St. John's Law Review

Volume 8
Issue 2 *Volume 8, May 1934, Number 2*

Article 8

June 2014

Charitable Trusts--Certainty of Purpose

Joseph D. Reznick

the facts and over the objection and protest of the plaintiff, took down its building including the entire party wall." [33] It could not possibly be maintained that plaintiff had abandoned the wall and its rights in it.

Had plaintiff wished to raise the height of its building, extend the wall to the rear or alter the tenement house that originally stood on the premises, it could have used the party wall for that purpose and defendant could not rightfully have interfered. Why, then, should defendant be allowed to interfere when plaintiff wishes to erect a new building, fully satisfied with the condition of the wall as it exists? There is authority holding that one who wishes to rebuild cannot tear down the party wall when it is not dilapidated but must use it, if it affords a sufficient support for his building.[34] Plaintiff was doing no more than complying with the law. Should he be penalized? The writer respectfully submits that on principle and reason the court went astray. The doubts that the court itself evinced by the dissent of two judges, who unfortunately did not hand down opinions, have been, in the writer's estimation, resolved against the decision of the court.

ANTHONY CURRERI.

CHARITABLE TRUSTS—CERTAINTY OF PURPOSE.

A charitable trust is a gift to indefinite or uncertain beneficiaries for the purpose of "either bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." [1] At the outset it is well to note certain distinctive features of this type of trust.

(1) It is founded upon a humanitarian view looking to the improvement and well being of mankind.[2]

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[33] 357 East Seventy-sixth Street Corp. v. Knickerbocker Ice Co., 237 App. Div. 717, 262 N. Y. Supp. 705 (1st Dept. 1933).

[34] Partridge v. Lyon, 67 Hun 29, 21 N. Y. Supp. 848 (1893).

[1] Union Pac. Ry. Co. v. Artist, 60 Fed. 365, 369 (C. C. A. 8th, 1894); Stuart v. Easton, 74 Fed. 854, 859 (C. C. A. 3rd, 1896), *aff'd*, 170 U. S. 383, 18 Sup. Ct. 650 (1898); People v. Fitch, 154 N. Y. 14, 32, 47 N. E. 983, 988 (1897); Jackson v. Phillips, 96 Mass. 539, 556 (1867).

[2] Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450 (1874); Tilden v. Green, 130 N. Y. 29, 28 N. E. 880 (1892), wherein the phrase "well doing and well being of mankind" was used in denoting the purpose of the charitable trust.

(2) The beneficiaries must of necessity be indefinite and uncertain as an element of the definition.[3]

(3) It must be for some public purpose as distinguished from a purely selfish or private purpose in the guise of charity.[4]

(4) It does not necessarily have to be exclusively for the benefit of the poor.[5]

(5) The rule against perpetuities does not affect this type of trust,[6] but it must take effect within the prescribed period of vesting and if it meets this requirement, the power of alienation may be suspended beyond the statutory period.[7]

In a recent case[8] the testatrix had directed her executor to pay stated sums to various persons and associations, providing for the remainder as follows: "Any remainder after these bequests have been made, *I leave to A. G. H. to use at his discretion in promoting the ends of justice.*" The court held this to be an absolute gift on the ground that the testatrix showed no intent to create a trust, as the words used were not legal terms sufficient for that purpose; that if the words "at his discretion" were omitted, the remainder of the clause might be a limitation on the use of the funds, which might show an intent to create a trust. In its entirety, the clause raises the question whether the discretion applies in determining whether the funds should or should not be put to the use designated, or does it apply in determining what are the "ends of justice." If it refers to the former there would be no intention to create a trust as the trustee would have the power to defeat it, if to the latter, an intent to create a trust would be manifested. In construing this clause to be a gift the court invokes the familiar principles governing wills, that such construction will be adopted as will avoid the implication that the testatrix intended to leave a major part of

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[3] Bowman v. Domestic, etc. Soc., 182 N. Y. 494, 75 N. E. 535 (1905); Richtman v. Watson, 150 Wis. 385, 136 N. W. 797 (1912); *In re* MacDowell's Will, 217 N. Y. 454, 112 N. E. 177 (1916); Stewart v. Franchetti, 167 App. Div. 541, 153 N. Y. Supp. 453 (1st Dept. 1915).

