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CROSS-CURRENTS IN THE WISCONSIN CHARITY DOCTRINE

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The Anglo-Saxon history of the Charity Doctrine is a prominent example of the working out of legal results partly through the co-operation of the judicial and the legislative departments and partly by their opposition to each other. The very statute of Elizabeth was a remedial measure designed to furnish a quicker and more certain relief than the courts at that time had devised. Its very title was: "An Act to redress the mis-employment of certain lands, goods and stocks of money heretofore given to certain charitable uses."[1] Its plain object was to place in the hands of a commission a troublesome branch of the royal prerogative subject only to the revising power of the Lord Chancellor. In other words its purpose was to create a commission to deal with the situation, but to make the commission subordinate to the Lord Chancellor. This legislative intention, however, was thwarted by the Courts. The power given to the Lord Chancellor though secondary and appellate was in fact absolute and final and soon swallowed up its parent and became original and absolute. By judicial legislation, that which parliament had intended as the principal object of the statute was completely submerged and superseded. All that remained effective was the enumeration of the various charitable uses in the preamble of the statute which were intended merely as an enumeration.

Turning to America, we find a similar situation. In 1827-28, two decades before Wisconsin became a state, New York enacted the first real revision of its statutes. In this revision it sought to codify the law of trusts and abolished at the same time all uses and trusts "except as authorized and modified in this article."[2] There clearly was no intention to effect the law of charities. Due to the primeval conditions still prevailing in the state this subject was not in the minds of the legislature at all. The chancellor, therefore, was startled in 1844 when the contention was made that this statute had abolished charitable uses and pointed out clearly that the ends which the statute

[1] 43, *Elizabeth*, chapter 4.
[2] 1 *Revised Statutes of New York*—1829, page 727.

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sought to remedy were not incident to charitable trusts, that its provisions were inapplicable to the administration of charities, and that the purpose of the statute was merely to cut down those intricacies and refinements in the dealings of individuals with real estate which had perplexed conveyances and filled the courts with litigation.[3]

Five years later in 1849 Wisconsin adopted this statute[4] and, on ordinary principles, adopted with it the construction which had theretofore been placed upon it. It is true that this construction was not by the highest court. This, however, should not have affected the situation because the New York Court of Appeals in 1853 adopted the construction placed upon the statute in 1844.[5]

However, the question did not come before the Wisconsin Supreme Court until 1876 after the New York Appellate Court in the meantime had overruled its former decision and had held that the statute in fact had abolished all uses and trusts including charitable trusts.[6] The court, therefore, was confronted with a choice between the construction of the statute at the time it was adopted by Wisconsin and its subsequent construction. Luther S. Dixon, its eminent chief justice for fifteen years, had resigned his office in 1874 and contended ably and earnestly for the former construction. His successor, Chief Justice Ryan, unfortunately, had been retained in the case before he went to the bench, and hence was disqualified to sit. This threw the responsibility of making a choice on Lyon J. and Cole J., his only associates. The result was that Dixon's correct contention was overruled and that Wisconsin for the time being was committed to the New York heresy that charitable trusts had been abolished by the statute so far, at least, as real estate is concerned.[7]

At the same time another case involving a gift for the benefit of "the Roman Catholic orphans of the diocese of La Crosse" was disposed of by the court. The holding was that such a gift was invalid for indefiniteness, the court saying:[8] "How is it

[3] 1844, *Shotwell vs. Abbott*—2 Sandf. Ch. 46, 51 (N. Y.).

[4] *Revised Stats. of Wis.*, 1849. Chap. 57. The present section is 2071.

[5] 1853, *Williams vs. Williams*, 8 N. Y. (4 Seld.) 525.

[6] For discussion of process by which this result was arrived at see author's book *American Law of Charities*. Sects. 51 to 53 now being published by Bruce Publishing Company, Milwaukee. See also article by author in Vol. 1 *Wis. Law Review*, page 129, entitled "The Development of Charity Doctrine in Wis."

[7] 1876 *Ruth vs. Oberbrunner*, 40 Wis. 238.

[8] 1876 *Heiss vs. Murphy*, 40 Wis. 290, 291.

possible to ascertain and determine what orphans were intended to be benefitted? Are they whole orphans or half orphans? Are they orphans of parents both of whom were members of the Roman Catholic Church, or will an orphan of a Roman Catholic father, or of a Roman Catholic mother, come within the designated class? Are the objects of this charity the full orphans or half orphans who were living within the diocese at the death of the testator, or will such of either class as may thereafter come into the diocese be entitled to take as beneficiaries? Again, upon what principle or in what manner is the fund created by the sale of the real estate to be expended? Is the executor or trustee to apportion it equally among the orphans of the diocese, when it is ascertained who are entitled to take, or is he to dispense it in his discretion for the benefit of such orphans as he may select from time to time? These questions suggest the perplexities and difficulties which the court must encounter in establishing and carrying into effect this trust. It seems to us they are insuperable."

