

THE SYSTEM OF PROBATE COURTS IN CONNECTICUT WITH SOME SUGGESTIONS FOR ITS IMPROVEMENT.

The system of separate Probate Courts having jurisdiction of small districts as at present established in Connecticut, is largely the outgrowth of the Connecticut desire for the local control of local affairs.

In early Colonial times, the powers now exercised by the judges of probate, were vested in the "Particular Court," but in May, 1666, they were transferred to these several county courts by the General Assembly, which ordered that "wills and inventories of persons deceased within any of the Counties of this Colony, shall be exhibited and proved at the County Court, to which the deceased did appertain by his habitation," and later, in 1698, probate courts were established as separate tribunals by the same authority.

These probate courts still held county jurisdiction, however, and it was not until 1719, that a district, smaller than a county, was established.¹

From the time of this subdivision in 1719 the number of these districts has been steadily increased, gradually at first, but afterwards more rapidly, until a total of one hundred and twelve (the present number) has been reached

On examining the records, we find the number of the districts increased at the following rate: From 1719 to 1830, a period of one hundred and eleven years, thirty-nine districts were formed; from 1830 to 1840, a period of ten years, thirty-four; from 1840 to 1860, a period of twenty years, thirty-three; and from 1860 to 1904, a period of forty-five years, only six.

It has been asserted that this multiplication of districts was due principally to the fact that the people of the state, who conducted their own cases in the probate courts, found the difficulties of travel to another town so great, that they demanded local tribunals;² but the statistics given above do not entirely support

1. See note to Sec. 189, Gen. Stat. Conn. Rev. 1902.

2. Judicial and Civil History of Connecticut, p. 154.

this theory; for it will be observed that in the earlier times, when travel was most difficult, the districts were larger, and that as the roads and other means of communication improved, the number of the districts increased, with a corresponding decrease in area.

We notice further, that the greatest increase occurred between 1830 and 1860, a period when the country was growing in prosperity and when the attention of more people was directed to these courts, because they were obliged to use them.

The citizen of Connecticut at that time, even more than now, was a firm believer in the local control of local affairs, and the system of town government, in which his neighbors were the officials and performed, on the spot, nearly all the governmental functions with which he was familiar, made him prefer to have his estates settled by "the Squire," at home, rather than by some strange judge in another town. We must therefore conclude, as the same difficulties of travel existed in other states, and did not suffice to change their county system of probate courts, that it was local instinct, rather than the bad roads, or limited means of conveyance, that caused the localizing of these courts in Connecticut.

It must be remembered too, that in 1840, the population of the state was more evenly distributed than now, and that this greater equality in population would result in making the districts more nearly alike in their relative importance, and any incongruity, resulting from a comparison of their respective signs, less evident.

Of the one hundred and thirty-nine towns then existing, there were seventeen having less than one hundred inhabitants, one hundred and fourteen containing between one hundred and four thousand, and only eight over four thousand, the largest of them being New Haven with a population of fourteen thousand, three hundred and nine.

Let us see how the population of the districts compared in 1900, the date of the last census. Of the one hundred and twelve probate districts, seventeen contained less than one thousand inhabitants; twenty-nine, between one and two thousand; thirty, between two and five thousand; fourteen, between five and ten thousand; sixteen, between ten and thirty thousand; and six, over thirty thousand. The smallest of them was the district of Marlborough, with a population of three hundred and twenty-two persons; the largest, the District of New Haven, with a population of one hundred and twenty-three thousand, eight hundred and thirty-one.³

3. A comparison by counties shows that New Haven County, with a popu-

If Marlborough is taken as a standard in size, New Haven should be divided into three hundred and eighty-one districts, and the title of "Judge" would be as common as that of "Colonel" in Kentucky.

It must not be supposed that all these districts have been created entirely by a simple process of subdivision; on the contrary, some towns have been transferred from district to district by the legislature in the most confusing manner.⁴

To the Connecticut mind the logical result of local probate courts was the election of local judges to preside over them, and this right to elect these judges is now assured by constitutional amendment as well as by statute.⁵

For nearly two hundred years the probate business of the state has been transacted in these little district courts with their elective judges and it is one of the purposes of this article to point out some of the unfortunate results of our long adherence to this system.

They are manifested in two directions:

First: In the condition of the probate court records. Second: In the inferior position which the probate courts occupy in our judicial system.

