

GIFTS FOR PUBLIC MONUMENTS

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The discussion of this subject was suggested by the decision of a recent case¹ in New Jersey involving a will in which the testatrix left her estate in trust to her executor to sell and convert it and to pay fifty dollars a month to her nephew for life and to turn over the residue to the town of Bucksport, Maine, for the purpose of erecting a monument to the memory of her brother, the site and the details thereof to be left to the discretion of the proper authorities. The will was contested on the ground that it involved a trust in perpetuity and was not a charitable use. The court held that the law of charitable uses was not involved in the case. The Vice-Chancellor, the late Frederic W. Stevens, declined to follow the ruling of the late Vice-Chancellor Howell in *Morristown Trust Company v. Town of Morristown*.² He said it was contrary to a decision of the Court of Chancery based upon well established rules of property and recognized authority and referred to *Detwiller v. Hartman*,³ in which Chancellor Runyon cited the decision of Sir Thomas Plumer in the case of *Mellick v. Guardians of the Asylum*,⁴ where he said

“the statute of mortmain does not bear a resemblance to anything like a sumptuary law; and does not apply to property expended like this by the party on himself, for the gratification of his own vanity, on an object, which, instead of having any similitude to charity, is the very reverse of it; the builder of the monument is to be paid for his labour only. It stands on the same footing as an expensive funeral; and it has never been argued that the expences of a funeral cannot be defrayed out of real estate. There is nothing to controul the general right incident to property of disposing of it, either in the party's life-time, or after his death, as he may think proper; and though the sum which this testator has devoted to the erection of his monument may be disproportioned to his station in life, the Court cannot on any such grounds extend the construction of the statute.”⁵

Vice-Chancellor Stevens said the only questions were whether Mrs. Dean could lawfully give the residue of her estate to the town of Bucksport to the memory of her brother, a prominent citizen of that

¹ *Lawrence v. Prosser* (1918, Ch.) 89 N. J. Eq. 248, 104 Atl. 772.

² (1913, Ch.) 82 N. J. Eq. 521, 91 Atl. 737.

³ (1883, Ch.) 37 N. J. Eq. 347.

⁴ (1821, Eng. Ch.) 1 Jac. 180.

⁵ *Ibid.*, 184, quoted in *Detwiller v. Hartman*, *supra*, 353. See also *Masters v. Masters* (1718, Eng. Ch.) 1 P. Wms. 421; *Adnam v. Cole* (1843, Eng. Ch.) 6 Beav. 353; *Ogden, Petitioner* (1903) 25 R. I. 373, 55 Atl. 933; *Fancher v. Fancher* (1909) 156 Calif. 13, 103 Pac. 206.

city; and secondly, whether the town of Bucksport had the capacity to receive the gift and apply it as directed. The decision on both points was in the affirmative.

Speaking of the contention that the bequest violated the rule against perpetuities, the Vice-Chancellor said there was a palpable fallacy underlying the complainants' argument on this head, that because a monument is likely to endure beyond the legal period the case is one of perpetuity, and on the question of capacity he said it was established at least in this country that municipalities are capable of taking property in trust for purposes germane to the objects of their incorporation, that in all ages civilized communities have adorned their ways and parks with memorials of their illustrious dead and it was idle to assert that columns and statuary have no proper place in them.

The question, what is meant by a monument, was suggested in that case but was not involved in it. The will as originally drawn provided expressly for a gift of a sum of money for the erection of a town hall as a memorial to the brother of the testatrix but in the last will the word was monument, but the question whether the money can be applied to the erection of a town hall has not yet arisen. At this time, when many minds are set upon erecting fitting memorials for those who have given their lives in the late war and are thinking also of social and civil welfare and of erecting worthy buildings for carrying it out, it may well become a practical question whether the word "monument" in a will or deed of gift may be taken to include a building or must be confined to the shaft or arch or statue with which the word has been associated.

There are cases in which the decision depended upon the context or the circumstances, as for example, the amount of money to be expended and its relation to the space of ground to be used. In the case of the proposed monument in Independence Square in Philadelphia⁶ the question was whether the proposed monument was within the prohibition against erecting buildings in that square. The court said:

"A monument may take the shape of a memorial hall or other building, but that is not the general sense of the word and will not be presumed,"⁷

and the decision was that a memorial which took the form of a shaft or column was not within the prohibition against buildings and might be erected in Independence Square.

In a case in the New York Court of Appeals, involving a question of the law of sales⁸ allusion was made to the use of the word "monument" in connection with St. Paul's Cathedral and Sir Chris-

⁶ *Society of the Cincinnati's Appeal* (1893) 154 Pa. 621, 26 Atl. 647.

