Orphans' Court of Pennsylvania, Philadelphia County.
McKee Estate
No. 654.

April term, 1902.
February 6, 1953.

****1 *493** Exceptions to adjudication.

West Headnotes

Wills ⚷618
409k618 Most Cited Cases
The fact that no beneficiary is named to receive and enjoy surplus income earned by testator's residuary estate during the life of certain of his descendants does not violate any rule of law where it is clear from the will as a whole that the surplus income is to be accumulated for the benefit of a charity.

Charities ⚷4
75k4 Most Cited Cases
A gift to charity is not rendered invalid where it vests immediately upon testator's death because possession and enjoyment are postponed during the life of certain of testator's descendants.

Charities ⚷4
75k4 Most Cited Cases
A charitable bequest is not rendered invalid by reason of certain provisions in the will intended to perpetuate testator's name in connection with the charitable institution for which he has provided.

Charities ⚷34
75k34 Most Cited Cases
A charitable bequest is not rendered invalid because of an alleged absence of any cestui que trust capable of enforcing its terms since, as to charities, the Commonwealth always stands in the position of cestui que trust ready and able to enforce its terms.

Charities ⚷35
75k35 Most Cited Cases
If a testator's meaning is vague, interests will be construed as vested rather than as contingent.

Charities ⚷37(1)
75k37(1) Most Cited Cases
Distribution of assets of a charitable trust cy pres was delayed for a five year period during which income was to be applied under a scholarship plan authorized by the auditing judge and by which the court retains supervisory controls of a fund for a limited period of years "in order to permit the situation to crystallize."

Charities ⚷37(6)
75k37(6) Most Cited Cases
Where it is clear from a will as a whole that testator's intent is primarily charitable, a provision that the fund is to be used for the specific charitable purposes outlined and for "no other purpose", does not prevent the application of the doctrine of cy pres, unless accompanied by restraints upon alienation, forfeiture or reverter clauses.

Charities ⚷37(8)
75k37(8) Most Cited Cases
Where a testator who was a Negro and military man left his residuary estate of approximately $1,000,000 for the purpose of founding and maintaining an inter-racial school for orphan boys desiring naval training, and the fund is insufficient for such purpose and there is no existing institution which exactly meets the criteria testator had in mind, the fund will, under the doctrine of cy pres, be retained for a period of time sufficient to permit the completion of a thorough study as to whether with other gifts or support testator's primary plan is at all feasible, the income to be used meantime for scholarships to existing institutions approximating as closely as possible what testator had in mind.

Perpetuities ⚷8(1)
298k8(1) Most Cited Cases
Neither the rule against perpetuities nor the statute against accumulations is applicable to charitable bequests.

Perpetuities ⚷8(8)
298k8(8) Most Cited Cases
Where a testator's primary purpose is to devote his residuary estate to the founding and support of a charitable institution, the fact that in outlining an
investment program concerned principally with real estate, of which his investments largely consisted, he provided for

accumulations in order to improve such real estate and make it more productive, does not render the disposition of his estate invalid, especially where there is nothing to indicate that the accumulation and building program could not have run concurrently with the foundation of the charitable institution.
Before KLEIN, P. J., BOLGER, LEFEVER, HUNTER, SAYLOR and SHOYER, JJ.

****2 *494** The facts appear from the following extracts from the adjudication of

BOLGER, J., Auditing Judge.

John McKee died on April 6, 1902, and this trust arose under his will dated December 8, 1899, which was duly admitted to probate in Philadelphia County on May 21, 1902. After making numerous bequests and devises (which have long since been satisfied and as to which there is now no controversy), he bequeathed certain annuities to his daughter and grandchildren and directed that his residuary estate should be held in trust and, after the deaths of all his children and grandchildren who were living at the time of his decease, used for the purpose of establishing and maintaining a naval school to be known as ""Colonel John McKee's College". In addition, the will provided for an elaborate program of conversion of extensive real estate holdings into income producing property and gave meticulous directions concerning the operation of the school, all of which will be referred to more in detail hereafter.

When this, the third account of the trustee, came before me for audit on November 3, 1947, counsel for the accountant stated that it was filed because of the death of Dr. Henry McKee Minton, grandson of decedent, on December 29, 1946, it being thought that he was the last survivor of testator's children and grandchildren who were living at the time of his (testator's) death. It was stated that the fund in the hands of the trustee consisted of approximately $650,000 in personalty and $150,000 in unconverted real estate, and that the fund was inadequate to carry out testator's charitable purpose to establish a naval school as specified in the will. The court was therefore requested to exercise its cy pres jurisdiction and to determine, if possible, what other charitable purpose might fit the testamentary intention as expressed in the will.

***495** The audit was continued, and by decree dated November 12, 1947, John Blessing, Esq., was appointed amicus curiae with powers of a master, with authority to advertise his appointment, conduct hearings and to make such investigation or inquiry as might enable him to make appropriate recommendations to the court as to the action it should take respecting distribution of the residue of the estate of decedent. [FN1]

> FN1. This report will recite only that part of the adjudication dealing with the cy pres aspects of the case. Voluminous evidence was offered to establish the family tree of decedent and to determine which of his present living descendants would be entitled to inherit under the intestate law in the event that the fund could not be awarded cy pres. Also it was determined that certain unpaid annuities bequeathed under the will to testator's daughter and grandchildren should not be awarded at this late date. For a full discussion of the facts and the law related to these matters see the report of the amicus curiae and the adjudication filed of record in this case.

****3** Based upon the financial condition of the estate as reflected by the account originally filed and upon consideration of the written opinion of a qualified expert, the amicus curiae found as a fact and all counsel of record agreed that testator's project for construction and maintenance of Col. John McKee's College in accordance with the terms of the will is impossible of accomplishment at this time. The amicus curiae therefore recommended in his report that the fund be awarded to be retained by the trustee and the income therefrom used cy pres for scholarship purposes which will be discussed in detail hereafter.

The surviving descendants of decedent, on behalf of themselves as well as the estates of their deceased parents, have attacked the validity of the provisions of the will concerning establishment of Col. John McKee's College.

