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COMPROMISE AGREEMENTS AFFECTING ESTATES

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Introduction

Several statutes of New York deal with compromise agreements affecting estates. Section 249-0 of the New York Tax Law, for example, authorizes an executor to make an agreement with the Tax Commission of New York State and the taxing authority of any other State compromising conflicting claims respecting the domicile of deceased. This section, added by the Laws of 1941, is a sensible means for settling a type of controversy apt to be expensive and quite capable of imposing a double tax burden, state-wise, on the estate of a decedent whose domicile is in issue.

Under Section 213 of the New York Surrogate's Court Act, the Surrogate on application by an executor, administrator, temporary administrator, guardian or testamentary trustee, may authorize the compromise of any debt, claim or demand which must be settled or liquidated in the settlement of an estate. The purpose of this Section was considered in *Matter of Leopold*.[1] There a lawsuit begun in the lifetime of deceased was pending undetermined at the date of his death. Two persons qualified to act as his administrators. An opportunity to compromise the lawsuit was presented. One administrator wished to compromise. The other declined to do so. The administrator seeking the compromise invoked Section 213 of the Surrogate's Court Act. The Surrogate granted the application and approved the compromise. The Appellate Division reversed,[2] but on further appeal the Court of Appeals[3] upheld the determination by the Surrogate. The court said the purpose of Section 213 of the New York Surrogate's Court Act is to protect a fiduciary against surcharge growing out of negligence or the exercise of bad business judgment. It noted that every administrator has full power over the entire estate under administration. In consequence of this plenary power it is possible for a particular administrator to seek approval of the compromise agreement which he desires to make and for the court to direct that the compromise be accomplished notwithstanding opposition by a co-administrator. An application for an order pursuant to Section 213 of the New York Surrogate's Court Act may be made on an *ex parte* basis unless the rule of a particular county

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1. 259 N. Y. 274, 181 N. E. 570 (1932).
2. 233 App. Div. 412, 253 N. Y. Supp. 354 (1st Dep't 1931).
3. 259 N. Y. 274, 181 N. E. 570 (1932).

requires that notice shall be given to estate beneficiaries. Nevertheless, when the court makes its order approving a compromise under this Section, all parties interested in the estate are foreclosed thereby, except that any party on the final settlement of the estate may show that the debt or claim was fraudulently compromised.

The most important compromise statute in the law affecting estates is found in Section 19 of the New York Decedent Estate Law.[4] This Section provides the method for compromising any kind of dispute affecting an estate including cases where the interests of infants, incompetents, persons unknown or persons unborn are or may be affected by the adjustment proposed. Although Section 19 has been part of the law for many years, there is not a very substantial body of case law regarding its meaning.

Content of Section 19, New York Decedent Estate Law

The Statute empowers the Supreme Court or the Surrogate's Court having jurisdiction to authorize an executor, administrator or trustee to compromise any controversy arising between different claimants to the estate. The compromise takes the form of an agreement which must be executed by all parties in being claiming an interest whose interests are affected by the proposed agreement.[5] By a separate subdivision of the Section provision is made for compromise agreements disposing of any controversy arising before probate between persons claiming as devisees or legatees on the one hand and persons claiming on a basis of intestacy. In agreements before probate the necessary parties are the nominated executors or petitioners for administration with the will annexed together with all persons claiming as devisees or legatees and all persons claiming by reason of intestacy. If, however, any person in the classes mentioned (other than a nominated executor or petitioner for letters c. t. a.) is unaffected by the proposed compromise he is not a necessary party to the agreement.

To meet the problem of disability based on infancy or incompetency the Section provides that persons so disabled shall be represented by a special guardian who is to execute all proper instruments in the name of his wards to carry into effect any compromise sanctioned by the court. Similarly where it appears that the interests of persons unknown or the future contingent interests of the unborn are or may be affected by the compromise the court must appoint a suitable special guardian to make and execute the necessary instruments to carry out the approved compromise agreement in their behalf. It is incumbent upon the

4. N. Y. DECEDENT ESTATE LAW § 19.

5. Matter of Wilson, 269 App. Div. 665, 53 N. Y. S. (2d) 14 (2d Dep't 1945).

court itself to examine the proposed compromise agreement and to decide whether it is just and reasonable in its effects upon the interests of persons under disability and on the interests of unknown or unborn persons. When the court determines that the proposed agreement is just and is reasonable, its approval makes the agreement binding on the persons under disability as well as on the interests of the unknown and unborn who are parties in interest. When the agreement has been submitted to the court for approval the signatories have no right to withdraw therefrom.[6]

Procedurally the application for approval of a compromise agreement is simple. A verified petition must be made setting forth the provisions of any instrument by virtue of which any claim is made to the estate in controversy, together with all facts relating to the respective claimants and the positions they have assumed. The petition must disclose the possible contingent interests of the unborn and in general exhibit all facts the court would require to make a reasoned determination of the application. The court need not conduct any formal hearing but it must examine all the facts and surrounding circumstances and then announce its decision. In a case where the compromise agreement adjusts a probate contest it is customary to bring the application for approval of the compromise agreement as an incident to the main probate proceeding. Similarly it would be proper, in the adjustment of a controversy in an accounting or any other type of proceeding, to entitle the application for approval in the proceeding pending when the controversy arose.

