New York, New York, USA – December 21, 2013: Surrogate's Courthouse in New York City located at Chambers Street. Showing pedestrians and traffic.

What's in a Name? That Which We Call Surrogate's Court

The Historical Origins of a Uniquely New York Term of Art

By Dennis Wiley

For many trusts and estates attorneys, particularly those who work or practice in the New York State Surrogate's Court, the term "Surrogate" is so ingrained in our area of law that few, if any, see anything unusual about the word. Like many busy professionals, we simply accept things for what they are, file our papers and conference our cases, and move on with our business. For the uninitiated, however, "Surrogate" may seem like an odd name for a court or a judge, particularly one charged with the probate of Last Wills and Testaments and all other "matters relating to estates and the affairs of decedents . . . ."[1]

Which it is, quite frankly. Google "Surrogate" or "Surrogate's Court" and the uniqueness of these terms becomes readily apparent. Outside of New York State, Surrogates are practically unheard of. Most jurisdictions have "probate" judges, and "probate" or "orphan"

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courts. In fact, according to this author's research, of all the various probate systems throughout the United States, only two states – New York and New Jersey – have ever used the word "Surrogate," and it appears that only one foreign jurisdiction (the Canadian province of Ontario) had ever formally adopted it in connection with its own probate courts.

Perhaps even more surprising, "Surrogate" is entirely absent from the modern vernacular of English jurisprudence. If the country from which we borrowed so much of our own legal system doesn't use the term, then why do we? How did the word "Surrogate" become synonymous with probate judges? Surprisingly, the answers to these questions pack a lot of historical punch that is uniquely New York.

Probate in Medieval England

The origin of the term Surrogate, and how it came to signify the trier of last wills and testaments, covers a fascinating period of history, and the forces that shaped its modern use can be traced back to the Norman conquest of England in 1066. Primitive testamentary instruments were already in existence throughout Anglo-Saxon England, but after William the Conqueror's coronation as the new King, existing governing systems – including the law of succession – underwent tremendous change.[2] The Crown was very suspicious of religious authorities, particularly with respect to dying persons (English historians Sirs Frederic Pollock and Fredric Maitland remarked that the Crown felt that "a boundary must be maintained against ecclesiastical greed"[3]), and consequently directed the removal of clergy from common court proceedings, while also establishing the law of primogeniture, the right of the firstborn son to inherit the family estate, for the succession of land (but not for personal property).[4] These suspicions were not entirely unfounded. The Roman Catholic Church had long maintained a strong interest in the afterlife and the last wills of its followers, on the ground that "the 'last will' of a dead man was . . . intimately connected with his last confession,"[5] providing opportunity for some clergy to unjustly enrich themselves at the expense of their followers.

The Crown's efforts to minimize the Church's role upon its subjects had limited effect, however. While primogeniture arguably "saved" English real estate from the influence of local clergymen, deathbed gifts of personal property to the Church remained common in the Middle Ages. Gradually, over the course of the 12th and 13th centuries, the Church, through its own judiciary (known as the ecclesiastical courts), increasingly asserted jurisdiction over the probate of decedents' wills,[6] eventually – with the blessing of the English monarchy – becoming *the* probate courts in feudal England.[7] Church authority eventually pervaded the administration of all decedents' estates, including those who died without wills, with the local bishop often personally supervising the distribution of estate assets to ensure that the prevailing custom of splitting the estate into thirds was maintained. That custom provided one share of the estate to the decedent's spouse, one share to his children, and the last to the Church.[8]

The function of the ecclesiastical courts was more than ministerial. Just like in modern times, wills in feudal England had to be validated, or "proved," in order to take effect. This was generally done before the bishop in whose diocese the decedent's personal property was located, with the archbishop retaining jurisdiction in cases where the testator had a sizable estate in two or more dioceses.[9] Bishops, however, were very busy people, so they often delegated certain duties and responsibilities to so-called "professionals" trained in canon (church) law, or who were at least somewhat familiar with it.[10]

The Church's firm grip over probate in England remained largely unchallenged through the 14th century. With the rise of the Tudor dynasty in the 1400s, and the resulting Reformation in the 16th century, however, attempts were made to reform the laws of succession and to rein in the power of the ecclesiastical courts, particularly during the rule of King Henry VIII (he of the beheadings fame). Money, of course, was a primary driver of such change, as the Crown became increasingly desperate to refill its coffers (Henry VIII, unlike his father, Henry VII, had a proclivity of finding things on which the Crown could spend its treasure),[11] and certain Church assets – including the "business" of probate – seemed ripe for the picking. But reform proved hard in an agrarian society rife with special interests.[12] With respect to bills that came up for vote in Parliament seeking to clamp down on the Church's monopoly on probate,

