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THE JURISDICTION OF THE COURT OF CHANCERY TO ENFORCE CHARITABLE USES.

(CONCLUDED.)

The law of charities considered in reference to personal property.—Some peculiarities in reference to charitable uses in personal property have been reserved for a separate discussion. If chattels are devoted to charity by gifts *inter vivos*, no reason is perceived why the law of charitable trusts should not be fully applicable. A difficult question arises when a gift is made by testament.

I. To obtain a clear view of this question, an examination should be had in respect to the disposition of the effects of intestates. There can be no doubt that the bishop or ordinary from an early date had the control of personal assets where the owner died intestate, for the purpose of applying them to pious uses. What was the precise origin of his power is not entirely clear. Some very respectable authorities regard it as a branch of the royal prerogative—the right to take such goods as had no owner (*bona vacantia*); others of great weight, among whom is Selden, discard this idea. However this may be, it is believed, that, as far as administrators were concerned, the question became unimportant

after the statute of 31 Edward III., c. 11. This act expressly requires administrators, as deputies of the ordinary, after satisfying debts, to dispend the personal property for the soul of the deceased.[1] It is said in Theloall's Digest (written A. D. 1579) that the object of this statute was to enable administrators to sue in the king's courts. They had previously been appointed by the bishop, but could not bring actions. Their duties were now assimilated to those of executors.[2] Their conduct became from this time, at least, subject to the supervision of the superior courts, and their duty to dispend for the soul was even recognised in the common law tribunals. The language of the statute appears to refer to an already existing practice. As between two creditors, it was deemed a breach of duty to pay a debt before it was due, rather than one already due. An injury was done "to the soul of the deceased," and they might be compelled to repay the money from their own estate.[3]

These views are confirmed by the fact that administration must have been committed in such a manner that the administrator could dispend for the soul of the deceased; otherwise he was not, in view of the courts of law, "administrator," but only a servant of the ordinary. The form of such a limited appointment is given in the case cited in the note, and is perhaps the earliest extant.[4] He would now be termed "a collector." The proposition in this case undoubtedly means that an appointee with such qualified powers was in the same position in which an administrator would have been before the statute of Edward III., and bound to account only to the ordinary. Where the statute was not complied with, the ordinary himself was administrator and was responsible in the

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[1] Yet Lord Eldon, in Moggridge *vs.* Thackwell, mentions it as a singular fact, that the ordinary, of *his own accord*, had determined to apply a portion of the personal estate of every intestate to charity. This statute had evidently escaped his notice. Blackstone, in alluding to the statute 31 Ed. III., does not mention this clause. 2d Book of Commentaries, p. 496.

[2] Theloall cites 19 E. III., 20 and 24. His Digest is bound with the "Register of Writs."

[3] Year Book, 9 Ed. IV., 13.

[4] Year Book, 16 Ed. IV., 1, case 4.

superior courts as such.[1] The duty of the administrator to dispend for the soul was similar to that of an executor who held a residue not disposed of by the will. This was termed a "general trust."[2] A gift in general terms to an executor to "dispend for the soul" was inoperative because he was previously and by force of his office under an obligation to expend the money in that manner. This was so held at common law.[3] A residuary gift to him expressly to his own use was valid, but if the general words "to pay the debts and to expend for the soul" were added, the legacy was not beneficial but a general trust. The court remarked that all works of charity were within the intent.[4]

There was no reason why the Court of Chancery should not enforce these general trusts. An administrator's duty could not be enforced in the ecclesiastical Court, for by the grant of administration the ecclesiastical authority was gone.[5] It was well settled at an early period that an executor in respect to debts held the personal property as a trustee, though no specific direction to pay debts was given to him. He was compelled by the process of a Court of Chancery to pay them.[6] The ground of this rule was that the obligation bound *his conscience*, as he had no right to receive the assets, except as he took them with the just charges to which they were liable. No reason is apparent why the same view should not be taken of the obligation to "expend for the soul." Both duties are named in the statute of Edward III.; both are coupled together in the wills of that day; both are termed, in the early authorities, general trusts. The striking fact that the payment of debts and the appropriation of property to charitable purposes are everywhere spoken of together, is well explained in the statute of Henry V., previously cited. The fulfilment of each of these duties was equally advantageous to the soul of the testator. The result is that, in the absence of specific