[4] *In re* Shattuck's Will, 193 N. Y. 446, 86 N. E. 455 (1908); *In re* Robinson, 203 N. Y. 380, 96 N. E. 925 (1911); *In re* MacDowell's Will, *supra* note 3; In the Matter of Frasch, 245 N. Y. 174, 156 N. E. 656 (1927).

[5] Am. Academy of Arts and Science v. Pres., etc. of Harvard College, 78 Mass. 582 (1832); Godfrey v. Hutchines, 28 R. I. 517, 68 Atl. 317 (1907); Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415 (1911); Little v. City of Newburyport, 210 Mass. 414, 96 N. E. 1032 (1912).

[6] Williams v. Williams, 8 N. Y. 524 (1853); Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568 (1899); Matter of Griffin, 167 N. Y. 71, 60 N. E. 284 (1901); Matter of MacDowell's Will, *supra* note 3; Matter of Davidge, 200 App. Div. 437, 193 N. Y. Supp. 245 (2d Dept. 1922).

[7] Leonard v. Burr, 18 N. Y. 96 (1858); cited with approval in Booth *et al.* v. Baptist Church *et al.*, 126 N. Y. 235, 28 N. E. 238 (1891).

[8] In the Matter of Hayes, 263 N. Y. 219, 188 N. E. 716 (1934).

her estate undisposed of;[9] and where words used are absolute in character followed by words which do not limit or cut down the bequest, an absolute gift is intended.[10]

These grounds in themselves would have been sufficient to uphold the decision in this case. There is no doubt but that the rules are sound and well established as the law of this state, but in the course of its opinion the court goes on to say, "The broad construction avoids implying an attempt on the part of the testatrix to create a trust which, if intended, *might be void for uncertainty of object and beneficiary.*"[11] This statement shows the existence of a doubt on the part of the court. The question presented by this decision is whether it is possible to uphold it as a valid charitable bequest? It is respectfully submitted that the same result might have been accomplished were the residuary clause to be upheld as a valid trust. In that case the construction adopted to avoid intestacy would not be necessary as everything not disposed of would fall into the residuum. Admittedly there are two constructions possible as to the presence of an intent on the part of the testatrix to create a trust. Where a will is possible of two interpretations, one which will uphold and declare it valid and the other void, that which sustains its validity is adopted.[12] Applied to charitable trusts this rule gains even greater strength, since this trust is favored in law.[13] It is, therefore, possible to say with impunity that the discretion applies only to determining what are the "ends of justice" and so take from the trustee the power to defeat the object of the trust. This raises the question whether or not a contention that a trust for the purpose of promoting the "ends of justice" is so indefinite, as to beneficiaries and object, as to be invalid. In view of some of the recent decisions and the trend of thought of the courts in general in regard to bequests for charitable purposes, it is probable that such a bequest could be sustained, if these were the only objections to its validity. Since in the instant case the court did not definitely say that the clause was void for uncertainty but only that it *might* be, and the decision went on other grounds, it is only proper to

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[9] Schult v. Moll, 132 N. Y. 122, 30 N. E. 377 (1892); Meeks v. Meeks, 161 N. Y. 66, 55 N. E. 278 (1899); Hodcox v. Cady, 213 N. Y. 570, 108 N. E. 84 (1915); Waterman v. N. Y. Life Ins. and Trust Co., 237 N. Y. 293, 142 N. E. 668 (1923).

[10] Foose v. Whitmore, 82 N. Y. 405 (1880); Clark v. Leupp, 88 N. Y. 228 (1882); Post v. Moore, 181 N. Y. 18, 73 N. E. 483 (1905); Johnson v. Hughes, 187 N. Y. 450, 80 N. E. 374 (1907).

[11] 263 N. Y. at 227, 188 N. E. at 719.

[12] Seitz v. Faversham, 205 N. Y. 197, 98 N. E. 385 (1912); Matter of MacDowell's Will, *supra* note 3, at 465; Matter of Lally, 136 App. Div. 781, 121 N. Y. Supp. 467 (2d Dept. 1910), *aff'd*, 198 N. Y. 608, 92 N. E. 1089 (1910).

[13] Rotch v. Emerson, 105 Mass. 431 (1870); St. John's v. Andrew's Institute, 191 N. Y. 254, 83 N. E. 981 (1908); Matter of Robinson, *supra* note 4; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013 (1913); Buell v. Gardner, 83 Misc. 513, 144 N. Y. Supp. 945 (1914).

review some authoritative decisions to resolve the doubt as to this point.

