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Charitable Trusts

W. T. O'Farrell

West Virginia University College of Law

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option to do one of two things, rather than absolutely agreeing to do one, with a stipulation as to damages in case of his default in granting the renewal. Consequently, it is submitted that this was no contract calling for liquidated damages, but rather a true alternative contract.

Much can be said for the theory contended for by Professor Williston, for undoubtedly if the obligor performed, he would choose the alternative most beneficial to himself. Consequently there is reason in limiting the obligee to the value of the least onerous alternative, for in theory this is the extent of his damage. On the other hand, in every ordinary case where the defendant is given option to do one of two things, he contracts to exercise the option within a given time. Consequently, if he fails to exercise it, he has broken his contract in its entirety, else the time provisions in such contracts would have little meaning. Should the plaintiff be compelled to limit his damages because the defendant has broken his contract? If we admit that by failure to exercise his option at the agreed time the defendant has lost the right, and there is considerable authority in support of this rule,¹⁰ then the effect of (3) above would be to give him a double option, and the same criticism could be made of (2), because he would probably choose the least onerous, if he still retained the right of choice.

—KENDALL H. KEENEY.

CHARITABLE TRUSTS.—Testator, who was seized of valuable real estate situated in West Virginia, devised the property to a certain banking company in trust, the income to be used in educating young men from certain counties in West Virginia and Ohio, at Lafayette College. *Held*, that the devise is valid under Section 3, Chapter 57, CODE, providing "Where any conveyance of land has been made * * * or shall be made to trustees for the use of

¹⁰ *Texas & Ry. Co. v. Marlor*, 123 U. S. 687, 31 L. ed. 303, 8 Sup. Ct. 311 (1887); *Rewrick v. Goldstone*, 48 Cal. 554 (1874); *Choice v. Mosley*, 1 Bailey (S. C.) 136, 19 Am. Dec. 661 (1828); 13 C. J. 697; 6 R. C. L. 360. In *Wilson v. Lewis*, 2 Yeates (Pa.) 466 (1799), the court said although the election was lost at law, equity would relieve in a hard case.

any college, academy, high school, or other seminary of learning, or for the use of any society of Free Masons, Odd Fellows, or for an orphan asylum or children's home * * * or other benevolent association or purpose; or if without the intervention of trustees such conveyance has been made * * * same shall be valid."¹

Charitable trusts received little encouragement from the early Virginia and West Virginia decisions.² In the leading case of *Gallego's Executor v. Attorney-General*,³ the Virginia Court held a bequest of money to be distributed among needy widows; and a devise and bequest to be used in building a certain church, were both void, because of indefiniteness of the beneficiaries. The court gave as its reason, that the old statute of charitable uses (43 Eliz.) had been repealed in Virginia; therefore such charitable trusts were subject to the ordinary rule that in order to create a valid trust there must be a definite beneficiary; and there being no definite beneficiary to these trusts, but rather a broad class, the trusts must fail. It might be interesting to note that later investigations by legal scholars demonstrated that such charitable trusts had been enforced by the courts of equity as a part of their inherent power, long before the passage of the statute of 43 Eliz.; and that this statute was merely intended to provide additional means of enforcing them. This was the basis of the opinion of Judge Storey in the famous case of *Vidal v. Gerard's Executor*,⁴ in which the United States Supreme Court reversed its former ruling, and held these charitable trusts enforceable without the aid of a statute.

But in subsequent cases the Virginia court enforced the rigid doctrine of the Gallego Case.⁵ *Hill's Executor v. Bowman*⁶ held that a devise and bequest of property to be used to help "any person or persons who may be in distress" was too vague to be enforced. *Janey's Executor v. Latane*⁷ held that a bequest to be used for the schooling of poor white children failed. And in *Seaburn's Executor v. Seaburn*,⁸ a bequest for the building of churches, and the payment of ministers, shared a like fate.

¹ *Gallagher v. Gallagher*, 105 W. Va. . . ., 146 S. E. 643 (1929).

² See two previous articles on this present subject by the writer in 35 W. VA. L. QUAR., 302 and 386.

³ 3 Leigh 450 (1832).

⁴ 2 How. 127 (1844).

⁵ *Supra*, n. 2.

⁶ 7 Leigh 657 (1836).

⁷ 4 Leigh 327 (1833).

⁸ 15 Grat. 423 (1859).

