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JUDGE ROUJET D. MARSHALL AND THE WISCONSIN CHARITY DOCTRINE*

Among the great jurists of the country Chief Justice Ryan of the Wisconsin Supreme court, despite the comparatively short time which was given to him on the bench, must be accorded a prominent place. Many of his opinions are granite rocks against which the waves of time will wash forevermore. They are not merely trails which have been blazed in a wilderness but are modern cement highways on which the traffic of the state will move many generations hence, just as highways built by the old Romans are still in use in Italy. It was the words of Ryan that charity "in thought, speech, and deed, challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory," uttered in a case decided in 1879 that sank deep into the soul of Marshall when he was in 1900 assigned the duty of writing the opinion of the court in Harrington v. Pier,

and brought about a resolve to vitalize them in the jurisprudence of the state. It is the purpose of this chapter to show how well Marshall has succeeded in this resolve and incidentally to point out some of the dangers which are discernible ahead. Marshall personally stated to the writer shortly before his death that he considered his work in the restoration of the English charity doctrine in Wisconsin as his monument and that he believed that he was more nearly inspired in writing his opinions on charity matters than in anything else that he had ever done or written. In his memoirs he has this to say: "Of all the work I did as a member of the Supreme Court none was of equal public benefit and none was accomplished against so many and such strenuous obstacles. Had I

*This article by Professor Carl Zollmann of Marquette University Law School was written as a chapter of Marshall's forthcoming biography which is now in press. It is now published at this time by the courtesy of Messrs. McLeod and Wiley, executors of Judge Marshall's will, and Gilson G. Glasier, editor of his biography.

1 Dodge v. Williams, 46 Wis. 70, 91, 1 N.W. 92.
3 For a review of the development of this doctrine see an article by the author entitled The Development of the Charity Doctrine in Wisconsin, 1 Wisconsin Law Review 129. See also his "American Law of Charities," pp. 40-43.
not been fully convinced of the error the court had fallen into before Harrington v. Pier, I should not have ventured to contend so long and vigorously against Chief Justice Cassoday, who was just as confident of being in the right of the matter as I was. Long years after I shall have been forgotten the success of my work will bear rich fruit for the public good."

It is regrettable that the Supreme Court in a decision handed down on December 11, 1923, one and one half years after Marshall's death, has already cast a shadow over this splendid monument which Marshall had erected to himself. Due perhaps to the hurry in which cases must be decided in these days in order to prevent the calendar from becoming clogged, due perhaps in larger measure to the brief for the trustee, which, though it cited from the previous cases, did not set out their significance fully, the court over the dissent of Eschweiler J. decided that a bequest to a designated trustee 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, is void for indefiniteness, because the particular branch of the Seventh Day Adventist Church intended to be benefited was not sufficiently designated.4 In support of its decision the court cited Will of Fuller,5 which Marshall had explicitly overruled in 1900 in Harrington v. Pier.6 In the same breath the court in support of the same proposition cites Harrington v. Pier, the very case in which Marshall had so unambiguously overruled Will of Fuller. The apparent approval by the court of both of these two contradictory decisions cannot but have the effect of throwing the whole subject into the domain of unsolvable doubt and thus to breed litigation. In view of this most unfortunate situation thus created, a full exposition of the history of the charity doctrine in Wisconsin would seem to be in order.

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4 Tharp v. Seventh Day Adventist Church, 182 Wis. 107, 195 N.W. 331. See an article by the writer entitled Cross Currents in the Wisconsin Charity Doctrine in Vol. 8 Marquette Law Review, 168-173.

5 75 Wis. 431, 44 N.W. 304.

6 105 Wis. 510, 82 N.W. 345, 50 L.R.A. 307, 76 Am. St. Rep. 924. In referring to the Fuller case Marshall said that the task of harmonizing it with the principles announced by the other decisions of the court was one too great to hope for its successful accomplishment. In the thirteenth headnote, which Marshall wrote himself, he says that the cases are reviewed, distinguished and harmonized except Fuller's Will "which is disapproved." Winslow J., in the same year reverses a judgment of the trial court which was founded on Will of Fuller and says: "Were the rule of that case to be followed, it is not easy to see how the conclusion reached by the trial court could be avoided. In the recent case of Harrington v. Pier, 105 Wis. 485, however, the doctrine of the Fuller case was substantially overruled." Hood v. Doer, 107 Wis. 149, 152.
While human kindness has ever been exhibited wherever human beings have formed even the rudest form of society, a legally established system of charitable relief is distinctly absent from the early legal systems of the Greeks, Romans and other heathen nations. No trace of any such system is to be found in the code of Hammurabi or in the twelve tables of the early Roman law. The Spartan code of Lycurgus which sacrificed those children deemed to be too weak for useful citizenship was based on the very antithesis of charity. The only early system of law which distinctly recognized charity was the Jewish. Moses commanded the children of Israel when harvesting the crops in their fields not to make clean riddance of the fields nor to gather the gleanings of their harvest but to leave them to the poor and to the stranger. This was true charity in every sense. "Although it was not known which individual would get the sheaf, yet it was known that a class of poor gleaners would come after the harvesters had passed." Who the individuals were to be was of course not known and could not be known until after they had appeared and had been benefited. A beautiful application of this law is seen in the story of Ruth as related in the Old Testament book of that name. A better illustration of the indefiniteness of beneficiaries which is today the very badge of charitable trusts and the very bane of private trusts could perhaps not be imagined.

It was not, however, the Jews who directly bestowed their system of charity on the jurisprudence of other races. They have been a persecuted people from their beginning in Egypt to the present time and therefore on the one side have lacked the necessary influence and on the other were fully occupied most of the time in relieving their own mutual wants. It has therefore remained for the Christian religion to accomplish this task. It was Christ who taught the great command to love thy neighbor as thyself. It was Paul who has sung the praises of charity in a magnificent anthem which will never die or be forgotten. It was the early Christians who practiced charity as it had never been practiced before and who thus were able to survive the ten gruesome persecutions which broke upon them just as the Jews have survived even more numerous persecutions. When Constantine ascended the Roman throne and Christianity was established as the state religion this law of charity was engrafted on the Roman jurisprudence and later found its way into the code of Justinian. Charity, therefore, is one of the earliest and finest flowers of Christianity and occupied the Roman rulers during the later centuries of the Empire. From the Roman law it has spread

7 Leviticus 23: 22; see also Deuteronomy 24:19, 20, 21.
to every people which has adopted that system of jurisprudence and is
today universally recognized as an essential part of every civilized code.

Among the systems of law which were enriched by the Roman law
was the common law. Ecclesiastics during the middle ages had a
strong influence not only on religion but also on law. The English
chancellor in the beginning was an ecclesiastic. These ecclesiastics were
bred in the Roman law. When the crude inhabitants of England were
christianized they were christianized by ecclesiastics whose legal study
had concerned itself with the code of Justinian. It has therefore been
correctly stated that the law of charity was, at an indefinite but early
period of English judicial history, engrafted upon the common law, and
derived its general maxims from the civil law, as modified in the later
period of the Roman Empire by the ecclesiastical elements introduced
with Christianity. It has been said that charitable trusts “were en-
grafted into the Roman law concurrently with the growth of Chris-
tianity; and with the same benign influence, they became a part of the
common law of England. They were recognized and in force before
the Norman conquest.”

