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Brief History of English Testamentary Jurisdiction

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BRIEF HISTORY OF ENGLISH TESTAMENTARY JURISDICTION[1]

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If we seek an English prototype for the American court of probate, we shall not find it in the courts of common law or Chancery or other temporal tribunals. More nearly it will be found in the English ecclesiastical courts. While the latter had jurisdiction which was entirely unconnected with probate and succession,[2] while they had nothing to do with the succession to real property,[3] while even in the heyday of their power they shared jurisdiction over succession with the common law and Chancery courts, and while American courts of probate are largely statutory in both the extent of their jurisdiction and the manner of their procedure—in spite of all these things, we must look in the main to the doctrines and workings of the English ecclesiastical courts for comprehension of our substantive and procedural law of succession. To mention but a single factor the Anglo-American scheme of succession through personal representatives was largely developed, and once almost entirely administered, in the courts Christian. While the historical scene centers there, the rivalries of the temporal courts, which in the end resulted in the downfall of ecclesiastical testamentary jurisdiction, must be noted. The whole picture is inexorably bound up with the development of rules and concepts of a purely substantive nature. Hence, these matters also will receive some attention in the following pages.

THE ANGLO-SAXON PERIOD

Of many of the phases of succession prior to the Norman Conquest we cannot speak with any degree of certainty—partly because the law itself was vague, partly because such law as there was has not been preserved for us. We can be sure that the English recognized individual private prop-

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1. See generally the bibliography appended as note 91 *infra.*

2. *E.g.* matters concerning marriage, divorce, defamation and church discipline.

3. 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2nd ed. 1898) 126-127, 246, 251; 2 *id.* 199, 333.

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erty and succession to it upon the owner's death. There were different rules for lands and chattels although the distinction was neither of the kind nor to the degree which developed after the Conquest.[4] There was a law of intestate succession but different kinds of chattels and of land passed to different persons and the lord and the church had different claims concerning the various types of property.[5] One might dispose of bookland by will and of at least a portion of his chattels.[6] A dying man ordinarily made a death-bed disposition of his chattels under the auspices of the priest who administered the last confession. A part of the goods would be left to the widow, another to the children; perhaps there was no power to deprive them of their reasonable shares. At least a part might be left as the testator desired and the priest would see to it that something went to the church or to pious uses. In the case of the important man the Anglo-Saxon *cwide*,[7] a more formal and more nearly true testamentary device, supplanted the death-bed disposition but for common folk the death-bed disposition of chattels continued to be the usual means of passing on the worldly goods. The significance of this is that the church had its hand in the matter of succession to chattels. We cannot claim too much for this factor because the bishop sat with the earl in the county court and the archdeacon with the hundredary in the hundred court, and there was not separate system of ecclesiastical courts. However, it is easy to see how the clergy had a particular interest in, and familarity with, testamentary matters.

There seems to have been no uniform rule as to who saw to the distribution of chattels. Usually the division would be made by the family of the deceased. Sometimes this was done by friends present at the death-bed or by the priest who administered the last sacrament. Occasionally the deceased may have requested the bishop to see that the testament was carried out.[8] There was, however, no concept of the executor or any person charged with the general duty of executing the will, or of collecting debts owing to the decedent and paying obligations owed by the latter. Probably most obligations did not survive the death; in so far as they did survive it was the heir who tended to these things.[9] However, the heir

4. 2 *id.*, 259-260, 332.
5. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1936) 92-93.
6. *Id.* at 93-94.
7. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 3, at 319-321; *cf.* 1 PAGE, WILLS (3rd ed. 1941) § 13.
8. 2 HOLDSWORTH, *op. cit. supra* note 5, at 96-97.
9. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 3, at 258.

was definitely not the Roman law heir who, as universal successor, succeeded to all the decedent's property and was responsible for all his debts. No such advanced concept existed in Anglo-Saxon England, though in certain aspects the idea may have been in vogue in Glanville's day.

In most cases wills must have been carried out and the deceased's property distributed in a voluntary manner without any judicial proceedings. There were no probates, no grants of administration, no inventories or accounts, returnable to any court. When disputes arose they were litigated before the courts of the county or the hundred where the bishops and archdeacons sat on the bench with the earls, sheriffs, and other lay authorities.[10] There was as yet no separation of temporal disputes between those of the state and those of the church. All cases were settled side by side in the customary courts of the Anglo-Saxons.

From the Conquest to Bracton

In spite of the great political upheavals which were wrought by the Norman Conquest and the attendant changes in the property, status and affairs of the great men of the realm, it is a mistake to believe that there was any sudden change in the law of succession—or for that matter other fields of the law—which revolutionized the affairs of the common man. There was undoubtedly more or less chaos and disregard of things as they had formerly been but there was no immediate setting up of a rival system of private law. The institution which we know as the common law did not have its origin until the reign of Henry II (1154-1189). However, two events in the reign of William the Conqueror had great and enduring influence upon the law of succession. The first was the establishment of the fuedal system, which in addition to its comparatively transitory political or public side, had also a permanent private law aspect in the scheme of land tenure and inheritance as later developed and applied in the common law courts.[11] The second was the separation of the lay and ecclesiastical courts by royal ordinance.[12]

It is possible that from the date of this separation the church courts may have exercised considerable testamentary jurisdiction. The priests

10. Selden, Disposition or Administration of Intestates Goods (1683) c. I; Selden, Original of Ecclesiastical Jurisdiction of Testaments (1683) c. V.

