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Decedent's Estates—Jury Trial in Will Contest

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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).

The dissent in the instant case pointed out that the Appellate Division did not remand on the first appeal for error but felt itself unable to pass judgment "absent of an explanation from proponent"[12] thus precluding the appellant from making a stipulation for an order absolute as required under subdivision 3 of section 588 of the Civil Practice Act.[13] At the trial, a special verdict was rendered, typically of an advisory jury so that, on the facts revealed in the opinions, there may have been some room for argument that there was not such inaction on the part of counsel as to preclude his raising the question of the propriety of a jury trial upon the second appeal. It is quite apparent, however, that raising the objection after an adverse verdict for the second time considerably weakens appellant's case from the viewpoint of the general policy against unnecessarily protracted litigation.

Appointment Of Successor Trustee

At common law whenever a greater estate and a lesser estate coincided in one and the same person without any intermediate estate, it was said that the lesser was merged in the greater.[14] The doctrine of merger as adopted by statute is, in part, that if a person is simultaneously the owner of both legal and equitable interests in the same res, the equitable interest merges with the legal, creating the end result of absolute ownership to the extent of the former.[15]

By the same token it is a general and well-settled provision of law that the office of sole trustee and sole beneficiary may not be united in the same person, as the two interests are incompatible.[16] Keeping this principle in mind does it necessarily follow that a merger will always occur if one of two co-trustees dies leaving the sole beneficiary as the only surviving trustee? The New York courts have sometimes said that the trust is extinguished and merged.[17]

The propriety of such a conclusive rule has been seriously questioned in *In re Phipp's Will*,[18] wherein the trust res was real property under lease to a

12. 281 App. Div. at 254, 119 N.Y.S.2d at 312.
13. Section 588 provides:
> Appeal to the court of appeals as of right lies only . . . 3. from an order of the appellate division granting a new trial . . ., where the appellant stipulates that, upon affirmance, judgment or order absolute shall be rendered against him; and upon such appeal the court of appeals shall affirm and render judgment or order absolute against the appellant unless it determines that the appellate division erred as a matter of law in granting the new trial or hearing.
14. 1 TIFFANY, REAL PROPERTY §34 (2d ed. 1920).
15. N.Y. REAL PROPERTY LAW §92.
16. Woodward v. James, 115 N.Y. 346, 357, 22 N.E. 150, 152 (1889); In re Brittain's Estate, 48 N.Y.S.2d 931, 933 (Surr. Ct. 1944).
17. Weeks v. Frankel, 197 N.Y. 304, 90 N.E. 969 (1910) (real property); Reed v. Browne, 295 N.Y. 184, 66 N.E.2d 47 (1946) (personal property).
18. 2 N.Y.2d 105, 138 N.E.2d 341 (1956).