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THE CY PRES DOCTRINE AND CHANGING
PHILOSOPHIES

*Edith L. Fisch**

THE cy pres doctrine¹ arose so far back in antiquity that its origins are obscure. Apparently it was known and used in Roman law, for an application of the cy pres doctrine is reported in the *Digest of Justinian*. In the early part of the third century a city received a legacy bequeathed for the purpose of commemorating the memory of the donor by using the income of the legacy to hold yearly games. As such games were illegal at that time a problem arose concerning the disposition of the legacy. Modestinus, a well known jurist, found the solution.

“Since the testator wished games to be celebrated which are not permitted, it would be unjust that the amount which he has destined to that end should go back to his heirs. Therefore, let the heirs and magnates of the city be cited and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner.”²

The precise manner in which the cy pres doctrine was introduced into English law is not known. It appears probable that it was adopted in connection with the medieval practice of alms giving as a means of expiating sin. “After baptism,” says Cyprian, “we would have no resource to expiate our continual faults, if the divine compassion had not taught us works of justice and pity as a way of safety, and alms as a means of washing out the stains of our vices.”³ It was thus common for men who wished to avoid the clutches of the devil and the tortures of hell to attempt to buy their way into heaven by giving property to charity. That the donors were conscious of the fact that the transac-

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¹ The RESTATEMENT OF TRUSTS §399 (1935) defines the cy pres doctrine as follows: “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.”

² DIGEST OF JUSTINIAN 33:2:16. The cy pres doctrine was not an innovation of Christianity as it was used before the time of Constantine. See 3 STORY, EQUITY JURISPRUDENCE, 14th ed., §1518 (1918).

³ Willard, “Illustrations of the Origin of Cy Pres,” 8 HARV. L. REV. 69 at 72 (1894). See also ZOLLMAN, AMERICAN LAW OF CHARITIES 71 (1924).

tion was a deliberate purchase is evidenced by the use of the phrase "for the health of my soul" in connection with the charitable gift.⁴

Sir Thomas Wyndham wrote in his will in 1521:⁵

" . . . I trust that . . . thy blessyd mother [of Christ] will in my moost extreme nede, of her infinite pitye, take my soule into her hands, and hit present unto her moost dere sonne. . . . Also to the singular mediacions, and prayers of all the holy company of hevyn, aungells, archaungells, patriarches, prophets, apostells, evangelists, martyres, confessoures, and virgynes; and specially to myn accustomed advourrys, I call and crye, Saint John Evangelist, Saint George, Saint Thomas of Canterbury, Saint Margaret, Saint Kateryn, and Saint Barbara, humbly beseche you, that not onlye at the houre of deth, soo too ayde, socour, and defend me; that the auntyent and goostly enemy, nor noon other yll or dampnabell spirite, have power to invade me, nor with his tereablenes to anoye me. . . ."

In return for these benefits he then set forth the price he would pay:

"Also I will have immediatelie after my decesse, as shortly as may be possible [a thousand] masses to be said within the citie of Norwich, and other places, within the shire of Norfolk; whereof I will have, in honor of the blessed Trinitie, one hundreth; in honor of the five wounds of our Savyour J'hu Crist, one hundreth; in honour of the five joys of our blisshed Lady, one hundreth; in honor of the nine orders of Aungells, one hundreth; in honor of the Patriarchs, one hundreth; in honor of the twelve Apostells, one hundreth. . . ."

The English chancellors with their ecclesiastical background and training in Roman law resurrected the *cy pres* doctrine as a means of permitting the donor to obtain the salvation he was seeking to buy, the theory being that as the testator by donating money to charity could purchase a position in the heavenly kingdom he ought not to be denied entrance if the gift, for some unforeseen reason, could not be carried out in the manner specified by him.⁶ Thus Lord Wilmot stated: "The

⁴ Willard, "Illustrations of the Origin of *Cy Pres*," 8 HARV. L. REV. 69 at 72 (1894). See also Stat. Hen. VII, c. 4, 1 Stat. Realm, p. 285, "charitable deed to be done by their executors for the health of their souls" was repeated three times in this statute.

⁵ NICHOLAS, *TESTAMENTA VETUSTA* 579 (1826).

⁶ BOGERT, *TRUSTS AND TRUSTEES* §431 (1935): "If the exact scheme for securing pardon and an eternal period of bliss for the soul failed for any reason, it was natural that chancery, with its ecclesiastical tinge, should think that the testator would have desired the substitution of any other plan which would bring about the same result as the original

Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the same reward."⁷

Tudor attributes the use of the cy pres doctrine to the fact that the chancellor having placed charities in a favored position gradually began to treat the charity as a fictitious person entitled to the same rights as any other cestui que trust.⁸ The object designated by the donor was thus treated as being merely the manner and mode of going into effect of a general charitable intent. This reasoning is illustrated by the following passage:

"Where a legacy is given so as to denote, that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee."⁹

Whatever the reasons for the introduction of the cy pres doctrine it is clear that long before the American Revolution it was a principle, firmly established, in English law.¹⁰

