The Cy-près Doctrine: A Canadian Approach

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The stimulating contribution to this Review on the cy-près doctrine of charitable trusts by Mr. L. A. Sheridan[1] must have prompted in the minds of Canadian readers the question: How far, if at all, do these theories drawn from English cases apply to the Canadian law of charitable trusts?

It will be recalled that Mr. Sheridan's thesis is that "the cy-près doctrine is in a state of confusion" and that "recent decisions have added to the uncertainty" caused by earlier precedents.[2] His argument runs in this manner. The courts are confusing themselves in considering "the cy-près doctrine" because in fact there are several. One of these doctrines requires the element of general charitable intention on the part of the donor, but this element is not, or at least should not, be required in another application of the doctrine, that is, where the gift can be construed as having been given "out and out". In this latter case the donor's intentions are irrelevant and the presumption of general charitable intention which the courts may make is mere humbug, serving no useful purpose.

Attention seems to have been drawn to this idea of "out and out" giving for charitable purposes by recent English decisions concerning the disposition of charitable funds which consisted either wholly or partially of moneys raised by street collections, concerts, and the like.[3] If such funds cannot be used for the original planned purpose, should they be applied cy-près or, in theory,

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[1] (1954), 32 Can. Bar Rev. 599

[2] *Ibid.*, p. 599.

[3] *Viz.*, *Re Hillier's Trusts*, [1954] 1 W.L.R. 700 (C.A.); *Re British School of Egyptian Archaeology*, [1954] 1 W.L.R. 546 (Harman J.); *Re North Devon and West Somerset Relief Fund Trusts*, [1953] 1 W.L R. 1260 (Wynn-Parry J.).

returned to the donors?[4] The latter course is usually impracticable and the cy-près solution seems to have been uniformly adopted. Although Mr. Sheridan commends this common-sense solution, he would prefer to base it upon a seemingly novel principle, namely, that where a person donates money "out and out" that fact alone warrants cy-près application and the question of general charitable intention does not, and need not, arise.

It is not the purpose of this article to challenge the correctness of Mr. Sheridan's deductions from his obviously thorough examination of English precedents, but rather to ascertain how far Canadian precedents would support them. It is respectfully submitted at the outset that the Canadian decisions considered later indicate that Mr. Sheridan's theories, whatever their intrinsic merits, would not be found acceptable by a Canadian court. Whether or not their acceptance would be desirable raises very different issues. This article is concerned with the narrower question as to what the law is rather than what it ought to be.

Before turning to the leading Canadian cases on the cy-près doctrine, it is useful to emphasize equity's traditional rôle in this field, which was, and is, the carrying out of a donor's charitable intention. So strongly embedded is this attitude that the courts will even supply charitable objects when the donor himself has failed so to do, provided of course that he has shown a general charitable intention. The general principle involved was enunciated by Lord Eldon in the classic cases of *Moggridge* v. *Thackwell*[5] and *Mills* v. *Farmer*.[6] It was more recently restated by Lord Sterndale M.R. in *Re Willis*:[7]

> . . . in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court . . .

In the *Willis* case, the testatrix had wished her friend to choose the charities to benefit within three months after the death of the testatrix's sister, who was given a life interest in the fund. Unfortunately both the friend and sister predeceased the testatrix, but the court, construing a general charitable intention, ordered the fund to be applied cy-près under a scheme.

The Canadian decision in *Re Leslie*[8] is on all fours with the

[4] Or in the last resort go to the Crown as *bona vacantia.*
[5] (1803), 7 Ves. 36; 32 E.R. 15; aff'd (1807), 13 Ves. 416; 33 E.R. 350.
[6] (1815), 1 Mer. 55; 19 Ves. 483; 34 E.R 595.
[7] [1921] 1 Ch. 44, at p. 47 (C.A.).
[8] [1940] 3 D.L.R. 790 (Ont., Greene J.)

Willis case. The testator gave his widow the income of funds for life, the residue to go on her death to charities he would designate in a codicil to his will. No codicil of this description was found. It was held that the will itself showed a general charitable intention and the court would supply a mode for effecting it even though the amount was uncertain at the date of the testator's death.

The leading Canadian cases on the cy-près doctrine, which mercifully are fewer in number than their English counterparts, can be assembled into the categories used by Mr. Sheridan: (i) the impossibility cases; (2) the surplus cases: and (3) the specified institution cases.

