disturbances prior to and during the Revolution led Mr. Washburn to remark that, "Very little can be said of the probate proceedings prior to the Revolution. Nor were there any changes in their organization, during the existence of the charter, worthy of notice."
Part IV.— The Commonwealth of Massachusetts.  
1780 - 1895.

The Constitution of Massachusetts was agreed upon by delegates of the people in convention begun and held in Cambridge, September 1, 1779. The convention continued, with adjournments until the following March. The people ratified the Constitution before the convention reassembled in June and it was accordingly "Resolved that the said constitution or frame of government shall take effect on the last Wednesday of October next, save only for the of making election$. Agreeable to this resolution the first legislature assembled at Boston, Oct. 25, (a) 1780.

The provisions of the Constitution directed that "The judges of probate of wills and for granting letters of administration, shall hold their courts at such place or places, on fixed days as the convenience of the people shall require; and the legislature shall, from time to time, hereafter, appoint such times and places: until

which appointments, the said court shall be held at
times and places which the respective judges shall di-
rect! All appeals were to be heard and determined by
the governor and council until the legislature made other
(a)
provision. As we have seen the separation between the
jurisdiction of the probate court and that of the common
law courts had become as well settled in the colonies as
in England. The Constitution to some extent contemplated
(b)
a similar separation. All the laws of the colony, prov-
ince or state of Massachusetts Bay were declared to be in
force until altered or repealed by the legislature, ex-
cept such as were repugnant to the rights and liberties
contained in the constitution.

The system as set forth in the constitution continuad
in active operation until the act of March 13, 1784, by
which county courts of probate were established with the
powers and jurisdiction given by the laws of the common-
wealth. The general provisions of this act of 1784 being
similar to those now in force need not be given and we

(a) Const. of Mass., Chap. III., Art. 4,5.
(b) Waters v. Stickney, 12 Allen, 3.
may consider the different branches of the present probate system, indicating, however, the more recent additions to the jurisdiction of the probate courts. The Pub. Stats. c. 156, Sec. 2, defines the general jurisdiction, which includes

1. The probate of wills,
2. The granting of administrations,
3. The appointment of guardians to minors and others,
4. All matters relating to the estates of such deceased persons and wards.
5. Petitions for the adoption of children.
6. Petitions for the change of names.
7. Such other matters as have been or may be placed within their jurisdiction by law.

It is difficult to find in the statutes all the matters over which the Probate court has jurisdiction. The provisions are scattered through the Public Statutes and the thirteen annual volumes that have since appeared.

It is the purpose of this paper to treat, necessarily with brevity, the leading branches of the probate juris-
diction, without attempting to cover the practice in the Probate Courts.

The probate systems of Massachusetts and New York have been the models for similar systems in many other states of the Union. The New England group of states as well as many others which were largely settled by natives of Massachusetts, have substantially the same procedure.

In the writer's judgment, the Massachusetts courts of probate, while less minutely regulated by statutes and codes, are fully the equal of the New York courts in efficiency.
DIVISION II.

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Probate courts are held each year in certain designated towns and cities, within the several counties, in such places therein as the several judges from time to time appoint. Whenever changes take place notice must be given by the judges by advertisement in some newspaper or by posting the same in public places. The county commissioners must provide and maintain suitable rooms for the use of the probate courts in their respective counties, and fire-proof rooms with cases for documents, also furnishing the books and stationery used. Whenever a regular term of any probate court occurs on a legal holiday or on the day of any national or state election, the court is held on the next day after. As early as September, 1639, it was provided that records be kept of all wills, administrations and inventories, but not until the statute of 1862, c. 58, was the probate court formally

(a) Stat. 1884, c. 141.
made a court of record. Chief Justice Parker stated that "A court of probate, although not technically a court of record, ought to have a perfect record of all its orders and decrees. It was for this purpose principally that the Constitution established the office of register." (Chase v. Hathaway, 14 Mass. 226).