American Development

1. *Separation of Powers.* Largely as a result of Montesquieu's theory of separation of powers, the early American courts, unlike those of England, were extremely hostile to the cy pres doctrine.¹¹ In England the cy pres doctrine was of two types, prerogative and judicial, the prerogative power being exercised by the chancellor as the minister of the king and the judicial power in his capacity of an equity judge.¹² Montesquieu reasoned that in order to have political liberty there must be three types of separate powers, the executive, the legislative and the

gift." Cf. *Attorney General v. Dutch Reformed Protestant Church*, 36 N.Y. 452 at 457 (1867), affirming, 33 Barb. 303 (1866) (doctrine was used in England in order to save gifts made for religious purposes and thereby subject property to control of the church).

⁷ *Attorney General v. Downing*, Wilmot 1, 33 (1767).

⁸ TUDOR, *CHARITIES*, 5th ed., 2-3 (1929).

⁹ *Mills v. Farmer*, 19 Ves. 483 at 486, 34 Eng. Rep. 595 at 596 (1815).

¹⁰ *Da Costa v. De Pas*, 1 Amb. 228, 7 Ves. 76 (1754); *Attorney General v. Matthews*, 2 Lev. 167 (1677).

¹¹ See cases cited *infra* note 19.

¹² FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 56-57 (1950). The prerogative power was exercised where the object of the gift was illegal or void as contrary to public policy, and where a gift was made to charity generally without the interposition of a trustee. *Moggridge v. Thackwell*, 7 Ves. Jr. 36, 32 Eng. Rep. 15 (1803), *affd.* 13 Ves. Jr. 416, 33 Eng. Rep. 350 (1807).

judicial.¹³ The political liberty of each citizen, he argued, involves peace of mind, arising from the opinion of each person that he has safety. When the legislative and executive powers are vested in the same person or in the same political body, there can be no liberty because the citizen becomes apprehensive and fears that the same individual or body will enact tyrannical and oppressive law. There would also be no liberty, if the judicial power were not separated from the legislative and executive, for then the life and liberty of the citizen would be subject to arbitrary control. Were it not for the executive power the judge might act "with all the violence of an oppressor."¹⁴

The American courts endorsing this theory rejected the prerogative *cy pres* on the ground that the principle of separation of powers forbids the exercise of a legislative or executive power by a judicial body.¹⁵ Thus the court in *Jackson v. Phillips*,¹⁶ in regard to a situation in which the prerogative *cy pres* was applicable in England, remarked:

"No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power (prerogative *cy pres*) in England before the reign of Charles II. . . . It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the Commonwealth as succeeding to the powers of the king as *parens patriae*. . . . It certainly cannot be exercised by the judiciary of a state whose constitution declares that 'the judicial department shall never exercise the legislative

¹³ 1 MONTESQUIEU, *SPIRIT OF LAWS* 181 (1802 ed.).

¹⁴ *Id.* at 43. John Locke's concept of checks and balances also had great influence in the United States. Like Montesquieu, Locke advocated the separation of the legislative and the executive in order to prevent an abuse of power. Although Locke said nothing about the judiciary, wherever the system of checks and balances had been established the judiciary has become a third independent branch of government. See RUSSELL, *HISTORY OF WESTERN PHILOSOPHY* 508 (1945).

¹⁵ *Moore's Heirs v. Moore's Devises and Executors*, 4 Dana 354, 366 (Ky. 1836); *Parsons v. Childs*, 345 Mo. 689, 136 S.W. (2d) 327 (1940), cert. den. 310 U.S. 640, 60 S.Ct. 1088 (1940), rehearing den. 311 U.S. 724, 61 S.Ct. 55 (1940); *Green v. Allen*, 5 Humph. 170 (Tenn. 1844); *Harrington v. Pier*, 105 Wis. 485, 82 N.W. 345 (1900). But cf. *First Congregational Society v. City of Bridgeport*, 99 Conn. 22, 121 A. 77 at 80 (1923), where the court said: "The jurisdiction of the courts over charitable trusts is administered not only under these liberal rules of construction, but also under the undoubted right of the court to exercise prerogative authority in dealing with a charitable gift. That authority gives to it the right to apply the *cy pres* doctrine to charitable trusts. . . ." The judicial exercise of prerogative *cy pres* has since been repudiated in Connecticut. *Shannon v. Eno*, 120 Conn. 77 at 86, 179 A. 479 (1935).

