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# WASHINGTON UNIVERSITY LAW QUARTERLY

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## THE CHARITABLE CORPORATION AND THE CHARITABLE TRUST

THOMAS E. BLACKWELL†

### I. INTRODUCTORY

The past thirty years or more have witnessed a vast increase in the property and funds held by educational, philanthropic, and other charitable institutions in this country. Statistics in this field are difficult to assemble, but incomplete estimates indicate the magnitude of the problem. According to a survey made in this field in 1932 by Wood, Struthers & Company of New York, "the fact that philanthropy's trustees have a responsibility of monumental size may be grasped by examining the following exhibits \* \* \*."<sup>1</sup>

<i>Philanthropies</i>	<i>Property and Endowment</i>
Religion .....	\$3,839,500,000.00
Higher Education .....	2,815,000,000.00
Hospitals .....	1,400,000,000.00
Foundations .....	1,000,000,000.00
Organized Charity .....	239,000,000.00
Total .....	\$9,293,500,000.00

It is a matter of common knowledge that the majority of these great institutions and foundations are corporations—charitable corporations. In what capacity do these corporations hold their funds—as technical trustees, subject to all the restrictions and

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1. *Trusteeship of American Endowments* (1932) 6. According to the Office of Education of the United States Department of the Interior, institutions of higher education, in 1934, held physical property and permanent funds totalling \$3,792,605,030.00. Of this amount, \$1,472,946,354.00 represented endowment funds. *Statistics of Higher Education, 1933-34*, Biennial Survey of Education in the United States (1932-34).

limitations evolved by courts of equity in the field of trusts, or in absolute ownership, subject only to the provisions of their own charters? The very phrasing of this question may startle some, so general is the assumption that institutions of this character hold their funds in trust.

A survey of the cases, however, indicates an interesting conflict of opinion. One need only contrast the view expressed by the *Restatement of the Law of Trusts*<sup>2</sup> with that of a recent decision in Nebraska<sup>3</sup> in order to frame the issue. According to the *Restatement*, if the charitable institution receiving the

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2. *Restatement, Trusts* (1935) sec. 348, Introductory Note: "Where property is given to a charitable corporation, a charitable trust is not created, even though by the terms of the gift the corporation is directed to hold the principal forever and to devote the income only to the accomplishment of the purposes of the corporation, and even though by the terms of the gift the corporation is directed to use the property only for a particular one of its purposes."

3. *Hobbs v. Board of Education of Northern Baptist Convention* (Neb. 1934) 253 N. W. 627:

"The endowment fund was initiated June 23, 1892, by a gift from 'The American Baptist Education Society' under a written proposal in the following terms: 'Will contribute to Grand Island College located at Grand Island in the State of Nebraska for the purpose of endowment for said institution, and to be invested and preserved inviolable as such, the sum of five thousand dollars. \* \* \*'

"Under these circumstances and the conditions the question recurs: Does this endowment fund constitute a charitable trust? If so, it is not subject to the claims of creditors, and, if not, it belongs to the general assets of the college. \* \* \*

"We think that all these cases are distinguishable from the one under consideration by the fact that the absolute control of the corpus of the estate conveyed was transferred to the grantee, while here the body of the gifts and contributions were distinctly stated to be for the endowment of the college, the corpus to be kept intact and inviolable, and the income only to be used for the general purposes of the college. While the legal title or estate may be said to be in the college, it is not an absolute estate. The college is given no control over anything but the income arising therefrom. The college has no beneficial interest in the body of the gift, and the real beneficiaries of the trust are the students who attend the college for the purpose of education. \* \* \* This is in its very nature a charitable trust, and to put any other construction upon the instruments evidencing the donations would destroy and render nugatory the benevolent intentions of the donors."

See also *Woman's Foreign Missionary Society v. Mitchell* (1901) 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711; *Clarke v. Sisters of Society of the Holy Child Jesus* (1908) 82 Neb. 85, 117 N. W. 107; *Bennett v. Baltimore Humane Impartial Society* (1900) 91 Md. 10, 45 Atl. 888; *Bird v. Merkle* (1895) 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423; *Wetmore v. Parker* (1873) 52 N. Y. 450; *Whitmore v. Church of the Holy Cross* (1922) 121 Me. 391, 117 Atl. 469; *Doan v. Vestry of Ascension Parish* (1906) 103 Md. 662, 64 Atl. 341, 7 L. R. A. (N. S.) 1119; *Art Students' League v. Hinkley* (D. C. D. Md. 1929) 31 F. (2d) 469, aff'd (C. C. A. 4, 1930) 37 F. (2d) 225, cert. denied (1930) 281 U. S. 733.

gift is incorporated, a charitable trust is not created, though by the terms of the gift the corporation is directed to hold the principal intact as a perpetual fund and may use only the income for one or more designated purposes. On the other hand, the Nebraska court contends that under such conditions, *i. e.*, where the corpus must be retained intact and inviolable, with only the income expendable, the institution holds the property merely as trustee, not as owner; consequently, such assets are not subject to claims of creditors of the insolvent institution. In other words, unrestricted gifts and those permitting the principal to be expended become the absolute property of the corporation, but all endowment funds are held as charitable trusts.

Again, the federal district court for Maryland has held that not even the use of the words "in trust" was sufficient to limit the title of the charitable corporation to that of trustee.<sup>4</sup> The Art Students' League of New York had been given certain property for an endowment fund, to be known as the Edward G. McDowell Travelling Scholarship, the income to be expended for the education of deserving art students abroad. According to the test laid down for the guidance of Nebraska courts, this was clearly a charitable trust. The court, reviewing the decisions of the jurisdiction, concluded that it is impossible to create a charitable trust in Maryland by a gift to a corporation for a corporate purpose.<sup>5</sup>

Both viewpoints find solid support in the cases, but it is submitted that this conflict can be explained and reconciled by a consideration of the following factors: (1) the desire of the court to preserve the charity as against adverse claimants, if possible; (2) the history of statutory and decisional law in the field of private and charitable trusts in certain jurisdictions.

Despite the spectacular failure of the "Tilden Trust,"<sup>6</sup> it may be said that courts have paid more than lip service to the maxim, "Charity is the favorite of equity."

As courts and text writers have pointed out, charitable trusts are construed as valid wherever possible by applying the most

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4. *Art Students' League v. Hinkley* (D. C. D. Md. 1929) 31 F. (2d) 469, *aff'd* (C. C. A. 4, 1930) 37 F. (2d) 225, *cert. denied* (1930) 281 U. S. 733.

5. 31 F. (2d) at 479.

6. See for extended discussion Ames, *The Failure of the Tilden Trust* (1891) 5 *Harv. L. Rev.* 289.

liberal rules of which the nature of the case admits.<sup>7</sup> This liberality has apparently led the courts into certain inconsistencies. Thus in each of the two cases referred to, the charitable gift was sustained or protected against adverse claimants, in the Maryland case by holding the fund an absolute gift to the charitable corporation and not an attempt to create a trust for "indefinite and uncertain beneficiaries," banned by Maryland's statutes and legal precedents, and in the Nebraska case by ruling that it was not an absolute gift to the Grand Island College, subject to the demands of its creditors, but a charitable trust, not to be dissipated and diverted from its original charitable purpose.

This rule of Liberality toward charitable gifts and bequests is not difficult to justify.

Springing as they usually do, from the very best that is in human nature, and having for their object the amelioration of the hard condition of those who are at odds with fate and fortune, it is the policy of an enlightened jurisdiction to uphold and sustain them wherever this can be done without violation of positive principles of law.<sup>8</sup>

## II. INCEPTION AND MEANING OF THE CHARITABLE TRUST

The development of the law of charitable uses is an exceedingly interesting field and has given rise to great conflict of opinion. The early history of the subject is beyond the scope of this article, and it will be necessary to restrict consideration of the topic to the issues that serve to explain and reconcile the conflict of decisions in this country.

The most important landmark in this entire field is, of course, the Statute of Charitable Uses.<sup>9</sup> Although the remedial sections of the statute were repealed by Parliament in 1888,<sup>10</sup> the preamble was considered of sufficient importance by way of exhibiting the spirit of charities to warrant retention. Frequently cited by the courts of this country, it reads:

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money,

7. *Rusell v. Allen* (1883) 107 U. S. 163; *Ould v. Washington Hospital* (1877) 95 U. S. 303; *Hadley v. Forsee* (1907) 203 Mo. 418, 101 S. W. 59, 14 L. R. A. (N. S.) 49.

8. *Green's Adm'rs v. Fidelity Trust Co. of Louisville* (1909) 134 Ky. 311, 120 S. W. 283, 288, 20 Ann. Cas. 861; 2 *Perry, Trusts* (7th ed. 1929) sec. 691.

9. 43 Eliz. c. 4 (1601).

10. 51 & 52 Vict. c. 42, sec. 13 (1888).

have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands \* \* \* have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same for redress and remedy whereof:—

The remedial portions of the statute authorized the Chancellor to commission certain officials to inquire into breaches of charitable trusts.

Although this recital of the types of charity given recognition by Elizabethan courts is of general interest to the student of the history of equitable jurisprudence, it is clear that modern courts should not accept it as an exclusive list of charitable trusts to be given recognition and protection under modern concepts of social needs.

One of the most frequently cited definitions of a legal charity is that of Justice Gray:

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or by otherwise lessening the burdens of government.<sup>11</sup>

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11. *Jackson v. Phillips* (1867) 14 Allen (96 Mass.) 539, 556, quoted in whole or in part in (1896) *Stuart v. Easton* (1896) 164 U. S. 706; (1898) 170 U. S. 383; *In re Hinkly* (1881) 58 Cal. 457; *Buckly v. Monck* (Mo. 1916) 187 S. W. 31; *Crow v. Clay County* (1906) 196 Mo. 234, 95 S. W. 369; *Haggerty v. St. Louis, Keokuk & Northwestern R. Co.* (1903) 100 Mo.

“Charity” in its popular sense means whatever is bestowed gratuitously on the needy or suffering for their relief.<sup>12</sup> In a leading case on this point, the court, referring to the word “charity” in a will, said:

That word in its widest sense denotes all the good affections men ought to bear toward each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its significance is derived chiefly from the Statute of Elizabeth.<sup>13</sup>

In other words, charity in the legal sense is not confined to mere almsgiving, but has a much wider scope and significance, embracing the improvement of social conditions and the promotion of the happiness of mankind. However, courts have been prompt to point out that, while charity may be benevolence, all benevolence is not necessarily charity in the eyes of the law. All charities which are recognized as such within the meaning of the law of charitable uses are in some degree public in character. The line of demarcation between public and private charity has been “pricked out” at different levels by the courts, and this has caused much of the apparent want of harmony in the decisions. It should be borne in mind that only where the court can find some element of public benefit and advantage will it feel free to apply the peculiar provisions of the law of charitable trusts.

The word “peculiar” is employed advisedly, since it is something of an anomaly in our system of jurisprudence that a private individual, by employing suitable phraseology, is permitted to exercise control over the use and disposition of property in perpetuity. Only where the benefits conferred are such as are of interest to the public at large or to a substantial portion thereof can we find justification for this delegation of power to an individual member of society.

As Professor Bogert has indicated,<sup>14</sup> the statement that the rule against perpetuities does not apply to charitable trusts is both vague and misleading. It may refer to any one or all of the four restrictive rules worked out by the courts in the field

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App. 424, 74 S. W. 456; *State v. Powers* (1881) 10 Mo. App. 263; *Crerar v. Williams* (1893) 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

12. *Utica Trust & Deposit Co. v. Thomson* (Sup. Ct. 1914) 87 Misc. 31, 149 N. Y. S. 392.

13. *Morice v. Durham* (Ch. 1804) 9 Ves. J. 399, 405, 32 Eng. Rep. 947.

14. 2 Bogert, *Trusts* (1935) sec. 341.

of private trusts, *i. e.*, the rule against remoteness of vesting of contingent interests, the common law rule against restraints on alienation, the statutory rules against undue suspension of the power of alienation, or the rule against unduly postponing the direct enjoyment of property. Moreover, some of these rules do apply to a degree to charitable trusts. However, it is true that this power to erect a plan of benevolence extending into the indefinite future exists and courts have been compelled to evolve in the *cy pres* doctrine, compensatory powers of modification and control equally unusual and anomalous.

The phrase originally used was *cy pres comme possible* and freely translated meant "as near as possible."<sup>15</sup> Generally speaking, it refers to that power vested in a court of equity which permits it to make specific a general charitable intent of a settlor and, where lapse of time and changed conditions render an original specific intent impossible or inexpedient, to substitute another plan of administration which approaches "as nearly as possible" the original scheme of the donor. In other words, it designates that power which courts of equity have evolved to correct the lack of wisdom and foresight of the benevolently inclined, permitting them to mould the charitable trust to meet the vicissitudes of a changing world.

The nice distinctions between the judicial and prerogative *cy pres* powers have been considered in detail by the text writers.<sup>16</sup> The doctrine is of immediate interest here only to the extent that it serves to throw light on the question of the extent to which the power of equity over charitable uses depends upon the Statute of Elizabeth. The answer to this problem has a direct bearing upon the conflict of authority in this country.

