

THE  
AMERICAN LAW REGISTER.

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JANUARY, 1862.

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THE JURISDICTION OF THE COURT OF CHANCERY  
TO ENFORCE CHARITABLE USES.

The jurisdiction of the Court of Chancery to enforce charitable uses, is very obscure, owing to the fact that, since the statutes of Elizabeth, to be hereafter noticed, it has not been necessary, in England, to examine the subject historically. As those statutes were not re-enacted in this country, the original jurisdiction of that court becomes here, not merely a subject of speculation, but of strictly legal inquiry. The investigation must be made with most imperfect data. The student is carried back to a period when chancery reports did not exist, and in regard to which little authentic information was accessible until the publication of the results of the "record commission." Our great jurists who have made the subject a study, have not agreed in their conclusions. Among the dead who have taken a prominent part in the discussions growing out of this topic, may be mentioned the names of Kent, Story, and Marshall; among the living, that venerable sage of the Philadelphia bar, who did so much to secure to his own city the princely benefaction of Girard. Questions involving this subject have, in late years, arisen nowhere so frequently as in the State of New York. Owing to a difference of opinion among the

members of the bench, they have been discussed with great ardor and thoroughness of research.<sup>1</sup> It is now time to gather up the results of these discussions as well as by an independent examination of the various sources of information, to present the matter in a systematic form. As the question of the jurisdiction of the court is mainly historical, a foundation of our inquiry should be laid in an examination of the principles of the Roman law upon the subject of charities.

*The principles of the civil law concerning charities.*—Charity was one of the earliest and finest flowers of Christianity. While the administration of charitable funds occupied the attention of Roman rulers during most of the period of the Empire, no trace can be found of such property in those twelve tables so greatly extolled by Cicero, nor in any of the sources of law during the period of the republic.

The church, from the outset, devoted its revenue to the use of the poor, because it was regarded as their patrimony. The bishop was the legal depositary of these revenues. Under him were superintendents, who had the actual disbursement of the income of the church. The deacons were declared to be his "hand, mouth, and soul." Hospitals were established to simplify their labors, called *xenones* or *xenodochia*. The nurses, here employed, formed one of the minor orders of the clergy, and the office of the modern Sisters of Charity was anticipated as early as the days of St. Jerome. This class of establishments, whether founded by the bishops or not, was placed under their care, as their administration was regarded as a matter essentially ecclesiastical.

Contributions for the use of the poor were treated as religious acts. The writings of the time mention many legacies in which the testator provided by the same gift both for the support of the indigent, and for the forgiveness of his sins.<sup>2</sup> The revenues pro-

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<sup>1</sup> Among the recent arguments of counsel, pre-eminent for historical research and affluence of learning, may be noticed that of W. Curtis Noyes, Esq., of the New York bar, in the case of *Beekman vs. The People*—Ct. Appeals.

<sup>2</sup> This form of gift was greatly employed in the Middle Ages.

vided for charitable purposes were tithes, legacies, donations of movables and immovables, given to churches and otherwise. These gifts became so numerous, and were, at times, so improper, that conscientious bishops returned them to the next of kin, stating, that though they were valid by the human law, they were void by the divine law. The resources of believers were apparently poured out without stint, both because it was a privilege and a duty to support "Christ's poor."<sup>1</sup>

At the time of Constantine, charity became organized and systematized. Individual almsgiving was mainly displaced by the dispensation of charity through regular channels. The churches acquired legal rights to hold property. The Church of Rome possessed houses and lands not only in Italy and Sicily, but in Syria, Asia Minor, and Egypt. Charity flowed, in general, through such channels as the church provided. The *State*, as such, in a few instances previous to the time of Justinian, had bestowed charity for special and peculiar reasons; but, in his reign, it abdicated such functions through sheer exhaustion, and definitely left the charge of the poor to private and to voluntary benefactions.

The monasteries, from an early period, admitted into their bosom a crowd of poor, who could have found elsewhere no means of subsistence. They were also places of refuge, and supplied the means of education to children.

The objects of charity were very diversified. Besides the support of the poor and the sustentation of hospitals, the redemption of captives was in a large measure made by the aid of the church. Severity of taxation was also alleviated. It was said by one that "Christ chose to be born at the time of a census for the purpose of teaching collectors their duty of equity and mercy."

