PerIn Vs. Carey

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Appellant : Perin

Respondent : Carey

Judgement :

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Perin v. Carey

65 U.S. (24 How.) 465

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF OHIO

SYLLABUS

Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue.

He devised certain real and personal property to the City of Cincinnati and its successors, in trust forever for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants.

If there should be a surplus, it was to be applied to making additional buildings and to the support of poor white male and female orphans, neither of whose

Page 65 U. S. 466

parents was living, preference to be given to our relations and collateral descendants.

The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the City of Cincinnati, who should have power to appoint directors to said institution.

This will can stand, and with reference to the various points of law connected therewith, this Court establishes the following propositions, *viz.:*

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio, but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.

2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the governor and judges in her territorial condition, and if so, they were repealed by the act of 1806.

3. The City of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.

5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention, and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.

7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

8. Legislation of Ohio upon the subject of corporations, by the Act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

The nature of the devise is stated summarily in the headnote

Page 65 U. S. 467

of this report, and more particularly in the opinion of the Court.

The bill specified the following objections to the validity of the devises and bequests:

"1. Said of City of Cincinnati was formerly a municipal corporation, created and having certain powers conferred upon it by an act of incorporation of the Legislature of the State of Ohio, but it now exists only as a political division of the

state, under a general law having a uniform operation throughout the state, and is without any power or authority to accept said devises and bequests, to acquire or hold the title to the property mentioned in said devises and bequests for the purposes therein expressed, or to execute the trusts or any of them therein set forth and declared."

"2. Said Charles McMicken, deceased, has undertaken, by said alleged devises and bequests, to render a large amount of real estate above described, situate in said City of Cincinnati, in said State Of Ohio, and an indefinite amount of real estate to be hereafter purchased in said City of Cincinnati, forever unalienable, contrary to the law and public policy of said state."

"3. There are no persons mentioned or referred to as beneficiaries under the trusts attempted to be created by said will who are so described that they are entitled to and can claim the benefit of said trusts or any of them, and the same are therefore void for uncertainty."

"4. By the terms of said will, the establishment of the regulations necessary to carry out the objects of the endowment attempted to be made, and the power to appoint directors of the institutions therein named, are vested in the corporate authorities of the City of Cincinnati, but there are no persons, either artificial or natural, who fall within or are sufficiently identified by said description."

"5. The trusts attempted to be created by said will are uncertain and illegal for the further reason that the distribution of the trust fund between the two objects, of the education of white boys and girls and the support of poor white male and female orphans, is to be left to the unrestrained discretion of

Page 65 U. S. 468

the City of Cincinnati, or of the corporate authorities of the City of Cincinnati."

"6. The trust attempted to be created by said will for the support of poor white male and female orphans is illegal and void because, without authority of law and in violation of the statutes and public policy of the State of Ohio, it is therein required

that before they shall receive any benefit therefrom, their guardians, or those in whose custody they are, shall have first entirely relinquished their control of them to the said city, and provided that those orphans who may have remained until they have reached any age between fourteen and eighteen years shall be bound out by the said city to some proper art, trade, occupation, or employment."

The respondents demurred to the bill, which was sustained by the circuit court and the bill dismissed. The complainants appealed to this Court.

Page 65 U. S. 491

MR. JUSTICE WAYNE delivered the opinion of the Court.

The appellants here were the complainants in the court below.

The object of their bill is to set aside the devises and bequests in the will of Charles McMicken to the City of Cincinnati, in trust for the foundation and maintenance of two colleges.

