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American Acceptance of Charitable Trusts

Edith L. Fisch

AMERICAN ACCEPTANCE OF CHARITABLE TRUSTS

The doctrine of charitable trusts is not an Anglo-American innovation. It was developed by the Romans,[1] and introduced into England through the ecclesiastics.[2] Despite its ecclesiastical introduction, the English law of charity was not shaped merely by religious or moral concepts. The idea of utility to the public was recognized, and it was accepted that "There is, indeed, but a slight difference in the eye of reason between such property as is devoted to charity and that which is given to ordinary public uses." [3] To a society developing commercially during the Middle Ages, the growth and security of trade and travel were essential.[4] There was thus a need felt for transportation facilities. Gifts for the construction of roads and the repair of bridges and highways were early recognized as valid charitable uses.[5]

In the Middle Ages it was popularly believed that the donation of property to charity was an effective means of saving the soul and expiating sin.[6] Many persons, on their death beds, in the hopes of attaining salvation, gave property to religious uses. The church thus came to own great quantities of land which was held in frankalmoigne tenure.[7] The overlord and the king thereby lost their expectation of escheat and various other rights and incidents of military tenure.[8] To avoid this result several statutes were enacted providing that "lands" held by religious bodies should be

1 Church of Jesus Christ v. United States, 136 U.S. 1, 10 S. Ct. 792, 806, 34 L. Ed. 478 (1890).

2 Bascom v. Albertson, 34 N.Y. (7 Tiff.) 584, 601 (1866). See also Willard, *Illustration of the Origin of Cy Pres*, 8 HARV. L. REV. 69, 72 (1894).

3 DWIGHT, ARGUMENT IN COURT OF APPEALS OF NEW YORK IN THE ROSE WILL CASE 66 (1863), as quoted in, Willard, *supra* note 2, at 71.

4 Willard, *supra* note 2, at 71.

5 The bridge at Witham is inscribed, "And the blessid besines is brigges to make." Willard, *supra* note 2, at 71 n. 4.

6 FISCH, CY PRES DOCTRINE IN THE UNITED STATES 4-5 (1950).

7 3 SCOTT, TRUSTS § 348.2 (1939).

8 Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N.E. 490, 491 (1907).

forfeited to the overlord; and if he failed to enter, then to his overlord, and finally to the crown." [9] These remedial efforts culminated in the suppression of monasteries during the reign of Henry VIII.[10]

The disherision of the heirs of the donor often resulted from these desperate death-bed grasps at salvation. And again, statutes were enacted to prevent this evil. Thus, the act of 9 Geo. II, c. 36 (1736), commonly called "The Mortmain Act," was enacted for the purpose of preventing "improvident alienations or disposition made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherision of their lawful heirs. . . ." [11] Under this act such uses were absolutely void.

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[9] 3 SCOTT, *op. cit. supra* note 7. See also 1 BL. COMM. 1079-80 n. 7 (Jones ed. 1915).

[10] Bradway, *Tendencies in the Application of the Cy-Pres Doctrine,* 5 TEMP. L.Q. 489, 491 (1931).

[11] Statutes preventing the death-bed disherision of heirs in favor of charities have their present day counterparts in the laws of several states. N.Y. DECEDENT ESTATE LAW § 17 provides: "No person having a husband, wife, child, or descendent or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association, corporation or purpose, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more." See also CAL. PROB. CODE ANN. §§ 41-2 (Deering Supp. 1951); FLA. STAT. §731.19 (1951).

The enactment of constitutional provisions against the establishment of testamentary devises of land, and inter vivos gifts of personalty (now repealed) in Mississippi was explained in Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895) as an attempt to prevent the donor from disinheriting his wife and children by giving all of his property to religious uses. Unwillingness to sustain charitable trusts by virtue of the cy pres doctrine on the ground that it would result in the disherision of heirs is still found in present day decisions. Brooks v. Belfast, 90 Me. 318, 38 Atl. 222, 227 (1897), as quoted in, First Universalist Soc. of Bath v. Swett, ...Me....., 90 A (2d) 812, 817 (1952): "It is not the duty of the court to be 'curious and subtle' in devising schemes to aid testators in disinheriting their next of kin. . . ." In Doughten v. Vandever, 5 Del. Ch. 51, 77 (1875), the court, in upholding a charitable bequest, stated: "I am aware that I have in this opinion gone quite far enough in the application of well-recognized equitable principles to charitable uses. It would not have been a matter of regret to me if I had been able to arrive at different conclusions. There is nothing in the will of Amy Doughten, with respect to these charitable bequests, at the expense of her relatives in blood, that meets with the approval of my judgment. Her example in this respect I would not commend as worthy of imitation; and nothing but a sense of duty, which compels me to follow the law as expounded by courts of equity, has caused me to give an interpretation to the pro-

