

## Cy Pres in New York

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will be overruled only upon presentment of evidence proving prior illegal narcotics transactions may be drawn from these statements.

### Conclusion

For the federal courts, the basic teaching on the entrapment doctrine is to be found in the Supreme Court case of *Sorrells v. United States*.<sup>65</sup> Yet, in applying the rules as formulated in this case, an appellate court has in one case upheld and in another reversed a conviction on substantially similar factual situations. Such a glaring difference of opinion obviously requires that a more precise standard be set by the Supreme Court. Although the authority of law enforcement officers must be limited if adequate protection is to be afforded to law abiding citizens, it is essential that the law itself must be definite if these officials are to know the scope of their authority. Perhaps in granting certiorari in the *Masziale* case, the Supreme Court will avail itself of this opportunity to clarify the law of entrapment in the federal courts.



### CY PRES IN NEW YORK

Testatrix executed a will in 1934 and died in 1938 a resident of New York. By the terms of the will a trust was created for the benefit of testatrix' sister for life with remainder to a charitable hospital in Great Britain. The life tenant died in 1950 and the remainder in trust ordinarily would have passed without question except that by 1948 the British government had taken title to all hospital property and nationalized all medical services.<sup>1</sup> Is the hospital still a charity within the intent of the testatrix as expressed in the will and the surrounding circumstances? Or, do the facts make appropriate an exercise by the court of its cy pres power? The answer, as provided by the New York courts in two recent cases,<sup>2</sup> makes timely an examination of current trends in the application of the cy pres doctrine in New York.<sup>3</sup>

<sup>65</sup> 287 U.S. 435 (1932).

<sup>1</sup> See National Health Service Act, 1946, 9 & 10 Geo. 6, c. 81; National Health Service (Scotland) Act, 1947, 10 & 11 Geo. 6, c. 27.

<sup>2</sup> *Matter of Perkins*, 2 A.D.2d 655, 152 N.Y.S.2d 315 (1st Dep't 1956); *Matter of Bishop*, 1 A.D.2d 612, 152 N.Y.S.2d 310 (1st Dep't 1956).

<sup>3</sup> This note will be concerned mainly with cases decided after 1931 when the surrogate's court was empowered to apply cy pres. The cases before that date are few. See Note, 39 COLUM. L. REV. 1358 (1939).

### *Historical Background*

The doctrine of cy pres applies only to charitable trusts.<sup>4</sup> Definitions of the doctrine have varied widely.<sup>5</sup> But, a generally acceptable definition is that of the *Restatement of Trusts*. It is there said that:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.<sup>6</sup>

The formulation of the doctrine resulted essentially from a desire to save for the public the benefit of a gift which otherwise would lapse under the law applying to private trusts.<sup>7</sup> Thus, where a private trust fails if the beneficiary is not definite and ascertained,<sup>8</sup> the application of cy pres will save a charitable trust.<sup>9</sup> Again, where a private trust fails because its purpose has already been accomplished,<sup>10</sup> cy pres will save a charitable trust.<sup>11</sup>

The origins of the doctrine reach back into antiquity.<sup>12</sup> A case in the third century applying the cy pres principle to save a gift to the public for a purpose then illegal appears in the Digest of Justinian.<sup>13</sup> The jurist there thought that, since the testator had not intended the funds to go to his heirs, he might be memorialized in another manner. Indeed, the Roman Law treated the performance of many public duties as acts of charity.<sup>14</sup> When, during the Middle Ages the English ecclesiastical chancellors began to apply the cy pres principle,<sup>15</sup> they fused the Roman public-duty concept with their own theory that gifts to charity should be upheld for the good of the soul

<sup>4</sup> 2A BOGERT, TRUSTS AND TRUSTEES § 431, at 317 (1953); 4 SCOTT, TRUSTS § 399, at 2826 (2d ed. 1956).

<sup>5</sup> See FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 1.00, at 1 (1950).

<sup>6</sup> 2 RESTATEMENT, TRUSTS § 399 (1935).

<sup>7</sup> BOGERT, TRUSTS § 147, at 567 (3d ed. 1952).

<sup>8</sup> *Id.* § 34, at 148.

<sup>9</sup> See, e.g., *Matter of Durbrow*, 245 N.Y. 469, 157 N.E. 747 (1927); 2A BOGERT, TRUSTS AND TRUSTEES § 438, at 373 (1953).

<sup>10</sup> BOGERT, TRUSTS § 150, at 582 (3d ed. 1952); NEWMAN, TRUSTS 498 (2d ed. 1955).

<sup>11</sup> See, e.g., 2A BOGERT, TRUSTS AND TRUSTEES § 439, at 378-79 (1953); 2 RESTATEMENT, TRUSTS § 399, comment *h* (1935); 4 SCOTT, TRUSTS § 399.2, at 2838 (2d ed. 1956).

<sup>12</sup> FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 1.02, at 3 (1950).

<sup>13</sup> See *Mormon Church v. United States*, 136 U.S. 1, 52 (1890).