The testator says:

"Having long cherished the desire to found an institution where white boys and girls may be taught not only a knowledge of their duty to their Creator and their fellow men, but also receive the benefit of a sound, thorough, and practical English education and such as might fit them for the active duties of life, as well as instruction in all the higher branches of knowledge, except denominational theology, to the extent that the same are now or may be hereafter taught in any of the secular colleges or universities

Page 65 U. S. 492

of the highest grade in the country, I feel grateful to God that through His kind providence I have been sufficiently favored to gratify the wish of my heart. I therefore give, devise, and bequeath to the City of Cincinnati and its successors, for the purpose of building, establishing, and maintaining, as far as practicable,

after my decease, two colleges for the education of boys and girls, all the following real and personal estate, in trust forever, to-wit,"

describing the property in nine clauses of the thirty-first article of the will.

He then proceeds to declare that none of the real estate devised, whether improved or otherwise or which the city may purchase for the benefit of the colleges, should at any time be sold, but that the buildings upon any part of it should be kept in repair out of the revenues of his estate. In the event, however, of dilapidation, fire, or other cause, or if it shall be deemed expedient to have a larger income, he directs houses to be taken down, and that they are to be rebuilt out of the income of his estate. He further authorizes purchases to be made of other property, buildings to be put up on his vacant lots, and designates a part of the eastern boundary of the grounds devoted to the college for the boys for the erection of boarding houses for the accommodation of the students, from which a revenue may be derived. The testator then declares where the colleges shall be located, that there might be a separation between that for the boys and that for the girls. There are other particulars under this article of the will which we need not recite, as they have no bearing upon the controversy made by the bill. Passing over the 33d article of the will for the same reason, the next article in the will is a direction that the Holy Bible of the Protestant version, as contained in the Old and New Testaments, shall be used as a book of instruction in the colleges. Next it is declared that in all applications for admission to the colleges, that preference should be given

"to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Max McMicken and his descendants."

Then he directs: "If, after the organization and establishment of the institution" and the admission of as many pupils as in the discretion of

Page 65 U. S. 493

the city have been received, there shall remain a *sufficient surplus of funds* that the same shall be applied to making additional buildings, and to the support of

poor white male and female orphans, neither of whose parents are living &c.;, preference to be given by my relations and collateral descendants &c.; that they were to receive a sound English education &c.; and afterwards, directions are given as to the mode of receiving such poor white made and female orphans, and the privileges to be allowed under certain circumstances. The testator, in the thirty-fourth article of his will, declares that

"The establishment of the regulations *necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the City of Cincinnati, who shall have power to appoint directors to said institution.* "

The last article of the will relates to the devises and bequests to the city, and directions as to paying the accounts of the trust. The testator then nominates executors, and they are the appellees in this appeal.

This statement has been made that the devises and bequests of the testator may be fully disclosed and the merit of them as a charitable use may be fully understood.

Our first observation is that it was his intention to establish primarily two colleges for boys and girls, and then a third for the support of poor white male and female orphans neither of whose parents was living, and who were without any means of support, who were to receive a sound English education. This third school was to be founded by applying to the purpose the surplus funds which might remain after the complete organization of the colleges. (36th article of the will.) The testator anticipated that there would be such a surplus, as he left it in the discretion of the city to determine the number of the pupils who were to be admitted to the colleges. We must then keep in mind the thirty-first and thirty-sixth articles of the will in considering it, though they are but contingently connected by the happening of a surplus in the way just mentioned. For, now, if the first is subject to a failure as a gift for charitable purposes, the devises and bequests may be good under the second. Our attention, however, will be

chiefly given to the thirty-first section and its clauses, as under that it was principally argued by counsel.

The learned sergeant, Sir Francis Moore who drew the statute of 43 Elizabeth, chapter 4, says in his exposition of it:

"As in all other grants, so in a gift to a charitable use, four things are principally to be considered: 1. the ability of the donor; 2. the capacity of the donee; 3. the instrument or means whereby it is given; 4. the thing itself which is or may be given to a charitable use."