11. Holdsworth, Historical Introduction to the Land Law (1927) 26.

12. Stubbs, Select Charters (9th ed. 1913) 99. The ordinance is undated and no definite year can be assigned to it. *Cf.* Lichtenstein, *The Date of Separation of Ecclesiastical and Lay Jurisdiction in England* (1909) 3 Ill. L. Rev. 347.

and bishops had their hands in such matters in Saxon days, and leading churchmen must have known of the edicts of Justinian in the sixth century charging the bishops with the execution of particular pious bequests. On the other hand neither the civil nor the continental canon law awarded general testamentary jurisdiction to the church courts.[13] This doctrine had its establishment on English soil and no doubt the growth was gradual from the time of the separation of the ecclesiastical from the temporal courts. At any rate that was the nature of the later history. We find early traces of ecclesiastical testamentary jurisdiction by the middle of the twelfth century; bit by bit we see it growing for upwards of two hundred years.

At the time that Glanville wrote (*circa* 1188) one could not will land but he could make a testament of one-third of his chattels after debts were paid if he left a wife and heir, and half if he left no wife.[14] Glanville says nothing of probate but declares that cases concerning the validity and construction of testaments are for the court Christian.[15] It is the heir who pays the debts in this period and if the effects are not sufficient he must make it up out of his own.[16] Although Glanville does not say so, it is apparently the heir who sues to recover debts owing to the testator. Heirs are obliged to observe the reasonable testaments of their ancestors.[17] The only mention of executors is that they "should be such persons, as the testator has chosen for that purpose, and to whom he has committed the charge."[18] If no executor is nominated the nearest of kin "may take upon them the charge" and if the heir or other person detains the effects the executors or the others may have the king's writ to require a reasonable division.[19]

Whence came the executor? Surely not from the English law before the conquest, though some of the *cwides* called upon the king to allow the *cwide* to stand or appointed important lords or churchmen to be guardians of it. Surely not from the classical Roman law where the instituted heir must carry out the will. The best opinion[20] seems to be that the executor had his prototype in the Germanic *salman* who was the person to whom

13. SELDEN, ORIGINAL OF ECCLESIASTICAL JURISDICTION OF TESTAMENTS (1683) cc. I to IV.
14. GLANVILLE, THE LAWS AND CUSTOMS OF ENGLAND, VII 1, 5.
15. *Id.* VII 8.
16. *Id.* VII 5, 8.
17. *Id.* VII 5.
18. *Id.* VII 6.
19. *Ibid.*
20. As to the early history of executors see the works of Goffin, Holmes and Caillemer listed in the bibliography at the end of the present section.

property was conveyed upon the charge to benefit some unfree person to whom the conveyance could not be made directly. Later when the Germans began to use the testament they appointed someone like the *salman*—variously denominated—to ensure the execution of their wills which did not use the Roman device of instituted heir. This person was or became the testamentary executor and appeared a little later in France and in England. There was close contact between England and the continent in Angevin days and perhaps the clergy had something to do with the transfer of the idea. How many years before Glanville this took place is problematical but apparently he did not regard the office as an innovation. The office and the name was known but the executor had then only limited functions and was not yet the important person that he later became.

In summary, it was the heir and not the executor who represented the testator with regard to the personal property. The heir paid testator's debts and probably collected those owing to the testator. The executor's only interest was in in the part of the chattels of which the testator might lawfully dispose. Even of this he apparently did not necessarily obtain possession. His business was merely to see that legacies were paid and if the heir or anyone else interfered he could bring suit in the king's court to enforce the payment.

It is quite probable that the recognition of the heir as the one who sues and is sued for claims in favor of and against the deceased had its seeds in the civil law doctrine of universal succession. At any rate the common law of this period reached the same conclusion as to these matters. It is a different thing, however, to say that the English law adopted for a time the theory of the Roman instituted heir. The common law prevented the decedent from choosing the successor to his land while it permitted him to dispose of at least part of his chattels. With regard to the latter, the recognized interests of the spouse and kindred, and in case of intestacy, of the lord and the church as well, are inconsistent with the idea of a universal successor. The same can be said of the limited functions of the executor, who later becomes the decedent's representative so far as the personalty is concerned—a concept which is the very antithesis of universal succession by the heir.

Glanville[21] says that if one dies intestate, all his chattels are understood to belong to his lord. Probably intestacy was not the usual state, for if one

21. GLANVILLE, *op. cit. supra* note 14, at VII 16.

received the last sacrament the priest would see to it that the dying man made his testament and left something for the good of his soul. But sudden death must have prevented making a will in a fair number of cases, and the rule of Glanville must have worked considerable hardship. Perhaps the lord usually gave the widow and children their reasonable shares of the goods or their customary portions of which the deceased could not have disposed by will. At any rate, Magna Carta[22] provided that if a freeman died intestate his chattels should be distributed by his near kinsmen by view of the church, saving the debts due by the deceased. However, the provision was not included in the later confirmations of the charter and for sometime it was a problem of whether the lords, the kinsmen, or the church would succeed to the intestate chattels.[23]

From Bracton to Edward III

This period brought remarkable development in the extent of ecclesiastical testamentary jurisdiction. By the reign of Henry III (1216-1272) the ecclesiastical courts are probating testaments[24] and are requiring the executor, unless he renounces, to prove the will in the proper court—usually of the bishop of the diocese where the testator died. Furthermore they require an oath of the executor by which he swore to render an account of his dealings to the ordinary. For misconduct the executor could be set aside by the church courts. In thus obtaining firm control over the executor, the ecclesiastical courts were building well toward their ultimate goal of plenary jurisdiction over testamentary matters.