<sup>14</sup> See Willard, *Illustrations of the Origin of Cy Pres*, 8 HARV. L. REV. 69, 71-72 (1894).

<sup>15</sup> How the cy pres doctrine was absorbed into the common law is not certain. See FISCH, *op. cit. supra* note 12, § 1.03, at 4; Comment, 49 YALE L.J. 303, 309 (1939).

of the giver.<sup>16</sup> Consequently, gifts for the repair of bridges were upheld as equally charitable as alms-giving and hence proper objects of the chancellor's cy pres power.<sup>17</sup> Finally, in 1601 the Statute of Charitable Uses<sup>18</sup> codified the law in England.

As the cy pres doctrine developed there, the chancellors exercised their power in one of two ways.<sup>19</sup> As judges of a court of equity they exercised a *judicial* power, but as chancellors or keepers of the king's conscience they exercised the king's *prerogative* right, as *parens patriæ*,<sup>20</sup> to save trusts beyond the jurisdiction of equity courts.<sup>21</sup> The exercise of judicial cy pres was controlled by the equity court's own jurisdictional limitations. The prerogative power, however, had no bounds in fact but the king's will.<sup>22</sup> As a result, the chancellor, in some early cases, abused the power<sup>23</sup> and brought discredit upon the whole doctrine. This resulted from the fact that, at the time, both types of cy pres were exercised by the chancellor without distinction.<sup>24</sup> Thus, it was not until 1803 that this confusion was cleared by Lord Eldon when he formulated a distinction still recognized in England today. It remained for that great jurist to point out that

. . . [W]here there is a general indefinite purpose, not fixing itself upon any object . . . the disposition is in the King by Sign Manual: but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust.<sup>25</sup>

The prerogative power still exists in England today, but has little significance.<sup>26</sup> Because this power is arbitrary, and hence, repugnant to our theory of government, it has never been accepted in this

<sup>16</sup> For general discussion, see Willard, *supra* note 14. See also Comment, 49 YALE L.J. 303, 309 (1939).

<sup>17</sup> See Willard, *supra* note 14 at 71.

<sup>18</sup> Statute of Charitable Uses, 1601, 43 ELIZ. I, c. 4.

<sup>19</sup> See 2 PERRY, TRUSTS AND TRUSTEES § 718, at 1222 (7th ed. 1929); Comment, 13 CORNELL L.Q. 310, 312 (1928).

<sup>20</sup> Under this name, the king had general administration of all charities. 2 PERRY, *op. cit. supra* note 19.

<sup>21</sup> A Massachusetts court classified such cases as follows: "The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it." Jackson v. Phillips, 96 Mass. (14 Allen) 539, 574 (1867).

<sup>22</sup> See 2 PERRY, *op. cit. supra* note 19; 4 SCOTT, TRUSTS § 399.1, at 2831 (2d ed. 1956); Comment, 49 YALE L.J. 303, 305 (1939).

<sup>23</sup> See, e.g., Cary v. Abbot, 7 Ves. Jr. 490, 32 Eng. Rep. 198 (Rolls 1802); Da Costa v. De Pas, 1 Amb. 6228, 27 Eng. Rep. 150 (Ch. 1754). See also 4 SCOTT, TRUSTS § 399.1, at 2829 (2d ed. 1956).

<sup>24</sup> See 2 PERRY, TRUSTS AND TRUSTEES § 718, at 1222 (7th ed. 1929); Comment, 13 CORNELL L.Q. 310, 312 (1928).

<sup>25</sup> Moggridge v. Thackwell, 7 Ves. Jr. 36, 86, 32 Eng. Rep. 15, 32 (Ch. 1803).

<sup>26</sup> See Comment, 49 YALE L.J. 303, 306 (1939); Comment, 13 CORNELL L.Q. 310, 313, 314 (1928).

country. Whether this power inheres today in the American legislatures, as successors to the powers of the English kings, is a question left unanswered by more than 150 years of American case law.<sup>27</sup>

*Application of Cy Pres in the United States*

For a time not even judicial cy pres was accepted in most states.<sup>28</sup> Some jurisdictions, confused by common-law history, failed to distinguish between prerogative and judicial cy pres.<sup>29</sup> Others believed that the English courts derived their power solely from the Statute of Charitable Uses and that American courts had no such power.<sup>30</sup> A few denied the validity of charitable trusts and thus had no opportunity to pass upon the doctrine.<sup>31</sup> Gradually, as historical misconceptions were corrected, states generally adopted the doctrine through the courts or legislatures, with but six jurisdictions positively rejecting it.<sup>32</sup>

In New York, the cy pres doctrine received little attention in the nineteenth century while the courts determined the validity of charitable trusts. The Legislature in 1829 expressly limited legal trusts to four classes of which charitable trusts were not included.<sup>33</sup> In the leading case of *Williams v. Williams*,<sup>34</sup> however, the Court of Appeals upheld a trust for the education of poor children. In a series of decisions that followed it,<sup>35</sup> the case was so criticized and limited that it was all but overruled. Finally, in 1893 the Tilden Act<sup>36</sup> was passed validating charitable trusts and giving the supreme court control over them. The act was subsequently amended<sup>37</sup> and