The first ground of alleged invalidity is predicated upon the theory that testator created two residuary estates, the first of

which they claim is in paragraph ***496** thirteenth where he disposes of all of the rest, residue of his estate to Most Reverend Patrick John Ryan, Archbishop of Philadelphia ... and Joseph P. McCullen, in trust for the purposes "hereinafter fully set forth and none other", while the second residuary clause is contained in paragraph twenty-seventh, wherein he provides for the creation of Col. John McKee's College. Claimants argue that the college was to be a project separate and apart from all the others and not to be undertaken until those others had been completed; that since the gift for the college is dependent upon prior limitations which are void for remoteness, that gift likewise is void. They further theorize that the accumulated corpus of the first residuary estate was never to vest in anyone, but was merely a scheme to create a gigantic private business enterprise devoid of any benevolent purpose. Mr. McKee's testamentary intention cannot be derived properly by a reading of the will in the sequence of its provisions. Apart from specific legacies of various articles of personal property and the direction for payment of debts and funeral expenses, he provided 21 uses and projects to which his estate or portions thereof should be devoted. He specifically directed that all of the projects and uses mentioned, with the exception of but a few, should be financed or paid out of income. In the sixth and eleventh items of the will, he directed payments to be made out of income. In other sections, he provided that payments should be made out of the rents, issues, income and profits of his residuary estate. Since the residue was the only portion of the estate that testator directed to be invested, it is clear that he must have intended all payments directed to be made out of income to be paid out of the income from the residuary estate, even though they may have been written into the will ahead of the residuary clause.

***497** Claimants' argument relegates testator's charitable purpose as of secondary importance. The argument precludes the vesting in interest in the charity until after the so-called contingent and building funds were accumulated and all real estate improvements finally completed. The will is devoid of such declaration or indication of intention. It is perfectly clear that the accumulation of income for contingencies and for building purposes was intended to run concurrently with the establishment and maintenance of the college after the death of the last surviving grandchild. The twenty seventh item of the will expressly states when his college should be built:

****4** "I order and direct that after the death of all my children and of all my grandchildren who may be living at the time of my decease my said Trustees shall hold all the said rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever, in trust, to use the net rents, issues, income and profits thereof for the erection ... of a ... college".

Nothing contained in the provisions pertaining to the contingent and building funds is inconsistent with the direction to establish the college immediately after the death of the last of testator's children and grandchildren. In fact, in the sixteenth item, which provides for the accumulation of the $75,000 building fund, it is stated that the fund should be accumulated out of the net income from the residuary estate "not needed for the paying of said annuities and for other purposes of this my will". A similar limitation in paragraph seventeenth is placed upon the improvement of the Stonehouse Lane property. It is quite clear that these two provisions are purely administrative or investment directions to the trustees, whereas the creation of the college is a dispositive provision.

Testator's dominant purpose was to found a charitable institution, the plans and specifications of which ***498** are meticulously set forth. Realizing that his estate might not be sufficiently large or liquid at the time of his death to carry out this purpose, he deliberately fixed the time of its commencement as of the date of death of the last survivor of his children and grandchildren who were living at the time of his decease, being careful to stay well within the limit prescribed by the rule against perpetuities, i.e., a life or lives in being at the time of his death and 21 years thereafter. At the time he made his will in 1898, his youngest living grandchild was still a minor and it is safe to assume that he contemplated a long period of time before his college would be started; in fact, the elapsed time has been just about 50 years. Having been an investor in real estate for many years and having accumulated a modest fortune in those enterprises, he laid careful testamentary plans to enhance the value of his estate after his death so that there would be sufficient income from his residuary estate to build and main-

tain his college when the proper time arrived. He obviously had unbounded faith in the future development of real estate in and around Philadelphia, for he directed that none of his holdings should ever be sold but that they should be improved and made ever more productive as the years went on. In this regard he emulated the example set by Stephen Girard in his will made some 70 years before.

With great foresight, he provided for the immediate setting up of a contingent fund out of income to take care of "unfortunate contingency and accident". The initial amount was fixed at $20,000, but this was to be augmented by the addition of $2,000 per year after the death of all of his children until the death of his youngest grandchild. He also provided for the improvement of his large lot of ground on Stonehouse Lane so that it might produce a maximum of income. This he provided by directing the accumulation of a ***499** second fund of $75,000 out of income "not required ... for the other purposes of this my Will", and said that if the Stonehouse Lane project should exhaust the fund so accumulated then building should proceed at the expense of other income of the residuary estate. He then stated that after the Stonehouse Lane property had been fully improved, other real estate should be likewise built upon and made income producing, again with the admonition that only income should be used which was "not required ... for the other purposes of this my Will". Only then did he launch into what might be considered his primary purpose, viz., the establishment and maintenance of his college for poor colored and white orphan boys. He trusted that by careful planning, his college might be both built and maintained out of income, leaving principal perpetually intact. In this respect, his will differs from that of Stephen Girard, which provided for the creation of the college out of principal as soon as practicable after his death. Testator had apparently envisaged the difference between the size of his estate and that of Stephen Girard would be taken care of by the lapse of time covered by the accumulation of income during the lives of his children and grandchildren. Mr. McKee's project was an excellent one and perfectly legal. The record is devoid of evidence to indicate that the accumulation and building programs could not have run concurrently with the building of the college. As the matter now stands, the question is moot. The project to accumulate income and make improvements to real estate has long since been abandoned as being impracticable, and the project to build the college is impossible at this time because of inadequacy of the fund.

