Lee Brobst's

EYE OF THE EAGLE

THY WILL BE DONE IN ASSOCIATION

NEWSLETTER

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HISTORY OF CHARITABLE TRUSTS STATUTE OF CHARITABLE USES

Early English law was extremely rigid. Forms and technicalities were strictly observed. The courts of common law gave no remedy unless a writ fitted exactly to the case could be found. The introduction of new remedies through the law courts was a matter of great difficulty. Spence, History of the Court of Chancery, 2 Select Essays in Anglo-American Legal History. The interests of the beneficiary of a use were not protected by the common law courts because no writ existed to fit the case. The ecclesiastical courts had no jurisdiction to enforce them. Therefore, for many years uses and trusts existed as honorary obligations but had no legal standing. If the trustee saw fit to deny that he held the property as trustee, and to appropriate it to his own use, he might do so with impunity. Ames, Lectures on Legal History History, 236-237. Simple fiduciary relations with respect to money and chattels were early enforced by the common law courts, but these were the so-called "common law trusts," and not uses or equitable trusts. If money was delivered to A, to be paid to B, the common law action of account lay. Anonymous, Year Book, 6 Henry IV, folio 7, plac. 33; Ames on Trusts 2d ed., p.1. For a recent case of this sort see Ripling v Superior Court in and for Los Angles County, 112 Cal.App.2d 399, 247 P.2d 117.

But the development of the court of chancery wrought a change. About the time that uses and trusts were arising, it became the custom to petition the king or his council for relief in cases where the law courts gave no remedy. If no writ was available, or if the opponent was powerful enough to prevent justice, the aggrieved suitor besought the king or his council for a special and extra-legal dispensation. During the reign of Edward I (1272-1307) it became usual to refer these petitions to the chancellor for consideration. The chancellor became the custodian of the king's conscience, and his court the court of conscience. Equity and fairness were supposed to rule there, rather than technically.

It was natural that beneficiaries who had been injured, due to a failure of their trustees to hold the property for their use, should apply to the chancellor for relief. At some time early in the 15th century the justice of these petitions began to be recognized by the chancellor, and uses and trusts were enforced. Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 741, 742. The chancellors of those days were churchmen, and their consciences were naturally shocked by the unfairness of allowing a trustee to violate an obligation which he had admittedly undertaken. The process by which the chancellor acted was known as a subpoena. It commanded the defendant to do or refrain from doing a certain act. The relief was personal and specific, not merely money damages. Hence it was often said that cestui que trust had a remedy only by subpoena.

By the beginning of the 16th century, uses and trusts had come to involve such serious injustices and frauds that parliament enacted the famous Statute of Uses (27 Henry VIII, c. 10) in 1535 but the statute had little effect because it was administered by courts of law and presented far too many problems of enforcement. The parliament then decided to separate the most important aspects of trust uses which had effect on the people as a whole. Those were to become known as charitable trusts.

In order to recognize these charitable trusts, the English Parliament in 1601 enacted a statute which has come to be known as the Statute of Charitable Uses.[1] The statute enumerated some of the more important charities and provided for their better protection and enforcement.

Prior thereto the court of chancery had recognized and enforced many charitable trusts. The Statute recited that property had been given for certain enumerated charitable purposes and that the trustees of the charities were, in many cases, neglecting the performance of their duties, and it then proceeded to provide for the enforcement of these charitable trusts by the appointment of commissioners by the Lord Chancellor or the Chancellor of the Duchy of Lancaster. These commissions might be issued to bishops of the established church or to other persons and were to authorize the issuance of orders for enforcement.

In England formerly all charities were under the care of the ecclesiastical courts. At the reformation they were withdrawn from the church and paupers thrown upon the public. Henry VIII (1509-1547) was glad to find some other way of supporting them, and Elizabeth (1558-1603) encouraged **private persons** to found charities with the same view. But since her day, the source of the power which chancery has exercised over charities in England has been the prerogative of the **crown**, and this prerogative law never could have been introduced into the colonies. Jurisdiction over the three subjects of lunatics, infants, and charities, has always gone together, and been claimed because the king is said to be parens patrice. 1 Bla. Com., 3 Bla. Com., 47.[2]

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[1] Statute 43 Elizabeth, C. 4 The preamble enumerated the following as some of the purposes for which charities had been established at that time: Relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners schools of learning, free schools, and scholars in universities, repair of bridges, ports, havens, causeways, churches, seabanks and highways, education, and preferment of orphans, relief, stock or maintenance of houses of correction, marriages of poor maids, supportation, aid and help of young tradesman, handicraftsmen, and persons decayed, relief and redemption of prisoners and captives, aid of any poor inhabitants concerning payments of fifteens, (type of tax) setting out of soldiers, and other taxes. 7 Pickering's English Statutes, P. 43.

