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sections of the Code.[41] The Code is a statute designed to codify the law of commercial transactions. Strict liability in tort—and it bears repeating—is liability without fault, imposed by law on the manufacturer for personal injury or physical damage to property caused by its product.

At the least it seems safe to forecast that *Corprew* signals stormy weather for privity in the near future. Currently, the case can be limited to the abolition of the privity rule only where labeled products are sold in sealed containers. With the proper set of facts, however, the court might be convinced to impose strict liability expressly on the manufacturer across the board since it is clear that the theory does not provide automatic recovery for the consumer.

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## Trusts—Cy Pres Enacted in North Carolina

The 1967 General Assembly enacted legislation giving North Carolina courts power to use the doctrine of cy pres[1] in charitable trust administration. The North Carolina Supreme Court has long rejected the cy pres doctrine[2] while upholding modification

[41] In a California case which involved the UNIFORM SALES ACT, not the UNIFORM COMMERCIAL CODE, the California court held that where damages were sought for personal injuries no notice was required in an action for breach of warranty. The court treated the potential liability as non-contractual in nature and referred to it as strict liability. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 67, 377 P.2d 897 (1963). *See generally* Comment, *Products Liability—Sales Warranties of the Uniform Commercial Code*, 46 N.C.L. REV. 451 (1968).

[1] The words "cy pres" are Anglo-French for "as near" and were originally part of the phrase "cy pres comme possible" meaning "as near as possible." The doctrine of cy pres gives to a court the power to alter the particular purpose of a charitable trust under certain circumstances. Where the testator or settlor intended that the trust property be applied to some particular purpose and yet also had a more general charitable intent, he presumably would have desired that the property be applied to a purpose "as near as possible" to the specific disposition chosen by him rather than that the trust be allowed to fail. Therefore, if the particular purpose named by the settler becomes impossible, illegal, or impracticable, the court will exercise its cy pres powers to select a disposition similar to that named by the settlor or testator. The cy pres doctrine is limited in its use to charitable trusts and is widely accepted among United States jurisdictions. *See* G. BOGERT, TRUSTS § 431 (2d ed. 1964) [hereinafter cited as BOGERT]; A. SCOTT, TRUSTS § 399 (2d ed. 1956) [hereinafter cited as SCOTT].

[2] As to the previous status of the cy pres doctrine in North Carolina, *see* E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03(g) (1950)

of trust provisions under an equity court's general power to supervise trust administration. Because of new problems developing as to charitable trusts, the cy pres power has become an increasingly valuable tool of trust administration and public policy. This note will analyze the 1967 legislation, fit it into the scheme of existing North Carolina law, and forecast possible future applications of the cy pres doctrine.

The 1967 Charitable Trusts Administration Act[3] sets forth the generally accepted requisites[4] for a court's use of cy pres power:

1. the existence of a charitable trust, bequest, or devise;
2. impossibility, impracticability, or illegality of fulfilling the settlor's particular intent;
3. a general, rather than specific, charitable intent by the settlor;
4. the absence of an alternative disposition provided by the settlor.

Where these requirements are met, the court can order modification of trust provisions to apply the trust fund or income "as nearly as possible" to the disposition outlined by the settlor. Courts must exercise discretion in selecting an alternative disposition; nevertheless, a major limiting factor exists in the requirement that the disposition selected closely approximate the settlor's intent as set out in the trust instrument. Although the cy pres power can be exercised only by the court, some interested party or the Attorney General must initiate an action for application cy pres of trust funds.[5] The language of the 1967 Act[6] gives authority to the North Carolina

[hereinafter cited as FISCH]; Note, 27 N.C.L. REV. 591 (1949); Note, 1 N.C.L. REV. 41 (1922).

[3] N.C. GEN. STAT. § 36-23.2 (Supp. 1967) [hereinafter cited as the 1967 Act]. For examples of similar statutes, *see* ALA. CODE tit. 47, § 145 (1958); MD. ANN. CODE art. 16, § 196 (1957); VT. STAT. ANN. tit. 14 § 2328 (1959). *See* other cy pres statutes collected in SCOTT § 399 n.2.