Legislation followed in aid of the efforts of the church. This was of a two-fold character: *First*, in providing peculiar rules in favor of legacies to pious uses; and, *Second*, in the establishment of rules for the administration of the charity.

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<sup>1</sup> This continued to be true down to the time of Justinian. "Some with the highest hope in God, and to save their souls, run to the churches, bringing and bestowing all their property for the use of the poor and needy."—*Cod.* 1, 3, 42.

I. In the time of Valentinian and Marcian, A. C. 452, it was provided that legacies in favor of the poor should be maintained, even though the legatees were not designated.<sup>1</sup> It would appear to be implied from this passage that a legacy left to "undesigned persons" was, in general, void. What the words "uncertain person" (*incertus persona*) mean, is not entirely clear. It would seem, from another part of the code, that they included guilds or associations, as well as individuals. Cod. VI. 48.<sup>2</sup>

Leo and Anthemius enacted that, notwithstanding the uncertainty of persons, every legacy or *fidei commissum*, made for the redemption of captives, should be, in the course of the year, consecrated to that use by the bishop of the place. The text, so far as this branch of the subject is concerned, is as follows: No heir or legatee shall in any manner unjustly disappoint the intention of the testator by asserting that a legacy left for the redemption of captives is *uncertain*. If the testator named any one by whom he desired that such legacy should be carried into effect, let such person have the liberty of exacting the legacy or trust, and let him scrupulously fulfil the wish of the testator. But if no person is designated, and the testator has only fixed the amount to be used for this purpose, let the bishop of the place where the testator was *born*, have the power to demand the gift. But when the testator who has left such a legacy lives beyond the limits of the Empire, (*barbaræ sit nationis*), and doubt arises in respect to his native country, let the bishop of the State in which the testator *died*, have the power to receive the legacy."<sup>3</sup> It appears from this passage that the bishop was only made superintendent in cases where the testator had provided no method for carrying the will into effect, and had only fixed the amount to be appropriated to a charitable purpose.

Where the language of the will was indefinite, and not capable

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<sup>1</sup> *Id quod pauperibus testamento vel codicillis relinquitur non ut incertis personis relictum evanescat, sed omnibus modis ratum firmumque consistat.*—Code, 1, 3, 24.

<sup>2</sup> The edition of the Corpus Juris, from which citations are made, is Beck's Leipsic, 1831.

<sup>3</sup> Code, 1, 3, 28.

of precise application, provision was made by Justinian for an arbitrary method of determining the testator's intention. The Roman law did not favor methods of interpretation so strict as those which have prevailed in modern times. The rule that oral evidence is not admissible to vary the meaning of a written instrument, seems to have been expressly repudiated by Justinian. He says: "where the deceased had in his mind a different word from that which he used, we decided, in the case of a certain Ponticus, that the written language should not prevail over the truth." With such notions we should not be surprised that he established the following constitutions: "Since we have in many wills found provisions in which our Lord Jesus Christ is named as heir, without the mention of any chapel or church, and since we have seen *that much uncertainty thence arises according to our ancient laws*, we determine, by way of *emendation*, that in such a case the holy church of the city or district where the deceased resided, must have been intended to have been instituted heir. The same view is to be adopted in the case of a legacy or of property given in trust (*fidei commissum*), and the church is to hold it in trust for the poor. If the gift was made to an archangel, or to one of the blessed martyrs, a provision which I have known to be made by one of high rank and learned in theology and law, it should be bestowed upon a church constructed in honor of that archangel and martyr; but if there be none such, then upon the Church of the metropolis," &c.

2. The law would compel a donor to carry pious intentions into effect when the intentions *had assumed a legal form*. Thus, if a donor had devoted property to a saint, prophet, or angel, to construct a church, and had proclaimed the gift to a magistrate, he and his heirs must carry the provision into effect. The same rule was applied to gifts in behalf of hospitals. The bishops and governors of hospitals were charged with the duty of observing that the intention was effectuated.<sup>1</sup> In fact, by the direction of Jus-

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<sup>1</sup> The *administration* of the funds was to be in accordance with the donor's intentions; *administratio secundum ea quæ his qui liberalitatem exercuerunt visa fuerunt et secundum præscriptos fines fiat*.