When during the reign of Henry VIII the Reformation broke upon
England the occasion was utilized by this able but unscrupulous mon-
arch to draw into the royal coffers most of the rich holdings of the
church. This action automatically released vast hordes of improvident
poor who hitherto had wasted their useless lives at the doors of the
religious houses and had subsisted on the alms dispensed by such insti-
tutions on society. In consequence the highways and byways of the
kingdom in the decades to follow swarmed with sturdy beggars, who
when begging proved to be unsatisfactory very readily took up criminal
pursuits. By the violent break in the established charity dispensation a
condition was thus created which called loudly for relief. Such relief
finally was attempted by the famous statute of Elizabeth enacted in the
closing years of her reign and entitled “an act to redress the mis-
employment of lands, goods and stocks of money heretofore given to
certain charitable purposes.” The enumeration of charities in its pre-
amble has been a standard ever since by which to determine whether
a certain use is or is not charitable within the technical meaning of the
law. Its lengthy enumeration may well be recast in modern language
as follows: Whereas property, real and personal, has been heretofore
donated both by the royal family and by other well disposed persons to
certain eleemosynary, educational, ecclesiastical and municipal purposes,
but has not been employed according to the charitable intent of the

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9 Williams v. Williams, 8 N.Y. (4 Seld.) 525, 542.
10 Shotwell v. Mott, 2 Sandf., Ch. 46, 51 (N.Y.)
donors by reason of frauds, breaches of trust and negligence of its trustees; for redress and remedy thereof be it enacted, etc. The commissions which the statute contemplated and authorized and which were its real purpose have never functioned, but the enumeration of charities in its preamble, which was made merely by way of inducement, has had a tremendous influence over the subsequent development of the subject.

When the thirteen colonies separated from England the belief was general that the entire charity doctrine was founded on this statute. Various states in the heat of the Revolutionary War abolished all English statutes. This raised the question whether such repeal left any charity doctrine to be administered. Unfortunately the Supreme Court of the United States in 1819 speaking through no less a legal luminary than Chief Justice John Marshall held that such was the effect of the repeal of English statutes in Virginia. That such a contention should not go unchallenged was but natural. Shortly after the results of the investigation of the English Charity Commission became available and showed to a demonstration that the courts of England long before the passage of the statute of Elizabeth had fully recognized the doctrine. Justice Baldwin of the United States Supreme Court sitting as a circuit justice in Pennsylvania took up the matter and wrote a long opinion in which he demonstrated conclusively that Marshall had erred in his decision. Finally in 1844 the Supreme Court was again con-

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fronted with the question, Daniel Webster arguing for the heirs and Horace Binney, the sage of the Philadelphia bar, appearing for the executors. The brief of Binney has properly been called a marvel of forensic skill sustained throughout by an almost unmeasurable wealth of research and crowned with unanswerable logic and overwhelmed the ponderous argument of the great Webster and resulted in the establishment of the charity which under the name of Girard College is in active operation in Philadelphia today. It also resulted in exploding the former opinion of the Supreme Court on this matter and established the doctrine so important on this side of the Atlantic that equity has inherent jurisdiction over charity independent of the statute of Elizabeth.1

In 1827 and 1828 the state of New York passed the first real revision of its statutes—a compilation which was to have a far reaching influence both within and without the state. One of the most ambitious purposes of this revision was the codification of the law of trusts. All trusts were by the express words of this enactment abolished "except as authorized or modified in this article." As might be expected under the primeval conditions which then still prevailed in the Empire State charitable trusts were not thought of at all by the draftsmen of the statute and by the legislature itself. No express provision covering them therefore is to be found in it. This naturally was bound to make the question whether it repealed all charitable trusts a judicial one. This question was not presented until 1844 and then not to the highest court. Lewis H. Sandford, assistant vice chancellor, was startled when the contention was made before him that all charitable trusts springing as they do from benevolent and not from interested motives should be abolished by a statute which did not even mention them. He therefore vigorously overruled the contention on the ground that the statute clearly referred only to private trusts and was aimed 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. He stated that charitable trusts were not within the purview of the lawmakers, that the evils which it was sought to remedy were not incident to them and that provisions enacted to preserve what was useful and beneficial in private trusts were inapplicable to the administration of charities. He called the contention startling, impossible, contrary to the public interests and repugnant to the spirit of the age. He referred to the famous statute of uses which by a literal interpretation was capable of a construction which would include charitable trusts and

2 Revised Statutes of New York, 1829, p. 727.
stated that none such construction had ever been indulged in. He stated that it appears clearly from the notes of the revisors accompanying the article when it was submitted to the legislature that such was not the intention of the legislature. He said: "They proposed sweeping and radical changes in the existing law of uses and trusts, and stated their reasons and objects fully and elaborately. But there is not one word upon the subject of charitable uses. They were treating wholly of private uses and trusts."

After Wisconsin in 1848 had been admitted to statehood the new state at once set to work on a revision of its statutes. It was to be expected that such revision would be largely influenced by the Michigan statutes since the new state until it had become a separate territory in 1836 had actually been a part of Michigan, which, in 1846, had adopted the New York statute already referred to. What could be more natural than for Wisconsin to copy from Michigan what Michigan had copied from New York? Accordingly, the New York statute appears in the revision of the Wisconsin statutes of 1849 in substantially the same form as it had been originally drafted.

The only construction of this statute which then existed was the decision of Assistant Vice Chancellor Sandford of New York which has already been referred to. Had any question under this statute arisen at once the Wisconsin court would undoubtedly have been influenced if not controlled by it and a long wandering in the wilderness would have been prevented.

However, no such question arose during the next quarter century. It was not until 1876 that the Wisconsin Supreme Court was confronted with it. In the meantime a vast development had taken place in New York. New York had forged ahead in every way and with prosperity had come increasing and magnificent gifts to charitable purposes. The statute afforded too good an opportunity for a contention on the part of counsel representing disinherited heirs to go unutilized. Nor did this contention fall on deaf ears. Accordingly, the New York Supreme Court in 1850 severely criticized the construction of Vice Chancellor Sandford as judicial legislation, pointing out that the language of the statute was plain, distinct and emphatic, and signified that there should be a thorough and radical reform in this branch of the law and a total abrogation of express trusts for any and every purpose except as therein expressly authorized. The decision of the

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18 Shotwell v. Mott, 2 Sandf. Ch. 46, 51 (1844).
17 Revised Statutes of Michigan, 1846, Ch. 63.
16 Revised Statutes of Wisconsin, 1849, Ch. 57. This section has for many years been section 2071 and is now section 231.01, etc.
Court of Appeals in 1853 in Williams v. Williams involved only personal property and hence could not be governed by a trust statute which on its face referred to real estate. The gift was therefore upheld. This case was the last ray of light preceding a total eclipse. It was to be followed by a wandering in a judicial wilderness which bears a strong resemblance to the sojourn of the children of Israel in the desert after they left Egypt and before they reached the promised land. After the Williams case had been distinguished on more or less substantial grounds in 1856 and 1858 the Court of Appeals in 1865 was ready to make a vigorous attack upon it. Accordingly it declared that a system which recognized such charitable trusts was palpably incongruous with the state's political system and the principles which lie at the basis of its government and institutions; not adapted to its social conditions and impracticable of execution and that by the implied repeal of the statute of Elizabeth which had taken place in 1789 it was not intended that "indefinite trusts of every kind and description, however irrational or absurd, superstitious, fanatical or idolatrous, should become valid in equity; and that the property of the donors, without limit or restraint, might, at their own will, and for the promotion of such objects, be withdrawn and put in mortmain, away from the general uses of society."

