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Decedents' Estates and Trusts—Uncashed Checks Received by Decedent Are Part of Testamentary Estate

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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).

Division, the Court stated its agreement with Appellate Term that title to the checks passed to decedent and from him to his estate.⁸⁰

Before his death, Sylvester Connolly was an employee of the City of New York. He retired on March 3, 1955 and, as a member of the New York City Employees' Retirement System, chose to receive his retirement benefits under "Option 1."⁸¹ Under this option Connolly would receive an annual retirement allowance payable in equal monthly installments. Connolly died on August 28, 1955, after having received checks, none of which he cashed, for \$1,985.05. "Option 1" provided that any balance in the decedent's account was to go to his beneficiaries. Decedent's original account with the Retirement System totaled \$47,815.35 and this amount was paid to the three beneficiaries under decedent's will, the uncashed checks having been returned to the Retirement System and the amount thereof recredited to his account. James T. Connolly, plaintiff, executor and beneficiary under the will, took the position that the \$1,985.05 represented by the uncashed checks belonged to the estate; so, he paid his share thereof to himself as executor and brought this suit against the other two beneficiaries and against the Retirement System for the other two thirds of the total amount of the checks.

The heart of this controversy is the meaning and purpose of the arrangement made by decedent and the Retirement System under "Option 1." The Court of Appeals interpreted "Option 1" to mean that the beneficiaries were to get an amount equal only to the original account less the monthly allowances accrued to the member of the System during his retirement. In reaching its conclusion the Court termed inapplicable the general law as to whether or not a check imports payment. The relationship between Connolly and the Retirement System was that of debtor and creditor, but the Court did not view this as helpful in answering the question before it. Although the application of general legal principles by analogy is often helpful, it also increases the risk of strained reasoning. Notably, the Court here limited itself to a common-sense interpretation of language fairly clear on its face.

Bd.

EVIDENCE

WIFE'S OBSERVANCE OF HUSBAND WITH ACCOMPLICES NOT A CONFIDENTIAL COMMUNICATION

In *People v. Melski*,¹ the Court of Appeals affirmed a conviction of second degree grand larceny against appellant, who had been charged with illegally appropriating some guns from a shop in Batavia with a few of his friends.

80. 8 A.D.2d 729, 187 N.Y.S.2d 18 (2d Dep't 1959).

81. See Administrative Code of City of New York § B3-46.0.

1. 10 N.Y.2d 78, 217 N.Y.S.2d 65 (1961).