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## Equity Jurisdiction in Probate Matters Under the New Code

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*16th Judicial Circuit Court of Jackson County, Missouri*

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# EQUITY JURISDICTION IN PROBATE MATTERS UNDER THE NEW CODE

(SUPPLEMENT TO 1961 WASH. U.L.Q. 309)

JUDGE LESLIE A. WELCH\*

Since the publication of the article on the above captioned subject in 1961 *Washington University Law Quarterly* 309 two more appellate court opinions indicate the continuing uncertainty, and thus emphasize the need for early clarification by the Missouri Supreme Court of probate court equitable jurisdiction under the new probate code. They are the *Mathews* case<sup>1</sup> by the Supreme Court in May, 1963, and the *Myers* case<sup>2</sup> by the St. Louis Court of Appeals one month later. Such jurisdiction was considered to a limited extent in each case. In *Mathews* the subject was discussed but it was held unnecessary in that case to decide the extent of the broadened equity powers. *Myers* held that under the new code the probate court had jurisdiction to adjudge that a decedent was not the owner but was a mere trustee of money in his possession or control and to enforce the trust if the decedent kept the money in "a separate fund established capable of identification, either in a bank account or elsewhere,"<sup>3</sup> but if he had commingled the trust money with his own, the probate court had no jurisdiction to enforce the trust. Such distinction appears to be expressly contrary to the decision of the Supreme Court in *Lolordo*<sup>4</sup> where a discovery proceeding in the probate court was certified to the circuit court (presumably as authorized by Section 481.130) and hence the circuit court had no greater jurisdiction than the probate court. There, a commingled bank account was impressed with the trust of decedent's money. And this even before the new code. Furthermore, *Lolordo* was cited approvingly on the subject of probate court equity jurisdiction in *Mathews*. Hence, detailed examination of *Mathews*, *Myers* and *Lolordo* seems called for here.

In *Mathews*, the plaintiff-executor filed an action in the circuit court alleging that defendants had agreed with the deceased, Martha White, that upon her causing defendant Esther White's name to be added as joint depositor in certain bank accounts then in Martha's name, the defendants would not draw from said accounts except to pay Martha's

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\*Probate Judge, Jackson County, Missouri.

1. *Mathews v. Pratt*, 367 S.W.2d (Mo. 1963).

2. *In re Estate of Myers*, 368 S.W.2d 925 (Mo. Ct. App. 1963).

3. *Id.* at 932.

4. *Lolordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935).

bills, and that upon Martha's death they would hold the accounts in trust and distribute such trust funds as provided in Martha's will. The petition prayed that in equity and good conscience "a resulting trust be adjudged"<sup>5</sup> and the funds be ordered paid over to Martha's estate.

The circuit court sustained defendants' motion to dismiss plaintiff's petition, the defendant's position being "that the exclusive remedy of plaintiff lay in the Probate Court in a proceeding for the discovery of assets."<sup>6</sup> On appeal, the Supreme Court reversed the judgment of dismissal and held that the circuit court had at least concurrent jurisdiction, the court declining to decide in that case whether under the new code the probate court also had the same jurisdiction in a discovery proceeding under Section 473.340. (No such proceeding was pending when the circuit court action was tried.)

The Supreme Court opinion, after citing certain cases antedating the new code which declared that probate courts were without power to establish, declare, enforce, or execute trusts, and the *Frech*<sup>7</sup> and *Stark*<sup>8</sup> cases (postdating the new code) also so holding or declaring, stated:

However, even before the new Code, it would be inaccurate to say that the probate courts had no equity powers or jurisdiction. See for instance, *Lolordo v. Lacy*, 337 Mo. 1097, 88 S. W. 2d. 353; *Hoffmann v. Hoffmann's Executor*, 126 Mo. 486, 29 S. W. 603; *State ex rel. Stetina v. Reynolds*, 286 Mo. 120, 227 S. W. 47; *Equity Jurisdiction in Probate Matters under the New Code*, Leslie A. Welch, Washington University Law Quarterly, Vol. 1961, No. 4. We must now note §473.030, R.S.Mo. 1959, V.A.M.S. (Laws 1955), which reads in part as follows: "The court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters. . . ." We have no occasion here to construe that section, nor shall we do so. We merely call attention to it. It was ignored in *Frech*, supra, but it was discussed later in *Stark*. The proper time and place will come for an adequate construction of the section, but this case presents neither, for this appeal does not arise from probate action or assumed probate jurisdiction.<sup>9</sup>