However, at the time that Bracton wrote (*circa* 1258) it is still ordinarily the heir who sues and is sued for debts.[25] These actions proceed in the temporal courts. The heir's liability is now limited to the extent of goods received from the testator.[26] The executor's functions have increased: it is now his duty to take possession of the part of the goods which the testator is privileged to dispose and to distribute them according to the will. If the testator reduces a debt to judgment or if the debt is mentioned in the

22. C. 27 (1215).
23. See Gross, *The Medieval Law of Intestacy* (1904) 18 Harv. L. Rev. 120, reprinted in 3 Select Essays in Anglo-American Legal History (1909) 723; McKechnie, Magna Carta (2nd ed., 1914) 326-329.
24. Selden's remark in his Original of Ecclesiastical Jurisdiction of Testaments (1683) c. VI he had never seen an express probate prior to the time of Henry III, taken in connection with Glanville's silence as to probate (see note 15 *supra*), give some idea as to the time when the practice of probate originated.
25. Bracton, f. 407b.
26. *Id.* f. 61.

will, the executor may sue for it, and he must pay the debts if the will directs him to do so.[27] These actions by and against the executor are probably in the church courts,[28] as are suits to recover legacies.[29]

Three decades later Fleta (*circa* 1290) says that the executor is sometimes permitted to recover his testator's debts in the king's court[30] and a few years later still the Year Books show the king's court upholding writs of debt in favor of executors. Statutes give the executor actions of account and of trespass for carrying off the testator's goods. By the end of the thirteenth century the creditor can sue the executor on a sealed instrument and the heir is no longer liable except upon sealed instruments which expressly bind him. His liability to pay debts requires that the executor have possession of all the testator's goods, and the king's court will give him an action to get them in. Simple debts will not lie against the executor for he would be unable to employ wager of law, a privilege that would have been open to his testator. This resulted in total non-liability as long as no other applicable action could be brought against the executor—a state of affairs which remained until the rise of assumpsit in the fifteenth century. However, by the fourteenth century the executor's powers with respect to both debts and goods are extensive enough so that he may be called the representative of his testator, except of course as to the freehold.[31]

At the same time that the king's courts were starting to entertain these actions by and against executors, they were prohibiting all such actions from proceeding in the ecclesiastical courts.[32] It was being established for the future that the latter could not hear a plea of debt. Naturally this curtailed the power of the church courts which in Bracton's time had regularly asserted jurisdiction over certain of such cases. However, this loss was more than compensated by the added prestige which the king's court bestowed upon the executor by recognizing him as the testator's representative. As he was the creature and officer of the church court, the latter's testamentary jurisdiction to this extent was firmly established.

Meanwhile what of the goods of an intestate? The struggle between the church, the lord, and the next of kin continued for almost a century and

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27. *Id.* f. 407b.
28. See GOFFIN, THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE (1901) 40-43.
29. BRACTON'S NOTE-BOOK, case no. 381.
30. L. 2, c. 57.
31. See generally 2 POLLOCK AND MAITLAND, *op. cit. supra* note 3 at 345-348.
32. 2 *id.* at 346-347.

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a half after Magna Carta, during which time the church seemed to be obtaining the upper hand. Bracton[33] says that in case of sudden death the lord should not seize the chattels of the deceased but these should go to his friends and the church. The church claimed and maintained the right to administer an intestate's goods. Apparently the clergy were abusing this prerogative, for a statute in 1285[34] declared that the ordinary should be bound to pay the debts of the intestate in the same manner as executors were bound to pay their testators' debts. Probably in most instances the prelates retained only the dead man's share, and allowed the widow and children to receive their reasonable portions. But this procedure did not prove satisfactory. In 1357[35] another statute declared: (1) in case of intestacy the ordinaries should depute the next and most lawful friends to administer the goods; (2) these deputies should have an action to recover debts due intestate in the king's court; (3) they should be answerable in the king's court in the same manner as executors; (4) they should be accountable to the ordinary in the same manner as executors were accountable.

This brief statute is a milestone in the history of administration for it originates the office of administrator and provides that his powers and duties shall be the same as those of the executor. Its greatest deficiency was that it failed to designate the persons entitled to the residue after payment of debts, a matter which for three centuries was decided by the spiritual courts according to loose and uncertain practices. The idea that the ordinary succeeded to the chattels of an intestate, which had its start perhaps with Magna Carta, was continued in the legislation of 1285 and 1357 and the theory of this is still perpetuated by the Administration of Estates Act (1925) which provides that until letters of administration are granted the title to intestate's property vests in the Judge of Probate, as it had formerly vested in the ordinary.[36]

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33. f. 60 b.
34. Statute of Westminister II, 1285, 13 Edw. I, c. 19.
35. 31 Edw. III, stat. 1, c. 11. (1357).
36. See SHEPPARD, TOUCH-STONE OF COMMON ASSURANCES (1648) 474; WILLIAMS, EXECUTORS (1st ed. 1832) 236-239; Coote, *Theory of Succession Ab Intestato* (1855) 53 LAW. MAG. 1; Administration of Estates Act, 1925, 15 Geo. V, c. 23, § 9. The idea has been expressed that the goods vested initially in the ordinary even if there was a will naming executors. Coote, *On Probate of Wills* (1856) 1 LAW MAG. and LAW REV. 252. This, however, is not the concept of the common law with respect to executor. SHEPPARD, *ibid*; WILLIAMS, *id.* at 159 *et seq.*

