PURPOSE TRUSTS AND POWERS.

Ever since Ames analysed the failure of the "Tilden Trust" in 1892,[1] writers have been urging that purported trusts for purposes not charitable should be treated by the courts as powers of appointment. This advocacy has not been unanimous, but it has taken on a sharpened aspect of urgency during the last two decades when judges have made explicit holdings based on a general proposition that trusts must be for charity or for persons. It has probably never been disputed by anyone that a trust for non-charitable purposes takes effect as a resulting trust if the settlor or testator has specified no purposes. Until recently the dispute has centred on dispositions having insufficient precision for orthodox trust law but certain enough for power rules. But twice in the last few years English judges of first instance have said, and decidedly not *obiter,* that subject to certain exceptions and anomalies there is no such thing as a trust for non-charitable purposes, and any attempt to create one ends in a resulting trust. This alleged rule is said to apply even though the purpose is described with sufficient precision to satisfy that branch of trust law. Yet the authority is not formidable.

Authorities adverse to non-charitable purpose trusts.

Morice v. Bishop of Durham, decided by Grant M.R.[2] and Lord Eldon,[3] has been analysed often enough without agreement as to its effect. Property was left to the defendant "to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham . . . shall most approve of." This was held not charitable, and a resulting trust. "Apart from charities", said the Master of the Rolls, "every other trust must have a definite object. There must be somebody, in whose favour the court can decree performance."[4] Yet the indefiniteness of the object in this case would have been sufficient ground to give rise to a resulting trust, without basing it on the absence of power to enforce distribution by the Bishop.

In *In re Barnett,*[5] where there was a legacy to a society for an annual dinner, Parker J. evidently thought that a purpose trust must be void (as he held this example) once its non-charitable nature had

1 *The Failure of the "Tilden Trust",* (1892) 5 HARV. L. REV. 389.
2 (1804) 9 Ves. Jun. 399, 32 E.R. 656.
3 (1805) 10 Ves. Jun. 522, 32 E.R. 947.
4 9 Ves. Jun. 405.
5 (1908) 24 Times L.R. 788.

been established. Yet if valid on all other grounds, this disposition would have infringed the rule against perpetuities.

Lord Parker of Waddington, in *Bowman v. Secular Society, Ltd.*,[6] said obiter: "A trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which the Courts in this country recognize as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty. A simple instance of this is a gift for charitable or benevolent purposes." The last sentence drastically reduces the force of the preceding part of the *dictum* by bringing the whole discussion back to the topic of vagueness.

In *In re Wood*,[7] Harman J. said that there could not be a trust without a *cestui qui trust,* but he had already held the particular purposes before him uncertain.

In re Astor's Settlement Trusts[8] was concerned with a settlement *inter vivos* whereby shares were transferred to trustees to apply the income, for a certain period not infringing any perpetuity period, for purposes admittedly not charitable. These purposes were: "1. The establishment maintenance and improvement of good understanding sympathy and co-operation between nations, especially the nations of the English speaking world and also between different sections of people in any nation or community. 2. The preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies. 3. The promotion of the freedom independence and integrity of the press in all its activities and of the adoption and maintenance of the highest standards throughout the profession of journalism. 4. The control publication carrying on financing or management of any newspapers periodicals books pamphlets or publications or businesses connected therewith or with the publication thereof. 5. The protection of newspapers (particularly country or provincial newspapers as distinct from those of the capital) from being

6 [1917] A.C. 406, at 441.

7 [1949] Ch. 498, at 501, 502.

8 [1952] Ch. 534. For a general discussion of this case, see Marshall, *The Failure of the Astor Trust,* (1953) 6 CURRENT LEGAL PROBLEMS 151. Support for the decision in the Astor Case was supplied by Murray-Aynesley C.J. in Re Alsagoff Trusts, (1955) 22 MALAYAN L.J. 244, a Singapore case.

absorbed or controlled by combines or being tied by finance or otherwise to special or limited views or interests inconsistent with the highest integrity or independence. 6. The restoration encouragement protection and maintenance of the independence of the editors of and writers in newspapers and periodicals and the securing (as far as possible) for the public of full means of ascertaining by whom any newspaper is actually owned or controlled. 7. The establishment assistance or support of any charitable public or benevolent schemes trusts funds associations or bodies for or in connexion with (*a*) the improvement of newspapers or journalism or (*b*) the relief or benefit of persons (or the families or dependents of persons) actually or formerly engaged in journalism or in the newspaper business or any branch thereof or (*c*) any of the objects or purposes mentioned in this schedule." At the end of the period, there was a gift over to the "younger of the two persons who shall at such end be respectively the Warden of All Souls College, Oxford, and the Master of Trinity College, Cambridge, or if the younger of them shall disclaim this benefit then for the other of them or if either office (of Warden or Master) shall be vacant at such end then for the person who shall hold the other office at such end." Roxburgh J. held that the primary gift failed, and that consequently there was a resulting trust, on the basis that *Morice v. Bishop of Durham*[9] correctly laid down a rule against non-charitable purpose trusts. Equitable rights under a trust, it was said, had been hammered out in litigation between beneficiary and trustee; therefore there could be no trust without a correlative right. Besides, there was a practical objection to large funds being in the hands of trustees whom no one could control. The learned judge[10] characterised the cases in which non-charitable purpose trusts had been upheld as "anomalous and exceptional"; they concerned "matters arising under wills and intimately connected with the deceased" and were probably "concessions to human weakness or sentiment", justifying no larger principle. Yet this was not the whole story, for quite apart from any rule against non-charitable purpose trusts as such and assuming that there was no such rule, Roxburgh J. held that there was still a resulting trust on account of the uncertainty of the purposes enumerated in the settlement.

Bernard Shaw's will has provided the latest in this line of cases. His bequest for research and propaganda in connexion with the alphabet was initially struck down by Harman J. on the ground that

[9] (1804) 9 Ves. Jun. 399, 32 E.R. 656; (1805) 10 Ves. Jun. 522, 32 E.R. 947.
[10] At 547.

there could be no trust except for charities or persons.[11] But the learned judge also thought the terms of the will uncertain.

No English case exists, therefore, in which a non-charitable purpose trust has been held inoperative on the ground that such trusts cannot exist at all and where it would have been upheld but for the existence of a general rule against them. In all the cases there has been either perpetuity or uncertainty of a kind fatal to all private trusts.

