THE CY-PRÈS DOCTRINE

Bequest to a non-existing charity—whether the rule against perpetuities applies—vesting—Re Brier[1]

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The most important principle in the construction of wills is that effect should be given to the intention of the testator. There are, however, rules that seem to cut directly across this principle. Among them are the rule against perpetuities, the rules analogous thereto, and the rule against accumulations. Some suggested rationales of these rules are: (a) the keeping of land freely alienable, (b) the preventing of stagnation of the economic market, (c) the preventing of the dead having too great a control over property, (d) the preventing of undue concentration of wealth in the hands of a few, and (e) the preventing of capricious or eccentric dispositions. The *cy-près* doctrine was developed very early[2] to aid the courts in giving effect to the testator's intentions when for some reason his specific directions could not be followed. The doctrine applied not only to charitable but also to non-charitable bequests.

In the construction of wills the considerations that arise when the object of the testator's bounty is a charity are different than when it is a non-charity. It could be said that the courts will apply the limiting rules with less strictness when the object is charitable. For example, if for some reason the testator's scheme for benefiting a charity cannot be effected, the court will apply the gift in a manner which coincides as nearly as possible with the testator's intention, provided the testator manifested a general charitable intention or intended to make the gift outright. That is just how the doctrine of *cy-près* operates; in fact "cy-près" is of French derivation meaning literally "near too".

It is evident that in the case of *Re Brier,* decided in the British Columbia Court of Appeal, the deceased, Louis Brier, went to great lengths to ensure that certain of his enumerated bequests would be devoted to charitable institutions, but both at trial and on appeal it was held that the gifts failed and that the next-of-kin would take them. The facts of the case are as follows. The testator bequeathed his estate to his "executor and trustee in trust for the following purposes". He then listed bequests, lettered from (a) to (s). Under each of paragraphs (n), (o) and (p) he directed, "when my debts are paid and after the bequests herein before mentioned are paid to date and as soon as there is money available derived from the income of my estate" to accumulate three separate sums respectively of $20,000 each, for a Jewish Hospital, a Jewish Orphan Asylum and a Jewish Old Men's Home. These funds, together with the accumulated interest were to be paid out in the event of the building of an institution for each of the above, costing at least $100,000 within 50 years after his death provided the institutions offered care on a non-sectarian basis. In the event that care was not so offered, or such a building was not built within 50 years, the bequest was to lapse and the executor and trustee was to give the

[1] (1959) 18 D.L.R. (2nd) 670; (1960) 23 D.L.R. (2nd) 229.

[2] One of the earliest examples of the working of this doctrine is found in the case of *Attn.-Gen. v. Bishop of Chester* (1785) 1 Bro.C.C. 444.

money to some other charitable institution, as he "may deem worthy". The residuary clause of the same will directed the residue of his estate to be divided into three, one third to be given to each of the above as are in existence within 50 years, and if less than three exist, the residue that remains shall be distributed to such charitable objects as the trustee may deem best.

The action arose when the trustee asked for directions as to how this estate, the three funds and residuary of which amounted to over half a million dollars, should be disposed of after a Jewish Home for the Aged made application for a share of the estate. Both at trial and in the British Columbia Court of Appeal it was held that the intended gifts were void for remoteness. More specifically, Bird, J.A. in the latter court stated that the trust corporation designated as the executor and trustee of the will was not a trustee for the charity. For this reason and because he considered the vesting itself to be contingent, he held that there was a possibility that the gift might not vest within the perpetuity period and was therefore void. He said at page 235 of the report:

> Here, in my view under the circumstances above related, there can be no vesting in the trust corporation in its capacity as trustee of any such fund until that fund has been accumulated pursuant to the provisions of the paragraph applicable thereto and "until there is a person having all the qualifications that the testator requires and completely answering the description of the object of his bounty given in the will". 34 Hals., 2nd ed., p. 273, para. 418, and the cases there cited. Here, since the vesting in the trust corporation in its capacity as trustee is not immediate but is contingent at the earliest upon the happening of the events enumerated in paragraphs numbered (1) to (3), inclusive above, and the accumulation of the particular fund, in my judgment the first rule in *Chamberlayne* v. *Brockett* can have no application.

He went on to say that this case fell within the second rule in *Chamberlayne* v. *Brockett*, i.e. that if the gift is conditional it is not vested.

