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The Origin, History and Jurisdiction of the Surrogate's Court in New York

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THE ORIGIN, HISTORY AND JURISDICTION OF THE SURROGATE'S COURT IN NEW YORK.

Presented by

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PART 1, ORIGIN AND HISTORY OF THE COURT.

SUB-DIVISION 1, UNDER THE DUTCH ADMINISTRATION.

It was in 1609 that a yacht belonging to the Dutch East India Company, and commanded by Henry Hudson, entered and explored the waters of the Hudson River; but not until 1621 was the Dutch East Indian Company formally incorporated by the States General of the United Netherlands, and an attempt made to colonize what was then known as the Province of New Netherland.

The Colony of New Netherland was organized in May, 1623, and all the executive and judicial power appears to have been clothed in the Governor, or Director-General and his council, subject at all times to the supervision and direction of the chamber at Amsterdam. Afterwards, in 1630, extensive grants of lands were made by the West Indian Company to the "Patroons", who appear to have been a favored class of Dutch nobility, and who were invested with many of the powers of the

Feudal Lords of England. They were authorized to establish courts, known as the "Patroon's Courts", which exercised unlimited civil and criminal jurisdiction, subject however, to appeals to the Director-General and Council at New Amsterdam.

But the people soon rebelled against the arbitrary methods exercised by their governing authorities, and their inherent desire for self government began to crop out. One of the most potent causes of their dissatisfaction was the administration as Governor of William Kieft, who was appointed in 1638, and who, during the eight years of his rule, brought the colony nearly to the verge of ruin.

In order to in a measure satisfy the demands of the colonists, which they felt could not safely be resisted any longer, it was decreed by the Amsterdam Chamber, in 1653, that a Municipal Court be established which was known as the Court of Burgomasters and Schepens and consisted of a Schout, two burgomasters, and five schepens. Before this Court, wills were proved, executors and administrators appointed, provisions made for the care of property belonging to widows and

orphans, and distribution decreed. Of this Court, Chief Justice Charles P. Daly, in his "History of the Judicial Tribunals of New York", says: "Upon perusing its records it is impossible not to be struck with the comprehensive knowledge they display of the principles of jurisprudence, and with the directness and simplicity with which legal investigations were conducted. In fact, as a means of ascertaining truth, and of doing substantial justice, their mode of proceeding was infinitely superior to the more technical and artificial system introduced by their English successors."

But as the colony became more populous, and the duties of the courts consequently became greater, the "Court of Orphan Masters" was established in 1665, and was clothed with the probate jurisdiction formerly belonging to the "Court of Burgomasters and Schepens", except that it could not act when excluded from so doing by the words of the testator's will.

Other courts, of the same general nature as the above, were established, as occasion required, at Brooklyn, Long Island, Flatbush and some other settlements, and these, together with those above enumerated, including the Patroon Courts and the Supreme Court,

consisting of the Governor and his council, constituted the judicial tribunals of New Netherland until the conquest of the province by the English in 1664.

SUB-DIVISION 2.

UNDER THE ADMINISTRATION OF THE ENGLISH.

When New Netherland passed into the hands of the English and became New York, a curious state of affairs seems to have prevailed in regard to the Courts of the Colony. The English, who had settled in considerable numbers on Long Island and in parts of Westchester, adopted their own usuages and customs, and settled their disputes, and conducted their legal affairs in accordance with the common law; while in the Dutch Settlements an entirely different system, the Dutch law, prevailed.

The change to the English system was a gradual one. The Court of Orphan Masters, and the Court of Burgomasters and Schepens were consolidated, and known as the Mayor's Court, which was clothed with the same jurisdiction as to Probate matters, intestate's estates, etc., as had been previously exercised by the Court of

Orphan Masters, with a few modifications and restrictions.

Shortly after James, the Duke of York, had been apprised of the success of his expedition against New Netherland, he, with the aid of his father-in-law, Clarendon, then Lord Chancellor, prepared a body of laws for the government of his new possession. The Code thus prepared was known as the "Duke's Laws", and appears to have been compiled largely from the laws then in force in the other American colonies. It was based entirely upon the English Constitution, without any reference to the Dutch judicial system, hence, although it was formally ratified in 1665, several years elapsed before it came into full operation in those parts of the province where the Dutch had settled.