Although various statutes had been aimed at the suppression of monasteries and also hospitals and colleges,[12] the utility of charitable organizations for political purposes was recognized by Edward VI. A primary purpose of his reign was to promote the Reformation by every possible means, and the establishment of schools was considered an effective method for the accomplishment of this end. Accordingly, many schools were founded by the king and by other persons with wealth who were encouraged to devote their fortunes to the same cause.[13] Queen Elizabeth I also encouraged the founding of schools in order to spread political ideologies; and in addition, she gave relief to the poor and generally extended the limits of charity.[14] But, in common with other English monarchs who had preceeded her, Elizabeth I was faced with the problem of abuses in connection with charitable institutions: abuses resulting from the fact that the internal organization of permanent institutions, such as colleges, and hospitals for the relief of the sick and the indigent, were subject only to the control of the visitor.[15] The visitorial power is the right of the founder to see that the institution fulfills the purposes for which it was created. As these powers were only sporadically exercised, many abuses in the management of charitable institutions and the application of their funds resulted.[16]

To correct these abuses, in 1601 the Statute of Charitable Uses was enacted.[17] The statute entitled, "An act to redress

visions of her will and the codicil thereto by which her heirs at law are excluded from the benefit of sharing her estate."

12 3 SCOTT, *op. cit. supra* note 7.

13 BOYLE, CHARITIES 4 (1837).

14 *Id.* at 8.

15 TUDOR, CHARITIES AND MORTMAIN 2 (4th ed. 1906).

16 *Ibid.*

17 Statute of Charitable Uses, 1601, 43 ELIZ., c. 4. The preamble states that many hospitals were decayed and the goods and profits misemployed. The act then provides for the reformation of these abuses. It is interesting to note that the statute contains the following words: "founded . . . in aid and merit of the souls of the said founders."

the mis-employment of lands, goods and stocks of money heretofore given to certain charitable uses," recited as follows: [18]

> Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore . . . 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 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, tenements . . . nevertheless 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 gave the chancellor the power to inquire into breaches of and enforce charitable trusts by special commission, while preserving the already existing remedy afforded by the Chancery court.[19]

Repeal of the Statute of Charitable Uses

After the American revolution, many of our states experienced a feeling of great revulsion to laws of English derivation, and a wholesale repeal of statutes was instituted.[20] Typical of these was the statute enacted by the General Assembly of Virginia in 1792 which provided that "no . . . statute or act of parliament shall have any force or authority

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18 SCOTT, CASES ON TRUSTS 572-3 (4th ed. 1951).

19 3 SCOTT, *op cit. supra* note 7. The remedial parts of the statute were repealed by the Mortmain and Charitable Uses Act, 1888, 51 & 52 VICT., c. 42, § 13.

20 See notes 21, 22, 23 *infra*.

within the commonwealth." [21] The Statute of Charitable Uses, being an English statute, thus fell victim to the axe of the legislator. In New York[22] and Michigan[23] the repeal of the Statute of Charitable Uses sounded the death knell of charitable trusts of personalty.

The New York Court of Appeals in 1853, in the leading case of *Williams v. Williams*,[24] upheld the validity of a bequest in trust for the education of the children of the poor, on the ground that the law of charitable uses had not stemmed from the statute of Elizabeth but "was at an indefinite but early period in English judicial history, engrafted upon the common law. . . ." [25] Subsequent decisions, however, repeatedly attacked the *Williams* case,[26] and its scope was narrowed until it was virtually impossible to formulate a charitable trust of personalty that would be held valid.[27] Some of the latter decisions were based on the contention that by the repeal of the Statute of Charitable Uses, the legislature intended to abrogate the entire law of charitable trusts, for in 1788 it was generally thought that all charitable trusts depended on this statute for their enforceability.[28] It

21 1 VA. REV. CODE c. 40, § 3 (1819). This statute repealed that part of the ordinance of 1776 which related to any English statute. The ordinance of 1776 adopted as the law of Virginia the common and general statute law which was in force in England prior to 4 JAMES I.

