

REMOTENESS AND CHARITABLE GIFTS

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The late John Chipman Gray begins the chapter on Charitable Trusts in his well known book on *Perpetuities* by observing that :

“it is commonly said that gifts to charities are not subject to the Rule against Perpetuities. This may be to a certain extent correct, but the subject is involved in considerable confusion owing to the ambiguity of the terms employed.”¹

In this article I propose to discuss some of the English cases, which illustrate this confusion. Although a trust for charitable purposes may last forever, the gift should, according to English law, vest within the period fixed by the rule in *Cadell v. Palmer*.² Lord Selborne³ states this principle in the following words :

“If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises ; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.”

The principle, as thus stated, seems clear and has frequently been applied. Thus in *Re Lord Stratheden and Campbell*⁴ the testator bequeathed an annuity to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel. Romer, J. said :

“It is a gift conditional on the appointment of the next lieutenant-colonel. Now, the next lieutenant-colonel may not be appointed for some time after the death of the present commanding officer ; he never may be appointed at all ; and consequently, it appears to me that this is a gift conditional upon an event which transgresses the limit of time prescribed by the rules of law against perpetuities.”

This principle, however, does not, at any rate at first sight, appear to have been applied in several reported cases, so that it is necessary to consider whether the cases can, in some way, be reconciled with it, or, if not, whether there is some exception. There is a passage in

¹ Gray, *The Rule Against Perpetuities* (3d ed. 1915) sec. 589.

² (1833, H. L.) 1 Cl. & F. 372.

³ *Chamberlayne v. Brockett* (1872) 8 Ch. 206, 211.

⁴ [1894] 3 Ch. 265.

Lord Macnaghten's judgment in *Wallis v. Solicitor General for New Zealand*⁵ in which, quoting Tudor's *Charitable Trusts*, he says:

"Where there is an immediate gift for Charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all."

This statement is often quoted, but what does it mean? Does "immediate" mean that the gift is not subject to a condition precedent or that there is no prior gift to some person? Again, is Lord Macnaghten's statement limited to those cases where there is a general charitable intention so that if the particular application fails the money can be applied *cy pres* or does it extend to cases where the only charitable intention is for the particular purpose so that the doctrine of *cy pres* is not applicable; and if it does so extend how can it be reconciled with Lord Selborne's principle stated above? Mr. Tyssen's view is that the cases establish an exception to Lord Selborne's principle. He says:⁶

"We have already noticed many cases of bequests for the establishment of new charitable institutions, where the testator's object could not be carried out by his own trustees alone, but some act was required to be done by some other person, such as a gift of land as a site for the institution. In such cases if no limit is fixed to the time within which all necessary conditions precedent must be fulfilled, an objection may be raised that the gift is not limited so as necessarily to take effect within the period defined by the rule of remoteness. On considering the cases, however, we find that the Court has not subjected such cases to this rule, but has adopted a very elastic principle, namely, that all conditions must be fulfilled within a reasonable time."

But can this "elastic principle" be fairly deduced from the cases? On the other hand we find Mr. Gray saying:⁷

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

⁵ (P. C.) [1903] A. C. 173, 186.

⁶ Tyssen, *Charitable Bequests* (1888) 423.

⁷ Gray, *op. cit.*, secs. 607, 608.

corporation to keep the fund locked up until such time as it may please itself to be incorporated. The formation of the corporation is not a condition precedent to the charitable trust, and therefore the trust is not too remote. The cases where charitable gifts to non-existent corporations or societies have been sustained are numerous. This mode of treating charitable gifts to bodies hereafter to be incorporated as present valid gifts depends upon the doctrine of *cy pres*."

But again we may ask do the English cases support Mr. Gray's views? In *Attorney-General v. Downing*⁸ there was a gift to a college to be established. Wilmot, C. J. said that the gift was not too remote because the King's License might be obtained in six months, which was greatly within the time allowed by the law for the expecting executory trusts to arise. The matter again came before the Court in *Attorney-General v. Bowyer*⁹ in which it was decided that the heir was not entitled to the intermediate rents until the college was incorporated; so that the *cy pres* doctrine was applied to these rents.