The Duke's Laws provided, among other things, that all wills, and other instruments connected with the administration of estates, should be registered in the office of records, which was established in New York City. The province was divided into three "ridings", and in each a Court of Sessions was established, presided over by all the "Justices of the Peace" living within

the riding. These Courts of sessions, concurrently with the Mayor's Court, above described, were Courts of Probate, and exercised the general jurisdiction now entrusted to Surrogates.

During Governor Dongan's administration, and in the year 1686, a letter of instructions was received by him which worked many changes in the course of procedure. The Governor or Secretary of the province now acceded to the probate jurisdiction of the Mayor's Court, and Courts of Sessions, though these courts were for a short time permitted to exercise their jurisdiction concurrently with him; but in 1691 a provision was made, whereby the sole power of issuing letters testamentary or of administration, and the granting of the final discharge from administration, was given to the Governor or delegate appointed by him, except as to estates of the value of less than Fifty Pounds, in which case the Courts of Common Pleas had jurisdiction.

In 1702 a Doctor Budges, a man of great legal attainments, was appointed to act as "Delegate", and he was the first in the province to use the title of "Surrogate", affixing it, after his signature, to all docu-

ments. The Governor, for the convenience of persons living in distant parts of the colony, afterwards appointed delegates to represent him in each county.

The Secretary of the Province presided over what was known as the Prerogative Court, which had control of all probate matters where the decedant had, as the official documents expressed it, "Goods, chattels, and credits in divers places within the province", that is, where his property was situated in different counties. This prerogative court seems also to have exercised a general supervision over the acts of the delegates for the several counties, and all final accountings and decrees for final distribution were made there. Scarcely any records of the Prerogative Court are now in existence, and it is almost impossible to define its exact powers. It continued to exist, sometimes called the Provate Court, until the Revolution, although an act of 1743, for the more speedy recovery of lagacies, which gave the Supreme Court jurisdiction, tended to rob it of very much of its usefulness, and, during several years immediately prior to the Revolution, it was seldom resorted to.

The local, or county delegates, began to be called Surrogates in 1746, and were so designated thereafter.

It is to be noted that in New York, less than in any other American colony, was the Ecclesiastical Jurisdiction as to probate matters, then in vogue in England, established. This was impracticable because New York was originally a Dutch colony, with absolutely no Ecclesiastical control as to its judicial organization. An attempt was made by the Duke of York, in his letter of instructions to Governor Dongan in 1689, to establish this jurisdiction, "as farr as conveniently may bee", but his plans were never fully carried out, although there were many points of similiarity between the Courts established by him, and the Ecclesiastical Courts of England.

SUB-DIVISION 3.

UNDER THE ADMINISTRATION OF THE STATE OF NEW YORK.

The Fourth Provincial Congress, which assumed the name of "The convention of Representatives of the State of New York", assembled at White Plains, July

ninth, 1776, and it was then and there "Resolved, unanimously, that the reasons assigned by the Continental Congress for declaring the United Colonies free and independant states, are cogent and conclusive, and that, while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will at the risk of our lives and fortunes, join with the other colonies in supporting it."

By this act the State of New York was formally ushered into existence. Upon March 12th 1777, the first Constitution of the State was adopted. By the provisions of the Constitution thus adopted, no radical change was made in the judicial organization of the State; but the next year the Legislature constituted a Court, to be known as the "Probate Court", which was vested with all the powers of the former Prerogative Court, and was presided over by a single Judge. This Court held Stated sittings in different parts of the State, until 1783. It was then removed to New York and remained there until 1787, when it was permanently established at Albany.

During all this time the Surrogates in the different

counties had been exercising exactly the same powers which they first had as delegates, and later as Surrogates, before the Revolution; but in 1787 an act was passed whereby the Surrogates were clothed with many of the powers formerly belonging exclusively to the Probate Court; the Probate Court having from this time on, substantially only appellate jurisdiction.

Before the act of 1787, the Surrogate's and Probate Court seems to have been considered somewhat as were the Ecclesiastical Courts of England,and had very little power to enforce most of their decrees, and no power to compel executors and administrators to a final accounting; but they were now given the full power of the common law courts, as to all matters properly before them. From this time until the passage of the Revised Statutes in 1823, the powers of these courts were gradually enlarged. In 1802 Surrogates might appoint guardians for infants; in 1806 they were permitted to sell lands for the payment of debts; in 1807 they were given authority to order the admeasurement of dower. Various other acts were passed, immediately following the ones above enumerated, all of which tended to

enlarge and widen the powers of the Surrogate.