It has often been said, and wrongly so, that the rule against perpetuities does not apply to charitable trusts. Much of the confusion originates from a basic misunderstanding of the rule itself as well as from the fact that there are two other rules very much like it, one of which does not apply to charitable trusts. That rule, expressed in general language, is the rule against undue duration of trusts for non-charitable purposes and was developed to prevent capital from being tied up too long without any direct benefit to living persons. The rule against inalienability, which prevents present interests being rendered unmarketable, is the other rule which is similar to the rule against perpetuities. Those who say that the rule against perpetuities does not apply to charitable trusts are probably referring to the rule against undue duration of trusts, which has at times been referred to as the rule against perpetuities.[3]

Further confusion sometimes arises from the use of the phrase "the exception to the rule against perpetuities" in connection with charitable trusts. This expression has been misinterpreted to mean that the rule against perpetuities has no application to charitable trusts. What such a statement in fact refers to is the rule in *Christ's Hospital* v. *Grainger*[4] that a gift to one charity with a gift over to another charity upon the happening of an event that may never happen is good. This is the only true exception to the rule against perpetuities in the case of charitable gifts.

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[3]Morris and Leach, *The Rule Against Perpetuities*, 1956 ed., pp. 314-5.

[4]19 L.J. Ch. 33.

Jarman on Wills states[5] that the rule against perpetuities is directed against remoteness of vesting of legal interests and as such applies alike to charitable and non-charitable gifts. Much the same thing was stated by the Lord Chancellor in *Chamberlayne* v. *Brockett*:[6]

> On the other hand, if the gift in trust for charity was itself conditional upon a future and uncertain event, it was subject, in their Lordships' judgment, to the same rules and principles as any other estate depending upon its coming into existence upon a condition precedent.

This rule, which is called the second rule in *Chamberlyne* v. *Brockett*, and which has been thought to describe the circumstances under which the rule against perpetuities will apply to charitable gifts, is vague to say the least, and any attempt to make this the definitive test is inadequate. Bird, J.A. felt that the present case fell within this second rule in *Chamberlayne* v. *Brockett*. Perhaps it could equally well be said that the present case falls within the first rule of that case, which is,

> . . . . . although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness.[7]

The facts of that case were very close to those of the present case. There a testatrix bequethed her estate to trustees to hold the income for certain charitable purposes one of which was the building of an almhouse "so soon as land shall at any time be given for the purpose as hereinbefore mentioned". The court held that the gift was good and that it fell within the first rule. Bird, J.A. distinguished this case from *Re Brier* by saying that there was no vesting in Louis Brier's trustees in their capacity as trustees of any such fund until a qualified person came forward. As authority he cited a passage from Halsbury.

> An estate or interest must remain contingent until there is a person having all the qualifications that the testator requires and completely answering the description of the object of his bounty given in the will.[8]

This statement without more, is also an inadequate statement of the law on the subject of vesting. *Chamberlayne* v. *Brockett*, the other purpose trust cases, and the cases where enjoyment of the gift was postponed, are in conflict with this statement if it is to be restricted to a strict literal interpretation for in such cases the gifts have been held to be vested even though there was no one answering the description of the object of the testator's bounty. When Bird, J.A. uses the above quotation as authority, he seems to confuse the trustee of a charitable gift with the objects of that gift itself, particularly when he says that someone must come forward answering the description before the gift could become vested. He is forgetting that the charitable gift may be vested once and for all in the trustee who is invested with the responsibility of effecting the charitable purpose intended by the testator. Furthermore, it should be remembered that a charitable trust has the very nature and the same origins as the purpose trust. It has been called a purpose trust, which in turn, has been called an unenforceable trust for the very reason that there is no one to come forward to enforce it. No one is required to come forward, meeting a certain description. The object described must be effected if possible, and where not

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[5] 8th ed. p. 381.

[6] (1872) L.R. 8 Ch. 206 at p. 211.

[7] (1872) L.R. 8 Ch. 206 at pp. 210-11.

[8] 34 Hals., 2nd ed., p. 372, para. 373.

possible the gift should be applied *cy-près* if a general charitable intention is obvious.

The passage from Halsbury, part of which is quoted above, is immediately preceded by a paragraph[9] which states that there is a presumption in favor of vesting. If the language of the instrument is ambiguous, a construction that will render the gift valid is preferred to one that would render it invalid. Because the present cases is borderline on the question of vesting, this presumption should be dealt with in a discussion that would thoroughly dispose of the matter.

Had Louis Brier known ahead of time that such a construction would have been placed on his will he could have designated, at that time, a second trustee, stating that he had money which he wished to be devoted to charity, and directing that it be applied according to a particular scheme. He could have stated that if this were not possible that it should be applied to charities as the trustees deemed best. Applying the reasoning of Bird, J.A. the gift would have been good as far as the rule against perpetuities was concerned. It seems harsh that a few words could make such a difference, especially when the intention of the testator would have been the same in both situations.

