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CY PRES IN PENNSYLVANIA

The Estates Act of 1947 should clear away much of the confusion surrounding the *cy pres* doctrine. It expressly repealed five inconsistent statutes relating to the doctrine, and it embodied the *cy pres* law in section ten. Although it is not the purpose of this article to trace the history of the law concerning *cy pres* in Pennsylvania, it is necessary to examine the repealed statutes to a certain extent in order to determine the elements necessary for the application of the doctrine before the passage of the Estates Act. Then an attempt will be made to find out how, if at all, the latest statute changed the previous concepts. It is also necessary to look at past court decisions to determine the elements necessary for the application of the doctrine previously. In addition, these cases are beneficial in another respect; viz, to define terms used in the latest legislative enactment.

The definition of *cy pres*, as given in recent cases,¹ was announced in an early case when the court said, "The meaning of the doctrine of *cy pres*, as received by us, is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close *approximation* to that scheme as reasonably practicable; and so, of course, it must be enforced."² The Restatement of Trusts comments, "The expression indicates the idea that where the exact intention of the settlor is not carried out, his intention is carried out 'as nearly as' may be."³ These definitions are general, and one must look to the statutes to find out exactly what the doctrine means.

Before the Estates Act of 1947, the status of the law was in confusion, primarily because the doctrine was enounced by five inconsistent statutes none of which expressly repealed the other. To make matters worse, the first act was reenacted with minor amendments after three other acts were passed in the meantime. According to the rule of construction of statutes, an amendment to an act which reenacts the act amended is qualified by the intervening act just as the original act was qualified by the intervening act.⁴ Since the last statute previous to the 1947 act was the amending act, there was confusion as to how much this amendment affected the intervening statutes, one of which practically abandoned *cy pres*. The first statute was passed in 1855,⁵ and it stated in effect that no disposition of property for religious, charitable, literary, or scientific use shall fail for want of a trustee; or by reason of the objects being indefinite, uncertain, or ceasing; or depending upon the discretion of the last trustee; or being given in perpetuity or in excess of the annual amount the charitable organization is allowed

¹ Williams Estate, 353 Pa. 638, 46 A.2d 237 (1946); Connors v. Ahearn, 342 Pa. 5, 19 A.2d 388 (1941); Curran's Estate, 310 Pa. 434, 165 A. 842 (1933); Kramph's Estate, 228 Pa. 455, 77 A. 814 (1910).

² Philadelphia v. Heirs of Girard, 45 Pa. 9 (1863).

³ Restatement, Trusts, § 399 (a) (1935).

⁴ Toner's Estate, 260 Pa. 49, 103 A. 541 (1918).

⁵ Act of April 26, 1855, P.L. 328, 10 PS 13 (Pa.).

to take; but the court shall supply a trustee and carry into effect the intent of the donor. The statute allowed the doctrine to operate in these situations. The next act was passed in 1876,⁶ and it declared that if an estate vested in a trustee for the purpose of applying the income for the benefit of a designated class of persons and this class becomes extinct, then if there be no heirs, the court shall allow the trustee to apply the income to some similar class of persons. This statute had little effect, because of its provision making it applicable only if there are no heirs. Usually *cy pres* is used to deprive the heirs.

It was the next statute that caused all the trouble. The legislature seemingly desired to abolish *cy pres* and therefore passed the Act of 1885.⁷ Without passing an express repealer of the previous acts, the statute merely said that in disposition of property by *will* for any religious, charitable, literary, or scientific purpose, if the disposition is void for uncertainty, or the object be not ascertainable, or has ceased to exist, or be an unlawful perpetuity, such property shall go to the heirs of the decedent. This act by necessary implication repealed part of the Act of 1855, but it dealt only with wills while the older act was not so limited. It also failed to give property to the heirs in case the disposition be void by reason of the amount being in excess of what the organization is allowed to take, or if void by reason of the objects depending on the discretion of the last trustee. However, this latter provision was probably repealed by the provision in the 1885 act that property was to go to heirs if the objects be not ascertainable. If the objects of the charitable trust depend on the trustee's appointing them as beneficiaries, and if he dies before he appoints them, then it could be argued that the objects are not ascertainable. On the other hand, a trust will not fail for want of a trustee, and the court could appoint one to designate the charitable objects. At any rate it was for the court to decide what parts of the former act were repealed by the latter.

Then the Act of 1889 was passed.⁸ It provided that no disposition of property for religious or charitable uses shall fail for want of a trustee, or by reason of the objects ceasing, or depending on the discretion of the last trustee, or being given in perpetuity or in excess of the annual amount limited by law, but the court shall supply a trustee and carry out the intention of the donor. It will be noted that although this act did not expressly repeal the other statute, it did repeal some of the provisions of the Act of 1885 by necessary implication. However, it did not repeal provisions of that act relating to failure of the trust due to the objects being unascertainable or uncertain (for some other reason than that they depend on the discretion of the last trustee). Therefore, apparently, if a will devised property for a purpose which became void because of uncertainty of the objects, the property would go to the heirs. While if a similar disposition became void because of the objects ceasing, it would be applied to some other objects under the *cy pres* doctrine as put forth by the Act of 1889.