FROM EDWARD III TO THE REFORMATION

The period from 1357 to the Reformation is the era of greatest testamentary activity by the ecclesiastical courts. The organization of these tribunals was far from regular and exceedingly complex but the general picture can be described briefly with reference to testamentary jurisdiction. The courts of the archdeacons and other inferior tribunals had little importance in the matter of succession. Probate would ordinarily be granted in the court of the bishop in whose diocese the deceased died. This court was presided over by the ordinary, *i.e.* the one having regular jurisdiction of common right. This was the bishop, or particularly in later time, someone deputized by him for the purpose. Letters of administration would likewise be granted by the ordinary in case of intestacy and all further steps in the administration of either testate or intestate estates would take place in his court. However, there were a large number of courts having ancient right to peculiar jurisdiction over testamentary affairs. Some of these were ecclesiastical, others the courts of particular manors and there were also royal peculiars. Appeal from the ordinary and from the peculiar ecclesiastical courts would lie to the courts of the archbishops in the respective provinces—to the Court of Arches in Canterbury and the Chancery Court of York. The archbishops had, however, two other types of courts: (1) the ordinary court of the diocese of the archbishop; (2) the prerogative courts of the archbishop which had jurisdiction when the deceased left goods of a value of five pounds in more than one diocese of the province. From the archbishops' courts appeal might be taken to the Pope.[37]

The law[38] administered in the ecclesiastical courts was not the common law which recognized the king as sovereign but the canon law which looked to the Pope as the supreme authority. A large part of the canon law was the general law of the church but there were also constitutions of various papal legates, English archbishops, bishops and synods. Canon law was studied in the English universities side by side with Roman civil law and

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37. The detailed organization of the ecclesiastical courts is described in REPORT BY COMMISSIONERS ON THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS (1832) 11-12, Appendix D 6, 7, 8. With the exception of the tribunal hearing appeals from the archbishops' courts the arrangement was much the same in the fifteenth century.

38. See generally REPORT BY COMMISSIONERS ON THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS (1832) 10-11; STUBBS, *The History of the Canon Law in England,* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 248.

the former drew on the latter for many of its doctrines and procedures. It was not only with matters purely spiritual that the canon law dealt, but particularly in England with testamentary, matrimonial and many other matters. As time went on a special group of the clergy undertook the various duties in the church courts. Of course there were bound to be clashes between the ecclesiastical and the temporal courts and both had weapons to assert their claimed prerogatives, religious sanctions in case of the former and prohibitions in case of the latter. As we have seen, parliament sometimes intervened to settle the controversies. But aside from these borderline and sometimes temporary clashes, each legal system recognized the jurisdiction of the other within its proper sphere.

The ecclesiastical courts of this era had no system of reports and few of their records or proceedings have been printed. We are obliged to rely very largely on the writings of two great canonists: John of Ayton who wrote in the reign of Edward III and William Lyndwood of the time of Henry V. From these sources we know that a regular system was evolved for the grant of probates and administrations and for compelling executors and administrators to file inventories and accounts. Personal representatives were allowed considerable freedom as to how and when they should administer the estate but they must always satisfy the ordinary that this had been done properly. Delays or negligence might result in removal of the representative and the temporal courts were willing to invoke process in certain cases but the chief weapon of the church courts in their control over personal representatives was excommunication or other spiritual punishment. For the average man in these times that was indeed a powerful threat.

From the Reformation to the American Revolution

By the sixteenth century a body of men who had received the degree of doctor of civil and canon law from the universities associated together as a distinct profession for the practice of that law. In 1567 some of them purchased a site at their own expense and erected buildings in London known as Doctors' Commons for housing of the principal ecclesiastical and admiralty courts and for residences of the judges and advocates thereof. With the Reformation, appeals to Rome of course were forbidden,[39] and a new court known as the High Court of Delegates was provided to hear

39. 24 Hen. VIII, c. 12 (1532).

appeals from the courts of the archbishops.[40] This court, differently constituted for each case, was made up of three common law judges and four to six doctors of the civil and canon law. The other church courts remained the same, as did the laws administered therein except such as were inconsistent with the theory that the king was now head of the English church. The spiritual courts flourished under Henry VIII but sank to a low ebb under Edward VI due to the latter's interference with both personnel and legal doctrine. In so far as she could, Mary restored the pre-reformation status but Elizabeth brought the ecclesiastical courts back to something like the condition in which her father had left them. By this time the ecclesiastical law had become a distinctly English law and indeed a part of the sovereign's common law in the broad sense of that word.[41] This was due partly to the separation from Rome and partly to the rise of the professional class which was administering the ecclesiastical law in the metropolitan courts.

All this might indicate that the ecclesiastical courts would continue to exercise and perhaps extend their testamentary powers. On the contrary the post-reformation period marks the beginning of the decay of large parts of that jurisdiction. This was due to several factors—in part to weaknesses within the church courts themselves. While the metropolitan courts were staffed with able judges, officials and practitioners, those in the other dioceses were often unlearned in the law and uninterested and lax in their administration.[42] In addition, the church courts practically limited themselves to excommunication as a means of enforcing their orders and this was rapidly losing its terrors even for members of the established church. Then too, church courts found themselves unable to cope with such frauds as confession of judgments by executors in favor of fictitious creditors, and the appointment of men of straw as administrators whom creditors were unable to reach.

Forces equally as great were being exercised outside the church courts. The common law courts had issued writs of prohibition hampering the church courts before and now commenced to prohibit the latter from in-

40. 25 Hen. VIII, c. 19 (1533). Upon recommendation of the Lord Chancellor and the issuance of a commission of review the decision of the High Court of Delegates could be reopened for further consideration.