¹⁶ 14 Allen 539 (Mass. 1867) (the court was discussing a gift given to charity generally without the interposition of a trustee).

and executive powers, or either of them: to the end it may be a government of laws and not men.'"¹⁷

To the newly founded republic the idea of the judiciary exercising the prerogative power of the English sovereign was anathema. Consequently, not only was the prerogative cy pres doctrine rejected¹⁸ but many courts, in an excess of zeal, erroneously assumed that the cy pres doctrine was solely a prerogative principle and rejected the entire doctrine.¹⁹ *Doughten v. Vandever*,²⁰ decided in Delaware in 1875, is typical of those cases in which the nature of the cy pres doctrine was misconceived. Here the court stated that the cy pres doctrine was a doctrine of prerogative and for this reason could not be exercised by an equity court which has only judicial powers. That the court was unaware that the cy pres doctrine also existed judicially is revealed by the following statement:

"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."²¹

This unfortunate rejection of both the prerogative and judicial cy pres coupled with the refusal of the courts to re-examine the nature of the doctrine resulted in the destruction of charitable trusts that would

¹⁷ Id. at 576. It is interesting to note that even today some courts refuse to uphold charitable gifts in situations where the prerogative cy pres was applicable in England. See, for example, *Shannon v. Eno*, 120 Conn. 77, 179 A. 479 at 482 (1935); *Levin v. Attorney General*, 136 N. J. Eq. 568, 42 A. (2d) 870 at 871 (1945).

¹⁸ See cases cited supra note 15.

¹⁹ *Carter v. Balfour's Administrator*, 19 Ala. 814 (1851); *White v. Fisk*, 22 Conn. 31 (1852); *Doughten v. Vandever*, 5 Del. Ch. 51 (1875); *Beall v. Drane*, 25 Ga. 430 (1858); *Miller v. Chittenden*, 2 Iowa 315 (1856); *Cromie's Heirs v. Louisville Orphans' Home Society*, 3 Bush 365 (Ky. 1867); *Watkins v. Bigelow*, 93 Minn. 210, 100 N.W. 1104 (1904); *In re Creighton's Estate*, 60 Neb. 796, 84 N.W. 273 (1900); *Williams v. Williams*, 4 Seld. 525 (N.Y. 1853); *Keith v. Scales*, 124 N.C. 337, 32 S.E. 809 (1899); *Witman v. Lex*, 17 S. & R. 88 (Pa. 1827); *Attorney General v. Jolly*, 2 Strob. Eq. 379 (S.C. 1848); *Green v. Allen*, 5 Humph. 162 (Tenn. 1844); *Gallego's Exrs. v. Attorney General*, 3 Leight 450 (Va. 1832); *Heiss v. Murphy*, 40 Wis. 276, 292 (1876).

²⁰ 5 Del. Ch. 51 (1875).

²¹ Id. at 64.

otherwise have been saved by adapting them to changing social and economic conditions.

2. *Stress on Private Property.* Not only was the cy pres doctrine held to violate the principle of separation of powers but it was also condemned as unsuited to our democratic institutions.²² This conclusion arose from the fact that the king's prerogative power over charities was exercised without regard to the intention of the donor. As a result property was sometimes devoted to purposes which were contrary to the desires of the donor.²³ A notorious example of such a subversion of intention is found in the case of *Da Costa v. De Pas*,²⁴ decided in 1754, where a gift was left by a testator to establish a "Jesuba" to read the Jewish law and instruct people in the Jewish religion. Gifts to promote the Jewish religion were illegal in England at that time. The legacy thus became subject to disposition by the prerogative power of the king who ordered the fund applied to the support of a preacher in a foundling home so that the children therein might receive instruction in the Christian religion. Such extreme and unrestrained applications of the prerogative cy pres doctrine prejudiced some American courts against both branches of the doctrine, judicial as well as prerogative and consequently those courts which failed to observe that the judicial cy pres was not applied arbitrarily rejected the whole doctrine.²⁵ That the objection to the cy pres doctrine was not merely because it was mistakenly supposed to be only a doctrine of prerogative is shown by the Mississippi case of *National Bank of Greece v. Savarika*,²⁶ decided as recently as 1933. Referring to the cy pres doctrine the court stated:

"Without regard to the refinement of distinction between the use of the term of 'cy pres' to describe the power exercised by the English chancellors in charity cases under the sign manual of the crown, on the one hand, and that exercised under the assumed general jurisdiction of equity, on the other, the practice *in either case* is incompatible with the public and judicial policy of this state. . . ."²⁷

²² See cases cited *infra* notes 27-31.

²³ SCOTT, TRUSTS §399.1 (1939).

²⁴ 1 Amb. 228, 7 Ves. 76 (1754).

²⁵ *Watkins v. Bigelow*, 93 Minn. 210, 100 N.W. 1104 (1904); see *Jackson v. Phillips*, 14 Allen 539, 575 (Mass. 1867). See also cases cited *infra* notes 26-31.

²⁶ 167 Minn. 571, 148 S. 649 (1933).

²⁷ *Id.* at 652-653. Emphasis added.

