THE SOURCES AND DEVELOPMENT OF PROBATE LAW*

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I.

INTRODUCTION

Adoption of New Probate Code in Missouri Typifies National Movement for Reform of Probate Law

In 1955 the General Assembly of Missouri, by an almost unanimous vote,[1] adopted an act governing the administration of estates of de-

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1. The overwhelming support of the bill from the time it was introduced until its final adoption was due not alone to the fact that the probate law of the state was mature and the time was ripe for reform, but also was due to the fact that for a long time extensive preparations had been made for a complete overhaul and revision—nearly two years had been spent in the drafting of the bill. In 1898 Judge Woerner, who was one of the ablest probate judges Missouri has ever produced, and who was distinguished and renowned both for his brilliant career as Judge of the Probate Court of the City of St. Louis and his scholarly and profound work *The American Law of Administration*, commented upon the need for a revision of our probate laws in this summary statement:

> The administration code has been refined upon and loaded down with multitudinous and heterogeneous amendments, to which every session of the Legislature has diligently contributed, not always in the spirit of the original act, nor conducive to perspicuity and efficiency of its detail, so that a recodification in the spirit of the codifiers of 1825 would prove a blessing to the courts, the bar and the public.

THE HISTORY OF THE BENCH AND BAR OF MISSOURI 32 (Stewart ed. 1898).

Sporadic attempts to modify and amend portions of the law were made at nearly every subsequent legislative session after the fashion first described by Judge Woerner, but no major attempt at a complete recodification occurred until 1950, when the President of the Missouri Bar appointed a special committee to revise the probate law of the state. After three years of surveying the field of existing probate law, listing its endless imperfections, and planning its reform, the committee convinced the profession and the interested public that adequate revision could come only through a completely new code, and through its able and indefatigable chairman, Judge Leslie A. Welch of the Probate Court of Jackson County, Missouri, the committee persuaded the General Assembly in 1953 to create a Joint Probate Laws Revision Committee. Five members of each of the two houses of the General Assembly were appointed to the committee, and it, assisted by an advisory committee of probate judges and other members of the legal profession, particularly the Revisor of Statutes of Missouri and the Committee on Legislative Research, drafted the Code. During the progress of formulating the Code the committee met regularly, examined and considered the probate codes recently adopted in other states, conferred with lawyers from other states who were leaders in securing probate law reform in those states, inspected probate court records and facilities in some of the principal courts in the state, made extensive use of the *Model Probate Code*, conferred with members of the bench and bar in different parts of the state, completed a draft of a new probate code, and caused it to be introduced in both houses of the General Assembly early in 1955. During the progress of the work of the Joint Probate Laws Revision Committee and the earlier work of the committee of the Missouri Bar, the Probate Judges Association supported and encouraged the movement and

ceased persons and of persons under legal disability.[2] The act provided for the repeal of existing provisions of the statutes covering the same field,[3] some of the essential parts of which had been in effect for almost a century and a half,[4] and for the enactment of a new code governing administration and procedure in probate courts. It is entitled "The Probate Code of 1955."[5] The new Probate Code has been interwoven into the permanent fabric of Missouri statutory law and comprises chapters 472, containing General Provisions; 473, containing provisions pertaining to the Administration of Decedents' Estates; 474, containing provisions pertaining to Intestate Succession and Wills; and 475, pertaining to Guardianship.[6] A large part of the subject matter of the provisions repealed by the act, some of which was in the precise language of the former statutes, was re-enacted as a part of the new Code.[7] But the new act marks the progress in Missouri of current attempts to adapt the entire body of procedural law to the conditions of the times,[8] and it typifies a movement in America for the codification of probate law[9] which has already extended to many of

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discussed its progress at its regular meetings. While the bill was under consideration by the General Assembly, it was studied critically and constructively by lawyers of great ability and skill, and a large number of amendments were adopted perfecting the Code and increasing its merit and desirability. After the adoption of the Code by the Legislature, it was approved by the Governor on July 14, 1955, and became effective January 1, 1956. The rare harmonious accord the Code received in the General Assembly represented a universal conviction that probate law reform was indispensable and a faith that the proposed Code was the farthest advance which we are now prepared to make in a reform program.

2. Mo. Laws 1955, at 385.

3. *Id.* at 390.

4. On October 4, 1804, an act was passed by the Territorial Legislature creating probate courts for what was then the Territory of Missouri. 1 Mo. TERR. LAWS 57 (1842). On July 4, 1807, there was enacted an act governing "Wills, Descent and Distribution" for the Missouri Territory. 1 *id.* at 125-39. Some of the principal provisions of the last of these acts continued in effect and constituted a part of our statutory probate law when the Probate Code of 1955 was adopted.

5. See Mo. Laws 1955, at 385.

6. MO. REV. STAT. §§ 472.010-.280, 473.010-.357, 473.360-.767, 474.010-.530, 475.010-.480 (Supp. 1955).

7. For a summary of the major changes in the statutory probate law made by the new Code, see the introductory article by Summers, Revisor of Statutes of Missouri. 25 MO. ANN. STAT. v-xxi (Vernon 1956). *Compare* the former provisions of statutory probate law, 26A *id.* at 269-459, *with* the provisions of the Probate Code, see note 6 *supra.*

8. In 1943 Missouri adopted a new Code of Civil Procedure and a new Corporation Code. In 1945 a new constitution was adopted and, in the course of implementing it and making effective the changes it wrought, Missouri has, following the trend that characterizes law reform throughout the nation, codified the various classifications of our procedural law.

9. The term "probate law" has not yet made its appearance in legal dictionaries, encyclopaedias, statutes, or digests. It is used here to refer to the law applied by probate courts in administering estates of deceased persons and persons under legal disability.

the states,[10] and which has the support and cooperation of the organized profession.[11]

Concept of Reform by Codification Particularly Applicable to Probate Law

The concept of law reform, through codification as applied to civil procedure in trial courts of general jurisdiction for more than a century[12] and to many other classifications of the law in more recent years,[13] is particularly adaptable to the law and procedure in our probate courts.[14] Much of the vast body of the law of administration as it is known in America,[15] though among the most ancient of all of our

10. Between 1929 and 1946 Ohio, California, Florida, Minnesota, Kansas, Illinois, Michigan, Nevada, and New York adopted new probate codes. MODEL PROBATE CODE 9 (1946). Since the publication of the *Model Probate Code*, Arkansas (Ark. Acts 1947, No. 140), Indiana (Ind. Acts 1953, c. 112), Missouri (Mo. Laws 1955, at 385), Pennsylvania (PA. STAT. ANN. tit. 20, c. 2 (Purdon 1950)), and Texas (Texas Laws 1955, c. 55) have modified their probate laws.

11. In 1939 and 1940 there appeared in the *Journal of the American Judicature Society* a series of articles written by Professor Thomas E. Atkinson on probate law and procedure, which was concluded by an article entitled *Wanted—A Model Probate Code*, 23 J. AM. JUD. SOC'Y 183 (1940). Following the publication of these articles, the Section of Real Property, Probate, and Trust Law of the American Bar Association, through a special committee and in cooperation with the research staff of the University of Michigan Law School, prepared and submitted to the profession what was called a *Model Probate Code*. This proposed probate code was published under the auspices of the University of Michigan Law School as one of the Michigan Legal Studies. Professor Lewis M. Simes of the University of Michigan Law School was the Director of Legal Research for the project. The officers and members of the Section of Real Property, Probate, and Trust Law of the American Bar Association have either taken an active part, or furnished assistance in states where codification has been attempted or completed.

12. Perhaps the most authoritative and certainly the most scholarly single treatise on the causes for and the evolution of reform in pleading through codification in England and in America is HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND (1897). But the concept of such reform, the account of its progress, the impact of its effect upon the whole legal system in this country and in the world, and the enduring influence of its underlying purpose are brilliantly and profoundly set forth in the collection of papers of eminent and distinguished legal scholars, judges, and lawyers under the title of *Field Centenary Essays* which were produced and read at the New York University Law School centennial celebration of the adoption of the original Code of Civil Procedure in New York and published in 1949 in tribute to the illustrious and renowned champion of that concept, David Dudley Field. Those interested in the possibilities of legal reform in probate law will find much to sustain their faith and to increase their knowledge in these excellent papers.

13. There is scarcely a field of procedural law in which some attempt at reform by codification has not been made. The wide diversity in the classifications of the law where codification has occurred is indicated by the fact that we have criminal codes, evidence codes, a Uniform Commercial Code, the Federal Rules of Civil Procedure, the Federal Administrative Procedure Act, the Internal Revenue Code, and an interminable list of legislative enactments, each of which is termed a "code" of some subject of the law.

