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Charities - Recent Developments in Illinois, 1942-1957

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OPTION TO PURCHASE-ASSIGNMENT

It is generally agreed that, absent a manifestly contrary intention of the parties, upon a valid assignment of a lease containing an option to purchase, the option, as a covenant running with the land, passes to the assignee and may be enforced by him in the same manner and to the same extent as by the original lessee.[32] But where the option clause provides for the extension of credit to the optionee for at least a portion of the purchase price, upon acceptance of the option, the option contemplates a relation of personal confidence between the lessor and the lessee and it is therefore not assignable.[33] However, in *Rosello v. Hayden*,[34] a lease contained an option to purchase partly on credit and the court held that the assignee of the lease could enforce the option upon offering to pay cash in full.

CONCLUSION

It can be seen that in dealing with option clauses contained in real estate leases, the courts apply rules of law only after considering (1) the language of the option clause, (2) the lease in its entirety, (3) the intention of the parties and (4) the extrinsic circumstances in each case.

Many of the problems which arise would be avoided or more easily solved by more careful draftsmanship in order to manifest the intent of the parties.

[32] In re Frayser's Estate, 401 Ill. 364, 82 N.E. 2d 633 (1948); Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

[33] Kritz v. Moon, 88 Ind. App. 5, 163 N.E. 112 (1928); Prichard v. Kimball, 190 Cal. 757, 214 Pac. 863 (1923); Menger v. Ward, 87 Tex. 622, 30 S.W. 853 (1895).

[34] 79 So. 2d 682 (Fla., 1955).

CHARITIES–RECENT DEVELOPMENTS IN ILLINOIS, 1942–1957

Increasing interest has been focused on the law of charitable trusts. Perhaps the most notable development has been in the field of tort immunity.[1] In view of the immense public value of charities, problems such as "what qualifies as a charity"[2] and "how can charities be saved from invalidity" are of great significance. Of course tax considerations which pervade all fields of law are also a problem in charitable trusts. The following discussion does not attempt to develop any particular aspect of charities but rather to review the Illinois cases from 1942 to 1957.

[1] Charitable Institutions–Immunity from Tort Liability, 4 De Paul L. Rev. 56 (1954).

[2] Professor Curran has discussed the question of whether a trust for masses qualifies as a valid charity. Curran, Trust for Masses, 7 Notre Dame Lawyer 42 (1931); and Curran, Charitable Trusts for Masses 1931–1956, 5 De Paul L. Rev. 246 (1956).

QUALIFYING AS A CHARITY

In Illinois the definition of a "charity" invariably referred to is the one found in *Crerar v. Williams:*

> A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described to show that it is charitable in its nature.[3]

The limited litigation on this point has been concerned with cemeteries. In each of two cases handed down by the Supreme Court, cemeteries were held to be valid objects for charitable trusts. In *Stubblefield v. Peoples Bank of Bloomington*[4] the court was concerned with the problem of a private cemetery corporation which was almost a mixed trust, i.e. charitable and profitable. The cemetery corporation had in the past provided for dividends but had never declared them and had subsequently (but before this suit) stricken the dividend provisions from its bylaws. The court in examining the facts, found enough of the charitable element to establish a valid charity. In dicta, the court said that if the trust would fail because of the profit element, equity would separate the private from the charitable element in order to save the charity.

The requirement of *an indefinite number of persons* was the subject matter of an appellate court holding.[5] The devise in that case was for hospitalization and medical supplies for "worthy persons" residing in the city of Geneseo (population 4,325). It was held that the class was large enough so that the community had an interest in the performance of the trust. The court used as a definition the one appearing in the *Crerar* case indicating a liberal construction so as to save the gift.

On the other hand, when construing a tax exemption statute the courts are as strict as they are liberal in saving charities. To qualify for exemption under the Revenue Act of 1939[6] (property tax) or under the provisions for inheritance taxes,[7] the property sought to be exempted must be used for a charitable purpose. It is not enough to show that the organization holding the property has done some charitable work. "A charitable purpose must refer to some specific form of conduct or course of actions

[3] 145 Ill. 625, 643, 34 N.E. 467, 470 (1893).

[4] 406 Ill. 374, 94 N.E. 2d 127 (1950).

