

# WASHINGTON UNIVERSITY LAW QUARTERLY

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Volume 1961

December, 1961

Number 4

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## EQUITY JURISDICTION IN PROBATE MATTERS UNDER THE NEW CODE

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### I. INTRODUCTION

The reliance of the court in the recent case of *In re Frech's Estate*<sup>1</sup> upon various judicial opinions rendered before the new 1955 probate code, in which Missouri courts, by sweeping declarations, denied or greatly restricted the equity or equitable jurisdiction of Missouri probate courts in probate matters, suggests the need of a prompt, thorough re-examination of such declarations. Neither the opinion nor briefs of counsel in *Frech* mentioned Section 472.030 or any of the other hereinafter referred to sections of the new probate code. Section 472.030, following the lead of the Model Probate Code,<sup>2</sup> provides that the court "has the same legal and equitable powers to effectuate its jurisdiction . . . in probate matters as the circuit court has in other matters . . ."<sup>3</sup>

Necessarily, the re-examination should be made in the light of: (1) the attempt of the legislature in the new code to terminate the conflicts, confusion and uncertainty on the subject which existed under the old code; (2) the 1945 constitutional requirement that all probate judges be lawyers<sup>4</sup> (instead of only those in counties of over 50,000 population); (3) the recognition of the power of the General Assembly to pass "practical and common sense statutes" in probate

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1. 347 S.W.2d 224 (Mo. 1961).

2. Model Probate Code § 6 (Simes 1946). See also Rheinstein, *The Model Probate Code: A Critique*, 48 Colum. L. Rev. 534, 536 (1948); Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 Mich. L. Rev. 321, 324 (1947).

3. Mo. Rev. Stat. § 472.030 (1959). Unless otherwise indicated herein, all section references are to 1959 Mo. Rev. Stat.

4. Mo. Const. art. V, § 25 (1945).

matters;<sup>5</sup> and (4) the fact that probate court hearings can be speedily had, and that its decrees are usually accepted as final and not appealed. But if appeal is desired, trial *de novo* in circuit court is always available, and frequently such trial can be had as soon as, or sooner than an action originally filed there.

Depite a long-standing grant to probate courts of jurisdiction over "all matters pertaining to probate business,"<sup>6</sup> prior to the 1955 probate code the power of these courts over the administration of estates was severely limited by numerous judicial decisions and pronouncements to the effect that they had no "equitable" jurisdiction. The more than forty case discussions of this subject were, in the aggregate, confusing and contradictory. And their effect was such that probate courts were plagued with innumerable controversies involving their jurisdiction, and the necessity of filing and trying "equitable" probate matters in other courts delayed and added greatly to the expense of many estate administrations.

The drafters of the new code were well aware of this unfortunate state of affairs. They proposed to correct it by giving full implementation, equitable as well as legal, to the courts' jurisdiction over all matters pertaining to probate business.

It was hoped that Section 472.030 and the other jurisdictional sections of the new code would put an end to the various uncertainties concerning jurisdiction, and that the courts' powers, in the probate field, would thenceforth be regarded as plenary. After the adoption of the code, it remained to be seen to what extent the courts would recognize and sanction the legislative intent.

The first post-code case to discuss this subject was *North v. Hawkinson*,<sup>7</sup> in which one of the two opinions stated that while the probate court does not have the "general equity jurisdiction of circuit courts," it does have "plenary equity jurisdiction of 'matters pertaining to probate business.'" However, whatever satisfaction the proponents of the broadened probate court powers under the new code derived from this language was short-lived, and somewhat abruptly terminated by the decision and opinion in *Frech*, which disregards this aspect of the new code.

The *Frech* case was a discovery proceeding to recover what admittedly were at one time assets of an inter-vivos trust established by the decedent. The administrator contended, and the defendant-trustee denied, that the trust had been revoked prior to the decedent's death and the assets were therefore a part of his estate. The supreme

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5. *Parsons v. Harvey*, 281 Mo. 413, 427, 221 S.W. 21, 25 (1920).

6. Mo. Rev. Stat. § 481.020 (1949), now contained in Mo. Rev. Stat. § 472.020 (1959).

7. 324 S.W.2d 733 (Mo. 1959).

court, relying solely on cases antedating the new code, held that the probate court lacked jurisdiction to decide the question of revocation, and stated that since the matter involved a trust it was "equitable" and that,

the probate court . . . is without power to entertain a suit or proceeding based on strictly equitable principles . . . unless such jurisdiction is expressly conferred by a statute or is necessarily incident to the proper exercise of duties directly imposed.<sup>8</sup>

It is primarily the *Frech* case which prompts this article. It was thought by the code's drafters that after the new code became effective those old cases concerning jurisdiction of equitable matters would thenceforth have only historical significance. The *Frech* opinion nevertheless proceeds as if the new code had never been adopted, citing as its authority and quoting with approval many of those old cases; resurrecting them, as it were, from the legal limbo to which, it was hoped by many, they had been permanently consigned.<sup>9</sup>

A third case, *Courier v. Scott*,<sup>10</sup> decided in June, 1960 is also of significance in determining probate court jurisdiction under the new code, even though the supreme court held that it involved no equitable issue. The *Courier* case involved a declaratory judgment action filed in the circuit court by a widower against the administrator of his wife's estate and her heirs. The husband claimed the right to retain the proceeds of a bank account standing in the name of his wife when she died, which proceeds the bank thereafter delivered to the husband; and also to recover United States bonds purchased by the wife with funds withdrawn by her from said account. The circuit court adjudged that the husband was the owner of \$10,000 of the bank account, that his wife's estate was the owner of \$212.20 thereof and that the husband "is the equitable owner of the bonds . . . and is entitled to the proceeds of the same."<sup>11</sup> The supreme court reversed the judgment and, *ex mero motu*, directed a dismissal of the suit on the ground that the probate court had exclusive jurisdiction of the same issues in a prior discovery proceeding filed and pending in the probate court.

Thus, the foregoing introduction indicates not only a continuation of the pre-code uncertainty and controversy as to probate court equity powers, but a probable increased confusion. Hence, this article, after brief reference to constitutionality, will explore the statutes and decisions pro and con before the new code, and the many changes in the law intended to be effected by the code.

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8. In re Frech's Estate, 347 S.W.2d 224, 227 (Mo. 1961).

9. For further discussion of In re Frech see notes 76 and 78 infra.

10. 336 S.W.2d 375 (Mo. 1960).

11. This quoted portion of the circuit court judgment does not appear in the appellate court opinion.

*Constitutionality*

Because neither *Frech, Courier* nor *North* considered the constitutionality of a legislative grant of equitable powers to the probate court in probate matters, this article will not extensively explore that question. Two prior articles<sup>12</sup> have partially done so. In the second of these it was contended that the General Assembly is wholly without constitutional power to vest in the probate courts any equitable power whatsoever. For the purposes of this article, let it suffice to observe that if such contention were sound, then the vast majority of the functions of Missouri probate courts now and heretofore exercised are and have been unconstitutional. That would be true not only as to specific grants of jurisdiction, such as actions for the specific performance of contracts of decedents to sell real estate, and other actions hereinafter noted, but also as to the general equitable powers necessarily involved in the winding up of the affairs of deceased persons and the handling of the affairs of persons under disability.