1 Year Book, 11 H. IV., 73; stat. 13 Ed. I. c. 19.

2 Cary's Reports, p. 28.

3 Year Book, 21 Ed. IV., 6, case 15.

4 Hancks *vs.* Alborough, (C. B.), Sir F. Moore R. 754.

5 2 Bla. Comm. 515; Williams' Ex. 1169; 1 Spence Eq. Jur. 579.

6 1 Spence's Equitable Jurisdiction of Court of Chancery, pp. 191 and 192.

directions by the decedent, the duties of personal representatives were the same in respect to debts and charities; and that they could have equally been enforced in Chancery except from the technical difficulty, in the case of charity, of naming a plaintiff. The duty of the administrator rested upon the statute; that of the executor who held a residue, reposed upon general principles of law.

It may be urged in opposition to this view that no authorities can be found to sustain it. If this were admitted, it would not be decisive. We can in these remote periods only look for fragments and shreds of proof. There were no Chancery reports, and as Mr. Spence justly remarks, equity jurisprudence could not possibly have been so poor and jejune as would be inferred simply from the reported cases. There is however some proof on the subject. When the statutes of Elizabeth were passed, the ordinary was expressly excepted and retained the same power as before. Still he could be charged in respect to charitable uses by the commissioners until an administrator was appointed, and must be summoned in such a case to attend the hearing.[1] From what source was this power derived? Manifestly not from the statute. It is believed to have originated in this manner. The ordinary's own duty to pay debts was enforced by statute, and where no administrator was selected he was certainly liable to that extent in the common law courts. He therefore held like an executor under a general trust which was ultimately extended to the residue held for the soul of the deceased. It having been shown previously that the commissioners exercised no new jurisdiction, the inference is that the Court of Chancery could have enforced the application of intestates' estates to charitable purposes before the statutes of Elizabeth.

II. We may now regard the case of executors *and the subject of legacies*. It will only be necessary to discuss the question when a legacy was given by the testator. The duty of an executor in respect to a residue not disposed of in the will has been sufficiently noticed. The trust of the executor in such a case, it is clear, did not depend upon any statute.

[1] Duke on Charitable Uses, 185 and 152.

It is not to be disputed that the ordinary had jurisdiction over legacies of personal property. The principles of the Roman law were largely adopted and amplified in the ecclesiastical courts. Great favor was shown to legacies given to pious uses. It is not our purpose to state the results attained in these tribunals. The authorities named in the note amply and learnedly illustrate them.[1] It is only designed to show that no "plain, adequate and complete remedy" could be had in these courts, and that, therefore, Chancery, in accordance with the ordinary rule which guided its action, was induced to entertain jurisdiction.

The power which the ordinary possessed to carry his decrees into effect was that of excommunication. Stringent as this remedy was, it was indirect, while that of the Court of Chancery was direct, and the recusant could be confined in prison until he obeyed the decree. Thus, in Owen's Reports, it is stated that the Master of the Rolls said "that when executors had goods of a testator to dispose of to pious uses, their power is subject to the controlment of the ordinary, and he may make distribution of them to pious uses. It was said at the bar that the ordinary might make the executor's account before him, and might punish them according to the law of the church if they spoil the goods, but *cannot compel them to employ them to pious uses.*"[2]

The following additional reasons for the belief that the Court of Chancery actually exercised jurisdiction, are submitted.

1. The Court must have been appealed to for the purpose of discovery. When the statute for the distribution of intestates' estates was passed, it was argued to the Lord Keeper that the distribution could only be enforced in the ecclesiastical court. He summarily disposed of the objection with the contemptuous remark that the probate court had but "a lame jurisdiction."[3] This "lameness" was equally apparent in the case of legacies. Some authorities take the ground that the jurisdiction of Chancery in

[1] Swinburne on Wills; Mr. Noyes' argument in Beekman *vs.* Bonsor; Mr. Bradford's argument in Rose *vs.* Rose. See the concluding note to this article.