<sup>27</sup> See BOGERT, TRUSTS § 147, at 569 (3d ed. 1952); 4 SCOTT, TRUSTS § 399.2 (2d ed. 1956). Whether the legislature could exercise this power is a matter of dispute among textwriters. See, e.g., 2A BOGERT, TRUSTS AND TRUSTEES § 434 (1953); 2 PERRY, TRUSTS AND TRUSTEES § 719, at 1225 (7th ed. 1929); 2 RESTATEMENT, TRUSTS § 399, comment e (1935); 4 SCOTT, TRUSTS § 399.2 (2d ed. 1956).

<sup>28</sup> See FISCH, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 377 (1953).

<sup>29</sup> See FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03, at 56 (1950); Note, 8 CORNELL L.Q. 179, 181-82 (1923).

<sup>30</sup> See Comment, 49 YALE L.J. 303, 306-07 (1939).

<sup>31</sup> See FISCH, *op. cit. supra* note 29, § 2.02, at 28-29.

<sup>32</sup> See NEWMAN, TRUSTS 195-96 (2d ed. 1955). The states are Arizona, Alabama, Delaware, North Carolina, South Carolina and Tennessee. In Alabama and North Carolina, the courts exercise the same power but under different doctrines. *Id.*

<sup>33</sup> N.Y. REV. STAT. 1828, c. 1, tit. 2, §§ 45, 55.

<sup>34</sup> 8 N.Y. 525 (1853).

<sup>35</sup> See *Cottman v. Grace*, 112 N.Y. 299, 307, 19 N.E. 839, 841 (1889); *Holmes v. Mead*, 52 N.Y. 332, 337 (1873); *Bascom v. Albertson*, 34 N.Y. 584, 589 (1866).

<sup>36</sup> Laws of N.Y. 1893, c. 701.

<sup>37</sup> Laws of N.Y. 1901, c. 291, § 1; Laws of N.Y. 1909, c. 144, §§ 1, 2; Laws of N.Y. 1931, c. 562, §§ 8, 9; Laws of N.Y. 1953, c. 715, §§ 1, 2.

as amended is found today in both the Real Property Law<sup>38</sup> and Personal Property Law.<sup>39</sup> With the validity of charitable trusts established by legislative enactment, the path was cleared for the application of the cy pres doctrine. Thus, since 1893 the New York courts have frequently applied the doctrine in a variety of circumstances.<sup>40</sup>

When the courts exercise the cy pres power today, they are applying a rule of construction,<sup>41</sup> rather than wielding an unlimited power to revise a will. In construing the will and the testator's intention, the court will make the construction as liberal as possible in order to save the trust.<sup>42</sup> Where there is an absolute gift to a charity<sup>43</sup> or where, though in trust, no particular charity is named as beneficiary<sup>44</sup> the courts will apply cy pres. To find the necessary intent, the courts look to the will and any pertinent external evidence.<sup>45</sup> In exercising the cy pres power, the courts must use a great degree of discretion.<sup>46</sup> They are confronted with such an unusual variety of factual situations that almost every case must be considered *sui generis*.<sup>47</sup> But the exercise of the court's discretion in applying cy pres should not be confused with the court's usual equitable powers. For example, as a general rule, a court may appoint a trustee in order to save a trust,<sup>48</sup> or may permit a variance of a trust scheme under the doctrine of deviation.<sup>49</sup> These are not instances of the use of cy pres.

To exercise the cy pres power, a court must find three precedent conditions. First, the gift or trust must be charitable in nature.<sup>50</sup> Secondly, the language of the will read in connection with the surrounding circumstances must indicate that the testator had the intention to aid charity in general.<sup>51</sup> And, finally, the court must

<sup>38</sup> N.Y. REAL PROP. LAW § 113(1), (2), (2-a).

<sup>39</sup> N.Y. PERS. PROP. LAW § 12(1), (2), (2-a).

<sup>40</sup> See *Allen v. Stevens*, 161 N.Y. 122, 55 N.E. 568 (1899); Note, 39 COLUM. L. REV. 1358 (1939).

<sup>41</sup> See, e.g., *Matter of MacDowell*, 217 N.Y. 454, 112 N.E. 177 (1916); *Matter of Lawless*, 194 Misc. 844, 87 N.Y.S.2d 386 (Surr. Ct. 1949); 2 PERRY, TRUSTS AND TRUSTEES § 728 (7th ed. 1929).

<sup>42</sup> See *Matter of MacDowell*, *supra* note. 41; BOGERT, TRUSTS § 147, at 567 (3d ed. 1952).

<sup>43</sup> See *City Bank Farmers Trust Co. v. Arnold*, 283 N.Y. 184, 27 N.E.2d 984 (1940); 2A BOGERT, TRUSTS AND TRUSTEES § 431, at 318 (1953).