⁶ Act of May 26, 1876, P.L. 211, 10 PS 15 (Pa.).

⁷ Act of July 7, 1885, P.L. 259, 20 PS 196 (Pa.).

⁸ Act of May 9, 1889, P.L. 173, 10 PS 14 (Pa.).

The final act was passed in 1895,⁹ and was a substantial reenactment of the Act of 1855 (the first of the series), there being only two minor additions. One made the statute applicable to dispositions before the statute, and the other allowed corporations not for profit to institute a suit by leave of the Attorney General. The earlier statute gave this right to others but not to non-profit corporations.

From this brief examination of the statutes, it can readily be seen why it has been so difficult for the courts to decide just what the legislature meant. Even Chief Justice Sadler apparently overlooked the statute of 1889 when he stated, "Starting with the Act of 1855, we find a fixed purpose of the legislature to protect and conserve charitable bequests, though in conflict with the Rule against Perpetuities, unless the same are void 'for uncertainty, or the object of the trust be not ascertainable, or has ceased to exist.' in which case the estate reverts to the next of kin by the terms of the Act of 1885."¹⁰ The Act of 1889 stated that no disposition of property shall fail because of the objects ceasing. The Act of 1855 and its amending act of 1895 said the same. A year later he recognized that the Act of 1885 did change the earlier rule in certain cases, but that it was restored in part by later legislation.¹¹

From an inspection of the statutes, it would seem, as pointed out above, that if the trust failed because of the objects being uncertain, the property would go to the heirs. This result would be reached if the statutes were construed according to rules of construction announced in one case.¹² Here the court said that the Act of 1895 did not have the effect of eliminating either the Act of 1885 or the Act of 1889, but that the amendment of 1895 would be qualified by both of these prior statutes just as the Act of 1855 (act amended) was affected by them since there was no absolute repugnancy between the new parts of the 1895 legislation and the intermediate acts. When a statute merely reenacts the provisions of an earlier one, it is to be read as part of the earlier statute and not of the reenacting one if it is in conflict with another passed after the first but before the last act, and therefore it does not repeal by implication the intermediate one. The intermediate act qualifies the new one in the same manner as it did the first one. This rule was put in statutory form later.¹³

However, it seems as if this construction was not followed, because many cases laid down the rule that gifts would be sustained over the objections that they were void for uncertainty.¹⁴ It should make no difference that some of these cases

⁹ Act of May 23, 1895, P.L. 114, 10 PS 13 (Pa.).

¹⁰ Hunter's Estate, 279 Pa. 349, 123 A. 865 (1924).

¹¹ Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925).

¹² Toner's Estate, 260 Pa. 49, 103 A. 541 (1918).

¹³ Act of May 28, 1937, P.L. 1019, 46 PS 573, 571. (Pa.).

¹⁴ Jordan's Estate, 329 Pa. 427, 197 A. 150 (1938); Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925); Kimberly's Estate (No. 1), 249 Pa. 469, 95 A. 82 (1915); Dulles's Estate, 218 Pa. 162, 67 A. 49 (1907); Daly's Estate, 208 Pa. 58, 57 A. 180 (1904); In re Murphy's Estate, 184 Pa. 310, 39 A. 70 (1898).

were also cases where there was no trustee. Even when a trustee is appointed, the objects are still uncertain. However, here another conflict of statutes arises, and it is possible that the Act of 1889 could have sustained these decisions where there was no trustee in addition to uncertain objects. That act said that if there were no trustee, the court should appoint one to carry out the intent of the donor (apparently whether the objects were uncertain or not). At any rate there was a conflict whether the uncertainty should give the gift to the heirs or whether the lack of a trustee should allow the court to appoint another trustee to carry out the intent of the testator where the statute gave the courts this power but said nothing about uncertainty.

Perhaps these cases can be explained in another manner. In spite of the obscurity and inconclusiveness of the five inconsistent statutes, the courts have been guided by one bright star. This is the policy of the law to protect and preserve charities since they are favorites of the law.¹⁵ This light has enabled the courts to sustain gifts to charities in almost all cases. Unfortunately, clouds of confusion occasionally caused the courts to lose sight of this star. In one case,¹⁶ the testatrix created a trust for her sister for life and on her death to a trustee for charitable uses. The trustee predeceased the sister and did not designate charities to benefit. The court held that the death of the trustee put beyond possibility the distribution of the fund as he alone was to name the beneficiaries. Thus the testatrix was intestate as to the remainder, and it went to the sister who then had a fee. The trust was dissolved. Courts have repeatedly held that a trust will not fail for want of a trustee,¹⁷ nor because of uncertainty of objects,¹⁸ nor because of the failure of the last trustee.¹⁹ In these latter cases, courts repeatedly appoint new trustees to perform duties which the appointed trustee never accomplished. There was even some evidence of the testatrix's intent as to charities to be selected, because the last trustee had a tentative memo as to what he might do in designating beneficiaries. There was no indication in the case as reported that the testatrix indicated that *only* the designated trustee could appoint beneficiaries. If she did not do this, it seems that her intent should not have been thwarted merely because the trustee died without performing his duty. Since her intent was charitable, it cannot be said that the named trustee was the only one who could designate the beneficiaries. A charitable intent cannot be limited to what one man as trustee may desire if he dies before he expresses his desire. If this were allowed, a trustee could purposely refrain from choosing the charities which are to benefit; thus if he died first, he

¹⁵ Hunter's Estate, 279 Pa. 349, 123 A. 865 (1924); Unruh's Estate, 248 Pa. 185, 93 A. 1000 (1915); Daly's Estate, 208 Pa. 58, 57 A. 180 (1904).