Let us consider the record first. It is the duty of every judge of probate to cause a complete record to be made of all orders passed him, and of certain of the documents filed with the court, and the towns composing his probate district are required to pay for the record books.⁶

The statutes further require that the records (and by this term must be understood not only these books, but also the original papers filed with the court) shall be kept by the judge in a fire proof safe, vault, or building, and if no such place is already provided, the selectmen of the town, or towns, composing the district, shall supply one. And in case they fail to act it shall be the duty of the judge to provide such a safe, as he deems necessary, and draw on the town for its cost, but no fire-proof vault, or building shall be erected without the unanimous vote of the towns.⁷

It will be easily guessed that the judge of a small probate dis-

lation of 269,163, has 13 districts, while Windham County, with a population of 46,861, has 14 districts.

4. See History of Conn. Probate Districts compiled by Albert C. Bates.

5. Art. 21, Conn. Constit., and Sec. 189, Rev. Stat. Conn. 1902.

6. Sec. 197, Gen. Stat. Conn. Rev. 1902.

7. Sec. 198, Rev. Stat. Conn. 1902.

trict, even if sufficiently provided with fire-proof accommodations, would hesitate a long time, before ordering, on his own responsibility a safe large enough to hold all the court files and record-books; especially when he must trust to his ability to pay for it by collecting from some town, whose receipts from taxes are in all probability barely sufficient to meet its current needs.⁸

The risk of losing the records by fire is so great and the law for providing them with places, where they can be safely stored, so barren of results, that the State Record Commission in 1900 made the remarkable suggestion that all records prior to 1800 be removed from the keeping of the local districts and stored away at Hartford!—a proposition to which there would be strenuous and righteous opposition.

This multiplicity of independent districts has resulted in almost as many different methods of keeping the records.

The report last quoted says, "an examination of the reports (from the probate judges) shows that hardly two districts keep their records in like manner . . . and . . . this lack of uniformity is of great public inconvenience."

The blanks provided by the different courts for the filing of petitions, or giving notice, and the formal decrees entered thereon, differ widely, while the certificates of appointment, letters testamentary, etc., issued by them have only "a slight family resemblance."

The advantage of uniformity in all these documents and in methods of procedure is self evident, but it never can be attained where it depends on one hundred and twelve judges, influenced by as many different surroundings and traditions to adopt some one plan satisfactory to all. Such a reform can only be accomplished by reducing the judges to a ~~limited~~ number who can adopt uniform rules of practice and a system of forms with power to make their use compulsory throughout the state.⁹

But it is not only with each other that the courts differ in their methods, in fact we do not always find a uniform system of filing and recording even in the same court.

This is caused largely by the change in judges, caused by the

8. The want of proper accommodation for these records and the consequent danger of their loss by fire is strikingly shown by the report of the Record Commission, p. 1900.

9. Such a system of forms and procedure adopted by the Supreme Court of Massachusetts in 1862 has been in existence in that state ever since, and has all the force of a law to which the Probate Courts must conform. *Baker v. Blood*, 128 Mass. 543.

frequent elections, which change also furnishes an additional chance for the records and files to be actually lost entirely.

In most of the country districts, the records are kept in the judge's house,¹⁰ and with each swing of the political pendulum the records and papers are transported from the house of the vanquished to that of the victorious judge, with all the possibilities of loss *in transitu*." Let us now turn from observing the bad effects of our system of petty probate districts presided over by elective judges, as shown in the condition of the records, and notice how it has resulted in placing the courts themselves on a plane lower than the importance of their functions deserves.

As I have already said, the natural consequence of the localizing of the probate courts was the election of local judges to preside over them, for while it is not prescribed by law that the judge must be a resident of his own district, the same reasons that led the people to make the office elective, have established the custom that such a residence in the district is a prerequisite for a nomination for judge of probate in that district. This not only results in giving the electors of our smaller districts a very narrow field from which to choose their probate judges, but also prevents a man of ability and training who might be willing to act as judge of a small district (if it does not necessitate a change of his residence to do so) from accepting the position.

The outcome has been that these judicial positions have been necessarily given in most cases to laymen who, without previous training or experience, have very little opportunity to exercise their functions after taking office, on account of the smallness of their districts, and therefore never learn how to do properly their work.

In the larger districts, the judge devotes his entire time to the court and is assisted by one or more clerks; in the smaller districts he can hardly have more than four or five matters a year to attend to. It seems almost unnecessary to say that the judge of any court should be familiar with the procedure of the court and the legal principles involved in the business transacted therein, but such knowledge is especially essential in the judge of a probate court.