This case certainly supports the view of Mr. Gray. The leading case, however, is *Attorney-General v. Chester*.¹⁰

In that case Archbishop Secker gave among other charitable legacies £1,000 three *per cent* bank annuities to his trustees for the purpose of establishing a bishop in his Majesty's dominions in America and ordered that if any charity to which he had given a legacy should no longer subsist, such legacy should fall into the residue. At his death there was no bishop in America nor any likelihood of there ever being one. It was argued that the legacy was void and fell into the residue, but Lord Thurlow, C. said "the money must remain in Court till it shall be seen whether any such appointment shall take place."

This is the whole of the judgment as reported in relation to the legacy. The point of remoteness does not seem to have been raised, nor was it suggested that the money could be applied *cy pres* if a bishopric in America was not founded. Ultimately upon the appointment of a bishop of Canada the legacy was applied.¹¹

In *Henshaw v. Atkinson*¹² the testator bequeathed money for a Blue Coat School and a Blind Asylum, adding

"but I direct that the said Monies shall not be applied in the purchase of Lands or the erection of Buildings, it being my expectation that the Persons will, at their expense, purchase Lands and Buildings for those purposes."

⁸ (1766, Eng. Ch.) Amb1. 550.

⁹ (1798, Eng. Ch.) 3 Ves. 714.

¹⁰ (1785, Eng. Ch.) 1 Bro. C. C. 389.

¹¹ See *Attorney-General v. The Ironmongers' Company* (1833, Eng. Ch.) 2 My. & K. 576, 579.

¹² (1818, Eng. Ch.) 3 Madd. 306.

Referring to this direction Sir J. Leach, V. C. said :

“It is next argued, that it was this Testator’s intention that the Charities were not to take effect until Lands or Buildings were supplied by others, and that the Money may be locked up for an indefinite period of time, and therefore, that the Bequest cannot be sustained. The Cases of *Downing College* and the *Attorney-General v. Bishop of Chester*, seem to be Authorities against that objection; but the point does not arise here.”

It did not arise because of certain provisions in a second codicil.

In *Attorney-General v. Master and Fellows of Catherine Hall, Cambridge*¹³ the testatrix directed her trustees to convey certain real estate and her personal estate to the college for certain purposes, when a site of ground had been purchased or procured for the reception of six fellows and ten scholars in the college. The point that the devise and bequest were upon the happening of an event which might be too remote does not seem to have been raised. The testatrix died in 1745, and the estates were not conveyed until 1767 pursuant to a decree of 1752.

In *Mayor of Lyons v. East India Company*¹⁴ an inquiry was ordered to ascertain whether a bequest for a college in Oude could be given effect to. Lord Brougham said :

“The case of *Attorney-General v. Bishop of Chester* furnishes a direct authority for not declaring a legacy void because it was for an object which could not at the time be accomplished, and for retaining the fund in Court until it should be possible to apply it. No doubt if, in that case, some years had elapsed, and no prospect appeared of an Episcopal establishment in Canada, the Court would then have declared the legacy void, and distributed the fund to the parties entitled. So here, if it shall be found that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it, which they should have done had the bequest been at first declared void.”

In *Girdlestone v. Creed*¹⁵ there was a bequest of residue for building and endowing a church at Stow Bridge; and when in further proceedings¹⁶ the Attorney-General claimed the residue for the purpose to the extent of £500¹⁷ a sum of consols equal thereto was directed to an account intituled “the contingent account for building and endowing a Church at Stow Bridge” and an inquiry was directed whether there were any means of applying the fund in or towards the building

¹³ (1820, Eng. Ch.) Jac. 381.

¹⁴ (1836) 1 Moore P. C. 175. 295.

¹⁵ (1849, Eng. Ch.) 8 Hare, 208.

¹⁶ (1853, Eng. Ch.) 10 Hare, 465, 473.