14. Atkinson, *Codification of Probate Law*, in FIELD CENTENARY ESSAYS 177 (1949) (hereinafter cited as Atkinson).

15. When Judge Woerner wrote his celebrated treatise on probate law, he called it *The American Law of Administration*. Because of the emergence and rapid development of administrative law since that time, it is doubtful if he would have chosen the same title for his great work had he been writing today.

law,[16] is still set forth and discussed under many widely segregated and unrelated subjects.[17] Although the nations of antiquity as well as those of our own time have caused the processes of administering estates to be exercised through various courts vested with jurisdiction of other justiciable subject matter,[18] in most of the American states we have created and maintained as a permanent part of our judicial structure a separate, independent system of courts in which we have vested exclusive jurisdiction of probate business and power to administer estates.[19] The creation of this distinctive and independent classification of courts in America was a natural response by a free people to a genuine instinct for adapting their government and their institutions to the public needs;[20] and within the limits of jurisdiction vested in them, probate courts are a part of the American judiciary the same as any other courts of general or plenary power.[21] It was inevitable that the law and procedure for courts of such standing and importance in our judicial system should ultimately receive the attention of the law reform movement.

Emphasis on Codification of Civil Procedure Delayed Reform of Probate Law

Absence of national uniformity in the character of these courts,[22] the great diversity of powers and jurisdiction assigned to them,[23] and the unsatisfactory organization of judicial control of probate jurisdiction and procedure in the various states,[24] have combined to delay reform and codification. For many generations probate courts were completely overshadowed as to their standing and comparative importance by the trial courts of general jurisdiction,[25] and the attempt

16. ATKINSON, WILLS § 2 (2d ed. 1953); 2 BLACKSTONE, COMMENTARIES *200-40; MAINE, ANCIENT LAW 101-78 (Everyman's Library ed. 1917); 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 1-24 (2d ed. 1909) (hereinafter cited as POLLOCK & MAITLAND); 1 WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 22, 84-93 (1928).

17. In the encyclopaedias, such as *American Jurisprudence, Corpus Juris,* and *Corpus Juris Secundum,* and in the digests, probate law is not discussed as a united and harmonious classification of the law, but it is discussed under headings such as Administrators and Executors, Descent and Distribution, Wills, and Guardian and Ward.

18. 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION §§ 137-42 (2d ed. 1899) (hereinafter cited as WOERNER).

19. POUND, ORGANIZATION OF COURTS 136-40, 158-59, 250-51 (1940); POUND, THE FORMATIVE ERA OF AMERICAN LAW 82-84 (1938); 1 WOERNER § 142.

20. POUND, ORGANIZATION OF COURTS 136 (1940); POUND, THE SPIRIT OF THE COMMON LAW 32-59, 112-38 (1921); 1 WOERNER § 141.

21. Jones v. Peterson, 335 Mo. 242, 257, 72 S.W.2d 76, 85 (1934); Robbins v. Boulware, 190 Mo. 33, 42-44, 88 S.W. 674, 676 (1905); Johnson v. Beazley, 65 Mo. 250, 256 (1877); Miller v. Iron County, 29 Mo. 122, 123 (1859).

22. POUND, ORGANIZATION OF COURTS 140 (1940); Simes & Basye, *The Organization of the Probate Court in America,* 42 MICH. L. REV. 965, 43 MICH. L. REV. 113 (1944) (reprinted in MODEL PROBATE CODE 385 (1946), hereinafter cited to the *Code* as Simes & Basye).

23. POUND, ORGANIZATION OF COURTS 78-79 (1940); Simes & Basye 401-05.

24. POUND, ORGANIZATION OF COURTS 140 (1940).

25. *Id.* at 136-40, 178-81, 250; 1 WOERNER § 143.

at codification of the law in use in these courts, which originated with the first great American advocate of codification on a national scale,[26] remained dormant for many years while the codification of the general civil code was, against steadfast opposition, scoring a permanent and complete triumph.[27]

Failure of Probate Practice to Advance Tradition that Law Is an Adversary Business also Delayed Reform

Major differences in the type of practice prevailing in probate courts as compared with that in trial courts of general jurisdiction also contributed to the postponement of probate reform. Lawyers are trained and work in the tradition that the law is an adversary business.[28] The trial courts of general jurisdiction which consider and determine issues and rights are the forums in which adversaries in the law appear and strive mightily. In the development of the legal system in America, trials in these courts have not only attracted sensational public interest and attention,[29] but they have also engaged the energies of the leaders of the bar in every community who were possessed of or who developed the highest professional talent and skill.[30] Procedure in these courts is of greater consequence than in probate courts and the regulations which govern it are supereminent with those whose chief professional concern is to maintain their positions on the field of legal combat. It was never a problem to obtain the interest of the entire profession and the active support of some of the ablest lawyers for codes of civil procedure, for these were the implements by which the most cherished traditions of the profession were upheld.

For the most part, the business transacted in probate courts is not of an adversary nature. The parties who appear there often come in sorrow and with a desire to respect the wishes of the departed or the welfare of those under legal disability. They are usually not in the mood for contention and combat. Procedure in probate courts in-

26. Although Livingston is noted for his Louisiana Penal Code in 1824 and as a figure of importance in law reform, the highest honor in leadership in the movement for reform and the greatest distinction as a champion of codification in America in the nineteenth century was won by David Dudley Field. See particularly Pound, *David Dudley Field: An Appraisal*, in FIELD CENTENARY ESSAYS 3 (1949); Reppy, *The Field Codification Concept*, in *id.* at 17.

27. The struggle for the adoption and retention of the Field codes engaged the attention of the leading members of the American Bar and the energies and activities of some of its ablest and most eminent leaders for almost half a century. For comments on that memorable contest between the giants of the profession in that period, see CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 263-319 (1907); HEPBURN, *op. cit. supra* note 12; Reppy, *supra* note 26, at 44-52.

28. CURTIS, IT'S YOUR LAW 1-5 (1954); FRANK, COURTS ON TRIAL 5-9, 80-102 (1949).

29. FRANK, *op. cit. supra* note 28, at 80-102; POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 130-242 (1949); WARREN, HISTORY OF THE AMERICAN BAR 39-445 (1911) (hereinafter cited as WARREN).

30. WARREN 39-445; STRYKER, THE ART OF ADVOCACY 155-94 (1954).

volves conferences, direction and supervision of business and administrative activities, detail and accounting, and the observance and application of the law. Ordinarily, that procedure is simple, positive, but uncontentious. The law pertains to inheritance, descent, wills, and the method of effecting intestate or testamentary succession or handling the business of those who are not legally competent to handle it themselves. In most instances it can be determined and applied informally and without the necessity of a heated trial. Environment in probate courts is usually characterized by delicateness of attention to the rights and sympathetic consideration of the feelings of the bereaved and of the unfortunate or legally incompetent. In those instances where controversial business arises in probate courts, the ultimate trial of the issues is frequently reserved for courts of general jurisdiction to which each case may go on appeal after what may be only a perfunctory hearing in the probate court. For the lawyer who is most interested in and familiar with trial court procedure and who considers the practice in probate courts inharmonious with the tradition that the law is an adversary business, there is little interest in a movement for the reform of probate law and procedure. At least, there has not been the broad professional interest or the universal feeling of urgency for codification of the probate law as there was for the codification of civil procedure. And, even though the codification of the probate law was a part of the Field plan for a complete program of law reform,[31] the movement to promote it never assumed anything like a national scope until recent years.[32]

Current Attempts to Codify Probate Law Are Through the Historical Approach

Attempts through a code to bring together, unify, and harmonize by re-arranging and restating related portions of existing probate law, eliminating its incongruous and obsolescent provisions, and adapting it to present day conditions are in conformity with the Field technique of codification through the historical approach.[33] These attempts, coupled with the strengthening of the probate courts which are to apply the law, by clarifying and enlarging their functions and powers, represent the achievements of reform as a result of experience.[34] The entire process is nothing more than the practical application of the celebrated Holmes doctrine that the life of the law is experience and

31. Atkinson 188-90, 203.

32. There were no significant developments from the Field suggestions for incorporating in his codes provisions pertaining to probate law. *Id.* at 190. The authors of the *Model Probate Code* make no reference to the Field provisions concerning probate law, but, as Professor Atkinson observes, we are indebted to Field for the general idea of codification. *Id.* at 203.