Impossibility

Mr. Sheridan breaks his treatment of this category into two subdivisions, namely, cases of initial and supervening impossibility. However, since he concedes that in both classes cy-près application will be made on the same basis, it is proposed to consider as a whole the relevant Canadian decisions under this heading. Before I do so the reader is reminded of Mr. Sheridan's two basic propositions:

> The first proposition that can safely be made is that if the donor has a general charitable intent his property will be applied cy-près.[9]

General charitable intent in this context arises

> ...where, as a matter of construction, the donor had a broader object in view than that indicated by his detailed specifications, where the detailed specifications are merely an indication as to how he would prefer his broader object to be carried out if possible....[10]

The second proposition is expressed in these words:

> The second [application of the cy-près doctrine] is independent of the intention of the donor, except that he must intend to part with all his interest in the property. Then, no matter how detailed his instructions may have been, if they are impossible to carry out the property should be applied cy-près. It should be noticed, however, that the more detailed the donor's specifications are the less likely it is that he intended to part with all his interest in the property.[11]

It is submitted that the Canadian cases will support only the first proposition, which might be labelled orthodox, and not the second, which is plainly heterodox.

Cases arise where the testator's estimate of his ultimate assets proves mistakenly optimistic, with the result that the value of the property donated for charitable purposes proves inadequate for

[9] *Supra*, footnote 1, at p. 601. [10] *Ibid.*, p. 605.
[11] *Ibid.*

the specific project. For example, in *Re Trenhaile*[12] the houses, which the testatrix bequeathed to provide a home for single and widowed women, had to be partially converted into cash to meet the cost of her support in an asylum before she died. The remaining funds, being inadequate to carry out the scheme of the will, were applied cy-près. Sir John Boyd stated: "The general intention is that of benefit for poor deserving women . . .".[13] This decision was followed in *Re Evans*,[14] where the facts were very similar.

Generally speaking, the courts are unwilling to modify a testator's charitable scheme, but if that scheme proves impracticable, then the courts will act to save a general charitable intention from failure. The Canadian cases emphasize this requirement of general charitable intention.

In *Power* v. *A.G. of Nova Scotia*[15] the testator gave a portion of the income arising from his residuary estate for the introduction of the Jesuit Fathers into Halifax and their support. There appears to have been a certain difference of ecclesiastical opinion since, although for some time the Archbishop refused to sanction the entry of the Jesuits to found a school, when he did at last change his ruling it was found that the Jesuits were no longer willing to take advantage of the offer. The court held that, having regard to the terms of the will, since the original object of the gift was inexpedient and impracticable, the revenue should be applied cy-près for charitable purposes. In the court of first instance, Townsend J., who was later upheld by the Supreme Court of Canada, cited the following *dictum* of Lord Eldon in *Moggridge* v. *Thackwell*:[16]

> That if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity: but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.

It appears, therefore, that the courts are under no difficulty where the gift is testamentary. If a general charitable intention can be construed from the will and its surrounding circumstances, the cy-près doctrine will be applicable, otherwise the property falls into residue or goes as on an intestacy.

But Mr. Sheridan foresees difficulties where the gift is non-testamentary: where in fact there are thousands of individual

[12] (1911), 20 O.W.R. 610. [13] *Ibid.* p. 612.
[14] [1947] 2 W.W.R. 639 (B.C., Wilson J.).
[15] (1904), 35 S.C.R. 182; affirming 35 N. S. Rep. 526.
[16] *Supra*, footnote 5.

anonymous gifts placed in collecting boxes and the like. He feels that, though the court will presume that the donor to a street collection has a general charitable intent, it does not necessarily follow that he has. Therefore, Mr. Sheridan urges that the reason for applying the cy-près doctrine to funds of this kind should rest on the fact that the donor has parted with his money "out and out".[17] On this basis the court can disregard any consideration of general charitable intent. Interesting though this theory may appear, it does not seem to fit the Canadian decisions. These indicate categorically that, unless the court can find a general charitable intention on the part of the donors in any particular case, the cy-près doctrine will not be applied. A second Canadian decision illustrates what might be verbosely called the "no general charitable intent, no cy-près application" rule.

In *Re Y.W.C.A. Extension Fund* the facts were as follows.[18] In 1929 the Regina Y.W.C.A. and its annex were constantly filled to capacity and so a canvass of the citizens of Regina was organized and approximately $18,000 was raised. The contributors each signed a card which stated that the contributions were "for the purpose of building an extension to supply the increased demand for accommodation in order to be of greater service to the young girl". The fund proved insufficient to commence building immediately and by 1934 the existing buildings were once again more than adequate to meet the decreased demand for accommodation. At the same time the association had a deficit of over $7,000 and asked for leave to divert the $18,000 to reduce this deficit, to improve its existing swimming pool and to meet contingent liabilities. MacDonald J., after referring to *dicta* by Kay J. in *Biscoe* v. *Jackson*[19] and by Lord Cottenham in *Cherry* v. *Mott*[20] on the nature of the cy-près doctrine, found himself unable to grant the requested order. The learned judge stated:[21]

> The purpose for which it was subscribed is, as already stated, indicated in the heading to the subscription card, and it seems to me that, as in *Cherry* v. *Mott*, referred to in *Biscoe* v. *Jackson*, *supra*, in this case there is no gift except to do that which it is inexpedient and unnecessary to effect now, and that it is not within the principle of the cases in which the Court executes a general purpose cy près. If, apart from the particular mode indicated, there was any general charitable purpose in the

[17] *Supra*, footnote 1, esp. pp. 603 and 604.

