Introduction

THIS Code is offered to meet the rapidly increasing demand for a coherent, efficient and economical probate system.

THE NEED FOR PROBATE REFORM

In many states an outmoded judicial organization and an inadequate procedure hamper the functioning of probate courts and breed delay and injustice. Even where the legal devices conceived by legislators are reasonably well adapted to their purpose, faulty draftsmanship has rendered probate statutes a prolific source of litigation. Moreover, probate judicial organizations and procedural systems have, in many instances, been built up piece by piece, with little or no regard to considerations of coherence and consistency in the body of the legislation as a whole.

THE MOVEMENT FOR REFORM IN PROBATE LEGISLATION

To eliminate such evils, a movement for probate reform began in this country more than a decade ago, and is still continuing. Already probate codes have been adopted by the following legislation on the dates indicated: Ohio Laws (1931) p. 320; California Stat. (1931) c. 281; Florida Laws (1933) c. 16103; Minnesota Laws (1935) c. 72; Kansas Laws (1939) c. 180; Illinois Laws (1939) p. 4; Michigan Public Acts (1939) No. 288; Nevada Stat. (1941) c. 107. The recent, comprehensive revision of the New York law of decedents' estates should also be noted. See New York Laws (1929) c. 229. At the present time extensive reform in the probate law is under way in a number of other states, and it is entirely possible that the movement may become nation-
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wide in extent. To provide an adequate and authoritative guide for such legislation, this Code was prepared.

UNIFORMITY NOT AN OBJECTIVE

This is a model code, not a uniform act. Its objective is not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought. Primarily, it is intended as a reservoir of ideas, and of acceptable legislative formulations of those ideas, from which legislative committees may draw the framework of new probate codes. Just as a good form book for wills loses none of its value because the draftsman of a will adapts the form to his particular problems, likewise it is believed that this Code will prove no less valuable though it may be thought advisable to adapt its provisions to the judicial organization and legal system of the particular state.

STEPS IN THE PREPARATION OF THIS CODE

Before any part of this Code was drafted, the statutes of all common-law American states were read and classified. Those of Louisiana, being based on the civil law, were only used occasionally. In addition to the study of contemporary statute law, an examination was also made of the case law with respect to particular problems, and of the legislative history of particular provisions. While the probate legislation of the states in which probate codes have been recently adopted has been generally helpful in this connection, older statutes have also sometimes furnished valuable suggestions for the Model Code. This is particularly true in the case of Massachusetts where excellent solutions of many problems were found in well drafted statutes.

While much of the research incident to the preparation of the Code has been preserved only in the form of unpublished memoranda, in a few instances it has crystallized into law review articles. The following are by-products of this research:
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Though a critical, comparative study was made of existing probate statutes, the task was not limited to a selection of the best type found in the statute books. If no satisfactory legislation could be found as to a problem the Code proceeds upon original lines. Extensive litigation on a question was taken as some indication that the rules of law should be clarified. If the subject matter was of a sort which could be satisfactorily dealt with by statute, legislation was attempted even though none existed before. But not infrequently the problem was of a sort which could only be solved by judicial pronouncement and not by statutory rules.

RELATION OF THE MODEL PROBATE CODE TO ACTS PROMULGATED BY THE UNIFORM LAWS CONFERENCE

Recognizing the excellent work of the National Conference of Commissioners on Uniform State Laws of the American Bar Association, it was agreed that, in drafting the Model Probate Code, legislation promulgated by the Commissioners should be incorporated wherever the same subject matter had been dealt with. Accordingly, the following Uniform or Model Acts, promulgated or in preparation, have been incorporated in whole or in part in this Code at the points indicated:

Model Execution of Wills Act, §§ 45 to 50.
Uniform Act Governing Secured Creditors’ Dividends in Liquidation Proceedings, § 139.
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Uniform Veterans' Guardianship Act, Part IV.
Uniform Powers of Foreign Representatives Act, Part V.
Uniform Ancillary Administration of Estates Act, Part V.

It is also contemplated that when and if a new Uniform Wills Act, Foreign Probated, is promulgated by the National Conference, that also will be incorporated into the Model Code. Attention should also be called to the following Acts promulgated by the Commissioners which were not incorporated in this Code, but which have a close relation to it and might prove useful to the draftsman of a probate code:

Uniform Absence as Evidence of Death and Absentees' Property Act.
Model War Service Validation Act.
Uniform Fiduciaries Act.
Uniform Fraudulent Conveyance Act.
Uniform Illegitimacy Act.
Uniform Joint Obligations Act.
Uniform Marriage and Marriage License Act.
Uniform Partnership Act.
Uniform Principal and Income Act.
Uniform Property Act.
Uniform Reciprocal Transfer Tax Act.
Uniform Simultaneous Death Act.
Uniform Trustees' Accounting Act.
Uniform Trusts Act.

