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Decedents Estates and Trusts—Trial by Jury as of Right in Surrogate's Courts—Available to Executors in Compulsory Accounting Proceedings.

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DECEDENTS ESTATES AND TRUSTS

TRIAL BY JURY AS OF RIGHT IN SURROGATE'S COURT—AVAILABLE TO EXECUTORS IN COMPULSORY ACCOUNTING PROCEEDINGS.

John J. Garfield, the testator, died in 1952 naming his widow as executrix and sole beneficiary. Thereafter a law firm filed its claim of $50,445.15 against the testator's total estate of $192,000 for legal services rendered to the testator during his life. The executrix refused to honor this claim. About six years after this rejection, they petitioned the Surrogate for a compulsory accounting. In response the executrix served an affidavit in which she objected to the accounting as an unnecessary expense, since she, as the sole legatee with no other claims pending against the estate, would not otherwise be required to render an accounting. She also contended that the assets of the estate were more than sufficient to meet the claim if valid. She refused, however, to admit the validity of the claim. In conclusion, she stated that she would agree to a trial on all issues "provided all [her] defenses . . . and . . . rights substantive and procedural [were] preserved." No demand for a jury trial was made. About two months later the executrix served a duplicate copy of her original affidavit on which there was noted "Respondent Demands Trial By Jury." The latter was "deemed" to be her answer by the Surrogate. Petitioners indicated that they would consent to a trial of all issues provided the right to an accounting would be preserved pending the outcome.[1] However, they resisted the demand for a jury on the ground that the executrix was not entitled to trial by jury as a matter of right. Granting petitioners' motion to vacate the demand for a jury trial the Surrogate held that a trial by jury in an accounting proceeding could not be granted as of right nor even as a matter of discretion.[2] By a divided court the Appellate Division affirmed the order, but granted leave to apply for a jury trial at the Surrogate's discretion.[3] On appeal, *held*, order reversed, two judges dissenting and one concurring in result only. An executor-respondent in a compulsory accounting proceeding has a constitutional right to trial by jury of rejected claims under section 68 of the Surrogate's Court Act. *Matter of Garfield*, 14 N.Y.2d 251, 200 N.E.2d 196, 251 N.Y.S.2d 7 (1964).

New York's Constitution provides that "Trial by jury in all cases in which it has heretofore been guaranteed shall remain inviolate forever."[4] This has been construed to mean that the right exists in all cases in which a trial by jury had been permitted prior to the New York Constitution of 1894.[5] Under

1. Estate of John J. Garfield, 144 N.Y.L.J. No. 53, p. 13, col. 1 (Sept. 15, 1960) (opinion of Mr. Surrogate Cox).
2. Estate of John J. Garfield, *supra* note 1.
3. Matter of Garfield, 18 A.D.2d 29, 238 N.Y.S.2d 191 (1st Dep't 1963).
4. N.Y. Const. art. I, § 2 (1938).
5. Matter of Leary, 175 Misc. 254, 23 N.Y.S.2d 13 (Surr. Ct. 1940), *aff'd sub nom.* Werner v. Reid, 260 App. Div. 1000, 24 N.Y.S.2d 1000 (1st Dep't 1940), *aff'd*, 285 N.Y. 693, 34 N.E.2d 383 (1941).

the Revised Statutes a jury trial of a claim against an estate could have been obtained only by instituting an action at law in the Supreme Court.[6] If, however, suit was not brought within six months of the executor's rejection, the claim was barred.[7] In 1895 an amendment authorized the Surrogate to hear and determine such claims if both parties so consented.[8] The first general provision permitting trial by a jury in Surrogate's Court was enacted in 1914;[9] the present section 68 of the Surrogate's Court Act is essentially the same. This section provides that, on the demand of one of the parties, the Surrogate must direct a jury trial in his court or transfer the cause to the Supreme Court "in any proceeding in which any controverted question of fact arises, of which any party has [a] constitutional right of trial by jury. . . ."[10] Although this provision gave surrogates the authority to conduct jury trials, some courts nevertheless asserted that Surrogate's Court was not a court in which to hold such trials.[11] This section was intended to remedy a multiplicity of trials and other procedural difficulties, not to add jury trials to proceedings which did not previously require them.[12] The 1914 revision also shortened the statute of limitations on a claim from six to three months.[13] Further, the absolute bar was eliminated and the determination of disputed claims was allowed on the judicial settlement of accounts where the limitations had already run.[14] Under this last modification the right to trial by jury was not specified but Judge Heaton, counsel to the 1914 Revisory Commission, commented that both parties could still demand a jury.[15] The real question of the right to trial by jury in the accounting proceeding was left to the courts.