The West Virginia court⁹ adopted the Virginia doctrine with respect to charitable trusts of a religious nature. Section 1, Chapter 57, CODE, provides that "Every conveyance of land which shall hereafter be made for the use or benefit of any church, religious sect, society, congregation, or denomination, as a place of public worship, or as a burial place, or as a residence for a minister, * * * shall be valid." The court held, in the case of *Knox v. Knox*¹⁰ that the word "conveyance" used in this statute did not include a devise, and that a devise of real estate to a church was void. And in the case of *Bible Society v. Pendleton*,¹¹ the court decided that the word "conveyance" did not include a bequest, and that a bequest of personal property for religious purposes was void. These decisions were reaffirmed in *Wilson v. Perry*¹² and *Mong v. Roush*.¹³

Section 3, Chapter 57; CODE, respecting trusts of a non-religious nature, provides that "Where any conveyance of land shall be made * * * for the use * * * of any college, academy, high school, or other academy of learning, or for the use of any Society of Free Masons, Odd Fellows, * * * or for an orphan asylum or children's home * * * or for any other benevolent association or purpose * * * the same shall be valid." Considering the earlier decisions of the court on charitable trusts of a religious nature, it is perhaps best that this section was not construed by the court until 1913. By that time there had evidently been a change of policy, for in *Hays v. Harris*¹⁴ the court construed the word "conveyance" occurring in Section 3, Chapter 57, CODE, to include and make valid both a devise of real property and a bequest of personal property in trust for the purposes enumerated in the statute. The court evidently disregarded both the spirit and the law of the earlier decisions in arriving at this conclusion; but that the result was good cannot be denied.

⁹ A complete list of West Virginia cases dealing with the present subject are: *Carpenter v. Mill*, 3 W. Va. 174 (1869); *Bible Society v. Pendleton*, 7 W. Va. 79 (1873); *Knox v. Knox*, 9 W. Va. 124 (1876); *Carskaddon v. Torreyson*, 17 W. Va. 43 (1880); *Brown v. Caldwell*, 23 W. Va. 187 (1883); *Mong v. Roush*, 29 W. Va. 169, 1 S. E. 302 (1886); *Heiskell v. Trout*, 31 W. Va. 810, 8 S. E. 557 (1888); *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410 (1888); *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731 (1890); *Paek v. Shanklin*, 43 W. Va. 304, 27 S. E. 389 (1897); *Baker v. Baker*, 53 W. Va. 165, 44 S. E. 174 (1902); *Harris v. Neale*, 61 W. Va. 1, 55 S. E. 740 (1906); *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827 (1913); *Bank v. Showacre*, 102 W. Va. 260, 135 S. E. 9 (1926); *Gallagher v. Gallagher*, 105 W. Va. . . . , 146 S. E. 623 (1929).

¹⁰ 9 W. Va. 124 (1876).

¹¹ 7 W. Va. 79 (1873).

¹² 29 W. Va. 169, 1 S. E. 302 (1886).

¹³ 29 W. Va. 119, 11 S. E. 906 (1886).

¹⁴ 75 W. Va. 17, 80 S. E. 827 (1913).

So, in the recent case of *Gallagher v. Gallagher*,¹⁵ set forth above, the court has continued the policy inaugurated in *Hays v. Harris*¹⁶ in giving the statute a broad construction, and construed "benevolent purpose" to cover scholarships in a college. The wording of the statute is certainly liberal, for "benevolent" has been defined to mean "all gifts prompted by good will or kindly feeling toward the recipient, whether an object of charity or not. It is a word of somewhat broader, larger, and wider meaning than charitable."¹⁷ That the statute will be construed in keeping with its liberal wording, is indicated by *Gallagher v. Gallagher*.¹⁸

As the cases now stand, a devise or bequest in trust for religious purposes is void, because the court in its earlier decisions construed the word "conveyance" not to include a devise or bequest. But in construing the same word in a statute relating to charitable trusts of a non-religious nature,¹⁹ the court in more recent decisions has arrived at an opposite result, and decided that both devisee and bequest are included in the word "conveyance." *Quaere*, if the question now came before the court as to the validity of a devise or bequest in trust for religious purposes, would the court adhere to its earlier decisions and declare the trust void; or would it decide in accordance with its present liberal views with regard to trusts of a non-religious nature?

—W. T. O'FARRELL.

PRINCIPAL AND AGENT—PRINCIPAL'S LIABILITY FOR THE FRAUDULENT ACT OF HIS AGENT—ACT SOLELY FOR THE AGENT'S BENEFIT.—McDonnell was an agent of the defendant railway. His duty was, and his continuous practice had been, to give notice to consignees, including the plaintiff, of the arrival of goods. The agent, in pursuance of a scheme of his own, notified the plaintiff of the arrival of goods under a bill of lading and the plaintiff relying on this notice, paid a draft. The agent had forged the bill of lading. The plaintiff sued the railway in deceit. The Circuit Court of Appeals followed *Friedlander v. Texas and Pacific Rail-*

¹⁵ *Supra*, n. 1.

¹⁶ *Supra*, n. 12.

¹⁷ 7 C. J. 1141.

¹⁸ *Supra*, n. 1.

¹⁹ CODE, c. 57, §3.