By an act of 1823 the probate Court was abolished, and its jurisdiction was transferred to the Court of Chancery.

In 1830,by the revised statutes passed in that year, a few slight changes were made, none of which are especially important; but these statutes furnish an excellent codification of the then existing law and practice in the Surrogate's Court. From this time until 1846, several other acts were passed, regulating the practice, and by the Constitution of 1846, which reorganized the whole judicial system of the State, other slight alterations were made.

It is impossible, in so brief a work as the present, to point out the many modifications and improvements made by special acts of the Legislature in almost every year since the adoption of the revised statutes until the present code. It is sufficient to say that these acts were passed mainly to remedy the defects which from time to time, as the population increased and the business of the courts became larger, became apparent.

The difficulty in keeping informed as to the changes which were annually made, and the confusion resulting from the kind of legislation above described at length became so great that efforts were made to effect a complete and permanent system of procedure, and to condense and codify the vast number of seperate statutes. The first step in this direction was taken by Messrs. Field, Noyes and Bradford, and the result of their efforts appeared in the form of an appendix to the Field Code, first published in 1862.

Later, in 1870, Messrs. Throop, Stebbins, and Werner were appointed Commissioners to revise the Statutes, and they formulated a system of procedure which appears in their draft of revision.

By Chapter 18 of the prssent Code of Civil Procedure which took effect September first, 1880, the rights, powers and duties of the Surrogate are explicitly defined, and the rules of procedure are clearly laid down, as are the cases where the jurisdiction of the Court can properly be exercised. The important provisions and the authorities are cited and discussed in Part 2 of this article, to which we now pass.

PART 2, JURISDICTION OF THE COURT.

SUB-DIVISION 1, THE SURROGATE, SURROGATE'S CLERKS, ETC.

Section fifteen of article six of the Constitution now in force in the State of New York reads as follows:

"The existing Surrogate's Courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogate's Courts shall have the jurisdiction and powers which the Surrogates and existing Surrogate's Courts now possess, until otherwise provided by the Legislature. The County Judge shall be surrogate of his county, except where a seperate Surrogate has been or shall be elected. In counties having a population of forty thousand or over, wherein there is no seperate Surrogate, the Legislature may provide for the election of a seperate officer to be Sugrogate, whose term of office shall be six years. When the Surrogate shall be elected as a seperate officer,

his salery shall be established by law, payable out of the county treasury . No County judge or Surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of County Judge or Surrogate shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any County Judge or Surrogate shall not be increased or diminished during his term of office. For the relief of Surrogate's Courts the Legislature may confer upon the Supreme Court in any County having a population exceeding four hundred thousand, the powers and jurisdiction of Surrogates, with authority to try issues of fact by jury in probate cases."

In addition to the Section of the Constitution above given, Chapter eighteen of the Code of Civil Procedure is devoted to the Surrogate and his Court, and article second of that chapter treats of the general duties and disabilities of the Surrogate. These it is proper to notice, and we will attempt to discuss briefly the most important provisions. In the first place, it is provided by Section 2483. that where the

County Judge is also Surrogate, he may be designated, in any proceeding relating to the office of Surrogate, as the Surrogate of the County, with no reference to his office as County Judge. A local officer elected, as prescribed in the Constitution, to discharge the duties of Surrogate, may be designated as "Special Surrogate," and where an officer other than the Surrogate acts, in a case prescribed by law, he shall be designated by his official title, and in addition thereto, by the words, "and Acting Surrogate".

If the office of Surrogate becomes vacant, or the Surrogate becomes disabled for any reason, it is provided, except in New York and Kings Counties, that the duties of the office shall be discharged, (1) by the Special Surrogate, (2) If no Special Surrogate, or he is disqualified, by the Special County Judge, (3) if for any reason he cannot act, by the County Judge, and (4) by the District Attorney. (Section 2484).

But none of these officers can act until their authority to do so is proved. This may be done either by the Surrogate's own certificate that he is disqualified or otherwise unable to act, or by the order of a Supreme Court Justice of the judicial district embracing

the County, which order, when filed, is deemed conclusive The making of the order is left almost wholly within the discretion of the Supreme Court Justice, and may be made upon or without notice, as he requires.