41. See remarks of Lord Blackburn in Mackonochie v. Lord Penzance, 6 App. Cas. 424, 446 (1881).

42. See REPORTS BY COMMISSIONERS ON THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS (1832) 13-14, 22-24.

quiring into inventories and accounts and from entertaining suits on administration bonds to compel the administrator to account for the surplus.[43] The resulting inability of the church courts to require the administrator to account sometimes caused that officer to be regarded by the common law courts as the beneficial successor of the overplus.[44] While the common law courts succeeded in rendering ineffective a large part of the testamentary jurisdiction of the church courts, they could not succeed to that jurisdiction largely because their procedure did not afford facilities to take and enforce a satisfactory account. True the creditor might sue the personal representative there, but the plaintiff was often defeated upon a trumped-up defense that there were no assets to pay the claim. Other difficulties were encountered because of the representative's personal liability if he made a mistake in pleading to the creditor's action or in case he voluntarily paid a debt when there were other debts of superior rank.[45]

The superior procedure of the Court of Chancery was able to deal with these matters, and Chancery, in part by virtue of its remedies to enforce discovery and accounting, and in part by enjoining proceedings in the church courts or disregarding[46] them, was able to get an increasing amount of administration business. The ecclesiastical courts were said to have "but a lame jurisdiction" in matters of distribution of an intestate's estate.[47] Because of inadequacy of remedy elsewhere suits for accounts were entertained from an early date in Chancery for matters arising out of decedents' estates. The next great step is the order of administration whereby Chancery, at the instance of creditors, distributees, legatees, or personal

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43. See Slawney's Case, Hob. 83 (1622); Tooker v. Loane, Hob. 191 (1618); Fotherby's Case, Cro. Car. 62 (1627); Levanne's Case, Cro. Car. 201 (1631); Hughes v. Hughes, Carter 125 (1666); Brown v. Atkins, 2 Lee 1 (1754). For the difference of position between the King's Bench and the ecclesiastical courts with reference to objections to inventories filed in the latter, see 1 WILLIAMS, EXECUTORS (1st ed. 1832) 644-649.

44. See Blackborough v. Davis, 1 P. Wms. 41, 49 (1701); Carter v. Crawley, T. Raym, 496, 500 (1681).

45. In a tiny book *Englands Balme* (1657) addressed to the Protector and the Parliament, the learned and prolific writer, William Sheppard, cited these defects in the law (p. 105). His suggested remedy was to have a commission issued out of Chancery as in case of bankruptcy with public notice given to creditors of loss of claims to those who do not come in. See further, SHEPPARD, *op. cit. supra* note 36, at 477-480; LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (1905) 125 *et seq.*

46. In Bissel v. Axtell, 2 Vern. 47 (1688) the Chancellor decreed a new account by an administrator though one had already been had in the ecclesiastical court.

47. Matthews v. Newby, 1 Vern. 133 (1682).

representatives, entertained proceedings to adjust the rights of all interested parties and gave protection which neither ecclesiastical nor common law courts were able to supply.[48] This was done as early as the seventeenth century. By 1787, at least, it was established that the pendency of suit in the church court was not ground for dismissal of a bill in equity for administration of the same estate.[49]

While suits for payment of legacies had long been a traditional part of the ecclesiastical courts' jurisdiction, it was doubtful during most of the seventeenth and eighteenth centuries whether assumpsit would lie by the legatee against the executor. Ultimately the question was decided in favor of the executor[50] but long before this decision equity had entertained suits by legatees upon the theory that the executor held the personalty in trust.[51] As a result, the church courts and Chancery had concurrent jurisdiction over most proceedings of this nature, and the latter had sole jurisdiction if the legacy involved a trust or where it was payable from, or secured by, land.

Another phase of succession which was undertaken by Chancery was in connection with reaching the decedent's land to pay the debts when the personal property would not suffice for that purpose. After the very early period in which the heir was generally liable for debts, it became the rule that the heir was not liable except for specialty debts which by terms of the specialty was made expressly binding on him, and then only to the extent of the land inherited. Indeed, after the Statute of Wills in 1540 which permitted a testator to devise his land, he could defeat even these specialty creditors by devising the land to others. This was corrected by an act of 1691[52] which gave such creditors action against the devisee. These actions could be maintained against the heir or the devisee in the king's court to recover out of the land, but this remedy was inadequate principally because there was no means of discovering in the suit the value of land which the heir or devisee had received. For this reason equity entertained suits by creditors against the heir or devisee in cases where the land was liable.[53] Moreover, after 1540 testators frequently charged their lands with the

48. See generally LANGDELL, *op. cit. supra* note 45 at cc. vi, vii; 1 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) § 530 *et seq.* See also note 90 *infra.*
49. Phipps v. Steward, 1 Atk. 285 (1737).
50. Deeks v. Strutt, 5 T. R. 690 (1794).
51. See GOFFIN, *op. cit. supra* note 28, at 74.
52. 3 & 4 Wm. & Mary, c. 14 (1691).
53. See LANGDELL *op. cit. supra* note 45, at 144-150.

payment of debts and legacies. Chancery enforced these charges on the theory of trust;[54] indeed the common law and ecclesiastical courts offered no remedy in these cases. In many instances equity followed the rule of the common law as to devises, liability of heirs, and the respective rights of personal representatives, debtors, and creditors of the estate. As to legacies, Chancery usually followed the rules of the church courts. In some important respects, however, Chancery devised new principles of its own making, designed to enforce a fiduciary duty upon the personal representative, and equality between creditors and between those who shared in the decedent's estate.[55] The important doctrines of satisfaction, ademption, marshalling, conversion, election and subrogation were worked out in Chancery and applied in the administration of decedents' estates.[56]

Meanwhile attempts were made to bolster up the waning jurisdiction of the ecclesiastical courts. These efforts now come from the profession that serves as judges and lawyers at Doctors' Commons in London where the principal ecclesiastical courts are located. In 1601 a remedial statute,[57] after reciting that persons entitled to administer intestate estates often refused to do so and secured the appointment of straw men as administrators from whom they received the intestate property without payment of the lawful debts, declared that these recipients should be charged as was the executor of his own wrong. During the Commonwealth, 1649-1660, ecclesiastical jurisdiction was in eclipse. Special courts with district registries were set up for probate and grant of administration and suits for legacies transferred to common law. In 1661, however, the former jurisdiction of the church courts was restored. The famous Statute of Distributions[58] of 1670 was penned by ecclesiastical lawyers and did much to relieve the existing chaos by indicating the beneficiaries to whom intestate's personalty should be distributed after debts were paid. The act also declared that upon grant of administration the ordinary should take a bond, conditioned upon the administrator exhibiting an inventory, administering the goods according to law, rendering a true account and delivering the residue according to the decree of the ordinary. The bonds were made suable in any courts