"[I]t has been established law in this state for over 100 years that jury trials cannot be obtained *as of right* in accounting proceedings."[16] So stated Surrogate Foley forty years ago, in holding that an executor-claimant had no

6. 2 N.Y. Rev. Stat. 89 pt. 2 ch. VI tit. 3, § 38 (1827).

7. *Ibid.* See, *e.g.*, Van Ness v. Kenyon, 208 N.Y. 228, 101 N.E. 881 (1913); Selover v. Coe, 63 N.Y. 438 (1875); see generally Annot., 100 A.L.R. 241 (1936). See also 2 N.Y. Rev. Stat. 88 pt. 2 ch. VI tit. 3, § 36 (1827) which provided a claimant with another remedy before the time limitation foreclosed this suit; he and the executor could agree to have the Surrogate refer the controversy to "three disinterested persons."

8. N.Y. Sess. Laws 1895, ch. 595, § 1822.

9. N.Y. Sess. Laws 1914, ch. 443, § 2538.

10. N.Y. Surr. Ct. Act § 68.

11. See, *e.g.*, Matter of Woodward, 105 Misc. 446, 450, 173 N.Y. Supp. 556, 559 (Surr. Ct. 1918), *aff'd*, 188 App. Div. 888, 175 N.Y. Supp. 926 (1st Dep't 1919) (dictum) (This was apparently based on the equitable origins of Surrogate's Court.); Matter of Ludlam, 5 Misc. 2d 1068, 1070, 162 N.Y.S.2d 138, 140 (Surr. Ct. 1957) (by implication) (It was reasoned that all proceedings of Surrogate's Court were special proceedings. Therefore it was to be presumed that there was no trial by jury unless provided by statute.)

12. See Report of the Commission to Revise Practice and Procedure in Surrogate's Court, 1914 N.Y. Senate Document Vol. XI No. 24, at 1 and 67; *cf.* Bowen v. Sweeney, 89 Hun 359, 35 N.Y. Supp. 400 (1st Dep't 1895), *aff'd*, 154 N.Y. 780, 49 N.E. 1094 (1898).

13. N.Y. Sess. Laws 1914, ch. 443, § 2681 (N.Y. Surr. Ct. Act § 211 in instant case, repealed by N.Y. Sess. Laws 1963, ch. 488, § 5; subject matter now in N.Y. Surr. Ct. Act § 210-211-c).

14. *Ibid.*

15. 2 Heaton, Surrogates' Courts 1163 (3d ed. 1914).

16. Matter of Beare, 122 Misc. 519, 520, 203 N.Y. Supp. 483, 484 (Surr. Ct. 1924), *aff'd*, 214 App. Div. 723, 209 N.Y. Supp. 793 (1st Dep't 1925).

right to trial by jury in a compulsory accounting instituted by a legatee. Only six years before, the same court had denied a demand for jury by an executor-respondent in an accounting proceeding instituted by a claimant or an estate.[17] The court in the latter case stated that the action ceased to be one at law once the statute of limitations had run.[18] However, courts of other departments took a quite different view where the statute of limitations had run. Without expressly referring to the limitations, these courts granted jury demands in cases involving a judicial settlement of accounts.[19] This conflict appeared to have been settled in *Matter of Boyle*[20] when the Court of Appeals denied a jury to the claimant who had brought her claim seven years after the administrator had rejected it. There the Court held that the claimant had lost any right to a jury trial she may have had by not bringing an action at law on the claim within the period specified by statute. "The settlement of an administrator's account," stated the Court, "in some respects resembles an equity proceeding . . . [in] which there was and is no constitutional right to a jury trial."[21] *Boyle* expressly adopted the cases of the First Department in preference to other departments.[22] Thereafter *Boyle* was taken by courts[23] and texts[24] to stand for the proposition that an executor's account was equitable in nature and therefore there could be no jury trial as of right.