The distinction between probate and common law courts has been repeatedly recognized by the cases. A writ of error will not lie to a judgment of a probate court. The probate decrees are final unless appealed from, upon subjects within its jurisdiction. The probate of a will is conclusive with regard to lands devised as it is with regard to chattels. In no case can the due execution of a will, the sanity of the testator, the attestation of the witnesses or any question of that kind be tried in the courts of common law in the Commonwealth. But the common law rules of evidence are binding upon the probate court. A writ of certiorari will not lie from the Supreme Judicial Court to the probate courts. In this case Shaw, C.J., reviews the whole jurisdiction.

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(a) Smith v. Rice, 11 Mass. 507.
(b) Dublin v. Chadbourn, 16 Mass. 433.
(c) Eveleth v. Crouch, 15 Mass. 309.
(d) Peters v. Peters, 8 Cush. 529.
Part II. -- The Judge and Register of Probate.

Pub. Stat., c. 158.

The Constitution provides that all judicial officers shall be appointed by the Governor, by and with the advice and consent of the Council, and shall hold their offices during good behavior. A statute, March 12, 1784, directed that "there shall be appointed in each county some able and learned person to act as judge who shall have full power and authority to make such process or processes as may be needful." The office of judge of probate was enlarged by the statute of 1858, c. 93, to include insolvency matters. The judge must take oath that he will faithfully perform his duties and will not be interested in nor benefited by any matter pending in the court over which he is judge. Judges may interchange services or perform each other's duties, if necessary.

The several probate judges make the rules for regulating the practice and conduct of business in their courts, returning a copy to the Supreme Judicial Court for their approval.

(a) Const. Mass. c. 2, Art. 9, and c. 3, Art. 1.
approval. A statute, 1893, c. 372, required that the
rules of proceeding and practice and blanks for use of
the probate courts should be uniform throughout the
state. These were prepared and approved, taking effect
on and after May 15, 1894.

The probate judge keeps order in court and may pun-
ish any contempt of his proceeding. He may adjourn the
court as occasion requires. A probate judge must not be
"interested" in any suit brought before him. Thus it was
held that where the judge was a debtor to the estate,
though the debt was secured by a mortgage, he had no jur-
isdiction and probate before him was void. The interest
of relatives of the judge forbids his acting unless the
interest is remote. But the interest must be legal or
beneficial, not a mere general interest in the prosper-
ity of the town in which the judge resides. A bequest
of money to be used for the poor of a certain town does
not make a probate judge who is an inhabitant of one of
those towns, "interested" in the probate of the will.(b)

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(a) Gray v. Minot, 3 Cush. 352.
(b) Hall v. Thayer, 105 Mass. 219; Aldrich, Aplt.,
110 Mass. 189.
(c) Northampton v. Smith, 11 Met. 390.
The resignation of a judge of probate operates a discontinuance of an action in his name upon an office bond. (a) The judge of probate is a mere trustee of an administration bond for all the next of kin and creditors and he cannot submit their rights to reference or arbitration. (b)

The judge of probate has several statutory duties. By statute, 1894, c. 401, the judge must satisfy himself that the father, mother or guardian of a minor about to marry, consents when the male is under 18, or the female under 16, and make order accordingly before the town clerk may issue a marriage license. Probate judges have jurisdiction in common with trial justices and judges of police, district and municipal courts of offences against the statutes compelling children to attend school. (c) The judge may receive complaints, issue warrants and hear cases against juvenile offenders at such times or places as may be convenient. The probate judge may within his county, commit to any of the state lunatic hospitals any insane person then residing or being in the county who, 

(a) Cutts v. Parsons, 2 Mass, 440.  
(b) Thomas v. Leach, 2 Mass. 153.  
(c) Pub. Stat., c. 47, s. 3: c. 48 s. 13; 1889,, c. 249; 1891, c. 426.  
(d) Ibid. c. 89, s. 16.
in his opinion is a proper subject for its treatment and custody. He may also commit dipsomaniacs to the proper institutions, the feeble minded he also examines and may commit to a hospital. The judge may by an order in writing permit an attorney to visit his client who is a patient therein.

