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The Cy Pres Doctrine in West Virginia

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STUDENT NOTES

THE CY PREST DOCTRINE IN WEST VIRGINIA.—The trust doctrine of cy pres involves the theory that where a general charitable intent is expressed on the part of a donor to a trust, and either no particular object is mentioned or the original object is illegal, impossible or impractical so that it fails completely or does not exhaust the res, the court will apply the funds to charitable objects cy pres (as near) to the donor's intent as the law will allow. This method of preserving charitable trusts by effectuating a trust similar to that envisioned by the settlor has been given wide favor in many jurisdictions but has encountered death-dealing difficulties in this state. It is universally held that an essential characteristic of a charitable trust is that the beneficiary of the trust, as distinguished from the object or purpose, must be indefinite. While the West Virginia court has exhibited reluctance to enforce trusts which have indefinite objects, in cases where a definite object is shown the court has allowed the trust as an ordinary private trust even if the object so named was a type of charity. The hostility of the West Virginia court toward trusts which have indefinite beneficiaries was inherited from early Virginia precedents which are contra to trust law in nearly all other states and which have been apparently repudiated in that state.2

1 See Scott, Trusts § 399 (1939); 2 Bogert, Trusts and Trustees § 433 (1946); Restatement, Trusts § 396 (1935).
The Supreme Court of the United States, in Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs, announced in an opinion by Chief Justice Marshall with a concurring opinion by Mr. Justice Story that the validity of trusts for charitable purposes depended upon the English Statute of Charitable Uses. The General Assembly of Virginia had repealed certain English acts, including that statute, in 1792, consequently the doctrine of charitable uses and its offspring cy pres doctrine had been repudiated. The Virginia Court of Appeals followed that decision in Gallego v. Attorney General and held gifts to needy widows and a bequest for building a certain church invalid as the beneficiaries were too indefinite.

Further historical research and the publication of additional early court documents satisfied the Supreme Court in the famous case of Vidal v. Girard's Ex'rs that trustees for indefinite charities had been appointed by the English Court of Chancery prior to the passage of the Statute of Charitable Uses. Mr. Justice Story then reversed his view in the Hart case and wrote the opinion for the court holding that charitable uses and cy pres are common law doctrines and the statute only added certain additional methods for seeking relief.

In 1850 the Supreme Court held the Gallego case had established a controlling rule of property, and although that case was founded upon the erroneous Hart decision, it had determined that in Virginia there was no common-law doctrine of charitable uses. Virginia maintained that position for many years before a series of modern statutes reversed the earlier holding.

West Virginia followed for a number of years the peculiar rule of its mother state and held charitable trusts void for want of a definite cestui. Inasmuch as cy pres is accepted or rejected by the courts according to their favor or disfavor of charitable uses in

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43 Eliz. c. 4 (1601).
3 Leigh 450 (Va. 1819).
43 U.S. (2 How.) 127 (1844).
Seaburn's Ex'r v. Seaburn, 15 Gratt. 423 (Va. 1859) (trust for building churches and payment of ministers invalid); Hill's Ex'r v. Bowman, 7 Leigh 757 (Va. 1836) (gift to "any person or persons who may be in distress" void, too vague).
See note 2 supra. See a discussion of the modern charitable use doctrine in Virginia in 25 Va. L. Rev. 109 (1938), expressing doubt as to the present status of the cy pres doctrine in that state.
Knox v. Knox, 9 W. Va. 24 (1876) (devise of land to a church void); Bible Society v. Pendleton, 7 W. Va. 79 (1873) (bequest of personal property for religious purposes void). For a purported complete list of cases concerning charitable uses to the year 1929, see Comment, 35 W. Va. L.Q. 372 n.9 (1929).
general, there was never a common-law doctrine of cy pres in this state. While paying lip service to charities being "regarded by courts of equity with special favor, and given a much more liberal construction..." the court struck down several trusts which would have been valid at common law.12

With the enactment of the present statute in 1931, a limited cy pres doctrine was introduced for the first time in this state. W. VA. CODE c. 35, art. 2, § 1 (Michie 1955), provides:

"Where any ... gift ... be made to trustees for the use of any university, college, academy, high school, seminary, or other institution of learning; or for the use of any benevolent, fraternal, patriotic, literary, temperance, or charitable society, order, lodge or association, or labor union or similar association or brotherhood of craftsmen or employees, or any local branch thereof, or for the use of any orphan asylum, children's home, house of refuge, hospital, or home or asylum for the aged or incurables, or the afflicted in mind or body, or for the use of any other benevolent or charitable institution, association or purpose; or if, without the intervention of trustees, such ... has been made ... or shall be hereafter made for any such use or purpose, the same shall be valid and such land or property ... shall be held for such use or purpose only."

