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## TRUSTS-CHARITABLE TRUSTS-EFFECT OF NATIONALIZATION ACT ON GIFTS TO ENGLISH HOSPITALS

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TRUSTS—CHARITABLE TRUSTS—EFFECT OF NATIONALIZATION ACT ON GIFTS TO ENGLISH HOSPITALS—Complainant held property under a trust created by a Rhode Island will, the validity of which had previously been determined by the Rhode Island court. Respondent hospitals were remainder beneficiaries of the trust, the gifts to them being subject to certain limitations on their use. Respondent churches were named in the trust deed as alternative legatees "in case any of my preceding gifts, specially my gifts to Public purposes, should fail. . . ." The remainder interests vested, and partial distribution of the corpus was made in 1939.<sup>1</sup> In 1946 the National Health Service Act was passed in Great Britain which nationalized all hospitals, including respondents, and vested all property in which they had any beneficial interests in the Minister of Health, or a governing board under his control. The property was to vest free of all trusts, but trust funds were to be used for stated purposes "as far as practicable." In an action by the trustee for instructions, *held*, the gifts to the English hospitals failed by reason of the Health Act, and vested in the respondent churches as alternative legatees. The naming of alternative legatees precluded *cy pres* performance. *Pennsylvania Co. for Banking and Trusts v. Board of Governors of London Hospital*, (R.I. 1951) 83 A. (2d) 881.

The gift in question here is a charitable gift in trust; but because it is a distribution of the corpus, the end result is very similar to a gift for a charitable purpose, though not in trust, with the donee holding the principal of the gift.<sup>2</sup> Although there is some question as to the enforceability of the provisions of such a gift, it is highly probable that they would be enforced as if the gift were not in

<sup>1</sup> The court allowed postponement of final distribution to permit more advantageous liquidation of the trust.

<sup>2</sup> This distinction is actually of little practical significance, in view of the similar treatment accorded charitable gifts in trust and not in trust by the American courts.

trust in the first instance.<sup>3</sup> The court based the failure on the fact that the English legislation, specifically exempting the governing boards from trust restrictions on property transferred to them, made it impossible to be reasonably sure that the limitations on the gift would be fulfilled. There are several objections to finding a failure on the reasoning advanced. In the case of foreign trusts, it is generally held that the court should only declare a proper distribution, leaving enforcement to the jurisdiction of the trust's administration.<sup>4</sup> It would thus appear that the court is getting off on the wrong foot by attempting to enforce a foreign trust by advance forfeiture. Secondly, there is no evidence of any breach of the limitations imposed upon the gifts. The mere possibility of a future termination is not grounds for a decree of present termination.<sup>5</sup> Finally, even had a present breach been found, a decree of forfeiture would be unusual. The courts are traditionally slow to find a condition requiring forfeiture for breach.<sup>6</sup> It is sometimes said that an express reverter clause is necessary,<sup>7</sup> or simply that a breach of trust is not grounds for termination.<sup>8</sup> In case of breach, the better procedure is to apply to the jurisdiction of administration for enforcement.<sup>9</sup> On the reasoning given, the decision seems to indicate something of the hostility to foreign charities sometimes said to exist in American courts.<sup>10</sup> Admitting that the impossibility of enforcing the limitations on the gift under the laws of England, should the need arise, might give the court cause in declaring a distribution, it is suggested that a stronger line of reasoning is to be found for the court's conclusion, viz., that the passage of the National Health Act caused a failure of the settlor's charitable purpose. This is hinted at, but not stressed, in the court's opinion, where it is said that the act transformed the hospitals from charities to governmental instrumentalities.<sup>11</sup> Were the gift upheld, payments would be made to the British Government. The gift contemplated the availability of certain types of hospital facilities, but it is reasonable to say that the government's program of existing and projected hospital facilities would not be altered by the settlor's wishes, nor noticeably advanced by his donation. With hospital administration now entirely a governmental function, the settlor's charitable purpose is impossible of achievement except as it may perchance coincide with the government's program. In more general

<sup>3</sup> See *St. Joseph's Hospital v. Bennett*, 281 N.Y. 115, 22 N.E. (2d) 305 (1939).

