FEDERAL QUESTIONS AND THE PROBATE EXCEPTION

From time to time, contests over decedents’ estates arrive in the federal courts. One such case began when a hotel magnate, dividing his empire among the children of his first and second marriages, appointed an executor in his will.1 As a daughter of the second marriage saw it, the executor administered the estate in a way that favored the children of the first marriage.2 So she sued — alleging, among other things, “fraudulent interstate communications” that entitled her to recover under the Racketeer Influenced and Corrupt Organizations Act3 (RICO).4 To hear her claims, she chose a federal district court.5

Whether a federal court may hear such claims, however, turns on the “probate exception.” The exception says that federal courts lack subject matter jurisdiction to probate wills or to administer decedents’ estates.6 But the boundaries of this principle are far from clear. Whether the probate exception can apply at all to a claim under a federal law like RICO is a question almost unexplored,7 a particularly hidden turn within “one of the most mysterious and esoteric branches of the law of federal jurisdiction.”8 Decisions often steer around the issue altogether, as the court of appeals did when it encountered the daughter’s RICO claim.9 And when they do reach the question, answers split.10

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1 Glassie v. Doucette, 55 F.4th 58, 62 (1st Cir. 2022). This account reflects the case’s posture.
2 Id. at 62.
4 Glassie, 55 F.4th at 62.
9 See Glassie, 55 F.4th at 69, 71 n.9.
10 Compare Goerg v. Parungao (In re Goerg), 844 F.3d 1562, 1565 (11th Cir. 1988) (limiting the probate exception to diversity cases), with Jones v. Brennan, 465 F.3d 304, 306–07 (7th Cir. 2006) (deciding against such limits). These two leading cases both involved claims with plausible jurisdictional footing beyond 28 U.S.C. § 1331. See infra note 155 and accompanying text. This Note at times uses “federal questions” to refer generally to claims based on federal law rather than a particular jurisdictional basis for such claims.
In response, this Note sets off into the “misty understandings”\textsuperscript{11} of the probate exception to chart its relationship to federal questions. Part I explores the development of the exception, with particular attention to the Supreme Court’s recent grounding of the exception in the rule that one court’s assertion of in rem jurisdiction can preclude another’s.\textsuperscript{12} Part II canvasses the lower court decisions that have followed that explanation. Those decisions show uncertainty over what the “prior exclusive jurisdiction” doctrine means in general, and what it means for federal question cases in particular. To address that uncertainty, Part III draws on connections between in rem jurisdiction and judgments to conclude that the prior exclusive jurisdiction doctrine is a rule of common law about the federal judicial power. Unless displaced by legislation, then, the probate exception can properly limit federal jurisdiction even over federal questions. And, based on the available evidence, so it does.

I. INTRODUCING THE PROBATE EXCEPTION

The probate exception, along with its cousin the domestic relations exception,\textsuperscript{13} breaks the rule that a federal court with jurisdiction over a case has a “virtually unflagging obligation” to hear it.\textsuperscript{14} The probate exception allows that obligation to lapse when a case implicates probate of a will or administration of a decedent’s estate.\textsuperscript{15} Just how closely a case must be related to such matters, however, is a question that has received varying answers over the years, with the Supreme Court lately expressing a dim view of exemptions from the unflagging obligation.\textsuperscript{16} This Part focuses accordingly on the Supreme Court’s most recent articulation of the exception in the case \textit{Marshall v. Marshall}.\textsuperscript{17} But first,

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\textsuperscript{11} \textit{Marshall}, 547 U.S. at 299.
\textsuperscript{12} See id. at 311. As will be explained, it is not always obvious what counts as in rem jurisdiction for purposes of this rule. The general principle, however, is that a court with jurisdiction over the person of a defendant can render a judgment in personam binding the defendant personally, while a court with jurisdiction over property can render a judgment in rem establishing rights in that property (or res) against the world, or a judgment quasi in rem establishing rights in the property against specific defendants. See \textit{Shaffer v. Heitner}, 433 U.S. 186, 199 & n.17 (1977). Probate of a will to establish its validity has thus been considered a proceeding in rem against a decedent’s estate. Lewis M. Simes, \textit{The Administration of a Decedent’s Estate as a Proceeding In Rem}, 43 MICH. L. REV. 675, 684–87 (1945). Other cases have presented quasi in rem claims to be satisfied out of estate property. E.g., \textit{Williams v. Benedict}, 49 U.S. (7th Cir. 2007). This Note groups these together as cases in rem.
\textsuperscript{13} See \textit{Struck v. Cook Cnty. Pub. Guardian}, 508 F.3d 858, 859 (7th Cir. 2007). The domestic relations exception limits federal jurisdiction over matters such as divorce and child custody. \textit{Id}.
\textsuperscript{15} \textit{Marshall}, 547 U.S. at 311–12.
\textsuperscript{17} 547 U.S. 293.
\end{footnotesize}
a quick journey through this garden of forking paths reveals a few other ways the probate exception might have worked out.

One of those untaken paths involves Article III’s limits on the exercise of “[t]he judicial Power.” Article III justiciability requires “a concrete, living contest between adversaries.” Yet proceedings in probate can be “uncontested.” For instance, a will may be admitted to probate or an administrator appointed without contest. This motivated some nineteenth-century decisions to refuse jurisdiction over probate matters. But the substance of those decisions is the unremarkable conclusion that such matters are beyond Article III’s boundaries only if no case or controversy is presented, not that they are nonjusticiable as a matter of course.

Another untaken path views the probate exception as a means of enforcing federalism. In this telling, the particular state interest in decedents’ estates keeps probate in state courts. It is not obvious how. One opinion linked such concerns to Article III, distinguishing probate proceedings in the federal courts of the District of Columbia from those in courts restrained by “those limitations implicit in the rubric ‘case or controversy’ that spring from the Framers’ anxiety not to intrude unduly upon the general jurisdiction of state courts.” Perhaps because this theory would entail “Cases” and “Controversies” meaning different things in different settings, it has had limited purchase, although a similar account has been offered under the auspices of the Tenth Amendment.