Register of Probate.

The office of register of probate was intended by the Constitution to be filled by appointment. Amendment 19, ratified by the people, May 23, 1855, changed that provision so as to allow the election of register by the people of the county. The register is a quasi-judicial officer, who has the care and custody of all books, documents or papers deposited or filed in the probate office. He takes oath to faithfully perform his duties, giving a bond with sufficient sureties to the probate judge. He may issue orders of notice and citation in the same manner and with the same effect as if issued by the judge.

(a) Pub. Stat., c. 87, s. 11.
(b) 1885, c. 339; 1886, c. 298.
(c) Pub. Stat., c. 87, ss. 35,40.
(d) Const. II., 9.
He may issue attachment and execution, also all other proper processes necessary to carry into effect any order or decree of the court and these may run into any county and be obeyed throughout the state. The judge of the probate court at least once in six months, must inspect the books of the register. The register must make without charge, one certified copy of all wills proved, inventories returned and accounts settled, and of all orders and decrees of the court. These he shall deliver on demand to the executor, heir or other person interested. In 1875, the legislature requested the justices of the Supreme Court to give their opinion upon the question whether the office of register of probate could lawfully be abolished by the legislature. The judges decided that the legislature might change the term of office or abolish the office and transfer its duties to another, but in any case the people must elect him.

(a) Pub. Stat., c. 158, ss. 6-20.
(b) Pub. Stat., c. 158, s. 40
(c) Opinion of the Justices, 117 Mass. 603.
Part. III.-- Attorneys in the Probate Court.

A person admitted as an attorney in either the Supreme Judicial or the Superior Court may practise in every other court of the state. Parties may manage, prosecute and defend their own suits personally or by such counsel as they may engage. Any attorney at law duly authorized may enter his appearance as attorney for the party represented by him in any proceeding in any probate court or court of insolvency. All processes or notices served upon such attorney shall have the same force and effect as if served upon the parties themselves. The probate courts shall make rules and regulations so as to require notice to be given to such attorney, or to the parties interested, of any motion, hearing or other proceeding proposed in any case before said courts.

(b) 1890, c. 420, s. 1-2.
Part IV.--- The Probate of Wills.

"That the courts of probate in Massachusetts have jurisdiction over the probate of wills of real as well as of personal estate and that its decrees, not appealed from, are conclusive upon all parties and not reexaminable collaterally in other courts, is clear and will not be controverted." The will be delivered into court within thirty days after notice of the testator's death by the person having charge of it, in the office of the county of which the deceased was an inhabitant. The registry, upon being paid a fee of one dollar is required to receive and keep a will for any testator, giving a receipt therefore. If not withdrawn by the testator it will be publicly opened at the first sitting of the court after the testator's death. When the will is presented a petition signed by the executor or other person who offers the will, must be presented setting forth the testator's residence and date of his death, praying that the will be allowed. The names of the widow, heirs at law and next of

(a) Parker v. Parker, 11 Cush., 534.
kin should be given. Citation is issued by the register to the heirs at law and all other persons interested in the estate. This is usually done by publishing the notice in some county newspaper. Formal notice is dispensed with when the heirs and others interested waive notice in a writing annexed to the petition. By the practice in England a will may be proved either in common form or in solemn form. The latter method accords with the Massachusetts practice in all cases. When it is apparent to the court that no person intends to object, the court may grant probate upon the testimony of one subscribing witness. But any party objecting to the probate of the will has a right to insist to the testimony of all three if they can be produced. The party seeking to probate the will must prove: (1) that the will was signed by the testator or by some one in his presence and by his express direction, (2) that the will was attested and subscribed in the presence of the testator by three or more competent witnesses, (3) That the testator at the execution of the will was of full age and of sound mind. These

(a) Pub. Stats., c. 156, s. 37.
(b) Waters v. Stickney, 12 Allen, 4.
(c) Pub. Stats. c. 129, s. 1; Chase v/ Lincoln, 3 Mass. 236.
having been established, the burden is upon the party oppo-
posing the probate to maintain their objections.