tinian, every gift (donatio) to charitable purposes exceeding five hundred solidi, must have been made in judicial form. It was otherwise void.<sup>1</sup>

3. Heirs or legatees could be compelled to erect buildings for charitable purposes. In case of a church they were allowed three years, in case of a hospital, a single year, to complete the necessary structures, and, in the meantime, a building might be hired, in which beds for the sick could be made until the hospital was constructed. If the heirs did not perform the duty within the specified time, the bishop and President of the province could insist on its fulfilment.<sup>2</sup>

4. If a gift to charitable uses could not be carried into effect in the manner in which the testator provided, his main design must be observed, and the property must, in some other form, be devoted to a charitable use. This was not so wide a departure from the intention of the donor as it might seem, because the principal reason, "the forgiveness of sins," would still exist. The *cy près* doctrine, thus originated, is not *theoretically* objectionable so long as the primal idea of charitable gifts prevailed; the religious duty of the donor and his consequent reward.

Like principles prevailed if the testator made the poor his heirs. The hospital of the State or city obtained the property, and its managers divided the income among the sick, either through the receipt of rents, if lands were given, or, if movable property had been bestowed, by the purchase of immovable, so that an annual and permanent support might be secured to them. "For who need help more than those who find themselves in poverty and in a hospital, and who, on account of corporeal weakness, cannot obtain the means of life." The hospital stands in the position of an heir: can bring actions for debts, and must respond to creditors. If there are several hospitals, then the gift went to the one which needed it most, to be determined by the bishop. These provisions

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<sup>1</sup> Cod. 1, 2, 19.

<sup>2</sup> The objects to which gifts "*ad pias causas*" might be made were churches, hospitals, houses for the sick, poor, aged, and for foundlings, the poor themselves, and the State. Id.

were only applicable in cases of uncertainty in the disposition of the property. If the donee was ascertained, whether an individual, or an organization for charitable purposes, the funds belonged to the person or organization designated. *Sin autem in personam certam venerabilem certumve domum respexerit, ei tantummòdo hereditatem vel legatum competere sancimus.* This decree was accompanied with the sternest threats in case the administrators of the property derived, or allowed others to derive, any personal advantage from this sacred trust.

5. A gift to pious uses was privileged above other legacies. Thus, as a general rule, a testator could not so dispose of his property as to withdraw it entirely from his heirs. The part of his estate which they could claim was termed the "falcidian portion." But a testator could, by adopting a particular form, bestow all his property for pious purposes, even though his object was to evade the law, (*ad declinandum legem falcidiam.*) Justinian is careful enough to provide, in a special title, *how* this evasion may be made by the testator.<sup>1</sup> This idea of the privileged character of a legacy to pious uses, which had its germ in the civil law, produced most fruitful results when transplanted into the canon and ecclesiastical law, as will be seen hereafter in citations from Swinburne and other authorities.

6. The State favored this class of gifts by providing that they should be exempt from taxation for profits, and also by establishing a different term of prescription in claiming them, from that which prevailed in other cases. Code 1, 2, 23.

II.—*The method of administering charities.*—1. The general control of a charity, if not placed by the testator under the care of particular persons, was given to the bishop or governors of hospitals, but they were not independent of the State. Thus, in the directions of Leo and Anthemius respecting the application of funds set apart for the redemption of captives, it was required that the bishop should make known to the governor of the province, by a written statement, the time when the funds were

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<sup>1</sup> Code, 1, 3, 49.

received and the amount paid. After the lapse of a year he was required to state, in the same manner, the number of captives redeemed, and the amount paid for them, so that it might be certain that the pious intentions of the testator were carried into effect. In all these engagements the bishop was expected to act gratuitously, in order that the funds might not, under the pretence of beneficence, be wasted in the expenses of courts. Justinian provided that no gift to the bishop or a governor of a hospital should belong to him personally, but should be devoted to the charitable purpose. He urges the celibacy of the clergy, on the ground that charitable funds will otherwise be wasted in providing for their families.<sup>1</sup>

2. While the testator could select those who should dispense his bounty, the bishop superintended their management, being required "to have a watchful eye over them, to praise them when they fulfilled their duty, to chide and remove those who are negligent, and, in such case, to appoint other trustees, who had the true fear of God in their hearts, and the final day of judgment in their eye."