If any Surrogate is disabled or disqualified, and there is no Special Surrogate or Special County Judge, the board of Supervisors are given power to appoint a person to act as Surrogate, until the Surrogate's disability ceases, or until a Special Surrogate or Special County Judge is elected.

A Surrogate is disqualified from acting upon an application for probate, or for letters testamentary or letters of administration, (1) where he is or claims to be an heir or one of the next of kin to the decedant, or a devisee or legatee; (2) where he is a witness to the will, or (3) where is is named as Executor, trustee, or Guardian in any will involved in the matter.

In addition to these there are, of course, the general disqualifications which hold good as to all judges. The Surrogate cannot in a case where he has acted as attorney; nor can a father or son of a Surrogate practice before him. He is also unable to act where

he is a party or interested in the result. All objections to the Surrogate's acting because of disqualification, must be made before the submission of the matter or question to him, or they are deemed to have been waived.(Section 2497.) Thus,in a case where the Surrogate's wife was a witness to the will, and the will gave a legacy to a church of which the Surrogate was a vestryman, it was held that the objection to the Surrogate's acting on this account must be made in accordance with the last mentioned section, and if this is not done, the probate of the will will not afterwards be disturbed. (Hopkins vs. Lane, 17 N.Y. State Rep. 677).

The Surrogate's Court is always open, during the proper hours of all business days, to transact any business properly before it. In case the parties cannot attend before the Surrogate at his office, he may hold his Court at any places or places within the County.

Power is given the Surrogate to appoint a clerk, who shall be known as the Surrogate's Clerk, or Clerk of the Surrogate's Court, for whose acts as such the Surrogate shall be liable, and whose duties and powers are defined as follows, in Section 2509 of the Code:

1. He may certify and sign as Clerk of the Court, any of the records of the Court, including the certificate specified in section 2629 of this act, (this certificate being one attached to a will after probate, stating that the will has been regularly probated etc.); and the records and papers specified in sub-division nine of section 2481, (any records left uncompleted or unsigned by any predecessor of the Surrogate.)

2. He may issue any mandate to which a party is entitled as of course, either unconditionally or on the filing of any paper, and may a sign as Clerk of the Court and affix the seal of the Court to any letters or mandate issued from the Court.

3. He may certify in the manner prescribed by chapter ninth of this act a copy of any paper required or permitted by law to be filed or recorded in the Surrogate's office. (Chapter ninth refers to certified copies of papers; that they may be offered in evidence etc.)

4. He may adjourn to a definite time, not exceeding thirty days,any matter, when the Surrogate is absent from his office, or unable by reason of other engagements, to

attend to the same.

5. He may take the acknowledgment or proof of any instrument to be used in the court of which he is a clerk.

He may exercise, concurrently with the Surrogate, the following additional powers: On the return of a citation issued from such Surrogate's Court, on a petition for the probate of a will, where no objection to the same is filed, or where all the persons entitled to be cited sign and verify the petition, or personally or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. (section 2510).

The Clerk must, however, act strictly within his powers; and in the case of Rodingas vs. East River Savings Institution, 76 N.Y. 316, where the clerk received a petition, and filled up a blank left with him and signed by the Surrogate, thus granting letters of administration, it was held that the letters were absolutely void, and no protection to any one, the Surrogate never having acted judicially in the matter, and being unable to delegate his power. So the letters

were no protection to a person who had in good faith paid to the administratrix a debt owing to the supposed decedant, who was afterwards shown to be alive.

In the case of Mauran vs. Hawley, 2 Dem. 396,it was held that the Surrogate's clerk had no power to issue a citation in a proceeding instituted by the executor or administrator to ascertain the whereabouts of property concealed or withheld; the Court saying that although this citation is a mandate, it is not one to which a party is entitled "of course", and therefore cannot be issued by the Clerk.

Where a paper, claiming to be a decree of the Surrogate, but unsigned by him, was filed as a decree by the Clerk, it was held that such decree was invalid, the Court saying that there is no way in which a Surrogate's Clerk can validate an unsigned decree of the Surrogate. (McNaughton vs. Chave, 5 Abbott's N.C. 225.)

SUB-DIVISION 2, GENERAL JURISDICTION OF THE COURT.

The General jurisdiction of the Court is outlined in Section 2472 of the Code, as follows: It has jurisdiction,1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof, and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

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 so removed.