[18] [1934 3 W.W.R. 49 (Sask., MacDonald J.). Note also the decision of the English Court of Appeal in *Univ. of London Medical Sciences Institute Fund* v. *A.-G.*, [1909] 2 Ch. 1.

[19] (1887), 35 Ch. D. 460, at p. 464.

[20] (1836), 1 My. & Cr. 123; 40 E.R. 323.

[21] *Supra*, footnote 18, at p. 52.

> minds of the contributors to the fund, that general purpose, it is clear, was for the enlargement and extension of the accommodation and activities of the Y.W.C.A. Now the purposes for which it is sought to use the fund are not an enlargement or extension of the building or its facilities, but to make up for deficits in its operation; . . .

In other words, the court was satisfied on the evidence (whether rightly or wrongly is irrelevant to the present argument) that each donor to the fund had, by the very fact that he or she had subscribed to a card on which the specific purpose of the appeal was stated, made "it clear that if the main purpose should become impossible, he will want his money back". These were the words of Denning L.J. in *Re Hillier's Trusts*[22] in describing what he called "exceptional cases". He added that "in the absence of some such evidence, the law will, I think, make in every case a presumption in favour of charity".

Halifax School For Blind v. *A. G.*[23] exemplifies the other side of the coin, since the court found a general charitable intent on the part of the donors and therefore applied the fund cy-près. The fund had been instigated by a Toronto woman journalist, and had been subscribed by schoolchildren across Canada. The object of the fund was to build a home for children blinded as a result of the collision of two munition ships in Halifax Harbour during World War I. The fund proved insufficient to build the home and, in fact, earlier reports proved to be exaggerated, since the children actually blinded in the tragic accident numbered only eleven. These had been educated by the Halifax School for the Blind. The court held that from correspondence put in evidence it was clear that, though the immediate incentive to raising the fund was the Halifax disaster, the idea of building a home for blind children revealed a long term motive, that is, a general charitable intention to benefit blind children. The often cited judgment of P. O. Lawrence J. in *Re Welsh Hospital (Netley) Fund*,[24] which Mr. Sheridan criticizes,[25] was referred to with approval and the money applied cy-près in assisting the work of the Halifax School for the Blind.[26]

Surplus

As this heading implies, the surplus cases arise when "there is more money available for the charity than is necessary for it or than can

[22] [1954] 1 W.L.R. 700, at p. 716.
[23] [1935] 2 D.L.R. 347 (N.S., Doull J.).
[24] [1921] 1 Ch. 655.
[25] *Supra*, footnote 1, at pp. 613-614.
[26] See judgment of Doull J. at p. 348.

be used for it".[27] It will be recalled that Mr. Sheridan regrets that, before applying the cy-près doctrine, the English courts now require proof of a general charitable intent on the part of a donor who has given funds which prove to be more than sufficient for the achievement of some specific charitable purpose. He complains that[28]

> . . . in the present century a new tendency, wholly unjustifiable, has begun to appear. Some modern cases have demanded a general charitable intent for all classes of cy-près application.

Thus in cases like *Re Monk*[29] the court required, and found, a general charitable intent, while an earlier decision, *Re King*,[30] which Mr. Sheridan prefers, was not even mentioned. In *Re King* a testatrix left a fund of over £1,000 to provide a stained glass window in a church to perpetuate the memory of her late father. The best possible window could not cost more than £800, so what could be done with the surplus? Romer J. rejected the claim of the heir at law that the surplus should not be applied cy-près because there was no general charitable intent. The learned judge agreed that general charitable intent was lacking, but notwithstanding he considered that, since the initial gift was charitable, the surplus must be applied cy-près.

The most appropriate Canadian case to contrast with *Re King* is *Re Harding*,[31] which, while contrary to *Re King*, is in complete harmony with the recent English decisions requiring a general charitable intent. The testatrix gave a residuary bequest for the completion of the tower of a church and for the installation of a bell in it. She did contemplate a surplus after these objects had been completed, and provided that it should be applied in paying off the church debt as soon as the congregation raised a sum equal to the surplus for the same purpose. At the date of the will the church debt amounted to $6,500, but by the time of the testatrix's death it had been reduced to $1,800 by the receipt of moneys other than in the way contemplated by or known to the testatrix. The surplus over and above that required for reducing half the church debt amounted to approximately $6,300. The court held that, since no general charitable intent could be construed from the will, the surplus must go to the next of kin.

Specified Institution

Mr. Sheridan considers the cases of specified institution under three headings, fictitious, expired and moribund institutions. Before turn-

[27] *Supra*, footnote 1, at p. 608.
[28] *Ibid.*, p. 612.
[29] [1927] 2 Ch. 197 (C.A.).
[30] [1923] 1 Ch 243 (Romer J.)
[31] (1904), 4 O W.R. 316 (Idington J.).

ing to these the reader is asked to consider a fourth category, that is, the contemplated institution cases.