We hold that this is a suit in equity to establish and enforce a trust, and that the Circuit Court had inherent jurisdiction; also, that the petition properly stated a claim. It may be that the Probate Court would have the power to do the same things in a

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5. *Mathews v. Pratt*, 367 S.W.2d 632, 634 (Mo. 1963).

6. *Id.* at 633.

7. *In re Frech's Estate*, 347 S.W.2d 224 (Mo. 1961).

8. *Stark v. Moffit*, 352 S.W.2d 165 (Mo. Ct. App. 1961).

9. *Mathews v. Pratt*, 367 S.W.2d 632, 635 (Mo. 1963).

discovery proceeding under the existing Code, contrary to what has so long been declared. We do not so decide here. In such event, however, the probate jurisdiction could only be *concurrent*, for the inherent jurisdiction of our circuit courts to establish, declare and enforce trusts may certainly not be foreclosed by probate jurisdiction or proceedings. The petition here was erroneously dismissed.<sup>10</sup>

In *Myers*, the Laclede Gas Company filed petition under Section 473.357 in the probate court. It provides a procedure in the probate court to recover property wrongfully withheld *by* an executor or administrator, in contrast to the procedure authorized by Section 473.340, to recover property wrongfully withheld *from* an executor or administrator. The action was tried both in the probate and circuit courts on a stipulation of facts. The probate court found against the Gas Company, the circuit court found for it. On appeal the court of appeals reversed, holding the case involved equitable issues not within the jurisdiction of the probate court. The facts were stipulated and apparently there was no dispute as to the substantive law.

Myers, a storekeeper in outlying St. Louis, agreed in writing to act as agent for the Gas Company, to collect its bills, keep account of all moneys collected, keep them separate from his own and to "hold in trust" such moneys until paid to the petitioner. At Myers' death, his unpaid collections were \$1423.44 which he had deposited in a bank account subject to withdrawal upon checks by "Myers Hardware Company by John W. Myers, or Florence E. Myers." After the death of Myers, his widow Florence issued and delivered to the Gas Company checks for \$1423.44, but the drawee bank returned them unpaid because of the death of Myers. He had no other bank account and his business and personal bills were paid by checks drawn upon it. The account balance at his death was \$2945.29.

The *Myers* opinion relies principally upon *Frech* and *Stark*.<sup>11</sup> From *Frech* it quotes the statement that "the Probate Court lacks jurisdiction in matters involving trusts and trustees."<sup>12</sup> It cites with apparent reliance old cases containing broad declarations that the probate court has "no power to establish, declare, enforce or execute trusts."<sup>13</sup> However, in its summary the court says that Section 473.357 "would have application" and the probate court would have power to determine the equitable issues pertaining to the existence, enforcement and

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10. *Id.* at 637. For discussion of concurrent jurisdiction, see p. — *infra*. [Page 9 of article]

11. For a detailed discussion of what it is respectfully suggested were infirmities in *Frech*, including the ignoring of the new code and the reliance upon questionable old cases, see 1961 WASH. U.L.Q. 309, 323 n.76, 324 n.78.

12. *In re* Estate of Myers, 368 S.W.2d 925, 930 (Mo. 1963).