****5** This construction of the will eliminates all considerations of violation of the rule against perpetuities and of the statute against accumulations. In The ***500**City of Philadelphia v. The Heirs of Stephen Girard, 45 Pa. 9, a perpetual trust for charity was held perfectly valid. See also Lennig's Estate, 154 Pa. 209; Pepper's Estate, 154 Pa. 331; Young v. St. Mark's Lutheran Church of Hanover, 200 Pa. 332; Darlington's Estate, 289 Pa. 297. In conclusion, the Act of April 18, 1853, P. L. 503, sec. 9, reënacted by the Act of April 14, 1931, P. L. 29, specifically states that any donation, bequest, or devise for any literary, scientific, charitable or religious purpose, shall not come within the prohibition of the act. This exemption in favor of charities has been construed and upheld in Archambault's Estate, 308 Pa. 549, and Wanamaker's Estate, 335 Pa. 241. See also, by analogy, the Estates Act of April 24, 1947, P. L. 100, sec. 6(5).

In answer to the argument that the will was void because it lacked a cestui que trust capable of enforcing its terms, it is only necessary to point out that the Commonwealth of Pennsylvania stands in the position of cestui que trust ready and able to enforce any and all of the terms of a charitable trust. The State serves as visitor to all charitable institutions: Mercer Home's Application, 162 Pa. 232. Property given to charity becomes in a measure public property which the State protects by inspection: Hamilton v. Mercer Home, 228 Pa. 410. In numerous cases our orphans' courts have been held possessed of the broad visitorial and supervisory powers of the Commonwealth: Toner's Estate, 260 Pa. 49; Lehigh University v. Hower, 159 Pa. Superior Ct. 84. The most important illustration of this power is expressed in Wilson, Mayor, v. Board of Directors of City Trusts et al., 324 Pa. 545, wherein the Orphans' Court of Philadelphia County was held to have jurisdiction to examine and audit the books of the Board of City Trusts of Philadelphia, the great majority of those trusts being testamentary and charitable. Therefore, this court can at any time under its visitorial powers require the trustees of this estate ***501** to render an accounting in order to enforce the terms of the trust should occasion arise. Furthermore, such an action could be initi-

ated by the Attorney General of the Commonwealth or by any other party claiming an interest. If the argument advanced by claimants on this score is sound, it would seem that any testamentary gifts in trust to establish a charitable institution must be void, because there is no cestui que trust in existence capable of enforcing its terms. Such argument is untenable.

****6** It is conceded that a gift to charity to vest in interest upon a remote contingency is void under the rule against perpetuities: Penrose's Estate, 257 Pa. 231; Ledwith et al. v. Hurst et al., Execs., 284 Pa. 94; Stephan's Estate, 129 Pa. Superior Ct. 396. However, the charitable gift under the McKee will vested in the charity immediately upon the death of testator. It is true that possession and enjoyment were postponed until the death of all children and grandchildren of testator living at the time of his death, but as has been frequently pointed out, the rule against perpetuities is not concerned with mere possession and enjoyment; the time of vesting in ownership or interest is the criterion: Lawrence Estate, 136 Pa. 354; Gageby Estate, 293 Pa. 109.

As to the time of vesting, the prevailing rule is that if a testator's meaning is vague, an interest will be construed as vested rather than contingent. What is required in cases of doubt is not that words of the will admit of a possible, or even reasonable, inference that testator intended a contingent gift, but that such intention should appear plainly, manifestly and indisputably, otherwise the estate is always held to be vested: McCauley's Estate, 257 Pa. 377; Groninger's Estate, 268 Pa. 184. There is always a strong presumption in favor of vesting: Shaw's Estate, 326 Pa. 456; ***502**Riverside Trust Company v. Twitchell, 342 Pa. 558. The law inclines to treat the whole interest as vested and not as contingent and therefore, in case of doubt or mere probability, it declares interests vested: Letchworth's Appeal, 30 Pa. 175. Therefore, if a reading of the will of John McKee leaves any doubt as to when his charitable gift was to vest, the law requires immediate vesting so as to avoid the possibility of ownership remaining in abeyance. There is nothing in the provisions for accumulation that is inconsistent with immediate vesting in interest and ownership where the ultimate beneficiary is a charity which is to exist in perpetuity. The fact that no beneficiary is named to receive and enjoy the surplus income earned by the residuary estate until the death of the last surviving grandchild does not violate any rule of law. It is an implied direction to accumulate for the benefit of the charity. Furthermore, vesting in interest must have taken place immediately upon the death of testator, if for no other reason than that there was no person or interest designated to receive the beneficial enjoyment of the property in the interim between his death and the death of the last grandchild, for the law, like all nature, abhors a vacuum and prefers the immediate vesting so that ownership will not remain suspended. Charities have always been favorites of the law. Therefore, it is concluded that neither the statute against accumulations nor the rule against perpetuities applies.

****7** The next of kin further argue that testator's real purpose was not charitable, but that he desired the college to be established because of self-glorification and perpetuation of his name and also that the will nowhere evidences a general charitable intent as opposed to a particular purpose which must be carried out in detail or not at all.

In support of the first of these two points, the next of kin point to the fact that the college is to be called ***503** Col. John McKee's College; that his name is to be inscribed on a large marble slab set in the front of the college building; that a large equestrian statue of himself in full military regalia be placed in front of the college, upon which the legend "Colonel John McKee, The Founder of this College" shall be placed; that the students and the band should parade and decorate his grave annually; the students should wear uniforms with brass buttons embossed with the name "McKee", together with other indications to perpetuate his name and glorify his memory.

Colonel McKee's will differs from that of Stephen Girard in the fact that Girard did not require the institution established by his benefaction to bear his name although the trustees of his estate have given it his name. This does not in any sense seriously detract from the realism of the situation, viz., that McKee wanted established an institution of learning for an equal number of colored and white orphan boys. To destroy this charitable purpose because of the obvious attempt by McKee to perpetuate his name would subvert the underlying motive of his benefaction. Self-glorification has been the

basis of many benefactions woven, of course, just as in the instant case with the requirement that such glorification be attached to a worthy service of mankind in some particular aspect. Our Pennsylvania authorities have met with this argument in other cases and have disposed of it uniformly in favor of the underlying intent. See Daly's Estate, 208 Pa. 58; Williams' Estate, 353 Pa. 638; Wilkey's Estate, 337 Pa. 129. See also A. L. I. Restatement of the Law of Trusts, §368, comment (d). In Wilkey's Estate the court said:

"Of course, she (testatrix) had also the motive, not uncommonly associated with a purpose otherwise wholly altruistic, to perpetuate her family name by a testamentary memorial."