W. VA. CODE c. 35, art. 2, § 2 (Michie 1955), adds:

"No ... gift ... made for any of the uses set forth in the preceding section shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such ... gift ... or for any failure to name or appoint a trustee for the execution of the trust, but such ... shall be valid; and whenever the objects of any trust shall be defined ... a suit in chancery may be instituted ... for the appointment or designation of a trustee or trustees to execute the trust, or for the designation of the beneficiaries in, or the objects of any such trust or ... for the carrying into effect as near as may be the intent and purpose of the person creating such trust. ..."

The Reviser's Note to these sections states their effect is to re-enact the English Statute of Charitable Uses, "saving practically every charitable gift from failure." The comprehensive catalog of different charities in those statutes, when read together, would seem to validate almost any philanthropic gift, yet in the nearquarter century since the effective date of those provisions, the

12 A gift "to my wife for charitable purposes" was held to be an absolute gift to the wife, the limitation being mere precatory language, in Baker v. Baker, 53 W. Va. 165, 44 S.E. 174 (1902).
The doctrine of cy pres has not saved one trust before our supreme court. The first hint of the court's interpretation of the above limited cy pres statute came in Beatty v. Trust Co., by way of a dictum. The court said "clearly, the thirty-one act, had it been in effect at the operative date of the will before us, would have validated it. . . ." The will to which the court had reference gave a fund for "placing worthy homeless old women in some one of the Protestant Homes maintained for the purpose. . . ." That gift is within the purview of "hospital, or home or asylum for the aged or incurables" in the language of the statute, and the result would seem inescapable that the bequest would have been valid had it come after 1931.

The recent case of Goetz v. Old National Bank, dealt with a will leaving a residue to trustees for distribution to "religious, charitable, scientific, literary, educational, or fraternal corporations and associations as they may in their discretion select." Trusts for charitable, literary, educational and fraternal objects are expressly protected by the statute set forth above, and religious trusts are sometimes considered charitable but are validated by separate earlier statutes. Hence only gifts for scientific institutions remain, from this will, undelated with by statute, yet the court seized upon that word "scientific" to invalidate the entire residuary trust. It would appear the court strained the point in saying "the intention of the testatrix in the will here considered would not be carried out if the trustees should use the property bequeathed for purely charitable purposes and thus ignore scientific corporations or associations," for the objects stated are clearly in the alternative and no such preference for science is exhibited.

The court expands on its decision that a bequest to a scientific institution is not affected by the statute, saying "an analysis of the two sections above quoted discloses that the application of Code, 35-2-2 rests upon the purposes and uses enumerated in Code, 35-2-1. The testatrix in the instant case included some of the uses set forth in Code, 35-2-1, but she named a scientific use or purpose in the residuary clause which is not named as a use, purpose or object in Code, 35-2-1." The statutory validation of trusts "for the use of any other benevolent or charitable institution, association or pur-

123 W. Va. 144, 148, 13 S.E.2d 760, 762 (1941).
14 84 S.E.2d 759 (W. Va. 1954).
15 W. Va. Code c. 35, art. 1, § 8 (Michie 1955), allows limited devises of land for religious purposes; id. § 4 concerns gifts and bequests of personal property to churches.
17 Id. at 770.
pose" apparently did not, to the court, include gifts to science.