And then, by way of caution to donors, he says:

"There are five things which cannot be granted to such a use: 1. things that yield no profit; 2. things that are incident to others, and inseparable; 3. possibilities of interest; 4. conditions -- meaning that such things are from their nature insusceptible of serving such a purpose,"

and then he adds the 5th: "Copyholds, if in any way prejudicial to the lord." We shall not consider them numerically, but both seem to be the natural way to discuss such a gift, when its validity is disputed. We shall follow it in those particulars as briefly as we can.

No question is made, however, in this case as to the execution of the will, nor as to the capacity of the devisor. It is insisted, though, that the devises and bequests to the donee, the City of Cincinnati, are void because the city has not the capacity to take them, and also that they create a perpetuity from being inalienable, which is contrary to law.

Charity, in a legal sense, is rather a matter of description than of definition, and the word "perpetuity" in law is only determined by the circumstances of such cases. But for the purposes of this case, the objection to the validity of the charity on account of its perpetuity, we will place under Mr. Sander's definition in his Essay upon Uses and Trusts 196:

"A perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity."

It is then a limitation upon the *jus disponendi* of property, *upon the common law*

Page 65 U. S. 495

right of every man to dispose of his land "to any other private man at his own discretion. " And one class of those limitations is technically termed alienation in mortmain, and to charitable uses. Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the *general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation.* The effect of these statutes deprived every corporation in England, spiritual or secular, from acquiring, either by purchase or gift, real property of any description without a general license from the Crown enabling it to hold lands in mortmain, or a special license in reference to any particular acquisition. These restraints were subsequently relaxed in many particulars, including gifts to a corporation for purposes of education. But this case does not require us to particularize them; our only purpose for having alluded to statutes of mortmain being to show, from the view taken of them from an early day by the courts in England, that devises to corporations, which generally cannot take lands under a will, were held good when made in favor of charities, and that such gifts, from the purposes to which they were to be applied, and the ownership to which they are subjected, have had the protection of courts of equity to prevent any alienation of them on the part of the person or body interested with the offices of giving them effect; and that in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in

corporations when they are charitable gifts. *Hillam's case,* Duke 80, 375; *Mayor of Bristol v. Whitton,* 1633, Duke 81, 377; *Mayor of Reading v. Lane,* 1601, Duke 81, 361; Lewis on Perpetuity 684; 1 Macnaghten & S. Gordon 460; *Chart. Hospital v. Grauger; Griffin v. Graham,* 1 Hawks 130; *State v. Girard,* 2 Ired.Eq. 210. The objection that the devises and bequests create a perpetuity cannot be maintained

Page 65 U. S. 496

unless they are forbidden by the law of Ohio. And if a perpetuity was forbidden, the charitable trust would not fail, but would be held good and carried out in equity.

We were told that the first and second sections of the 13th article of the constitution, in connection with the legislation of the state under them, prevent an estate in perpetuity from being made in Ohio. And for showing the bearing of them upon this case, we were referred to an act of Ohio to restrain the entailment of real estates. 2 Swan, secs. 355-356.

We are unable to see any fair connection between them. The first and second sections of the 13th article of the constitution were that the general assembly shall pass no special act conferring corporate powers. Sec. 2. Corporations may be formed under general laws, but all such may from time to time *be altered or repealed* -- that is, though they may be formed under general laws, that the legislature may alter or repeal them. That by the provision, they meant to retain their legislative powers to give larger powers than a corporation might have had, to reform them in any particular that might become necessary, that of the violation of a contract excepted. The act to restrict the entailment of real estates obviously applies to individuals exclusively, and not at all to corporations, and especially to such of them as may take and hold charitable gifts in perpetuity.

