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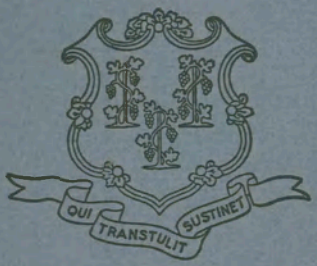

COMMITTEE ON
HISTORICAL PUBLICATIONS

The Connecticut Intestacy Law

II

PUBLISHED FOR THE TERCENTENARY COMMISSION
BY THE YALE UNIVERSITY PRESS
1933

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The Connecticut Intestacy Law

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THE colonial era of our history has generally been treated with an insufficient appreciation of its economic forces, and, in consequence, there has been a tendency to minimize the importance of certain periods of that history which show little political activity and are to the world at large dull and uninteresting. Such a period is the first forty years of the eighteenth century, and in the following paper I hope to show why I think that, from the point of view of the English policy toward the colonies and their economic development, this period will in the future stand much higher in the estimate of historians than it does now. The discussion that follows involves a number of points of law, and carries us through a controversy which, although of immediate importance to Connecticut only, was of exceeding interest to all New England, and indirectly touches the general subject of colonial history.

The starting point of the controversy and its underly-

This article was printed originally in the old series of the *Yale Review*, III, 261–292, (November, 1894), and reprinted with some changes in *Select Essays in Anglo-American Legal History*, I, 431–463. For the purpose of this series of pamphlets it has been somewhat further revised and is here printed without the footnotes which originally accompanied it.

ing cause was the agrarian system of New England. It is well known to students of the subject that the methods employed in the division of lands by the proprietors of the various towns involved certain principles based on the necessities of a new country. We may believe, if we wish, that these methods were the expression of deep-seated racial traits, but it is more rational to take into account two influences only; first, the agrarian environment in which the settlers had been reared; and, secondly, the conditions and necessities that govern the settlement of a new and uninhabited country. These two considerations will concern us here.

Those who settled the New England colonies were—save in a very few cases—men of the burgher and freeholder class, to whom the detail of the English agricultural life was familiar. They had been inhabitants of towns and villages located on feudal estates and subject to a superior, the king or the lesser lay or ecclesiastical lord; they had in a large number of cases been reared in the midst of the English agricultural system, of which the village community with its long streets, its homesteads, its open fields divided into shots or furlongs and subdivided into what were originally acre and half acre strips, its meadows, pastures, common and waste, was the local unit and that part of the system with which they were in daily contact. To this system that of New England bears a striking resemblance. One cannot compare the old manor maps of the seventeenth and eighteenth centuries with any plan based upon the land records of a New England town without feeling that the similarities are more than coincidences. There is the same village street, the same homestead plots, the same great fields, the same shots and furlongs, and the same subdivision into smaller strips; there are the enclosed

meadows held by a few, the pasture and waste common to all, and there are numbers of trifling manners and customs which show the English origin. It was the local, non-feudal land system which was transplanted with important changes to New England, and formed the basis of the law of real property.

But there were other reasons why the local agrarian system of England was in its outward form reproduced by the New England settlers. Had it not accommodated itself to their notions of equality and equity, and to the economic needs of a people settling in a new and uninhabited country, it might have been altered and changed beyond recognition. But the local land-system of England was pre-feudal in its origin, and probably grew out of a primitive system of agrarian equality, a fact which the equal strips, the scattered holdings and the common rights serve to attest. The New England settlers were entering an environment similar to that out of which the English village came, and they therefore found it necessary to change the English local system but little in order to apply the methods of allotment demanded by a new country. The colonists took no retrograde step; all changes from the existing system at home were in keeping with the higher ideas of property and equality which the New Englanders brought with them. The principles which governed their action were three: first, that of preventing the engrossing of lands and their accumulation in the hands of a few, the dangers of which in England were familiar to the colonists; secondly, that of subserving the law of equity by treating every man fairly, not only in giving him a share in conquered or purchased lands, but also in so allotting that share that he might be subject to all the advantages and drawbacks that bore upon his neighbors; and thirdly, that of hastening settlement and

the improvement of land. Land was therefore divided by the towns or by the bodies of proprietors into fields, called 'squadrons' in Worcester, 'furlongs' in Middletown, 'shots' in Milford, and 'quarters' in New Haven, and these were subdivided into smaller strips ranging from one acre to forty or more in size. Various methods were employed for obtaining equality, and every effort was made to hasten cultivation and to increase industry. Removal was discouraged by liability to forfeiture; alienation was limited by laws common to nearly every town in New England; the burden of taxation and the care of the fences, highways, etc., was distributed as evenly as possible; and every effort was made to increase the amount of land brought under cultivation. All this was characteristic of New England in general and of Connecticut in particular. The life in the latter colony was predominantly agricultural, the industrial and commercial aspects had hardly begun to appear, the government was popular—and for a hundred and fifty years of all the colonial governments it was the one most independent of the mother country—the laws made were adapted to the conveniences of the inhabitants rather than to the common and statute law of England, and the policy of the colony at all times was to remain hidden as far as possible from the notice of the home authorities. It is no wonder, therefore, that there should have grown up under the conditions—agrarian and economic—attendant on the settlement of a new, partly uninhabited, partly unconquered territory, laws based not on legal theory but on custom, laws that either were not known to English law or were not in accord with it.