<sup>44</sup> See *Matter of Durbrow*, 245 N.Y. 469, 157 N.E. 747 (1927); 4 SCOTT, TRUSTS § 399, at 2826 (2d ed. 1956).

<sup>45</sup> See 2 PERRY, TRUSTS AND TRUSTEES § 723, at 1232 (7th ed. 1929).

<sup>46</sup> See *Matter of MacDowell*, 217 N.Y. 454, 112 N.E. 177 (1916).

<sup>47</sup> See 2A BOGERT, TRUSTS AND TRUSTEES § 436, at 346 (1953); Comment, 49 YALE L.J. 303, 310 (1939).

<sup>48</sup> NEWMAN, TRUSTS 108 (2d ed. 1955).

<sup>49</sup> See 2A BOGERT, TRUSTS AND TRUSTEES § 431 (1953); 4 SCOTT, TRUSTS § 399, at 2826 (2d ed. 1956).

<sup>50</sup> See note 4 *supra*.

<sup>51</sup> See FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 5.03, at 147 (1950); 2 RESTATEMENT, TRUSTS § 399 (1935); 4 SCOTT, TRUSTS § 399,3 (2d

determine that the specific trust purpose has failed or become impossible or impracticable to achieve.<sup>52</sup>

At times, the courts have found it difficult to determine whether this latter condition to the application of cy pres has been met by the facts of a particular case. However, they have recognized numerous situations in which the express trust scheme fails. Thus, cy pres has been applied where the specific purpose has already been accomplished<sup>53</sup> or where the specific purpose is impossible of fulfillment;<sup>54</sup> as well as where the trust funds are insufficient<sup>55</sup> and where it is impracticable to carry out the specific purpose.<sup>56</sup> Less difficult to recognize as situations giving rise to a proper exercise of the power are instances where the specific purpose fails for lack of consent,<sup>57</sup> or where the beneficiary is a non-existent corporation.<sup>58</sup> On the other hand, cy pres has not been applied where the trust or gift is not charitable in nature,<sup>59</sup> or where the testator's intent is to benefit only the particular charity named.<sup>60</sup> Neither will cy pres be

ed. 1956). One writer pointed out that the court is doing what is desirable in view of public policy, rather than giving effect to the testator's intent. 2A BOGERT, TRUSTS AND TRUSTEES § 436, at 344 (1953).

<sup>52</sup> See, e.g., N.Y. REAL PROP. LAW § 113(2); N.Y. PERS. PROP. LAW § 12(2); 2 RESTATEMENT, TRUSTS § 399, comment *f* (1935); 4 SCOTT, TRUSTS § 1399.2, at 2831 (2d ed. 1956).

<sup>53</sup> See *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867); 2 RESTATEMENT, TRUSTS § 399, comment *h* (1935); 4 SCOTT, TRUSTS § 399.2, at 2838 (2d ed. 1956); cf. *Matter of Neher*, 279 N.Y. 370, 18 N.E.2d 625 (1939).

<sup>54</sup> See *Matter of Rupprecht*, 271 App. Div. 376, 65 N.Y.S.2d 909 (4th Dep't 1946), *aff'd per curiam*, 297 N.Y. 462, 74 N.E.2d 175 (1947); *Matter of Lewis*, 208 Misc. 968, 145 N.Y.S.2d 829 (Surr. Ct. 1953), *rev'd mem.*, 278 App. Div. 888, 104 N.Y.S.2d 952 (4th Dep't 1951), *rev'd mem.*, 308 N.Y. 795, 125 N.E.2d 598 (1955); *Matter of Heckscher*, 131 N.Y.S.2d 191 (Sup. Ct. 1954); 2 RESTATEMENT, TRUSTS § 399 (1935); 4 SCOTT, TRUSTS § 399.2, at 2838 (2d ed. 1956).

<sup>55</sup> See *Matter of Gary*, 248 App. Div. 373, 288 N.Y. Supp. 382 (1st Dep't 1936) (*per curiam*); *Matter of Lawless*, 194 Misc. 844, 87 N.Y.S.2d 386 (Surr. Ct. 1949); *Matter of Borden*, 180 Misc. 988, 42 N.Y.S.2d 560 (Surr. Ct. 1943); 2A BOGERT, TRUSTS AND TRUSTEES § 438, at 362-64 (1953); 2 RESTATEMENT, TRUSTS § 399, comment *g* (1935); 4 SCOTT, TRUSTS § 399.2, at 2834-38 (2d ed. 1956).

<sup>56</sup> See *Matter of Neher*, 279 N.Y. 370, 18 N.E.2d 625 (1939); *Matter of Swan*, 237 App. Div. 454, 261 N.Y. Supp. 428 (4th Dep't 1933), *aff'd mem. sub nom. St. John's Church of Mt. Morris v. Kelly*, 263 N.Y. 638, 189 N.E. 734 (1934); BOGERT, TRUSTS § 147, at 570 (3d ed. 1952); 2 RESTATEMENT, TRUSTS § 399, comment *m* (1935).

