Minnesota's Statute of Charitable Trusts

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MINNESOTA'S STATUTE OF CHARITABLE TRUSTS

By RALPH H. DWAN*

Important changes in the Minnesota law of trusts were made by "an act providing for the creation and administration of charitable trusts" passed by the Minnesota legislature in 1927. This statute reinstates charitable trusts to a position much like that at common law. The purpose of this paper is to discuss the general effect of the statute and some of the problems which are likely to arise under it. Nothing so ambitious as an exhaustive treatment of those problems is attempted here. For the most part, references to fuller discussions in standard textbooks and in legal periodicals will take the place of any detailed analysis of the cases. However, some emphasis will be put upon the cases in the New York court of appeals since the Tilden Act of 1893.

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1Minn. Laws 1927, ch. 180; Mason's 1927 Minn. Stat., sec. 8090-1 to 8090-4 inclusive. An earlier statute dealing with charitable trusts was held to be unconstitutional, on the ground that its subject matter was not expressed in its title. Watkins v. Bigelow, (1904) 93 Minn. 210, 100 N. W. 1104. No such difficulty is anticipated as to the 1927 statute. Cf. Loomis v. Mack, (1915) 183 Mich. 674, 150 N. W. 370, affirming by an equally divided court a decree sustaining a Michigan statute on charitable trusts, the validity of which was attacked on that ground. The title of the Michigan statute was less clear than that of the 1927 Minnesota statute. A later amendment avoided this constitutional objection. See In re Brown's Estate, (1917) 198 Mich. 544, 562, 165 N. W. 929; Greenman v. Phillips, (1928) 241 Mich. 464, 467, 217 N. W. 1.

2New York, Laws 1893, ch. 701. This Act, as subsequently amended, is now Real Property Law (Cahill's Consol. Laws of New York, 1923, ch. 51) sec. 113; Personal Property Law (Cahill's Consol. Laws of New York, 1923, ch. 42) sec. 12.

This statute, following shortly after the failure of the Tilden trust, Tilden v. Green, (1891) 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487, was held to reestablish in New York the law of charitable uses and trusts. Allen v. Stevens, (1899) 161 N. Y. 122, 55 N. E. 568. For an almost contemporaneous discussion of this case, its background, and its implications, see Fowler, Charitable Uses in New York, (1902) 2 Col. L. Rev. 10.
because the background of those cases is similar to that of future litigation in Minnesota. There is some satisfaction in the thought that the state which led us into our difficulties may help to lead us to a better treatment of this important legal and social matter.

The unsatisfactory history of the repudiation in Minnesota of those favorites of the common law, charitable trusts, by a construction of our statutes, borrowed from New York, has been traced in this Review and will not be repeated at any length here. Our statutes abolished all express trusts not expressly authorized. Trusts for charitable purposes, with certain exceptions presently to be noticed, were not expressly authorized. The result was that a trust for charitable purposes of either real or personal property for indefinite beneficiaries was held to be invalid. To take the

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3Thurston, Charitable Gifts and the Minnesota Statute of Uses and Trusts, (1917) 1 Minnesota Law Review 201. This article also includes a discussion of the similar history in New York, Michigan and Wisconsin resulting in remedial legislation. See also Fraser, The Rules Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation in Minnesota, (1925) 9 Minnesota Law Review 314, 323 et seq.; Bogert, Trusts 196 et seq.; Zollman, American Law of Charities 28 et seq.

A recent statement of the situation in New York is found in Whiteside, Suspension of the Power of Alienation in New York, (1927) 13 Corn. L. Quart. 31, 37; see also Hinrichs, Charitable Trusts in New York, (1929) 1 N. Y. Law School Rev. 95, 133.


The Wisconsin cases are discussed by Professor Zollman in (1921) 1 Wis. L. Rev. 129 and in (1924) 8 Marquette L. Rev. 168. The latest cases since those articles appeared are: Estate of Briggs, (1926) 189 Wis. 524, 208 N. W. 247; In re Lott's Will, (1927) 193 Wis. 409, 214 N. W. 391; In re Monaghan's Will, (Wis. 1929) 226 N. W. 306; Matson v. Town of Caledonia, (Wis. 1929) 227 N. W. 298.

4Mason's 1927 Minn. Stat., sec. 8081.

5The purposes now authorized are to be found in Mason's 1927 Minn. Stat., sec. 8090. It has been shown that our statutes on trusts, which at one time narrowly restricted trusts, have been so broadened by amendment that private trusts for every purpose possible at common law are now possible under our statutes. Fraser, The Rules Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation in Minnesota, (1925) 9 Minnesota Law Review 314, 323-324. The statute now under discussion completes this departure from the original theory of the statutes by authorizing charitable trusts.


most recent case so holding as an example, in Bogart v. Taylor, a bequest to one Taylor of money "to be used by him for the extension of the Kingdom of God" in a certain church was held to be invalid.

This does not mean that all gifts to charity were invalid in Minnesota. The trusts statutes, themselves, expressly authorize gifts to municipal corporations on trust for certain specified charitable purposes. Furthermore, a gift could be made to a corporation organized for charitable purposes. This gift could be absolute or on condition that it be used for one or more of the purposes for which the corporation was organized. But, for the reasons given above, if a gift were construed as a charitable gift in trust for indefinite beneficiaries, the gift would be void. But the Minnesota court by a process of strained construction in a number of cases has upheld such a gift as an absolute gift or a gift on condition rather than in trust. A gift to a charitable corporation


9A recent case indicates that authorization for what amounts to a charitable trust may be found in the statutes on religious societies. Mabel First Lutheran Church v. Cadwallader, (1927) 172 Minn. 471, 479-480, 215 N. W. 845. That case involved, among other things, the effect of a deed of land to certain individuals as trustees for a certain church. At the time of the conveyance, the church was not incorporated; it was a voluntary unincorporated association. The purpose of the conveyance was to provide a church site. A statute provided:

"Lands . . . conveyed by devise, grant, purchase or otherwise, to any persons as trustees in trust for the use of any religious society heretofore or hereafter organized, for a meeting house, burial ground or parsonage . . . shall descend in perpetual succession, and be held by such trustees in trust for such society." Mason's 1927 Minn. Stat., sec. 7971. Under that statute, the court held that the trust was valid and that the title to the land vested in the church on its incorporation by the operation of another statute. Mason's 1927 Minn. Stat., sec. 7986. Before the incorporation, the trust was in substance a charitable trust for religious purposes. It was not a private trust because of the indefiniteness of the beneficiaries. See Lane v. Eaton (1897) 69 Minn. 141, 143, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559.

10The existing statute is Mason's 1927 Minn. Stat., sec. 8090, sub-div. 7. This provision is amended in effect, although not expressly, by Minn. Laws 1929, ch. 209.

This provision was the basis for upholding a bequest of money to a city as an endowment in perpetuity for a kindergarten. City of Owatonna v. Rosebrook, (1903) 88 Minn. 318, 92 N. W. 1122.

As to the duties of municipal corporations when acting as trustees of charitable funds, see (1924) 22 Mich. L. Rev. 478.

11See Watkins v. Bigelow, (1904) 93 Minn. 210, 221, 100 N. W. 1104.

