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WHY CHARITABLE TRUSTS FAIL

William L. Crow

AFTER deploring in vigorous language the occasional strangling of the high purposes of individuals who wish to devote a part or all of their property to the public good, which strangling leads to the diversion of these accumulations to private enjoyment, contrary to the "will of him whose last days are solaced with the thought that his public benefactions would build an enduring monument to his memory in the hearts of a grateful people," Marshall, J., in *Harrington* v. *Pier*[1] pledged anew judicial adherence to the long established rule "that gifts to charitable uses should be highly favored and construed by the most liberal rules that the nature of each case, as presented, would admit of, rather than the gift should fail, and the intent of the donor fail of accomplishment." He was applying the ancient maxim, *Ut res magis valeat quam pereat.*

Charitable trusts are, indeed, highly favored by the courts. But in spite of this fundamental attitude of favoritism, an examination of decided cases in various jurisdictions indicates that judicial rules come in more than one brand, and that the liberality of good-intentioned philanthropists may be thwarted even in a court of professed generous tendencies, owing to the nature of each case. The present discussion is concerned for the most part with trusts that have failed; but quite a substantial amount of it would become obsolete were the problem approached with the simplicity, and enlightenment too, which accompanied a recent decision of the Pennsylvania Supreme Court.[2] But, the author feels, no attempt is made here to fight for the end of servility to irrational historical precedents.

Why do charitable trusts fail, as they too frequently do? The courts which have been instrumental in producing the most casualties have found four primary reasons: (1) uncertainty as to the expression of purpose; (2) uncertainty as to subject matter; (3) uncertainty as to beneficiaries; and (4) failure, under certain conditions, to express a general charitable intention.

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[1] 105 Wis. 485, 82 N.W. 345 (1900).

[2] *In re* Jordan's Estate (Pa. 1938) 197 Atl. 150. A testatrix gave a certain part of her estate to "charity," naming no trustee and specifying no charities. By applying without equivocation the doctrine that charities are the favorite of the law, the trust was upheld. This, however, is not the first decision of its kind in the United States. Minot v. Baker, 147 Mass. 348, 17 N.E. 839 (1888). A testator left property to a trustee "to be disposed of by him for such charitable purposes as he shall think proper." The trustee died before acting. The court by Holmes, J., held that the gift was unconditional and should be applied to charitable purposes under the direction of the court.

(1) Uncertainty as to Purpose

The decision of the Supreme Court of Pennsylvania, to which reference has just been made, while commending itself as a reasonable application of a high resolve to save charitable trusts, does not represent the general rule in the United States. The expressed purpose is too general. Even the justice in the Wisconsin decision who argued so brilliantly in the cause of saving charitable trusts found himself helpless unless there was a particularization of the charitable purpose.[3]

How far must this particularization go? In a recent South Carolina decision[4] the court had to deal with a situation where property was given by will in trust to executors to be paid "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." The court found that uncertainty extended not only to the beneficiaries and to the discretionary power given to the executors, but to the ultimate purpose of the gift. "By what means," inquired the court, "is the promotion of the cause to be effectuated?" Presumably if the testator had said, for example, that the prevention of cruelty was to be promoted by educational methods, the court, on this point, would have been satisfied.

(2) Uncertainty as to Subject Matter

While the decided cases are not very numerous, it is the general rule that there cannot be a valid charitable trust without certainty of subject matter.[5] *Minot* v. *Parker*[6] held void a charitable trust on these facts. A testator bequeathed the residue of his estate to his executors for charitable purposes, authorizing them at the same time to give to

[3] Harrington v. Pier, *supra* note 1. "Given a trust, with or without a trustee, a particular purpose—as education, or relief of the poor, *as distinguished from a bequest to charity generally*—and a class great or small, and without regard to location, necessarily . . . and we have a good trust for charitable purposes." (Italics supplied.) The reason had previously been given in Webster v. Morris, 66 Wis. 366, 28 N.W. 353 (1886). "The courts in this state have no . . . prerogative jurisdiction, but 'only a strictly judicial power . . .' Before that power can be exercised, however, the scheme of charity must be sufficiently indicated, and its object made sufficiently certain, to enable the court to enforce the execution of the trust according to such scheme, and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money for charitable purposes *at large* is too indefinite and uncertain to be carried into execution . . ."