¹⁷ See 9 Geo. II, ch. 36; 43 Geo. III, ch. 108.

or endowing of a church at the same place. The question of remoteness was not raised.

In *Philpott v. George's Hospital*¹⁸ Lord Cranworth, C. refers to *Attorney-General v. Chester* apparently with approval but says "the grounds of that decision it is not necessary for me to go into."

In *Sinnett v. Herbert*¹⁹ the testatrix gave the residue of her personal estate to trustees to be by them applied in aid of erecting or endowing an additional church at A. The question, "Can the trust be executed *cy pres* if no opportunity appears within any reasonable time for applying the fund as directed by the testatrix?" was discussed by Lord Hatherley²⁰ and argued at some length, but Lord Hatherley did not decide the point. He said, however:²¹

"As to the difficulty from the possible remoteness of the time when her intention can be carried into effect. I think the case of the *Attorney-General v. Bishop of Chester* is a complete answer. In that case the very point which arises here was suggested. There was a sum of £1,000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the king's dominions in *America*. There was no bishop in *America*. The sum, being only £1,000, was not very likely in itself to be sufficient to establish a bishop. Nothing could be more remote or less likely to happen within a reasonable period, than the appropriation of that fund to that particular object. But the Court did not direct any application of the fund according to the *cy pres* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time with liberty to apply, because it was not known whether any bishop would be established. But that the Court would continue to retain it for ever, waiting until a bishop should be appointed, I think is a very doubtful proposition."

His Lordship directed an inquiry whether or not the funds given to the trustees for the purpose of aiding in erecting or endowing a church at A, or any and what part thereof, could be so laid out and employed.

In *Chamberlayne v. Brockett*,²² an inquiry was ordered as in *Sinnett v. Herbert*. Lord Selborne said:

"When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness. . . . If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this Court has power to apply the surplus, or the whole (as the case may be) to such other purposes as it may deem proper, upon what is called the *cy pres* principle."

¹⁸ (1857) 6 H. L. C. 338.

¹⁹ (1872) 7 Ch. 232.

²⁰ *Ibid.*, 235, 237.

²¹ *Ibid.*, 240.

²² *Supra*.

In *Re White's Trusts*²³ money was bequeathed to a company upon trust "when a proper site can be obtained for that purpose" to "erect or build almshouses." The money was paid into Court. Bacon, V. C. said:

"I do not think the trustees are entitled to have the money until they are in a position to come to the Court and say they have the land to build upon and there must be a declaration to that effect."

Four years later it appeared that there was no reasonable prospect of a site being obtained. Bacon, V. C. held that the doctrine of *cy pres* could not be applied and that the legacy lapsed. It is difficult to see why the legacy could not be applied as in *Biscoe v. Jackson*²⁴ as to which see *Re Wilson*.²⁵

It will have been seen that no certain conclusion can be drawn from the cases. On the one hand the opinion of Lord Brougham and apparently that of Lord Hatherley as well as the decision of Bacon, V. C. are against what would appear to be Mr. Gray's view that the principle of *Attorney-General v. Chester* depends upon the doctrine of *cy pres*. On the other hand the cases do not seem sufficient to establish Mr. Tyssen's elastic principle²⁶ which, if it were established would be an anomalous exception to the rule in *Cadell v. Palmer*. Lord Macnaghten's statement²⁷ is not made clear by a perusal of the cases upon which it may be supposed to be founded. Gifts for the benefit of institutions which the donor hopes will be founded are not uncommon, so that the point has more than an academic interest and we may hope that one day Lord Macnaghten's cryptic words will be construed authoritatively.

Meanwhile the practitioner who drafts a deed or will containing such a gift should be careful to avoid the question either by confining the time for the performance of the condition precedent—the founding of the institution—within due limits or by expressing a general charitable intention so that the *cy pres* doctrine may be applied.

²³ (1886) 33 Ch. D. 449.

²⁴ (1887) 35 Ch. D. 460.

²⁵ [1913] 1 Ch. 314, 321.

²⁶ *Supra*, p. 47.

²⁷ *Ibid.*