> [t]he House of Lords, where the bishops and abbots still had more votes than the lay peers, agreed to the Bills reforming sanctuaries and abolishing mortuary fees, which affected the lower clergy only, but when the Probate Bill came up to the Lords the Archbishop of Canterbury "in especial" and all the other bishops in general, both frowned and grunted.[13]

Despite vigorous opposition, the ecclesiastical courts ultimately could not escape unscathed. Under Henry VIII, the Church of England affirmatively split from the Roman Catholic Church in 1533, and the Crown assumed the role as the supreme head of the Church of England.

So, you may ask, what does all of this have to do with the use of "Surrogate" to describe probate courts? With its new authority, the Crown seized control of the Church and imposed administrative regulations and restrictions that, over many years, culminated in the promulgation of the Canons of 1603. Adopted by the Crown as the law of the land, subordinate only to common and statute law,[14] the Canons expressly preserved the Church's domain over English probate and estate administration, specifically authorizing, under Canon 127, each ecclesiastical judge – typically the presiding bishop – to continue

the practice of appointing a so-called "professional," or deputy, to keep court upon his absence. But the Canons went one step further, and formally bestowed the title "Surrogate" (derived from Latin, it means "substitute") upon such deputies.[15] Thus, "Surrogates," when properly appointed by the presiding bishop, had the power to prove wills, among other things.

Probate in Colonial New York

During this time, "Surrogates" and ecclesiastical justice were nonexistent in the New World. In 1624, the Dutch settled the colony of New Amsterdam in what is now known as New York City, and they brought with them their own laws and customs in connection with probate and estate administration.[16] Little changed in this regard following the Dutch surrender to the English in 1664, at least initially.

The colony's new English owner, James, the Duke of York (his brother was Charles II, the King of England), never visited his new kingdom, as doing so was out of the question for English royalty. (Surprisingly, it would take almost another 300 years for the first English King to visit the United States.) To rule his lands from afar, the Duke decided to appoint a governor to oversee the colony, who, like the hereditary nobleman in the "counties palatine" governance system used in England, had autonomous legal authority to adjudicate crimes and civil matters.[17]

After the Dutch turned over the colony to him in 1664, the Duke commissioned a stalwart Royalist, Colonel Richard Nicolls, as his first governor of New York.[18] Among the first acts of the new governor upon arriving in the New World was to implement its first body of laws, known as the "Duke's Laws."[19] These laws evolved over time, and were revised periodically to incorporate the latest principles of English common law and, of course, the occasional written instructions received from the Duke himself.[20] With respect to decedents' estates, the Duke's Laws vested probate authority in three tribunals, the Court of Assizes (which later became the highest court of the land at the time) and the lower Court of Sessions, and, in New York City, a reconstituted Dutch court which the English renamed the "Mayor's Court." Responsibility for intestate estates was assigned to local justices of the peace.[21]

As the colony expanded over the next 30 years (both in terms of land area and population), however, more formal governing structures were established. The Province of New York was divided into three administrative jurisdictions, called "ridings," and in each was a Court of Sessions, composed of resident justices of the peace, which handled all probate, guardianship and estate accounting matters. Within the city of New York, the Mayor's Court continued to handle probate. Proofs and proceedings were had before the court in the first instance, with the governor – like the bishops in the English ecclesiastical courts – retaining final say over the granting of letters to fiduciaries.[22]

In February 1685, the Duke ascended to the Crown as King James II, and subsequently his title to New York merged into the royal kingdom. Seeking a more formal and structured implementation of English law upon his new royal province, James II sent a secret letter of instruction, dated May 29, 1686, to then-Governor Thomas Dongan, formally delegating "ecclesiastical" authority of the province to the governor's office, including the power to probate wills.[23]

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Three years later, in 1689, the newest heir to the English throne, King William III, further expanded the governor's probate authority by permitting the governor's commander-in-chief to also take proofs of wills.[24]

This expansion of executive power was quickly affirmed by the governor's office, and later, by the provincial legislature. Following Governor Sloughter's death in 1691, his successor, Lieutenant Governor Richard Ingoldsby, began inserting a clause in all letters testamentary and letters of administration, expressly stating that the final decision to grant letters belonged solely to the governor and not to any inferior court. In addition, the governor's office began annexing certificates to wills proved before the governor's secretary, as evidence of his authority to do so as the governor's delegate.[25]

Approximately one year later, on November 11, 1692, the New York provincial legislature required all wills in the province to be proved in New York City before the governor *or his delegate*. A distinct office blossomed in the governor's office to handle probate, called the Prerogative Office, which was shortly renamed the Prerogative Court.[26] In more remote counties, the Court of Common Pleas (one in each county) took proof and transmitted papers to the Prerogative Court in New York City for probate.