22 By the N.Y. Laws 1786, c. 35, a commission was appointed to collate the English statutes in force in that state "to the intent that when the same shall have been completed, then and from thenceforth, none of the statutes of England or of Great Britain, shall operate or be considered as laws of this state." The Statute of Charitable Uses was then repealed by N.Y. Laws 1788, c. 46, § 37.

23 Michigan, in 1810, enacted a statute which provided ". . . 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." 1 TERRITORIAL LAWS OF MICHIGAN 900 (1810).

24 8 N.Y. (4 Seld.) 525 (1853).

25 *Id.* at 542.

26 Owens v. The Missionary Society of the Methodist Episcopal Church, 14 N.Y. (4 Kernan) 380 (1856); Beekman v. New York, 27 Barb. 260 (N.Y. 1858), *aff'd*, Beekman v. Bonsor, 23 N.Y. (9 Smith) 298 (1861); Dodge v. Pond, 23 N.Y. (9 Smith) 69 (1861), *affirming*, Phelps v. Phelps, 28 Barb. 121 (N.Y. 1858); Downing v. Marshall, 23 N.Y. (9 Smith) 366 (1861); Prichard v. Thompson, 95 N.Y. (50 Sick.) 76 (1884); Holland v. Allcock, 108 N.Y. (63 Sick.) 312, 16 N.E. 305 (1888).

27 ZOLLMANN, AMERICAN LAW OF CHARITIES 33 (1924).

28 Bascom v. Albertson, 34 N.Y. (7 Tiff.) 584 (1866); Levy v. Levy, 33 N.Y. (6 Tiff.) 97 (1865).

was also felt that charitable uses were frequently abused and should be prohibited. Thus the court in *Bascom v. Albertson* stated: [29]

> . . . it seems to have been assumed in the Williams case, that the purpose of the legislature of 1788 was to reinaugurate here an ancient and obsolete system, freed from all the salutary restraints of modern English legislation; or, perhaps more properly, that the members of that enlightened body, through heedless incaution, circumvented their own intent, and exhumed to new life in a free State the buried abuses of the old English Court of Chancery, by repealing the Mortmain Acts and the statute of Elizabeth, which had shorn that court of the unlimited powers it had usurped from time to time, in periods of sectarian strife and of intestine and foreign wars.

The court also said: [30]

> By this inchoate act of the State government a new policy was inaugurated. It was not merely the rescission of certain British statutes. It was the abrogation of a system which had been tried and condemned. It was not the revival of a more ancient and odious system, but a casting off of the English law of charitable uses, as an unseemly outgrowth of ecclesiastic innovation and abuse.

With the passage of the Tilden Act [31] in 1893, charitable trusts were established in New York.

The Michigan court followed the reasoning of the later New York cases and outlawed charitable trusts of personal property in *Hopkins v. Crossley*,[32] on the ground that the repeal of the statute of Elizabeth had abolished the entire law of charities.[33]

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29 34 N.Y. (7 Tiff.) 584, 614 (1866).

30 *Id.* at 605-6.

31 N.Y. Laws 1893, c. 701. "An act to regulate gifts for charitable purposes. Section 1. No gift, grant, bequest, or devise to religious, educational, charitable or benevolent uses, which shall, in other respects, be valid under the laws of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes 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."

32 132 Mich. 612, 96 N.W. 499 (1903).

33 See note 23 *supra*.

Unlike New York and Michigan, the repeal of the Statute of Charitable Uses would not have proved disastrous to charitable trusts in Virginia,[34] Maryland,[35] West Virginia[36] and the District of Columbia.[37] Only as a result of a misconstruction of the statute by the Supreme Court of the United States,[38] did its repeal become the instrument that outlawed charitable trusts in these states.

In 1819 the Supreme Court of the United States was called upon to decide the case of *Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs*,[39] where a Virginia testator bequeathed a gift to a society for the purpose of educating Baptist youths for the ministry. Virginia had repealed all English statutes, including the Statute of Charitable Uses, prior to the death of the testator, and the question before the Court was the validity of the bequest. Erroneously finding that the English equity courts had no inherent jurisdiction to sustain charitable trusts, jurisdiction being derived only from the Statute of Charitable Uses, Chief Justice Marshall held the gift invalid. American equity courts, having the same jurisdiction as the English equity courts, were thus unable to enforce charitable trusts.[40]

Three years after the *Baptist* decision, the Maryland judiciary in deciding the case of *Dashiell v. Attorney General*,[41]

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34 See note 21 *supra* for repeal of Statute of Charitable Uses in Virginia.