Section 213 of the New York Surrogate's Court Act and Section 19 of the New York Decedent Estate Law Compared

Section 213 of the New York Surrogate's Court Act provides authority for a limited number of types of compromise following probate of a will or the grant of letters of administration. It cannot be used in the disposition of disputes arising prior to probate or issuance of such letters. Section 19 on the other hand supplies the authority for adjusting controversies originating immediately after the death of deceased and going to the admissibility of his will to probate or the propriety of the grant of letters of administration to the petitioner who seeks them. It should be noted parenthetically that neither of these sections need be invoked to compromise a dispute touching an estate where all parties in interest are adult and competent and all agree by stipulation on the disposition of a disputed question always provided of course that the agreement is not void for considerations of public policy. Section 213 of the New York Surrogate's Court Act in contrast to Section 19 of the

6. Matter of Carstens, 272 N. Y. 662, 5 N. E. (2d) 382 (1936).

New York Decedent Estate Law is characterized by informality and by its *ex parte* character. Strict formalism and notice to all parties feature the Decedent Estate Law provision.

The order made by the court under Section 213 of the New York Surrogate's Court Act, owing to its *ex parte* character, lacks the quality of definitiveness. An order under Section 19 of the New York Decedent Estate Law is clearly of a more definitive character. By supposition, before the order under Section 19 is made every party in interest without exception has become a signatory to a written agreement either in person or by way of his special guardian.

Effect of Secrecy on a Compromise Agreement under Section 19 of the New York Decedent Estate Law

A compromise agreement under Section 19 of the New York Decedent Estate Law probably would not be binding on any party executing it on the erroneous assumption that the agreement expressed the whole body of material understandings reached by all the parties to the agreement relative to one another. This principle is not always easy of application as is apparent from a comparison of *Adams v. Outhouse*[7] and *Callaghan v. Corbin*.[8] In *Adams v. Outhouse* the deceased died intestate. His estate was administered by his widow and one Lyon. One of the distributees was Orrin Outhouse. When the administrators were prepared to settle their accounts they applied to all distributees to agree upon the accounts as submitted. A brother and sister of Orrin declined to accept the accounts as proposed charging that Orrin in the lifetime of deceased had appropriated personal assets belonging to the latter. They claimed the administrators had a duty to compel Orrin to restore the same. Apart from the complaining brother and sister there were other distributees who knew nothing about this alleged misappropriation and knew nothing about the objections which had been thus expressed. In this state of fact Orrin promised his brother and sister $150 each if they would consent to settlement of the accounts of the administrators as presented by the latter. The offer was accepted. The agreement thus made—actually a form of compromise agreement—was concealed from the other distributees. Thereafter the promisor refused to make the $150 payments. The promisees sued. They were denied recovery. The Court said:

"These promises are within the principle which avoids all promises and agreements by which one creditor, uniting in a composition deed, seeks to secure an advantage over the other creditors agreeing to the compro-

7. 45 N. Y. 318 (1871).

8. 255 N. Y. 401, 175 N. E. 109 (1931).

mise. Such arrangements and agreement, whatever their form, are uniformly condemned . . ."[9]

The agreement between Orrin, his brother and his sister might be called a "side agreement" affecting the basic agreement which was made between all the distributees on the one hand and the administrators on the other. This basic agreement was an understanding whereby the claims of the administrators to have fully administered the property of deceased were accepted as true by all parties beneficially interested in the estate. The supervening side agreement was pronounced unenforceable by the Court of Appeals on the theory that each of the distributees had a duty of full disclosure to all of the other distributees of all facts relevant to the administration of the fund in which they had a common interest.

