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Decedent's Estates—Improper Delegation of Judicial Authority—Waiver

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terms were construed to insure that the prisoner received at least the equal of his New York sentence before the agreement was fulfilled. However, the Court agreed the prisoner was entitled to have the time spent in the Pennsylvania prison credited against his New York sentence.

Thus, New York has insured against another state's indiscriminate release preventing vindication of New York Law.

Per Curiam

Right To Appeal — In *People v. Kalan*,[81] the Court of Appeals held, per curiam, that when a defendant is penniless and unable to employ counsel or pay for a transcript of the trial minutes, and further when he is in prison and physically unable to inspect such trial minutes filed in Clerk's office, the refusal to assign counsel upon his request effectively deprives him of his use of the right to appeal.

Coram Nobis — In *People v. Farina*,[82] the Court set aside a conviction on grounds that not only had the defendant not received the sentence promised him by the trial court to induce a plea of guilt, but that he had actually been coerced by the judge into entering the plea.

DECEDENT'S ESTATES

Improper Delegation Of Judicial Authority—Waiver

The Court in, *In Re Nowakowski's Estate*,[1] determined that there was a basis for the Surrogate's finding that the appellant was not fraudulently induced into waiving and releasing his right of election against his wife's will.[2] Another problem with which the Court was faced was the properiety of the Surrogate's clerk taking and reporting testimony, that is, whether this was an improper delegation of judicial authority.[3] On this point the majority felt it was not necessary to reach a conclusion for it found that the appellant waived any right to a particular mode of trial by participating in the proceedings before the clerk without raising any objection. In fact there was no objection until rehearing before the Appellate Division. The dissenter was of the opinion that before you can find a waiver there must be a finding of a right subject to be waived. Accordingly he found that the clerk exceeded his powers which are limited by section 32 of the Surrogate Court Act.

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81. 2 N.Y.2d 278, 159 N.Y.S.2d 480 (1957).
82. 2 N.Y.2d 454, 161 N.Y.S.2d 88 (1957).

1. 2 N.Y.2d 618, 162 N.Y.S.2d 19, (1957).
2. N.Y. DECEDENT ESTATE LAW §18(1) provides for spouse's right of election against the will and §18(9) provides for waiver and release of this right.
3. N.Y. CONST. art. VI, §13; N.Y. SURROGATE'S COURT ACT §32(10).

There can be no question that the Court made a proper disposition of this case. There is no need of quibbling as to the existence of a right when the Court may say, even if there is a right, it has been waived. Nor is there any question that a party may waive his right to a proper mode of trial by participating in the improper proceedings without objecting.[4]

Jury Trial In Will Contest

In *In re Satterlee's Will*,[5] the Appellate Division remitted a first appeal to the Surrogate's Court with a direction that there be a jury trial and that a beneficiary under the contested will (testatrix's attorney) take the stand and explain how it came about that his client made a will in his favor.[6] Though the parties had previously waived jury trial, the surrogate expressly accepted the jury's findings in the second trial as conclusive upon him and the appellant thereupon raised the objection, *inter alia,* in his second apeal that it was error for the surrogate not to treat the jury verdict as advisory only. The Court (Judges Froessel and Conway dissenting) did not accept this argument however, on the grounds that the Appellate Division's order was clear and the objection to jury trial should have been raised at that time,[7] noting also that the objection here raised was not made until some weeks after the second trial and that that trial had been conducted in all respects as an action at law.

Generally where an advisory jury's verdict is accepted by a court without independent consideration of the evidence, this is sufficient grounds for reversal,[8] but since the single system of pleading established by the codes, many instances have arisen where the court and counsel have tacitly followed the usual routine through trial and judgment only to have the question later raised whether the case was of equitable cognizance. Probably the most liberal handling of this sort of error by the appellate courts has been to assume that the lower court concurred in the findings of the jury adopting them as his own.[9] Other courts have reviewed all the facts independently at the appellate level to reach an independent verdict,[10] while others have refused the appeal altogether, as in the instant case, on grounds of estoppel.[11]

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4. See, *e.g.*, Wolf v. Assessors of the Town of Hanover, 308 N.Y. 416, 126 N.E.2d 537 (1954).
5. 2 N.Y.2d 285, 159 N.Y.S.2d 689 (1957).
6. 281 App. Div. 251, 119 N.Y.S.2d 309 (1st Dep't 1951).
7. N.Y. CIV. PRAC. ACT §588(3).
8. Guild v. Hull, 127 Ill. 523, 20 N.E. 665 (1889).
9. Sullivan v. Wilson Mercantile Co., 172 Ark. 914, 290 S.W. 938 (1927); *contra*, Dunphy v. Kleinsmith, 78 U.S. 610 (1870); Century Loan & Investment Co. v. Loiseau, 59 S.D. 255, 239 N.W. 487 (1931).
10. Leser v. Smith, 212 Mich. 558, 180 N.W. 487 (1931).
11. *Cf.* Holland v. Kelly, 177 Cal. 43, 169 Pac. 1000 (1917).