In 1866 the same court declared that the abolition of the statute of Elizabeth was the abrogation of a system which has been tried and condemned and was not the revival of the ancient and odious system abrogated by it. This ancient system was branded as fragmentary and disjointed, obscure in its origin, incongruous in its theory, disastrous in its tendency, discarded as an excrescence on the common law, inappropriate even in a government in which the crown and the mitre are in mutual alliance and dependence, and still more unsuited to a state in which every religion is free and ecclesiastics of whatever creed are subject to no restraint except that imposed by general legislation. Accordingly the court concluded that the contention that the repeal of the statute of Elizabeth was not intended to displace the English system of charitable trusts, but merely to sweep away the restraints which alone rendered it endurable even in a monarchy and to inaugurate such ancient and obsolete system freed from all the salutory restraint of modern English legislation, would impute to the legislature of 1788, through heedless incalculation circumventing its own intent, the exhumation

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30 8 N.Y. (4 Seld.) 525.
33 Jones and Varrick, Laws of New York.
to new life, in a free state of the buried abuses of the old English court of chancery. The controversy was practically closed in 1873, twenty years after it had commenced in the Court of Appeals, and after it had exercised the best minds both upon the bench and at the bar. Says the Court of Appeals in that year: "The sweeping provisions of the Revised Statutes, abolishing all uses and trusts, except those specially named, are sufficiently general and comprehensive to include all charities."

It is clear from what has been said that when the Wisconsin court in 1876 was finally confronted with the problem of the construction of this statute, the court, there being at that time no decision in Michigan, had to make its choice between the construction by Assistant Vice Chancellor Sandford which antedated the adoption of the statute by Wisconsin and was ratified by one decision of the Court of Appeals in 1853 and the construction of the New York Court of Appeals which followed such adoption. Both constructions were fully presented to the court. No less a person than former Chief Justice Luther S. Dixon contended vigorously that the construction of the assistant vice chancellor was the only one which had been taken over with the statute and that it should control as against the subsequent and contrary construction adopted by the Court of Appeals. Unfortunately, Chief Justice Ryan, before he had succeeded Dixon on the bench, had been of counsel in the case and hence was disqualified to sit. This threw the responsibility of making the decision on Lyon and Cole, his only associates. The case involved a devise of real estate to certain sisters of the St. Dominican order in trust for the use and benefit of the order of St. Dominican and St. Catherine's Female Academy in the city of Racine, an unincorporated association. The court repudiated the construction of the assistant vice chancellor and the argument of its former chief justice, adopted the construction of the Court of Appeals and held that this devise was within the statute and hence void.

At the same time another case involving a gift for the benefit of "the Roman Catholic orphans of the diocese of LaCrosse" was decided by the court. The holding was that such a gift is invalid for indefiniteness, the court saying: "How is it possible to ascertain and determine what orphans were intended to be benefited? 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 designation? Are the objects of this charity the full orphans or half orphans who were living within the diocese at the death of the testator,

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26 Holmes v. Mead, 52 N.Y. 332, 338.
27 Ruth v. Oberbrunner, 40 Wis. 238.
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 is 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.28

In strict accord 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 yet been declared paupers.29 In these cases the gift was in form direct to the beneficiaries instead of going to them through a trustee. In 1890, 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."30 In 1897 the court, although Marshall had then already been for two years on the bench, held unanimously that a will bequeathing and devising all the remainder of testator's property "to the Roman Catholic bishop of Green Bay, Wisconsin, to be by him used for the benefit and behoof of the Roman Catholic Church" was void, saying: "What church or body is thus designated or intended? Is it the Roman Catholic Church in any particular city, state, or diocese? Certainly no such church is specified. Or does this designation include the Roman Catholic Church throughout the entire world? The difficulty—indeed the utter impossibility—of dealing with and executing this provision as a

28 Heiss v. Murphy, 40 Wis. 290, 291. This lengthy citation is made because it is conceived that nothing else could better reduce the contention of the court to an absurdity than the very language which the court uses. Yet this case was cited as one of the authorities relied on by the court in Tharp v. Smith, 182 Wis. 107, 195 N.W. 331, decided after Marshall's death. See notes 6 and 46 for further details.

29 Estate of Hoffen, 70 Wis. 522, 36 N.W. 407.

30 Will of Fuller, 75 Wis. 431, 437, 44 N.W. 304. This case had been expressly overruled in Harrington v. Pier. See note 6 supra.
valid trust is, we think, obvious and insuperable; and, within the authorities, this clause of the will must be regarded for these reasons as void and inoperative for any purpose and utterly ineffective to pass any interest or estate whatever to the bishop of the Roman Catholic Church of the diocese of Green Bay. Manifestly, he could not take or derive thereunder any trust estate, or enforce, for want of certain, competent, and definite beneficiaries of the trust. It is evident that no one of these trust provisions affecting the testator's real estate can be sustained under the statute in relation to uses and trusts."

It has been stated that Chief Justice Ryan was disqualified to sit when the Wisconsin court was in 1876 for the first time confronted with this problem. His opportunity, however, to exercise his keen mind, deep insight, great influence and extraordinary ability in connection with this matter was to come. In 1873 Rufus Dodge had died in Beaver Dam, leaving a will devising and bequeathing all the residue of his estate to certain designated natural persons "to hold, manage, invest and improve the same at their discretion for and during five years after my decease, and each and every year, out of the proceeds and income of said residue, to pay to the trustees of the Wisconsin Female College at Fox Lake, Ripon College at Ripon, and Beloit College at Beloit, each the interest on the sum of five thousand dollars," etc. In 1879 this will came before the Supreme Court. The court now consisted of five judges, but Cole and Lyon, who had decided the case in 1876, were still members and naturally, having been so long on the bench, exercised a considerable influence over the two newly appointed or elected judges. The task of overruling the previous case therefore seemed hopeless. If Ryan had attempted this he probably would have written a dissenting opinion instead of writing the opinion of the court. He wisely refrained from such a course. It was too early to overrule the previous decision. He therefore distinguished it. Mr. Dodge had given his trustees considerable discretion in managing his estate and this provision was stressed and the doctrine of equitable conversion applied. By holding that the property had been equitably converted into personal property Ryan was able to demonstrate to the satisfaction of his colleagues that the trust statute and the former decision of the court had no application to it.32 So well had he convinced his colleagues that Cole, the very writer of the opinion of 1876, in another case decided at the same time, applied the same distinction and declared that it afforded the court

31 *McHugh v. McCole*, 97 Wis. 166, 175, 72 N.W. 631. This case, at least so far as it held that a gift for masses is void, has been explicitly overruled by *Will of Kavanaugh*, 143 Wis. 90, 126 N.W. 672.

