PURPOSE TRUSTS

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In *Roman Catholic Archbishop of Melbourne v. Lawlor*,[1] Rich, Starke and Dixon JJ. (whose views prevailed, the Court being equally divided) held, affirming the decision of the Supreme Court of Victoria, that a trust of shares " as a nucleus to establish a Catholic daily newspaper " was invalid. The Supreme Court appears to have held the gift invalid as tending to perpetuity. In the High Court, however, Rich and Starke JJ. gave no reasons for holding the trust invalid, confining their judgments on this point to the question whether or not the trust was charitable. Dixon J., without discussing the question of perpetuity, cited and relied on the dictum of Lord Parker of Waddington, " a trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognise as charitable in the legal as opposed to the popular sense of that term."[2]

Further consideration of this principle, which appears to have the effect of invalidating all non-charitable " purpose " trusts, raises interesting speculations as to the validity of trusts directed to the execution of some design of the settlor or testator which confers no benefit on any specific individual or class.

It is commonly said that the grounds on which non-charitable " purpose " trusts may be held invalid are perpetuity and uncertainty. The application of the rule against perpetuities to such trusts is itself an intricate subject, which it is not proposed to discuss here ; but in many cases the fact that the trust in question was perpetual rendered it unnecessary to consider whether there was any other reason for holding the trust invalid. In other cases, the fact that it was obvious that the trust was vague and uncertain has obviated the necessity for any precise analysis of the principles involved. The cases which raise the question whether it is permissible to create such trusts at all are therefore of comparatively infrequent occurrence, and they exhibit a disconcerting lack of attention to general principles.

The earliest form in which this question has arisen is in connection with trusts for the erection of tombs or monuments. In *Mellick v. President and Guardians of the Asylum*,[3] the main argument was on the question whether the trust was charitable ; being a trust of real estate, it would, if charitable, have infringed the provisions of the Mortmain Act, but it was apparently assumed that it was valid if not charitable. The trust was held not to be for a charitable purpose, but it failed in any event because the consent of the rector of the parish in which the monument was to be erected could not be obtained. In *Adnam v. Cole*,[4] a similar question arose ; again it was assumed without argument that the trust was valid if not charitable. In *Trimmer v. Danby*[5] the question was as to the validity of a bequest of £1,000 by the artist Turner for the erection of a monument to himself in St. Paul's Cathedral. Kindersley V.C., to

1. 51 C.L.R. 1.
2. *Bowman v. Secular Society Ltd.*, [1917] A.C. 406, at p. 441.
3. (1821) Jac. 180.
4. (1843) 6 Beav. 353.
5. (1856) 25 L.J. (N.S.) Ch. 424.

whom the two previous cases were cited, held the gift valid, saying: "I do not suppose that there would be anyone who could compel the executors to carry out this bequest and raise the monument; but if the residuary legatees or the trustees insist upon the trust being executed, my opinion is that this court is bound to see it carried out. I think, therefore, that as the trustees insist upon the sum of £1,000 being laid out according to the directions of the will, that sum must be set apart for the purpose."[6]

In *Pirbright v. Salwey*,[7] a trust for keeping up an inclosure in a churchyard so long as the law for the time being permitted, was held valid for at least 21 years from the testator's death. The reasons of the learned judge (Stirling J.) and the arguments of counsel are not reported. In *Re Hooper*,[8] Maugham J., with some doubt, followed this decision. No other authorities were cited in argument.

In *Re Dean*,[9] a similar question arose in relation to a trust for the benefit of animals. North J. held valid a bequest of income upon trust during the lives of certain animals to apply such income for their benefit.[10] He based his decision on the analogy of the "tomb" cases, and on *Mitford v. Reynolds*,[11] in which, however, the validity of the trust for animals does not appear to have been argued.

In *Pettingall v. Pettingall*,[12] a bequest in favour of the testator's favourite black mare was admitted by counsel to be valid, and directions were sought as to the disposition of the surplus income.