[2] P. 33, 40 Eliz.

[3] Matthews *vs.* Newby, 1 Vernon 133 (1682).

the case of legacies first attached for the purpose of discovering assets, and that upon usual principles the court retained jurisdiction with the object of enforcing the legacy.[1] So in an old case, it is given by counsel as a reason why a monk could be executor, that he holds for the use of another, and may be compelled to give testimony *in Chancery*.[2] It is well known that a monk was regarded as civilly dead, and could not be party to an action in the ordinary tribunals. This statement was made a hundred years before the statutes of Elizabeth, and was not disputed. It is not conceivable that it should have been made if the jurisdiction had never been exercised.

It is entirely clear that bills of discovery in respect to legacies were entertained before the year 1600. Thus in West's Symboleography, written in 1594, there is given at full length the form of a bill in Chancery to compel executors to pay legacies. It is addressed to Sir Nicholas Bacon, and alleges as a reason why Chancery should entertain jurisdiction, that the plaintiffs are not acquainted with the assets which the executors had collected, and that there was no adequate remedy in the ecclesiastical court. If this form was taken, as is altogether probable, from a bill actually used, it must have been filed before 1579, as Sir Nicholas Bacon died in that year.[3]

2. It is altogether probable that application was made to the Court of Chancery for the purpose of saving expense and delay. The regular course of proceeding in the ecclesiastical court was to appeal from the ordinary's decision to the Pope at Rome. These appeals were taken away in the reign of Henry VIII. No such appeal could be taken from the king's courts. Suitors for this reason in the time of Henry VII. and Henry VIII. had recourse to the Star Chamber for the recovery of legacies. Says an author of repute, "Another sort of usual complaints in point of justice was for matters testamentary, of which there are very many

[1] Keily *vs.* Monck, 3 Ridgway P. Cas. 243; Hurst *vs.* Beach, 5 Maddock 360; Fielding *vs.* Bound, 1 Vernon 230.

[2] Year Book, 12 H. VII., 28.

[3] West's Symboleography or Precedents, part 2, § 161 (Ed. 1601). Forms of other bills against executors will be found in this book.

examples. King Henry VII. heard a cause betwixt Haughton, a saddler of London, and Barker, a goldsmith, and decreed to the plaintiff two hundred marks, according to the intention of the will of one Haughton, deceased. In Henry VIII.'s time it was also usual, and the court gave order to have the testator's goods put in safety to be inventoried as in Sessions case."[1] This interference, according to the writer, was due to the frequency and expensiveness of appeals from the ordinary's decisions. This authority is of great importance, as showing that the ecclesiastical court had no such *exclusive* jurisdiction as to prevent other courts from taking cognisance of testamentary matters. If the Star Chamber was induced to interfere on account of a defect of justice and to prevent a right of appeal to a foreign government, still more would the Court of Chancery, whose office it was to give remedies of a more adequate and complete character than could be obtained elsewhere, relieve the suitor from the burden of frequent and ruinous appeals. Says Mr. Spence, "the jurisdiction of Chancery over executors and administrators appears to have gradually grown up from its being found that there was no other tribunal capable of doing effectual justice to all parties interested."[2]

3. A more important reason why Chancery should enforce legacies, was on account of the trust reposed in the executor by the testator. This trust might be twofold. The chattels might be given to the executor in trust to perform some act, or there might be a legacy directly to some object without any gift to the executor.

First. If the gift was to the executor, what was called a *special* trust was created as distinguished from the general trust where no gift was made.[3] As such it could only be recognised in Chancery, for the Spiritual Court could never enforce the execution of a trust.[4] Cases of this kind are to be found in the early reports. Thus an executor compelled a co-executor to give sureties for the

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[1] 2 Hargrave's Collectanea Juridica; (Treatise on Star Chamber) p. 56.