The first act passed under the constitution of 1851, relating to corporations, was to enable the trustees of colleges, academies, universities, and other institutions for promoting education, to become bodies corporate. We will give it in its terms, for nothing it the legislation of that state can show more satisfactorily than it does that

public spirit there is in harmony with, and fully up to, that of the age upon the subject of education. The language of the 1st section is that any number of persons, not less than five, desiring to establish a college, university, or other institution for the purpose of promoting education, religion or morality, agriculture and the fine arts, may, by complying with the provisions of the act, become a body corporate and politic, with perpetual succession, and may assume a corporate name, by which they may sue and be sued, plead

Page 65 U. S. 497

and be impleaded, in all courts of law and equity; may have a corporate seal, and the same alter or break at pleasure; *may hold all kinds of estate, real, personal, and mixed,* which they may acquire by *purchase, donation, devise, or otherwise,* necessary to accomplish the objects of the corporation; and further, the trustees of any university, college, or academy may hold in trust any property devised, or bequeathed, *"or donated"* to such institution, upon any specific trust consistent with the objects of said corporation; also, when any number of persons shall have procured by subscription, donation, or devise, purchase, or otherwise, and sum of five hundred dollars for the purpose of establishing an academy, they may become a body corporate &c.;, and do all acts and things necessary for the promotion of education and the general interests of such academy. Time and the occasion will not permit us to give more of this liberal and enlightened statute, and of the supplemental acts passed in August, 1852, and March, 1853. 2 Swan, secs. 195, 196.

There is nothing in either of them in any way interfering with the power of *before existing corporations* to become the trustees of charitable devises and bequests for education and to hold them in perpetuity. There is rather a disposition manifested to enlarge and confirm their power to do so, and to give to other corporations under the act certainty and security in the administration of such trusts. The legislature has succeeded in giving to corporations, for the promotion of education, what the learned gentlemen who brought this bill said were the requisites of a corporation: lawful existence; artificial capacity and perpetuity of existence, and, we add, the unquestioned enjoyment of all these privileges, which

courts of equity have said for more than two hundred years they were entitled to, in the construction of devises and gifts for charity and for the administration of them.

It was conceded in the argument that the trusts in this will fall within the description of public trusts or charitable uses as recognized in England since the statute of 43 Elizabeth, c. 4, notwithstanding that statute is not in force in Ohio, *and, in our opinion, never was, as we shall show presently.*

Page 65 U. S. 498

Charities had their origin in the great command to love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused -- so much so that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe where Christianity prevailed found it necessary to limit such devises by statutes of mortmain.

In France, by the ancient constitutions of that kingdom, churches, communities, chapters, colleges, convents &c.;, were not permitted to acquired or hold immoveable property. Dumoulin sur 1st art., 51 De la Cou., Paris. This incapacity after a long time was relaxed, and they were allowed to hold by license of the King.

In Spain, the communities mentioned before could neither acquire nor hold property, unless by authority of the Sovereign; but in *England, corporations had the capacity to take property by the common law.* Co. Litt. 99. They were rendered incapable of purchasing without the King's license by a succession of statutes from Magna Charta, 9 Henry 3, to 9 Geo. 2.

They are known as the statutes of mortmain -- that is, as it was the privilege of anyone, before such statute restrained it, to leave his property of every kind by testament to whom he pleased and for such purposes, charitable or otherwise, as he chose and the will was in every particular administered according to the

testator's intentions, *sometimes by the courts of common law, and at others by a court in chancery,* as may be seen from the cases in Duke and other writers upon charities. The question, then, under such a condition of the law in Ohio, where there was no statute of mortmain, cannot be in this case, whether chancery had such a jurisdiction or whether Ohio had adopted in whole or in part the common law, but whether Ohio, in the construction of her judicial system, did not mean to give to those courts which were to have equity jurisdiction cognizance of trusts made by wills for charitable uses, as well as of other trusts, and whether the judges in Ohio have not uniformly entertained it upon that principle. We cannot be mistaken in the conclusion that they have done

Page 65 U. S. 499

so from the cases cited on both sides in the argument of this case, the larger number of which we have verified by examination.

And we are more confirmed in what has just been said, for the English statutes of mortmain were never in England supposed to have been meant to extend to her colonies, and were never in force in those of them in America which became independent states but by legislative adoption.