This view still obtains in North Carolina,²⁸ South Carolina,²⁹ Tennessee,³⁰ and Mississippi.³¹

Thus the cy pres doctrine was objected to, not only because it was thought to be incompatible with the theory of separation of powers, but because it was deemed undemocratic in that it violated the natural rights of man, particularly his right of property, and it is here that John Locke's influence can be felt. Although he contributed much to the American legal system by his theory of natural rights, Locke's great reverence for private property hindered the development of the cy pres doctrine. According to his theory of a social compact the individual does not give up all his natural rights to the government but only the right to be a judge in his own case. Consistently with this theory Locke declared: "The supreme power cannot take from any man any part of his property without his own consent."³² When refusing to apply the cy pres doctrine the courts reaffirmed this principle. In *Moore's Heirs v. Moore's Devisees and Executors*,³³ the court stated that it did not act judicially when it applied the testator's bounty

" . . . to a specific object of charity, selected by itself, merely because he had dedicated it to charity generally, or to a specified purpose which can not be effectuated; for the court can not know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation, where he, and not the donor, in effect and at last, creates the charity."³⁴

The great reverence for private property prevailing at this period, was also manifested by those decisions in which application of the doctrine was denied, not because of a misconception as to the nature

²⁸ *Johnson v. Wagner*, 219 N.C. 235, 13 S.E. (2d) 419 (1941); *Board of Education of Wilson County v. Town of Wilson*, 215 N.C. 216, 1 S.E. (2d) 544 (1939); *Bridges v. Pleasants*, 4 Ired. Eq. 26 (N.C. 1845).

²⁹ *Mars v. Gibert*, 93 S.C. 455, 77 S.E. 131 (1913); *Brenan v. Winkler*, 37 S.C. 457, 16 S.E. 190 (1892).

³⁰ *Henshaw v. Flenniken*, 183 Tenn. 232, 191 S.W. (2d) 541 (1946).

³¹ *National Bank of Greece v. Savarika*, 167 Miss. 571, 148 S. 649 (1933).

³² LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* 187 (Everyman edition, 1924).

³³ 4 Dana 354 (Ky. 1836).

³⁴ *Id.* at 366. Similar reasoning is found in *McAuley v. Wilson*, 1 Dev. Eq. 276 at 280 (16 N.C.) (1828), where the court refused to apply the cy pres doctrine on the ground that "We can not dispose of the property of the decease[d] by undertaking to conjecture what would have been his will, provided he had foreseen what has since happened, which has thwarted his intent as expressed."

of the doctrine, but because of a reluctance to vary the original plans of the donor. As it was believed that no clear line could be drawn between the directions of the donor and confiscation, courts were fearful that deviations from the directions of the donor would result in the overthrow of charitable trusts and ultimately imperil the safety and sacredness of all private property.³⁵ The case of *Harvard College v. Society for Promoting Theological Education*,³⁶ decided in 1855, clearly reflects this attitude. Harvard College had received funds in trust for the promotion of theological education at the college or at the divinity school connected with the college. The trustees, claiming that the college and theological school could not be conveniently managed by the same corporation and that the divinity school had become less useful and effective because it was unable to assume a more marked sectarian character than the present trustees deemed it their duty to permit, asked the court to award the funds to an independent board of trustees, to be applied to the support of the divinity school, distinct and separate from the college. The court refusing to apply the cy pres doctrine to vary the terms of the trust declared:

"A contrary decision would furnish a precedent dangerous to the perpetuity and sacredness of all our great public charities, leaving the question of the management and supervision of our public charities to be the subject of change with every fluctuation of popular opinion as to what may be the more expedient and useful mode of administering them."³⁷

This case is characteristic of this era when the question of how the trust could best be utilized for the benefit of society was excluded from consideration and it was held that the court could not substitute a new scheme merely because the court or the trustees believed that it would be a better plan than that created by the settlor.³⁸ Decisions of this type

³⁵ *State v. Adams*, 44 Mo. 570 at 580 (1869) ("If the original trust, in all its requirements, is not obligatory, where shall the line be drawn? and what is to hinder a total perversion of the fund? If a change can be made so material as one affecting the choice of curators, I can see no limit"). Bentham felt that a threat to property was also a threat to law. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 85 (1945). Cf. MILL, *DISSENTATIONS AND DISCUSSIONS* 35 (1865).

³⁶ 3 Gray 280 (Mass. 1855).

³⁷ *Id.* at 301.

³⁸ *Boston Safe Deposit & Trust Co. v. Attorney General*, 234 Mass. 261, 125 N.E. 392 (1919); *President and Fellows of Harvard College v. Attorney General*, 228 Mass. 396, 117 N.E. 903 (1917); *Crawford v. Nies*, 224 Mass. 474, 113 N.E. 408 (1916) ("whenever a charitable trust can be administered in accordance with the directions of the donor or founder, this court 'is not at liberty to modify it upon considerations of policy or convenience.'"); *Jackson v. Phillips*, 14 Allen 539, 592 (Mass. 1867) (policy and convenience cannot be considered by the court); *Crow v. Clay County*, 196 Mo. 234, 95 S.W. 369 (1906). Cf. SCOTT, *TRUSTS* §399.4 (1939).

stemmed not only from Locke's philosophy but also from Blackstone who had great influence on the early courts of this country. Speaking of the great regard of the law for private property Blackstone stated that the law would not authorize the least violation of it, not even for the general good of the whole community.³⁹

"In vain, may it be urged, that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be judge of this common good, and to decide on its expediency."⁴⁰

Consequently, for many years the courts favored the dead hand over the public welfare⁴¹ and as recently as 1923 a court in refusing to apply the cy pres doctrine announced:

"No public benefit, no increased beneficence, no advantage to religious activity, can justify a court in making over the wills or contracts of men, in the conviction that changed conditions make this, if not necessary, at least highly desirable."⁴²

3. *Balancing Between Individual and Society.* After 1900 the tide of public thinking flowed away from emphasis on the individual and towards society as a whole with the result that fewer courts were influ-

³⁹ BLACKSTONE, COMMENTARIES 74 (Gavit ed. 1941).