Of all these laws none was more important, more an organic part of the life of the colony or fundamental to its welfare, than that which governed the disposal of intes-

tate estates. It is manifest that people influenced by the principles already mentioned in their distribution of land would apply the same principles to the distribution of the realty of an intestate. They certainly would not have undermined the colonial structure by admitting into its construction methods foreign to the general plan. Primogeniture, favorable to the accumulation of estates, but unfavorable to a rapid increase of the inhabitants, a furtherance of agriculture, and a cultivation of the soil, and opposed to the natural law of equity, was not in accord with the principles of the New England settlers. The intestacy law was, therefore, the unavoidable and logical outcome of the principles which underlay the land-system of New England.

By the English common law the eldest son was the sole heir and was entitled to the whole estate exclusive of all other children, whereas the colonial law directed that the real estate of an intestate be distributed in single shares to all the children except the eldest son, to whom a double portion was to be assigned. The Connecticut practice had the sanction of both law and custom. As early as 1627 a visitor at Plymouth found that "in the inheritance they place all the children in one degree, only the eldest son has an acknowledgment for his seniority of birth." A statute of 1636 confirmed this practice, while in Massachusetts, in 1640, the court of assistants distributed the real estate of an intestate to his six sons, reserving a double portion for the eldest son. Thus what is known as partible succession became early rooted in New England.

Connecticut followed the lead of the older colonies. On October 10, 1639, the general court ordered that when a person died intestate an inventory of his goods should be taken and "the publique court" should "divide the estate to wiefe (yf any be) children or kindred, as in

equity they shall see meet." This rule was inserted verbatim in the Code of 1650 and in the Revision of 1673. Until the end of the century this was Connecticut's law of descent in intestacy cases. It was enforced by the Particular Court and later by the probate courts. The latter distributed each estate according to its needs, with a growing tendency to an approximately equal division among the surviving wife and children, the eldest son usually receiving the larger share.

On October 12, 1699, the general assembly enacted a formal law, which was rather an affirmation of custom than anything new in the way of legislation. Previous practice, though based on rules laid down in the law books and tending toward uniformity had been conducted, as Governor Law said afterward, according to the principles of righteousness and equity lodged in the breast of the county court. The law of 1699 provided that probate courts should distribute an intestate's property as follows: one third of the personal estate to the wife forever (in addition to her dower right), the rest in equal shares among the children (or their representatives, if dead), except the eldest son, who was to get two shares or a double portion. This was merely the putting into statute form the practice of all the New England colonies, constituting a kind of compromise between the custom of gavelkind in Kent, which provided for an equal division among all the children, and the rule of the Mosaic Code (Deuteronomy, xxi, 17), which gave to the eldest son a double portion. It had grown out of the consent of heirs to an intestacy and had been found to be best adapted to the needs of the colonies. Governor Talcott gives in brief the reasons for the intestate law in his instructions to Belcher:

And much of our lands remain unsubdued, and must con-

tinue so without the assistance of the younger sons, which in reason can't be expected if they have no part of the inheritance; for in this poor country, if the landlord lives, the tenant starves: few estates here will let for little more than for maintaining fences and paying taxes. By this custom of dividing inheritances, all were supply'd with land to work upon, the land as well occupy'd as the number of hands would admit of, the people universally imploy'd in husbandry; thereby considerable quantities of provisions are rais'd, and from our stores the trading part of the Massachusetts and Rhode Island are supply'd, the fishermen are subsisted, and the most of the sugars in the West Indies are put up in casks made of our staves. By means of this custom his Maj'ties subjects are here increased, the younger brethren do not depart from us, but others are rather encouraged to settle among us, and it's manifest that New England does populate faster than the Colonies where the land descends according to the rules of the common law. And such measures as will furnish with the best infantry does most prepare for the defence of a people settled in their enemies country. If this custom be, so ancient and so useful, *non est abolenda, sed privare debet communem legem.*