33. Reppy, *supra* note 26, at 29-30.

34. Atkinson 178-203; Simes & Basye 385.

that in order to know what the law is we must learn from history what the law has been.[35]

Attention to the historic development of probate courts and probate law was not neglected in the process of formulating the Probate Code in Missouri, nor in that of acquainting the profession with it prior to, in the course of, and since its adoption. The importance of the historical aspects of the Code as a whole, and of each section of it as it appears in our statutes, is appropriately and helpfully emphasized by the publication with it of an article tracing its development,[36] prepared by the Revisor of Statutes for Missouri, to whom is due much of the credit for its draftsmanship,[37] and of an article on the closely related subject of Trusts and Trustees[38] prepared by an eminent legal scholar, author, and member of the Missouri Bar.[39] The historical approach to the whole probate scene is also further promoted by the policy of the publisher of the Annotated Statutes to subjoin to each of the principal sections of the Code a historic account of the origin and development of its provisions, together with occasional comments indicating consideration given to this development in the formulation of the new Code.[40]

Re-examination of Origin and Historic Evolution of Probate Law Should Assist in Successful Operation of Code

A re-examination of the sources from which our probate law was derived, of the courts, and of the procedure through which it has been applied, and of the occasional historic readaptation of its essential principles and provisions as they are reproduced in the new Probate Code of Missouri, should not only further the historic approach to reform through codification, but should also assist us to arrive at a more complete and sympathetic understanding of the Code and aid us to make it more effective and successful.

Forty years after the Field Code of Civil Procedure was adopted in New York, a distinguished member of the American Bar wrote in support of it that "when a code comes, it always comes to stay."[41] But nearly ten years later, and after that Code had been in effect for almost half a century and after it had been adopted and used in a large number of the other states, a New York lawyer was reported to have said of the Code: "The reformed procedure, instead of simplifying practice, has in the long run made it more technical."[42] These irrecon-

35. HOLMES, THE COMMON LAW 1 (1881).
36. 25 MO. ANN. STAT. v-xxi (Vernon 1956).
37. Edward D. Summers, Revisor of Statutes for Missouri.
38. 25 MO. ANN. STAT. 1-19 (Vernon 1956).
39. McCune Gill, President, Title Insurance Corporation of St. Louis.
40. For illustrations of this excellent plan, see annotations to MO. ANN. STAT. § 472.020 (Vernon 1956).
41. Dillon, *A Century of American Law*, 22 AM. L. REV. 30, 48 (1888).
42. Quoted in HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND xiii (1897).

cilable points of view, the one that the Code was a permanent achievement in procedural experience, and the other that it represented retrogression instead of reform, led to Hepburn's epochal disquisition on its historical development. If, as Hepburn found, the practicing lawyer in a given state, under the pressure of urgent daily necessities of getting results in the transaction of professional business, looks only at the letter of the law which he seeks to apply, without considering the causes which produced it, and if he disregards its historic development and broad purposes in relationship to the experience and the similar law of other states[43]—the tendency for which is probably more pronounced than in Hepburn's time—we are in danger of losing the full fruits of probate law reform and of permitting probate practice to degenerate into a dull routine of technical construction and rigid application of the provisions of the new Code.

It is with the idea that the profession has no such narrow outlook upon practice under the new Code that the examination of some of its historical significance is here undertaken. Extensive studies of a far more ambitious nature have already been made in the background of probate law development.[44] It shall be our purpose further in this article to look at the scene from the standpoint of probate history and experience in Missouri in its relation with the whole movement for the codification and reform of probate law.

II.

THE PLACE OF THE PROBATE COURT IN THE DEVELOPMENT OF PROBATE LAW

Legal Systems and Courts

The great legal systems of the world have achieved their pre-eminence, not alone by the excellence or superiority of their laws, but also by the majesty of their courts and the high sense of justice of their illustrious judges. In his celebrated introduction to Stephen's great *Treatise on the Principles of Pleading*,[45] Professor Tyler shows that among the nations of the world only two great legal systems have evolved, the one being that of the civil law of ancient Rome and the other that of the common law of England. In tracing the history of these two legal systems, he showed how each emerged and expanded through the character and judicial wisdom of the great judges who served the courts of the nations where these legal systems prevailed and who, by their commentaries on the law and systems of administer-

43. *Id.* at ix-xvi.

44. Atkinson 177; Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943); Simes & Basye 385.

45. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING 1-23 (3d Am. ed. from 2d London ed. 1875).

ing justice, nationalized the law and made its influence effective both in the nations where the systems prevailed and in that part of the world to which these nations extended their dominion.[46]

The importance of the role of the courts, through the handiwork and achievements of the judges who composed them, in unifying and developing the law under these great legal systems is characteristic of the development of the law in the other legal systems of the world.[47] We in America have created our own legal system based largely upon the common law of England, with an organization of courts originally including some similar in design and purpose to those under which the common law developed in England. There is such similarity and cohesion between the two systems that they are often referred to together as the Anglo-American legal system. The judges and the courts in England and in America have been largely responsible for the formulation and development of the common law and for the influence it has exerted in the Anglo-American world. In England the common law is that which is associated with the names of its great champions on the courts: Bracton, Littleton, Fortescue, and Coke.[48] In America it is that associated with the names of our great judges, Marshall, Story, and Kent.[49] For the molding and solidifying of a body or classification of law, experience in the development of great legal systems reveals that one of the chief factors is an organized court composed of competent judges, dispensing justice according to the needs of the people.[50]

The American Probate Court: An Innovation

The movement in this country to converge the various streams of the probate law and to systematize it into a harmonious body or code is consistent with our legal and judicial structure. For, as a part of our judicial system, our probate courts are the logical instrumentalities for the more effective use and application of a code of the probate law. The American probate court is an innovation in the legal systems of the world. It has no precise counterpart in any other nation. Among the various legal systems that have operated at different periods in the world's history, apparently none ever created or maintained a separate organization of courts for the sole purpose of handling the administration of estates of deceased persons and persons

46. *Ibid.*

47. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (Library ed. 1936). In the legal systems which Professor Wigmore studied, it will be observed that a prominent place was assigned by him to the work of the great judges of the courts where these legal systems prevailed—particularly in the Hebrew, Roman, Mohammedan, and Anglican systems.

48. *Id.* at 1053-110.

49. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); POUND, THE SPIRIT OF THE COMMON LAW (1921).

50. POUND, ORGANIZATION OF COURTS v-ix (1940).

under legal disability. The position of the American probate court is, therefore, unique in legal history and it represents a judicial development that is distinctly American.[51]

An adequate history of the origin and early evolution of the probate courts in America has yet to be written. Large areas of information concerning the creation of these courts in the various colonies and states have been probed, and exceedingly helpful references to early constitutional and statutory provisions have been catalogued. The courts as they have changed through the years have been classified and their weaknesses, as well as their enduring qualifications, have been scholarly discussed.[52] But the history of the origin and evolution of these courts as a part of the development of our complete judicial structure and their place in our legal system cannot be adequately presented without considering the social and economic history of the American people.[53]

The task of preparing a history of this nature awaits the hand of an American Blackstone, Reeves, or Holdsworth, or the genius of collaborators like Pollock and Maitland.[54] Pending the appearance of such a monumental work, we may sketch some of the incidents connected with the rise and progress of probate courts in America and note some of the results that have occurred in the development of probate law through the operation of these courts.[55]

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51. 1 WOERNER §§ 141-42; 1 LIMBAUGH, MISSOURI PRACTICE 570-71 (1935).

52. POUND, ORGANIZATION OF COURTS (1940); Atkinson 177; Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943); Simes & Basye.

53. POUND, ORGANIZATION OF COURTS vi (1940).

54. Dean Pound, who has often urged the undertaking of such a task, as is illustrated in the preface to ORGANIZATION OF COURTS vi (1940), has made momentous contributions to such "monumental history of American law," as he conceives it, through his preliminary survey of the American court structure in his text last cited, and in many of his other great works such as *The Spirit of the Common Law* and *The Formative Era of American Law*. But if the whole task could be done it could accomplish for the profession and for our legal system what a Bracton or a Coke did for the profession and for the Anglican legal system centuries ago, and it could give to the laity such an understanding of and enthusiasm for our system as did the work of Fortescue for his time and as did the *Commentaries* of Blackstone for the profession and the laity on both sides of the Atlantic.

55. In the progress of codification of the probate law, much has already been done in the field of historical research. Hepburn complained nearly fifty years after the birth of the Code of Civil Procedure: "In these days of multitudinous law books it is strange that so little attention has been given to the historical side of the codes." HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND ix (1897). But undergirding and supporting the new probate codes we have the results of extensive studies. POUND, ORGANIZATION OF COURTS (1940); WOERNER; Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943); Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUD. SOC'Y 183 (1940); Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges*, 23 J. AM. JUD. SOC'Y 93 (1939); Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 J. AM. JUD. SOC'Y 137 (1939); Simes & Basye and numerous other texts on wills and other branches of the probate law.

The Seeds from Which It Emerged

In searching for the origin of the idea that there should be a separate court in which all business pertaining to the administration of estates is transacted, we naturally turn to England, from which so much of our legal system was derived. To understand how the administration of estates was handled in the different periods of English history, it is necessary to know something of the kinds of courts that existed in those periods and the functions each exercised.