54. Lewin v. Okeley, 2 Atk. 50 (1740).
55. See 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1937) 316-318.
56. See MAITLAND, EQUITY (2nd ed. 1936) cc. 15 to 19.
57. 43 Eliz., c. 8. (1601).
58. 22 & 23 Car. II, c. 10 (1670). This act was amended and made permanent by 1 Jac. II, c. 17 (1685).

of justice and the ordinaries were empowered, in terms, to call administrators to account, and compel distribution of the residue.

So far as it designated distributees and assured their right to the residue, this legislation was successful but it came too late to restore to the church courts their testamentary jurisdiction before the common law and Chancery courts had begun to interfere. As the ordinary's jurisdiction to enforce administration was not declared to be exclusive, Chancery continued to administer estates whenever an interested party brought suit there. In case an estate was subject to some serious dispute or was debt-ridden, it would be apt to be taken into Chancery, for only that court could give discovery and by its injunction protect the personal representative who followed the court's orders in the administration. The common law courts continued their jurisdiction over actions for debts. Both secular courts still recognized the ecclesiastical courts' exclusive jurisdiction to grant probate and letters of administration; indeed all the courts required that these things be done before the representative's title was regarded as established. Sir Leoline Jenkins, the learned civilian lawyer and judge who assisted in drafting the Statute of Frauds, was careful to include a provision therein preserving the ecclesiastical probate jurisdiction. Probate, however, remained ineffective as to devises of land, and the will so far as realty was concerned had to be proved like a deed was proved in every case where title in the devisee was put in question.

It is commonly said that by the eighteenth century the English ecclesiastical courts, as a practical matter, had lost all testamentary jurisdiction except probate and grant of letters. This is not quite so, for the first volume of Lee's Reports of cases in the ecclesiastical courts contains opinions in perhaps a score of cases[59] involving demands for inventories and accounts, suits for legacies, and similar matters. The true situation seems to have been that after probate or grant of letters the simple solvent estate might be settled without further proceedings in any court, which is indeed the case in England today. Simple detached litigation as to debts and other obligations in favor of or against the personal representative might proceed in the common law or Chancery courts. When serious disputes involving the

59. *E.g.*, Hendren v. Shaw, 1 Lee 51 (1752); Franco v. Alverenza, 1 Lee 187, 659 (1753); Sutton v. Smith, 1 Lee 275 (1753); Pytt v. Fendall, 1 Lee 381 (1753); Minty v. Gould, 1 Lee 414 (1753); Winchlow v. Smith, 1 Lee 416, 651 (1753); Plunket v. Sharpe, 1 Lee 623 (1754). The Pytt and Minty cases show the use of excommunication as process. The Franco and Sutton cases indicate interference by Chancery.

interrelated rights of the parties occurred, the estate usually was removed to Chancery sooner or later, though in numerous cases the parties still attempted to litigate matters in the ecclesiastical courts.[60] These attempts would be successful, if and only if, no one initiated proceedings in Chancery.

Thus matters stood at the time when American colonial courts of justice were being established and when the colonies later separated from the mother country. Jurisdiction over administration and succession upon death was divided between three sets of courts, ecclesiastical, common law, and Chancery. What happened in England after 1776 is not a part of the American legal heritage. However, later English developments are interesting to us, both because they reflect the earlier English law and for the sake of comparison with our law.

From the American Revolution to the Present

The first half century after the American Revolution was not a period of particular change in the English law of succession or in the courts which administered that law. It was evident, however, that the situation called for wide-sweeping reforms which could only be brought about by legislation. Two royal commissions brought in reports relative to these matters in 1832 and 1833. In part there was no disagreement between the reports and as to most of these matters Parliament speedily passed remedial legislation. However, the controversial question of the testamentary jurisdiction of ecclesiastical courts remained unsettled for another quarter of a century.

The general *Report by the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts* was submitted early in 1832. It recommended the abolishment of the Court of Delegates and the transfer of its appellate jurisdiction in ecclesiastical cases to the Privy Council. The plan also called for the abolishment of the inferior, diocesan, and peculiar courts and the vesting of the entire testamentary jurisdiction in the courts of the provinces of Canterbury and York. Attention was called to the inconveniences caused by the doctrine of *bona notabilia* and the uncertainties which existed in this connection.[61] The report also declared that the same

60. In Conset, Practice of the Spiritual or Ecclesiastical Courts (2nd ed. 1700) 288-316 a whole chapter is devoted to the manner of requiring representatives to account, and another to suits for legacies.

61. See p. 23. For a fuller discussion of these difficulties, see Fourth Report by Commissions Respecting Real Property (1833) 45-47; Williams, Executors (1st ed. 1832) 166-184. To mention but one of the defects in the law, probate and administration had to proceed in both places when the deceased left personalty in both the provinces of Canterbury and York.

formalities should be required for wills of personalty and of realty and that probate should be effective as to all wills. Certain measures were favored for strengthening the processes of probate and administration in the spiritual courts, but aside from reorganization and minor changes the testamentary jurisdiction of these courts was to continue as before.

The *Fourth Report of the Commissioners on the Law of Real Property* was filed a little more than a year later. Much of it dealt with the complex organization and procedural difficulties of the ecclesiastical courts. This report recommended that the entire testamentary jurisdiction of the latter be abolished; that a central registry of Wills be set up in London and that will contests and grants of administration be undertaken by Chancery. There was agreement with the ecclesiastical courts commissioners that there should be only one form of execution for all wills and that probate should be effective as to both real and personal property.

