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## Trusts - Cy Pres Not Applicable to Charitable Bequest "For White Children" - LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959)

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### Recommended Citation

DePaul College of Law, *Trusts - Cy Pres Not Applicable to Charitable Bequest "For White Children" - LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959)*, 9 DePaul L. Rev. 308 (1960)  
Available at: <https://via.library.depaul.edu/law-review/vol9/iss2/26>

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the property right to the truck, which LaVoy passed to the plaintiff-trustee by his assignment in bankruptcy, as the factor which prevented the Michigan minority rule of non-assignability of fraud actions from applying to this case. The opinion noted that no title passed to Hicks until plaintiff elected to affirm the voidable sale and the right of election carried with it the right to sue either for conversion, or for fraud; citing *Sweet v. Clay*,<sup>37</sup> where the Michigan court said, "that the rule . . . that a right of action for fraud is not assignable, has no application to an assignment of something which is *in itself tangible*; capable of delivery; involving a right of property. In such case, the right to whatever remedy the assignor has follows the assignment."<sup>38</sup>

The *Jones* case is a clear departure from the majority rule, which will allow a trustee to sue for a bankrupt's action of fraud arising out of a property claim, either under sections 70(a)(5) or 70(a)(6) of the Federal Bankruptcy Act. This conclusion is made especially apparent from the fact of the actual property interest—the title to the truck—which was passed to the trustee by LaVoy's assignment in bankruptcy, a factor which even the Michigan court has held to render the above rule inapplicable. The majority opinion in *Jones* leaves unresolved the question as to what remedy plaintiff would have had, had the sheriff sold the truck to a bona fide purchaser for value before plaintiff avoided, as well as to what remedy now remains, after plaintiff has formally affirmed defendant's voidable title. In any event, *Jones* stands both as a re-affirmance of the minority common law rule and its reasoning.

<sup>37</sup> 88 Mich. 1, 49 N.W. 899 (1891).

<sup>38</sup> *Ibid.*, at 12, 901 (emphasis supplied).

#### TRUSTS—CY PRES NOT APPLICABLE TO CHARITABLE BEQUEST "FOR WHITE CHILDREN"

Emma Katherine Sagendorph, deceased, provided in her will for the balance of her estate to be given to the City of Detroit, Wayne County, Michigan, "for a playfield for white children, and known as the 'Sagendorph Field.'" It was agreed that to carry out the bequest would be contrary to the laws of Michigan and the United States of America. The plaintiffs contended that since the residuary clause is void, they, as heirs, should take the balance through descent. The defendant-city contended the bequest should be made under the doctrine of *cy pres*. For that reason, they unanimously adopted a resolution in the Detroit Common Council accepting it. The defendant construed the clause: "[A]s giving the City of Detroit the right to make the playfield available to all children, without regard to race, color or creed." An evenly divided Michigan Supreme Court upheld the Ingham County Circuit Court, which had de-

cided that the bequest was void as against public policy. *LaFond v. Detroit*, 357 Mich. 362, 98 N.W. 2d 530 (1959).

Under the doctrine of *cy pres* if a charitable trust fails, the court may so dispose of the funds as will most nearly fulfill the intent of the testator.<sup>1</sup> The doctrine of "approximation" is an adaption, or modification of the *cy pres* doctrine, whereby courts, in cases of charitable trusts, seek, as nearly as possible, to effectuate the intent of the settlor or testator, when, through a change of circumstances or conditions, it has become impossible, impractical or illegal to carry out the purpose exactly.<sup>2</sup> The American Law Institute's Restatement of Trusts is in accord.<sup>3</sup> Whether the *cy pres* rule attaches depends upon whether or not the will itself discloses a general charitable intention; for if it does, *cy pres* may be applied.<sup>4</sup> Although the testator's intention cannot be fully carried out for one reason or another, the gift will be construed to effectuate as nearly as possible that intention.<sup>5</sup>