35 The Statute of Charitable Uses was found unsuited for local needs in Maryland by virtue of Kilty's Report. See Dashiell v. Attorney-General, 9 Md. 392, 403, 5 Harris & J. 320 (1822).

36 When West Virginia separated from Virginia and became a state, it retained Virginia law and Virginia had repealed the Statute of Charitable Uses. See note 21 *supra*.

37 The District of Columbia was regulated by the laws of Virginia and Maryland until 1846 when Maryland laws alone were the governing authority. See note 35 *supra*.

38 Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1, 4 L. Ed. 499 (U.S. 1819).

39 *Ibid.*

40 Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U.L.Q. 1 (1938).

41 9 Md. 392, 5 Harris & J. 320 (1822). The reasoning of this case was followed in: American Colonization Soc. v. Soulsby, 129 Md. 605, 99 Atl. 944 (1917); Missionary Soc. of Methodist Episcopal Church v. Humphreys, 91 Md. 131, 46 Atl. 320

embedded the error of the Supreme Court into its law and over one hundred years of effort by the legislature was needed to correct the result of that decision.[42] The District of Columbia adopted the error five years later in *Barnes' Heirs v. Barnes*,[43] the court stating that "The peculiar doctrines of the English law in regard to charitable devises, are founded altogether upon that statute [Statute of Charitable Uses]." [44] Virginia, in 1832, followed the view of the *Baptist* case,[45] thereby reversing its earlier decisions upholding the validity of charitable trusts.[46] After the decision in *Gallego's Ex'rs v. The Attorney General*,[47] several attempts were made both by the courts[48] and the legislatures[49] of Virginia to validate charitable trusts, but this result was not fully achieved until 1914 when the Assembly enacted the following statute: [50]

(1900); Maught v. Getzendanner, 65 Md. 527, 5 Atl. 471 (1886); Isaacs v. Emory, 64 Md. 333, 1 Atl. 713 (1885); Church Extension of the Methodist Episcopal Church v. Smith, 56 Md. 362, 397 (1881); Needles v. Martin, 33 Md. 609 (1871); Wilderman v. Mayor of Baltimore, 8 Md. 551 (1855).

42 Charitable trusts were completely recognized by Md. Laws 1931, c. 453. For prior statutes partially validating charitable trusts see MD. COMP. LAWS §§ 13512-13521 (1929).

43 2 Fed. Cas. 855, No. 1,014 (C.C.D.C. 1827). This was followed by Coltman v. Moore, 1 MacArth. 197 (D.C. 1873). The error was corrected in Ould v. Washington Hospital for Foundlings, 95 U.S. 303, 24 L. Ed. 450 (1877).

44 2 Fed. Cas. No. 1,014, at 858 (C.C.D.C. 1827).

45 Gallego's Ex'rs v. Attorney General, 3 Leigh 450 (Va. 1832). For subsequent cases adopting this point of view see: Jordan v. Universalist General Convention Trustees, 107 Va. 79, 57 S.E. 652 (1907); Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S.E. 446 (1897); Seaburn's Ex'r v. Seaburn, 15 Gratt. 423 (Va. 1859); Literary Fund v. Dawson, 10 Leigh 147 (Va. 1839).

46 Overseers of the Poor v. Tayloe's Adm'r, 1 Gilm. 336 (Va. 1821); President and Professors of William and Mary College v. Hodgson, 6 Munf. 163 (Va. 1818); see also, 2 Va. Col. Dec. B. 363 (1743).

47 3 Leigh 450 (Va. 1832).

48 Trustees of the General Assembly of the Presbyterian Church v. Guthrie, 86 Va. 125, 10 S.E. 318 (1889); P. Episcopal E. Society v. Churchman's Reps., 80 Va. (5 Hansb.) 718 (1885) (charitable trust valid on ground that equity has inherent power to enforce charitable trusts).

49 Acts of Assembly 1839, c. 12; Acts of Assembly 1840, c. 26, VA. CODE c. 80, §§ 2 *et. seq.* (1849) (validated devises and bequests made to educational institutions other than theological seminaries); Acts of Assembly 1841, c. 102, VA. CODE c. 77, §§ 8-13 (1850) (partially validated trust for religious purposes); Acts of Assembly 1847, c. 105, VA. CODE c. 77, §§ 14-15 (1849) (validated trusts for benevolent association); VA. CODE c. 80, § 2 (1860) (partially validated devises and bequests for literary purposes).