The only constitutional limitation upon the power of the legislature to regulate the exercise of the jurisdiction or judicial power vested in the probate courts by Article V, Section 1 of the 1945 Missouri Constitution, is that imposed by Sections 16 and 17 of the same Article. Section 1 provides that, "The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts. . . ." The limitation of Section 16 is only that the jurisdiction of probate courts shall be "of all matters pertaining to probate business. . . ." The Section specifically enumerates only four of such matters, *viz.*, granting of letters, appointment of guardians, settling accounts, and sale or leasing of lands. The limitation of Section 17 is that such courts shall be "uniform in their organization, jurisdiction and practice. . . ." Since the Missouri constitution, unlike the federal constitution, is not one of delegated powers, all lawmaking power is reserved to the General Assembly except as limited by the constitution.<sup>13</sup>

Except for loose and unnecessary language in some opinions, it will be found on careful analysis that the judicial limitations heretofore placed on probate court jurisdiction in probate matters have been based on absence of statutory, not constitutional, authority. One contention of lack of constitutional authority<sup>14</sup> has been based upon the action and comments of the delegates at the 1945 convention in rejecting a proposal to place in the constitution a provision making an

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12. Welch, Oliver, Jr., & Summers, *Constitutionality of The Broadened Powers of The Probate Court in Missouri Under The New Code*, 23 Mo. L. Rev. 113, 140 (1958); 5 St. Louis U.L.J. 578 (1959).

13. 16 C.J.S. Constitutional Law § 70, p. 191 n.84 (1956) (Mo. cases cited).

14. See 5 St. Louis U.L.J. 578 (1959).

exception to the uniformity of jurisdiction provision in the constitution; to-wit, that in certain counties only, probate courts should have jurisdiction over such legal and equitable actions as might be provided by law.<sup>15</sup> Although the action and comments of the delegates may undoubtedly add to the confusion on the subject (some of such comments are obviously of doubtful accuracy), it is well to bear in mind that the Judiciary Committee of the convention was striving mightily to retain the nonpartisan court plan. As a part of this effort, the committee was endeavoring to avoid controversies and to maintain the status quo on questions of constitutional jurisdiction of the appellate, circuit and probate courts. Hence, it may well be that many votes opposing the proposed amendment were based on a belief that the legislature already had the power to vest in the probate courts equitable jurisdiction in probate matters, and that rather than making specific provision therefor in the constitution, it would be wiser to leave this matter for the legislature. Other negative votes may have been based upon the belief that the proposal was undesirable because inconsistent with the uniformity provision.

Significance also has been attached<sup>16</sup> to the fact that in 1945 the delegates appended to the end of Section 16 the clause, "and of such other matters as are provided in this constitution." At first blush it might be thought that such words impose a limitation upon the legislature not existing under the jurisdictional clause in the 1875 constitution (the latter otherwise being the same as that of 1945, insofar as pertinent here). In truth, this clause was added as a result of a misconception of the convention delegates that the clause was necessary or advisable because two sections later it is provided that in counties of 30,000 inhabitants or less, the probate judge should also be judge of the magistrate court.<sup>17</sup> It is clear that the fact that the two courts were nevertheless to be separate and distinct was completely overlooked, for there were no other matters provided in the constitution pertaining to probate court jurisdiction.<sup>18</sup>

In 1920 the supreme court held constitutional the so-called "refusal of letters" statute<sup>19</sup> which authorized the probate court to transfer

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15. Debates, Missouri Constitutional Convention p. 2623 (1943-44).

16. 5 St. Louis U.L.J. 578 (1959).

17. Mo. Const. art. V, § 18 (1945).

18. If this added clause were construed as limiting the legislature to only such probate matters as are specifically enumerated in the constitution, very little of the probate jurisdiction exercised by probate courts for 135 years could be continued. See Welch, Oliver, Jr., & Summers, *supra* note 12 at 119-20, for a list of the statutes vesting jurisdiction in probate courts not within any specific enumeration in the constitution, and the validity of which hinge upon the clause, "all matters pertaining to probate business."

19. Mo. Rev. Stat. § 2 (1919), now contained in Mo. Rev. Stat. § 473.090 (1959).

title to personal property to decedent's surviving spouse without administration, although the power was not within the specific wording of the jurisdiction section of the constitution. The court said,

It is manifest that section 34 of article 6 of our Constitution confers upon probate courts complete jurisdiction over all matters pertaining to probate business. There is nothing in our Constitution which forbids the General Assembly from passing practical and common sense statutes, like section 10, supra. . . .<sup>20</sup>

In 1947 Judge Ellison in *State ex rel. Kowats v. Arnold*,<sup>21</sup> commenting that "Sec. 16, Art. V, Const. 1945 is not by any means as clear and definite as we might wish,"<sup>22</sup> held constitutional statutes empowering the probate court not only to commit persons of unsound mind to the state hospitals, but also to impose liability on the county for their care. Necessarily such statutes depended for their validity upon the construction of the phrase in Section 16, "jurisdiction of all matters pertaining to probate business. . . ."<sup>23</sup>

Obviously, then, the validity of the great bulk of the probate statutes has been based upon this general phrase, "jurisdiction of all matters pertaining to probate business." Hence, further consideration of constitutionality in this article would be superfluous.

## II. THE MOVEMENT FOR PROBATE COURT REFORM

What was the probate court jurisdictional picture when in 1955 Missouri undertook to enact a new probate code? A study of the history of probate court organization and jurisdiction throughout the nation and England leads only to a bewildering morass of statutory and judicial philosophy varying from state to state and in individual states from time to time.<sup>24</sup> Missouri has been no exception. As long ago as 1898 it was said of the Missouri probate code by an eminent authority that it had become "refined upon and loaded down with multitudinous and heterogeneous amendments, to which every session of the Legislature has diligently contributed."<sup>25</sup>

In England, probate court organization and jurisdiction were completely overhauled in 1857. However, notwithstanding an ever growing discontent in the United States with our archaic probate laws—conceived to serve the needs of an agricultural economy when

20. *Parsons v. Harvey*, 281 Mo. 413, 427, 221 S.W. 21, 25 (1920).

21. 356 Mo. 661, 204 S.W.2d 254 (1947).

22. *Id.* at 670, 204 S.W.2d at 258.

23. Mo. Const. art. V, § 16 (1945). The only relevant specific powers there authorized were appointment of guardians and curators and the settling of their accounts.

24. Model Probate Code 385-488 (Simes 1946).

25. Welch, Oliver, Jr., & Summers, supra note 12, at 114 n.1.

it ordinarily required a day to travel a distance now traveled in thirty minutes or less—the sporadic advocacy for reform made little progress until the 1930's. Ohio in 1931, Florida in 1933, Minnesota in 1935, Illinois, Kansas and Michigan in 1939 adopted new probate codes which represented varying degrees of progress, but much remained to be done. New York and Pennsylvania had greatly improved their probate court organizational and jurisdictional picture in the urban areas.

But it was not until 1939, when Professor Atkinson wrote a series of articles,<sup>26</sup> that the advocacy for reform induced the American Bar Association to take substantial action in the matter. At its instance, the University of Michigan Law School, under the supervision of Professors Simes and Atkinson and Mr. Paul E. Basye, commenced research which culminated in the publication of extensive articles,<sup>27</sup> and the presentment in 1947 by the Probate Law Division of the American Bar Association of a proposed Model Probate Code.<sup>28</sup> The picture was clearly portrayed in Professor Atkinson's articles.<sup>29</sup>

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26. Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges*, 23 *J. Am. Jud. Soc'y* 93 (1939); Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 *J. Am. Jud. Soc'y* 137 (1939); Atkinson, *Wanted—A Model Probate Code*, 23 *J. Am. Jud. Soc'y* 183 (1940).

27. Basye, *Dispensing with Administration*, 44 *Mich. L. Rev.* 329 (1945); Simes & Basye, *The Organization of the Probate Court in America: II*, 43 *Mich. L. Rev.* 113 (1944); Basye, *The Venue of Probate and Administration Proceedings*, 43 *Mich. L. Rev.* 471 (1944); Simes & Basye, *The Organization of the Probate Court in America*, 42 *Mich. L. Rev.* 965 (1944).