Remarkably, by 1700, the New York provincial probate system had the look and feel of the English ecclesiastical probate courts, although there was still no mention of "Surrogates" in New York, or in any other colony in the New World. That soon changed.

John Bridges, LL.D.

In 1701, Edward Hyde, who also went by the more exotic name, Viscount Cornbury, was appointed governor of New York. A relative of her royal highness Queen Anne, Governor Cornbury arrived in New York on May 3, 1702, accompanied by his friend, a Cambridge-trained barrister, John Bridges, LL.D.[27] Not much seems to be known about Dr. Bridges, but the little that is known indicates that by the time he arrived in the New World, he was a highly educated and well-connected young man. His law library was considered extensive, and its size and breadth quickly became renowned throughout the colony.[28]

Dr. Bridges's career rose quickly. A month after arriving in New York, the Queen appointed him Second Justice of the Supreme Court of Judicature and then, a month after that, Chief Justice of New York. In September 1702 – only four months after arriving in New York – Dr. Bridges was appointed as the governor's delegate in the Prerogative Court, a position he held for less than a year. As delegate, Dr. Bridges began adding the title "Surrogate" after his signature to all probate documents,[29] the first, it is believed, to do so, presumably borrowing the term from the ecclesiastical courts of England, which, under the Canons of 1603, had officially promulgated its use.

From New York, the use of "Surrogate" quickly spread to New Jersey. Governor Cornbury was likely the catalyst, having been appointed as the executive head of that province on December 5, 1702. As in New York, the governor's office proceeded to expressly reserve all New Jersey probate matters to itself, with Governor Cornbury personally taking proofs of wills and granting letters proved elsewhere in the province.[30] The governor later commissioned Thomas Revell as his New Jersey "Surrogate."[31] From that point forward, the term became imbedded in New Jersey probate, as evidenced by, among other things, Governor Cornbury's terse response, by letter dated May 12, 1707, to the New Jersey Assembly's request for the creation of an office for probate of wills in every county ("[C]onsidering the remoteness of Cape May County and the County of Salem, I did appoint a Surrogate at Burlington before whome any of the inhabitants of Either Division might have their Wills proved . . . .").[32]

With Dr. Bridges having planted the "Surrogate" seed, the rest, as they say, is history. Dr. Bridges died on July 6, 1704, only two years after arriving in the New World, likely having no idea of his lasting impact upon the New York judiciary. The Prerogative Court continued to handle probate in provincial New York for the next several decades, but its power remained more ministerial than judicial, as the final disposition of any estate matter remained with the governor and his delegate. As the colony grew, local delegates were appointed to assist with the administration of estates, and they eventually assumed the title of "Surrogates."[33] These delegates were little more than notaries who received evidence concerning the validity of a will, which was forwarded onto the governor's deputy's office for final approval.

In New York, the word "Surrogate" has been permanently ensconced in our body of laws, by virtue of its place in Article VI, § 12 of our state Constitution.

Following the creation of the state of New York in 1776, provincial governing structures and systems largely remained in place, although they became increasingly cumbersome for the growing populace to utilize.[34] In response, the New York State Legislature created the Court of Probates in 1778, which replaced and assumed the role of the Prerogatives Court, except with respect to the appointment of the local county Surrogates. Ten years later, the legislature created a Surrogate's Court in each county and, following the abolishment of the Court of Probates in 1823, the Surrogate's Court slowly grew in power and responsibility, eventually evolving into courts of record in the process.[35]

Notably, as the term Surrogate slowly rooted itself into New York jurisprudence in the 18th and 19th centuries, the opposite occurred in England. As the power of the English state grew, the power of the ecclesiastical courts (and their bishop-appointed Surrogates) diminished, until, in 1857, the courts were abolished in their entirety, and replaced by the newly created civil Court of Probate.[36] And just like that, Surrogates were no more in England.

Here in New York, the word "Surrogate" has been permanently ensconced in our body of laws, by virtue of its place in Article VI, § 12 of our state Constitution. It is a historically rich, and uniquely New York, term of art, with a backstory that is much more interesting than its name may suggest. ■

1. N.Y. Surrogate's Court Procedure Act 201(3) (SCPA).

2. *See* 2 Sir Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 330, 332-336, 339 (2d ed.) (1898).