### III. EFFECT OF LEGISLATIVE REJECTION OF ENGLISH STATUTES

#### A. *The Charitable Trust in Virginia and Maryland*

In the leading case of *The Trustees of the Philadelphia Baptist Association v. Hart's Executors*,<sup>17</sup> the United States Supreme Court was called upon to pass on the validity of a bequest to an

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15. *Ironmongers' Company v. Attorney General* (H. L. 1844) 10 Cl. & Fin. 908, 8 Eng. Rep. 983.

16. 2 Bogert, *Trusts* (1935) sec. 432; Note (1907) 14 L. R. A. (N. S.) 59.

17. (1819) 4 Wheat. 1.



unincorporated society, whereby Hart, a citizen of Virginia, attempted to create an endowed scholarship "for the education of youths of the Baptist denomination, who shall appear promising for the ministry." Since at the time of the death of testator the society was unincorporated, the court took the position that the gift could be sustained only as a charitable trust with the individual members as trustees. Had the society been a charitable corporation, the court indicated that the bequest could be construed as an absolute gift to the corporation, for its corporate purposes and those ancillary thereto. Unfortunately for the society and for the subsequent history of charities in this country, the Virginia legislature had, three years prior to the death of Hart, repealed all English statutes. Although obviously not aimed at the destruction of the jurisdiction of equity over charitable trusts, the Statute of Elizabeth fell with the others.

Counsel for the society strongly urged that "the peculiar law of charities" did not originate with the famous statute,—that it did not even "profess to give any validity to devises or legacies not before good, but only furnishes a new and more convenient mode of discovering and enforcing them. Chief Justice Marshall, speaking for the court, held that prior to enactment of the statute in England in 1601, charitable uses such as the one in question were not recognized, and that they owe their validity in England either to the statute or to prerogative *cy pres* powers, neither of which were part of the law of Virginia.<sup>18</sup>

It then became accepted Virginia law that

In short, there cannot be a trust without a *cestui que trust*, and if it cannot be ascertained who the *cestui que trust* is, it is the same as if there were none.<sup>19</sup>

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18. *Gallego's Ex'rs v. Att'y Gen.* (1832) 30 Va. 450; *Stonestreet v. Doyle* (1881) 75 Va. 356. "These principles, it is confidently believed, are the general principles of the common law upon this subject. If there are exceptions to these principles, those exceptions may without doubt be shown. A diligent search has led me to the conviction, that there was no case at common law, in which a bequest or a trust of this indefinite character would be supported; and the learned counsel on both sides have acknowledged that they have been unable to discover any case anterior to the Statute 43 Elizabeth in which the validity of such bequests has been distinctly recognized. It ought, therefore, perhaps suffice to rest the argument here, since, if under the general principle the bequest would be void, it is incumbent upon those who claim to be protected by an exception to establish that exception." *Gallego's Ex'rs v. Att'y Gen.*, *supra*, at 467. See also *Kain v. Gibboney* (1879) 101 U. S. 362.

19. (1832) 30 Va. 450, 466.

*Vidal v. Girard's Executors*,<sup>20</sup> the next most important decision in this field, clearly showed that the view of the *Hart* case regarding the scope of English equitable jurisprudence prior to the Statute of Elizabeth was based upon incomplete research. The decision repudiated the doctrine of *Baptist Association v. Hart's Executors*.<sup>21</sup> The Virginia courts, for a long period, possibly out of deference to the great Chief Justice Marshall, declined to follow the path indicated by the *Girard* Case and continued to hold charitable trusts on the same footing as other trusts to be sustained or rejected according to the same criteria.

However, some fifty years later the courts of the state attempted to break away and in 1885,<sup>22</sup> relying on a certain saving clause in the general act of repeal of 1792, held that the Statute of Elizabeth had not been repealed, and that even though the statute were not in force, equity could enforce charitable trusts by reason of its inherent powers. The court pointed out that the Virginia charity doctrine did not have its "judicial birth" in

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20. (1844) 2 How. 127. The great size of the estate, the eminence of counsel, the peculiar provisions of the trust instrument, and the importance of the questions involved excited great interest at the time.

21. (1819) 4 Wheat. 1. Justice Story, after observing that the Statute of 43rd of Elizabeth had been adjudged by the Supreme Court of Pennsylvania not to be in force in that state, in commenting on the *Hart* case, said: "But very strong additional light has been thrown upon this subject by the recent publications of the Commissioners on the Public Records in England, which contain a very curious and interesting collection of the Chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the Statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained from the subject when the case of *The Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheaton 1, was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded. If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania." 2 How. at 196.

22. *Protestant Episcopal Education Society v. Churchman* (1885) 80 Va. 718, 772.

Virginia but was an error copied from the Supreme Court of the United States. This same position was taken four years later,<sup>23</sup> and it appeared as though the state might free itself from its narrow view of the inherent power of equity over charities. Some eight years later, however, the court felt compelled to return to its old doctrine on the grounds that the law had been built up by a long line of decisions and, though based upon possibly erroneous conceptions, was too well settled to be overturned by judicial legislation.<sup>24</sup> Subsequent Virginia cases have been content to follow this reasoning.<sup>25</sup>

The legislature of Virginia has been willing to make minor modifications,<sup>26</sup> but the general limitations upon charitable trusts remain. It should be noted that, with the exception of these statutory provisions for certain charitable trusts, the only satisfactory procedure available to the charitably inclined in Virginia is to make the gift or bequest directly to a charitable corporation for one or more of its corporate purposes.<sup>27</sup> Since West Virginia did not sever its ties with Virginia until Civil War days, it is not surprising that its decisions on this, as well as many other points of law, are practically parallel. In 1873 the supreme court of the new state approved the Virginia doctrine.<sup>28</sup> After the Virginia court made its first attempt to break away in 1885, we find the following conservative comment:

\* \* \* we are not moved to depart from the line of safe precedents established by the Court of Appeals, from the time of the decision in *Gallego's Executors v. Attorney General* and followed by this court to the present time \* \* \*.<sup>29</sup>

In the absence of a definite *cestui* to initiate equitable proceedings against the trustee in the event of serious deviations from the original intent of the donor, adequate control may be lacking; and the West Virginia court evidently preferred to ad-

23. *Trustees v. Guthrie* (1889) 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321.

24. *Fifield v. Van Wyck* (1897) 94 Va. 557, 570, 27 S. E. 446.

25. *Jordan v. Richmond Home for Ladies* (1907) 106 Va. 710, 56 S. E. 730; *Jordan v. Universalist General Convention Trustees* (1907) 107 Va. 79, 57 S. E. 652.

26. See Va. Code (1936) secs. 587-590.

27. *Jordan v. Universalist General Convention Trustees* (1907) 107 Va. 79, 57 S. E. 652. For cases holding such a bequest to a charitable corporation valid see *Roy's Ex'rs v. Rowzie* (1874) 66 Va. 599; *Fitzgerald v. Doggett's Ex'rs* (1930) 155 Va. 112, 155 S. E. 129.

28. *Bible Society v. Pendleton* (1873) 7 W. Va. 79; see also *Knox v. Knox* (1876) 9 W. Va. 124.

29. *Wilson v. Perry* (1886) 29 W. Va. 169, 1 S. E. 302, 321.

here to the plan of restricting charitable administration to corporations with definite and limited charter powers. It was careful to explain that its doctrine was not intended to banish charity from the state, nor "to dry up the streams of charitable feelings and actions," but to control to a limited extent the manner of their operation.

The law on this subject has had a very similar history in Maryland. Although the legislature did not specifically repeal all English statutes after the Revolution, the Maryland Constitution of 1776 provided that only those passed before the time of the first immigration to the state and which were found applicable to local needs were to be considered in force. In 1822 its courts were compelled to determine whether the Statute of Charitable Uses had been thus engrafted into the common law of the state. The state had theretofore commissioned one Kilty to draft a report as to the English statutes to be rejected. His opinion that the English system of charitable uses was ill adapted to local needs was followed by the court with the comment that "it was a safe guide in exploring an otherwise dubious path."<sup>30</sup>

But, as in Virginia, gifts to charitable corporations for one or more corporate purposes were early recognized in Maryland. Since in order to sustain the charity it was necessary that the court find an intent to make an absolute gift and not an attempt to create a trust for indefinite and uncertain beneficiaries, even the use of the most precise terminology did not deter the courts. In the federal case discussed at the beginning of the article<sup>31</sup> the words "in trust" were not sufficient to turn the scales. But further on the court made a most illuminating comment:

It is also of significance that gifts and devises to corporations for charitable purposes, which we hold to be valid in Maryland, because we deny that they are trusts, would be called charitable trusts in those jurisdictions in which such settlements are valid in accord with the rule in the Girard Will case.<sup>32</sup>

In attempting to rationalize its doctrine with reference to the absolute title of charitable corporations, the Maryland court has

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30. *Dashiell v. Attorney General* (1822) 5 Har. and J. (Md.) 392, 9 Am. Dec. 572.

31. *Art Students' League v. Hinkley* (D. C. D. Mo. 1929) 31 F. (2d) 469, *aff'd* (C. C. A. 4, 1930) 37 F. (2d) 225, cert. denied (1930) 281 U. S. 733.

32. 31 F. (2d) at 478.

said that to hold otherwise would be equivalent to saying the corporation took the property in trust for itself.<sup>33</sup> It is submitted that this reasoning begs the question. Let us take the case of a true charitable trust. In the hands of individual trustees, the trust funds are held for the benefit of an indefinite group of beneficiaries, and to a larger degree, for the benefit of the public at large. If these trust funds, subject to the same provisions, are given to a Maryland charitable corporation with charter powers broad enough to include the provisions of the gift, the court would say that this cannot constitute a trust because the corporation would then be holding the property in trust for itself. But are not the real beneficiaries the same, whether the funds be held by individual trustees or by a charitable corporation? Can it be said with any degree of realism that the charitable corporation would be the beneficiary if the court preferred to call the fund a charitable trust?

The evidence seems quite clear that the Virginia and Maryland courts evolved this doctrine because of a belief that statutory and judicial control would be more effective over corporate charities than over charitable trusts. It should be recalled in this connection that religious corporations were greatly disfavored in Virginia in its early days, and this hostility was written into its constitution.<sup>34</sup>

Another modern case<sup>35</sup> in which the Maryland court disregarded language usually considered indicative of an intent to create a trust was concerned with the following provisions of the will:

I give and devise unto Trinity Reformed Church \* \* \* my hotel property \* \* \* in trust to the support of the minister, who may from time to time be in charge of said church.

The court said as to this:

\* \* \* there was no intention upon the part of the testator to create a trust, and \* \* \* the corporation takes the legal and beneficial title to the property, and \* \* \*, therefore, its estate is one in fee simple.<sup>36</sup>

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33. *Baltzell v. Church Home* (1909) 110 Md. 244, 73 Atl. 151.

34. Art. 5, sec. 17. See especially in this connection *Gallego's Ex'rs v. Att'y Gen.* (1832) 3 Leigh (30 Va.) 450, 477.

35. *Conner v. Trinity Reformed Church* (1916) 129 Md. 360, 99 Atl. 547.

36. 99 Atl. at 549. Accord: *Society v. Gaither* (C. C. D. Md. 1894) 62 Fed. 422; *Bennett v. Humane Society* (1900) 91 Md. 10, 45 Atl. 1888; *Church Extension v. Smith* (1881) 56 Md. 362; *Doan v. Ascension Parish*

The status of the charitable trust in the District of Columbia is the same as in Maryland for the obvious reason that, although the District was originally carved from Virginia and Maryland, the part ceded by Virginia was retroceded in 1846, leaving Maryland law as the rule of decision in the new territorial subdivision.<sup>37</sup> This was confirmed by the United States Supreme Court in 1877.<sup>38</sup>

Thus Virginia, West Virginia, Maryland, and the District of Columbia may be grouped together in this analysis since the doctrine announced by them may be traced to a general repeal of the English statutes and a refusal on the part of their courts to admit the somewhat anomalous doctrine of the charitable use into the body of the common law.

### B. *The New York Doctrine*

Another group of states adhering to a somewhat similar position consists of New York, Michigan, Wisconsin, and Minnesota.

In 1829 the New York legislature attempted a codification of the law of uses and trusts, abolishing all except those specifically authorized. At this early date in the history of the state, with little accumulated wealth to give rise to litigation with reference to gifts to charity, it is not surprising that those drafting this code failed even to mention the charitable trust.<sup>39</sup> When it was contended that this early statutory revision impliedly excluded the charitable trust, the court refused to entertain such a view "so contrary to the public interests and to the spirit of the age."<sup>40</sup> However, six years later<sup>41</sup> the court evidently yielded to the persuasive eloquence of counsel for disappointed heirs and held the

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(1906) 103 Md. 662, 64 Atl. 314; *Eutaw Place Baptist Church v. Shively* (1887) 67 Md. 493, 10 Atl. 244; *Gray v. Peter Gray Orphans' Home* (1916) 128 Md. 592, 98 Atl. 202; *Hanson v. Little Sisters of the Poor* (1894) 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; *Pratt v. Sheppard and E. P. Hospital* (1898) 88 Md. 610, 627, 42 Atl. 51; *Rizer v. Perry* (1882) 58 Md. 112; *Shaeffer v. Klee* (1905) 100 Md. 264, 59 Atl. 850; *Snowden v. Crown Cork & Seal* (1911) 114 Md. 650, 80 Atl. 510, Ann. Cas. 1912A 679; *Trinity M. E. Church South v. Baker* (1900) 91 Md. 539, 46 Atl. 1020; *Van Reuth v. City Council of Baltimore* (1934) 170 Atl. 199; *Waters v. Order of the Holy Cross* (1928) 155 Md. 146, 142 Atl. 297; *Williams v. Baptist Church* (1901) 92 Md. 497, 48 Atl. 930, 54 L. R. A. 427; *Woman's Foreign Missionary Society v. Mitchell* (1901) 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

37. *Zollman, American Law of Charities* (1924) 20.