28. *Model Probate Code* (Simes 1946).

29. Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges*, 23 *J. Am. Jud. Soc'y* 93, 94 (1939), wherein it is said:

The position of the probate courts in the judicial hierarchy was indeed a curious one. Vested with the combined powers of the English ecclesiastical courts to probate wills and grant letters of administration, and of the Court of Chancery to administer estates, they were generally declared to be courts of record and in this respect the equal of the supreme and ordinary trial courts. . . .

While it is still desirable that probate courts should be close at hand, improved transportation and communication facilities make a given distance much less material than formerly. The amount of property passing through administration has greatly increased in the last half century. Due to changes in the financial structure property rights are frequently of a more complex and perplexing nature. To cite a single example of this, personal representatives and courts of probate are often confronted with problems of exercise, sale or lapse of rights attached to corporate stock owned by decedents. In addition, the jurisdiction of probate courts has increased. Almost everywhere they pass on claims against the estate and construe wills in ordering distribution. In many states probate courts assign or distribute realty, and of late some of them have been given general equitable powers, jurisdiction to administer testamentary trusts, and some authority over claims in favor of the estate.

Much of the groundwork for the probate reform in Missouri had been laid by the drafters of the 1945 constitution, which required that all probate judges (except incumbents) be lawyers.<sup>30</sup> The criticism which for years had been directed at Missouri's probate laws prompted the legislature, in 1953, to establish The Joint Probate Laws Revision Committee to "make a complete and detailed study of probate procedure and . . . formulate a system of practice and procedure in the probate courts [to] . . . meet the needs of modern society."<sup>31</sup>

During the two years that the Joint Legislative Committee was engaged in drafting a proposed new probate code, it appeared that one of the most frustrating aspects of probate court procedure had been the recurring litigation over the question of the equitable powers of a Missouri probate court.<sup>32</sup> In practice under the old codes, equitable relief was granted intermittently for more than a century without challenge—sometimes with express statutory authority, sometimes with implied statutory authority, and sometimes simply because it was assumed to be a proper function of the court in winding up the temporal affairs of a dead person, a proceeding inherently equitable in nature and one which originated in courts of chancery. Judicial pronouncements on the subject were from time to time altered, modified, explained and criticized, until there evolved in the cases what has been termed the "vague abstraction that although the [probate] courts have no general equity jurisdiction, equitable prin-

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Atkinson, *Wanted—A Model Probate Code*, 23 *J. Am. Jud. Soc'y* 183, 187 (1940), wherein it is said:

Due no doubt to the fact that laymen probate judges are not versed in equity, it is sometimes held that they have no equitable jurisdiction, yet in the same breath the courts declare that the probate court should proceed in an equitable manner. What are the implications of such a statement? On its face at least, proceeding like a court of equity without being one seems to be a sort of apologetic play-acting.

The writer does not mean to infer that all of these matters are in a state of uncertainty in every jurisdiction. Probably everywhere a practitioner can be sure of something more than that he must present an ordinary matured debt claim, or be barred save for exceptional circumstances; but he is fortunate indeed who can answer *all* of the above questions even after a careful study of the statutes and decisions in his jurisdiction.

See also Pound, *Organization of Courts* 136-40 (1940), wherein it is said:

Probate jurisdiction has involved much difficulty. . . . Two things were unsatisfactory in the organization of this jurisdiction. . . . The judges were usually elected for short terms and given small salaries. . . . As has been seen, in some states equity powers were doled out piecemeal by statutes. 30. *Mo. Const.* art. V, § 25 (1945).

31. *Senate Concurrent Resolutions No. 9, 67th General Assembly, 1 Senate Journal* 821, 822 (Mo. 1953).

32. Welch, Oliver, Jr. & Summers, *supra* note 12, at 115.



ciples may be applied.”<sup>33</sup> Of this “vague abstraction” 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>34</sup>

Consideration of prior Missouri statutes and decisions is therefore important in order to see what the 1955 General Assembly was attempting to do with regard to the equitable powers of probate courts when it undertook to enact a code “to meet the needs of modern society.”<sup>35</sup>

### III. STATUTES AND DECISIONS BEFORE THE NEW CODE

Candor compels the recognition that frequently practical reasons, though not assigned, were more sound than the legal reasons given for judicial decisions denying probate court equitable jurisdiction. Chief among these was the fact that in most counties the probate judges were not required to be lawyers. Occasionally the opinion of the appellate court bluntly disclosed that the impelling influence in its judicial decision was its lack of confidence in the legal acumen of the probate judge.<sup>36</sup>

Categorical statements that under the previous law probate courts did not have equity jurisdiction have resulted in extensive disharmony in many judicial pronouncements and decisions, and they clash with statutes as well as frequent practice to the contrary.

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33. Note, *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, 48 *Yale L.J.* 1273, 1277 (1939). Obviously how to apply “equitable principles” without doing equity or granting equitable relief to somebody frequently presents perplexing problems.

34. Atkinson, *Wanted—A Model Probate Code*, 23 *J. Am. Jud. Soc’y* 183, 187 (1940).

35. Senate Concurrent Resolutions No. 9, 67th General Assembly, 1 *Senate Journal* 821, 822 (Mo. 1953).

36. In *First Baptist v. Robberson*, 71 Mo. 326, 335 (1879), Judge Sherwood declared that the powers invoked (construction of a will) were not within the “scope” or “grasp” of the probate courts. In *Caron v. Old Reliable Gold Mining Co.*, 12 N.M. 211, 226, 78 Pac. 63, 67 (1904), the court expressed it even more bluntly and pungently when it characterized a probate court of that state as “a court that is not required to know any law, and that does not know any more than the law requires.” In *Barnes v. Boatmen’s Nat’l Bank*, 355 Mo. 1136, 1143, 199 S.W.2d 917, 920 (1947), the very able Judge Ellison, in holding that the General Assembly had long ago (Mo. Rev. Stat. p. 113 [1825]) given to the circuit courts concurrent jurisdiction of actions against decedents’ estates and that the probate court jurisdiction was not exclusive, commented: “The fact should be remembered that while Art. V, Sec. 25 of the present Constitution of 1945 requires probate judges to be licensed to practice law, that was not necessary under the Constitution of 1875 and Secs. 1988 and 2444.”

### A. *The Prior Statutes*

The first codification of the probate statutes<sup>37</sup> contained numerous specific grants of equitable powers, many of which in substance have been consistently retained to this day. An example in the first codification was Section 76, which granted power to the probate court to act "as fully as any court of chancery may or can do" with respect to disobedience by executors and administrators of any order, sentence or decree, including power to sequester lands and goods.

Sections 463.450—500 of the 1949 code, granting jurisdiction to the probate court over proceedings for the specific performance of a deceased's written contract to sell real estate, have, in substance, been on the statute books since January 12, 1822.<sup>38</sup>

Section 465.340 of the 1949 code, pursuant to which countless trustees to collect notes and other assets not distributable in kind have been appointed, supervised and discharged by the probate courts, has been in effect since 1885.