In strict accordance with this decision the court in 1888 declared a gift direct "to the poor of the city of Green Bay" void because the testator had not designated whether he intended paupers or poor persons who had not as yet become paupers.[9] In these cases the gift was in form direct to the beneficiaries instead of going to them through a trustee. In 1897, however, the court held a gift to the deacons of a designated church for the American Baptist Publication Society "to aid in the support of a Baptist colporteur and missionary in the State of Wisconsin" to be void for indefiniteness and said: "Whether the colporteur or missionary should labor throughout the entire state, and sell or give away the religious books and publications, or whether they should expend their efforts among the colored or white population, or both; whether with the destitute or wealthy; and what publications they should distribute—all are matters left in doubt and uncertainty." [10]

This was not, however, the only line of decisions in Wisconsin prior to 1900. In 1879 the case of *Dodge vs. Williams*[11] came before the court. Chief Justice Ryan was now able to partici-

[9] 1888 *Estate of Hoffen,* 70 Wis. 522, 36 N. W. 304.

[10] 1890 *Will of Fuller,* 75 Wis. 431, 437, 44 N. W. 304. See also 1897 *McHugh vs. McCole,* 97 Wis. 166, 72 N. W. 631.

[11] 46 Wis. 70, 95, 50 N. W. 1103, 1 N. W. 92.

pate in the decision and threw his great influence, penetrating judgment and prophetic foresight into the judicial scales. The consequence was an opinion written by Ryan and concurred in by the entire court which distinguished *Ruth vs. Oberbrunner* decided three years before by applying to the case the doctrine of equitable conversion and by fiat of law changing the property from real to personal and thus making the trust statute inapplicable to it. It was this decision and particularly the reasoning of the court which was instrumental in producing another line of decisions dealing with the question of the necessary definiteness. Hence, the court in 1886 upheld a gift to a church for the relief of the resident poor of a town as being sufficiently definite and certain.[12] In 1897 a donation for the support, maintenance, education and aid of such indigent orphan children under the age of fourteen years in Rock County as to the executors may appear to be most needy and deserving was sustained.[13] A similar decision was made the same year in a case arising in Watertown in which a gift to that city for the aged and poor was upheld.[14]

These two lines of decisions are as clearly inconsistent as are darkness and light. They were completely before the court in the great and leading case of *Harrington vs. Pier*.[15] The first line of decisions was in express terms overruled and Marshal J. laid down that "Indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purposes declared, the general limits being reasonably ascertainable or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses." [15] In accordance with this decision gifts for the benefit of such "indigent sick persons residing in the city of Milwaukee as my said trustees in their wise discretion shall deem worthy of such aid and assistance" [16] and for "the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ" [17] have been

[12] 1886 *Webster vs. Morris*, 66 Wis. 366, 384, 57 Am. Rep. 278, 28 N. W. 353.
[13] 1897 *Sawtelle vs. Witham*, 94 Wis. 412, 69 N. W. 72.
[14] 1897 *Beurhaus vs. Cole*, 94 Wis. 617, 630, 69 N. W. 986.
[15] 105 Wis. 485, 514, 76 Am. ST. Rep. 924, 50 L. A. R. 307, 82 N. W. 345.
[16] 1920 *In re Keenan*, Wis. 176 N. W. 857.
[17] 1900 *Hood vs. Dorer*, 107 Wis. 149, 82 N. W. 546.

upheld in cases subsequently decided. In 1904 the court approved expressly of *Harrington vs. Pier* and stated that "if any specific use, clearly charitable, is excluded from the field of expenditure limited by the will, then to a demonstration the donation is not to charity generally, and without limit and does not fail of the definiteness required for its support."[18] One source of exasperation at the decisions of the court thus appeared to have been eliminated.

Unfortunately this appearance is deceiving. On October 16, 1923, the court handed down its decision in the case of *Tharp vs. Smith.*[19] The testator in this case had given all his residuary estate to a designated and competent trustee who was willing to act for the benefit of the Seventh Day Adventist Church to be used principally for the publication and distribution of tracts and literature teaching its doctrine. The testator had not been a member of that church and there was no local branch of it in the very city of his residence. The court by Vinje C. J. (Eschweiler J. dissenting) held this gift to be void for indefiniteness stating that it was impossible to designate with any degree of reasonable certainty what Seventh Day Adventist Church, local or general, incorporated or unincorporated, was intended and that neither the trustee nor the court could with reasonable certainty determine who the proper trustees or the proper church organization might be.

It is interesting to note the cases which the court cites in support of its decision. It cites *Heiss vs. Murphy* and *Will of Fuller,* heretofore referred to in this article as having been overruled by *Harrington vs. Pier.* There can be no question but what these two overruled cases support the decision of the court. The court, however, is not satisfied to cite these two cases but cites *Harrington vs. Pier* as well, though that great case clearly and decisively takes exactly the opposite view. Just what induced the court to do this is beyond the author's knowledge. If it were intended to overrule *Pier vs. Harrington* it certainly would have been better to have done so in direct terms. Nothing certainly is gained by citing a case which negatives a proposition in affirmance of it.

Little need be added to what already has been said. The court in *Tharp vs. Smith* very clearly overlooks the patent fact that a certain amount of discretion is inherently vested in every trustee

[18] 1904 *Kronshage vs. Varrell,* 120 Wis. 161, 97 N. W. 928.
[19] 195 N. W. 33.—Wis.—.

and even confuses this discretion with the *Cy Pres* doctrine which is declared not to be in force in this state.[20] It gathers to its breast an old error which Marshall had exposed clearly in his opinions and revitalizes it. It is to be hoped that the legislature will soon take the necessary action to correct the error thus propounded by the court.

[20] For a detailed discussion of the *Cy Pres* doctrine and of the discretion vested in the trustee the reader is referred to the author's *American Law of Charity* now in course of publication.