In spite of the arguments in favor of immediate vesting in this case, due consideration must be given to the second rule of *Chamberlayne* v. *Brockett* that if the gift itself is conditional it is subject to the rule against perpetuities. In the case of *Re Stratheden*,[10] a testator bequeathed "an annuity of £100 to be provided to the Central London Rangers on the appointment of the next lieutenant colonel". Romer, J. held that this was a charitable bequest, but that it was void because conditioned on a contingency possibly too remote. Perhaps that case on its facts is not too far from the facts of *Re Brier* which could be expressed very similarly; that is, "a sum of $20,000 for a Jewish Hospital when one exists and when $20,000 is available by accumulation". Furthermore, the situation in *Chamberlayne* v. *Brockett* could be expressed in similar terms, "money for an almshouse when someone donates land". But of course in the latter case the gift was good. In a more recent case, *Re Mander*,[11] a testatrix directed her trustees "to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St. Savior's Church, St. Albans". It was there held that the bequest was wholly inoperative as the event contemplated was completely uncertain and conditional. These cases serve as examples of situations where the courts have found contingent unvested gifts. It should be noted that in all of the situations where the gift was held to be void the gift was to a specific charity or was of a specific nature rather than a gift to charity in general.

The present case raises some serious problems of public policy in a general sense, and public policy is considered to be part of the rationale of the rule against perpetuities. Allowing a dead man to tie up such a large estate for uncertain purposes offends one's sense of justice. There would be no complaint if somehow the money could be put into immediate use or benefit for some charity. To allow these gifts to fall into the hands of the next-of-kin after the testator went to such lengths to prevent this happening, at least equally

[9] 34 Hals., 2nd ed., p. 372, para. 417.
[10] [1894] 3 Ch. 265.
[11] [1950) Ch. 547.

offends one's sense of justice. The *cy-près* doctrine was developed to resolve the problem created by the conflicting interests.

Whether or not the gift is held to be void for remoteness, it is necessary to consider whether it is necessary to apply the *cy-près* doctrine. Even if the gift is not void for remoteness, it may be impracticable or even impossible to apply the gift exactly as the testator intended and if a general charitable intention has been manifested, or it is obvious that the testator was making an immediate out and out gift to charity, the court may direct another scheme. At first glance, one would think that the whole doctrine was intended for just such a situation as the present one.

In *The Cy-Près Doctrine,* by Sheridan and Delany,[12] are stated the elements involved in the application of the doctrine. They are:

1. A gift of specific or ascertainable property by a donor to some charitable purposes,
2. A determination by the court that this specific gift either embraced a broader plan of which the specific gift was only a mode of application or was out and out,
3. The defeat of the specific gift, and
4. An application of the property by the court by order to achieve the continued fulfilment of the broader plan, if any, or to charity anyway.

The doctrine is also very well outlined by Parker, J. in *Re Wilson*[13] as follows:

> First of all we have a class of cases where in form, the gift is given for a particular charitable purpose, but it is possible taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose and to graft on to the general gift a direction as to the desires or intention of the testator as to the manner in which the general gift is to be carried into effect. . . . . Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, or where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail.

It is evident that Louis Brier had a paramount general charitable intention because he provided that if no institutions such as he described were in existence at the end of fifty years, then his executors and trustees were to apply the funds to some other charitable object within the province. Applying the four elements of the doctrine as set down by Sheridan and Delany to the facts of this case, it would appear that the doctrine should apply. There was a gift of specific or ascertainable property; it either embraced a broader plan or was out and out, and the specific gift had been defeated, either by the rule against perpetuities or impracticability. However, there are real problems that arise when it has been decided that the gift violates the rule against perpetuities. The fact that it is either stated or implied in the two passages just quoted that the gift has to be given, that is, it must be immediate or out and out, indicates that *cy-près* cannot apply to contingent gifts. *Jarman on Wills,*[14] seems to state just that:

> *Cherry* v. *Mott* 40 E.R. 323 shows that there may be a conditional legacy to a charity as well as for any other purpose, and that if the condition is not fulfilled, the legacy fails in substance. And if the condition is such that it need not be performed within the limits allowed by the rule against perpetuities the gift is void. Such cases must be distinguished from those where the intention is to give a fund to charity at once, though there may be an indefinite suspense or abeyance in its actual application. If the particular purposes may be answered, though not immediately, the fund will be retained—how long does not clearly appear: but if those purposes turn out on inquiry to be impractical, then the fund will be applied *cy-près*. And during such retention there is no resulting trust for the heir or next-of-kin.

