Criminal Law--Waiver of Jury Trial--Right to Waive Held Qualified (People v. Diaz, 8 N.Y.2d 1061 (1960))

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beneficiary of a real property trust. As a matter of fact, the proposition would seem to flow rather naturally from the applicable statutes, and has had, in all probability, a practical, if not a legal existence for some time in this state. As well as being entirely consistent with modern business activity and corporation law trends, the decision in the instant case is in accord with most scholarly authorities. Moreover, it would seem that ability to be a beneficiary may be implied from the power to hold and acquire property, and need not be specifically granted by the corporate charter.

CRIMINAL LAW — WAIVER OF JURY TRIAL — RIGHT TO WAIVE HELD QUALIFIED.— Defendant and codefendant were indicted on two counts of first degree manslaughter, second degree manslaughter, and conspiracy. The defendant was convicted on two counts of second degree manslaughter and conspiracy. He appealed from this conviction, claiming that the denial of his motion for a nonjury trial was a violation of his absolute right under the New York Constitution to waive a jury trial. In an opinion subsequently

31 Alcoma Corp. v. Ackerman, 26 Misc. 2d 678, 682 207 N.Y.S.2d 137, 142 (Sup. Ct. 1960).
32 Indeed, this is the theory which is implicit throughout Justice Streit's discussion of the previous case law, as he indicates that the prior cases were primarily concerned with violations of the rule against perpetuities, misinterpretation of § 96(3), and indefiniteness of beneficiaries. Id. at 680-84, 207 N.Y.S.2d at 140-43.
33 "[I]n the absence of statutes otherwise providing, a corporation can take and hold the title to land as well as to personal property, and can be the beneficiary of a trust either of land or of personalty." 2 SCOTT, TRUSTS 819 (2d ed. 1956). 1A BOGERT, TRUSTS AND TRUSTEES § 168, at 118 (1951). RESTATEMENT (SECOND), TRUSTS § 116, comment c (1959): "A corporation, municipal or private, may be the beneficiary of a trust of property if it has capacity to take and hold the legal title to such property."
34 See Lord v. Equitable Life Assur. Soc'y, 47 Misc. 187, 194, 94 N.Y. Supp. 65, 70 (Sup. Ct.), aff'd, 109 App. Div. 252, 96 N.Y. Supp. 10 (2d Dep't 1905): "[A]ll applicable provisions of a general law under which a corporation has been formed, not expressly set forth in its certificate or articles of incorporation, are to be read into, and taken to be a part of its charter . . . ." Ibid. Consequently, since the New York corporation laws authorize a corporation to hold choses in action, it would seem superfluous to include such a power in the corporate charter. BALLANTINE, CORPORATIONS § 18, at 62 (rev. ed. 1946).

1 N.Y. CONST. art. I, § 2. “Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however,
affirmed by the Court of Appeals, the Appellate Division held that the right is a qualified one within the discretion of the trial judge, and that it was not an abuse of this discretion to deny the defendant's motion in the absence of a similar waiver by the codefendant where they were both intimately involved in the commission of the crimes, and the defendant had made no claim that he was prejudiced by a joint trial or that he could not receive a fair and impartial verdict. People v. Dias, 10 App. Div. 2d 80, 198 N.Y.S.2d 27 (1st Dep't), aff'd mem., 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

Although at early common law no direct examples of waiver of jury trials can be found, there did exist procedural devices which effected the same results. The defendant, by pleas like "in Gratiam Reginae," could authorize the court to impose a sentence after trial if it found that such action was warranted from the facts. Early in American history, examples of waiver of jury trial appeared in the colonies of Massachusetts, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania and Maryland. New York, however, did not follow this example. The leading New York case is Cancemi v. People, where the Court of Appeals refused to accept the verdict rendered by a jury of eleven in a murder trial where one juror had withdrawn after trial had begun, even though the defendant had consented to be bound by the determination of the eleven. The court stated: "If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone." The court added that the right by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."