The 1967 Act is based on the MODEL ACT CONCERNING THE ADMINISTRATION OF CHARITABLE TRUSTS, DEVISES AND BEQUESTS, 9 UNIFORM LAWS ANNO. 25 (1967).

[4] *See* BOGERT §§ 436-438; FISCH § 5.00; Peters, *A Decade of Cy Pres*, 39 TEMPLE L.Q. 256 (1966).

[5] The 1967 Act also deals with the troublesome question of which charitable intent to follow where the settlor has designated an alternative charitable disposition, but it also fails: the intention shown in the original plan is to prevail. For a discussion of the effect of an alternative plan, see BOGERT § 437.

[6] For an interpretation of the language of the 1967 Act, *see* [1967] N.C. GEN. STAT. COMM'N REP. item 10.

courts to make needed changes in charitable trusts for the public benefit yet protects the charitable intent of the trust's creator.

Prior to the 1967 Act, the North Carolina Supreme Court has rejected the doctrine of cy pres whenever the question was raised, basing this position on vintage decisions of questionable validity. Despite a well-established judicial policy favoring charitable trusts as well as a trend toward more court-ordered adjustment of both private and charitable trust terms, the court failed specifically to adopt the cy pres doctrine. This failure is all the less understandable in light of a strong legislative policy favoring validity of charitable trusts. As an alternative to cy pres power, the court has used its equitable power over trust administration to produce results much like those obtained in other jurisdictions under the cy pres doctrine. Charitable trusts have been saved from failure in particular cases; however, the decisions are unclear as to how far the courts can or will go to avoid frustration of the settlor's charitable intent. A brief survey of the salient case law and statutory development will demonstrate the reasons for the 1967 Act.

North Carolina courts initially accepted the validity of charitable trusts and jurisdiction over their administration in broad terms.[7] This acceptance was followed by complete disavowal of the cy pres doctrine.[8] Early opinions failed to distinguish between prerogative cy pres, which had been productive of abuse in England, and judicial cy pres, which is limited by usual equitable rules.[9] The court feared complete perversion of the settlor's intent under the cy pres doctrine. Simultaneously, the rule developed that a charitable trust instrument indefinite on its face as to objects or beneficiaries left too much discretion to the trustee and, therefore, was unenforcible. As a corollary, the court held the doctrine of cy pres inapplicable to cure such a deficiency, treating the doctrine as purely arbitrary and prerogative. The rare use of *judicial* cy pres to remedy uncertainty in an at-

[7] Griffin v. Graham, 8 N.C. 96 (1820).

[8] McAuley v. Wilson, 16 N.C. 276 (1828).

[9] Bridges v. Pleasants, 39 N.C. 26 (1845); Holland v. Peck, 37 N.C. 255 (1842). For a discussion of the confusion between judicial and prerogative cy pres, *see* BOGERT § 432; FISCH § 203(g).

[10] Taylor v. American Bible Soc'y, 42 N.C. 201 (1857); Bridges v. Pleasants, 39 N.C. 26 (1845); Holland v. Peck, 37 N.C. 255 (1842). For a discussion of the connection between cy pres and charitable trusts invalid for definiteness, *see* BOGERT § 434.

tempted charitable trust[11] further demonstrates the early courts' failure to understand the doctrine.

These first cases firmly established the rule that courts in North Carolina do not have cy pres powers. Thus, when a situation arose for use of the cy pres doctrine, the court properly noted that the doctrine would allow the application of excess trust funds "as near as may be" to the settlor's specific intent, but it declined so to order because North Carolina courts do not have such power.[12] In later cases where the cy pres issue has properly been urged upon the court, it has been summarily rejected because it is "well settled" that cy pres power does not exist in North Carolina courts.[13] In other cases, the court has discussed the application of the cy pres doctrine and refused it where the doctrine would have no possible validity.[14] Apparently, the merits of the cy pres doctrine have not been discussed by a North Carolina court since 1857, and thus it seems that recent North Carolina judicial rejection of cy pres is based wholly on *stare decisis*.