It is submitted that the court has placed an undesirable limitation on gifts in approving trusts only for those chosen fields which are so fortunate as to be listed by name in the statute. One of the foremost authorities in the field of trusts, Scott, says "in classifying the purposes which are held to be charitable, it is possible to enumerate some of them. . . . But no matter how many types of purposes are thus enumerated, there will always be another class to include the miscellaneous purposes which cannot be classified under a single heading. The common element is that the purposes are of a character sufficiently beneficial to the community to justify permitting property to be devoted for an indefinite time to their accomplishment."18 Entire new fields of research have grown up in this country since 1931 which are socially-desirable objects to receive donations via trusts, yet they are excluded from ever being beneficiaries because the court refuses to give meaning to the miscellaneous category of objects "other benevolent or charitable institution, association or purpose." This interpretation of the statute puts us even further at odds with our sister states rather than bringing our trust law into accord with the great majority of other jurisdictions as was intended by the legislature.19

In refusing to allow a scientific object of a charitable trust, the court said "a scientific, literary, educational or fraternal corporation may be operated for profit. . . . We think that a trust for profit as well as a charitable trust is created by the fourth clause of the will,"20 which is a mixed trust and void. Scott states "not infrequently it happens that a testator leaves money in trust to be applied to such educational institutions as the trustees may select. Occasionally it has been held that such a trust is not a charitable trust since the trustees might select educational institutions organized for private profit. . . . It would seem that it would have been more reasonable to hold that the testator intended to afford aid only to such institutions as were non-proprietary in character, and therefore charitable."21 The same logical answer would apply to scientific objects.

Although the vast majority of other states have by common law

18 3 Scott, Trusts § 374.
19 See Revisers' Note to W. Va. Code c. 35, art. 1, § 2 (Michie 1955), indicating the statutes of Virginia, Kentucky and Rhode Island were relied on in drafting these statutes.
20 See note 16 supra.
21 3 Scott, Trusts § 376.
or statute overcome the weak arguments against the doctrine,\textsuperscript{22} cy pres, one of the strongest and most favored doctrines in Anglo-American trust law, has never been used by our supreme court. Through historical error, limited legislation and unduly narrow construction of the applicable statute in the \textit{Goetz} case, no trust has yet been preserved by our highest court by this, one of the most beneficent doctrines in equity jurisdiction. Perhaps it can be said of our court, as of another, that its refusal to allow these trusts "... has lost to the needy of the state innumerable charities because the Virginia court preferred to be consistent rather than right."\textsuperscript{21} That state has undergone a reversal in policy with regard to charities\textsuperscript{24} but it remains for further legislative action or more liberalized judicial interpretation to bring this aspect of West Virginia trust law into accord with the weight of authority in this country.

E. W. C.

\textbf{MINES AND MINERALS—IMPLIED RIGHT TO STRIP MINE COAL.—}

The subject of the implied strip mining rights has not received much attention by the courts, due primarily to the fact that wherever the right to strip mine is intended, it is usually expressly stated.\textsuperscript{1} The problem arises, however, where there is a reservation or conveyance of coal without spelling out the right to mine the coal by strip mining methods. The question then is whether, under the terms of the reservation or grant, the coal owner may strip mine the coal. The issue is especially important when it is subsequently discovered that all or a substantial part of the coal cannot be removed except by stripping it.

The problem is important because of the destructive nature of the strip mining method. By its use, the surface overlying the coal is either completely removed or destroyed, although it may

\textsuperscript{22} Any reluctance to accept fully the English view of cy pres is said in a Comment, 49 \textit{Yale L.J.} 300, 307 (1939), to be due primarily to: (1) the stigma and confusion attached to the ancient king's prerogative cy pres, as distinguished from judicial cy pres; (2) overemphasis placed by the courts upon effectuation of a donor's intent; (3) desire in some states to limit gifts to charitable corporations which are under legislative supervision.

\textsuperscript{21} Note, 17 \textit{Va L. Rev.} 302 (1931).

\textsuperscript{24} See note 2 supra.

\textsuperscript{1} If the right is expressly spelled out, it will be allowed unless prohibited by statute. \textit{Tokas v. Arnold Co.}, 122 W. Va. 613, 11 S.E.2d 759 (1940). That no West Virginia statute prohibits it, see \textit{West Virginia-Pittsburgh Coal Co. v. Strong}, 129 W. Va. 832, 42 S.E.2d 46 (1947).