[2] Private persons meaning private enterprise; crown spelled with a small c meaning the private corporation or private sector which is the government of England of today. In this

country, charities fell within the private sector as we shall see as detailed in Videl v Girard which follows in the main thrust of this newsletter; but, the 14th amendment introduced the means for charities to become public and did so in 1933. Prior to 1933 charity was administered at home and from the local church and that is where charity should be administered; therefore, under neighborhood and family control. Who was better qualified to judge who needed charity and who didn't, than the local members of the church or family unit? There was a wide diversity of opinion and that is the way it should be. When we start to narrow down the diversity of opinion which is what the combined world order is doing with its one world concept; then we see the results. The private law of corporationism has now become public law because 51% of the people consented and are now under control of the congress, state legislature, city or county ordinance statute, codes, etc. enforcing corporate law. An intresting question arises from the following: #1. The ecclesiasticial courts were within the private law of England but removed therefrom and thrown upon the public during the reign of Henry VIII (1509-1547). #2. In this country, since 1933, charities have been under public law. Therefore, are congress and the state legislatures enforcing ecclesiatical law in their private courts of commission????????????? According to Black's Law Dictionary 5th Ed; "equity is a system of jurisprudence collateral to, and in some respects independent of, "law"; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it with effect, or by exercising certain branches of jurisdiction independently of them." If equity is the conscience of congress and there is no "Law" as per H.J.R. 192 and Erie Railroad v Tompkins, 304 US 64; then what is the definition of a group of consciences?????????????? And further, the original Restatement of Trusts was adopted and promulgated in May 1935-the same year the Social Security Trust began. Parens patriae; parents of country; role of state as soverign and guardian of persons under legal disability. State of W Va. v Char. Pfizer & Co., C. A. N. Y., 440 F.2d 1079, 1089. 14th amendment 'persons' are under legal disability because they have no access to the "Law". In the "Law" there is no compelled performance to a commissioner of private enterprise that we call government. This commission or, if you will, executive equity is blocked from enforcement by the 9th and 10th amendments to the Bill of Rights because there is no fiduciary relationship with the public trust. The answer to our dilemma is in today's code and statute books and case law if only we will UNDERSTAND how to approach it. The coming issues will approach this problem so we can talk the language of today's courts.

The jurisdiction over charities is **not** within the **ordinary powers of equity**, but falls back upon the king's prerogative. Sir Francis More, 188; Hobart; 138; 13 Vesey, 248.) [3]

In America, the English Statute of Charitable Use was challenged as not being a part of the common law in some states thus becoming a major issue before the United States Supreme Court as to whether that statute had any force.

It seems to have been the view of some courts, manifested in early decisions, that the Statute of Charitable Uses validated charitable trusts and that they had no life separate and apart from that statute and its successors. Philadelphia Baptist Ass'n v Hart, 4 Wheat. 1, 4 L.Ed. 499 (gift by will of resident of Virginia where Statute of Charitable Uses was not in force, to aid young men to obtain an education for the ministry, held void); Gass v Wilhite, 2 Dana, Ky., 170, 26 Am.Dec. 446; Dashiell v Attorney General, 5 Har. & J., Md. 392, 9 Am. Dec. 572; Griffin v Graham, 8 N.C. 96, 1 Hawks 96, 9 Am.Dec. 619. Since in some states the statute had been expressly repealed or had been declared not a part of the common law, under this view, charitable trusts could not be created. In 1844 this question was carefully considered by Mr. Justice Story in Vidal v Girard's Ex'rs, 2 How. 127, 11 L Ed. 205, where there was a gift by a resident of Pennsylvania to the City of Philadelphia for

[3] see Videl v Girard contained herein.

the establishment of a school for orphans, and the courts of that commonwealth had held that the Statute of Charitable Uses was not in effect. Mr. Justice Story showed that charitable uses were known and supported prior to the Statute of Charitable Uses; that the statute merely recognized the existence of such uses and provided for their enforcement. He referred to the views of English judges which supported his contention and also to the then recent report of the Commissioners of Public Records in England, in which a collection of early chancery cases involving charitable trusts were made. As we shall see from what follows, the decisions of all the courts in United States since 1933 are nothing more than decisions of commissioners of public records enforcing public policy.

