

Memo

To: Dr. John Bruce
From: Caleb Stevens, Esq.
CC: Dr. Jeanette Carter; Dr. Mark Marquardt
Date: 1/5/2011
Re: US Probate Courts Registering All Land Transactions

I. Questions

- a. Whether US probate courts have ever been required to register all land transactions, as in Liberia?
- b. If yes, what was the policy rationale for restricting probate courts to consideration of only inherited deeds?

II. Short Answer

No, probate courts in the US have never been required to register all land transactions.

III. Analysis

Liberian law requires public probation of any “deed, mortgage or other instrument affecting or relating to . . . real property.”¹ Furthermore, “The instrument to be probated shall be presented to the Probate Court with a request that the Court make an order directing the Registrar of Deeds to register such instrument.”² If Liberian law is based on US law, has a US state similarly required the probation of all land transactions?

One commentator notes that the scope of US probate jurisdiction has varied throughout its history.³ In the early stages of their development probate courts were empowered to probate wills only.⁴ This jurisdiction was slowly expanded to include

¹ Title 29, Real Property, ch. 1, Section 2, Liberian Codes Revised.

² *Id.* at Section 3.

³ Lewis M. Simes & Paul E. Basye, Organization of the Probate Court: I, 42 Michigan Law Review, 965, 978 (1944).

⁴ *Id.* at 978.

supervisory powers over executors and administrators of estates.⁵ Yet, there is no mention of expanding that jurisdiction to include compulsory registration of all land transactions.⁶

Massachusetts has seen a gradual development of probate jurisdiction. During the colonial era, the General Court and county courts were vested with probate jurisdiction.⁷ In 1862 freestanding probate courts became courts of general record with power to enforce their rulings.⁸ Their jurisdiction over testamentary trusts was concurrent, however, with courts of general jurisdiction.⁹ Yet, Massachusetts probate courts retained exclusive jurisdiction over the settlement of estates.¹⁰ Probate courts in Massachusetts have never been required to register all land transactions.

Wisconsin modeled its probate court system on that of Massachusetts, “The laws originating in Massachusetts thus became and still constitute the basis of jurisdiction and procedure in the county courts of Wisconsin.”¹¹ ‘An act for establishing courts of probate,’ passed in 1818, established a probate court in every county.¹² Later probate powers were subsumed within the territorial courts (at the time Wisconsin was a US territory), which had jurisdiction “to probate wills, grant letters of administration . . . examine and allow accounts of executors, administrators, and guardians,” as well as being empowered to “have cognizance of all such other matters and things as the laws of this territory do or may direct.”¹³ In 1850 probate jurisdiction was transferred to the county courts, “the said judges of the county court . . . shall be invested with full and exclusive probate powers.”¹⁴ Up until at least the 1960s Wisconsin county courts retained exclusive probate jurisdiction.¹⁵ At no time were probate courts required to register all land transactions.

Wisconsin is not the only state to have vested probate jurisdiction within county courts. Twelve other states have done so: Colorado, Florida, Illinois, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, and

⁵ *Id.* at 979.

⁶ *Id.*

⁷ Thomas E. Atkinson, Development of the Massachusetts Probate System, 42 Michigan Law Review 425, 432 (1943). County courts were empowered to “hear and determine all cases relating unto wills and administrations, and to grant forth executions upon their judgment given therein.” *Id.* at 440.

⁸ *Id.* at 449.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Eugene M. Haertle, The History of the Probate Court, 45 Macquarie Law Review 546, 552 (1961-62).

¹² *Id.*

¹³ *Id.* (quoting Estate v. George, 225 Wis. 251, 259-62 (1937)).

¹⁴ *Id.* at 553 (quoting R. S. 1849, ch. 86, Section 4).

¹⁵ *Id.* at 554.

West Virginia.¹⁶ None of these states required the county courts, as part of their probate powers, to register all land transactions.

IV. Conclusion

Although probate jurisdiction has varied in US history, no state has required courts vested with probate jurisdiction, whether courts of general jurisdiction or freestanding probate courts, to register all land transactions as in Liberia.

¹⁶ Simes & Basye, *supra* note 3, at n.78.