St. John's Law Review

Volume 10
Number 2 *Volume 10, April 1936, Number 2*

Article 1

May 2014

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ST. JOHN'S LAW REVIEW

VOLUME X APRIL, 1936 NUMBER 2

THE EQUITABLE JURISDICTION OF SURROGATES' COURTS IN NEW YORK

ALL property, passing by death in New York, whether it be through a Will, or as a result of intestacy, must, of necessity, come under the jurisdiction of the Surrogates' Courts of that state, for such courts are given by statute the commission "to administer justice in all matters relating to the affairs of decedents, and * * * to try and determine all questions, legal or equitable * * * necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires." [1]

And the legislature further grants among the incidental powers of the surrogate, the power "to proceed, in all matters subject to the cognizance of his Court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." [2]

These courts which operate so efficiently under the aforesaid comprehensive grants of power are scarcely to be recognized as courts which have grown out of the Dutch Colonial Judicial Council, the English Prerogative Court, the Mayor's Court and the early Court of Chancery.

Yet, the roots of the present power of the Surrogates' Courts extend back to these early tribunals and to understand the present scope and limits of their jurisdiction, particularly in equity, it is necessary to keep in mind their origin and the history of their development from a merely adminis-

[1] SURROGATE'S COURT ACT § 40.
[2] SURROGATE'S COURT ACT § 20, subd. 11.

trative tribunal into their present form as courts of record and of original jurisdiction.[3]

In the revised statutes of 1830, we find the now almost incomprehensible provision "that no Surrogate shall under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by some statute of this State." Such a law, as might well be supposed, proved so unworkable that it was repealed by Chapter 460 of the Laws of 1837. For as Chancellor Walworth remarked, in *Pew* v. *Hastings*:[4]

> "* * * the exercise of certain incidental powers by courts was absolutely essential to the due administration of justice and * * * the legislature had not, by their care and foresight, been able to take the case of these Surrogates' Courts out of the operation of the general rule."

Following the repeal in 1837 of this restrictive statute, the legislature, by numerous enactments, extended the jurisdiction of Surrogates' Courts.

Nevertheless, as late as 1911, the Court of Appeals specifically stated that these courts possessed no jurisdiction, except such as had been especially conferred upon them by statute, together with such incidental powers as were requisite to enable them to effectually exercise the jurisdiction actually granted.[5]

Thus, in three-quarters of a century, these courts despite their constantly growing importance, had been unable to get very far from the basic idea of colonial times that their jurisdiction was to a large extent purely ministerial and that they possessed only such powers as were expressly granted to them or which were absolutely essential and incidental thereto.

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[3] For early history and later development of Surrogates' Courts, see *In re* Brick's Estate, 15 Abb. Pr. 12 (N. Y. 1862); Matter of Runk, 200 N. Y. 447, 94 N. E. 363 (1910).

[4] 1 Barb. Ch. 452 (N. Y. 1846).

[5] Matter of Runk, 200 N. Y. 447, 94 N. E. 363 (1910); see also *In re* Bolton, 159 N. Y. 129, 53 N. E. 756 (1899); *In re* Bunting, 98 App. Div. 122, 90 N. Y. Supp. 786 (1st Dept. 1904), *appeal dismissed*, 182 N. Y. 552; N. Y. CONST. (1777) art. XXIV; N. Y. CONST. (1821) art. V, § 6; N. Y. CONST. (1846) art. VI, § 14; AMENDED JUDICIARY ARTICLE (1869) art. VI, § 15; N. Y. CONST. (1894) art. VI, § 15.

While it must still be recognized that these courts have not yet become courts of general equity jurisdiction, nevertheless by reason of the learning, experience and diligent work of great surrogates, past and present, not only in doing the work submitted to them, but in pointing the way in court, and out of court, before bar associations, in legislative halls and in the professional and lay press, we have today in New York, Surrogates' Courts which are universally acclaimed for the speedy and satisfactory administration of the important matters over which they have jurisdiction.[6]

But the present desirable condition and the universal wish of the surrogates and the bar for even greater perfection has been won and is maintained only at the cost of constant watchfulness and intelligent co-operation from the legislature, the higher courts, the surrogates themselves and the bar of their courts.

Too frequently other courts, either grudgingly concede, or actually deny to Surrogates' Courts the equitable powers which they possess,[7] fearful lest these other courts lose their equitable powers in matters which, while once almost exclusively handled by them, can now be settled, as the public has learned to understand, to far better advantage, and with more expedition in Surrogates' Courts.