Such were the conditions out of which the intestate law grew, and such were the reasons for its embodiment, after sixty years of experience, in statutory form. But whatever the value to the colony of a law of this kind, the fact remains that it was clearly contrary to the corresponding law of England and in violation of that clause of the charter which said that the laws of the colony should not be contrary "to the laws of this Realm of England." There was no qualifying phrase "as near as may be" in the Connecticut charter, as there was in that of Rhode Island, so that the colony could not plead, as could the Rhode Islanders, that their law was "agreeable to the lawes of this our realme, considering the nature and constitution of the place and people there." Therefore, Connecticut was helpless when certain disaffected

ones in the colony, who were opposed to the charter government and wished to enter into closer relations with England, began to question very early the validity of the practice. The matter was not, however, destined to become a major issue for nearly thirty years, but it early became part of a larger problem, which greatly troubled the colony from 1701 to 1723, the forfeiture of the charter and the proposal to unite the private colonies to the crown. The agitation to produce this latter result was due to the desire to unite the colonies under a common political and military head for greater security against the French and for a more effective carrying out of the acts of trade.

It was not difficult to find charges against Connecticut and Rhode Island. Complaints were made that the colonies broke the navigation acts, harbored pirates, neglected to take the oaths required by law, encouraged manufactures, were negligent in military duties and in the erection of fortifications, encroached on the jurisdiction of the Admiralty, and opposed the authority of its officers, protected escaped soldiers, seamen and servants, and failed to comply with certain requirements of the home government—as in the case of the proclamation regarding coin, the instructions to naval officers, the command to aid New York with quotas of men against the French and Indians, etc. Through the influence of Dudley and the pertinacity of Edward Randolph, for it was he who personally led the campaign in the lobby of parliament, a bill was brought forward in 1701 for reuniting to the crown the governments of several colonies and plantations of America—Massachusetts Bay, New Hampshire, Rhode Island and Providence Plantations, Connecticut, East and West New Jersey, Pennsylvania, Maryland, the Carolinas, and the Bahamas—on

the ground that "the severing of such power and authority from the Crown and placing the same in the hands of subjects hath by experience been found prejudicial and repugnant to the trade of this Kingdom and to the welfare of his Majesty's other plantations." The bill, however, by reason of "the shortness of time and the multiplicity of other business," failed to pass, but the board, thinking it very likely that it would come up again for consideration, desired from the colonies all possible information that would aid in the matter. From 1701 to 1706 charges continued to be sent in. Quary, Bass, Congreve, Larkin, Dudley, and Cornbury all drafted lists of complaints. The board in a representation to the council in 1703 expressed its opinion "that the great mischief can only be remedied by reducing these colonies to an immediate dependence on the Crown." For Connecticut it was a time of anxiety. The influence of the Hallam case, of the controversy over the Narraganset country and the boundary line with New York, of the case of the Mohegan Indians, of the petition of the English Quakers against a Connecticut law, was to keep certain aspects of Connecticut's management steadily before the Board of Trade and to lead to what were often serious misrepresentations to the home authorities. In consequence Connecticut got a bad name. In 1704 the colony narrowly escaped having a governor put over it through the authority of the queen in council. But that body evidently preferred that parliament should take the matter in hand and in 1706 a bill similar to that of 1701 was introduced. It passed the House of Commons but failed of passage in the House of Lords.

The long list of charges against the proprietary and charter governments already on the books of the board was continually supplemented by additional charges from Congreve, Dudley, Quary, Gauden and others.

The failure of the bill of 1706 was a severe blow to its supporters, and the colony for several years experienced a relief from its anxiety. In 1715 the matter came up again because of the complaints regarding banks, naval stores, the trouble with Carolina, etc., and the House of Commons appointed a committee composed of members of the Board of Trade "to inspect into the miscarriage and to prepare a bill to resume the grants of the proprietary governments." Again a list of charges was prepared, but, whether another failure was feared or a juster policy decided upon, a different plan was tried for Connecticut. The long drawn out controversy between Connecticut and Rhode Island and the frequent appeals to England for aid in reaching a decision had led the Privy Council to request the Board of Trade to make inquiry and report. The board in its reply recommended, as the simplest solution of the difficulty the surrender of the charters and the uniting of both colonies to New Hampshire. The council approved the recommendation and bade the board inquire of the colonies, through their agents in London, whether they would be willing to surrender their charters peaceably. Connecticut's answer is a masterpiece of firmness and politeness and, although in the name of the Governor and Company, was undoubtedly written by Saltonstall. He commends the justice and honor of the ministry in thus referring the question to the corporation, a method wise and just, possessing not the least appearance of force and terror. He contrasts it with previous methods unreconcilable with common rights, law and custom, of which the colonies had had full experience. This spirit of fairness he attributes to the existing king and ministry, who, though unlimited and subject to none, yet observed the limits of wisdom and justice, and were tender of what others should enjoy as well as of

their own prerogative; who did not make use of their power to terrify the colony out of its rights and property, but gave it leave to speak for itself. After these quieting words, the Governor and Company regret that they cannot choose that resignation of their rights which the king and ministry think might be best for them, and conclude this portion of the letter with the following instructions to the agent: "You are therefore hereby directed in plainest terms to acquaint their Lordship that we can't think it our interest to resign our charter, But on the contrary, as we are assured, that we have never by any act of disobedience to the Crown made any forfeiture of the privileges we hold by it, So we shall endeavor to make it manifest and defend our right whenever it shall be called in question."