The person applying for the probate of a nuncupative will must state all material facts and the substance of the testator's declarations. The usual notice must be given. At the hearing the will is reduced to writing in the form established by the evidence and is then admitted to probate. A will made out of the state which might be proved where made, may be proved in Massachusetts.

Upon the allowance of the will if no appeal is taken and there is an executor named in the will who accepts, letters testamentary will issue to him upon his giving a sufficient bond.

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(a) Baldwin v. Parker, 99 Mass. 79.
(b) Pub. Stats., c. 127, s. 5.
Part V. — Granting of Administration.

Administration will be granted by the probate courts for each county of the estates of persons who at the time of their decease were inhabitants of or residents of such county. Whenever there is any delay in granting letters testamentary or of administration, the judge may at his discretion, appoint a special administrator to collect the effects of the deceased. The policy of granting administration to those most interested in the estate has been long established. The provisions of the statute, 31 Edw. III., c. 11, and 21 Hen. VIII., c. 5, cited supra, p. 3, were followed in the Massachusetts Statute of 1783, c. 36, and still remain without material change. It provides that the widow of the deceased or his next of kin, or the widow jointly with the next of kin, as the court deems fit, shall be entitled to administer. If none of the above are competent or renounce the appointment, or neglect for thirty days to take charge, administration shall be granted to one or more of the principal

(a) Pub. Stat., c. 156, s. 2.
(b) Ibid, c. 130, s. 10.
creditors' claim to administer does not depend upon the amount of the debt. In Arnold v. Sabin, 1 Cush. 525, the creditors' claim was for 58 cents. The next of kin suffered thirty days to pass after testator's death without obtaining administration and this creditor put in his claim. The intestate's father appeared at the hearing and objected, refusing, however, to accept it himself. Held, that while his refusal was not an effectual renunciation, his appearance after notice was sufficient. The creditor was appointed and proved his claim by his book of accounts and oath.

Administration is granted upon the estate of one who remains absent and unheard of for seven years, but probate proceedings upon the estate of a man who overthrows the presumption of death by his actual presence are void for want of jurisdiction. Thus when a man deposited a sum in a savings bank in 1848, shortly after went to California and remained there until 1860, returning a month after an administrator had been appointed over his estate, the proceedings were invalid and he recovered from the bank the sum paid over to his administrator. (a)

(a) Jochumsen v. Bank, 3 Allen, 87.
The appointment of the administrator is made complete by the approval of the bond required by statute. Public administrators may elect whether to give a separate bond for every estate settled or a general bond for all. Upon the approval of the bond by the probate judge letters of administration issue to the person appointed who proceeds to execute his trust.

Part VI. — Guardian and Ward, Pub. Stats. c. 139

The probate court may appoint guardians to minors, insane persons, spendthrifts and others liable to guardianship. Minors under 14 years may not name their guardians, above 14 years they may select the person but their choice is not necessarily binding upon the court. A court may take the guardianship from the parents if they are unfit to care for the child. A guardian is supposed to possess good business judgment and must be a person not indifferent to the happiness of his ward. The court considers the welfare and permanent good of the child in determining its custody. The court when practicable

ble, gives the guardianship to one whose natural affection for the ward will prompt him to faithfully discharge his duty. A guardian appointed by the laws of Massachusetts is the mere agent of his ward, having an authority not coupled with an interest. He has the custody of his ward and the care and management of his estate and unless discharged continues until the minor attains his majority.