Nevertheless, the surrogates thus criticized and restricted have neither usurped power nor denied the admitted chancery jurisdiction of the Supreme Court. They have

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[6] REPORT OF THE COMMISSION OF THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934). "Because there have been no complaints, but on the contrary, universal praise of the efficiency of the Surrogates' Courts, and because of the splendid work of the Commission which recently revised and harmonized the entire law relating to the work of the Surrogates' Courts there has been no need for any study of these courts by this Commission."

[7] Witness the following remarks of Mr. Justice Carew of the New York Supreme Court, in the much publicized case of the Matter of Vanderbilt, wherein he said: "* * * This order was made in order that the Supreme Court, the highest court of original jurisdiction in the State of New York, the successor of the Kings High Courts of Law and High Court of Chancery, endowed by the Constitution of the State of New York with all the powers of all those courts, might be able to enforce its own decrees. I will not tolerate for one instant the suggestion that the Supreme Court should go, hat in hand, to the Surrogate of New York County and ask him to cut off the relator's revenues if she kidnaps this child and removes it to Europe. I regard as an impertinence the consideration and discussion by the Surrogate in his opinion in 158 Misc. 889 of any decree that I may make of this matter."

merely pointed out that matters of which they themselves have jurisdiction can be better handled in their own courts than in the Supreme Court, even though the latter court has still full chancery jurisdiction.[8]

Mr. Surrogate Foley, in his decision in the *Vanderbilt* case, merely followed the policy of all present-day surrogates by interpreting literally those provisions of Section 40 of the Surrogate's Court Act which require the court to administer justice and to try and determine all questions legal or equitable, necessary to be determined in order to make a full, equitable and complete disposition of the matter.

The day is happily past since the Appellate Division was forced to hold, as it did in 1903 in deciding the case of *U. S. Trust Company of New York*,[9] that the surrogate had no power to pass upon the validity of a questioned general release.

A little over a year later the same court specifically stated:[10]

> "It has been settled by repeated adjudication that the general equitable powers of a court of equity have not been conferred upon Surrogates' Courts and, therefore, no authority exists in it to exercise such power."[11]

Such general equitable powers have not yet been conferred upon the Surrogates' Courts but despite some opinion to the contrary, there is nothing to prevent such a grant to them were the legislature to consider it necessary. Such a grant of general equitable jurisdiction would not be uncon-

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[8] Matter of Vanderbilt, 158 Misc. 889 (1935).

[9] 80 App. Div. 77, 80 N. Y. Supp. 475 (1st Dept. 1903).

[10] *In re* Bunting, 98 App. Div. 122, 90 N. Y. Supp. 786 (1st Dept. 1904).

[11] Matter of Howley, 104 N. Y. 250, 10 N. E. 352 (1887); Van Sinoren v. Lawrence, 50 Hun 272, 3 N. Y. Supp. 25 (1888); Matter of Wagner, 52 Hun 23, 4 N. Y. Supp. 761 (Sup. Ct. 1889), *aff'd*, 119 N. Y. 24, 23 N. E. 172 (1890); Matter of Hodgman, 11 App. Div. 344, 42 N. Y. Supp. 1004 (3d Dept. 1896); Matter of Randall, 152 N. Y. 508, 46 N. E. 945 (1897); Matter of Horn, 7 App. Div. 89, 39 N. Y. Supp. 954 (1st Dept. 1896); Matter of Schnable, 136 App. Div. 522, 121 N. Y. Supp. 54 (1st Dept. 1910); Matter of Clyne, 72 Misc. 593, 131 N. Y. Supp. 1090 (1911); Matter of Widmayer, 28 Misc. 362, 59 N. Y. Supp. 980 (1897).

stitutional for Judge Earl, writing for the Court of Appeals in *Matter of McPherson,*[12] said:

> "It is also objected that the act confers powers upon Surrogates' Courts not authorized by and contrary to the Constitution. There is nothing in the Constitution which in any way specifies or defines the powers or duties of Surrogates. They are recognized in various sections of the Constitution and they have been known by the laws of the State since the foundation of our government. Their jurisdiction has, from time to time, been defined in the statutes and from time to time extended and enlarged. Surrogates' Courts have always had jurisdiction of the administration, adjustment and settlement of the estates of deceased persons * * *."

