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## Decedent's Estates—Discovery Proceedings

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warrant the finding of a confidential relationship.<sup>8</sup> The acts of the sister did not amount to a handling of decedent's affairs, financial or otherwise, but rather resembled the acts of an agent of decedent, obtaining the requisite forms and the services of an official to act as a witness. These are not the sort of acts which should burden a beneficiary with the necessity of explanation.

### Discovery Proceedings

Section 205 of the Surrogate's Court Act authorizes the initiation of discovery proceedings by a representative of an estate to recover money or other personal property, or the proceeds or value thereof, belonging to the decedent. The court may determine adverse claims to the property. Upon a finding that the property is improperly withheld, the court, under Section 206, may direct its delivery to the representative.

In holding that the Surrogate lacked jurisdiction to issue an order directing a bank to pay over an ordinary bank deposit, the Court of Appeals in *In Re Trevor's Estate*<sup>9</sup> unanimously reaffirmed a construction that Section 205 was limited to specific money. The bank which held a deposit alleged to be under an assumed name of the decedent, challenged the jurisdiction of the Surrogate to force it to pay the deposit to the decedent's administrator, since discovery will not lie to enforce a debt,<sup>10</sup> and the relationship between a bank and its depositor is that of debtor and creditor.<sup>11</sup>

Discovery has been allowed for recovery of shares of stock,<sup>12</sup> insurance policy proceeds,<sup>13</sup> money belonging to a client held in trust by an attorney,<sup>14</sup> and proceeds from the sale of personal property.<sup>15</sup> While a debt is an in personam right, the nature of discovery proceedings is in rem. Therefore, the property

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8. *Gager v. Matthewson*, 93 Conn. 539, 107 Atl. 1 (1919). (But it is only where the beneficiary is or has acquired the position of a religious, professional, or business adviser . . . that the rule of public policy can be invoked which requires such beneficiary to show that he has not abused his fiduciary obligation). *But cf. In re Wilson's Estate*, 364 Pa. 488, 72 A.2d 561 (1950). (A confidential relation exists whenever the relative position of the parties is such that one has the power and means to take advantage of, or exercise, undue influence over the other.)

9. 309 N. Y. 389, 131 N.E. 2d 561 (1955).

10. *In re Thoms' Estate*, 235 App. Div. 450, 257 N. Y. S. 330 (1st Dep't 1932); *In re Thoms' Estate*, 165 Misc. 398, 300 N. Y. S. 872 (Surr. Ct. 1937).

11. *In re Delaney*, 256 N. Y. 315, 176 N.E. 407 (1931). The court suggested that the proper remedy was an action for debt in a common law court.

12. *In re Babcock's Estate*, 85 Misc. 256, 147 N. Y. S. 872 (Surr. Ct. 1914), *aff'd mem.* 169 App. Div. 903, 153 N. Y. S. 1105 (3d Dep't 1915), *aff'd mem.* 216 N. Y. 717, 111 N.E. 1084 (1915).

13. *In re Hawley's Estate*, 133 Misc. 34, 231 N. Y. S. 95 (Surr. Ct. 1928).

14. *In re Ostrow's Estate*, 162 Misc. 783, 295 N. Y. S. 610 (Surr. Ct. 1937).

15. *In re Fraley's Estate*, 129 Misc. 803, 221 N. Y. S. 641 (Surr. Ct. 1927).

sought must be a specific article or its equivalent in money. Money per se is discoverable only when traceable to a specific res, or, when not the subject of a debt or ordinary contract obligation, identifiable as the object sought. Thus where money was improperly withdrawn from a decedent's bank account, it became a trust fund of specific property and was properly discoverable.<sup>16</sup>

Keeping the principle in mind that discovery is limited to in rem proceedings, it follows that the Court was correct in holding, in the instant case, that where a debtor-creditor relationship existed, the Surrogate lacked jurisdiction, due to the in personam nature of an action for debt.

### Trustee's Commissions

A testamentary trustee who collects the rent of and manages real property becomes entitled to two commissions upon the amounts so received and paid out. This entitlement is purely statutory since fiduciaries under the common law were not compensated for their services.<sup>17</sup> The first or regular commission is allowed for the collection of rents without more.<sup>18</sup> The second or additional commission allows an added six per cent commission on gross rents collected when the trustee manages the real estate.<sup>19</sup>

The propriety of the testamentary trustee's claim for this additional commission was considered in *In re Smather's Will*.<sup>20</sup> The trustee merely received rent payments under the terms of a 99 year lease, negotiated by the testator himself. Despite the clear language of the statute, the trustee based its claim on its ultimate responsibility for the administration of the real property, attempting to bring itself within the terms of *Matter of Brennan's Will*,<sup>21</sup> a decision construing section 285. In the instant case, the Surrogate held that the assumption and exercise of ultimate responsibility constituted requisite management of the property within the meaning of the statute, and therefore that the *Brennan* case was controlling.<sup>22</sup>

In reversing and refusing the additional commissions, the Court looked

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16. *In re Akin's Estate*, 248 N. Y. 202, 161 N.E. 471 (1928).

17. *Collier v. Munn*, 41 N. Y. 143, 147 (1869); *Lent v. Howard*, 89 N. Y. 169, 178 (1882).

18. N. Y. Surr. Ct. Act §285-a (2).

19. N. Y. Surr. Ct. Act §285-a (7). Where a trustee is for any reason or cause whatsoever entitled or required to collect the rents of and manage real property, . . . in addition to the commissions hereinbefore provided he shall be allowed and may retain for such services six per centum of the gross rents collected, . . .

20. 309 N. Y. 487, 131 N.E. 2d 896 (1956).

21. 251 N. Y. 39, 166 N.E. 797 (1929).

22. —Misc.—, 133 N. Y. S. 2d 15 (Surr. Ct. 1954), *aff'd*, 285 App. Div. 1163, 140 N. Y. S. 2d 492 (1955).