<sup>57</sup> See *Matter of Gary*, *supra* note 55; 2 RESTATEMENT, TRUSTS § 399, comment *i* (1935); 4 SCOTT, TRUSTS § 399.2, at 2839 (2d ed. 1956).

<sup>58</sup> See N.Y. REAL PROP. LAW § 113(2-a); N.Y. PERS. PROP. LAW § 12(2-a); FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 6.02(b), at 181-82 (1950); 4 SCOTT, TRUSTS § 399.2, at 2840 (2d ed. 1956).

<sup>59</sup> See *Matter of Merritt*, 280 N.Y. 391, 21 N.E.2d 365 (1939); *Matter of Carpenter*, 163 Misc. 474, 297 N.Y. Supp. 649 (Surr. Ct. 1937); 2A BOGERT, TRUSTS AND TRUSTEES § 431, at 317 (1953). See also note 4 *supra*.

<sup>60</sup> See *Matter of Syracuse University*, 2 Misc. 2d 446, 150 N.Y.S.2d 251 (Sup. Ct. 1956); *Saltsman v. Greene*, 136 Misc. 497, 243 N.Y. Supp. 576 (Sup. Ct. 1930), *aff'd mem.*, 231 App. Div. 781, 246 N.Y. Supp. 913 (3d Dep't 1930),

applied where the testator provides for failure of the trust by a trust over.<sup>61</sup> In any case where application of cy pres is requested, the Attorney General is a necessary party.<sup>62</sup>

*Application of Cy Pres in New York*

As leaders in the formulation of contemporary trends, the New York courts have applied the cy pres doctrine with increasing liberality.<sup>63</sup> Thus, it has been held that absolute gifts to charitable corporations are within the scope of the cy pres statute and are proper objects of its exercise.<sup>64</sup> Under the theory of liberal construction, the courts have used their discretion freely. In *Matter of Gary*,<sup>65</sup> for example, testatrix made a gift of various objects of art together with a fund to maintain the objects, to the Metropolitan Museum of Art upon certain conditions. One such condition was that none of the objects was to be sold. The will provided for a change of beneficiaries should any condition be broken. When it appeared that the gift was unacceptable to museums because the maintenance fund was insufficient, the court allowed some of the objects to be sold to preserve the remaining pieces. Although an express provision of the will was violated by so doing, the court achieved as nearly as possible, the original purpose of the testatrix under changed conditions which she had never foreseen.

In *Matter of Clark*<sup>66</sup> and *Matter of Dillenback*<sup>67</sup> the surrogates found no difficulty in applying cy pres by directing that income from a trust intended to help pay a Methodist minister be used instead to help pay a Presbyterian minister. In both cases a church of each denomination was located in the town at the time the testator died, but the Methodist church closed its doors thereafter. Noting the co-operation between the two churches, the court, in each case, found that the testator intended to help the Christian church in the town generally; hence cy pres was applicable.

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*aff'd mem.*, 256 N.Y. 636, 177 N.E. 172 (1931); *In re Gault*, 48 N.Y.S.2d 928 (Surr. Ct. 1944); 4 SCOTT, TRUSTS § 399.2, at 2842-44 (2d ed. 1956).

<sup>61</sup> See *Matter of Fletcher*, 280 N.Y. 86, 19 N.E.2d 794 (1939); *Matter of Price*, 264 App. Div. 29, 35 N.Y.S.2d 111 (3d Dep't), *aff'd mem.*, 289 N.Y. 751, 46 N.E.2d 354 (1942); BOGERT, TRUSTS § 147, at 572-73 (3d ed. 1952); FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 5.03(a), at 151 (1950).

<sup>62</sup> See N.Y. REAL PROP. LAW § 113(3); N.Y. PERS. PROP. LAW § 12(3); 4 SCOTT, TRUSTS § 399, at 2828 (2d ed. 1956).

<sup>63</sup> See Comment, 49 YALE L.J. 303, 322 n.131 (1939). See also cases cited at notes 65, 66, 67, 68, 70, 71 *infra*.

<sup>64</sup> See *City Bank Farmers Trust Co. v. Arnold*, 283 N.Y. 184, 27 N.E.2d 984 (1940); *Sherman v. Richmond Hose Co. No. 2*, 230 N.Y. 462, 130 N.E. 613 (1921).

<sup>65</sup> 248 App. Div. 373, 288 N.Y. Supp. 382 (1st Dep't 1936) (per curiam).

<sup>66</sup> 1 Misc. 2d 869, 150 N.Y.S.2d 65 (Surr. Ct. 1956).

<sup>67</sup> 189 Misc. 2d 538, 74 N.Y.S.2d 473 (Surr. Ct. 1947), *aff'd mem.*, 273 App. Div. 1051 (4th Dep't 1948).