A. Congressional Acquiescence

The canonical account instead relates the exception to language that appears in both the Federal Constitution and the Judiciary Act of 1789. Both Article III of the Constitution and the initial version of

18 U.S. CONST. art. III, § 2.
21 E.g., Ellis v. Davis, 109 U.S. 485, 497 (1883); Gaines v. Fuentes, 92 U.S. 10, 21 (1876).
22 Ellis, 109 U.S. at 496–97; see Gaines, 92 U.S. at 17, 22 (interpreting the jurisdictional limit as statutory).
26 See McCan v. First Nat’l Bank of Portland, 139 F. Supp. 224, 228 (D. Or. 1954), aff’d, 229 F.2d 859 (9th Cir. 1956).
the diversity statute in the Judiciary Act\textsuperscript{30} provided for jurisdiction in cases of “Law” and “Equity.” Because the ecclesiastical courts in England had a separate jurisdiction from law or equity, the story goes that this phrasing must have excluded the business of the ecclesiastical courts.\textsuperscript{31} And within the ecclesiastical jurisdiction were such matters as marriage and its incidents — hence the domestic relations exception — and the probate of wills.\textsuperscript{32}

But that story has gaps. Exclusive ecclesiastical jurisdiction over probate was limited to personal property.\textsuperscript{33} Real property descended without probate, so rights in such property were tried at law or established in chancery.\textsuperscript{34} Chancery could also administer estates or intervene to provide its special procedures and remedies.\textsuperscript{35} All this filtered unevenly into colonial rules,\textsuperscript{36} so even early decisions recognized the challenges in analogizing to English practice.\textsuperscript{37} Those early decisions also mostly framed the issue in terms of collateral attack on probate court judgments.\textsuperscript{38} And as territorial courts were established, the Supreme Court heard appeals from their decisions in what would have been the ecclesiastical jurisdiction.\textsuperscript{39}

This history makes it difficult to attribute the probate exception to the exclusion of ecclesiastical jurisdiction from the language of the Constitution or the Judiciary Act. The challenges are intensified by the fact that in 1948, the key jurisdictional statutes were restated to give the

\textsuperscript{30} Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79.
\textsuperscript{31} Nicolas, supra note 28, at 1500. Another explanation is that such matters are not Article III cases or controversies as a result. See Rice v. Rice Found., 610 F.2d 471, 475 n.6 (7th Cir. 1980). In any case, a thoroughly textualist approach may be anachronistic given the weight of received English practice. See Gaines v. Fuentes, 92 U.S. 10, 24 (1876) (Bradley, J., dissenting). One early decision on the probate exception simply ascribed it to “the common law.” Armstrong v. Lear, 25 U.S. (12 Wheat.) 169, 175 (1827) (Story, J.). Armstrong, incidentally, involved the estate of General Tadeusz Kościuszko, whose executor seems to have considered heading to federal court in light of government money owing to the estate. See Letter of Thomas Jefferson to William H. Crawford (Jan. 5, 1818), in 12 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 319, 319 (J. Jefferson Looney ed., 2015). (The will ended up in the Orphan’s Court of the District of Columbia, where Armstrong remanded it for probate. 25 U.S. (12 Wheat.) at 176.)
\textsuperscript{32} Pfander & Downey, supra note 20, at 1544–45.
\textsuperscript{33} Nicolas, supra note 28, at 1503–04, 1509.
\textsuperscript{34} Id. at 1504–05.
\textsuperscript{35} Id. at 1505–06, 1509–10, 1509 n.169; Pfander & Downey, supra note 20, at 1568.
\textsuperscript{39} See Simms v. Simms, 175 U.S. 162, 167–68 (1899); De la Rama v. De la Rama, 201 U.S. 303, 308 (1906).
federal district courts jurisdiction over "all civil actions," leaving little obvious statutory basis for excluding ecclesiastical matters in any case.

Perhaps taking advantage of the fact that the precedents did not inquire too far into the foundations of the exception, recent cases have worked toward resolving these tensions at least as a matter of doctrine. The theory is now that Congress has acquiesced in judicial decisions applying the probate exception, putting the exception on statutory footing. In *Ankenbradt v. Richards*, the Court thus located the domestic relations exception in "Congress' apparent acceptance of the construction of the diversity jurisdiction provisions in the years prior to 1948." The Supreme Court's most recent decision on the probate exception, *Marshall v. Marshall*, left this theory intact as an explanation for the probate exception too.

**B. "Jurisdiction over the Same Res"**

*Marshall* also linked the probate exception to the doctrine of prior exclusive jurisdiction. That rule says "that, when one court is exercising *in rem* jurisdiction over a *res* such as a decedent's estate, "a second court will not assume *in rem* jurisdiction over the same *res." This rule seems to have been shaped by a problem particular to the federal system, although it had English antecedents. The problem is that a levy requires possession. If state and federal process were to result in simultaneous levies, both the sheriff and the marshal might need to possess the property at the same time. Such a result might also draw into

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41 See, e.g., *Fouvergne*, 59 U.S. (18 How.) at 473; *Byers v. McAuley*, 149 U.S. 608, 619 (1893); *Sutton v. English*, 246 U.S. 199, 205 (1918). At least one decision implied that the exception was statutory. See *Nicolas*, supra note 28, at 1522–24 (citing Gaines v. Fuentes, 93 U.S. 10, 19–20 (1876)).

42 "Acquiescence" can mean that Congress has accepted an interpretation of a statute by failing to respond, rather than that it has actively adopted such an interpretation by reenacting legislation. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988). This Note uses the term broadly.


44 Id. at 700.


46 Id. at 305–08 (reviewing *Ankenbradt* at length and stating that "[l]ike the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789," id. at 308).

47 Id. at 311–12.

48 Id. at 311. Probate and estate administration, although listed separately from "disposition of property" in *Marshall*, id. at 312, are plausibly within the scope of this principle. Compare *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 106 (2d Cir. 2007) (alluding to this distinction), with *Princess Lida v. Thompson*, 305 U.S. 456, 467–68 (1939) (finding administration of a trust to implicate control of the trust res).