¹⁶ Farrell's Estate, 38 D. & C. 238 (1940).

¹⁷ Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925); Stevens's Estate, 200 Pa. 318, 49 A. 985 (1901); Frazier v. St. Luke's Church, 147 Pa. 256, 23 A. 442 (1892).

¹⁸ Cases cited note 14 supra.

¹⁹ Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925); Anderson's Estate, 269 Pa. 535, 112 A. 766 (1921); De Silver's Estate, 211 Pa. 459, 60 A. 1048 (1905); Stevens's Estate, 200 Pa. 318, 49 A. 985 (1901); FOULKE, RULES AGAINST PERPETUITIES 422 ff. (1909).

would not only deprive charity but also defeat the testator's clear intent. He would in effect be denying the testator the right to dispose of his property as he wishes. This is in the nature of a breach of trust and such will not cause a reverter.²⁰

In all of the uncertainty in the law above, one thing is certain. There were many difficult decisions for the courts to make, and the inconsistent statutes made this trying job even harder. As one authority commented on the previous statutes, "The provisions of the acts relating to *cy pres* are so obscure and the authorities are so meagre that no definite conclusions can be drawn as to the law."²¹

Keeping the five statutes in mind, one can determine from them, and from the cases interpreting them, what elements in general are necessary for the courts to apply the *cy pres* doctrine. The first condition is that there be a charitable purpose. An early case stated, "It is the doctrine of approximation, and it is not at all confined to administration of charities but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence."²² As a later case pointed out, though, this statement was dicta, and there are no known cases applying the doctrine where the use is not literary, scientific, religious, or charitable.²³ At any rate, the statutes limited the doctrine to those four uses, some limiting it to the latter two only. The latter two can no doubt be considered as including the former two. Other authorities and cases limit the use of the doctrine to charitable purposes.²⁴ Ordinarily the doctrine is applied only to gifts by will.²⁵ This is not the case in Pennsylvania.²⁶ The repealed statutes provided that "dispositions of property" shall not fail (except Act of 1885 which applied to wills only), and the Estates Act of 1947 provides that the doctrine should apply when "an interest shall be conveyed." Obviously these do not limit the doctrine to cases involving dispositions by wills.

What is charitable could be the subject of a treatise in itself.²⁷ A look at a few cases, however, will give a good idea. In *Jackson v. Phillips*,²⁸ the following definition was enunciated:

"A charity, in a legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by 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,

²⁰ Norton's Appeal, 312 Pa. 239, 167 A. 341 (1933); Restatement, Trusts, § 401 (a) (1935); 3 SCOTT, TRUSTS 2124 (1939).

²¹ FOULKE, op. cit. supra note 19, at 476.

²² Philadelphia v. Heirs of Girard, 45 Pa. 9 (1863).

²³ Davis's Estate, 23 Dist. R. 768 (1914).

²⁴ White's Estate, 340 Pa. 92, 16 A.2d 394 (1940); In re Stephan's Estate, 129 Pa. Super. 396, 195 A. 653 (1937); Restatement, Trusts, § 399 (a) (1935); FOULKE, op. cit. supra note 19, at 476; 3 SCOTT, TRUSTS 2082.

²⁵ FOULKE, op. cit. supra note 19, at 476.

²⁶ Ibid.; Commonwealth v. Pauline Home, 141 Pa. 537, 21 A. 661 (1891).

²⁷ Restatement, Trusts, § 368 to 374 (1935); FOULKE, op. cit. supra note 19, at 431 ff.

²⁸ 96 Mass. 539 (1867).

or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government."

This definition has been quoted in several Pennsylvania cases.²⁹ Another definition often quoted in cases is, "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man."³⁰

There seems to be a tendency to broaden the technical meaning of the word "charitable" and to make it more inclusive. In a recent case,³¹ the testatrix gave the residue to a "worthy cause or institution," and the court advanced the idea that, "With these necessarily vague conceptions of what constitute a 'charity' in a legal sense it would seem that there is not, at best, an absolute criterion for distinguishing between such words as 'charitable', 'benevolent', 'worthy' and the like, when used by a testator to designate the class of institutions from which his beneficiaries are to be selected." In this case the court held that "worthy" as used by the testatrix was meant by her to refer only to an institution which would fall within the legal definition of a charity. The Restatement of Trusts discusses charitable purposes and the following was approved in a fairly recent case:³²

"The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community. . . . A purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity. . . . There is no fixed standard to determine what purposes are of such social interest to the community; the interests of the community vary with time and place."³³

The Estates Act of 1947 helps very little. In § 1 (1), it lays down the following:

"'Charity' or 'charitable purposes' includes but is not limited to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community."