ADAPTATION OF MODEL CODE TO LOCAL LEGISLATION—
QUESTIONS OF CONSTITUTIONALITY

In some jurisdictions it will be impracticable to enact this Code without a few modifications to adapt it to local conditions. It will have to be fitted into the local judicial organization; for the scheme presented herein contemplates a probate court which is an integral part of the judicial organization of the state. Great care has been taken to avoid provisions in the Code which may conflict with usual constitutional provisions. Moreover, a reference to such constitutional questions has
been made in a number of the comments. But it is impracticable to discuss or refer to every constitutional provision which might, in one particular state, be in conflict with a provision of this Code. For example, in Illinois it is held that the probate court has no jurisdiction under the Illinois constitution to pass on claims arising out of the torts of the decedent. Howard v. Swift, 356 Ill. 80, 190 N. E. 102 (1934); Gordon v. Bauer, 373 Ill. 357, 26 N. E. (2d) 110 (1940). In the same state it has been held that a statute which gives the probate court jurisdiction over testamentary trusts is unconstitutional. In re Estate of Mortenson, 248 Ill. 520, 94 N. E. 120 (1911). Doubtless it would require a constitutional amendment in some states to abolish the probate court as a separate court and to give exclusive original jurisdiction in probate matters to the trial court, as is here advocated. For this reason, alternative language has been inserted in the comment, whenever necessary, to permit a separate probate court. But it is essential to the satisfactory operation of this Code that the court which has jurisdiction over probate matters be coordinate with the court of general jurisdiction, and, therefore, in a state where it is not the same court, a change in the constitution should be sought, if necessary.

COMMENTS AND APPENDICES

Much of the research incident to the preparation of this Code has been preserved in Appendix A. There it is possible to find a summary of existing statutes on important questions dealt with. For the draftsman who seeks a somewhat different solution of the problem than that adopted by the Code, the Appendix provides a method of finding related legislation.

The comments, while serving also to preserve some of the results of the research, do much more. They are a part of the report of the Committee on the Model Probate Code and suggest the rationale of important sections.
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ALTERNATIVE RECOMMENDATIONS IN COMMENT

In keeping with the primary objective to make the Code a guide to draftsmen and not a uniform act, suggestions for alternative statutory provisions have been inserted in the comments to some of the sections. Sometimes this was done because of a difference of opinion on the part of the members of the drafting committee. Sometimes it was due to a feeling that, although one solution of a given problem was ordinarily to be preferred, another solution was not seriously objectionable and might, under some circumstances, be actually more desirable.

GENERAL PLAN OF THE CODE

In some probate codes an attempt is made to consolidate to a very considerable extent provisions for the administration of decedents' estates, testamentary trusts and estates under guardianship. Thus, provisions for bonds, letters, accounting and discharge may be found in a division of the code providing for fiduciaries in general. See, for example, Mich. Probate Code, c. 4, Mich. Stat. Ann. (1943) §§ 27.3178(251) to 27.3178(307). That plan has not been followed herein. In selecting language which applies to all types of fiduciaries, much may be lost in the way of precision and detail. It seems better to state the provisions for decedents' estates first, following those by a separate part on guardianship in which analogous provisions in the part on decedents' estates are incorporated by reference so far as possible. See introductory comment to Part IV. Part I and the first two divisions of Part V of the Code have general application to decedents' estates, guardianships and testamentary trusts. Indeed, Part I, being concerned largely with general provisions, comprehends any proceeding within the probate jurisdiction. Part V on "Ancillary Administration" is simply an incorporation of three acts prepared, or under consideration, by the Confer-
ence of Commissioners on Uniform State Laws. Part II, on “Intestate Succession and Wills” is largely concerned with those two branches of substantive law. Part III is mainly procedural and covers the subject of “Administration of Decedents’ Estates.” Part IV is devoted to the subject of “Guardianship.”

IMPORTANT FEATURES OF THE CODE

It is believed that a Code which merely presents a well drawn formulation of ideas commonly found in existing probate legislation would be worth promulgating. But this Code does something more. While it is a careful codification of the American system of probate law, it seeks to improve that law at certain points.