4. To enforce the payment of debts and legacies, the distribution of the estates of decedants,and the payment or delivery by executors, administrators and testamentary trustees, of money or other property in their possession belonging to the estate.

5. To direct the disposition of real property,and interests in real property of decedants, for the payment of their debts and funeral expenses, and the disposition

of the proceeds thereof.

6. To administer justice, in all matters relating to the estates of decedants according to the provisions of the statutes relating thereto.

7. To appoint and remove Guardians for infants, to compel the payment and delivery by them of money or other property belonging to their wards, and in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.

This jurisdiction must be exercised in all cases and in the manner prescribed by statute .

It is provided by section 2476, that the surrogate's court of each county has exclusive jurisdiction, (1) where the decedant was at the time of his death a resident of that county, whether he died there or elsewhere, (2) Where the decedant, being a non-resident of the State, died within that county, leaving personal property within the State, or which has since his death come into the state. (3) Where the decedant being a non-resident of the state, left personal property wholly within that county, or leaving personal property which has come into that county since his death and is

unadministered, (the decedant having died without the state). (4) Where the decedant was a non resident of the state, and a petition for probate of his will or for letters of administration has not been filed in any surrogate's court, but real property of the decedant is wholly situated within that county.

In a discussion of the general classification laid down in section 2472, (supra), I have deemed it best to follow the arrangement there given, as nearly as possible,and to take up the various divisions of the section, in the order as there given.

Probate of Wills: A will of personal property is entitled to probate if executed according to the laws of the State where it was executed, or if in Canada, Great Britan, or Ireland, in accordance with the laws of those Countries. (Section 2611.)

But it is held that only the last will can be proved under this section, and not any will. (Matter of Benedict's Will, 11 N.Y.Supp. 252).

A person named as Executor, legatee, or any person interested in the estate, or a creditor, may offer the will for probate. (Section 2614.)

An interesting case, and one which throws much light on the two sections last given, is that of Russell vs. Hartt, 87 N.Y. 18. In that case it appeared that John Russell, a native of Scotland, but a citizen of the United States, returned to Scotland, after having resided in this country for over fifty years, and there died, leaving a will of real and personal property, executed both in accordance with the laws of Scotland and New York, and disposing of real and personal property situated in New York. The original will, at the time it was offered for probate, was in the custody of some Court or tribunal in Scotland, and could not be obtained. It was offered for probate by the attorney for the executrix, and was thereafter admitted to probate. The first point raised on the appeal was that the attorney was not a "party interested in the estate", and so not entitled under the statute to propound the will. It was held that he was a person interested and could offer the will for probate, because, by virtue of a power of attorney which he had from the executrix, he was to be appointed administrator with the will annexed. It was further held that the will

would pass the real property therein devised, (situate in this state), even though the will itself was in a foreign jurisdiction, and that the surrogate could issue a commission to take the proofs, and the production of the original will before the commission was substantially a production of the will in Court, and sufficient to pass the real property above spoken of.

Revocation of Probate. The Surrogate has full power to revoke the probate of a will when it appears to him that the will was not sufficiently proved,or is for any reason invalid. This is done upon the petition of anyone interested in the estate, and must be within one year after the decree admitting the will to probate.

The procedure is laid down in sections 2647 to 2653 of the Code.

Where letters testamentary are issued on the probate of a will, and the probate is afterwards revoked, the letters are also revoked. (Section 2684.)

Probate of heirship: The Surrogate has power, where a person dies intestate, or without devising his real property, to make a decree establishing the right of

inheritance thereto. This is done upon the petition of any of the heirs, and inquiry is made into the facts and circumstances surrounding the death of the decedent. Upon being satisfied as to the number of heirs, their right to inherit, and the shares of each, the Surrogate makes a decree setting forth these facts, which when recorded, is presumptive evidence of the facts declared to be established therein.

This proceeding, however, is seldom resorted to, because it is of little practical value, and establishes nothing finally, but only presumptively.

Grant of letters Testamentary and Letters of Administration: The Executor is of course, named in the will, and if competent to act, recieves his letters testamentary upon the probate of the will, and upon his complying with the necessary legal requirements.

Letters of Administration are granted, in case of the death of an intestate, to any person entitled by law to recieve them. Any person entitled absolutely or contingently to administer, may petition the Surrogate for letters. The statute provides that the relatives of

the intestate who will accept it, shall be appointed as follows: (1) The surviving husband or wife; (2) The children. (3) The father. (4) The mother. (5) The brothers. (6) The sisters. (7) The grandchildren. (8) Any other next of kin entitled to a distributive share in the estate. Males are always to be preferred to females of the same degree of relationship.