50 Acts of Assembly 1914, c. 234, p. 414, VA. CODE ANN. § 55-26 (1950).

> . . . every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person. . . . Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any uncorporated theological seminary.

Although the Supreme Court in 1844 finally overruled [51] the *Baptist* case, West Virginia, when first called upon to decide the validity of a charitable trust in 1873, endorsed the incorrect theory enunciated in the *Baptist* case.[52]

Codification of the Law of Trusts

The judicial interpretation of the codification of the New York law of trusts was another factor that retarded the acceptance of charitable trusts. In 1829 the New York legislature revised the law, and in so doing abolished all uses and trusts in land except as expressly authorized.[53] The four purposes sanctioned were: [54]

> 1. to sell lands for the benefit of creditors;
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> 2. to sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon;
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> 3. to receive the rents and profits of lands, and apply them to the education and support, or either, of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this title;
>
> 4. to reserve the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this title.

No express provision was made for charitable trusts. When the question first arose in *Shotwell v. Mott*,[55] whether charit-

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51 Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205 (U.S. 1844).

52 Bible Society v. Pendleton, 7 W. Va. 79 (1873). For cases following see: Ritter v. Couch, 71 W. Va. 221, 76 S.E. 428 (1912); Weaver v. Spurr, 56 W. Va. 95, 48 S.E. 852 (1904); Pack v. Shanklin, 43 W. Va. 304, 27 S.E. 389 (1897); Wilson v. Perry, 29 W. Va. 169, 1 S.E. 302 (1886); Knox v. Knox's Ex'rs, 9 W. Va. 124 (1876). Beginning with 1868 the legislature enacted a series of statutes designed to validate charitable trusts. W. VA. CODE c. 57, § 7 (1868); W. VA. CODE ANN. § 3502 (1949). See also, *Charitable Trusts of a Religious Nature in West Virginia*, 34 W. VA. L.Q. 302 (1928).

53 1 N.Y. REV. STAT. § 45 (1829).

54 1 N.Y. REV. STAT. § 55 (1829).

55 2 Sandf. Ch. 46, 56 (N.Y. 1844).

able trusts of land were by exclusion abolished, the court held that the revisers were dealing solely with private trusts and did not intend the statute to relate to charitable trusts. Subsequent cases, however, failed to adhere to this interpretation[56] and the *Shotwell* decision was labeled unsound [57] and finally overruled.[58]

Michigan, in 1846, copied the New York revised statute dealing with trusts in land,[59] and also adopted the New York interpretation of this statute.[60] Three years later Wisconsin incorporated this statute into its laws,[61] and in *Ruth v. Oberbrunner*,[62] committed itself to the New York and Michigan position.

While Minnesota was a territory, it was subject to those Wisconsin laws which had been in force when Wisconsin became a state.[63] When Minnesota established it own code in 1851, it retained the Wisconsin statute dealing with trusts of land,[64] and following the lead of the other three states, refused to uphold charitable trusts of realty.[65]

Perhaps the underlying rationale of the effect given to the New York statute dealing with trusts in land can be found

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56 Yates v. Yates, 9 Barb. 324 (N.Y. 1850); Ayers v. The Methodist Church, 3 Sandf. 351 (N.Y. 1849).

57 Voorhees v. The Presbyterian Church of Amsterdam, 17 Barb. 103 (N.Y. 1853).

58 Holmes v. Mead, 52 N.Y. (7 Sick.) 332 (1873).

59 MICH. REV. STAT. c. 63 (1846).

60 Trustees of the First Society of the Methodist Episcopal Church of Newark v. Clark, 41 Mich. 730, 3 N.W. 207 (1879).

61 WIS. REV. STAT. c. 57 (1849).

62 40 Wis. 238 (1876). To remedy the results of this decision, the statute authorizing permissible trusts, WIS. REV. STAT. § 2081 (5) (1878), was amended by adding the following permissible purpose: ". . . real estate given, granted or devised to literary or charitable corporations which shall have been organized under the laws of this state for their sole use and benefit." It will be noted, however, that trusts, not in the corporate form, were not authorized until 1917. WIS. STAT. § 2081 (7) (1917).

63 9 STAT. 403, 407 (1849).