49 These concerned the effect given foreign judgments in prize cases when admiralty jurisdiction was understood as "co-ordinate throughout the world." *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 435 (1808) (opinion of Johnson, J.); see also id. at 437–41 (opinion of Washington, J.).

question the title passed at sale.51 Accordingly, it was found that a marshal’s levy could not displace a sheriff’s and vice versa.52 To explain these necessary results, the theory was advanced that a state or federal court’s in rem jurisdiction would exclude a subsequent jurisdiction over the same res by the other sovereign’s courts.53

Looming in the background of these decisions was the prospect of “an unpleasant conflict between courts of separate and independent jurisdiction”54 — a conflict which, at least initially, it was not clear the federal courts would win.55 Accordingly, one early case allowed state court jurisdiction over estate assets to limit a federal judgment on a debt against the estate’s administrator.56 The principle was then extended to unravel a judicial sale on the basis that “it would be strange indeed if State power was not competent to regulate the mode in which the assets of a deceased person should be sold and distributed.”57 It was even reasoned that a federal court sitting in equity could not “take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum,” by rendering a decree binding the administrator to a certain distribution of assets.58

For the most part, however, conflicting control of property could have only limited relevance within equity’s in personam jurisdiction.59 Whenever state law allowed a controversy between parties to proceed in equity, federal courts could thus hear it, even if probate was implicated.60 By the twentieth century, federal courts were permitted to hear any “controversies inter partes” maintainable in state court,61 including

55 Williams v. Benedict, 49 U.S. (8 How.) 107, 112 (1850); see Covell, 111 U.S. at 182; Lake St. Elevated, 177 U.S. at 61. For instance, one court might replevy property seized under judicial process from the custody of another. See Peck, 48 U.S. (7 How.) at 625; see also Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 9–10 (1817).
56 See Lane v. Vick, 44 U.S. (3 How.) 404, 482 (1845) (McKinley, J., dissenting).
57 Williams, 49 U.S. (8 How.) at 111–12.
58 Yonley v. Lavender, 88 U.S. (21 Wall.) 276, 280 (1875); see id. at 279, 281.
decrees effectively awarding a share in an estate, so long as “the prior possession of the state probate court” was not disturbed.63

For several decades, the key case navigating these opposing sets of precedents after the merger of law and equity was Markham v. Allen.64 The decedent devised property to German residents during the Second World War.65 At probate, heirs moved to set aside the will, but a federal declaratory judgment action was brought by a custodian under a wartime law who maintained that the estate belonged to the government.66 The Court held that a decree would merely establish the custodian’s rights in the estate alongside other claims, and would “not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.”67 This became the rule. Its phrasing, however, caused uncertainty about just how much “interfer[ing] with the probate proceedings” would bring the probate exception into issue.68

It was to such uncertainty that the Supreme Court addressed its decision in Marshall. The petitioner Vickie Lynn Marshall, widely known as Anna Nicole Smith, was the widow of a man who had not provided for her in his will.69 During probate, Marshall filed for bankruptcy.70 A dispute ensued in the bankruptcy court involving a defamation claim by her stepson,71 to which Marshall responded that the stepson had tortiously interfered with an expected gift from her husband.72 On this basis she was awarded compensatory and punitive damages, but the Ninth Circuit reversed, reasoning that claims about tortious interference with a testamentary gift were best left for probate courts.73

Not so, said the Supreme Court. The Court explained that Markham’s language about “interference” simply reflected “the general principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res.”74 Accordingly, the Court said, federal courts could not probate or annul a will, administer an estate, or “dispose of property that is in the custody of a state probate court.”75 But Marshall’s tort claim involved none of these, so she was entitled to a proper federal forum.76

64 326 U.S. 490 (1946).
65 Id. at 492.
66 Id.
67 Id. at 494.
68 Nicolas, supra note 28, at 1488; Graves, supra note 7, at 1645.
70 Id.
71 Id. at 300–01.
72 Id. at 301.
73 Id. at 304.
74 Id. at 311.
75 Id. at 312; see also id. at 311.
76 Id. at 312.
II. THE EXCEPTION TODAY

This Part explores what Marshall’s restatement of the probate exception has meant for the exception in general, and what it has meant for claims under federal law in particular. After Marshall, the lower courts have continued to struggle to discern the scope of the exception. Such ambiguity, together with a paucity of case law, has made it hard to tell how the exception relates to federal questions. Although the decisions provide some guideposts, it is not so clear where those guideposts lead.

A. Markham’s Resilience

When it replaced Markham’s interference standard with the prior exclusive jurisdiction rule, Marshall specified the activities “reserve[d] to state probate courts”: probate of a will, annulment of a will, administration of an estate, and distribution of property in a probate court’s custody. When the lower courts have needed to fix the boundaries of these categories, however, Markham’s notion of interference has at times seemed to exert a tacit influence.

For instance, some decisions have characterized in personam remedies as distributions of estate property. The easy cases are constructive trusts and equitable liens on specific estate assets, since, third parties aside, such equitable rights can bear a close resemblance to legal ones. The harder cases involve causes of action that turn on property rights, such as conversion, and remedies that happen to diminish the probate estate. The Second Circuit thus viewed relief for conversion and unjust enrichment as “disgorgement of funds . . . under the control of the Probate Court.” The Third Circuit likewise considered an injunction to pay future dividends “dispos[ing] of property . . . in the custody of a state probate court.” The Eleventh Circuit even suggested that a damages remedy could trigger the probate exception simply by running against a decedent’s estate.

Alternatively, courts may frame remedies involving the valuation of estate property as estate administration. This can happen when a
plaintiff asks for an accounting. In one case, Judge Posner described the prior exclusive jurisdiction forbidding the “premature distribution or valuation of estate assets,” “look[ed] past the plaintiff’s theory of relief and consider[ed] the ‘effect a judgment would have on the jurisdiction of the probate court,’” and decided that an accounting would usurp the probate court’s role. The Sixth Circuit framed the problem in terms of prior in rem jurisdiction and stated that relief for fiduciary breach or fraud could not include damages “equal to the amount of the probate disbursements” because that “would be tantamount to setting aside the will.”