⁴⁰ *Ibid.*

⁴¹ *White v. Fisk*, 22 Conn. 31 (1852); *Starkweather v. American Bible Society*, 72 Ill. 50 (1874); *Spalding v. St. Joseph's Industrial School for Boys of the City of Louisville*, 107 Ky. 382, 54 S.W. 200 (1899); *Merrill v. Hayden*, 86 Me. 133, 29 A. 949 (1894); *McAuley v. Wilson*, 1 Dev. Eq. 276 (N.C. 1828); *In re Long's Estate*, 204 Pa. 60, 53 A. 497 (1902); *Gladding v. St. Matthew's Church*, 25 R.I. 628, 57 A. 860 (1904). The preference for individual ownership of wealth appears in the case of *Doughten v. Vandever*, 5 Del. Ch. 51, 77 (1875), where the court after upholding various charitable gifts 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 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 provisions of her will and the codicil thereto by which her heirs at law are excluded from the benefit of sharing her estate." See also note, "Revaluation of Cy Pres," 49 YALE L.J. 303 at 317 (1939). But cf. *Bradway*, "Tendencies in Application of the Cy Pres Doctrine," 5 TEMPLE L.Q. 489, 582 (1931), where the reluctance of the courts to apply the cy pres doctrine during this period is attributed to the desire to encourage charitable gifts, the theory being that if prospective donors were secure in the belief that their desires would be adhered to throughout the years they would be encouraged to give property in trust for charity.

⁴² *First Congregational Society v. City of Bridgeport*, 99 Conn. 22 at 37, 121 A. 77 (1923). Other comparatively recent decisions that emphasize the intent of the testator are: *Harvard College v. Jewett*, (6th Cir. 1925) 11 F. (2d) 119; *Lovelace v. Marion Institute*, 215 Ala. 271, 110 S. 381 (1926); *Murr v. Youse*, 81 Ohio App. 253, 80 N.E. (2d) 788 (1946).

enced by the great reverence for private property championed by Blackstone and Locke.⁴³ The transition from stress on the dead hand to interest in public benefit is in accord with Pound's legal philosophy. Writing in 1906, Pound stated that the exaggerated respect for the rights of the individual are common-law doctrines and while men have changed their views as to the relative importance of the individual and of society the common law has not changed. Pound went on to declare that "No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the entrenched position in which our legal and political history has put him and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age."⁴⁴ "The problem, therefore, of the present is to lead our law to hold a more even balance between individualism and collectivism. Its present extreme individualism must be tempered to meet the ideas of the modern world."⁴⁵ The common-law stress on individualism was merely a revolt from the spirit of the Middle Ages, and this revolt carried beyond its time and as a basis of a permanent theory of society is regarded by Pound as not only false but dangerous. "Those who still repeat its formulas are dealing in ideas of the past which have no application to the present age."⁴⁶ We must therefore cease to mistake seventeenth century doctrine, in which temporary phases of its individualistic predilection were formulated, for fundamental principles of common law.⁴⁷

In conformance with Pound's theory of balancing between indi-

⁴³ The welfare of the beneficiaries rather than the intent of the donor was emphasized in the following cases: *State National Bank of Texarkana v. Bann*, 202 Ark. 850, 153 S.W. (2d) 158 (1941); *McCarroll v. Grand Lodge I.O.O.F. of Arkansas*, 154 Ark. 376, 243 S.W. 870 (1922); *Thatcher v. Lewis*, 335 Mo. 1130, 76 S.W. (2d) 677 (1934); *City of Keene v. Eastman*, 75 N.H. 191, 72 A. 213 (1909); *Morristown Trust Co. v. Protestant Episcopal Church*, (N.J. 1948) 61 A. (2d) 762; *Matter of MacDowell*, 217 N.Y. 454, 112 N.E. 177, 189 (1916), reversing 170 App. Div. 245, 156 N.Y.S. 387 (1915), which affirmed 89 Misc. 323, 153 N.Y.S. 653 (1915); *In re Mear's Estate*, 229 Pa. 217, 149 A. 157 (1930); *Morse v. National Bank of Galveston*, (Tex. Civ. App. 1946) 194 S.W. (2d) 578; *Fairbanks v. City of Appleton*, 249 Wis. 476, 24 N.W. (2d) 893 (1946).

⁴⁴ Pound, "Spirit of the Common Law," 18 *THE GREEN BAG* 17 at 20 (1906).