13. *Id.* at 931.

execution of a trust *provided* that the trust fund is “capable of identification.” For the court’s summary says:

Summing up what we have said, we find that §473.357, *supra*, is not applicable to petitioner’s action for the reason there is no such identifiable sum of money in the estate of decedent as described in petitioner’s petition. If there had been a separate fund established capable of identification, either in a bank account or elsewhere, this section would have application. Under the pleadings and stipulated facts in this case the Probate Court would have had to determine the existence of a trust and then proceed to trace and recover the trust funds. This it cannot do, so the Supreme Court said in the case of *In re Frech’s Estate*, *supra*, and *Howard’s Estate v. Howe*, *supra*, a principle of law which we followed in *Dietrich v. Jones*, *supra*, and in *Stark v. Moffit*, *supra*.<sup>14</sup>

Such “summing up” calls for comparison with the expressly stated views of the supreme court. Excerpts from the *Lolordo* opinion authoritatively and clearly show such views. The opinion stated that the defendant in his answers to the interrogatories in the discovery proceeding, admitted that he “sold the properties mentioned at foreclosure sales as trustee,”<sup>15</sup> and further stated that the defendant-trustee “admitted that he received the proceeds of these two properties and did not turn these proceeds over to the administrator, *but put them in his own bank account with his own personal funds and that they were not all used for the benefit of the estate.*”<sup>16</sup> “[I]t is a well-established rule that when a trustee has received and commingled trust funds with his own funds, it is presumed in the absence of a contrary showing, that the trust funds are still there, and it will be considered that what was paid out of the commingled funds for other than trust purposes was paid out of the trustee’s personal funds and not out of the trust money, and that all the rest remains as trust funds;”<sup>17</sup> in short that the balance was subject to the trust—to the extent of the amount of the trust fund. The opinion on the Motion to Transfer to Court En Banc, concluded: “This court has held (as have the Courts of Appeals) that, where specific personal property of an estate has been sold and the proceeds deposited in the bank account of the seller, the summary proceeding to discover assets is a proper remedy to compel him to pay the amount of the proceeds to the estate, and that this remedy is not ‘confined to a particular fund—the actual money which belonged to the decedent.’”<sup>18</sup>

Thus, the *Myers* view that an “identifiable sum of money” is essen-

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14. *Id.* at 932.

15. *Lolordo v. Lacy*, 337 Mo. 1097, 1100, 88 S.W.2d 353, 354 (1935).

16. *Id.* at 1105, 88 S.W.2d at 357-58. (Emphasis added.)

17. *Id.* at 1106, 88 S.W.2d at 358.

18. *Id.* at 1110, 88 S.W.2d at 360.

tial to probate court jurisdiction to enforce the trust appears impossible to harmonize with the Supreme Court views in *Lolordo*.

The former article in this *Law Quarterly* pointed out that the supreme court, in a line of cases decided before the new code, particularly those cited approvingly by the Supreme Court in *Mathews*,<sup>19</sup> culminating with the *Stetina* case by the court en banc, firmly established the proposition that, in a claim *against* an estate, a claimant could, in the probate court obtain a general judgment against the estate for trust assets shown to be in the possession of the decedent. If such claimant could, before the new code, recover such a "general judgment" for the wrongful withholding of trust assets, may he not, under provisions of the new code, go further and obtain a judgment finding that he was equitably entitled to all or such part of a commingled fund as equaled his trust money, *i. e.*, that he was the "owner" thereof? The pertinent sections of the new code point to an affirmative answer to that questions. The sections most pertinent are Section 472.030, a general grant to the probate court of equitable powers to effectuate its jurisdiction in probate matters, followed by Sections 473.233. (7), 473.340, and 473.357.<sup>20</sup> They should be read together. Section 472.030 provides:

The court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters. . . .  
Section 473.233 (1) (7) provides:

All property possessed but not owned by the decedent at his death shall be listed in the inventory, but separately from other property, together with a statement as to the knowledge of the executor or administrator as to its ownership. . . .

Section 473.357 granted jurisdiction and provided procedure for recovery of personal property wrongfully withheld by an executor or administrator from the "owner." It complements the jurisdiction and procedure long since provided by Section 473.340 for recovery of "any

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19. *Mathews v. Pratt*, 367, S.W.2d 632, 635 (Mo. 1963).