The indefiniteness of beneficiaries can no longer be a sound objection to the validity of this bequest.[14] The less certain the beneficiaries are the more certain is the fact that the public in general was intended to be benefited. If the beneficiaries are pointed out with a great degree of certainty the trust may be private and not a charitable trust.[15] Whatever the rule might have been before 1893 it can not now have any effect on the instant question. The Legislature has remedied that defect by the Charitable Uses Act, which provides:

> "No gift, grant, or devise to religious, educational, charitable or benevolent use, which shall in other respects be valid under the laws of this state shall be deemed invalid by reason of indefiniteness or uncertainty of the person designated as the beneficiary thereunder in the instrument creating the same * * *." [16]

In *Bauman* v. *Domestic and Foreign Missionary Soc.*[17] a bequest was left "to be equally divided between the Indian Missions and the Domestic Missions of the United States." There was no such organization or corporation in existence. Even though there were no express words of trust and the beneficiaries named were not in *esse* the bequest was upheld as a charitable trust and the proceeds turned over to the claimant, the Domestic and Foreign Missionary Soc., an organization in which the testatrix exhibited an interest during her lifetime. In *Bird* v. *Merklee*[18] a bequest was made to a certain church to buy coal "for the poor" of the church. It was held to be a gift to the church. This case was decided but two years after the above statute was passed. Undoubtedly the statute was not then regarded with the liberality it gained with time. This is even more clearly brought out if we consider the cases of trusts for masses. In the first instance they were regarded as invalid because they were deemed to be for a superstitious use. They were next regarded as being without beneficiaries,[19] while today

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[14] Bowman v. Domestic, etc. Missionary Soc., *supra* note 3; Starr v. Selleck, 205 N. Y. 545, 98 N. E. 1116 (1911); Stewart v. Franchetti, *supra* note 3; *In re* Groot, 226 N. Y. 576, 123 N. E. 867 (1919); Matter of Morris, 227 N. Y. 141, 124 N. E. 724 (1919); *In re* Davidge's Will, *supra* note 6.

[15] Yates v. Yates, 9 Barb. 324 (N. Y. 1852); Sherwood v. American Bible Soc., 4 Abb. 227 (N. Y. 1864); Bullard v. Chandler, 149 Mass. 532, 21 N. E. 95 (1899).

[16] N. Y. PERS. PROP. LAW (1909) §12; N. Y. REAL PROP. LAW (1909) §113.

[17] 182 N. Y. 494, 75 N. E. 535 (1905).

[18] 144 N. Y. 544, 39 N. E. 645 (1895).

[19] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464 (1885); Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305 (1888).

they are upheld on the theory that those who attend are the beneficiaries.[20] In the light of the recent decisions on the subject, a contention that a charitable trust is invalid because of indefiniteness of beneficiaries is clearly untenable. If in the exercise of the discretion in determining what are the "ends of justice," a case arose which would justify an application of the funds, the beneficiaries would then be sufficiently certain and that would be sufficient.

This leads to the consideration of the charitable purpose and the degree of certainty required where this is the objection raised to the validity of the charitable trust. No general rules can here be laid down as to what is a charitable purpose. There are, however, certain elements which generally characterize such a purpose. The gift is required to be for some public benefit or use or to enure to the benefit of a large portion of the public.[21] It must also come within the rule laid down in the *Robinson*[22] and *Cunningham*[23] cases in that the purpose must be sufficiently identified so as to make it possible and practicable for the court, in the first instance, to administer the bequest.[24] What is or what is not within these requirements is best brought out by illustration and example. In *Going* v. *Emery*[25] a bequest "to the cause of Christ, for the benefit and promotion of *true evangelical piety and religion*" was sustained as a valid charitable bequest and was said to be sufficiently definite and certain. In *Manley* v. *Fiske*[26] the remainder was left to the executors to be by them divided *"among such American charities they may think well of"* and asking sums be given *"to any* society that assists poor needlewomen" and the court held that the charitable purpose of the gift was sufficiently identified. In *In re Welch*[27] a bequest *"to charity"* was sustained as a valid charitable trust. From this case it would seem that indefiniteness should be no objection so long as it be for a charitable purpose. In *Stewart* v. *Franchetti*[28] a bequest was upheld as sufficiently certain where it provided that it was "to be spent in charity in Italy and New York." Obviously here the places where it is to be spent are named and definite. The boundaries are defined and limited with certainty, but what of the object? Is it limited with any definiteness and precision? Although it has been said that courts are unwilling to

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[20] Matter of Morris, *supra* note 14.