38. *Ould v. Washington Hospital* (1877) 95 U. S. 303.

39. *N. Y. Rev. Stat.* (1839) 727.

40. *Shotwell v. Molt* (1844) 2 Sandf. (N. Y.) 46, 51.

41. *Yates v. Yates* (1850) 9 Barb. Ch. (N. Y.) 324.

language of the statute too plain and unequivocal to be disregarded, criticizing the earlier holding as judicial legislation and calling upon the legislature to correct the situation by a more thorough revision of the statutes.

The court wavered in its position on the subject,<sup>42</sup> but by 1873 the controversy was practically closed. By this time the only way a testator could devote his property to charity was to give it to a charitable corporation already chartered by the state or to be formed within a limited period. The court in that year said:

\* \* \* corporations can only take and hold property to the amount and for the purposes prescribed by their charters or acts of incorporation, and to this extent each act of incorporation is a dispensation in favor of the particular corporation, in respect to the prohibitions of the statute against perpetuities. But for this dispensation, which is in effect a repeal *pro tanto* of the statute against perpetuities, grants of property to charitable corporations, for their general purposes would be incompatible with the statute \* \* \* for the reason that every such grant implies that it is to be held in perpetuity for the purposes of the grantee \* \* \*.<sup>43</sup>

In 1891 the New York court faced an acid test of this doctrine. Samuel J. Tilden attempted by his will to create a charitable trust of some five million dollars "to establish and maintain a free library and reading room in the City of New York, and to promote such scientific and educational objects as my said executors and trustees may designate."<sup>44</sup> The court felt constrained to follow its rule previously established, but the size of the estate lost to charity and the national prominence of the donor stimulated a critical examination of the subject.<sup>45</sup>

In 1893 the New York legislature took cognizance of the problem to the extent of passing a statute termed "The Tilden Act."<sup>46</sup>

42. See *Williams v. Williams* (1853) 4 Seld. (8 N. Y.) 425; *Owens v. Missionary Society* (1856) 4 Kern (14 N. Y.) 380; *Downey v. Marshall* (1861) 23 N. Y. 366.

43. *Holmes v. Mead* (1873) 52 N. Y. 332, 339-40.

44. *Tilden v. Green* (1891) 130 N. Y. 29, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487.

45. Ames, *The Failure of the Tilden Trust* (1891) 5 Harv. L. Rev. 289.

46. An act to regulate Gifts for Charitable Purposes, N. Y. Laws of 1893, c. 701: "Sec. 1. No gift, grant or devise to religious, educational, charitable or benevolent uses which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating such a gift, grant, bequest or devise, if there is a trustee named to execute the same, the legal title to the lands

The act did not reestablish the entire structure of the English common law respecting the charitable use or trust. It restored merely one feature of it, that which permitted a charitable use for uncertain persons—*personae incertae*, and to this extent relieved charitable trusts from the limitations imposed upon private uses in lands by earlier legislation.<sup>47</sup> Had the legislature gone a step further and relieved charitable or public uses from the application of the rules relating to perpetuities, the ancient law would have been revived in its entirety, with the exception perhaps of the executive *cy pres* power under the sign manual of the Crown.

In England, where no trust had been created and no object specified but where there had been a general charitable intent indicated, the Crown by virtue of the prerogative or as *parens patriae* itself applied the donation to some charitable purpose. This power was also utilized to dispose of gifts to a forbidden religion, the Crown taking the position that these should be withdrawn from the control of the courts. In the case of *De Costa v. De Pas*<sup>48</sup> a gift to establish a Jesuba, or Jewish assembly, was applied under the king's sign manual to the instruction of orphans in the tenets of the Christian religion. Such abuse of power was largely responsible for the rejection of the doctrine in this country.

Thus, the "Tilden Act" did not greatly alter the trend of decisions in New York. A contemporary comment on the statute and its effect upon decisional law remarked:

When a charitable corporation has power by its charter to take and hold property to various uses, a gift to one of such uses will not create a trust.<sup>49</sup> Even the words "in trust" are not conclusive of an intention to create an express trust \* \* \*. The dictation by the donor of the manner of its use within the law does not affect the ownership or make the corporation a trustee.<sup>50</sup>

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or property given, granted, devised or bequeathed for such purpose shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

"Par. 2. The Supreme Court shall have control over gifts, grants, bequests, and devises in all cases provided for by section one of this Act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court."

47. N. Y. Laws of 1788, c. 46, par. 37.

48. (Ch. 1754) Amb. 228.

49. *In re Look* (1889) 7 N. Y. S. 298, *aff'd* (1891) 125 N. Y. 762, 27 N. E. 408.

50. Fowler, *The Law of Charitable Uses, Trusts and Donations in New York* (1896) 115.



*In re Bogart's Will*,<sup>51</sup> decided six years after the Tilden Act, gives clear evidence that the New York courts continued to hold gifts and bequests to charitable corporations as absolute and not in trust wherever possible. The gift was

\* \* \* to the Reformed Dutch Church of North Hampstead, to be invested in safe and productive securities \* \* \* and the income thereof to be applied, first, in the payment of the salary of the pastor of said church \* \* \* and the remainder shall be applied to the general uses and purposes of said church \* \* \*,

and the court ruled:

There is an absolute gift \* \* \*. The fact that the testator has designated the purpose for which the legacy must be used does not indicate a desire on his part to create a trust \* \* \*<sup>52</sup>

Other cases after 1893 show a similar trend.<sup>53</sup> Even where a fund was given subject to an annuity to the donor, the court has refused to find an intent to create a trust.<sup>54</sup> The document was drawn with all the formalities of a declaration of trust and was thus termed. It created an endowment fund for the college subject to a "trust" in favor of the settlor for a portion of the income during his life; yet the court held that the college, even during the term of the annuity, did not hold as trustee but as absolute owner for the particular purposes set forth in the instrument.

Two cases that discuss in detail the problem of construing gifts

51. (1899) 43 App. Div. 582, 60 N. Y. S. 496.

52. 60 N. Y. S. at 498.

53. *Bird v. Merkle* (1895) 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423; *In re Arrowsmith* (Sup. Ct. 1914) 147 N. Y. S. 1016, aff'd (1915) 213 N. Y. 704, 108 N. E. 1089; *Congregational Unitarian Society v. Hale* (1898) 29 App. Div. 396, 51 N. Y. S. 704; *Corporation of the Chamber of Commerce v. Bennett* (Sup. Ct. 1932) 143 Misc. 513, 257 N. Y. S. 2; *In re Donchian's Estate* (Surr. Ct. 1923) 120 Misc. 535, 199 N. Y. S. 107; *In re Durand* (Surr. Ct. 1907) 56 Misc. 235, 107 N. Y. S. 393, aff'd (1908) 127 App. Div. 945, 111 N. Y. S. 1118; *In re Griffin* (1901) 167 N. Y. 71, 60 N. E. 284; *In re Hart* (1923) 205 App. Div. 703, 200 N. Y. S. 63; *In re Isbell's Estate* (1896) 1 App. Div. 158, 37 N. Y. S. 919; *In re Johnson's Estate* (Surr. Ct. 1933) 148 Misc. 218, 265 N. Y. S. 395; *In re Lister's Estate* (Surr. Ct. 1937) 161 Misc. 734, 292 N. Y. S. 870; *Johnson v. Hughes* (1907) 177 N. Y. 446, 80 N. E. 373; *In re Roche* (App. Div. 1907) 104 N. Y. S. 1138, 106 N. Y. S. 1142; *St. George Church v. Morgan* (Sup. Ct. 1915) 88 Misc. 702, 152 N. Y. S. 497; *Sherman v. Richmond Hose Co.* (1921) 230 N. Y. 462, 130 N. E. 613; *Warburton Avenue Baptist Church v. Clark* (1913) 158 App. Div. 230, 142 N. Y. S. 1089.

54. *Robb v. Washington & Jefferson College* (App. Div. 1906) 93 N. Y. S. 92, modified and aff'd (1906) 78 N. E. 359, 185 N. Y. 485.

and bequests that purport to establish permanent endowment funds, in view of the fact that the "Tilden Act" was silent on the question of perpetuities, are of special interest.

The first<sup>55</sup> presented the following situation. In 1891 the Fifth Avenue Baptist Church entered into an agreement with John D. Rockefeller accepting certain securities to be held upon the "trusts" and conditions that (1) the securities were to be left in the custody of a named trust company; (2) the entire income was to be paid to the Tabernacle Baptist Church, a second corporation; (3) power of reinvestment was given to the Fifth Avenue Church. Here, if ever, was a situation where one charitable corporation held merely as trustee for a second. The only incidents of ownership vested in the Fifth Avenue Church were those of reinvestment; it did not even have custody of the corpus. And yet if the court held the fund to constitute a charitable trust, it would violate the statute of perpetuities still in force in New York, even with reference to public trusts. Faced with this dilemma, the court countered with:

\* \* \* the legal effect of the agreement was to pass the absolute title to the bonds to the Fifth Avenue Baptist Church subject only to the payment of the income to the plaintiff \* \* \* and upon the conditions expressed therein \* \* \*. As we construe the instrument, it falls within the class of so-called trusts arising out of gifts and bequests to charitable and religious corporations for the promotion of some corporate purpose, which have been held not to create a trust, in the legal sense. Such a gift does not create a trust in any such sense as that term is applied to property.<sup>56</sup>

A second frank admission of judicial perversion of legal concepts in the desire to preserve the charity is found in an opinion construing a testamentary gift "in trust" to an Ohio education corporation.<sup>57</sup> The New York court conceded that the bequest was, in a sense, in trust to the Ohio corporation. But a strict construction would invalidate it as contravening the statute against perpetuities, said the court, gifts in trust for charitable uses having long been deemed absolute gifts, in order to enable

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55. *Tabernacle Baptist Church v. Fifth Avenue Baptist Church* (1901) 60 App. Div. 327, 70 N. Y. S. 181, aff'd (1902) 172 N. Y. 598, 64 N. E. 1126.

56. 70 N. Y. S. at 184-185.

57. *St. John v. Andrews Institute* (1907) 191 N. Y. 254, 83 N. E. 981; and see *Smithsonian Institution v. St. John* (1909) 214 U. S. 19.

the beneficiary of a commendable endowment, bequest or devise, to take.

The history of the problem in Michigan parallels almost precisely that in New York. Even before the area had achieved statehood, the legislature of the new territory broke all ties with English statutory law by providing that "no act of the parliament of England, and no act of the parliament of Great Britain shall have any force within the territory of Michigan."<sup>58</sup> In 1848 the state followed the New York policy by abolishing all uses and trusts except those expressly authorized,<sup>59</sup> and in 1907 it adopted the New York "Tilden Act" without material modification.<sup>60</sup> Consequently, it is not surprising that its decisional law duplicates the development in New York.<sup>61</sup>

Since Wisconsin was carved from Michigan in 1836, and Congress provided that the laws in force in the territory of Wisconsin at the date of its admission as a state should continue to be valid and operative in the new territory of Minnesota, created in 1849, the decisions of all three states are very much alike, although there are some vigorous cases opposing the general trend. The majority opinion in *Danforth v. Oshkosh*<sup>62</sup> is in line with the New York doctrine. A testatrix had directed her trustees to convey property to the City of Oshkosh for the purpose of constructing and maintaining a public library thereon. Of this, the Wisconsin Supreme Court said:

We can see no escape from the conclusion that this homestead is directed to be conveyed to the city of Oshkosh for its own corporate use as a municipal corporation; that both legal title and beneficial interest are held by it in the same, to wit, its corporate capacity. Hence, no trust is imposed upon it \* \* \*. The decided cases are numerous \* \* \* which declare \* \* \* that if the use limited is distinctively and purely a corporate one, the corporation itself holds the beneficial or equitable title, which therefore merges in the legal title. The right of individuals interested in the use of the property is, as members, to compel the corporation to perform its duties as a corporation, not as *cestuis que trustent*, to regulate its conduct as a trustee.<sup>63</sup>

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58. 1 Mich. Terr. Laws (1810) 900.

59. Mich. Comp. Laws (1929) secs. 10077-85.

60. Mich. Acts of 1907, No. 122.

61. *First Society M. E. Church of Newark v. Clark* (1879) 41 Mich. 730; *Hopkins v. Crossley* (1903) 132 Mich. 612, 96 N. W. 499; *Stoepel v. Satterthwaite* (1910) 162 Mich. 457, 127 N. W. 673.

62. (1904) 119 Wis. 262, 97 N. W. 258.

63. 97 N. W. at 264.