20. For other new statutes relating to probate court equitable jurisdiction see 1961 WASH. U.L.Q. 309, 325-29. Also collaterally pertinent are §§ 472.020 and 456.225, the latter enacted in 1961. Section 472.020 contains a general grant of jurisdiction "of the administration of testamentary trusts." In 1961, the legislature, evidently believing that an implementing statute was necessary to make the general grant effective, enacted § 456.225. It delineates such jurisdiction and prescribes the procedure for its exercise. This action by the legislature obviously emanated from its conception that the matter of devolution of property from a testator to the objects of his bounty in a trust created by his will might soundly be determined by it to be a probate matter—as legislatures in at least twenty-six other states have so determined. See 1961 WASH. U.L.Q. 309, 329 n.99.

personal property of the decedent" which "any person has concealed or embezzled or is otherwise wrongfully withholding from the executor or administrator."

The property required to be listed by paragraph (7) of Section 473.233(1) would clearly include "trust funds." If the executor or administrator does not deem such trust funds to be "owned" by another, but lists them as assets of the deceased's estate, Section 473.357 provides a specific remedy available to the owner. It says that if the petitioner alleges that he is the "owner of personal property described therein, and that it is in the possession of the executor or administrator . . ." and that the same is "wrongfully withheld from him," the court may determine the title thereto "and order the property to be delivered to him if he is found to be such owner." This section does not say it is applicable only when the executor or administrator *admits* the property belongs to the other party; neither does it say expressly or impliedly that the property had to be "earmarked" by the decedent as the claimant's property, nor does it say that the property has to be "legally" owned by such claimant. It is broad enough to cover any kind of owner, legal or equitable.

A perfect analogy is found in *Stetina* on the probate court's jurisdiction over "equitable" claims.<sup>21</sup> If, in *Stetina*, the court could say that the probate court's jurisdiction over *all* claims *against* an estate embraced a claim generally regarded as "equitable" in nature, so, in the *Myers* case, should not the court have held that Section 473.357 did not distinguish between "legal" and "equitable" *claims of title*, especially when considered in conjunction with Section 473.030?

When Section 472.030 is read in conjunction with Section 473.233 (1) (7) and Sections 473.357 and 473.340 the net seems to be: If personal property is wrongfully withheld by or from an executor or administrator, the probate court has jurisdiction of a proceeding to restore it to its rightful owner and has the same "legal and equitable powers to effectuate its (that) jurisdiction . . . as the Circuit Court has in other matters." Would not a denial of power to decide equitable issues and grant equitable relief in proceedings over which jurisdiction was expressly granted by the sections last mentioned, in effect delete the words "equitable powers" from Section 472.030?

When the 1955 legislature reenacted the discovery statutes without change and contemporaneously enacted Section 472.030, 473.233 (1) (7) and 473.357, may it not be inferred that it did so because of the inability to reconcile *Lolordo*, *Hoffmann*, *Stetina* with other opinions declaring that when a trust or other equitable issue is involved the

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21. *State ex rel. Stetina v. Reynolds*, 286 Mo. 120, 227 S.W. 47 (1920).

probate court has no jurisdiction?<sup>22</sup> (See 1961 WASH. U.L.Q. 309, 317-25 for detailed discussion of such "other opinions" the principal ones being *Wolf* and *Clay County Bank*.<sup>23</sup>) In short, can it not be further inferred that after such enactments the drafters of the new code and the legislature believed that *Wolfe*, *Orr* and the like would have no more than historical significance?

#### THE RATIONALE OF THE SUBJECT

This is to supplement the discussion on rationale and practicality in 1961 WASH. U.L.Q. 309, 329, 331.