⁷ *Ibid.*, 635.

⁸ *Cooke v. Millard* (1875) 65 N. Y. 352, 363.

topher Wren and to the remarks of the court in another case⁹ to the effect that where pieces of marble were put together and stood in a marble yard without an inscription, there was no monument in existence at the time. Dwight, Commissioner, said:

“the notion that such an arrangement of marble placed in a cemetery over a grave can not be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. . . . It would seem to be enough if the monument reminds the passer by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.”¹⁰

In *Fancher v. Fancher*,¹¹ a testator declared that \$25,000 should be set aside for the erection of a suitable monument to his memory and directed that he should be buried on his ranch. The decision was that his will would not be complied with by spending \$2,000 on a granite monument on his ranch and \$20,000 on building a public library in a distant city. In view of the fact that he used the word “monument” in connection with his funeral expenses and the interment of his remains, it was to be taken that he used the word as indicating a pillar, a statue or a shaft, or some structure placed over the grave on the ranch and not a memorial library in the city. Again in the *Ogden* case¹² Judge Stiness said:

“While it is true that lexicographers include structures and buildings in the definition of the word monument, we are required in this case to ascertain, not its possible meaning, but its meaning as indicated by the intent of the testator”¹³

and he said that in this particular will a distinction was made between a monument and a memorial.

The word “monument” has a much broader meaning than a tombstone or a memorial shaft. Its primary meaning is a memorial. The Latin word “monumentum” is derived from the verb “monere,” to remind or admonish. The definition in Andrew’s *Latin Dictionary* is as follows: “That which preserves the remembrance of anything, a memorial; a monument, especially buildings, statues, galleries and tombs erected to perpetuate the remembrance of a person or thing.” For example, there is cited from Cicero “monumentum Marii,” the temple built by Marius, and again, “monumentum senatus,” the house of Cicero built by the Senate. In Murray’s *Dictionary* we find: “(4) Anything that by its survival commemorates a person, an action, period or event; (5) a structure, edifice or erection intended to commemorate a notable person, action or event.” Webster’s *Dictionary* includes, “a building, pillar, stone, or the like, erected to preserve the

⁹ *Mead v. Casē* (1860, N. Y. Sup. Ct.) 33 Barb. 202.

¹⁰ *Cooke v. Millard*, *supra*, 363-364.

¹² *Supra*.

¹¹ *Supra*.

¹³ *Ibid.*, 374.

remembrance of a person, event, action," and the *Standard* mentions "any conspicuous or fine structure, especially considered as a memorial of the past."

It is clear that the primary purpose expressed by the word "monument" is a memorial, and that when the word is used without reference to a tomb and in connection with a generous gift to a city the memorial may well take the form of a public building, such as a town hall, a library or a museum, such a building as may serve not merely as a public memorial, but also for the common good—for the adornment of the town, for the education, for public health, the promotion of art, the dignity and efficiency of government.

The discussion of gifts or devises for monuments does not necessarily involve the law of perpetuities. The gift or bequest of a sum of money for the erection of a monument, whether as a memorial of the donor or some one else, and whether public or private, is valid and not subject to objection as a perpetuity. It is only in case the gift or bequest involves the investment or control of the principal and the use of the income for maintenance or repairs that the question arises whether the purpose of the monument is either a charitable use or such a public use as may be accepted by the public authorities.

The statute of 43 Elizabeth, chapter 4, made express mention of a number of specific objects for the public welfare. They were not, perhaps, the same objects as would have been mentioned in a modern statute, but they are objects of public concern and such that the gift would save the public expense or serve the public welfare, and whether there be a trust or not the question of the validity of a gift for a public monument depends very much upon whether the monument is germane to the functions of the public authorities and conducive to the public welfare.

The permanent character of the structure that is provided for by the gift does not create in itself a legal perpetuity. There is, as the Vice-Chancellor said in the recent New Jersey case, a fallacy underlying the argument that because a monument is likely to last beyond the legal period, the case is one of perpetuity. Perpetuity of legal ownership of land and buildings is involved in ownership in fee, but if there be a trust for an indefinite and fluctuating body, it must, in order to be valid, be held for a charitable purpose or for a public body,¹⁴ and among the purposes mentioned by Justice Gray in *Jackson v. Phillips* is "erecting or maintaining public buildings or works or otherwise lessening the burdens of government."¹⁵ The capacity of cities and towns to receive and hold the title to property by gift or devise was recognized even before it was allowed to private corporations. In *McDonogh's Executors v. Murdock*, Mr. Justice Campbell said that

¹⁴Lewin, *Law of Trusts* (12th ed. 1911) 18; Tudor, *Charitable Trusts* (4th ed. 1906) 5-15.

