

Testamentary Trust--Cy Pres Doctrine--Construction of Will (In re Price's Will, 264 App. Div. 29 (1942))

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compare the forgery and thus is in no position to make a reasonable examination for genuineness.⁹ When this is not so, as in the famous *Prudential* case¹⁰ wherein the depositor did have a genuine signature on file, the Court of Appeals held that it was a question of fact for the jury whether or not the depositor was negligent in omitting to compare the signatures with those on the cancelled checks. The depositor when receiving a cancelled check has a right to rely upon the bank's inquiry and warranty of genuineness.¹¹ It is no defense to the bank that it relied upon the inspection and investigation of agents or associate banks¹² or on clearing houses;¹³ if it chooses to pay away the depositors' funds relying on the investigation of another, then it must hazard the consequences, for the legal liability between the drawer and drawee will remain the same as if no funds were paid out.¹⁴ Neither will the depositor be precluded from enforcing its rights on any theory of agency because the forging officer is not acting within the scope of his authority.¹⁵ Estoppel will never lie to bar a recovery unless the negligent act of the depositor was relied upon by the bank and it was the substantial factor of the wrongful payment.¹⁶

C. S.

TESTAMENTARY TRUST—CY PRES DOCTRINE—CONSTRUCTION OF WILL.—Frances Paget Price, a widow, died having no descendants. In her will and the two codicils thereto she left her farm and personal property in trust for the maintenance of a home where retired Presbyterian ministers and their wives might live. The testatrix made alternative dispositions should her intent "because of illegality fail, or become impossible of realization"; thus, in the second codicil to the testament she designated Elmira College her contingent legatee. Mrs. Price's Alma Mater petitioned the Surrogate for a construction of the instrument, and asserting that the improvements demanded by

⁹ *Shipman v. The Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821 (1891).

¹⁰ *Prudential Ins. Co. v. Nat. Bank of Commerce*, cited note 1 *supra*.

¹¹ *Potts & Co. v. Lafayette Nat. Bank*, 269 N. Y. 181, 199 N. E. 50, 103 A. L. R. 1142 (1935).

¹² *American Surety Co. of N. Y. v. Empire Trust Co.*, cited note 2 *supra*.

¹³ *Jordan Marsh Co. v. Nat. Shawmut Bank*, cited note 1 *supra*.

¹⁴ *National Surety Co. v. Nat. Shawmut Bank*, cited note 1 *supra*; *Gutfreund v. East River Nat. Bank*, cited note 5 *supra*; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829 (1909); *Mechanics Nat. Bank v. Harter*, 63 N. J. L. 578, 44 Atl. 715 (1899).

¹⁵ *Prudential Ins. Co. v. Nat. Bank of Commerce*, cited note 1 *supra*; *Seaboard Nat. Bank v. Bank of America*, cited note 14 *supra*; *Henry v. Allen*, 151 N. Y. 1 (1896).

¹⁶ *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871 (1913).

the Department of Welfare would render realization impossible, the College asked that the trust be voided for insufficiency of funds. The Appellate Division affirmed the lower court's decision, holding that since such an inadequacy would not affect the trust's validity, and since the Board of Welfare could exercise no control over financial affairs in private homes, the intention of the decedent must be given effect. *In re Price's Will*, 264 App. Div. 29, 35 N. Y. S. (2d) 111 (1942).

Because our courts recognize a person's right to dispose of property in accordance with his own election,¹ they will effectuate testamentary intentions which do no violence to existing legal principles.² Charitable gifts and trusts are especial favorites of the law³ and enjoy a nation-wide popularity.⁴ In their behalf presumptions are indulged and liberal rules applied, so that from two possible constructions of a will, Chancery may adopt that one which operates to sustain such a trust.⁵

A doctrine called "*Cy Pres*"⁶ has often been applied in beneficial cases⁷ so that a donor's purpose may be given effect as near as possible where that cannot be literally accomplished.⁸ New York courts construe this principle with latitude and resort to it for all charitable gifts⁹ although some states, for example Connecticut, have restricted statutory recognition to such trusts as are created in deeds.¹⁰ The force of the rule is prescinded, however, when a testator himself

¹ *In re Forte's Will*, 149 Misc. 327, 267 N. Y. Supp. 603 (1933); *In re Gethin's Will*, 97 Misc. 561, 163 N. Y. Supp. 398 (1916).

² *In re Saunder's Will*, 262 App. Div. 578, 31 N. Y. S. (2d) 40 (1941), *aff'g*, 176 Misc. 654, 28 N. Y. S. (2d) 274 (1941); *In re Collins' Will*, 177 Misc. 80, 29 N. Y. S. (2d) 985 (1941).

³ *Kibbe v. City of Rochester*, 57 F. (2d) 549 (D. C. W. D. N. Y. 1932); *In re Frasch's Estate*, 245 N. Y. 174, 211 N. Y. Supp. 635 (1927); *In re Davidge's Will*, 200 App. Div. 437, 193 N. Y. Supp. 245 (1922); *Collier v. Lindley*, 203 Cal. 641, 266 Pac. 526 (1928).

⁴ *Kentucky Christian Missionary Soc. v. Moren*, 267 Ky. 358, 102 S. W. (2d) 335 (1937); *Bruce v. Maxwell*, 311 Ill. 479, 143 N. E. 82 (1924), (rehearing denied April 2, 1924); see notes 3, *supra*, and 5, *infra*.