Practicality seems to be all on the side of probate court equitable jurisdiction. At the outset, take for example the *Myers* case. Admittedly \$1423.44 of the commingled bank account of \$2945.29 was impressed with a trust. Said the opinion, "When a person holds property in a fiduciary capacity and mixes his own property with it so that it cannot be separated nor the amount of each ascertained, the whole becomes both at law and at equity the property of the trust estate. No one will quarrel with this statement of law, which has been announced in innumerable other cases, but it in no way can act as support for a contention that the Probate Court can determine and settle this purely equitable problem."<sup>24</sup> The law and the stipulated facts obligated the administrator to pay \$1423.44 to the cestui que trust. That was clearly true whether or not estate assets were sufficient to pay general creditors. Some court had the duty of merely ordering the administrator to pay that \$1423.44 to the equitable owner. Why not the probate court? Is anyone benefited by the philosophy denying probate court jurisdiction?

But suppose that in these equity issue cases the facts or substantive law, or both, are in controversy. Still, the vast majority of such controversies in estates of decedents, minors or incompetents are finally disposed of in the probate courts. By far the most of them are too

22. *Hoffmann v. Hoffmann's Ex'r*, 126 Mo. 486, 29 S.W. 603 (1895).

23. *State ex rel. Clay County State Bank v. Waltner*, 346 Mo. 1138, 145 S.W.2d 152 (1940); *State ex rel. North St. Louis Trust Co. v. Wolfe*, 343 Mo. 580, 122 S.W. 2d 909 (1938); *Orr v. St. Louis Union Trust Co.*, 291 Mo. 383, 236 S.W. 642 (1921). Clearly, the "co-depositor" held the legal title; necessarily the holding was that he held as trustee.

It is interesting to note that in *In re Kaimann's Estate*, 229 S.W.2d 527 (Mo. 1950) Judge Storckman (before he became judge), on behalf of an heir, filed in the probate court (and prevailed in) a discovery action claiming that the estate was the real owner of a joint bank account because the funds deposited were owned by the deceased and the surviving "co-depositor" was a fiduciary who had not overcome the presumption that the deceased had not made a gift of the funds to him.

24. *In re Estate of Myers*, 368 S.W.2d 925, 931-32 (Mo. Ct. App. 1963).

small to induce or justify the expense and other burdens of a circuit court suit.<sup>25</sup> But if a party does feel aggrieved, his right to appeal and to *trial de novo* in the circuit court should protect him from the errors of the probate judge, be he layman or lawyer, wise or unwise, whether his "conscience be large or narrow," or "his foot be long, short or indifferent."

Furthermore, let's face it—as stated in the former article—the real basis for restricting or denying equitable jurisdiction to probate courts under previous constitutions (frequently in controversies clearly pertaining to probate matters or business) was the view (frequently correct) that such court was "not required to know any law, and does not know any more than the law requires,"<sup>26</sup> and equitable questions were not within the "scope" or the "grasp" of such court.<sup>27</sup>

Notwithstanding what may have been the legal abilities of probate judges under previous constitutions, upon sound legal analysis of Section 1, Art. VI of the 1875 Constitution, was there tenable *legal* basis for denying to probate courts plenary equitable jurisdiction in probate matters for which statutory procedure was provided? For such section provided, "The judicial power of the state, as to matters of law and equity, except as in this Consitution otherwise provided, shall be in a Supreme Court, . . . Probate Courts." The only limitation of such judicial power of the probate courts was that in Section 34 of such Article which provided that it could be exercised only in "matters pertaining to probate business," and that in Section 35 which provided that the jurisdiction be "uniform" throughout the state. Hence, it would seem that the sporadic pronouncements denying or greatly restricting probate court equity jurisdiction in probate matters were court made law—not law made by the people either by their constitution or legislative enactments. Considered a strict legal perspective, it would seem that there might well have been much support for a contention that any question of the wisdom of probate court jurisdiction over matters of equity indisputably pertaining to probate business was foreclosed against both the judiciary and legislature by the express resolution of the constitution. But consideration of that question here need not extend that far.

Of course, the limitation in Section 34 did leave some scope for

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25. While our circuit courts have always had concurrent "jurisdiction over the establishment of all claims or demands against the estates of decedents" (*Barnes v. Boatmen's Nat'l Bank*, 355 Mo. 1136, 1138, 199 S.W.2d 917, 918 (1947)), the number of such actions filed there have been infinitesimal—a mere smidgen—immeasurably small.