⁴⁵ *Id.* at 24. Cf. BLACKSTONE, *COMMENTARIES* 74 (Gavit ed. 1941).

⁴⁶ Pound, "Spirit of the Common Law," 18 *THE GREEN BAG* 17 at 24 (1906).

⁴⁷ *Ibid.* Pound, however, does not completely forsake individualism. Although he revolted against its exaggerated form in our legal system, he declared that with all its faults, individualism is a salutary and beneficial doctrine. As the whole is no greater than its parts the community is not apt to be more interested in supporting right and repressing wrong than the citizens who compose it. Responsibility should not be upon society but upon the individual. *Id.* at 25. This reasoning was followed in the case of *Browning's Estate*, 165 Misc. 819 at 829, 1 N.Y.S. (2d) 825 (1938), *affid.*, 281 N.Y. 577, 22 N.E. (2d) 160 (1939), where the court stated: "There is reason now to approve charitable

vidualism and collectivism, decisions emphasized the fact that it is the public which is the real and ultimate beneficiary of charitable activities and it is the duty of the court to enable the public to receive the benefits of the gifts which have been contributed to it.⁴⁸ Consequently the origins of the cy pres doctrine were re-examined,⁴⁹ the prerequisites to the application of the doctrine were found to exist in a greater number of cases⁵⁰ and an attentive ear was turned to the needs and interests of the community.⁵¹

In re Dean's Estate,⁵² decided in 1938, is an interesting example of this reversal in attitude. A testator bequeathed a sum of money to

foundations as serving the public good because they restore to better balance the relationship of the individual to his government. To the extent of its resources private charity will remove the temptation of the underprivileged to regard government as obliged to furnish support and will aid in the restoration of a sense of personal responsibility among its donees."

⁴⁸ *Dickey v. Volker*, 321 Mo. 235, 11 S.W. (2d) 278 (1928), cert. den. 279 U.S. 839, 49 S.Ct. 252 (1929); *Wachovia Banking and Trust Co. v. Ogburn*, 181 N.C. 324, 107 S. E. 238 (1921). The following cases placed emphasis on the welfare of the beneficiaries: *State National Bank of Texarkana v. Bann*, 202 Ark. 850, 153 S.W. (2d) 158 (1941); *City of Keene v. Eastman*, 75 N.H. 191, 72 A. 213 (1909); *In re Lawless' Will*, 87 N.Y. S. (2d) 386 (Surr. Ct. 1949).

⁴⁹ Compare: *Noel v. Olds*, (D.C. Cir. 1943) 138 F. (2d) 581, affd. (D.C. Cir. 1945) 149 F. (2d) 13 (1945), cert. den. 321 U.S. 773, 64 S.Ct. 611 (1944), *with Dinwiddie v. Metzger*, 45 App. D.C. 310 (1916), cert. den. 242 U.S. 631, 37 S.Ct. 15 (1916); *Delaware Trust Co. v. Graham*, (Del. 1948) 61 A. (2d) 110, *with Doughten v. Vandever*, 5 Del. Ch. 51 (1875); *Harwood v. Dick*, 286 Ky. 423, 150 S.W. (2d) 704 (1941), *with Adams v. Bohon*, 176 Ky. 66, 196 S.W. 156 (1917); *Lindquist v. First Evangelical Lutheran Church*, 193 Minn. 474, 259 N.W. 9 (1935), *with Watkins v. Bigelow*, 93 Minn. 210, 100 N.W. 1104 (1904); *Hobbs v. Board of Education*, 126 Neb. 416, 253 N.W. 627 (1934), *with In re Creighton's Estate*, 60 Neb. 796, 84 N.W. 273 (1900); *Sherman v. Richmond Hose Co. No. 2*, 101 Misc. 62, 166 N.Y.S. 586 (1917), modified by 186 App. Div. 417, 175 N.Y.S. 8 (1919), affd. 230 N.Y. 462, 130 N.E. 613 (1921), *with Bascom v. Albertson*, 34 N.Y. 584 (1866); *Fairbanks v. City of Appleton*, 249 Wis. 576, 24 N.W. (2d) 893 (1946), *with Estate of Hoffen*, 70 Wis. 522, 36 N.W. 407 (1888). Eleven states enacted cy pres statutes after 1900. Ala. Code (1940) tit. 47, §145, Ala. Code (1947) tit. 47, §145; Ind. Laws, 1929, 214, Ind. Stat. Ann. (Burns, 1948) §26-632; Md. Laws (1945), c. 727, p. 806, Md. Code Ann. (Supp. 1947), art. 16, §279A; Mass. Laws (1929), c. 126, Mass. Ann. Laws (1950), c. 214, §3(11); Minn. Laws (1927), c. 180, Minn. Stat. Ann. (1950), §501.12(3); New York Laws of 1901, c. 292, §2, New York Real Property Law (McKinney, 1950) §113(2), and Personal Property Law §12(2); R.I. Gen. Laws (1923) c. 303, §9, R.I. Gen. Laws (1938) c. 487, §1; Vt. Acts 1945, No. 37, §1, Vt. Stat. (1947) §1282; Va. Acts of 1946, c. 187, Va. Code (Supp. 1948) §587a; W.Va. Code (1931) p. 933, W.Va. Code (1943) §3502; Wis. Laws (1933) c. 413, Wis. Stat. (1947) §231.11(7)(b)(c)(d).