The Surrogates' Courts have, however, always had such incidental powers in the application of equitable principles as were necessary for them to do justice in such matters as were before them, if jurisdiction of the subject matter of such proceedings had been expressly given to them by statute.[13]

In the *Matter of Brown,*[14] Mr. Surrogate Slater pointed out the distinction between the case where the court must determine the assets of an estate under statutory equitable power and that where it had to determine title to real estate presently owned by innocent third parties, under the exercise of general equitable jurisdiction, chancery in character. He stressed the fact that while the Surrogate's Court had only such power as the statute gave it to determine in an accounting proceeding, the title or the right of possession of property which belonged to the deceased in his lifetime, that, nevertheless, it could also determine the conflicting claims of the decedent's estate and the executor, individually, and could make any decree necessary or proper to pro-

[12] 104 N. Y. 306, 324, 10 N. E. 685 (1887).

[13] Vreedenburgh v. Calf, 9 Paige 128 (N. Y. 1838); Isham v. Gibbons, 1 Bradf. 69 (N. Y. 1849); Dobke v. McClaran, 41 Barb. 491 (N. Y. 1864); Matter of U. S. Trust Co. of N. Y., 175 N. Y. 304, 308, 67 N. E. 614 (1903); *In re* Brown, 192 Misc. 293, 221 N. Y. Supp. 305 (1927).

[14] 129 Misc. 293, 221 N. Y. Supp. 305 (1927).

tect the rights of both parties. In other words, in a case where the fiduciary made individual claims against the estate, the court had all of the power necessary to determine the justice of such claim and to make an appropriate decree. Such a determination would fall far short of the exercise of general equitable jurisdiction and would amount merely to the exercise of the inherent equitable power of the court to render complete justice in a matter of which it had statutory jurisdiction, namely, to compel the fiduciary to fully perform his duty.

The learned Surrogate of Westchester County thus clearly gives effect to the true meaning of subdivision 11 of Section 20, Surrogate's Court Act, for since the repeal of the unfortunate law of 1837, adverted to above, there has been no real question but that the surrogates have always had those incidental equitable powers which as Chancellor Walworth said,[15] were necessary for any court, if it was to do the work assigned to it.

Much of the seeming conflict in the decisions applicable to the court's equitable powers will disappear, if we keep in mind this distinction of Mr. Surrogate Slater. To have general equitable jurisdiction to determine any equitable question is quite different from the power to solve, by the application of equitable principles, matters within the clear scope of the court's statutory jurisdiction.

As the work of these Surrogates' Courts increased and the importance of the matters entrusted to them seemed to require it, the legislature in 1914,[16] attempted to codify the existing law applicable to such courts and enacted Section 2510 of the Code of Civil Procedure which, as amplified, is the present statute,[17] which gives the court its basic equitable jurisdiction.

While the statute thus enacted in 1914 seemed and was intended to be, a grant of plenary power, it was not so construed by the appellate courts for there came down from the Appellate Division, Second Department, a case which was affirmed by the Court of Appeals and which, for seven years, seemed to block the march of the Surrogates' Courts towards

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[15] *Supra* note 4.
[16] N. Y. Laws 1914, c. 443.
[17] SURROGATE'S COURT ACT § 40.

real equitable jurisdiction. It was the *Matter of Holzworth* [18] wherein Mr. Justice Carr, writing for a unanimous court, said:

> "It is claimed, however, by the Respondents, that by Section 2510 of the present Code of Civil Procedure, the Surrogate's Court has been given full equity jurisdiction in every proceeding that comes before it and that the Surrogate of Westchester County, in the case now before us, had the power to exercise this full equity jurisdiction on the facts that came before him. It is, of course, true that in Section 2510 of the Code of Civil Procedure, the legislature has declared as follows:
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> " 'Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows: To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.'
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> "But this legislative declaration is followed immediately by language as follows:
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> " 'And in the cases and in the manner prescribed by statute: * * * 3. To direct and control the conduct, and settle the accounts of executors, administrators and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee. 4. To enforce the payment of debts and legacies; the distribution of the estates of

[18] 166 App. Div. 150, 151 N. Y. Supp. 1072 (2d Dept. 1915), *aff'd*, 215 N. Y. 700, 109 N. E. 1079 (1915).

> decedents; and the payment or delivery by executors, administrators, and testamentary trustees, of money or other property in their possession belonging to the estate or fund.'
>
> "As I understand the law of statutory construction, all general phrases in a statute must yield to a particular specification contained in some statute. As to the subdivisions of Section 2510, just quoted, the cases and the manner in which the surrogate may exercise his equitable jurisdiction are specified particularly. Where there is such a specification, it must exercise its jurisdiction in accordance with the specification. Its general equitable power must yield to the statutory restrictions upon it, or directions as to it, and where the statute prescribes when and how it shall act, it cannot act otherwise than is prescribed. I think this is so well settled even as to courts of general equitable jurisdiction, as to require no discussion."