First it will be observed in all commentaries upon those statutes they are termed local or political laws, meant to suppress a public mischief and abuse in England. The statute of 43 Elizabeth is entitled "An act to redress the misemployment of lands, goods, and stocks of money, heretofore given to charitable uses." The mode and manner for the enforcement of it in any particular did not exist in any one of the English colonies. There was not in either of them a Lord Keeper or Lord Chancellor, or any corresponding officer to mature the regulations enjoined by the act for its enforcement. There were not in the colonies any abuses to redress for the misemployment of lands, goods, or money heretofore given to charitable uses; further, there were not then in any one of them those religious institutions which the monarchs of Europe deemed it politic to restrain from holding lands.

The statute, after beginning with a statement of the abuses to be controlled, declares that for the redress of them it shall be the duty of the Lord Chancellor or Lord Keeper of the Great Seal for the time being, and for the Chancellor of the Dutchy of Lancaster for the time being, to award commissions &c.;, into all or any part of the realm for the purpose of executing the &c.;, statute, and the realm or *Kingdom of England,* in statutory parlance, as well in the time of Elizabeth as now,

"meant the Kingdom over which her municipal laws or the common law had jurisdiction, and did not include either Wales, Scotland, or Ireland, or any other part of the King's dominions except the territory of England only."

1 Blackstone's Commentaries, sec. 4, 93, Wendell.

And in the same section, after having enumerated those dominions which had been subjected by statute or otherwise

Page 65 U. S. 500

to the laws of England, and such as had not been, all being adjacent to England, Blackstone says, our more distant plantations in America or elsewhere are also in some respects subject to English law. But that must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. Pp. 107, 108 Marginal. But we are not left to inferences to establish the locality of the operation of the statutes of mortmain to England, and that they never had any force in the colonies. The whole subject, in all its generality, was ably discussed and decided in the High Court of Chancery in England some forty years since. In that case, 2 Merivale 143, *Attorney General v. Stewart,* the question being whether the statute of mortmain, 9 Geo. II, extended to the Island of Grenada, in the West Indies, it was ruled that it did not, and that none of the English mortmain acts were of force in the colonies.

Without, then, a particular enactment for such purpose, the statute of 43 Elizabeth, c. 4, could never have been in force in Ohio. Nor do we think it to be a point of

judicial uncertainty there, for we cannot find a decision in the courts of Ohio directly declaring that it ever was.

The law was adopted in terms from the statute of Virginia by the governor and judges of the territory. 1 Chase, 190. Whatever may have been its validity in other respects, it did not comprehend the statute of Elizabeth. For though it was a remedial statute to correct abuses, it was a restraining statute of the common law right of every man to dispose of his property by will as he pleased. The law taken from Virginia for Ohio made statutes and acts of Parliament in aid of the common law, which were of a general nature, and not local to that kingdom, of force in Ohio. It was not in aid of the common law, but being restrictive of it, it should have, as to the places assigned for its operation, a strict interpretation.

But whether we are right or not so, in respect to the law adopted from Virginia, and passed in the Territorial Legislature

Page 65 U. S. 501

of Ohio, it is certain that in the year 1806 it was repealed; and that since the Statute of Elizabeth has had no force in Ohio as a statute, though the judges of that state, without any assumption, have applied its principles to all cases of charitable devises as a part of chancery jurisdiction. It certainly was right in them and a duty to carry out the charitable intentions of a testator by the same principles that his will was executed in every other respect, when the legislature was silent in respect to such devises, or had given no other rule concerning them.

No more was done by them in Ohio than was done in every other state in this Union where the Statute of Elizabeth had not been adopted by legislative enactment.

But in justice to the subject we cannot leave it without saying that original chancery jurisdiction over charities existed in England, and was exercised there, before the Statute of Elizabeth was passed; also, that it has now become an established principle of American law, that courts of chancery will sustain and protect such a gift, devise, or bequest, or dedication of property to public charitable uses,

provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor. In confirmation of this, we refer to the cases collected in Angell and Ames upon Corporations, private and aggregate, 6th edition, 182, 177, and from pages 170 to 180, inclusive.