In *Murr v. Youse*<sup>6</sup> a testator left \$5,000 to be used by the Germantown Board of Education to erect a library building, "said building to be called the J. S. Antrim Library Building."<sup>7</sup> At the time of the devise, Germantown needed a library, but as the devise could not take effect until after the testator's wife's life estate ended, the board felt it could not wait to construct the building, and it accepted a Carnegie Foundation grant for financing. Since another library wasn't needed, the board wanted the legacy to be used for construction of a children's library in the basement of the present building, to be known as "The J. S. Antrim Children's Library." The court applied *cy pres* saying:

[T]here are two prerequisites to the application of the equitable doctrine of *cy pres*; namely, a failure of a specific gift made by the settlor and a general charitable intent disclosed in the instrument creating the trust. In such cases the trust will not fail, but the court will direct the application of the gift to some charitable purpose which falls within the general charitable intention of the settlor.<sup>8</sup>

It is to be noted that a prerequisite for the application of *cy pres* is the existence of a valid trust. In *Robinson v. Crutcher*<sup>9</sup> the testator bequeathed the residue of his estate to the capital of a township, county and state public school fund, but did not designate the trustee. The court re-

<sup>1</sup> *Fisher v. Minshall*, 102 Colo. 154, 78 P.2d 363 (1938).

<sup>2</sup> *Shannon v. Eno*, 120 Conn. 77, 179 Atl. 479 (1935).

<sup>3</sup> Restatement, Trusts (2d ed.) § 399, p. 846.

<sup>4</sup> *Gilman v. Burnett*, 116 Me. 382, 102 Atl. 108 (1917).

<sup>5</sup> *In re Schramm's Estate*, 115 Cal.App.2d 55, 251 P.2d 418 (1952).

<sup>6</sup> 80 N.E.2d 788 (Ohio, 1946).

<sup>8</sup> *Ibid.*, at 794.

<sup>7</sup> *Ibid.*, at 793.

<sup>9</sup> 227 Mo. 1, 209 S.W. 104 (1919).

fused to apply the *cy pres* doctrine and stated: "An essential to the application of this doctrine is the ascertainment . . . as to who was intended to take as trustee. If the taker . . . has . . . no legal entity . . . then the doctrine of *cy pres* cannot properly be invoked, because that cannot be approximated which does not exist. . . ." <sup>10</sup>

In *Bancroft v. Maine State Sanatorium Ass'n.*,<sup>11</sup> a trust was created in favor of a particular tuberculosis sanatorium association, to be used "at Hebron in its present location." Because the sanatorium had been turned over to the state, and the court could find no general charitable intent, *cy pres* was held inapplicable.<sup>12</sup>

In *Bowditch v. Attorney General*<sup>13</sup> the will provided for the use of the income of a trust to promote the cause of women's rights. The provision was void. There was no application of *cy pres* because the trust was invalid ab initio and the testator made a different provision in case of invalidity. If the testator provides for an alternate disposition in the event the original disposition is void, *cy pres* will not be applied and the alternative will be given effect.

Twenty-four states and the District of Columbia have expressly recognized the doctrine of *cy pres* as an inherent power of a court of chancery,<sup>14</sup> while only seven states have wholly rejected it.<sup>15</sup> In some

<sup>10</sup> *Ibid.*, at 106.

<sup>12</sup> *Ibid.*, at 56, 587.

<sup>11</sup> 119 Me. 56, 109 Atl. 585 (1920).

<sup>13</sup> 241 Mass. 168, 134 N.E. 796 (1922).