3 Id. at 660-69.
4 18 N.Y. 128 (1858).
5 Even today under the provisions of article I § 2 of the constitution, the decision in the case would remain the same since the constitution does not allow waiver where the crime charged is punishable by death. But the provision denying waiver when the crime is punishable by death did not come into effect until almost eighty years after the case was decided. N.Y. Sess. Laws 1937, appendix, p. 2095.
6 Cancemi v. People, 18 N.Y. 128, 138 (1858). Subsequent cases have been distinguished from Cancemi. In Pierson v. People, 79 N.Y. 424 (1880), the defendant, after challenging the jury on the ground that it was improperly
to a jury trial cannot be dispensed with except by constitutional amendment.\(^7\)

In the federal area, a different result was reached with the decision in *Patton v. United States*.\(^8\) The defendant, who had been indicted for conspiring to bribe a federal prohibition agent, was tried in a federal district court, and with the advice of counsel and in open court, waived trial by twelve jurors and consented to trial by eleven. The defendant was convicted and appealed on the ground that he had no power to waive his constitutional right to trial by jury. The Supreme Court held that there could be a waiver with the consent of counsel and the expressed and intelligent consent of the defendant. The Court added the further requirement that the waiver must be approved by the trial court:

\[\text{[T]he duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.}\(^9\)\]

Since this right did not evolve from constitutional provisions as in New York State,\(^10\) it was treated in the federal courts as a common-law right. It was subsequently codified, and is presently contained in Rule 23(a) of the Federal Rules of Criminal Procedure.\(^11\) In a recent case, the Court of Appeals for the Tenth Circuit, relying on the language of the *Patton* case, interpreted rule 23(a) as giving the defendant a qualified right, holding that

called, withdrew the challenge. The court stated this waived any irregularities and distinguished the *Cancemi* case on the ground that here the error was merely formal and did not affect public interest. In *People v. Cleary*, 205 N.Y. 91, 98 N.E. 408 (1912), the defendant was convicted by a jury of twelve, one of whom did not meet the proper requirements necessary to become a juror. The court stated that his failure to challenge the juror at the trial was a waiver of the objection.

\(^7\) *Cancemi* v. *People*, *supra* note 6, at 136. This constitutional guarantee does not extend to the Courts of Special Sessions. *People v. Bellinger*, 269 N.Y. 265, 199 N.E. 213 (1935); *People v. Luczak*, 10 Misc. 590, 32 N.Y. Supp. 219 (Super. Ct. 1894). The right to a jury trial for the type of crime triable by a Court of Special Sessions did not exist at the time of the constitution and thus the constitution did not extend this right to it. *People v. Cleary*, 182 Misc. 302, 43 N.Y.S.2d 533 (Utica City Ct. 1943). See also *N.Y. Const.* art. VI, § 18 (1926). The defendant may, however, demand a jury. *N.Y. Code Crim. Proc.* §§ 701-02. In counties other than New York this is not a constitutional jury of twelve, but rather a statutory jury of six. *N.Y. Code Crim. Proc.* § 710.

\(^8\) 281 U.S. 276 (1929).

\(^9\) *Id.* at 312-13.

\(^10\) *Cancemi* v. *People*, *supra* note 6.

\(^11\) *Fed. R. Crim. P.* 23(a): "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."
the approval of the trial court is not merely ministerial but discretionary.\(^{12}\)

The New York legislature, in the 1930's, enacted laws to meet several problems which were arising. In 1933 the Code of Criminal Procedure was amended to allow alternate jurors,\(^{13}\) thereby alleviating the mistrial problem presented in the *Cancemi* case where a juror was unable to continue after trial had begun.