Subsequent to the case, of Videl v Girard the United States Supreme Court ruled in Russell v Allen, 107 U.S. 163, 27 L Ed 397 that "the United States Government may be the trustee of a charitable trust" and further; "The United States or a state has capacity to take and hold property upon a charitable trust, but in the absence of a statute otherwise providing, the charitable trust is unenforceable against the United States or a state." (notice state is spelled with small c) Restatement, Trusts 2d @ 378 (2); of course the 14th amendment fullfills this requirement and further we read;

In other states the view is that the Statute of Charitable Uses is not in force but that charities are valid by reason of the general powers of equity to enforce all trusts. For example, the **DISTRICT OF COLUMBIA.** Bogart, Trusts and Trustees (2d edit.) @ 322 (1942). There will be more on this in future issues.

Gifts or trusts for charitable purposes are favorites of the law and courts. It is the fixed policy of the law to uphold charitable gifts and trusts whenever possible, and the courts favor devises and bequests for charitable uses. That is, gifts or trusts, whether inter vivos or testamentary, for purposes which the law recognizes as charitable, are regarded with special favor, once the charitable purpose becomes evident, and will not be declared void if they can, by any possibility consistent with law, be upheld; courts of equity it is said, will go to the length of their judicial power to sustain such gift. Taylor v Columbian University, 226 US 126, 57 L Ed 152; Speer v Colbert 200 US 130 50 L Ed 403 Ould v Washington Hospital for Foundlings, 95 US 303, 24 L Ed 450

With the above in mind, along with the US v Ferriera case discussed in the October 89 issue of this newsletter, let us proceed to the case of Vidal v Girard decided in 1844, and is an extremely detailed case in trust law that helped lay the ground work for the 14th amendment. We will give the case verbatim as it appears in 2 Howard page 229; 11 L Ed. starting at *186 but we will add footnotes in our comments to the case so the reader can comprehend the magnitude of this most important case as it applies to the 14th amendment. Stephen Girard was a wealthy Frenchman who settled in Philadelphia, Pennsylvania, and before his death, made a will to give his fortune of upwards of $1,700,000 in real property and $5,000,000 in personal property to the City of Philadelphia for purposes of charity. His heirs brought suit against the will and the substance of the case follows: **(Bold print will add emphasis).**

"The present bill is brought by heirs at law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, alderman and citizens of Philadelphia in trust as aforesaid to be declared void, for the want of capacity of the supposed divisees to take lands by devise, or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust; and because the objects of the charity for which the

lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, not any trust estate devised that can vest at law or in equity in any existing or possible cestui que trust; and therefore the bill insists that as the trust is void, there is a resulting trust thereof for the heirs at law of the testator; and the bill accordingly seeks a declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief."

"The principle questions, to which the argument at the bar have been mainly addressed, are: First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will. Second, whether their uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania. Third, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will; or it belongs, as a resulting or implied trust; to the heirs and next of kin of the testator.

As to the first question, so far as it respects the capacity of the corporation to take the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The Act of 32 and 34 Henry VIII respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The act of 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the Mayor, Alderman and Citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects to them and their successors forever, or for any other or less estate." etc., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice and immortality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, effective powers of government than at present established. "Some at least, of these objects might certainly be promoted by the application of the city property or its income to them and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the true scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust

ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it should not be compellable to execute it. But that will furnish no ground to declare the trust itself void, of otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities; but a single case may suffice. In Sonley v The Clockmaker's Company 1 Bro. Ch. R., 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmaker's Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation, was, by the English statute of wills, void, that statute prohibiting devises to corporation, and the question was, whether the devise being so void, the heir-at-law took beneficially or subject to the trust. Mr. Baron Eyre, in his judgment, said, **that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named.**[4] Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth: a fortiori, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly dehors the purposes of the corporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. **Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation.**[5] In case of Green v Rutherford 1 Ves R., 462, a devise was made to St. John's College in Cambridge of the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred, if there should be anyone capable thereof, in the college; if none such, they should present the senior divine then fellow of the college, and on his refusal the next senior divine, and so downward; and, if all

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[4] Such is the case of the public trust of 14th amendment citizens which are not named but implied by law upon a constructive trust.