The ink was not dry upon the former report before Parliament abolished the High Court of Delegates and provided that the Privy Council should hear final appeals from the ecclesiastical courts.[62] In 1833 two important acts were passed, one putting the rules for descent of land upon a more rational basis[63] and the other providing that a decedent's land should be liable generally for payment of his debts.[64] In 1837 the Wills Act[65] was passed providing uniform rules for the execution, revocation, revival and construction of wills of both real and personal property.

Two decades went by, however, before it was decided what was to become of the testamentary jurisdiction of the ecclesiastical courts. The real property commissioners had reported that "for considerable time there had been few suits in any of the spiritual courts for legacies" and that suits there to compel the exhibition of inventories and accounts were "of very rare occurrence."[66] The tables in the appendix attached to the report of the ecclesiastical courts commissioners shows, however, a considerable num-

62. 3 & 4 Wm. IV, c. 92 (1832). See also 3 & 4 Wm. IV, c. 41 (1833).
63. 3 & 4 Wm. IV, c. 106 (1833).
64. 3 & 4 Wm. IV, c. 104 (1833). The land of traders had been made liable for debts by 47 Geo. III, stat. 2, c. 74 (1807). There was also a series of statutes dealing with the procedure of reaching land for the payment of debts. 11 Geo. IV & I Wm. IV, c. 47 (1830); 2 & 3 Vict., c. 60 (1839); 11 & 12 Vict., c. 87 (1848).
65. 7 Wm. IV & 1 Vict., c. 26 (1837).
66. FOURTH REPORT BY COMMISSIONERS RESPECTING REAL PROPERTY (1833) 60-61.

ber of each.[67] As late as 1847, Henry Charles Coote, a proctor in Doctors' Commons, was able to secure a publisher for a practice book containing modern ecclesiastical court forms, and a large part of the work deals with suits for subtraction of legacies, to compel inventory and account, and for distribution of intestate goods.[68] The spiritual courts had a valiant and learned defender in Robert Phillimore,[69] an advocate in Doctors' Commons. In a letter to the Prime Minister, which was published in book form,[70] he replied to a recent attack made in Parliament upon the church courts. Describing the jurisdiction, procedure, and personnel of these tribunals and citing comparisons regarding delay and cost which were unfavorable to the common law and Chancery courts he favored reorganization and strengthening of the ecclesiastical courts. Naturally the officials and practitioners of the latter took this position. The reports of the ecclesiastical courts show that down to the last there were some bitterly contested cases there, involving testamentary matters other than probate and grant of administration.[71]

However, it was a losing fight. In 1857 Parliament, by the Court of Probate Act,[72] abolished all testamentary jurisdiction of the ecclesiastical courts and created a new Court of Probate with power to grant probate and letters of administration. Probate was made effective as to real property when the will disposed of both lands and chattels.[73] It was specially provided that no suits for legacies or for the distribution of residues should be entertained by either the ecclesiastical courts or the newly created Court of Probate.[74] The act is a lengthy one, due to the fact that there are minute provisions granting to the old officials of the spiritual courts places in the newly organized Court of Probate, not only in the principal registry in London but in district registries throughout the kingdom.

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67. REPORTS BY COMMISSIONERS ON THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS (1832) 351-430.

68. COOTE, PRACTICE OF THE ECCLESIASTICAL COURTS (1847) 634-754. See also 2 WILLIAMS, EXECUTORS (1st ed. 1832) 1263-1270; TOLLER, EXECUTORS (6th ed. 1827) 489-496.

69. Born 1810—died 1885. He was also a barrister and attained distinction as a scholar, writer and judge, and was knighted in 1862. See short biographical sketch in 19 AM. L. REV. 443 (1885).

70. PRACTICE AND COURTS OF CIVIL AND ECCLESIASTICAL LAW (1848).

71. See In the Goods of Hewlett, 1 Spinks 1 (1853); Broadwood v. Holland 1 Spinks 5 (1853); In the Goods of Rainier, Deane 317 (1857).

72. 20 and 21 Vict., c. 77 (1857). See also amendments thereto in 21 & 22 Vict., c. 95 (1858).

73. § LXII *et seq.*

74. § XXIII. See note 81 *infra.*

A most important milestone is the Land Transfer Act of 1897,[75] which made probates effective as to wills which disposed of lands alone.[76] The most vital provision of the act, however, declared that both real and personal property should vest in the personal representative regardless of any devises contained in the will;[77] land passed to the heir or devisee only upon assent or conveyance by the personal representative.[78] It remained for the Administration of Estates Act (1925)[79] to provide a single set of rules for succession to both real and personal property in case of intestacy.

When an Englishman dies today his will is probated, or in case of intestacy, letters of administration are granted, by the Probate Division of the High Court of Justice, the successor of the Court of Probate.[80] Application for probate in common form may be made either to the Principal Probate Registry in London or to one of the district registries. If solemn form of probate is desired, or is necessary because of contest of the will's validity, the proceedings take place in the Probate Division, or if the value of the estate is small in the County Court. The Probate Division has no business regarding succession except to grant, contest, or revoke probate and administration.[81]