Following a similar principle, the Supreme Court of Georgia in Bramblett v. Trust Co. (Ga. 1936) 185 S.E. 72, found the purpose too uncertain in a gift by will of property to trustees to erect, maintain and equip a "home for gentlewomen," there being no description of the nature of the proposed home. "Is it," asked the court, "for the aged, impotent, diseased, or poor? Or for educational or religious purposes?"

[4] Woodcock v. Trust Co., 214 N.C. 224, 199 S.E. 20 (1938).

[5] *Contra,* Dye v. Beaver Creek Church, 48 S.C. 444, 26 S.E. 717 (1897).

[6] 189 Mass. 176, 75 N.E. 149 (1905).

any of the testator's relatives, whom without reason he might have overlooked, such sum as might seem to the testator or his executors under all the circumstances fitting, suitable, and proper. "While the general intention of the testator that the residue of the estate should be held by the executors in trust is fully apparent," said the court, "the unfortunate terms he employed to express this permits the fund . . . to be wholly applied for objects which are not charitable in law, or for purposes so uncertain as not to be capable of identification, or for the benefit of relatives not named, and who, by reason of the descriptive limitation, imposed by him, cannot otherwise be ascertained. The whole trust, therefore, becomes too indefinite for the court to administer, and a resulting trust must be decreed in favor of the next of kin . . ." In *Wilce* v. *Van Andren*[7] a testator provided in his will that after the death of his widow and daughter to whom were given life annuities, the trustees could give such part of the remaining estate as they thought best and proper to any one or more of the testator's brothers or sisters who in the judgment of the trustees might stand in need of it, with whatever thereafter remained to be devoted by the trustees, in their discretion, to certain charities. "There are two considerations," the court pointed out, "which render the gift to charity void for uncertainty. In the first place, it is uncertain what, in any, amount will remain upon the death of the annuitants; and, secondly, the trustees have a discretion as to whether they will give what remains, if any, after the death of the annuitants to a needy brother or sister or donate it to charity."

(3) UNCERTAINTY AS TO BENEFICIARIES

There is no uniformity in the several jurisdictions as to the effect of uncertainty of beneficiaries in the will or instrument creating a charitable trust. The courts of some states hold that it is sufficient if the general class of beneficiaries is designated, leaving to the trustees the duty of selecting from such class the particular individuals or corporations to be benefited; but there are other courts which hold quite to the contrary. The trust fails when a general class has been indicated, although the power of selection from that class has been specifically given to a trustee.

As a matter of fact, charitable trusts have been held void for uncertainty as to beneficiaries when (1) the class is large and widely distributed and no power of selection by the trustee has been given; (2) when the class is large and uncertain, although the trustee has been given the power of selection; and (3) when no class is indicated, the decision as to the application of the funds resting entirely in the

[7] 248 Ill. 358, 94 N.E. 42 (1911).

discretion of the trustee. In *Moran* v. *Moran*[8] a will provided for property to be divided by trustees among the Sisters of Charity. The court took judicial notice of the fact that Sisters of Charity exist throughout Iowa and the United States. Holding the trust void for uncertainty as to beneficiaries, the court used this language: "If the bequest should be sustained, how would the trustees execute it? No one would say that it should be divided among all of them, for such, in reason, could not have been the intention. There is no limitation as to locality, state or nation. . . . We infer that appellees think the trustees may select to whom the bequest shall be given. The will does not so provide." The court in *People* v. *Powers*[9] had to deal with a devise to a trustee, with power to dispose of property "among charitable and benevolent institutions or corporations in the city of Rochester, as he shall choose, and in such sums and proportions as he shall deem proper." The gift was held void for uncertainty. The court, upon reflection, discovered a rather large number of existing charities in the city of Rochester, and then concluded that the inclusion of all charitable institutions within the city was probably never contemplated or intended by the testatrix. The court's holding was based upon the failure of the testatrix to indicate a class of beneficiaries to whom distribution would be practicable or that could be identified with reasonable certainty.