In ***504**Fire Insurance Patrol v. Boyd, 120 Pa. 624 (1888), we find a passage most worthy of repetition in extenso:

"Who can say that the millionaire who founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from love to God and love to his fellow, free from the stain of selfishness? Yet, is the hospital or the College any the less a public charity because the primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions? There is ostentation in giving, as well as in the other transaction of life. In some instances donations to public charities may be in part due to this cause; in "others, there may be the expectation of indirect pecuniary gain or return.... Coiled up within many a gift to a public charity there is a secret motive, known only to the Searcher of all hearts. It may be to benefit the donor in this world or to save his soul in the next. It would be as vain as it would be unprofitable for a human tribunal to speculate upon the motives of men in such cases. Nor is it necessary for any legal purpose. The money which is selfishly given to public charity does as much good as that which is contributed from a higher motive, and in a legal sense the donor must have equal credit therefor."

****8** I accordingly find this argument of the heirs and next of kin without merit, and therefore dismiss it.

Respecting the suggestion that the will does not as a whole disclose a general charitable intent as distinguished from a particular intent, that the establishment of the college is the particular intent and since that cannot be carried out, the gift cannot be cy presed and falls, the next of kin point very particularly, inter alia, to several phases in the will wherein the testator states that the estate shall be devoted to "no other purpose". For instance, that none of the moneys, ***505** principal, interest, dividends, rents, issues, income or profits arising from his residuary estate "shall at any time be applied to any other purpose or purposes whatsoever than those herein mentioned and appointed".

The learned amicus curiae points out in his thorough and scholarly report that such argument is made without giving true effect to the entire pattern of the will and is predicated upon an improper emphasis on certain of its provisions and on a deceptive construction of those provisions divorced from their context. These expressions of testator do not negate his desire to have his estate devoted to the predominant purpose specified in the will in a manner different from that set forth.

The record indicates that testator made an earlier will in 1884, 15 years before he executed his last will, wherein he provided relatively small benefits for his daughter and grandchildren as he did in his last will and directed that his residuary estate should be devoted to the establishment and maintenance of a military school and armory for colored male orphans. Therefore, we know that the present will was not a subject of hurried decision, but came only after mature deliberation and was deeply entrenched in his mind. An examination of other parts of the present will supports the conclusion that he had in mind the general charitable intent because he gave 10 acres of his New Jersey real estate for the establishment of a Roman Catholic Church although he was not of that faith. The pattern of the will follows that of Stephen Girard and the conclusion that McKee or his counsel deliberately copied portions of the Girard will is fairly sustainable. There are many similar provisions in each, such as the opening sentence to paragraph 22 of the Girard will, "... and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance ***506** than they usually receive from the application of the public funds", should be compared with the same phraseology which appears in item 27 of the McK-

ee will. Public education at public expense at the time Girard and McKee made their wills was only under the Act of March 3, 1818, 7 Sm. L. 53, for "indigent orphan children, or children of indigent parents, residing within the said school sections". While Girard restricted his educational opportunities to "poor white male orphans", McKee went further and included colored orphans as well. The advanced thinking of this testator is something to be greatly admired and respected. Like Girard, he did not have the advantage of a formal education, and he had the additional handicap of being a member of the colored race which, even in his day, possessed less opportuniey for education than white orphan boys did in Girard's day. He furthermore had been a military man and was devoted to the safety of his country and provided, therefore, that the purpose of the education of those benefitting under his will should be preparation for service in the United States Navy. He was far ahead of his time in his thinking in two particular respects, that the best way to break down the racial barrier in this country is to have the races know each other and that this objective can best be accomplished when the members of them are poor and young and, therefore, unspoiled by the discriminations and prejudices entertained by most adults, which the same boys might grow into if they did not have the advantage of such education as McKee intended. The fact that the estate is inadequate to presently finance the construction and establishment of the college, as McKee envisaged it, is no reason why the entire benefaction should be stricken down and the estate distributed to the next of kin. Colonel McKee's primary intention, in my opinion, contained several facets which in their order of importance can be ***507** delineated as follows: (1) The education of poor white and colored orphan boys; (2) from the ages of 12 to 18 years; (3) that they live together; (4) that the education be nautical in character in order to prepare them for the service of their country; (5) that the college bearing McKee's name should be established. The last purpose, therefore, I place in the position of least importance. More will be said on this subject later on, however, because I am satisfied that through proper efforts such a college might eventually be established because of the interest that McKee's will should arouse in proper circles of this country.

****9** To hold that this benefaction should be stricken down would be unworthy as well as illegal. Although the judicial context of Girard's will did not involve the application of the cy pres doctrine, nevertheless some of the language from the decisions is pertinent. In The City of Philadelphia v. The Heirs of Stephen Girard, 45 Pa. 9, it was argued that the terms of the will were so fantastic as to be impossible of fulfillment. The Supreme Court of Pennsylvania said of this argument:

"Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention."

The cy pres doctrine was dwelt upon in this decision:

"And this is the doctrine of cy pres, so far as it has been expressly adopted by us. Not the doctrine 'grossly revolting to the public sense of justice': ... and 'carried to the extravagant length that it was formerly', in England: by which an unlawful or entirely indefinite charity was transformed by the Court or the Crown ***508** into one that was lawful and definite, though not at all intended by the donor or testator. But a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness.

"Our jurisprudence furnishes several illustrations of the doctrine thus restricted.... The meaning of the doctrine of cy pres, as received by us, is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence." (Italics added.)

Terms of charitable bequests have frequently been departed from under the cy pres doctrine of Pennsylvania. See In re Daly's Estate, 208 Pa. 58; Kramph's Estate, 228 Pa. 455; Lehigh University v. Hower, 159 Pa. Superior Ct. 84; Smith's Estate, 18 Dist. R. 1024, and the recent action of this court authorizing the sale of the so-called Girard Estate property in South Philadelphia in defiance of the terms of Girard's will that none of his real estate should ever be sold.