However, this passive acceptance of New York precedents was sharply criticized in the dissenting opinion.

Moreover, when the court was faced with an almost identical situation some seven years later, it preferred to find that the city took, not as absolute owner, but as trustee of a public or charitable trust.<sup>64</sup> Property of testatrix had been given to the City of Oshkosh for the purpose of establishing a manual training school, clearly a corporate function of a municipal corporation. Yet the court concluded that its former doctrine has one fatal weakness, *i. e.*, the problem of enforcement of the terms of the gift or bequest. If the city takes as absolute owner, how can it be compelled to comply with provisions of the bequest? The court, reasoning on this point, observed:

It seems highly improbable that the testatrix had in mind the giving of this splendid donation in a way that it might be dissipated or disposed of for any purpose which the city saw fit as soon as it came into possession of the property. It is likewise improbable that the donation would have been made had the donor understood that any such result could legally follow.<sup>65</sup>

But in 1920 we find the Wisconsin court apparently returning to its former line of reasoning, again in order to preserve the funds for the charity.<sup>66</sup> The gift was

\* \* \* to the State Historical Society of Wisconsin, upon this express condition, that the fund so received \* \* \* shall always be kept separate and distinct from other funds of said society, and that no part of the principal shall be diverted or used, and to be known always as the George B. Burroughs Fund \* \* \*.

The Society claimed that upon the death of the son without lawful issue, the estate vested in it, charged however with the payment by it of an annuity, while the trustees for the estate argued that the Society's charter did not authorize it to act as trustee.

Thus, the issue was drawn. If trusteeship in the technical sense was *ultra vires* the corporation, to hold the fund a charitable trust was to render it lost to charity notwithstanding the provisions of the will as to the perpetual character and isolation of the fund, and despite a factor of greater significance, that during the life of the annuitant, it could scarcely be said that

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64. *Maxcy v. City of Oshkosh* (1910) 144 Wis. 238, 128 N. W. 899.

65. 128 N. W. at 904.

66. *State Historical Society v. Foster* (Wis. 1920) 177 N. W. 16.

the entire legal and equitable interest in the fund vested in the corporation, according to traditional legal concepts; yet the court felt constrained to hold that the corporation was absolute owner of the fund and that the payment of such an annuity was not the performance of trust duties.

One excerpt from a fairly recent Minnesota case<sup>67</sup> may suffice to indicate how far that state has been content to follow along with New York. The court was considering a bequest in the following terms:

I give, devise and bequeath in trust to the State Convention of Universalists of the State of Minnesota all of the property \* \* \* of which I shall die seized. All the income and profit arising from the estate to be used \* \* \* to pay \* \* \* the salary of the minister who may be located where said graves are located \* \* \*.

The court announced that

Weight may be given to the fact that respondent is a religious corporation \* \* \* organized for religious, educational and benevolent purposes \* \* \*. It is really a gift or devise to respondent direct, to be used according to its known general practice. The use of the words "in trust" should be attributed to hazy notions of legal terms.<sup>68</sup>

Other decisions show a similar pattern of judicial reasoning.<sup>69</sup>

### *C. Summary of the Virginia-New York Doctrines*

The foregoing historical survey would seem to justify the conclusion that in those states where the Statute of Elizabeth was rejected and the inherent power of equity over charitable uses denied, either by direct statutory expression of policy or by judicial interpretation of English precedents, the courts were compelled to evolve the doctrine that gifts and bequests to a charitable corporation for one or more corporate purposes become the absolute property of the corporation and are not held

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67. *In re Little's Estate* (Minn. 1919) 173 N. W. 659.

68. *Id.* at 660.

69. *Wells v. Commissioner of Internal Revenue* (C. C. A. 8, 1933) 63 F. (2d) 425; *Atwater v. Russell* (1892) 49 Minn. 57, 51 N. W. 629; *Cone v. Wold* (1902) 85 Minn. 302, 88 N. W. 977; *In re Henrickson's Estate* (1925) 163 Minn. 176, 203 N. W. 778; *Lane v. Easton* (1897) 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669; *In re Minneapolis Police Dept. Relief Ass'n* (1902) 85 Minn. 302, 88 N. W. 977; *Peterson v. Northwestern Baptist Hospital* (1935) 194 Minn. 399, 260 N. W. 512; *Shanahan v. Kelly* (1903) 88 Minn. 202, 92 N. W. 948; *Watkins v. Bigelow* (1904) 93 Minn. 210, 100 N. W. 1104; *Young Men's Christian Ass'n v. Horn* (1913) 120 Minn. 404, 139 N. W. 905.

by it "in trust," in the technical sense of that phrase, as applied by the courts in the field of private trusts. Even after substantial statutory modification of earlier limitations, a definite tendency to follow former habits of reasoning is apparent. Some courts in these jurisdictions have been concerned with the problem of enforcement of conditions and restrictions, but the majority seemingly have been content to dismiss the discussion with the convenient word, "precatory."

#### IV. NON-ABOLITION OF THE ENGLISH DOCTRINE

Where the English doctrine of charitable uses is rejected, the general problem under discussion is relatively simple. Charitable corporations are not, and apparently cannot become, trustees for the funds given to them for purposes within the scope of their charters.

However, the majority of states have accepted the English doctrine, some by specific enactment, others by general adoption of English statutes passed prior to 1606, and a few by judicial recognition without legislative support. In these jurisdictions, the problem is more difficult. Having recognized the broad powers of equity in the field of charitable uses, the courts in these states were free to apply the general concepts of trusteeship to both charitable and private trusts. Consequently, there was not the same necessity for maintaining a distinction between corporate and unincorporated charities.

As a result of this historical development, we find many cases in which the court clearly recognizes the charitable corporation as trustee of its endowments. On the other hand some courts within this same group have apparently failed to take this difference in historical evolution into consideration and have not hesitated to apply the Virginia-New York doctrine despite prior acceptance and adoption of the Statute of Charitable Uses. Missouri, because of early acceptance of the Statute, furnishes a good example of the confusion resulting from the application of conflicting concepts.

##### *A. The Problem in Missouri*

Missouri adopted the Statute of Elizabeth some five years before statehood.<sup>70</sup> However, the Missouri courts have preferred

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70. "Our statute of the 19th of January 1816 introduced 'the common law of England, which is of general nature, and all statutes made by the

to rest their doctrine of charities upon the inherent powers of equity rather than the statute, looking to the preamble of the statute merely for guidance in delimiting the area of application of the doctrine. The early case of *Chambers v. St. Louis*<sup>71</sup> contains a valuable summary of the subject and lays down the main framework of the doctrine for Missouri:

The statute has been resorted to as a guide, because it furnishes the largest enumeration of just and meritorious charitable uses; and it may perhaps be rather considered as a declaratory law, or specification of previously recognized charities, than as creating, as some cases have intimated, the objects of chancery jurisdiction over charities.<sup>72</sup>

If the Statute of 43rd Elizabeth had been repealed in this state, we must confess we would have been embarrassed in endeavoring to uphold a charity which differed in any material respect from any other lawful trust. Although it might be argued that the repeal of the statute would not affect the common law, yet the two subjects are so closely joined, giving and receiving aid from each other, that such a measure could not fail to influence the judgment, and be regarded as evidence of the indifference if not the hostility with which the subject was viewed by the legislature. In declining to be governed by opinions formed from such considerations, we do not disparage the courts by which they were delivered nor diminish in anywise the respect to which they are deservedly entitled.<sup>73</sup>

With this background courts of Missouri were rarely called upon to make any real distinction between gifts to charitable corporations subject to limitations and restrictions and the creation of a charitable trust with the corporation as trustee. The gift or bequest was valid, whether sustained as an absolute gift or as a charitable trust. The cases are numerous wherein the court either terms such gifts "charitable trusts" or applies general principles of trust law to them without discussion as to their precise status.<sup>74</sup>

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British Parliament in aid of, or to supply the defects of the common law, made prior to the 4th year of James I, and of a general nature and not local to that kingdom." *Chambers v. St. Louis* (1860) 29 Mo. 543, 586.

71. (1860) 29 Mo. 543.

72. *Id.* at 588.

73. *Id.* at 582-583.

74. *Academy of the Visitation v. St. Clemens* (1872) 50 Mo. 167; *Barkly v. Donnelly* (1892) 112 Mo. 561, 19 S. W. 305; *Buckly v. Monck* (Mo. 1916) 187 S. W. 31; *Catron v. Scarritt Collegiate Institute* (1915) 264 Mo. 713, 175 S. W. 571; *Crow v. Clay County* (1906) 196 Mo. 234, 95 S. W. 369; *Cummings v. Dent* (Mo. 1916) 189 S. W. 1161; *Eads v. Y. M. C. A.*

That this broad doctrine has failed to compel the Missouri courts to sharpen their usage of terms is well illustrated by the case of *Society of the Holy Souls v. Law*.<sup>75</sup> The will of the testatrix gave certain property "to the order of The Little Helpers of the Holy Souls." This was the name by which both an unincorporated order and a charitable and religious corporation were known. The devise to the unincorporated order could only be sustained as a charitable trust, whereas the same property to a charitable corporation could be considered as an outright gift. The court refused to meet the issue:

It necessarily follows, under the equitable principle which conserves a charitable devise, that the one made by the testatrix became effective either in the unincorporated society \* \* \* or in the corporate body equally denoted by the same term.<sup>76</sup>

It is clear that in the states that have always accepted the English doctrine of charitable trusts, the trustee of such a trust may be a corporation<sup>77</sup>—a charitable corporation or even a municipal corporation.<sup>78</sup> Because of its artificial nature and restricted powers as contrasted with the natural status and unrestricted capacities of natural persons, a corporation cannot become the trustee of a charitable trust repugnant to or inconsistent with its charter provisions. Since it may also take as absolute owner, it becomes important to determine the true intent of the donor or testator. The tendency of courts in states where charitable trusts are invalid to find that the intent of the donor was to make an absolute gift, despite the use of words normally indicative of trust intent has already been discussed. Cases are not lacking to show the influence of these decisions in states where the charitable trust is fully recognized.<sup>79</sup> Practically all courts have held that, where the gift or bequest was

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(1930) 325 Mo. 577, 29 S. W. (2d) 701; *Farm & Home Savings & Loan Ass'n v. Armstrong* (1935) 337 Mo. 349, 85 S. W. (2d) 461; *Society of the Helpers of the Holy Souls v. Law* (1916) 267 Mo. 667, 186 S. W. 718.

75. (1916) 267 Mo. 667, 186 S. W. 718.

76. 186 S. W. at 727.

77. Note (1915) 7 L. R. A. (N. S.) 715.

78. Note (1889) 5 L. R. A. 858.

79. *Eccles v. R. I. Hospital Trust Co.* (1916) 90 Conn. 592, 98 Atl. 129; *Greek Orthodox Community v. Malicourtis* (1929) 267 Mass. 472, 166 N. E. 863; *St. James Parish v. Bagly* (1905) 138 N. C. 384, 50 S. E. 841, 70 L. R. A. 160; *Clark v. Sisters of Society of the Holy Child Jesus* (1908) 82 Neb. 85, 117 N. W. 107.



to the corporation, without restrictions, limitations, or suggestions as to its use, no trust was imposed. But if the donor should see fit to impose some restriction upon the discretion otherwise vested in the board of the corporation, will this be sufficient to cut down absolute ownership to that of mere legal title? If preferences and suggestions may be dismissed as merely precatory, how far must the words of instruction or command cut into the area of discretion before the courts will find all the elements of a technical trust? If the use is limited to only one of several functions or purposes of the corporation, will this be sufficient? Or must we accept the test suggested by the Nebraska court in *Hobbs v. Board of Northern Baptist Convention*,<sup>80</sup> discussed at the beginning of this article, that all gifts and bequests intended as permanent endowments are to be construed as trusts? Just what words are necessary to transmute an otherwise absolute gift to a charitable corporation into a charitable trust is really the crux of the problem.<sup>81</sup>

The inquiry may well commence with *National Board v. Fry*.<sup>82</sup> There an executor brought an action to construe the following provision in the will:

Item Eleven: I give and bequeath my residence property \* \* \* and my diamond brooch to the National Board of Christian Women's Board of Missions of the Christian Church of the United States of America \* \* \* for home mission work in the United States as they, the said board, may think best \* \* \* the same to be received and handled and used as the W. H. French Memorial Fund for said mission work.

It would seem that the phrase "for home mission work in the United States" restricts sharply the area of discretion of the Board. Otherwise, it would have been free to use it for missionary work in any part of the world, or for the general expenses of the organization. Yet we find the Supreme Court of Missouri denying that the words imposed restrictions:

Item 11 devises the residence property to plaintiff, not upon a trust, but absolutely and without reservation or limitation \* \* \*. The devise is not in the nature of a charitable trust. It is a clear gift. There are no words in the devise to raise or create a trust; hence there is no trust declared

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80. (Neb. 1934) 253 N. W. 627.

81. Note (1906) 7 L. R. A. (N. S.) 1119.

82. (1922) 293 Mo. 399, 239 S. W. 519.

