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Decedents' Estates and Trusts—The Hidden Question of Law in Cy Pres

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would take as *bona vacantia*,⁶¹ which the Court in *In re Menschëfrend's Estate*,⁶² decided at the same time as the instant case, held to be a form of escheat rather than a substitution of the state as an heir at law. Therefore, British Honduras had no interest in the estate in the event of intestacy and, accordingly, lacked standing to intervene.

The decision can perhaps be explained in terms of comity, although it does not purport to be so grounded. Comity among nations requires that, for the orderly administration of the estate of a foreigner who dies owning personal property both at home and abroad, recognition be given to the fact that there is but one estate and that primary probate or administration proceedings should be brought in the court of the decedent's domicile, all other proceedings being ancillary thereto.⁶³ By allowing intervention in this case, the Court may be complying with the general purpose of the comity rules although, as the dissent demonstrates, there was no comity requirement in this instance since the will was not admitted to probate in solemn form in British Honduras.⁶⁴ It was admitted only in common form which is not deemed a probate within the meaning of the New York statute.⁶⁵ Unless a will has been probated in a foreign country in a manner which complies with the New York statute, ancillary letters of administration will be withheld and thus probate proceedings can properly be brought in a New York court.⁶⁶ Further, as the dissent argues, intervention should be based on a demonstrated property interest in the proceedings and cannot be allowed as a matter of discretion, favor or comity.

In view of the demonstrated lack of property interest on the part of British Honduras and its tenuous interest in the proceedings, *In re Turton* suggests a possible extension of the already broad interpretation which Section 147 received in the *Davis* case. The Court, however, gives no indication of an intent to extend the rule set forth in *Davis* nor does the Court claim to be interpreting it. Rather, it merely states that the case falls within the broad framework of that decision. Because of this, the net effect of *In re Turton* on Section 147 remains uncertain.

P. W. D.

THE HIDDEN QUESTION OF LAW IN CY PRES

When, due to a change in circumstances, a literal compliance with the charitable provisions of a will has become impracticable or impossible, the court, by invoking its cy pres powers, may make such disposition as in its discretion will most effectively accomplish the general charitable purpose of the testament.⁶⁷ In *In re Scott's Will*, after the death, without lineal descendants,

61. Supra note 56.

62. 283 App. Div. 463, 128 N.Y.S.2d 738 (1st Dep't 1960), aff'd, 8 N.Y.2d 1093, 208 N.Y.S.2d 453 (1960).

63. *Parsons v. Lyman*, 20 N.Y. 103 (1859); *In re Fitch's Estate*, 160 N.Y. 87, 54 N.E. 701 (1899).

64. Supra note 53 at 316, 206 N.Y.S.2d at 764.

65. *In re Gifford's Will*, 279 N.Y. 470, 18 N.E.2d 663 (1939).

66. *Ibid*; N.Y. Surr. Ct. Act § 159.

67. N.Y. Per. Prop. Law § 12; N.Y. Real Prop. Law § 113.

of the last income beneficiary, there was a remainder limited "to the Rector, Church Wardens and Vestrymen of St. Thomas' Church in the City of New York, for the purpose of erecting and maintaining, in such place as they may select, a building or buildings for the care of persons suffering from tuberculosis, to be called the Scott Memorial Home."⁶⁸

Finding the disposition to be impracticable because of the substantial decline in the incidence of tuberculosis since the execution of the instrument and impossible because the principle was inadequate in terms of present construction costs, the Surrogate amended the disposition to provide care for persons suffering from "respiratory and thoracic diseases."⁶⁹ The Appellate Division affirmed.⁷⁰ St. Thomas' Church appealed arguing that the bequest to the church was absolute, in which case, the direction in the will being precatory, the Church was free to apply the fund to any corporate purpose. In the alternative, it urged the exercise of the cy pres powers to permit it to expend almost half of the fund to rehabilitate its church building, placing a Scott memorial plaque near the entrance, and to allow it to devote the balance to maintenance and repair of the building from time to time and to such general charitable uses as it saw fit.

