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EMPOWER SURROGATE TO COMPEL DISCOVERY OF ORDINARY
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LEGISLATION

SURROGATE'S COURT ACT—SECTION 205 AMENDED TO EMPOWER SURROGATE TO COMPEL DISCOVERY OF ORDINARY BANK ACCOUNTS.—In order to overcome the effect of a recent unanimous decision by the New York Court of Appeals,¹ the New York State Legislature has enacted, and the Governor has approved, an amendment to § 205 of the Surrogate's Court Act² which enlarges the jurisdiction of the Surrogate to cover discovery proceedings involving ordinary bank deposits.

The statute, even before amendment, provided that the Surrogate may entertain petitions to discover "money or other personal property" in the possession of third parties, and that he may order its delivery to the executor or administrator. The uniform judicial construction of this section had been that the discoverable property had to be *specific* personalty—a chattel or a segregated fund—having in rem characteristics. The statute had never been held to empower the Surrogate to order discovery of a debt owed the decedent, the view being that such a general in personam claim would be more properly asserted by the personal representative in an action at law.³

However, the section as amended now provides that "the term 'money or other personal property', as used in this section, shall include money deposited . . . with a bank, trust company, savings bank, savings and loan association. . .".

The unusually swift action of the legislature⁴ in changing the law was precipitated⁵ by the decision in late December, 1955, by the Court of Appeals in *Matter of Trevor*.⁶ In that case, the decedent left three bank books, including one of an ordinary bank deposit account with the defendant bank. Letters of administration were issued to the Public Administrator of New York County, who instituted discovery proceedings in the Surrogate's Court to direct the defendant bank to pay over to the estate the balance of the bank deposit account.

In its answer, defendant admitted the existence of the account, but set up the affirmative defense that the relationship between the bank and its depositor was that of debtor and creditor and, accordingly, that the Surrogate's Court had no jurisdiction to issue a decree directing the bank to pay over the balance standing to the credit of the account.

The Surrogate found that the account was an asset and property of the estate within the meaning of § 205, and directed the bank to deliver

¹ *Matter of Trevor*, 309 N. Y. 389, 131 N. E. 2d 561 (1955).

² N. Y. L. 1956, c. 270.

³ See *Matter of Lusher*, 159 Misc. 387, 283 N. Y. Supp. 754 (Surr. Ct. Kings Co. 1936).

⁴ The amendment was introduced in the Assembly February 7, 1956, and was subsequently approved, effective April 3, 1956.

⁵ See Report of the Committee on the Surrogates' Court of the New York County Lawyers' Association, dated February 16, 1956, which states that the bill "is recommended by the Surrogate's Association, to overcome the decision of the Court of Appeals in the *Matter of Trevor*. . ."

⁶ See note 1, *supra*.

the proceeds of the account to the Public Administrator. The Appellate Division, First Department, affirmed by a divided court.⁷

In arriving at its decision that the account was not discoverable property, the Court of Appeals considered two main issues, namely, whether in a discovery proceeding the Surrogate has in personam jurisdiction or in rem jurisdiction, or both; and whether an ordinary bank deposit account is a res which may be the subject of an in rem action.

Prior to 1914, the Surrogate had no power to try any title to property. Under the 1914 amendment to Section 2675 of the Code of Civil Procedure,⁸ that power was given, but in 1923 it was decided by the Court of Appeals that the Surrogate's power was "confined exclusively to property owned by the deceased in his lifetime and it does not relate or apply to any other property".⁹ Thereupon, § 205 was amended,¹⁰ adding to the executor's right to secure discovery of property of the decedent, and a similar right with respect to "the proceeds or value thereof". This section was further amended in 1939,¹¹ authorizing a testamentary trustee to bring discovery proceedings, and permitting the bringing in of a third party who claims the right to possession of the property.

Consequently, while the statute spoke in broad and unqualified terms of "money and other personal property or the proceeds or value thereof", there existed a great number of decisions from 1923 to date interpreting that language to mean that the purpose of discovery proceedings in the Surrogate's Court was to obtain the possession of *specific* personal property or money which belonged to the estate, or the value of the proceeds thereof in the event of the disposal of such specific property.¹² These decisions confirmed the right to discovery proceedings involving shares of stock,¹³ insurance policy proceeds,¹⁴ papers relating to financial affairs of the deceased,¹⁵ death benefits from a labor organization,¹⁶ interest in a mortgage,¹⁷ deposit of foreign money,¹⁸ money of a client held in trust by an attorney,¹⁹ and proceeds of sale of personal property.²⁰

Based upon the decisions in these cases, the Court of Appeals declared itself in agreement with Surrogate Wingate in *Matter of Lusher*,²¹ where it

⁷ *Matter of Trevor*, 282 App. Div. 451, 123 N. Y. S. 2d 527 (1st Dep't 1953).