A testamentary guardian for an infant can be appointed only by a will duly executed as provided by statute. The expressed wish of a deceased parent is entitled to great respect but does not control the judge's discretion. The guardian is allowed to settle all accounts of the ward and with the consent of the court to sue for or compound debts due. The probate court may appoint a guardian for insane persons, also for one who through idleness or dissipation exposes himself or his family to want, or renders them public charges. Applications for guardians over a spendthrift or insane person are made either by the friends of the party or the officials of the town or city.

(a) Gnanby v. Amherst, 7 Mass. 6.; Manson v. Felton, 13 Pick. 211.
(b) Wardwell v. Wardwell, 9 Allen, 518.
where he lives. In either case notice not less than 14 days must be given to the supposed insane or spendthrift person and at the time and place named in the citation he may be heard. If after a full hearing, it is shown that a guardian is necessary, the court will appoint a suitable person. From what has been said the two classes of persons seem to be akin but Judge Holmes, in a recent opinion says, "There is no incapacity of spendthrifts at common law nor does the Massachusetts statute so far liken him to an insane person as to create a new capacity apart from guardianship." The guardian has the care and custody of the person of his ward and management of his estate when it appears to the court that the guardianship is no longer necessary the guardian will be discharged.

Persons out of the State.

A guardian may be appointed for a minor, insane person or spendthrift residing out of the state but having property therein upon the application to the court in any county where the estate lies by any person interested.

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(a) O'Donnell V. Smith, 142 Mass. 511.
Married Women.

The recent statutes giving married women the right to hold their separate property free from the control of their husbands renders some provision necessary for the care of the separate property of minor and insane married women. The court may appoint a guardian over such a person as though she were sole, but no guardian can be appointed without notice to the husband, and the application must state particularly the reasons why the application is necessary.

Guardian's Bonds.

All guardians are required to give bonds with sufficient sureties to the judge of the court in such sum as he shall order. The surety or sureties may be admitted from the bond of a testamentary guardian, when the testator so orders. Upon the approval of the bond by the probate judge the guardian receives his letters and proceeds to execute his trust.
Part VII. — Proceedings in Insolvency.


The courts of insolvency of Massachusetts are courts of record and are presided over by the probate judge and register. The courts have original jurisdiction in their respective counties over all cases of insolvency. The judge may in vacation do all official acts not requiring notice to the adverse party. The assignments and certificates must always be worded in full and these together with other books and papers open to the inspection of the public. The expenses of attending the sessions of the courts are paid from the treasury of the Commonwealth. Over courts of insolvency the Supreme Judicial Court has a general supervision making such rules as are necessary to establish uniform proceedings throughout the state. The practice is fully regulated by statute.


If the estate is insolvent the executor or administrator must represent that fact to the probate court
promptly. Delay or neglect may make him personally liable. The representation should set forth the indebtedness of the estate and the assets. If the evidence of insolvency is unsatisfactory the court may appoint commissioners to receive the claims. In Massachusetts, when the estate of a person is insufficient to pay all his debts it must after paying the expenses of the last sickness and funeral, with the charges of administration, be applied as follows: (1) debts entitled to a preference under the laws of the United States, (2) public rates, taxes and excise duties, (3) wages not exceeding $100 due to a clerk or servant, (4) debts due to all other persons. If commissioners are appointed six months after the appointment are allowed for creditors to present and prove their claims. The court may, in all cases, where a just and equitable distribution of the estate requires it, allow further time not to exceed 18 months. The commissioners must notify the creditors of the times and places where their claims can be examined. After the expiration of the time limited for the proof of claims, the commissioners make their returns to the probate court. If the
if the executor or administrator has settled his account the final distribution of the balance in his hands may be ordered after the expiration of thirty days from the return of the commissioners, and the settlement of the estate completed, unless there are debts which could not be proved before the commissioners, or unless an appeal is taken. Should further assets come to the estate the court may, on the application of a creditor, reopen the commission. When an inhabitant of another state or county dies insolvent, leaving an estate to be administered in Massachusetts, the estate is never given to the foreign administrator, until creditors have received their dividends.

