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## THE DUTY OF THE STATE, IN SUITS ATTACKING CHARITABLE BEQUESTS.\*

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A charitable bequest is seldom relished by heirs. In most wills, the executor is himself an heir. If, then, the charitable intentions of the testator are to be carried out, it must often, if not ordinarily, be done by unfriendly hands.

As every will is a departure from the usual rules of succession established or approved by the law, it is a kind of challenge to the community. It asserts that the testator can dispose of his property better than they can; that he can make a law for himself better than the law of the land.

Our American States have adhered to the ancient principle of Roman law, as found in the Twelve Tables, that for every citizen "*uti legassit super pecunia, tutelave suae rei, ita jus esto*," more closely than did Rome herself. In most of them, there is no statutory restriction on the right to disinherit. Precisely for this reason an American will is peculiarly open to attack. The sympathies of the people are with the heir, who has been stripped of everything, when they might not be aroused if some Falcidian law guaranteed him a certain share of the inheritance. The validity of the will must be determined by a jury, and the jury will be a fair representative of popular sentiment.

Charitable bequests would be in less danger, also, had we a form of action such as is familiar to most countries, by which wills can be attacked directly and openly, when the heir is passed over without due cause. But, so far as I am aware, there is no remedy for a mere undutiful will, except in Louisiana. Elsewhere

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\* This paper was read in the Judicial Section of the Congress of Jurisprudence, held at Chicago in connection with the Columbian Exposition, during the Summer of 1893.

the heir can gain what the community are apt to regard as his rights against such an instrument, only by breaking it altogether, as the act of one without testamentary capacity, or unduly influenced, or by maintaining some legal objection to particular provisions, adverse to his interest.

Where the devisees or legatees are natural persons, taking a beneficial estate in their own right, they can be trusted to protect themselves. If minors, a guardian *ad litem* will maintain their interests, and, if necessary, even against their parents.

So provisions for charities may be adequately defended, if made in trust to corporations having funds with which to employ proper counsel. But it is not so when the trustees, whether natural persons or corporations, are without funds, or, if corporations, are not under efficient management. They can then hardly be expected to present their claims in the most effective way. The executor, indeed, represents the dead, but if he be one of the heirs who would otherwise succeed, his adverse interest will be likely to make his defence perfunctory.

He may, indeed, virtually lead the attack, by bringing an equitable action, after the probate of the will, to determine its proper construction and effect, where these are doubtful. The doubt may be so stated as to exaggerate its importance. Considerations and authorities tending to defeat the will may be brought to the attention of the Court, and others left unnoticed which go to support it.

It is true that the Court, in such a suit, may often, perhaps ordinarily, be trusted to recall the law, and apply the proper rule; but a decision upon a case that has been but half argued is seldom quite satisfactory, nor is it the true office of a judge to supply the want of counsel for the absent or undefended. This is a duty not to be disregarded, when it is forced upon the bench, but the rarer the occasions for its exercise, the better will be the administration of justice. It is a duty of the State, but one which the State can best discharge through its executive officers.

The French Code of Civil Procedure (Article 83), provides that notice of every suit concerning public corporations and establishments, and gifts and legacies for the benefit of the poor, shall be given to the principal law officer of the State (*procureur de la republique*), and bestows upon him authority to intervene in any other cause in which he may deem his participation necessary.

England makes it the duty of her Attorney-General to institute all proceedings necessary to secure the due application and administration of charitable endowments. A similar function has

been cast upon the Attorney-Generals of many of our States. I believe that this should be the practice in all, and that the French law might well be followed, by requiring service of process upon the Attorney-General in every suit affecting either the validity or the administration of a charitable gift.

It would not be difficult for him to ascertain whether, among the other parties to the controversy, were any who would adequately present the cause of the charity. His function in this respect would be somewhat analogous to that of the Queen's Proctor in England, in uncontested divorce suits. He would be bound to see that all the material facts were placed before the Court; that there was nothing savoring of collusion; and that the leading authorities in support of the bequest, if its validity were questioned, were fairly presented. Should he find that others stood ready to do this, his active intervention would be unnecessary; but otherwise it would be vital to the attainment of justice.<sup>1</sup>

The appearance of the Attorney-General in proceedings for the probate of a will may seem more like an intrusion into matters of private concern than his participation in suits arising as to the meaning and effect of the instrument. But where the executor is adversely interested, it is never safe to trust him implicitly. A very little inattention or neglect on his part will suffice to defeat the probate. The charitable provisions may be inconsiderable, as compared with the other bequests, but, be they great or small, the State which has, for its own good, given the testator power to make them, has an interest in their preservation, not only for what they are in themselves, but for their effect on the community.

A government under which charitable wills are generally set aside will soon come to have few of them.

The object and effect of every charitable bequest is to confer a public benefit; else it is no charity. I say its effect, for on this point the opinion of the community, as manifested in its laws, must be decisive.

If we were to grant that Turgot was right when he declared all permanent endowments to be permanent evils, opinions of

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<sup>1</sup> In Connecticut the functions exercised in most States by an Attorney-General are discharged in the several counties by the State's Attorney for the county. It is ordinarily his duty to bring suits to enforce public charitable trusts, and where such trusts are attached in any proceeding and no one appears to defend them, the Court will order him to be notified, and continue the cause, if necessary, to give him a proper opportunity for preparation. *Dailey v. New Haven*, 60 Conn. 314; *Hayden v. Connecticut Hospital*, 64 Conn. 321, note.

philosophers cannot be set up in this discussion against the law of the land.

John Stuart Mill has said that the great characteristic of modern civilization—of the new world which mankind is forming for itself, not in territory, but in mind and action—is that the importance of the masses is continually growing greater, and that of individuals less. It may be a tendency to be resisted, but it is certainly one that we must recognize, and recognize as a constant force.

Charity moves from the individual to the masses. It is the stream flowing to the sea. It is a return of a gift to the giver, for the labors of all contribute to the prosperity of each.

In no country has this process gone on so rapidly as in the United States of the nineteenth century. The example in this, as in so much else, was set by Franklin; and the richer among his countrymen, gaining wealth in the same way as he, as the easy reward of honest and intelligent industry, under favorable circumstances, have followed him in leaving part of it behind them for the service of their fellow-citizens.

With us it is a subject of remark when a rich man's will contains no charitable bequests. With us, therefore, it is peculiarly the duty of the State to guard this tribute from the dead, which public opinion demands, and no surer safeguard can be found than the intervention of the principal law offices of the government from whose statutes wills derive their only force.

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