This is the definition of the Restatement § 368 plus the words "but is not limited to."

From these definitions, it can readily be seen that the word "charity" includes many things. A look at a few things it does not include may be helpful. It mat-

²⁹ Taylor v. Hoag, 273 Pa. 194, 116 A. 826 (1922); Centennial and Memorial Association of Valley Forge, 235 Pa. 206, 83 A. 683 (1912); Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 A. 553 (1888).

³⁰ Tollinger Estate, 349 Pa. 393, 37 A.2d 500 (1944); Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925); Taylor v. Hoag, 273 Pa. 194, 116 A. 826 (1922); Barnwell's Estate, 269 Pa. 443, 112 A. 535 (1920); Centennial and Memorial Association of Valley Forge, 235 Pa. 206, 83 A. 683 (1912).

³¹ Funk Estate, 353 Pa. 321, 45 A.2d 67 (1946).

³² Ibid.; Tollinger Estate, 349 Pa. 393, 37 A.2d 500 (1944).

³³ Restatement, Trusts, § 368 (a) (b) (1935).

ters not what was the motive of the donor. It made no difference that the testator wanted a memorial monument or arch with a bronze statue of himself and a playhouse, containing a name plate, for children in a playground.⁸⁴ A Fire Insurance Patrol, the purpose of which was to save life and property, was no less charitable merely because it was supported by voluntary contributions of fire insurance companies and aided their business.⁸⁵ Also, it did not matter that the motive of an erection of a window in a church in memory of a father and containing an inscription to that effect might be said by some to be somewhat non-charitable. It was a memorial in a church and therefore charitable. The test of public charity is not the motive of the donor but the object or purpose to be attained.⁸⁶ It is interesting to note, however, that a bequest for a statue of testatrix's deceased husband and a memorial window to his memory to be placed in Allegheny County Memorial Hall in honor of soldiers, sailors, and marines of that county, which failed because the husband had not enlisted from that county, was not given elsewhere under *cy pres* because the legacy was not for a religious or charitable use.⁸⁷ Then too, it must not be assumed that all bequests to charitable institutions are for charitable purposes or create charitable trusts. In *White's Estate*,⁸⁸ the testatrix, who while living had made arrangements with an institution to care for her daughter after her death, made bequests to charitable institutions as "compensation" for maintenance of her daughter at the institution. The institution renounced the benefits of the will and refused to take the child. The child went to another home, and the court ordered the amount to be paid for her care. She died and the heirs claim the excess. The court agreed with the heirs that the testatrix contracted with the home to care for her daughter and that there was no charitable gift intended. The daughter was not thought of as being subject to charity. A charitable trust is not created merely because one of the parties to a contract is a charitable institution and consideration is to be paid under the contract to the institution.

Trusts for the care and upkeep of cemeteries and monuments had been, by statutory enactment, declared to be made for charitable uses.⁸⁹ One case held that under the statute a bequest "for the keeping of my lot in the cemetery" was for a charitable use. Therefore, the amount of the bequest that was in excess of the needs for her lot was given for the care of the rest of the cemetery which needed attention. Beautification of other parts of the cemetery contributed to the sightliness of her lot.⁴⁰ Despite this case, a later lower court held under substantially the same facts that the bequest was not charitable within the meaning necessary for the *cy pres* doctrine to apply. The distinguishing feature was that here the rest of the cemetery

⁸⁴ Smith's Estate, 181 Pa. 109, 37 A. 114 (1897).

⁸⁵ Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 A. 553 (1888).

⁸⁶ Becker's Estate, 28 District Reports 695 (1919).

⁸⁷ Davis's Estate, 23 District Reports 768 (1914).

⁸⁸ White's Estate, 340 Pa. 92, 16 A.2d 394 (1940).

⁸⁹ Act of May 26, 1891, P.L. 119, 9 PS 4. (Pa.).

⁴⁰ Neely's Estate, 288 Pa. 130, 135 A. 540 (1927).

needed no care.⁴¹ Under this law, such trusts were not considered to be charitable within the meaning of the statute invalidating bequests made to charities within thirty days of the death of the testator,⁴² nor for memorials out of cemetery lots,⁴³ nor for provisions for head and foot tombstones.⁴⁴ To avoid this confusion as to whether such trusts were charitable or not, the Estates Act merely says that such trusts are not void as a perpetuity.⁴⁵

