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Decedent's Estates—Appointment of Successor Trustee

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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).

tenant. The trust was measured by the lives of the widow (the primary income beneficiary) and testator's brother, William (a secondary income beneficiary), with the income of the trust upon the death of the widow to be paid over to William and Francis, testator's other brother. Upon William's death the remainder was to be paid to Francis and his issue. The widow and a friend were named co-trustees, and the co-trustees "or those who may be acting for the time being or their *successor* or *successors*" were given power and authority to sell the trust property. Testator's brother and the co-trustee friend died and thus the widow became sole trustee and sole income beneficiary. Francis, the remainderman, petitioned the Surrogate's Court to be named as successor trustee.[19] The Court of Appeals held that a successor co-trustee should be appointed and that the doctrine of merger is not to have such an austere application to defeat the testator's intent that the trust shall continue. Such intent was manifested by the power of sale given to the co-trustees and the use of the words *successor* or *successors.*

A careful reading of the cases which decided for merger show that although the trust was extinguished, such was the obvious intent of the testator, or the court was not authorized to designate another trustee so as to avoid a merger of the equitable into the legal estate.[20] The difficulty which arises however in such situations is the danger that the legal owner will unduly favor himself, and may be tempted to utilize the property in such a mode as to increase his own income at the risk of diminishing the remaindermans interest. Usually, appointment of a successor co-trustee to continue the trust would be better for protection of the remainderman. The Court of Appeals states that view here in that the facts did not warrant the application of the doctrine of merger.

Charitable Bequests—Liberal Construction

Charitable bequests are traditionally favored by the courts and are liberally

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19. N.Y. SURROGATE'S COURT ACT §168 provides:
Where one of two or more testamentary trustees dies . . ., and the trust has not been fully executed, the surrogate's court may appoint a trustee or successor or successors, unless such appointment would contravene the express terms of the will . . . .

20. Weeks v. Frankel, *supra* note 17 at 307, 90 N.E. 969 at 971:
I hereby . . . appoint my son, Charles and my friend, Michael . . . . In the event of the death, resignation or refusal to serve of *both* of my . . . trustees named, I hereby nominate and appoint the U.S. Trust Co. . . . trustee. (Emphasis added).
Son Charles was a trustee with right to beneficial income until first grandchild reached majority. Co-trustee Michael died. Held — merger applicable, son entitled to sole possession and absolute ownership of an estate for years.