[2] 1 Spence Eq. Jur. 579, citing cases from the reign of H. VI. and Ed. IV.

[3] Cary's Reports, p. 28.

[4] Farrington *vs.* Knightly, 2 P. Wms. 548.

performance of a trust in a will concerning money.[1] Trust property of a similar kind was followed into the hands of the executor's representatives.[2] So the Court, after entertaining jurisdiction in respect to a legacy, granted an order to show cause why an injunction should not be issued against a party who endeavored to proceed in the ecclesiastical Court.[3] As a general principle of equity jurisprudence, it was well settled, that whenever the will of the deceased was in danger of being frustrated, the Court would make a decree not only against the executor, but against all who took with notice of the trust. Lord Keeper Egerton declared the legacy in such a case to be both an express and implied trust, and compared it to that of the assignment of a chattel in trust, where the assignees were then compelled by the common course of the Court to execute the trust.[4]

These principles were applied to charities. Money could be given for such uses as well as land. Men were accustomed from an early period to give money to their friends to deliver it to their administrators to be expended for the good of their souls. Such money was held in trust, so that the administrator could proceed in Chancery to recover it.[5] Sometimes money was given by one person to another to be disposed of after the donor's death for the good of his soul. The donee became a "special executor," and the money could not be recovered of him by the executors of the will.[6] Clearly he was a trustee over whom the ordinary had no jurisdiction.

The calendars in Chancery show that charitable legacies to executors were trusts and were established in that Court. The cases of this kind will be noticed hereafter.

Second. The still more important question remains as to the enforcement of legacies given to legatees other than the executor.

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[1] Cotton *vs.* Cawston, Cary R. 113, 21 and 22 Elizabeth.

[2] Wray *vs.* Sapcote, Cary R. 123, 21 and 22 Elizabeth.

[3] Parre *vs.* Tiplady, Cary R. 104, 21 and 22 Elizabeth.

[4] Sydnam *vs.* Courtney, in Chancery, Moore R. 567, 41 and 42 Elizabeth.

[5] Year Book, 4 E. IV., p. 37.

[6] Year Book, 8 E. IV., 5, per Needham, J.

Mr. Spence is of the opinion that from the time of Charles I. and probably earlier, jurisdiction was entertained in all cases of legacies. The authorities already cited place the jurisdiction before the year 1600. To these, the following may be added. Suits in the ecclesiastical Court for legacies were stayed by injunction in the fourth and thirty-second years of the reign of Elizabeth.[1] So where a legacy was given to a female if she married with the consent of her friends and she married without their assent, it was decreed to her.[2]

Similar results were reached in the case of charities. Many decisions of this kind are collected by Mr. Binney in the note to *Vidal* vs. *Girard*. In some instances, the charities were of the nature of *foundations*. In one case, the object of the suit was to recover a legacy of £400 bequeathed for the purpose of producing a yearly fund for the relief of the poor.[3] In another, the object was to recover a legacy which was directed to be *invested at interest* for the poor.[4] These suits were brought by one inhabitant of the parish in behalf of himself and others, against the executors. In some instances, where the money was given for the perpetual benefit of the poor, the bill prayed that the Court would direct the purchase of land for that purpose.[5] One of these suits to recover bequests of a charitable nature was instituted as early as the fifteenth year of Queen Elizabeth.[6] Charity legacies for the poor were ordered to be paid in preference to others, on account of equity and good conscience.[7]

A remarkable case from the Year Books illustrates the desire of the early Chancellors to enforce charitable dispositions. An executor was wasting the assets, and his co-executor commenced a

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1 Cary *vs.* Mildmay, 32 Eliz.; Denton *vs.* Biggot, 4 Eliz., cited in the Introduction to Praxis Almæ Curiæ Cancellariæ, p. 40, 41.