<sup>14</sup> *State v. Van Buren School District No. 42*, 191 Ark. 1096, 89 S.W.2d 605 (1936); *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270 (1896); *Fisher v. Minshall*, 102 Colo. 154, 78 P.2d 363 (1938); *First Congregational Society of Bridgeport v. Bridgeport*, 99 Conn. 22, 121 Atl. 77 (1923); *Noel v. Olds*, 78 App. D.C. 155, 138 F.2d 581 (1943); *Delaware Trust Co. v. Graham*, 30 Del. Ch. 330, 61 Atl.2d 110 (1948); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930); *Bruce v. Maxwell*, 311 Ill. 479, 143 N.E. 82 (1924); *Reasoner v. Herman*, 191 Ind. 642, 134 N.E. 276 (1922); *Hodge v. Wellman*, 191 Iowa 877, 179 N.W. 534 (1920); *Harwood v. Dick*, 286 Ky. 423, 150 S.W.2d 704 (1941); *In re Opinion of the Justices*, 237 Mass. 613, 131 N.E. 31 (1921); *Snow v. President and Trustees of Bowdoin College*, 133 Me. 195, 175 Atl. 268 (1934); *Gifford v. First National Bank*, 285 Mich. 58, 280 N.W. 108 (1938); *Mott v. Morris*, 249 Mo. 137, 155 S.W. 434 (1913); *Hobbs v. Board of Education of Northern Baptist Convention*, 123 Neb. 416, 253 N.W. 627 (1934); *Drury v. Sleeper*, 84 N.H. 98, 146 Atl. 645 (1929); *Crane v. Morristown School Foundation*, 120 N.J.Eq. 583, 187 Atl. 632 (1936); *Lutheran Hospital of Manhattan v. Goldstein*, 182 Misc. 913, 46 N.Y.S.2d 705 (1944); *Girard Will Case*, 386 Pa. 548, 127 Atl.2d 287 (1956); *Providence v. Payne*, 47 R.I. 444, 134 Atl. 276 (1926); *Women's Christian Temperance Union of El Paso v. Cooley*, 25 S.W.2d 171 (Tex., 1930); *United States v. Church of Jesus Christ*, 8 Utah 310, 31 Pac. 436 (1892); *Burr v. Smith*, 7 Vt. 241, (1835); *First Wisconsin Trust Co. v. Board of Trustees of Racine College*, 272 N.W. 464 (Wis., 1937).

<sup>15</sup> *Dunn v. Elliser*, 225 Ala. 15, 141 So. 700 (1932); *In re Hayward's Estate*, 65 Ariz. 228, 178 P.2d 547 (1947); *Dumfries v. Abercrombie*, 46 Md. 172 (1876); *Lane v. Eaton*, 69 Minn. 141, 71 N.W. 1031 (1897); *National Bank of Greece v. Savarika*, 167 Miss. 571, 148 So. 649 (1933); *Thomas v. Clay*, 187 N.C. 788, 122 S.E. 852 (1924); *Mars v. Gibert*, 93 S.C. 455, 77 S.E. 131 (1913).

states, the doctrine has been provided for by legislation. Louisiana, for example, has held the right of application of the funds of a charitable trust to the use approximating most nearly the one for which the fund was created to be a function of the legislature.<sup>16</sup> In Georgia, it has been held that if the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in the manner next most consonant with the specific mode prescribed.<sup>17</sup> However, even where there is no question that the doctrine has been accepted, as in Michigan,<sup>18</sup> we find, from the result of the *LaFond* case, it is not to be casually applied.

The problem assumes particular importance in the light of recent United States Supreme Court decisions *vis-à-vis* civil rights.<sup>19</sup> More and more, bequests of the type in the *LaFond* case, are going to be held void, and, consequently, the resulting question of the application of the doctrine of *cy pres* will be considered. No general rule can be enunciated as to the manner in which the *cy pres* doctrine will be applied, but each case must necessarily depend on its own peculiar circumstances.<sup>20</sup> In the *LaFond* case, with an even split in the court, we can see how difficult this task is. The Circuit Court of Ingram County, which was affirmed, said:

This court cannot find where this doctrine applies because such doctrine does not apply where it is impossible to carry out the object of the bequest . . . [T]o carry out the bequest of the deceased it would be necessary to violate the laws of this state and of this country.<sup>21</sup>