In the instant case, the majority's basic premise was that the "claim [was] an action at law for work, labor and services . . ."[25] which has always been entitled to a jury trial under constitutional provision. *Boyle* was distinguished by limiting its holding to only those cases where it is the claimant who demands the trial by jury. This distinction was based on a claimant's choice of forum and proceeding. His failure to bring his claim within the statutory time operates as a waiver of his legal right to a trial by jury because his own untimeliness makes the suit an equitable one. An analogy was then made to the situation in which a plaintiff joins equitable and legal claims whereby the plaintiff waives his right to trial by jury[26] but the defendant does not.[27] The legislature cannot

17. Matter of Woodward, 105 Misc. 446, 173 N.Y. Supp. 556 (Surr. Ct. 1918), *aff'd*, 188 App. Div. 888, 175 N.Y. Supp. 926 (1st Dep't 1919).

18. *Id.* at 449, 173 N.Y. Supp. at 558 (dictum). The "wholly adequate reason" for denying trial by jury was that the demand was too late. *Id.* at 450, 173 N.Y. Supp. at 559.

19. Matter of Stein, 200 App. Div. 726, 193 N.Y. Supp. 298 (4th Dep't 1922) (demand by claimant); Matter of Beer, 188 App. Div. 894, 175 N.Y. Supp. 894 (2d Dep't 1919) (memorandum decision, facts set out in detail in *Stein, supra*) (demand by administrator-respondent).

20. 242 N.Y. 342, 151 N.E. 821 (1926).

21. *Id.* at 345, 151 N.E. at 822.

22. Matter of Stein, 200 App. Div. 726, 193 N.Y. Supp. 298 (4th Dep't 1922); Matter of Beer, 188 App. Div. 894, 175 N.Y. Supp. 894 (2d Dep't 1919).

23. See, *e.g.*, Matter of Ludlam, 5 Misc. 2d 1068, 162 N.Y.S.2d 138 (Surr. Ct. 1957); Matter of Leary, 175 Misc. 254, 23 N.Y.S.2d 13 (Surr. Ct. 1940), *aff'd sub nom.* Werner v. Reid, 260 App. Div. 1000, 24 N.Y.S.2d 1000 (1st Dep't 1940), *aff'd*, 285 N.Y. 693, 34 N.E.2d 383 (1941).

24. See, *e.g.*, 1 Warren's Heaton, Surrogates' Courts § 108 ¶ 2(h)(i) (6th ed. 1940); 1 Jessup-Redfield, Surrogate Law and Practice § 420 (rev. ed. 1947).