In *Callaghan v. Corbin*,[10] the deceased died survived by a widow, mother, one brother and three sisters. His will placed his entire $800,000 estate in trust for the income benefit of his widow. It directed that upon the death of the widow the remainder should be paid to the distributees of deceased ascertained as of that time. A probate contest ensued. The widow was not on speaking terms with two of the sisters of deceased. She applied to the brother and sister with whom she was on speaking terms for aid in obtaining the consent of the other two to a compromise agreement disposing of the probate controversy. The widow in writing promised that if such aid were given she would pay $7,500 for the service. The service was rendered. The agreement of compromise desired by the widow was made, presented to the court and approved. Thereafter the widow refused to pay the $7,500 promised depending for her justification upon the principle framed in *Adams v. Outhouse*.[11] She asserted that the secret promise on which the plaintiffs relied was against public policy and good morals. On the authority of the *Adams v. Outhouse* rule she was successful[12] until she reached the Court of Appeals. The Court of Appeals unanimously held that *Adams v. Outhouse* did not control.[13] Specifically the court said that the *Adams* case related to a compromise made in consideration of concealment of estate assets. This amounted to a clear fraud on the distributees who knew nothing about such concealment, while in the *Callaghan* case the agreement, though likewise secret, did not lessen the interests of any parties

9. Adams v. Outhouse, 45 N. Y. 318, 322 (1871).

10. 136 Misc. 731, 240 N. Y. Supp. 426 (Sup. Ct. 1930).

11. 45 N. Y. 318 (1871).

12. Callaghan v. Corbin, 136 Misc. 731, 240 N. Y. Supp. 426 (Sup. Ct. 1930), *aff'd*, 231 App. Div. 708, 245 N. Y. Supp. 778 (1st Dep't 1930).

13. Callaghan v. Corbin, 255 N. Y. 401, 175 N. E. 109 (1931).

in the estate because the $7,500 promised in payment for the services was to come from the pocket of the widow. The court also held that the interests of parties in an estate are in severalty and are not joint. They distinguished such interests from the interests of creditors of a common debtor who are entitled absolutely to treatment on a basis of equality with one another. The court saw no reason why any particular party interested in an estate should be deemed under any obligations of disclosure or otherwise to any other party interested therein.

In a recent case in New York County a probate contest eventuated in a tentative compromise formula framed by the attorneys for the proponent and the attorneys for the contestants. The proponent was one among a considerable number of general legatees. In the formula of compromise a fund was to be set up for the contestants to which all legatees were to make contributions in proportion to their respective interests under the will. The attorneys for the proponent submitted this proposal to all legatees. Every legatee approved with a single exception. The dissenting legatee demanded that he be paid par. It was pointed out that it was impossible to expect that his co-legatees, who would willingly contribute on the understanding that all were contributing alike, would consent that one of their number should have the benefits of the compromise while suffering none of its disadvantages. The proposal was then made by the dissenter that the legatee-contributor who was promoting the compromise agreement in a special manner should agree secretly to make up to the dissenter the amount of the contribution which the dissenter under the terms of the agreement would be required to make in the first instance. Such secret inducement might perhaps be permissible under the *Callaghan* case although it would appear that under the higher standard announced in the *Adams* case this side agreement if made should be condemned.

Whether a Signatory to an Agreement is Bound Where Other Parties Do Not Sign

In the *Estate of Nellie G. Taylor,*[14] an unreported case, settled in New York County, it appeared that deceased in her lifetime had owned a valuable mining property which she sold to one Smyth. The purchase price was payable in substantial installments over a number of years. Before the price had been fully paid Mrs. Taylor died. Smyth was one of her executors and qualified as such. Finding the balance of purchase price too burdensome in the light of the productivity of the mine he looked for a means to reduce his burden. Under the will of Mrs. Taylor her entire estate was distributable outright in equal shares to three par-

14. Surr. Ct. (N. Y. Co.), Index No. P. 716-1939.

ties, one of whom was an infant. In these circumstances Mr. Smyth and the two adult parties entered into a written agreement by the terms of which a substantial reduction in the balance due on the purchase price would be accomplished. As an incident to his accounting in the Surrogate's Court, Mr. Smyth submitted this agreement for approval by the court substantially in conformity with the requirements of Section 19 of the New York Decedent Estate Law. A special guardian was appointed for the infant legatee. His investigation led him to reject the compromise in so far as his ward's interest was concerned. At this stage in the proceeding the question arising was whether a promise by the executor-debtor to pay the infant's share in the purchase price at par would release the adult legatees from the contract to which they were parties. In other words, it was a question whether definitively to bind the adults it was indispensable that the infant party should bind himself to the provisions set forth in the contract. The question seems to be determinable by principles of contract law. Whether the signature of a party to a multi-party agreement is conditionally or unconditionally binding as respects that party's interests is a matter of intention.[15] In the *Taylor* case it was not necessary to determine the question because the adult parties consented to discharge by the debtor-executor of the whole amount of his obligation in so far as the interests of the infant were concerned.