This decision which so clearly limited the equitable power of the court to those matters enumerated, in the several subdivisions of Section 2510 [19] which followed the general preamble of said section, once more emphasized the limited scope of the court's jurisdiction.

Cases such as the *Holzworth* decision clearly decide that the Surrogate's Court is a court of limited equitable jurisdiction, and must ever remain so, until the legislature strikes off the shackles which restrict its equitable powers to those cases where it already has express jurisdiction of the subject matter or of the person.[20]

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[19] Now existing in amended form as SURROGATE'S COURT ACT § 40.

[20] Other examples of decisions sustaining this limitation and holding that the court has no general equitable power to review situations or contracts, jurisdiction of which is not specifically given to the court by statute, may be found in the following cases: Matter of Heinze, 179 App. Div. 453, 165 N. Y. Supp. 1017 (3d Dept. 1917); Hughes v. Cuming, 165 N. Y. 91, 58 N. E. 794 (1900); Matter of Martin, 211 N. Y. 328, 105 N. E. 1079 (1915); Roderigas v. East River Savings Institution, 76 N. Y. 316 (1879); Botlon v. Schriever, 135 N. Y. 65, 31 N. E. 1001 (1892); Matter of Walker, 136 N. Y. 20, 32 N. E. 633 (1893); Matter of Underhill, 117 N. Y. 471, 22 N. E. 940 (1889); Matter of Thompson, 41 Misc. 223, 83 N. Y. Supp. 983 (1903); Matter of Watson, 215 N. Y. 209, 109 N. E. 86 (1915); Matter of Schnabel, 202 N. Y. 134, 95 N. E. 698 (1911); Matter of Kenny, 92 Misc. 330, 156 N. Y. Supp. 827 (1915); see also General Note of Revisers of Surrogates Code Chapter 443, Laws of 1914.

In other words, while the court in those matters expressly committed to it, may reach out and, by using and applying equitable principles, may do complete justice between the parties before it, nevertheless, the parties must be properly before it and must be litigating a matter clearly within the court's statutory jurisdiction. Collateral matters or parties improperly impleaded are wholly outside its jurisdiction.

Yet, in recent years, there has been an ever increasing tendency to clarify and extend this court's equitable powers, not by granting it general equity jurisdiction, but by enlarging the scope of the matters expressly assigned to it. Many of these matters of their very nature require the exercise of equity jurisdiction.

Such a rule is necessary particularly in accounting proceedings where the court is most frequently called upon to apply equitable doctrines and remedies. It is also sometimes necessary, and the surrogates have exercised it, with the approval of the higher courts of the state, in probate proceedings, in discovery proceedings, and in proceedings involving the rights of trustees and persons beneficially interested in testamentary trusts.

For instance, the present Chief Judge of the Court of Appeals said in speaking of agreements not to contest a will:

> "As we have above stated, such agreements are only cognizable in equity; they are enforced by a decree which enjoins or prevents a contracting party from proceeding contrary to the agreement. Equity molds the relief to fit the situation, to compel the party to keep his bargain. As the Surrogate's Court, under section 40 of the Surrogate's Court Act, now has equity jurisdiction, the surrogate, after hearing the parties and taking the proof, will determine as would a court of equity whether these next of kin have any legal or equitable standing in his court." [21]

An interesting example of the application of the exercise of the court's equitable power arose in a case where a legatee

[21] *In re* Cook's Will, 244 N. Y. 63, 71, 154 N. E. 823 (1926).

had made an assignment of his legacy and the assignee came into court on the faith of the assignment, claiming to be entitled to the legatee's share of the estate. The legatee on his part asked the surrogate to set aside the assignment on the ground of fraud, and the assignee objected to the court's right to pass upon the question. The court did pass upon it and its action was approved by the Appellate Division, which said:

> "How can the surrogate determine the petitioner's standing in court, his right to file objections, the proper recipient of the interest which was the petitioner's before the assignment was executed, or direct the distribution of the estate, until it is determined whether the assignment is valid (in which case the petitioner has no standing in court and the executors have acquired his interest), or invalid (in which case the petitioner has lost nothing thereby)? The very purpose of the grant of power and jurisdiction to the surrogates, both in 1910 and 1914, was to enable them, in the eight classes of proceedings enumerated in section 2510, to try and decide every issue, whether legal or equitable, which was necessary to be decided in order to make a final decree or order. Thus a proceeding of the kind indicated, once begun in the Surrogate's Court would proceed to a final order or decree therein, without being halted; and final decision postponed, in order that a suitable action might be brought in the Supreme Court to dispose of some question directly affecting the subject-matter then pending before the surrogate.
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> "The assignment in question necessarily and vitally affects the disposition to be made of the executors' accounts and the distribution to be made of the decedent's estate. No decree or order could be made settling the account or directing a distribution until the validity of the assignment had been determined. My conclusion therefore, is that the surrogate had power and jurisdiction to make the order appealed from.
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> "The decision in *Matter of Mondshain,* 186 App. Div. 528, 174 N. Y. Supp. 599, is not at variance with