¹⁵(1867) 96 Mass. 539, 556.

"The Roman jurisprudence . . . seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personalty involved in the acceptance of a succession. The *disability* was removed by the Emperor Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* become frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom."¹⁶

It was not until the time of Henry III that limitations began to be made upon the power to convey lands to corporations, especially religious corporations, but it was not until a century later that there was direct inhibition of conveyance to cities and boroughs "which have offices perpetual." The opinion of Mr. Justice Campbell contains an account of the history of the doctrine of perpetuities and the statutes of mortmain, with references to the civil law, and concludes that the cities of Baltimore and New Orleans were capable of taking a universal title under the laws of Louisiana of real and personal property to be devoted perpetually to the instruction of the poor in wisdom and to lead them into the path of holiness. Justice Campbell quoted the rule of the civil law stated by Domat:

"One can bequeathe or devise to a city or other corporation whatsoever, ecclesiastical or lay, and appropriate the gift to some lawful and honorable purpose, or for public works, for feeding the poor, or for other objects of piety or beneficence."¹⁷

The principle is the same as that which underlies the doctrine of charitable uses; relaxing the restrictions imposed by the statutes of mortmain; but cities were not within the purpose of those statutes, and in an early treatise it is declared that none of these statutes included cities.¹⁸

In a recent case in New Jersey¹⁹ in which upon the determination of life estates certain tracts of land were devised to the city of Newark with a residuary devise to Yale University, Vice-Chancellor Stevens said:

"The next question is whether Newark has capacity to take. Of this there can be no doubt. By the general rule of the common law, says Kyd (*p.* 74), a body corporate is capable of taking any grant of property in the same manner as private persons."²⁰

¹⁶ (1853, U. S.) 15 How. 367, 404-405.

¹⁷ *Ibid.*, 410. Of the origin of wills to pious uses in the Roman law, Mr. Wheaton speaks in his learned note in (1819, U. S.) 4 Wheat. Appendix, 1, 4.

¹⁸ 1 Kyd, *Corporations* (1793) 105.

¹⁹ *Guild v. City of Newark* (1916, Ch.) 87 N. J. Eq. 38, 99 Atl. 120.

²⁰ *Ibid.*, 42.

The purposes for which such gifts may be received are

"not only those for which such towns may raise and assess money on the inhabitants by taxation, but to analogous purposes, or those of a like kind; such as are for the common convenience and accommodation of the inhabitants, though not by law."²¹

There can be no question but that monuments as memorials of public men and events may be provided for by private munificence and accepted and held by the public authorities. Whether they be furnished at the public expense by taxation may depend upon the powers conferred by statute upon the municipality.

There are, of course, many cases in which the gift or bequest involves the investment of a fund and the perpetual use of the income, so that the validity of the donation depends upon the doctrine of charitable uses. The principles are well settled and the cases are too numerous and too various for discussion here. The substance of these discussions is that a gift or devise of a sum of money for the erection of a definite structure for a perpetual memorial and without the creation of a trust fund of which the income is to be used in perpetuity does not involve the doctrine of charitable trusts. It is of no consequence whether the monument is public or private. It is nothing more than the disposition of property by will or deed. The gift or devise of such a monument to a municipality is not in violation of the rule against perpetuities. Included among the rights, privileges, powers and immunities of an owner of property is the *privilege* and *power* to dispose of his estate by will or by deed. The disposition may involve no trust in perpetuity, and if it does, the trust is for one of the public purposes that are recognized as charitable uses and are such as municipalities may lawfully accept.

Whether the word "monument" as used in the deed or will would privilege the erection of a public building or something other than the conventional monument may depend upon indications in the will or the circumstances there appearing, but the real meaning of the word conveying the purpose it expresses is broad enough to include a structure which serves primarily for commemoration, even though it serves some other purpose not inconsistent with the first. Not only have monuments been set up in churches through all the centuries, but churches also and chantries have been themselves the monuments of the saints whether ancient or contemporary, and the church of St. Geneviève in Paris was called the Pantheon and designated as the monument to the great men of the nation. Churches, hospitals and public buildings are appropriate monuments of the illustrious dead and of public benefactors, and the first building erected for the first collegiate school in New Haven was, in fact, made a monument to its founder, Elihu Yale.

²¹ *Nourse v. Merriam*. (1851, Mass.) 8 Cush. 11, 19.