Australia supplies two cases against non-charitable purpose trusts, but only one, the earlier, is unequivocal in denying the purported disposition all validity solely on the basis of a principle against such trusts. In *The Public Trustee v. Nolan*,[12] property was given "upon trust to erect a carillon on similar lines to the one at Avalon Catalina Island, California, at such place on Sydney Harbour, or on the foreshores thereof, or at Park Hill, North Head, as my trustees may deem expedient, or to join with any other person or public body in erecting such carillon, and it is my desire that such carillon should be played if possible on the arrival of and to welcome oversea liners coming into Sydney Harbour . . . " Roper J. held this gift non-charitable, and therefore void, as there was was a general principle that there was no such thing as a non-charitable purpose trust, except in cases of animals, monuments and graves, and this case came within no exception. Smith J. followed this decision in *Re Producers' Defence Fund*,[13] but he also held the disposition there void for perpetuity, and did not close the door on regarding it (had it not been for the infringement of the rule against perpetuities) as a valid power of appointment.

Literary support for the existence of a rule that an attempt to create a trust for a non-charitable purpose necessarily takes effect as a resulting trust is small in quantity, though, it must be admitted, respectable.[14]

Authorities favourable to non-charitable purpose trusts.

So far as England is concerned, the general validity of such dispositions is implicit in *In re Dean*.[15] North J., in upholding the gift

11 In re Shaw, [1957] 1 W.L.R. 729. By the good offices of "My Fair Lady", which provided the funds, and a compromise in the Court of Appeal, which provided the validity, the work is now going ahead.

12 (1943) 43 State R. (N.S.W.) 169.

13 (1954) 61 Argus L.R. 541.

14 See Gray, *Gifts for a Non-Charitable Purpose*, (1902) 15 HARV. L. REV. 67; Sweet, *Restraints on Alienation*, (1917) 33 L.Q. REV. 342. Even Gray was willing to countenance the possibility that such trusts might be valid until revoked, in the same way as a trust for paying debts.

15 (1889) 41 Ch. D. 552.

for the horses and hounds in that case, clearly did not intend to do anything exceptional, thinking the tomb and monument cases were illustrations of the validity (subject to the all-pervading rules of uncertainty, remoteness, and so on) of gifts for non-charitable purposes. Likewise, in *In re Clarke*,[16] Romer J. said: "Where on the other hand a fund is to be held upon trust for charitable and non-charitable definite purposes there is no uncertainty as to the non-charitable objects of the trust and the trust is a valid one." (In that case, however, Romer J. held the gift void for uncertainty.) Gifts for non-charitable purposes which have been upheld are quite diverse in character. They include among their objects the erection and maintenance of tombs and monuments,[17] the support of the donor's animals,[18] non-charitable religious purposes (in Ireland and Malaya),[19] the furtherance of fox-hunting,[20] maintenance of infants and discretionary distribution to adults (generally called "discretionary trusts"),[21] and trusts for paying debts.[22] Gifts for non-charitable purposes have sometimes been sustained in America too.[23]

Policy considerations.

Capricious purposes are sometimes dear to capricious testators. They may wish their yachts to be sunk, their houses to be boxed up, or the eyes of visitors distracted from the beauties of Sydney Harbour by ringing in their ears. This may seem a red herring (which it is), but it has been seriously put forward that once gifts for non-charitable purposes are allowed there will be no controlling the wild orgies of extravagance on caprice in which testators will increasingly indulge. The answer, of course, is that courts will have to strike down the silly purposes and uphold the sensible ones.[24] They are well used to dealing with questions of public policy (though they may not always do it very well) in cases of contract and of conditions annexed to gifts.

16 [1923] 2 Ch. 407, 417-418.

17 See the authorities listed in my article, *Trusts for Non-Charitable Purposes*, (1953) 17 CONVEY. 46, at 50-51, which also deals generally with the subject.

18 See the authorities listed, *ibid.*, at 51-52.

19 See the Irish authorities listed, *ibid.*, at 52. As to Malaya, see Phan Kin Thin v. Phan Kuon Yong, (1939) 9 MALAYAN L.J. 44. (Perak, Murray-Aynsley J.); Tan Chin Ngoh v. Tan Chin Teat, (1946) 12 MALAYAN L.J. 159. (Singapore, Worley J.).

20 In re Thompson, [1934] Ch. 342. And see *Trusts for Non-Charitable Purposes*, (1953) 17 CONVEY. 46, at 52-53.

21 See my articles, *Discretionary Trusts*, (1957) 21 CONVEY. 55, and *Protective Trusts*, (1957) 21 CONVEY. 110.

22 See my article, *Trusts for Paying Debts*, (1957) 21 CONVEY. 280.

23 See SCOTT, THE LAW OF TRUSTS, (2nd ed., 1956) 864-889, ss. 124-124.7.

24 And see Clark, *Unenforcible Trusts and the Rule Against Perpetuities*, (1911) 10 MICH. L. REV. 31.

If a New South Wales testator gave all his property to the New South South Wales University of Technology on condition that they erected a carillon on Sydney Harbour within twenty-one years, the issue would be squarely raised as one of policy and not of legal technicality. In fact, of course, in many of the cases where gifts for non-charitable purposes have been upset, the testator has described his objects as "benevolent", "deserving", "patriotic", and so on. These may be uncertain, but they cannot be malevolent, undeserving, or treacherous.

Roxburgh J. put the decision in *In re Astor's Settlement Trusts* partly on the ground that there was a practical objection to large funds being in the hands of trustees whom no one could control. If this means that the trustees can please themselves whether they further the donor's purpose or keep the trust property idle, it is difficult to see what the objection is, unless an argument is going to be put up that all powers of appointment are subject to the same practical objection. If, on the other hand, it means that the trustees can spend the money as they please, it just is not true. For any misapplied funds the trustees will be liable at the suit of the person entitled to residue, or, if the trust is of residue, at the suit of the intestate successor. If any person is given the choice whether or not to dispose of property, other than his own, there must be someone entitled in default of any disposition being made (unless the power is one whose exercise is meant to be obligatory, when the court will act in default, so that there is no uncontrollability).

Those who assert the principle against non-charitable purpose trusts have to get over the cases which approve such trusts. This they do by describing these cases as anomalous, exceptions, and concessions to human weakness. They may be concessions to human weakness; they may be anomalous to anyone who regards the word "trust" as always meaning the same thing in Chancery; but it is hard to see, after gathering together all the "exceptions", what room is left for the "rule."[25]

Treating purpose trusts as powers of appointment.