The testator may anticipate the establishment of some institution of a specific character to become the object of his bounty. Provided the institution does in fact materialize within a reasonable time, no problem arises. Otherwise the cy-près doctrine may be invoked, provided always that the court can construe a general charitable intention. Two Canadian decisions, both closely connected with problems arising out of World War I, are in point.

In *Re McNab*[32] a testatrix, who died in 1921, left one sixth of her residuary estate on trust for the first home which might be established for the care of the children of deceased Canadian soldiers. Over two years after her death no such home had been established and her next of kin claimed the fund. It was held that the gift did not fail but that a reference to the master should be made for the settlement of a scheme so that the money might be applied cy-près. Hodgins J.A., delivering the judgment of the court, stated:[33]

> The overriding charitable intention is that the money should be used for the best interests of the specified children; . . . The building or organization of a Home is an event in its nature 'contingent and uncertain', and only indicates the particular and favoured method of the application of the charitable purpose declared by her.

The court cited with approval the general rule from *Jarman on Wills*:[34]

> . . . if a donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects, which happen to fail, from whatever cause, although, in such cases, the particular mode of operation contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality or failure of its immediate objects, be carried into effect.

Two years later, in *Re Deremore*,[35] an Alberta court, faced with similar facts, followed *Re McNab*. As recently as 1948, a Canadian judge, citing *Re McNab*, has stated:[36]

> . . . where there is a general charitable intention it is, I think, quite clear on the authorities that the Court should do all in its power to assist in carrying out the wishes of the testatrix. The cases as to what the Court should do in circumstances of this kind are collected . . . in the judg-

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[32] [1925] 2 D.L.R. 1100 (Ont. C.A.).
[33] *Ibid.*, p. 1105.
[34] (3rd ed., 1861), Vol. 1, p. 223; see now (8th ed., 1951), Vol. 1, p. 258.
[35] [1927] 2 D.L.R. 1093 (Alta., Walsh J.).
[36] Wells J. in *Re Weldon*, [1948] O.W.N. 560, at p. 562.

ment of the late Mr. Justice Hodgins in the Court of Appeal in *Re McNab*.

The most recent decision in this context, *Re Wright*,[37] revealed an extraordinary state of inactivity on the part of the trustees. The facts were as follows. By a will probated in 1912 the testator provided $20,000 towards the erection of a building in which could be provided for members of the public "a higher form of amusement than is at present placed before the people", for example, "Meetings, Lectures, and to provide clean amusement in order to check the lure and bad influence of the streets". He added that, if necessary, the sum he had donated could be supplemented by public subscriptions. In the particular circumstances the charitable gift had to be abated to $18,820. The proceedings were first taken in 1912 and again in 1922,[38] when it was decided that the testator had had a general charitable intent and that the money should be applied cy-près. The trustees were ordered to hold the money until a scheme was submitted and approved by the court. No action was taken by the trustees and, by January 1951, accumulations of interest had increased the trust fund to a total of $80,803. In the present proceedings the Halifax Y.M.C.A. and the City of Halifax both applied for the fund to further building schemes which had been proposed but not started at the time their schemes were first placed before the court. After considering all the evidence available, the four members of the court held that the money should be paid to the Halifax Y.M.C.A., since its building and programme of activities would more closely promote the testator's wishes.

It is now proposed to consider the three categories of specified institution cases considered by Mr. Sheridan.

1. *Fictitious institution.* Mr. Sheridan describes the situation as follows:[39]

> Sometimes testators leave property to an institution which they name, but which has never existed. If it is clear from the will that the institution would be charitable if it did exist, then the question arises whether the property can be applied cy-près It is well settled that it can, if there is a general charitable intent.

Halsbury's Laws of England states the rule in similar terms:[40]

> Where there is a gift to a charity which has never existed, or cannot be identified, the Court leans in favour of a general charitable purpose, and accepts even a small indication of the testator's intention as suffi-

[37] [1951] 2 D.L.R. 429 (N.S.C.A.).
[38] Reported in (1923), 56 N.S.R. 364. The testator was a victim of the "Titanic" disaster.
[39] *Supra*, footnote 1, at p. 616. [40] Vol. 4 (3rd ed., 1953) p. 327.

> cient to show that a purpose, and not a particular charity, is intended, and gives effect to the purpose by means of a scheme, the name or description of the charity mentioned serving as an indication of the purpose intended to be benefited.

Mr. Sheridan does not claim that his "out and out" principle should be applied here since "the evidence which goes to show an out and out divesting will be the same evidence as will support the inference of a general charitable intent".[41] In other words, we are both in agreement that general charitable intent is the *sine qua non* of cy-près application in this particular class of cases. Certainly the Canadian decisions would not support any other principle.

