

property cannot be so forfeited and escheated and it must be disposed of according to the law of charities. While the decree gave the possession and custody of the personal property to the receiver to be held subject to the further order of the court, the use was to be charitable objects, lawful in their character, within the general intent of the donors. The opinion does not say that the control over the personal property is absolute; that it was regardless of the purposes of its dedication. The court further said in the same opinion:

"The principles of the law of charities are not confined to a particular people or nation but prevail in all civilized countries pervaded by the spirit of Christianity. * * *

A leading and prominent principle prevailing in them all is that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purpose of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use it is considered as given to the public, and is therefore taken under the guardianship of the law. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the State it will be applied to some object of kindred character so as to fulfill in substance if not in manner and form the purpose of its consecration."

In illustration of the application of the principle, the court quotes from the opinion of Lord Chief Justice Willes, in his opinion in *Attorney General vs. Lady Downing*, 1 Willes, 82: "But where property is given to mistaken charitable uses this court distinguishes between the charity and the use; and seeing the charitable bequest in the intention of the testator they execute the intention varying the use as the King who is the curator of all charities, and the constitutional trustee for the performance of them, please to direct and appoint."

In this it is not stated that a of equity in the exercise of its ordinary jurisdiction could vary the use to objects outside of the intention of the donors; but it does say "varying the use as the King please to direct and appoint." And after citing cases from various countries, many from England and our own land, in illustration of the doctrine of *cy pres*, the court continues, "The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be it is true, to the specific purposes to which it is devoted. * * *

Hence when such property ceases to have any other owner by the failure of the trustees, by forfeiture for illegal application or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the state; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court the legislature may interpose and make such disposition of the matter as

will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect."

In this the court says that when such property ceases to have any other owner by the failure of the trustees for any cause, the court of Chancery in the exercise of its ordinary jurisdiction will appoint new trustees; or if the case is beyond the ordinary jurisdiction of the court, the legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right.

If a person holding the legal title of property, for the use of another, or others, refuses to discharge the obligation arising out of the confidence reposed in him to apply it according to the trust, or if he forfeits his right to do so for any cause, the court in the exercise of its ordinary jurisdiction will appoint another trustee. This jurisdiction, termed ordinary jurisdiction is confined to the selection of the instrument to apply the property to the object; it does not extend to the selection of a new object to which to apply the funds.

The ordinary jurisdiction is here limited to the mode; but if the case is beyond that the opinion says the legislature may interpose to prevent the funds from being lost to the general objects or class of objects which they were intended to subserve, and in so doing may make such disposition of the matter as will accord with justice and right.

In the opinion from which we have been quoting the court defined the powers of the government to deal with the real estate forfeited and escheated to it, and also its authority with respect to the property not so forfeited and escheated. The court also discussed the power of the government through its courts of equity in the exercise of their ordinary jurisdiction and its authority through the sovereign in monarchical governments, and also its authority as expressed in enactments of the law making department in a republic.

It requires a careful examination of the opinion to distinguish the powers held to be applicable to the forfeited and escheated property from those applying to the property not forfeited and escheated, and also to distinguish the powers held to pertain to the court in the exercise of its ordinary jurisdiction with respect to property dedicated to charitable uses, from those belonging to the sovereign in a monarchy with respect to such property or to the law-making department in a government based upon the will of the people—one in which they are sovereign.

In *Jackson vs. Phillips and others*, 14 Allen, 539, a testator "bequeathed two sums to trustees; one for the preparation and circulation of books, newspapers, the delivery of speeches, and such other means as in their judgment" would "create a public sentiment," as would "put an end to negro slavery in this country," and the other for the benefit of "fugitive slaves" who might "escape from slave holding states." After his death slavery was abolished by the thirteenth amendment to the constitution

of the United States: Held "that these charitable bequests should be applied to carry out the intentions of the testator as nearly as possible, according to a scheme to be settled by a master and approved by the court." The master reported that "both sums should be paid over to the trustees, the first to be paid by them from time to time to an association already established to promote the education, support and interest of the freedmen, lately slaves in those states in which slavery had been so abolished; and the second sum (being of small amount) to the use of necessitous persons of African descent in the City of Boston and its vicinity, preference being given to such as had escaped from slavery."

The purpose of the first bequest was the liberation of negro slaves, and the purpose of the second was to assist such as might escape from slave holding states. The general purpose was aid to negro slaves. And these slaves having been liberated, the court held that the sum should be devoted to their use and benefit as freedmen, except a small portion to be used for the benefit of necessitous persons of the same race in Boston and its vicinity. While the mode prescribed by the testator for benefiting the negro slave by securing their liberation and by aiding those who had escaped from slavery was necessarily abandoned, the general object of the bequest was not. The court devoted it to their use as freedmen and to needy persons of the same race in a particular locality.

In this decision the court went to the verge of its jurisdiction. In the same opinion the court said, "This power of disposition by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, intrusted and empowered to see that nothing be done to the disservice of the crown or the propagation of a false religion; *Rex vs. Portington*, 1 Salk, 162; 8 C. 1 Eq. Cas. Ab. 96; or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws; *Dig. 83. 2, 17; 50, 8, 4; Code, lib. 1. tit. 2, c. 19; tit. 14, c. 12*; is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal. 4 Dane Ab. 239. *Gass vs. White*, 2 Dana 176. *Methodist Church vs. Remington*, 1 Watte, 226."

In the same opinion the court said further: "It is accordingly well settled by decisions of the highest authority. that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in charity, does not go to the