> the views herein expressed. The proceeding there was one for a discovery, and alleged the transfer of money by decedent to the respondent therein, and his refusal to disclose the same, the execution and delivery of a general release, and that it was induced by fraud. Such a proceeding is not one of the eight enumerated classes to which the general grant of jurisdiction conferred by section 2510 attaches, and therefore the power to set aside a release did not exist in such a case. But here the proceeding is one enumerated in the section, and therefore full jurisdiction attached to enable the surrogate to decide any issue required to be settled in order to make an effectual final decree." [22]

Finally in *Raymond* v. *Davis' Estate*,[23] we find in the lucid and authoritative language of Chief Judge Cardozo, what is perhaps the best statement of the true extent of the present equity jurisdiction of Surrogates' Courts. This case decided in May, 1928, fourteen years after the general amendments made in 1914 affecting the court's jurisdiction and seven years after their clarification by the amendment of 1921, which was passed by the legislature to overcome the effect of decisions similar to that in the *Matter of Holzworth*,[24] and which amendment inserted in Section 40, Surrogate's Court Act, the provision that the powers granted should thereafter be deemed to be in addition to and without limitation or restriction on the general powers granted in the preamble of the said section, summed up the law to date and in unmistakable language pointed the road along which those interested in the speedy and efficient administration of estates, desire to see the court travel. It sounded the death knell of multiplicity of actions and proceedings which in the English experience of administration of estates by Chancery Courts led to the horrible results and delays so aptly described by Dickens in *Bleak House*.

Contrast with such a situation the following words of Chief Judge Cardozo:

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[22] *In re* Malcomson, 188 App. Div. 600, 177 N. Y. Supp. 238 (1st Dept. 1919).

[23] 248 N. Y. 67, 161 N. E. 421 (1928).

[24] 166 App. Div. 150, 151 N. Y. Supp. 1072 (2d Dept. 1915), *aff'd*, 215 N. Y. 700, 109 N. E. 1079 (1915).

"There remains a question of jurisdiction and procedure. Liquidation may be ordered by a decree of the surrogate as an incident to the allowance or rejection of a claim to share as creditor in the assets of the estate. Only by such relief can there be complete justice between the parties without oppressive expense or harrowing delay. A Surrogate's Court has jurisdiction:

" 'To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.' Surrogate's Court Act, Sec. 40.

"Early decisions were made upon the basis of a different grant of power. They deny the competence of a surrogate to decree the winding up of the business of a partnership, though liquidation be a necessary preliminary to the determination of a controversy lawfully before him. *Thomson* v. *Thomson,* 1 Bradf. 24, 35; *Matter of Irvin,* 87 App. Div. 466, 470, 84 N. Y. Supp. 707. We must hold them superseded by the provisions of the statute. An amendment in 1921 which emphasized the general grant of jurisdiction had at times been read as limited by specific grants of jurisdiction as to enumerated subjects. *Matter of Mondshain's Estate,* 186 App. Div. 528, 174 N. Y. Supp. 599; *Matter of Holzworth,* 166 App. Div. 150, 151, N. Y. Supp. 1072; *Id.,* 215 N. Y. 700, 109 N. E. 1079. The amendment gives notice that the powers that are specific shall hereafter be read as being 'in addition to and without limitation or restriction on' the powers that are general. *Matter of Van Buren* v. *Estate of Decker,* 204 App. Div. 138, 198 N. Y. Supp. 297; *Matter*

> *of Haigh's Estate,* 125 Misc. 365, 367, 368, 211 N. Y. Supp. 521. *Cf. Matter of Kenny,* 92 Misc. 330, 156 N. Y. Supp. 827. 'Concentration of jurisdiction as to decedents' estates' (per Foley, S., in *Matter of Haigh's Estate, supra*) is the purpose clearly revealed in the statutory scheme. 'The state has empowered surrogates in unmistakable language, and it is not the function of the courts to discover or to fashion reasons for thwarting the manifest policy.' Per Thomas, J., in *Matter of Coombs,* 185 App. Div. 312, 314, 173 N. Y. Supp. 58, 60. To remit the claimant to another forum after all these advances and retreats, these reconnaissances, and skirmishes, would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has invoked." [25]