[21] *In re* MacDowell's Will, *supra* note 3; *In re* Robinson, *supra* note 4; *In re* Shattuck, *supra* note 4.

[22] *In re* Robinson, *supra* note 4.

[23] *In re Cunningham*, 206 N. Y. 601, 100 N. E. 437 (1912).

[24] 203 N. Y. at 385, 96 N. E. at 926; 206 N. Y. at 605, 100 N. E. at 438.

[25] 16 Pick. 107 (Mass. 1834); see also Rohodes v. Yater, 27 N. M. 489, 202 Pac. 698 (1921), wherein a trust for "Evangelization" and preaching the gospel was sustained as certain.

[26] 139 App. Div. 665, 124 N. Y. Supp. 149 (1st Dept. 1910), *aff'd*, 210 N. Y. 546, 95 N. E. 1133 (1911).

[27] 105 Misc. 27, 172 N. Y. Supp. 349 (1918).

[28] 167 App. Div. 541, 153 N. Y. Supp. 453 (1st Dept. 1915).

hold a trust "for charity" valid [29] it seems that one to "be spent in charity" is just over the line and is therefore valid when it is limited within given boundaries, whether the boundaries be that of a city or country would seem to be unobjectionable. So, too, bequests in trust "to provide shelter, necessaries of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such other persons as they shall select as being in need of the same" [30] and "to be applied to the benefit of such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my executors shall select" [31] have been sustained as being certain and sufficient. In the the latter example when the case was before the surrogate, he held that the word "charitable" qualified the term "institutions of learning" as well as the word "associations" and was in effect to be construed as though it were "to such charitable associations and to such benevolent associations and such institutions of learning as are charitable." The manifestation of this definite charitable purpose as construed insured the validity of this bequest. This is an excellent example of liberality in construction and shows the extent to which the courts have gone to uphold gifts for charitable purposes. In the *Matter of Dubraw* [32] a bequest was left to the executors and they were directed "to distribute where he or she or his successor or substitute, in his or her judgment shall consider it will be most effective in the advancement of Christ's Kingdom on Earth." The court here implied a trust and held it not to be indefinite or uncertain either as to beneficiaries or purpose. How in the light of this case can it be said that a trust "to be used in promoting the ends of justice" may be void for indefiniteness. Its purpose is not contrary to law. Can it be that the word itself is so uncertain or loose in meaning that it may with impunity be said to be uncertain? On the contrary, it has a more limited and certain meaning in the mind of social man. In every language or creed the word in the popular sense means "the rendering to every man his due" [33] and in the legal sense has even a more restricted meaning. While we may differ as to the best means of advancing "Christ's Kingdom on Earth" and in fact the varying Christian creeds do differ in this respect, there can be no such difference in "promoting the ends of justice" as we have but one code in regard to its administration and it applies to all alike. Reasoning

[29] Matter of Shattuck, *supra* note 4.

[30] *In re* Robinson, *supra* note 3.

[31] *In re* Cunningham, *supra* note 23.

[32] 245 N. Y. 469, 157 N. E. 747 (1927).

[33] State v. Jelks, 138 Ala. 115, 35 So. 60 (1903); Livingston Oil Corp. v. Henson, 90 Okla. 6, 215 Pac. 1057 (1923). "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit." McKinister v. Sager, 163 Ind. 671, 686, 72 N. E. 854 (1905).

by analogy it would seem that a trust "to promote the ends of justice" would not be objectionable because of indefiniteness. In the words of Justice Willard Bartlett speaking for the court in the *Cunningham* case "if that (referring to the *Robinson* case) was capable of being executed by judicial decree, so is this. The difficulties in the way of administering the trust here, so as to carry out the charitable intentions of the testator, are no greater than they were there; and having sustained that gift, after careful consideration, I think we must sustain this one." [34] This leaves for consideration the remaining question whether the general purpose of the attempted trust can be said to be charitable in its nature.