****10** In the consideration of what is a general charitable intent, we can well start with the quotation from Vidal et al. v. Girard's Executors, 2 Howard 127:

"The trusts ... are of an eleemosynary nature, and charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education ***509** of orphans and poor scholars are charities in the sense of the common law.... 'The conservative provisions of the statute of 43 Elizabeth, Chap. 4, have been in force in Pennsylvania ... and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it'.' D' (Syllabus.)

In the City of Philadelphia v. The Heirs of Girard, supra, our Supreme Court said:

"Whatever is given for the love of God or for the love of our neighbor, free from the stain of everything that is personal, private, or selfish, is a gift for charitable uses": Price v. Maxwell, 4 Casey 23.

Colonel McKee's intention is to be gathered from the four corners of his will and in my opinion he has impressed upon this fund such a public interest as will authorize the court to exercise its cy pres powers and award the fund otherwise than to his next of kin or other legatees. In his will he provides that "such a number of poor colored male orphan children and poor white male orphan children ... as can be trained in one institution may receive a better education as well as a more comfortable maintenance than they usually receive from the application of public funds". We must, therefore, conclude that his primary motive as stated was the education of orphan children and the fact that such orphan children cannot be educated in the college and therefore through the means that McKee intended does not mean that such children shall be deprived of the type of education that McKee wanted.

Directions by testator that none of the trust res shall at any time be applied to any other purpose or purposes whatsoever than those mentioned (sec. 1, par. 28) and other similar phases do not restrict the gift narrowly to the establishment of the college and exclude their application to the other purposes in the order hereinbefore outlined. The language of the section ***510** does not indicate that unless all purposes can be fulfilled, none shall be carried out. Application of the fund for some of them is all that is required. What is inhibited is their use for some purpose not mentioned in the will.

This gift is in trust for charitable and patriotic purposes. It is distinguished from a gift on condition. In conveyances on condition, the grantor may enter for condition broken, but in conveyances in trust the proper remedy for breach of trust is the appointment of a new trustee: Barr v. Weld, 24 Pa. 84.

****11** Statements negativing a use for any other purpose, for example, "and for no other purpose," will not create a defeasible estate unless they are accompanied by restraints upon alienation, forfeiture or reverter clauses. In the absence of such clauses, the negating provision will be disregarded as superfluous: T. W. Phillips Gas & Oil Co. v. Lingenfelter, 262 Pa. 500; Sapper et al. v. Mathers, 286 Pa. 364, and West Pittston Borough v. Clear Springs Coal Co., 22 Dist. R. 190. See Scott on Trusts, 401.2, p. 2126. Distinguished from this line of cases is Randall's Estate, 341 Pa. 501, cited by claimants. There the court invoked clauses of forfeiture and reverter in the will following a nonuser for 23 years. The reference in this decision to the invalidity of the gift we regard as dicta and not controlling. In Kirk v. King, 3 Pa. 436, real estate was deeded to the employers of a private school for an English school house. After nonuser for 17 years, the court held the gift was conditional, the main reason being that the school was not a charitable institution. Therefore, it is concluded as a matter of law that the instant gift being for a charitable as well as a patriotic use and there being no restraints upon alienation or clauses of forfeiture or reverter in the will that the gift to the trustees is in fee simple.

Counsel for the next of kin propounds the argument ***511** that the property should go to them under the Act of July 7, 1885, P. L. 259, 20 PS §196, because the charitable gift fails for uncertainty "or for other reason". They contend that neither the Act of May 9, 1889, P. L. 173, 10 PS §14, nor the Act of May 23, 1895, P. L. 114, 10 PS §13, repeal the provision of the Act of 1885, supra. They maintain, therefore, that in 1902 when testator died, the law was that in all cases where testator's charitable intent was so specific that it could not be approximated, the property should go to the heirs at law and next of kin, citing Trin's Estate, 168 Pa. 397. They further argue that the reënactment of the Act of 1855 by the amendment of 1895 did not change the law in this regard, because of the doctrine that reënactment by amendment does not repeal intervening statutes: Toner's Estate, 260 Pa. 57, and the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 PS §583. In Hildebrand's Estate, 47 Pa. D. & C. 537, Northampton County, an award was made to the next of kin because the court concluded that approximation of testator's intent was impossible.

At the time of testator's death in 1902, the statutory law with respect to cy pres was in a state of confusion. There were in force at that time five somewhat conflicting statutes. They are as follows: Act of April 26, 1855, P. L. 328, 10 PS §13; Act of May 26, 1876, P. L. 211, 10 PS §15; Act of July 7, 1885, P. L. 259, 20 PS §196; Act of May 9, 1889, P. L. 173, 10 PS §14, and Act of May 23, 1895, P. L. 114, 10 PS §13.

****12** Having found as a matter of law that the will of testator reveals a general charitable intent, the argument thus presented is without foundation and claimants, as next of kin, have no standing to claim the estate. In Wilkey's Estate, 337 Pa. 129 (1930), it was held that where property is given in trust to be applied to a particular charitable purpose and it is or becomes impossible, impracticable or illegal to carry out the ***512** particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor and that the heirs of testatrix had no standing to question the disposition of testatrix's residuary estate. Justice Stern, in reviewing the legislation, said (p. 135):

"If, ... the Act of 1885 was not technically repealed, it was at least so devitalized as to make its subsequent operative force practically negligible."

As to whether or not the Estates Act of April 28, 1947, P. L. 100, which became effective on January 1, 1948, prior to the date of death of T. John McKee, grandson of testator, and which provides that the court shall order a distribution of an estate in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific, has any application to the claims of the heirs and next of kin is not decided. However, this legislation, it can be said, points in the direction to which the thinking of both the legislature as well as the courts was leading.