Section 223 of the 1919 code<sup>39</sup> provided that "The court shall, at each settlement, exercise an equitable control in making executors and administrators account for interest. . . ." The supreme court, in *Enright v. Sedalia Trust Co.*,<sup>40</sup> a case based on this statute, said, through Henwood, C.:

And our appellate courts have held that cases of this character are in the nature of equity cases and triable as such in the probate court and the circuit court and upon appeal from the circuit court. *Perkins v. Silverman*, 284 Mo. 238, 223 S. W. 895; *Rash v. Rash* (Mo. App.) 256 S. W. 525. Accordingly, our consideration of this case must be de novo, as in all equity cases.<sup>41</sup>

There were other old statutes which necessarily implied the exercise of equitable jurisdiction in the collection and marshaling of a decedent's property;<sup>42</sup> the management and operation of his business,<sup>43</sup> if deemed prudent, or of his interest in partnerships;<sup>44</sup> the sale of a decedent's real or personal property;<sup>45</sup> the relinquishment of his in-

37. Mo. Rev. Stat. pp. 92-125 (1825).

38. Mo. Rev. Stat. § 27 (1825), now contained in Mo. Rev. Stat. §§ 473.303-.310 (1959).

39. Mo. Rev. Stat. § 465.080 (1949), now contained in Mo. Rev. Stat. § 473.550 (1959).

40. 323 Mo. 1043, 20 S.W.2d 517 (1929).

41. *Id.* at 1054, 20 S.W.2d at 521-22.

42. Mo. Rev. Stat. Ch. 462 (1949), now contained in Mo. Rev. Stat. Ch. 473 (1959).

43. 1 Limbaugh, *Practice with Forms* § 650 (1935).

44. Mo. Rev. Stat. §§ 461.650-.770 (1949), now contained in Mo. Rev. Stat. §§ 473.220-.230 (1959).

45. Mo. Rev. Stat. §§ 463.010-.530 (1949), now contained in Mo. Rev. Stat. §§ 472.100-473.533 (1959).

terest in real estate;<sup>46</sup> the redemption of real or personal property;<sup>47</sup> the division of land into village or town lots;<sup>48</sup> the cancellation of decedent's contracts to sell lands;<sup>49</sup> the partition of legacies not divisible in kind;<sup>50</sup> and the trial of issues of waste.<sup>51</sup> These amount to jurisdiction over the winding up of the affairs of a decedent similar to that of a court of general jurisdiction in receivership.

In fact, the very mechanics employed in requiring personal representatives to file periodic or final settlements, in auditing the same, in requiring vouchers for all expenditures, in "surcharging" a representative, and in approving the account as filed or as surcharged, are so identical to the methods by which a chancery court supervises the accounts of a trustee, a receiver or other fiduciary appointed by it (and so basically similar to the procedure followed in courts of bankruptcy, which, incidentally, exercise a strictly "equitable" jurisdiction), that it may be said that probate courts spend most of their time in pursuance of their equitable jurisdiction and a relatively small part in pursuance of their "legal" powers, such as the hearing of disputed money claims against estates.

#### *B. The Decisions Under the Prior Statutes*

In 1913 the supreme court en banc declared that,

There have been numerous rulings by the appellate courts of Missouri to the effect that probate courts possess no equitable jurisdiction at all. . . . We find that the rule announced in some of the foregoing cases goes rather too far in stripping probate courts of all chancery powers. . . .<sup>52</sup>

Some idea of conflicts which nevertheless thereafter continued may be gained by four relatively recent cases involving discovery of assets proceedings under Sections 473.340—353. In each case the defense was raised that the property sought to be recovered was trust

46. Mo. Rev. Stat. § 462.330 (1949), now contained in Mo. Rev. Stat. § 473.323 (1959).

47. Mo. Rev. Stat. § 462.360 (1949), now contained in Mo. Rev. Stat. § 473.287 (1959).

48. Mo. Rev. Stat. § 463.290 (1949), now contained in Mo. Rev. Stat. § 473.533 (1959).

49. Mo. Rev. Stat. § 463.440 (1949), now contained in Mo. Rev. Stat. § 473.277 (1959).

50. Mo. Rev. Stat. § 465.320 (1949), now contained in Mo. Rev. Stat. § 473.643 (1959).

51. Mo. Rev. Stat. § 465.200 (1949), now contained in Mo. Rev. Stat. § 473.590 (1959).

52. *State ex rel. Baker v. Bird*, 253 Mo. 569, 580, 162 S.W. 119, 122 (1913). The court ruled that the probate court had no equitable jurisdiction to remove a minor's guardian because the guardian's affiliation was different from that of the minor's parents, since that was not a ground specified by the removal statute.

property. In three of the cases the probate court was held or was assumed to have jurisdiction of the matter.<sup>53</sup> In the fourth it was held to lack jurisdiction.<sup>54</sup>

A picture of the early judicial conflicts can be seen by a comparison of the majority and dissenting opinions in *First Baptist Church v. Robberson*.<sup>55</sup> Judge Sherwood's majority opinion was bottomed upon his view "that the powers invoked here" (construction of a will) were not within the "scope" or "grasp" of the probate courts.<sup>56</sup> Judge Hough's dissent was based on the view that in probate matters Missouri probate courts "possess about the same powers formerly exercised in England by the ecclesiastical and chancery courts."<sup>57</sup> He supported his view by citing decisions by the same court as early as 1835. Thereafter, in thirty or more cases involving various equitable issues, the majority opinion was cited and followed. Others have applied its doctrine and still others have departed therefrom.<sup>58</sup> Forty-three cases are cited in the Missouri Digest under the single heading, "Probate Courts, Equitable Powers in General."<sup>59</sup> The continuing controversies for over seventy-five years in themselves strongly suggest uncertainty in the law, or perhaps confusion within the bar. The cases have been so numerous that the limited discussion here will be simply for the purpose of pointing up the existence of the conflicts, uncertainty and confusion, and the need for legislative action.

We have seen that the statutes hereinbefore reviewed conferred on probate courts powers which by their very nature were intrinsically and exclusively "equitable." They were the very same powers formerly embraced within the general jurisdiction possessed by the chancery courts of "control over" executors, administrators and guardians.<sup>60</sup> The ecclesiastical courts had only the power to appoint, no power to supervise.<sup>61</sup> Notwithstanding the historical source of

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53. *Masterson v. Plummer*, 343 S.W.2d 352 (Mo. Ct. App. 1961); *Covey v. Van Bibber*, 311 S.W.2d 112 (Mo. Ct. App. 1958); *In re Geel's Estate*, 143 S.W.2d 327 (Mo. Ct. App. 1940).

54. *State ex rel. North St. Louis Trust Co. v. Wolfe*, 343 Mo. 580, 122 S.W.2d 909 (1938).

55. 71 Mo. 326 (1879).

56. *Id.* at 335.

57. *Id.* at 341.

58. For a collection of cases see Maus, 3 Missouri Practice § 505, at 462-65 (1960). In 1952 Maus expressed emphatic opposition to the movement for a new probate code. *Commentary on Missouri Probate law*, 25 V.A.M.S. 327, 355-56 (1st ed. 1949). Indisputably, the new code has rendered entirely obsolete much of the former law, both statutory and judicial, covered by his extensive work.

59. 8 Mo. Dig. pp. 2-48 (1949).

60. Mo. Const. art. V, § 10 (1820).

61. 1 Woerner, *American Law of Administration* § 14, at 477-78; authorities in Judge Hough's dissent in *First Baptist Church v. Robberson*, 71 Mo. 326, 350 (1879).

those powers, the Missouri decisions, for a time, flatly denied that probate courts had any equitable jurisdiction,<sup>62</sup> and some of the cases held that such courts could not even apply equitable principles in the decision of matters legally before them.<sup>63</sup> Other cases held to the contrary, one of such declaring that "whatever would be a good defense to an action on a claim brought in the circuit court is equally good in a proceeding to establish the claim in a probate court."<sup>64</sup> Still another held that the probate court had jurisdiction to adjudicate the equitable defenses of estoppel or laches.<sup>65</sup> In principle, it is difficult to discern the difference between adjudicating an equitable issue for the purpose of *denying* relief from that of adjudicating it for the purpose of *granting* relief.