Here again it is possible to sustain this trust, since gifts have been sustained which had for their object and purpose the promotion of peace,[35] temperance [36] and to relieve the suffering and promote the comfort of animals [37] as charitable in purpose. Contrary to the law in Massachusetts [38] a gift to extend suffrage for women was upheld in Illinois [39] as a charitable trust. The doctrine has even been extended so as to include a theatre as a gift in trust for the people of a town as a charitable use on the ground that it will increase their happiness and social welfare.[40] Obviously a trust "to promote the ends of justice" can be supported on the ground not only that it promotes social welfare but tends to lift the burden of government since the administration of justice is a function of and an important branch in the structure of government.

The only logical conclusion as a result of consideration of the subject is that the recent trend in the liberality of thought resolves every possible doubt in favor of the charitable purpose. This view finds support in the recent adjudication by the Federal Court in the case of *Chicago Bank of Commerce* v. *McPherson*,[41] where a bequest of income and principal was directed to be expended for "such charitable, benevolent and educational and public welfare uses" as the trustees may elect. The court upheld this bequest as a valid charitable gift, and not to be uncertain either as to objects or beneficiaries. Here the court takes into consideration the present economic depression in upholding this gift. It considers the grave conditions existing at the time this Codicil was executed in 1930, and points to the fact that the term "public welfare" had come to be synonymous with "public charity" and so signified some form of relief to those affected by the spread of unemployment.[42] This is

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[34] *In re* Cunningham, *supra* note 23, at 608, 100 N. E. at 439.
[35] Tappen v. Deblois, 45 Me. 122 (1858).
[36] Buell v. Gardner, *supra* note 13.
[37] *In re* Graves, 242 Ill. 23, 89 N. E. 672 (1910); *In re* Coleman, 167 Cal. 212, 138 Pac. 992 (1914).
[38] Jackson v. Phillips, 14 Allen 539 (Mass. 1867).
[39] Garrison v. Little, 75 Ill. 402 (1898).
[40] Nixon v. Brown, 46 Nev. 439, 214 Pac. 524 (1923).
[41] 62 F. (2d) 393 (C. C. A. 6th, 1932).
[42] *Id.* at 397.

in truth liberality in construction and appreciation of the fact that where a charitable intent manifests itself in a will, however vague, if possible to do so, the intent should be given effect.

JOSEPH D. REZNICK.

SCHACKNO ACT AND REORGANIZATION.

As Samson sent the walls of the temple crashing about the heads of the Philistines, so has President Roosevelt sent reputedly sacred and inviolable legal precepts crashing about the heads of the "precedent" lawyers. By applying, to the fullest extent, the weight of popular support to the powerful lever of public opinion, the President has sufficiently disturbed "solid" foundations of the law so as to afford an opportunity for legal reform such as has never before been presented since the formation of the country. "Emergency" legislation passed in former times was admittedly but temporary; that which is being passed under the guidance of the present administration has for its end the permanent reformation of an apparently imperfect governmental philosophy. It may designate itself as "temporary" legislation, but, as an integral part of the New Deal, it must, of necessity, have for its ultimate purpose an effect as permanent and lasting as has the New Deal itself. Never has the adage that "a chain is as strong as its weakest link" been more forcibly illustrated.

As a part of this reform program, the Schackno Act[1] has been enacted in New York. Its validity was challenged and it was held, by Judge Frankenthaler, to be unconstitutional.[2] Such decision was reached in spite of the fact that the same statute had previously been declared constitutional by Judge Morschauser in *Schmaling* v. *Burling*,[3] and by Judge Hinkley in *Matter of Title & Mortgage Guarantee Company of Buffalo*.[4] The latter case, as well as the instant

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[1] L. 1933, c. 745.

[2] In the Matter of the Application of Abrams for an Order Restraining Van Schaick, Rehabilitator, from making payments under c. 745, L. 1933.

Such legislation may be validly enacted by Congress for the prohibition against the enactment of laws impairing the obligation of contracts is directed only against the states. Sinking Fund Cases, 99 U. S. 700, 718 (1878).

See Canada Southern Railway v. Gebhard, 109 U. S. 527, 535, 536, 3 Sup. Ct. 363 (1883), wherein the court, having reference to legislation similar in substance to that herein involved, said: "The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy. * * * In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not to unnecessarily injure another."

[3] 269 N. Y. Supp. 747 (1933).

[4] 149 Misc. 643, 269 N. Y. Supp. 16 (1933).