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easily be made proportional to the fault. The felony murder rule may have outlived its usefulness, and because of the courts' reluctance to abandon such a well established rule, the legislatures should consider abolition of the rule.

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MODIFICATION OF AN IMPRACTICABLE CHARITABLE TRUST

Holt v. College of Osteopathic Physicians & Surgeons,¹ decided by the California Supreme Court in August, 1964, has been earlier noted as announcing the rule that a minority of the board of governors of a charitable corporation can bring an action to enjoin a threatened breach of trust by the majority, and that the attorney general does not have the exclusive power to enforce a charitable trust.²

The action in *Holt* was brought to enjoin the majority trustees from a threatened breach of the trust. Inasmuch as the complaint alleged that the majority contemplated action which would change what was alleged to be the stated purpose of the corporation and divert the substantial resources of the corporation to purposes other than those for which it was organized, it was held to be sufficient. Plaintiffs were required by the court to make a minor amendment,³ once this is done, the matter will go to trial, and the circumstances surrounding the case give rise to some interesting speculations as to the final result.

The Problem: Whither Osteopathy in California

It seems important to note that the College of Osteopathic Physicians & Surgeons (COPS) was established in 1914⁴ and that early in 1961 the California Medical Association and the California Osteopathic Association entered into an agreement, the essence of which was the abolition of the distinctions between the regular or allopathic study of medicine and the osteopathic discipline.⁵ The forty-seven years that intervened span a millenium in terms of the expansion of medical science.

In May 1961 the majority of the board of COPS, seeking to implement this

¹ 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

² Note, 16 HASTINGS L.J. 479 (1965).

³ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 761, 394 P.2d 932, 939, 40 Cal. Rptr. 244, 251 (1964). The court affirmed the trial court's holding that the California Osteopathic Association was an indispensable party and gave plaintiffs leave to amend to join the Association as a party defendant.

⁴ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 758, 394 P.2d 932, 938, 40 Cal. Rptr. 244, 250 (1964).

⁵ Editorial, *Time for Unification*, California Medicine, July, 1962.

agreement, resolved to change the name of the College, eliminating the word "osteopathic" therefrom, to use its best efforts to obtain the necessary accreditation for approval as an allopathic medical school by making appropriate changes in the curriculum, and to assist in the removal of the distinction among persons practicing medicine in the State of California holding an unlimited Physician and Surgeon's certificate. This matter was all alleged at length in plaintiff's pleading,⁶ and it was action pursuant to this resolution that plaintiff sought to enjoin.

In the statewide election in California in November, 1962, the ballot contained Proposition 22, which tacitly provided for the implementation of the agreement between the California Osteopathic Association and the California Medical Association in that persons with a degree in osteopathy would be permitted to obtain an M.D. certificate by applying to the Board of Medical Examiners, passing the requisite examination, and paying one-half the regular fee. Such persons were then to abandon use of the title D.O. Failure to do so would be deemed unprofessional conduct. The legislature was to retain power to abolish the Board of Osteopathic Examiners in the event that the number of persons subject to its jurisdiction dwindled to forty or less. The voters of California passed Proposition 22, evidencing wide public awareness and approval of the plan, and it was duly incorporated into the Business and Professional Code.⁷

It should be emphasized that *Holt* merely decided that the complaint was sufficient to state a cause of action. It may be anticipated, however, that the facts themselves will present some very practical problems. The *Holt* opinion goes to considerable lengths in discussing the distinctions between the two schools of medicine, vouchsafing that osteopathy is a growing profession in the United States.⁸ But what if osteopathy is not a "growing profession"? What if, as appears from the 1961 agreement between the two professional associations, from Proposition 22 and its subsequent enactment into law, the study of osteopathy has reached the end of the line, at least in California? This possibility brings into sharp focus the questions of under what circumstances and to what extent deviation from the original purpose of a charitable trust may be permissible.