[5] The District of Columbia was not set up as a State under the common law of landed substance of the allodial land titles but instead was designed to accept foreign jurisdictions via treaties under its general equity powers. Treaties are charitable trust obligations.

refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but fell within the jurisdiction of the visitor. Sir John Strange (the Master of the Rolls) who assisted Lord Hardwicke at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it (the trust); and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees. And though they are a collegiate body whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute it under direction of the court." Lord Hardwicke, after expressing his concurrence in the judgment of the Master of the Rolls, put the case of the like trust being to present no member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a State where the statute of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of $1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuylkill (an object which some thirty or forty years ago would have been thought of transcendent benefit), why although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and few know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provision of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. **In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the trust policy of the State. We think then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and therefore, the objection that it is**

incompetent to take or administer a trust is unfounded in principle of authority, under the law of Pennsylvania.

It is manifest that the Legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the Acts of the 24th March, and the 4th April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust, expressly states that it is passed **"to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which, the testator had desired the Legislature to pass the necessary laws.** The tenth section of the act, provides

"That it shall be lawful for the mayor, alderman and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution on any and all the devises bequests, trusts, and provisions contained in the said will etc.; to carry which into effect," the testator had desired the Legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same act, which declares "That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other act is also full and direct to the same purpose, and provides, "That the select and common councils of the city of Philadelphia shall be, and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here, then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentally of agents appointed by them. No doubt can then be entertained, that the Legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will.[6]

It is true that **this is not a judicial decision**, and entitled to full weight and confidence as such. But it is a **legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts**; and if those trusts were valid in point of law, the Legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts;, either upon a quo warranto or any other proceeding, by which it should seek to divest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed

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[6] Likewise the approx. 10 miles square area where congress sits in the District of Columbia enacting codes, statutes ordinances and the like to carry into effect the wishes of its 14th amendment citizens.

[7] In other words, the court is saying this decision is not based on "Law" but upon carring into effect a private trust for the benefit of the public.

incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the State in its covering capacity, and in its sole discretion, to inquire into and contest the same by a quo warranto, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the Legislature, are of the highest importance and potency.[7] We are then led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a **judicial sense**, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools and seminaries of learning, especially such as are for the education of orphans and poor scholars. [8]

The statute of 43 of Elizabeth (ch. 4) has been adjudged by the Supreme Court of Pennsylvania not to be in force in that State. But then it has been solemnly and recently adjudged by the same court, in the case of Zimmerman v Andres (January Term, 1844), "it is so considered rather on account of the inapplicability of its regulations as to the mode of proceeding, than in reference to its conservative provisions." "These have been in force here by **common usage and constitutional recognition**; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formally promulgated in the case of Witman v Lex (17 Serg. & Rawle, 88), at much earlier period (1827). [9]

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such indefinite nature are not good at the common law (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges), and hence the charity fails; and the decision of this court in the case of The Trustees of the Philadelphia Baptist Association v Hart's Executors (4 Wheat. R., 1), is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which State the statute of 43 Elizabeth (ch. 4) had been expressly and entirely abolished by the Legislature, so that no aid whatsoever could be derived from its provisions to substain the bequest.

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[8] Again the court is acting in a judicial sense, meaning not in the "Law".

[9] The United States Constitution takes cognizance of trusts under Article I.

