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CY PRES COMES TO DELAWARE*

Until the case of *Delaware Trust Company v. Graham*,¹ decided in September 1948, the courts of Delaware had refused to recognize the doctrine of cy pres although it was widely applied in the United States.² Cy pres, a term derived from the Norman-French expression "cy pres comme possible" which means "as near as possible",³ is the mechanism utilized by the equity courts to save a charitable trust, when the particular charitable purpose of the settlor cannot be carried out, by applying the gift as near as possible to the donor's general charitable intention.⁴

In America, the reluctant acceptance and retarded development of the cy pres doctrine, in some of the states, was largely due to the failure of the early courts to distinguish between judicial and prerogative cy pres.

Prerogative versus Judicial Cy Pres

Cy pres as administered in England was of two kinds; judicial and prerogative. Not much is known about the common law origins of cy pres but it is believed that the judicial power was first exercised by the chancellor under his jurisdiction as an equity judge while the prerogative cy pres is supposed to have originated from the power of the king to insure justice to all of his subjects.⁵ In time the prerogative power was delegated to the king's council and was finally taken over by the chancellor as the keeper of the king's conscience.⁶ Thus the chancellor acted in a dual capacity, one judicial and the other ministerial.⁷ Although it is not known exactly where the line was drawn between prerogative and judicial cy pres there was a tendency to increase the judicial power at the expense of the prerogative until the chancery had encompassed most

* This Comment was written by E. L. Fisch, Esq., LL.B. Columbia University, of the New York Bar. On this occasion the REVIEW has gladly deviated from its usual policy of emphasizing Maryland problems, because the Comment involves the law of a neighboring State, which has no legal journal of its own. For the history of the cy pres doctrine in Maryland see Howard, *Charitable Trusts in Maryland* (1937) 1 Md. L. Rev. 105; and the later statute, Md. Code Supp. (1947) Art. 16, Sec. 279 A.

¹ *Delaware Trust Co. v. Graham*, 61 A. (2d) 110 (Del. 1948).

² BOGERT, TRUSTS AND TRUSTEES (1935) Sec. 433.

³ 2 *Ibid.*, Sec. 431.

⁴ RESTATEMENT, TRUSTS, Sec. 399 (1935).

⁵ 2 PERRY, TRUSTS & TRUSTEES (7th ed. 1929), Sec. 718.

⁶ Note, *A Reevaluation of Cy Pres* (1939) 49 Yale L. J. 303, 304.

⁷ *Op. cit.* supra n. 5.

of the prerogative powers over charitable trusts.⁸ The Crown, however, as *parens patriae* retained the power to designate a charitable purpose by means of the sign manual where the object of the gift was illegal or void as contrary to public policy, and where there was a gift made to charity generally without the interposition of a trustee.⁹

An apparent confusion in the cases resulted from the fact that the chancellor administered both the prerogative and judicial cy pres and it was not always clear which branch of the doctrine he was applying or in what capacity he was acting.¹⁰ So great was the disorder that Lord Eldon declared:

“All I can say upon it is, I do not know, what doctrine could be laid down, that would not be met by some authority on this point; whether the proposition is, that the Crown is to dispose of it, or the Master by a scheme.”¹¹

It is not surprising, therefore, to find that the Delaware courts went astray on this point. There was a complete failure to recognize any distinction between judicial and prerogative cy pres, and it was assumed that the doctrine was one of prerogative only.

Delaware Interpretation of the Doctrine of Cy Pres

The first important statement dealing with cy pres in Delaware appears in *Doughten v. Vandever*,¹² a case decided in 1875. The court there held that certain bequests to charitable institutions were not void for uncertainty or misdescription and that a court of equity had power to give effect to charitable bequests by virtue of the common law. Although the doctrine of cy pres was not involved the chancellor gratuitously added the statement that the cy pres doctrine was not recognized in Delaware because it was a prerogative doctrine and therefore could not be applied by the equity courts which have only judicial powers. Obviously the court was unaware that the cy pres doctrine also existed judicially for it incorrectly observed that:

⁸ 3 SCOTT, TRUSTS (1939), Sec. 399.1.