Trusts generally have the following ingredients: (1) a settlor or testator; (2) a trustee or trustees; (3) trust property; (4) a beneficiary or beneficiaries who can sue the trustee for breach of trust. Items (3) and (4) must be expressed with certainty, i.e., it must be possible to

[25] See MORRIS & LEACH, THE RULE AGAINST PERPETUITIES, (1956) c. 12; Potter, *Trusts for Non-Charitable Purposes,* (1949) 13 CONVEY. 418.

identify the trust property and all the beneficiaries and to perceive an intention to make the trustee suable by the beneficiary. There are two cases which differ, but which are universally accepted as being trusts, *viz.*, (a) where, instead of any beneficiary the trust is for charitable purposes and the Attorney-General can sue the trustee for breach of trust; and (b) where, instead of any trust property there is a power of appointment whose exercise is intended to be obligatory, and where, therefore, there is no beneficiary but a group of objects collectively entitled in default of appointment, and where at the suit of the objects in default of appointment the court will order equal division of the property subject to the power. In these cases (a) and (b) there must be respectively certainty that the object is charitable and certainty that all the objects of the power can be identified. In all cases of trust in this strict sense there is direct enforceability.

Powers, when not held on trust to be exercised, involve: (1) a settlor or testator (donor); (2) a donee (who may be a trustee, but not as such); (3) property subject to the power; (4) objects, who cannot sue the donee or anyone else for anything; (5) a person entitled in default of appointment, who can sue to recover the property if no appointment is made or if the power is released or to set aside an excessive or fraudulent appointment. It must be possible to identify the property subject to the power and all the beneficiaries entitled in default of appointment (who are the persons entitled under a resulting trust if nobody else is specified or if the specification is uncertain). It is not necessary, however, that all the possible appointees should be identifiable, but only that there should be such a certain criterion provided that, when tested by it, any appointee can definitely be said to be an object or a non-object. In the rest of this article I shall refer to the need under a trust in the strict sense for identifiability of beneficiaries as "trust certainty" and to the need in respect of bare powers for a clear criterion of what appointments are *intra vires* as "power certainty."

Under a so-called trust for non-charitable purposes there is no beneficiary and no machinery by which the Attorney-General or anyone else can compel payments in accordance with the "trust." However, such "trusts" are capable of satisfying all the requirements of a valid power of appointment and should therefore be treated as coming within that category. The analysis that they are special powers is supported by the way the rule against perpetuities has been applied to them.[26] The rule that a non-charitable trust (of one of the kinds

[26] See *Trusts for Non-Charitable Purposes,* (1953) 17 CONVEY. 46, at 53-61.

held valid) is void if it can last longer than the perpetuity period can be regarded as a particular application of the wider rule that a special power of appointment is invalid if it could be exercised outside the period. Morris and Leach[27] point out that this analysis has never been adopted by a court, but in my submission it should be. Discretionary trust are called "trusts", but are dealt with as powers of appointment by the courts, even for the purposes of the rule against perpetuities.[28] So are revocable trusts for paying debts.[29] Why not then other trusts for non-charitable purposes? It is true that trusts for paying debts, when for the convenience of the debtor, are revocable, but discretionary trusts are not, and it is not apparent why other non-charitable purpose trusts should be. The literary support for treating such trusts as ordinary special powers of appointment is considerable.[30]

Against treating what purport to be trusts for non-charitable purposes as special powers to appoint in furtherance of those purposes are two recent English cases. In *Inland Revenue Commissioners v. Broadway Cottages Trust*,[31] the Court of Appeal, whose judgment was delivered by Jenkins L.J., decided that a purported trust (which failed as a trust in the strict sense) could not be validated by treating it as a power. This was a case of a settlement *inter vivos*. In *In re Shaw*,[32] Harman J., apparently reluctantly, extended this doctrine of rigid categorisation to wills. This attitude is supported by two writers,[33] but not by any other decisions. In the Victorian case of *Re Producers' Defence Fund*,[34] Smith J. did not look with favour upon the power

27 THE RULE AGAINST PERPETUITIES, (1956), at 314, following my statement in *Trusts for Non-Charitable Purposes, supra* at 59.

28 See *Discretionary Trusts,* (1957) 21 CONVEY. 55, at 63.

29 See *Trusts for Paying Debts,* (1957) 21 CONVEY. 280, at 288-289.

30 See MORRIS & LEACH, THE RULE AGAINST PERPETUITIES, (1956) 306-311; SCOTT, THE LAW OF TRUSTS, (2nd ed., 1956) 860, s. 123; Ames, *The Failure of the "Tilden Trust",* (1892) 5 HARV. L. REV. 389; Hart, *What is a Trust?* (1899) 15 L.Q. REV. 294; Smith, *Honorary Trusts and the Rule Against Perpetuities,* (1930) 30 COL. L. REV. 60; Glanville Williams, *The Three Certainties,* (1940) 4 MOD. L. REV. 20; Potter, *Trusts for Non-Charitable Purposes,* (1949) 13 CONVEY. 418; Kiralfy, *"Purpose Trusts", Powers and Conditions,* (1950) 14 CONVEY. 374; Sheridan, *Trusts for Non-Charitable Purposes,* (1953) 21 CONVEY. 46; Marshall, *The Failure of the Astor Trust,* (1953) 6 CURRENT LEGAL PROBLEMS 151; Wooden, *Wills-Devise to Executor for Further Distribution—Application of Trust and Power Doctrines,* (1958) 56 MICH. L. REV. 1167.

31 [1955] Ch. 20.

32 [1957] 1 W.L.R. 729.

33 Gray, *Gifts for a Non-Charitable Purpose,* (1902) 15 HARV. L. REV. 67; Eggleston, *Purpose Trusts,* (1940) 2 RES JUDICATAE 118. See also Hart, *Some Reflections on the Case of Re Chardon,* (1937) 53 L.Q. REV. 24.

34 (1954) 51 Argus L.R. 541, at 550-551.

analysis, but nor did he reject it, for had the "trust" there been construed as a power it would still have been void—for perpetuity.

Apparently the only argument against treating non-charitable purpose purported trusts as powers of appointment is that by purporting to create a trust the donor desired compellability of the trustee, so that by holding the trustee to have a discretion the court would be "making a new will for him", and not "construing the testator's will." On closer inspection this argument will be seen to be doubly absurd.