A case which concerned animals, but from a somewhat different standpoint, was *Re Thompson*[13]. In that case the testator, who was a member of Trinity Hall in the University of Cambridge, bequeathed a legacy of £1,000 to his friend G.W.L. (a member of the same college) to be applied by him in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting, and he devised and bequeathed his residue to the college. The college, as residuary legatee, argued (with unconcealed reluctance) that the bequest was invalid, and for the first time, so far as appears from the reports of any of the cases so far discussed, took the point that such a trust was invalid on the ground that there was no one in whose favour the Court could decree performance, citing *Morice v. Bishop of Durham*[14]. Clauson J. pointed out that the gift was not charitable, adding, "although it may well be that a gift for the benefit of animals generally is a charitable gift; but it seems to me plain that I cannot construe the object for which the legacy was given as being for the benefit of animals generally."[15] But the learned judge considered that the object of the gift had been defined with sufficient clearness and was of a nature to which effect could be given. He therefore ordered the legacy to be paid to G.W.L. on his giving an undertaking to apply it to the purpose mentioned, with liberty to the residuary legatee to apply to the Court if the legacy was not so applied.

6. *ibid*, at p. 427.
7. [1896] W.N. 86.
8. [1932] 1 Ch. 38.
9. (1889) 41 Ch. D. 552.
10. North J. treated the animals as "lives in being" for the purposes of the rule against perpetuities. As pointed out by Professor Gray, such a doctrine may lead to curious results where the "beneficiary" is an elephant or a carp.
11. (1842) 1 Ph. 185.
12. (1842) 11 L.J. (N.S.) Ch. 176.
13. [1934] Ch. 342.
14. (1804) 9 Ves. 399 (affirmed (1805) 10 Ves. 522).
15. [1934] Ch., at p. 344.

The authorities so far examined, and particularly the last cited, suggest that a non-charitable purpose trust may be valid if it is sufficiently definite to escape attack on the ground of uncertainty, and is not obnoxious to the rule against perpetuities. On the other hand, in *Brown v. Burdett*[16] where the testatrix directed her trustees to seal up her house for twenty years, and gave precise directions for doing so, against which no charge of uncertainty could be levelled, Bacon V.C. held that the property was undisposed of during the twenty years, and emphatically rejected the suggestion that the trustees could perform the trust if they so desired. This decision suggests the reflection that the animals in *Re Dean*[17] were also undisposed of, and that the residuary legatee might have claimed those animals as his own. In that event he could presumably have forbidden the trustees to feed or care for the animals, and could then have claimed the income set apart for that purpose.

Re Thompson, *Re Dean*, and the "Tomb" cases are remarkable for the fact that they were not treated by the judges who decided them as exceptions from the general principle stated at the beginning of this article, but were so decided in spite of, or in ignorance of, the general rule. On the other hand, it may be noted that they deal with subjects near to the hearts of Englishmen—their graves, horses and dogs, and fox-hunting—and therefore would presumably, in an English Court, be regarded as deserving of exceptional treatment. It therefore becomes necessary to examine the general principle above referred to, in order to consider whether it admits of the creation of such exceptions.

The general principle, that no trust is valid unless it is either for the benefit of individuals, or for charitable purposes, may be found succinctly stated by Grant M.R. in *Morice v. Bishop of Durham*: "If there be a clear trust, but for uncertain objects, the property that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this Court."[18] This passage shows that the real objection to a non-charitable purpose trust is that there is no person who can enforce it. The trust property being therefore undisposed of, there will be a resulting trust in favour of the settlor, residuary legatees, or next of kin, as the case may be; and the references to "uncertainty" (which have led to confusion in later cases) express the invalidity of trusts which are not in favour of a definite *cestui que trust*, and are not intended to limit the principle so as to invalidate only trusts of which the purpose is indefinite.

The principle laid down by Sir William Grant has received but little judicial discussion. The passage quoted was cited with approval by

16. (1882) 21 Ch. D. 667.
17. *supra*.
18. 9 Ves., at p. 405.

Romer J. in *Re Clarke*,[19] and in *Re Davidson* Cozens Hardy M.R. said that the ground on which a non-charitable purpose trust is invalid is " that the Court cannot recognize a trust which is so uncertain that there is no known means by which the trustee can be compelled to distribute that fund " ; and also said " in the present case the testator has created a trust, but has not indicated any body of beneficiaries, any *cestuis que trust*, who can invoke the aid of the Court and prevent the trustee from doing that which some trustees might do if there were no Court to call them in question, namely, put the money in their own pockets."[20]

As pointed out above, however, many trusts which could have been held invalid on this ground have in fact been held invalid for perpetuity or uncertainty. Many more fail because they give the trustees a discretion as to the objects for which the property is to be applied which is wider than the law permits. Thus a trust to divide a fund amongst " such charitable or religious institutions and societies as my trustees shall select " is invalid because it purports to give the trustees power to select from an undefined class of beneficiaries (see *Grimond v. Grimond*,[21] *Houston v. Burns*[22], *Griffiths v. Griffiths* [23 24]). Moreover, where the trust comprises both charitable and non-charitable purposes, so that it is impossible to say what part of the property must be devoted to the charitable purpose (which is valid) the charitable trust (apart from statutory provisions now to be found in section 131 of the *Property Law Act*, 1928) fails for uncertainty, not in the purpose, but in the property subject to the trust (see *A.G. for N.Z. v. Brown*,[25] *Bowman v. Secular Society*[26]). *Morice v. Bishop of Durham*[27] is itself the leading authority for this proposition, and is constantly cited with approval for this purpose.