\* \* \*. If the devise created a charitable trust, its object and purpose would have to be clear, definite and certain. In such case the words of creation must announce a definite subject and a definite object, and the terms of the trust must be sufficiently declared \* \* \*. Under no conceivable circumstances could a court be called upon to administer this fund any more than if the devise had been to John Doe.<sup>83</sup>

The court might well have applied these same tests to the facts of the case and reached an opposite result. The object and purpose of the bequest were quite definite. The beneficiaries themselves must of necessity be indefinite, to some extent, since this is one of the primary characteristics of a charitable trust.<sup>84</sup> The corporation was impliedly forbidden to merge the fund in its general accounts since it was commanded to receive, handle, and use it "as the W. H. French Memorial Fund." How much further must a donor go in order to create a technical trust, if such be her intention?

The last sentence quoted from the opinion is significant. Suppose the Board had been inclined to disregard these instructions and limitations and had indicated an intent to expend the fund for general expenses. Is there no legal process available in Missouri to restrain such breach of faith? The attorney general, as representative of the interests of the general public, might intervene,<sup>85</sup> but what would be the nature of the action if this is not a charitable trust? The payment of general operating expenses is not in itself a violation of any of the terms of the charter of a charitable corporation. If the fund is really the absolute property of the board, how can anyone, even the state, question the manner of its expenditure so long as the corporation stays within the provisions of its charter powers? Some courts have said that a gift for only one of the corporate purposes is made on condition that it be applied to the corporate use specified;<sup>86</sup> but what the procedure would be if the condition were broken is a nice question. Courts are hostile to forfeitures and consequently to conditions subsequent.<sup>87</sup>

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83. 239 S. W. at 524.

84. Note (1938) 23 WASHINGTON U. LAW QUARTERLY 556. But cf. 2 Bogert, *Trusts* (1935) sec. 362.

85. 2 Bogert, *Trusts* (1935) sec. 411.

86. *Snowden v. Crown Cork & Seal Co.* (1911) 114 Md. 650, 80 Atl. 510; *Conner v. Trinity Reformed Church* (1916) 129 Md. 360, 99 Atl. 547; *FitzGerald v. Big Rapids* (1900) 123 Mich. 281, 82 N. W. 56.

87. *Newton v. Newton Burial Park* (1930) 326 Mo. 901, 34 S. W. (2d) 118; *In re Jordan's Estate* (1933) 310 Pa. 401, 165 Atl. 652.

In 1919<sup>88</sup> the court again manifested an inclination to accept at least a portion of the Virginia-New York doctrine. The heirs of deceased requested the court to construe the following paragraphs of his will:

Seventh. One of such third parts I give and bequeath to the capital of the public school fund of the State of Missouri \* \* \*.

Justice Walker, speaking for the majority of the court, said:

The word "capital" as used to designate the recipients of these bequests has no significance other than that generally given to it as applied to public or private funds \* \* \*. Neither directly or by reasonable implications is a donee designated who can take the legal title to the funds bequeathed and thus authorize the appointment of a trustee \* \* \*.<sup>89</sup>

The court then concluded that the bequest could not be sustained as a direct gift to the school fund and was therefore void except on the theory that these bequests created charitable trusts for the advancement of education. So construed, the provisions of the will in controversy, aided by the *cy pres* doctrine, might be upheld, and as a consequence, the powers of a court of equity exercised in the designation of a trustee. To quote:

In the creation of a charitable trust, it is essential that there be a separation of the legal estate from the beneficial enjoyment of the same \* \* \*. This separation must be indicated by the words of the donor, otherwise the equitable and legal estate will meet in the same person, and the trust will be extinguished by a merger of the equitable in the legal estate. The rule thus plainly put finds affirmative expression in *Doan v. Vestry*, 103 Md. 662, 64 Atl. 314, 7 L. R. A. (N. S.) 1119 \* \* \*. If such a trust has been created, it will not be permitted to fail because a trustee has been erroneously or uncertainly designated, but the court in the exercise of its inherent equity jurisdiction will appoint one \* \* \*. The question here confronting us has a deeper significance, in that the will does not, either by express terms or by implication, create such a trust \* \* \*.<sup>90</sup>

The primary significance of this decision is the readiness of the court to cite a leading Maryland case on the point that a

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88. *Robinson v. Crutcher* (1919) 277 Mo. 1, 209 S. W. 104, (1921) 21 U. of Mo. Bull. L. Ser. 31.

89. 209 S. W. at 106.

90. *Id.* at 105, 107.

charitable bequest is to be construed as a direct or absolute gift unless there is a clear intent to cut down the interest granted, *i. e.*, a separation of the legal estate from the beneficial enjoyment.

Justice Williams, speaking for the minority, was of the opinion that there was an intent to make such separation of interests:

By the terms of the will the legal estate in the property \* \* \* became immediately vested in the statutory custodian of the respective school funds, and the equitable title or beneficial enjoyment thereof is vested in the persons who by statutory law become now, or are hereafter, entitled to receive the benefits from the respective school funds.<sup>91</sup>

In 1936<sup>92</sup> the Supreme Court of Missouri was again called upon to construe a will of this character, with almost identical provisions:

2nd. I give devise and bequeath the remaining part of my estate both real and personal to the Macon County Missouri school funds.

By a unanimous decision, the court reversed itself, concluding that the minority opinion in the *Crutcher* case correctly stated the law applicable and that a valid charitable trust had been created.

It is obvious that this decision does not necessarily reflect the attitude of the court with reference to gifts and bequests to charitable corporations. School funds as such are not corporate entities, and a court might be reluctant to sustain a bequest as a direct gift to such a fund and yet be willing to hold that a similar bequest to a charitable corporation with fully defined charter powers need not constitute a charitable trust. In other words the *Burrier* case clearly overrules the *Crutcher* case but should not be accepted as a complete reversal of the tendency shown in the *Fry* case. This view is reinforced by the court's observation that "what was said in *Doan v. Vestry* \* \* \* to the separation of the legal and equitable estates was perfectly proper."<sup>93</sup> Indeed the court quoted the major portion of the *Doan* decision again and apparently concurred in the view that the

91. *Id.* at 107.

92. *Burrier v. Jones* (1936) 338 Mo. 679, 92 S. W. (2d) 885; see Note (1936) 1 Mo. L. Rev. 369.

93. 92 S. W. (2d) at 889.

intention to vest merely the legal and not the equitable or beneficial interest in the charitable corporation must be deduced from rational analysis of the will and not from abstract speculation.

It justified repudiation of the *Crutcher* case by pointing out that, since Missouri has accepted the English common law of charities almost in its entirety, it may well adopt a broader view of the power of equity to frame a scheme or plan to administer gifts merely "to charity" or "to the poor" without mention of the trust or trustee.

It is the failure of the *Crutcher* case to adopt this more liberal concept of the inherent powers of equity to frame administrative schemes for gifts to "charity" in general and not its apparent acceptance of the Virginia-Maryland-New York doctrine with reference to direct gifts to charitable corporations that is criticized by Professor Bogert as "*contra* and less desirable."<sup>94</sup>

In support of the view that charitable corporations in Missouri hold their endowment funds as trustees and not as absolute owners may be cited the case of *Catron v. Scarritt Collegiate Institute*.<sup>95</sup> The provisions of the will in question read:

I do give and grant \* \* \* unto the Scarritt Collegiate Institute, a corporation, \* \* \* for the use and benefit of said institute of learning, especially for the endowment of the president's chair in memory of my deceased son, J. Winston Hall \* \* \* which proceeds are to be applied by said corporation to the object hereinafter stated.

The Scarritt Institute ceased to attract students, and its board decided to merge with the Morrisville College. An attempt was made to induce the board to return the endowment to the Hall family in order that they might erect a church in memory of the son. The court objected to the return of the fund, holding:

\* \* \* that it was the purpose of the grantor \* \* \* to vest in the grantee a charitable trust \* \* \* for educational purposes and that this donation created a public charity.

\* \* \* to permit the fund to be used for the erection of a memorial church would be to contravene the expressed purposes of the gift. The fund, being for educational purposes, must, in the exercise of judicial *cy pres*, be turned over to the Scarritt-Morrisville College \* \* \*. If necessary to accomplish these directions, the attorney-general may become a party to a proper proceeding.<sup>96</sup>

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94. 2 Bogert, *Trusts* (1935) sec. 434, n. 69.

95. (1915) 264 Mo. 713, 175 S. W. 571.

96. 175 S. W. at 574, 575.

It is submitted that the same result could have been attained without the holding that the fund constituted a charitable trust. The court might well have said that the institute, during its corporate life, held the fund as absolute owner, restricted only by the provisions of its charter that the funds be devoted to education. Upon its dissolution,<sup>97</sup> the attorney-general should represent the public interest in the fund and see that it is devoted to the same or similar purposes, since there are no stockholders to receive the net assets, as would be the case of the dissolution of an ordinary corporation. Nevertheless, the attention of the court was not directed to the possible advantages of such a solution, and the case stands squarely in the path of any theory that charitable corporations in Missouri are vested with absolute title to their endowment funds. The *Fry* case came five years later, but it did not expressly overrule the holding in this case. Other decisions of similar import may be found.<sup>98</sup>

The so-called "trust fund doctrine" adhered to by Missouri and other courts to justify tort immunity of charitable corporations also suggests the view that such corporations do not hold their funds as absolute owners. The recent case of *Eads v. Y. M. C. A.*<sup>99</sup> illustrates the trend.

The decision of the courts<sup>100</sup> to grant this degree of tort immunity to charitable corporations need not rest upon any doctrine of charitable trusts. One may say that all charitable organizations hold their funds "in trust" for the general purposes of the charity for which admittedly they are organized without such holding constituting a technical trust. In fact, many courts prefer to base such immunity on the theory that public policy requires the exemption on the broad ground that public encour-

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97. Comment (1936) 21 *Cor. L. Q.* 96; Comment (1926) 20 *Ill. L. Rev.* 842; Comment (1927) 75 *U. of Pa. L. Rev.* 177.

98. *Buckly v. Monck* (Mo. 1916) 187 *S. W.* 31; *Crow v. Clay County* (1906) 196 *Mo.* 234, 95 *S. W.* 369; *Cummings v. Dent* (Mo. 1916) 189 *S. W.* 1161.

99. (1930) 325 *Mo.* 577, 29 *S. W.* (2d) 701. The trust fund theory holds that the funds of institutions constitute a trust fund for charitable purposes of the organization which may not be diverted to the payment of claims for damages for injuries due to negligence of agents of the institution, thereby depleting the fund.

100. See for illustrative cases *Ettlinger v. Trustees of Randolph-Macon College* (C. C. A. 4, 1929) 31 *F.* (2d) 869; *Adams v. University Hospital* (1907) 122 *Mo. App.* 675, 99 *S. W.* 453; *Roberts v. Kirksville College of Osteopathy & Surgery* (Mo. 1929) 16 *S. W.* (2d) 625; *Vermillion v. Woman's College of Due West* (1916) 104 *S. C.* 197, 88 *S. E.* 649.

agement of such institutions should be extended to protect them from tort responsibility. Nevertheless, the language of the courts of Missouri and other states on this subject cannot be entirely disregarded.

### *C. The Rule in Other Jurisdictions*

A brief survey of decisions in other states which, like Missouri, have accepted the English law of charities, will show a high degree of conflict and confusion. These are summarized by jurisdictions in the appendix to this article.

## V. THE PROBLEM CONFRONTING FINANCIAL OFFICERS OF CHARITABLE INSTITUTIONS

### *A. Lack of Adequate Precedents*

Until the courts have spoken more fully, it will be difficult to advise the financial officers and directors of charitable corporations as to the precise character of their endowment funds, especially those subject to material restrictions as to use of income, except in states that have accepted the Virginia-New York doctrine of absolute ownership. The viewpoint expressed in the *Restatement*<sup>101</sup> is constructive, but seems to be based largely upon the general doctrine evolved through judicial necessity in Virginia, New York, and other states of this group. The historical development of this doctrine has been shown.

Although some courts in jurisdictions recognizing the inherent power of equity over charities have accepted the doctrine of absolute ownership, at least with reference to gifts without restrictions, the cases cited in support of this viewpoint are generally those from the original group of states where the doctrine was evolved. Moreover, the doctrine is usually relied upon where it is necessary to preserve the charity, without rationalization.

### *B. Possible Inhibition of Future Gifts*

Since one of the primary objectives of the American Law Institute in drafting the general restatement of the common law

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101. *Restatement, Trusts* (1935) sec. 348, Introductory Note. See note 2, *supra*. The comments of the editor of the *Restatement* on this point are of interest: "On the broad question whether a charitable corporation is trustee for charitable purposes, the language of the cases is conflicting. The reason why we made the statement which we made in the *Restatement* \* \* \* is that we were dealing with trusts strictly so called, and did not wish to lay down the rule that the same principles are always applicable to charitable corporations, since the rules governing charitable corporations were not within the scope of the *Restatement* but were to be

is the expectation that the trend of future decisional, if not statutory, law will be influenced thereby, it may not be entirely inappropriate to consider the possible effects of a general acceptance of the viewpoint that charitable corporations hold their funds, even restricted endowment funds, as absolute owners.

