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# Decedent Estates—Substitution of Executor for Testator

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dence, inside or outside the writing, that it is intended to be a settlement by which his child would be provided for after his death. The first two requirements are concurred in by the majority. It was only with his third requirement that they differed. Judge Desmond's application was too strict and in cases such as the instant one the results would prove inequitable. His term "weighty evidence" should include the surrounding circumstances so that testator's intent may be shown by the relationship of the amount of his estate and the amount given to each legatee under the will. Only in this manner will it be possible to avoid the injustice of providing the after-born child with a sum out of proportion to that received by the other children living at the time of the execution of the will. This inequitable result surely would not be the intent of a testator.

*Substitution of Executor for Testator*

In *Humbeutel v. Humbeutel*,[33] the testator, who had been the plaintiff in the action, had recovered a judgment from her son directing him to pay over to her certain amounts of cash and securities in his possession. After the testator's death, her executor moved to amend the final judgment requiring the son to deliver the cash and securities to the executor. The *nunc pro tunc* amendment made to substitute the executor for the testator was held valid by the Court of Appeals.

There should be no reason, in the light that the executor is the continuing personality of the testator[34] and that a judgment may be amended to conform to the actual state of facts,[35] that a court should not be justified in allowing the amendment *nunc pro tunc* so that the executor can settle the estate of the deceased in the most expedient manner possible. There would be little reason in holding that the executor must establish his right to possession of the property when the right of the deceased has been already established and he is that person in the eyes of the law.

33. 305 N. Y. 159, 111 N. E. 2d 429 (1953).

34. C. P. A. § 84, "In the case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court, upon a motion, must allow or compel the action to be continued by or against his representative or successor in interest"; see also § 557 (3), "Where the adverse party has died since the making of the order or the rendering of the judgment appealed from or where the judgment appealed from was rendered after his death, in a case prescribed by law, an appeal may be taken as if he were living, but it cannot be heard until the heir, devisee, executor or administrator, as the case requires, has been substituted."

35. *Herpe v. Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919); followed in *Core v. Hoffman*, 256 N. Y. 254, 176 N. E. 383 (1931); see also, C. P. A. § 105.