64 MINN. REV. STAT. c. 44 (1851).

65 Little v. Willford, 31 Minn. 173, 17 N.W. 282 (1883). This was followed by *In re* Shanahan's Estate, 88 Minn. 202, 92 N.W. 948 (1903); Lane v. Eaton, 69 Minn. 141, 71 N.W. 1031 (1897). An amendment to the statute permitting trusts by the addition of certain trusts of personalty, was held in the Shanahan case to bring all trusts, both of realty and personalty within the statute.

in an inherent and basic dislike by our courts of the doctrine of charitable uses. Thus, in *Watkins v. Bigelow*,[66] the court, in holding unconstitutional a statute that attempted to establish charitable trusts, declared: [67]

> No legislator, lawyer, or layman, by reading the title, would understand, or even suspect, that the purpose of the act was to effect a practical repeal of the existing statutes prohibiting express trusts by authorizing the creation of trusts for nearly every conceivable purpose; to change the settled public policy of the state on the subject of trusts, as indicated by its statutes and the decisions of its courts for 50 years; to open wide the door for abuses which the original statute was intended to remedy; to permit an evasion of our laws against perpetuities and accumulation by the creation of trusts; to abrogate the rule requiring the beneficiaries to be certain, or capable of being rendered certain; and to establish the ancient and discarded rule of charitable uses, and to invest the courts with the prerogative power of cy pres in its most obnoxious form. Such is the legal effect of the statute in question.

Misinterpretation of Charitable Trust Doctrines

The misinterpretation of the scope of the doctrine of charitable trusts, plus confusion as to the nature of the *cy pres* doctrine were also instrumental in retarding the development of charitable trusts. The *cy pres* doctrine is a trust device used to effect a new application of purpose where it is impossible to carry out the specific charitable intention of the donor.[68] In England the *cy pres* power was of two kinds, judicial and prerogative.[69] The chancellor exercised the judicial *cy pres* under his jurisdiction as an equity judge and the prerogative *cy pres* as the representative of the king.[70] American courts, with their great aversion to anything relating to

66 93 Minn. 210, 100 N.W. 1104 (1904).

67 *Id.*, 100 N.W. at 1109.

68 RESTATEMENT, TRUSTS § 399 (1935): "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."

69 2A BOGERT, TRUSTS AND TRUSTEES § 432 (1953).

70 2 PERRY, TRUSTS AND TRUSTEES § 718 (7th ed. 1929).

the prerogative of the English sovereign,[71] failed to take cognizance of the existence of the judicial *cy pres* power, and abolished the entire doctrine as one of prerogative[72] and, therefore, dangerous and contrary to our American institutions.[73]

Our courts made the further error of confusing the doctrine of charitable trusts with the doctrine of *cy pres*. Thus Pomeroy found it necessary to advise that: [74]

> The true doctrine of *cy pres* should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts, where the trustee, object, and beneficiaries are simply *uncertain*. There is a radical distinction between the two. . . .

In those states which rejected the *cy pres* doctrine and misunderstood the principle of charitable trusts, many charitable

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71 White v. Fisk, 22 Conn. 31 (1852); Cromie's Heirs v. Louisville Orphans' Home Society, 66 Ky. (3 Bush) 365, 375 (1867); Watkins v. Gigelow, 93 Minn. 210, 100 N.W. 1104 (1904); Bascom v. Albertson, 34 N.Y. (7 Tiff.) 584 (1866); Holland v. Peck, 37 N.C. 255, 2 Ired. Eq. 187 (1842).

72 Lovelace v. Marion Institute, 215 Ala. 271, 110 So. 381 (1926); Universalist Convention of Alabama v. May, 147 Ala. 455, 41 So. 515 (1906): ". . . the theory upon which the bill is filed finds no support in the former adjudications on the subject by this court. The doctrine of cy pres, as recognized . . . by the English Court of Chancery, was based upon prerogative power of the king, and the principle, therefore, is by us, under our institutions, without recognition." Woodroof v. Hundley, 147 Ala. 287, 39 So. 907 (1905); Williams v. Pearson, 38 Ala. 299 (1862); Doughten v. Vandever, 5 Del. Ch. 51, 64 (1875): "The principle or doctrine of the exercise of this ministerial function of the English chancellor was what is known as *cy pres;* that is to say, where there was a definite charitable purpose which could not take place, the court would substitute another, and formerly of a very different character. It was not, however, in the exercise of the judicial function of his office, but in the exercise of his ministerial function, that the English chancellor applied the fund to a different purpose from that contemplated by the testator, provided it was charitable." Johnson v. Johnson, 92 Tenn. 559, 23 S.W. 114, 116 (1893): "The doctrine of *parens patriae* and *cy pres,* as recognized in the English law, have never obtained in Tennessee. Only those powers which in England were exercised by the chancellor by virtue of his extraordinary, as distinguished from his specially delegated, jurisdiction, exist in our chancery court." *In re* Fuller's Will, 75 Wis. 431, 44 N.W. 304, 305 (1890): the doctrine of *cy pres* was not used because it "rested upon prerogative or sovereign power, and was not strictly a judicial power. . . ."