The Court of Appeals dismissed the contention that the bequest was absolute. It also denied that cy pres would permit the application of the entire *res* to rehabilitation of the church building. Nevertheless, the Court reversed on the authority of *In re Potter's Will* that where the intent of the testator is to be ascertained from his language alone, or from his language and surrounding circumstances about which there is no dispute, the intention of the testator is a question of law and not one of fact.⁷¹ Therefore, the appellate court in such cases is free to review the Surrogate's exercise of the cy pres power. The fact that there may be alternative practical substitutes for the testator's direction "does not preclude a question of law from arising concerning whether the Surrogate has exceeded his powers by overriding or failing to give effect to basic purposes of the testator as expressed in the instrument."⁷²

The Court concluded that the testator was actuated by three dominant considerations: (1) that his name be memorialized by means of a building erected for the benefit of mankind, (2) that the building be erected by St. Thomas' Church, and (3) that people afflicted with tuberculosis should be aided in regaining their health. The Surrogate, by placing undue emphasis on the third purpose, nullified the first and second.⁷³ Thus, the decree was erro-

68. 8 N.Y.2d 419, 423, 208 N.Y.S.2d 984, 987 (1960).

69. 19 Misc. 2d 18, 21, 189 N.Y.S.2d 87, 90 (Surr. Ct. 1958).

70. 10 A.D.2d 556, 196 N.Y.S.2d 597 (1st Dep't 1960).

71. 307 N.Y. 504, 515, 121 N.E.2d 522, 527 (1954), citing *Underhill v. Vandervoort*, 56 N.Y. 242, 247 (1874). Neither case is a pure cy pres case.

72. *Supra* note 68 at 426, 208 N.Y.S.2d at 989.

73. This conclusion was based on the probability that St. Thomas' Church would decline to execute the Surrogate's decree which it considered an assignment of an ultra vires responsibility. Thus the fund would have to be administered by some other organization to whose objectives it would be applied.

neous as a matter of law. The Court declined to exercise the cy pres powers itself,⁷⁴ but remanded for disposition by the Surrogate.

Three judges dissenting argued that the exercise of the cy pres power necessarily involves a great deal of discretion.⁷⁵ Finding nothing in the record to indicate an abuse of discretion in this instance, they would have affirmed. The decree, they argued, was in accord not only with the purposes set forth in the will, but also with that part of the proposal of St. Thomas' Church which would apply seventy percent of the fund to the treatment of tubercular patients in Episcopal hospitals.⁷⁶ Thus, when an appellant agrees with the finding of the Surrogate as to the dominant charitable purpose of the testator, it cannot be held as a matter of law that the Surrogate improperly exercised his discretion by failing to authorize application of the balance of the fund to a purpose which is quite different.

The effect of the instant decision on the cy pres doctrine is potentially wide sweeping. The cy pres powers, rooted in the discretion traditionally exercised by a court of equity, by long usage belong to the court of first instance, whether Supreme Court or Surrogate's Court.⁷⁷ This proposition is not questioned by the majority opinion in this case and indeed, the Court expressly does not usurp the cy pres power of the lower court.⁷⁸ The manner in which this discretion is exercised is reviewable on appeal only when it is abused. In the instant case, the Court claims to be reviewing not the exercise of discretion but the question of law arising out of the interpretation of the will. Cy pres discretion must in all instances, however, be exercised to most closely approximate the testator's intent and thus necessarily is based upon an interpretation of the will. The question of law reviewed by the Court in *Scott* is an inseparable element of the cy pres process. Thus, it is difficult to conceive of any cy pres case which would not be reviewable on this ground.

Bd.

UNCASHED CHECKS RECEIVED BY DECEDENT ARE PART OF TESTAMENTARY ESTATE

In *Connolly v. Connolly*, the Court of Appeals had to decide the question whether uncashed pension checks belonging to decedent and in his possession at his death were part of his testamentary estate.⁷⁹ Reversing the Appellate

74. Pending appeal, St. Thomas' Church modified its position proposing to apply 70% of the fund to the care of tuberculars in Episcopal hospitals and the balance to rehabilitation of the church building and a memorial plaque.

75. See *City Bank Farmers Trust Co. v. Arnold*, 283 N.Y. 184, 195, 27 N.E.2d 984, 987 (1940); *Sherman v. Richmond Hose Co.*, 230 N.Y. 462, 473, 130 N.E. 613, 616 (1921).

76. *Supra* note 74.

77. *Supra* note 75.

78. By remanding to the Surrogate's Court for disposition.

79. 9 N.Y.2d 272, 213 N.Y.S.2d 438 (1961).