And this Court, in *Vidal v. Mayor of Philadelphia,* reviewed its opinion to the contrary of what has just been said in the case of the *Baptist Association v. Hart's Executors,* and admitted, whatever doubts had been expressed in that opinion, that they had been removed by later and more satisfactory sources of information.

And in *Vidal's Case,* the court went on to say: it may therefore be considered as settled, that chancery has an original and necessary jurisdiction in respect to devises and bequests in trust to persons competent to take for charitable purposes, when the general object is specific and certain, and not contrary to any positive rule of law. 2 Kent's Comm. 287, 288,

Page 65 U. S. 502

4 edition; *Gibson v. McCall,* 1 Rich.S.C. 174; *Att'y General v. Jolly, ibid.,* 176, N.; *Sohun v. Wardens & Trustees of St. Paul's Church,* 12 Met.Mass. 250; *Beall v. Fox,* Ga. 404; *Miller v. Chittenden,* 2 Clarke, Ia.; and *Williams v. William,* Opinion by judge Denio, 4 Selden 525. We also refer to the opinion of Mr. Justice Baldwin which led the way upon this question of jurisdiction in the United States in the will of Sarah Zane in pamphlet; Cir. Co. in Pennsylvania, April term, 1833; and to Mr. Justice Story's Essay in the Appendix to 3 Pet.S.C. 481 to 502, inclusive.

The same results have been announced by the decisions in Ohio. *Trustees of the McIntyre Poor School v. Zanesville Canal and Manufacturing Co.,* 9 Ohio 203, does so. Lane, C.J., avoiding the discussion of the extent of chancery jurisdiction over charities independently of the statute, says:

"But one of the earliest claims of every social community upon its law-givers is an adequate protection to its property and institutions, which subserve public uses, or are devoted to its elevation &c.;, and in a proper case the courts of one state might

be driven into the recognition of some principle analogous to that contained in the Statute of Elizabeth as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is clearly defined and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute nor resulting from its functions as *parens patriae.* "

The same ruling was made afterwards in 15 Ohio 593 and in 18 Ohio 500, and the main point in both of them could not have been decided without maintaining the jurisdiction in chancery over charitable uses, independently of the Statute of Elizabeth. The same may be assumed of the case growing out of the will in 20 Ohio 483. Indeed, it was assumed that no case in Ohio of a charitable trust has been judicially maintained, or could have been valid under the universal admission that the statute of the 43 Elizabeth, c. 4, was not in force in Ohio, unless the courts

Page 65 U. S. 503

there had acted from the conviction that in such cases chancery had a jurisdiction over them by its own authority.

We shall now consider the objections which were made by the counsel for the appellants to the validity of the devises and bequests of Mr. McMicken, that the City of Cincinnati has not the capacity of take them and to execute the trusts of the will, and that no other trustee can be appointed.

In our view, the answers to them from the opposing counsel were decisive. No incapacity of the City of Cincinnati to take in this instance can be inferred from its charter. It has the power to acquire, to hold, and possess, real and personal property &c.;, and to exercise such other powers and to have such other privileges as are incident to municipal corporations of a like character and degree, not inconsistent with this act or the general laws of the state. Swan 960. It was admitted in the argument, that the section just read confers power upon the city to acquire and hold real estate for the legitimate objects of the city. These objects are enumerated in many particulars directly connected with its powers to govern the

city, and in the nineteen sections following that cited there is not a sentence or word from which an inference can be made that the legislature meant to deprive the City of Cincinnati from taking and administering charitable trusts. Indeed, such a course would have been inconsistent with the legislature's caution in its enactments under the Constitution of 1851. It would be doing great injustice to the legislature even to suppose that it meant, in passing an act for the government of corporations, under the provisions of the Constitution that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors. So far from any intention to interfere with such a privilege in the City of Cincinnati, we infer from previous and subsequent legislation that it was to have an important agency in carrying out the 6th article of the Constitution in respect to education. We allude to the act for the better organization and classification