25. Instant case at 256, 200 N.E.2d at 198, 251 N.Y.S.2d at 9-10.

26. DiMenna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917).

27. Wheelock v. Lee, 74 N.Y. 495 (1878).

deprive one of the right to trial by jury in an action at law, continued the Court, by granting jurisdiction to a court of equity. Two factors were used to show that the legislature never intended to deprive executors of trial by jury. First, prior to 1914 disputed claims against estates could be heard in Surrogate's Court only with the consent of an executor. Second, the 1914 revision which allowed claims to be determined on judicial settlement of accounts also provided a general provision for trial by jury in this court. The petitioner's argument that the executrix waived her right by an untimely demand for a jury was then disposed of. The Court ruled that no fact had been put at issue before the demand was made in the executrix's second affidavit. Therefore this affidavit could properly be considered the answer.[28] Moreover, this contention was first raised by petitioner in the Appellate Division which was too late.[29] The main thrust of Judge Burke's dissent was addressed to the majority's "error . . . concern[ing] the place of jury trials in accounting proceedings in Surrogate's Court."[30] Judge Burke contended that such a result was never intended by the legislature and that the ruling in *Boyle* was never before thought to have been limited only to claimants. The majority's analogy to a plaintiff's combining actions at law with proceedings in equity was attacked as unrelated to the instant situation and other comparisons were offered.[31] It was pointed out, for example, that in other Surrogate's Court proceedings there is no jury as of right even though only payment of a sum of money is sought.[32] In sum, the nature of the proceeding should control the granting of a jury, rather than the nature of the claim. Judge Burke concluded by expressing a fear that the effect of the instant decision is to hold the newly enacted procedure for Surrogate's Court[33] invalid. This fear was based on the fact that the new provisions provide for settlement of claims without a jury. Chief Judge Desmond concurred with Judge Burke's dissent and directed his dissent to the untimely demand for a jury trial, as an adequate basis for affirmance. He reasoned that sufficient facts were raised by the first affidavit to make it an answer with which the demand must be served.[34] Further, the timeliness of the demand was not actually passed on below where only the general right to a jury trial in the proceeding was in

28. See N.Y. Surr. Ct. Act § 67: The jury "demand by a respondent must be served with his answer or objections."

29. The majority reasoned that the Surrogate had ruled that the demand was timely and that the Appellate Division had "properly" disregarded the argument; there was no reason this new question should be asserted in the Court of Appeals. See Cohen & Karger, Powers of the New York Court of Appeals ch. 17, *Review of New Questions on Appeal* (rev. ed. 1952). *But see id.* at 626-30.

30. Instant case at 260, 200 N.E.2d at 200, 251 N.Y.S.2d at 13.

31. Instant case at 262-65, 200 N.E.2d at 201-04, 251 N.Y.S.2d 14-17.

32. N.Y. Surr. Ct. Act § 231-a (setting fees of attorney for executor or estate); Matter of Pardee, 239 App. Div. 876, 265 N.Y. Supp. 842 (4th Dep't 1933), *affirming* 145 Misc. 634, 261 N.Y. Supp. 644 (Surr. Ct. 1930); N.Y. Surr. Ct. Act § 216 (compelling payment of funeral expenses); Matter of Popek, 157 Misc. 421, 283 N.Y. Supp. 758 (Surr. Ct. 1935).

33. N.Y. Sess. Laws 1963, ch. 488, § 5, N.Y. Surr. Ct. Act §§ 210-211-c (effective March 1, 1964).

34. N.Y. Surr. Ct. Act § 67.

question. It, therefore, could still be ruled on as a matter of law in the Court of Appeals.[35]

In light of the history of claims against estates the Court seems to have made a logically sound decision and has clarified an area of the law which had not been properly examined previously. For in spite of sweeping assertions that there was no right to trial by jury in an executor's accounting, the executor's right to trial by jury in defending a claim against the estate in such a proceeding has never been properly investigated. The distinction between an estate representative and a claimant is a valid one. Only the claimant can choose the court and the proceeding. Added to this is the fact that prior to 1914 claimants' basic remedy was at law in the Supreme Court. Claimants could come into Surrogate's Court only with an executor's consent. Moreover, if six months had elapsed from executor's rejection he was without remedy. Since the 1914 provision for claims allowed the claimant to come into Surrogate's Court without consent and removed the previous bar, the Court in *Boyle* properly reasoned that the claimant had waived his jury rights by not commencing an action at law within the statutory time. In no way does it follow, however, that the waiver should also apply to the estate representative who is subjected to the other party's inaction and delay. The majority of the instant Court, however, did not seem to fully consider the possibility that its decision may have effects adverse to the 1963 revision of the Surrogate's Court Act. The new provisions allow the Surrogate to determine the validity of a claim prior to an accounting without a jury.[36] Estimates of the extent of delay caused by jury trial proceedings may vary, but the fact that they do cause considerable delay is generally recognized.[37] Injecting trial by jury into accounting proceedings will not further the revision's objective for uniform, simple and speedy settlement of claims against estates.[38] The legislative policy of quick settlement of such claims is evidenced by the long existence of a short statute of limitation on actions at law. This limitation was recently reduced to sixty days.[39] The suggested long range goal was that all claims be determined on judicial settlement.[40] No elaboration is needed on the advantages of expeditious settlement for both estates and creditors. The dissenting judges in the instant case seemed well aware of this policy of preventing delays. Unfortunately they failed to overcome the force of the majority's argument which was based on a literal