2 Yelverton, contra, Newport, 36 Eliz.

3 Fytche et al. *vs.* Robinson, 1 Calendars in Chancery, 134, case 44.

4 Carlton *vs.* Blythe, 1 Calendars, 159, case 10; Mayor of Chester *vs.* Brooke, 1 Cal. 216, case 42.

5 Sayer *vs.* Lambe, 1 Cal. 399, case 26.

6 Fisher *vs.* Phillipps, 3 Cal. 293, case 23.

7 1 Spence Eq. Jurisd. 387 (an. 1583).

suit in Chancery against him. The Chancellor thought the case a proper one for equitable relief. "Let no one," he said, "depart from the Court of Chancery without a remedy." (Nullus recedat a cancellaria sine remedio.) The counsel for the defendant (Fineux) insisted if that maxim were true, there would be no need of a confessor—and that this particular case belonged to the confessor. The Chancellor replied that the law of the land should agree with the law of God, and that such an executor who wasted the goods would be "damned in hell."[1] He then rehearsed the will, saying that the executor was directed to dispose of the goods for the weal of the testator's soul, and that if he did not do it, there was a good remedy in Chancery. He however expressed his willingness to hear further argument. The case does not appear to have been moved again. The fact that it was thought worthy of being reported in the Year Books, where so few Chancery decisions in comparison are found, shows that the case was regarded as one of importance. It is remarkable that Fineux, who, when Chief Justice, was notoriously no friend to the Court of Chancery, did not raise the objection that the case was exclusively cognisable in the Ecclesiastical Court, if such were the fact. Instead of that, he contents himself with a feeble protest that the matter was not judicially cognisable at all.[2]

This is an early application of the venerable maxim that Courts of Chancery entertain jurisdiction where "a plain, adequate and complete remedy" cannot be had in other Courts. It was made a hundred years before the statutes of Elizabeth. Cases must have continually arisen where this principle needed to be invoked. The machinery of the Ecclesiastical Courts was wholly inadequate to provide the necessary relief. We have seen that it could not even enforce the payment of simple contract debts.[3] Much less would

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1 This style of argument was not infrequent with the Chancellors. So great a man as Lord Ellesmere indulged in it a century later. He remarked in one case that a usurer and broker might reckon together when they met in hell. Praxis Almæ Curiæ Cancellariæ, Introduction, p. 47.

2 Year Book, 4 H. VII. fol. 5.

3 1 Spence Eq. Jurisd. 580, section 2.

it have been able to provide for "foundations" in cases of charities; to require investments to be made; to decree the performance of the varied trusts which might be established, or to remove any obstacles which stood in the way. An illustration may be found in the case of *Attorney-General* vs. *La Roche*.[1] Money was directed by a testator to be laid out in the purchase of land to the use of A. for life, remainder to his first and other sons in tail, remainder to a charity. A. having died, his widow feigned pregnancy. The Master of the Rolls made an order in the nature of a writ *de ventre inspiciendo*, by means of which the fraud was discovered, and the charity preserved. Had such a case arisen before the statutes of Elizabeth, how persuasive would have been the Lord Chancellor's maxim enunciated in the reign of Henry VII., "that no one shall depart from the Chancery without a remedy."

The only remaining inquiry is whether the proceeding by information existed. There appears to be no reason against it. Legacies of a charitable nature were enforced on behalf of unincorporated bodies against the executors. Wherever they assumed the character of trusts, they could be established by the *Court* as such. "An executor is a trustee for the legatee with respect to his legacy, and this is the only reason why he is liable in equity."[2] The king could use the process of information in trusts of personal as well as of real estate. It is said by Lord Hale, that when a trust of chattels is forfeited to the king, it may be executed by information in the Exchequer *or in Chancery*.[3] Wherever *the heir would be held a trustee for a charity in cases of real estate, the executor would be deemed to sustain the same character in the case of personal property*. The position of the executor differed from that of the heir in this respect; that where no specific directions were given, he held under a "general trust" to dispend for the soul. The jurisdiction over this latter class of cases ceased after statutes had directed the residuum to be distributed among

[1] 2 P. Wms. 591; Mosely R. 191.

[2] Ward *vs.* Jekyl, 2 P. Wms. 575.