3. *Id*. at 344 ("In the interest of honesty, in the interest of the lay state, a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men.").

4. *See id*. at 279–80, 330.

5. 1 Sir Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 136 (2d ed. 1898).

6. *See Manning v. Anderson Galleries, Inc.*, 130 Misc. 131 (Sup. Ct. Albany Co. 1927) ("A will of land probated in an ecclesiastical court did not become a part of the record there, because that court had no jurisdiction to render judgment upon a will of land . . . .").

7. See 2 Pollock & Maitland, *supra* note 2, at 345, 348. For an excellent overview of the history of the law of succession governing real property in England and America, see Francisco Augspach's article, *The Executor and the Real Property*, in N.Y. Real Property Law Journal, Spring 2012, Vol. 49, no. 2, p. 17–30.

8. 2 Pollock & Maitland, *supra* note 2, at 345, 348, 373, 376–79.

9. *Id*. at 377.

10. 1 Pollock & Maitland, *supra* note 5, at 220.

11. "Why did Italians enjoy the revenues of English bishoprics? Why were the clergy demanding fees for probate on wills and gifts on the death of every parishioner? The King would ask his learned Commons to propose reforms." 2 Winston S. Churchill, A History of the English Speaking People: The New World 53 (1956).

12. *See* Blackwell, A Companion to Tudor Britain 89–90 (Robert Tittler and Norman Jones eds., 2004).

13. *Id*. at 54.

14. Rev. C. H. Davis, M.A., The English Canons of 1604 1-8 (1869).

15. Specifically, Canon 127, "Judges Ecclesiastical and their Surrogates." *See* Davis, *supra* note 14, at 109–11. Canon 128, "The Quality of Surrogates," delineated the qualifications necessary to serve as an appointee.

16. *See Runk v. Thomas*, 200 N.Y. 447, 452–53 (1911).

17. Robert Ludlow Fowler, Introduction to Decedent Estate Law of the State of New York 33 (1911).

18. Alden Chester, 1 Courts and Lawyers of New York: A History 1609-1925, 290–91 (1925).

19. *In re Brick's Estate*, 15 Abb. Pr. 12 (Sur. Ct., N.Y. Co. 1862) (Daly, J., Acting Surrogate); 1 Chester, *supra* note 18, at 302–05. Images of the Duke's Laws may be found at www.nycourts.gov/history/legal-history-new-york/documents/Publications_1665-Dukes-Law.pdf.

20. *See Brick's*, *supra* note 19.

21. *See* Clark Bell, LL.D., Esq., *The Supreme Court of New York*, Medico-Legal Journal, Vol. XX – No. 1, at 484–85 (1902); *Brick's*, *supra* note 19; 1 Chester, *supra* note 18, at 317–31. Although the Duke's Laws were the law of the land, the Dutchmen in the colony were permitted, under the Articles of Capitulation of 1664, which governed the terms of their surrender to the English, to administer their estates in accordance with Dutch law. Fowler, *supra* note 17, at 33.

22. *See Brick's*, *supra* note 19.

23. *See* Fowler, *supra* note 17, at 33–34; II Ecclesiastical Records State of New York 915-916 (1901) (published under supervision of Hugh Hastings, State Historian).

24. John Romeyn Brodhead, Esq., III Documents Relative to the Colonial History of the State of New York 688 (1853).

25. *See Brick's*, *supra* note 19; 1 Chester, *supra* note 18, p. 424–425, at footnote 27.

26. *See* Fowler, *supra* note 17, at 34; *Brick's*, *supra* note 19; 1 Chester, *supra* note 18, p. 425, at footnote 27. *See also* Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-prerogative.html.

27. Princess Anne became Queen following the death of William III on March 8, 1702.

28. *See* D.T. Valentine, Manual of the Corporation of the City of New York 568 (1864); Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-bridges.html.

29. *See Brick's*, *supra* note 19.

30. William Nelson, The Law and the Practice of New Jersey, From the Earliest Times 45–48 (1909).

31. *See id*. at 47–48.

32. *See id*. at 50.

33. *See Runk*, *supra* note 16, at 453; Historical Society of the New York Courts, at www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-prerogative.html.

34. *See Runk*, *supra* note 16, at 453-54.

35. *See Brick's*, *supra* note 19; Fowler, *supra* note 17, at 36–37; *Runk*, *supra* note 16, at 452-53.

36. *See* Probate Act, 20 & 21 Vict., c. 77 (1857) (Eng.).