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75. 60 & 61 Vict., c. 65 (1897).
76. § 1 (3).
77. § 1 (1).
78. § 3.
79. 15 Geo. V, c. 23 § 45 *et seq.* (1925).
80. Under the Judicature Act 1873, 36 & 37 Vict., c. 66, §§ 16, 22, 23, 31, 34, and acts amendatory thereof, the jurisdiction of the former Court of Probate was vested in the Probate, Divorce, and Admiralty Division of the High Court of Justice. This is now called the Probate Division. For details see 1 WILLIAMS, EXECUTORS (11th ed. 1921) 201-206; 1 WILLIAMS, EXECUTORS (12th ed. 1930) 177-181.
81. See, however, 1 WILLIAMS, EXECUTORS (12th ed. 1930) 613-618 assuming that the Probate Division can require a personal representative to exhibit an inventory and account. The principal reliance is upon old cases in the ecclesiastical courts. The Court of Probate Act of 1857, § LXXXVII, provided these inventories and accounts should be returnable to the Court of Chancery. See also note 74 *supra*. *Cf.* Bouverie v. Maxwell L. R. 1 P. & D. 272 (1866); Jenkins v. Jenkins, 76 L. T. R. (N. S.) 164 (1897) requiring account upon application to probate registrar. English texts seem to place some reliance upon section 25 of the Administration of Estates Act (1925) declaring the personal representative, when required, shall exhibit "in the court" an inventory and account. "The court" refers to the High Court. *Id.* § 55 (1) (iv); hence the Chancery Division would seem to be here intended in light of the Court of Probate Act of 1857 and the provisions for the organization of the High Court under the Judicature Acts. See 1 WILLIAMS, *op. cit. supra* at 177-185. The furnishing of an inventory and account is a condition of the administrator's bond and a representative is always required to make affidavit of the amount of the estate for taxation purposes before obtaining probate or administration. RANKING, SPICER AND PEGLER, EXECUTORSHIP LAW AND ACCOUNTS (14th ed. 1939) 115, 173, 180. Whatever the power of the Probate Division, it

After probate or grant of letters, personal representatives may collect the assets of the estate and sue in appropriate courts to this end. They may also be sued in the King's Bench or Chancery divisions or in the inferior courts with reference to claims against the decedent. In the usual case the representative administers the estate without any further court proceedings after probate or grant of letters. Of course it is the representative's duty to prepare an inventory and keep strict account of his dealings; the law relating to death duties requires that these things be done;[82] they will be essential at the time of voluntary settlement with the beneficiaries;[83] and if necessary the Chancery Division will enforce the obligation.[84] The representative can prefer one creditor to another of the same class but he is personally liable if he exhausts the assets in payment of creditors of inferior classes without satisfying those holding preferred claims,[85] though he can be absolved of this liability as to debts of which he has no notice by publishing an advertisement for all creditors to present their claims within two months.[86] He may compromise debts due to the estate.[87] He is not obliged to distribute the estate until a year after the death.[88]

If the representative or some person interested as a creditor or beneficiary brings the necessary proceedings, the entire estate may be brought within the power of the Chancery Division by an order for administration.[89] When the order is signed the court will cause all actions by or against the representative to be transferred to the Chancery Division. The court may order the taking of accounts, the payment of estate money into court, or the appointment of a receiver. After signing of the order the representative can no longer prefer creditors nor do any other act of management

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seldom requires the representative to furnish the inventory or account except those necessary for taxation purposes. The power of the Probate Division to construe wills is limited to construction necessarily incident to the grant or refusal of probate. See *In re* Hawksley's Settlement [1934] Ch. 384; In the Estate of Fawcett [1941] P. 85; Note (1941) 192 L. T. 265.

82. See generally RANKING, SPICER AND PEGLER, *op. cit. supra* note 81, at 115.

83. See generally WOODS, SOLICITOR'S REPORTS ON ADMINISTRATION AND EXECUTORSHIP (1887).

84. Administration of Estates Act, 1925, 15 Geo. V, c. 23 § 25.

85. Vibart v. Coles, 24 Ch. D. 364 (1890); 1 WILLIAMS, EXECUTORS (12th ed. 1930) 646-648.

86. Trustees Act, 1925, 15 Geo. V, c. 19, § 27.

87. *Id.* § 15.

88. Administration of Estates Act, 1925, 15 Geo. V, c. 23, § 44.

89. See *supra* note 48. Administration actions were assigned to the Chancery Division by Judicature Act, 1873, 36 & 37 Vict., c. 66 § 34 (1873). See also Administration of Estates Act, 1925, 15 Geo. V, c. 23, § 32.

without court supervision. The court will virtually take upon itself the business of administration and will order creditors to be brought in by advertisement, adjust their claims, and pass on the representative's accounts. Distribution will then be ordered in accordance with the rules of law and the representative is protected if he obeys the court's orders. There are various remedies to require the representative to disgorge amounts found due. It is also now possible to bring particular questions concerning the administration before the Chancery Division without removal of the entire administration; indeed the court will not sign a complete administration order if the controversy can be settled by other proceedings.[90]

Thus, jurisdiction over matters relating to succession upon death is divided between the three divisions of the High Court of Justice in somewhat the same way that it was for centuries divided between three separate courts. However, clashes between tribunals have been eliminated, as have many uncertainties and inadequacies in the law. Of the highest importance is the virtual abolition of the historical jurisdictional discrepancies which grew out of the distinction between real and personal property and their separate courses in the law of succession.[91]

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90. As to the present practice in administration actions, see 2 WILLIAMS, EXECUTORS (12th ed. 1930) 1259-1303; DANIELL, CHANCERY FORMS (7th ed. 1932); SETON, FORMS OF DECREES (7th ed. 1912). See also 14 HALSBURY'S LAWS OF ENGLAND (1934) 430-465. For statement of the substantive rules see MAITLAND, EQUITY (1936) cc. 16, 17.

91. A short and selected bibliography on testamentary jurisdiction in England follows. Dates given are usually to the first editions with subsequent editions also noted in some cases. For further details concerning literature in the field, see 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 395-396, 607-620.

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