Finally, some courts have simply carried on with probate exception purposivism. Before Marshall, the Seventh Circuit had a notably open-textured approach to the probate exception. After Marshall, it still does. In one case, Judge Posner described the prior exclusive jurisdiction rule and added that “[t]he purpose of a legal doctrine frequently limits its scope,” such as “[t]he comparative advantage of state courts “in core probate and domestic-relations matters.”

And yet, other decisions stick closely to Marshall. Its test has proven easier to apply to inter vivos transfers that do not involve estate assets. The fact that a claim does involve such assets is not always enough to trigger the exception either. A few decisions have even read Marshall for all it might be worth. The Fifth Circuit allowed an injunction forbidding participation in probate proceedings. The Eighth Circuit approved a constructive trust on estate property.

85 Stuart, 75 F. App’x at 809 (quoting Turton v. Turton, 644 F.2d 344, 347–48 (5th Cir. 1981)); see also id. at 810.
86 Wisecarver v. Moore, 480 F.3d 747, 751 (6th Cir. 2007).
87 Id. at 750 n.1.
88 See Nicolas, supra note 28, at 1490–91.
90 Struck v. Cook Cnty. Pub. Guardian, 508 F.3d 858, 860 (7th Cir. 2007). Struck involved the domestic relations exception, but the court analyzed the exceptions as coextensive. Id. at 859–60.
91 Even the more purposive decisions state that Marshall limited the exception. See, e.g., Three Keys Ltd. v. SR Util. Holding Co., 540 F.3d 220, 227 (3d Cir. 2008); Lefkowitz v. Bank of N.Y., 528 F.3d 102, 105–06 (2d Cir. 2007); see also Goncalves v. Rady Child.’s Hosp. San Diego, 865 F.3d 1237, 1252 (9th Cir. 2017).
92 See Kinder Morgan, Inc. v. Crout, 814 F. App’x 811, 816 (5th Cir. 2020); Osborn v. Griffin, 865 F.3d 417, 435 (6th Cir. 2017); Curtis v. Brunsting, 704 F.3d 406, 409–10 (5th Cir. 2013); Gustafson v. zumBrunnen, 546 F.3d 398, 400 (7th Cir. 2008); Lee Graham Shopping Ctr., LLC v. Est. of Kirsch, 777 F.3d 678, 681, 683 (4th Cir. 2015). But see Oliver v. Hines, 943 F. Supp. 2d 634, 637 & n.11 (E.D. Va. 2013).
93 See Glassie v. Doucette, 55 F.4th 58, 68–69 (1st Cir. 2022).
94 Hill v. Washburne, 953 F.3d 296, 301, 308 n.6 (5th Cir. 2020) (per curiam).
95 Crain v. Crain, 72 F.4th 269, 277 (8th Cir. 2023); see Chevalier v. Est. of Barnhart, 803 F.3d 789, 802 (6th Cir. 2015).
Circuit permitted jurisdiction over a claim against an estate.96 Taken together, then, the decisions are in some degree of disarray.97

B. Federal Questions and the Exception

With the probate exception itself so difficult to discern, it is unsurprising that there is little clarity on how the exception applies in federal question cases — even if it is often called “the probate exception to diversity jurisdiction.”98 As a sketch of the landscape, this section describes decisions under the bankruptcy code, the civil rights laws, the Employee Retirement Income Security Act of 197499 (ERISA), and RICO. Grouping these cases together is appropriate in part because key cases speak generically about the probate exception’s relationship to “federal questions” even when jurisdictional provisions other than 28 U.S.C. § 1331 seem relevant.100 Many of the decisions have apparently assumed that the probate exception applies in such cases, but several have reached the opposite conclusion. Rarely, however, is the question pondered in depth.101

1. Bankruptcy. — Bankruptcy and probate sometimes intersect, since both bankruptcy and probate courts work in rem to match claims to a division of property,102 deciding adversarial controversies along the way.103 One example is Marshall, although in reasoning that the probate exception did not apply, the Court left open whether it could have applied to another bankruptcy claim.104 Harris v. Zion’s Savings Bank & Trust Co.105 makes for better illustration. The decedent had filed for bankruptcy, and the petitioner was her administrator.106 After abatement of the bankruptcy proceedings because of the decedent’s passing, the bank foreclosed on and purchased real property of the decedent’s.107 During a redemption period extending after the sale, the

96 Dunlap v. Nielsen, 771 F. App’x 846, 850–51 (10th Cir. 2019).
97 See Silk v. Bond, 65 F.4th 445, 455 & n.12 (9th Cir. 2023); Glassie, 55 F.4th at 68.
100 See infra notes 155–56 and accompanying text.
101 In relevant cases, the Supreme Court has found either that federal and state rights are not in conflict, Harris v. Zion’s Sav. Bank & Tr. Co., 317 U.S. 447, 451 (1943); Pufahl v. Est. of Parks, 299 U.S. 217, 224–27, 232 (1936), or that any such conflict falls outside the probate exception, Marshall, 547 U.S. at 308; Markham v. Allen, 326 U.S. 490, 494–95 (1946).
105 317 U.S. 447.
106 Id. at 448.
107 Id.
administrator — without authority from Utah’s probate code, but with a then-colorable basis in the Bankruptcy Act — asked the bankruptcy court to resume proceedings. It declined. The question was thus whether federal bankruptcy law superseded state probate law. The Court answered:

When we reflect that the settlement and distribution of decedents’ estates, and the right to succeed to the ownership of realty and personality are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction . . . consistent with these principles. . . . Congress has extended the benefits of the act only to administrators who can lawfully elect to avail of them. Thus conflict between federal and state power is avoided and the two are accommodated.

Other bankruptcy cases have steered clear of federal-state tension too. In the case In re Goerg, considering whether an estate could be a debtor in bankruptcy, the Eleventh Circuit cited ecclesiastical jurisdiction and the Supremacy Clause to explain that the probate exception did not apply to federal question cases, and then avoided the issue by statutory interpretation anyway. After Marshall, claims characterized as in personam may avoid the probate exception in similar fashion.