32 *Dodge v. Williams*, 46 Wis. 70, 1 N.W. 92.

33 *Gould v. Taylor Orphan Asylum*, 46 Wis. 106.
"much gratification to be able, without violation of principle, to sustain
the will and the charity created under it."

While, however, the decisions of 1876 and 1879 can stand together,
the underlying reasoning on which they are based is utterly disharmoni-
ous. The doctrine of equitable conversion as applied indeed worked out
some good results but should never have been necessary. Though the
court in 1884 held that an express direction to sell at the expiration of
twenty years only, excluded all application of the doctrine,1 the doctrine
has been repeatedly used to salvage gifts to charity which otherwise
would have gone down. The great case of Harrington v. Pier,2 in
which Marshall made his first titanic effort to rescue the Wisconsin
law of charity from the confusion into which it had fallen after Ryan's
decease is itself an application of this principle. Says Marshall in
1910: "The doctrine of equitable conversion, so many times resorted
to as a convenient way of avoiding the one supposed infirmity in our
system hampering owners of property in their efforts to devote the
same to the public good, no longer cuts any figure."3

We have already referred to a number of decisions following the
decisions of 1876 in which the court exacted a certainty of designation
of both purposes and beneficiaries which it is all but impossible for
testators to achieve, in connection with a charitable trust. The decision
of Ryan in 1879 had the effect to produce another line of decisions,
running parallel with the former, in which the court applied very liberal
rules of construction. Thus the court in 1886 upheld a gift to a church
for the resident poor of the town as being sufficiently definite and
certain.4 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.5 In the same year a similar decision was
made in a case arising in Watertown in which a gift to that city for
the aged and poor was upheld.6

The two lines of decision in regard to the certainty requisite in con-
nection with charitable gifts extended side by side into the first four
years of Marshall's occupancy of the supreme bench. Three decisions

3 Will of Kavanaugh, 143 Wis. 90, 110, 126 N.W. 345.
Curiously enough the opinion in this case was written by Cassoday, J., who later
in this controversy with Marshall was to take a radically opposite position.
5 Sawtelle v. Witham, 94 Wis. 412, 69 N.W. 72. Two of the five judges dis-
7 ented without however filing a dissenting opinion. Marshall was one of the
concurring judges.
6 Beurhaus v. Cole, 94 Wis. 617, 630, 69 N.W. 986.
were rendered during this period, two in 1896, which represented the position which he was to take in later years, and one a year later which represented the other line of cases which he was to fight so bitterly in his later career. In none of these cases did Marshall write any opinion and in all of them he concurred with the decision of the court. It was not until 1900 that he definitely took up the burden of restoring the English charity doctrine to the jurisprudence of Wisconsin—a task which he never relinquished while he remained on the bench and which was ever close to his heart in the short time which intervened between his retirement from public duties and his decease.

There can be no doubt that the Supreme Court was in error in those cases where it required a certainty which was substantially the same as in private trusts. Vagueness, uncertainty and indefiniteness of the beneficiaries is not merely a permissible but actually essential element of a public charity. Its beneficiaries are inherently vague and indefinite. While its objects must be certain the individual beneficiaries must be uncertain if it is to retain its character. Uncertainty of beneficiaries until they are appointed or selected is a never failing attendant of charitable trusts. Charity cannot be confined to the narrow channels, prescribed for other trusts, without detriment to its inmost character. It flourishes by diffusion. It belies itself when it contracts itself. Uncertainty is its native element. It actually delights in uncertainty and is essentially shifting. It draws its strength from the fact that its benefits are to be distributed among unknown persons. Its very generality is an illustration of Christian charity; and uncertainty of individual objects at the time of the gift is its characteristic and element. If all the recipients of a charity could be designated with certainty at the time of its creation there would be no necessity for a law of charitable uses different from that which governs private trusts. The rule that there must be no uncertainty in a trust therefore has its exception in charitable uses. From the necessity of the case they form exceptions to the rule which requires a definite grantee. The very purpose of the rise and development of the law of charities was to obviate the strict rule of law which condemns trusts unless the beneficiaries are so named or identified that they have a standing in the courts to enforce the trust. It is for the very reason that trusts for charitable purposes are not fully expressed and clearly defined that the law of charitable uses has grown up and been maintained. Indefiniteness of beneficiaries who can invoke

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40 Sawtelle v. Witham, 94 Wis. 412, 69 N.W. 72; Beurhaus v. Cole, 94 Wis. 617, 69 N.W. 986.

41 McHugh v. McCole, 97 Wis. 166, 72 N.W. 631. This case was expressly overruled in Will of Kavanaugh, 143 Wis. 90, 126 N.W. 672, at least so far as it held that a gift to masses is invalid.
judicial authority to enforce the trust, therefore, does not militate against the validity of a trust for charitable uses. A claim that there must be some beneficiary capable of enforcing the charity, if allowed, would abolish all charitable trusts. It follows that where a grant to trustees is made in perpetuity for beneficiaries who are indefinite, vague and uncertain the grant cannot be upheld as a private trust while if the individual beneficiaries are definitely named such a trust can be upheld as a charitable one. Gifts for charitable purposes will therefore be upheld where gifts for private purposes would be cast down. A person who founds his claim on right is not the recipient of charity. The certainty and definiteness of beneficiaries which is the badge of private trusts is the bane of charities. The greatest of all solecisms in law, morals or religion is the supposition of a charity to individuals personally well known and selected by the giver. It may not be amiss to remark that a very important change had occurred in New York in 1893 by the passage of the Tilden act. Samuel J. Tilden, former governor of New York and defeated presidential candidate on the democratic ticket in the famous presidential campaign of 1876, which was decided in favor of Rutherford B. Hayes by the electoral commission, had died in 1886 leaving the larger portion of a five million dollar estate “to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate.” The New York Court of Appeals in strict accord with its previous decisions declared this provision to be void. The

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42 See the author’s American Law of Charities, pp. 235, 236, 237. This essential distinction was quite plainly overlooked by the court in the recent case of Tharp v. Seventh Day Adventist Church, 182 Wis. 107, 195 N.W. 331. The court in support of its holding cites not only charitable cases but also Holmes v. Walter, 118 Wis. 409, 95 N.W. 380, a clear case of a mere private trust.

prominence of the donor, the size of his intended gift and the noble purpose which had been thwarted, caused widespread discussion throughout the country. The consequence of this was the passage of an act by the New York legislature in 1893 which declared that no charitable gift which in other respects was valid should be deemed invalid "by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries." Through this statute and its subsequent amendments the charity doctrine has been substantially restored in New York. Whether Marshall paid more than fleeting attention to this development while it was going on we do not know. He probably read about it as any other newspaper reader would. It came back to him later when in 1900 he began his investigations into the charity doctrine, was referred to by him at great length in his subsequent opinions and undoubtedly greatly influenced his course of action.