⁵⁰ The three prerequisites to the application of the cy pres doctrine are (1) a valid charitable trust, (2) a general charitable intention, and (3) the impossibility or impracticality of carrying out the original scheme. FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 128 (1950). A trust was implied in the following cases: *Goree v. Georgia Industrial Home*, 187 Ga. 368, 200 S.E. 684 (1938); *In re Peterson's Estate*, 202 Minn. 31, 277 N.W. 529 (1938); *Stevens v. Smith*, 134 Mo. 175, 183 A. 344 (1936); *In re Walter's Estate*, 150 Misc. 512, 269 N.Y.S. 400 (1933); *School District No. 70 Red Willow County v. Wood*, 144 Neb. 241, 13 N.W. (2d) 153 (1944). Cf. older cases where no trust was implied and the cy pres doctrine was held inapplicable: *Robinson v.*

be held in trust until a parochial school in connection with a designated church should be built, the money then to be paid to the church to be used as an endowment. After a twenty year period had elapsed and the school had not yet been erected, the court exercising the cy pres doctrine ordered the fund to be paid to the church to be used for purposes which would as nearly as possible effectuate the intention of the testator. In reaching this decision the court pointed out that the necessity for a separate Catholic parochial school in the area had been eliminated as a result of an agreement among the various churches in Millbrook, New York where classes in religious instruction under the direction of the different denominations were held in the public schools. In the opinion of the court "the relationship and spirit of co-operation existing between the various religious denominations in Millbrook, N.Y., approaches a state of Utopia . . ." and

" . . . such a departure from the present mode of procedure might tend to destroy the splendid co-operative spiritual endeavor now in force. In view of the troubled times through which we are now passing, such a disruption would indeed be unfortunate."⁵³

The necessity for the charity formulated by the testatrix was also given weight in determining whether there was a sufficient degree of impracticality or impossibility to authorize the application of the doctrine in *In re Neher's Will*,⁵⁴ where real property was devised to a village to be used as a hospital. The village asserted that it was without the resources necessary to establish and maintain a hospital and that a modern hospital had been recently established in a neighboring village which

Crutcher, 277 Mo. 1, 209 S.W. 104 (1919); Matter of Rappolt, 140 Misc. 239, 250 N.Y. S. 377 (1931), *accord*, Raque v. City of Speyer, Germany, 97 N.J. Eq. 447, 129 A. 207 (1925).

In the following cases the courts found a general charitable intention despite the fact that the terms of the trust provided that the property be devoted to the specified purpose "and no other purpose": O'Hara v. Grand Lodge of I.O.O.G.T. of California, 213 Cal. 131, 2 P. (2d) 21 (1931); Grimke v. Malone, 206 Mass. 49, 91 N.E. 899 (1910); *In re Harrington's Will*, 243 App. Div. 235, 276 N.Y.S. 868 (1935); Graff v. Harrington, 137 Misc. 712, 244 N.Y.S. 307 (1930); Fairbanks v. City of Appleton, 249 Wis. 476, 24 N.W. (2d) 893 (1946). In Pennsylvania the requirement of a general charitable intent has been eliminated by statute. Pa. Stat. (Purdon, 1950) tit. 20, §301.10. For cases dealing with impracticality and impossibility see notes 52-55 *infra*.

⁵¹ See cases cited *infra* notes 52-58.

⁵² 167 Misc. 238, 3 N.Y.S. (2d) 711 (1938). (There was some testimony that the project would be impractical for the further reason that the parish was small and the expense involved was large).

⁵³ *Id.* at 240.

⁵⁴ 279 N.Y. 370, 18 N.E. (2d) 625 (1939), reversing, 254 App. Div. 708, 4 N.Y.S. (2d) 983 (1938). Duplication of facilities was a factor of importance in the following cases: *Exeter v. Robinson*, 94 N.H. 463, 55 A. (2d) 622 (1947) (property left to town, income to be used for the salary of a teacher for the sole instruction of women in a

would adequately serve the needs of both villages, whereupon the court ordered the gift to be executed cy pres through a scheme to be framed by the court.⁵⁵