And in passing upon the right of the divorced wife of a dishonest trustee who was also the life tenant of a trust to take a share of the income to which, had he been faithful to his fiduciary duty, her late spouse would have been entitled, Mr. Surrogate Foley held, in the case of *In re Boris' Estate,*[26] that the court's equitable jurisdiction in accounting proceedings had been repeatedly sustained and was now unquestioned. He held that the application of such recognized equitable jurisdiction to the facts before him required and authorized him to determine the question of priority between adverse claimants to the same fund and reached the equitable conclusion that the primary duty of the surrogate was to compel its officer, who was the fiduciary of an estate, to be faithful to his trust, and that, consequently, the claim of the wife to receive part of the income which would have been paid to her husband, had he been faithful to his trust, was subordinate to the right of the estate to recoup its losses out of said income, when they were caused by the dereliction of the fiduciary.[27]

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[25] 248 N. Y. 67, 73, 161 N. E. 421 (1928).
[26] 143 Misc. 877, 257 N. Y. Supp. 654 (1932).
[27] *In re* Winslow's Estate, 151 Misc. 298, 272 N. Y. Supp. 829 (1934); *In re* Burstein's Estate, 153 Misc. 515, 275 N. Y. Supp. 601 (1934); *In re* Haber's Estate, 151 Misc. 82, 270 N. Y. Supp. 603 (1934); Matter of Lakner, 143 Misc. 117, 255 N. Y. Supp. 809 (1932).

In discovery proceedings as they now exist under Section 205 *et seq.* of the Surrogate's Court Act, we find another major advance in the matter of the equity jurisdiction of the Surrogate's Court.

In one form or another, discovery for the benefit of the representative of the estate has always existed in the Surrogate's Court since the enactment of Chapter 359 of the Laws of 1870, but until the amendments made through the revisions of 1921, the proceeding was of no substantial benefit to the estate because the respondent was able to claim title and thus divest the surrogate of any jurisdiction, either to order the delivery of the property sought by the estate's representative, or to order the payment to such representative of the proceeds of said property, if it had been sold or otherwise wrongfully dissipated.

As late as 1918, it was said by the Appellate Division in the *Matter of Videgary,*[28] that a discovery proceeding was not designed to try out questions of title between conflicting claimants.

That such was the law prior to the amendments to Section 205, Surrogate's Court Act, made in 1924 and in 1933, was definitely settled by the *Matter of Hyams.*[29] In that case the Court stated:[30]

> "Under the sections of the Surrogate's Court Act to which reference has been made, it will be observed that the proceeding is limited to an inquiry concerning 'money or other personal property' which should be delivered to the executor. At the conclusion of the hearing the decree terminating the proceeding can only direct the delivery of specific money or personal property *which belonged to the deceased in his lifetime.* If such property has been exchanged for other property, or sold, then the Surrogate's Court has no power to direct that the same be turned over to the executor. (*Matter of Heinze,* 224 N. Y. 1.) The Surrogate's Court is a court of limited jurisdiction. It

[28] 184 App. Div. 381, 170 N. Y. Supp. 874 (1st Dept. 1918).
[29] 237 N. Y. 211, 142 N. E. 589 (1923).
[30] *Id.* at 216.

has only such power as is conferred upon it by statute. It has not been given power to determine the title, or the right to possession, of any property, other than that which belonged to the deceased in his lifetime.

"It is suggested that when sections 205 and 206 are read in connection with section 40, the Surrogate's Court has the power to determine all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter involved. Section 40 does not enlarge the powers of the Surrogate's Court in so far as the same relate to a discovery under sections 205 and 206. These sections point out specifically what must be done to obtain the discovery. An inquiry may be had concerning specific personal property. The inquiry is in terms limited to specific personal property, which was owned by the decedent in his lifetime, and before a decree can be entered under section 206, it must appear that the petitioner is entitled to the possession of the specific property withheld. No decree can be entered directing the disposition of other property or proceeds derived from property in case a sale has been made. The right of an executor or administrator to compel discovery of a decedent's property is not of recent origin. It has existed for many years, as indicated by legislation and decisions upon the subject. It was not, however, until the amendment of 1914 (Chap. 443) that title to property, the possession of which was sought, could be tried. If a verified answer were interposed denying the right to the possession of the property specified, then until the amendment of 1914 the proceeding had to be dismissed. (*Matter of Walker,* 136 N. Y. 20.) The remedy now given does not apply to the case before us. Its primary purpose is still inquisitorial."