The limits of this paper will not allow a further discussion of the attitude of the home government toward the colony. It is, however, fundamentally important that we should appreciate the relations which had previously existed, and the one sided character of the information which the Board of Trade, the Privy Council and even parliament itself received. The mere titles of the papers containing charges against the proprietary and charter governments cover twenty-one pages of an entry book. Regarding Connecticut there is almost nothing to relieve the unfavorable impression received by the board, except a letter now and then from the governor, and the answers to the queries that were occasionally sent to the colony. The references to Connecticut in the Journal are rare, and generally relate to some complaints against her. It is difficult to determine how far the board believed the statements sent it, but its representations do not show any inclination to lighten the impression which the letters from the colonies give.

This was the position that Connecticut occupied in the sight of the home authorities when John Winthrop, a grandson of one colonial governor and nephew of another, denying the validity of the intestacy law, claimed all the real estate of his father who had died in 1717, but lost his case in the colony court. One Timothy Prout of Maine, who visited Winthrop at New London at the time, wrote as follows about the matter.

Sometime after that I was at the house of Mr. John Winthrop at New London when he told me he had a contest in the law with his brother and sister Letchmore; that it was determined in faver of his sister Letchmore, but said he was determined to go to Great Britain for relief, upon which I told him I never had an own sister but if I had I should have look'd upon her next to my wife and I should have been willing she should have enjoy'd part of my father's estate with me. He answered me his affairs were a Point of Law and was resolv'd to have it determined. Upon which I related to him what I above set forth [about a matter of appeal to England] and told him I would give it to him as his father's advice, that he would not go to Great Britain. Notwithstanding which he refused the advice and in about two months after took his passage for Great Britain, involved his estate and there spent his days in prosecuting that affair and never returned to his family again.

As the result of Winthrop's efforts the intestacy law was disallowed by an order in council, February 15, 1728, as contrary to the laws of England and not warranted by the charter. The case was a private one and the colony was not heard in the matter until afterward, when the agents tried to obtain a reversal of the order. There is no doubt that the defendant, Lechmere, was inadequately defended by someone little versed in the colony's affairs, that his evidence was far from complete, his purse far from full, and that he was especially in want of "a good

sword formed of the royal oar." Winthrop, on the other hand, was ably defended by Attorney General Yorke and Solicitor General Talbot. The committee of the council did not call in the assistance of the Board of Trade, and there are no documents bearing on this phase of the case among their papers. Winthrop did not rest his case solely upon the question of the validity or invalidity of the law, but he repeated most of the charges, which were already familiar to the council and its committee, and thereby, as Mr. Parris said, "very much assisted his case." The legal aspects of the trial have attracted but a small amount of attention from historians, for the incidents were neither dramatic nor politically exciting, yet there were involved in the case principles of great moment to the colonists, questions, the solution of which was to affect the future relations between them and the home government.

The effect of the vacating of the law shows at once that the Privy Council acted without a reasonable understanding of the matter at issue. It based its opinion upon the literal interpretation of the charter from its own point of view, and was entirely without a just appreciation of the equity in the case. Two conditions, defensible in themselves, had come into conflict. For the moment the customary law of one country, arising from one set of historical circumstances, was to be enforced in another country, the agrarian and economic life of which had brought into existence a customary law very different. The common law of England and the common law of the colony did not agree. The latter did not represent the defiant will of a body of lawmakers, it represented a principle of land-distribution which the experience of the colony had shown to be best adapted to its own prosperity and continued existence. This becomes clearer when we

note what would have been the economic effects of voiding the intestate law.

The first result would have been a general unsettling of titles to lands left intestate or alienated after intestate settlement. This was due to the fact that a large majority of the people consisted of farmers and agriculturists, possessing little personal estate. Many of these settlements reached back to the beginnings of the colony, and the invalidating of titles would have affected large numbers of descendents who would thus have been liable to ejection at the instance of the eldest heir. Such ejectment concerned the younger sons and the female heirs, for whom under such conditions there would be no place in the colony. Even if the titles to estates already settled in the court of probate should be allowed to stand, yet there were many estates of twenty or thirty years standing that had never been settled, and more of a later date, so that the suffering would only be limited, not ended. Furthermore, litigation would have at once ensued, which would have involved the colony in an economic loss greater than that entailed in a resistance to the decree. The agrarian system of the towns would have given to this litigation a curious complexity. Quarrels were certain to arise within the towns themselves regarding the ownership of the common and undivided lands. Would the title rest with the heirs at common law of those who received by grant from the king, that is, the patentees, or with those who as proprietors and contributors to the common fund purchased the lands from the Indians, and received their shares according to the size of their families and the amount of their subscription? Judges, too, in settling all these disputes, would have been thoroughly perplexed as to whether they should obey the decree, in which case the foundation of the

colony would have been "rip't up from the bottom and the country undone"; or whether they should disregard the decree, and so bring down upon the colony the loss of its charter.