12Atwater v. Russell, (1892) 49 Minn. 57, 51 N. W. 629; Lane v. Eaton, (1897) 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Watkins v. Bigelow, (1904) 95 Minn. 210, 100 N. W. 1104; Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 139 N. W. 805; Little v. Universalist Convention, (1919) 143 Minn. 298, 173
could be of the legal and equitable interest in the property or in trust for it. Also the gift could be to a corporation to be formed within a "reasonable" time. But it has been held that such a gift was not valid when the time of formation of the corporation was left to the unlimited discretion of the trustees. Likewise, such a gift of land has been held void when the corporation was given five years in which to accept the gift on the ground that the absolute power of alienation might be suspended for longer than the statutory period of two lives in being, since the period was measured not by lives but by years.

These methods of making gifts to charity are still available under the new statute. In fact, it expressly so provides. The

N. W. 659; see also Henrikson v. Swedish Baptist Mission Society, (1925) 163 Minn. 176, 184, 203 N. W. 778.

For a discussion of whether such so-called conditions are properly conditions subsequent, see Fraser, Future Interests in Property in Minnesota, (1919) 3 MINNESOTA LAW REVIEW 320, 331.

Cases where the gift was on trust for the corporation include: Atwater v. Russell, (1892) 49 Minn. 57, 51 N. W. 629; Lane v. Eaton, (1897) 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Kahle v. Evangelical Lutheran Joint Synod, (1900) 81 Minn. 7, 83 N. W. 460; Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 139 N. W. 806.


Bemis v. Northwestern Trust Co., (1912) 117 Minn. 409, 135 N. W. 1124. The court distinguished Watkins v. Bigelow, (1904) 93 Minn. 210, 100 N. W. 1104 on the ground that in the latter case the will required the corporation to be formed during two specified lives in being. Query whether the other two cases cited in note 14 also can be distinguished. As to the statutory and common law rules against perpetuities applicable to trusts in Minnesota, see Fraser, The Rules Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation, (1925) 9 MINNESOTA LAW REVIEW 314.


Minn. Laws 1927, ch. 180, sec. 4; Mason's 1927 Minn. Stat., sec. 8090-4. Nothing in this act contained shall in any manner impair, limit, or abridge the operation and efficacy of the whole or any part of any existing statute authorizing the creation of corporations for charitable purposes or permitting municipal corporations to act as Trustee for any public or charitable purpose under any existing statute.

No doubt a gift to a municipal corporation for one of the purposes authorized could be sustained now under either statute. It recently has been so held in Michigan under similar statutes. Greenman v. Phillips, (1928) 241 Mich. 464, 217 N. W. 1.

It is often a matter of some difficulty to determine which of several possible legal devices is best adapted to carry out the intention of the donor of a gift to charity. One phase of this problem is discussed ably in Simonton, Methods of Making Gifts of Land for Charitable or Public Purposes, (1927) 33 W. Va. L. Quart. 317.
new statute merely broadens the field for the expression of charitable impulses. There is, however, the possibility that gifts to corporations for charitable purposes which have been construed as absolute gifts or gifts upon condition now will be given the more natural construction of gifts on trust for charitable purposes, and therefore will be subject to the remedial devices provided by the statute with all of their advantages.

That seems to have been the experience in Wisconsin. See Maxey v. City of Oshkosh, (1910) 144 Wis. 238, 128 N. W. 899, 31 L. R. A. (N.S.) 787, particularly the concurring opinion of Marshall, J., 144 Wis. 238, 277. In fact, at common law, a trust often is found rather than a condition subsequent even when the word "condition" is used, if from the whole instrument that construction carries out the intention of the settlor. That is illustrated by a recent Vermont case involving a gift to a corporation for charitable purposes. Middlebury College v. Central Power Corporation, (1928) 101 Vt. 325, 340, 143 Atl. 384, 390. Cf. City of Providence v. Payne, (1926) 47 R. I. 444, 134 Atl. 276, involving a testamentary gift to a municipal corporation for charitable purposes.

But the New York cases seem still to treat a gift to a charitable corporation for some, Matter of Arrowsmith, (1914) 162 App. Div. 623, 147 N. Y. S. 1016, aff'd (1915) 213 N. Y. 704, 108 N. E. 1089, or all, Sherman v. Richmond Hose Co., (1921) 230 N. Y. 462, 130 N. E. 613, of the purposes for which it was created, as a gift not on trust. See Chaplin, Suspension of the Power of Alienation, 3d ed., sect. 522. But even so, in the latter case the court held that such gifts come under the operation of the New York charities statutes. The court said, p. 472-473:

"These acts . . . did more than make applicable to this state the doctrine of charitable uses. They authorized the court itself to apply the cy pres rule not only where a trust existed but where property had been devised or bequeathed to a corporation authorized to take and hold it for charitable purposes." Cf. Matter of Potts, (1923) 205 App. Div. 147, 199 N. Y. S. 880, aff'd (1923) 236 N. Y. 658, 142 N. E. 323; Matter of Juilliard, (1924) 238 N. Y. 499, 506, 114 N. E. 772, both cited in another connection in note 101.

Of course the New York cases do not mean that a corporation, at least one which is not a strictly charitable corporation, cannot be trustee of a charitable trust. A recent example of a charitable trust with a corporate trustee is found in Matter of Frasch, (1927) 245 N. Y. 174, 156 N. E. 656. If a trust is clearly intended, it could be administered as a trust even though the named trustee is a charitable corporation. If the corporation is incapable of acting as trustee, the court could administer the trust. See the remarks of Gray, J., in Matter of Griffin, (1901) 167 N. Y. 71, 81-82, 60 N. E. 284; see also Jones v. Habersham, (1883) 107 U. S. 174, 189, 2 Sup. Ct. 336, 27 L. Ed. 401.

A recent case supporting the writer's contention that a gift to a charitable corporation should be construed and administered as a charitable trust if under ordinary rules of construction a trust is intended is Estate of Prickett, (1929) 128 Or. 591, 275 Pac. 605 (devise and bequest of residue to Portland Community Chest, a charitable corporation, to "be expended by said charitable corporation in such manner as it may deem advisable for the relief of young people in the city of Portland who are and who may become in need of charitable assistance," held valid as a charitable trust.)
In discussing the Minnesota statute\(^9\) and comparing it with the common law of charitable trusts, it will be convenient to consider specific problems.

**PURPOSES OF CHARITABLE TRUSTS**

The title of the Minnesota statute provides for the creation and administration of "charitable trusts." The text, however,

\(^9\)For convenient reference, the entire text of the Minnesota statute follows. Minn. Laws 1927, ch. 180; Mason's 1927 Minn. Stat., sec. 8090-1 to 8090-4 inclusive.

An act providing for the creation and administration of charitable trusts.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Trusts created.—Express trusts of real or personal property, or both, may be created to receive by grant, devise, gift, or bequest, and to take charge of, invest and administer in accordance with the terms of the trust, upon and for any charitable, benevolent, educational, religious or other public use or trust.

Section 2. Not to be invalid for uncertainty.—No such Trust shall be invalid because of indefiniteness or uncertainty of the object of such trust or of the beneficiaries thereof designated in the instrument creating the same nor by reason of the same contravening any Statute or rule against perpetuities, but no such Trust shall be construed so as to prevent or limit the free alienation of the title to any of the trust estate by the Trustee in the administration of said Trust, except as may be permitted under existing or subsequent Statutes.