While cases will be found, from time to time, of simple hallucinations on the part of testators in thinking that specific institutions exist when in fact they do not, it is much more likely in practice that the mistake will be one of misdescription of an existing institution. In this latter event there is no necessity for the courts to evoke the cy-près doctrine at all. Mr. Sheridan does not consider this point but it appears of greater practical importance than strict cy-près cases. Moreover, both are bound together by the common factor that the court in each seeks out the testator's general charitable intention. Thus in *Re McIntyre Estate*[42] it was held on the evidence that a bequest "To the Children's Aid Society" was intended for the "Children's Aid Society of Winnipeg" and, since it was not a case where it was impossible to say which society the testator had intended to benefit, the cy-près doctrine was inapplicable.

It is extremely difficult, however, to draw any clear line between cases like *Re McIntyre*, where the mistake is crystal clear, and other cases where it is not so manifest. It will be found that the courts are very ready to treat all such cases as matters of misdescription and to go to extreme lengths to identify as beneficiary an existing institution which comes closest to the one the testator is supposed to have had in mind.[43] The recent decision of the British Columbia Court of Appeal in *Re Smith*[44] illustrates this attitude. By a will made in 1945 the testatrix left her residuary estate to the "Vancouver Humane Society", expressing the desire that the institution would

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[41] *Supra*, footnote 1, at pp. 618-619.

[42] [1950] 2 W.W.R. 682 (Campbell J.).

[43] The judicial process may require a long period of gestation. See, for example, *Toronto General Trusts Corp.* v. *St. Andrew-Wesley's Church*, [1946] 3 D.L.R. 571 (B.C.); reversed *sub. nom.*, *Re MacKay*, [1947] 1 D.L.R. 477; restored by the Supreme Court in *St. Andrew's-Wesley Church* v. *Toronto General Trusts Corp*, [1948] 4 D.L.R. 241 and 875.

[44] [1953] 3 D.L.R. 510 (B.C.).

use the gift "for the purpose of relieving the suffering of pets and animals". No society of this name had ever existed in Vancouver or elsewhere, but there were two institutions doing similar work, the B.C.S.P.C.A. (Vancouver Branch) and the Animal Welfare Association. Manson J., at first instance, held that the gift failed for uncertainty and should go as on an intestacy to the next of kin, for whom the testatrix had made no provision. The learned judge refused to admit extrinsic evidence to explain what, it was alleged, amounted to a latent ambiguity. The Court of Appeal unanimously overruled this decision and admitted the evidence, which took the form of four prior wills made in 1922, 1929, 1933 and 1938, respectively. Bird J.A., in delivering the judgment of the court, quoted Lord Hanworth M.R. in *Re Bain*:[45]

> Where possible, a construction ought to be given to the terms of a will which will enable it to be upheld. . . . the Court ought not to be astute or officious to try and find some means of rendering the words of the bequest of no effect.

On examination of the earlier wills it was revealed that the testatrix had originally intended to benefit the Toronto Humane Society (which did exist) and the "Vancouver Humane Society" equally, and that the misdescription of the Vancouver society arose from the fact that the testatrix, a former resident of Toronto, had been under the mistaken impression that the Vancouver organization doing similar work was similarly named. Accordingly the B.C.S.P.C.A took the gift.

It is interesting to observe the variety of extrinsic evidence which the court will admit in order to ascertain the testator's intention. For example, the initial decision in *Re Gilroy*[46] was reversed[47] by the trial judge when he had allowed the admission of new evidence. The testatrix bequeathed a gift to the "Home for Fallen Girls", but no such institution had ever existed. It was held that this was a case of misdescription or error in the proper name only. Evidence of the solicitor who had drawn the will was admitted to show the intention of the testatrix and to testify as to her acquaintanceship with the work of the "Church Home for Girls". The learned judge remarked:[48]

> Apparently in the act of recalling and making a record of the name her mind retained predominately the thought of the nature of the work carried on by the institution, rather than its exact name.

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[45] [1930] 1 Ch. 224, at p. 230.
[46] [1937] 1 D.L.R. 142 (Man., Donovan J.).
[47] [1937] 2 D.L.R. 351. [48] *Ibid.*, p. 352.

Accordingly the Church Home for Girls was declared to be the institution the testatrix intended to benefit.

In *Re Hogle*[49] the court examined the will of the testatrix's husband, to which she had referred, in order to ascertain the wife's intention, which proved to be to benefit crippled children. The court then went on to examine the organization and objects of several charities, which were equally suggested by the misdescription in the will, in order to choose the one which most closely fitted the intention.

The editorial note to its report rightly observes that the judgment in *Hanson* v. *Torrence*[50] is a veritable brief in itself. It is worthy of close inspection by any Canadian lawyer concerned with a cy-près problem. The testatrix had given a legacy to the "Institute for the Blind in New Brunswick"; no such institution existed, though there was the Canadian National Institute for the Blind which, as its name implies, carries on its work in each of the provinces. The learned judge said:[51]

> . . . the whole question is one of paramount intention. Was it the paramount intention of the testator in any case that only a particular mode should be used or was it his paramount intention that the objects, discoverable from the expressions he had used even though not specially named, should be benefited?