Sometimes, however, conflict is unavoidable. When that happens, Goerg is the primary authority for the proposition that the probate exception does not apply in bankruptcy. On the other side is the Ninth Circuit’s Marshall opinion, which reasoned that the probate exception could apply based in part on the fact that the Supreme Court had not foreclosed the possibility in Harris or Markham, and in part on the principle that a bankruptcy case might “interfere[] with state probate proceedings” no less than one in diversity. One post-Marshall decision reframed this reasoning in terms of prior in rem jurisdiction: a probate court and a bankruptcy court, it explained, are in a “race to the res.”

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108 Id. at 448–49.
109 Id. at 449.
110 Id. at 450.
111 Id. at 450–51 (emphasis added).
112 E.g., In re Ring, 138 F. App’x 834, 836–37 (7th Cir. 2005); see also Marshall v. Marshall, 547 U.S. 293, 309 n.3 (2006).
113 Goerg v. Parungao (In re Goerg), 844 F.2d 1562 (11th Cir. 1988).
114 Id. at 1563, 1565–66, 1565 n.8.
117 In re Est. of Taplin, 641 B.R. 236, 244 (Bankr. E.D. Cal. 2022); see also Pufahl v. Est. of Parks, 299 U.S. 217, 226 (1936) (“[O]ne having a right to go into the federal court, either by reason of
2. **Section 1983.** — The probate exception can also overlap with claims under 42 U.S.C. § 1983 to redress deprivations of federal rights by state officials. Even if this provision might lend itself to a second try at probate, one might still think that putting federal constitutional rights at stake would weigh against the probate exception. Yet the opposite has happened. The courts of appeals have instead applied the exception to shunt § 1983 claims into summary dispositions.\(^{119}\)

Apart from *Goerg* and the Ninth Circuit’s *Marshall* decision, this context provides two of the key opinions on whether the probate exception applies to federal claims. Both said it did. The first, *Tonti v. Petropoulous*,\(^ {120}\) predated *Marshall*. Slightly simplifying, the probate court determined that the decedent, and not the appellant, owned certain stock.\(^ {121}\) Various appeals ensued in which the appellant alleged deprivation of his due process rights.\(^ {122}\) When it was the Sixth Circuit’s turn to review these claims, the court said, “[i]t is well settled that the federal courts have no probate jurisdiction,” cited thirteen cases, and affirmed.\(^ {123}\)

After *Marshall*, the Seventh Circuit considered the similar case of *Jones v. Brennan*.\(^ {124}\) The plaintiff alleged that the defendants, who included probate judges and county officials, “conspired to deprive her of property without due process of law,” for example by the probate judges’ receipt of *ex parte* communications.\(^ {125}\) She sought damages.\(^ {126}\) In considering whether the probate exception applied, Judge Posner described the origins of the exception in the diversity provisions of the Judiciary Act of 1789, explained that its logic applied equally to the federal question statute, and remanded the due process claims accordingly.\(^ {127}\)

\[^{118}\] See, e.g., *Jones v. Brennan*, 465 F.3d 304, 305 (7th Cir. 2006) (considering such an argument).


\[^{120}\] 656 F.2d 212 (6th Cir. 1981).

\[^{121}\] Id. at 213–14.

\[^{122}\] Id. at 215.

\[^{123}\] Id.; see also id. at 215–16.

\[^{124}\] 465 F.3d 304 (7th Cir. 2006).

\[^{125}\] Id. at 305.

\[^{126}\] Id.

\[^{127}\] Id. at 306–09 (citing Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79).
Other § 1983 appeals have been more summarily dispatched by the probate exception. In this there are hints of misgivings about what Tonti described as "misuse of 42 U.S.C. § 1983 in an attempt to obtain federal jurisdiction," but perhaps there is also something ironic about due process claims receiving especially abbreviated review. Either way, for the probate exception to apply to these claims sounding in constitutional rights suggests that it must be powerful indeed.

3. **ERISA and RICO.** — Other federal statutes can also implicate the probate exception. In ERISA cases, the exception can depend on whether employee benefits are part of a decedent’s estate. When money has already been paid into the estate, federal courts may decline to order its redistribution. Conversely, when benefits are payable to third parties, beneficiaries may sue for their payment, or the plan administrator may bring an interpleader action to determine the beneficiaries, and in such cases the benefits may not be considered part of the estate. ERISA cases can also present ambiguities about whether formally in personam remedies like equitable reimbursement are in rem in substance.

RICO claims present similar issues. The gravamen of RICO claims may resemble the tortious interference alleged in *Marshall*, and perhaps for that reason some courts have allowed jurisdiction over such claims. Nonetheless, a court applying a broader approach to the probate exception may find that it cannot grant certain types of relief. Conversely, the Eleventh Circuit, following its restrictive approach in *Goerg*, has described the exception as inapplicable in such cases. These decisions suggest an “equilibrium adjustment” quality of the probate exception. Wealth increasingly passes by nonprobate means

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128 E.g., Profita v. Andersen, 771 F. App’x 414, 414 (9th Cir. 2019); Sibley v. Sibley, No. 11-7051, 2011 WL 4920555, at *1 (D.C. Cir. Sept. 27, 2011) (per curiam); Huber-Happy v. Est. of Rankin, 233 F. App’x 789, 789 (10th Cir. 2007).
132 Id. § 1132(a)(3).
135 See Gherini v. Lagomarsino, 258 F. App’x 81, 83 (9th Cir. 2007); Rothberg v. Marger, No. 11-5457, 2013 WL 1314690, at *9 (D.N.J. Mar. 28, 2013).
136 Rothberg, 2013 WL 1314690, at *8 & n.4.
such as the employee benefits governed by ERISA. Claims under RICO, like those under § 1983, may sometimes be repackaged complaints about maladministration. Dismissing such claims even when they are only incidentally connected to probate might be justified as preserving a traditional domain of the states from unwarranted erosion by new federal rights. But whether federal courts are authorized to ward off such encroachment is another question entirely.