There were no probate courts in the English congeries of tribunals prior to or at the time of the colonization of America. Administration under the English system had followed a course through centuries of experience entirely different from the course it has taken here. Originally, the major part of what we now are familiar with as a probate proceeding was apparenty carried on in the county courts, which were a classification of the King's courts of common law.[56] The age when this practice prevailed, when the county courts are said to have exercised jurisdiction of probate proceedings, is indefinite.[57] The county court is said to have originated in the reign of Alfred the Great, and was created in fulfillment of his policy to bring justice to every man's door. Out of the county court and for the same purpose was derived the hundred court.[58]

In later years, although the administration of the estate of a deceased person was considered a proceeding more naturally temporal than spiritual, jurisdiction of such proceedings was, by favor of the Crown, transferred to the church.[59] Information as to the time when such jurisdiction was transferred is, as has been observed by authorities on the history of the English law, indefinite and scanty, but it probably occurred during and as an incident of the struggle for the separation of the church and state.[60] In the course of time a large part of the jurisdiction of the proceedings incident to testamentary and intestate succession became vested in the ecclesiastical courts.[61] But the jurisdiction of these courts over administration proceedings prior to the colonization of America was far more restricted than is

56. 3 BLACKSTONE, COMMENTARIES *95.

57. Pollock and Maitland refer to the county court as an Anglo-Saxon court of public justice. 1 POLLOCK & MAITLAND 42-43. The nature and business of the county court is discussed in 1 *id.* at 535-56.

58. 3 BLACKSTONE, COMMENTARIES *27-29; 1 POLLOCK & MAITLAND 42-43, 88, 529-30.

59. 3 BLACKSTONE, COMMENTARIES *95.

60. 1 POLLOCK & MAITLAND 2-4, 11, 18, 128, 439-57.

61. At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any antient writer . . . . We find it indeed frequently asserted in our common law books, that it is but of *late years* that the church hath had the probate of wills. But this must only be understood to mean, that it had not always had this prerogative, for certainly it is of very high antiquity.

3 BLACKSTONE, COMMENTARIES *96.

the jurisdiction of our probate courts today, and, along with the power they exercised over probate proceedings, ecclesiastical courts had jurisdiction over a large number of other things.[62]

Jurisdiction over other portions of what we designate today as probate matters and over which ecclesiastical courts had no power was vested in both the common-law courts and in the courts of chancery.[63] Both of these courts are of ancient origin in the English judicial system, and each exercises jurisdiction of wide diversity.[64] Jurisdiction which these two classifications of courts held over probate business arose largely out of the ancient distinction between real estate and personal property. Under the feudal system in England, the King's courts would not yield jurisdiction over real property and the power to determine the right of succession to lands.[65] Nor would these courts yield to the ecclesiastical courts the power to admit to probate wills which devised lands. And, while ecclesiastical courts generally had jurisdiction over the personal property of a decedent, chancery courts also came to assume concurrent jurisdiction of administration proceedings pertaining to personalty and, in some cases, proceedings pertaining even to real property.[66]

Thus, at the time of the establishment of the first permanent English colonies in America, there existed under the English system a multitude of courts, many of which had been established under the pressure of circumstances and in satisfaction of the demand that there be a separate court to take care of every situation, but no separate court confined in its jurisdiction alone to probate matters had been created.[67] Among the courts existing under the three classifications of courts which handled administration proceedings and other proceedings now considered as a part of the process of administration, and with which the first English colonists in America were familiar, were the county courts, the courts of common pleas, the chancery courts, the ordinary courts, and the courts of quarter sessions.[68] The term "ordinary" was frequently used to describe the official granting letters, and the distinction between the terms "executor" and "administrator" and between their duties and responsibilities was well

62. 2 *id.* at *489-520; 1 POLLOCK & MAITLAND 104-12; 2 *id.* at 237-361.
63. 3 BLACKSTONE, COMMENTARIES *46-48.
64. 3 *id.* at *46-55; 1 POLLOCK & MAITLAND 172-87.
65. 2 POLLOCK & MAITLAND 180-82, 257-94.
66. For a more complete consideration of the probate jurisdiction of each of these courts, see 2 BLACKSTONE, COMMENTARIES *489-520; 2 POLLOCK & MAITLAND 237-361; 3 REEVES, HISTORY OF THE ENGLISH LAW 70-118 (Finlason ed. 1869); Atkinson 178-84; Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); Simes & Basye 386-95.
67. POUND, ORGANIZATION OF COURTS 5 (1940).
68. 3 BLACKSTONE, COMMENTARIES *1-49; POUND, ORGANIZATION OF COURTS 5 (1940).

known.[69] Not only had no court been made a part of the English system for the purpose of handling probate business, but the term "probate," except as originally used in connection with proof of wills, had not yet come into common use.[70] In fact, as late as 1880, the term was not used by a famous commentator on the procedure in the various courts in England, except in the strict sense in which it was originally applied.[71] The process of administration under the English court system, where no single court controlled, furnished the seeds but not the planting of the principle that probate law and the process of administering estates called for the creation of a new court. A new country and the spirit of a people unfettered by ancient institutions, customs, and practices furnished the place and the occasion for such planting.[72]

The Soil in Which It Took Root

Apparently the concept of a separate court for probate business did not originate with the first English colonists in America. Among them there were no lawyers,[73] or at least none who practiced their profession,[74] and for some time there were no independent courts.[75] When courts were established they were not presided over by men who were lawyers or trained in the law,[76] but by clergymen,[77] businessmen,[78] physicians,[79] and men of other occupations.[80] It was not only a society of law without lawyers,[81] but a people with a fixed

69. 2 BLACKSTONE, COMMENTARIES *506-07; 2 POLLOCK & MAITLAND 332-34, 340-46, 358-60.

70. See BLACKSTONE, COMMENTARIES; POLLOCK & MAITLAND; REEVES, HISTORY OF THE ENGLISH LAW (Finlason ed. 1869).

71. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND (1880).

72. 1 WOERNER §§ 141-42.

73. See WARREN 59, in which the author notes that, of the sixty-five men who came to America on the Mayflower and founded the Plymouth Colony in 1620, not one was a lawyer. See also POUND, ORGANIZATION OF COURTS 27 (1940). In WARREN 4, the author states that Virginia produced no trained bar for nearly a hundred years, and in 1 BEARD, THE RISE OF AMERICAN CIVILIZATION 100-01 (1927), it is stated that in the founding years in Maryland, thanks were rendered that "there were no lawyers in that colony and no business to occupy such factious members of a community."

74. There was no practicing lawyer among those who founded the Massachusetts Bay Colony, although two founders had been trained at the Inner Temple and some of the others had a limited knowledge of the law. POUND, ORGANIZATION OF COURTS 27 (1940); WARREN 59.

75. "In many Colonies it was not until half a century after settlement that separate and independent courts were instituted." WARREN 3.

76. "In all the Colonies, the courts were composed of laymen, with the possible exception of the Chief Justice. It was not until the era of the War of the Revolution that it was deemed necessary, or even advisable, to have judges learned in the law." *Ibid.* See also POUND, ORGANIZATION OF COURTS 26-57 (1940); POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 132-33 (1953).

77. *Ibid.*; WARREN 75.

78. WARREN 75.

79. *Ibid.*

80. *Ibid.*

81. POUND, ORGANIZATION OF COURTS 27 (1940); WARREN 3-18.

aversion for lawyers.[82] Among some of the colonial settlements there existed an antipathy for the law and the courts in the country from which they had come.[83] Among others there was a faith that, should the enactment of law become necessary, it should follow the course of the common law of the homeland.[84] There was no need for the establishment of courts for continuous business, since the occasions for the determination of justiciable issues were infrequent.[85] There was no settled notion that in matters of government and law there should be a separation of powers, but among the first institutions of government and law established among the colonial settlements the same agencies acted both as legislative bodies and as judicial tribunals.[86] There were practically no law books in the land,[87] and when courts, or bodies of men vested with legislative and judicial power, were called upon to enact laws or render judicial decisions in some of the colonies they sought to follow the laws of God rather than the common law of the motherland.[88] They lived the communal life amid constant danger of extinction at the hand of the native Indian population.[89] For a pioneer people thus engaged, they avoided as much as possible all connection with the law and all persons seeking to pursue the practice of the profession of the law.[90] The experience of many of them with the law and the courts in their homeland had been unsatisfactory, and in their new home they had a desire to be let alone so that they could handle their own affairs without the interference of law or lawyers.[91]

Little or nothing appears in colonial history to support the idea that, in the earlier years, when the feeling against law and lawyers was so pronounced, there was any popular demand for the creation of a separate probate court. Among the first judicial organizations, or organizations for legislative and judicial purposes, there appears no record of an independent court for administering estates. Probate business was first assigned, as it had been in England, to courts or other agencies established for other purposes. Apparently, the first

82. For the lay opinion, see 1 BEARD, THE RISE OF AMERICAN CIVILIZATION 100-01 (1927); BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 140-41, 145-46 (1950); MILLER, ORIGINS OF THE AMERICAN REVOLUTION 56 (1943). For the professional opinion, see POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 130-44 (1953); WARREN 3-143.