3. But it was not enough that the law had thus placed the bishop over the governor of the charity, and had made that ecclesiastic, in turn, amenable to the archbishop or to the Governor of the Province. Every citizen, without distinction, was empowered to make a judicial complaint that the charitable intention of the testator was not fulfilled, because it was a matter that concerned the public weal; and the bishop was solemnly cautioned, that by such criminal delay on his part, he not only incurred the risk of punishment of Heaven, but also that he would suffer from the wrath of the Emperor. This remarkable passage from the Code, shows that the great principle of the *public nature of a charity*, was judicially recognised to the same extent as at present, although no officer like the attorney-general was employed to represent the public, in a proceeding to establish the public right.<sup>2</sup>

4. Provisions of a complicated nature were established, to prevent the sale or alienation of charitable estates. Justinian must, from his frequent ordinances on this subject, have paid great atten-

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<sup>1</sup> Code, 1, 3, 42.

<sup>2</sup> Code, 1, 3, 46.



tion to the details of the management of this kind of property. The trustees, who for the time being had the control, were not allowed to compound the yearly rents for a gross sum, and thus put themselves in a position to expend the whole estate. "Were it otherwise, the yearly rents *and the eternal remembrance of the dead, on account of which he left the property*, shall not remain, but it and the estates will vanish together." All such, and other alienations, were declared to be void, and the governor of the charity had, notwithstanding the alienation, power to demand the property again by a legal proceeding. No period of prescription barred the right. The purchaser had no claim upon the fund for indemnity.<sup>1</sup>

In another constitution Justinian reiterates his statements in respect to the permanent nature of a charity, and rises to higher reasons for it than the narrow and selfish one of simply preserving the memory of the deceased donor. "While," he says, "a certain term of life is given to each man by his Creator, which ends with death, in respect to those pious institutions which are under the continuing protection of God, this is not the case; and so long as they exist (for they continue forever, so long as the name of Christ exists and is worshipped among men), it is just that their revenues should continue forever, in order that they may serve for the pious objects which will themselves never cease."<sup>2</sup> He proceeds to enact, in still stronger terms, that no injury shall happen to these institutions by the alienation of their property, but that they may demand it, without diminution, from the purchaser. Finally, in the 7th Novel of Justinian, the Emperor established a digested and systematic series of rules respecting the right of churches, hospitals, and the various asylums for orphans and the aged,<sup>3</sup> to alienate their property. It was conceived in the Greek language, that it might be of universal application to his empire. All right of alienation was taken away from each of these institutions, except that the Emperor might take the property, if necessary, for the public good.

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<sup>1</sup> Code, 1, 3, 46.

<sup>2</sup> Code, 1, 3, 57.

<sup>3</sup> These institutions were always classed together as *being consecrated to God*. *Consecratæ Deo ædes*. (*Ecclesiæ videlicet Xenodochia, et atropa et orphanotropa*.) Const. 13, Leo.

The right of "eminent domain" can be exercised, upon the principle so happily established in modern times, by *paying a just compensation*. This remarkable passage is as follows: "Permittimus igitur Imperatori ut si quædam in commune utilis et ad reipublicæ utilitatem spectans necessitas adsit, quæque possessionem ejusmodi rei immobilis qualem proposuimus, exigat, eam a sanctissimis ecclesiis reliquisque sacris domibus et collegiis illi accipere liceat ut tamen semper, sacræ domus *indemnes serventur et ab accipiente res æqualis vel major quam data est, vicissim detur.*" The reason given for the exercise of the right is also far-seeing. There is but a slight difference, in the eye of reason, between such property as is devoted to charity, and that which is given to ordinary public uses. (Neque enim multum inter se differunt sacerdotium et imperium neque res sacræ a rebus communibus et publicis.) He but anticipates the classification of charities in the statute of 43 Elizabeth, where provisions for the building and support of bridges are coupled with the supply of funds for the support of hospitals.

This constitution also protected these institutions against improper acquisitions. If sterile land was sold to them as fertile, or even given to them, it could be returned, and the price demanded. But if land had been sold by the charitable institution, it could be demanded again without returning the price to the purchaser. This was a penalty imposed upon him for presuming to enter into a contract which was forbidden by public policy.