For while in other courts the parties in interest are always represented by attorneys, in the probate court the majority of es-

10. Report Tem. Exam. Pub. Rec. 1904, p. 5.

11. On the lack of systems in the courts and loss of documents, see the Reports collected by the Tem. Exam. Pub. Rec. in 1904.

the multiplicity of districts and the method of selecting the judges are settled by persons, unaided by any legal adviser other than the judge himself. Notwithstanding this, as a result of our present system, out of the one hundred and twelve judges, who were conducting probate courts in 1904, less than thirty were lawyers.¹²

This preponderance of laymen on the probate bench has naturally resulted in placing these courts, and the opinions of these judges, on a low plane. Never, in this state, is the decision of a judge of probate quoted as authority in a higher court, though in New York, the rulings of the surrogate are considered of sufficient value to be published;¹³ and the legislature as if recognizing the probability of error in these tribunals has allowed an appeal from *any* order, denial or decree of a court of probate,¹⁴ though a justice of the peace is given final jurisdiction in at least one class of cases, viz.: Summary Process.¹⁵

In the smaller districts, the biennial elections of the probate judges are not so exciting as in the larger city districts, where the office is of more importance.

Here the contest is frequently waged with the greatest vigor, the judge being forced every two years to battle fiercely at the polls for his place, and hundreds of dollars are often spent, on both sides, for pasters and other legitimate election expenses, and this feature of the office might alone deter, or prevent, many competent lawyers from accepting a nomination, or even an election as judge of probate in these cities.

From all of the foregoing it seems to the writer evident that we have outgrown our present system and the question at once arises, what other should we adopt? The answer to this might almost be, any system that will eradicate the two sources from which spring most of the evils of our present arrangement; namely,

12. Many instances could be cited to show the difficulties in which innocent persons have been involved, because the judge either has not required them to observe the law in settling an estate, or has misinformed them as to their rights or powers in connection therewith. The numerous suits recently brought by D. P. Atwood against officials who had not been required to file their inventories is an example of the former. See also *State v. Thresher*, 77 Conn. 70.

13. In many districts the judicial functions of the court have so little prominence that the judge occupies relatively the same position in the community as the town clerk and his court-room is known as the probate office. In fact, it is only within a few years that, even in our larger cities, the "office" has been raised to the dignity of a "court." *Vide*, 71 Conn. 756.

14. Sec. 406, Rev. Stat. Conn. 1902.

15. Sec. 1081, Rev. Stat. Conn. 1902.

to preside over them; but a return in part to our ancient county system which is still used by Maine, New Hampshire and Massachusetts and which Schouler in his work on "Executors and Administrators" calls the "New England system,"¹⁶ seems most logical.

To make the attendance at the court easy for those living a distance from the county seat, there should be several courts established in each county. At these courts the records should be collected, arranged according to some uniform system, and preserved in fire-proof vaults.

In charge of these records at each court should be a clerk, with such deputy clerks as may be necessary, who could assist those who needed it, as far as they properly could. These clerks should be appointed by the judges and hold their places without fear of political upheaval. The blanks, record-books and rules of court should be of a uniform style, approved by the judges. The judges themselves should have county jurisdiction, sitting on regular days at the different courts, and should be appointed by the governor, to hold office during good behavior. The salaries of the judges and the clerks, and the expenses of the court, should be paid by the state, and the fees (which should be regulated, that they would meet these expenses), should go into the state treasury.

In this way, in addition to avoiding the unfortunate results of the present system, the smaller towns would have the benefit of as good service, and as good protection for their records, as the larger ones, and their inhabitants would find (now that travel is so easy by electric and steam roads) but little trouble in attending to court duties in another town. The difficulties of making such a reform are fully understood by the writer. It would require a constitutional amendment, with all the attendant formalities, as well as an amendment of the statutes, to do away with the election of the judges. Any change of the kind proposed would be met by an array of probate judges, ex-judges and prospective judges, who would wish the district system to remain for personal ends, and by many others who by reason of local pride, or prejudice, would wish to cling to the system, so long in vogue. The functions of the probate courts are of great importance. Most of the property of the community eventually passes by their decrees. They are the instruments by which an important part of the state's revenue (the succession tax) is collected. They care for the helpless; and are resorted to by the ignorant unassisted by coun-

16. Schouler on Executors and Administrators, Sec. 11.

sel; family connections, and rights to property depend on the accuracy and security of their record and the validity of their judgments.

The dignity and learning of their judges should be made commensurate with these responsibilities, and their records should be prepared and preserved as their importance demands.

The appointment of a record commission to investigate the condition of the latter and the passage of a statute authorizing their repair,¹⁷ were both steps in the right direction; the abolition of the district system and the election of the judges should follow to complete the work.

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17. Pub. Acts, Conn. 1905, ch. 239.