III. MAKING SENSE OF MARSHALL

In navigating the conflicting and ambiguous views of the probate exception in the courts of appeals, Marshall suggests looking to congressional acquiescence and to the prior exclusive jurisdiction rule. Both imply that the probate exception applies to at least some federal questions. Both also imply that Congress can limit the exception. Yet it matters which of these theories one credits, given the separation of powers concerns raised when courts deny a federal forum to causes of action afforded by Congress. For its part, Marshall showed more enthusiasm for the prior jurisdiction rule than for its ostensible statutory basis. This Part considers accordingly whether the rule can stand on its own in federal question cases as a principle of common law.

A. Congressional Acquiescence

Marshall ambiguously endorsed Ankenbrandt’s acquiescence theory. But that theory’s implications for federal questions are unclear. The problem is that Ankenbrandt traced the domestic relations and, by implication, the probate exceptions to congressional acquiescence in judicial construction of the Judiciary Act of 1789, but there was no grant of general federal question jurisdiction in that Act.

Judge Posner addressed this problem in Jones. The key, he said, was the use of identical “law” and “equity” language to confer federal question jurisdiction in the Judiciary Act of 1875 — “by which time the probate and especially the domestic-relations exceptions had become established in the case law.” The most logical result, in his view, was “that the exceptions were probably intended to apply to federal-question

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140 See, e.g., Glassie v. Doucette, 559 F. Supp. 3d 52, 60 n.13 (D.R.I. 2021) (“The defendants maintain that the inclusion of a RICO count in the Complaint is a transparent attempt to remove the case from the probate exception.”), rev’d, 55 F.4th 58 (1st Cir. 2022).
141 See, e.g., Kinder Morgan, Inc. v. Crout, 814 F. App’x 811, 815 (5th Cir. 2020) (per curiam) (suggesting doubts about the application of the probate exception to federal questions).
cases too.146 Both the diversity and federal question statutes were re-

\[\text{stated in 1948 to give federal district courts jurisdiction in “all civil ac-

\text{tions” — into which language Ankenbrandt interpreted congressional ac-

\text{quiescence — and Judge Posner found “no good reason to strain to}

give a different meaning to” that “identical language.”147}

The rebuttal argument has been advanced most fully in domestic
relations cases. In fact, the probate and domestic relations exceptions
may be diverging on this point.148 Several courts of appeals have viewed
the domestic relations exception as inapplicable in federal question
cases.149 One factor may be that federal constitutional rights “permeate
state family law.”150 The decisions also, however, cite Ankenbrandt’s
focus on the diversity statute, suggesting that its reasoning “plainly does
not apply to” the federal question statute.151 If they are correct, Mar-
shall’s acceptance of Ankenbrandt’s reasoning could imply a similar
result for the probate exception.

Yet Ankenbrandt’s reasoning seems to go just as far in federal ques-
tion cases. Although Ankenbrandt indeed focused on diversity juris-
diction, the process of acquiescence it described included the diversity
provision’s reenactment in 1875 alongside the new federal question pro-

\[\text{vision. And the phrase “all suits of a civil nature at common law or}
\text{in equity” appeared in the 1875 Act, modified first by the federal question
\text{provision and then by the diversity provision.153 To be sure, Congress could at that point have legislated against only the limi-
\text{ted background of a probate exception defined through diversity
\text{cases. But for its acquiescence in the exception to extend no further
\text{would either give language in the 1875 Act two meanings at once or cut its
meaning loose from the text altogether — results at odds with an
interpretation of the probate exception tied to that same text.}

146 Id.
147 Id.
148 Such a statement is necessarily tentative, given the few decisions in point on the probate
exception.
149 E.g., Atwood v. Fort Peck Tribal Ct. Assiniboine, 513 F.3d 943, 947 (9th Cir. 2008); United
States v. Bailey, 115 F.3d 1222, 1231 (9th Cir. 1997); United States v. Johnson, 114 F.3d 476, 481
(4th Cir. 1997); Flood v. Braaten, 727 F.2d 303, 308 (3d Cir. 1984); see Deem v. DiMella-Deem, 941
F.3d 618, 623–24 (2d Cir. 2019) (finding the exception inapplicable but supporting abstention in

\text{such cases). But see Kowalski v. Boliker, 893 F.3d 987, 995 (7th Cir. 2018) (taking a contrary view);
Silverman, supra note 7, at 1382–85 (describing inconsistencies in the case law); Meredith Johnson
150 Flood, 727 F.2d at 307 n.17. Another factor may be federal legislation in the area. See id. at
304–05.
151 Atwood, 513 F.3d at 947; see Bailey, 115 F.3d at 1231; Johnson, 114 F.3d at 481.
152 See Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). Notably, the decision referred to
“interpretation of the prior statutes” to 1948. Id. (emphasis added).
154 See Winkler, supra note 7, at 114 & n.201. But see Peter J. Smith, Textualism and Jurisdiction,
in a “larger pattern” of jurisdictional narrowing).
The analysis to this point centers on 28 U.S.C. § 1331 despite the other jurisdictional provisions for claims under federal law. Key decisions have disregarded these provisions and treated “federal questions” in unison,\(^{155}\) perhaps because only § 1331 jurisdiction has been pleaded\(^{156}\) or perhaps because the decisions have really turned on general policy considerations. Nonetheless, Ankenbrandt could imply that legislative acquiescence has incorporated the probate exception into these statutes too.

For instance, Ankenbrandt’s reasoning could translate to bankruptcy. The Bankruptcy Act of 1898\(^ {157} \) conferred jurisdiction on the district courts “at law and in equity” before 1948,\(^ {158} \) plausibly excluding probate jurisdiction by mirroring the diversity and federal question provisions.\(^ {159} \) At least one appellate decision arguably read the exception into this language.\(^ {160} \) Although bankruptcy jurisdiction has expanded over the years,\(^ {161} \) legislative history suggests that jurisdiction over claims “related to” bankruptcy may not have been intended to reach probate proceedings.\(^ {162} \) To the extent that such an interpretation relies on presumptions, however, it must contend with the enumerated status of the bankruptcy power.\(^ {163} \)

Other cases are closer still. The 1871 text of the Civil Rights Act referred to liability “in any action at law, suit in equity, or other proper proceeding for redress.”\(^ {164} \) The 1874 revisions preserved this broad language\(^ {165} \) but added a jurisdictional grant over “suits at law or in equity,”\(^ {166} \) followed by the usual streamlining in 1948.\(^ {167} \) RICO also


\(^{156}\) Cf. Aldinger v. Howard, 427 U.S. 1, 1 n.3 (1976).