In the opinion of university and college business officers with whom this question has been discussed, donors might well hesitate to make funds available in the future if the courts should declare unambiguously that restricted endowments, as well as unrestricted gifts, are expendable at the discretion of the governing boards of charitable corporations. Further, such unfettered power would, in their opinion, be apt to alter the permanent and enduring character of such institutions and thus rob them of their greatest appeal to those desirous of perpetuating a name or memory.<sup>102</sup>

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treated in some subsequent restatement. We therefore left open the question how far the same principles might be applicable." Correspondence, Dec. 14, 1937.

102. "The paragraph from the restatement may be a sound rule for the courts to adopt in appropriate factual situations. \* \* \* The idea, however, that the donor of a fund to a state university who directs the investment of the principal and the use of the income for a stated purpose would view with equanimity the news that the donee treated the principal as well as the income as an unrestricted gift appears to me to be an unwarranted and unsafe assumption of complacency in the giver of the gift. If it were to be known that the University of Illinois, in situations of the type described, treated the gifts as its absolute property and not encumbered in any sense with a trust, I am clearly of the opinion that friends who otherwise might have considered donations for purposes near their hearts would hesitate and probably place their bounty elsewhere. \* \* \* In any event, I do not know of a single gift of the type we are discussing made to the University of Illinois which I could be willing to advise the Board of Trustees to treat as absolute and not impressed with a trust character. I should, \* \* \* unless the circumstances be very clear to the effect that the gift is absolute, advise the Board to take the matter into court and obtain a formal adjudication which would protect that body against future challenge." Mr. Sveinbjorn Johnson, general counsel for the University of Illinois, in correspondence of Dec. 7, 1937.

Another recent comment on this problem is that of Mr. J. Harvey Cain of the American Council on Education in (1938) 47 *School and Society* 442-443: "I have noticed a growing tendency on the part of college administrators to disregard, or at least not to hold so sacred as in the past, the obligations expressed or implied in the acceptance of gifts and bequests for endowment, plant, and annuity funds. I have particularly in mind the guarding of the principal of these funds. We should recall that most of these capital funds have been solicited from benefactors to whom we have presented many and compelling reasons for the necessity of their generosity. The greatest appeal of all, however, is based upon the assumption that a great university endures. \* \* \* These great institutions have tranquilly survived through the centuries while governments have fallen into decay. What has now suddenly happened? Have we, like little Vir-



### *C. Need for Flexibility in the Administration of Funds*

On the other hand, what are the advantages to the charitable corporations and to the charities they serve of an opposite point of view? If these funds are to be considered technical trusts, are they subject to all the restrictions and limitations that are

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ginia who questioned the existence of Santa Claus, become affected by the skepticism of a skeptical age? Have we, too, become inoculated with new political doctrines? Shall we destroy the very foundations of our endowed institutions and pass on our obligations to future generations? \* \* \*

"\* \* \* A man high in academic circles told me recently that he thought the action of certain college presidents in selling their endowment, in order to keep the doors of opportunity open for our young college men and women, was to be highly commended. My tongue was nearly tied in rebuttal and I could only think of replying that I did not think the end justified the means. \* \* \* It will greatly discourage if not completely stop generous benefactions to our institutions, and the bad example of a comparatively few will work to the detriment of many. \* \* \* One little friendly law suit, and it is bound to come, will send them all scurrying to amend their newly accepted policies and to rebuild their financial structures. \* \* \*

In this connection one should bear in mind another sentence from the Restatement, *supra*. "The Attorney General can maintain a suit not only to enforce a charitable corporation to apply property held by it to the charitable purposes for which it is given to the corporation." This may be true, but if the funds are in reality the absolute property of the corporation, as many of the decisions seem to hold, and if the gift was not made upon condition subsequent, just what is the nature of the legal obligation that is sought to be enforced? If the corporation is applying the funds to the general purposes of its charter, it is not in direct violation of that charter, see Note (1929) 62 A. L. R. 573; Note (1927) 40 Harv. L. Rev. 891, unless the court can read into its provisions the covenant that it will apply all funds precisely as directed by the donor.

A recent unpublished thesis on the question of the purchase of common stocks for trust funds in Missouri summarizes the question of the purchase of equities by the trustee of a technical trust in Missouri as follows: "Whether or not he may invest in stocks has as yet been undecided, but it is probable, in view of the legislative policy of the state and the liberal tendency of the courts, that Missouri will adopt the more desirable Massachusetts rule, which permits investment in stocks if the trustee has exercised due diligence in their selection." Biggs, *The Investment of Trust Funds in Missouri* (Unpublished thesis in Washington University Law Library, 1937).

Barnes Hospital in St. Louis is administered as a technical trust and not as a charitable corporation, there being three individual trustees named in accordance with the will of the original donor. Recently these trustees applied to the circuit court for advice, stating that the will of Robert A. Barnes did not sufficiently direct them in the investment of the endowment funds valued at approximately \$1,200,000. The attorney for the trustees were instructed by the court to draft a decree permitting the trustees to invest the endowment funds in sound, high-grade corporation stocks and bonds. *St. Louis Globe-Democrat*, March 18, 1938.

Must the directors of a charitable corporation in this same jurisdiction request the guidance of equity on this point, or are they safe in relying on the doctrine that the corporation is not trustee for its own endowments? The question can be answered when the courts have spoken more explicitly.

The editor of the *Restatement of the Law of Trusts* comments as follows: "There are two questions which have been troubling trustees of charitable

associated with the investment and administration of private trusts?

During the dynamic changes of the past two decades, there has grown up a demand for greater flexibility in the administration of all funds. It is argued that educational and charitable

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institutions recently. One is the question whether a charitable corporation in making investments of its funds is limited to investments which are legal for private trustees. The other question is whether if funds are given to them for different specific purposes, they are justified in investing the funds with their other funds and allocating the interest. Curiously enough, I have been unable to find much authority on these questions. When Ex-President Hoover raised the question as to the investment of the funds of Stanford University, the court held that it was proper to invest in shares of stock. The court, however, went on the broad ground that in California investment in shares of stock was a proper trust investment. It seems to be held that where funds are held by individual trustees for charitable purposes, the trustees are bound by the rules applicable to trustees of private trusts. See *Schroeder v. American National Red Cross*, 254 N. W. 371 (Wisconsin 1934). It is not clear, however, whether these restrictions on investments are applicable to charitable corporations, either with respect to their unrestricted funds, or with respect to fund given for a specific purpose." Correspondence of December 14, 1937.

Reasoning by analogy may furnish a partial solution, but analogies have a disappointing way of disintegrating under the impact of actual court decisions.

At the meeting of the Association of Business Officers of Universities and Colleges, held at Chicago in May, 1937, E. S. Erwin, Assistant Comptroller of Stanford University, presented a paper on "The Policy of Merged Investments and their Legal Aspects." His final paragraphs in summarization are as follows:

"The legal aspects of investing in stocks and the mingling of the investments of endowments of educational trusts of necessity must be treated in an abstract way because so far as I know there are no Supreme Court decisions dealing directly with the problem. It might seem strange that during the many years that educational trusts have been operating there would be no law dealing directly with the problem. However, when one stops to consider the fact that generally only the attorney general, or other public officer, a co-trustee, or person who has a special interest in the investment of the educational trust has power to intervene in the management of such trusts, it is not surprising that there are so few cases of record.

"I think it can be assumed that all educational trusts are managed with diligence, prudence, and honesty, and therefore there has been no occasion for the attorney general to question the administration of such trusts. Persons having a special interest in the investment of an educational trust are few. ("Power of Donor's Heirs to Enforce Charitable Trust" (1928), 14 *Mass. L. Q.* 50, 37 *Yale L. J.* 533, 62 *A. L. R.* 881) and it can be presumed that in those instances where such a person may have a complaint as to the investment procedure of an educational trust, such a complaint no doubt has been settled by negotiation and agreement.

"While the law (in many states) explicitly prohibits the mingling of the investments of trust funds in the possession of commercial or private trusts, I do not hesitate to express my confidence that the policy of educational institutions of mingling endowment investments when there are no restrictive features to the contrary in the deed of grant would be upheld by the courts. I think any institution that sets up adequate safeguards to protect the principal of the original gift and at the same time can show that the

institutions should have the power to protect themselves against the dangers of inflation through the purchase of common stock for their endowments. Wider diversification is also essential for stability of income and preservation of principal. Must the trustees of a charitable corporation apply to the courts for permission to invest in equities? Do institutions have the right to merge the investment of the principal of their various endowments in order to afford this diversification to the smaller funds? These are vital questions of administration which the courts as yet have failed to answer with any degree of clarity.

#### *D. Merger of Investments*

On the question of the power of charitable corporation to merge its funds, the established practice of representative institutions may have some weight with the courts when they are confronted in the future with the necessity of formulating specific rules of law. An analysis of the financial reports of a number of universities and foundations, and correspondence with their financial officers, indicates that practically all follow the procedure of merging the investment of all funds unless inhibited by the specific prohibitions of the instrument of gift.<sup>103</sup>

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income to which the fund was entitled had been expended for the purpose for which the gift was made can demonstrate to the satisfaction of the court that the practice was sound, and that the provisions of the various trusts have not been violated."

On the general question as to the authority of a trustee to pool the investments of individual trusts held by him, see Note (1936) 103 A. L. R. 1192. A recent (December 27, 1937) regulation of the Federal Reserve Board sheds some light on the situation. The following is taken from the Associated Press Dispatch of the same date: "The Federal Reserve Board announced today regulations under which banks in states which permit common trust funds can get federal tax exemption for the funds. A common trust fund was defined as one maintained by a national bank exclusively for the collective investment of money contributed by the bank in its capacity as trustee, executor, administrator or guardian. States permitting common trust funds include New York, Pennsylvania, Ohio, Indiana, Minnesota, Delaware and Vermont. The revenue act of 1936 provided exemptions for such funds if they met requirements set by the Board. Income from the funds is to be taxed through pro rata levies against the participants in each fund and not against the fund itself."

103. A recent communication (December 9, 1937) from Henry L. Shattuck, Treasurer of Harvard College, is of interest in this connection: "We have a general investment account in which most of our funds are invested. We also have funds which are specifically invested in whole or in part. These consist of two classes of funds, the first being those which under their terms are specifically required to be specifically invested, and the second being funds which are for the time being wholly or partly separately invested by reason of the receipt of securities or real estate which we do not desire to add to our general investment account. \* \* \* In general the

## VI. CONCLUSION

Until the courts have had the issue clearly presented to them and have spoken in more precise terminology, the trustees and directors of charitable corporations in states accepting the English doctrine would do well to exercise a high degree of prudence, and should be meticulous in observing the provisions and

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line we draw is that if under the terms of gift it is stated that the fund must be kept *and invested* as a separate fund, we carry it as a separate investment. On the other hand, if the terms go no further than to say that the fund is to be kept separate we consider that this does not require separate investment. Every fund is kept separately on our books whether separately invested or not, and in the annual report there is a list of the funds giving the principal sum to the credit of each and the income and the disposition of the income."

The policy of the University of Chicago on this point is stated by H. H. Moore, of the legal department in the office of the treasurer of the University: "Our own policy, particularly as related to investments, has been based for many years on the theory that a legal trust cannot be said to exist in the legal sense when the legal and equitable interests are merged. Within the past few months in fact the question arose in connection with the pooling of much the greater part of our endowment investments previously held in separate accounts, and this action was largely based upon the acceptance of this principle." Correspondence of December 23, 1937.

In 1929, the University of Chicago requested an opinion from William R. Conklin of New York City. The following is an extract from his brief of some thirty pages of citations: "It is my opinion, therefore, that so far as the law is concerned these corporations do not hold their property as trusts and, therefore, are not subject to the law of investments of trust funds; and further that there is no prohibition in the corporation law against investments in any class of securities; but probably we should go further than the strict legal interpretation of this situation. \* \* \* Safety of principal and reasonable income must always be the ideal in regard to investments. In fact it seems that they must follow the rules laid down by our courts for investment of trusts where broad discretionary powers are given to trustees in express trusts." This opinion is to be read in the light of the strong position New York courts have always taken on this subject.

The general procedure of Columbia University is illustrated by the following comment of Douglas S. Gibbs, Assistant Treasurer: "Whenever possible it is our policy to 'pool' our investments which is, we presume, an answer to your question regarding 'merged vs. unmerged endowment funds.' When the income from a fund is payable to outside parties for a given time and in other cases where 'pooling' of the fund is not permitted or feasible, we invest the fund in particular securities. Of our 'Special Endowments' which total \$39,418,484.23 about \$29,000,000 is invested in our 'pool account.'" Correspondence of December 14, 1937.

Massachusetts Institute of Technology has also adopted this same policy, as indicated by the comments of its treasurer, Horace S. Ford: "In the matter of gifts, we do not take the position here that every gift, subject to restrictions as to use of income, constitutes a technical trust and renders its administration subject to the rules applicable to charitable trusts. Massachusetts laws give considerable scope both to trustees and to the trustees of educational and charitable institutions. If they can show that they have followed the course that they as prudent men would have followed in their own behalf, there appears to be little disposition to question such

limitations expressed in the bequests and deeds of gift, applying to the courts for guidance where the language is ambiguous or where conditions have radically changed. The liquidation of securities donated for permanent endowment in order to benefit the present generation is to be condemned, not only as inexpedient and as contrary to the best interests of endowed education and charity but also as a dangerous reliance upon the language of the courts where they have referred to the title of the institution as "absolute." It is to be hoped that future development of judicial theory in this field will evolve adequate restraints upon administrators without cutting too sharply into the area of proper discretion.