A Compromise Must Involve a Real Dispute

A compromise agreement is a matter of mutual concessions. It is a rare case where claims put forward by parties may reasonably be pronounced utterly worthless. Such cases, however, have recently occurred. In *Matter of Lachat*[16] it appears that a woman 93 years of age made a will in favor of the manager of the hotel where she resided. The manager propounded this paper. The terms of an earlier will made gifts almost entirely to various charities. To the probate of the hotel manager's will objections were interposed by the charitable legatees under the prior paper, by the Public Administrator of New York County, by the Alien Property Custodian and by the Attorney General of the State of New York. The case went to trial. The proponent put in his *prima facie* case. Thereafter the matter was adjourned for a substantial period. In the interval of adjournment the charitable residuary legatees under the earlier paper entered into an agreement with the proponent and sole beneficiary under the propounded instrument by the terms of which the propounded instrument would be denied probate and

15. 3 WILLISTON, CONTRACTS (rev. ed. 1936) § 824.

16. 184 Misc. 492, 52 N. Y. S. (2d) 445 (Surr. Ct. 1944).

The Interest of the Deceased Himself as Fixed by Statute Imposes Limits on What Can Be Compromised

The *Wadsworth* case indicates that for a compromise agreement there must be something to compromise. The case shows that the agreement may not take the form of a total disregard of testamentary intention. The court in that case reached its result on considerations of general public policy. There is one particular rule of public policy moreover which deserves special attention relative to its bearing on compromise agreements. Reference is made to the consequences in this state of the rule that certain trusts are indestructible.

In *Matter of Caswell*[18] the facts show that the deceased was domiciled in New York State. He owned real estate in Florida. His will was duly probated in New York. By its terms he placed in trust for the income benefit of his widow the minimum amount required to prevent an election by her under the terms of Section 18 of the New York Decedent Estate Law. The widow was dissatisfied with this provision. She therefore brought an action in the State of Florida to appropriate to herself the deceased's real estate in that jurisdiction. To do this she invoked some principle of the homestead law of that state.[19] Faced with difficult and expensive litigation with the widow, the executor of the estate entered into a compromise agreement with her subject to approval by the court. By the terms of this agreement the widow in consideration of a payment of $18,000 purported to surrender all rights she had in the estate. A special guardian was appointed to represent infant trust remaindermen. He made a calculation that an outright payment of $18,000 to the widow would have the effect of increasing the pecuniary rights of his wards. He therefore reported to the court approval of the agreement and requested permission on his part to execute it. All other parties in interest approved the agreement. This case therefore presents a situation featured by a *bona fide* controversy and a controversy having intrinsic merits on both sides. Nevertheless the court was constrained to disapprove the agreement on the sole ground that under Sections 103 of the New York Real Property Law and 15 of the New York Personal Property Law the widow, as an income beneficiary of an indestructible testamentary trust, could not effectively alienate her right to receive the income from such trust. If the agreement were approved, said the court, and the $18,000 paid to the widow, nothing could thereafter prevent her from compelling the Trustee to reconstitute

18. 185 Misc. 599, 56 N. Y. S. (2d) 507 (Surr. Ct. 1944), *aff'd*, 269 App. Div. 809, 56 N. Y. S. (2d) 407 (4th Dep't 1945).

19. FLA. COMP. GEN. LAWS (Supp. 1940) § 5507 (1), Fla. Acts 1933, c. 16103, § 35, as amended, Acts 1939, c. 18999, § 1.

the proponent would receive a sum of money amounting to approximately ten percent of the estate. To this agreement objection was made by the Public Administrator, the Alien Property Custodian and the Attorney General on the ground that the hotel manager's case for probate was devoid of all merit; literally that his was a worthless case. The Surrogate to whom the compromise agreement was proposed for approval refused such approval thereby necessarily holding that it was neither just nor reasonable. Whether this agreement would have been approved in the absence of opposition cannot be determined. It might have been disapproved even in that situation. It must be remembered that in compromise agreements, especially touching the probate of wills, the dead man has rights which the courts will protect.

The rights of the deceased are well illustrated by the result in *Matter of Wadsworth*.[17] There the testatrix by a simple will, in substance cut off most of her brothers and sisters. The bulk of her estate she gave to a charitable use, specifically to Near East Relief work. To the probate of this will the disinherited brothers and sisters objected. All parties in interest, including the charity entitled to the residue, entered into a written agreement under the terms of which the brothers and sisters were made legatees and by the provisions of which the money reserved to the charity would be expended elsewhere than at the place and for the purpose specified by the testatrix. An application for approval of this agreement was made to the Surrogate having jurisdiction. His opinion recites that he was compelled to find on the facts that this will had been properly executed; that the testatrix at the time of its execution was in all respects competent to make a will; and that when she executed this will she was subject to no restraints. He therefore disapproved the proposed compromise agreement. He investigated the underlying necessities for a compromise agreement and stated that every such agreement contemplates as a background a *bona fide* and meritorious controversy. He noted that a deceased person has rights which the court will protect. One such right is to have his will probated as he wrote it when there is due execution, no serious doubt as to his testamentary capacity and the absence of all traces of fraud and undue influence.

