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Decedent's Estates—Charitable Bequests—Liberal Construction

John H. Stenger

tenant. The trust was measured by the lives of the widow (the primary income beneficiary) and testator's brother, William (a secondary income beneficiary), with the income of the trust upon the death of the widow to be paid over to William and Francis, testator's other brother. Upon William's death the remainder was to be paid to Francis and his issue. The widow and a friend were named co-trustees, and the co-trustees "or those who may be acting for the time being or their *successor* or *successors*" were given power and authority to sell the trust property. Testator's brother and the co-trustee friend died and thus the widow became sole trustee and sole income beneficiary. Francis, the remainderman, petitioned the Surrogate's Court to be named as successor trustee.[19] The Court of Appeals held that a successor co-trustee should be appointed and that the doctrine of merger is not to have such an austere application to defeat the testator's intent that the trust shall continue. Such intent was manifested by the power of sale given to the co-trustees and the use of the words *successor* or *successors.*

A careful reading of the cases which decided for merger show that although the trust was extinguished, such was the obvious intent of the testator, or the court was not authorized to designate another trustee so as to avoid a merger of the equitable into the legal estate.[20] The difficulty which arises however in such situations is the danger that the legal owner will unduly favor himself, and may be tempted to utilize the property in such a mode as to increase his own income at the risk of diminishing the remaindermans interest. Usually, appointment of a successor co-trustee to continue the trust would be better for protection of the remainderman. The Court of Appeals states that view here in that the facts did not warrant the application of the doctrine of merger.

Charitable Bequests—Liberal Construction

Charitable bequests are traditionally favored by the courts and are liberally

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19. N.Y. SURROGATE'S COURT ACT §168 provides:
Where one of two or more testamentary trustees dies . . ., and the trust has not been fully executed, the surrogate's court may appoint a trustee or successor or successors, unless such appointment would contravene the express terms of the will . . . .

20. Weeks v. Frankel, *supra* note 17 at 307, 90 N.E. 969 at 971:
I hereby . . . appoint my son, Charles and my friend, Michael . . . . In the event of the death, resignation or refusal to serve of *both* of my . . . trustees named, I hereby nominate and appoint the U.S. Trust Co. . . . trustee. (Emphasis added).
Son Charles was a trustee with right to beneficial income until first grandchild reached majority. Co-trustee Michael died. Held — merger applicable, son entitled to sole possession and absolute ownership of an estate for years.

construed so as to sustain the gift wherever possible.[21] Since the intention of the grantor constitutes the controlling element in any construction problem,[22] the courts must first determine that intent and then ascertain whether it can be carried out.

Three cases recently before the Court of Appeals[23] presented substantially the same problem of interpretation regarding such charitable bequests. These cases involved bequests to foreign hospitals that had been nationalized after the death of the testator but before fulfillment of the gifts. In each case, the Court held (6-1) that such nationalization did not divest the gift.

Since the intent of the testator, to aid the sick poor of the district served by the hospital, was clearly ascertainable from the will, it was only necessary for the Court to determine whether such purpose was effectively defeated by nationalization. Examination of the applicable nationalizing acts[24] disclosed provisions for a corporate Board of Directors to operate each hospital with the power to accept endowments and administer them in accordance with their terms as far as practicable. In view of such provisions, the fact that the nationalizing acts vested technical title in a government minister was deemed immaterial. Likewise, the fact that the bequests would benefit the nationalizing governments, by ultimately reducing the cost of operating the hospitals, was deemed incidental to, and not destructive of, testator's purpose to aid the sick poor.

Thus, the liberal view taken by the Court in these cases presents a clear manifestation of the established policy of favoring charitable bequests.[25] On the basis of the facts involved, there appears to be little danger of frustration of the testator's purpose; hence, there has been no undue extension of the policy of liberality.

Construction Of Wills

In the matter of interpretation of wills, the Court of Appeals appeared to progress from liberal to strict as the term progressed.

21. In re Robinson's Will, 203 N.Y. 380, 96 N.E. 925 (1911); In re Cunningham's Will, 206 N.Y. 601, 100 N.E. 437 (1912); Where a general charitable purpose is clear, but the exact terms of the gift cannot be carried out, the gift may nonetheless be sustained by invocation of the *cy pres* doctrine. N.Y. REAL PROPERTY LAW §113; N.Y. PERSONAL PROPERTY LAW §12; In re Lyon, 280 N.Y. 391, 21 N.E.2d 365 (1939).

22. In re Hayes' Will, 263 N.Y. 219, 188 N.E. 716 (1934).

23. In re Ablett's Will, 3 N.Y.2d 261, 165 N.Y.S.2d 63 (1957); In re Perkin's Will, 3 N.Y.2d 281, 165 N.Y.S.2d 77 (1957); In re Bishop's Will, 3 N.Y.2d 294, 165 N.Y.S.2d 86 (1957).

24. NATIONAL HEALTH SERVICE ACT, 1946, 9&10 GEO. 6, c.81; NATIONAL HEALTH SERVICE ACT, 1947, 10&11 GEO. 6, c. 27 (Scotland).

25. See note 21 *supra*.