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[12]Sweet & Maxwell Ltd., London, 1959, p. 4.

[13][1913] 1 Ch. 314 at p. 321.

[14]8th ed., at p. 267, and see *Morris and Leach,* p. 256, Keeton, *Law of Trust,* 6th ed., p. 164.

But a close reading of this passage reveals that once you find in a situation that there is an intention to give a fund to charity at once even if the plan provides for an abeyance, no question of contingency can arise, because the overriding principle of *cy-près* protects it from such destruction. If *cy-près* were never heard of in English law, many of the situations that it protects would have been avoided by the rule against perpetuities. Although none of the authorities deal with this problem directly, *Morris and Leach,*[14] states when referring to the application of the doctrine to non-charitable gifts:

> It has been pointed out, however, that in all the cases in which the *cy-près* doctrine has been applied, the limitations would have otherwise infringed the modern Rule against Perpetuities as well as the rule in *Whitby v. Mitchell.*

Keeton simply says,[14]

> If the trust is for an institution, a general charitable purpose being expressed, and an institution corresponding with that indicated cannot be discovered, or has never existed, the gift in *prima facie* charitable, since the testator's; intention could not have been a benefit such a hypothetical institution only.

This passage indicates that even if the gift is to a non-existing institution it would be applied *cy-près.* If vesting is a prerequisite to the doctrine applying it would appear that this statement by Keeton is wrong because property cannot be vested in someone or something that does not exist. It is only reasonable that the existence of the charity is as much a condition precedent as any other contingency. Contingency and vesting never seem to pose much of a problem and even seem to be ignored in most cases when the doctrine is applied. The important elements to which the main attention is directed are a general intention to benefit charity and the specification by the testator of an object the performance of which becomes impracticable or impossible. If the court in this case were restricted to this type of thinking in contruing Louis Brier's will, there would have been no logical reason why the gifts should not have been applied *cy-près.*

Immediately following his discussion of contingent gifts to charities Gray[15] says:

> Immediate Gift. It the Court, however can see an intention to make an unconditional gift to charity (and the Court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if it cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out *cy-près.* Thus while the Court will allow the fund to be transferred to a corporation not in existence at the time of the gift, if such corporation is constituted in a reasonable time, it will not recognize the right of such non-existent corporation to keep the fund locked up until such time as it may please itself to be incorporated. The formation of the corporation is not a condition precedent to the charitable trust, and therefore the trust is not too remote.

In the present case the non-existence of the corporation was the only real condition precedent and it is apparent that Gray's description in the latter half of this quotation fits the present case well. At the beginning of the passage when Gray says that if the Court can see an intention to make an unconditional gift to charity, he is speaking of charity in a general sense as contrasted with a specific charity. It would seem that if the testator designated a specific charity but the whole spirit of his will indicated a desire to benefit charity in general then the gift would be regarded as general and immediate. As Gray says, the courts are keen-sighted in discovering such an intention and certainly they

[15]Gray, *Tht Rule Against Perpetuities,* 4th ed., p. 581.

should be. The fine distinction here pointed out (whether the gift is contingent to a specific charity or is immediate to charity generally with a specific scheme) is stated more precisely by Dixon, J. of the Australian High Court in *Monds* v. *Stackhouse*.[16]

> The principle by which the question is governed involves what may seem to be a refined distinction, but it is a clear distinction. If there is a gift impressed with an immediate trust for a charitable purpose it is good, nothwithstanding that the actual application of the fund in carrying the purpose into execution must await an event that may or may not happen within the period prescribed by the rule against perpetuites. But if such an event is made the occasion, not of the application or expenditure of the fund, but of the subjection of the fund to the charitable trust itself, that is another matter. A trust which only arises or becomes operative upon a condition which may not occur within the period allowed by the rule against perpetuities is bad for remoteness notwithstanding that it is a charitable trust. Where the trust has a particular object in view, to which the fund cannot be applied until the happening of a future contingent event, it may appear that the gift to the charity is subject to a condition precedent, so that if it is capable of fulfillment outside the period allowed by the rule the trust will be void. But consistently with the selection of a particular charitable object as a means of effecting his charitable aims, a testator may manifest a more general charitable intenion: cf. *Attorney-General* (N.S.W.) *v. Perpetual Trustee Co. Ltd.* (1940) 63 C.L.R. 209, at pp. 219, 223-225. If the general charitable intention is impressed upon the fund from the beginning it is immaterial that the particular means chosen for effectuating the intention may await an uncertain event capable of occuring outside the prescribed period. For there is a gift to charity operative at once and only the particular application is suspended.