In *Tilden* v. *Green*[10] there was a devise to trustees to apply the property to "such charitable, educational, and scientific purposes as in the judgment of my executors will render . . . my property most widely and substantially beneficial to mankind." In holding this trust void for indefiniteness as to beneficiaries, the court said: "As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the will." The trustees in *Johnson* v. *Johnson*[11] were given discretion in the selection of beneficiaries, although the testator indicated a preference if the way be clear for a grand female college. Said the court: "Under the broad discretion and power, the trustees might, instead of a female school, establish a public library or a lecture room, or a church or woman's home, or any other charity; and if either of these should be selected by these trustees as the object of this devise, certainly it could not be said they had exceeded their powers and discretion, and, if either should be established, it would not be because of direction in the will of the testator, but from choice and preference on the part of the trustees." In *Jones* v.

[8] 104 Iowa 216, 73 N.W. 617 (1897).
[9] 147 N.Y. 104, 41 N.E. 432 (1895).
[10] 130 N.Y. 29, 28 N.E. 880 (1891).
[11] 92 Tenn. 559, 23 S.W. 114 (1893).

Patterson[12] a will placed property in the hands of an individual "to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my dear Savior and for the salvation of souls." The court, holding the provision void, used this language: "The entire matter is . . . left to the wisdom, or it may be, the whim or caprice of the trustee. Strong and far-reaching as is the arm of equity in upholding such a charity, the one here sought to be created is beyond its grasp."

In the recent case of *Hedin* v. *Westdala Lutheran Church*[13] the Supreme Court of Idaho was called upon the first time to make a decision concerning a provision in a will in which the beneficiaries were not made certain, the trustee being given "full power and absolute authority to distribute such moneys as may come into his hands as such trustee for any and all such charitable or religious purposes as my said trustee may elect from time to time . . ." With one justice dissenting, the trust was held void. The court pointed out that the English doctrine was not in existence in Idaho, that there was no king in their state and no court with ministerial power.

The better rule is that the trust should not fail when only a general class of beneficiaries has been indicated, and although no method of selection from the class has been designated by the settlor. The reason for the opposite holding is historical. While we inherited the common law of England so far as it was adapted to our new environment and to our form of government, the question arose a short time after the Revolution as to whether the English system of charities had its origin in Statute 43, Elizabeth, and whether such system was adopted in or adapted to this country. Those courts which held that the common law system was dependent upon the Statute of Elizabeth and that the Statute was not adapted to this country concluded that charitable bequests, therefore, must have all the elements of certainty of a private trust, which would include, of course, certainty as to beneficiaries.[14]

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[12] 271 Mo. 1, 195 S.W. 1004 (1917).

[13] (Idaho 1938) 81 P. (2d) 741.

[14] "There is, perhaps, no subject concerning which there is greater diversity of decisions in the different states than the certainty and definiteness required in the beneficiaries and objects of charity. The radical differences in the views of the courts have been produced, to some extent, by statutory provisions, and largely by the question whether the Statute of 43 Elizabeth has been recognized or adopted as the law of the state. In some states the statute is not recognized as a part of the law, and in others all trusts, except those specifically enumerated in statutes, have been abolished, and in those states objects and beneficiaries must be described with great certainty. In states where the Statute of Elizabeth is in force as a part of the law, the disposition has been to follow English rules to a great extent and to permit a great degree of uncertainty as to beneficiaries. The effort of such courts is to sustain a gift to charity if it can be done, and they will not declare a trust void if there is a power of appointment somewhere, by which the object may be rendered certain." Welch v. Caldwell, 226 Ill. 488, 80 N.E. 1014 (1907).

(4) Failure to Express a General Charitable Intention

If the performance of a trust is impracticable, impossible or illegal, the particular gift fails. Thereupon the *cy pres*[15] doctrine is applied by the courts[16] in accordance with the principle that charitable gifts are especially favored in the law. However, this doctrine has no application when the donor has not expressed, or the court cannot find, a general charitable intent. If the *cy pres* doctrine cannot be applied, the trust fails and the property passes to the heirs at law.