In the recent case of *Matter of Lee*,<sup>68</sup> cy pres was applied to save a bequest to a tuberculosis sanitarium. The testatrix directed that a memorial cottage be built to house patients at the sanitarium's Saranac Lake, New York, location. But eight months after she died, the sanitarium closed its hospital although it continued its research activities on respiratory ailments. The court ordered the bequest be given to the sanitarium as a memorial endowment fund, the income to be used "for the benefit of persons suffering from respiratory or other similar disorders."<sup>69</sup> In other cases courts have directed the sale of privately endowed parks and applied the proceeds to public parks,<sup>70</sup> and have diverted property and funds left to maintain homes for the aged and infirm to agencies dispensing similar services.<sup>71</sup> In each case the court determined the testator's intention. Then, guided by the general intent, the court sought a scheme in substitution for the original plan which would effectuate the testator's will generally, and consequently benefit the public. So, in the *Clark* and *Dillenback* cases the court achieved the testator's intention to benefit the Christian church in the town by substituting a new beneficiary for one no longer in existence.

Where the courts have not applied cy pres, they have felt constrained not to do so only by the testator's own intention or the nature of the gift. Thus in *Matter of Fletcher*<sup>72</sup> the testator bequeathed a sum for the construction and maintenance of a hospital. When the fund proved inadequate the trustee petitioned for application cy pres of the fund. The court denied the petition because the testator provided for an alternate disposition should the bequest "for any reason, be declared illegal or inoperative."<sup>73</sup> In *Matter of Grossman*<sup>74</sup> the court was asked to save a bequest to the Socialist Labor Party, an unincorporated association not able to take bequests under New York law.<sup>75</sup> The court denied the application on the ground, among others, that the named beneficiary was not a charitable organization. The courts have also occasionally withheld cy pres where they construed testator's intention narrowly. Thus, in *Matter*

<sup>68</sup> 3 Misc. 2d 1072 (Surr. Ct. 1956).

<sup>69</sup> *Matter of Lee*, 3 Misc. 2d 1072, 1080 (Surr. Ct. 1956). See also *Matter of Scott*, 1 Misc. 2d 206, 145 N.Y.S.2d 346 (Surr. Ct. 1955).

<sup>70</sup> See, e.g., *Smith v. Village of Patchogue*, 285 App. Div. 1190, 141 N.Y.S.2d 244 (2d Dep't 1955) (mem. opinion); *In re Heckscher*, 131 N.Y.S.2d 191 (Sup. Ct. 1954).

<sup>71</sup> See, e.g., *Matter of Swan*, 237 App. Div. 454, 261 N.Y. Supp. 428 (4th Dep't 1933), *aff'd sub nom. St. John's Church of Mt. Morris v. Kelly*, 263 N.Y. 638, 189 N.E. 734 (1934); *Matter of Lewis*, 208 Misc. 968, 145 N.Y.S.2d 829 (Surr. Ct. 1953), *aff'd mem.*, 308 N.Y. 795, 125 N.E.2d 598 (1955); *Matter of Lawless*, 194 Misc. 844, 87 N.Y.S.2d 386 (Surr. Ct. 1949).

<sup>72</sup> 280 N.Y. 86, 19 N.E.2d 794 (1939).

<sup>73</sup> *Matter of Fletcher*, 280 N.Y. 86, 90, 19 N.E.2d 794 (1939).

<sup>74</sup> 190 Misc. 521, 75 N.Y.S.2d 335 (Surr. Ct. 1947).

<sup>75</sup> See *Matter of Cunningham*, 206 N.Y. 601, 100 N.E. 437 (1912).

of *Collins*<sup>76</sup> testator left a legacy to the "Children of St. Joseph's Hospital." A closely-divided court<sup>77</sup> affirmed the Surrogate's ruling that the gift lapsed because it was a direct gift and not a charitable trust. Such narrow constructions are the exception, however, and not the rule.<sup>78</sup>

### *A Current Problem*

The current problem facing the courts in construing a testator's intention is that stated at the outset of this note. That is, is a hospital formerly devoted to charitable work and voluntarily supported, but now operated by the government, still to be considered charitable in nature? Or, more broadly stated, does a government-operated institution have a charitable character? In *Matter of Bishop*<sup>79</sup> the court answered the questions affirmatively, citing with approval English decisions on the same question. It points out that the testatrix must be deemed to have anticipated changes in the modes of paying for medical care. In answer to the argument that the hospital intended to be benefited no longer existed, the court said that only the administration has changed and that the former voluntary entity continues. On the direct question of charitable character the court accepted without question the English conclusion that such hospitals are charitable and pointed out that they would ". . . not evoke a difficulty that the courts intimately concerned with the impact of this statutory purpose on charitable hospitals do not find in it."<sup>80</sup>

The same day the court decided the *Bishop* case, it decided *Matter of Perkins*.<sup>81</sup> The facts in this latter case were similar to those in the *Bishop* case except that the testator in *Perkins* had died at a much earlier date. Though the *Bishop* case was decided unanimously, Justice Frank, who did not participate in that decision, wrote a strong dissent in the *Perkins* case.<sup>82</sup> Justice Frank urged

<sup>76</sup> 254 App. Div. 649, 3 N.Y.S.2d 291 (1st Dep't 1938) (mem. opinion).