Particular churches received the right to sell their property on making application to the Emperor, as was the case of the "Church of the Resurrection" at Jerusalem (40th Novel). "The prohibition against alienation was established for the good of the church. Why should not alienation be permitted when a greater good can be derived from the sale?"<sup>1</sup>

The general law was subsequently modified by a provision permitting the property to be alienated to pay public or individual

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<sup>1</sup> Corpus juris Civilis, Vol. 4, p. 259, Ed. Beck.

debts upon a judicial examination of the case, and with the observance of great precautions that no fraud should be practised.<sup>1</sup>

The general scope of this legislation is nowhere more clearly shown than in the special provisions established for the province of Mysia. It appeared from the representations of a certain bishop, that many houses had been left to the church for the redemption of captives and the support of the poor, but that these objects could not be accomplished, from the nature of the property. The Emperor responds, that wherever the lands yield a certain rent they must not be sold, for the charitable object can be accomplished by means of the rent. But if the property yields no rent, or is dilapidated, or far distant from the church, it may be sold, and the proceeds applied to these two purposes only, in favor of liberty and life; for the possession of property cannot be so necessary as is the freedom of the captive and the sustentation of the poor. If the land was sold merely on account of its distance, the testator must have given in his will his consent to a sale, and his very words must be incorporated into the instrument of alienation.<sup>2</sup>

These various provisions are systematized in the one hundred and twentieth constitution, which allows charitable property in other places besides the metropolis to be leased by a perpetual lease rendering rent. If it became necessary to sell land to pay debts, it was to be publicly advertised, so as to create a competition among purchasers. The buyer was to pay the price down. If no purchasers could be found, the property was to be transferred to the creditor at a valuation. The land was to be taken instead of payment, the tenth part of the estimated value being added to the original valuation, as its price.<sup>3</sup>

The results of this examination may be briefly recapitulated. The Roman law greatly encouraged the gift of property for charitable purposes, under which term were included foundations for

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<sup>1</sup> C. J. C., Vol. 4, p. 280.

<sup>2</sup> C. J. C., Nov. 65, 4 Vol. 336.

<sup>3</sup> The meaning of this sentence may not have been correctly apprehended. The text is, "justa et diligente aestimatione facta, atque decima parte totius aestimationis pretio ad eandem quantitatem addita."

churches, hospitals, and asylums for the poor and aged. It could be given either by gift *inter vivos*, *causa mortis*, or by will. Im-movables could be devoted to such purposes, as well as movables, and a donor might direct that money should be appropriated to the purchase of land. No legacy of this kind was allowed to fail because it was uncertain, if the design of the testator was to bestow it for charitable purposes. Such gifts were privileged above others. A donor who had, in an authentic manner, declared his intention to make such a disposition of his property could be compelled to carry it into effect.

The donor could himself select those who were to manage his bounty and prescribe the purposes to which it should be applied. His directions must, if possible, be strictly complied with. If his intention could not be exactly carried out, his main design must be accomplished. If he made no selection, the gift was managed by the bishops or by the heads of hospitals and asylums. They were obliged, in some cases at least, to render an account of their trust. Improper "trustees, (as we may term them for want of a better name,) were removed and new ones appointed. Charities were public in their nature, and any citizen could complain if they were not duly administered. Charitable property could not be placed in the same category with individual property. The right to the latter terminated at death; but the design of a charitable gift was that it might be perpetual, both in order that the name of the founder might not be forgotten, and because charitable objects were in their own nature enduring. In general the property could not be sold, although it might be leased. The transfer was contrary to the policy of the law, and the purchaser must devote the property to the trust. The right of "eminent domain" was, however, superior to that of the charitable use, on condition of the payment of a just compensation for the property. It might be sold for the payment of debts, but not because it was unproductive, unless it so happened that the testator had expressed an intention to that effect in his will, and then only in special cases.

We can but wonder at the admirable system which was thus devised in the main by a single emperor, Justinian. The general

principles of this branch of the law, as administered at the present day, were then clearly recognised.

THE ENGLISH LAW BEFORE THE STATUTE OF ELIZABETH.