Between the *Lachat* and *Wadsworth* cases a notable difference is that there was an active objective controversy in the first case while there was none in the second. Hence from the *Lachat* case it is apparent that there must be not only a *bona fide* controversy but there must be some merit to both sides of the disagreement.

17. 142 Misc. 717, 256 N. Y. Supp. 348 (Surr. Ct. 1932), *aff'd*, 236 App. Div. 712, 258 N. Y. Supp. 982 (4th Dep't 1932).

the trust and to pay to her its income. To the same effect see *Matter of Mayer*.[20]

The holding in the *Caswell* and *Mayer* cases should be distinguished from the rule announced by the Court of Appeals in *Fisher v. Fisher*.[21] There an action was brought to compel specific performance of a compromise agreement. The defense was that the agreement was void in its inception because by its terms it destroyed utterly the future contingent interests in a testamentary trust of parties unborn at the time the agreement was made. The deceased there by his will had created indestructible trusts. Objections to the probate of this will were filed and a genuine controversy arose. A compromise agreement answering to all the requirements of Section 19 of the New York Decedent Estate Law was reached and was approved by the court having jurisdiction. By the terms of this agreement a total destruction of the trusts contained in the will was accomplished. The destruction of the trusts was not found by the Court of Appeals to have been improper. The *Fisher* case since the time of its announcement has been deemed authority for the principle that whereas trusts of an indestructible kind cannot be destroyed by a compromise agreement made *after* the probate of the will, such trusts may be destroyed by an agreement executed and approved *prior* to such probate. The reason is that until a will is probated any trust created by it is not known to be valid. Once a will has been probated, however, the validity of the trust is established. At that point the policy supervenes and makes destruction of the trust wholly or *pro tanto* impossible of accomplishment.

As is the case with all general principles, instances may arise where their application is supposed by a court to work such hardship that to avoid it, the court may be led to display considerable ingenuity. *Matter of Wade*[22] furnishes an illustration for this observation. There the deceased by his will gave $500,000 to his trustee for the income benefit of the widow. The residuary estate of the deceased was committed to separate and distinct trusts for the respective lives of his three children. The widow and the trustee were the executors of deceased. The widow was not a trustee. In the administration of the estate by the executors heavy losses were suffered. When the accounts of the executors were presented the beneficiaries of the residuary trusts filed objections. Eventually a compromise agreement disposing of the objections was made. To this agreement the widow as executrix and in her individual capacity was a party. The sole trustee was likewise a party as such. It was pro-

20. 261 App. Div. 982, 27 N. Y. S. (2d) 433 (2d Dep't 1941).

21. 253 N. Y. 260, 170 N. E. 912 (1930).

22. 270 App. Div. 712, 61 N. Y. S. (2d) 16 (4th Dep't 1946).

vided by the agreement that whereas the will directed payment to the trustee of $500,000 with which to set up the widow's trust, such fund should be "reduced" to $400,000. The compromise agreement in this form was approved and the trust in the year 1937 was set up in the amount of $400,000. An intermediate account was filed by the trustee in 1942. The widow together with a special guardian representing infant contingent remaindermen objected to the account. The objections of the widow were (a) to the non-report of the missing $100,000 and (b) to the non-report of income thereon for the period from the inception of the trust to the closing date of the account. The trial court overruled the objections holding that the compromise agreement was valid. To the objection that the widow could repudiate the agreement[23] owing to the public policy embodied in Section 103 of the New York Real Property Law and Section 15 of the New York Personal Property Law the trial court answered that the legal effect of the widow's act amounted to a "renunciation" of her right to receive income on $100,000 in trust. The trial court conceded that the trust fund had been reduced.

On appeal the Appellate Division disagreed with the reasoning of the Trial Court but approved its result. This it accomplished by holding that no reduction of the trust actually occurred.[24] The court said that if the trust had been set up (as, according to the court, it should have been set up) one year after the testator's death in 1930 its value six years thereafter (i.e. in 1937), at which time it was actually set up in the sum of $400,000, would not have been in excess of $400,000. Consequently the Appellate Division declared the use of the term "reduction" in the compromise agreement was in the nature of an unfortunate misnomer. Moreover, the Appellate Division seems to have held that the approval of the compromise agreement in the first instance by the Surrogate's Court having jurisdiction carried with it by necessary implication the conclusion that the Surrogate gave his approval only after a full investigation of all the facts and circumstances plus the relevant law. Indulging in this hypothesis the Appellate Division said that the approved compromise agreement was the manifest equivalent of a finding in 1937 that $400,000, when the trust was then set up, was the equivalent of $500,000 within the meaning of the terms of the will. This matter reached the Court of Appeals on a motion for leave to appeal and in that court it was unanimously affirmed.[25] The decision in the Court of Appeals involved recognition for the first time that the Com-