⁹ *Moggridge v. Thackwell*, 7 Ves. Jr. 36, 32 Eng. Rep. 15 (1803), *affirmed*, 13 Ves. Jr. 416, 33 Eng. Rep. 350 (1807). See also 3 SCOTT, TRUSTS (1939), Sec. 399.1.

¹⁰ Note, 8 Corn. Law Quarterly 179, 180 (1923).

¹¹ *Moggridge v. Thackwell*, *supra* N. 9; 7 Ves. Jr. 36, 82, 32 Eng. Rep. 15, 31 (1803).

¹² *Doughten v. Vandever*, 5 Del. Ch. 51 (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."¹³

Unfortunately in *Murphy v. McBride*,¹⁴ where the Delaware court had before it for the first time a clear-cut case in which *cy pres* could be applied, the dictum of *Doughten v. Vandever*¹⁵ repudiating the doctrine of *cy pres*, was applied. The testator, devised the residue of his property to the Sisters of Charity of St. Peter's School to be used "for the support and maintenance of the orphan girls under its care and charge". The charter of the corporation had expired three years before the testator's death and an entirely new corporation was formed some four months after his death. The court, without reexamining the statements of the *Doughten* case regarding the nature of *cy pres*, refused to allow the new corporation to take the property on the specific ground that the doctrine of *cy pres* had never been adopted in Delaware.¹⁶

¹³ *Ibid*, 64. The court did distinguish between the judicial and prerogative jurisdiction over charities but took the position that the *cy pres* power was not judicial.

¹⁴ *Murphy v. McBride*, 14 Del. Ch. 457, 130 A. 283 (1925), affirming 14 Del. Ch. 242, 124 A. 798 (1924). But cf. *Blackstone v. Chandler*, 15 Del. Ch. 1, 130 A. 34 (1925) where a home for the aged to which a will directed payment of the principal of the invested proceeds of realty after the death of the life tenant and, after revival regularly effected a merger with another such home, the legacy passed to the latter as against the heirs of the testatrix. The court did not mention the *cy pres* doctrine but distinguished this case from *Murphy v. McBride* on the ground that in the latter case the corporate beneficiary had ceased to exist before the testator had died while in this case the corporation was in existence at the time that the will took effect. The property was held to vest in the resulting corporation by virtue of section 1974 of the Revised Code of Delaware (1915). The statute is now section 2092 Rev. Code of Del. (1935) and provides that the "title to any real estate, whether vested by deed or otherwise . . . vested in any such constituent corporations, should not revert or be in any way impaired . . ." by a merger, but shall become the property of the new corporation.

¹⁵ *Supra*, n. 13.

¹⁶ This statement was repeated in *U. S. v. 1,010.8 Acres, More or Less, Situate in Sussex County*, 56 F. Supp. 120, 144 (D. C. D. Del. 1944).

It was not until Chancellor Harrington in the recent case of *Delaware Trust Company v. Graham*¹⁷ reinvestigated the origins of the cy pres doctrine and came to the conclusion that "in principle there, therefore seems to be no good reason why judicial cy pres should not be applied in appropriate cases by this court" that the misconception of the earlier court was finally exposed and effectively demolished. *Delaware Trust Company v. Graham* involved a testamentary bequest to a trust company in trust, the income to be paid to a foreign missionary society of a designated Methodist church for the purpose of furthering the objects and purposes of that society. The Foreign Missionary Society, an unincorporated society, was in existence at the time of the death of the testator in 1926 and received the net income from the fund until 1940 when it ceased to exist as a result of the merger of various church organizations. The chancellor recognized that the cy pres rule as used in England was applicable to charitable uses in both judicial and ministerial cases and adopted the doctrine by awarding the income of the fund to a similar church society to be used for the purposes designated by the testator.

With this judicial clarification of the law it is hoped that the Delaware courts will continue to construe the doctrine liberally so that in the future there will be no "wrecks of original charities,—charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public."¹⁸

¹⁷ *Supra*, n. 1, 113.

¹⁸ *Allen v. Stevens*, 161 N. Y. 122, 140, 55 N. E. 568, 572 (1899).