[5] Raser v. Johnson, 9 Ill. App. 2d 375, 132 N.E. 2d 819 (1956).

[6] Ill. Rev. Stat. (1945) c. 120, § 500.

[7] Ill. Rev. Stat. (1955) c. 120, § 401

tending to promote the well-doing and well-being of social men."[8] In the case of *In re Estate of Schureman*[9] an exemption was denied to a Masonic organization because of the secret nature of its purpose. The court as a matter of judicial notice held that the Masons were not a charity because of the secrecy of their purpose. Moreover, the court recognized the fact that the devise did not specify a charitable use but was given unconditionally to the Masons. The case suggests the possibility that a devise to a Masonic organization if restricted to a legally recognized charitable use would be exempt.

There is a distinction to be made in the case of property tax exemptions which concerns itself with the use of the land sought to be exempted. On the same day that the Supreme Court decided the *Schureman* case, it handed down two other decisions dealing with charitable use. In *Rogers Park Post No. 28 v. Brenza*[10] the court set up two requirements for a charitable exemption: (1) ownership by a charitable organization and (2) exclusive use for charitable purposes. An exemption was refused to the American Legion Post because, although it was a nonprofit organization, it had no charitable functions. The building in which the post was located was used for bingo games, dances and meetings, none of which qualified as a charitable use.

Upon the same grounds, a tax exemption was denied to the International College of Surgeons for their headquarters building in Chicago. The organization is wholly supported by the dues of its members. Its purposes are to aid in creating higher standards of surgery through the association of leading surgeons, to promote the education of its members, to combat unethical and illegal practices and to inspire younger members to become more skilled in the art of surgery. There was also evidence that the college did various acts of charity. The court in denying the exemption said:

> The mere fact that property is held by an institution of public charity, it is seen, is not sufficient to exempt it from taxation. The property itself must be devoted to charitable purposes, and it must be in actual use by the institution in carrying out directly its charitable purposes. . . . In determining what is meant by charitable purposes in the statutory sense [tax exemption statute] the fact that the activities of the organization are not conducted for profit is not of controlling importance.[11]

The preceding rule of "exclusive use for charitable purpose" might not, however, be as rigid as the above indicates. In an earlier Supreme court

[8] In re Estate of Schureman, 8 Ill. 2d 125, 131, 133 N.E. 2d 7, 10 (1956).

[9] 8 Ill. 2d 125, 133 N.E. 2d 7 (1956).

[10] 8 Ill. 2d 286, 134 N.E. 2d 292 (1956).

[11] International College of Surgeons v. Brenza, 8 Ill. 2d 141, 144, 133 N.E. 2d 269, 271 (1956).

case, *People v. Missionaries*,[12] appellant objected to taxes levied on dormitories of a religious educational institution assessed because they were used during the summer months for housing guests. In holding that an exemption was proper the court said:

> When the primary purpose to which the property is applied is for a public educational, charitable, religious or other exempt purpose, income obtained from a secondary or incidental use for nonexempt purposes will not, of itself, render the property nonexempt.[13]

CHARITABLE INTENT—THE MAGIC WORDS

> A fundamental and established rule of law in this State is that bequests and devises for charitable purposes are looked upon with favor and all reasonable interpretations and inferences tending to uphold them are made by the courts.[14]

This familiar phrase appears in cases where some difficulty arises in validating a charitable trust. Although the "intent" is often not the sole criterion,[15] it would be helpful to observe particular difficulties in recent cases that were overcome by finding a charitable intent.

In *Continental Illinois National Bank and Trust Co. v. University of Notre Dame*,[16] the testator devised and bequeathed the residue of his estate to the lay trustees of the university in trust for worthy students intending to study for the priesthood. The university never had a board of lay trustees and at the death of the testator (1942) the corporate existence of the school had been dissolved by court order (1937) because of its failure to file reports and otherwise conform with the Illinois corporation laws. In 1944 the school petitioned to have the dissolution order set aside because of improper service. The equity court revived the corporate existence of the university. On appeal the Supreme court in examining this sequence of events, i.e. dissolution, charitable bequest and revival of the corporation, along with the fact that there was never a board of lay trustees, held the trust valid. The court remarked:

> [A] court of equity may revive or resuscitate a dead corporation. It is a well established rule in this state that a court of equity will not allow a charitable trust to fail for want of a trustee . . . nor will it be allowed to fail for uncertainty or because the manner specified for managing the gift cannot be carried into exact execution.[17]

[12] 409 Ill. 370, 99 N.E. 2d 186 (1951). [13] Ibid., at 375 and 189.