83. WARREN 10-16, 20-26, 60, 101-03.

84. *Id.* at 39-58, 90-91.

85. *Id.* at 3-18.

86. POUND, ORGANIZATION OF COURTS 56-57 (1940); WARREN 61-143.

87. WARREN 19-38.

88. *Id.* at 60-71.

89. 1 BEARD, THE RISE OF AMERICAN CIVILIZATION 33-227 (1939); TURNER, THE FRONTIER IN AMERICAN HISTORY 1-125 (1920).

90. 1 BEARD, THE RISE OF AMERICAN CIVILIZATION 33-188 (1939); 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 1-68 (1919); BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 3-62 (1954); 1 RANDALL, LIFE OF JEFFERSON 1-35 (1858).

91. WARREN 3-18, 39-187.

statutory enactment relative to probate business in Massachusetts was an act adopted in 1639—nearly two decades after the landing at Plymouth. That statute vested probate jurisdiction in the county courts."[92] The other New England colonies of Connecticut, Rhode Island, New Hampshire, and Maine shaped their first judicial organizations after those of Massachusetts.[93] In New York and New Jersey the first courts established differed in some degree, as did those in Pennsylvania, Maryland, Virginia, and the Carolinas.[94] But all these early judicial bodies were of a simple and elementary nature, and it appears that the transaction of probate business was left to the county or magistrate or inferior courts which also had other judicial powers.

It was not until after the population in the colonies became more aware of the necessity of creating more stable and permanent institutions of government and law, and after the appearance of trained lawyers among them to replace those who had brought so much disrepute to the profession, that courts of a more permanent nature were established.[95] The rise of commerce, the expansion of business, the appearance of a landed aristocracy and a wealthy mercantile class all brought conflicts of interest which called for a competent and stabilized judiciary. In the process of establishing and vesting judicial power in courts adequate to meet the requirements of active and growing communities, the problem of probate jurisdiction had to be faced. The distribution of the process of administration among several courts under the English system and the jealous regard of property rights and control of descent by courts other than those which had the responsibility for conducting administration were inharmonious with the independent and republican spirit of the colonial population. A more simple and more reasonable and efficient method of handling probate business was demanded, and the idea of a separate probate court with sufficient power to handle such business found its way into colonial judicial thinking.

There was something in the colonial spirit and habits that nurtured similar ideas in different communities and brought parallel developments among people who had little intercommunication.[96] This common instinct for creating similar institutions of government and law led to the establishment of separate probate courts in the colonial judicial system. In the beginning of the eighteenth century, if not before, separate courts for administering estates were established in the oldest colonies. In the beginning, these courts, in some instances,

92. POUND, ORGANIZATION OF COURTS 30 (1940).
93. *Id.* at 33-36.
94. *Id.* at 36-57.
95. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 130-74 (1953); POUND, ORGANIZATION OF COURTS 58-90 (1940); WARREN 16-18, 39-208.
96. WARREN 3.

were vested with power to do other things outside the probate field, but irrespective of this separate courts were established and vested primarily with jurisdiction to handle probate business in one colony after another.[97]

The Forms in Which It Grew

Although the idea of the appropriateness of a separate probate court came to be accepted in the colonies prior to the Revolution, the court itself is known by different names, and it grew into different forms in the various colonies and states. In Massachusetts it has been known from the beginning as the probate court. Many of the other states refer to it by the same name. In Delaware, Maryland, New Jersey, and Pennsylvania it is called the orphan's court. At different times it has been designated in different colonies and states as the ordinary, county, surrogate, prerogative, orphan's, or probate court.[98]

Jurisdiction of probate business has not always been assigned uniformly to courts primarily vested with probate powers. In many of the states, the courts exercising general probate jurisdiction have exclusive power over most of the usual proceedings in the administration of estates of decedents and persons under legal disability, though they have inferior attributes in relation with other courts. In other states jurisdiction of probate business is vested in courts having additional general jurisdiction. In others, general probate jurisdiction is vested in separate courts which occupy the same status in the state court system as other courts of general jurisdiction. In others, probate jurisdiction is assigned to chancery courts.[99]

The jurisdiction of probate courts has not always been confined strictly to probate business. In some cases probate courts have been given jurisdiction of civil cases involving small amounts. They have also had in some states jurisdiction of criminal cases involving minor offenses. In some states they have jurisdiction to partition property belonging to heirs and to decree specific performance of contracts by decedents to convey real estate. In some instances, they have been given power to supervise the administration of testamentary trusts, and in some states they have jurisdiction of adoption proceedings, divorce actions, and proceedings to change a name. Since the adoption of state inheritance tax laws, probate courts are usually required to supervise the process by which inheritance taxes of a deceased person are determined and paid. Jurisdiction is often limited by constitutional provisions and by statutory enactments, and when such courts are thus limited they must stay within the boundaries fixed for them.

Probate judges are sometimes required to be members of the legal

97. POUND, ORGANIZATION OF COURTS 78-79 (1940).
98. 1 WOERNER § 142; Simes & Basye 401-05.
99. In an exhaustive study probate courts in the different states have been classified as to probate jurisdiction they exercise. Simes & Basye 420.

profession, but in many instances they are not. Probate courts are in some instances courts of record, but in other instances they are not. In some states the judgments of probate courts have the same standing as judgments of courts of general jurisdiction, and in other states they do not have such standing. In their relations with other courts of the judicial system, probate courts are usually considered inferior tribunals, and this is true even when they have original and exclusive jurisdiction over certain designated probate business.[100]

In the whole field of their jurisdiction and in their comparative standing with other courts, there is such a wide diversity in fact and in the opinion of those who have studied them[101] that it would perhaps be improper to designate the probate court organization in any particular state as typical. We now trace the probate court through Missouri history for further observation on the general influence it has had on the development of probate law.

III.

THE ORIGIN AND OPERATION OF THE PROBATE COURT IN MISSOURI

The Founding of the First Probate Courts in Missouri

The idea that there should be a separate probate court for the administration of estates had been accepted by some of the American colonies, and probate courts had been created for and were in operation in some of the original states of the Union prior to the admission of Missouri as a state.[102] The fact that a separate probate court was created for each political subdivision of the area embracing Missouri as a part of the original judicial structure for that area was not novel in probate court history in America.

Prior to the admission of Missouri as a state, the area in her boundaries was a part of the territory ceded by France to Spain on November 3, 1762. Prior to that cession of territory, a number of scattered

100. For authoritative and profound discussion of the jurisdiction, powers, functions, and standing of the probate courts in the different states, see the references heretofore made to the works of Atkinson, Pound, Simes and Basye, and Woerner.

101. Among those who have extensively studied the probate courts from the seeds that produced them in England through their origin and growth in this country, Dean Pound has shown the least enthusiasm for them, and he has pointedly shown their weaknesses. See POUND, ORGANIZATION OF COURTS 136-40, 178-81 (1940). Judge Woerner, who spent many years as a probate judge and as a student of the probate law and as a friendly observer of the operation of the probate courts, was perhaps their most enthusiastic advocate and devoted friend. And Professors Atkinson, Simes, and Basye, who have made their examination of the probate court system later than or at least contemporaneously with Dean Pound, come nearer in their appraisal to a justification of the faith expressed by Judge Woerner in their permanence and their merit.

102. Separate probate courts existed or there was a separate probate judge, surrogate, or commissioner for each county in Connecticut in 1715 and in Massachusetts in 1719. *Id.* at 79. Missouri did not become a state until 1821.

settlements had been established in different parts of the area of Missouri, consisting principally of French population, and such law as had been observed was of French origin. Spanish authority over the area was exercised by Commandants commissioned by the government of Spain, and special grants of large tracts of land in the area were made to encourage immigration and to compensate the Commandants for their services as governing officials.[103]

On October 1, 1800, Spain ceded the area back to France, and on April 30, 1803, Napoleon, by treaty with the United States, sold and ceded to her Louisiana,[104] which embraced the area of Missouri. On March 26, 1804, by act of Congress, the province of Louisiana was divided into two territories, the one being the Territory of New Orleans, comprising the south portion, and the other being the Territory of Louisiana, comprising the north portion.[105] The area composing Missouri was in the Louisiana Territory.