26. *First Baptist Church v. Robberson*, 71 Mo. 326, 335 (1879).

27. *Caron v. Old Reliable Gold Mining Co.*, 12 N.M. 211, 226, 78 Pac. 63, 67 (1904). 1961 WASH. U.L.Q. 309, 317, n.36.

determination by the legislature (or absent that—by the courts) as to what matters did pertain to probate business. But, if the legislature makes such a determination—and it does not do violence to reason—why must not such determination be given force and effect? Express constitutional grant of equitable power plus not unreasonable statutory determination that a matter was a probate matter would, it seems, foreclose a contrary conclusion. In short, would not a determination by either court or legislature that a controversy which necessarily is involved in the winding up of the affairs of a decedent, is a matter pertaining to probate business, be a sound determination?<sup>28</sup>

Hence, it appears clear that it was the skepticism as to the legal acumen of the judges which resulted in the so-called doctrine that probate courts could apply equitable principles but could not try equitable issues or grant relief that was purely equitable—of which, as pointed out in 1961 WASH. U.L.Q. 309, 317, Professor Atkinson observed, “On its face at least, proceeding like a court of equity without being one seems to be a sort of apologetic play-acting,”<sup>29</sup> and another writer called it a “vague abstraction.”<sup>30</sup> When the 1945 Constitution required that thereafter probate judges (except for temporary hold-overs, now very few) should be lawyers, it destroyed the basis for the old doctrine denying or restricting equitable jurisdiction, whether the doctrine was based on legal principles, or merely practicality.

### *Concurrent Jurisdiction*

The observation in *Mathews* that the probate court may have concurrent jurisdiction with the circuit court to determine the equitable issues there involved,<sup>31</sup> suggests that consideration be given here to the extent of such concurrent jurisdiction—in the light of the constitution and the reasoning of Judge Ellison in the cases of *Barnes*<sup>32</sup> and *Flynn*.<sup>33</sup>

The 1875 Constitution provides “The circuit courts shall have . . . exclusive jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as is or may be provided

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28. Even *Frech* (where both court and briefs of counsel ignored the new code) stated that the probate court had “power to entertain a suit or proceeding based upon strictly equitable principles” if “such jurisdiction is expressly conferred by statute or is necessarily incident to the proper exercise of duties directly imposed.” The new code sections, *supra*, meet both conditions.

29. Note, 48 YALE L.J. 1273, 1277 (1939).

30. Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUD. Soc’y 183, 187 (1940).

31. *Mathews v. Pratt*, 367 S.W.2d 632, 637 (Mo. 1963).

32. *Barnes v. Boatmen’s Nat’l Bank*, 355 Mo. 1136, 199 S.W.2d 917 (1947).

33. *State ex rel. Lipic v. Flynn*, 358 Mo. 429, 215 S.W.2d 446 (1948).

by law.”<sup>34</sup> The 1945 Constitutional provision is identical except that in lieu of “as is or may be provided by law” it merely says “as is provided by law.”<sup>35</sup> In at least four<sup>36</sup> court of appeals cases and three<sup>37</sup> Supreme Court cases it has been held or declared that when the relief sought could be obtained in a discovery proceeding in the probate court, its jurisdiction over the subject matter was exclusive and that an action in the circuit court involving the same issues and relief, no matter when filed, could not be successfully maintained. But that view in effect was repudiated in *Barnes and Lipic*.

In *Barnes*, Judge Ellison pointed out that the probate court’s jurisdiction is of two kinds: One, is “administrative and auditorial” functions and the other, its “judicial” functions, particularly those of adjudicating disputed claims between the estate of third persons. It is only the first—the administrative and auditorial—function that was intended to be vested exclusively in the probate court. And there should be no implication of a withdrawal from the circuit courts of their anciently invested power to litigate *adversary* proceedings between the personal representative of a decedent’s estate and persons claiming against it, unless such intention is clearly shown by the constitutional or statutory provisions in question. Upon such reasoning in *Barnes*, it was held that the circuit court had power to pass on a claim which was not a “premortuary debt or demand” because the circuit courts had anciently exercised such jurisdiction and there was no clear showing, in either constitutional or the statutory provisions, that such jurisdiction was intended to be withdrawn.