The allowances to widows and minor children are liberal irrespective of the claims of creditors. The articles of apparel and ornament of the widow and children of a deceased belong to them and the probate court may allow such parts of the personal estate to the widow and children as he sees fit, not exceeding however, $50 to each child. The use of the house, furniture and provis-

(a) Dawes v. Head, 3 Pick. 128.
ions therein for forty days is permitted. The widow may expend money belonging to her husband's estate which is in her possession, in the purchase of necessaries during that period.

Part VIII. — Equity Jurisdiction of the Probate Court.

Pub. Stats. c. 141.

The probate courts concurrently with the Supreme Judicial Court, have general equity powers in all matters relating to trusts created by will or other written instrument, also having jurisdiction over all matters relating to the termination of trusts under wills, deeds, indentures or other instruments, and of all cases and matters relating to administration of estates of deceased persons or trusts created by will. All matters of trust except those arising under wills, are within the jurisdiction of the probate courts in any jurisdiction or county where the lands lie or where any of the interested parties live. The court that first takes jurisdiction excludes all others from all matters in relation to the trust.

(b) Pub. Stat., 1892, c. 116; 1891, c. 415.
A trustee appointed by the will should ask the court to confirm his appointment. Every trustee must, unless especially exempted, give a bond to the probate judge. But Massachusetts courts have held that trustees of charitable trusts need not give bonds. Domestic safe deposit, loan and trust companies and their capital stock is regarded as security for their proper performance. Trustees are appointed by the court to receive and hold the amount paid for damages where the party in interest is legally incapable of choosing a trustee or the interested parties cannot agree upon a choice.

When it appears that wood or timber standing on lands which belong for life or otherwise to a person other than the owner of the fee, has ceased to improve by growth or ought for any cause to be cut, the probate court may appoint a trustee and authorize him to cut and sell the wood and timber and to hold the proceeds in trust for the benefit of those equitably entitled. When

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(a) Lowell App., 22 Pick. 215; Drury v. Natick, 10 Allen, 169.
(b) Stat. 1888, c. 413; 1890, c. 315.
(c) Pub. Stat. c. 49; 1883, c. 253.
(d) Ibid. c. 126, s. 12.
the sale of any real or personal estate held in trust appears to be necessary, the probate court may, after notice, order such sale and apply the proceeds in such manner as will best effect the objects of the trust. If the executor is authorized to sell land for trust purposes, he does not by renouncing the office of executor lose the power to convey as trustee under the will. Guardians and trustees are allowed such compensation as the court deems reasonable together with their necessary expenses. But a trustee is not allowed in his accounting for the expenses of a suit occasioned through his own fault. When the trustee dies before the object of the trust is accomplished, the court appoints his successor. Every trustee under a written instrument and every trustee appointed by a probate court, may upon his own request resign his trust if it appears proper to the court to allow such resignation. Appeals and petitions for appeal are entered on the docket with cases in equity in the appellate court and have the same rights as such cases.

(a) Clark v. Tainter, 7 Cush, 567.
(b) Bran v. Coates, 117 Mass. 41, Turnbull v. Pomeroy, 140 Mass, 117.
(c) Blake v. Pegram, 109 Mass. 541.
(d) Schouler, Petitioner, 134 Mass. 426.
The probate court in each county has concurrent jurisdiction with the supreme judicial and superior courts of petitions for the partition of lands within the county where the shares or proportions do not appear to be in dispute or uncertain. If the court once assumes jurisdiction it retains it though subsequently the shares are found to be uncertain. Proceedings for partition are commenced by petition signed by one or more of the parties interested. Notice of the petition must be served on all parties interested. If upon the hearing it appears that the petition prayed for should be made the court appoints three or five persons to make the division. It is now provided that only the share of the petitioner should be set off, leaving the residue if necessary subject to a future petition. Property that cannot well be divided may be sold and the proceeds distributed. The partition is made complete by the decree of the court.