It cannot be doubted that, after the fall of the Roman Empire, and during the middle ages, charitable gifts continued to be made. The limits of this article do not admit any full citation of early cases. The great motive which prevailed during the empire still continued to be expressed, the "forgiveness of sins" and consequent reward. No more striking instance of this, perhaps, exists than a gift made by Baldwin, Count of Flanders, in the year of the Norman Conquest, 1066: "Moreover, my wife desiring to be a partaker with me in almsgiving and reward from our Lord, and remembering that word of the Lord, 'I was a stranger, and ye took me in; I was hungry, and ye gave me food,' I have given a villa to a church for the support and refreshment of the poor."<sup>1</sup>

Without stopping to show that charitable gifts of a similar kind were made in England, as could be easily done, we may proceed to inquire in what methods gifts of property might be made. They might either be of land or personal property. If *land* were transferred, it might either be by a direct conveyance, through the medium of uses, or in certain localities by a will. As our object is to investigate the jurisdiction of Chancery to enforce the gift in this class of cases, the inquiry will be confined to the question whether a transfer of land for charitable purposes could be made at common law through the medium of feoffments to uses and through wills.

1. *Feoffments to uses.*

It is not necessary to our discussion to trace the origin of uses

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<sup>1</sup> Heirs do not appear to have readily acquiesced in wills of this kind, at least if we may judge from the objurgations contained in the instruments of donation. One is as follows: "If any of our heirs shall oppose this donation, let him be anathematized, and his name be blotted out of the celestial book of the living; let him be a consort of Judas Iscariot, and, if he will not alter his purpose, may God change his senses and involve him in the doom of Ananias and Sapphira," p. 24. These maledictions would lead to the conclusion that *legal* remedies were quite imperfect. *Codex Donationum Piarum*. Brussels, 1624.

and the jurisdiction of Chancery over them. It is well known that they had their origin in the Roman law, and were introduced into England through the medium of the clerical chancellors. It came to be settled that an owner of land could, by simply making a feoffment of his land to another for his own use, enable himself to make a disposition of his property in a different manner from what he could otherwise have done. This arrangement would have been void at common law, as being contradictory to the feoffment.<sup>1</sup> But this very fact was a good reason why it should have been enforced in Chancery, as being against conscience, not to fulfil the direction of the feoffor. Thus the chancellor says, in the Year Book 7 H. VII. f. 12: "Where there is no remedy at common law, there may be good remedy in conscience, as, for example, by a feoffment upon confidence, the feoffor has no remedy by common law, and yet by conscience he has; and so, if the feoffee transfers to another who knows of this confidence, the feoffor, by means of a subpoena, will have his rights in this Court." The justices agreed with him in opinion that, where there was no remedy at common law, there would be remedy in chancery. The reporter adds, *quod nota*. The original owner was held to have a use in the land which he could enforce in that court. He could direct his feoffors to hold the property for the use of another, whereupon such person could also have the use enforced in his favor. This principle could be used to enable the owner of the land to make a will, for he could make a feoffment of the land to the use of his will. The will operated simply as a direction to the feoffors to whose use they were to hold the land after his death. This person stood in the place of the feoffor, and could enforce the direction in Chancery, and thus the heir might be disinherited.

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<sup>1</sup> June, J., expresses the reason for this, (Year Book, 7 H. VI. 43:) "One day, between Westminster and Charing Cross, I met Master Hank, (whom God assoilzie,) and he demanded of me whether, if he should enfeoff me in fee, *proviso* that he should always have the profits of the land, who should have them. And I replied the feoffee for the deed shall be taken *more to the advantage of the feoffee* than of the feoffor, so the feoffment shall be good and the proviso void, and this was his opinion." This little glimpse of two ancient lawyers talking law as they met in the street, is not without interest.

It is not easy to say at what time this doctrine was first established. The earliest case in which the question is known to have been discussed, is in Statham's Abridgment, 31 H. VI., title Conscience, A. D. 1453. The case was heard in the Exchequer Chamber before all the judges. It was common, at that time, to adjourn Chancery questions into this Court, as will be seen hereafter.