Two Approaches to a Solution

1. The Cy Pres Doctrine—An Actual Change in the Charitable Purpose

The court in *Holt* observed that it was not presented at that stage of the proceedings with the applicability of the cy pres doctrine.⁹ It seems, however, that if the case develops along the lines that the factual background outlined above suggests, cy pres, or something like it, must at least be considered in disposing of the matter.

The doctrine of cy pres ("as near as [possible]"),¹⁰ as it pertains to American law, permits a court to apply the assets of a charitable trust as nearly as possible

⁶ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 758-59, 394 P.2d 932, 938, 40 Cal. Rptr. 244, 250 (1964).

⁷ CAL. BUS. & PROF. CODE § 2396.5.

⁸ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 758, 394 P.2d 932, 937-38, 40 Cal. Rptr. 244, 249-50 (1964).

⁹ *Id.* at 755 n.3, 394 P.2d at 936 n.3, 40 Cal. Rptr. at 248 n.3.

¹⁰ BLACK, LAW DICTIONARY 464 (4th ed. 1951).

to the trustor's original purpose where the particular purpose has become impossible or impracticable of fulfillment.¹¹ The cy pres power is actually to change the charitable purpose, to apply the trust property for a charitable purpose other than that designated by the terms of the trust.¹² It is much more extensive than the ordinary power of deviation from the method of administration of a trust, charitable or otherwise, exercisable by a court of equity when circumstances have changed in a manner not foreseen by the settlor and such circumstances necessitate the deviation.¹³ Although the cy pres and the deviation doctrines are sometimes confused,¹⁴ there is a clear distinction between them, and both are part of California law.¹⁵

The cy pres doctrine, applicable only to charitable trusts,¹⁶ has as an essential condition for its application that a sufficient general charitable intent on the part of the settlor be found, an intent broader in its scope than the particular purpose for which the trust was created. Absent such intent, the cy pres doctrine may not be used to save the trust when the specific purpose fails.¹⁷

If the requisite general charitable intent is found, it may be broad enough to permit a substituted trustee as well as substituted beneficiaries. For example, in one case large funds had been left in trust to the City of Philadelphia to administer a college for white persons. After determining that the city could no longer constitutionally act as trustee subject to that condition, the Pennsylvania Supreme Court directed the funds be turned over by the city to a group of private individuals who *could* so administer the college.¹⁸ And in a recent California case, where testator's named beneficiary, Alcoholics Anonymous, refused to accept a bequest in a will evidencing an intent to create a charitable trust, the court invoked cy pres and appointed a trustee to carry out what it found to be a general purpose to aid alcoholics with the funds so bequeathed.¹⁹ On the other hand, the settlor may have manifested his wishes in such definite terms as to require that the trust continue to be administered by the same trustee but permit the court to apply the property for the benefit of a new *cestui*.²⁰

¹¹ RESTATEMENT (SECOND), TRUSTS § 399 (1957).

¹² 4 SCOTT, TRUSTS § 399 (2d ed. 1956).

¹³ RESTATEMENT (SECOND), TRUSTS § 381 (1957); 4 SCOTT, TRUSTS § 381 (2d ed. 1956).

¹⁴ 15 AM. JUR. 2d *Charities* § 132 (1964).

¹⁵ Estate of Loring, 29 Cal. 2d 423, 175 P.2d 524 (1946).

¹⁶ 4 SCOTT, TRUSTS § 399 (2d ed. 1956).

¹⁷ Compare O'Hara v. Grand Lodge I.O.G.T., 213 Cal. 131, 2 P.2d 21 (1931) with Estate of Zilke, 115 Cal. App. 63, 1 P.2d 475 (1931) and Rohlff v. German Old People's Home, 143 Neb. 636, 10 N.W.2d 686 (1943).

¹⁸ *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958). An eloquent and painstaking dissent by Musmanno, J., apparently failed to convince the Supreme Court of the United States—an appeal was dismissed without comment in 357 U.S. 570 (1958).