⁵ *In re Durbrow's Estate*, 245 N. Y. 469, 157 N. E. 747, 14 C. J. S. Charities § 6 (1927), *rev'g*, *In re Clayton*, 218 App. Div. 317, 218 N. Y. Supp. 325 (1926); *In re Brighin's Will*, 208 App. Div. 511, 203 N. Y. Supp. 646 (1924); *Buell v. Gardner*, 83 Misc. 513, 144 N. Y. Supp. 945 (1914).

⁶ "*Cy Pres*" means "*as near to*" or "*as near as may be*", 14 C. J. S. Charities § 52(a); 2 WORDS AND PHRASES 1809; see *Allen v. Stevens*, 33 App. Div. 485, 497, 54 N. Y. Supp. 8 (1898).

⁷ N. Y. REAL PROP. LAW § 113, subd. 2; N. Y. PERS. PROP. LAW § 12, subd. 2. *Cf. Thatcher v. Lewis*, 35 Mo. 1130, 76 S. W. (2d) 677 (1934), rehearing overruled Nov. 16, 1934; *In re Hunter's Estate*, 279 Pa. 349, 123 Atl. 865 (1924); *Matter of Robinson*, 203 N. Y. 380, 96 N. E. 925 (1911); *accord*, see notes 8, 9, *infra*. *But see* note 11, *infra*.

⁸ *In re Neher's Will*, 279 N. Y. 370, 18 N. E. (2d) 625 (1939); see *Matter of MacDowell*, 217 N. Y. 454, 466, 112 N. E. 177, 180 (1916).

⁹ *Sherman v. Richmond Hose Co. No. 2*, 230 N. Y. 462, 130 N. E. 613 (1921), *aff'g*, 186 App. Div. 417, 175 N. Y. Supp. 8 (1919); *cf.* note 7, *supra*.

¹⁰ *White v. Fisk*, 22 Conn. 31 (1852). *But see* *First Congregational Soc. of Bridgeport v. City of Bridgeport*, 99 Conn. 22, 121 Atl. 77 (1923).

makes alternative dispositions,¹¹ and as Mrs. Price had provided for a gift over of the property should her first desire be defeated, "*cy pres*" could not be applied here. Since inadequacy of resources could not affect the validity of the trust in the case we are discussing,¹² the plan which the testatrix prescribed should be carried out to the extent of the available funds.¹³ It is true that the Welfare Board must approve the organization of homes supported by private subscriptions;¹⁴ still, as that body lacks jurisdiction in the monetary affairs of these projects,¹⁵ it cannot justify a refusal of its consent for any financial reasons.¹⁶ Equity is adverse to defeat gifts to charity which are not impossible to be realized. When a decedent's intent is clearly evidenced, the law will substitute no different use which an outside intelligence might dictate.¹⁷

H. G. S.

TRUSTS—REVOCATION—PERSONS BENEFICIALLY INTERESTED—UNBORN CHILDREN AS CONTINGENT REMAINDERMEN.—In January, 1929, the plaintiff executed a deed of trust and delivered it, with the property therein described, to the defendant, the trustee named in the deed. The deed of trust provided that the income should be applied for the benefit of the settlor's daughter, Irene M. Hanlon, and that

¹¹ *In re Fletcher's Estate*, 280 N. Y. 86, 91, 19 N. E. (2d) 794, 795 (1939), 14 C. J. S., Charities § 52, 10 AM. JURIS., Charities § 124, *motion denied*, 280 N. Y. 800 (1939). Judge Hill's dissenting opinion as well as the majority holding in the principal case concur with this theory. *But cf.* notes 7, 8, 9, *supra*.

¹² *In re Nelson's Estate*, 143 Misc. 843, 258 N. Y. Supp. 667 (1932); *Taylor v. Columbia University*, 226 U. S. 126, 33 Sup. Ct. 73, 57 L. ed. 152 (1912); *accord*, note 13, *infra*.

¹³ *Wilson v. First Nat. Bank of Independence*, 164 Iowa 402, 145 N. W. 948, Ann. Cases 1916D 481 (1914); *cf.* note 12, *supra*. Judge Hill, however, dissented in the instant case because he feared lest the home become a burden on the state.

¹⁴ SOCIAL WELFARE LAW § 35; "no certificate of incorporation shall hereafter be filed which has for its purpose the establishment or maintenance of any home or institution for invalid, aged or indigent persons, except with the written permission of the board and of a justice of the supreme court endorsed on or annexed to the certificate of incorporation." *Cf.* note 15, *infra*. *But see* note 16, *infra*.

¹⁵ SOCIAL WELFARE LAW § 21, subd. 2; N. Y. CONST. Art. XVII, § 2: "As to institutions not in receipt of public funds . . . the state board of social welfare shall make inspections, but *solely* as to matters directly affecting the health, safety, treatment and training of their inmates." *Cf.* note 14, *supra*. *But see* note 16, *infra*.

¹⁶ Capricious denial of incorporation would be subject to Supreme Court review. *Accord*, notes 14, 15, *supra*.

¹⁷ *Accord*, notes 3, 4, 5, 12, 13, *supra*. *But see* the dissenting opinion in the case we are discussing.