Even in the absence of cy pres power, however, the cases reveal an increasing judicial willingness to modify specific provisions of charitable trusts which would otherwise fail or prove ineffectual.[15] Where trust funds prove inadequate to achieve the designated purpose, the courts have consistently applied the fund as far as it will go to carry out "the leading and primary intent of the testator."[16]

[11] FISCH § 5.01(b); *But cf.* BOGERT § 434.

[12] Trustees of Davidson College v. Chambers, 56 N.C. 253 (1859). Where the trust fund was excessive for its purpose, the court refused to apply the excess amount cy pres. There is some question as to whether a gift to a particular college is made with *general* charitable intent. *See* BOGERT § 437.

[13] *See, e.g.*, Woodcock v. Wachovia Bank and Trust Co., 214 N.C. 224, 199 S.E. 30 (1938); Thomas v. Clay, 187 N.C. 778, 122 S.E. 852 (1924); Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921).

[14] Lemmonds v. Peoples, 41 N.C. 137 (1848) (a *private* trust); Board of Educ. v. Town of Wilson, 215 N.C. 216, 1 S.E.2d 544 (1929) (application of tax funds to purposes designated by statute).

[15] This trend in North Carolina is in accord with a similar trend which has developed throughout the United States and has led to the adoption of the cy pres doctrine in many jurisdictions. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953); Fisch, *Judicial Attitudes Towards the Application of the Cy Pres Doctrine*, 25 TEMPLE L.Q. 177 (1951).

[16] Paine v. Forney, 128 N.C. 237, 241, 38 S.E. 885, 886 (1901); University of North Carolina v. Gatling, 81 N.C. 508 (1879).

Most jurisdictions hold that such facts call for the cy pres doctrine;[17] but, the North Carolina court has contended that its remedy does not amount to the application of the cy pres rule because the fund is applied to the "very purpose named" by the settlor and not to a purpose "equally as good."[18] The court departed from "the very purpose named" in *Trustees of Watts Hospital v. Board of Commissioners.*[19] Increased hospital operational costs had made trust income inadequate. Therefore, the trust indenture was modified to allow conveyance of the hospital property to the county. This holding was based upon the inherent power of an equity court "to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust."[20] Language of this sort is normally used in other jurisdictions to justify the application of cy pres powers.[21]

The North Carolina Supreme Court has also used the administrative change concept[22] to order sale of trust property where necessary to avert failure of the trust or material impairment of its usefulness.[23] In order "to give effect to the general intent expressed" by the settlor, the trust corpus will be liquidated despite a trust provision forbidding its sale.[24] The earlier cases provided that the sale proceeds be used for the express purpose chosen by the settlor for the original property. Implicitly, alteration of trust provisions was

[17] BOGERT § 438.

[18] Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 328, 107 S.E. 238, 241 (1921).

[19] 231 N.C. 604, 58 S.E.2d 696 (1950).

[20] *Id.* at 615, 58 S.E.2d at 705.

[21] *See, e.g.,* Noel v. Olds, 78 App. D.C. 155, 138 F.2d 581 (1943).

[22] Cy pres power is more extensive than the ordinary power of the court to permit deviation from the terms of a trust whether it be private or charitable. The court under cy pres can order the application of trust property to a charitable purpose other than that designated in the trust instrument; however, this could not be done under the deviation or administrative change rule. *See* SCOTT § 399.

The North Carolina Supreme Court has drawn no distinction between charitable and private trusts in its use of the administrative change concept. *Compare* Wachovia Bank and Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967) (court-ordered sale of *private* trust property), *with* Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951) (court-ordered sale of *charitable* trust property). Nevertheless, using the administrative change rule, the court has ordered the change of the particular purpose of a charitable trust. Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941).