Before taking up in detail Marshall's work in this matter it may be well to restate the situation which confronted him in 1900. In 1876 the court had all but committed itself completely to the New York construction of the trust statute. Through the efforts of Chief Justice Ryan the decision of 1876 was in 1879 limited to real estate, the common law doctrine concerning charities was saved so far as personal property is concerned and, by stretching the equitable doctrine of conversion to near the breaking point, much which in fact was real estate was, for the purposes of charity, classified as personal property to which the trust statute did not apply. Through the subsequent decisions, however, great uncertainty had been created as to the degree of certainty which is necessary in describing the purposes of a charitable trust. It was to this question that Marshall applied himself in 1900. He began his powerful opinion in Harrington v. Pier as follows: "The vital question presented for adjudication on this appeal is, Is the bequest to trustees to promote temperance work in the city of Milwaukee void for uncertainty? That involves the consideration of several cases where the important questions involved have been decided by this court, but without such a strict adherence to a definite judicial policy in each case and reasons given for the conclusions reached that it can be said, even at this late day, that we have an established system based on entire harmony of judicial decisions, by which trusts for charitable purposes can be tested when their validity is challenged."45

The testamentary gift involved in this case was made by Elizabeth Ann Sutton and gave to designated trustees three-fourths of the net proceeds of the estate to be by them expended for temperance work in Milwaukee as their best judgment shall dictate, the greater portion to

be used for the benefit of Crystal Spring Lodge I. O. G. T. and the Women's Christian Temperance Union of Milwaukee. Marshall reviewed the previous cases in the court, showed the influence which the decisions of 1876 and 1879 respectively had exercised, managed to distinguish some of the cases which followed the decision of 1876 and concluded that with one exception the decisions of the court since 1879 were in harmony and that the single break in the line of decisions in view of the quick return to such line should not be taken as a considerate change of judgment as to the law at any time. He concluded that the decision of Chief Justice Ryan and the cases expressly ruled by it correctly stated the law on the points essential to the conclusions reached and that whatever there was in other cases, decisions or reasons for decisions inconsistent therewith must yield to that view. In upholding the gift he said: "It follows 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 purpose 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 purposes. Given a trust, with or without a trustee, a particular purpose . . . and a class great or small, and without regard to location . . . and we have a good trust for charitable purposes." This decision, however, was not unanimous. Though Cassoday J. in 1886 had written the opinion of the court in a case which relied on Ryan's decision of 1879 and upheld a charity for the resident poor of a town and which Marshall could not but emphatically approve he now filed a dissenting opinion in which he acknowledged that he was not certain that he fully comprehended just what general propositions had and what general propositions had not been determined. He further stated that he was not certain as to how many of the former decisions of the court have been in part overruled, doubted, questioned or distinguished. He was, however, emphatic in declaring that a direction such as was before the court in this case to

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44 This exceptional case is Will of Fuller, 75 Wis. 431, 44 N.W. 304, which accordingly was expressly overruled by Marshall in Harrington v. Pier, 105 Wis. 485, 510, 82 N.W. 345, 76 Am. St. Rep. 924, 50 L.R.A. 307. See also Hood v. Dorer, 107 Wis. 149, 82 N.W. 546, where Winslow J., states that such is the effect of the Harrington case. See also note 6 supra for a more extended statement of this most important action by the court. Despite the fact that this case was so unambiguously overruled, the court in Tharp v. Smith, 182 Wis. 107, 195 N.W. 331, decided after Marshall's death, relied on it in support of its judgment.


46 Webster v. Morris, 66 Wis. 366, 57 Am. St. Rep. 278, 28 N.W. 353. This gift certainly was every bit as definite and every bit as indefinite as the gift involved in the Harrington case.
use and expend money in temperance work is too indefinite and uncertain to be carried into execution under the repeated rulings of this court. Thus the judicial duel between the Chief Justice and Marshall which was destined to continue until Marshall was completely victorious in 1905 had begun.

Little more than an enumeration need be added concerning the subsequent unfolding of this particular proposition. In the same year another case came before the Supreme Court. The trial court had held on the strength of *In re Fuller* that a gift "to be invested in a fund provided for that purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ" was void for indefiniteness. Winslow J. over the dissent of Cassoday C. J. reversed the decision, saying: "Were the rule of that case to be followed, it is not easy to see how the conclusion reached by the trial court could be avoided. In a recent case of *Harrington v. Pier*, 105 Wis. 485, however, the doctrine of the *Fuller* case was substantially overruled. In fact, in that case nearly or quite all the questions which arise in this case were so fully treated by Justice Marshall, the result being to sustain such a trust as that before us, that it would seem unnecessary to enlarge upon the subject here."48 In 1904 the court by Dodge J., and again over the dissent of Cassoday, C. J., upheld a gift "for the charitable purpose of relieving the wants, distress, and suffering arising from such causes (storms, floods, fires and other accidental and natural causes), and for the purpose of aiding and assisting to such extent as lies within their power and as they may deem advisable the victims of such accidents and catastrophies" and said: "The degree of definiteness essential to the validity of any grant in trust for charity is a subject so recently treated at large, and as to which our attitude is so unambiguously declared in *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, that we cannot justify extended review of either its history or of the writings of authors or judges upon it generally."49 In 1910 Kerwin J. in holding a gift for masses to be said under the direction of certain designated persons to be valid discussed the distinction between private and charitable trusts and said: "In the former, statutory certainty is required, while in the latter it is not. The certainty of beneficiaries in cases of private trusts does not obtain in cases of public trusts. And this is necessarily so from the nature of public trusts as distinguished from private trusts."50 Says Marshall in 1910: "Effectually, it was thought, though not without some difficulty for want of unanimity, all seeming or real departure from *Dodge v. Williams* (the

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48 *Hood v. Dorer*, 107 Wis. 149, 82 N.W. 546.
49 *Kronshage v. Varrell*, 120 Wis. 161, 97 N.W. 928.
50 *Will of Kavanaugh*, 143 Wis. 90, 99, 100, 126 N.W. 672.
case of 1879) was cured in the decision of the Harrington case, the earlier case being given its true dignity as condemning, at least as regards personality, the idea that the common law doctrine of charities had been, in any way or to any extent, displaced in this state. In 1912 Marshall again had occasion to refer to this matter. He stated that indefiniteness to a large extent is one of the characteristics of a charitable trust and that courts will not allow such a trust to fail because the objects of the charity are uncertain. He further said that if the general limits of the purpose however broad be reasonably ascertivable by the most liberal methods which can be devoted to the matter, though there be great indefiniteness in the mode of carrying out the purpose and there be an absence of details or even of a trustee willing to act and in some cases no trustee at all—so long as the purpose is within the field of charity in the broadest sense—the trust is a good one and a way can be found of carrying it out. In 1917 the legislature to make assurance doubly sure created a new subdivision of the trust statute reading as follows: "No trust for charitable or public purposes, whether in real or personal property shall be invalid for indefiniteness or uncertainty where power to designate the particular charitable or public purpose or purposes to be promoted thereby is given by the instrument creating the same to the trustees, or to any other person or persons." In the last case decided in Marshall's lifetime, though after he had retired from public life, the court upheld a gift to establish and carry on one or more free medical dispensaries in Milwaukee for the benefit of such indigent sick persons residing in Milwaukee "as my said trustees in their wise discretion shall deem worthy of such aid and assistance." The contention was again made that this clause was void for uncertainty. Siebecker J. in overruling this contention cited the cases and said: "Discussion of this subject has been most searching and extensive in the cases in this court, and anything repeated here would of necessity be in substance but a repetition of what has been stated in these adjudications." In vivid contrast with all these cases is the last decision of the court handed down after Marshall's death, holding that a gift to designated trustees 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 is void for indefiniteness.