Section 3. Liberal construction.—Such Trust shall be liberally construed by the Courts so that the intentions of the Donor thereof shall be carried out whenever possible, and no such Trust shall fail solely because the Donor has imperfectly outlined the purpose and object of such charity or the method of administration. Whenever it shall appear to the District Court of the proper county that the purpose and object of such charity is imperfectly expressed, or the method of administration is incomplete or imperfect, or that the circumstances have so changed since the execution of the instrument creating the Trust as to render impracticable, inexpedient, or impossible a literal compliance with the terms of such instrument, such Court may upon the application and with the consent of the Trustee, and upon such notice as said Court may direct, make an order directing that such Trust shall be administered or expended in such manner as in the judgment of said Court will, as nearly as can be accomplished the general purposes of the instrument and the object and intention of the Donor without regard to, and free from any, specific restriction, limitation or direction contained therein, provided, however, that no such order shall be made without the consent of the Donor of said Trust if he is then living and mentally competent. The attorney general shall represent the beneficiaries in all cases arising under this act, and it shall be his duty to enforce such trusts by proper proceedings in the courts.

Section 4. Application.—Nothing in this act contained shall in any manner impair, limit, or abridge the operation and efficacy of the whole or any part of any existing Statute authorizing the creation of corporations for charitable purposes or permitting municipal corporations to act as Trustee for any public or charitable purpose under any existing Statute. Nothing in this Act shall apply to any gift, bequest, devise, or trust, made, created, or arising by or under the provisions of the will of any person whose decease occurred before this Act takes effect.
CHARITABLE TRUSTS

authorizes trusts "for any charitable, benevolent, educational, religious or other public use or trust." Meaning can be attached to those words only by reference to the common law cases. The New York cases construing the similar New York statute frequently resort to the common law cases in determining whether a particular purpose is charitable. Although often attempted, an accurate and all-embracing definition of charity in the legal sense is difficult if not impossible. Probably the best known American definition is that by Mr. Justice Gray in a leading Massachusetts case, Jackson v. Phillips:

"A charity in the 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 minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government."

The enumeration of specific charitable objects in the preamble of the statute of charitable uses of 43 Elizabeth has had great influence, but has not been regarded as exclusive. The New York court of appeals recently has put it this way:

"Not every charitable, educational or benevolent use is enumerated in the statute 43 Elizabeth (c.4) commonly called the statute of charitable uses. . . . Conceptions of public charity, benevolence

20The words there used are "religious, educational, charitable or benevolent uses." Real Property Law (Cahill's Consol. Laws of New York, 1923, ch. 51) sec. 113; Personal Property Law (Cahill's Consol. Laws of New York, 1923, ch. 42) sec. 12.


22Various famous definitions are given and commented upon in Zollman, American Law of Charities, ch. IV, at p. 124 et seq. See also Bogert, Trusts 190 et seq.

23(1867) 14 Allen (Mass.) 339, 356.

243 Eliz. ch. 4. (1601). The objects enumerated in the preamble are: "some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out soldiers and other taxes."

25The University of London v. Yarrow, (1857) 1 De. G. & J. 72, 79.

and education change with the passing generations. When the
courts are called upon to give effect to a statute covering trusts
to ‘religious, educational, charitable or benevolent uses’, they con-
strue those words as including at least those uses which prevailing
conceptions bring within the spirit of the statute of Elizabeth.”

A useful classification of charitable objects is made in an im-
portant English case often referred to:27

“‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.”

One typical example28 of each of these divisions will close this part of the discussion. The first three examples are from the New York cases. In Allen v. Stevens,29 the first case after the Tilden Act of 1893, a trust for the maintenance of a home for the aged poor was sustained under that statute. In Butterworth v. Keeler,30 a trust for the establishment of a school for girls was upheld as a charitable trust for the promotion of education, the court construing the will to mean a school not operated for private profit. The latest case31 in the New York court of appeals aptly illustrates a religious trust of the broadest kind in sustaining a trust for the “advancement of Christ’s Kingdom on earth.”


28Many examples of what are and what are not charitable purposes may be found in the standard textbooks. 3 Pomeroy, Equity Jurisprudence, 4th ed., sec. 1021-1024; 2 Perry, Trusts and Trustees, 7th ed., sec. 698-706; Bogert, Trusts 204-225; Zollman, Charities, ch. V-IX; Tyssen, Charitable Bequests, 2d ed., ch. VI-X; Tudor, Charities, 5th ed., ch. I.

For a good discussion of a problem not touched in the text, viz., when the purpose is against public policy, see (1917) 31 Harv. L. Rev. 289.

29(1899) 161 N. Y. 122, 55 N. E. 568.

30(1916) 219 N. Y. 446, 114 N. E. 803. As to whether an educational charitable trust must be for the benefit of the poor alone, see a recent discussion by Professor Bogert in (1930) 24 Ill. L. Rev. 687; see also (1930) 39 Yale L. J. 437.

31Matter of Durbrow, (1927) 245 N. Y. 469, 157 N. E. 747. In this connection, it may be noted that it has been held in New York that a trust for the saying of masses is a valid charitable trust. Matter of Morris, (1919) 227 N. Y. 141, 124 N. E. 724. Trusts of this nature have caused much difficulty in other jurisdictions. See Bogert, Trusts 208-211; Zollman, American Law of Charities 177-180.
The fourth catch-all class is typified by a trust for promoting the permanent preservation of lands of beauty or historic interest.

**Indefiniteness of Beneficiaries and Object**

The Minnesota statute provides:

"No such trust shall be invalid because of indefiniteness or uncertainty of the object of such trust or of the beneficiaries thereof designated in the instrument creating the same."

So far as the indefiniteness of beneficiaries is concerned, the statute states the common law rule. One of the principal differences between a private trust and a charitable trust is that the latter may have indefinite beneficiaries. The illustrations already given of valid charitable trusts show that. In fact, it is said usually that the beneficiaries must be indefinite for the charitable trust to be valid. There is, however, much difficulty in determining how small the class to be benefited by the trust may be. Two Massachusetts cases will indicate the nature of the problem. In *Kent v. Dunham*, a trust "for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of . . . [the] trustees need such aid" was held not to be supportable as a charitable trust. The court said that there was no general public object sufficient to justify an accumulation of funds until there should be a destitute descendant, the mere possible advantage which the public might obtain by the protection of descendants of the testator from beggary and thus becoming a public charge not being enough. In a later case, the court held to be valid as charitable a trust "for the benefit of the widows and orphan children that may be left by the future ministers" of a...
certain church, even though admittedly the class to be benefited was quite small. Referring to the previous case, the court said:

"We infer . . . that one reason of the decision is that the class was not sufficiently large and indefinite to make the gift of common and public benefit."

No doubt some such limitation will be made in the construction of the Minnesota statute. There is some indication of that in the construction of the New York statutes by the New York court of appeals. In Matter of MacDowell, a trust to maintain a home for poor gentlewomen, preference to be given to certain relatives and friends and their lineal descendants, was held to be a valid charitable trust in spite of the preference clause. But the court said that if the benefit had been only for those persons and their lineal descendants, it would not be a charitable trust.