[23] Bond v. Tarboro, 217 N.C. 289, 7 S.E.2d 617 (1940); Holton v. Elliot, 193 N.C. 708, 138 S.E. 3 (1927); *Ex Parte* Wilds, 182 N.C. 704, 110 S.E. 57 (1921); Church v. Ange, 161 N.C. 315, 77 S.E. 239 (1913).

[24] Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951).

held permissible so long as the means, and not the settlor's designated ends, were changed. However, in *Johnson v. Wagner*[25] the court abandoned the "very purpose" requirement and applied the cy pres doctrine without identifying it. Trust land impracticable for its designated use as a religious assembly was sold and the proceeds dedicated to "other religious purposes" in accordance with the terms of an entirely separate trust created by the settlor. In ordering this change of purpose, the court ascertained the settlor's general charitable intent and directed the trust res to a similar but different purpose within that intent.

As the *Johnson* and *Watts Hospital* decisions demonstrate, the North Carolina judiciary has become willing to modify specific trust provisions where the trust has become impossible or impracticable.[26] This judicial policy is completely in accord with the favored position enjoyed by charitable trusts[27] in both case law and statute. The North Carolina cases on charitable trusts are replete with references to the rule that every effort should be made to save a trust which is by definition beneficial to the public.[28] A lone exception to this general attitude has been the hostility of the courts to charitable trusts with uncertain or indefinite dispositive provisions.

The 1925 General Assembly acted expressly to validate charitable trusts with indefinite objects or discretionary powers of selection in the trustee.[29] The 1925 Act enables the trustor to give the trustee

[25] 219 N.C. 235, 13 S.E.2d 419 (1941).

[26] For opinions where the court demonstrated its responsive attitude toward the need to adjust trust terms by direct or implicit approval of plans suggested by the trustees, *see* Wachovia Bank and Trust Co. v. McMullan, 229 N.C. 746, 51 S.E.2d 473 (1949) (trustees' plan to modify means and time of trust income dispersal approved); West v. Lee, 224 N.C. 79, 29 S.E.2d 31 (1944) (court failed to comment on alternate application of funds by trustees); Lassiter v. Jones, 215 N.C. 298, 1 S.E.2d 845 (1939) (alternate plan for use of trust property, approved as proposed by trustees). *See also* McKay v. Trustees of the Gen. Assem. of the Presby. Church, 228 N.C. 309, 45 S.E.2d 342 (1947) (dictum). The court found no impossibility of the designated purpose, but indicated that the fund might have been applied to a similar purpose had there been impossibility.

[27] The public policy favoring charitable trusts is especially apparent in their exemption from most federal, state, and local taxation. *See* FISCH § 4.02(b).

[28] Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951); Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941); Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921); Paine v. Forney, 128 N.C. 237, 38 S.E. 885 (1901); Keith v. Scales, 124 N.C. 497, 32 S.E. 809 (1899).

[29] N.C. GEN. STAT. § 36-21 (1957) (hereinafter referred to in the text as the 1925 Act).

discretion to deal with unforeseen contingencies, thus reducing the need for court intervention in charitable trust administration. There was speculation that this legislation would lead to judicial adoption of the cy pres doctrine.[30] Indeed, it is reasonable to argue that if the legislature deems it proper to grant a trustee discretionary powers where a trust is indefinite, then the courts should exercise similar powers where a trust's specific purpose has been frustrated but the testator's general charitable intent is evident. The North Carolina Supreme Court ignored this opportunity to adopt the cy pres rule and proved its reluctance to abandon precedent by invalidating a charitable trust for indefiniteness regardless of the 1925 Act.[31] The legislative response was a clear restatement of the public policy favoring the validity of charitable trusts even though they be indefinite.[32] In broadly construing the language of this subsequent legislation, the court commented that the statute "will not permit us to misunderstand what the law-making power meant."[33]

The 1967 Act is properly viewed as the third step in a statutory scheme insuring the validity of trusts having a general charitable purpose. It is clear that the law-making power intends that the cy pres doctrine be effectively employed by the courts. Now that a strong legislative basis exists, the North Carolina Supreme Court should reconsider the value of the cy pres doctrine for the first time in over a century and adopt it as an important tool of trust administration. With such a conclusion to the long trend toward more court-ordered modification of charitable trusts, predictability can be established for a facet of charitable trust administration previously characterized by the uncertain application of equity's general administrative powers. The public interest in charitable trusts as well as the settlor's interest in the effectuation of his charitable purpose require that the courts act to save duly constituted charitable trusts under a rule with clearly delineated guidelines such as those of the cy pres doctrine as embodied in the 1967 Act.