23. Matter of Wentworth, 230 N. Y. 176, 129 N. E. 646 (1920).

24. See note 22 *supra*.

25. Motion for leave to appeal granted, May 22, 1946, 270 App. Div. 982, 62 N. Y. S. (2d) 850 (4th Dep't 1946), *aff'd*, 296 N. Y. 244, — N. E. (2d) — (1947).

promise Agreement was made in violation of Section 15 of the Personal Property Law and Section 103 of the Real Property Law. Nevertheless that court held the Surrogate's decree of January 14, 1937, approving the agreement, a conclusive adjudication of its validity. This result in the Court of Appeals should be read against a background of the language used in *Matter of Wentworth.*[26]

Jurisdictional Limitations on Surrogates' Courts as Affecting Compromise Agreements

Is it possible for a compromise agreement in the Surrogate's Court to make effective disposition of matters normally outside the jurisdiction of that court? In *Matter of Kraetzer,*[26a] a compromise agreement was presented for approval adjusting all controversies which had arisen among multiple parties with regard to the disposition of trust remainders some of which were testamentary while others existed under deeds *inter vivos.* Apparently to decide on the justice and reasonableness of the compromise the Surrogate would have found it necessary to construe all the instruments involved. The Surrogate held that since he lacked jurisdiction to construe an *inter vivos* instrument, he likewise lacked the power to approve the compromise agreement in the form in which it had been presented to him.

In *Matter of Bausch*[27] it appears that a compromise agreement adjusting a probate controversy in effect placed the deceased's entire estate in a trust the form of which in substance made it an *inter vivos* trust. Years later it became necessary for the trustee to render its accounts. Some doubt arose in the trustee's mind as to the jurisdiction of the Surrogate's Court to take and state its account. It is apparent from the provisions of the New York Surrogate's Court Act[28] that the Surrogate's Court has no jurisdiction over an *inter vivos* trust. The trust in question had all the earmarks of a living trust though it came into being by way of a compromise agreement in the Surrogate's Court. Special Term held that the Surrogate's Court lacked jurisdiction.[29] The Appellate Division reversed.[30] There was implicit in the compromise agreement, according to the Appellate Division, the idea that some day the Trustee would be required to account in order to gain a final discharge. The court held jurisdiction was not lost by the Surrogate's Court but fastened on this fund until the termination of the trust.

26. 230 N. Y. 176, 129 N. E. 646 (1920).

26a. 147 Misc. 609, 264 N. Y. Supp. 443 (Surr. Ct. 1933).

27. 270 App. Div. 418, 59 N. Y. S. (2d) 485 (4th Dep't 1946).

28. N. Y. SURR. CT. ACT § 171.

29. Order of Sup. Ct. (Onondago Co.) (Spec. Term, Cross, J.) entered May 14, 1945.

30. See note 27 *supra.*

In *Matter of Jasie*,[31] an unreported decision in New York County, the inter-connections between matters coming immediately under the jurisdiction of the Surrogate's Court and matters not pertaining to such jurisdiction is well illustrated with reference to compromise agreements. There the surviving spouse of the deceased was presented by provisions under the will of his wife which he believed were inadequate as tested by Section 18 of the New York Decedent Estate Law. Moreover he was prepared to litigate the question whether the estate consisted merely of the assets acknowledged by the executors to belong to it or included additional property of substantial value. The surviving spouse at the same time was plaintiff in an action pending in the Supreme Court, the defendants of which were the executors in their individual capacity and corporations, the stocks of which were owned by such executors either individually or as fiduciaries. The surviving spouse was a defendant in a separate replevin action but the subject matter of the action was physically held by the executors who claimed it belonged to the estate of deceased. In addition the surviving spouse was an indemnitor in relation to an obligation on which the primary obligor was the deceased spouse. All parties agreed that it would be desirable to arrive at a fixed amount of money by way of which to settle all the claims of the surviving spouse and to detach him and his interests wholly from the tangled property relations of the deceased spouse, her children, certain close corporations and her fiduciaries. A suitable agreement was contrived. The question was whether such agreement came within the jurisdiction of the Surrogate's Court having jurisdiction of the estate of the deceased spouse. The court in substance held that it had power to approve the agreement which provided for payment from the estate of a substantial sum of money. The court took this action after it had determined that the agreement, tested solely by the interests of the estate itself, would operate beneficially with reference to all parties concerned in the estate. The mere fact that this approval had ramifications beyond the jurisdiction of the Surrogate's Court was considered to be immaterial.