¹⁹ Estate of Faulkner, 128 Cal. App. 2d 575, 275 P.2d 818 (1954). *But see* Bacon Memorial Home v. Bracken, 21 Conn. Supp. 217, 152 A.2d 518 (Super. Ct. 1959). It is axiomatic, of course, that a trust will never be allowed to fail for want of a trustee in the absence of a clear expression to that effect by the settlor. 4 SCOTT, TRUSTS § 397 (2d ed. 1956).

²⁰ Thatcher v. Lewis, 335 Mo. 1130, 76 S.W.2d 677 (1934).

2. *The Deviation Doctrine—A Modification in the Method of Administration of the Trust Under Changed Circumstances*

Even where the settlor's intent permits no substitution of beneficiary or charitable purpose, the court, to avoid a total failure of the trust, may nevertheless invoke the deviation power to provide for a more practical administration of the trust for the named beneficiaries or purposes. This power is not limited to charitable trusts, but is one of the equity courts' general powers of trust administration.²¹ Thus, in a California case where the trust fund was so diminished that it was no longer sufficient to carry out settlor's intent to erect a hospital of a stated cost, cy pres was denied in the absence of a showing of a general charitable intent, but the court nevertheless invoked the power of deviation to execute the trust by authorizing erection of a smaller hospital, thus preventing a failure of the trust.²² An Ohio case, a bequest in trust for the "full orphans of the United Lutheran Church of Miami County, Ohio," held that this was too specific to permit the application of cy pres, but that the trustee's prayer for general equitable relief was sufficient to permit the court to order a deviation as to the administration of the fund so as to conform in substance with the settlor's intention.²³ And in another California case, the court permitted the sale of land that had been given in trust for an orphanage, where the use of the orphanage over the years had so declined as to make it impracticable to continue to operate it. The court approved a plan to apply the proceeds of such sale for the benefit of a different orphanage in an adjoining county.²⁴ A variation of this approach is sometimes seen where a court deems a condition to be subsidiary to what it finds to be the overriding charitable purpose of the trust and ignores the condition. So, in an English case, where settlor left funds in trust for a named church on condition that the minister wear black during the services and the church was unwilling to comply with this condition, it was held it was not necessary that it do so.²⁵ Similarly, in a 1961 case, the New Jersey Supreme Court, confronted with a bequest to a college in

²¹ 4 SCOTT, TRUSTS § 381 (2d ed. 1956).

²² Estate of Loring, 29 Cal. 2d 423, 175 P.2d 524 (1946).

²³ Craft v. Shroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947).

²⁴ O'Hara v. Grand Lodge I.O.G.T., 213 Cal. 131, 2 P.2d 21 (1931). This case illustrates how close and academic the relationship between cy pres and deviation may become. Depending on what is determined to be the charitable purpose, the case may stand as an example of cy pres or of deviation. If the charitable purpose of the trust is to benefit the particular orphanage which is now defunct, applying the funds for the benefit of an entirely different orphanage is a case of cy pres. On the other hand, if the charitable purpose of the trust is found to be generally to benefit orphans, then the transfer of the funds to a different orphanage is simply a modification in the administration of the trust and is a case of the court applying its power to deviate from the terms of the trust in changed circumstances unforeseen by the settlor when he selected the original orphanage as the trustee.

²⁵ *In re Robinson*, [1923] 2 Ch. 332. The English courts have apparently felt it desirable to exercise rather broader powers in this type of case in recent years than the American courts. 4 SCOTT, TRUSTS § 399.4 (2d ed. 1956). In 1960 Parliament adopted the Charities Act, 8 & 9 Eliz. 2, c. 58, § 13, which provides, *inter alia*, that application cy pres shall be allowed where the original purposes have "ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift."

trust for "protestant, gentile boys of good moral repute," held that the lower court had properly turned the funds over to the college even though the charter of the college made it impossible for it to accept the bequest with those conditions.²⁶ This case has been criticized as an improper application of cy pres in that the court frustrates the clear intent of the settlor, and it has been suggested that a better result could have been reached by invoking the deviation power to place the funds in trust in the hands of an institution which was capable of carrying out the settlor's intent.²⁷ On the other hand, where there was a residuary bequest to the City of Detroit for a playground for white children, and a Michigan anti-discrimination statute made it impossible for the city to accept the gift, the Michigan Supreme Court found settlor's intent to be so narrowly circumscribed as to preclude application of either cy pres or deviation and held that the trust failed.²⁸