Such proceedings today have ceased to be purely inquisitorial and are now complete proceedings in which the court exercises full equity jurisdiction, not alone to try the title to assets claimed by an estate, but if it finds title in

the decedent at the date of his death, it can, by its decree, follow the property if it is in existence and order its return to the fiduciary, and if it has been sold, it can order the wrongdoer to repay the proceeds of the sale to the estate.[31]

This, however, does not make the Surrogate's Court a collection agency and if the property sought in discovery is merely a *chose in action,* such as a bank deposit, the Surrogate's Court still has no jurisdiction to compel the bank to pay over the amount to the estate's representative.[32]

Surrogate Henderson of Bronx County has limited the holding of the Court of Appeals in *Raymond* v. *Davis' Estate*[33] to the equitable power to order a partnership liquidation in an accounting proceeding, and has denied such power in a discovery proceeding. This decision would seem to be good law although if the partnership liquidation was actually in progress in the Supreme Court it might now by permission of that Court be transferred to the Surrogate's Court under subdivision 9 of Section 40 of the Surrogate's Court Act, which became effective September 1st, 1934.[34]

This last mentioned subdivision of Section 40, Surrogate's Court Act, perhaps more than anything else indicates the present tendency of the court to carry out literally the apparent mandate given to it by the legislature to make a full, equitable and complete disposition of any matter properly before it.

This new amendment gives the Surrogates' Courts of the counties of New York, Kings, Queens, Bronx, Richmond and Westchester, powers, which so far have not been granted to any other Surrogates' Courts of the state, by enabling these particular courts, as a matter of right, to transfer to them-

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[31] Matter of Peno, 127 Misc. 718, 221 N. Y. Supp. 205 (1926); Matter of Howley, 133 Misc. 34, 231 N. Y. Supp. 95 (1928); *In re* Dickman's Estate, 142 Misc. 307, 254 N. Y. Supp. 302 (1931); Matter of Fraley, 129 Misc. 803, 221 N. Y. Supp. 461 (1927); Matter of Gallagher, 137 Misc. 564, 241 N. Y. Supp. 759 (1930); *In re* Forrest's Estate, 140 Misc. 14, 249 N. Y. Supp. 766 (1931); *In re* Hammer's Estate, 140 Misc. 14, 249 N. Y. Supp. 766 (1931); *In re* Hammer's Estate, 237 App. Div. 497, 261 N. Y. Supp. 478 (4th Dept. 1933), *aff'd,* 261 N. Y. 677, 185 N. E. 789 (1933); *In re* Dobkin's Estate, 145 Misc. 703, 260 N. Y. Supp. 909 (1932).

[32] Matter of Brazil, 219 App. Div. 594, 220 N. Y. Supp. 331 (1st Dept. 1927); Matter of Arduini, 243 App. Div. 10, 276 N. Y. Supp. 90 (1st Dept. 1934).

[33] 248 N. Y. 67, 161 N. E. 421 (1928).

[34] N. Y. Laws 1934, c. 352.

selves for trial and determination, any action or proceeding pending in a court other than the Supreme Court, in which the representative of an estate is a party, if the trial and determination of such action or proceeding is necessary to the complete and final termination of a proceeding then pending undetermined in the Surrogate's Court. It further gives the said Surrogates' Courts the power to receive similar actions and proceedings pending in the Supreme Court, which may, by the order of the Supreme Court, and the consent of the surrogate, be transferred to the Surrogate's Court.

In all cases of transfer, whether from the Supreme Court or from an inferior court, a proceeding must be pending in the Surrogate's Court, the determination of which will be expedited by the requested transfer.

No interference with existing rights of trial by jury or other rights of the litigants involved, is suffered by them through the transfer to the Surrogate's Court, because if trial by jury has been seasonably demanded and the case is on the jury calendar of the court where the action is pending, such right of jury trial is preserved and the jury trial takes place in the Surrogate's Court.

This statute has not been in force a sufficient length of time for the bar and the public generally to appreciate its full significance, but read in the light of the decision of the Court of Appeals in *Raymond* v. *Davis' Estate*[35] it seems to mean that in the counties mentioned, at least, a Surrogate's Court has full and complete jurisdiction of an equitable character. The constitution of the state of New York expressly reserves to the Supreme Court all of the equitable and chancery powers formerly possessed by the Chancellor and exercised through the old courts of equity, so that it must of necessity follow, that if an action is transferred from the Supreme Court to the Surrogate's Court for trial, that in such action at least, the Surrogate's Court has all of the Supreme Court's jurisdiction.