<sup>1</sup>“The clerk of the rolls reported a matter in Chancery that one had made a feoffment of trust, and had declared his will to the feoffee *after* the feoffment that one of his daughters should have the land. And afterwards he came to the said feoffee, and said that the one who had the land did not wish to marry, &c., and, therefore, he revoked his will, and desired that another daughter should have the land after his decease. Then he died, and the question was *which of the two* daughters had the land.” It will be observed that the very statement of the case involves the idea that the trust could be enforced, so as to disinherit the heir, because, otherwise, the land would have descended to the two daughters equally in coparcenary. After the various judges had discussed the question, Fortescue, C. J., remarked, “We are not to argue law in this case, but conscience, and it seems to me that he could change his will for special cause; put the case: I have issue a daughter, and I am sick, and I enfeoff a man and say to him that my daughter should have the land after my decease, and then I revive and have issue a son; now it is right that my son should have the land because he is my heir, and if I had had a son at the time, I would not have made such a will; *and the law is the same* if I will that *one* of my sons should have the land, and he becomes a robber, &c. And conscience comes from *con* and *scio*, to know at the same time with God; that is, to know his will as near as possible by reason, wherefore a man can have land *by our law* and *by conscience* he will be condemned.” One of the judges then expressed himself to the effect that the uses of the feoffment could not be declared after the making thereof, but only contemporaneously with it; but this was denied by the others, and Statham remarks that the residue of the matter must be sought in Chancery.

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<sup>1</sup> 1 Camp. Ld. Chancellors, 319-20. Coke, J.

This case shows that the distinction between law and equity was well understood. The term "conscience" is used as in other instances, to indicate the jurisdiction of a court of equity. Fortescue was familiar with general principles of jurisprudence.<sup>1</sup> From the instances he puts, he could have had no doubt that the declaration of uses could be supported against the heir. The edition of Statham's book, in which this case is found, was printed in 1470, only seventeen years after the decision.

Lord Bacon's view of the law, before the statute of uses, was evidently the same. "Men used this device to make a will. They conveyed their full estates of their lands, in their good health, to friends in trust, properly called feoffees in trust, and then they would by their wills declare how their friends should dispose of their lands, and if those friends would not perform it, the Court of Chancery was to compel them, by reason of trust, and this trust was called the use of the land, so as the feoffees had the land and the party himself had the use; which use was in equity to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the *use should go to the heir*, as the estate itself of the land should have done, for the use was to the estate like a shadow following the body."<sup>2</sup>

In all cases of *feoffments* to uses, this extract shows, with most transparent clearness, that the use could be enforced in chancery against the feoffees, and that the only question with the court was, whether the testator had properly appointed the use; if not, the *use* descended to the heir, for that was all the interest that his *ancestor* had after the feoffment. The heir could then compel the feoffees to convey to him.

It is true that Lord Bacon, in his "Reading on the statute of uses," raises some doubt whether the decree could be made against the heir of the feoffee as well as against the feoffee himself. This point, however, does not militate against *the remedy* but only against its *extent*. In other words, this at least was true, that so

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<sup>1</sup> 1 Camp. Ld. Chan. 318.

<sup>2</sup> Lord Bacon's Tract on "the Use of the Law," p. 57, London, 1639.



long as the feoffee *lived*, any use declared by the last will of the feoffor could be enforced against him. But it is at least doubtful whether Lord Bacon's statement upon this last point is historically correct. The case to which he refers is probably the Year Book 8 E. IV. 6. A suit in chancery was brought against three executors, and only one appeared. The question was whether the suit could proceed in the absence of the others. The court, after deciding that it could not, *converse* in respect to the question whether a "subpœna" would lie against the executor or heir. And Choke, J., said that he had brought "subpœnas" against the heir of the feoffee, and the matter was for a long time debated. The opinion of the chancellor and the justices was, that it did not lie against the heir, wherefore the plaintiff must sue a bill in Parliament. Fairfax said *that this was a good subject to dispute about, after the others* (meaning the executors) *had come in, &c.*<sup>1</sup> Choke's statement, that *he had known of such suits*, is certainly greatly to be preferred to the mere dicta of the judges without argument. Fairfax's remark shows that the question was not to be treated as settled. The Lord Chancellor had occupied his seat only for a few months.

Lord Bacon's version of this case would lead to the idea that Choke thought there were no instances of suing the heir, while Choke, himself, says directly the contrary, and that it was the *advice* of the judges that the subpœna did not lie, when it was evidently a mere dictum, and the decision was postponed.