Despite the relative scarcity of actual decisions on the point, therefore, it is submitted that the principle laid down by Sir William Grant, supported as it is by judges of the highest authority, is an accurate statement of the law, and that generally speaking a trust is invalid unless it is either for the benefit of individuals or a defined class, or is for charitable purposes. The question remains whether such cases as *Re Dean* and *Re Thompson*[28] can be treated as exceptions to the general rule.

The basis of such an exception is suggested by Clauson J. in *Re Thompson* when he remarks that " the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given."[29] This expression is, it is submitted, based on a misapprehension of the rule. The rule is not that the trust is valid if the Court can see *ex post facto* whether or not it has been performed, but that the trust must be of such a nature that the Court itself can direct the execution in cases where the trustee refuses to act, or in cases where there is no trustee for the time being. In the case of charitable trusts, the difficulty of uncertainty is

19. [1923] 2 Ch. 407, at p. 417.
20. [1909] 1 Ch. 567, at p. 571.
21. [1905] A.C. 124.
22. [1918] A.C. 337, at pp. 342, 343.
23. [1926] V.L.R. 212.
24. In the face of these authorities it is submitted that *Gott v. Nairne*, 3 Ch. D. 278, cannot be regarded as good law.
25. [1917] A.C. 393, at p. 396.
26. [1917] A.C. 406, at p. 441.
27. *supra*.
28. *supra*.
29. [1934] Ch. 342, at p. 344.

overcome by directing the preparation of a scheme, where the terms of the trust are indefinite,[30] or by administration by the King by sign manual where there is a general gift for charity[31]; while the difficulty that there is no person in whose favour the Court can decree performance is overcome by the rule that in such cases the Attorney-General is a necessary party to the proceedings and takes the place of a *cestui que trust*. No analogous procedure exists for the execution of a non-charitable trust, and in the cases of trusts for maintenance of animals, etc., the Court has been unable to do more than direct the payment of the fund to the trustees with liberty to apply if it should be misapplied.[32] Such trusts clearly do not fulfil the test laid down, and indeed, if they did so, many other non-charitable purpose trusts would be in the same position; for example, in *Farley v. Westminster Bank*,[33] a gift to trustees "for parish work" was held non-charitable and void, but the question whether or not a trustee had applied a fund to parish work would seem at least as easy of solution as the question whether or not a trustee had applied a legacy in the promotion or furthering of fox-hunting. The cases, however, make it clear that what invalidates the trust is the impossibility of its being executed by the Court itself. Thus in *James v. Allen* Sir William Grant said: "If [the property] might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."[34] In *Williams v. Kershaw* Lord Cottenham, then Master of the Rolls, held a gift invalid "not because it is illegal, but because it introduces a generality, which deprives it of its character of a charitable legacy, and makes it impossible for the Court to execute it."[35] In *Baker v. Sutton* Lord Langdale M.R. referred to the words "objects of benevolence and liberality" as being "open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution."[36] These cases were cited with approval by Lord Macnaghten, delivering the judgment of the Judicial Committee, in *Dunne v. Byrne*[37] and Lord Macnaghten's citation was cited in its turn by Lord Atkin in *Farley v. Westminster Bank*.[38] It will be seen that in all these cases the emphasis was laid on execution by the Court itself, and the key to the distinction between charitable and non-charitable "purpose" trusts is to be found in the jurisdiction, where the trust is for charitable purposes, to direct a scheme in proceedings to which the Attorney-General is a party.