The completeness of the court's equitable jurisdiction has been materially aided by the enactment of Section 231a, Surrogate's Court Act,[36] and particularly the paragraph

[35] 248 N. Y. 67, 161 N. E. 421 (1928).

[36] N. Y. Laws 1923, c. 526.

thereof added by Chapter 332 of the Laws of 1934,[37] giving the court power to order an attorney to refund any sum paid to him in excess of the fair value of his services, as such fair value shall be determined by the surrogate; by the addition of Section 231b, Surrogate's Court Act,[38] giving the surrogate power to fix, irrespective of any agreement to the contrary, the reasonable value of the services rendered by an attorney-in-fact, for a legatee or other person interested in an estate; and by the addition of Section 206a, Surrogate's Court Act,[39] which is complementary to Section 205, and authorizes the surrogate to direct a representative of an estate to pay over to a claimant, any property wrongfully withheld by such estate representative.

It is thus clearly the purpose of the legislature, as Mr. Surrogate Foley stated in the *Matter of Haigh's Estate,*[40] to concentrate jurisdiction of decedents estates in the Surrogate's Court, and to give such court all of the necessary power legal or equitable, to completely settle such estates.

Chief Judge Cardozo, citing with approval the *Matter of Haigh's Estate,* adds:

> "The amendment gives notice that the powers that are specific shall hereafter be read as being 'in addition to and without limitation or restriction on', the powers that are general." [41]

And in the same case quotes Mr. Surrogate Foley, in the *Matter of Haigh's Estate,*[42] to the effect that:

> "The state has empowered Surrogates in unmistakable language, and it is not the function of the courts to discover or to fashion reasons for thwarting the manifest policy."

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[37] The amendment reads: "In the event that any such attorney has already received or been paid a sum in excess of the fair value of his services as thus determined, the surrogate shall have power to direct him to refund such excess."

[38] N. Y. Laws 1935, c. 206.

[39] N. Y. Laws 1934, c. 539.

[40] 125 Misc. 365, 211 N. Y. Supp. 521 (1925).

[41] Raymond v. Davis' Estate, 248 N. Y. 67, 161 N. E. 421 (1928).

[42] *Supra* note 40.

This distinguished jurist, now a member of the highest court in the land, lays down the rule, which it seems to us should be the only rule applicable to these Surrogates' Courts, when a question of their equitable jurisdiction is concerned, for he says:

> "To remit the claimant to another forum after all these advances and retreats, these reconnaissances and skirmishes, would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has invoked." [43]

This salutary rule, if followed by the Surrogates and the Appellate Courts, while it would of necessity further increase the equitable jurisdiction of the Surrogates, would avoid multiplicity of actions and proceedings and would enable its judges, whose work in the last score of years has been notable for its intelligence and expedition, to apply the special knowledge which they have acquired so far as the administration of problems coming before their court is concerned, with a consequent gain to the public at large.

Decisions, such as the *Matter of Vanderbilt,* while manifestly right on the evidence submitted to the court, are unfortunate in so far as they seek to deny or limit the equitable jurisdiction of Surrogates' Courts. The problems coming before such courts whether they be in accounting proceedings, in proceedings affecting the rights of testamentary trustees, or beneficiaries of testamentary trusts, legatees, attorneys or claimants interested in decedent's estate, infants or their guardians, adopted children and foster parents, can best be handled in these Surrogates' Courts, which have today developed highly specialized and efficient facilities for doing complete justice.

In the Supreme Court, similar results can be accomplished only through expensive references and prolonged litigation in a multiplicity of actions or proceedings.

The surrogate with the help of his clerks, experienced through many years with the handling of the special problems presented by infants' rights, whether personal or prop-

[43] *Supra* note 41, at 73.

erty, the rights of those interested in the estates of decedents, either as legatees, creditors or attorneys, or the rights or obligations of fiduciaries, can, if given full equitable jurisdiction, render complete justice to all parties in a single forum.

The grant of such general equitable jurisdiction would in no way affect the jurisdiction and dignity of the Supreme Court, which, as Mr. Justice Carew said, is the successor of the King's High Court of Chancery, for experience has shown that abuse of such power by the surrogates would scarcely ever arise, and the amount of good to be accomplished would far outweigh any occasional abuse which could easily be corrected on appeal.

At the present time, it may be stated that there is no general equity jurisdiction in the Surrogate's Court, such equitable jurisdiction as it has being limited to the complete determination of those special matters specifically committed to it by statute.

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St. John's University,
New York City, 1936.