Pound's legal theories have also influenced the manner in which the courts exercise the cy pres doctrine. The degree to which the new plan, formulated by the court, will be of public service is considered and with the deviation from emphasis on the individual to society as a whole the courts have tended to depart from the specified purposes of the trust to a greater degree than before.⁵⁶ Thus where funds were collected to erect a war memorial and the amount was not sufficient for that purpose the court approved a plan to use the funds for war memorial playground.⁵⁷ In California a testatrix authorized her executors to erect a granite tower containing a carillon of eighteen bells . . . "dedicated to the memory of all those who . . . strove to make Madera and Madera County all that it is." When it was proved impractical to

female seminary to be provided by the town. After 83 years the court ordered the abandonment of separate education of women in the seminary as it was found that the correlation of the facilities for educating girls with those of the boys high school was not effective and retarded the development of secondary education in the town. The court directed the income to be used for the support of teachers only instructing females in a co-educational system); *Board of Education of City of Rockford v. City of Rockford*, 372 Ill. 442, 24 N.E. (2d) 366 (1940) (where buildings of school erected under a trust for the benefit of inhabitants of a particular school district had become obsolete, and the area in which the buildings stood was served by a new school the court held the cy pres doctrine applicable); *Town of Milton v. Attorney General*, 314 Mass. 234, 49 N.E. (2d) 909 (1943); *School District No. 70, Red Willow County v. Wood*, 144 Neb. 241, 13 N.W. (2d) 153 (1944) (bequest to school district for the construction of a building when the fund should grow to a specified amount. While fund was accumulating the district erected a new building and the court applied the cy pres doctrine to the bequest). Statutory recognition of the welfare of the community is found in *Ind. Stat. Ann. (Burns, 1948) §§26-631, 26-632* which provides that "where any funds shall have been created by general donation to carry on activities of a charitable, humane, philanthropic or other nature for the common good; and where the organization carrying on said activity, or where the need of said funds for the purpose for which the same was created, have ceased to exist, without using all of the funds so collected" the board of commissioners of the various counties are authorized to "make distribution of said funds as in their judgment will best serve the interests of the residents of the political division from which the same shall have been received."

⁵⁵ Court authorized property to be used as a memorial administration building. *Matter of Neher*, 279 N.Y. 370, 8 N.E. (2d) 625 (1939).

⁵⁶ *In re Butin's Estate*, 81 Cal. App. (2d) 176, 183 P. (2d) 304 (1947); *Society of California Pioneers v. McElroy*, 63 Cal. App. (2d) 332, 146 P. (2d) 962 (1944) (gift to society to construct a monument may be applied for the general historical purpose of the society); *Connors v. Ahearn*, 342 Pa. 5, 19 A. (2d) 388 (1941); cf. *Seymour v. Attorney General*, 124 Conn. 490, 200 A. 815 (1938) (gift for a memorial was not permitted to be used for a library); *Kerner v. Thompson*, 293 Ill. App. 454, 13 N.E. (2d) 110 (1938), cert. den. 305 U.S. 635, 59 S.Ct. 102 (1938) (surplus of fund for the purpose of relieving the suffering caused by floods of the Mississippi River could not be used for flood control).

⁵⁷ *Berle v. Dawkins*, 150 Misc. 911, 271 N.Y.S. 579 (1934).

carry out the bequest the court stated that a substitute memorial might take the form of a health center.⁵⁸

Pound's belief, that the common-law stress on individualism when carried beyond its time and established as the basis of a permanent theory of society is dangerous,⁵⁹ accords with the position that a society in which there is a more or less even distribution of wealth is apt to be more stable and peaceful than one where there are great extremes of wealth and poverty. It has been aptly put by Friedrich when he said: "When emulation becomes embittered envy, when the ambition to rise and make more of oneself becomes frustration and hopelessness . . . then social unity and stability are torn by social discord."⁶⁰ Judicial recognition of this viewpoint was expressed in *Wachovia Banking & Trust Co. v. Ogburn*,⁶¹ where it was held that a trust did not fail even though the funds were not adequate for the full design. The court stated:

" . . . those rich men should be remembered with honor who devote some part of their estate to widen opportunity and enjoyment for the public. In death, as in life, those who have accumulated large estates should have regard 'for the spears of Judah and the archers of Benjamin'—that solid mass of men who have lived in poverty or struggled through life on small means, yet whose law-abiding spirit has protected the property of those who have made large accumulations of wealth, in safety and untroubled by the spoiler."⁶²

The same attitude is found in *Browning's Estate*,⁶³ where the Surrogate declared that with a sense of personal social responsibility for wealth " . . . there is little temptation to the violent explosions which in other lands have been based in part upon this disparity in the possession of worldly goods."⁶⁴

Thus the courts of today, believing that the public good is served by a liberal enforcement of the purposes of the donor, apply the cy pres doctrine whenever possible and support charitable trusts to the limits of the doctrine.

⁵⁸ *In re Butin's Estate*, 81 Cal. App. (2d) 76, 183 P. (2d) 304 (1947).

⁵⁹ *Supra* note 46.

⁶⁰ Friedrich, "The Economics of Inheritance," in *SOCIAL MEANING OF LEGAL CONCEPTS* 35 (1948) (published by N.Y. Univ. School of Law).

⁶¹ 181 N.C. 324, 107 S.E. 238 (1921).

⁶² *Id.* at 331.

⁶³ 165 Misc. 819, 1 N.Y.S. (2d) 825 (1938), *affd.* 281 N.Y. 577, 22 N.E. (2d) 160 (1939).

⁶⁴ 165 Misc. 819 at 829.