INVESTMENTS BY CHARITABLE CORPORATIONS.

The policy of Governments in accepting the responsibility of providing educational facilities for their citizens, of creating corporations or enabling them to be created, by statute, with purely educational purposes, and of enabling them to accept gifts *inter vivos* or by will, from private benefactors, provokes an inquiry as to the extent of the power of such corporations to deal with these private benefactions, free from the control of the rules of law, statutory or otherwise, which regulate investments of trustees, and free from the control of any Court whose power is invoked by a member of the corporation or by the Attorney-General.

Gifts to such a corporation may take the form of money, or shares, or other property, which is not included in the list of " authorised investments " in section 4 of *The Trustees and Executors Acts*, 1897 *to* 1924.

The corporation wishes, so far as the law will permit, to invest the property it receives, and any interest or dividends accumulating thereon, to its best advantage, but a question arises whether the corporation becomes a trustee of these gifts within the meaning of the above Acts, and is limited to the above " authorised investments."

The Trustees and Executors Acts, 1897 *to* 1924, section 4, provides:

> "A trustee may, unless expressly forbidden by the instrument, if any, creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say . . . ." then follows a list of possible investments, and the section proceeds: " and may also from time to time vary any such investment."

The section is entirely permissive. It enables a trustee to invest in these various funds; but neither that section, nor the Act in any other section, requires a trustee to invest in them. Any requirement, any compulsion, to invest in them must, therefore, be found outside the Act. If specific property is given to a trustee to hold in trust for A, the trustee, prior to *The Trustees and Executors Acts* and their forerunners, was bound to hold that specific property for A, and the position was the same though the gift was " to A for life and on his death for B ": *Pickering* v. *Pickering* 4 My. & Cr. 289 at pp. 298 and 299; 41 E.R. 113 at p. 116. The direction in the trust had to be obeyed. Section 4 of the above Acts, however, enables a trustee, " unless expressly forbidden by the instrument, if any, creating the trust," to invest any trust funds in his hands, in the investments named in the section. This gives him power to sell the property given on trust and to invest the proceeds: *Hume* v. *Lopes* [1892] A.C. 112. But it does not bind him to do so. These remarks apply equally to a gift of specific property, whether made by will or by deed.

But in the case of a gift to trustees of residuary personal estate made by will to be enjoyed by persons in succession, the trustees are under a duty to sell and convert into money any property which is of a wasting or hazardous nature: *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137, 148. The resulting funds must be then invested in property of a permanent income-bearing character. With regard to the nature of this latter investment, the position is not exactly clear.

Godefroi, *Law of Trusts*, 3rd Edn. pp. 499 and 500, states the position prior to the introduction of the " authorised investments " by legislation thus:

> " The Court usually restricted trustees who had no express powers of investment to consols, and discouraged investments on mortgage or other securities; though an investment on mortgage, if not giving an unfair advantage to a tenant for life, was not regarded as a breach of trust. It was, moreover, held out as an encouragement (at all events to executors) to invest only in consols since, in that case, they were never held liable for fluctuations, while if they invested in other securities they might be made liable for depreciation."

Keeton, *The Law of Trusts*, 4th Edn. states at p. 245:

> " Before the modern Trustee Acts, the powers of trustees to invest trust money, apart from special powers in the instrument, or under orders of the Court, were very limited. It has already been observed that trustees ought not to lend on personal security; and it was also consistently held that they ought not to invest in the stock of any private company. Before the *Law of Property Amendment Act*, 1859, trustees could not invest in Bank of England stock apart from express permission. Even the power to invest in mortgages with wide margins was doubted by Lord Thurlow, though admitted by Lord Hardwicke and Lord Alvanley."

The precise situation may not be material, but the power of investment does appear to have been extremely circumscribed; this suggests that the purpose of constituting authorised investments by legislation was to give wider scope for a trustee to invest, apart from giving him a power of sale of trust property, unless the trust instrument expressly forbade such an investment, or the exercise of such a power. It may be taken, therefore, that a trustee, acting with due prudence, may invest in these authorised investments.

Much of the foregoing matter does not relate particularly to our corporation, and none of it relates to it, if it is not a trustee; but it is clear that the rule in *Howe* v. *Lord Dartmouth* (*supra*) can have no application to the corporation, and that it is under no obligation, arising from any positive rule of law, to sell a specific, or any other, gift made to it, unless so required by the terms of the gift.

The constitution and the powers of a corporation such as that under consideration may vary greatly, but I assume a corporation created for educational purposes and required by statute to apply all fees and other money and property received by it for the purposes of the corporation.

In such a case, these funds are not held to be applied for the benefit of any other body or person, or for any other object, except in so far as the application for that body, person, or object, constitutes an application for the purposes of the corporation.

It appears to be fundamental in the nature of a trust that property is held by one person or other legal entity for or on behalf of some other person or legal entity for some purpose other than his or its own: see Keeton, *The Law of Trusts*, 4th Edn. p. 3. I do not see how any person or body can be trustee for himself exclusively; and, as the corporation holds its funds only for the purposes of the corporation, I do not see how it can be trustee of the funds which it holds. My own point of view is put clearly in the Restatement of the Law of Trusts by the American Law Institute, under the title " Trusts," vol. 2 at pp. 1093 *et seq.*:

> " Property may be devoted to charitable purposes not only by transferring it to trustees for such purposes, but also by transferring it to a charitable corporation for any of the purposes for which the corporation is organised or for a particular one of its purposes. Where property is given to a charitable corporation, a charitable trust is not created, even though by the terms of the gift the corporation is directed to hold the principal forever and to devote the income only to the accomplishment of the purposes of the corporation, and even though by the terms of the gift the corporation is directed to use the property only for a particular one of its purposes. Thus, if a gift of property is made to an incorporated educational institution with a direction to invest the principal and use the income in paying the salary of a professor of mathematics, a charitable trust is not created, but the institution is the owner of the property, though it holds it for this particular charitable purpose.
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> "Although a gift to a charitable corporation for one or for any of its purposes does not create a charitable trust, the rules of law which are applicable are to a large extent those which are applicable to charitable trusts, since the ends to be served are the same. The differences are due to the fact that different juridical devices are employed.
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> " Where property is given to a charitable corporation, the disposition is valid although the corporation is directed to hold the principal and to devote the income perpetually to the accomplishment of the purposes of the corporation and although the corporation

is directed to use the property only for one of its purposes. The Attorney-General can maintain a suit not only to enforce a charitable trust, but also to compel a charitable corporation to apply property held by it to the charitable purposes for which it is given to the corporation. The doctrine of *cy pres* is applicable to charitable corporations as well as to charitable trusts."

No authorities are quoted in the work, but the following passage from the *Corpus Juris Civilis*, vol. II p. 351, and the authorities there cited, are in accord with the above extract:

"After so taking, it [a charitable corporation] does not hold in trust in the true sense of the term but as its own to be devoted to the purpose for which it was created. A bequest to a college to aid students by loans or free scholarships is not a trust but a valid gift directly to the college, to be used by it within the scope of its corporate functions. And a grant or gift to a religious society, ' the interest thereof to be annually paid to their minister forever,' is a gift to the society. A devise to a certain church ' absolutely to be used by the said church or its trustees in aiding the cause of home or foreign missions equally ' is an absolute and valid gift to the church and not a trust, if the church is incorporated and authorised by statute to receive gifts for missions. A gift to an incorporated missionary society whose work includes both domestic and foreign missions is not received by it as a trust because of the donor's direction to apply it to domestic missions ": See *Domestic and Foreign Missionary Society* v. *Gaether* 62 Fed. Rep. 422; *Brigham* v. *Peter Brigham Hospital* 134 Fed. Rep. 513.

In my opinion, such a corporation is not a trustee of its own general property.

However, it would not be right to leave the point without referring to authorities which appear to conflict with the view I have expressed.

Halsbury, 2nd Edn. vol. 4 p. 336 para. 566, states:

"As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not."

Tudor on *Charities*, at p. 62, says the same thing. Both rely on the same cases in support of the proposition, but, on examination, they appear to give it very slender support, and, in one of the cases, *Green* v. *Rutherforth* 1 Ves. Sen. 462, there are indications that it is only property given to a charitable corporation for a special purpose as distinct from the general purposes of the corporation which is regarded as trust property (see at pp. 467, 468 and 473).

In re Clergy Orphan Corporation L.R. 18 Eq. 280, was a case in which the corporation was enabled by the Act of Parliament to " have

hold receive enjoy possess and retain for the ends and purposes of that Act and *in trust for and for the benefit of* the society" all moneys paid to it. It seems clear to me that the property of the corporation was trust property, and it was so treated by Counsel and the Court without argument. In *Re Manchester Royal Infirmary* 43 Ch. D. 420, four Acts of Parliament were under consideration. By the first, 48 Geo. 3 c. 127, power was given to Sir Oswald Mosley to grant lands to trustees to hold upon the trusts and for the purposes mentioned, and the trustees were required to stand seised of the land for the benefit of the charities mentioned. By the second, 5 & 6 Vic. c. 1, a corporation was constituted and the lands mentioned were vested in the corporation "according to the true interest and purport of the conveyances" by which the land had been conveyed to the previous charity. The other two Acts do not call for mention. North J. accepted the argument that the funds were originally vested in trustees and when the corporation was created it was merely substituted for the previous trustees. *In re National Permanent Mutual Benefit Building Society*, 43 Ch. D. 431, was a case in which North J. decided that the funds of a building society were not trust funds within the meaning of *The Trust Investment Act*, and that the trustees of the funds were not trustees to invest; *The Trust Investment Act* did not, therefore, apply to them.

There is very little support in any of the cases referred to for the proposition quoted above from Halsbury, and, in my opinion, except in the case where property is given to the corporation to hold in trust, the corporation is not a trustee of property held by it.

Though, however, the corporation is not a trustee, and may convert its property into money and invest it, this power is not absolute and unfettered. While I have not found any authority which indicates the interference of a Court with either a charitable corporation or a statutory corporation of any kind in relation to a wrongful investment of its funds, there are cases of interference in relation to a misapplication of funds to some purpose beyond the power of the corporation; see, *e.g.*, *The Attorney-General* v. *Manchester Corporation* [1906] 1 Ch. 643; *London County Council* v. *The Attorney-General* [1902] A.C. 165; *The Attorney-General* v. *The Mersey Railway Co.* [1907] A.C. 415. And it would seem that the scope of investment of a charitable corporation should be directed to such investments as would commend themselves to a man of ordinary prudence, acting with due diligence in the management of his own private affairs, avoiding all investments which are attended with hazard. Otherwise, the Supreme Court would have jurisdiction to interfere; see, *e.g.*, Shadwell V.C. in *The Attorney-General* v. *The Mayor, etc., of Carlisle* 2 Sim. 437 at p. 449; 57 E.R. 851 at p. 856, approving the statement of Lord Eldon.

M. HANGER.*

* B.A., LL.M. (Queensland); Judge of the Supreme Court of Queensland.