Although the doctrine of separation of powers had become fundamental in American political philosophy, the Congress in enacting the Organic Act of March 26, 1804, vested in the governor and the three judges of Indiana Territory the power to enact laws to govern the territory. The governing officers of Indiana Territory through this act became responsible for establishing government in the Territory of Louisiana. Missouri, as a part of Louisiana Territory, thus became attached to the Territory of Indiana. By an act of Congress of March 3, 1805, the Territory of Louisiana became the District of Louisiana,[106] and by an act of Congress of June 4, 1812, the area embraced in Missouri became the Territory of Missouri.[107]

Pursuant to the powers vested in the governor and the three judges of Indiana Territory by the Act of March 26, 1804, these four officials, constituting the first legislative body for Missouri, met in Vincennes, Indiana, then the capital of the Territory of Indiana, on October 1, 1804, and passed a series of legislative acts comprising fifteen chapters by which the law for government of the territory, for administering justice, and for regulating the conduct of the people was established.[108] Chapter 12 in that series of legislative acts was entitled "Court of Probate."[109] The chapter, containing seven paragraphs, provided for the appointment of one judge of probate in each district, "whose duty it shall be to take the proof of last wills and testaments,

103. 1 SHOEMAKER, MISSOURI AND MISSOURIANS 80-129 (1943).
104. 1 MO. TERR. LAWS 1-4 (1842).
105. 1 *id.* at 4-6.
106. 1 *id.* at 6-8.
107. 1 *id.* at 8-13.
108. For a description of this first legislative session, information as to the men who composed it and the significance of their work, see Loeb, *The Beginnings of Missouri Legislation*, 1 MO. HIST. REV. 53 (1906-07).
109. 1 MO. TERR. LAWS 57-58 (1842).

and to grant letters testamentary and letters of administration, and to do and perform every matter and thing, that doth, or by law may, appertain to the probate office, excepting the rendering definite sentence and final decree."

There were then five districts, originally formed and designated districts under the Spanish regime, known as the St. Charles, St. Louis, Ste. Genevieve, Cape Girardeau, and New Madrid districts. Each district embraced an area of land in Missouri bounded on the east by the Mississippi River and extending westwardly indefinitely. The act provided that the judge of each district hold four sessions each year and a special session "at such place in the district as he may deem expedient, whenever the circumstances of the people may require it." Where it was necessary to render a "definitive sentence" or a "final decree" upon a point contested, the probate judge was required to call to his assistance two of the justices of the court of common pleas of the same district. The three judges then constituted the court of probate, a majority of whom could render final sentence and decree, and from such final decree there was the right of appeal to the general court of the district.

In the same series of acts in which separate probate courts were provided for, there was also passed an act creating for each district a court styled the general quarter sessions of the peace and a general court to hear appeals. By another act justice of the peace courts were provided for, and these various courts constituted the complete judiciary. No provision was made requiring legal training as a qualification for service on either court, and it is quite likely that lawyers were not chosen for service as judges on any of the courts created. There was then only a total of about 10,000 people residing in all Missouri, and life among these people was primitive but peaceable.[110] It was in this way and in this form that the first separate probate courts were established in Missouri. The act providing for these courts also provided for a clerk of each court, and required that the clerk record all sentences and decrees of the court of probate, and that he make entries and records of all matters proper to be entered and recorded in his office.[111]

The Probate Courts Prior to Statehood

The law creating the first probate courts in Missouri, together with the other acts passed with it, was not new or untried. It was designed for an expanding pioneer society and was lifted out of that which had served in the Northwest Territory. This was done by the legislators who had been familiar with it and who, as officials in the Northwest

110. 3 HOUCK, HISTORY OF MISSOURI 160-62 (1908); 1 SHOEMAKER, MISSOURI AND MISSOURIANS 100-01 (1943).

111. Some of the records made in these courts are still in existence.

Territory, had assisted in making it and who had some responsibility for its operation.[112] There was a striking similarity in form, substance, and phraseology of that part of the Northwest Ordinance[113] which provided for government of the Northwest Territory and that part of the first statutes which provided for the government of the Territory of Louisiana. The men who framed both instruments came from those states where a separate probate court was in operation.

The Northwest Ordinance provided that the inhabitants of the territory should be entitled to benefits of "judicial proceedings according to the course of the common law."[114] The ordinance also directed the course of descent of property.[115] But in the first legislative session of the Territorial Legislature for Louisiana there was no direct adoption of the common law for the probate courts, nor were provisions set forth to regulate administration or descent. As to the law to be applied by the probate courts under the territorial statutes in the handling of their business there was no statutory direction until July 4, 1807 when the Territorial Legislature adopted an act found in Chapter 39, entitled "Wills, Descent and Distribution."[116] On the same day an act was passed creating the orphan's court,[117] by which the judges of the court of common pleas of each district were vested with power to act as the orphan's court, as well as to perform their other judicial duties. Thus, the Territorial Legislature did not adhere strictly to the principle, indicated in the first act passed relative to the administration of estates, that a separate probate court should be maintained for handling all business pertaining to the administration of estates.

Other incidents of historic importance in determining the place of the probate court in Missouri occurred with rapidity. Immediately after the purchase of Louisiana, the population of the Territory of Missouri began increasing rapidly. Among those who came into the territory in this great wave of immigration were a large number of lawyers, some of whom became locally and nationally distinguished

112. William Henry Harrison, Governor of Indiana Territory at the time and later President of the United States, was a native Virginian. He had served as Secretary of the Northwest Territory and had been its delegate in Congress. Henry Vanderburgh, one of the three judges who, with Governor Harrison, adopted the law, had served as a member and as president of the Legislative Council for the Northwest Territory. These men had served four years as the governing body of the Indiana Territory prior to their adoption of the statutes in 1804, which were to take effect in Missouri.

113. The Northwest Ordinance was passed by the Continental Congress in 1787, the year the Constitution of the United States was drafted. For the provisions of this celebrated ordinance, see U.S.C.A. CONST. ART. I, §§ 1 TO 9, at 23-34 (1951).

114. *Id.* at 26.

115. *Id.* at 23.

116. 1 MO. TERR. LAWS 125-39 (1842).

117. 1 *id.* at 140-42.

at the bar and on the bench.[118] Conflicting interests in land claims, commercial activity, and politics led to a popular demand for government nearer the people and greater stability in the law and in the courts. Lawyers who came from the environment of Revolution were quick to see that representation in the lawmaking body was necessary to secure such stability.

In response to the demand from Missouri that the territory be allowed self-government, Congress passed an act on June 4, 1812, providing that a territorial government be established in the territory.[119] By this act, legislative power for the territory became vested in a governor, a legislative council and a house of representatives. What had formerly been districts became counties under the new regime. The legislative assembly held four notable meetings in which they passed laws of consequence in the development of the legal system in the state.[120]

By an act passed by the General Assembly of the Territory of Missouri on January 21, 1815, the idea of a separate probate court was repudiated. The provisions of the former territorial laws on wills, descent, and distribution were rewritten, and jurisdiction over probate business was vested in the circuit courts in the several counties in Missouri Territory.[121] That legislative opinion on the major body of the probate law had not solidified is indicated by the fact that in 1807,[122] 1815,[123] 1816,[124] 1817,[125] and 1820[126] comprehensive acts were passed enacting, re-enacting, and modifying this body of the law. And the fact that legislative opinion did not support the idea that a probate court was necessary to an effective administration of estates was indicated by the legislative vesting of jurisdiction over probate business in the circuit courts.

This early trend in legislative opinion in the territorial days of Missouri away from the idea that there should be a separate probate court for probate business was not destined to continue for any extensive period. The trend was doubtless influenced materially by the lawyers who came into Missouri during the territorial era. It indi-

118. The number of remarkable jurists these great opportunities (in Missouri) developed is unparalleled in the history of any state. Nearly all the lawyers who came to Missouri before the admission of the state into the Union achieved distinction, and many attained a national reputation. 3 HOUCK, HISTORY OF MISSOURI 12 (1908).

119. 1 MO. TERR. LAWS 8-13 (1842).

120. For a description of the personnel of the territorial legislative assembly and its achievements in laying the legal and judicial foundations of the state, see 3 HOUCK, HISTORY OF MISSOURI 1-33 (1908).

121. 1 MO. TERR. LAWS 394-420 (1842).

122. 1 *id.* at 125-39.

123. 1 *id.* at 394-420.

124. 1 *id.* at 441-43.

125. 1 *id.* at 509-10.

126. 1 *id.* at 641.

cated familiarity with the English common law and system of courts, where there was no separate probate court. As Judge Abiel Leonard in the celebrated case of *Cutter v. Waddingham*[127] observed concerning the law of descents passed during the territorial days: "It [the statute on Wills, Descent, and Distribution] was the work of men familiar with the common law and strangers to the Roman law, and was no doubt adopted by our territorial lawgivers from the written laws of the older States of the Union, and not constructed here with any special reference to the existing law of this country."