35. Instant case at 266, 200 N.E.2d at 204, 251 N.Y.S.2d at 18.

36. N.Y. Surr. Ct. Act § 211-b concludes "If the Surrogate is satisfied that the best interests of the estate require it, he may thereupon determine the claim and all issues relating thereto as a preliminary step in the accounting proceeding and make such direction as justice shall require."

37. See, *e.g.*, Desmond, *Should It Take 34 Months for a Trial?*, N.Y. Times, Dec. 8, 1963, § 6 (Magazine), p. 29; Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956).

38. See Second Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, N.Y. Legis. Doc. 1963, No. 19, at 358-67 (hereinafter cited as 1963 Report).

39. N.Y. Sess. Laws 1963, ch. 488 § 5, N.Y. Surr. Ct. Act § 211-c (effective March 1, 1964).

40. 1963 Report at 365, comment on § 211-a.

interpretation of New York's Constitution. Nor did they answer the inability of the legislature to take away one's jury rights by authorizing an equity court to take jurisdiction of an action previously triable at law. Other proceedings[41] in Surrogate's Court directing payment of a sum of money without jury trial as of right are distinguishable in that they arose after the estate was placed in the hands of this court. The instant holding does not mean that the new revision is invalid as Judge Burke feared. Although there is no express provision for trial by jury, the discretion given the Surrogate to determine claims does not necessarily exclude juries. A trial by jury can still be obtained as of right under Surrogate's Court Act section 68. Perhaps the only way to achieve speedy, uniform settlement of claims against estates without trial by jury is by constitutional reform.

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THE INCOME BENEFICIARY OF ONE TRUST WHICH SHARES OWNERSHIP IN A CORPORATION WITH ANOTHER TRUST FOUND TO BE AN INCIDENTAL BENEFICIARY OF THE LATTER TRUST WITH NO STANDING TO ENFORCE ITS PROVISIONS

Vincent and Walter McGuire incorporated a wiping materials company, later known as McGuire Bros. Incorporated, in 1916. Each owned one-half of the stock. Later they incorporated Walvin, a real estate holding company. Again, they owned the stock equally between them. Until the death of Vincent in 1936 they operated the two corporations successfully and harmoniously. By his will, Vincent bequeathed his 50 per cent ownership in each of the two corporations in the following manner: he placed 49 per cent of his ownership in each into a trust, naming his wife as income beneficiary; the remaining one per cent he willed to his brother Walter in order to secure in him controlling interest in the two corporations. Walter died in 1951 and by his will placed his controlling interest in each corporation in another trust. Thus the deaths of Vincent and Walter resulted in the creation of two trusts. The Vincent trust owning 49 per cent of each corporation and the Walter trust owning 51 per cent. Plaintiff, as testamentary trustee of the minority Vincent trust, brought an action on behalf of his income beneficiary. He sought to compel the defendant, testamentary trustee of the majority Walter trust,[1] to distribute a larger portion of the earnings of each corporation. The plaintiff argued that as a trustee of the majority trust, defendant had duties to both the income beneficiary and the remaindermen of that trust. These duties were said to require equal treatment of each of the two types of beneficiaries and to favor neither. Plaintiff contended that by defendant's failure to declare and distribute larger dividends

41. See note 32 *supra.*

1. The defendant was not sued by virtue of his position as a director of each of the corporations, but rather as a testamentary trustee who controlled the distribution of income to his majority trust's beneficiaries because of his corporate directorship.