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51 Marxey v. Oshkosh, 144 Wis. 238, 274, 128 N.W. 899.
52 Richtman v. Watson, 150 Wis. 385, 136 N.W. 797.
53 Chapter 70, Wisconsin Session Laws of 1917, adding a seventh subdivision to section 2081. The new numbering of this section is 231.11. This section was not referred to in Tharp v. Seventh Day Adventist Church, 183 Wis. 107, 182 N.W. 331.
54 In re Keenen, 171 Wis. 94, 176 N.W. 857, 862.
because the particular branch of the Seventh Day Adventist Church intended to be benefited was not sufficiently designated. The court cites In re Fuller in support of its decision and also Harrington v. Pier, although as pointed out above the latter case had expressly overruled the former. No reference is made to the statute of 1917 referred to above in this paragraph.

It is clear indeed that the Wisconsin Supreme Court, from 1900 to the time of Marshall's death, was firmly committed to the doctrine that gifts of personal property to charity are perfectly good and that a large amount of indefiniteness is not only permissible but essential in such matters. This left the question open whether real estate was subject to the same rule. If the decision of 1876 was to rule this proposition there could be no doubt but that such a gift is invalid. It was but natural that Marshall should attempt to extend his conquest and equally natural that he should meet resistance. To fully understand the controversy which now developed or rather continued between him and Chief Justice Cassoday we must again go back to the decision of 1876 and trace its influence through its subsequent development.

In the decision of 1876 the court had held that the doctrine of perpetuities so far as it refers to the length of time for which a piece of real property is held, is applicable to property deeded or devised to charity. This extraordinary doctrine was almost at once confined to a certain extent by the legislature when it enacted the revision of 1878. The note of the revisors on this matter is as follows: "In section 2039 amendment is made to allow grants or devises in perpetuity to literary or charitable corporations. It is thought that this ought not to be extended to religious corporations but left only to those which are formed for advancing literary or charitable ends. The decision in Ruth v. Oberbrunner, 40 Wis. 238, shows a defect in the law as it is, which is generally admitted to require amendment. We have endeavored to afford it without too great innovation. In that spirit it is provided that corporations under our laws can alone enjoy the benefit of such a grant because they are within legislative control under the constitution, while they can readily be formed to possess all necessary powers for the full enjoyment of all the benefits which should follow such a provision in the law." Accordingly the legislature in 1878 added to section 2039, which had merely provided that the absolute power of alienation shall not be suspended for a longer period than the continuance of two lives

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53 Tharp v. Seventh Day Adventist Church, 182 Wis. 107, 195 N.W. 331. See an article by the writer of this chapter entitled "Cross Currents in the Wisconsin Charity Doctrine," published in 8 Marquette Law Review, 168 to 173.

56 See notes 46 and 6 supra. For the statute referred to see note 53 supra.

57 Ruth v. Oberbrunner, 40 Wis. 238.
in being, the following exception: “Except when real estate is given, granted or devised to literary or charitable corporations which shall have been organized under the laws of this state.”

It has already been seen that Ryan's great interest in rendering his decision in 1879 was to show that the opinion of 1876 applied only to real estate and not to personal property. It was quite natural for him therefore to say in his opinion in reference to section 2039 that “the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty. *Expressio unius exclusio alterius.* Though Cole, J., the writer of the opinion of 1876 and the very originator of the perpetuity heresy which the legislature had now in part overruled, concurred with this decision and in a companion case even expressed delight at being able without violation of statute or principle to sustain the charity in 1884 after Ryan's decease said that it may admit of doubt "Whether the remark of the chief justice is strictly accurate in saying that it (the statute) abolishes the common rule of perpetuities as to personalty when applied to private trusts." This situation gave Cassoday another opening against Marshall. If he could establish that the perpetuity rule covered personal property wrapped up in a private trust the way was open to follow with a decision that it covered private property wrapped up in a charitable trust which of course would take away the very foundation on which *Harrington v. Pier* had been built, and could not but be followed by a decision overruling *Harrington v. Pier.* Marshall in self defense was driven to the conclusion that all private trusts in personal property are impliedly exempted from the statute and succeeded in convincing his colleagues except Cassoday, who in a lengthy dissenting opinion worked himself into such a towering rage that he closed by calling the decision "a judicial monstrosity," a statement which, it may be freely admitted, was not entirely without justification. In his prevailing opinion Marshall wisely did not attempt to argue the matter on principle but was content to state that whether Ryan's statement was inherently right or wrong it had remained undisturbed so long that it ought to be given the force of a statute, leaving any change of policy that might be desirable to the legislature.

While Marshall by this decision had warded off a flank attack on the position taken by Ryan in 1879 and on his own decision in *Harrington v. Pier,* he had done this at the expense of taking away from under his

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68 This section is now 230.15.
69 See notes 32 and 33 supra.
70 *Gould v. Taylor Orphan Asylum,* 46 Wis. 106, 117.
72 *Becker v. Chester,* 115 Wis. 90, 131, 147, 91 N.W. 87, 650.
own feet an argument subsequently to be made by him according to which all charities whether they concerned real or personal property were impliedly exempt from the perpetuity rule. He had clearly drawn the line of demarcation between personal property and real estate. On principle of course it should be drawn between property, whether real or personal, which is covered or is not covered by a charitable trust. He soon was to feel himself bound hand and foot by his own decision. Says Dodge J. in 1903 in writing the opinion of the court and overriding a long dissenting opinion by Marshall: “The only basis of reason upon which that conclusion could rest was and is that the legislature, in enacting Sec. 15, ch. 56, R. S. 1849, intended to cover the whole field of perpetuities, to substitute entirely a statutory policy for the pre-existing court-made rule of policy of the common law. To hold that such intent was so clear that it must by implication annul the common law as to personalty, which was not within the express words of the statute, and at the same time to rule that it was not sufficiently obvious to exclude the common-law as to charities, which did fall within the literal words of the enactment, would be the height of inconsistency.”

The opportunity to contend that the perpetuity statute impliedly exempted all charitable trusts, and not only charitable trusts concerned with personal property, was presented in the case just referred to. In 1903 the will of Abby S. Harris came up for construction. The testatrix had given the residue of her estate to designated trustees to found, prepare, conduct and maintain perpetually a public library on her homestead lots in the city of Oshkosh and had provided further that if within three years of her death the city should raise an equal amount the trustees were to make an absolute conveyance of the property to it. This condition the city fulfilled. The appeal was from the final decision of the court assigning the residue amounting to about $75,000 to the trustees. The court was strongly pressed to hold that the statute of perpetuities had no application to grants for charitable purposes. The question was squarely presented and was argued with much vigor and learning. Marshall and Siebecker were in favor of the contention. Cassoday vigorously opposed it. A division of opinion was inevitable. Marshall states in his biography that the other judges were almost persuaded but were led by Cassoday’s vigorous opposition. In consequence the court in an opinion written by Barnes J. said that however fully some of its members might believe in a policy which would permit perpetuities in charitable grants, the court would transcend its rightful powers should it attempt to establish or enforce such a policy in