\(^{157}\) Act of July 1, 1898, ch. 541, 30 Stat. 544.


\(^{159}\) Cf. United States v. Freeman, 44 U.S. (7 How.) 556, 564–65 (1845).


\(^{166}\) 13 Rev. Stat. § 563(16) (1874) (granting district courts jurisdiction “[o]f all suits at law or in equity authorized by law”); see also id. § 629(16) (granting circuit courts jurisdiction “[o]f all suits authorized by law”).

approaches the fault lines of prior exclusive jurisdiction in a provision that authorizes jurisdiction over claims for disgorgement of unlawfully obtained assets.168 Statutory interpleader has been understood to avoid the exception altogether.169

In suggesting a statutory basis for the probate exception even in such close cases, Marshall may have inadvertently helped to secure it. The decision avoided describing the doctrine as prudential or as a rule of abstention, mitigating the constitutional questions raised by such jurisdictional limits170 and guarding against reversal in the process.171 Moreover, statements in nineteenth-century cases abjuring any “probate jurisdiction” whatsoever172 can be read to sweep more broadly than the prior exclusive jurisdiction rule — and it seems plausible, on the theory of Ankenbrandt, that Congress has acquiesced in those understandings too.

At the same time, such acquiescence seems particularly unlikely when Congress has clearly intended broad extensions of federal rights, whether that is expressed in the jurisdictional provisions themselves, as with claims related to bankruptcy, or in grants of rights and remedies, as with § 1983.173 Perhaps the probate exception is still in the background of such enactments. But at some point, such an interpretation seems to trade on legislative authority without much support in actual legislation.

**B. “Jurisdiction over the Same Res”**

Facing such uncertainties, this section turns to Marshall’s second guidepost, the prior exclusive jurisdiction rule. That rule may bring federal questions within the sweep of the probate exception, since federal jurisdiction over a res could be incompatible with prior state jurisdiction whether the federal court is deciding claims based on federal or state law.174 There is authority for limiting the rule to diversity cases, but the distinction often goes unexplained.175

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174 *See supra* notes 116–17 and accompanying text; *see also, e.g.*, Dailey v. Nat’l Hockey League, 987 F.2d 172, 178 (3d Cir. 1993).

175 *See supra* note 117; Covell v. Heyman, 111 U.S. 176, 179–80 (1884) (“[T]he same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those
One explanation for the narrower view could involve a choice of law issue related to the challenge of distinguishing in rem from in personam jurisdiction.176 If the scope of the res or the types of claims barred by its custody are substantive questions under "Erie,"177 then perhaps the probate exception simply reflects federal courts applying state law about the probate court’s exclusive jurisdiction.178 And then, the exception’s rationale might run out in the federal question context. Although much of the probate exception case law predates "Erie," the doctrine’s themes were foreshadowed in a line of cases concerning the federal courts’ construction of wills179 and in a case that registered concerns about inequitable administration of the laws.180

This explanation, however, is at odds with "Marshall’s" emphasis that the probate exception was not up to the states to define through probate procedure or the law of decedents’ estates.181 Although "Marshall" was not itself a diversity case, its concern about letting the states expand or contract federal jurisdiction implied that the exception was more than an application of substantive rules of decision under "Erie."182 That implication lines up with the lower courts’ general view that the exception can bar equitable remedies, which "Erie" doctrine leaves to federal law even in diversity cases.183

But unmooring the scope of exclusive jurisdiction from state law, and making it a federal matter instead, leaves it without an obvious basis in positive law and raises the separation of powers questions that

cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.”). "Cowell" perhaps had in mind a state court whose assertion of jurisdiction “interfer[ed] with the authority of the United States." Cf. Tarble’s Case, 80 U.S. (13 Wall.) 397, 404 (1872).

176 See, e.g., Three Keys Ltd. v. SR Util. Holding Co., 540 F.3d 220, 229 & n.9 (3d Cir. 2008) (“[T]he distinction between in rem and in personam is often as elusive as the boundary lines of the probate exception.”).

177 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

178 See Yonley v. Lavender, 88 U.S. (21 Wall.) 276, 279–80 (1875); Williamson v. Berry, 49 U.S. (8 How.) 495, 558 (1850) (Nelson, J., dissenting); McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988); Winkler, supra note 7, at 131 & n.290; Nicholas, supra note 28, at 1541; see also Pflander & Downey, supra note 20, at 1538–59.


180 Yonley, 88 U.S. (21 Wall.) at 280 (rejecting a rule that would apply differently “to the fortunate creditor who happens to be a citizen of another State”).


have clouded the abstention doctrines. 184 It seems to let federal courts dismiss claims that, as Marshall pointed out, Congress has required them to hear. 185 Furthermore, federal rights are often in personam, 186 so as a practical matter this less formalistic approach may expand the probate exception in federal question cases. Steering between the Scylla of the states controlling the federal courts and the Charybdis of the courts’ obligation to exercise jurisdiction, it is no wonder that even decisions faithfully applying Marshall for the moment have left open the option to interpret it less precisely in the future. 187

This tension explains why Marshall left intact Ankenbrandt’s recourse to legislative imprimatur. 188 If Congress has truly established the probate exception by statute — incorporating it by acquiescence into Title 28 of the U.S. Code — then these problems are much diminished, since Congress may limit to some extent the jurisdiction and remedial powers of the federal courts. 189 Yet as described above, in this instance it is not clear that such an interpretation is a reasonable one.