His conclusion in this case was that the testatrix had had an intention to assist the blind and "It does not matter what you call the institution". The general charitable intent was construed from the very fact that the testatrix was not clear as to the name of the institution, from the particular clause in the will, from the name of the society itself, and from evidence that the mother of the testatrix was blind. The learned judge also considered that, even if it could be argued that there was no general charitable intent, the Canadian National Institute would benefit on the ground that the expression used in the will was merely a misdescription of the national body which was, in fact, the only organization doing that kind of work in the province.

In *Re Manning*[52] evidence that the testatrix had been baptized into the claimant religious organization, had derived comfort from its broadcasts and had lived in the town where it was situated was admitted to identify the organization as the one intended by the testatrix.

[49] [1939] O.R. 425 (Urquhart J.), [1939] 4 D.L.R. 817.
[50] [1938] 4 D.L.R. 470 (N.B., Baxter C.J.).
[51] *Ibid.*, p. 477.
[52] [1947] 2 W.W.R. 487 (Man., Williams C.J.K.B.).

As a final comment on this particular category of cy-près cases, the recent judgment of Lord Sorn in the Scottish case *Tod's Trustees* v. *The Sailors' and Firemen's Orphans' & Widows' Society*[53] is worthy of note. Again the testamentary gift was to a society which had never existed. Lord Sorn refused to accept the argument that the legacy had lapsed and had fallen into residue, and he ordered a scheme to be settled. His judgment contains the following clear statement of the legal principles involved:[54]

> [In] the case of a bequest to an institution which never did exist . . . it is permissible to impute to the testator a general charitable intention—provided, of course, that the words used in describing the non-existent institution are sufficiently definite to prevent the expression of intention failing from uncertainty. The distinction may not be altogether logical, or easy to follow, but it appears to me to be a distinction which is well recognised and I refer to the case of *Rymer* v. *Stanfield*, [1895] 1 Ch 19, in which the earlier decisions, on one side and the other, are reviewed and considered by Herschell, L.C.
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> When a testator names an institution which in fact is non-existent, what went on in his mind about it at the time must, as a rule, be a matter of pure speculation. It is perhaps not easy to see why a more general intention should be ascribed to him when he names a particular non-existent institution than when he names a particular existent institution. To me the most satisfying way of looking at the distinction is to think that, in all cases where the institution cannot be found at the date of death, the Court, from favour to charity, leans towards recognising a general charitable intention but that, where the named institution actually existed at the date of the will, this course is excluded on the view that the testator's particularity of intention must be treated as a certainty

2. *Expired institution.* Again, in dealing with this category Mr. Sheridan concedes:[55]

> It would seem . . . that if such a general charitable intent can be established the property will be applied cy-près. . . . whenever cy-près application has been refused it has been because there was no general charitable intent.

In this class of cases the institution may have existed at some time but becomes defunct before the death of the testator. The recent Canadian decision in *Re Ogilvy & Ogilvy*[56] illustrates that the courts will not invent a general charitable intent where there is no evidence from which such an intention can be reasonably presumed.

In the *Ogilvy* case the testator bequeathed by his will, made in 1947, a tenth part of his residuary estate to the "Salvation Army

[53] [1953] Scots Law Times, Notes of Recent Decisions, p. 72; 103 Law Journal (Newspaper) 670.
[54] *Ibid.*
[55] *Supra*, footnote 1, p. 619.
[56] [1953] 1 D.L.R. 44 (Ont., Judson J.).

(Ottawa Branch)" and the "Home for Friendless Women, Ottawa". The latter had changed its name in 1936, and in 1941 had been wound up, its assets being transferred to the Salvation Army at Ottawa. The Salvation Army had agreed to hold the assets for the promotion of its work among unmarried mothers in Ottawa. There was no evidence that the testator knew anything of the history of the home beyond the fact that his first wife had been a member of its executive from 1896 to 1902. It was held that there was no general charitable intent. Consequently the gift was subject to the ordinary doctrine of lapse and went to the next of kin. The learned judge quoted the statement of principle to be found in Halsbury:[57]

> A bequest to a charitable institution which at some time existed, but has ceased to do so in the testator's lifetime, whether before or after the date of his will, lapses, unless a general charitable intention can be proved. There is no lapse, however, where the institution has not wholly ceased to exist, nor of course where there has merely been a change of name. So there is no lapse where an institution which has ceased to exist was named merely as the channel for carrying out a charitable intention.

Judson J. distinguished the English decisions in *Re Faraker*[58] and *Re Lucas*,[59] where the old charity had become part of a new one under a scheme of the Charity Commissioners, and *Re Withall*,[60] where the court found an intention to add the bequest to the funds of an old charity which were in the hands of a new charity. "There is no such intention to be gathered from this will."