In 1937 the Constitution was amended to allow waiver of jury trial in criminal actions, but this amendment failed to provide for consent of the court.\(^{14}\) The legislature provided for consent in a 1938 amendment.\(^{15}\) The applicable article now reads:

A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court *before and with the approval of a judge or justice* of a court having jurisdiction to try the offense.\(^{16}\)

The section is self-executing and independent, needing no other implementary legislation.\(^{17}\)

The question has recently arisen as to whether the right to waive a jury trial is absolute, *i.e.*, whether it exists only to insure that the defendant be informed of the serious nature of his act, reducing the approval of the court to a purely ministerial function, or whether the right is qualified, the granting or withholding of which is in the sound discretion of the court. The decisions in other jurisdictions on this question are of little help, since the problem is essentially one of statutory interpretation. Some states have construed their statutes as creating a qualified right,\(^{18}\) some have held

\(^{12}\) Mason v. United States, 250 F.2d 704 (10th Cir. 1957).

\(^{13}\) N.Y. Code Crim. Proc. § 358(a).


\(^{15}\) Revised Record, N.Y. State Constitutional Convention of 1938, vol. II, 1273-86.

\(^{16}\) N.Y. Const. art. I, § 2 (emphasis added). The provision forbidding waiver in crimes punishable by death was first reported in the 1937 amendment and carried over into this amendment. The decision in the *Cancemi* case that legislative action was needed to allow waiver was finally effectuated but the legislature expressly denied the right to waive in cases like *Cancemi*.


that the right is absolute, and others have decisions going both ways. Since in New York the right to waive is a creature of statute and not of common law, it would seem that the legislature could, in creating it, make it qualified. The question is whether in fact they did so.

Prior to the instant case, an aura of confusion surrounded the sparse New York case law in the area. In *Scott v. McCaffrey*, the court held the right to be an absolute one. There, a sixteen year old boy was indicted and tried for first degree assault with five other defendants. His application for severance was denied, and he then sought to waive trial by jury. The trial court denied his application for waiver on the ground that he would thereby be indirectly accomplishing that which he was unable to accomplish directly—a severance. The defendant then instituted a proceeding under Article 78 of the Civil Practice Act to stay the trial and compel the trial court to approve his waiver. The Supreme Court granted the petition and construed the amendment as follows:

It is... my view that it was intended by the amendment to provide that, when the defendant wishes to waive, the only function of the Trial Judge with respect to this matter is to protect the rights of the defendant, and when the Judge has ascertained that the defendant is fully aware of the nature and consequences of his request, and the defendant has signed his written statement in open court before the Judge, approval must follow.

Shortly after *McCaffrey*, the case of *People v. Masucci* was decided in the same county. The defendant was indicted with two others for conspiracy to commit extortion, and his application for

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19 People v. Spegal, 5 Ill. 2d 211, 125 N.E.2d 468 (1955); State v. Shall, 177 La. 923, 149 So. 523 (1933); Grady v. State, 117 Tex. Crim. 115, 35 S.W.2d 158 (1931).


22 It is difficult to ascertain what the intent was on this question. The record of the proceedings offers no answer. See Revised Record, N.Y. State Constitutional Convention of 1938, vol. II, 1273-86. However, the N.Y. JUDICIAL COUNCIL FIFTH ANN. REPORT AND STUDIES, 37, 161-67 (1939), indicates that the convention intended the right to be qualified.


24 Id. at 680, 172 N.Y.S.2d at 964 (emphasis added).

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trial without jury was denied. The court here differed with *Scott v. McCaffrey*,\(^{26}\) saying that the court in that case had been influenced by the youth of the petitioner. This time the court denied the application for waiver of the jury and decided that all three defendants should be tried by the jury.

In the instant case, the defendant Diaz, tried with three others in the First Department, moved for a waiver of trial by jury. The court denied the waiver and Diaz appealed. The Appellate Division held that the legislature\(^{27}\) must have intended to give the trial court discretion, thus making the right a qualified one.\(^{28}\) The Court drew an analogy to Section 10 of the Membership Corporation Law, under which approval of a certificate of incorporation by a justice of the Supreme Court is not a mere ministerial duty, but calls for the exercise of judicial discretion. The Court also relied on the federal rule as established in *Mason v. United States*,\(^{29}\) noting the similarity of the "approval" language in Rule 23(a) of the Federal Rules of Criminal Procedure to the language in the New York Constitution. The Appellate Division also referred to the fifth annual report of the New York State Judicial Council, where the committee indicates that, although history favors conferring an untrammelled privilege, the constitutional mandate requires the consent of the court, such consent being a matter of discretion.\(^{30}\)