Under this provision, the Courts have held that a divorced wife has no right to administer upon the estate of her former husband, even though the divorce was granted for his fault; and that she is entitled to no distributive shars of his estate. (Estate of Ensign, 103 N. Y 384.)

The person appointed as administrator must give a bond, with two or more sureties, in a sum not less than twice the value of the personal property of the decedent, conditioned for the faithful performance of his duties as administrator; and upon his appointment, the personal estate of the decedent vests at once in him.

In case there is no one entitled or competent to act, the County Treasurer may be appointed, except in New York and Kings Counties, where Public Administrators are provided for, whose duty it is to administer in all

such cases..

The Surrogate has a general supervision and control over the acts of all administrators appointed by him, (Matter of Wagner, 119 N.Y. 281), such administrators really acting as officers of the court in the settlement of the estate.

Upon the petition of a person interested in the estate, or a creditor, the Surrogate may cite an administrator to an accounting. He has power in a case prescribed by law, (See Sec. 2725 of the Code), to compel what is called an intermediate accounting, which discloses the condition of the estate at the time it was made. He may also require , in either of the following cases, a final accounting, and judicial settlement of the accounts of the executor or administrator (1) Where one year has expired since the letters were issued. (2) Where the letters have been revoked, or for any reason the powers of the executor or administrator have ceased. (3) Where real property has been disposed of, in accordance with a decree of the Surrogate, or (4) in accordance with a power contained in the testators will, after one year has elapsed from the time letters

were issued to him. (Section 2726)

It will be observed that this judicial settlement may be made "from time to time", but upon the debts being determined, and matters connected with the estate being ready for settlement, a final decree is entered, directing the payment of the debts and the distribution of the surplus, after deducting the commissions and expenses of the Administrator, and upon this being done, the Executor or Administrator is discharged.

In case any debt against the estate is contested by the Executor or Administrator, it may be referred, with the consent of the Surrogate, to a Referee who shall determine its validity. It case it is not referred, an action must be commenced within six months after its rejection, against the Executor or Administrator.

In addition to the letters of administration above discussed, the Surrogate may issue what are known as ancillary letters, in the following cases. (1) Where a will has been admitted to probate without the State, and it is necessary that there be some representative

of the estate who is entitled to act within the State, and within the jurisdiction of the Surrogate who issues the letters. (2) They may also be issued upon application of the party entitled to receive them, or his attorney, to a Surrogates Court having jurisdiction of the estate,where it appears that letters have been issued upon the estate in some other jurisdiction where the party died; or in a case where the party died without the United States, that the person applying, either in person or by attorney, is entitled to the possession, in the foreign Country, of the personal estate of such decedent, and presents a duly authenticated copy of the foreign letters upon his application.

Revocation of Letters Testamentary or Letters of Administration: Letters of an administrator or Executor may be revoked, upon the petition of a creditor or person interested in the estate , where it is shown, (1) That the administrator or Executor was, at the time of his appointment, or has since become incompetent, or disqualified by law to act. (2) That he has improvidently managed the estate, or by reason of other misconduct, is unfit to act. (3) Where he has refused to

he obtained the letters by false representation of a material fact. (5) In the case of an Executor where his circumstances are such that they do not afford adequate protection to creditors or persons interested in the estate. (6) In case of an executor where he has removed or is about to remove from the State, and the case is not one where a non-resident executor would be entitled to letters without giving a bond. (7) In case of an Executor where his office was to cease upon a contingency which has happened. (8) In the case of a temporary administrator appointed upon the estate of an absentee, where it appears that the absentee has returned or is living and competent to manage his affairs, or where an administrator in chief or an executor has been appointed, or a committee has been appointed.

It is of course, the duty of all executors and administrators to pay debts and legacies, and to make distribution, under the direction of the Surrogate, and if the directions are not carried out, the executor or administrator may be removed.

Disposition of Real Property to Pay Debts: Sections

2749 - 2801 of the Code govern the disposition of a decedent's real property for the payment of his debts and funeral expenses.