Applying These Doctrines to the Holt Situation

It should be noted in passing that a trustee never has discretion to apply a trust cy pres or to deviate from its terms in changed circumstances without making due application to the proper court.²⁹ In doing so, the trustee bears a heavy burden of proving a real need for such action.³⁰ But assuming for the sake of discussion that such a need can be proved—assuming in the *Holt* situation that the evolution of the practice of medicine in California may have brought about a condition wherein COPS under its old method of operation faces the bleak prospect of dwindling attendance and a diminishing demand for the services of its graduates³¹—what may the court do to remedy the situation?

It will be seen from the foregoing discussion that the court may invoke the cy pres doctrine and permit the present trustee (doing business as of this writing as the California College of Medicine³²) to continue to administer the trust, but as a regular, or allopathic, school of medicine, rather than one devoted to osteopathy. On the other hand, if it determines that the charitable intent of the donors permits

²⁶ *Howard Savings Institute v. Peep*, 34 N.J. 494, 170 A.2d 39 (1961).

²⁷ Note, 36 TUL. L. REV. 176 (1961). Again an illustration of the semantic problems in this area. Since the court determined the overriding charitable purpose of the donor was to benefit the *college*, it did not need to, and did not in this case, invoke cy pres; it merely ordered a deviation by eliminating what it deemed to be a subsidiary detail, unimportant to the testator.

²⁸ *La Fond v. City of Detroit*, 357 Mich. 362, 98 N.W.2d 530 (1959). Note, 59 MICH. L. REV. 651 (1961) expressed approval of the result, agreeing that the conclusion is unavoidable that the primary intent of the testator was to have a playfield for white children only. Remedial legislation was proposed.

²⁹ RESTATEMENT (SECOND), TRUSTS § 399, comment *e* (1957).

³⁰ See *In re McDonough Trust*, 252 Iowa 870, 109 N.W.2d 29 (1961).

³¹ The American Osteopathic Association apparently fears just such a debilitating effect on their profession in any case where there is action similar to the agreement between the California Osteopathic Association and the California Medical Association, and it is energetically resisting the trend. *E.g.*, *Journal of the American Osteopathic Association*, Sept., 1964, p. 8, and Nov., 1964, p. 9. For a discussion of the effects of that agreement and the subsequent legislation in California which gives credence to the American Osteopathic Association's feelings of alarm, see *Osteopathic Physicians & Surgeons v. California Medical Ass'n.*, 224 Cal. App. 2d 378, 36 Cal. Rptr. 641 (1964).

³² Editorial, *Time for Unification*, *California Medicine*, July, 1962.

no such latitude in the purposes for which the funds are to be used, it may still find that the exigencies of the situation require a deviation and direct that the fund be transferred in trust to a different institution, perhaps outside of California, which can more practically administer the trust for the benefit of the profession of osteopathy. The court may, of course, require that the institution presently acting as trustee abandon its newly-undertaken program and resume the teaching of osteopathy, despite the arguments favoring a change of some sort.

An Important Inquiry: The Donors' Intent

Ultimately, the decision as to which of these alternatives the court should take will depend to a great extent upon what it finds to be the intent with which these trust funds were contributed, the purposes that the donors contemplated in giving them. This in turn raises the question of where the court is to look for evidence regarding this intent.³³

COPS has been in existence for over fifty years and in that time has doubtless received many separate contributions from many different sources, some solicited, some unsolicited, some in writing by deed or bequest, others not in writing, some with conditions, some without. The difficulty in determining a charitable intent applicable to all these donors is apparent.