3. *Moribund institution.* The first type of case which falls conveniently under this heading consists of the situation where the institution is in existence both before and after the testator's death but becomes defunct before the estate is distributed. (The usual situation is where the charitable gift only vests in possession after the termination of prior life interests in favour of, for example, the surviving spouse.) Here no problem of cy-près arises and the nature of the testator's intention is irrelevant. The gift has vested in interest in the charitable institution. Mr. Sheridan puts the matter in this way:[61]

> These decisions must proceed on the basis that the property has been given outright to the charitable organization and that therefore the representatives of the testator have no claim on it. Presumably, if the contrary were shown, it would still be permissible to support cy-près application by adducing evidence of a general charitable intent.

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[57] Vol. 4 (2nd ed.) p. 180; see now Vol. 4 (3rd ed.) p. 279, to the same effect.

[58] [1912] 2 Ch. 488 (C A).

[59] [1948] Ch. 424 (C.A).

[60] [1932] 2 Ch. 236 (Clauson J.).

[61] *Supra*, footnote 1, p. 620.

The solution adopted in the leading English decision of *Re Slevin*[62] has been adopted by Canadian courts. The latest of such cases is *In re Enderton Estate.*[63] The testator died in 1920, leaving one sixth of his residuary estate to the Winnipeg Boys' Club. The club had been terminated by legislation in 1938 and the executors were not able to realize sufficient assets to pay all the specific bequests until the club ceased to exist. It was held that the bequest in favour of the club vested on the testator's death and passed to the Crown as *bona vacantia*. The court drew the attention of the Crown to *Re Slevin*, which indicated the customary practice of the Crown in England in similar cases.

However, as Halsbury indicates in the last passage cited, the initial question whether or not an institution can be said to have ceased to exist is a question of fact. If, for example, the assets of charity *A* have been transferred to charity *B*, which carries on substantially the same work, the court may well construe charity *B* as being nothing more than the *alter ego* of charity *A*. In this event there is no question of lapse or cy-près *stricti sensu*. Charity *B* will take as of right.

Such was the case in *Re Brown.*[64] The testator died in 1878, leaving a bequest, subject to various life interests, to the *X* church. The last survivor of the beneficiaries died in 1947. Meanwhile, in 1907, the *X* church had ceased to exist but an act of that year provided that the ecclesiastical corporation of *Y* should "be deemed for all purposes to be the corporation of" the *X* church. The court held that the *Y* corporation could take since it was the *alter ego* of the *X* church.[65]

Finally, the decision in *Re McDougall*[66] should be noted as an example of the way in which the courts sometimes reach a desired (though not necessarily desirable) result by following a number of different paths. The testator made his will in 1914 and died in 1916. He gave a residuary bequest, subject to a life interest in favour of his wife, to the "Dominion Alliance for the suppression of the liquor traffic". The wife died in 1937. At the date of the testator's will and death, two organizations were in existence, which, al-

[62] [1891] 2 Ch. 236.
[63] (1954) 12 W.W.R. (N.S.) 267 (Man., Freedman J.).
[64] [1950] 1 D.L.R. 777 (N.S., Doull J.).
[65] The court also came to the same conclusion on the different ground that the gift constituted a charitable bequest for the general benefit of the religion of the Church of England in the locality where the *X* church was established, and that the *Y* corporation was the proper party to receive it.
[66] [1939] O.W.N. 64 (J. G. Kelly J.). Note that the report in [1939] 1 D.L.R. 783 is inaccurate

though not having exactly the same name as that used in the will, were sufficiently similar so as to leave no doubt that the testator intended to benefit one of them. Firstly, the court followed *Farewell* v. *Farewell*,[67] which decided that a legacy to promote total prohibition was a good charitable trust.[68] Then the court held that since both organizations were in existence at the date of the testator's death no question of lapse could arise. If both had ceased to exist after the testator's death the court would have followed *Re Slevin*[62] and applied the cy-près doctrine. However, since at the date of distribution of the legacy one of the possible institutions had ceased to operate, the total legacy was paid to the one still extant as being the existing body carrying out the charitable purpose in the testator's mind.

A second type of case arises where the specified institution has received the gift, or income from it, for some period after the testator's death and then becomes defunct. The decision in *Re Fitzgibbon*[69] indicates that if the court cannot find a general charitable intention, no cy-près application will be made. It might be argued that the determining factor in this case was the fact that the charity was the recipient only of the income and not the corpus of the fund itself, so that the court could distinguish *Re Slevin* and apply *Re Rymer*.[70]

The facts of *Re Fitzgibbon* were as follows. By a will made two weeks before she died in 1915 a testatrix left a small fund to provide an annual prize to a former member of the "Women's Welcome Hostel", who had gone into domestic service and proved a satisfactory employee for three years or more. The testatrix was a founder of the home, which had been established to receive and assist young female immigrants from England who contemplated entering domestic service in Canada. When the Dominion government took over the supervision of immigrants, it was decided that the home had outlived its usefulness and in 1920 its life was terminated and its assets transferred to the Girls' Friendly Society.