But the injustice would have concerned others besides those holding lands derived from intestate settlements. Creditors who had taken lands in payment of debts—a procedure not in favor with the colony because of the cheapness of lands—would be defrauded, unless the lands, which might have considerably improved in their hands, had been made chargeable for the original loan and the improvements. Furthermore, the will and intent of many who had died intestate might have been frustrated, inasmuch as they, trusting in the colonial custom, with which they had been perfectly satisfied, had made no will.

In addition to these results, so contrary to justice and equity, certain economic consequences would have inevitably followed the carrying out of the order in council, consequences detrimental not merely to the colony, but, judging from the standpoint of her clearly avowed colonial policy, to England as well. The voiding of the law meant the abatement of husbandry. The towns of all New England, and of Connecticut in particular, were, at this stage of their development, predominantly agricultural. The results of such abatement would be a desertion of lands, a lessening of population, and a decrease in the supply to the neighboring provinces, which, engaged in trade and fishery, were dependent on Connecticut for provisions. It was a clever stroke on the part of the colonial supporters of the law when they showed that its confirmation was adapted to the furthering of England's policy, and that its vacation was to the injury of that policy. Voiding the law would lead to manufac-

turing, for the younger sons from sheer necessity, driven from agriculture, would turn to trade and manufacturing, or else would be obliged to leave the country. Thus, by this argument, England was placed on the horns of a dilemma as regards the colonies, either beggary or insufficient population on the one side, or the promotion of trade and manufactures on the other. This, as Law surmised, "was a tender plot," and there is no doubt that as an argument it was frequently repeated in order that it might be "thot of at home." These economic results are sufficient to show that the law was an organic part of the life of the colony. Indeed, as Talcott said in a later letter to Francis Wilks in London, "we cannot think our law will be looked upon to be contrary to the law of England for the colony could not have been settled without it."

The colony immediately made every effort through its agents, Dummer, Belcher, and Wilks, to defend the law if possible. There was reason for hope in such action from the fact that the Massachusetts law of 1692, after which the Connecticut law has been modeled, with one amendment, one addition, and three explanatory acts had been confirmed by the crown. Furthermore, the law was a general one in New England and, if the order in council were to be insisted on, it might endanger the titles to a considerable amount of New England real estate; and it would seem incredible that the home government could persist in so crippling the colonies. Therefore the colony was justified in believing that, if all the arguments were fairly presented to the Board of Trade, the good offices of that board might be obtained. This was an important step, for by the report of the committee of the council the matter had been referred to the board.

The strongest argument against the law was that it

was contrary to the law of England, and in the discussion which followed the colony exerted all its strength to minimize the force of this argument. The question is an important one in itself, but the value of the discussion lies in the expression of opinion on the part of the English and the colonial authorities regarding the interpretation and strict construction of the phrase "contrary to the law of England." There were three views held regarding the English law in the colonies, as to how far it was binding there, and to what extent the colonial corporations had been invested by their charters with law-making powers. The first of these opinions was held by all those who were opposed to the colonial prerogatives, such as Palmes, Hallam, Gershom Bulkeley, in his "Will and Doom," Winthrop the appellant, in his "Complaint" and "Memorial," Dudley and others. According to this view the colonies were erected as corporations within the kingdom of England; they held by and were subject to the laws of that kingdom, and their legislative power extended to the making of by-laws and ordinances only for their own good government, provided the same were not contrary to the law of England. From this point of view all laws passed by the colonial assemblies which were of a higher character than by-laws, and which, even within that limit, touched upon matters already provided for by English common or statute law, were illegal. The colonies were as towns upon the royal demesne.

The second view was expressed by the agent of Connecticut, Francis Wilks, and was doubtless held by those at home who, with English proclivities, were nevertheless well disposed toward the colonies. According to this view, it followed that when the colonists came to America they brought with them the common law to which they were entitled as Englishmen, and such part of the statute law

as was in force before the settlement of the plantations took place. To this body of law, written and unwritten, binding on the colonies, was to be added all such later acts of parliament as expressly mentioned the plantations, and such acts as had been re-enacted for the colony by her own legislature. But no other statutes passed since the settlement could be held as binding. Therefore, according to Wilks, that law was contrary to the law of England which was contrary to the common and statute law prior to the settlement, or to the statute law made afterwards which expressly mentioned the plantations.