First, assuming that the donor really did regard compellability of the trusteee as an important factor, contrast the results of the *Astor-Shaw* cases with those of the power analysis in a hypothetical but typical case. Suppose *T* leaves £10,000 to my trusted friend *A* on trust to distribute it within five years among such non-charitable institutions in Oxford as qualify for rating relief, and the residue of my property to *B*." Roxburgh and Harman JJ. would say because *A* is not compellable he is prohibitable and the £10,000 goes to *B*. Under the power analysis, *A* may distribute in accordance with the testator's selection of objects, but any part of the £10,000 not distributed *intra vires* within five years must be paid to *B*. The power analysis may be described as providing that if there is an attempt to create a trust of a kind unknown to the law, it may be treated as a special power of appointment if it would be valid as such a power. This, be it noted, is quite different from saying that an abortive attempt to create a possible trust is to be upheld as creating a power or anything else. The *Astor-Shaw* view is that "if the trustee may, he can, but if he must, he can't." It involves the proposition that the donor regarded the compellability of the trustees as the fundamental part of his gift. That is possible, but unlikely, and in cases where it is construed to be so the power analysis should not be applied, but the *Astor-Shaw* cases followed. Normally, and especially in cases of wills, and even more especially in cases of wills made since the *Astor* and *Shaw* cases were decided, it would seem too obvious for argument that a testator who wanted a trustee compelled to do something would prefer, on learning that compulsion was impossible, that the "trustee" be allowed to do it than that he be restrained from doing it. To suggest that this is speculation is to betray a very naive view of testators. It is not easy to see why it should be regarded as wrong to "make a will" for a testator, approximating very closely to his intention (as the *cy-près* doctrine does in charity and some other cases), but alright to make an intestacy for him in flagrant defiance of what he wanted.

Secondly, it is far too easy an assumption that because he used the word "trust" a testator must have intended compellable trustees.

He may have, and he may not. The artless testator, unversed in the mysteries of Chancery, is quite likely to have meant, when he said "on trust", to do something, simply that he wanted it done. Having selected his "trustee", it is quite probable that the testator gave no thought to the possibility of his wishes not being readily complied with. He would probably not be concerned with compellability and the distinction between trusts strictly so-called and powers of appointment. The judicial view of their testators as people who mean "trust" to imply obligation involves this curious feature: the testator either (a) knows enough Chancery law to be aware of the technical nature of a trust but is ignorant of the absence of any method of enforcing non-charitable purpose trusts, or (b) knows about the unenforceability of non-charitable purpose trusts and uses words purporting to create one as a circumlocutory method of establishing a resulting trust. Of course, if there is reason to believe that a particular testator regarded compellability as fundamental to his gift, then it should not be treated as a power of appointment.

Validity of non-charitable purpose powers.

So far it has been assumed, in arguing that purported trusts for non-charitable purposes should be treated as powers, that an expressly created power to pay out money in furtherance of a non-charitable purpose would be valid. This requires investigation, and there is precious little authority. For the purpose of examining the arguments on this question, powers will be divided into two types:— (1) a power to appoint for one or more specified non-charitable purposes; (2) a power to appoint for one or more non-charitable purposes selected from an unlimited range or from a range limited by generic description. Examples of the first type are:— (a) "with power to appoint to the trustees of the Astor Trust"; (b) "with power to appoint in furtherance of fox-hunting or in furtherance of propaganda against vivisection." Examples of the second type are:— (a) "for such purposes as he may think fit"; (b) "for such non-charitable purposes as he may select"; (c) "for benevolent purposes"; (d) "for the purposes of non-charitable institutions in Oxford which qualify for rating relief."

Power to appoint for one or more specified non-charitable purposes.

The validity of these is assumed by all writers, including Gray.[35] It seems to be questioned by no authority, and is supported by the

[35] *Gifts for a Non-Charitable Purpose,* (1902) 15 HARV. L. REV. 67.

decision of the English Court of Appeal in *In re Douglas.*[36] It is also supported by the existence of trusts for maintenance, discretionary trusts, and trusts for paying debts, all of which are treated by the courts as powers of appointment.

In *In re Douglas,* the testatrix gave legacies to several societies, all of which were clearly charitable except for two, *viz.,* the "Home for Lost Dogs" and the "Society for the Protection of Animals liable to Vivisection." She gave her residue on trust to distribute it "among such charities, societies, and institutions (including or excluding those hereinbefore mentioned as may be preferred), and in such shares and proportions as the said Earl of *Shaftesbury* shall by writing nominate . . . " The Earl nominated 153 societies, not including the Home for Lost Dogs or the Society for the Protection of Animals liable to Vivisection. The Court of Appeal held (i) that all the gifts were charitable, and (ii) that if the two societies mentioned were not charitable there was still a valid power of appointment. Cotton L.J. said:[37] " . . . where there is a gift without any definite object pointed out, but merely a description of the character of the object to which the gift is to be applied, and if that character is not charity, then the Court will not execute such an indefinite purpose, and it must be considered as if the legacy had been left to the legatee as a trustee, and with no trust declared, in which case he would hold it as a trustee for the next of kin. That really is what is laid down by the case of *Morice v. Bishop of Durham*[38] . . . " Later,[39] Cotton L.J. said: "Then there are certain specified things which he may include in the distribution if he thinks fit. Does that come within the principle of *Morice v. Bishop of Durham?* In my opinion it does not. All that that case decided was this, that where there is no definite object pointed out as the object of the trust, then the Court says that the trust cannot be executed unless the Court can itself determine how it is to be applied, which it can only do where the object is a charity. But if there are definite objects pointed out and a discretion is given to trustees to distribute property amongst those definite objects, in my opinion that judgment in no way decides that such a gift fails." And finally:[40] "It would be good if it was limited to a charitable gift, although for purposes utterly indefinite; and the addition to that of definite pur-

36 (1887) 35 Ch. D. 472. *Cf.* Sandhurst and Northern District Trustees Executors and Agency Co. Ltd. v. Pitt, [1958] Victorian R. 310 (Smith J.).
37 *Ibid.,* at 482-483.
38 (1805) 10 Ves. Jun. 522, 32 E.R. 947.
39 (1887) 35 Ch. D. 472, at 485.
40 *Ibid.,* at 486.

poses, though they are not all charities, will not, in my opinion, make the ultimate gift bad."

Power to appoint from unlimited range or from a class: uncertainty cases.