The opinion cited with approval *Linn County Bank v. Clifton*<sup>38</sup> which quoted with approval an excerpt from *Richardson v. Palmer*,<sup>39</sup> as follows:

Where a court has possessed and exercised jurisdiction of a subject matter, even if it were conceded that such jurisdiction were conferred over it on another court by a subsequent law, such fact would not oust the jurisdiction of the first court, without the employment in the latter enactment of words of exclusion, in the absence of any repealing clause.<sup>40</sup>

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34. Mo. CONST. art. VI, § 22 (1875).

35. Mo. CONST. art. V, § 14, (1945).

36. *State ex rel. Lamm v. Lamm*, 216 S.W. 332 (Mo. App. 1919); *Beck v. Hall*, 211 S.W. 127 (Mo. App. 1918); *Kerwin v. Kerwin*, 204 S.W. 922 (Mo. App. 1918); *Lemp Brewing Co. v. Steckman*, 180 Mo. App. 320, 168 S.W. 226 (1914).

37. *In re Frech’s Estate*, 347 S.W.2d 224, 227 (Mo. 1961); *State ex rel. Nute v. Bruce*, 334 Mo. 1107, 70 S.W.2d 854 (1934); *Davis v. Johnson*, 332 Mo. 417, 58 S.W.2d 746 (1933). The declarations in *Frech* and *Nute* were pure *obiter*.

38. 263 Mo. 200, 172 S.W. 388 (1914).

39. 24 Mo. App. 480 (1887).

40. *Linn County Bank v. Clifton*, 263 Mo. 200, 217, 172 S.W. 388, 393 (1914).

Judge Ellison, therefore disapproved a rather long line of cases<sup>41</sup> holding the probate court's jurisdiction exclusive in certain classes of cases, saying of them that they "interpolated" the word "exclusive" in the constitutional grant of "jurisdiction over all matters pertaining to probate business."<sup>42</sup> His conclusion was that the circuit court's jurisdiction to determine "postmortuary" claims against an estate was concurrent with the probate court's jurisdiction.

Again, in *Lipic*, Judge Ellison held that the circuit court's jurisdiction to adjudge a case of trover and conversion was concurrent with the probate court's jurisdiction to hear the same sort of case in a discovery of assets proceeding, saying that it did not matter whether the recovery sought was of particular property in specie or the money value thereof, as in conversion—in either case the probate court would have jurisdiction in a discovery proceeding and the circuit court would have an alternative or parallel jurisdiction in either replevin or trover and conversion. After an exhaustive review of the discovery statutes the opinion states:

This brings up the question whether a discovery of assets proceeding in the probate court under our present law is, or may be, substantially the same as a suit in trover and conversion for the value of the same assets . . . [I]t seems to us the proceeding in the probate court to discover assets and the action for conversion in the circuit court are parallel and do or may involve the same issue and seek the same relief at the option of Gertrude Wheeler, admn'x. d. b. n. who instituted both.<sup>43</sup>

At the inception of the *Lipic* opinion attention was directed to the fact that the discovery proceeding was first filed and "is still pending." After concluding that the jurisdiction of the two courts was concurrent, the court held that the "circuit court is encroaching on the jurisdiction of the probate court" and prohibited it from proceeding further with the action pending there. In short, the circuit court could not exercise its concurrent jurisdiction unless and until the probate action was dismissed.<sup>44</sup>

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41. "A part of them" said Judge Ellison, being listed in his footnote 2, *Barnes v. Boatmen's Nat'l Bank*, 355 Mo. 1136, 199 S.W.2d 917 (1947).