The articles of incorporation of COPS state its charitable purposes to be:

To establish, maintain, carry on and conduct an osteopathic medical and surgical college, in which all branches of learning, and instruction which now pertain or which may in the future pertain to the science and art of health maintenance; prevention, relief and recovery from disease, as well as any or all academic subjects desirable or necessary as a foundation for the teaching of such branches.³⁴

In weighing the sufficiency of the complaint, the court in *Holt* suggested that these articles, combined with the conduct of the College over the years and representations made in solicitation of contributions, define and fix the charitable purpose of the institution as "primarily to conduct a college of osteopathy for the training of osteopathic physicians and surgeons and for the general furtherance of the profession of osteopathy."³⁵ And whether or not the articles by themselves require such a limited interpretation, the findings on trial as to the other factors considered by the court may well bear out the court's suggestion. At any rate, some such sort of analysis would appear to be the only practical way of determining the charitable purpose for which the trust funds have been given.³⁶

The general rule is that neither cy pres nor deviation will be permitted where the donor has not expressed his charitable intention generally, but has established the trust for a specific purpose and with a specific trustee.³⁷ Nevertheless, in de-

³³ The *Holt* opinion suggests, 61 Cal. 2d at 758, 394 P.2d at 938, 40 Cal. Rptr. at 250, that a substantial contributor to COPS through the years has been the American Osteopathic Association. The intent of this particular donor may perhaps be more readily ascertainable upon trial of this case than that of most other contributors. See note 31 *supra*.

³⁴ *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 757, 394 P.2d 932, 937, 40 Cal. Rptr. 244, 249 (1964).

³⁵ *Id.* at 759, 394 P.2d at 938, 40 Cal. Rptr. at 250.

³⁶ See generally 15 AM. JUR. 2d *Charities* § 136 (1964).

³⁷ *Estate of Black*, 211 Cal. App. 2d 75, 27 Cal. Rptr. 418 (1962); *Estate of Zilke*, 115 Cal. App. 63, 1 P.2d 475 (1931).

termining whether a general charitable intent has been expressed, the construction is always most strong against the trustor.³⁸ The bases for this rule are the presumption that the donor did not intend for the trust to fail³⁹ and the interest in avoiding injury to the innocent beneficiaries.⁴⁰ Furthermore, the search for the requisite general charitable intent will be more vigorous where there is a subsequent failure of a formerly valid and subsisting charitable use⁴¹ than where the trust purpose was void *ab initio*.⁴² As applied to the *Holt* case, these rules would seem to indicate that if the continued operation of the College as an osteopathic institution is found to be impracticable, the facts should be interpreted if possible to discern a sufficient general charitable intent on the part of the donors to permit the application of the funds to some other purpose under the cy pres doctrine.

Conclusion: Some Policy Considerations

Finally, there are questions of public policy. Is there a California interest in conserving, in California, a well-endowed medical facility turning out doctors who can practice their profession in California in harmony with the clearly expressed consensus of both the public and the members of the medical profession? And if so, what weight is such an interest to be given when balanced against the interest in maintaining the trust for the particular purposes which donors over the last half-century have contemplated in contributing to this institution?

It may be observed that courts in recent years have had recourse to cy pres and similar rules with increasing frequency and liberality of application, generally as a means of effecting the courts' notions of social utility.⁴³ Whether cy pres will be applicable in *Holt* must await the outcome of the trial.

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³⁸ O'Hara v. Grand Lodge I.O.G.T., 213 Cal. 131, 2 P.2d 21 (1931).

³⁹ *Ibid.*

⁴⁰ See George W. Donaghey Foundation v. Little Rock Univ., 231 Ark. 748, 332 S.W.2d 497 (1960).

⁴¹ Union Methodist Episcopal Church v. Equitable Trust Co., 32 Del. Ch. 197, 83 A.2d 111 (1951); Powers v. Home for Aged Women, 58 R.I. 323, 192 Atl. 770 (1937); RESTATEMENT (SECOND), TRUSTS § 399, comment i (1957).

⁴² Estate of Black, 211 Cal. App. 2d 75, 27 Cal. Rptr. 418 (1962).

⁴³ E.g., Howard Savings Institute v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); see generally the valuable article by Edith Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382 (1959).

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