Both of these views, however, were strictly opposed by the colony. To the statement that the common and statute law existent at the time of the settlement was in force in the colonies, the answer was made that the charter nowhere directed the administration to be according to one law or another, whether civil, common, or statute law; that by a decision of the council itself an uninhabited and conquered country was to be governed by the law of nations and of equity until the conqueror should declare his laws, and that if such declaration had not been made, then it was evident that the law of equity and of nations governed and not the common or statute law of England. Therefore, the colony argued, English common law could be binding beyond the sea only in case it had been accepted by the colonist's own choice. From the nature of the laws passed, it is evident that the colonial government never considered the common law to be in force within its jurisdiction, and in this belief it said it had never been corrected or otherwise instructed from the throne. In this connection Governor Talcott pertinently asks, "And why should we be directed to make laws not contrary to the laws of England if they were our laws, for

what propriety can there be in making that a directory to us in making a law which was our law before we made it." As this was the case, it is evident that something more was implied in the charter than the making of by-laws. In that document was proposed an object, the religious, civil, and peaceable government of the colony, which could not have been attained by the passing of by-laws. The charter implied a power to enact in the colony that which was law in England and also any good and wholesome law which was not contrary to it; and such limitations could not be to by-laws only. Furthermore, the colony insisted that the analogy to a municipal corporation in England was not sound, inasmuch as it was the privilege of Englishmen to be governed by laws made with their own consent. The colonies were not represented as were the English towns in parliament; therefore the only laws made with the consent of the colonies were those of their own legislatures, and those were more than by-laws. The opinion of the colony, therefore, was that the phrase, "contrary to the law of England," referred only to laws contrary to those acts of parliament which were in express terms designed to extend to the plantations. That this had been the practice as well as the theory in Connecticut is evident from Congreve's letter to the Board of Trade, in which he says, "They allow of none of the laws of England either common or statute to be pleaded in their courts."

According to the opinion held by Winthrop and Wilks the intestate law was clearly contrary to the law of England. Even Lieutenant Governor Law of the colony seems to have inclined to this view, for he came to the conclusion that the colony in acting in the past, contrary to the view expressed by Wilks, had been mistaken. But Governor Talcott was led into no such concession; he

stood firmly on the ground already taken, and adroitly persisted in maintaining the complete validity of the intestate law. He probably realized that under the circumstances concession was more dangerous than resistance, and that to accept Wilks's theory would be to strike a blow at the absolute integrity of the charter. "We would," he writes, "with the greatest prostration request your Majesty, that when we find any rules of law needful for the welfare of your Majesty's subjects here, which is not contrary to and agrees well with some one of the Tryangles of the law of England, as it then is, or heretofore had been, when England might have been under the like circumstances in that particular, which we are when we make the law, that it might not be determined to be contrary to the law of England."

The opinions of the English lawyers of this period, so far as I am able to discover them, are neither definite nor complete. In a report to the Board of Trade, Attorney General Yorke and Solicitor General Talbot upheld the colony's position regarding by-laws. They affirmed that the assembly of the colony had the right by their charter to make laws which affected property, on condition that such laws were not contrary to the law of England; but, although it seems probable that they intended "law of England" to cover the whole law, they did not make it clear what they meant by this term. Yet these same lawyers in a later judgment declared that in one particular case, the barring of an heir to entailed lands lying in the plantations by a process of fine and recovery in England, the common law did not extend to the plantations, unless it had been enacted in the plantation where the entailed lands lay. The board itself supported the colony against adverse criticism when it stated that according to the charter the laws were not repealable by

the crown, but were valid without royal confirmation unless repugnant to the law of England.

The most definite expression of opinion, however, was adverse to the view which the colony took. Mr. West, the first standing counsel to the Board of Trade, in a judgment rendered regarding admiralty jurisdiction in the plantations, took the ground that wherever an Englishman went there he carried as much of law and liberty with him as the nature of things allowed; that, in consequence of this, the common law of England was the common law of the colonies, and that all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony were binding upon that colony. He also held, as did Wilks, that no statutes made since the settlements were in force unless the colonies were particularly mentioned. His view, which I do not doubt was very generally held by English lawyers outside of the colony, was simply a legal opinion, and was probably based on little real knowledge of the subject to which it referred. We are, therefore, fortunate in having another and different view of the matter of greater practical value. In 1733 Francis Fane, who succeeded West as standing counsel to the Board of Trade, returned to the board his comments upon the first installment of the laws of Connecticut and he completed his examination of the entire 387 laws in 1741. In this report opinion came face to face with facts, and the lawyer realized the anomaly of attempting to force English law upon a people whose conditions of life were in so many particulars different from those at home. In his comment upon the intestate law Fane notices that it was different from the law of England, but it is evident that this aspect of the case troubles him little. He is chiefly concerned with matters of rule, form, and procedure, and it is in these particulars

that his real objection to the law lies. He recommends the repeal of the act, but would substitute another law "either as it is now done in England or by such other methods as may best fit the province where this law is to take effect."