Now as to the matter of the indefiniteness of the object of the trust, there is much conflict of opinion in the common law cases. It sometimes is said that although the beneficiaries may be indefinite, the purpose or object must be definite. To this writer, that statement means that the beneficiaries may be indefinite but not too indefinite. The object or purpose of the trust refers to the possible beneficiaries of the trust. In view, however, of this usage, it is significant that the Minnesota statute mentions both the object and the beneficiaries.

This problem has two aspects which often are confused. The first is easy to state. The trust must be limited to charitable purposes, i.e., the trust will not be sustainable as a charitable trust if under a proper construction of the trust instrument the property may be used for purposes not charitable in the legal sense. The leading case is the famous case of Morice v. The

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41Discussions and collections of cases on this matter are available in the standard text books. 3 Pomeroy, Equity Jurisprudence, 4th ed., sec. 1025; Bogert, Trusts 200-204; Zollman, American Law of Charities, ch. IX, particularly sec. 356-362; 2 Perry, Trusts and Trustees, 7th ed., sec. 713, 713a, 713b.
42Valuable discussions in the legal periodicals include: (1924) 8 MINNESOTA LAW REVIEW 353; (1923) 8 Corn. L. Quart. 179; (1913) 61 U. of Pa. L. Rev. 507; (1912) 12 Col. L. Rev. 356; (1926) 12 Iowa L. Rev. 66; (1927) 22 Ill. L. Rev. 454; (1924) 22 Mich. L. Rev. 387; (1925) 73 U. of Pa. L. Rev. 322; (1929) 38 Yale L. J. 1144.
43Bogert, Trusts 200.
44A good statement of this rule is to be found in a recent case. Morgan v. National Trust Bank, (1928) 331 Ill. 182, 187, 162 N. E. 880.
There a bequest to the Bishop of Durham on trust to dispose of the property “to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of” was held by Lord Eldon not to be supportable as a charitable trust because the trustee was not confined to acts of charity in the legal sense, and therefore the court could not enforce the trust. The trust was held to fail and a resulting trust to the next of kin was decreed. This rule undoubtedly will be followed in Minnesota. The statute makes valid charitable trusts, not trusts for indefinite purposes not charitable. The New York statutes have been so construed.

The application of this rule often leads to difficult problems of construction on the question of whether or not the particular words of a particular trust instrument limit the trust to strictly charitable purposes. There has been much litigation on that matter with conflict of judicial opinion on the meaning of certain words. Two New York cases will serve as illustrations. In Matter of Shattuck, a trust to pay the income “to religious, educational or eleemosynary institutions as in his [the trustee’s] judgment shall seem advisable” was held not to be valid as a charitable trust because of the possible devotion of the income to a private use, the court emphasizing the fact that the trustee was not limited expressly to educational institutions which are public or charitable. A more reasonable construction was adopted in Matter of Frasch, where the court limited the Shattuck Case to its facts. The Frasch Case involved a trust for the establishment

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44(1805) 10 Ves. Jr. 521, affirming the decree of the Master of the Rolls in (1804) 9 Ves. Jr. 399.

45Whether the trust could have been sustained on principles of the law of private trusts and powers is a question not within the scope of this paper. Dean Ames contended that it should have been so sustained. (1892) 5 Harv. L. Rev. 389; Ames, Lectures on Legal History 285. Professor Gray contended that it could not, (1902) 15 Harv. L. Rev. 509; Gray, Rule Against Perpetuities, 3rd ed., Appendix H. Those contentions are summarized and the state of the authorities given in Scott, Control of Property by the Dead, (1917) 65 U. of Pa. L. Rev. 527, 538.

46Matter of Shattuck, (1908) 193 N. Y. 446, 86 N. E. 455. This case is discussed infra, p. 597.


48(1908) 193 N. Y. 446, 86 N. E. 455.

49(1927) 245 N. Y. 174, 156 N. E. 656.
of a fund for chemical research and for the payment of the income, under the advice and supervision of the American Chemical Society, to one or more incorporated institutions in the United States upon their agreement to use the money in research in the field of agricultural chemistry with the object of obtaining results of practical benefit to the agricultural development of the United States. The contention was made that the trustees might, under the terms of the will, choose a business corporation which might use the funds to advance its own business interests. The court, however, construed the will as not authorizing any institution selected to use the money for any purpose not public.

In this connection, the wording of the Minnesota statute should settle one question which has caused much difficulty in the common law cases, viz., the construction of the word "benevolent." The courts have reached different results in determining whether that word, when used alone or with other words, extends the trust object to include purposes not strictly charitable.\(^{50}\) The Minnesota statute, however, seems to treat the words "charitable" and "benevolent" as synonymous\(^{51}\) for it authorizes trusts "for any charitable, benevolent, educational, religious or other public use or trust." Similarly, the New York statutes\(^{52}\) refer to "religious, educational,

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\(^{50}\) In addition to the citations in note 47, see (1928) 1 So. Calif. L. Rev. 180; (1919) 29 Yale L. J. 242.

\(^{51}\) Cf. Estate of Hinckley, (1881) 58 Calif. 457, 511, where, in sustaining as a charitable trust a trust for "human beneficence and charity," the court was aided by the provisions of a section of the Civil Code regulating bequests or devises to "any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses" (p. 484). The court said (p. 511), "By that section charitable and benevolent corporations are placed upon the same footing: and it is to be supposed the 'trusts to charitable uses,' mentioned immediately afterwards, include the same purposes as those for which the corporations named may be organized."

But cf. Hays v. Harris, (1913) 73 W. Va. 17, 80 S. E. 827. The statute there involved (73 W.Va. 17, 21) made valid conveyances to trustees for the use of certain educational institutions, or certain named societies, or an orphan asylum, children's home, "or other benevolent association or purpose." The court said (73 W.Va. 17, 22-23) that the word benevolent "is more comprehensive and wider in its scope of meaning than the word charitable, and may include what are not recognized as charities in the old English law." That statement is quoted in a recent case, Gallaher v. Gallaher, (1929) 106 W. Va. 588, 591, 146 S. E. 623, 624, and is discussed in (1928) 34 W. Va. L. Quart. 386. But it is to be noted that the statute involved did not couple the word "benevolent" with the word "charitable" as the Minnesota statute does. Furthermore, the title of the Minnesota statute uses only the word "charitable."

See also Smith v. Pond, (1920) 92 N. J. Eq. 211, 111 Atl. 154, where a statute entitled an "Act concerning corporations . . . organized for religious educational, charitable or benevolent purposes" empowered
charitable or benevolent uses.” Under those statutes, a trust for the application of money “to such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my said executors may select” has been sustained as a charitable trust.\textsuperscript{53}

In conclusion, as to the first aspect of the problem of indefiniteness of purpose, it may be added that expensive litigation on some of these questions may be avoided by the elimination of words having no technical legal significance in the drafting of wills or other instruments designed to create charitable trusts.