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\[Danforth v. Oshkosh, 119 Wis. 262, 273, 97 N.W. 258.\]
defiance of a contrary legislative declaration and concluded that the statutes prohibited a suspension of the power of alienation for the forbidden period, whether the grant be for a charitable or other purpose and added that if the policy be unwise it could very easily be modified for the future by the legislature, without sacrifice of rights acquired upon the faith of the present statutes and the construction given to them by the court for at least twenty-five years. The gift involved, however, was upheld on the ground that it was to the city of Oshkosh and was in legal theory an absolute gift to the city for one of its municipal purposes.44

An opportunity with one sweep to exempt all gifts to charity, whether of personal or real estate, from the perpetuity rule had thus miscarried. For the first time in their judicial duel Cassoday had gained an advantage over Marshall. Of course Marshall concurred heartily with the result. He was glad that the public misfortune that would be involved in a loss of the great charity designed by the testatrix for the city of her residence had been averted, though by pure accident so to speak. However, he was correspondingly sad that the court adhered to the case of 1876 and refused to recognize the principle that all charitable gifts whether of real or personal property are inherently exempted from the perpetuity rule. He regretted that the court upon a review of its entire judicial history had reached the conclusion that it must stand substantially alone in holding that the general language of statutes on the subject of perpetuities cover property devoted by deed or devise to charitable purposes. He stated that he had been in doubt as to whether he should file a dissenting opinion but that it seemed to him that he had no right to take such a mere negative course in the face of the many evidences we have of good springing from the free independent personal expression of judicial views in circumstances such as this. With faith rather than hope he therefore took up the burden of discharging the duty which seemed to call for the labor and ventured into a thirty page dissenting opinion in which he was joined by Siebecker J. It will not be necessary at this day to follow his reasoning or even attempt to make a summary of it. Enormous labor and research was expended by him. He realized that the task of changing the judicial policy of the court in this regard was too much for him to accomplish. He referred to the New York development of 1893 in connection with the Tilden statute and said that the legislature in that case reached out and rescued the judiciary. It was this analogy which probably prompted him to issue his famous appeal to the legislature as

44 Danforth v. Oshkosh, 119 Wis. 262, 97 N.W. 258. The cases relied upon by the court of course were Ruth v. Oberbrunner, 40 Wis. 238, and also De Wolf v. Lawson, 61 Wis. 469, 21 N.W. 615; Beurhaus v. Cole, 94 Wis. 617, 69 N.W. 986.
follows: "It is now, seemingly, up to the legislature, as it was in New York in 1893, to say whether a broad policy as to devises of property to charity shall prevail in this state, or not. It will in the light of the decision in this case, be unmistakable that if the public desires that men of wealth shall at least be permitted to have a free hand in devoting their property to the benefit of mankind instead of to mere selfish or private ends, legislative aid or command must be had in the matter. Why should such free hand not be permitted? That is the policy which generally prevails in every section of our country. Why should Wisconsin be an exception? The legislature must answer that. The responsibility for the continuance of the exception rests with that branch of the government, regardless of whether it is responsible for having created it or not. If what I have written shall so emphasize that situation as to stimulate remedial action, placing our state in the front rank of communities as regards favoring devises of privately accumulated wealth to charitable objects, it will be a 'consummation devoutly to be wished'. Shall we have incorporated into our system the thought so beautifully expressed: 'Charity in thought, speech, and deed, challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory, and the inspired apostle exhausts his powerful eloquence in setting forth its beauty and the nothingness of all things without it.'"

Whether Marshall was content with making this appeal or whether he followed it up by advising with members of the legislature or even actually drafting the amendment which was subsequently adopted, does not appear. In view of the fact that he had in his early life been intimately associated with legislative work and intimately knew the ins and outs of legislative procedure, it is not unlikely that he did more than make the appeal. Nor would any such action, if in fact he took it, be in any manner to his discredit. While he was earnestly championing the cause of charity he was doing it for an entirely unselfish and altruistic reason. Be this as it may, his great appeal was effective. At the very next opportunity in 1905 the legislature amended the perpetuity section by excepting from it real estate "given, granted or devised to a charitable use". The position which Marshall had so heartily fought for had thus been sustained by the lawmaking power. The people of the state through the proper channels had speedily made the public policy of the commonwealth conform to the well-nigh world wide conception of the importance of promoting the wishes of possessors of privately accumulated wealth to devote the same to the betterment of mankind. As Marshall himself said in a subsequent concurring opinion, charity, sweet

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*Danforth v. Oshkosh, 119 Wis. 262, 311, 97 N.W. 258.*
charity, had come into its own. The doctrine of equitable conversion applied to the situation by Ryan in order to accomplish what was feasible in 1879 had lost its importance. A donor now was free to devise as well as bequeath his property to charitable objects. This concurring opinion was filed in a case where the opinion of the court had stated that "charitable trusts may be enforced and are not controlled by our statutes of uses and trusts." The Oshkosh case, as Marshall in 1910 took occasion to say, marked an epoch of monumental character in our jurisprudence because of the now more unmistakable restoration and firm entrenchment in our system of one of the most valuable of our inheritances from the mother country, placing the state without room for reasonable controversy in the front rank of communities as regards favoring devises of privately accumulated wealth to charitable objects.

The result was that the case of 1876 was now completely overruled and charity was recognized by the public policy of the state not only as regards personal but also as regards real property. The duel between Marshall and Cassoday had ended wholly in favor of Marshall and the work which Ryan could only commence had been completed by Marshall. It should not, however, be overlooked that Cassoday, once the decision had definitely gone against him, submitted with the utmost good grace. Marshall says of this phase that the long struggle fully to restore the common law of charities had now come to a successful end "happily without any apparent regret by any of my associates, not even by the Chief Justice who had occupied the center of the stage in opposition for some twenty years."

One additional point must be touched upon and the purpose of this chapter will be accomplished. The decision of 1876 vaguely hinted that the cy pres doctrine is not in force in Wisconsin. The court asked the following question: "Suppose a bill were filed to compel the trustees to execute the trust; what could the court order the trustees to do? Would it not be compelled to resort to the cy pres doctrine?" This notion has echoed and re-echoed through the Wisconsin cases decided prior to Harrington v. Pier. Of course the old prerogative English cy pres doctrine is not in force in America, not to speak of Wisconsin. However a cy pres doctrine which carries out the general intent of the testator where his special intent has through change of circumstances become illegal or incapable of execution is recognized by almost all the states. There is no logical reason why Wisconsin should not recognize this doctrine. Says Marshall: "When it is said that the doctrine of

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66 Will of Kavanaugh, 143 Wis. 90, 102, 126 N.W. 672. See also Rust v. Even-son, 161 Wis. 627, 155 N.W. 145.
67 Marxey v. Oshkosh, 144 Wis. 238, 276, 128 N.W. 899.
68 Ruth v. Oberbrunner, 40 Wis. 238, 264.
cy pres does not prevail in this state, that does not refer to those liberal
rules of judicial construction of charitable trusts, by courts of equity,
which, prior to the statute of Elizabeth were applied in chancery and
of which such statute is only confirmatory, but to the prerogative power
exercisable where such statute prevails. Courts here, as anciently, look
with favor upon all donations to charitable uses, and give effect to them
where it is possible to do so consistent with rules of law, and to that
end the most liberal rules the nature of the case will admit of, within
the limits of ordinary chancery jurisdiction, will be resorted to if
necessary.”