Probate Judge to Be Same as or Coordinate with Trial Judge

First, it provides a court organization coordinate with, and a part of, the trial court of general jurisdiction. See § 6. In the early history of our probate law following the model of the English ecclesiastical courts which had probate jurisdiction, our probate courts were commonly regarded as inferior tribunals. But as their jurisdiction was gradually extended, the tendency has been to give them a status more nearly like that of the trial court of general jurisdiction. Indeed, in some states this trial court is the tribunal which sits in probate matters. It is believed that such a type of judicial organization is desirable. There is no more reason for separate probate courts in most localities than there is for separate criminal courts. But, far more important than the matter of separation of function, is the proposition that the judge in probate matters should be as well qualified and should receive as large a salary as the trial judge. This Code is so drawn that it can be enacted whether a separate probate court is
desired or whether the judge of the trial court of general jurisdiction is given jurisdiction over probate matters.

*General Administration May Be Initiated Without Notice*

A second important feature of this Code is that it permits probate and the appointment of an executor or a general administrator without requiring prior notice to interested persons. See § 68. This accords with the English practice of probate in common form, and also with the practice in a considerable number of states. On the other hand, in another large group of states, neither an executor nor a general administrator can be appointed without reasonable notice to interested persons. The difference between these two procedures is not as great as might at first be supposed. Under this Code, if no notice is given prior to the appointment of the personal representative, notice must be given as soon as the appointment is made, and interested persons then have an opportunity to have all matters reheard which were passed upon prior to the notice. In states where notice is required prior to the appointment of an executor or a general administrator, statutes permit the appointment of a special administrator without notice. The advantage of the appointment of an executor or general administrator without notice is that some one may take charge of the estate and preserve it as soon as the decedent dies. There is no delay for the giving of notice, nor is there the additional expense of a special administratorship. However, under this Code a court or an interested person may always require notice; or a court could adopt a rule requiring notice in all cases. Notice is required, however, in the case of guardianship estates.

*Court to Have Jurisdiction Over Land*

Although the English ecclesiastical courts, which to some extent provided the model for our probate system, had no
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jurisdiction over land, the modern tendency is to give the probate court more and more control over the lands of the decedent. Indeed, there is no good reason why probate jurisdiction should not extend just as fully to a decedent's lands as to his personalty. This Code so provides. See §§ 6, 84, 124, 152, 183. While the personal representative does not take title to the lands of the decedent nor to his personalty, he is entitled to possession of both unless the court otherwise orders in a particular case.

Only One Contest Permitted

One of the objections to existing probate procedure which this Code seeks to obviate is the wide latitude given to will contests. If the probate of the will is upon notice to interested persons there is no reason why more than one trial and one appeal of the issue of will or no will should be permitted. Yet in some states a trial de novo of the issue is permitted in the trial court of general jurisdiction as a matter of course after the issue has already been determined in the probate court. In this Code, with one exception, it is provided that, if the will is admitted to probate on notice to interested persons, no further trial of the issue is permitted. See § 73. An interested heir must take a true appeal to an appellate court. The one exception is as follows: if the basis of contest is another will, then a contest is permitted on that ground at any time before final distribution of the estate is ordered. See § 73.

Notice to Creditors Combined with Original Notice

In this Code the published notice to creditors and the notice of the appointment of the personal representative are combined; or, if notice by publication is given prior to the hearing for the appointment of a personal representative, then the notice to creditors is combined with that notice. See §§ 69,
70. In small estates the cost of publication of notices is an important item, and these provisions are designed to reduce that expense. In addition, there is a saving of time.

**Time Schedule to Insure Speedy Administration**

Throughout this Code time provisions have been fixed with a view to securing as speedy an administration as is consistent with justice to all interested persons. A time schedule summarizing these periods of time appears as Appendix B. Any legislative determination of periods of time is necessarily somewhat arbitrary and legislative bodies may sometimes find it advisable to modify the periods to suit their own particular problems. However, it must be noted that, in the time periods for various procedures, one period can be modified only in relation to other time periods. Thus, ordinarily the surviving spouse should not be compelled to elect until the time for the filing of creditors' claims has expired. Hence, if modification is to be made in any procedural provisions as to time, the time schedule in Appendix B should first be consulted.

**Decree of Distribution Significant in Determining Title**

In this Code the decree of distribution and not the order admitting the will to probate is the significant decree in determining the title to the real and personal property of the decedent. See § 183(d). Every effort has been made to render the decree of distribution conclusive in determining who are the successors in interest of the decedent. Much uncertainty and consequent litigation will thereby be avoided.

**Reduction in Number of Appeals**

One of the evils of existing probate procedure is that, since nearly every probate court order is appealable, a whole series of appeals to the higher court is possible with consequent delays
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and expense. To reduce this evil, provision has been made in this Code permitting the appellate court to review prior orders in the administration of decedents' estates as well as the particular order from which the appeal is taken. See § 20. It is expected that with such legislation in force, litigants will not usually appeal from anything but the final order of distribution, the order admitting the will to probate, or the order appointing the personal representative.