It is submitted that the decision in *Matter of Kraetzer*[32] is not sound. The Surrogate's Court is to be sure a court of limited jurisdiction. For example, it has no authority directly to decide questions such as liability for breach of contract. Suit cannot be brought there directly on a promissory note. The court cannot entertain an application to settle the accounts of a trustee of a trust *inter vivos*. Its jurisdiction in short almost wholly springs from an estate. Once the court has jurisdiction,

31. Surr. Ct. (N. Y. Co.), Index No. P. 683-1945.
32. 147 Misc. 609, 264 N. Y. Supp. 443 (Surr. Ct. 1933).

however, any issues determinable by principles of law or equity whether they involve contracts, debtor-creditor relationships or any other category of relationships may be decided by that court as an incident to the proper discharge of the business over which it has direct jurisdiction. If, as in the *Kraetzer* case, the approval of a compromise agreement directly affecting the fortunes of an estate calls for a determination of the meaning of a trust deed *inter vivos* no reason appears why the court should not supply such construction. The court is engaged in such activity not by way of tampering with *inter vivos* trusts but is engaged, as in the *Jasie* case, with the problem of the proper administration of the affairs of a deceased person.

The Range of Compromise Agreements

If it be supposed that there is something to compromise, that there is a genuine controversy and that there is no flagrant disregard either of public policy or the requirements of good faith, it is believed that there is no limitation on what may be accomplished through the medium of a compromise agreement approved under the provisions of Section 19 of the New York Decedent Estate Law.

To illustrate the extent to which a compromise agreement may go consideration may be given to what was done in the *Estate of Emma H. Rose*,[33] an unreported case in New York County. There deceased, dying in 1944, left what purported to be her last will and testament dated in August of that year. She had also executed testamentary instruments in 1943 and in 1942. Under the 1944 paper she had wholly eliminated two persons named in the earlier papers to receive substantial legacies. She had also changed her executors and trustees to persons unmentioned in the earlier papers. In the 1944 paper she set up a single trust. That paper contained an *in terrorem* clause. It also contained provisions endowing her nominated executors and trustees with unusual powers. For example, they were authorized to abandon her property if they chose to do so. They might carry estate property in their individual names with no mark of trusteeship attached thereto. Many administrative powers were given to be exercised in the "absolute and uncontrolled discretion" of the nominated fiduciaries. Express power was given to hold the estate in cash for any length of time whatever regardless of whether any interest was earned thereon. The judgment of the nominated executors and trustees was made final and conclusive in making any division or distribution of the estate both as to the value and as to the kind of property to be divided or distributed. Objections to this paper were filed by the legatees under the earlier

33. Surr. Ct. (N. Y. Co.), Index No P. 91-1945.

wills. The litigation was prolonged. The controversy eventually was compromised by way of an agreement to which all parties in interest were signatories.

By way of the compromise agreement a legatee charged with undue influence in the procurement of the propounded paper had his legacy reduced by fifty percent. This legatee, who was one of the nominated executors and trustees under the propounded paper, was wholly eliminated from the office of fiduciary. Two persons named to act as executors and trustees under the terms of earlier papers were made by the compromise agreement executors and trustees under the will as probated, though that paper in its original made no mention of them. These same parties, named as legatees in the earlier papers, were added as legatees to the terms of the propounded paper in the form in which it was probated. The unusual powers mentioned above were removed because the compromise agreement provided that they should be deleted from the propounded paper. It was likewise required by the compromise agreement that the *in terrorem* clause should be deleted. Many other changes were accomplished and the whole result achieved the form of a completely restated will, the text of which was the propounded paper amended by way of additions to and subtractions from the text in important particulars. One further result of the compromise agreement consisted in the substitution of four simple trusts for one trust of exceptional complexity.

The compromise agreement in the *Rose* estate contained express consents in advance by all parties that the will as compromised when offered for probate in foreign jurisdictions would not be the subject matter of opposition by any party to the agreement. On the contrary all such parties by the terms of the agreement expressly waived notice of any such probate proceeding and covenanted that they would make, execute and deliver all further instruments necessary to aid in the admission of the will, as compromised, to probate in any other jurisdiction. The agreement fixed the compensation of all attorneys who had participated in the proceeding. It provided that the court having jurisdiction should retain jurisdiction of the entire proceeding pending complete performance of the agreement. In the *Rose* case the complexities of the problem related to the alterations to be made in the dispositive and administrative scheme set forth in the will as originally propounded. There were no particular difficulties relative to the parties necessary on the agreement itself. Decided complications in this regard may however arise.