The second aspect of this problem may be stated in this way. Assuming that the trust is restricted to charitable purposes in the legal sense, how broad may those purposes be? There is a good deal of difference of opinion in the cases.\textsuperscript{54} The most extreme case, of course, is a trust for charity without the designation of any particular charity. One view on a trust of that character is represented by a Kentucky case. In \textit{Spalding v. St. Joseph's Industrial School},\textsuperscript{55} a devise and bequest to the Archbishop of Baltimore “for charitable objects, to be expended for said objects in this diocese of Louisville, according to his discretion” was held to be invalid for uncertainty. The court said that since the will selected no class out of the wide range of charitable objects, the court could not tell whether the object selected by the archbishop would be approved of by the testator. The other view that such a trust is valid has been taken in a long line of Massachusetts cases.\textsuperscript{56} That view is supported ably by the court in a recent Washington case.\textsuperscript{57}

\begin{footnotesize}
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\item\textsuperscript{52} Real Property Law (Cahill's Consol. Laws of New York, 1923, ch. 51) sec. 113; Personal Property Law (Cahill's Consol. Laws of New York, 1923, ch. 42) sec. 12.
\item\textsuperscript{53} Matter of Cunningham, (1912) 206 N. Y. 601, 100 N. E. 437.
\item\textsuperscript{54}See the citations in note 41, particularly (1923) 8 Corn. L. Quart. 179. See also Scott, Cases on Trusts. 339-341, n.; notes in 14 L. R. A. (N.S.) 49 and 37 L. R. A. (N.S.) 993. In England, indefiniteness of object seems to have no effect on the validity of a charitable trust. Tudor, Charities. 5th ed., p. 129.
\item\textsuperscript{55} (1899) 107 Ky. 382, 410, 54 S. W. 200, 21 Ky. Law Rep. 1107.
\item\textsuperscript{56} Gill v. Attorney General. (1908) 197 Mass. 232, 236, 83 N. E.
\end{itemize}
\end{footnotesize}
"We are unable to see why a bequest to charity generally may not be in law rendered certain and legally effectual by the exercise of an appointing power vested in some one by the testator, as well as a bequest to charity, in terms limited to some named class of persons or objects, may be rendered certain and legally effectual by the exercise of an appointing power vested in some one appointed by the testator."

There should be no doubt that this view is embodied in the Minnesota statute by reason of the broad language above quoted concerning indefiniteness of the object or beneficiaries. The New York statute is not so broad as the Minnesota statute, since it mentions only indefiniteness of beneficiaries. Yet a remarkable development has taken place toward what may be called the liberal view of sustaining trusts for little defined charitable purposes. It is a far cry from Matter of Shattuck to Matter of Durbrow. The Shattuck Case, as shown above, held the indefinite trust there involved invalid on the theory that the trust was not limited to strictly charitable purposes. However, the court made this statement:

"The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguished

676. A recent case shows that the person having the power of appointment to charity need not be the trustee. Reilly v. McGowan, (Mass. 1929) 166 N. E. 766.

57In re Planck's Estate, (1928) 150 Wash. 301, 308, 272 Pac. 972, 974. In that case the will provided as to the residue that it was to go "to charity and to charitable purposes" and authorized the executrix to dispose of it "to worthy charities and to such charitable purposes as she may believe to be fit and proper recipients thereof." That part of the will was held to be valid.

Likewise, in a recent Ohio case involving a so-called community trust giving a committee wide discretion in the selection of charitable objects in the city of Cleveland, the court sustained the trust on the ground that the trustee could select the charitable objects under the supervision of the court. Linney v. Cleveland Trust Co., (1928) 30 Ohio App. 345, 165 N. E. 101.

The same view has been adopted in Wisconsin by statute. See In re Monaghan's Will, (Wis. 1929) 226 N. W. 306.

This is strengthened by the provision in section 3 of the Minnesota statute that "no such trust shall fail solely because the Donor has imperfectly outlined the purpose and object of such charity or the method of administration."

59"No gift . . . to . . . charitable . . . uses . . . shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries . . . ." Real Property Law (Cahill's Consol. Laws of New York, 1923, ch. 51) sec. 113; Personal Property Law (Cahill's Consol. Laws of New York, 1923, ch. 42) sec. 12.

60(1908) 193 N. Y. 446, 451, 86 N. E. 455.


62P. 597.
from its beneficiaries as to be impracticable, if not impossible for the courts to administer."

In the Durbrow Case, the will directed that the residuary estate be distributed by the executor where he "in his . . . judgment shall consider it will be most effective in the advancement of Christ’s Kingdom on earth." The court construed this to include not only doctrinal propagation but also education of the young and care of the sick under church auspices. Thus broadly construed, the trust was sustained. After pointing out that the Shattuck Case had been confined strictly to its facts by later and "better considered" cases, the court said: "Broadness of scope and generality of purpose do not in themselves breed impossibility of execution."

Suppose that in a charitable gift of the general character just considered no trustee or other person to designate the particular purposes to be carried out is named or if named never exercises the power. What is to be done? That presents one of the questions connected with our next problem.

**The Cy Pres Power**

The Minnesota statute provides:

"Whenever it shall appear to the district court of the proper county that the purpose and object of such charity is imperfectly expressed, or the method of administration is incomplete or imperfect, or that the circumstances have so changed since the execution of the instrument creating the trust as to render impracticable, inexpedient, or impossible a literal compliance with the terms of such instrument, such court may upon the application and with the

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62Although there was no formal gift in trust, the court implied one. (1927) 245 N. Y. 469, 477, 157 N. E. 747.

But the same court has refused to spell out a trust when the gift is to an unincorporated charitable association. Ely v. Megie, (1916) 219 N. Y. 112, 143, 113 N. E. 800; cf. Fralick v. Lyford, (1905) 107 App. Div. 543, 95 N. Y. S. 433, aff’d (1907) 187 N. Y. 524, 79 N. E. 1105; see the criticism by Professor Scott in (1920) 33 Harv. L. Rev. 688, 695. There is authority contra. American Bible Society v. American Tract Society, (1901) 62 N. J. Eq. 219, 50 Atl. 67; see (1927) 37 Yale L. J. 258-259. Cf. Bates v. Schillinger, (Me. 1929) 145 Atl. 395, where a bequest to an unincorporated church society to be used for the society was sustained as a charitable trust. The court said that failure to name a trustee would not cause the gift to fail; the court would administer the trust or appoint a trustee to do so.

64Citing Butterworth v. Keeler, (1916) 219 N. Y. 446, 114 N. E. 803; Matter of Frasch, (1927) 245 N. Y. 174, 156 N. E. 656. In the former case, the court said (219 N.Y. 446, 450) that the Shattuck Case "lays down no principle of large and general application. It defines the meaning of a particular will, and later cases have held that it must be limited to its special facts."
consent of the trustee, and upon such notice as said court may
direct, make an order directing that such trust shall be administered
or expended in such manner as in the judgment of said court
will [carry out], as nearly as can be accomplished the general
purposes of the instrument and the object and intention of the
donor without regard to, and free from any, specific restriction,
limitation or direction contained therein, provided, however, that
no such order shall be made without the consent of the donor
of said trust if he is then living and mentally competent. The
attorney general shall represent the beneficiaries in all cases arising
under this act, and it shall be his duty to enforce such trusts by
proper proceedings in the courts."

This provision states, with some modifications, presently to be
noticed, the judicial cy pres power which has been exercised by
courts of equity for centuries. A similar provision in the New
York statutes has been referred to as establishing the cy pres
doctrine.  