One solution to this dilemma might involve justifying the probate exception as a doctrine of federal common law. Perhaps the probate exception is “procedural,” not necessarily in the Erie sense 190 but in the sense that it relates so closely to the federal judicial power that Article III licenses federal courts to formulate independent common law in the area. 191 Instead of Congress adopting the probate exception by acquiescence, the theory would be that Congress has left this federal matter to the federal courts. 192

Although this federal valence of the probate exception stands in contrast to the interests of the states often in focus in the decisions, the early cases on prior exclusive jurisdiction lend support to this view. Even as those opinions alluded to values such as stability and comity, they also suggested a basis for decision in the connection between jurisdiction and judgments. Jurisdiction to decide a case entails the ability to render a

185 Marshall, 547 U.S. at 298–99 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).
186 Even bankruptcy has been characterized this way. See Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction, 41 WM. & MARY L. REV. 743, 850–51 (2000).
187 See Silk v. Bond, 65 F.4th 445, 452 (9th Cir. 2023) (viewing contract claim keyed to estate’s value as in personam, but taking a substantive view of the distinction between in rem and in personam claims).
188 Cf. Fallon, supra note 184, at 850–51 (describing the tenuous statutory basis for some jurisdictional doctrines).
190 See Roberts, supra note 183, at 494 n.3.
judgment in the case. And the defining characteristic of in rem jurisdiction is the conclusiveness of its judgments on “the world.” But a race to a judgment in rem may cause uncertainty that precludes such conclusiveness. Whereas conflicting in personam obligations might be simpler to adjust, competing in rem cases risk vacuous judgments and hard-to-unwind title problems. In keeping a court from giving effect to its jurisdiction with a conclusive judgment, such a result would run counter to the decisional power inherent in Article III courts. One view might have it that in rem jurisdiction cannot exist under such circumstances at all.

The connection between jurisdiction and judgments helps to explain the metaphor of a probate court’s exclusive “custody” of an estate. The notion seems to beg the question of why such custody is exclusive in the first place. One answer could be that in rem jurisdiction requires the type of control over the res associated with possessory rights. That need for control is at odds with the prospect for conflict introduced by concurrent proceedings in rem. If the relevant feature of the probate court’s custody of the res is thus the power to make a conclusive disposition of rights in the res, then the way that the prior exclusive jurisdiction doctrine anticipates the conclusive effect of another court’s judgment might even classify it as a cousin of preclusion.

Whether federal in rem jurisdiction is possible may therefore turn on a relationship between state and federal judgments. And although the effect of state judgments is determined by state law under the federal full faith and credit statute, the effect of federal judgments is a matter of federal common law, unless Congress instructs otherwise. That is because “it is in the nature of the judicial power to determine its own boundaries.” When federal courts determine that they cannot give sufficient effect to their jurisdiction because of ongoing probate

194 E.g., In re Broderick’s Will, 88 U.S. (21 Wall.) 503, 509, 519 (1875).
202 Degnan, supra note 200, at 769.
proceedings, they seem to be doing just that — and thus interpreting the federal judicial power, a federal purview that is an appropriate subject for federal common law.203 This theory lets federal law determine the scope of federal judicial power, and it explains how jurisdiction can be absent when Congress has seemed to grant it.

Of course, the legitimacy of a common law of prior exclusive jurisdiction is a separate question from the content of that law. As a general matter, the analogy to preclusion suggests that federal courts might, for reasons of uniformity, look to state law as to the scope and nature of in rem probate jurisdiction, but that the “preclusive” effect of such jurisdiction on federal questions in federal courts might be a matter for those courts to decide.204 There might then be reasons other than Erie that could justify limiting the probate exception to diversity cases, such as the greater state interest in such cases (for instance, drawing from analogies to abstention205 or remedial discretion206). But those reasons seem unlikely to be keyed to the relationship between jurisdiction and effectiveness of judgments. To the extent that the probate exception is understood as a result of that relationship — and hence legitimated by it — it seems plausible for the “race to the res” to be triggered by competing state and federal in rem cases, regardless of whether the claims in those cases arise under federal or under state law.

To be sure, an important corollary to a common law theory of the probate exception is that Congress can displace it.207 In federal question cases, this seems particularly likely, for all the reasons noted above.208 Yet this is far from saying that Congress always acts to do so.209 After all, Congress may leave procedural common law in place as it legislates without ratifying it, and it may not be unreasonable to presume as

203 See Barrett, supra note 191, at 839–40.
205 See cases cited supra note 25.
208 Although Markham can be read to suggest that the grant of a federal right displaces the exception, the Trading with the Enemy Act provided particularly broad jurisdiction for its enforcement. See Markham, 326 U.S. at 495–96 (citing Act of Oct. 6, 1917, ch. 106, § 17, 40 Stat. 411, 425 (codified at 50 U.S.C. § 4316)).
much. Moreover, the reasonable place to situate considerations of federalism may be this displacement inquiry, rather than analysis of the probate exception itself. Although probate raises its own version of the parity debates, courts have long interpreted legislation in light of the relationship between the federal separation of powers and state control of private rights, including in *Harris*, the Supreme Court precedent closest to being in point. One interpretation of the lower court decisions may be that the probate exception in those courts already stands for this type of presumption-shifting approach.

**CONCLUSION**

The assault upon the citadel of probate is proceeding in these days apace. Yet in many ways, *Marshall* has fortified the probate exception from attack, providing shelter for the lower courts to rebuild *Markham*’s interference test. Those courts have sometimes advanced the exception even in the context of federal question jurisdiction, apparently setting to one side concerns about differences among the relevant tribunals and about the separation of powers, although perhaps shoring up the obstacles to a federal law of succession in the process.

This Note has explored whether such decisions can be squared with prevailing views of the obligations of the federal courts. It has reached a vantage point from which some aspects of the case law, such as the relationship between jurisdiction and judgments, have started to come into focus. Others remain uncharted. For now, the probate exception remains undiminished by federal questions, mysterious and esoteric still.

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211 See, e.g., *Ashton v. Josephine Bay Paul & C. Michael Paul Found.*, Inc., 918 F.2d 1065, 1072 (2d Cir. 1990); see also Shapiro, supra note 14, at 583–84.


214 The phrasing is then-Chief Judge Cardozo’s. See *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).