In passing judgment upon the merits of the cy pres claimants, reference must be made initially to the proposed action expressed hereinafter which may result in the final accomplishment of Colonel McKee's purposes in the establishment of a college, if not his own or bearing his name, certainly much more approximating his intention. Everyone of the claimants complies substantially with at least some of the testamentary specifications and every one agrees to fulfill others if an award of principal should be made to it, some being more specific than others as to how they propose to carry out the terms of the will. However, as to the major objectives of testator, all of the claimants frankly ***513** admit the impossibility of full compliance. Careful study of the record reveals that the majority of the specific purposes of the will would have to be completely ignored were an award made to one or more of these claimants. This is, no doubt, due to testator's unique plan. Certainly some of the funds would have to be applied to some other purpose or purposes than those mentioned and appointed in the will. One or more of the claimants would agree to hold a major portion of principal intact and expend income only for the maintenance of college buildings already in existence or to be erected. Likewise, they all would agree to render periodic accountings to this court and no doubt publish information concerning the state of the trust from time to time. While the amicus curiae indicates that the fund could be awarded in his opinion to one or more of the claimant institutions and in compliance with the provisions of any award could be controlled by the court, nevertheless he indicates with much

justice and wisdom that the principal should not be disposed of at this time because if such principal were awarded all hope of fulfilling one of the most important provisions of the will, namely, the establishment of a college on McKee's property in Bristol Township, Bucks County, Pa., would be dissipated. He adds, "Surely, if any spark of hope remains of building Col. John McKee's College on the site selected by him for the purpose, that spark should be kept alive and fanned into the flame of reality if at all possible".

****13** A very interesting part of the report is the discussion respecting those provisions of the will regarding the nature and character of the buildings of the college, the erection of a statue of testator, dormitory accommodations and many others. Of equal interest are the observations respecting the provisions having to do with the student body, curriculum and management, the clothing of the students, the band of music-***514** some of these, he points out, are practically impossible of accomplishment.

Of the four naval academy claimants, only one meets fully the requirements of the will as to age limitations, the students there being admitted between the ages of 13 and 14 and graduate at about 18 or 19. This aspect of testator's purposes is most important, for while he indicated that curriculum of his college should be based upon that of the United States Naval Academy at Annapolis, he nevertheless, in my opinion, intended education to be at the high school level rather than at the college level. It is most important that none of the naval academy claimants now has or ever had any appreciable number of Negro students. The reasonable explanation is offered that they never had any large number of applications by Negro boys, although some who applied may have been denied admission because of inability to pass the rigid physical or mental examinations. These academies are practically all under State regulation and in each instance the State law prohibits, or at least does not sanction segregation or discrimination between the races. The auditing judge agrees with the amicus curiae in his conviction that any of these institutions could and undoubtedly would accept a limited number of Negro boys who would qualify for admission and that they would all be given the same treatment as other students; nevertheless none of the claimants now has any substantial number of Negro students, much less a student body composed of an equal number of white and Negro boys. Furthermore, it does not appear that the students at any of these schools are fatherless orphans or drawn from the poorer classes. In view of the fact that John McKee, testator, lived a major portion of his life in Philadelphia and died here, I do not believe it was his intention to relieve the tax burdens of the people of other States by providing funds for students in their ***515** institutions, but that he intended such tax relief or assistance to aid his native State. He clearly intended to confine his benefaction to the residents and taxpayers of Philadelphia.

The amicus curiae points out very properly that any direct award of principal to one or more of the claimants from outside the Commonwealth of Pennsylvania would entail the loss of control of the fund by this court; that future accountings, if any, would probably be in some foreign jurisdiction; that this is important because this court should retain visitorial powers and a measure of control over the fund by attaching conditions to its award requiring periodic accountings. The court, therefore, accepts and adopts the suggestion of the amicus curiae that no part of principal or income be awarded to any of the naval academies considered.

****14** The claims of the Downingtown School, Lincoln University, Spring Garden Institute and the Morristown College are very impressive and worthy of the utmost consideration. While they are not naval schools, they are educational institutions of established standing and worth. The first three are located in Pennsylvania and hence within the jurisdiction of the court. Furthermore, they more or less serve the Philadelphia area. Morristown College is outside the Commonwealth and, therefore, subject to the objection that any award to it might entail loss of control of the fund by this court. The principal objection to the Downingtown School, Lincoln University and the Morristown College is that the student bodies are so overwhelmingly Negro that they do not fulfill one of testator's dominant intentions that the student body be of an equal number of Negro and white boys. Furthermore, they do not provide for the naval training testator prescribed. None of claimants is truly inter-racial. Every one is either predominantly white or all Negro. While they all deny any taint of intolerance, discrimination or segregation, ***516** none conforms to the high inter-racial

standard set by testator. In my opinion, the so-called white schools would, no doubt, accept a limited number of Negro students, but would not accept as many as one half. This is supported by the testimony. To what is stated respecting the so-called Negro schools, it must be added that they would welcome white students up to the prescribed proportion of one half and it is not due to any fault of those institutions or to any lack of effort on the part of their management that they are not truly inter-racial within the meaning of this will.

While the Spring Garden Institute has a large number of Negro students, nevertheless the fatal defect in this institution's claim lies in its lack of dormitory facilities and the fact that it does not give a strictly naval course, although it teaches a majority of the subjects set forth in testator's will and as well vocational trades, most if not all of which are useful in the Navy. Finally, it does not meet the requirement as to age limits.

The Downingtown and Morristown Schools, while they meet the age limitation, are coeducational and, therefore, do not qualify. Lincoln University is exclusively for boys, but the educational level is of the college university standard and no students are admitted as young as 12 years of age. Accordingly, Lincoln University fails to meet essential requirements of the will.

Mercy-Douglass Hospital is admittedly not an educational institution, much less a naval school. Therefore, in spite of the fact that it is a most worthy hospital with an efficient training school for nurses, it is clearly not eligible for any direct award in this estate. Jehovah Jireh Baptist Institutional Church is a denominational church and not a school. The Moorish National Berkshire Homestead is a school in prospect, not yet in operation and with no fixed, definite curriculum ***517** or plan of operation. Obviously, these last two claimants are appearing mainly because they need funds for expansion of their programs and, while the projects they sponsor are probably worthy, yet they do not qualify under the auditing judge's theory of the application of the cy pres doctrine. Therefore, the claims of the Mercy-Douglass Hospital, Jehovah Jireh Baptist Institutional Church and the Moorish National Berkshire Homestead are dismissed.