42. Mo. CONST. art. VI, § 34 (1875).

43. *State ex rel. Lipic v. Flynn*, 358 Mo. 429, 436, 438, 215 S.W.2d 446, 450-51.

44. Whether, after prohibition was made absolute, the circuit court should dismiss or merely abate the action there is immaterial here. The pertinent points here are (1) that the two courts had concurrent jurisdiction of the same issues and could grant the same relief, and (2) that the circuit court had no power to proceed upon a showing of the pendency of the "parallel" action in the probate court. Even though the procedures in the two actions were not identical (the discovery procedure in the probate court no doubt being "exclusive") the jurisdiction to determine the issues was the same.

When *Mathews* said that the jurisdiction of the circuit court, even though con-

These two opinions are perfectly consistent with each other. Judge Eager's opinion in *Mathews*—although expressly reserving a decision of this question—seems to indicate that if essential to a decision the court might have held that a proceeding for discovery of assets in the probate court would have lain in that case, to obtain the same sort of relief as was sought in the circuit court action. Thus, when the opinions in these three cases are considered together, it would seem that practically every adversary proceeding between the estate and some person claiming against it with respect to the title to any species of personal property could be the subject matter of litigation in either the probate court or the circuit court, but that, over objection, one action could not be prosecuted to judgment while the other action was pending. This conclusion is not only sound technically, but it is highly practicable and in the public interest, as has been demonstrated in actual practice.

Experience shows that discovery has provided a "quick method of bringing property into the estate," or obtaining a money judgment for conversion, and "expediting" the administration. Obviously, the issues can be adjudicated far more quickly in the probate court than in an action in the circuit court. After inquiry or hearing in the discovery proceeding, the "defendant" (cited) frequently complies with the judgment of the probate court and promptly delivers the property or the money proceeds thereof to the estate. In some instances the "punitive" sections of the discovery statutes have a compelling influence in this direction. However, the estate may, and sometimes does, find it advantageous to sue at once in the circuit court—either in replevin or for damages for trover and conversions; this for one or more of several reasons. First, it would avoid the risk of appeal and the resultant two trials in *nisi prius* courts. Second, the estate in a replevin action may obtain immediate possession of assets by putting up a replevin bond, thus protecting itself against the possibility of property being removed from the state before any proceeding—discovery or replevin—could possibly reach trial and judgment. An estate should not be denied a choice of remedy which would be available to any other replevin plaintiff.

To distinguish between "purely" equitable issues and those which are only partially equitable, or those in which merely "equitable principles" may be applied is frequently quite difficult, if not impos-

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current, could "not be foreclosed by probate jurisdiction or proceeding" it is fair to assume that by the word "proceeding" the author of the opinion meant the overall administration proceeding, not a pending specific adversary proceeding between the same parties involving the same issues as the circuit court action. For if two such actions are pending one or the other must at least be abated if timely objection be made, either by motion or answer.

sible. At least, the bar has found it so—and it apparently is continuing to find it so—after litigation over the matter for more than a century. Just how a judge may apply “equitable principles” without granting or denying equitable relief to some one is not really apparent.

Strict adherence to a rule of no jurisdiction of equitable issues would compel probate courts to refuse jurisdiction of innumerable equitable controversies, usually small, which customarily are submitted to it, jurisdiction exercised, and its determination accepted as final. In some cases, even when appealed to the higher courts, both courts and the lawyers just assumed that equitable jurisdiction lay in the probate courts,<sup>45</sup> although if there is no jurisdiction of the subject matter, it was the duty of the court to raise the question *sua sponte*. Perhaps the most important of all practical reasons for not denying probate court concurrent jurisdiction is that a litigant may get a trial *de novo* in the circuit court in any case, if he wants it; the rule of no jurisdiction, if always applied, would force circuit court litigation, with all its burdens, of even the smallest equitable controversies rather than permit the usually expeditious procedure thereof in the probate court; either that or forego judicial determination.

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45. See *In re Kaimann's Estate*, 229 S.W.2d 527 (Mo. 1950); *Lolordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935).

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