The general result of Marshall's work and influence on his colleagues
and on the legislature clearly, at the time of his death, was that chari-
table trusts whether of real or personal property were exempted from
the rule of perpetuities were not required to have the same degree of
certainty which is necessary in private trusts and that the courts in
regard to them have a judicial as distinguished from a prerogative cy
pres power and may construe them in such a manner as to carry out the
general as distinguished from the special intention of the donor. It is
undeniable that Marshall had done everything that it was humanly pos-
sible to do to preserve for the future the re-established English charity
doctrine. It was with almost prophetic foresight that he wrote in 1910:
"I wish to emphasize the event to the end that nothing may be left un-
done which I can do to so firmly entrench the beneficent principles of
the law of charities in our system that all danger of their being here-
after obscured in judicial confusion or misconception will be effectually
guarded against.”

What effect on this situation the case of Tharp v. Seventh Day Adventist Church decided after Marshall's death is des-
tined to have, only the future decisions of the Supreme Court will show.
It rests with that tribunal whether the great work of Ryan and Marshall
in the restoration of the English charity doctrine in Wisconsin shall
be demolished or shall endure.

To sum up: In 1876 the Wisconsin Supreme Court decided that the
trust and perpetuity statutes applied to charitable trusts. In 1879
through the efforts of Chief Justice Ryan this decision was limited to

N.W. 345. For additional information see the writer's American Law of Charities,
chapter three. For a recent case where the Wisconsin court in what appears to be
a dictum has gone counter to this statement of Marshall see Tharp v. Seventh Day
Adventist Church, 182 Wis. 107, 195 N.W. 331. See on this matter note 6 supra.
70 Marxey v. Oshkosh, 144 Wis. 238, 272, 128 N.W. 899.
71 182 Wis. 107, 195 N.W. 331. See note 6 supra. See particularly note 72
infra which refers to a very recent case in which the Tharp case though not ex-
pressly overruled is substantially modified.
real estate, personal property was exempted from it and the doctrine of equitable conversion was so applied as to greatly extend the scope of the exemption. Both decisions, curiously enough, were accompanied by twin cases in the first of which (Heiss v. Murphy decided in 1876) great certainty was required in a charitable gift, while this requirement was relaxed if not abandoned in the second twin case decided in 1879. These two sets of cases threw the law during the last two decades of the century into utter confusion, the court at one time following the one, at another time the other. This confusion extended into the first four years of Marshall's incumbency of the supreme bench. It was eliminated by him in 1900 in Harrington v. Pier over the vigorous dissent of Cassoday J. and the cases of 1879 and those following these decisions were approved while the other line of cases were distinguished, harmonized and in one instance, Will of Fuller, overruled. Thus the law stood until 1923 when the Supreme court in Tharp v. Seventh Day Adventist Church went back to the line of cases which Marshall had overruled, expressly cited all the three cases mentioned in this summary in support of its holding, thus resurrecting Will of Fuller to new life and now apparently holds that a charitable gift requires substantially the same certainty as does a private trust.

In 1902 Cassoday C. J. made a flank attack on the position taken by Marshall in 1900 contending that the perpetuity statute covered not only real but personal property. Marshall in self-defense was forced to the position that all personal property was impliedly exempted even though it was covered only by a private trust which position Cassoday branded as a judicial monstrosity. Marshall's position, however, was sustained by his colleagues and Harrington v. Pier had thus received additional support.

In 1903 the opportunity was presented to the court to overrule the decision of 1876 and declare that all charities whether of real or personal property are exempted from the perpetuity statute. Cassoday's success in convincing his colleagues (except Marshall and Siebecker) that such a step should not be taken led to Marshall's famous appeal to the legislature, which promptly in 1905 amended the perpetuity statute by excepting from it real estate "given, granted or devised to a charitable use." Marshall's contention had thus been sustained by the law making power and the state had been placed abreast in regard to its doctrine of charities with the great majority of the other states.

What the result of Tharp v. Seventh Day Adventist Church is to be, only the future decisions of the Supreme Court will reveal. The great brevity of the prevailing opinion and the fact that Harrington v. Pier was cited in support, though it is squarely opposite, leaves the mind in doubt as to whether the court intended to overrule the position taken
by it while Marshall was on the bench or whether the court was merely
misinformed or forgetful of its own history in the matter. It should
not be overlooked that the charity controversy practically closed in
1905 while the court had been completely reconstituted since Chief
Justice Vinje took his seat on September 10, 1910. It should also be
remembered that the brief for the executor in this case did not set out
the history restated in this chapter and therefore was of little if any
help to the court. It is to be hoped that the next opportunity the court
will definitely commit itself to one side or the other of the question.
The sooner this is done the better it will be.\footnote{After the above chapter was set up in type, the Supreme Court rendered a
decision which bears materially on this subject matter, though \textit{Tharp v. Seventh
Day Adventist Church} is not in terms overruled. Herman A. Briggs of Delavan,
Wisconsin, had bequeathed five thousand dollars to the Young Women's Christian
Association of Wisconsin. There being no such statewide organization in exist-
ence in Wisconsin, the county court of Walworth County, in strict accord with
the \textit{Tharp} case, had declared the gift lapsed. The Supreme Court by Doerfler, J.,
reversed this decision, stating that the testator's object was centered upon a gen-
eral scheme to promote a given cause (this word was underlined by the court),
and concluding that the non-existing body named as legatee is deemed to be a
mere agency for administrative purposes, which failing, will not cause the pur-
pose to fail, but that equity will supply a new agency in the form of a trustee to
carry out the donor's intentions. After thus asserting in strong terms and apply-
ing the American \textit{cy pres} doctrine, the court heartily endorses and follows \textit{Har-
rington v. Pier}, stating that it is one of the leading cases in the country on the
construction of a charitable trust, and quotes a lengthy extract from it dealing with
the question of indefiniteness, which abstract is found above in note 47, and
states that this quotation aptly and forcibly applies to the instant case and fits
it in its minutest details. The court then distinguishes the \textit{Tharp} case on the
ground that the various church organizations in that case, though all of the
Seventh Day Adventist Order, were not identical in their creed, and therefore no
distribution could be made without creating discord and dissatisfaction.

The emphatic approval of \textit{Harrington v. Pier} and the distinguishment of \textit{Tharp
v. Seventh Day Adventist Church} clearly indicates that the court prefers the doc-
trine of the \textit{Pier} case over that of the \textit{Tharp} case, and that it has returned to the
old moorings established by Ryan, C. J., and re-established by Marshall, J. The
emphatic assertion and the application of the \textit{cy pres} doctrine in the present case,
though it was explicitly stated in the \textit{Tharp} case that such doctrine is not in force
in Wisconsin, shows clearly that the instant case in fact is inconsistent with, and
contradictory to, the \textit{Tharp} case.

It affords the writer of this chapter great pleasure to be able in this closing
note to state that Marshall's clear vision, though temporarily obscured by the
clouds of misunderstanding, is now again illuminating the path of the inquirer.
See \textit{In re Briggs Estate}, 188 Wis. --, 208 N.W. 247.