****15** The auditing judge is much impressed with the learned amicus curiae's reaction to the evidence supporting these claims. He states that while all the evidence was presented with a high degree of sincerity and honesty of purpose, it points up one important thing, that the intention of testator to establish better racial relations should be adhered to by not awarding the funds to any of the claimant-institutions, but that the door should be kept open for the fulfillment of the dominant purpose of testator at some future time.

The amicus curiae, whose services have been invaluable to the court in the assembling and weighing of the facts as well as the research and presentation of the law, recommends the award of the fund back to the present trustee in further trust as follows: That the court appoint a scholarship committee, inter-racial in character, of not less than five nor more than 10 persons, the committee to select by competitive examination or otherwise an equal number of poor white and Negro orphan boys, preferably of the City of Philadelphia, mainly those seeking naval training to whom scholarships or scholarship aid shall be awarded from the income of the estate, the said committee to be denominated "John McKee Scholarship Committee". The committee shall specify the amount and kinds of aid the recipients should receive and the institutions which they should attend and such other matters as are necessary to a proper administration of their office. ***518** He also recommends that the trustee be authorized to expend the income upon proper vouching by the said committee.

Events have proved the unique wisdom and foresight of testator's purpose and scheme. One of the greatest social problems facing this country today, the handling of which the whole world is watching with keen interest, is the so-called Negro problem. When this will was written, few white men had envisaged it and it was, therefore, neglected, but Mr. McKee felt it keenly and decided to do something about it. He did so in an intensely practical and timely manner. No doubt he felt that immediate establishment of the college at the time of his death would be inauspicious and that his estate, which was then inadequate for the purpose, would yield enough income prior to the death of his last surviving grandchild living at the time of his death to raise a fund large enough to then establish the college, at which

time also his plan for such a nonsegregated institution would be generally accepted by the public. The plan for a nonsegregated school is one of the most practical and tangible ideas yet offered for the solution of this great sociological problem. Teaching colored and white to live together helps enormously to break down the artificial social barriers society has traditionally raised between them, and to live and study together in preparation for service in the Navy of the United States is of great added value and incentive to the project.

****16** Had Mr. McKee's investment sense been as shrewd as the great Stephen Girard or had his investments been as fortunate as have those of Girard's, this college might be a reality today. This is mentioned because McKee's will is modeled very largely upon Girard's will. The fact that this fund of approximately $1,000,000 is patently inadequate to fulfill testator's purpose is not, in my opinion, sufficient reason at this ***519** time to declare his purpose impossible of accomplishment. The objective is of such transcendental importance, not merely locally, but nationally, that further effort should be made to carry it out. Testator himself has pointed the way in which it may be done. Paragraph 28, sec. 4, of his will provides that his trustee may accept funds from other sources for the purposes of the trust. This invitation to augment what can be regarded as a substantial nucleus provided by testator cannot be now ignored and the door shut permanently upon possible eventual materialization of McKee's idea. This provision makes this trust what is commonly called an "open end trust" as distinguished from a closed trust, such as that established by Stephen Girard. In the closed trust, other assets cannot be added even by settlor or testator, let alone from outside sources. However, in an open end trust, such augmentation is possible. If this augmentation is not feasible, then the fund might even be added to other funds under cy pres for the accomplishment or approximate fulfillment of the purposes and if necessary under some other auspices or management, subject to the approval of the court. It is perfectly possible that an institution might be established on a State or a National, rather than the strictly local, level provided by McKee's will and since, as stated, the problem is a National one and not merely a local one, it can be expected to attract substantial gifts possibly through a foundation established on a State or a National level with persons of equal prominence serving as trustees. It is conceivable also that an institution might be established under a charter granted by the State of Pennsylvania and that the Legislature of Pennsylvania might aid in the development and operation of the project. This fund could well be added to or form a basis of such a project under the cy pres doctrine and if such a college were ultimately established, its doors ***520** could be opened to not merely Philadelphia boys as provided in the will, but from all sections of the State with adequate representation provided for Philadelphia boys. The changing conditions since the death of testator, unforeseen by him, call for some such measures, which would not be in defiance of, but in furtherance of his intent. Therefore, the trust assets will be awarded back to the trustee to be held by him and again accounted for not more than five years from the date hereof. In the meantime, the court will undertake to explore the possibilities hereinbefore expressed.

****17** Therefore, in adjudicating this account and making the award of the fund back to the trustee to be retained by him, I shall divide the purposes of the award into two parts: The first shall be for the establishment of scholarship aid as recommended by the learned amicus curiae, but with the requirement that another accounting be made by the trustee not more than five years hence, and secondly, the intervening time to be utilized by the court and those that it can persuade to engage in the project to take appropriate means to obtain sufficient funds through a foundation or other fund raising agency on a National scale, which funds can be merged with this trust or the funds of this trust merged with other funds under terms and conditions agreeable to the foundation, the trustee and the court. The court possesses the broadest possible powers for the application of this fund to fulfill the purposes of the will, even to the extent of awarding all of it, principal and income, to an independent agency so long as that agency's purposes conform to what the court regards as Colonel McKee's intention and the court can retain and exercise its visitorial powers. No doubt we will have no hesitation in using that power should occasion arise.

It is to be noted of record that the accountant herein, His Eminence, Dennis J. Dougherty, Cardinal Archbishop ***521**

of Philadelphia, as succeeding trustee, died on May 31, 1951, and his successor in this office of Archbishop of the Diocese of Philadelphia, Most Reverend John F. O'Hara, C.S.C., was installed in such office on January 9, 1952. He will now be substituted as succeeding trustee of the fund in accordance with the terms of the will of John McKee. Joseph P. McCullen, coexecutor and cotrustee, died December 2, 1929.