This is a very technical proceeding, and we can only attempt to sketch a general outline of the jurisdiction. A petition may be presented to the Surrogate at any time within three years by an Executor or Administrator, or Creditor; upon which a citation is issued to all the creditors, the husband wife, heirs, and devisees and all persons claiming under them. Upon the return of the citation the Surrogate takes the proofs, and if it appears that it will be necessary to sell the property, or a portion of it, a decree is made accordingly. The Executor or Administrator, before he can execute the decree, must give a bond, and if he refuses, the decree may be executed by any free holder within the County, designated by the Surrogate. The sale is made in accordance with the laws governing the disposition of real property, and the proceeds paid into Court. The Surrogate then causes a Notice of Distribution to be published, and makes a decree directing payment to the proper persons.

Appointment of Guardians: The Surrogate has power to appoint Guardians for infants. This is done upon the nomination of the infant, if he is over fourteen years of age, or, if under that age, a relative or other person may petition in his behalf, in which case the person to be appointed must be nominated by the Surrogate. This Guardian only serves until the infant reaches the age of fourteen, when he may nominate another person, or if he does not, the temporary Guardian continues to act. Any person appointed as Guardian of the property of an infant must file a bond, with at least two sureties, in an amount equal to at least twice the value of the personal property of the infant. A person appointed as Guardian of the person must take the oath prescribed by law, and give such bond as the Surrogate requires.

The letters of Guardianship may be revoked for misconduct or incompetency in substantially the same manner as are those of an Executor or Administrator, but the Surrogate has no power to remove a lawful guardian until facts warranting such removal are established. (MacKay vs. Fullerton, 4 Dem. 153).

Upon the ward's attaining his majority, the accounts

of the Guardian may be settled and the Guardian discharged.

In the Matter of Camp, 126 N.Y. 377, it is held that the Surrogate has no general jurisdiction over the acts of a Guardian, but only such as has been specially conferred by Statute, but the Surrogate has a wide discretion, and may withold the custody of the child from even its legal guardians, when considerations affacting the health and welfare of the child prompt him to do so. (Matter of Welsh, 74 N.Y. 299.)

It is also in the discretion, whether the Guardian shall be selected outside the relatives of the infant. (Matter of Van de Water, 115 N.Y. 669.)

In addition to the jurisdiction in all the above mentioned instances, the Surrogate has certain incidental powers, necessary that he may properly carry out the provisions of the Statutes, and which are enumerated in Section 2481 of the Code. He has power: (1) To issue citations to parties in any matter within the jurisdiction of his Court, and in a case prescribed by law, to compel the attendance of a party. (2) To adjourn any hearing or other proceeding, when necessary.

or when it appears that all the proper parties have not been brought in. (3)To issue a subpoena to compel the attendance of a witness residing in any part of the State, or a subpoena duces tecum, requiring the production of a book or paper material to the case. (4) To enjoin an executor, administrator, testamentary trustee or Guardian, to whom a citation has been issued, from acting as such until the further order of the Court. (5) To require an executor , administrator, testamentary trustee of Guardian to perform any duty imposed by Statute, or by the Surrogate's Court under authority of a Statute. (6) To open, vacate, modify or set aside, or to enter as of former time, a decree or order of his Court, or to grant a new trial or hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. (7) To punish any person for contempt of his Court, in any case prescribed by law where a Court of record may punish for a similar contempt, and in like manner. (8) Subject to the provisions of law, relating to the disqualifications of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs,

accountings and examinations. (9) To complete, certify and sign in his own name all records of papers left uncompleted or unsigned by his predecessor. (10) To cerfify all transcripts etc. (11) With respect to any matter not expressly provided for, to proceed, 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.

CONCLUSION.

In the foregoing pages an attempt has been made to give, very briefly, a history of the Surrogate's Court in New York; tracing it from its origin, through its different changes, down to the present time.

We have also tried to give the jurisdiction of the Court, necessarily in an incomplete manner, owing to the short space at our disposal.

The jurisdiction is almost entirely laid down by Statute,and has always been held to be limited and confined to such proceedings and the exercise of such powers as are given by the express terms of the statute, and as are incidental thereto. (Seaman vs. Whitehead, 78 N.Y. 306.)

The incidental powers are only such as are reasonably necessary to carry out the provisions of the Statute and such as may be inferred from its language to be necessary to accomplish its objects. (Siperly vs. Baucus, 24 N.Y.461. Du Bois vs. Sands, 43 Barb. 312.)