Cy pres is a law French expression meaning as near as.
The doctrine of cy pres involves the notion of approximating the
intention of the donor when his exact intention is not to be
carried out for some reason.

In England there are two kinds of cy pres: the prerogative
cy pres exercised by the Crown as parens patriae under the sign
manual, and the judicial cy pres. The prerogative power has been
exercised at times in an arbitrary manner. The example usually
given is the notorious case of Da Costa v. De Pas. In that case
a testamentary gift for the advancement of the Jewish faith was
held to be incapable of taking effect as directed because contrary
to the established religion and to be at the disposal of the Crown.

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65 Some such expression must be read into the statute to fill out
the incomplete verb form beginning with the word "will.
66 Matter of MacDowell, (1916) 217 N. Y. 454, 466, 112 N. E. 177,
L.R.A. 1916E 1246, Ann. Cas. 1917E 853; Sherman v. Richmond Hose
67 Other cases in the New York court of appeals involving the cy pres
doctrine include: Bowman v. Domestic and Foreign Missionary So-
ciety, (1905) 182 N. Y. 494, 75 N. E. 535; Trustees of Sailors' Snug
69 For general treatments of the doctrine and its use in this country
see Zollman, American Law of Charities, ch. 3; 2 Perry, Trusts and
Trustees, 7th ed., sec. 717-730; Bogert, Trusts, 225-231; 3 Pomeroy,
Equity Jurisprudence, 4th ed., sec. 1027, 1029; (1923) 7 MINNESOTA
LAW REVIEW 174; (1924) 8 MINNESOTA LAW REVIEW 353; (1920) 33
Harv. L. Rev. 598; (1925) 23 Mich. L. Rev. 430. As to the English
cases, see Tyssen, Charitable Bequests, 2d ed., ch. XVII; Tudor,
Charities, 5th ed., ch. IV.
60(1754) 1 Amb. 228.
The king by his sign manual directed the money to be used toward supporting a preacher to instruct children in a foundling hospital in the Christian religion.

It is said that the American courts do not have the prerogative cy pres power but that it is vested in the legislatures subject to constitutional limitations. It becomes, therefore, important at times to determine where the judicial cy pres power leaves off and the prerogative power begins. This is not always easy to do. The question has been raised in cases where the gift is to charity generally without the designation of any particular charitable purpose. The leading English case is Moggridge v. Thackwell. The bequest was to one Vaston "desiring him to dispose of the same in such charities as he shall think fit," with certain recommendations by the testatrix. Vaston died before the testatrix. Lord Eldon, after showing the confusion in the cases, held with some hesitation that it was proper to dispose of the property under a scheme approved by the master rather than by the king. Lord Eldon said that, "the general principle thought most reconcilable to the case is, that, where there is a general indefinite purpose, not fixing itself upon any object, ... the disposition is in the King by Sign Manual; but where the execution is to be by a trustee with general or some objects pointed out, there the court will take the administration of the trust."

In a later case, in which a bequest in trust for charitable purposes was held to be the subject of a scheme before the master, Lord Eldon said:

"Where the bequest is to trustees for charitable purposes, the disposition must be in that mode, but where the object is charity, without a trust interposed, it must be by Sign Manual. That is the distinction which I adopted in the case of Moggridge v. Thackwell."

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70 See Mormon Church v. United States, (1890) 136 U. S. 1, 56. 10 Sup. Ct. 792, 34 L. Ed. 481; In re Lott's Will, (1927) 193 Wis. 409, 214 N. W. 391; but see Zollman, American Law of Charities 116-118.

71 In addition to the citations in note 68 supra, see (1923) 8 Corn. L. Quart. 179; (1928) 13 Corn. L. Quart. 310; (1930) 78 U. of Pa. L. Rev. 573. For discussions of the English cases, see Tyssen, Charitable Bequests, 2d ed., ch. XVIII; Tudor, Charities, 5th ed., ch. V.


372 Both cases were quoted from and followed in In re Pyne, [1903] 1 Ch. 83, holding that a scheme should be directed by the court where the trust was "for such charitable purposes... as may be hereafter set forth in any codicil... to this my will." No codicil ever was executed.
Both cases were cited and relied upon in a Massachusetts case, *Minot v. Baker.* The will gave the residue to Healy "to be disposed of by him for such charitable purposes as he shall think proper." Healy died without disposing of most of the residuary estate for charitable purposes. In an able opinion by Mr. Justice Holmes, the court found, as a matter of construction, that the limitation to charity was not conditional upon the appointment being made by Healy and directed that the money be applied to charitable purposes according to a scheme under the direction of the court. The court regarded the adoption of Lord Eldon's view in this country as necessary to prevent a failure of justice. Some American courts, however, have not been willing to go this far. The Minnesota statute is broad enough to warrant the following of the Massachusetts doctrine. It specifically provides for the situation when the "method of administration is incomplete or imperfect." In passing, it may be said that there would seem to be no need, in a case like those just discussed, for a cy pres application when the trustee is alive and willing to exercise the power given to him under the terms of the trust. It has been so held in New York.

Consideration of when and how the judicial cy pres should be exercised may be prefaced by an example of the operation of that doctrine. Probably the leading American case is *Jackson v. Phillips.* Testator by the fourth article of his will made a bequest to trustees to be expended for propaganda that would "create a public sentiment that will put an end to negro slavery in this country;" by the fifth article he made another bequest to the same trustees "for the benefit of fugitive slaves who may escape from the slave holding states of this infamous Union from time to time." The executor brought a bill in equity for instructions, making the trustees and heirs at law of the testator parties. While the case was under advisement, the thirteenth amendment to the constitution of the United States was adopted abolishing slavery. In an opinion of much learning by Mr.

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77If the contrary finding were made, the trust would fail. *Rogers v. Rea,* (1918) 98 Ohio St. 315, 120 N. E. 828; see *Gambell v. Trippe,* (1892) 75 Md. 252, 23 Atl. 461, 15 L. R. A. 235, 32 Am. St. Rep. 388.


79*Rothschild v. Schiff,* (1907) 188 N. Y. 327, 80 N. E. 1030.

80*(1867) 14 Allen (Mass.) 539.
Justice Gray, the court held that the bequests created valid charitable trusts; that they were not so restricted in objects or time as to be terminated by the abolition of slavery in the United States, and there was hence no resulting trust; and that the funds should be applied cy pres under a scheme to be framed by a master and confirmed by the court, with liberty to the attorney general and the trustees to submit schemes for his approval. The case then was referred to a master in chancery. The report of the master, made after notice to and hearing of the trustees and the attorney general, was adopted by the court with some slight changes. The trustees were directed to apply the unexpended balance of the bequest in the fifth article to the "use of necessitous persons of African descent in the city of Boston and its vicinity, preference being given to such as have escaped from slavery" and to pay what remained of the fund bequeathed by the fourth article to the treasurer of the New England Branch of the Freedmen's Union Commission, "to be employed and expended by them in promoting the education, support and interests generally of the freedmen (late slaves)" in the states in which slavery had been abolished. Here we have the use of the doctrine of cy pres at its best.