[14] Caruthers v. Fisk University, 394 Ill. 151, 159, 68 N.E. 2d 296, 300 (1946).

[15] In Rubel v. Friend, 344 Ill. App. 450, 101 N.E. 2d 445 (1951), the trust was sought to be invalidated because the instructions to the trustee provided for application of the funds ten years after the testator's death. The appellate court thought that the inherent power of equity was needed to save the trust because of the fact that there was no provision for nonexecution by the trustees.

[16] 326 Ill. App. 567, 63 N.E. 2d 127 (1945).

[17] Ibid., at 575 and 131.

In *Caruthers v. Fisk University*,[18] a 1946 case, a charitable devise to Fisk University was clouded by the occurrence of a condition subsequent. The devise was subject to the condition that the testatrix's niece be educated at the expense of the institution. The university communicated with the niece several times expressing its willingness to abide by the terms of the devise and urged her to enroll. The niece, however, of her own volition attended another school. In dismissing the niece's appeal the Supreme court held that all conditions laid down by the testatrix had been fulfilled. The expressed charitable intent of the testatrix along with the fact that the niece who stood to gain by the failure of the trust by her own choice did not attend, were the motivating forces for the holding.[19]

The power of the court of equity to strike superfluous words from a will was reinforced by the charitable character of the bequest in *Mason v. Willis*.[20] The court struck the phrase "of America" from a bequest to the Salvation Army of America in order to conform with the registered title, "Salvation Army." It also allowed extrinsic evidence to show that the Illinois Salvation Army was the intended object among four other organizations of the same name.

Gifts in perpetuity to a charity are invariably attacked as a violation of the rule against perpetuities. A lucid analysis of the law on this subject appears in *Walliser v. Northern Trust Co. of Chicago*,[21] a 1949 case:

> It has been repeatedly held, that the rule against perpetuities pertains to the vesting of interests and not to their duration. . . . [A]nd if there is no perpetuity in the first taker, and the gift to the charity vests immediately upon the expiration of the lives in being, the rule cannot be interposed to invalidate the charitable trust even though it may continue indefinitely. Nor is it necessary that the corpus ever be paid to the charity.

Equity adopted a construction which avoided the application of the rule against perpetuities in *Monarski v. Greb*.[22] In that case the testator devised to his collaterals and if they were disqualified because of their alien status, then two years after the end of the war[23] it was to go to the church, if the collaterals were still disqualified. Since the war could endure indefinitely, invalidity because of the rule seemed inevitable. The Attorney General intervened, claiming succession to the interest of the aliens. After

[18] 394 Ill. 151, 68 N.E. 2d 296 (1946).

[19] The decision deals at greater length with the ability of the university to hold title to the property.

[20] 326 Ill. App. 481, 62 N.E. 2d 135 (1945).

[21] 338 Ill. App. 263, 273, 87 N.E. 2d 129, 133 (1949). Accord: Catholic Bishop of Chicago v. Murr, 3 Ill. 2d 107, 120 N.E. 2d 4 (1954).

[22] 407 Ill. 281, 95 N.E. 2d 433 (1950).

[23] The testator used "armistice" but the equity court construed it to mean the end of the war.

discussing the fact that the testator was a priest himself and that his intention was to benefit the church rather than the Attorney General, the court construed the will so as to have the gift vest in the church immediately upon disqualification of the collaterals and, therefore, avoided the application of the rule.