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(b) Stat. 1885, c. 293.
A wife is entitled to her dower at common law in the lands of her deceased husband and if her right is not disputed by his heirs or devisees it may be assigned to her in whatever counties the land lies by the probate court in which the estate of the husband is settled. Until dower is assigned to her a widow has no estate in the lands of her deceased husband. A widow is not entitled to dower in addition to the provisions of her husband's will unless such plainly appear by the will to have been the intention of the testator. A widow may make her election to take dower effectual by filing in the probate office her waiver in writing of the testator's provisions made for her. A widow must claim her dower within twenty years of her husband's death. The petition must be presented to the probate court and sets forth the husband's seizin and her claim to dower. If at the hearing it appears that the right of hearing is not disputed the court issues a warrant to three disinterested persons,

(a) Smith v. Shaw, 150 Mass. 297.
(a) Matthews v. Matthews, 141 Mass. 511.
authorizing them to set off the dower. The probate court was not constituted a tribunal to investigate and settle controverted claims to dower, for such cases ample provision is made in the courts of the common law. The assignment of dower is complete when confirmed by the court.

Homestead Estates, Pub. Stats. c. 123.

A homestead in Massachusetts is an estate for the life of the householder and for the subsequent occupation of his widow or any of his minor children. When a widow or minor children are entitled to an estate of homestead, the same may be set off to them in the same way as dower is assigned to a widow. The widow has a homestead estate in addition to her dower. The dower may be assigned to her from the whole estate of her husband and the homestead from the estate remaining after dower is assigned. The widow and guardian of the minor children, under a license from the probate court, may join in a sale of the homestead estate. And the court will apportion the proceeds of the sale among the parties entitled thereto.

(a) Woodward v. Lincoln, 9 Allen, 240.
(b) Silloway v. Brown, 12 Allen, 32.
(c) Cowdrey v. Cowdrey, 131 Mass. 186.
Part XI. -- Adoption of Children and Change of Name.

Pub. Stats. c. 173.

Any person of legal age may petition the probate court in the county of his residence, for leave to adopt as his or her child, some younger person. If the petitioner has a husband or wife living both should join in the petition. The written consent must be obtained when such child is over fourteen. A giving up in writing of a child to any incorporated charitable institution operates as a consent to any adoption approved by the institution. When the written consent of parents or others interested is not submitted to the court with the petition, notice is given to such persons. Notice need not be given to certain persons at all, for example, the father of an illegitimate minor, the written consent of the guardian is sufficient. If the probate court is satisfied that adoption is proper it makes such decree. An adopted child acquires the settlement of his father by adoption.

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(a) Gibson, App., 154 Mass. 378.
(b) Washburn v. White, 140 Mass. 568.
Change of Name.

Applications may be heard and determined in the probate courts of the counties where the parties lived. No change of the lawful name is made unless there is sufficient reason consistent with the public interests. Public notice of the application is given so that any who wish may show cause why the change should not be granted. The court also requires public notice of the change decreed and on return of the proof thereof grants a certificate under the seal of the court, of the name which the party thereafter legally bears. Each probate judge makes an annual return to the secretary of the commonwealth of all changes of name made in his court. The secretary causes them to be printed in the public acts and Resolves.


The probate courts have jurisdiction of the petitions of married women concerning their separate estate and petitions concerning the care and maintenance of minor children where the parents live separately. The probate

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(a) Pub. Stats., c. 147, ss. 31, 32, 36.
court upon the application of a guardian, may compel the parents to contribute to the support and maintenance of the ward.