At this point, certain limitations upon the application of the judicial cy pres doctrine will be discussed briefly. For one thing, the power is exercised properly only when a general charitable intention, not restricted to the particular purpose named, can be found.⁸⁰ In the case just stated, such a general intention was found in the will. Another Massachusetts case will illustrate the converse situation. In Bowden v. Brown,⁸¹ a testamentary gift of the residuary estate to the town of Marblehead "toward the erection of a building that should be for the sick and poor, those without homes" was not accepted by the town. Hence the charity could not be administered in the way stated in the will. The court found that there was no general charitable purpose and held that the gift failed and could not be administered cy pres but the residuary estate went to the next of kin.

The Minnesota statute does not expressly make a general charitable intention a condition precedent to the exercise of the

⁸⁰In addition to the citations in note 68 supra, see (1922) 35 Harv. L. Rev. 477; (1923) 37 Harv. L. Rev. 263; (1924) 33 Yale L. J. 335; (1922) 21 Mich. L. Rev. 109.

⁸¹A recent English case stating the problem in terms of conditions subsequent and precedent is In re Monk, [1927] 2 Ch. 197, 205.

statutory cy pres power. It does, however, say that the district court "may" make an order of administration in such manner as will carry out as nearly as possible the "general purposes" of the trust instrument. This seems to assume that the trust instrument shows "general purposes." Also, the use of the word "may" indicates some discretion in the court. In view of this language and of the common law background, it is believed that the limitation of the cy pres power under discussion will be enforced in Minnesota. That that view is to be taken under the similar New York statute is at least hinted in a case in the New York court of appeals.82

Another limitation not so readily disposed of has to do with the question whether the judicial cy pres power may be exercised when the carrying out of the directions of the donor is anything short of impossible.83 It is said that physical impossibility is not necessary if there be an impracticability amounting to substantial impossibility.84 But that mere expediency is a sufficient basis for a cy pres application generally has been denied.85 A few cases, however, by the language used86 or by the results reached87 indicate that nothing is said to the contrary.


83The cases are collected and discussed in (1920) 33 Harv. L. Rev. 598, 601; (1926) 35 Yale L. J. 643. See also Zollman, American Law of Charities, sec. 156.

For an able discussion of the power of the legislature in this field, see Scott, Education and the Dead Hand, (1920) 34 Harv. L. Rev. 1. As to the legislative power over a charitable corporation under reserved power to amend the corporate charter, see (1927) 40 Harv. L. Rev. 891; Matter of Mount Sinai Hospital, (1928) 250 N. Y. 103, 164 N. E. 871.

84Lackland v. Walker, (1899) 151 Mo. 210, 266, 52 S. W. 414. ("The impossibility . . . must be more than a mere nervous apprehension, and should be based on or arise from reasons which will warrant a judicial conclusion that the condition disclosed is permanent in its nature. On the other hand, it would be impracticable to grant relief only where there is a showing of an absolute or physical impossibility, in the literal sense of the term. An impracticability which evidences a substantial impossibility will suffice.") See also Norris v. Loomis, (1913) 215 Mass. 344, 102 N. E. 419.


86Christian v. Catholic Church, (1920) 91 N. J. Eq. 374, 377, 110 Atl. 579.

87In re Queen’s School, [1910] 1 Ch. 796; cf. Bruce v. Maxwell, (1924) 311 Ill. 479, 143 N. E. 82.
cata a somewhat broader view of the scope of the judicial power. The Minnesota statute uses the expression "impracticable, inexpedient, or impossible." The word "inexpedient" may mean a broader power in the court than generally is conceded in the common law cases. On the other hand, the position of the word between the words "impracticable" and "impossible" may show that it is to be regarded as practically synonymous with the other two words. At any rate, the common law cases will be useful in determining the scope of the cy pres power under the Minnesota statute. Here again the fact that the statute says the court "may" order a change shows the delicacy required in reconciling as far as possible the interest of the creator of a trust and the public interest.

The procedure on a cy pres application remains to be considered. In the first place, it should be borne in mind that the cy pres power is in the court, not in the trustee. At common law, the trustee of a charitable trust may not make a cy pres application of his own motion. Likewise, the cy pres provisions of the Minnesota statute refer to applications to the court. Of course this does not mean that the trust instrument could not give expressly to the trustee power to depart from the directions of the settlor. That is often a desirable method of giving flexibility to the trust and of making less necessary applications to the court.

The Minnesota statute says that the court may "upon the application and with the consent of the trustee" make the cy pres order. Under the similar provision in the New York statute, the New York court of appeals has said that this method of invoking the power of the court is not exclusive but that the court may act on information by the state or even on its own motion when the proper parties are before it. However that may be, it is clear that both at common law and under the Minnesota statute the attorney general may and should be made.

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89See (1928) 41 Harv. L. Rev. 514, 518, n. 31, discussing in particular the flexibility of the modern community trust. The operation of the community trust in New York is discussed in Hinrichs, Charitable Trusts in New York, (1929) 1 N. Y. Law School Rev. 133, 142.
a party to the proceeding. The statute provides that "the attorney general shall represent the beneficiaries in all cases arising under this act." Under the New York statute, it has been held to be proper to make the attorney general a party defendant in cy pres proceedings.92

In this connection, it may be said by way of a slight digression that in suits to enforce the carrying out of a charitable trust the attorney general is a proper party plaintiff and usually is the only person who has sufficient interest to bring the suit since he represents the public.93 In the exceptional situations where other parties may be able to maintain the suit, the attorney general should be made a party defendant.94 These common law rules are adopted by the Minnesota statute by this provision:

"The attorney general shall represent the beneficiaries in all cases arising under this act, and it shall be his duty to enforce such trusts by proper proceedings in the courts."

The Minnesota statute requires the consent of the donor "if he is then living and mentally competent" to a cy pres order. Under this provision the donor should be made a party to cy pres proceedings. At common law, neither the donor nor, if he be dead, his heirs are necessary parties. The statute does not extend this right of the donor to his heirs.

PERPETUITIES AND RESTRAINTS ON ALIENATION

The Minnesota statute provides:

"No such trust shall be invalid . . . by reason of the same contravening any statute or rule against perpetuities, but no such trust shall be construed so as to prevent or limit the free alienation

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93 Dickey v. Volkert, (Mo. 1928) 11 S. W. (2d) 278. This case contains an able and exhaustive consideration of the English and American authorities. See also (1928) 12 MINNESOTA LAW REVIEW 653.
94 Gray, Rule Against Perpetuities, 3rd ed., p. 533, n. 6; but see Zollman, American Law of Charities, sec. 615. An example of a situation where others than the attorney general may sue as plaintiffs to enforce the charitable trust is found in Trustees Andover Seminary v. Visitors, (1925) 253 Mass. 256, 301-302, 148 N. E. 900. There the visitors of the corporate trustee brought the suit making the attorney general a party.
95 See Women's Christian Association v. Kansas City, (1898) 147 Mo. 103, 126-127, 48 S. W. 960. This case holds that the donor's heirs are not necessary parties but also puts the donor in the same category.

As to the rights and powers of the donor and his heirs, see Bogert, Trusts 247 and 449; Scott, Education and the Dead Hand, (1920) 34 Harv. L. Rev. 1, 11-12; (1928) 37 Yale L. J. 533.
of the title to any of the trust estate by the trustee in the administration of said trust, except as may be permitted under existing or subsequent statutes."