There has been some attempt to distinguish between gifts in fee to a charitable corporation for its purpose and gifts to a charitable corporation as trustee for specific purposes. The contention was that *cy pres* is applied only to charitable trusts as such and not to gifts to charitable corporations. Some decisions make this distinction, but not for the purpose of applying the *cy pres* doctrine. The difference is admitted in cases involving questions of who has legal and equitable title. If the corporation is trustee for specific purposes, it has not the equitable title. Therefore, the court may deprive it of the trust property,⁴⁶ or prevent it from ending the trust to get the property.⁴⁷ Another case made this distinction seemingly to avoid the Act of 1885 when it held that only gifts for charitable purposes were declared void by that statute and not gifts to a charitable corporation.⁴⁸ For purposes of applying the doctrine of *cy pres*, there seems to be no doubt that there is no difference. Some cases use the theory that the corporation is the trustee for the benefit of others.⁴⁹ Other cases point out that the corporation is a trustee for itself holding property for purposes specified in the gift, and that it is a trust in the sense that the fund does not merge into the general property of the corporation but remains under the jurisdiction of the court of equity.⁵⁰ Another and more realistic approach is that if a corporation is created for charitable purposes only, bequests to it are for those purposes only and cannot be used for another purpose, and therefore there is really no distinction.⁵¹ Other authorities agree.⁵² In actuality, the corporation, although owning the property completely, cannot do with it entirely as it pleases; it holds the property for the use of others. Under the latest enactment, the use of the word "trust" is avoided, and the statute merely declares that "if the charitable purpose for which an interest shall be conveyed shall" not be able to be fulfilled, the court may administer *cy pres*.⁵³ There can be no doubt now that the doctrine applies in both cases.

41 Devereux's Estate, 48 D. & C. 491 (1943).

42 Deaner's Estate, 98 Pa. Super. 360 (1929).

43 In re Stephan's Estate, 129 Pa. Super. 396, 195 A. 653 (1937).

44 Wise v. Rupp, 269 Pa. 505, 112 A. 548 (1921).

45 Estates Act of 1947, § 4 (b) (2).

46 Lehigh University v. Hower, 159 Pa. Super. 84, 46 A.2d 516 (1946).

47 Unruh's Estate, 248 Pa. 185, 93 A. 1000 (1915).

48 McCully's Estate, 269 Pa. 122, 112 A. 159 (1920).

49 Commonwealth v. Pauline Home, 141 Pa. 537, 21 A. 661 (1891).

50 Craig Estate, 356 Pa. 564, 52 A.2d.650 (1947).

51 Kortright's Estate (No. 2), 237 Pa. 143, 85 A. 111 (1912).

52 Restatement, Trusts, § 399 (a) (j) (1935); FOULKE, op. cit. supra note 19, at 478; 3 SCOTT, TRUSTS 2075 ff.; 2 BOGERT, TRUSTS AND TRUSTEES 2187 ff. (1935).

53 Estates Act of 1947, § 10.

The second major element necessary, after a charitable purpose is discovered, is that there must be a failure of the primary purpose of the donor. This failure may result from any number of causes. The prior statutes, as reviewed above, enumerated a number of these causes of failures in which the *cy pres* doctrine would apply. Under these, a charitable trust did not fail for want of a trustee, and the court appointed one to carry out the duties of a trustee.⁵⁴ Also under the old acts, a disposition of property did not fail because of its being in excess of the amount the charters authorized the organization to hold.⁵⁵ Likewise, when the failure of the primary purpose of the donor was due to the objects ceasing⁵⁶ or being uncertain,⁵⁷ *cy pres* saved the gift for charity. Nor did the charitable intent of the testatrix fail because of insufficient funds to establish a charitable home she desired.⁵⁸ Where the trustee which the testator appointed failed to name the beneficiaries, the charitable trust did not fail because of the failure of the last trustee.⁵⁹ The next of kin gained nothing when the funds, which were in excess of the amount necessary for the named purpose, were awarded *cy pres*.⁶⁰

If the purpose of the donor should fail because of an illegal element, other problems arise. If a testator willed property to educate pick pockets, the purpose is illegal and obviously the *cy pres* doctrine would not apply. It can hardly be imagined that this would be a charitable bequest. Certainly it does not benefit the community. However, the illegal element may be an unlawful condition, limitation, power, or restraint annexed to a lawful purpose. In this situation, the unlawful condition, limitation, power, restraint, and the estates limited thereon would be void while the principal or vested estate remains.⁶¹

The charitable trust may fail because it violates a statute. Where charitable trusts violated the former statutes⁶² which declared such trusts void if they were made within a month of the death of the testator or if they were not witnessed by two disinterested witnesses, the courts properly declared the trusts void and awarded the property to the heirs rather than under the *cy pres* power.⁶³ If the statute voided gifts to charity because made too soon before death of the testator, and if the courts awarded that gift to another charity under the *cy pres* power, the

⁵⁴ Cases cited note 17 supra.

⁵⁵ *Darlington's Estate*, 289 Pa. 297, 137 A. 268 (1927); *Kortright's Estate* (No. 2), 237 Pa. 143, 85 A. 111 (1912).

⁵⁶ *Craig Estate*, 356 Pa. 564, 52 A.2d 650 (1947); *Wilkey's Estate*, 337 Pa. 129, 10 A.2d 425 (1940); *Hoff's Estate*, 315 Pa. 286, 172 A. 645 (1934); *Toner's Estate*, 260 Pa. 49, 103 A. 541 (1918).

⁵⁷ Cases cited note 14 supra.