But it has been trust cases which have produced the greatest amount of uncertainty and confusion. Sometimes the deceased was the alleged trustee and the action or proceedings were against the executor or administrator. In other instances, the alleged trustee was a third person and the executor or administrator brought the action or proceedings against him alleging that he was withholding assets of the estate. In most of the cases the Missouri courts declared the probate courts had no jurisdiction.<sup>66</sup>

However, it is also indisputable that many times appellate courts have approved, tacitly or expressly, the exercise by probate courts of equitable jurisdiction in trust cases. In 1895 the supreme court in the *Hoffmann* case<sup>67</sup> ruled that a probate court had jurisdiction of a proceeding against a decedent's estate to enforce an antenuptial agreement between decedent and his wife, *and for an accounting of trust funds held by him thereunder*. Of the statutes granting probate court jurisdiction, "upon any demand against the estate of the testator or intestate," the court said,

This provision seems broad enough to include all money demands, *of whatever nature, whether legal or equitable*; and so it was held in *Hammons v. Renfrow*, 84 Mo. 341. . . . *The probate court*

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62. *Jenkins v. Morrow*, 131 Mo. App. 288, 109 S.W. 1051 (1908); *Ivie v. Ewing*, 120 Mo. App. 124, 96 S.W. 481 (1906); *In re Glover*, 127 Mo. 153, 29 S.W. 982 (1895).

63. See, e.g., *In re Glover*, supra note 62, which held that the court could not adjudicate an equitable defense.

64. *Evans v. York*, 216 S.W.2d 124, 127 (Mo. Ct. App. 1948).

65. *In re Thomson's Estate*, 362 Mo. 1043, 246 S.W.2d 791 (1952).

66. The leading cases expounding this proposition are: *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 352 (1938); *Orr v. St. Louis Union Trust Co.*, 291 Mo. 383, 236 S.W. 642 (1921).

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

had jurisdiction to hear and determine a money demand against the executor of deceased, though it grew out of this trust relation.<sup>68</sup>

In 1920 the supreme court en banc in the *Stetina* case<sup>69</sup> quashed a court of appeals opinion on the ground that it was in conflict with *Hoffmann*. Regarding the claimant's claim in the probate court that she had turned her earnings over to her deceased grandmother, who had failed "to account to plaintiff for the balance in her hands," the court of appeals had ruled that "the grandmother was the trustee of an unsettled and unascertained trust cognizable only in equity . . . [and the probate] court has no equitable jurisdiction."<sup>70</sup> The supreme court en banc, speaking through Williams, J., concluded, "It is at once apparent that the decision of the Court of Appeals is in direct conflict with the above decision in the Hoffman [sic] case."<sup>71</sup>

Insofar as the capacity or power of a court to adjudicate the existence or nonexistence of a trust is concerned it would seem immaterial whether the recovery sought is a money judgment as in *Hoffmann*, *Stetina* and others, or property.

And in 1935, the supreme court, in *Lolordo v. Lacy*,<sup>72</sup> held that the probate court in a discovery proceeding had power to conduct an accounting against a trustee in deeds of trust securing notes belonging to the estate, and to compel him to pay to the estate the balance remaining after various credits. The court said,

The relation of defendant to this estate was fiduciary. He obtained the fund in question as a trustee. . . . [T]he summary proceeding to discover assets is a proper remedy to compel him to pay the amount of the proceeds to the estate, and . . . this remedy is not "confined to a particular fund—the actual money which belonged to the decedent."<sup>73</sup>

When the new code was drafted, many cases, principally *Wolfe*, *Clay County Bank* and *Orr*,<sup>74</sup> were contrary to the decisions in *Hoffmann*, *Stetina* and *Lolordo*. In *Wolfe*,<sup>75</sup> strongly relied upon in *Frech*, decedent delivered to B a \$5,000 HOLC bond, allegedly with instructions to deliver the same to C upon his death. It would seem that, even before the new code, it would have been held that the probate court had the power to decide such a simple issue as one growing out

68. Id. at 493, 29 S.W. at 605. (Emphasis added.)

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

70. Id. at 123-24, 227 S.W. at 47.

71. Id. at 124, 227 S.W. at 48.

72. 337 Mo. 1097, 88 S.W.2d 353 (1935).

73. Id. at 1110-11, 88 S.W.2d at 360-61.

74. See text accompanying note 66 supra.

75. State ex rel. *North St. Louis Trust Co. v. Wolfe*, 343 Mo. 580, 122 S.W.2d 352 (1938).

of the specifically conferred power (under the "discovery" statutes) to determine whether any third person was "wrongfully withholding any money or property belonging to the estate." However, the court held that the parties had to go into the circuit court as a court of equity to decide that simple issue, for the asserted reason that trusts are essentially and exclusively of equitable cognizance and probate courts have no jurisdiction to decide issues which are "purely equitable." If that is so, then the en banc decision in the *Stetina* case was wrong, but neither *Wolfe* nor *Frech*<sup>76</sup> criticized or even mentioned *Stetina*. Neither did *Wolfe* mention *Lolordo*,<sup>77</sup> but *Frech* did do so.<sup>78</sup>

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76. In re *Frech's Estate*, 347 S.W.2d 224 (Mo. 1961). Here the commissioner recognized the rule succinctly stated in 2 Scott, Trusts § 198.2 (2d ed. 1956), that "an action at law can be maintained by the beneficiary against him where the trustee is under an immediate duty to transfer it and deliver . . . , if no accounting is necessary." At the same time the commissioner relied upon the *Wolfe* case which completely overlooked that rule. The commissioner, attempting to bolster his opinion that the probate courts have no jurisdiction involving equitable remedies, declared that if the trust were in fact revoked before the executor died, an accounting would be necessary, the commissioner declaring that the probate court had no jurisdiction to conduct an accounting. Was an accounting required? Not only did the trustee bank say that the only issue was whether the trust had been revoked, but it pleaded that as of July 20, 1959 the assets in the trust "consisted of government and corporate bonds, and common stocks in various corporations, as specifically set out in an exhibit attached to answers of Mercantile Trust Co., to the interrogatories." (Brief for Appellant p. 5.) Admittedly "the sole substantive issue in dispute is whether or not the trust was revoked," as the trustee bank said in its brief (Brief for Respondent p. 11). Furthermore it may be noted that probate courts constantly audit the accountings of fiduciaries as trustees for heirs, legatees and creditors; metropolitan probate courts maintain an experienced staff of auditors who do nothing but audit such trustees' accounts.

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

78. In re *Frech's Estate*, 347 S.W.2d 224, 229-30 (Mo. 1961). Of *Lolordo* the commissioner said:

Appellant relies heavily upon *Lolordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353, in his contention that the probate court has jurisdiction. That case is not controlling for at least three reasons. (1) The point that the court erred in refusing to transfer the case to an equity division was not properly preserved for review, and therefore was not passed upon. (2) The trust was completely terminated. (3) The trustee, upon receipt of the trust funds, was under an immediate duty to turn them over to the administrator of the estate to which they belonged.

