It may be doubted whether the older rules applicable to the position of trespassers who were recognized as trespassers and not disguised as licensees, were quite so inelastic as many think. The older formulation recognised not only a duty to refrain from wilful injury to trespassers but also one not to act in reckless disregard of his presence. As Windeyer J. points out, in some of the cases "reckless disregard" has been interpreted as amounting to little more than lack of reasonable care.[4] It is true that the older formulation envisaged positive acts of misfeasance but the common law has furnished numerous examples of gradual expansion of earlier formulated principle. Such an approach may furnish more opportunities for wise judicial control than an application of a pure "foreseeability" test.

E. I. SYKES.*

TRUSTS

Non-Charitable Purpose Trusts.— The question whether a valid trust can be created for non-charitable purposes has now been definitively answered by the Court of Appeal in England in a judgment which is in complete accord with the recent decision of the Privy Council on appeal from the High Court of Australia in *Leahy v. Att. Gen. for New South Wales.*[1] In *re Endacott*[2] a testator gave his residuary estate to a parish council "for the purpose of providing some useful memorial to myself". It was argued that this was a valid charitable gift, or alternatively that it fell into that class of trusts for non-charitable purposes which, though not charitable, will nevertheless be enforced by the courts. The Court of Appeal rejected both contentions. It is with the second argument only that this note is concerned.

The leading principle is that a trust will be valid only if it is constituted for the benefit of individuals or for purposes which the law recognises as charitable. This rule has been expressed in numerous decisions, including *Morice v. Bishop of Durham*,[3] *Bowman v. Secular Society Ltd.*,[4] and *Leahy's Case*,[5] and was re-affirmed in the case under discussion. In the words of Lord Evershed M.R., "no principle perhaps has greater sanction or authority behind it

4. As in *Mourton v. Poulter* [1930] 2 K.B. 183; *Addie v. Dumbreck* [1929] A.C. 358.

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1. [1959] A.C. 457.
2. [1960] 1 Ch. 232.
3. (1804) 9 Ves. 399, 405 (Grant M.R.).
4. [1917] A.C. 406, 441 (Lord Parker of Waddington).
5. *Op. cit.*, at pp. 478-9.

than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries".[6]

There are two grounds upon which this principle has been explained. One is that a distinction is drawn between charitable and non-charitable purposes on the basis that while trusts for charitable purposes are legally certain, trusts for non-charitable purposes may be so uncertain that the courts will be unable to determine whether the trustee has carried out the trust.[7] It is a corollary of this that where the non-charitable purpose is sufficiently definite the trust is valid. This explanation seems to have prevailed with Roxburgh J. who, in the unreported case referred to in argument of *In re Catherall* decd., held valid a disposition to a vicar of a sum of money for a suitable memorial to the testator's parents and sister. It is perfectly true that trusts for "benevolent" or "patriotic" purposes, which are non-charitable purpose trusts, have been held to fail on the ground of uncertainty; but even where the non-charitable purpose lacks nothing in definiteness, trusts for such purpose fail on the other explanation of the general principle which was admirably expressed by Roxburgh J. himself in *Re Astor's Settlement Trusts*.[8] This is that there can be no trust in the absence of someone to enforce the trustee's obligation. This explanation is also that given by Viscount Simonds in *Leahy's Case*.

The Court of Appeal recognised that exceptions had been admitted to this principle in the case of trusts for the maintenance of animals and tombs, but was not prepared in any way to add to the number of "those troublesome, anomalous and aberrant cases", as Harman L.J. termed them.[9]

If trusts for non-charitable purposes fail as trusts, may they take effect as powers? In characteristically vigorous language Ames long ago observed: "The only objection that has ever been urged against such a gift is that the court cannot compel A to act if he is unwilling. Is it not a monstrous *non sequitur* to say that therefore the court will not permit him to act when he is willing?"[10] But if property is vested in trustees upon trusts which fail, their right to apply it to non-charitable purposes instead of holding it for those entitled under the resulting trust must depend upon two considerations: first, that the porported trust should be capable of being interpreted as the grant of a power; and secondly, that the grant of the power should itself be valid.

6. [1960] 1 Ch., at p. 246.
7. This is the way in which the observations of Grant M.R. in *Morice v. Bishop of Durham* are explained in Keeton: Law of Trusts, 7th Edition, p. 127.
8. [1952] Ch. 534, 542.
9. [1960] 1 Ch., at p. 251.
10. The Failure of the Tilden Trust (1891) 5 Harv. L.R. 389, 395.

With respect to the first of these matters, Gray's observation that an invalid trust cannot be tortured into a valid power has been echoed by Jenkins L.J. in *Inland Revenue Commissioners v. Broadway Cottages Trust*,[11] where he stated that "we do not think that a valid power is to be spelt out of an invalid trust". In *re Endicott*, the Court of Appeal did not discuss this matter in detail, but Lord Evershed M.R. observed that "the proposition stated in Mr. Morris and Professor Barton Leach's book (p. 308) that if these trusts should fail as trusts they may survive as powers, is not one which I think can be treated as accepted in English law".[12]

Even if the invalid trust can be interpreted as a power to apply the property to a non-charitable purpose, or if the testator expressly frames his disposition not as a trust but as a power, it may happen that the power itself will not be supported. The grant of the power must of course not infringe the perpetuity rules and must be sufficiently certain; but in addition it must not involve a delegation of the power of testamentary disposition. It is significant that in *Leahy's Case* Viscount Simonds, after pointing out that no one can enforce a non-charitable purpose trust, observed that from the fact that the trustees were not themselves the beneficiaries, yet the trust fund was in their hands, and that they may or may not think fit to carry out their testator's wishes, it would seem that "the testator has imperfectly exercised his testamentary power; he has delegated it, for the disposal of his property lies with them, not with him".[13]

K. W. Ryan.

11. [1955] Ch. 20, 36.
12. [1960] 1 Ch., at p. 246.
13. [1959] A.C. at p. 484.