The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth (ch. 4), for that was still the common law of Virginia. Upon a through examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure, and flickering) the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects, occurred. The court said: "We find no dictum that charities could be established on such an information (by the Attorney-General) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon Collison's case (Hobart Rep., 136; S. C. cited Duke on Charities, by Bridgman, 368, Moore, R., 888), and Platt v St. John's College, Cambridge (Finch. Rep., 221; S. C.., 1 Cas. in Chan. R., 267; Duke on Charities, by Bridgman, 379, and the case reported in 1 Chancery Cases, 134). But these cases, as also Flood's case (Hob. R., 136; S. C.., Equity Abridg., 95, pl. 6), turned upon peculiar circumstances. Collison's case was upon a devise in 15 Henry VIII., and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The dictum of Lord Loughbourgh in Attorney-General v Bowyer (3 Ves., 714, 726), was greatly relied on, where he says: "It does not appear that this court at that period (that is, before the statute of wills) had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting (an information to establish a college under a devise before the statute of mortmain of 9 Geo. II.(1727), ch. 36); but they made out their case as well as they could at law." In this suggestion Lord Loughbourgh had under his consideration Porter's case (1 Co. Rep., 16). But there a devise was made in 32 Henry VIII., to the testator's wife, upon condition for her to grant the lands. etc., in all convenient speed after his decease for the maintenance and continuance of a certain free school, and almsmen and almswomen forever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was, whether the devise was not to a superstitious use, and therefore void under the Act of 23 Henry VIII. (ch. 2), or whether it was good as a charitable use. And it was resolved by the court that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good before the statute of Elizabeth, upon the ground of the common law, there being a good devisee originally, although the condition was broken and the use was for charitable purposes in some respects indefinite. Now, if there was a good devisee to

a good devisee to take as trustee and the charity was good at the common law, it seems somewhat difficult to say, why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since for other specific purposes, were then, at least when there were designated trustees, within the jurisdiction of chancery.

There are, however, dicta of eminent judges (some of which were commented upon the case of 4 Wheat. R., 1 which do certainly support the doctrine that charitable uses might be enforced in chancery upon the **general jurisdiction** of the court, **independently of the statute of 43 of Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute.** Such was the opinion of Sir Joesph Jekyll in Eyre v Countess of Shaftsbury (2 P. Will. R., 102; 2 Equity Abridg., 710, pl. 2), and that of Lord Northington in Attorney-General v Tancred (1 Eden, R., 10; S.C., Ambler R., 351; 1 Wm. Black, R., 90), and that of Lord Chief Justice Wilmot in his elaborate judgment in Attorney-General v Lady Dowing (Wilmot's Notes, P 1, 26), given after an examination of all the leading authorities. Lord Eldon, in the Attorney-General v The Skinner's Company, (2 Russ. R., 407), intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were substained. Sir John Leach, in the case of a charitable use before the statute of Elizabeth (Attorney-General v The Master of Brentwood School, 1 Mylne & Keen, 376), said: "Although at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact the charity was so decreed in that very case, in the 12th year of Elizabeth. But what is still more important is the declaration of Lord Redsdale, a great judge in equity, in The Attorney-General v The Mayor of Dublin (1 Bligh. R., 312, 347, 1827), where he says: "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. **That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, etc.**[10] **; but the proceedings of that commission were made subject to appeal to the Lord Chancellor,**[11] and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before passing of that statute; and there can be no doubt that by **information** by the Attorney-General the same might be done." He then adds, "the right which the Attorney-General has to file an information, is a right of prerogative. The king, as parens patrice, has a right, by his proper officer, to call upon the several courts of justice, **according to the nature of their several jurisdictions**, to see that right is done to **his subjects who are incompetent to act for**

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10 The statute of Elizabeth allowed the taking of equity as recognized by the law of trusts to be enforced by a commission form of government out of the legislature under the inherent powers as granted by a corporation.

11 This is the reason why today you have only one right of appeal; any appeals beyond that is by permission only.

themselves, as in the **case of charities** and other cases."[12] So that Lord Redsdale maintains the jurisdiction on the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of The Incorporated Society v Richards (1 Drury & Warren R., 258), where Lord Chancellor Sigden, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held that same doctrine as Lord Redsdale, **and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift**; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth. Mr. Justice Baldwin, in the case of The will of Sarah Zane, which was cited at the bar and pronounced at April Term of the Circuit Court, in 1833, after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion in which the District Judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England; and, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calenders, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either **no trustees appointed**, or the trustees were not competent to take. These records, therefore, do in a remarkable manner confirm the opinions of Sir Joesph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redsdale, and Lord Chancellor Sugden. Whatever doubts, therefore might properly be entertained upon the subject when the case of The Trustees of the Philadelphia Baptist Association v Hart's Executors (4 Wheat., 1) was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If then, **this be the true state of the common law on the subject of charities, it would upon the general principal already suggested, be a part of the common law of Pennsylvania.** It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The **trusts**