In this explicit statement there was for the colony a world of meaning. Furthermore, in his criticism of the later amendments and additions to the law he says nothing about their being contrary to the law of England; his recommendations for repeal are based upon the ground of uncertainty or upon some other defect of the law which would naturally attract a lawyer. An analysis of his comments upon the remaining 384 laws gives us approximately the same result. The laws recommended for repeal were too strict, severe, or unreasonable, incomplete or not severe enough, inexact, giving too much power to certain bodies, etc. In only one instance is a law declared contrary to the law of England, and then it is the legal principle implied in a part of the law that a man can be convicted on a general presentment which is declared repugnant. It is true that in a number of cases he recommends the repeal of a law which is different from the law of England, but it is not on the ground of its difference that the recommendation is made; it is because the law is unsatisfactory from a legal standpoint and would not be a good law in any civilized community. In nine cases, however, he considers the colony's convenience, and recommends the acceptance of the law, even though it would not have been proper for England or was not so good as the corresponding law in England. In these instances he recognizes the principle that the colony was generally the best judge of its own law, and practically concedes two of the points for which the colony contended, the principle of equity and that of

custom. Fane's comments are uniformly fair and reasonable, and contain not a trace of animus toward the colonies.

The circumstances and discussions thus far outlined are necessary to an understanding of the influences that acted upon the board when it came to draw up its representation to the committee of the council upon the petition of Belcher and Dummer. In this petition the colony begged the king to confirm by an order in council to the inhabitants of the province the lands already distributed under the intestate law, to quiet them therein, and to enable them to divide the lands of intestates in the same manner in the future. The colony had already discussed at considerable length the wording of the petition, debating whether it would be best to ask for a confirmation by an order in council, or to apply for leave to bring forward a bill in parliament. Belcher strongly advocated the latter method. Talcott in a forcible communication presented his fears of parliament in case the matter were brought to its attention, and he had good reason to fear if we are to judge from later events. He was a prophet in his apprehension that it might lead parliament to inquire whether the government had not accustomed itself to take the same liberty of making other laws contrary to the law of England; and, further, that it might lead parliament to the opinion that the charter had not made them a government or a province but only a corporation. Yet, on the other hand, it was equally true that neither the petition of Belcher nor the introduction of a bill in parliament was needed, if that body had desired to end the privileges of Connecticut in 1730 as it practically did those of Massachusetts in 1775.

It is not quite clear to which conclusion the agents arrived, though in the petition upon which the board

based its representation, confirmation was asked for by an order in council. This request at once raised an exceedingly important question expressive of the political change which had come over England since the Revolution of 1689. Could the king by virtue of his prerogative and without the assistance of parliament grant the wish of the colony? To this Fane answered at the request of the board, as follows:

> I cannot pretend to say whether the King by virtue of his prerogative can do what is desired by the petitioners. But I must submit it to your Lordship's consideration supposing the King had a power by his prerogative of gratifying the request, whether under the circumstances of this case it would not be more for his Majesty's service to take the assistance of Parliament, as that method will be the least liable to objection as well as the most certain and effectual means of gratifying the request of the petitioners.

That this was the opinion widely held among English lawyers is evident from Belcher's letters, in which he mentions Lord Chancellor King and the counsel which he had secured as inclined to this view.

With this opinion of its legal adviser before it, the board summoned to its presence the agents of the colony, and Winthrop, and listened to the arguments on both sides. It then finished the draught of its own representation. Many influences underlay the wording of that report, influences which it has been the purpose of this paper to disclose. The report was the resultant of at least three forces: first, the desire to gratify the colony in confirming the lands already settled under the intestate law, for Dummer had ably presented the inconveniences which would follow the upholding of the decree of the council; secondly, the determination to syncopate the privileges of Connecticut on the ground that she had

been too independent of the crown, and had too long a list of charges against her to escape some limitation of her powers; and thirdly, the conviction, in view of the changing constitutional relations of king and parliament, that the only safe method whereby such end could be accomplished was to apply to the king for leave to bring in a bill for that purpose. A few extracts from the report will exemplify this. After recommending compliance with the request of the colony, the board adds,