⁵⁸ *Williams Estate*, 353 Pa. 638, 46 A.2d 237 (1946).

⁵⁹ Cases cited note 19 supra.

⁶⁰ *Neely's Estate*, 288 Pa. 130, 135 A. 549 (1927).

⁶¹ *Philadelphia v. Heirs of Girard*, 45 Pa. 9 (1863).

⁶² Act of April 26, 1855, P.L. 328, 10 PS 12 (Pa.); Act of June 7, 1917, P.L. 403, 20 PS 195 (Pa.).

⁶³ *Crozer's Estate*, 296 Pa. 48, 145 A. 697 (1929); *Paletthorp's Estate*, 249 Pa. 389, 94 A. 1060 (1915); *Arnold's Estate*, 249 Pa. 348, 94 A. 1076 (1915); *Anderson's Estate*, 243 Pa. 34, 89 A. 306 (1914); *Kessler's Estate*, 221 Pa. 341, 70 A. 770 (1908); *Lynch v. Lynch*, 132 Pa. 422, 19 A. 281 (1890).

statute would become a nullity. This is one case where *cy pres* cannot apply when the trust fails because of illegality. The Restatement of Trusts § 399 states that if "it is or becomes impossible or impracticable or illegal to carry out the particular purpose" *cy pres* will apply. This section was quoted with approval in a recent case, but that case did not deal with any illegal element.⁶⁴ The present statute does not purport to deal with the possibility of illegality. However, as pointed out above, there would be very few times, if any, when the courts would be justified in applying *cy pres* when the purpose failed because of illegality.

The present legislation deals with all the situations enumerated in the previous statutes. It says that "if the charitable purpose . . . becomes indefinite or impossible or impractical of fulfillment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose," the court may apply the gift *cy pres*. It is submitted that this statute includes all of the possibilities mentioned in the repealed statutes and possibly some contingencies not there mentioned since the language is phrased broadly. Instead of listing isolated cases where *cy pres* will be applied, it uses such general terms as "indefinite or impossible or impractical." These terms include at least the aforementioned causes of failure and could include others not presently brought to mind.

The third element necessary for *cy pres* to operate under the old law was a general charitable intent of the donor besides the specific named purpose.⁶⁵ The statutes did not speak of a general intent as such, but they inferred as much when they stated that the courts should carry into effect the intent of the donor when the disposition failed. This "intent" could only be a bigger, more general charitable intent than the specific, named purpose; for if the specific intent failed, it would be useless for the legislature to give the courts power to carry out that specific intent which has already failed. The statute's "intent" undoubtedly referred to the general charitable intent that the courts talked about. Although this element was invariably declared to be necessary, the courts seldom had any trouble finding it. Because of the tendency of the courts to apply *cy pres* whenever possible, the legislature in the 1947 act abolished entirely the necessity of finding any general intent. It specifically points out that the doctrine will apply "whether his charitable intent be general or specific." All that is necessary is that he have a charitable intent to start with and that he has made no alternative gift. This phrase was added to provide for the application of *cy pres* in the situation where the courts might say that the donor did not intend to provide for any charitable purpose but the stated one. In some cases in other jurisdictions this was the result.⁶⁶

⁶⁴ Wilkey's Estate, 337 Pa. 129, 10 A.2d 425 (1940).

⁶⁵ Williams Estate, 353 Pa. 638, 46 A.2d 237 (1946); Hoff's Estate, 315 Pa. 286, 172 A. 645 (1934); Mears's Estate, 299 Pa. 217, 149 A. 157 (1930); Thompson's Estate, 282 Pa. 30, 127 A. 446 (1925); Toner's Estate, 260 Pa. 49, 103 A. 541 (1918); Kramph's Estate, 228 Pa. 455, 77 A. 814 (1910); Restatement, Trusts § 399 (1935); 2 BOGERT, TRUSTS AND TRUSTEES 1307 ff.

⁶⁶ Fisher v. Minshall, 102 Colo. 154, 78 P.2d 363 (1938); Bowden v. Brown, 200 Mass. 269, 86 N.E. 351 (1908).

Even though these three elements were present, the courts would not apply the doctrine if the donor annexed to his gift a condition and a reverter.⁶⁷ It seems unconscionable for the court to say that it is applying the gift according to the donor's general charitable intent (to some other charitable object) when his *express* intent was to dispose of the property elsewhere on failure of his first named donee to take or on failure of the trust for some other reason. Apparently this was never done in Pennsylvania, but it has been allowed in other jurisdictions.⁶⁸ If there is a condition only with no reverter, the situation is more difficult. There are cases saying that since a condition was not met, the gift must fall into the residue of the estate.⁶⁹ In one case, however, the testator desired to create a trust to provide for courses in eugenics at Harvard; the school refused to provide the courses. The court said the trust was for the general good and not for the benefit of a particular institution; therefore, the trust was not defeated and the court appointed an institution to carry out the testator's intention.⁷⁰ In another case, where the bequest was to go to a university in the event of its establishing certain courses, the lower court thought the condition was satisfied and gave the bequest to the legatee. Later the trustees petitioned the court to get back the money because of failure of the university to perform the condition. In granting the request of the trustees, the court said that conditions precedent to testamentary gifts must be strictly and literally complied with. It also pointed out that *cy pres* did not apply, because a charity is not created unless the condition of its creation is performed. This case explained that the previous case awarded the bequest *cy pres* because realization of a charitable design did not depend on a condition.⁷¹ In still another case, money was to go to a university for a building, but this provision was conditioned on the university providing and setting apart a piece of land as a site for the building. In event the university did not comply, the trustees were to contract with other colleges, but the trustees died without making other arrangements. The court said that even though the condition might not be carried out, the estate vested for a charitable purpose and therefore it did not matter *where* it was carried out. The university was named as a trustee.⁷² The court went out of its way to point out how a condition in a will, which provided that the income was to be used to promote higher education of females in an institution in or adjacent to Philadelphia, was met by giving the income to Wilson College in Chambersburg, 156 miles from Philadelphia.⁷³