CY PRES

It is difficult to perceive where the motivating force of the inherent power of equity to save trusts ends and the doctrine of *cy pres* begins. The appellate court was faced with this precise problem in *First National Bank of Chicago v. King Edwards Hospital Fund.*[24] The testator bequeathed funds in trust to the King Edwards Hospital. The nationalization of the hospitals by the National Health Act of Parliament made it necessary to invoke the extraordinary powers of equity. Appellants urged that the gift failed because the testator's specific purpose was to benefit a voluntary hospital which had been extinguished. The chancellor relied on *cy pres*, but the court in affirming said:

> The chancellor, in finding for the hospitals, places his principal reliance on the *cy pres* doctrine. We are of the opinion that the relief afforded in the instant case could have been obtained by the exercises of the court's inherent equity powers. . . . The award of these funds to those hospitals under the present management and ownership is not just an application of these funds to institutions of a similar charitable purpose, but to the identical purpose contemplated by the testator.[25]

As appears in a 1946 Illinois case, there are certain prerequisites for invoking *cy pres:*

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. This doctrine, however, does not apply if the settlor provides for the application of the funds in the event of the failure of the purpose first intended.[26]

Cy pres was held inapplicable in *Continental National Bank and Trust of Chicago v. Sever.*[27] There the testator left the residue of his estate for the establishment of an educational institution in Missouri or if impractical, to an institution already in existence, with the designation that it be

[24] 1 Ill. App. 2d 338, 117 N.E. 2d 656 (1954).

[25] Ibid., at 362, 363 and 667.

[26] First National Bank of Chicago v. American Board of Commissioners for Foreign Missions, 328 Ill. App. 481, 485, 66 N.E. 2d 446, 448 (1946).

[27] 393 Ill. 81, 65 N.E. 2d 385 (1946).

left to "my trustees." The testator's first intention was to have a separate institution established but he provided alternatively for a gift to one already in existence. The lower court appointed a commission to select an appropriate institution in an attempt to exercise *cy pres*. The commission designated St. Louis University but the trustees pursuant to authorization in the will, selected Washington University. The lower court decreed the fund go to St. Louis University in accordance with the commission's report. The appellate court reversed and the Supreme court in affirming the appellate court said in part:

> Courts of equity will not, however, interfere with the exercise of the discretionary powers of a trustee . . . nor will they undertake to exercise a discretion, which by the instrument creating the trust, has been left to the trustee.[28]

Here the court indicated that although the testator's first intention, establishment of an institution, was impractical, there appeared an alternative, thus making the application of *cy pres* improper.

The appellant's contention in the *Continental National Bank & Trust of Chicago* case, the application of *cy pres*, represents a paradoxical conflict between the doctrine of *cy pres* and equity's concern with following the general charitable intent of a testator because the former has its logical basis in the latter. The conflict also appears in *First National Bank of Chicago v. American Board of Commissioners for Foreign Missions*.[29] There the testatrix established a benevolent fund from which nineteen charities were to receive income to be appropriated in specific amounts, first to the Union Congregational Church and then successively to eighteen other charities. The church was destroyed by fire and it was urged that *cy pres* be applied to save the bequest. The court held that *cy pres* did not apply since the settlor provided for application of the fund in the event of the failure of the purpose first intended. The more general charitable intent could best be effected not by applying *cy pres* but by following the actual intention of the settlor.

In *Martin Home for Old Folks v. Unknown Owners*,[30] the court considered whether a charitable trust which could possibly not sustain itself was the proper subject of *cy pres*. The trustees of the home contracted with a hospital. The hospital was to take over the funds and apply them to care for the aged within the hospital. The court held that it was necessary for the devise to be *impossible* or *impractical* and would not apply *cy pres* where there appeared only a possibility that the trust might not sustain itself financially.

Refusal by two alternative trustees to accept a trusteeship has been held

[28] Ibid., at 93 and 391.

[29] 328 Ill. App. 481, 66 N.E. 2d 446 (1946).

[30] 4 Ill. App. 2d 145, 123 N.E. 2d 861 (1955).

to be a proper reason for the application of *cy pres*. In a 1950 case,[31] both of two religious orders alternatively designated as trustee for the establishment of an orphans' home declined to accept the trust. The court found that there was a general intent to benefit orphans rather than the particular religious orders. In order to effectuate the gift, a trustee was substituted. The same reasoning was used in *Community Unit School Dist. No. 4 v. Booth*[32] where a devise to School District 13 was impossible because it has been abolished and its area incorporated by district 4. The Supreme court approved the lower court's application of *cy pres* in that the intention was to benefit the school community rather than a district named "13."