[67] (1892), 22 O.R. 573.

[68] *Sed quare* whether this decision would be followed today. The gift was political in nature in requiring a change in legislation. In England it has been held that the encouragement of temperance is charitable: see Lawrence L.J. in *Re Hood, Public Trustee* v. *Hood*, [1931] 1 Ch. 240, at p. 252. (C.A.). But if the trust has as its object the securing of legislative reform, it is not charitable: see *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (1926), 136 L.T. 27; and Lord Simonds in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1948] A.C. 31, at p. 63.

[69] (1922), 69 D.L.R. 524 (Ont., Middleton J.).

[70] [1895] 1 Ch. 19.

The latter did not carry on the same work and therefore made no claim on the fund. Other beneficiaries under the will, whose legacies had had to be abated, claimed that the fund should be used, *quantum valeat*, to make up the deficiency. The Attorney General claimed that the gift was charitable and should be applied cy-près.

It was held that, since the home itself was not the beneficiary (the corpus being vested in the testatrix's trustees, who applied the income to some deserving former member of the home), the principle in *Re Slevin* did not apply. Although the intention of the testatrix was to further the work of the hostel, she had no general charitable intention. Therefore when the particular work failed, the gift failed and the fund must be distributed among the legatees, thus following the decision in *Re Rymer*.

Conclusions

Mr. Sheridan concludes that:[71]

> There are two types of cy-près application and two types of intention on the part of the donor forming their bases. On the one hand there is the case where the donor intended to give his property out and out to charity; on the other hand is the case of the general charitable intent.

As was stated at the beginning of this article, it does not appear that the Canadian cases would support this two-pronged theory of the cy-près doctrine. On the contrary, it is submitted that, whether the court is dealing with an impossibility, surplus or specified institution case, the existence of some general charitable intent on the part of a testator must be evinced from the will itself and the surrounding circumstances of the gift before cy-près application of the funds will be ordered.

Where gifts to charity are of an inter-vivos nature, exactly the same principles apply. Unless the donor gave his money with the intention of benefiting charity generally, though he may have expressed some preference as to the application of his donation, he will be entitled to have his gift returned: no question of cy-près can arise. On the other hand, the very circumstances of the giving, for example the fact that the donation was made in purchasing a ticket for a charity concert, or in exchange for a tag in a street collection, may satisfy the court of the donor's general charitable intention.

Though Mr. Sheridan has seen in this presumption a new form of cy-près, that is, one which does not require a general charitable

[71] *Supra*, footnote 1, p. 621.

intention, the present writer submits that the Canadian doctrine remains a unity. However the burden of proof may not always rest on the same side. Thus, in the case of testamentary gifts, the burden of proving a general charitable intention is on those asking the court to apply the funds cy-près and, whilst the courts are usually anxious to apply the doctrine, they will not do so unless this burden of proof is satisfied. In contrast, the cases dealing with inter-vivos gifts for charitable purposes show that, on grounds of practicability and expediency, the courts will presume a general charitable intention, that is, the onus of proof is on those resisting the application of the money cy-près. Generally speaking, it will only be possible to rebut the presumption where the gift has been so specifically circumscribed that it is clear the donor intended to give only for one particular purpose or institution.

Pace Mr. Sheridan, it is suggested that it is not unrealistic for the courts to presume that donors, who place coins in collecting boxes or purchase tickets for charity concerts, have a general charitable intention. In this context one may applaud the claim that the law (including "equitable" law) is based not on logic but on common-sense.

Steadying the Judicial Hand

But for all this, the responsibilities of the judges and lawyers for the preservation of our scheme of liberty under law is heavy, and failure will not be excused by the difficulties, weaknesses or uncertainties that I have pointed out in our process. We cannot escape the dangerously vague by resort to the dangerously rigid. But we must recognize the pliability of the process for what it is and strive to keep our liberty under law by keeping ourselves under law. The profession knows that the law is a progressive discipline and that each decision cannot be a mere copy of one that went before. It knows that the nature of our task gives much latitude to our judgment. But it also has an instinctive dislike for rootless or erratic decisions which it expects to be rewritten when the wind shifts to another quarter. It will be satisfied if our conclusions, fallible though they are and mistaken though they may be, represent a real respect and aspiration for law, a faithful effort to apply law and a veneration for the work of the great minds that have made our legal structure the nearest to a safeguard of freedom that has been devised. (Hon. Robert H. Jackson, The Role of the Judiciary in Maintaining Our Freedoms, an address delivered at the annual dinner in honour of the judiciary of the United States during the annual meeting of the American Bar Association at Boston, August 24th, 1953)