The fund presently before the court and available for distribution, both principal and accumulated income, will be awarded hereunder to be retained by the succeeding trustee in further trust for the uses and purposes outlined above. The trustee is directed to file another account for audit not later than five years from the date of final confirmation of this adjudication, during which period efforts will be made to probe the possibility of securing additional funds necessary to carry out the purpose of testator as expressed in his will.

In the meantime, the recommendations of the amicus curiae as set forth in his report are adopted pro forma and the auditing judge will make the appointment of a Scholarship Committee and outline its duties and responsibilities in a supplemental adjudication following final confirmation of this adjudication.

Mercer L. Lewis, Myron H. Fineman, John F. Thaete, William T. Coleman, Jr., Herbert R. Cain, Jr., and D. Alexander Wieland, for exceptants.

James E. Gallagher, Jr., and Gerald Ronon, contra.

February 6, 1953.

KLEIN, P. J.

John McKee died in 1902, at the age of 81. He was a Negro with a dream in his heart, and a determination to convert his dream into reality. He was not a particularly modest man and obviously had an intense desire to perpetuate his name.

****18** He left a considerable fortune, consisting principally of large real estate holdings which he had acquired in ***522** Pennsylvania, New Jersey, West Virginia, Georgia and Kentucky. His dominant purpose, as expressed in his carefully drawn testament, appears to have been to devote this fortune to the fostering and promoting of integrated education for white and colored boys, between the ages of 12 and 18, by establishing a nautical school to prepare the students for service in the United States Navy.

The account which is the subject of the present audit, was filed by His Eminence, Dennis J. Dougherty, Cardinal Archbishop of Philadelphia, on October 1, 1947. In the five-year period which has elapsed since that date, this case has been the subject of a most searching and thorough inquiry and study by Mr. Blessing, the amicus curiae appointed by the court, and by Judge Bolger, the learned auditing judge.

The report of the amicus curiae and Judge Bolger's adjudication are models of scholarly thoroughness. Since we are in complete accord with Judge Bolger's conclusions, and concur in the reasons he assigns as the basis therefor, we will not attempt to rewrite what he has already said so fully and so well.

Testator's will was obviously patterned after the will of Stephen Girard, and the charitable trust which he sought to establish was defined with clarity and precision comparable to the trust created by Girard, which has been upheld by the courts as a proper and valid charity.

As the result of our study of this voluminous record, we are completely satisfied that testator created a valid charitable trust and that neither the statute against accumulations nor the rule against perpetuities has any application thereto and, further, that none of testator's next of kin have any interest therein or right thereto.

It also seems evident that even if the next of kin ever had any interest in the estate, the deeds of release ***523** executed by Abby A. P. Syphax, testator's daughter, her five children and by Dr. Henry McKee Minton, testator's grandson, in settlement of the proceedings instituted to contest the probate of testator's will, operate as a complete relinquishment of all their rights and interest in this estate, as well as the interests of those who are now claiming through them, not only under the will but also under the provisions of the intestate laws.

There cannot be the slightest question concerning the cor-

rectness of the auditing judge's finding that "the fund as presently constituted is grossly inadequate to fulfill the charitable purposes as specified in the will." As a matter of fact, none of the parties in interest challenge this conclusion.

It is necessary, therefore, to direct the application of the fund in accordance with the doctrine of cy pres.

A great transition has taken place in the United States in the 50 years which have elapsed since the testator's death. In this period the social consciousness of our people has been awakened and greatly developed. In keeping with this trend, our courts have reversed their earlier position in regard to the cy pres doctrine. From an early attitude of extreme aversion, modern courts are disposed to apply the doctrine with the utmost liberality. [FN2]

> FN2. Judicial Attitude Toward Cy Pres Doctrine, by Edith L. Fisch, 25 Temple Law Quarterly 177.

****19** In the present case the disappointed charitable claimants are impatient; and this is natural. However, we are all of the opinion that the scholarship plan adopted in the adjudication is fair and reasonable and the most practical method of disposing of the questions confronting us at the present time.

Since most charitable trusts are perpetual in character, a delay of 5 or 10 years to permit additional study and research to determine whether testator's ***524** plans can actually be put into operation, and if not, to consider the manner in which the cy pres doctrine can best be applied, will not be of particularly serious consequence.

Although all of the charities which have come forward to claim this estate are most worthy, and are serving the community well, not a single one of them renders exactly the type of service envisaged by John McKee. Since testator's primary aim was to foster inter-racial integrated education, it seems clear to us that under the circumstances this fund should not be awarded to religious organizations, hospitals or similar institutions. If the conclusion is ultimately reached that a school cannot be built and operated as specified in the will, we believe that the corpus of this trust will have to be awarded to an educational institution which teaches both white and colored students. We might be committing irreparable error if we accede to the wishes of the charitable claimants at this time and award to them the corpus of this trust. We certainly would be straying far afield from the course charted by testator.

Under the scholarship plan suggested by the amicus curiae and adopted by the auditing judge, we hope to learn a great deal about the possibilities of integrated education in the next five years. With this additional information we should be in a much better postion to solve the difficult problem confronting us in this case. It is quite possible, for instance, that one or more of the present applicants might alter its policies sufficiently to qualify at a later date to receive the trust res.

The plan adopted by the auditing judge is in accord with the practice which we have been following recently in similar cases, in which the court retains supervisory control over a fund for a limited period of years in order to permit the situation to crystallize. See Craig's Estate, 56 Pa. D. & C. 135, affirmed by the Supreme Court, 356 Pa. 564 (1947); ***525**Ashbridge's Esstate, 61 Pa. D. & C. 279 (1948); Wanamaker Estate, 67 Pa. D. & C. 517, affirmed by the Supreme Court, 364 Pa. 248 (1950).

All of the exceptions are therefore dismissed and the adjudication is confirmed absolutely, without prejudice to the rights of the charity claimants to present their claims de novo at the audit of the next account filed by the trustees.

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