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Decedents' Estates and Trusts—Intervention in Probate Proceedings Allowed If Rights May Be Affected

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It also seems that the majority opinion is misconstruing the intended meaning of Section 143. The statute refers to fraud. It is straining the meaning of the statute to find constructive fraud where the will was accidently destroyed without the testator's knowledge. It is unrealistic to find fraud, actual or constructive, when the testator had knowledge of the events which occurred and had a reasonable opportunity to execute a new will but failed to do so prior to his death.

J. D. R.

INTERVENTION IN PROBATE PROCEEDINGS ALLOWED IF RIGHTS MAY BE AFFECTED

Section 147 of the Surrogate's Court Act permits any person to file objections to the probate of a will who is "interested in the event as a devisee, legatee or otherwise."[49] This section is in accordance with the more general right to intervene set forth in Section 193-b of the Civil Practice Act.[50] In an earlier decision, *In re Davis' Will*,[51] the Court of Appeals interpreted Section 147 to include only a person having a pecuniary interest to protect, either as an individual or in a representative capacity. By this the Court meant anyone who would be deprived of property in a broad sense or who would be entitled to property by probate of a will.[52]

In the recent case of *In re Turton*,[53] the Court was called upon to determine whether the Surrogate's Court had properly denied a motion by the government of British Honduras to intervene specially in probate proceedings pending in that court.[54] Decedent was domiciled in British Honduras, as were his descendants who were all illegitimates. Prior to the commencement of the action in the Surrogate's Court, a court of British Honduras had ordered that a will left by the decedent, purportedly executed in 1918, be admitted to probate "until a later will be found." Thereafter, an action was brought in the British Honduras court to have the 1918 will declared revoked and to probate the alleged will of 1955 as a lost or destroyed testament. While that action remained undetermined, the New York Surrogate assumed jurisdiction to probate the 1955 will, basing jurisdiction on the presence in New York of stock

49. N.Y. Surr. Ct. Act § 147:
Any person interested in the event as devisee, legatee or otherwise, in a will, codicil offered for probate . . . may file objections to any will or codicil so offered for probate.
50. N.Y. Civ. Prac. Act § 193-b:
Upon timely application any person shall be permitted to intervene in an action . . . (c) when the applicant has an interest in real property, the title to which may be affected by the judgment . . . (d) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of or subject to the control of or disposition by the court or an officer thereof.
51. 182 N.Y. 468, 75 N.E. 530 (1905).
52. Id. at 472, 75 N.E. at 534.
53. 8 N.Y.2d 311, 206 N.Y.S.2d 761 (1960).
54. 20 Misc. 2d 569, 192 N.Y.S.2d 254 (Surr. Ct. 1959), aff'd, 9 A.D.2d 759, 193 N.Y.S.2d 1001 (1st Dep't 1960).

certificates in fifty corporations and several bank or brokerage accounts which formed part of the estate.

The government of British Honduras, appearing specially, asserted the right to intervene in the New York probate proceeding on the grounds that the decedent was domiciled in that country at the time of his death and that under British Honduran law all of his property would, in the event of intestacy, vest in the Crown as statutory distributee and heir. It relied upon an ordinance which provided that in the absence of any lawful descendants or distributees, "the residuary estate of the intestate shall belong to the Crown as *bona vacantia*,[55] and in lieu of any right to escheat."[56]

In a 4-3 decision, the Court of Appeals reversed and granted the motion to intervene.[57] It held that this asserted claim constituted a sufficient interest, within the rule of the *Davis* case, for intervention. Section 147 is satisfied if "the rights of British Honduras may be affected if the will is probated in New York.[58] The Court, however, made no determination as to the existence of the claimed property rights.

In dissenting, Chief Judge Desmond argued that when a person seeks to intervene and the question of his right to do so is raised, the Surrogate must first determine his status before permitting intervention.[59] The question of the existence of his interest must be settled prior to allowing him to contest the will. The evidence in this instance, he contended, warranted the Surrogate's determination that British Honduras had no interest in the New York proceeding.

Judge Burke, dissenting, also asserted that British Honduras had no interest in the proceeding and that intervention was properly denied.[60] When a non-resident's will is admitted to probate in New York, the proceedings relate only to the assets located here. Therefore, the court must first decide whether, if probate should fail, the party seeking intervention would be entitled to the personal property in New York. Since New York State claimed the property by escheat, to defeat this claim British Honduras had to take through the decedent in the same manner as any other legal heir. However, the statute under which the petitioner government claimed the assets indicated that it

55. This term is used as meaning vacant, unclaimed or stray goods; those things in which nobody claims a property and which at common law belonged to the finder, except in certain instances, when they were the property of king. 1 Bl. Comm. 298.

56. Ordin. Br. Hond. #34, § 53(1)(j):

> . . . in defect of any person taking an absolute interest under the foregoing provisions, the residuary estate of an intestate shall belong to the Crown as bona vacantia, in lieu of any right to escheat and the Crown may, out of the whole or any part of the property devolving on it, provide in accordance with the existing practice, for dependents, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

57. Supra note 53.

58. Id. at 316, 206 N.Y.S.2d at 764.

59. Id. at 318, 206 N.Y.S.2d at 766.

60. Id. at 316, 206 N.Y.S.2d at 765.

would take as *bona vacantia*,[61] which the Court in *In re Menschèfrend'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.