What is an impractical or impossible gift turns out to be, of course, a matter of fact, to be proved like any other fact before a court in equity cases. However, certain important decisions dealing with impracticality or impossibility are illuminating even in the field of fact finding. In the case of *Teele* v. *Bishop*,[17] decided by the Supreme Judicial Court of Massachusetts, the testatrix had made a bequest to trustees to purchase a lot and build a chapel in Carndrine, Ireland, "to be used for public worship." It was found to be impracticable to carry out the provisions of the will because the population of Carndrine was small and diminishing. The people were too poor to support a chapel; and the bishop refused to assist in its maintenance. The same court decided a few years later the case of *Bowden* v. *Brown*.[18] In this instance the testatrix gave her residuary estate to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. The court came to the conclusion that the particular purpose became impracticable or impossible, giving two reasons therefor: (1) The city of Marblehead refused to erect such a building, and (2) the property available for the purpose, amounting to about $8,000.00, was insufficient. "It is manifest," said the court, "that the property . . . is insufficient for the existence and maintenance of such a building as the testatrix contemplated."

In *Gilman* v. *Burnett*,[19] decided by the Supreme Judicial Court of Maine, the testatrix had provided that her farm (appraised at $2,360.00) be held in trust as a home for one or more unmarried women who have been employed in the straw industry of Massachusetts, where they might have a place of refuge and comfort. It was held that the trust was so impracticable that it could not be satisfactorily executed, the court giving the following reasons: (1) The real estate was grossly insufficient for the contemplated purpose; and (2) while the testatrix had in her will suggested that somebody else might be

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[15] From the Norman French, "*Cy pres comme possible*," *meaning* "as near as possible."
[16] Some courts do not recognize this doctrine and therefore do not apply it.
[17] 168 Mass. 341, 47 N.E. 422 (1897).
[18] 200 Mass. 269, 86 N.E. 351 (1908).
[19] 116 Maine 382, 102 Atl. 108 (1917).

interested enough to augment her bequest, there had in fact been no additional endowment. Even if the property could be sold, the accumulations would be so meagre as to postpone the enjoyment of the gift so far in the future that the purpose of the testatrix would be thwarted.

On the subject of impracticability or impossibility, with the resulting failure of the particular gift, *Restatement of the Law of Trusts*[20] analyzes three possible contingencies which are pertinent to the present discussion, *viz.*, a specific provision in the trust that in case of the failure of its purpose the trust should terminate; an amount insufficient for the intended purpose; and a purpose which has already been accomplished:

> "b. *Specific provisions in the terms of the trust.* If property is given in trust to be applied to a particular charitable purpose, and it is provided by the terms of the trust that if the purpose should fail the trust should terminate, the property will not be applied *cy pres* on the failure of the particular purpose, since the terms of the trust negative the existence of a general charitable intention. In such a case there will be a resulting trust for the settlor or his estate, unless there is a valid gift over . . .
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> g. *Amount insufficient for the intended purpose.* If property is given in trust for a particular charitable purpose and the amount given is so small that it is impossible to accomplish the purpose with the amount so given, the intended trust fails if, but only if, the settlor manifested an intention to restrict his gift to the particular purpose which he specified . . .
>
> If the amount required for the particular purpose does not greatly exceed the amount given, the court may direct an accumulation of the income until the amount becomes sufficient. Ordinarily, however, the court will not direct such an accumulation in the absence of a direction in the terms of the trust.
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> h. *Particular purpose already accomplished* . . . When a testator bequeaths property in trust to establish a hospital in a town, and a similar hospital has been established in the town and no useful purpose would be accomplished by having two hospitals, the court will direct the application of the property *cy pres* if the testator had a more general intention, as for example, by making other provisions for the sick in the town, or by establishing a hospital elsewhere. If, however, the testator manifested an intention to restrict his gift to the particular purpose of establishing a hospital in the town, and the purposes which would thereby be accomplished are fully accomplished by the establishment of the other hospital, the trust fails and a resulting trust will arise for the testator's estate."

In case the trust is found to be impracticable or impossible of performance, how and when does the *cy pres* doctrine apply?