In *In re Sutton*,[41] Pearson J. said that a gift for "charitable and deserving objects" would be void if two classes were intended. In *A.-G. v. National Provincial and Union Bank of England*,[42] the House of Lords reached the same conclusion about "charitable or patriotic" purposes, and a similar fate was met at their Lordships' hands in *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*[43] by a gift for "charitable or benevolent" purposes. The decisions were arrived at on the basis that "deserving", "patriotic" and "benevolent" are words which denote objects some of which are not charitable. There are three grounds (apart from an alleged rule against delegation of will-making power) which could support these decisions:— (1) these were cases of trust, but the words delimiting the non-charitable classes did not have trust-certainty (i.e., it was not possible to list all possible payees); (2) these were cases of powers of appointment, but the words delimiting the non-charitable classes did not have power-certainty (i.e., it was possible to have payees of whom it could not be said whether they came within the class or not); (3) these were cases of trust and there cannot be a trust for non-charitable purposes. It is submitted that in fact they were cases of power, but that there was power-certainty and that all these decisions are wrong, but it is conceded that:— (a) if there was not power-certainty then the decisions were right, and (b) if they were trusts, or rather if they purported to be trusts, then the decisions were right because of the absence of trust-certainty, but it is not conceded that the third ground makes any sense for reasons already given, in other words, that there cannot be a rule that a disposition must be construed as a trust so that it can then be held void on the ground that there is no such kind of trust. The best opinion seems to be that gifts of the type dealt with in the *Tetley-Diplock* cases are held void because of lack of trust-certainty because it has not been successfully urged that they should be treated as powers.

House of Lords decisions have also applied the *Tetley-Diplock* rule in Scotland,[44] though not uniformly. In *Millar v. Rowan*,[45] there

41 (1885) 28 Ch. D. 464.
42 [1924] A.C. 262.
43 [1944] A.C. 341. See also In re Shaw, [1957] 1 W.L.R. 729 (Harman J.).
44 Blair v. Duncan, [1902] A.C. 37; Grimond v. Grimond, [1905] A.C. 124; Houston v. Burns, [1918] A.C. 337.
45 (1837) 5 Cl. & F. 99, 7 E.R. 341.

was a gift for "charitable and benevolent" purposes. This House treated this as a disjunctive gift, i.e., for two classes of purpose, and held it valid.

Australian decisions have accepted the *Tetley-Diplock* attitude.[46] In *A.-G. for New South Wales v. Metcalfe*,[47] Griffith C.J., giving the judgment of the High Court, said: "It is not disputed that if property is given upon trust to be expended on charitable or other purposes, and it is left wholly to the discretion of the trustee to decide what those other purposes shall be, the gift fails." This would still be the case in most jurisdictions if the case were regarded as one of trust, but later cases in several jurisdictions establish that there can be a valid power of appointment which is neither general nor limited to an identifiable number of objects. This type of hybrid power, as it has come to be called, may not be accepted in Australia.[48]

The position is the same in Canada. In *Brewster v. Foreign Mission Board of Baptist Convention of Maritime Provinces*,[49] a New Brunswick case, Barker J. held void for uncertainty a gift "to assist in aiding good and worthy objects." In *Re Hawkins*,[50] where there was a gift to *F.H.C.* "in trust to be divided among such charitable and such purposes as he may in his sole discretion see fit . . . ," Kelly J. held the disposition void for uncertainty. *Re Metcalfe*[51] is the opposite of *Millar v. Rowen*.[52] The bequest was " . . . to such religious charitable and benevolent purposes as my executors . . . in their discretion shall determine." Barlow J. held the objects disjunctive, i.e., consisting

46 Attorney-General for New South Wales v. Metcalf, (1904) 1 Commonwealth L.R. 421; Attorney-General for New South Wales v. Adams, (1908) 7 Commonwealth L.R. 100; Re Dobinson, (1911) 17 Argus L.R. 280, a Victorian case where Cussen J. held a gift to an executor and trustee "for such religious uses or purposes as he shall in his absolute discretion think fit" void for uncertainty; Re Forrest's Will, (1913) 19 Argus L.R. 414 (Victoria, Madden C.J.); In re White, [1933] South Aust. S.R. 129 (Richards J.); Re Boland, [1950] Queensland S.R. 45, where the testator directed "my said trustees to hold such one-third share in my residuary estate upon trust at their discretion to pay the same to any deserving Roman Catholic institution": The Full Court held this not charitable and void for uncertainty; In re Edwards, [1952] South Aust. S.R. 67 (Napier C.J.). *Cf.* In re Parker, [1949] Victorian L.R. 133 (Fullagar J.).

47 (1904) 1 Commonwealth L.R. 421, at 426.

48 See Tatham v. Huxtable, (1950) 81 Commonwealth L.R. 639; Sandhurst and Northern District Trustees Executors and Agency Co. Ltd. v. Pitt, [1958] Victorian R. 310 (Smith J.).

49 (1900) 21 Canadian L.T. 131.

50 (1929) 36 Ontario W.N. 347. And see Re Gripton, (1931) 40 Ontario W.N. 207 (Rose C.J.).

51 [1946] Ontario R. 882.

52 (1837) 5 Cl. & F. 99, 7 E.R. 341.

of three classes, and the whole thing void for uncertainty. In *Re Loney Estate*,[53] a Manitoba case, residue was given "to my executor and trustee, Theodore Constantine Greschuk, absolutely, for the purpose of promoting and propagating the doctrines and teachings of Socialism, the said rest and residue of my estate to be distributed if possible, by my executor and trustee within five years after my death." DuVal J. held there was intended a trust, and this was void for uncertainty. The learned judge said:[54] "Counsel for the applicant suggested in argument that the testator Loney intended to make an absolute gift to the executor and trustee with full power to select the method of furthering the purposes named in the said will as quoted above. It is well established that such gifts are not valid or effective." And he cites the *Tetley Case*[55] as authority. It would appear, on the contrary, that it is well established that an absolute gift is valid and effective.[56]

New Zealand also has the *Tetley-Diplock* rule, as two Privy Council cases[57] lay down.

The principles to be derived from these cases and which are clearly correct are: (1) where, as a matter of construction, the testator intended a trust, i.e., intended his gift to take effect only if enforceable, then it is invalid unless it complies with the certainty rule for trusts; (2) where, as a matter of construction, the testator intended a bare power, then it is invalid unless it complies with the certainty rule for powers. In so far as the cases lay down that the use of the word trust excludes construing the disposition as the creation of a power, they are wrong. At all events, there is nothing in any of these uncertainty cases to suggest that a power to distribute for non-chari-

53 (1953) 9 Western W.R. (N.S.) 366.

54 *Ibid.*, at 368.