The Illinois Supreme Court in 1954 and 1956 considered the sale of land held in trust when the land becomes useless to the charity. In *Catholic Bishop of Chicago v. Murr*,[33] land was conveyed to the Bishop for cemetery use with a restraint on alienation. The court first held that "a condition in a deed which wholly forbids alienation as does the contention in this conveyance is invalid unless the deed creates a charity."[34] After holding the restraint valid the court suggested that by virtue of *cy pres*, it could be alienated:

> We hold, therefore, that this gift in trust, to be used for cemetery purposes is a charitable trust, and that an absolute restraint upon alienation of that land is therefore not invalid.
>
> It does not follow, however, that a court of equity, in the exercise of its traditional power over charitable trusts may not decree that the land or some part of it, may be sold.[35]

The case was remanded in order to find whether or not the then present conditions justified the sale of the property. On remand the Circuit Court of Will County found the tract unsuitable for burial purposes and that circumstances fully justified its sale. The appellate court affirmed the circuit court but did not base its holding on *cy pres*.[36]

By the same reasoning, the Supreme court in 1956 applied *cy pres* in authorizing the City of Aurora to sell land devised to it for public use.[37] It held that the statute under which the land was sought to be conveyed was inapplicable but remanded, suggesting that if holding the land by the city was unfeasible, then by *cy pres* the money derived from a sale thereof could be put to public use.

[31] First National Bank of Chicago v. Liott, 406 Ill. 44, 92 N.E. 2d 66 (1950).

[32] 1 Ill. 2d 545, 116 N.E. 2d 161 (1953).

[33] 3 Ill. 2d 107, 120 N.E. 2d 4 (1954).

[34] Ibid., at 109 and 7. [35] Ibid.

[36] Catholic Bishop of Chicago v. Castle, 14 Ill. App. 2d 495, 144 N.E. 2d 874 (1957).

[37] City of Aurora v. Y.M.C.A., 9 Ill. 2d 286, 137 N.E. 2d 347 (1956).

TORT LIABILITY

The cases on immunity from tort liability must be discussed with chronological reference to *Moore v. Moyle*.[38] Cases before the *Moore* decision gave immunity for various considerations.[39] The *Moore* case represents the modern trend away from charitable immunity.[40] It held that a judgment against a charitable institution was valid but could not be satisfied by trust funds. Therefore, charitable institutions are liable to the extent that they have liability insurance.[41]

CONCLUSION

It appears that the most notable development in the law of charitable trusts is in the field of tort liability. The distinction between *cy pres* and equity's inherent powers poses the problem of which to apply. Some courts have been reluctant to apply *cy pres* while others apply it very liberally, arriving at the same result but leaving doubt as to the propriety of its application. Strict conformance with the tax exemption statutes set requirements of (1) ownership by a charitable organization and (2) exclusive use for charitable purposes. The public benefit attributed to charitable trusts makes the law pertaining thereto a matter of increasing concern.

[38] 405 Ill. 555, 92 N.E. 2d 81 (1950).

[39] Meyers v. Y.M.C.A. 316 Ill. App. 177, 44 N.E. 2d 755 (1942). In Lenahen v. Ancilla Domini Sisters, 331 Ill. App. 27, 72 N.E. 2d 445 (1947), immunity was based on considerations of public policy and on the theory that respondeat superior did not apply.

[40] See Bing v. Thunig, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3 (1957), noted in 7 DePaul L. Rev. 131 (1957) infra.

[41] Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill., 1954) which held that the existence of trust funds need not be alleged in a complaint. The district court reiterated the fact that immunity such as it exists is not immunity to liability, but rather to execution of the judgment on trust funds; Slenker v. Gordon, 344 Ill. App. 1, 100 N.E. 2d 354 (1951); Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E. 2d 342 (1947).

REDISTRICTING WARDS

"Ward" is of teutonic origin and has a variety of meanings all of which spring from the general idea of a military guard or protector. Thus, a person elected from such section is considered a protector of a geographical part as distinguished from the city as a whole.[1]

Wards do not possess any power of local self-government, and are erected exclusively for the purpose of securing representation in the city government. The method of determining the number and the manner of

[1] Hammond v. Young, 117 N.E. 2d 227, 231 (1953).