He then cites authority and goes on to say on the next page:

> The decided cases show that before adopting a construction which makes the gift to charity depend upon a condition precedent consisting in an uncertain future event, it is necessary to be satisfied that such is the true meaning of the will. If no overriding and more general intention in favor of charity operating from the beginning is discoverable, it may be found that what looks like a condition precedent is in truth a condition subsequent.

Both in the main clauses of his will and the residuary clause, Louis Brier directed that his trustees were to give the moneys to other charities if the ones he had in mind were not in existence after fifty years. One cannot help but feel on studying the provisions of his will, that he was setting up a scheme rather than a series of conditions precedent, and that this was really just a case of the scheme being impracticable and perhaps even impossible. If *cy-près* applies to gifts otherwise void for remoteness it would have to be on this basis, that although the specific direction to a specific charity is conditional and offends, there is a general overriding intention that no matter what, the gift should go to some charity. On the other hand, it could be contended that since there is a condition precedent to the specific gift then no general charitable intention to devote the gift to charity once and for all could be found.

A very illuminating case on this point is *In re Swain*,[17] where the testator bequeathed the residue of his estate to his trustee to hold in trust for his niece for life and then to give the income to three poor people and, "I further direct that the said annuities shall not become payable until the said reserve fund shall amount to 400 l." Stirling, L.J. quoted the rules from *Chamberlayne* v. *Brockett* and then went on to say,[18]

> We think that, subject to the life estate given to Elizabeth Price, the residuary real and personal estate was devoted to charity as from the testator's death, and that the direction to postpone the payments of the annuities until the reserve fund reached 400 l was not a condition precedent to the charitable gift coming into effect, but was a direction as to the particular application of the charitable fund, and was intended to secure the working of the charity in the most beneficial manner.

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[16] (1948) 77 C.L.R. 232, at p. 248.

[17] /1905/ 1 Ch. 669 at p. 675.

[18] *Supra.* at p. 675.

Martin v. *Maugham*[19] was also a case of a direction to accumulate and the gift there was also held to be good. The courts in these two cases were keen to find that there was an intention to devote the fund to charity immediately. It is important to notice also that in the former case, the trustee of the will and the trustee for the charitable object were the same person, just as in the present case.

In *Loscombe* v. *Wintringham*[20] the testator bequeathed 500 l "to the governors, guardians, and trustees of a society instituted for the increase and encouragement of good servants." The gift was valid and applied *cy-près* although no such institution existed and although such trustees as he bequeathed the money to did not exist. These last three cases point out situations similar to the present case but where the courts allowed them to stand.

An American case similar to the present one was critically commented upon by the editor in 48 *Harvard Law Review*, page 1260.

> The attempted creation of a future charitable gift led to a novel decision by the New Jersey Court in *First Camden Nat. Bank & Trust Co. v. Collins*. There the testator devised the bulk of his estate to a trustee to invest and accumulate income during the life of the survivor or six named infants and 21 years thereafter. "After the expiration" of this period, the trustee was directed to "proceed to form" a charitable corporation to which the accumulated fund was to be "then" transferred. Because of the possible interval between the termination of the legal period and the formation of the corporation, the court held the entire gift invalid. This result would have been unavoidable had the gift not been charitable, but the court could have found ample authority that the non-existence of the corporation might be disregarded and the fund applied, as it were, *cy-près*. Thus a New York court recently sustained a will which directed the formation of a corporation "as soon as convenient and possible" and proceeded, "When such a corporation shall be so incorporated . . . . I give" to the corporate trustees the residuary estate. But in spite of the concern ordinarily manifested by the courts to uphold charitable gifts, the New Jersey court looked with undisguised disapproval on this particular testamentary scheme, which cut off the testator's family with a pittance and contemplated the accumulation of an enormous fund for the religious education of youth in the distant future.

It is unfortunate that the law is so uncertain in an area which has had so many years to develop. With the increasing accumulation of large estates in Canada, such problems as this will recur more frequently, and if any lesson is to be learned by the lawyer when aiding a testator in setting up a scheme to benefit charity, it would be to avoid details which suggest a contingency and direct the property to be paid over immediately to some hospital, orphanage, or some other existing charitable institution, rather than try to give effect to what the testator more particularly would have intended. *Re Brier* could just as easily have been decided the other way. It was definitely a borderline case. It is submitted that with a more careful consideration of the testator's intention and of the preference of the law for charitable bequests, the gift would have been upheld. It is unfortunate that this case, which merited deep and thorough study, was dealt with so summarily and uncreatively by the courts, especially when its consequences could be so far reaching.

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[19] 14 Sim. 230.

[20] 13 Beav. 87.