55 A.-G. v. National Provincial Bank, [1924] A.C. 262.

56 Further Canadian cases supporting the Tetley-Diplock rule are: Lawrence v. Lawrence (1913) 13 Dominion L.R. 737 (Barker C.J.) ("benevolent"); Re Greaves, [1917] 1 Western W.R. (Clement J.); Cameron v. Church of Christ, Scientist, (1918) 43 Dominion L.R. 668 (Sup. Ct.); Re McPherson, (1919) 17 Ontario W.N. 22 (Kelly J.); Re Street, (1926) 29 Ontario W.N. 428 (Lennox J.); Planta v. Greenshields, [1931] 2 Dominion L.R. 189 (C.A.); Re Poole, (1931) 40 Ontario W.N. 558 (Riddell J.A.); Re Eacrett, [1949] 1 Dominion L.R. 305 (C.A.); Brewer v. McCauley, [1955] 1 Dominion L.R. 415 (Sup. Ct.); Re Delaney, (1957) 10 Dominion L.R. (2d) 213 (Macfarlane J.), where the decision was in accordance with the dictum already quoted from Attorney-General for New South Wales v. Metcalfe, (1904) 1 Commonwealth L.R. 421, at 426.

57 Attorney-General for New Zealand v. Brown, [1917] A.C. 393; Attorney-General of New Zealand v. New Zealand Insurance Co. Ltd., [1936] 3 All E.R. 888.

table purposes is invalid except when infringing rules also applying to powers to appoint to people absolutely.[58]

None of the cases holding words like, "benevolent", "patriotic", "deserving" and "worthy" too uncertain to delimit the purposes for which property is held on trust consider whether they are sufficiently certain for the rules governing powers. The issue in the cases is almost invariably put as charity v. invalidity. One strange feature of this branch of the law is the treatment of gifts for charitable and benevolent purposes where the conjunctive construction, i.e., that only one class is intended, is placed upon them. In *Kendall v. Granger*,[59] Lord Langdale M.R. said: "There is no charitable purpose which is not a benevolent purpose . . . " This is intelligible, resulting in the gift being for charitable purposes generally, but not typical. In *In re Sutton*,[60] a gift for "charitable and deserving objects", regarded as a single class of "objects which are at once charitable and deserving",[61] was held valid by Pearson J. In *In re Best*,[62] where there was a gift for "charitable and benevolent institutions", Farwell J. said: "Having regard to the curiously technical meaning which has been given by the English Courts to the word "charitable", I am not surprised that the testator should have desired that the institutions should be not only charitable but should be also benevolent. There are certainly some which I think it would be difficult to say are benevolent, such as the distribution of the works of Joanna Southcote,[63] although that was held to be charitable." This was quoted with approval by Lord Buckmaster in the Scotch case of *Caldwell v. Caldwell*[64] in the House of Lords.

Australian cases are similar. In *Wilson v. A.-G.*,[65] a gift by will to distribute among one or more "of the various religious, charitable, and useful institutions in the colony of Victoria . . . " was held by Molesworth J. to intend one class and therefore to be valid. In *Moule v. A.-G.*,[66] property was to be divided "amongst such of charitable or benevolent institutions or organisations of a similar character in Vic-

58 See, further, SCOTT, THE LAW OF TRUSTS, (2nd ed., 1956) 851-859, s. 123; Scott, *Trusts for Charitable and Benevolent Purposes,* (1945) 58 HARV. L. REV. 548.

59 (1842) 5 Beav. 300, at 302-303, 49 E.R. 593, at 594.

60 (1885) 28 Ch. D. 464. And see Lloyd Greame v. Attorney-General, (1893) 10 Times L.R. 66 (Stirling J.).

61 *Ibid.*, at 465.

62 [1904] 2 Ch. 354, at 356.

63 Thornton v. Howe, (1862) 31 Beav. 14, 54 E.R. 1042.

64 (1921) 91 L.J.P.C. 95, at 96.

65 (1882) 8 Victorian L.R. (Equity Cases) 215.

66 (1894) 20 Victorian L.R. 314.

toria as my wife may, in her uncontrolled discretion, think proper." a'Beckett J. held this charitable and valid.

Likewise in Canada. In *Re Huyck*,[67] the Divisional Court was faced with a gift " . . . to be applied or expended . . . in charitable and philanthropic purposes, as the said trustee may direct." They held it a valid gift for such charitable purposes as were also philanthropic.

In New Zealand, in *Clarke v. A.-G.*,[68] the testator said: "As to the balance of moneys held by my trustees after payment of all sums of money as aforesaid I give to my trustees upon trust to distribute amongst local charitable or benevolent institutions the balance . . . to use their absolute discretion in their choice of local charitable or benevolent institutions and as to the sum or sums of money to be paid to each or any of such institutions." Denniston J. held this valid, and directed the money to be applied to such charitable and benevolent institutions in Christchurch as were within the technical legal meaning of "charitable institutions."

The assumption or holding in some of the cases that a gift for charitable and benevolent (or words like that) purposes, when construed to create a single class, is valid as a gift for such charitable purposes as are benevolent, but that there are also charitable purposes which are not benevolent, is strange. It contrasts oddly with the well-settled opinion in most jurisdictions that a gift "for benevolent purposes" (not limited to charity) is void as lacking trust-certainty. If "benevolent" is not sufficiently certain to designate non-charitable purposes, why is it sufficient to designate a class of charity? It is not disputed for a moment that a gift for a single class of "charitable and benevolent" purposes is valid. Any gift confined to charity must (leaving aside perpetuity, mortmain, and the like) be valid. The contrast suggests the following possibilities. (1) it is not possible to attribute trust-certainty to "benevolent" when extended to non-charitable purposes, but the word does have that certainty when used to designate a limited class of charity. There is no reason for believing this. (2) The decisions are wrong in so far as they hold that some charitable purposes are not benevolent. (3) The decisions are right in thinking "benevolent" to exclude some charities, but wrong in thinking that a gift for such charitable purposes as are benevolent is valid as written. "Benevolent" is an uncertain restriction on the range of

[67] (1905) 10 Ontario L.R. 480. See also Re Street, (1926) 29 Ontario W.N. 428 (Lennox J.); Re Morton, [1941] 4 Dominion L.R. 763 (Fisher J.). *Cf.* Re McPherson, (1919) 17 Ontario W.N. 22 (Kelly J.).