<sup>4</sup> 14 C.J.S., *Charities*, §§78, 79 (1939).

<sup>5</sup> *Gaess v. Gaess*, 132 Conn. 96, 42 A. (2d) 796 (1945).

<sup>6</sup> 3 SCOTT, *TRUSTS* §401.2 (1939); 14 C.J.S., *Charities*, §44 (1939); *Pennebaker v. Pennebaker Home for Girls*, 291 Ky. 12, 163 S.W. (2d) 53 (1942); *In re Jordan's Estate*, 310 Pa. 401, 165 A. 652 (1933); *City of Newport v. Sisson*, 51 R.I. 481, 155 A. 576 (1931).

<sup>7</sup> 3 SCOTT, *TRUSTS* §401.2 (1939); *In re Meade's Estate*, 227 Wis. 311, 227 N.W. 694 (1938).

<sup>8</sup> 3 SCOTT, *TRUSTS* §§401.1, 401.4 (1939); 54 AM. JUR., *Trusts*, §83 (1945).

<sup>9</sup> See *St. Joseph's Hospital v. Bennett*, *supra* note 3.

<sup>10</sup> REULER, *CHARITABLE FAILURES: A FUNCTIONAL STUDY* 92 (Ann Arbor 1948).

<sup>11</sup> Principal case at 885.

terms, it is suggested that the possibility of a charitable purpose may completely disappear in an area exclusively under government control.<sup>12</sup>

In denying cy pres, the court relied upon the naming of alternative legatees. However, preventing the failure of charitable gifts and trusts is the primary purpose of cy pres, and it is only secondarily a determination of alternative legatees. Thus it would seem that a provision intended to take effect only after failure should not preclude cy pres performance.<sup>13</sup> Where the requisite general charitable intent exists,<sup>14</sup> there is ample authority for the application of cy pres in spite of alternative provisions in case of failure, and sometimes in the teeth of limitations attempted by the donor.<sup>15</sup> It is suggested that a better ground for denying cy pres is the failure of the general charitable purpose as discussed above. The courts will not change the area or general purpose of a charitable trust in applying cy pres.<sup>16</sup> Therefore, if a charitable disposition in the general area contemplated by the donor is impossible, it would seem clear that cy pres could not be applied. Thus, although the court's conclusions seem correct on both points considered, it is submitted that the strongest available reasoning was not used in arriving at those conclusions.

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<sup>12</sup> It is interesting to note that all of the English cases upholding such gifts have been based upon the conclusion that there has been no failure of the charitable purpose. It is suggested that this requires a far wider view of a charitable purpose than is usual in American courts. See *In re Gartside*, [1949] 2 All E.R. 546; *In re Frere*, [1950] 2 All E.R. 513; *In re Morgan's Will Trust*, [1950] 1 All E.R. 1097; *In re Kellner's Will Trust*, [1950] Ch. 46; *In re Hunter*, [1950] 66 T.L.R. 1108.

<sup>13</sup> *Hinsdale v. Chicago City Missionary Society*, 375 Ill. 220, 30 N.E. (2d) 657 (1941).

<sup>14</sup> In this case, the court expressly found a general charitable intent. See principal case at 888.

<sup>15</sup> *United States v. 265.5 Acres of Land*, (D.C. Cal. 1944) 54 F. Supp. 692; *Society of California Pioneers v. McElroy*, 63 Cal. App. (2d) 332, 146 P. (2d) 962 (1944); *Harwood v. Dick*, 286 Ky. 423, 150 S.W. (2d) 704 (1941); *Hinsdale v. Chicago City Missionary Society*, supra note 14; *City of Newport v. Sisson*, supra note 6. Many cases which hold that alternative provisions for disposition of the property will bar cy pres, seemingly contrary to the cases cited, can be reconciled and distinguished on the grounds that no general charitable intent was found on their facts.

<sup>16</sup> 10 AM. JUR., *Charities*, §132 (1937); *Board of Education v. City of Rockford*, 372 Ill. 442, 24 N.E. (2d) 366 (1940); *Kerner v. Thompson*, 293 Ill. App. 454, 13 N.E. (2d) 110 (1938); *Thatcher v. Lewis*, 335 Mo. 1130, 76 S.W. (2d) 677 (1934).