The decision is of significance to the criminal law practitioner. It eliminates the right of one codefendant to waive a jury trial if the other defendants do not also waive, unless he can show something which would prevent an unprejudiced trial. In this latter event a tender of waiver would compel the court to approve. Even

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\(^{27}\) See Revised Record, *supra* note 22.

\(^{28}\) People v. Diaz, 10 App. Div. 2d 80, 86-87, 198 N.Y.S.2d 27, 34-35, *aff'd mem.*, 8 N.Y.2d 1061, 170 N.E2d 411, 207 N.Y.S.2d 278 (1960). But see the dissenting opinion which quotes from the Revised Record the statement: "The proposal is a very simple one. It is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge of full opportunity to understand what he is doing." *Id.* at 95, 198 N.Y.S.2d at 43.

\(^{29}\) 250 F.2d 704 (10th Cir. 1957).

\(^{30}\) N.Y. JUDICIAL COUNCIL FIFTH ANN. REPORT AND STUDIES, 37, 161-67 (1939). Subsequent to the Appellate Division decision in the *Dias* case but prior to its affirmation by the Court of Appeals, Duchin v. Peterson, 12 App. Div. 2d 622, 208 N.Y.S.2d 458 (2d Dep't 1960), was decided in the Second Department holding that a writ of prohibition pursuant to Article 78 of the Civil Practice Act, employed in *Scott v. McCaffrey*, 12 Misc. 2d 671, 172 N.Y.S.2d 954 (Sup. Ct. 1958), was not the proper procedure to enforce the right to waive, the remedy of appeal being available to the petitioner. The court did not reach the question of whether the right to waive was absolute or qualified.
if the decision is not an "untainted determination," the court may refuse the waiver and grant a severance instead.

Thus the practitioner who could, prior to this decision, under the *Scott v. McCaffrey* rule, waive a jury after severance had been denied, and thus in reality effect a severance, has lost a procedural device valuable in separating his client from the others. It may well be, after this case, that the practitioner will find his client tied to the other defendants with bonds that cannot be broken.

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**Estate Administration — Apportionment — Amount of Claim Based on Antenuptial Contract and Includible in the Gross Tax Estate Held Subject to Apportionment.** — In a proceeding to settle their account, the executors of the decedent's estate sought to have the widow pay her apportioned share of the estate taxes under Section 124 of the New York Decedent Estate Law. Decedent and his widow had entered into an antenuptial agreement under the terms of which each mutually waived his rights in the other's estate, including his right of election. As additional consideration for the contract, the decedent agreed that if the widow survived him she would be entitled to the remaining annuity payments due under an agreement between the decedent and his employer. The widow contended that she was a contract creditor of the estate and that, as such, no tax could be apportioned against these annuity payments since they were nontestamentary assets although they were included in the gross taxable estate. The Court, applying federal estate tax concepts of consideration, *held* that this antenuptial agreement was not a contract which created a legal obligation exempt from apportionment under section 124, but was in reality a gift taking effect at death against which there must be apportionment. [*Estate of Samuel Lipshie*, 145 N.Y.L.J. 15, col. 5 (Surrogate Ct. 1961)].

Section 124 of the Decedent Estate Law provides for equitable apportionment of the estate taxes due among all "the persons interested in the gross tax estate . . . to whom such property is or may

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31 People v. Diaz, *supra* note 28 at 93, 198 N.Y.S.2d at 40. The Court does not spell out the meaning of this phrase.


1 N.Y. DECD. EST. LAW § 18. This section provides that when a decedent dies testate, the surviving spouse is entitled to elect his or her share of the estate as in intestacy subject to certain limitations. There is also included a provision allowing a waiver of the right of election.