Party complexities may be illustrated from the situation arising in

the *Estate of Charles H. Hastings*[34] who died a resident of New York County and whose will was the subject of a contest. Mr. Hastings gave his entire estate to charitable purposes cutting off entirely those persons who would take in intestacy. His will if probated would operate on real estate in a foreign jurisdiction. While the contest of his will was pending one of the contestants died testate, domiciled in a foreign jurisdiction. That contestant's will was probated. It set up trusts and named a trustee. Theoretically if Charles H. Hastings had died intestate (something which was not known to be or not to be the fact when the contestant died) title to his real estate on the facts stated would have vested in part at least in the Trustee of the deceased contestant. It was thought therefore that to secure an absolutely binding compromise agreement which would pass muster when examined later by title examiners of real estate, it would be necessary for the contestant's trustee to secure ancillary authority in the State of New York so that such trustee with ancillary power might become a signatory to the proposed compromise agreement. A somewhat similar situation arose relative to a second contestant who during the pendency of the probate contest became incompetent while domiciled in a foreign jurisdiction.

In the *Hastings* case the consideration for the surrender of the right to object was simply a stated number of dollars but the situation of the parties exacted a quite refined form of legal analysis so that the agreement itself, as it turned out, proved fairly complicated.

There is currently pending in New York County a rather singular problem connected with compromise agreements.[35] In this instance deceased died testate according to the claims made by his nominated executors. At the time of his death he had no known distributees. Under such circumstances the Surrogate's Court Act requires that citation issue to the Attorney General of the State of New York[36] and to the Public Administrator of New York County.[37] Finally a citation on this state of fact must be published against unknown distributees for whom on the return of the citation it is a matter of standard practice for the court to appoint a special guardian. Objections to the propounded paper were filed by the Public Administrator and by the special guardian. The Attorney General served and filed merely a notice of appearance.

In due course negotiations were opened between the attorneys for the proponent, the attorneys for the Public Administrator and the

34. Surr. Ct. (N. Y. Co.), Index No. P. 869-1942.
35. Estate of Isidor Liberman, Surr. Ct. (N. Y. Co.), Index No. P. 570-1946.
36. N. Y. SURR. CT. ACT § 54
37. N. Y. SURR. CT. ACT § 136-2.

special guardian. These negotiations resulted in a compromise agreement by the terms of which, among other provisions, a sum of money would be set up for the benefit of the distributees of the deceased provided such distributees appeared and proved their positions within two years following the date of approval of the compromise agreement. If at the expiration of the two year period no distributees answer the requirement of the compromise agreement the provision is made that the money shall be repaid to the parties benefited under the will who are to contribute such money in the first instance.

On this state of the record an application entitled in the probate proceeding was made for approval of the agreement. This application was on notice to all who had appeared. Every legatee and devisee was signatory to it and all other parties had assented to it except the People of the State of New York in their sovereign capacity who, it was supposed, had no interest in the matter and would claim none. On the return day of the motion for approval it turned out that the Attorney General opposed approval on the theory that the People's "right" to escheat was cut off by the provisions of the agreement. The idea underlying the position taken by the Attorney General seems to be this: If the deceased died intestate for the reason that the instrument propounded as his will could not be probated owing to the incompetency of deceased at the time the paper was executed or for some other reason, then the fund in the first instance would belong to his distributees. Should it happen, however, that no distributees would appear and prove status, then there would be a complete failure of title to the property whereupon the principle of escheat would place the fund in the coffers of the public.

It is believed that this is the first time in the history of the office of the Attorney General that that functionary has taken such a position; and yet it has some appearance of merit. A difficulty is that the so called right of escheat does not appear to rise to the level of a title. If the People in their sovereign capacity do not gain title under the operation of the principle of escheat it may perhaps be doubted that the Attorney General has standing to object while purporting to speak solely for the People in their sovereign capacity. The function of the Attorney General it may be is to speak only for the unknown distributees. If so, one has the curious situation of a special guardian willing to adjust the matter while acting for such unknown distributees while the Attorney General having the same clients declines to consent. It is a question whether the Attorney General in such circumstances is a supernumerary.

Enough has been said on the *Liberman* case to show that in com-

promise law as in all other law new facts bring about brand new questions as to legal rights and obligations.

A Note on Fees

Lawyers representing parties to the compromise agreement other than the lawyers representing the estate fiduciary and other than special guardians are not entitled to be paid from the general fund for their services in connection with the compromise agreement.[38] Nevertheless there is nothing to prevent payment of compensation from the general fund to all attorneys who have appeared and who have contributed to the success of the agreement if provision therefor is made part of the agreement itself.

38. Matter of Wadsworth, 250 App. Div. 11, 293 N. Y. Supp. 304 (1st Dep't 1937), *aff'd*, 275 N. Y. 590, 11 N. E. (2d) 769 (1937).