As to (1), was not the question one of jurisdiction, not mere error? If the probate court had no jurisdiction, the circuit court had none, its jurisdiction being derivative and therefore did not the judgment of the supreme court in effect necessarily approve the jurisdiction of the probate court. As to (2), how could it be said that a trust is "completely terminated" when the trustee still held the trust funds and claimed credit for 35 various alleged expenditures, eight of which were disputed by the cestui que trust? As to (3), the "trust funds" received by the trustee were the *gross* proceeds from the foreclosure sales; but

Until the *Barnes* decision,<sup>79</sup> several cases had held that probate courts had *exclusive* jurisdiction of all claims against decedents' estates "save in cases of equitable cognizance."<sup>80</sup> Judge Ellison, in ruling that the circuit court had concurrent jurisdiction with the probate court of claims against decedents' estates, demonstrated the fallacy of the holdings that probate court jurisdiction was exclusive. Presently, in concurrent jurisdiction cases, the court in which such actions are first filed has exclusive jurisdiction.<sup>81</sup> Upon the same theory of concurrent jurisdiction, a pending first filed declaratory judgment action in the circuit court alleging a justiciable controversy would bar probate court jurisdiction of a subsequent action involving the same issues, whether legal or equitable. Accordingly, the actual decision in *Clay County Bank*<sup>82</sup> might well have been based on that ground without undertaking to pass on whether the probate court could have had jurisdiction.

A frequent ground of denial of probate court jurisdiction has been that the issues call for equitable accountings and that such accountings are beyond the scope of probate court jurisdiction. And yet the supreme court approved the jurisdiction of the probate court in a claim against the estate of a manager of claimant's branch office which "contemplated an account, and a judgment for what might be found due claimant upon such accounting."<sup>83</sup> The supreme court ordered the claim dismissed on the ground that it contemplated "a complete accounting," whereas the amended claim filed in the circuit court after appeal was based on only one hundred thirty specific items of collections made by the deceased agent and hence, according to the ruling, it constituted a departure.

The above is but a partial resume of the many conflicting and inconsistent decisions of the appellate courts on the subject of the probate court's equitable jurisdiction up to the time of the adoption of the new probate code. It is true that some broad principles before the new code could be deduced from all these authorities. For example, a probate court might apply equitable principles and might even pass upon what were anciently regarded as "equitable" rights or titles, such as

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obviously, the trustee was not only entitled, but was obliged to make many of the payments therefrom for which he claimed credit, and to account therefor, before turning over the balance to the cestui que trust. So it becomes difficult to justify the attempted distinctions.

79. *Barnes v. Boatmen's Nat'l Bank*, 335 Mo. 1136, 1142-43, 199 S.W.2. 917, 919 (1947).

80. *Id.* at 1143, 199 S.W.2d at 920.

81. *Courier v. Scott*, 336 S.W.2d 375 (Mo. 1960).

82. *State ex rel. Clay County Bank v. Waltner*, 346 Mo. 1138, 145 S.W.2d 152 (1940).

83. *Sandwich Mfg. Co. v. Bogie*, 317 Mo. 972, 981, 298 S.W. 56, 60 (1927).



the marshaling of assets, in the determination of matters specifically entrusted to it for decision. Nonetheless, the application of such general principles to given cases in controversy was difficult. The situation called for legislative clarification. Clearly there was need to remove the disability which most of the cases asserted, this being the lack of power in a probate court to issue such equitable writs and other processes as would enable it to do "full justice" in any matter of an equitable nature brought before it in pursuance of its constitutional and statutory jurisdiction.

It would seem that the foregoing abstracts of prior cases, though incomplete, are sufficient to indicate the picture which confronted the 1953 Joint Committee and the 1955 General Assembly when they undertook to draft a new probate code.

#### IV. THE NEW STATUTES RELATING TO EQUITY JURISDICTION IN MATTERS PERTAINING TO PROBATE BUSINESS

It must be assumed that the Joint Legislative Committee and the 1955 General Assembly knew of the conflicts and uncertainties in the decisions; of the ever-continuing litigation over the equitable powers of the probate court; of the frequent probate orders over the years granting equitable relief, and usually accepted as valid. They knew that the new code, to be truly effective concerning equitable jurisdiction, had to contain broader provisions than those in the existing probate legislation. They were also cognizant of the 1945 constitutional requirement that probate judges be lawyers, and that broad equity powers would therefore not be beyond their "scope" or "grasp." With these considerations in mind, they drafted Section 472.030 and the other equitable statutes abstracted below. It would seem indisputable that the General Assembly intended thereby to grant that very power which many of the cases heretofore pointed out held that the court did not have. In short, if Section 472.030 should be held not to change the former law, then such holding would simply delete from the statute the words, "the same . . . equitable powers . . . as the circuit court has in other matters."

To accord with the foregoing intention of granting full equitable powers in probate matters and in order to provide rules and procedures in certain circumstances, the General Assembly in 1955 and 1957 enacted many sections included in the discussion below; and in 1961 it enacted Section 456.225<sup>84</sup> to implement the 1955 grant of jurisdiction over testamentary trusts.

In Section 472.010(4) "Claims" are defined to include all liabilities of the decedent whether "in contract or in tort or otherwise."<sup>85</sup>

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84. Mo. Rev. Stat. § 456.225 (Vernon's Supp. 1961).

85. Mo. Rev. Stat. § 472.010 (4) (Vernon's Supp. 1960). (Emphasis added.)

Old Chapter 464 of the 1949 code, pertaining to "Demands," along with all other sections of the old code, was repealed, and Sections 473.360, 473.367, and 473.403<sup>86</sup> were enacted. These provide that the probate and circuit courts have concurrent jurisdiction of *all claims*, whether due or to become due, absolute or *contingent*, liquidated or *unliquidated*, founded on contract or otherwise. The italicized words denote changes from former law.

Section 473.233-1 requires that the executor or administrator "shall inventory" not only the property owned by the deceased, but "*all other property* possessed by decedent at the time of his death."<sup>87</sup> And in subsection (7) it is provided:

*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.*<sup>88</sup>

To construe this section and section 473.357 as applying only to *legal* ownership and not *equitable* ownership would ignore the words "*all other property possessed* by decedent," and Section 472.010 (26) and (27), which state that when used in the code, "'Property' includes both real and personal property," and that "'Real property' includes estates and interest in land, . . . legal or equitable."<sup>89</sup> Sometimes deceased individuals held property as life tenants or in trust,<sup>90</sup> without any record thereof except that of the deceased. Obviously, the General Assembly believed it to be in the public interest to require that the administrator or executor publicly disclose in the probate court the extent and description of such property, and also his knowledge concerning its ownership, legal or equitable. It also provided a probate court procedure designed to aid in the protection of cestuis que trus-

86. Mo. Rev. Stat. §§ 473.360, 473.367, 473.403 (1959).

87. Mo. Rev. Stat. § 473.233—1 (1959). (Emphasis added.)

88. Mo. Rev. Stat. § 473.233—1 (7) (1959). (Emphasis added.)

89. This is not to infer that the definition of § 472.010 was intended to exclude an equitable interest in personal property. To the contrary, for it would not make sense to include equitable interests in realty and exclude such interests in personalty. This is particularly true in view of the old cases which stated that the probate court had no jurisdiction to "try" title to real estate, when no such statement ever appeared with reference to personalty. Therefore, since equitable interests in land are specifically included, *a fortiori* equitable interests in personalty are included. Section 472.010 is, for the most part, an enactment of § 3 of the Model Probate Code, and undoubtedly equitable interests were included in the "real property" definition by the drafters of the code, because these were the interests which had long been the subject of judicial controversy. They were aware, for example, of cases holding that there could be no dower in equitable interests in land, and they wanted to be sure that "real property" in the Model Code did include such interests.

90. E.g., relatives, minors, charities, etc.

tent and remaindermen of life tenancies, or bailors. It is believed that many such beneficiaries never receive or even learn of their rights in property which perhaps has become commingled by a deceased trustee, life tenant or bailee.

Section 473.357 provides the procedure for the determination by the probate court of the ownership of any personal property in the custody of an executor or administrator and the giving of appropriate relief.<sup>91</sup> The ownership contemplated by this section was either legal or equitable.