[12] The individual cannot bring an action against public policy. The Attorney General has to bring the action because the individual has no access to the Law of the constitution.

would nevertheless be valid in point of law; and remedies may from time to time be applied by the Legislature to supply the defects. It is no proof of the non-existence of equitable rights that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and enforced in the State courts of Pennsylvania, as for as their remedial process would enable these courts to act. This abundantly established in the cases cited at the bar, and especially by the case of Witman v Lex (17 Serg. & Rawle, 88), and that of Sarah Zane's Will, before Mr. Justice Baldwin and Judge Hopkinson. In the former case, the court said "that it is immaterial whether the person to take be in esse or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the yearly meeting of Friends in Philadelphia, an **unincorporated association,**[13] for purposes of general and indefinite charity; were, as well as other bequests of a kindred nature held to be good and valid; and were enforced accordingly. The case then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and second, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding by implication, all instruction in the Christian religion.

In considering this objection, the courts are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which, indeed, we can know nothing), nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what is constitution and laws and judicial decisions made known to us. The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will

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[13] The 14th amendment citizens are an unincorporated association who have given by gift a conveyance of power of attorney of everything they own to the corporate city of the District of Columbia to be used for charitable purposes to be administered by the board of elders called congress.

and will complexionally differ; above all, when the topic is connected with religious policy, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examination, beyond what the State constitutions, and laws, and decisions necessarily bring before us.

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this supposition is to be received with its appropriate qualifications and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838) expressly declares, "That all men have natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believe in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified since, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." Such was the doctrine of the Supreme Court of Pennsylvania in Updegraff v The Commonwealth (11 Serg. & Rawle, 394).

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judasim, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated.

Now, in the present case, there is no pretense to say that any such positive or expressed provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college. What legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked; why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such a

such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reasons given; and the question is not, whether it is satisfactory to us or not whether the history of religion does or does not justify such a sweeping statement; but the question is , whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructions but Judaism. Would the bequest have been void in that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satifactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor or a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not a layman instruct in the general principles of Christianity as well as ecclesiastics. There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be, not only distinguished for learning and talents, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings which such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college-its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins, "that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles or morality, so that on their entrance into active life they may from inclination and habit evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer." Now, if may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, and love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive. The objection then, in this view, goes to this,- either that the

testator has totally omitted to provide from religious instruction in his scheme of education (which, from what has been already said, is an inadmissible interpretation), or that it includes but partial and imperfect instruction in those truths. In either view can it be truly said that it contravenes the known law of Pennsylvania upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an omission to provide for instruction in Christianity in any scheme of school or college education a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equality fatal? These questions are propounded, because we are not aware that anything exists in the constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take a case of a charitable donation to teach the poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction; would the donation be void, as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto it has been supposed that a charity for the instruction of the poor might be good and valid in England even if it did not go beyond the establishment of a grammer school. And in America, it has been taught, in the absence of any express legal prohibition, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require anything to be taught inconsistent with Christianity.

Looking to the objection, therefore, in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations restrictions contained therein, which are inconsistent with the Christian religion or are opposed to any known policy of the State of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city or become a resulting trust for the heirs-at-law. End

In brief review of Videl v Girard the court ruled that a corporation could receive an absolute gift from a person and that the corporation could administer the charitable gift; not in the "Law" but in equity upon its general equitable powers and that if the corporate charter lacked the laws to administer the gift in trust; then the legislature could enact the necessary laws to enforce the trust thru commissions. If a person (14th amendment citizen) partakes of its benefits, then that person becomes subject to the trust laws in equity.

The District of Columbia is not a corporation within a State or state therefore cannot receive the land in trust so the land is held in the state thru its general equity jurisdiction because the 'person' who owns the real property only has an equitable ownership thru the charitable trust of the state. The same applied before 1933 to the public money (landed substance) of the "Law" which came from the union of States of the Republic therefore, the District of Columbia had no jurisdiction in "Law".

It is hoped the reader is beginning to UNDERSTAND the unfolding of the mystery that has plagued us for so many years.

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