> And we think this may be done by his Majesty's royal license to pass an Act for that purpose with a saving therein for the interest of John Winthrop, Esq. But we can by no means propose that the course of succession to lands of inheritance should for the future be established upon a different footing from that of Great Britain. In return for so great a favor from the Crown we apprehend the people of Connecticut ought to submit to the acceptance of an explanatory charter whereby that colony may for the future become at least as dependent upon the Crown and their Native Country as the people of Massachusetts Bay now are whose charter was formerly the same with theirs. And we think ourselves the rather bound in duty to offer this to his Majesty's consideration because the people of Connecticut have hitherto affected so entire an independence of Great Britain that they have not for many years transmitted any of their laws for his Majesty's consideration nor any account of their public transactions. Their governors whom they have a right to choose by their charter ought always to be approved by the King, but no presentation is ever made by them for that purpose. And they, thó required by bond to observe the laws of Trade and Navigation, never comply therewith, so that we have reason to believe that they do carry on illegal commerce with impunity, and in general we seldom or never hear from them except when they stand in need of the countenance, the protection or the assistance of the Crown.

With this report the case of Winthrop *vs.* Lechmere, growing as it did, out of the land system of the New

England colonies, has brought us step by step dangerously near to the principles and theories which underlay restriction on the one side and revolution on the other. How far this particular case and the discussions which grew out of it aided in the shaping of those principles, we need not attempt to discover. As part of the larger question of the uniting of the colonies and the annulling of the charters, its influence was direct and definite. After 1700 the fact of parliamentary supremacy was proven each time an effort was made to limit the independence of the proprietary and charter colonies and to bind them more firmly to the crown; and at the same time the continuance of such efforts for thirty years increased the familiarity of parliament with the task of controlling the colonies. In this the English authorities were not showing themselves either arbitrary or despotic. The Board of Trade, the crown lawyers, even the Privy Council acted according to their convictions, which, though honest, were based undoubtedly upon insufficient and *ex parte* information. Connecticut's policy of reticence was in part responsible for this; she had made it possible for her enemies to fill the minds of the home authorities with suspicion, and there was just enough truth at the bottom of the charges for them to be extremely effective. Other colonies as well were on the black list of the board. Among intelligent Englishmen both in and out of parliament there was a strong feeling that some of the colonies were not acting consistently with the interests of England, and needed the strong hand of parliament to curb them, even to the taking away of their treasured privileges.

But the blow was not to fall yet. Parliament was perhaps not yet prepared to intervene in the management of colonial affairs, however general the opinion seemed to be that it had a right, in view of the events of 1689, to

assume this function of the royal prerogative. Although for thirty years ample opportunities for so doing had been given, yet the rights and privileges of the charter colonies remained unimpaired. Perhaps the colonies had given insufficient provocation; if so, time would soon render the provocation greater, not because of any defiant act of the colonies but because of the inevitable tendency of their economic development. The intestacy law is but a straw showing the direction of the wind; it has a legal stamp upon it but it is in origin and effect an economic measure.

The representation of 1730, followed soon after by that of 1733 to the House of Commons, resulted in a vehement body of resolutions of the House of Lords, but no further effect was seen. One session of parliament passed and still another, but, as no steps were taken pursuant to the resolutions, the colony began to breathe more freely. That it would have resisted the acceptance of an explanatory charter is evident; it is fortunate that it was never called upon to put the matter to the test. While the fate of Connecticut was thus hanging in the balance, another case, that of Phillips *vs.* Savage, was carried by appeal from the superior court of Massachusetts to the king in council. Here a decision in favor of the intestacy law gave new courage to Connecticut, and in another private suit, that of Clark *vs.* Tousey, the matter was again brought before the king in council. The appeal was dismissed, however, by the Privy Council in 1745, not through any decision as to the right or wrong of the case, but because of the fact that Clark had not prosecuted the appeal within a year and a day as required by the council. Connecticut accepted the dismissal as a decision in her favor, although it was in fact nothing of the kind. It ended the matter, only because no one dared to make

another appeal and the question never came up again.

We have now followed step by step this important question from its starting point in the land system of Connecticut to its final issue in the prerogatives of crown and parliament. The land system, representing the pre-feudal idea rather than the feudal, was reproduced in America with some important changes. Out of this sprang the law of intestacy, differing in principle from that of England which rested upon feudal law. This difference between the common law of the two countries was taken advantage of by certain disaffected ones of Connecticut who sought to benefit themselves by appealing to England against the colonial law. This matter, at first private, touching the lands and interests of but a few persons, became of wider importance by the vacation of the law by the king in council. By this the agrarian harmony of Connecticut, and possibly of New England, was threatened. This roused the colony, and the issue became a part of the larger question of the relations of the proprietary and charter colonies to the crown. This made the matter of importance not merely to Connecticut and New England, but to the other colonies of this class as well. But the influence of the Winthrop case did not stop here; it passed even higher, and raised the question of fundamental importance to all the colonies as to the constitutional relations of crown and parliament. The settlement of this question foreshadowed the action which parliament was to take forty years after.

Printed at the Printing-Office of the Yale University Press