Collateral Inheritance Tax. Stats. 1891, c. 438

The act imposing taxes upon collateral legacies and successions became a law June 11, 1891. Many states now impose a similar tax, but the Massachusetts statute differs from most of them, following closely the statute of Connecticut, Acts of 1889, c. 180. The tax imposed is five per cent of the value of the property. The Massachusetts statute excludes allestates from first provisions unless the value after the payment of debts, exceeds ten thousand dollars. Legacies and bequests to father, mother, husband, wife and lineal descendants, with legacies to charitable, religious and educational societies are exempt from taxation. The probate court has jurisdiction to hear and determine all questions in relation to the tax, subject to appeals in other cases. The treasurer of the Commonwealth represents the interests of the state in

(a) Stats. 1891, c. 358.
such proceedings. The question as to the constitutionality of the tax arose and was determined in Minot v. Winthrop et al, 38 N.E. Rep. 512, and two other cases decided at the same time, by the Supreme Judicial Court, Oct. 17, 1894. Chief Justice Field in an elaborate opinion, decided that the statute is in effect a tax in the nature of an excise upon the privilege of taking or transmitting property in this way. The privilege of transmitting and receiving property by will or descent on the death of the owner is a "commodity" within the meaning of the Constitution and an excise may be laid upon it. He held that the tax was not so clearly unjust or unequal as to be unconstitutional. Justice Lathrop, dissented as to the meaning of the term "commodity" insisting that the tax was unequal being placed upon few estates compared with the whole number administered. It would seem that Justice Lathrop's views that the valuation of the estates subject to the tax is too high, are not without weight. In other states the value does not exceed one thousand dollars in any case.

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(a) For a discussion of this subject see "The Law and Collateral Inheritance Taxes", DosPasos, 1890.
Part XIII. — Appeals from the Probate Court.

Pub. Stats., c. 156.

The Supreme Judicial Court is the supreme court of probate having appellate jurisdiction of all matters determinable by the probate courts. The many appeals from decrees or orders on petitions of married women for separate support or concerning their separate estate, or other matters contained in Chapter 147 of the Public Statutes led to a change in 1887. These appeals are now (a) taken so far as is practicable to the Superior Court. The language of the statute "a person aggrieved" means when the rights of such persons are in any way affected by the decree. Mere dissatisfaction is not sufficient. Objection to the jurisdiction of the probate court can be (b) taken only by appeal. Notice of the appeal is filed in the registry of probate and the appeal must be entered in the supreme court within thirty days after the act appealed from. The statutes do not require that a bond be given for the prosecution of the appeal. After an appeal is claimed and notice given to the probate court all fur-

(a) Stats. 1887, c. 332.
(b) Cummings v. Hodgdon, 147 Mass. 21.
ther proceedings are stayed until the decision of the supreme court is had. According to the practice in Massachusetts in appeals from probate either allowing or disallowing the will, it is to be heard in the appellate court in the same manner as if first presented for probate in that court. But the appeal never gives jurisdiction to the supreme court to proceed in the settlement of the estate. All judgments handed down must be carried into effect by the probate court which does not lose its jurisdiction by the appeal.

Conclusion.

We have now completed a survey of the probate court from its beginning to the present time. We have seen how the powers of the court have been enlarged by a series of statutes, reaching back more than two hundred years. Jurisdiction has been given it over matters formally within the exclusive cognizance of courts of common law. These various statutes have been passed with the

(a) Brooks v. Barrett, 7 Pick. 94.
(b) Dunham v. Dunham, 15 Gray, 578.
Gale v. Nickerson, 144 Mass. 416.
view of promoting the prompt and economical disposition of matters, some of which, at one time or another, concern every family and estate in the Commonwealth. Thus the probate court, as one branch of the judiciary system, realizes in a high degree the ideal set forth in the preamble to the Massachusetts Constitution, which declares "for impartial interpretation and faithful execution of the laws, that every man may, at all times find his security in them."

Henry B. Montauque.