[68] (1914) 33 N.Z.L.R. 963.

charity, and the result is in law a gift for charitable purposes without that restriction (a result achieved if necessary by a *cy-près* order). (4) "Benevolent" is always a word possessing trust-certainty, and a gift for benevolent purposes not confined to charity, when held void, is not so held because of uncertainty in this sense, but because of a rule against non-charitable purpose trusts and/or powers, or because of a rule against hybrid powers (in Australia), or because of a rule against delegating the function of testation. (5) Either or both lines of decision are wrong. Of these, number (5) is the most attractive possibility, but requires an attack on the House of Lords, even if not frontal. The fact that some judges are willing to define "benevolent" for the purpose of ruling whether a charity is benevolent or not supports the view that by and large (subject to or assisted by context) it is a word having power-certainty. Therefore a gift by will "upon trust for such charitable or benevolent purposes as my trustee may select" should be given maximum efficacy by treating it as a hybrid power of appointment. Failing this, number (2) above is favoured, or, if not that, then number (3). Of course, in jurisdictions where there is legislation saving for charity property which is destined by the testator partly for (valid) charitable and partly for (invalid) non-charitable purposes, the question is unimportant. But the United Kingdom is not yet as civilised in this respect as the antipodes. Whatever the correct analysis, the *Tetley-Diplock* cases do not seem to be authority against powers to appoint either for non-charitable purposes generally or for non-charitable purposes selected from a class delineated with working precision.

Power to appoint from unlimited range or from a class: "no delegation" dicta.

Typical of the English *dicta* are those in the *Diplock Case, Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson.* Lord Simon said:[69] "The fundamental principle is that the testator must by the terms of his will himself dispose of the property with which the will proposes to deal. With one single exception, he cannot by his will direct executors or trustees to do the business for him. That exception arises when the testator is minded to make gifts for charitable purposes, and where he directs his executors or trustees, within such limitiations as he chooses to lay down, to make the selection of charities to be benefited." Lord Macmillan said:[70] "My Lords,

[69] [1944] A.C. 341, at 348. To the same effect spoke Viscounts Cave and Haldane in the Tetley Case, A.-G. v. National Provincial Bank, [1924] A.C. 262, 264, 268, and Lord Porter in the Diplock Case, [1944] A.C. 341, at 364.

[70] *Ibid.*, at 349.

the law, in according the right to dispose of property mortis causa by will, is exacting in its requirement that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection: see *Houston v. Burns,*[71] per Viscount Haldane."

Three times the House of Lords have spoken in similar vein for Scotland. First, Lord Robertson adverted to the matter in *Blair v. Duncan.*[72] Then, in *Grimond v. Grimond,*[73] the Earl of Halsbury said: "In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow." Finally in *Houston v. Burns,*[74] Viscount Haldane said: "My Lords, by the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries. There is, however, an apparent

71 [1918] A.C. 337, 342, 343.
72 [1902] A.C. 37.
73 [1905] A.C. 124, at 126.
74 [1918] A.C. 337, at 342-343. To the same effect spoke Lord Macmillan giving the advice of the Judicial Committee of the Privy Council in Attorney-General of New Zealand v. New Zealand Insurance Co. Ltd., [1936] 3 All E.R. 888, at 890.

exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes."

Only one writer[75] has come out in favour of a rigorous application of these *dicta,* and he makes no claim that such an application has been made by the courts. The *dicta* must in fact be related to the cases in which they occur, which were uncertainty cases, and not to branches of law not considered by the judges. Everyone accepts the following propositions. (1) An absolute gift to a person by will is valid notwithstanding that the legatee is then given complete power to decide what to do with the property. (2) A general power of appointment can be created by will. (3) A special power of appointment can be created by will. (4) Except, perhaps, in Australia, a hybrid power can be created by will. (5) a gift to charity can be made by will, not specifying any charity or type of charity at all, or purporting to specify in a fashion too uncertain to operate as written. If there is any no-delegation rule, it must function in some area remaining after these five propositions have been conceded. All the cases from which the *dicta* come involved a gift for non-charitable purposes held void for uncertainty. The inference would appear to be that the no-delegation rule is not a rule against testators giving someone else power after the death to dispose of property, but is a rule against giving someone (other than the court) power to decide whether what is done with the property after the death is in accordance with the testator's intention or not. In other words, it is a rule that trusts must have trust-certainty and that powers must have power-certainty.[76] These cases do not seem to be authority against powers to appoint either for non-charitable purposes generally or for non-charitable purposes selected from a class delineated with working precision.

Power to appoint from unlimited range or from a class: trust and discretion.

"There is a group of cases in which a testator has left property to his executor or trustee with a very broad provision that it is to be disposed of for such purposes as the executor or trustee shall determine. In such a case it has not infrequently been held that the testator intended to give the property to the executor or trustee for his own

[75] Gordon, *Delegation of Will-Making Power,* (1953) 69 L.Q. REV. 334; *Wills—Delegation of Will-Making Power—Powers of Appointment,* (1955) 33 CAN. B. REV. 955; see also Commentary to Campbell, *The Enigma of General Powers of Appointment,* (1955-57) 7 RES JUDICATAE 253.

[76] This view was put forward by Campbell, *The Enigma of General Powers of Appointment,* (1955-57) 7 RES JUDICATAE 244. See also Scott, *Trusts for Charitable and Benevolent Purposes,* (1945) 58 HARV. L. REV. 548.

benefit and free of trust.[77] On the other hand, in a number of cases it has been held that the testator did not intend to make a beneficial gift to the executor or trustee, but intended that he should take the property in trust to apply it to any purpose other than to benefit himself. Where the courts have so construed the will, they have held that the trust failed."[78] [79]

Where there is a gift to an executor "for such purposes as he shall think fit" the following constructions may be put upon it: (1) it is an absolute gift to the executor; (2) the executor has a general power of appointment; (3) the executor is not intended to take any benefit, so there is a trust, which is a resulting trust because of the absence of trust-certainty. The contest will be between the executor and the claimants under a resulting trust, so that construction (2) is likely to be urged by nobody. Though it would serve an executor as an excellent second string if he lost on (1), the possibility of (2) is rarely raised in the cases. It may be that a general power of appointment ought to be regarded as an absolute gift, but this is not yet the law.