Justice Kelly, in writing the majority opinion, which agreed with the circuit court decision, said, "‘for white children’ are words of command, and there is no application for the doctrine of *cy pres* to validate this residuary bequest."<sup>22</sup> The majority applying the doctrine in its strictest possible manner, is not the first court to so do.<sup>23</sup>

Justice Edwards, of the minority, stated the issue to be whether, "an old lady, in setting up a memorial trust in honor of her deceased husband, had as her basic intent a charitable purpose toward the children of the city of Detroit, or an expression of hatred for the children of all races ex-

<sup>16</sup> *Cox v. Gretna Academy*, 141 La. 1001, 76 So. 177 (1917).

<sup>17</sup> *Ford v. Thomas*, 111 Ga. 493, 36 S.E. 841 (1900).

<sup>18</sup> *In re Hannan's Estate*, 227 Mich. 569, 199 N.W. 423 (1924).

<sup>19</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>20</sup> *Thatcher v. Lewis*, 335 Mo. 1130, 76 S.W.2d 677 (1934).

<sup>21</sup> *LaFond v. Detroit*, 357 Mich. 362, 98 N.W.2d 530, 532 (1959).

<sup>22</sup> *Ibid.*, at 533.

<sup>23</sup> *DuPont v. Pelletier*, 120 Me. 114, 113 Atl. 11 (1921).

cept white.”<sup>24</sup> He stated: “It would take clearer and more dramatic language than we find in this will for us to [have] held that testatrix’ real intention was one of revenge rather than one of charity.”<sup>25</sup> The minority applied *cy pres* to carry out the intention of the testator. They noted, in expressing this result as her intent, that she provided for no alternative takers: “[W]e believe the basic purpose of the bequest is patently that of a memorial to her husband and herself to perpetuate their memory in a playground for the children in the city of Detroit.”<sup>26</sup>

Notwithstanding the refusal to apply the doctrine of *cy pres* in the principal case, the trend is clearly to the contrary.<sup>27</sup> The rationale is simple, and can be expressed tersely in the following manner: “Readiness exists to find a general charitable intent where the specific charity named . . . is not functioning.”<sup>28</sup> The future of *cy pres* is best expressed in the last paragraph of the minority opinion: “We note that the appellees cite the Girard College cases . . . Pennsylvania v. Philadelphia . . . In re Girard College Trusteeship. . . . [T]he most significant thing about these cases is that no court held the bequest to the college invalid.”<sup>29</sup> This illustrates the tendency of the courts to find the charitable intention.

In conclusion, by way of prognostication, it is likely that *cy pres* will be applied frequently, as a preferred alternative to rendering charitable bequests void. Probably, where a testator attempts such a bias-based bequest in the future, the court will endeavor, instead of making the devise void, to construe the will in such a way as to validate the gift.<sup>30</sup>

<sup>24</sup> LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530, 533, 534 (1959).

<sup>25</sup> Ibid., at 535.

<sup>26</sup> Ibid., at 535.

<sup>27</sup> For indication of the growth of the acceptance of the doctrine of *cy pres* in the last few years, consult *Cy Pres Comes To Delaware*, 9 Md. L. Rev. 359 (1948) which concerns the reversal of precedent in Delaware and the following of *cy pres* in Delaware Trust Company v. Graham, 30 Del. Ch. 330, 61 A.2d 110 (1948); *Cy Pres in Kentucky*, Ky. L. J. 95 (1946).

<sup>28</sup> Rhode Island Hospital Trust Co. v. Williams, 50 R.I. 385, 148 Atl. 189 (1929).

<sup>29</sup> LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530, 535, 536 (1959).

<sup>30</sup> People v. Braucher, 258 Ill. 604, 101 N.E. 944 (1913); *Tincher v. Arnold*, 147 Fed. 665 (C.C.A.7th, 1906).