Sections 473.287, 473.290, 473.387 and 474.450, enacted in 1955, prescribe new statutory rules for the exercise by the probate court of its equitable jurisdiction in marshaling assets and determining the funds from which various types of creditors are to be paid. In adjudging such questions prior to the new code, the mandate of Section 464.080 of the 1949 code, regarding secured claims, frequently proved so inequitable that inconsistent judicial decisions resulted which themselves proved so inadequate<sup>92</sup> that they caused the 1955 General Assembly to enact the four above-mentioned new sections authorizing the probate court to grant the equitable relief indicated by the circumstances. It may be noted that these sections authorize determination of various equitable issues and the granting of equitable relief by the probate court, including, *inter alia*, exoneration of liens under various circumstances to be determined upon hearings; the various issues regarding equities of redemption; the making, after hearing, of such orders in the premises as may be necessary to preserve the rights of the parties: (1) where property owned by one other than deceased is pledged to secure the debt of deceased; (2) where property owned by one of tenants by the entirety or of joint tenants is pledged and the other is not a principal debtor; and (3) where a life insurance policy is pledged as collateral.

Section 473.377 of the 1955 code substantively amended Section 464.090 of the 1949 code. It relates to those actions in probate matters in which the circuit courts have concurrent jurisdiction. Before the amendment the section read:

If any person commences suit of any kind in the circuit court against an estate, within six months from the date of administration, he may recover judgment but shall be adjudged to pay all costs; *provided, this section shall not apply to suits in equity.*<sup>93</sup>

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91. It may be noted that in order to avoid non-compliance with due process requirements, the legislature in 1959 deleted the words in the 1955 supplement, "in a summary manner."

92. See annotated cases following V.A.M.S. § 464.080 (1949).

93. Mo. Rev. Stat. § 464.090 (1949). (Emphasis added.)

The new code changed such section by substituting for the italicized proviso clause the limitation that, "This section does not apply to suits not cognizable in the probate court."<sup>94</sup>

It must be apparent that the reason for the deletion of the words "provided, this section shall not apply to suits in equity," was that the new code was both expressly and impliedly authorizing suits in equity in the probate court in matters pertaining to probate business. The amendment was obviously intended to make the section apply only to suits "not cognizable in the probate court" for some reason other than that it was a suit in equity.<sup>95</sup>

Section 472.020 specifically provided that the probate court shall have "jurisdiction of the construction of wills as an incident to the *administration of estates*,"<sup>96</sup> not merely as an incident to an order of distribution. This provision was included because reflection made it apparent that very frequently it was essential to the administration of an estate that a will be construed and orders based upon that construction be made long before orders of distribution.

Section 472.020 expressly, but only generally as enacted in 1955, provided for probate court jurisdiction of the administration of testamentary trusts. In 1961, implementing such express grant, the General Assembly enacted Senate Bill No. 48,<sup>97</sup> now Section 456.225,<sup>98</sup> empowering the probate court before rendering any decree of partial or final distribution of bequests or devises in trust to certain trustees, to require such trustees to file bond, and to require all testamentary trustees to file accountings in the probate court upon the petition of any beneficiary. The 1961 act further provides that the jurisdiction of the probate court over testamentary trusts shall be the same as and concurrent with that of the circuit court, but that an interested party may, upon motion, require any proceeding in the probate court which involves the administration of such trust to be transferred to the circuit court, and there to be proceeded upon as if a probate court judgment had been appealed. While doubts as to constitutionality of this section have been expressed, many believe that if the question is adequately briefed in an appropriate case, the section will be held constitutional, on the theory that the General Assembly has the power to define what is a "matter pertaining to probate business," as long as its definition does not do violence to reason; and further, that the devolution of property to the ultimate beneficiaries of a testator's

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94. Mo. Rev. Stat. § 473.377 (1959).

95. E.g., actions, whether legal or equitable, against an administrator, and another defendant over whom there was no ground for probate court jurisdiction.

96. Mo. Rev. Stat. § 472.020 (1959). (Emphasis added.)

97. 71st Mo. General Assembly (1961).

98. Mo. Rev. Stat. § 456.225 (Vernon's Supp. 1961).

bounty may properly be determined by the General Assembly to be a matter pertaining to probate business. Many states have, in varying degrees, granted to probate courts jurisdiction of testamentary trusts.<sup>99</sup>

Section 473.230 provides that the probate court may, in certain circumstances, "appoint a receiver of the partnership estate with like powers and duties of receivers in chancery."<sup>100</sup>

Section 473.223 provides that "the probate court whenever it appears necessary may order the surviving partner to account to the court."<sup>101</sup> This and other new partnership sections clearly widen the pre-existing equitable jurisdiction of the probate courts over partnership estates.

Section 474.200 empowers the probate court to approve an election by a guardian for his ward to take against the will of a deceased spouse, whereas under prior law only a court of equity could authorize such election.<sup>102</sup>

Section 475.130 grants to a guardian "under supervision of the court" the same general powers over his ward's estate as a receiver.

Section 475.110 authorizes a probate court, upon petition of a fourteen year old ward, to remove a guardian and appoint another if it is found to be for the best interests of the ward, whereas under prior law it was held that the court had no such equitable power.<sup>103</sup>

It would seem that the judiciary would interpret the new statutes in the light of the factors which prompted their enactment. Should it any longer be declared, in the face of the foregoing changes and provisions in the new code, that the probate courts, while empowered to "apply equitable principles," do not have full equity power in all matters pertaining to probate business over which statutes have granted general jurisdiction?

## V. SUMMARY AND RATIONALE OF THE SUBJECT

Summarizing:

(1) In England, before the reform legislation of 1857, probate jurisdiction was divided as follows: (a) The ecclesiastical courts issued letters authorizing administration on personalty only and could do "little or nothing more in the way of judicial proceedings," except

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99. Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Vermont, Washington and Wisconsin.

100. Mo. Rev. Stat. § 473.230 (1959).

101. Mo. Rev. Stat. § 473.223 (1959).

102. *In re Connor's Estate*, 254 Mo. 65, 80, 162 S.W. 252, 256 (1914).

103. *State ex rel. Baker v. Bird*, 253 Mo. 569, 162 S.W. 119 (1913).

at one time to require a bond and inventory;<sup>104</sup> devises of land were effective without probate of the will.<sup>105</sup> (b) The Common law courts had no jurisdiction in probate matters, except that they could try ejectment, trespass, replevin or trover actions.<sup>106</sup> (c) The chancery courts had jurisdiction of all other probate matters.<sup>107</sup>

(2) The Missouri legislature was not compelled, under any of the constitutions in force since statehood, to confer *all* the equity powers formerly exercised by the separate chancery courts upon the circuit courts. It could separate those powers, and grant certain equitable powers to the probate courts. This is what the legislature attempted to do under the previous statutes granting jurisdiction to the probate courts over probate matters which originally had come under the exclusive jurisdiction of the chancery court. This was sometimes done specifically and expressly, but more often generally and by implication.

(3) Despite these legislative grants of power, from at least 1843<sup>108</sup> to 1955 there was such a conflict of views as to the extent of equitable jurisdiction properly exercisable by the probate courts in Missouri that a stream of judicial decisions resulted. They were far from harmonious, many of the cases reflecting the reluctance and unwillingness of the appellate courts to attribute "equitable" powers to lay or non-lawyer probate judges. There seemed to be no end to the litigation involving jurisdiction of issues as to claimed trusts.