[3] 1 Hale's Pleas of the Crown, 248. This passage serves to explain Porter's Case, before alluded to. The king had his choice of remedies.

the next of kin. There are instances of the enforcement of such general trusts by Chancery in behalf of charities as late as the reign of James I.[1] The Court of Chancery, in exercising jurisdiction over executors, adopted the rules prevailing in the Ecclesiastical Courts.[2]

It is not necessary to show that the present jurisdiction of Chancery was then fully developed. It is enough if the germ existed from which these doctrines are properly derived. No subject of Chancery jurisdiction was then followed to its legitimate consequences. From what we possess we may infer the residue as an artist "makes out a statue from an existing torso, or an anatomist constructs a perfect skeleton from the fossil remains of a part."

On the whole, the opinion of Mr. Hargrave must be acceded to, that the right to *prove* a will in the Ecclesiastical Court is exclusive; jurisdiction to enforce its provisions is concurrent with Chancery.[3]

The imperfect survey taken of this subject may lead to the conclusion that a more exhaustive research into the early authorities than was possible in the preparation of these articles, would show that no class of men have been more truly charitable than those rude men, as we are apt to term them, who lived in the middle ages. It has recently been observed by competent authority, that "the objects of ancient bounty comprised every institution felt to be necessary or beneficial, or capable of relieving the public burdens. They included establishments for instruction, spiritual and secular; endowments to make and maintain causeways, roads and bridges; for assisting the people in the charge of fifteenths and other taxes; for providing arms for the general defence, hospitals for the cure of disease, and for contributing to the support of the poor in every form."[4]

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[1] Tothill, 150–1. 6 Jac. 1.

[2] Keily *vs.* Monck, 3 Ridgway P. C. 243; 1 Spence Eq. Jurisd. 582.

[3] Hargrave's Law Tracts, 473.

[4] Report of the Committee of the Society for the Amendment of the Law, 11th London Law Magazine, 305.

[The later authorities have not been specially noticed, because, from the character of these articles, it was mainly desirable to state the results arrived at by historic investigation. For similar reasons, local statutes have not been alluded to. Attention is invited to the very learned and elaborate argument of Hon. Alexander W. Bradford, former Surrogate of the city and county of New York, in the case of *Rose* vs. *Rose*, Supreme Court of New York. Mr. Bradford's great acquaintance with the civil law gives his researches into the jurisdiction of the Ecclesiastical Courts, especial value. See also the argument of Edward O. Parry, Esq., in the case of the heirs of Stephen Girard against the City of Philadelphia, recently tried in the Court of Common Pleas, Schuylkill County, Pennsylvania. Mr. Parry claimed that where the devise or gift to a charity was *in terms* inalienable, so as to take away from the Chancellor the power to order a sale in his discretion, it came within the policy of the law as to perpetuities, and was void.

The following are important legal decisions: *Sonley* vs. *Clockmakers' Co.*, 1 Brown Ch. Cas. 81; *Incorporated Society* vs. *Richards*, 1 Drury & Warren 301; *Will of Sarah Zane*, Brightly's Rep. 346; *Tappan* vs. *Deblois*, 45 Maine 122; *Baptist Association* vs. *Hart*, 4 Wheat. 1; *Dutch Church* vs. *Mott*, 7 Paige 80; *Williams* vs. *Williams*, 4 Selden 524; *Fontain* vs. *Ravenel*, 17 How. U. S. 369; *Owens* vs. *Methodist Episcopal Church*, 4 Kernan 380; *Beekman* vs. *Bonsor*, 23 N. Y. (9 Smith) 298. The argument of Mr. Noyes in this case, previously mentioned, will be found in the Appendix to the volume, p. 575, et seq.

The investigation of this subject leads to the conclusion, that the obscurity of the law should be removed by legislation. There is a disposition in England to place the subject on more satisfactory grounds. There is an evident reaction against the policy of the Mortmain Acts, which tended to discourage charitable donations. A valuable report has recently been made by the Committee of the Society for promoting Amendments of the Law. The following wise suggestions were made by the Committee: 1. That hereafter no land should be acquired by a charity, except so far as was