Dispensing with Administration

This Code presents several provisions to take care of cases where it might be desirable to dispense with administration in whole or in part. See §§ 86 to 92, 235 and 237. While it is believed that there are definite limits beyond which provisions dispensing with administration should not go, within those limits it is important to avoid the expense and delay of administration by appropriate legislation.

OMITTED MATTERS

Something should be said with respect to subjects which are excluded from this Code. Some of these, as will be hereinafter indicated, are excluded because such provisions are inherently undesirable. Others are excluded merely because it was impracticable or unnecessary to include them. This may be because they are axioms of the common law, assumed but not stated, because they impinge on other fields of law or because, though recognized by the common law, they cannot satisfactorily be expressed in statutory form. Indeed, no code, however complete, could be expected to codify all the law of decedents' estates and of guardianship. So much of the business of the probate court is administrative that the judge must often make a new rule for the actual situation when it arises. However, in so doing, he is aided by that great
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body of judicial opinion which may well be described as the American common law of probate and administration and on which this Code is built.

While statutes are found in a number of states providing for public administrators, no such provision is included herein or is recommended. It is believed that a common result of establishing the office of public administrator is to encourage the official administration of estates solely because of the fees involved, although administration may be entirely unnecessary.

No special provisions are included herein concerning the probate of lost or destroyed wills. See, however, §§ 64(a) and 65(e) of the Code. Where such statutes have been enacted it is believed that their operation has not been entirely satisfactory. Formal restrictions on the probate of such wills have often been found to be too rigid; and it seems impossible to lay down any hard and fast rules which would work justly in all cases. This matter is best developed in the case law. See, in general, Ferrier, "Statutory Restrictions on Probate of Lost Wills," 32 Cal. L. Rev. 221 (1944).

After careful consideration of the subject it was determined to exclude any legislation on ante-mortem probate. The practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding.

This Code makes no attempt to deal generally with problems of ademption. It is true, much well-merited criticism has been directed toward the present state of the law. See Mechem, "Specific Legacies of Unspecified Things—Ashburner v. Macguire Reconsidered," 87 U. of Pa. L. Rev. 546 (1939); Page, "Ademption by Extinction: Its Practical Effects," (1943) Wis. L. Rev. 11; Warren, "History of Ademption," 25 Iowa L. Rev. 290 (1940). But the problems are believed to involve a subject matter which can better be
handled by unwritten law than by statutes. If the courts would adopt a less rigid definition of a specific legacy, many of the difficulties would disappear without legislation. However, in one situation, a single aspect of the subject is dealt with in connection with guardianship. See § 231.

No provisions are presented with respect to the effect of the murder of the testator or intestate by a person interested in his estate. Any adequate legislation on this subject would extend beyond the probate field and include analogous problems involved in the murder of the insured by the beneficiary of a life insurance policy, the murder of a life tenant by a remainderman, and the murder of a joint tenant or tenant by the entireties by another co-tenant. Moreover, an adequate statement of common-law doctrines covering all these situations is to be found in the American Law Institute Restatement of the Law of Restitution, §§ 187–189 (1937). If the courts adhere to this Restatement, little, if any, legislation will be needed. However, it must be conceded that, according to the law of some states, the murderer of the decedent may take as heir or devisee. See cases cited in 51 A. L. R. 1696. Where this is the case, legislation would be desirable. For helpful suggestions as to legislation on this subject, see Wade, “Acquisition of Property by Wilfully Killing Another—A Statutory Solution,” 49 Harv. L. Rev. 715 (1936).

Aside from the fact that testamentary trusts are within the scope of Part I of this Code, containing general provisions, and Part V, on Ancillary Administration, no general provisions are included on this subject. A probate code might well contain a separate part devoted solely to the subject of testamentary trusts. However, no good reason is perceived why testamentary trusts should, for most purposes, be differentiated from inter vivos trusts; and a judicial organization which gives to one set of courts exclusive jurisdiction over testamentary trusts and to another exclusive jurisdiction over inter
vivos trusts is open to criticism. If the judge having probate jurisdiction is also the judge of the trial court of general jurisdiction, then this difficulty does not arise. If, however, there is a separate probate court, with jurisdiction over testamentary trusts, then something more on this subject in a probate code may be desirable. However, a better solution of the problem, even in that situation, would be to enact a separate body of statute law entirely outside the probate code, dealing with the administration of both testamentary and inter vivos trusts.

No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan. Gen. Stat. (Supp. 1943) §§ 59–1001 to 59–1005; Mo. Rev. Stat. Ann. (1942) §§ 81 to 93. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woerner, Administration (3rd ed., 1923) §§ 128 to 130; annotation, 121 A. L. R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. Davis v. Hutchinson (C. C. A. 9th, 1929) 36 F. (2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it.