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## APPENDIX. A SURVEY OF DECISIONS IN OTHER STATES

### 1. Alabama

A general statute<sup>1</sup> accepting that portion of the common law applicable to its needs and conditions placed Alabama among the group of states recognizing the English doctrine of charities, and a recent case would lead to the belief that she prefers to adhere to the theory that charitable corporations hold their funds as trustees. In this case, decided in 1927,<sup>2</sup> the court was asked to authorize a mortgage on a school building in order to raise funds for its proper maintenance. The donors, in unequivocal terms, had forbidden such encumbrance. The court, in discussing the problem, obviously considers that it is called upon to vary the terms of an express trust. At no point in the discussion does it suggest the idea that the corporation might hold its plant funds as absolute owner. It refuses permission to encumber the property on the grounds that, since the doctrine of

procedure. I have no opinion of counsel to offer in this connection but the fact that all but seven of our two hundred and fifty funds are merged in one investment pool places emphasis on our general administrative plan." Correspondence of November 22, 1937.

Four other representative institutions show the following merged endowment figures, according to latest available financial reports:

	Merged	Unmerged
Dartmouth College .....	\$11,848,809.90	\$5,579,247.81
Princeton University .....	27,791,659.19	2,264,513.29
University of Pittsburgh .....	1,006,877.86	2,120,555.48
Washington University .....	18,456,181.89	3,235,085.06

Thus it would seem that a consistent policy of merging or "pooling" a substantial proportion of endowment investments is indicated. Just what influence a showing of facts of this character would have upon a court, confronted with the problem of passing upon the legality of merged investments, is a question worthy of consideration.

1. Ala. Ann. Code (1928) sec. 14.

2. *Lovlace v. Marion Institute* (1926) 215 Ala. 271, 110 So. 381; Note (1915) 1 Va. L. Reg. (N. S.) 161.

judicial *cy pres* or approximation proceeds on the assumption that, were the donors alive and cognizant of the changed conditions, they would consent to the alteration, it can obviously have no application in this case, for, said the court:

The donors knew that buildings fall into decay, but as clearly as words could express the idea they state their will that the property shall not be alienated or encumbered. Evidently the expectation was the funds for repairs should be supplied from a different source.<sup>3</sup>

An earlier case<sup>4</sup> was concerned with the following bequest:

I give, devise and bequeath \* \* \* to the trustees and their successors, of Milton College, in trust to be invested and held by said trustees as an endowment for the benefit of the theological department of said college.

The department of theology was discontinued and abandoned by the college. If this endowment had been held in trust, the court, through the exercise of *cy pres*, could have appointed some other institution, with a theological department, as trustee, or perhaps permitted Milton College to utilize it for courses in ethics and philosophy. Instead the court chose to regard the abandonment of the department as a breach of a condition, evidently on the theory that the original donation had been an outright gift to the corporation, on condition that it be used as directed. The property was held to revert to the heirs of the testator. This, despite a provision of the college charter giving the trustees specific authority to determine what application should be made of endowments in the event of the discontinuance of a department.

The conflict in viewpoint of the two cases is apparent, with the recent trend toward the trust fund doctrine.

### 2. Arkansas

Arkansas adopted all English statutes passed prior to 1606,<sup>5</sup> including, therefore, the Statute of Elizabeth.

A small college in that state accepted bonds from a donor and wife, agreeing to pay them a life income. It sold the bonds, purchased a new heating plant, and later became insolvent. The court held that the annuitants were entitled to a lien on all trust funds in the hands of the receiver. If these were trust funds in the true sense of the word, dedicated to the promotion of education, it seems rather anomalous that the liability of the college to two individuals under an annuity contract should be permitted to dissipate them.<sup>6</sup>

### 3. California

One brief quotation sheds some light on the attitude of the California courts:

The bequest under consideration here does not by its terms create any trust whatever. It reads as follows: "I give and bequeath unto the

3. 110 So. at 383.

4. Trustees of Cumberland University v. Caldwell (1919) 203 Ala. 590, 84 So. 846.

5. Ark. Kirby's Dig. Stats. (1904) sec. 623.

6. Word v. Spark (1935) 191 Ark. 893, 82 S.W. (2d) 5.

French Hospital of the City of Los Angeles the sum of five thousand dollars." The legal effect of the bequest is to make the money the absolute property of the respondent, and the language does not impose upon it any trust.<sup>7</sup>

An outright gift without restrictions as to use of either income or principal is usually thus considered to become the absolute property of the corporation. Apparently the California courts have not been called upon to decide the character of a more restricted gift.

#### 4. Colorado

In 1902 the Colorado courts, after deciding that the Statute of Elizabeth was in force in the state, ruled that the municipal corporation of the City of Denver held a bequest for the establishment of a school for orphan boys as trustees of a charitable trust.<sup>8</sup>

#### 5. Connecticut

The decisions of this state are of special interest. Early in its history (1684) it adopted the substance of the Statute of Elizabeth, and it is still in force.<sup>9</sup> Yet its courts are in line<sup>10</sup> with the decisions in Virginia, New York, and other jurisdictions where the statute is not available to preserve charitable gifts. One of the earliest cases to announce this doctrine with clarity was that of *Pierce v. Phelps*.<sup>11</sup> The will of the testator was as follows:

\* \* \* all the remainder of my estate to the Advent Christian Publishing Society \* \* \* which society I charge with the duty of faithfully performing the legacy, according to their wisdom and judgment, chiefly by publication, in counteracting, as far as may be, that greatest of all pagan delusions, namely the unscriptural, unreasonable, and pernicious doctrine of the immortality of the soul.

The court said:

We are of the opinion that it [the remainder] is given absolutely and not in trust. \* \* \* This amounts merely to a gift for corporate use, coupled with a direction that it be applied principally to one of those uses.<sup>12</sup>

An even stronger case, where the use of the words "in trust" was not sufficient to sway the court, is that of *Dwyer v. Leonard*,<sup>13</sup> involving the following language:

I give, devise and bequeath to the New York Association for Improving the Condition of the Poor, to hold the same in trust, and to expend the income thereafter annually in sending poor children residing in any part of said city, into the county during the summer months.

The case of *Pierce v. Phelps* was cited as authority for the proposition

7. In re Dol's Estate (1920) 182 Cal. 159, 187 Pac. 428, 432.

8. Clayton v. Hallett (1902) 30 Col. 231, 70 Pac. 429, 59 L. R. A. 407.

9. Conn. Gen. Stats. (1930) sec. 5000.

10. Lockwood v. Weed (1817) 2 Conn. 287; Eccles v. Rhode Island Hospital Trust Co. (1916) 90 Conn. 592, 98 Atl. 129; Lyme High School Ass'n v. Alling (1931) 113 Conn. 200, 154 Atl. 439.

11. (1902) 75 Conn. 83, 86, 52 Atl. 612.

12. 52 Atl. at 613.

13. (1924) 100 Conn. 513, 124 Atl. 28, 29, 30.

that no technical trust was created and hence the New York Association need not qualify with the Connecticut court as testamentary trustee.

The majority opinion of *Loomis Institute v. Healy*<sup>14</sup> is equally vigorous in support of the general doctrine, but the dissent is of some significance:

My brethren hold the words of this clause are mere words of advice and comment and in consequence, the invested funds of this institution, of about a million and a half thus far set apart by the trustees in their belief that the language of this clause was imperative and must be carried out by them, may be expended by the trustees of this institution at their discretion and without regard to these perpetuity requirements. \* \* \* It is my belief that the diversion of these charitable funds from the purposes designated by the testator will injure not alone this institution but all institutions of learning which live in greater part upon the bounty of the dead.<sup>15</sup>

#### 6. Illinois

This state adopted the Statute of Elizabeth in 1845, and its courts have uniformly declared that it forms a part of the common law of the state.<sup>16</sup> Two cases in 1911 seemed to indicate a distinct preference for the rule that charitable corporations hold their funds, especially those received subject to conditions or restrictions, as charitable trusts.<sup>17</sup> By 1924 a trend in the other direction was observable,<sup>18</sup> and a case<sup>19</sup> last year apparently carries Illinois almost in line with the Virginia-New York group. To quote:

"It is my will that said property, when turned over to said Union Academy, shall become part of its endowment funds." \* \* \* The plaintiff contends that the direction in the will that the property when turned over to the academy shall become a part of its endowment fund is to be treated as creating a trust in the hands of the academy for a particular purpose. \* \* \* The academy, being a charitable corporation, chartered for the purpose of furnishing higher education, was dependent upon charity for funds to carry out its corporate purposes. \* \* \* It was a gift to a charitable institution to be used by it for the charitable purpose for which the academy was organized, higher education, and the direction to carry it in an endowment fund did not limit the use or mark it for any particular purpose so as to constitute it a trust fund.<sup>20</sup>

By implication at least, this court seems to hold that if the income from this endowment had been restricted to a special department or course of study, this would be sufficient to change the absolute title of the corporation to that of a trustee. It is to be doubted whether the court would so hold, if confronted squarely with the issue, provided the department was clearly one of the charter functions of the institution. It refuses to be bound by the reasoning in *Hobbs v. Board of Education*.<sup>21</sup>

14. (1922) 98 Conn. 102, 119, Atl. 31.

15. 119 Atl. at 40.

16. See *Skinner v. Northern Trust Co.* (1919) 288 Ill. 229, 123 N. E. 289; *Heuser v. Harris* (1867) 42 Ill. 425.

17. *French v. Calkins* (1911) 252 Ill. 243, 96 N. E. 877; *Monticello Seminary v. Madison County Board of Review* (1911) 249 Ill. 481, 94 N. E. 938.

18. *Trustees of Rush Medical College v. University of Chicago* (1924) 312 Ill. 109, 143 N. E. 434.

19. *Grear v. Sifford* (1937) 289 Ill. App. 450, 7 N. E. (2d) 371.

20. 7 N. E. (2d) at 373, 375.

21. (1934) 126 Neb. 416, 253 N. W. 627.



The plaintiff relies upon *Hobbs v. Board of Education* as supporting its theory that a gift to an endowment fund of a charitable institution is a gift in trust, but an examination of that case discloses that the instrument under which the gift was made provided that the gift was made "for the purpose of endowment for said institution, and to be invested and preserved inviolable as such and upon condition that a like amount should be raised from other sources and set apart inviolably as endowment for said college."<sup>22</sup>

It is rather difficult to see to what extent the Illinois court has succeeded in differentiating the terms of the gift before it and the one in the *Hobbs* case. In both, the fund was to be preserved and held as a general endowment.

#### 7. Iowa

The Iowa courts, after some early hesitation,<sup>23</sup> have accepted the Statute of Elizabeth or at least the English doctrine of charities. In *Starr v. Morningside College*,<sup>24</sup> however, the court unfortunately preferred to evade the problem of the status of endowment funds. The pertinent provision reads:

I do now hereby will and direct that said sum of \$2,000 be added to and made a part of the endowment fund of said Charles City College, located at Charles City, Iowa, and that the same be in no manner used or disposed of by them.

Merger was proposed with another college of the same denomination in another city, and heirs of the donor demanded the fund. The college contended that it was an absolute gift to the college corporation. The court replied:

It is, in a sense, a trust. \* \* \* whether it is strictly and technically a trust we shall not discuss, preferring to place our decision on another ground,—that the gift was not a conditional one, because Charles City College was located at Charles City, but rather the intention of the testator was to further the cause of education and religion.<sup>25</sup>

The case of *Curtis and Barker v. Central University of Iowa*<sup>26</sup> contains one significant comment to the effect that it is the rule in some cases, as argued by the claimant, that where the trustee and *cestui que trust* are the same, the title merges. But the court continued with the observation that the trustees of the college hold the fund for the benefit of the college and the donors, impliedly reasoning that the college could not be said to hold absolute title. The other Iowa cases<sup>27</sup> also fail to come to grips with the essential factors of the problem.

#### 8. Kansas

The courts of Kansas have always accepted the English charity doctrine whenever the issue has been before them.<sup>28</sup> A case arising in 1907<sup>29</sup> was

22. 7 N. E. (2d) at 375.

23. *Marshall v. Chittenden* (Iowa 1852) 3 C. Greene 382; *Mill v. Chittenden* (1856) 2 Iowa 315.

24. (1919) 186 Iowa 790, 173 N. W. 231.

25. 173 N. W. at 233.

26. (1920) 188 Iowa 300, 176 N. W. 330.

27. *Lupton v. Leander Clark College* (1922) 194 Iowa 1008, 187 N. W. 196; *Schnell v. Leander Clark College* (D. C. N. D. Iowa 1926) 10 F. (2d) 542.