⁶⁷ Randall's Estate, 341 Pa. 501, 19 A.2d 272 (1941); Jordan's Estate, 310 Pa. 401, 165 A. 652 (1933); White's Estate, 174 Pa. 642, 34 A. 321 (1896).

⁶⁸ In re Y. W. C. A., 96 N.J. Eq. 568, 126 A. 610 (1924).

⁶⁹ Wanamaker's Estate, 312 Pa. 362, 167 A. 592 (1933); Thompson's Estate, 304 Pa. 349, 155 A. 925 (1931) (no charity); Gunning's Estate (No. 1), 234 Pa. 139, 83 A. 60 (1912); Domestic and Foreign Missionary Society's Appeal, 30 Pa. 425 (1858).

⁷⁰ Mears's Estate, 299 Pa. 217, 149 A. 157 (1930).

⁷¹ Wanamaker's Estate, 312 Pa. 362, 167 A. 592 (1933).

⁷² Hunter's Estate, 279 Pa. 349, 123 A. 865 (1924).

⁷³ Curran's Estate, 310 Pa. 434, 165 A. 842 (1933).

Sometimes the testator uses "condition" when he really intends to impose a duty to apply the property to a particular purpose rather than a condition. However, if there is a true condition, the property reverts even though the testator says nothing about reverter.⁷⁴ There must be an intention to create a condition. If property is conveyed to be used for a charitable purpose forever or for such purposes only, no condition is created. If property is given "upon condition" that it be applied to certain charitable purposes, a charitable trust is created, and unless there is a reverter the instrument imposes no condition. The property will not revert if it is not applied for the specific purposes named.⁷⁵ Where the property is in trust to be applied to charitable purposes so long as a certain state of affairs continues or until a certain event happens, the charitable trust ends when the state of affairs ceases, and a trust results for the settlor or his heirs unless there is a valid gift over.⁷⁶ If property is given upon a legal condition subsequent, the trust will end upon the happening of the condition.⁷⁷ When the condition subsequent is illegal, the condition is invalid but the charitable trust is valid.⁷⁸ Where a condition precedent is illegal, either the charitable trust will not arise when the event happens, or the condition will fail and the trust arise even though the event has not happened, the result depending on the intention of the testator.⁷⁹ It is believed that these rules will apply under the 1947 enactment. The act says nothing about conditions; it merely states that "except as otherwise provided by the conveyor," *cy pres* may apply. If there is a reverter on failure of the charitable purpose, or if there is a true condition, the application of *cy pres* is precluded. However, if the conveyance is made "upon condition" that it be applied to certain charitable purposes, this should not be a provision preventing *cy pres* from operating; rather it should be construed as imposing a duty on the trustee to carry out that purpose if possible, and if not, then as applicable under the *cy pres* power.

If these four elements are present, then the courts are ready to apply the *cy pres* doctrine, but someone must bring the matter to the attention of the court. Originally, this was provided for in the Act of 1855 where the "Attorney General of the Commonwealth, on relation of any institution, association, or individual, desirous of carrying such disposition into effect, and willing to become responsible for the costs thereof" shall institute the action. As amended in 1895, a corporation not for profit could also be the relator. The Act of 1889 provided for no method of suit, merely setting forth the duty of the court to carry out the intent of the donor. The courts have always held that the Attorney General at the relation of another must bring the suit rather than the heirs.⁸⁰

⁷⁴ 3 SCOTT, TRUSTS 2126.

⁷⁵ Restatement, Trusts § 399 (b), 401 (b).

⁷⁶ Id., § 401 (c).

⁷⁷ Id., § 401 (d).

⁷⁸ Id., § 401 (h).

⁷⁹ Id., § 401 (m).

⁸⁰ Williams Estate, 353 Pa. 638, 46 A.2d 237 (1946); Commonwealth v. Pauline Home, 141 Pa. 537, 21 A. 661 (1891).