Frequently it is said that at common law the rule against perpetuities does not apply to charitable trusts. This is true in the sense that there is no time limit upon the duration of charitable trusts, i.e., a charitable trust may last forever.67 Because of indefiniteness of the beneficiaries, there may be no one to alien the beneficial interest because no one has such an interest.68 But the rule does apply to the extent that the gift in trust for charity is void if it may not vest within the period of the rule.69 This is subject to a rather anomalous exception where the gift follows a previous gift in trust for charity.70

The extent to which the Minnesota statute follows or departs from these common law rules is open to some doubt. In New York, without any provision in the charitable trusts statutes dealing with this matter, the courts appear to have adopted the com-

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69 Contrast the rules applicable to non-charitable trusts with no designated beneficiaries. See Smith, Honorary Trusts and the Rule Against Perpetuities, (1930) 30 Col. L. Rev. 60.
70 As to the related question of accumulations in charitable trusts, see (1928) 41 Harv. L. Rev. 514; (1924) 9 Corn. L. Quart. 496; (1930) 16 Va. L. Rev. 370; Bogert, Trusts, sec. 66; 2 Perry, Trusts and Trustees, 7th ed., sec. 738; Gray, Rule Against Perpetuities, 3rd ed., sec. 679; Tudor, Charities, 5th ed., 75; in New York, see Chaplin, Suspension of the Power of Alienation, 3rd ed., sec. 521.
73 It is said, however, that if an intention can be found to make an immediate gift to charity it will be sustained although its application may be postponed indefinitely. Tudor, Charities, 5th ed., 76; see (1920) 33 Harv. L. Rev. 986-987; but see Bogert, Trusts 234. This rule is said to depend upon the doctrine of cy pres. Gray, Rule Against Perpetuities, 3rd ed., sec. 607-608. That the English cases rest on that doctrine and that the rule itself is clear has been questioned. Tyssen, Charitable Bequests, 2d ed., 154-161, restating the position taken by one of the editors in Sanger, Remoteness and Charitable Gifts, (1919) 29 Yale L. J. 46.
75 This exception is stated and criticized in Gray, Rule Against Perpetuities, 3rd ed., sec. 597-603g inc.
mon law rules above stated to the statutes against perpetuities. A similar adaptation to the Minnesota rules as to perpetuities would be desirable. Clearly under the statute there is no time limit upon the duration of charitable trusts. Not so clear is the question of whether or not there is any limit upon the time in which the gift in trust for charity must take effect. If the provision that no such trust shall be invalid “by reason of the same contravening any statute or rule against perpetuities” be read literally, there would seem to be no such limit. But it is possible to interpret the statute as being merely declaratory of the rule so often stated in the common law cases and therefore subject to the limitations of that rule as indicated above. Furthermore, some light may be shed by the following proviso of the statute that no such trust “shall be construed so as to prevent or limit the free alienation of the title to any of the trust estate by the trustee in the administration of said trust, except as may be permitted under existing or subsequent statutes.” This may mean only that the trustee must have that power once the administration of the trust has commenced, but it could be construed to refer to the time of the creation of the trust and to require that the trustee acquire that power within the statutory period from that time.

This proviso warrants some further comment. Does it apply to personal property as well as real property? The Minnesota statutes against suspension of the absolute power of alienation for more than two lives in being are in the chapter on estates in real property. It might be assumed, then, that this proviso


It was settled soon after the enactment of the Tilden Act that there is no limit on the duration of charitable trusts. Allen v. Stevens, (1899) 161 N. Y. 122, 55 N. E. 568. For a discussion of that case, see Thurston, Charitable Gifts and the Minnesota Statute of Uses and Trusts, (1917) 1 MINNESOTA LAW REVIEW 201, 209. See also Bogert, Trusts, sec. 65.

102 As to the rules applicable to private trusts in Minnesota, see Fraser, The Rules Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation in Minnesota, (1925) 9 MINNESOTA LAW REVIEW 314.

103 Mason's 1927 Minn. Stat., sec. 8044, 8045.
refers only to land. On the other hand, it could be argued that the same period has been adopted for personal property. The proviso is framed in terms of construction. If there is nothing in the trust instrument about alienation or what there is is ambiguous, then this proviso should apply. But suppose that the settlor expressly directed the trustee never to alien the trust property. Then there hardly would be any question of construction. What effect would this proviso have upon such a direction? Conceivably the trust might be held to fail. It could be contended, however, that the purpose of this proviso is to make such a direction void and to free the trustee from any such restriction. Even a valid restraint might be removed by the court under the cy pres power under conditions before discussed warranting the exercise of that power. In the common law cases, a court of equity sometimes has authorized an alienation even in the face of express directions of the settlor to the contrary. That a similar power in the courts exists in New York under the cy pres provisions of the New York charities statute has been indicated.

Statute Not Retroactive

The Minnesota statute ends with this statement:

"Nothing in this Act shall apply to any gift, bequest, devise, or trust, made, created, or arising by or under the provisions of the will of any person whose decease occurred before this Act takes effect."

This provision, curiously enough, seems to restrict itself to gifts

104 Perhaps the question is not of great practical importance as to personal property because a settlor is not likely to restrict the alienation of personal property which usually is in the form of investments. Compare the remarks of the court in Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 415, 139 N. W. 805. It is conceivable, however, that a settlor might direct that certain personal property such as valuable pictures should not be sold.

A similar question exists as to the proviso of Mason's 1927 Minn. Stat., sec. 8090, subdivision 6. Compare the treatment of accumulations of income from personal property, a matter not expressly covered by subdivision 6, in Congdon v. Congdon, (1924) 160 Minn. 343, 370, 200 N. W. 76.

105 See Lackland v. Walker, (1899) 151 Mo. 210, 248, 52 S. W. 414.


107 Lackland v. Walker, (1899) 151 Mo. 210, 52 S. W. 414; Scott, Cases on Trusts 355, n.


109 Italics ours.
by will. That the rest of the statute is not restricted to testamentary dispositions is shown by the provision requiring consent by the donor to a cy pres application if he is then living and mentally competent. However, any attempt to apply the statute retroactively to inter vivos transactions would meet with constitutional objections. In a New York case, it was said that the Tilden Act could not affect the property rights of the heirs at law which vested previously by the failure of the trust.

**Conclusion**

The statute under discussion has restored to the law of Minnesota one of the legal devices for making gifts to charity. The other devices previously used are still available, but the advantages of the trust in ease of creation and flexibility of administration may cause the older forms largely to be displaced. Charitable trusts under the statute are in most respects as they were at common law and common law precedents will be useful in working out the law in Minnesota. Even more valuable, perhaps, are precedents from states which have had a similar legislative history such as New York, Michigan and Wisconsin. Of those points where the Minnesota statute departs from the common law, the various questions discussed as to the matter of perpetuities and suspension of the power of alienation are the most troublesome. Prudence would suggest the avoidance of those questions by express provisions in trust instruments at least until things are clarified by judicial construction or amendment of the statute.

Time may show the desirability of more provision for administrative supervision over the administration of charities similar to that made in England. In the meantime, the statute is a distinct advance in the Minnesota law of trusts.

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