It has been suggested by Mr. W. O. Hart[39] that these trusts for the erection of tombs or maintenance of animals, although no one can enforce them, are yet capable of being regarded as conferring powers on trustees, of the exercise of which the residuary legatee cannot complain. The idea is that in the case of a mere power no person can compel the exercise of the power, yet an appointment under the power is good. Why then should not such a power be good where there is no person who is benefited

30. A scheme may be directed even where the will gives the trustee a discretion as to the selection of charitable objects, which the trustee is willing to exercise—*Waldo v. Caley*, 16 Ves. 206.
31. *Moggridge v. Thackwell*, (1803) 7 Ves. 36.
32. See *Pettingall v. Pettingall* and *Re Thompson* (*supra*).
33. [1939] A.C. 430.
34. (1817) 3 Mer. 17, at p. 19.
35. (1836) 5 L.J. (N.S.) Ch. 84, at p. 87.
36. (1836) 1 Keen 224, at p. 233.
37. [1912] A.C. 407, at p. 411.
38. [1939] A.C. 430, at p. 434.
39. 53 L.Q.R. 24, at pp. 33-5.

by its exercise ? In the first place, as pointed out by Professor Gray in *The Rule Against Perpetuities*,[40] there is a distinction between a power given to a trustee to select amongst the objects for whom he holds the trust estate, and a power of appointment which the donee may exercise or not as he thinks fit. The authorities already cited establish that a mere power of selection given to trustees will be invalid unless the trust is one which the Court itself can execute if the trustee does not do so. It follows that if the settlor attempts to impose a duty on the trustee to make a distribution, the objects in whose favour the duty is imposed must be of such a nature that the Court can execute the trust in their favour even if the trustee is unwilling to do so.

Let us suppose, however, that the power to erect a monument, or to feed animals, is conferred in such terms that no trust is created, and that the donee has a mere power to apply the fund to that purpose if he so desires. Does the analogy of a power of appointment afford grounds for supposing that such a power is valid ? It is submitted that the analogy is misleading. In its essence a power of appointment operates as a delegation by the settlor of his right to declare who is entitled to the beneficial interests in the funds of the settlement. When the power is exercised the person who is to take the beneficial interest is ascertained and can enforce the performance by the trustee of his obligations in the same way as if he had been named in the original settlement. It follows that the true parallel would be a power to appoint the fund so as to dedicate it to the purpose indicated, *i.e.*, the erection of a monument, etc. But the trust thus created would be invalid for the same reasons as if it had been created directly by the original settlor. Mr. Hart[41] suggests on the other hand that such impersonal purpose trusts are rather analogous to powers of management, and instances a direction in a will to employ a particular land agent and to pay his fees. Here again, the analogy is imperfect. Such powers are given to trustees to be exercised by them for the benefit of the person entitled to the trust property, and if he is *sui juris* and absolutely entitled and directs the trustee not to exercise the power, the trustee must obey such a direction. Again, such a power affords no analogy to support a power which cannot be exercised for the benefit of the donee, but the exercise of which cannot be restrained by any other person.

It is true, of course, that if the trustee does exercise such powers of management (not having been forbidden to do so) the beneficiaries, even if entitled to put an end to the trust, cannot complain. But it is still true that the trustees must exercise those powers of management according to the standards of reasonable care and prudence laid down in *Learoyd v. Whitely*[42]. An express power to employ a particular land agent would afford no protection to a trustee who continued to employ him after discovering him to be incompetent or dishonest. Thus the question in cases where powers are conferred on trustees to apply moneys for purposes which may or may not be beneficial to the persons entitled to the trust property will be whether or not the trustees acted reasonably in the belief that the

40. 3rd Edn., at p. 633.
41. *op. cit.*, at p. 34.
42. (1887) 12 App. Cas. 727 ; (1886) 32 Ch. D. 196.

exercise of the power was desirable in the interests of the beneficiaries. Where the exercise of the power will be beneficial to no person whatever, it is submitted that, having regard to the principle under discussion, the trustees should not exercise it at all, unless directed to do so by the beneficiaries, all being *sui juris*.

The present condition of the authorities renders it difficult to be dogmatic,[43] but it may at least be said that testators who desire to provide for expensive and elaborate monuments, or who desire to devote substantial portions of their estate to non-charitable purposes, would be well advised to eschew a direct trust, and to seek the fulfilment of their wishes by other means, such as the imposition of conditions or the creation of conditional limitations. Such expedients, where no uncertainty is involved, may even be effective to avoid the operation of the rule against perpetuities.[44]

43. Since this article was written, Evatt J. has joined with Dixon J. in expressing the view that no trust is valid unless it is either for the benefit of individuals, or for a charitable purpose—*A. G. v. Perpetual Trustee Co. Ltd.*, [1940] A.L.R. 209, at p. 213.
44. *Re Chardon*, [1928] Ch. 464.