Page 65 U. S. 504

of the common schools in Cincinnati and Dayton, passed in the year 1846, Ohio Local laws, 91, and to that of the 27th January, 1853, both now in force. In the first, the trustees and visitors of common schools in the City of Cincinnati, with the consent of the city council, have the power to establish and maintain out of any funds under the control of the trustees and visitors such other grades of schools than those already established as they may deem expedient for such purpose. Further, by the 68th section of the state School law, Swan, 852, passed in January, 1856, power is given to township boards of education, and their successors in office, to take and hold in trust for the use of central or high schools, or sub-district schools, in the township, any grant or donation, or bequests of money, or other personal property, to be applied to the support of such public schools. Again, in Ohio laws, 33, March 26, 1856, it is declared that whenever anyone gives lands or money for the endowment of a school or academy, not previously established, and shall not provide for the management of it, that the court of common pleas shall appoint trustees with corporate powers. That act

provides also for the management of charities when the founders have not given directions; and another act, Swan, 193, 1856, provides how colleges may be incorporated by their own act, and how trustees of an endowment may also become a corporation by their own act. These acts have been cited to show that Ohio, in her legislation, has made municipal corporations trustees for charity devises and bequests, and that the management of them is a duty. They also prove that the privilege to take them is one given and imposed by law.

After a close examination of all the legislation of Ohio relating to corporations and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the constitution of 1851 in respect to a corporation receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and

not by any implication by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise

upon such trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers. 43 U. S. 2 How. 190. This Court announced the same principle again in the case of *McDonough v. Murdoch,* 15 How. 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio statute of wills to prevent corporations from taking by devise. Much was also said in the argument denying the legality of the trusts in consequence of the uncertainty of the beneficiaries and because the relatives of the testator were to have the preference. As to the first, white boys and girls make as

Page 65 U. S. 506

distinctive a status of a class who are to be the first beneficiaries of the trust, and the words in the 36th section, that

"if any surplus shall remain &c.;, it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support,"

make as certain a description as could have been expressed.

It seems to us now that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, c. 4, but to a charity under the common law. The answer is that a charity is a gift to a general public use, which extends to the rich, as well as to the poor. *Jones v. Williams,* Amb., c. 651. Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses, under the statute of Elizabeth, *Attorney General v. Earl of Lansdale;* but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the

testator. And we cannot be mistaken that a devise to a corporation in trust for any person is good, and will be effectuated in equity. 1 Bro.Ch.Cas. 81. And *a fortiori,* a devise to a charitable corporation, in trust for any other charitable use, would be good. All property held for public purposes is held as a charitable use in the legal sense of the term "charity." Law Library, vol. 80, 116, Grant on Corporations.

We will not pursue the subject further, for without having discussed either of the six objections made in the bill of the complainants or the points made by counsel in support of the demurrer to the bill, numerically, both have been under our examination, for all were appropriately in the argument of the cause, and in this opinion we meant to decide all of them, and have done so.

We cannot announce them more expressively than they were urged in argument:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations,

Page 65 U. S. 507

either municipal or private, have been adopted by the courts of equity in Ohio, but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.

2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the governor and judges in her territorial condition, and if so, they were repealed by the act of 1806.

3. The City of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

4. Those devises and bequests are charities, in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.

5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention, and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

This cause was argued on both sides with such learning and ability, that we feel it to be only right to the profession to acknowledge the assistance given to us in forming our conclusions, and our only regret is that it should necessarily have extended this opinion to a greater length than we wished it to be.

Page 65 U. S. 508

We shall direct the affirmance of the decree dismissing the bill by the court below.