The lawyers of that era were advocates of the common law and the English legal system. Through their influence, the General Assembly of the Territory of Missouri on January 19, 1816, adopted the common law of England,[128] and on January 21, 1816, an act was adopted, unquestionably originating with the lawyers of the territory, which provided for a division of the counties in the territory into two circuits, with a circuit judge learned in the law presiding over each of the circuits.[129] By this act, an attempt was made to centralize judicial authority pursuant to the common-law idea.

The Rise of Probate Courts under State Government

Though Judge Leonard's conclusion that the men who wrote the first basic laws for Missouri during the territorial period were men who understood the common law was correct,[130] these men were apparently less familiar with the constitutional doctrine of separation of powers.[131] Nevertheless, those who framed the first constitution for Missouri were not only familiar with that doctrine but they also wrote it into the body of that constitution,[132] and followed it in preparing the constitutional framework for the government. In establishing the judicial structure no concrete provision was made for

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127. 22 Mo. 206, 261 (1855).

128. 1 Mo. Terr. Laws 436 (1842).

129. 1 *id.* at 444-49.

130. There are substantial grounds in the law which Judge Leonard and his associates on the supreme court were applying at the time he made this observation to support his conclusion. In addition to that, Judge Leonard knew some of the early lawyers in Missouri, for he came to the Missouri Territory in 1819 from Vermont, and was admitted to the bar the following year and became one of the great lawyers of the state during the early years of statehood. 3 Houck, History of Missouri 27-29 (1908).

131. 3 *id.* at 1-34.

132. Mo. Const. art. II (1820). The doctrine was stated substantially as in the Massachusetts Constitution of 1780, but not precisely. The following statement in the Massachusetts Constitution is often quoted as the most classic:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it shall be a government of laws and not of men.

probate courts.[133] Instead, the constitution provided for a court of chancery, the jurisdiction of which was to be coextensive with the state, and to which court jurisdiction was assigned to exercise a general control over executors, administrators, guardians, and minors, subject to appeal to the supreme court and under such limitation as the General Assembly may by law provide.[134] It also provided that inferior tribunals be established in each county for the transaction of all county business, for appointing guardians, for granting letters testamentary and of administration, and for settling the accounts of executors, administrators, and guardians.[135]

Apparently, county courts handled probate business under the Constitution of 1820 until probate courts were established pursuant to provision of the act of the General Assembly on January 7, 1825. Until that time there was uncertainty as to whether it was the intent of the framers of the constitution that there be a system of county courts vested also with probate jurisdiction or whether a separate court should be established to handle probate business. The exact position the court of chancery was to occupy in the judicial structure was also uncertain.

When the First General Assembly met in special session in June 1821, it proposed an amendment to the constitution which clarified this situation. By this amendment, which was ratified by the Second General Assembly in 1822, the office of chancellor was abolished, and the judicial power was vested in "a Supreme Court, in circuit courts, and in such inferior tribunals as the general assembly may, from time to time, ordain and establish."[136]

The admission of Missouri into the Union of States was the occasion for a great protracted debate of national issues, but, during that period and the years immediately following, the legal foundations of the state were being reconstructed under the leadership of able members of the legal profession. A great mass of legislation had been adopted during the territorial period, and hurried experiments had been made in the shaping of a judicial structure, all of which required restudy and systemization. The men who devoted themselves to that task were late immigrants to the state, but they came from older states where state governments had long endured and where experimentation in probate law, with probate courts, and with the probate jurisdiction exercised by other courts had been extensive. Under the leadership of Henry S. Geyer[137] a complete revision of the law and provision for

133. See Mo. CONST. art. V (1820).
134. *Id.* at §§ 9-10.
135. *Id.* at § 12.
136. Mo. CONST. amend. I (1820).
137. Henry Sheffield Geyer was a native of Maryland, where he was admitted to the bar in 1811. He came to Missouri in 1815 and became one of the most eminent of Missouri lawyers. He participated in the framing of the Constitution

the creation of a system of courts pursuant to the constitution was prepared for the legislature. The experience of other states, as it was known by lawyers and others who originated there and who participated in the early form and use of the law, and the court structure in Missouri was studied in the light of the needs in the new state.[138]

On January 7, 1825, the legislature passed an act providing for the establishment of a complete court system in compliance with the provisions of the constitution.[139] In this judicial structure, probate courts were created for each county. On February 21, 1825, a complete probate code was adopted under which the probate court was vested with jurisdiction to supervise the whole process of administration.[140] By virtue of these two acts, the probate court became a permanent part of the court system in Missouri, and the probate law was carefully codified for its use.

The judges of the first probate courts, like the judges of other courts established under the Constitution of 1820, were appointed by the Governor. The constitution had not named probate courts in the category of courts provided for in the judicial organization. But the legislature created these courts under the constitutional sanction. Although the probate courts created by the act of 1825 were inferior courts under the provisions of the Constitution of 1820 as amended in 1821-22, they were given exclusive original jurisdiction of the principal part of the proceedings for the administration of estates of deceased persons and minors by the act creating the court system.[141] No provision was made for the continuation of the orphan's court created under the earlier territorial laws.

The place of the probate court in the judicial system of Missouri as fixed by these two legislative enactments in 1825 has not been further challenged by any subsequent constitutional or statutory provision. The power of selecting judges for these courts passed from the Governor and became vested in the people. Special courts were established in many of the counties during the period from 1835 to 1877 by acts of the legislature. Some of these courts, such as the courts of common pleas, were vested with jurisdiction, concurrent with probate

of 1820 and served through five sessions of the General Assembly, being the Speaker of the House during the first three sessions. He was the chief author of the revision of the laws of 1825. See 1 SHOEMAKER, MISSOURI AND MISSOURIANS 651 (1943).

138. Among the lawyers from Connecticut during the formative period of Missouri history were Edward Hempstead, who came to Missouri in 1804, Rufus Easton, who came the same year, and Judge Rufus Pettibone, who came to Missouri in 1818. For more complete information about the members of the bar from the older States of the Union who participated in laying the legal foundations in Missouri, see 3 HOUCK, HISTORY OF MISSOURI, particularly cc. 23-25 (1908).

139. Mo. Laws 1825, at 268-78.

140. *Id.* at 92-125.

141. *Id.* at 270.

courts, of probate business, but the power to create such special courts was removed and for the most part such special courts have disappeared.

The Constitution of 1865 did not specifically recognize probate courts, but it authorized the legislature to establish "inferior tribunals" in each county and vest in them jurisdiction over all matters pertaining to probate business.[142] The failure of the framers of the Constitution of 1865 to distinguish between the place of the county courts and the probate courts in the judicial system and their decision to relegate the courts doing probate business to a continued rank of inferiority resulted in a prolongation of the special courts era. But the convention which drafted that constitution was not prepared to make such distinction or to recognize the proper place of the probate courts or the exact functions they should exercise. The best legal talent of the state was not represented in the convention,[143] and many of the sixty-six elected delegates to the convention were comparatively unknown.[144] The leaders of the convention were immediately more concerned about punishment for those who had supported the southern cause in the War Between the States than with the permanent stabilization of an independent judiciary, and all the bitterness of cross currents of feelings among a people in a border state were manifested in the proceedings and the results of the convention.[145] By an

142. The provision of the Constitution of 1865 concerning such courts is as follows:

> Inferior tribunals, to be known as county courts, shall be established in each county, for the transaction of all county business. In such courts, or in such other tribunals, inferior to the circuit courts as the general assembly may establish, shall be vested the jurisdition of all matters appertaining to probate business, to granting letters testamentary and of administration, to settling the accounts of executors, administrators and guardians, and to the appointment of guardians and such other jurisdiction as may be conferred by law.

Mo. CONST. art. VI, § 23 (1865).

143. The lawyers of Missouri of the widest national reputation, such as Frank P. Blair, Jr.—brother of Montgomery Blair of Lincoln's war cabinet—who was to become United States Senator from Missouri, and Edward Bates who was Lincoln's Attorney-General, and James O. Broadhead who became known in his time as Missouri's leading lawyer, opposed the adoption of the constitution.

144. The membership of the Constitutional Convention included thirteen lawyers, fifteen farmers, fourteen doctors, twelve merchants, and a remaining scattering of not more than one to a separate occupation or vocation. Twenty-two of the sixty-six members were natives of free states; eight of Germany; one of England; nine of Missouri; and twenty-six of other slave states. In comparison with the membership of the state convention of 1861, that of the Constitutional Convention shows fewer lawyers, more natives of free states, and twice the number of foreign born.