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[20] § 399, p. 1208.

The *cy pres* doctrine, as has already been pointed out, is one of approximation. It is a doctrine of liberal construction in the application of charitable trusts. An excellent definition of the doctrine is found in *Restatement of the Law of Trusts*:[21]

> "If the 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."[22]

It will be noted from this definition that the thing which saves a trust from failure in case of impracticality, impossibility, or illegality is the manifestation on the part of the settlor of a more general intention to devote the property to charitable purposes. The expression of this general intent is the guiding principle. Professor Carl Zollmann[23] put the matter succinctly in the following language: "There is nothing mythical connected with the American doctrine . . . They [the courts] are merely construing the instrument before them in a liberal manner, with a view of promoting and accomplishing the donor's charitable intent." He then proceeds to state that this is only following the rule which says that the testator's intention shall prevail and nothing else. After quoting an Indiana court[24] to the effect that the *cy pres* doctrine of liberal construction will cause courts to be keen to discover whether the main purpose is charity, and, if it is, to treat the testator's machinery of administration, not as a condition precedent to vesting, but as suggestions regarding management, he continues: "The testator's intention is the one controlling factor. It is the trail which courts must follow in all its turns and windings, through swamps and over hills, provided only that it has been sufficiently blazed and does not trespass on forbidden territory."[25]

The necessity of a general purpose on the part of the donor is clearly stated in *Brown* v. *Condit*[26]: "A court of equity will carry out the expressed general charitable purpose of the donor by the use of means other than those specified, when such means have become im-

[21] § 399, p. 1208.

[22] Some states have adopted this doctrine by legislation after the courts have refused to recognize it judicially, such refusal being on the ground that it is a sovereign or prerogative power. Wisconsin, for example, has a statutory enactment worded considerably like he definition in RESTATEMENT, WIS. STATS. (1939) § 231.11 (7)d. For a similar Minnesota statute, see *In re* Peterson's Estate (Minn. 1938) 277 N.W. 529.

[23] ZOLLMANN, CHARITIES, c. III, § 124.

[24] Reasoner v. Herman, 191 Ind. 642, 134 N.E. 276, 280 (1922).

[25] ZOLLMANN, CHARITIES, § 140.

[26] 70 N.J. Eq. 440, 61 Atl. 1055, 1057 (1905).

practicable or impossible of use. But in such cases there is a general or comprehensive charitable purpose set forth in the will or inferable from its provisions; beyond which the court will not go in its substitutions."

Discussing the question as to whether a testator has expressed a general or only a particular intent, George Gleanson Bogert in *The Law of Trusts and Trustees*[27] says:

> "Thus, if a man desires to leave a fund for the support of a particular school, he may do so, the courts say, with either one of two general attitudes of mind. He may have in his thought the extension of education and the dissemination of knowledge as his primary objects, and then may cast about for a means of accomplishing this general educational charitable intent and select a school as an instrument. Here the choice of a school is secondary and incidental. It is not a vital choice with the settlor. But, on the other hand, the settlor may be fundamentally interested in a certain school, and leave money in trust to advance and support that school. Here it is possible that his desire may be merely to help this particular educational institution, and that he has no interest in education in general or in any other scheme for extending educational advantages. In other words, his mind may be set on founding or continuing a particular bit of educational machinery, and he may have the attitude that, if this institution cannot be employed, he does not desire to help any other school or otherwise to forward education.
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> If the intent has been narrow and exclusive, the courts have felt that they would not be justified in altering the trust or changing the application of the fund. They have believed themselves compelled to return the property to the settlor or his successors under a resulting trust, when the express trust for charity has failed for any reason."