73 Grimes' Ex'rs v. Harmon, 35 Ind. 198 (1871); Bascom v. Albertson, 34 N.Y. (7 Tiff.) 584, 613 (1866); Bridges v. Pleasants, 39 N.C. 26, 4 Ired. Eq. 20 (1845); Methodist Church v. Remington, 1 Watt. 218, 226 (Pa. 1832): the principle of *cy pres* was ". . . too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

74 4 POMEROY, EQUITY JURISPRUDENCE § 1027 (5th ed. 1941).

gifts became unenforceable.[75] An early example of such a result is found in *White v. Fisk*,[76] decided in 1852. One of the issues involved was the validity of a trust "for the support of indigent pious young men, preparing for the ministry, in New Haven, Conn." [77] The court, instead of recognizing this gift as a valid charitable trust, sustainable by the inherent power of equity, held that it could be validated only by an application of the *cy pres* doctrine: [78]

> There may be other cases in this country, and there certainly are many in England, in which charities, more equivocal and uncertain than the one we are considering, have been sustained; but we are persuaded that this has been done either avowedly, or under the influence of the principle of *cy pres*.

As Connecticut had rejected the *cy pres* doctrine as one of prerogative, the gift was not enforced.[79]

The reasoning of this case has been followed through the years by various courts,[80] and as recently as 1938, an Idaho court held a trust "for any and all such charitable or religious purposes as my said trustee may elect . . . ," invalid for failure to designate a beneficiary.[81] The decision was based on the following incorrect ground: [82]

> In England, and in some of the states of this country, a rule has been established, in the interest of trusts for public charit-

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75 Lepage v. McNamara, 5 Iowa 124, (1857); Dashiell v. Attorney-General, 9 Md. 392, 5 Harris & J. 320 (1822); Beekman v. Bonsor, 23 N.Y. (9 Smith) 298 (1861); Bridges v. Pleasants, 39 N.C. 26, 4 Ired. Eq. 20 (1845); Holland v. Peck, 37 N.C. 255, 2 Ired. Eq. 187 (1842); Davis v. Bullington, 164 Tenn. 272, 47 S.W. (2d) 555 (1932); Green v. Allen, 5 Humph. 169 (Tenn. 1844); Massanetta Springs v. Keezell, 161 Va. 532, 171 S.E. 511 (1933); Beatty v. Union Trust & Deposit Co., 123 W. Va. 144, 13 S.E.(2d) 760 (1941); Tharp v. Smith, 182 Wis. 107, 195 N.W. 331 (1923); Heiss, Ex'r v. Murphey, 40 Wis. 276 (1876).

76 22 Conn. 31 (1852).

77 *Id.* at 34.

78 *Id.* at 54.

79 *Ibid.* The doctrine was described as "inconsistent with the limited and defined powers of the judiciary, as understood and approved in this state."

80 Crim v. Williamson, 180 Ala. 179, 60 So. 293 (1912); Ingraham v. Sutherland, 89 Ark. 596, 117 S.W. 748 (1909); Robbins v. Hoover, 50 Colo. 610, 115 Pac. 526 (1911); Robinson v. Crutcher, 277 Mo. 1, 209 S.W. 104 (1919); Chelsea Nat. Bank v. Our Lady Star of the Sea, 105 N.J. Eq. 236, 147 Atl. 470 (Ch. 1929); Johnson v. Johnson, 92 Tenn. 559, 23 S.W. 114 (1893); City of Haskell v. Ferguson, 66 S.W.(2d) 491, (Tex. Civ. App. 1933). See also note 75 *supra*.

81 Hedin v. Westdala Lutheran Church, 59 Idaho 241, 81 P.(2d) 741, 742 (1938).

82 *Id.*, 81 P.(2d) at 742.