1 SHOEMAKER, MISSOURI AND MISSOURIANS 943 (1943).

145. Charles D. Drake, lawyer of St. Louis, a native of Ohio and a stormy petrel in politics, was elected vice-president of the convention and dominated its activities and proceedings. He had been a Whig, a Know-Nothing, a Democrat, an unconditional Unionist, and a Radical. Because of his leadership in the movement to adopt a new constitution and in the drafting of the instrument and in securing its adoption, the constitution is sometimes called the "Drake Constitu-

ordinance adopted by the convention on March 17, 1865—and not referred to the people for adoption or rejection—known as the Ouster Ordinance, all judicial offices of consequence in the state, including the judges of the probate courts, were vacated, and the Governor was empowered to fill the vacancies caused by such ouster by appointment for the remainder of the terms.[146] Even though the provisions of the constitution pertaining to the judiciary did not seriously conflict with prior judicial experience and development and, even though the constitution as a whole was not a radical departure from the former constitution and its amendments, it was obvious that a charter representing the fundamental law of the state born under such turbulent political circumstances and adopted and enforced with measures so lacking in self-restraint[147] could not long endure.

Besides, basic defects in the constitution soon became apparent. Among these was its failure to stabilize the probate court system and stay the power of the legislature through special acts to distribute probate jurisdiction among different courts and to create special courts vested with probate powers. A growing distrust of the legislature was reflected in the provisions of the constitution which specifically prohibited it from passing special legislation on a number of different subjects.[148] But the constitution did not prohibit the legislature from creating special courts, a practice in which it had indulged to the detriment of probate courts since 1835,[149] and to a large extent the constitution left the future both of probate courts and jurisdiction over probate business in the hands of the legislature.

At the next legislative session after the Constitution of 1865 went into effect, an act was passed creating a probate court in each of the

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tion," and because of the severity of some of its provisions for which Drake's leadership was responsible it is sometimes called the "Draconian Code." For an account of the convention, its officers and members, and its significance in the history of Missouri, see 1 SHOEMAKER, MISSOURI AND MISSOURIANS 943-52 (1943); VIOLETTE, A HISTORY OF MISSOURI 393-423 (1918). For the provisions of the constitution, amendments, and ordinances adopted by the convention that framed the constitution, see 1 MO. ANN. STAT. 114-65 (Vernon 1951). For commentaries on the constitution as a step in the progress of constitutional government in Missouri, see Loeb, *Constitutions and Constitutional Conventions in Missouri*, in 1 JOURNAL OF MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 7 (1920).

146. 1 MO. ANN. STAT. 155-56 (Vernon 1951).

147. 1 SHOEMAKER, MISSOURI AND MISSOURIANS 951-52 (1943); VIOLETTE, HISTORY OF MISSOURI cc. 20-21 (1918); Loeb, *supra* note 145, at 24-25.

148. MO. CONST. art. IV, § 27 (1865).

149. In 1835 county courts were vested with certain probate jurisdiction (MO. REV. STAT. §§ 1-48 (1835)), and after that time until 1866 probate jurisdiction in some of the counties was exercised by county courts, in others by probate courts, and in others by courts created by special act of the legislature. The concept of a separate probate court for each county to handle strictly probate business as envisioned by the historic revision session of the legislature in 1825 lacked positive constitutional sanction, and this concept did not prevail in the legislative sessions held subsequently nor did it receive the support of the delegates who framed the constitution of 1865.

twenty-seven counties of Missouri.[150] By this act the probate courts in these counties were made courts of record, and they were vested with broad probate powers in the administration of estates of deceased persons and minors, and their jurisdiction was declared original and exclusive. The act indicated a legislative purpose in the field of probate law and a conception of the place of probate courts in the handling of probate business more like that of the Legislature of 1825 than any legislative action since that time. It showed a tendency toward uniformity quite unlike the special acts the legislature had been passing, not only in creating special probate courts in one county at a time but also in abolishing them in the same manner.[151] The legislature continued during the next decade after the adoption of the Constitution of 1865 to abuse the privilege of passing special legislation,[152] and, though the adoption of the act of 1866 creating a probate court in twenty-seven counties in the state was a step in the right direction, it did not check the legislative propensity to create special courts for probate and other business.[153]

By the Constitution of 1875, Missouri finally gave to the probate court its full constitutional recognition, dignity, and power as a permanent part of the state's judicial system. In a special article devoted to the judiciary, the constitution provided that the judicial power of the state as to matters of law and equity, except as the constitution otherwise provided, be vested in a supreme court and other named courts, including probate courts.[154] The constitution directed the General Assembly to establish a probate court in every county, and it provided that, until the General Assembly created a uniform system of probate courts, the jurisdiction of probate courts already established should remain as provided by law.[155] It directed that probate courts be uniform in their organization, jurisdiction, duties, and practice.[156] It provided that every probate court be a court of record

150. Mo. Laws Adj. Sess. 1865, at 85-88.

151. In its regular session in 1865, the legislature had created a probate court in Worth and Miller Counties (Mo. Laws 1865, at 349-51) and it had repealed an act creating a probate court in Reynolds County (Mo. Laws 1865, at 334).

152. During that decade more special acts were passed than public laws. Loeb, *supra* note 145, at 32.

153. In GRAVELY, THE ORGANIZATION OF COURTS IN MISSOURI (unpublished manuscript in University of Missouri Library), it is estimated that from 1845 to 1865 the legislature created by special acts a probate court in fifty-four of the counties in Missouri and a special court of common pleas, some of which had probate jurisdiction, in fourteen counties. In the same manuscript the author estimated that from 1865 to 1875 ninety-four counties in the state had special probate courts, twenty-six had special common pleas courts, and fourteen had special courts vested with probate and common pleas powers, all created by special acts of the legislature.

154. MO. CONST. art. VI, § 1 (1875).

155. *Id.* at § 34.

156. *Id.* at § 35.

and consist of one judge who was to be elected.[157] It vested in each probate court "jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians; and the sale and leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices . . . ."[158]

The men who drafted the Constitution of 1875, in providing for a permanent place for probate courts in our judicial structure, took into account, as they did in the document as a whole, the experience derived from historical evolution.[159] Of the sixty-eight delegates in the convention, forty-five were lawyers,[160] and among them were some of the ablest men of the Missouri bar who had already attained or were to achieve national reputations.[161] For the most part, they were men of mature age, of independent means, of liberal education, of recognized ability, and of wide and varied experience.[162] From their experience as practical men of affairs and from their familiarity with the legal and judicial system of the state, they recognized probate courts as a necessary and distinct part of that system, and they knew that to give these courts such place they must remove them from the power the legislature had exercised over them for thirty years and direct by constitutional provision that such courts be established and that they be uniform in organization, powers, and functions.[163]

The constitution did not establish probate courts, but it directed that the General Assembly establish them. The provision was not self-enforcing but it required legislative action.[164] On April 9, 1877, the General Assembly complied with the constitutional mandate and passed an act establishing a probate court in the City of St. Louis and in every county in the state.[165] Many of the existing probate courts simply merged into and became the new probate courts established by that act, and each of these courts now has continued in existence since the effective date of the act establishing them. There are 114 counties in Missouri and the probate court in each county, together with the

157. *Id.* at § 34.
158. *Ibid.*
159. Loeb, *supra* note 145, at 56.
160. Shoemaker, *Personnel of the Convention*, in 1 *id.* at 65.
161. 1 *id.* at 70.
162. For complete information about the delegates to the convention that framed the Constitution of 1875, see 1 *id.* at 57-71. See also Bishop, *Government of Missouri under the Constitution of 1945*, in 1 MO. ANN. STAT. 5 (Vernon 1951).
163. See State *ex rel.* Cave v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914).
164. Linn County Bank v. Clifton, 263 Mo. 200, 212-13, 172 S.W. 388, 392 (1914); State *ex rel.* Attorney-General v. Gammon, 73 Mo. 421 (1881).
165. Mo. Laws 1877, at 229-32.

one for the City of St. Louis, comprises a total of 115 probate courts in Missouri.

Under the Constitution of 1945 the integrity, independence, and uniformity of the probate court system as a part of our judiciary are maintained. As under the prior constitutions, judicial power of the state is vested in the probate courts and the other courts of constitutional origin.[166] These courts are by the constitution required to be courts of record, and uniform in their organization, jurisdiction, and practice.[167] Their jurisdiction is fixed by the provisions of the constitution.[168] In counties of 30,000 inhabitants or less, the probate judge is also judge of the magistrate court,[169] the latter being a new classification of courts created to take the place of justice of the peace courts, which were abolished by the Constitution.[170] The judges of the probate courts of the City of St. Louis and Jackson County, as the judges of the circuit courts thereof, are selected under the non-partisan plan of selecting judges, and the probate judges in other counties of the state may, like the circuit judges of those counties, become subject to selection under that plan.[171] Probate judges are entitled to retirement benefits accorded all judges of courts of record and magistrates by the constitution.[172]

166. Mo. CONST. art. V, § 1.
167. *Id.* at § 17.
168. *Id.* at § 16.
169. *Id.* at § 18.
170. See *ibid.*
171. *Id.* at §§ 29(a)-(b).
172. *Id.* at § 27.

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