When is an intent general? Professor Bogert mentions three situations in which the courts find a general purpose or intent: (1) when the settlor has specifically provided that his intent is general; (2) when he has given two or more alternative methods of accomplishing his charitable intent; and (3) when the bulk of the testator's fortune is given to charities of various sorts.[28]

It happens occasionally that a testator, in making a specific gift to charity, will in more or less appropriate words, express a general intent. In the case of *Re Orr*[29] a testatrix, giving her entire estate in trust, stated one purpose as follows: "Ten thousand dollars as a fund to be used in lending to deserving people . . . to buy small homes or farms—this money can be lent at 6 per cent or whatever is lawful on

[27] p. 1210.
[28] *Ibid.*, p. 1314.
[29] 40 Ont. L. Rep. 567 (1917).

good security. The profits accruing can be utilized . . . in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked . . . by Mary Baker Eddy." The bequest was held void for uncertainty, but the *cy pres* doctrine was applied because of one sentence in the will which the court found was expressive of a general charitable purpose: "The whole of my estate must be used for God only." In *Grimke* v. *Malone*[30] a general purpose was indicated by this phrasing in a will: "I have long entertained a desire of assisting colored people of my country who have been oppressed and downtrodden in the past, and are now unjustly treated, kept back and hindered in the race of life because of a cruel prejudice against them." The residue of the estate was given to a certain home for these people. The particular gift having failed, the court then considered the question as to whether the *cy pres* doctrine had any application. "This depends," said the court, "upon whether the language of the will indicates a general charitable intent, to be carried out for the benefit of young persons of the colored race, . . . or whether the object of the testatrix was limited to a specific charity . . . We think the will contains very plain indications of a general charitable intent in reference to colored people."

While there are numerous decided cases dealing with provisions in wills bequeathing property in trust for charitable purposes where no general purpose or intent of the testator has been expressed, two or three here will suffice for purposes of illustration. In *Re University of London Medical Sciences Inst. Fund*[31] a testator bequeathed a very substantial sum to the Institute of Medical Sciences Fund, University of London. The scheme was abandoned; and the court held the *cy pres* doctrine inapplicable in disregard of the suggestion of the attorney general to the contrary. "There is not one word in the will," remarked Joyce, J., "upon which to found the theory of the testator having any general or other purpose of charity save the particular scheme of the projected institute." A somewhat similar case was decided in Maine.[32] The court quoted from Perry on *Trusts*,[33] where the author pointed out that if it appears from the whole instrument the gift was for a particular purpose, and there was no general charitable intention, there can be no application of the *cy pres* doctrine. By way of illustration he mentions the case of a testator who had in mind the building of a church. If the specific objective is incapable of execution the gift goes to the next of kin.

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30 206 Mass. 49, 91 N.E. 899 (1910).
31 2 Ch. (Eng.) 1. (1909).
32 Brooks v. Belfast, 90 Me. 318, 38 Atl. 222 (1897).
33 2 PERRY, TRUSTS § 726.

In the case of *Quimby* v. *Quimby*[34] the court lays down a rule for the determination of a general intention. The testator had made a gift in trust to the Chicago Waifs' Mission and Training School. This particular institution being no longer in existence, the court was called upon to make inquiry as to the application of the *cy pres* doctrine. In denying the application of the doctrine under the circumstances, and in drafting a test to be applied, the court used the following language:

> "From an inspection of the clause of the will under consideration it is seen that the testatrix used no special words indicating an intention to benefit needy boys and girls generally; so that the critical question arises, can a general charitable intent to benefit a particular class of dependents be deduced from the sole fact that the intent of the testator becomes impossible . . . The test seems to be this, that if the bequest is to a cause or for a purpose or to aid and further a plan or scheme of public benefit, there is evidence of a general charitable intent . . . Applying this test to the clause of the will before us, it will been seen at once that the gift is not for any cause, plan or scheme of charity, but to a specific and particular organization. We therefore must hold that the better reasoning favors the conclusion that no general charitable intent was indicated by the testatrix in her will . . ."
>
> "We have reached the foregoing conclusion not forgetting that gifts to charity are especially favored in law, and that courts should be 'keen-sighted' to discover an intention to make a gift to charity."