<sup>77</sup> The decision was 3-2. For cases in apparent agreement with the dissent, see footnote 78 *infra*.

<sup>78</sup> See, e.g., *Matter of Durbrow*, 245 N.Y. 469, 157 N.E. 747 (1927); *In re Smith*, 70 N.Y.S.2d 797 (Surr. Ct. 1947); *Matter of Whittelsey*, 180 Misc. 602, 41 N.Y.S.2d 815 (Surr. Ct. 1943).

<sup>79</sup> 1 A.D.2d 612, 152 N.Y.S.2d 310 (1st Dep't 1956).

<sup>80</sup> *Matter of Bishop*, 1 A.D.2d 612, 616, 152 N.Y.S.2d 310, 314 (1st Dep't 1956). The surrogate's court of Oneida County, was confronted by a case in 1954 presenting the same facts as those in the *Bishop* case. The surrogate felt that the trust over should go to the nationalized hospital providing the board of governors guaranteed a proper use of the funds consistent with the testatrix' intentions. The surrogate so decided because "[w]hile there may now be technical differences in the organizational set-up, nevertheless there could be no closer approximation of the wishes and intent of this decedent, which were to benefit medically the people of that area. . . ." *Matter of Ablett*, 206 Misc. 157, 170, 132 N.Y.S.2d 488, 500 (Surr. Ct. 1954).

<sup>81</sup> 2 A.D.2d 655, 152 N.Y.S.2d 315 (1st Dep't 1956).

<sup>82</sup> *Matter of Perkins*, 2 A.D.2d 655, 152 N.Y.S.2d 315 (1st Dep't 1956).

application of cy pres on the ground that the operation of hospitals was no longer a charitable enterprise but a government function, and that the testator could never have intended the result that the majority had approved. He pointed to the parliamentary debates that preceded passage of the nationalization act<sup>83</sup> to show that the government intended to abolish the hospitals as charities and distinguished the English cases relied upon by the majority by showing constitutional differences. These differences are rooted in the fact that English courts are bound by national policy as established by parliament while ours are not. He further felt that a man dying in 1907 could not possibly have anticipated the nationalization of hospitals then charitable. Noting that the testator, in the same paragraph of his will made a gift to a voluntary private hospital in New York City, Justice Frank urged that the trust be directed by the court's cy pres power to some charitable New York City hospital.

The question presented by these recent cases has not been frequently considered by New York courts. By statute, gifts in trust of real and personal property may be made to municipal corporations for charitable purposes.<sup>84</sup> But this does not make municipal corporations charitable in nature. The lower courts have given divided opinions on the question. In two cases<sup>85</sup> the courts felt that to give to a governmental group what was intended for a private enterprise would be to frustrate the donor's intention. They believed that such a construction would benefit the taxpayer and not the class the donor intended. The facts in *Matter of Syracuse University*<sup>86</sup> are strikingly similar to those in the *Bishop* and *Perkins* cases. There, the testator established a trust for the College of Medicine of Syracuse University. When the university decided to abandon the school for economic reasons, New York State intervened and, using the same physical plant, continued the school as the State University Medical Center. The court held that the bequest lapsed because the testator intended to benefit his alma mater exclusively. ". . . [T]he inference that the testator intended to ameliorate the tax burden of the People of the State of New York is wholly unwarranted."<sup>87</sup>

This same argument was answered in *Matter of Harrington*.<sup>88</sup> There, the testator gave a life estate to a niece with remainder to a privately-owned hospital, to build an annex. Before the life tenant died, the City of Rome bought the hospital. In a construction proceeding, awarding the remainder to the then municipally owned hos-

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<sup>83</sup> *Ibid.*

<sup>84</sup> N.Y. REAL PROP. LAW § 114; N.Y. PERS. PROP. LAW § 13.

<sup>85</sup> *Matter of Syracuse University*, 2 Misc. 2d 446, 150 N.Y.S.2d 251 (Sup. Ct. 1956); *Matter of O'Hanlon*, 147 Misc. 546, 264 N.Y. Supp. 251 (Surr. Ct. 1933).

<sup>86</sup> 2 Misc. 2d 446, 150 N.Y.S.2d 251 (Sup. Ct. 1956).

<sup>87</sup> *Matter of Syracuse University*, 2 Misc. 2d 446, 454, 150 N.Y.S.2d 251, 260 (Sup. Ct. 1956).