28. *Harrison v. Brophy* (1898) 59 Kan. 1, 51 Pac. 883; *Ingleside Ass'n v. Nation* (1910) 83 Kan. 172, 109 Pac. 984.

decided on the theory that a scholarship fund bequeathed to an incorporated educational institution was held as "an educational trust, which is a public charity." By 1920 the court was ready to agree that a bequest of an endowment fund to a municipal corporation, the income of which was to be used "for the purpose of maintaining a public park, which shall bear my name, \* \* \* and for no other purpose" vests the city with absolute title, with merely a limitation upon the use to which the property is to be devoted.<sup>30</sup>

#### 9. Kentucky

By early decisions Kentucky was held to have adopted the Statute of Elizabeth by implication in 1792.<sup>31</sup> Three cases<sup>32</sup> gleaned from the digests show a trend in favor of the trusteeship of charitable corporations. But a federal court<sup>33</sup> sitting in Kentucky, held that a share of national bank stock, registered in the name of the Cumberland College, was not held in trust so as to defeat an assessment on stockholders of bank stock.

#### 10. Louisiana

The civil law precedents in this state import "a flavor which is exotic to common law lawyers,"<sup>34</sup> and its decisions are not of great weight in other states for this reason. Two citations<sup>35</sup> should suffice.

#### 11. Maine

In 1820 the northern portion of Massachusetts was admitted to the Union as the sovereign State of Maine, and among the laws inherited from the mother state was the Statute of Elizabeth. At a comparatively early date (1888), it evidenced a preference for the Virginia-New York rule.<sup>36</sup>

#### 12. Massachusetts

The Commonwealth of Massachusetts accepted the Statute of Elizabeth

29. Trustees of Washburn College v. O'Hara (1907) 75 Kan. 700, 90 Pac. 234.

30. Schnack v. City of Larned (1920) 106 Kan. 177, 186 Pac. 1012.

31. Moore v. Moore (1836) 34 Ky. 354.

32. Carroll County Academy v. Trustees of Gallatin Academy (Ky. 1898) 47 S. W. 617; Central University of Kentucky v. Walter's Ex'rs (1906) 122 Ky. 65, 90 S. W. 1066; Baily v. Waddy (1922) 195 Ky. 415, 243 S. W. 21.

33. Gamble v. Cumberland College (D. C. E. D. Ky. 1933) 4 F. Supp. 767.

34. Zollman, *American Law of Charities* (1924) sec. 83.

35. Hutchinson v. Tulane University (1931) 171 La. 653, 131 So. 838; Succession of Hutchinson (1904) 112 La. 656, 36 So. 639. In the latter case the gift was made in the following language: "I give the balance of my estate \* \* \* to the Tulane University to create a fund for the sole and exclusive benefit of its Medical Department." The court said: "Here is an unconditional gift coupled only with an announcement of the object of the gift. This certainly vests the title in the university. \* \* \* The subsequent paragraphs do not purport to withdraw the title thus vested \* \* \* but merely contain advisory directions regarding the use of the property." 36 So. at 654.

36. Whitmore v. Church of the Holy Cross (1922) 121 Me. 391, 117 Atl. 469; Snow v. President & Trustees of Bowdoin College (1934) 133 Me. 195, 175 Atl. 268; Dascomb v. Marston (1888) 80 Me. 223, 13 Atl. 883. Construing a gift of "\$50,000 to the Maine Insane Hospital, the income only to be expended annually," the court declared: "These donations are absolute, to enable the donee to compass certain specific objects within the scope and purpose of its charter and incident to the beneficial design of its foundation." 13 Atl. at 889.

along with other "statutes of the realm," at an early date.<sup>37</sup> The decisions on the issue under discussion are conflicting. Among those holding that the corporation holds as owner and not as trustee is *Brigham v. Peter Bent Brigham Hospital*.<sup>38</sup> Two other cases show a similar trend,<sup>39</sup> whereas four earlier cases are emphatic in declaring that a charitable trust results from such a gift or bequest.<sup>40</sup>

### 13. New Hampshire

In New Hampshire the courts have merely taken notice that the statute has not been repealed and that the legislature has not spoken on the subject of charities.<sup>41</sup> They have, however, rejected the Virginia-New York doctrine, as indicated by the case of *Trustees of Pembroke Academy v. Epsom School District*.<sup>42</sup> Other cases, although not directly in point, seem to sustain the conclusion that the New Hampshire courts prefer to regard such funds as trusts.<sup>43</sup>

### 14. New Jersey

The courts in this state, although insisting that the Statute of Elizabeth as such is not in force,<sup>44</sup> have agreed that the English common law of charities was taken over as it existed in England, independent of the statute.<sup>45</sup> They have also been fairly consistent in holding that gifts and bequests to charitable corporations are trusts. A scholarship fund to be held by the

37. *Going v. Emery* (1834) 33 Pick. (Mass.) 107.

38. (C. C. A. 1, 1904) 134 Fed. 513, 517: "We should observe that the corporation contemplated by the will was not to hold in trust, in the technical sense of the word, the property which it might receive. It was to hold it for its own purposes, in the usual way in which charitable institutions hold their assets. Such a holding is sometimes called a *quasi-trust*, and an institution like the one in question is subject to visitation by the state; but the holding does not constitute a true trust."

39. *McNeilly v. First Presbyterian Church* (1923) 243 Mass. 33, 137 N. E. 691; *Greek Orthodox Community v. Malicourtis* (1929) 267 Mass. 472, 166 N. E. 863.

40. *Drury v. Inhabitants of Natick* (1865) 92 Allen (Mass.) 169; *Presidents & Fellows of Harvard College v. Att'y Gen.* (1917) 228 Mass. 396, 117 N. E. 903; *Amory v. Trustees of Amherst College* (Mass. 1918) 118 N. E. 933; *Massachusetts Institute of Technology v. Att'y Gen.* (Mass. 1920) 126 N. E. 521.

41. *Haynes v. Carr* (1901) 70 N. H. 463, 49 Atl. 638; *Union Baptist Society v. Candia* (1819) 2 N. H. 20, 21.

42. (1910) 75 N. H. 408, 75 Atl. 100. The gift was " \* \* \* to the trustees of Pembroke Academy the sum of \$1000 in money, the annual income of which sum I wish to be expended in paying the tuition of such poor boys in said town of Epsom, of good moral character \* \* \* ." To the plaintiff's contention that the precatory words used created no enforceable obligation, the court said: "The intent of the testator was to direct the disposition of the income of the fund. It was a command 'clothed merely in the language of civility.' Precatory words in a will, equally with direct fiduciary expressions, will constitute a trust." 75 Atl. at 101.

43. *Dartmouth College v. Woodward* (1819) 4 Wheat. 518; *Glover v. Baker* (1912) 76 N. H. 393, 83 Atl. 916.

44. *Hesketh v. Murphy* (1882) 8 Stew. (35 N. J. Eq.) 231, aff'd (1882) 9 Stew. (35 N. J. Eq.) 304.

45. *MacKenzie v. Presbytery of Jersey City* (1905) 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

Pennington Academy "for the education of all the poor children in the district forever,"<sup>46</sup> and an endowment fund of the Morristown School Foundations "to increase the salaries of the teaching staff and for the general purposes of the school"<sup>47</sup> were both referred to by the court as "charitable trusts." However, a scholarship fund bequeathed to the Woman's Medical College of Pennsylvania was said "to be held for the educational purposes for which the corporation was formed."<sup>48</sup> This language is more appropriate to absolute ownership than to trusteeship. A more recent case<sup>49</sup> refuses to apply the doctrine of *cy pres* to a gift to a German school, where there had been a change in name and curriculum.

#### 15. North Carolina

Only one case<sup>50</sup> in this state on this subject was found, and it is in support of the doctrine of absolute title. A deed "for the purpose of aiding in the establishment of a Home for Indigent Widows and Orphans, or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated \* \* \*," did not create a trust for the purposes mentioned in the deed.

#### 16. Oregon

In Oregon the English doctrine of charities has been recognized by the courts without direct legislative recognition.<sup>51</sup> Three cases,<sup>52</sup> all decided during the past fifteen years, show a strong inclination to view all bequests and gifts to charitable corporations as creating technical trusts.

#### 17. Rhode Island

Although the English doctrine of charities in Rhode Island does not rest upon any statutes now in effect, the spirit of earlier statutes incorporating the substance of the Elizabeth Statute lives on in its decisions.<sup>53</sup> In 1931 its courts were called upon to construe the following will:<sup>54</sup>

I give and devise my said Newport estate \* \* \* with the personal property \* \* \* to the said Art Association of Newport (a corporation)

46. *Green v. Blackwell* (N. J. 1896) 35 Atl. 375.

47. *Crane v. Morristown School Foundation* (N. J. 1936) 187 Atl. 632, (1937) 85 U. of Pa. L. Rev. 431.

48. *Cooke v. Woman's Medical College of Pa.* (1913) 82 N. J. Eq. 179, 87 Atl. 131.

49. *Raque v. City of Speyer, Germany*, (N. J. 1925) 129 Atl. 207, 208: "It was argued that, under the doctrine of *cy pres*, effect should be given to the gift in the alternative. I do not think so. That doctrine is applicable only to technical charitable trusts." Thus it would seem that a gift without restrictions upon use of either income or principal is not a technical trust in New Jersey.

50. *St. James Parish v. Bagley* (1905) 138 N. C. 384, 50 S. E. 841.

51. *In re John's Will* (1896) 30 Ore. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

52. *In re Kulka's Estate* (1933) 142 Ore. 104, 18 P. (2d) 1036; *State ex rel. Crutz v. Tony* (1933) 141 Ore. 406, 17 P. (2d) 1105; *Wemme v. First Church* (Ore. 1923) 219 Pac. 618. See Note (1924) 3 Ore. L. Rev. 241; Comment (1924) 22 Mich. L. Rev. 499.

53. *Rhode Island Hospital Trust Co. v. Olney* (1884) 14 R. I. 449.

54. *McLyman ex rel. v. Art Ass'n of Newport* (1931) 51 R. I. 273, 154 Atl. 117, 118, 119.

without restrictions, except that I wish the rooms on the ground floor kept \* \* \* in the same condition as when \* \* \* the Association shall come into possession \* \* \* and I wish an inscription placed over the door of said house, as follows, "Sara Swan Whitney Memorial."

The testatrix also bequeathed a fund of \$100,000

to be held by the said Association for the purposes for which it is incorporated; subject to the following provisions: The said principal shall be invested by said \* \* \* Association as a permanent fund and the income derived therefrom shall be applied to the care, maintenance and extension of my Newport estate.

The Association contended that the real estate and fund had been bequeathed to it for the purpose of its charter, that the will vested in it the absolute and uncontrolled discretion in the management and control of the property, and that no trust for public exhibit was created, but that the provisions were advisory and not mandatory.

The court rejected this argument with the statement that there was no doubt that the fund was given in trust for the specific purposes set forth. On the other hand, the court has said:

An absolute gift to a charitable organization without reference to the uses to which it may be put, and without the use of the words "in trust" is, if such be the testator's intention, for the purposes of the organization and this notwithstanding the possibility of its misuse.<sup>56</sup>

Thus it is the imposition of conditions and limitations upon user that is held to create the trustee relationship in Rhode Island.

#### 18. *South Dakota*

South Dakota's Civil Code of 1910<sup>58</sup> adopted that portion of the common law applicable to its conditions and not repugnant to its constitution. The leading case<sup>57</sup> on the question under discussion was concerned with the following provisions of the will:

\* \* \* in fee to the Norwegian Lutheran Church to be used in the support and maintenance of foreign missions of said church.

The appellants contended that the remainder to the church was a perpetual trust for the benefit of foreign missions of said church and hence void under South Dakota law with reference to restraint of alienation of real estate. The court, faced with the dilemma of either sacrificing the charity or refusing to find words of trust intent, chose to follow the Virginia and New York courts.

#### 19. *Tennessee*

Tennessee was originally part of North Carolina, and in 1778 the parent state adopted all such English statutes as were consistent with its form of government.<sup>58</sup> No further action was taken by the Tennessee legislature

55. *Rhode Island Hospital Trust Co. v. Williams* (1929) 50 R. I. 385, 148 Atl. 189, 191, 74 A. L. R. 664. See also *South Kingstown v. Wakefield Trust Co.* (1926) 48 R. I. 27, 134 Atl. 815; *Tillinghast v. Council* (1926) 47 R. I. 406, 133 Atl. 662.

56. *S. D. Comp. Laws* (1929) c. 1, sec. 3.

57. *In re Havesgaard Estate* (1931) 59 S. D. 26, 238 N. W. 130.

58. *Green v. Allen* (1844) 5 Humph. (24 Tenn.) 170.

after separation. In 1931 Vanderbilt University was challenged in its use of funds left under the following will:

I give and bequeath in trust in Vanderbilt University, in trust to use the net income \* \* \* to assist poor and deserving students \* \* \*. It is further my desire that said University lend the income rather than make absolute gifts.

Despite the use of the words "in trust," the court held that the trustees have discretion not controllable by the court whether to lend or to give. The expression of a desire that income be loaned, not given, was said to be merely precatory.<sup>59</sup>

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59. *Vanderbilt University v. Mitchell* (1931) 162 Tenn. 217, 36 S. W. (2d) 83. Other cases showing a similar trend are *Johnson v. Johnson* (1893) 8 Pickle (92 Tenn.) 559, 23 S. W. 114, 22 L. R. A. 179; *Carson v. Carson* (1905) 115 Tenn. 37, 88 S. W. 175; *Milligan v. Greenville College* (Tenn. 1928) 2 S. W. (2d) 90.