It may be urged that the breach of trust involved, in not fulfilling the declaration of uses upon a will, was properly remedial only in the spiritual court. This proposition was urged to the chancellor in the 8th E. IV., Year Book, fol. 4, and was overruled. It was claimed that a case of a breach of faith, must be sued in the court Christian; but the court said that when any one was damaged by the non-performance of a promise involving confi-

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<sup>1</sup> The original French is: Et fuit move si subpœna gist vs. execut. ou envs. un heire. Et Chok dit que il sua subpœna autfoits vs. le heire de un feoffee et le matter fuit longtemps debate. Et l'opinion de Chanc et les justices que il ne gist pas envs le heire, per que il sua un bill al Parliament. Fairfax—Cest matter est bon store pur disputer apres quand les autres veign. &c.

dence, he shall have a remedy in chancery. It was then said that it was the "folly" of the plaintiff to have trusted the defendant. The chancellor replied, so you might say if *I enfeoff a man in trust, &c., if he does not do my will*, I shall have no remedy in common law, for it was my folly to enfeoff a person who would not do my will, *but he shall have remedy in this court, for God is the proctor of the foolish, &c.*<sup>1</sup>

It will be remembered that no infringement of the *principles* of chancery took place by sustaining this doctrine. The feoffee could not claim *want of consideration*, for he had received the land upon the faith that he would fulfil the directions of the testator. The same principles which would lead the Court of Chancery to enforce a contract involving a pecuniary consideration,<sup>2</sup> would induce it to compel a feoffee to fulfil directions made in a will.

Later authorities are clearly in the same direction. Thus, in Year Book 15 H. VII. fol. 11, it was said, if one has feoffees upon confidence, and makes his will that they shall sell his land to pay his debts, the creditors can compel them to sell. And so, if the will be that a stranger should sell this land to J. S., now J. S. can compel this stranger, *by subpœna*, to sell this land to him.

In Year Book 15 H. VII. fol. 12, it is expressly stated that the ordinary or bishop had nothing to do with wills made upon feoffments to uses. Fineux, C. J., said, "if one has feoffees upon confidence, and make his will that his executors shall sell his land, now if the executors refuse the administration of the goods, still they can sell the land, because the will of land is not a 'testamentary thing,' (n'est chose testamentaire,) nor have the executors anything to do with the will, except that they have a special power conferred upon them. And if one has feoffees, and makes his will that his executors shall sell his land, and then makes no executors :

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<sup>1</sup> Original.—Per Chancellor: Et issint poies dire si jeo enfeoff un home en trust, &c., s'il ne voit faire ma volunt jeo n'avera remedy p'vous car il est ma foly d'en feoffer tiel person que ne voit faire ma volunt, &c., mes il avera remedy en cest court Car Deus est procurator fatuorum, &c.

<sup>2</sup> This was done in 37 H. VI., 1 Ld. Camp. 319.

now the ordinary cannot meddle with the land, nor can the administrator, for the ordinary can only meddle with the testamentary matters—that is, with goods, and consequently the same rule applies to his administrator, who is his deputy. And it was lately adjudged in the Exchequer Chamber, by all the judges of England, that if one makes a will of his land, that his executors shall sell, &c., if the executors refuse the administration and to be executors, neither the administrators nor ordinary can sell or alien. And if one makes his will that his executors shall sell his land, without naming them, still, if they refuse administration and to be executors, they can sell the land.” The other judges concurred in these statements.

This doctrine is evidently in accordance with principle. The ground of the bishop or ordinary’s jurisdiction over personal property was, that in the absence of a will it should be used by him for pious purposes. As the will was an attempt to withdraw the property from his own control, he was allowed to examine and test its validity. But, as in the case of real estate, in the absence of a will the use would *descend to the heir*, no reason could be given for his adjudicating the question.

The result would seem to be that *a use of any kind* could be enforced by the Court of Chancery, and that the only question remaining for discussion is, when and in what cases could a declaration for charitable purposes, made by the original owner to the feoffee, be deemed a “use.” If it comes within the definition of that term, it must, on general principles, be enforced in that court.

The examination of the term “use” will be deferred until the question regarding the jurisdiction of chancery *over wills of land*, made in accordance with the custom of London and that of other localities, is discussed.

T. W. D.

(To be Continued.)