<sup>88</sup> 243 App. Div. 235, 276 N.Y. Supp. 868 (4th Dep't 1935).

pital, the court upheld the gift as charitable and rejected the taxpayer-burden argument. The court felt that giving strict effect to the charitable intent of the testatrix did not necessarily mean relieving the taxpayer of expense, since, in the absence of a bequest, public funds may not have been used for this purpose.<sup>89</sup> In other cases the courts have found no difficulty in exercising the cy pres power by giving funds to a county home for the aged where the funds were inadequate to maintain a private home;<sup>90</sup> by conveying a park to the town;<sup>91</sup> and by permitting a town to build an administration building on land left for a hospital.<sup>92</sup> Since, indicated previously, the exercise of the cy pres power is confined to charities, it would seem that these cases, at least by implication, have recognized a charitable character in publicly-owned institutions.

One other jurisdiction has been presented with the identical problem posed by the *Bishop* and *Perkins* cases. In the *First National Bank v. King Edward's Hospital Fund*,<sup>93</sup> an Illinois appellate court directed under its cy pres power that the fund be given to the named hospitals, although it recognized that the use of cy pres was not necessary. The court there found that the testator had the general intent to promote the health of the community where he was born and pointed out that regardless of whether the government has taken on this task, ". . . the furnishing of medical and hospital service to human beings, is a worthy charitable purpose."<sup>94</sup>

### Conclusion

It would seem that the majority in the *Bishop* and *Perkins* cases refused to meet squarely the main problem. Instead of determining independently the charitable nature of nationalized hospitals, the court accepted without question the findings of English courts. Even in that country, these decisions may not be authoritative answers.<sup>95</sup>

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<sup>89</sup> The court said:

"If the present owner of the hospital building in question, the city of Rome, does not wish, or will not permit, an 'annex' or 'addition' to its building . . . it cannot be forced to have it, but it may not then claim the money for use in a manner not contemplated by the will."

Matter of Harrington, 243 App. Div. 235, 239, 276 N.Y. Supp. 868, 872 (4th Dep't 1935).

<sup>90</sup> See, e.g., Matter of Lewis, 208 Misc. 968, 145 N.Y.S.2d 829 (Surr. Ct. 1953), *aff'd mem.*, 308 N.Y. 795, 125 N.E.2d 598 (1955).

<sup>91</sup> See, e.g., *In re Heckscher*, 131 N.Y.S.2d 191 (Sup. Ct. 1954).

<sup>92</sup> See, e.g., Matter of Neher, 279 N.Y. 370, 18 N.E.2d 625 (1939).

<sup>93</sup> 1 Ill. App. 2d 338, 117 N.E.2d 656 (1954). The Supreme Court of Rhode Island has also had before it a similar situation in *Pennsylvania Co. v. Board of Governors*, 79 R.I. 74, 83 A.2d 881 (1951). Since the testator provided for the failure of the gift to the hospitals in any way, however, the court did not have to cope with the problem presented by the *Bishop* and *Perkins* cases.

<sup>94</sup> *First Nat'l Bank v. King Edward's Hospital Fund*, 1 Ill. App. 2d 338, 117 N.E.2d 656, 667 (1954).

<sup>95</sup> See 94 Sol. J. 608, 609 (1950).

Since the governmental structure there differs from ours and that government has established a policy of administering medical service alien to ours, the majority's reliance upon the English decisions appears ill-founded.

In effect, the court has equated a public purpose with a charitable purpose. Under the Roman Law later fused into early English decisions this construction would have been correct.<sup>96</sup> Is it correct today? A distinction between two types of charitable gifts must be drawn. For example a testator may devise real property to a municipality for the purpose of maintaining a park. The testator may also devise the property to a private charitable corporation for the same purpose. Thus, a gift may be made to a municipal corporation performing public duties and the gift may be charitable<sup>97</sup> and for the public benefit. But a gift to a private charitable corporation is meant to aid *voluntary* charitable works, not governmentally maintained. The argument may be made that in either case the public is to be benefited and it matters little whether the means are voluntary or not. The difficulty with this approach is that it subordinates the intention of the testator in favor of the public good; whereas the judge in every case should be guided primarily by the former and not the latter. The court must devise a scheme to benefit the class of persons the testator intended to benefit. Applying *cy pres* in any other way smacks of prerogative *cy pres*. So, if the testator wishes to aid the sick poor in general or in a particular area, and the only effect of giving gifts to nationalized hospitals is to provide relief for the taxpayers, can it be said that his intent is effectuated?

The decision of the court in the *Bishop* and *Perkins* cases appears inconsistent with the liberal spirit that has characterized application of *cy pres* in New York. The courts, as shown by the cases cited above,<sup>98</sup> have not hesitated to change the testator's original plan in order to give effect to his intentions. With the continuing expansion of government into various fields, the courts will undoubtedly be faced again with the problem discussed here. It is recommended that, they meet the problem with the liberal spirit that has characterized contemporary application of *cy pres* rather than the narrow construction presently put forward.

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<sup>96</sup> See text at note 14 *supra*.

<sup>97</sup> See N.Y. REAL PROP. LAW § 114; N.Y. PERS. PROP. LAW § 13.

<sup>98</sup> See cases cited in text at notes 65, 66, 67, 68 *supra* and cases cited in notes at 70, 71 *supra*.