(4) In order to end that uncertainty, the legislature in 1955 provided, by Section 472.030, that the probate court should have plenary equity powers in all matters properly before it; that is, all matters over which it had statutory jurisdiction. The result of this enactment is that we have only to look to the statutes to determine whether the probate court is given general jurisdiction of the class of cases involved. If the court has such "general" jurisdiction, it then follows that it may *fully* adjudicate the matter, even to the granting of such relief as anciently was regarded as "equitable" in character.

(5) Applying this rule to trusts, as heretofore noted, the new code specifically provides that the estate inventory shall list "all property possessed but not owned by the decedent"<sup>109</sup> and that any person claiming to own any property "in the possession of the executor or administrator" may file a formal petition in the probate court to determine ownership. These provisions, in conjunction with the

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104. Simes & Basye, *The Organization of The Probate Courts in America*, 42 Mich. L. Rev. 965, 970 (1944).

105. *Id.* at 971.

106. *Id.* at 971-72.

107. *Id.* at 972-74.

108. *Miller v. Woodward*, 8 Mo. 169 (1843).

109. Mo. Rev. Stat. § 473.233 (7) (1959).

claims statutes<sup>110</sup> and Section 472.030 seem broad enough to cover any type of proceeding to recover assets held in trust by a decedent, to allow the probate court to conduct an accounting to determine any liability of the decedent, to allow his estate any compensation to which he was entitled and to adjust all other matters of charge or credit.

As to claims asserted by the estate against third persons, Section 473.263 requires the executor or administrator to take possession of all personal property of the decedent, except exempt property. By Sections 473.340—.353, the probate courts are given statutory jurisdiction over proceedings to recover property wrongfully withheld from the estate.<sup>111</sup> If an accounting or other "equitable" determination is required, Section 472.030 gives the probate courts the same equitable power to effectuate its general jurisdiction over all probate matters, including the recovery of assets wrongfully withheld from an estate, as the circuit court has in other matters.

(6) Nearly all the controversies which will arise will involve simple claimed trusts terminating before or upon decedent's death. Usually, no complicated accounting is necessary in such a case. Why should the parties be compelled to go to the circuit court to secure that simple determination of whether there was or was not a trust, and, if so, whether it had been terminated? But if an accounting is necessary, are not the probate courts (particularly in the metropolitan areas, with their permanent staffs of auditors, whose sole duties are in the accounting field) better equipped to conduct it than the circuit courts, which ordinarily can perform such functions only through the appointment of a referee? And if a party is dissatisfied with the probate court determination, an appeal to the circuit court can ordinarily be heard as soon as an action originally filed there, or sooner if the court advances hearings on appeals. What good is done by a rule denying probate court jurisdiction in such cases? Whom does it benefit? The decisions denying jurisdiction under the old code benefited no one, except perhaps when, by the time of the decisions, laches had intervened to bar a suit in the circuit court.

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110. Mo. Rev. Stat. §§ 472.010 (4), 473.360, 473.367, 473.403 (1959).

111. One or two opinions have argued that because the discovery statutes permit a trial of the issues by a jury the discovery proceeding is therefore an "action at law" and cannot be used to try "equitable" issues. This argument fails, since the Missouri discovery of assets proceeding is one peculiar to the statute law. It cannot trace its ancestry exclusively either to the ancient chancery or common-law courts. The legislature, in its wisdom, could and did provide for a jury trial, as it has with respect to other proceedings involving "equitable" issues, e.g., the so-called lunacy determinations (Section 475.075). Under Section 472.030 the probate court can now determine any "equitable" issues, without the intervention of a jury, as fully as the circuit court can, as, for example, in a declaratory judgment proceeding.

(7) There is nothing sacrosanct about the circuit court's jurisdiction over trusts. It is common knowledge that probate courts have from time immemorial rendered decrees adjudicating that executors or administrators relinquish personal property that had been held by the decedent in trust for third persons. Prior to the new code the only way a trustee could secure in the circuit court an effective acquittance for delivery of such trust assets (except where Sections 456.110, 456.130, 456.180, 456.190, 456.200 or 456.210 are applicable) would be to refuse to turn over such assets to the person rightfully entitled to them, and for such person then to file a suit in the circuit court to compel delivery, or for an interested party to file a suit presenting a justiciable controversy under the Declaratory Judgment Act.<sup>112</sup> Is there any sound reason for requiring such "a full dress" adversary proceeding when the matter may ordinarily be easily and properly disposed of by a simple proceeding in the probate court?

#### CONCLUSION

If this article has demonstrated that the oft-repeated assertions that probate courts do not possess "equitable" jurisdiction are incorrect and misleading, it will have served its major function. It is also hoped, however, that it will have the added effect of recalling the goal of all modern probate legislation—the administration of estates quickly, economically and with finality. Experience, in Missouri as elsewhere, abundantly indicates that this goal cannot be fully attained unless the probate tribunal has plenary powers and jurisdiction; that is, the power to *decide* all probate matters.

Missouri's 1955 code, which attempts to invest probate courts with such jurisdiction, is a significant step forward toward the objective.

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112. McHaney, Probate Administration of Testamentary Trusts, in Missouri Estate Administration 322 (1960); Overstreet, Appointment of Successor Trustees, Trust Administration and Settlements in Missouri, 13 Mo. L. Rev. 269 (1948). In *State ex rel. Chilcott v. Thatch*, 221 S.W.2d 172, 176 (Mo. 1949), the court speaking through Judge Conkling held: "No justiciable controversy exists and no justiciable question is presented unless an actual controversy exists. . . ."



Whether it will meet with success depends upon the extent to which the courts will sanction the legislative intent. The *Frech* case indicates that there is serious cause for concern.<sup>113</sup>

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113. The St. Louis court of appeals, on Nov. 27, 1961, adopted the opinion of Commissioner Doerner in *Stark v. Moffit*, No. 30848, which ruled that the circuit court had exclusive jurisdiction of the action and that,

plaintiff's prior claim in the Probate Court does not involve the same parties nor the same subject matter as the action subsequently filed by him in the Circuit Court; and that the Probate Court does not have jurisdiction to render the particular relief sought in this action.

The "prior claim" was, of course, against only the decedent's estate. The defendants in the circuit court action included (in addition to an administrator d/b/n, c/t/a) the administrator individually, a Milling Corporation, the Farmers Bank, another individual and "Escrow Fund in Farmers Bank." The plaintiff's petition alleged that the executrix of the estate of deceased Moffit entered into a contract with the Milling Company and the Bank providing that the executrix should sell certain hogs for cash, deposit the sales proceeds with the bank which was to hold the proceeds in escrow "until the final determination of the liens and other claims on said hogs." The petition also alleged that \$4,425 of said escrow fund represented the proceeds of the sale of hogs which belonged to the plaintiff. The opinion states that, "According to plaintiff's petition, each of the defendants, for one reason or another, is contending that he has an interest in or a lien on the escrow fund."

Clearly, there is no basis whatsoever for questioning the correctness of the actual decision in the *Stark* case or its above-quoted ruling; for no statute purports to give to the probate court jurisdiction of an action against multiple defendants to determine conflicting interests in property which is not in possession of the administrator. As pointed out above (see text accompanying notes 93 & 94 *supra*), action like the *Stark* action is what caused the 1955 legislature (when greatly widening the equity jurisdiction of probate courts) to enact § 473.377, amending § 464.090 of the 1949 Statutes, by deleting, "this section shall not apply to suits in equity," and substituting in lieu thereof, "This section does not apply to suits not cognizable in the probate court"—for some reason other than that it was a suit in equity. E.g., actions, legal or equitable, against an administrator and another defendant over whom there was no statutory ground for probate jurisdiction.

But, unfortunately, the *Stark* opinion contains much dicta, citing the *Frech* case, and *Wolfe* and similar cases dealing with probate court equitable jurisdiction before the new code.