⁸ N. Y. L. 1914, c. 443, now N. Y. SURROGATE'S COURT ACT § 205.

⁹ *Matter of Hyams*, 237 N. Y. 211, 142 N. E. 589 (1923).

¹⁰ N. Y. L. 1923, c. 273.

¹¹ N. Y. L. 1939, c. 343.

¹² *Matter of Ehrlich*, 126 Misc. 673, 215 N. Y. Supp. 141 (N. Y. Co. 1926); *Matter of Sichel*, 162 Misc. 2, 293 N. Y. Supp. 559 (Kings Co. 1937).

¹³ *Matter of Babcock*, 85 Misc. 256, 147 N. Y. Supp. 168 (Lewis Co. 1914).

¹⁴ *Matter of Howley*, 133 Misc. 34, 231 N. Y. Supp. 95 (Westchester Co. 1928).

¹⁵ *Matter of Ryan*, 115 Misc. 472, 188 N. Y. Supp. 387 (N. Y. Co. 1921).

¹⁶ *Matter of Reilly*, 111 Misc. 66, 182 N. Y. Supp. 221 (Bronx Co. 1920).

¹⁷ *Matter of Hauber*, 136 Misc. 798, 244 N. Y. Supp. 343 (N. Y. Co. 1930).

¹⁸ *Matter of Gruens*, 80 N. Y. S. 2d 890 (N. Y. Co. 1949).

¹⁹ *Matter of Ostrow*, 162 Misc. 783, 295 N. Y. Supp. 610 (N. Y. Co. 1933).

²⁰ *Matter of Fraley*, 129 Misc. 803, 221 N. Y. Supp. 461 (N. Y. Co. 1927).

²¹ See note 3, *supra*, at 387, 283 N. Y. Supp. 754, 755.

was held: "If the genesis of the obligation of the respondent was predicated on the possession of an asset jurisdiction inheres. If it was based merely on a general claim against him, purely in personam, it does not". In accordance with the authority of the decided cases,²² the court concluded that there were distinctive types of assets that could not be sought by discovery proceedings, one of which was a common debt, because such a debt could be recovered only in an in personam action at law.

As to whether a bank deposit constituted a common debt, the court held that "the relationship between a bank and its depositor is that of debtor and creditor with the result that the obligation of the bank to the depositor becomes merely a chose in action in the possession of the depositor".²³ This holding was in line with previous decisions rendered by the Appellate Division in similar circumstances to the effect that a proceeding to obtain money in a bank account was an action to collect a debt and not cognizable in a discovery proceeding in the Surrogate's Court.²⁴

The Court of Appeals distinguished the *Trevor* case from two earlier decisions,²⁵ wherein it had been held that money improperly drawn from a bank was property which came under the jurisdiction of the Surrogate's Court in discovery proceedings. Such improperly withdrawn money was held to be "specific" property, different from the ordinary deposit bank account which constituted a simple debt for which payment could not be enforced in discovery proceedings.

Thus, although the Court of Appeals by deciding that an ordinary bank deposit account was a simple debt, had limited the extent of the jurisdiction of the Surrogate in discovery proceedings, the legislature has since by statutory amendment enlarged this jurisdiction to include such proceedings.

²² *Matter of Thomas*, 235 App. Div. 450, 257 N. Y. Supp. 330 (1st Dep't 1932); *Matter of Carey*, 11 App. Div. 289, 42 N. Y. Supp. 346 (3rd Dep't 1896); *Matter of Thoms*, 165 Misc. 398, 300 N. Y. Supp. 872 (N. Y. Co. 1937); *Matter of Faulkner*, 134 Misc. 507, 236 N. Y. Supp. 237 (Bronx Co. 1929); *Matter of Bawer*, 132 Misc. 568, 230 N. Y. Supp. 567 (Bronx Co. 1928).

²³ *Solicitor v. Bankers Trust Co.*, 304 N. Y. 282, 107 N. E. 2d 448 (1952); *Fidelity Cas. Co. v. Farmers Natl. Bank*, 275 N. Y. 194, 9 N. E. 2d 833 (1937); *Matter of Holden*, 264 N. Y. 215, 190 N. E. 413 (1934).

²⁴ *Matter of White*, 119 App. Div. 140, 103 N. Y. Supp. 868 (2d Dep't 1907); *Matter of Hitchings*, 281 App. Div. 202, 119 N. Y. Supp. 138 (4th Dep't 1953).

²⁵ *Matter of Akin*, 248 N. Y. 202, 161 N. E. 471 (1928); *Matter of Wilson*, 252 N. Y. 155, 157, 169 N. E. 122 (1929).