> able uses, whereby they will be upheld although the beneficiary is not designated. Trusts so upheld are dependent upon the English doctrine of cy pres, whereby the king, or the chancellor as the keeper of the king's conscience, has the power, acting ministerially as distinguished from judicially, to designate the beneficiary of a trust for charitable uses, where one has not been designated by the donor or where, for any cause, the trust would fail without such ministerial action. Here, we have no king and, in this state, we have no court with such ministerial power.

There can be no doubt that this trust could have been upheld by the ordinary power of an equity court to sustain charitable trusts, and that the *cy pres* doctrine had no application in this situation.[83]

Conclusion

The acceptance of charitable trusts was greatly impeded by three factors: (1) the misinterpretation and repeal of the Statute of Charitable Uses, (2) the codification of the New York law of trusts and (3) confusion as to the scope of the power of equity courts to uphold charitable trusts, and a misunderstanding as to the nature of the *cy pres* doctrine. Underlying all these factors, however, and to some extent the motivating cause for decisions antagonistic to charities, was a firm dislike of the English doctrine of charitable uses which had a long and well known history of evils and abuses. Thus, a Mississippi court even in 1933, while discussing the English charity doctrine, vehemently remarked: [84]

> Such practices, pernicious in their nature, and dangerous in their tendency, called for the interference of Parliament, until all uses charitable within the British statutes, including that of Elizabeth, were cut off. . . . The cy pres power, therefore, with its possibilities for intrigue and injustice, was not only naturally repelled by the constitutional spirit and limitations of popular government, but was justly feared by the opinion of patriotic British statesmen who sought relief from the evils of superstitious uses, in those days of power in the English sovereign and in the English bench.

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83 2 PERRY, TRUSTS AND TRUSTEES § 718 (7th ed. 1929). The prerogative *cy pres* is applicable only to sustain an illegal gift to charity, or a gift to charity in general without the interposition of a trustee. Moggridge v. Thackwell, 7 Ves. 36, 32 Eng. Rep. 15 (1803), *aff'd*, 13 Ves. 416, 33 Eng. Rep. 350 (1807).

84 National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649, 654 (1933).

Recognizing the desirability of charitable trusts, American courts have gradually reversed their earlier attitudes. They now take the position that charities are favorites of the law and give them their full support.[85] Our courts have run the gamut from complete rejection of charitable trusts to liberal support and encouragement. But the increase in charitable trusts and charitable trust property, has not brought with it accompanying facilities and provisions for adequate supervision. The attorney general of the state is charged with general supervision over charities. Such an official, however, does not have sufficient information about charitable funds, or the personnel and appropriations necessary to perform this function effectively.[86] Neglect and misapplication of charitable funds has been on the increase, and it has been estimated that "Billions of dollars of property and millions of dollars of current income designed for public charity are being diverted from their rightful beneficiaries." [87]

If this estimate is correct, it would seem that we are approaching a situation that was remedied in England by the enactment of the Statute of Charitable Uses. Today, the remedy lies, not in fewer charitable trusts, but in closer supervision and control.

*Edith L. Fisch**

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85 Russell v. Allen, Ex'x, 107 U.S. 163, 2 S. Ct. 327, 27 L. Ed. 397 (1883); Burke v. Roper, 79 Ala. 138 (1885). Bradway, *Tendencies in the Application of the Cy-Pres Doctrine,* 5 TEMP. L.Q. 489 (1931).

86 Souhegan Nat. Bank v. Kenison, 92 N.H. 117, 26 A.(2d) 26, 30 (1942). D'Amours, *Control of Charitable Trusts,* 84 TRUSTS AND ESTATES 345, (1947); *Report and Recommendations for Legislation of Former Attorney General Bushnell,* Reprinted from Public Document No. 12, 30 MASS. L.Q. 22 (1945); Note, 47 COL. L. REV. 659 (1947).

87 STATEMENT OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND TEXTILE WORKERS UNION OF AMERICA BEFORE THE R.I. SPECIAL COMMITTEE ON CHARITABLE TRUSTS, 6 (1949). See also Hennings, *The Road to Destiny,* 67 TRUST COMPANIES 720, 721 (1938).

* Associated with the firm of Conrad and Smith, New York City. LL.B., 1948, LL.M., 1949, J.S.D., 1950, Columbia University. Member of the New York Bar, the Federal Bar, the Association of the Bar of the City of New York, the National Association of Women Lawyers, and the Women Lawyers Association of the State of New York. Author of a book and numerous articles in legal periodicals on the *cy pres* doctrine.