

denied the right to cultivate or to fertilize his lands? Must he exclude from his acres the cattle yard, the pasture, or the sheepfold? Disease, often resulting in death, originates at human habitations. For this reason, will cottages, villages, or towns be forever excluded from the area of water supply of downstream communities? The exigencies of modern civilization, and the increasing density of population, forbid this. It would doubtless be well for all of our municipalities if they could be supplied with streams as pure as those which flow through granitic aqueducts constructed by Pisistratus 2,500 years ago, and which yet bear refreshment from Pentelicus and Hymettus to classic Athens, or such as flow down to the "Eternal City" from the springs of Cæruleus and Curtius, and from Lake Sabatinus, over marvelous structures built in the time of Claudius, Caligula, and Trajan, or which come down from the Balkans, replenish the fountains of the Seraglio, and revive the sinking subjects of Abdul at Constantinople, after they have swept through curving aqueducts designed by the genius of Justinian's architects, or those which flow to Glasgow, along channels cut through the adamant from the romantic shores of Loch Katrine, made immortal by the "Lady of the Lake." We can no longer, however, attain the ideal in the purity of our water supply, and courts must be guided by contemporary conditions.

Now, how can it be said, in a practical and legal sense, that the contemplated action of the prison commission will invade the rights of the plaintiff, and pollute the water supply of Milledgeville? No sewer, no stream, from the prison edifice, will be conducted into this water supply. A portion of the surface water may find its way there in those torrential downpours which in past ages have worn the country around that historic city until its lofty summits resemble, to some extent, the "mountains round about Jerusalem." In such event, the surface flow would pass the intake with such rapidity that, if it contained a germ, the chances are infinitesimal but that the noxious microbe would be swept past the intake, into the Oconee, and out to sea, where it would miserably perish. The building for males is 1,320 feet,—440 yards from the stream. It is more than an eighth of a mile from the female building to the stream. The land will be cultivated, and loose earth and its powers of oxidation are powerful disinfectants. The luxuriant crops will take up and modify the evasive bacillus. But it is objected that bathtubs will be furnished the convicts, and at times it is anticipated that they will bathe. This innovation seems startling to counsel, and may be bad for the bacilli; but it is not plain how it will be injurious to the plaintiff. Nor can the further fact, dwelt upon, that at intervals clothing will be washed, and floors scoured, affect the issue. Cleanliness will be conservative of health, and thus the danger of infection and disease will be diminished. The prison commissioners are public officers. Surely, then, we may invoke, as to them, the ancient maxim, "*Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium.*" It is to be presumed, even if their assurances under oath to this effect were absent, that the commissioners will do their whole duty to the public, and to the convicts in their charge. This requires the prevention of contamination of this water, from which the prison itself will

be supplied. Nothing more could be required of them. This presumption has the effect of evidence demonstrative of the fact that they will do everything which the teachings of modern sanitary science may dictate to preserve this water from pollution. Indeed, so far as the court has been able to gather from the intelligent and candid testimony of the chairman of the prison commissioners, and the voluntary amendment to their answer, by which they offer to change the site of the hospital, and consent to select new sites for the male building and for the female building, to conform to the wishes of the board of health of Milledgeville, they have already evinced much solicitude to protect the purity of this water.

As not uncommon in such cases, scientific experts differ as to the probability that this water may be contaminated because of the prison, and, as also common in such cases, the court must form its own independent judgment. I am very clearly of the opinion that the water supply of Milledgeville, drained in part from this extended watershed now to be under the careful inspection of the state officials, will be under a larger and a more careful scrutiny and guardianship than ever before. Indeed, the removal of the numerous settlements of careless and thriftless tenants, with their pigsties, mule pens, manure heaps, disregard of cleanliness, their washing places with tubs of foul water on the branches and at the springs, all familiar to every one acquainted with the methods of nomadic tenants, will be a positive benefaction to the people using the waters of Fishing creek. Indeed, from the evidence it appears that heretofore the banks of this creek have been to some extent used as a dumping ground for the remains of those hapless beasts of burden whose maltreatment and premature death is, in my opinion, the greatest cause for the poverty of the farmers of this section of the South. Then, too, we must consider the great benefaction to the state and the people involved in the construction of this prison. We must regard the greatest good to the greatest number. We must bear in mind that the treatment of children and infirm convicts at certain previous periods of the history of our state has been a reproach to the people, and that all the impulses which actuated the creation of this farm were benevolent. This being true, it is improper for the court to stand in the way of its completion. As to the state, the injunction will be denied. No injunction is asked at this time against the city of Milledgeville; but, in view of the somewhat equivocal conduct of the mayor and council of that municipality, the bill will be retained in court, so that at any time, if, in violation of what seem to be the equities existing in behalf of the water company, they proceed to inflict any illegal injury upon the latter, by violation of their contract, it will be competent for the court to exercise its powers to protect the interests of the parties.

## DUGGAN et al. v. SLOCUM.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 41.

## 1. CHARITIES—FAVORABLE CONSTRUCTION OF CHARITABLE TRUSTS.

Trusts for public charitable purposes are favored in equity, and will be upheld where, under the same circumstances, private trusts would fail.

## 2. SAME—VALIDITY OF TRUST—RULE AGAINST PERPETUITIES.

A provision of a will creating a trust for public charities, which directed the trustees to invest the fund, and permit the income to accumulate for a term of 10 years, or more, in their discretion, is not void as in violation of the rule against perpetuities, where the entire fund is an absolute and unconditional gift to charity, and there is no gift meanwhile to or for the benefit of a private person, as any unreasonable exercise of the discretion given the trustees would be corrected by the courts.

## 3. SAME—DEFINITENESS AS TO PURPOSE AND BENEFICIARIES.

A bequest in trust for the establishment of a public library in a town and a Roman Catholic protectory or asylum for boys in the diocese, both being charities of a well-known and general character, is not void for indefiniteness, either as to the charities or the beneficiaries, because the making of the rules by which the charities are to be governed, and for the selection of the persons to be benefited, is left to the discretion of the trustees.

Appeal from the Circuit Court of the United States for the District of Connecticut.

John C. Donnelly and C. Walter Artz, for appellants.

John O'Neill, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. John H. Duggan, of Waterbury, Conn., a priest of the Roman Catholic Church, who had never married, died on November 10, 1895, leaving a last will and testament, which was duly proved, and was approved by the probate court for the district of Waterbury. In this will he gave two legacies for religious or charitable purposes, and the residue of his property in the manner following:

"Fourth. All the rest, residue, and remainder of my estate, both real and personal, and wheresoever situated, I give, devise, and bequeath to my executors hereinafter named, in trust, however, for the following purposes, viz.: One-half to be used for the purpose of establishing and maintaining a library and reading room in connection with St. Patrick's parish, in said Waterbury, or in whatever part of said Waterbury may be deemed by my said executors most suitable and convenient for the general public; and one-half for the purpose of establishing or maintaining a Roman Catholic protectory for boys in said diocese of Hartford; it being my will that the personal estate and the rents accruing from any real estate of which I may die possessed be invested in safe securities for a term of ten years or more, at the discretion of my said executors. I also will that the management and disposal of my real estate be at the discretion of my said executors.

"Fifth. I name and appoint the Rt. Rev. Michael Tierney, of Hartford, Conn., and Hon. William C. Robinson, of New Haven, Conn., executors of this, my last will and testament."

Bishop Tierney and Mr. Robinson declined the executorship, whereupon Rev. William J. Slocum, of Waterbury, was appointed administrator with the will annexed.