Can a general intent be inferred from a particular intent? In the case of *Teele* v. *Brown, supra,* where the trust was to purchase a lot and build a chapel, the court was of the opinion that the *cy pres* doctrine was not applicable. The leading purpose of the testatrix was the purchase of a lot and the building of a chapel. To direct the bequest to other purposes and other suggested schemes would be at variance with those designated by the testatrix, and not in furtherance of any general intent on her part. A general intent to advance religion, in the mind of the court, could not be inferred from the particular purpose of building a chapel. It will be recalled that the erection of a building for the sick and poor was the purpose of *Bowden* v. *Brown.* When that trust became impracticable or impossible, the *cy pres* doctrine could not be invoked, said the court, "the reason being that there was no intent to make general provision for the sick and poor of the town unless they could be provided with a home in a building to be erected for their use . . . General provision for the sick and poor would seem to include a charity much broader than anything in her contemplation." In *Gilman* v. *Burnett, supra,* where a trust providing a home for certain

[34] 175 Ill. App. 367 (1912).

unmarried women was held impracticable, the court used this emphatic language in a denial of the application of the *cy pres* doctrine: "We search in vain in the will . . . for evidence of any general charitable intent on the part of the testatrix . . . Here the emphasis is laid not on the general relief of the beneficiaries named, but on one specific object to be carried out at one specific place . . . There is nothing to indicate that the testatrix intended to make any provision for the recipients of her bounty unless they could be provided for in the old home . . . Her charitable purpose was linked with the particular farm which constituted the subject of her bounty."

Conclusion

The foregoing discussion makes clear that there is no uniformity of decision in the various states of the United States as to the amount of certainty necessary in the framing of a charitable trust. This country has both its Pennsylvanias and its Idahos.

In all states those who purpose public benefactions must, of course, in order to be sure that their wishes will be carried out, either know the law or seek skilled advice; but the price of ignorance is much higher in some jurisdictions than in others. While this author, like Justice Marshall of Wisconsin, is inclined to engage in lamentation when a charitable trust fails, he has no utopian rules of a comprehensive nature to recommend at this particular time.[35] He is well aware, as was said by an early chief justice of Pennsylvania, that the courts can no more make wills for the dead than contracts for the living; but he has also in mind a statement by Lord Hardwicke that there is no authority to construe a bequest void if it can possibly be made good in law. Therefore, in the present state of the law he would rather undertake the more profitable task of re-emphasizing for lawyers—lawyers whose general practice now and then requires the drawing of instruments with provisions for charity—the fact that there are precautions that must be taken and rules that must be obeyed. The main purpose here might be summed up as two-fold: In some cases, the clearing of a highway, at least in part, over which the donor may travel to a destination he has in mind; and, in other cases, to call to the attention of the donor that he must re-define and clarify his objectives.

In the drafting of a will or other instrument which provides for a charitable trust, it is, therefore, necessary to anticipate numerous

[35] The legislature of Wisconsin has plugged some gaps within the last half dozen years by not only enacting the *cy pres* doctrine, but by providing that indefiniteness shall not result in a failure of the trust when the trustee is given power by the instrument to designate the purpose, or because the donor has neglected to indicate the method by which the purpose is to be accomplished. WIS. STATS. (1939) § 231.11.

situations. In a kind of recapitulation, the questions which follow are important, but, of course, not exhaustive. Is the purpose of the donor particularized? Does he have a general charitable intent, or is the charity limited to a particular object? If the objective is limited, is this fact clearly declared? If the intent is general, is this intent expressed in the instrument? Is there a clear separation of charitable gifts from private gifts? Is the gift considered carefully for any indication of impracticability or impossibility? Would the main purpose of the gift be thwarted by a substantial diminution of the funds? Are the beneficiaries capable of being identified according to the state ruling where the donor resides? If the erection of a building is contemplated, is the building to be erected or purchased immediately, or are the funds to accumulate interest for a specified maximum time? Does the donor contemplate the augmentation of his gift from other sources? If there is no augmentation, what are his wishes? Is the gift to be restricted to a certain locality? Does the donor realize the possibility that his gift might be declared void by the courts, resulting (in the absence of other provision) in the enjoyment of the property by the next of kin? Has the donor provided a reverter in case of a diversion of the trust property by the trustee?

It is hoped that with some questions like these in mind the donor or his attorney might bring closer to realization the maxim quoted in the beginning, *Ut res magis valeat quam pereat.*