The Act of 1889 made no provision as to who should sue. In event of a situation arising under that Act, the court merely was to issue a decree to carry out the intent of the donor. This Act did not apply to a failure of a trust because of uncertainties of the objects. This may account for a charitable trust failure in a lower court case.⁸¹ In that case, the testatrix left money to found a home for aged men in honor of her brother. World War II made prices high and materials scarce, so there was not enough money to build such a home. In spite of the fact that Justice Stern in a previous case⁸² said that the Act of 1885 was so devitalized as to make it negligible, the lower court pointed out that the Act of 1855 was not repealed and had sufficient vitality to apply to this case. Thus the will was void because of uncertainty and because the objects of the trust were not ascertainable. This was not a case of the Attorney General bringing the suit on relation of some charitable institution, and since the objects were uncertain, the Act of 1889 did not apply, nor did the Act of 1895, but the Act of 1885 giving property to the heirs did apply. The court said there was no intent to give for a charitable purpose but only for perpetuation of her brother's name. This does not seem to be a valid conclusion. The court applied statutes relating to charitable bequests, and it is hard to see how there can be a charitable bequest without a charitable purpose. Maybe testatrix had no charitable motive, but even the court admitted that this did not matter. Certainly a home for aged men is beneficial to the community, and this is true even though the motive may be to perpetuate her brother's name. As stated before, charitable bequests do not fail because of uncertainty of the objects. In those cases, the uncertainty was due to lack of specific named beneficiaries; here the uncertainty was due to impracticability because the object was not ascertainable, and apparently another charitable institution could become the beneficiary only as relator of the Attorney General. Certainly, the testatrix did have a charitable intent, and it seems wrong to circumvent this intent. Admittedly it was difficult to interpret the maze of statutes. It is hoped that the 1947 Act will prevent such decisions. It states, "The court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General when he is not the petitioner . . ." apply the estate *cy pres*. Notice that now the charitable institution is not required to find out about the failure of the trust and apply for the benefit. It may do so as an interested person, but the trustee may also ask the court what to do with the estate. All that is necessary is that the trustee or interested person notify the Attorney General. This is a much more practical provision than the former one.

When the proper case is before the court, it has the duty to apply the gift *cy pres*, meaning as near as possible to the intent of the conveyer. Usually there is not much doubt as to what charity is a reasonable approximation of the conveyer's desire. Thus, where funds were subscribed to supply comfort kits and per-

⁸¹ Hildebrand's Estate, 47 D. & C. 537 (1943).

⁸² Wilkey's Estate, 337 Pa. 129, 10 A.2d 425 (1940).

sonal necessities to draftees of World War I and there was an unexpended balance, the erection of a permanent memorial honoring service men was not the closest approximation practicable to the original plan. Since there was a new draft taking place, the balance was applied to the same purposes for service men of World War II.⁸³ In a recent decision, the court awarded the assets of a non-sectarian hospital, which because of financial trouble stopped its corporate purposes and submitted itself to the jurisdiction of the court, to an Episcopal hospital which although sectarian did not discriminate. At the same time the court recognized that the judgment of the court cannot be substituted capriciously for that of the testator, and even though the funds had been given to the original hospital for its non-sectarian purposes, the Supreme Court held that there was no abuse of discretion by the lower court. A dissent pointed out that the non-sectarian hospital received state aid; therefore, the funds should not be awarded to a sectarian hospital when there are non-sectarian hospitals qualified.⁸⁴ Although the courts exercised the power of *cy pres*, the Act of 1855 and its amendment, the Act of 1895, in rather obscure language set forth the law that if the events enumerated there which would cause failures of charitable trusts took place (objects ceasing, unascertainable, etc.), "such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the legislature of this Commonwealth, in manner as nearly in conformity with the intent of the donor or testator, and the rules of law against perpetuities, as practicable, or otherwise to accrue to the public treasury for public use." Thus the legislature could have administered the doctrine, and the gift might have been given to the public treasury. No case is known where these possibilities have happened. The provision was confusing, and one case in dicta said that the Act of 1885 did not change the *cy pres* power of the courts but merely repealed the power assumed by the legislature under the Act of 1855.⁸⁵ At any rate this is no problem today. The Estates Act provides that "the court may . . . order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyer." The legislature has no authority to dispose of property now; the court makes the disposition as it sees fit.

To summarize the elements necessary for the application of the *cy pres* doctrine today, the first necessity is that the conveyer have a charitable purpose. The 1947 Act does not change the previous law on this point. Second, this purpose must fail because of a reason mentioned in the Estates Act. Reasons enumerated in this Act include all possibilities existing in previous statutes, and because of the broad language, may take care of other eventualities. Third, the conveyer must not have provided otherwise. However, a general charitable intent is no

⁸³ *Connors v. Ahearn*, 342 Pa. 5, 19 A.2d 388 (1941).

⁸⁴ *Kensington Hospital for Women Case*, 358 Pa. 458, 58 A.2d 154 (1948).

⁸⁵ *Trim's Estate*, 168 Pa. 395, 31 A. 1071 (1895).

longer needed. It does not matter that the court feels that the conveyor intended the gift for this one purpose only. Fourth, an interested person must make application to the court and notify the Attorney General. When these elements are present, the courts may distribute the estate for some other charitable purpose which is similar to the expressed purpose of the conveyor.

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