Two subjects of current interest may soon call for the application

[30] *See* Note, 4 N.C.L. REV. 15 (1926).

[31] Woodcock v. Wachovia Bank and Trust Co., 214 N.C. 224, 199 S.E. 30 (1938) (funds to be paid out within 20 years by trustees to charitable organizations of a designated class).

[32] N.C. GEN. STAT. § 36-23.1 (1957). For a discussion of this legislation, *see* Note, 25 N.C.L. REV. 476 (1947).

[33] Banner v. North Carolina Nat'l Bank, 266 N.C. 337, 340, 146 S.E.2d 89, 92 (1966).

of the cy pres doctrine by the courts of North Carolina and other states: federal regulation of charitable trusts and racially discriminatory trusts.[34]

Charitable foundations (corporations) and trusts now play a large role in the economy of the United States.[35] Alleged rampant abuses perpetrated by donors, settlors and trustees acting under the guise of charitable intent have precipitated proposals for federal legislation to regulate these financial giants.[36] Where trusts are involved, the illegality of trust provisions which contravene federal regulatory legislation and rulings may prove fertile ground for use of cy pres powers by state courts. For example, regulations seriously curtailing certain commercial activities involving trust property[37] might well impair a charitable trust's effectiveness to such an extent that court action to carry out the testator's intent as near as possible would be required. The doctrine of cy pres might be used to excise specific trust provisions illegal under federal law. Should a federal regulatory agency[38] be created to supervise the financial activities of charitable trusts, a partnership for the control of the charitable giants may emerge comparable to that between the Securities Exchange Commission and state courts for the control of business corporations.

A recent United States Supreme Court decision indicates that a charitable trust which performs functions "in the public domain" may be held to violate the fourteenth amendment if it discriminates among the races.[39] Since the definition of a charitable trust requires that it be beneficial to the general public,[40] the presently expanding state action concept may in the future subject many charitable trust activi-

[34] *See* Note, 40 N.C.L. REV. 308 (1962).

[35] *See* CHAIRMAN OF THE COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, 87th Cong., 2d Sess., TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY (Comm. Print 1962) (Patman Report).

[36] *Id.*

[37] *See* Krasnowiecki and Brodsky, *Comment on the Patman Report,* 112 U. PA. L. REV. 190 (1963); Riecker, *Foundations and the Patman Committee Report,* 63 MICH. L. REV. 95 (1964).

[38] *See* articles cited *supra* note 37.

[39] Evans v. Newton, 382 U.S. 296 (1966). When a public park which was trust property had previously been operated by the city, but had since come under private trustee's control, the Court held that the park's mass recreational activities were plainly in the public domain and that the courts, under the fourteenth amendment, could not aid private trustees in performing those activities on a segregated basis.

[40] *See* SCOTT § 368.

ties to fourteenth amendment requirements. The courts often state that charitable trusts perform services which would otherwise be government responsibilities.[41] Cy pres power could be used by state courts to remove the offending provision or, if the trust be rendered impossible by its illegality, to apply the fund to a similar non-discriminatory purpose.[42]

Using the doctrine of cy pres as suggested above, the state judiciary can insure the continued existence of charitable trusts in forms beneficial to the community while acting to control those features of charitable trusts not in the public interest.

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[41] *See, e.g.*, Pierce v. Attwill, 234 Mass. 389, 125 N.E. 609 (1920).

[42] *See* La Fond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959) (equally divided court). Where the bequest was to the city to establish a white playground, four justices voted to apply the trust cy press for the benefit of all children.