Cases in which the executor got his way seem to begin with *Gibbs v. Rumsey.*[80] Residue was given by "my said Trustees and Executors . . to be disposed of unto such Person and Persons and in such Manner and Form and in such Sum and Sums of Money as they in their Discretion shall think proper and expedient." Grant M.R. held that the executors took either a general power of appointment or an absolute gift. He said:[81] " . . . it was never conceived, that such Words, instead of conferring a Power, raised a Trust. If that were so, there would be no such Thing as good general Powers of Appointment. They would all be void Trusts; for, if Trusts at all, they must be void from the Uncertainty of the Objects." In *Higginson v. Kerr,*[82] an Ontario case, the gift ran: "I also give my said executors power and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good and deserving." Ferguson J. held that there was no trust, but a general power of appointment. In *In re Howell,*[83] the Court of Appeal held that the executor took

77 Here, in a footnote, the learned author gives a list of such cases.
78 Here the learned author, in a footnote, gives a list of such cases.
79 Scott, *Trusts for Charitable and Benevolent Purposes,* (1945) 58 HARV. L. REV. 548, at 561-562.
80 (1813) 2 V. & B. 294, 35 E.R. 331.
81 2 V. & B., at 298.
82 (1898) 30 Ontario R. 62.
83 [1915] 1 Ch. 241.

beneficially where the residue was directed to "be at the discretion of my executor and at his own disposal." In a New Zealand case, *In re McEwen,*[84] the testator gave property upon trust for such person or persons (including themselves) as the trustees might appoint. Gresson J. held this a general power and valid. Like *Gibbs v. Rumsey, In re McEwen* seems inconsistent with *In re Churston Settled Estates,*[85] where Roxburgh J. held a joint power not general. The decision of Roxburgh J. was not cited to Gresson J.

Beneficiaries under a resulting trust have much more often been successful. In *Fowler v. Garlike,*[86] the gift was to executors "upon trust to dispose of the same at such times and in such manner, and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion": resulting trust (Leach M.R.). In *Ellis v. Selby,*[87] the gift was for such charitable or other purposes as the testator's trustees, and the survivors or survivor of them, his executors or administrators, should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof: resulting trust (Lord Cottenham). In the Penang case of *Yeap Cheah Neo v. Ong Cheng Neo,*[88] the testator provided: "As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just." Sir Montague E. Smith, giving the opinion of the Judicial Committee of the Privy Council, said:[89] "Their Lordships' decision, founded on the whole will, is, that a trust was intended to be created, which has failed for want of adequate expression of it." A similar result was achieved by the Irish Court of Appeal in *Fenton v. Nevin,*[90] where the gift was "I will my executors shall apply the overplus, if any, as they think fit."

84 [1955] N.Z.L.R. 575. And see Campbell, *The Enigma of General Powers of Appointment,* (1955-57) 7 RES JUDICATAE 244; Gordon, *Wills—Delegation of Will-Making Power—Powers of Appointment,* (1955) 33 CAN. B. REV. 955.

85 [1954] Ch. 334.

86 (1830) 1 Russ. & M. 232, 39 E.R. 90. Similar is Vezey v. Jamson, (1822) 1 Sim. & St. 69, 57 E.R. 27 (Leach V.-C.).

87 (1836) 1 My. & Cr. 286, 40 E.R. 384. Similar is Buckle v. Briston, (1864) 10 Jur. (N.S.) 1095 (Wood V.-C.).

88 (1875) L.R. 6 P.C. 381.

89 *Ibid.,* at 392.

90 (1893) 31 L.R. Ir. 478.

In *Re Lewis,*[91] a Victorian testatrix said: " . . . any balance including goods and chattels to be left as my executor may direct." It was argued that a general power had been created, but Hood J. held there was a trust which, the express one being void for uncertainty, resulted. Britton J. came to a similar conclusion in *Re Estate of Cronin,*[92] an Ontario case, where the gift was: "The rest and residue of my estate I leave to my said executors absolutely, to use as they deem best, trusting that they may spend the same upon some charitable object, or objects, but I leave their discretion absolutely unfettered as to this." In *In re Clarke,*[93] the gift was to "such other funds charities and institutions as my executors in their absolute discretion shall think fit." Romer J. held there was a resulting trust. In *In re Johnson,*[94] it ran: "I direct my trustees to hand over any balance of income . . . to any approved object or objects or person or persons either locally in Adelaide or in Australia or to a purely Imperial object": resulting trust (Napier J.). In *Re Carville,*[95] it was "The residue to be disposed of as my executors shall think fit": resulting trust (Clauson J.). In *Re Mack,*[96] an Ontario case, "All the residue of my Estate not hereinbefore disposed of I direct my Executors to distribute as they may in their discretion deem just and proper, without any reservation whatsoever in respect of the disposition by them of the said residue": resulting trust (Kelly J.). *Tatham v. Huxtable*[97] brings up the rear. The clause in the will ran: "I hereby authorise and empower in law my executor . . . to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me to the beneficiaries in this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the testator." Latham C.J., who dissented, referred to the no-delegation rule and pointed out that it was subject to exceptions for charity and for special and general powers. He held that, as the executor was a beneficiary under the will, the power was general and valid. Kitto J. also started with the no-delegation rule and accepted charity and special and general powers as exceptions. He took the view that the executor could not appoint to himself, so that the power purported to be special, and that it failed for lack of power-certainty.

91 (1907) 13 Argus L.R. 431.
92 (1910) 15 Ontario W.R. 819.
93 [1923] 2 Ch. 407. Similar is In re Chapman, [1922] 2 Ch. 479.
94 [1928] South Aust. S.R. 490.
95 [1937] 4 All E.R. 464.
96 [1939] 1 Dominion L.R. 651.
97 (1950) 81 Commonwealth L.R. 639.

Fullagar J. agreed with his brother Kitto, but added that, while general and special powers were exceptions to the no-delegation rule, in his opinion hybrid powers were bad and that *In re Park*[98] and *In re Jones*[99] were wrong. He also thought the power bad because being in the nature of a trust, it lacked trust-certainty.

Some of the interpretations are surprising, in that more of these clauses might have been expected to qualify as absolute gifts or general powers of appointment. The tendency is present here, as elsewhere, to regard the fact that the donee is a trustee as showing that he takes in that capacity. But granted in any of these cases that there is a trust in the strict sense, they are not authorities against wide powers to appoint for non-charitable purposes. They merely illustrate the rule that an express trust lacking in trust-certainty becomes resulting.

Trust-certainty and power-certainty.

An express trust is valid only if the destination of the beneficial interests is prescribed with such certainty that the trustee knows at any given time who all the beneficiaries are. The same applies to a power in the nature of a trust, i.e., a power to fix the shares of a class who, in default of appointment, are equally entitled.[100]

Though the certainty rule for bare powers is not so severe, a special power of appointment is invalid if the objects are uncertain in the sense that there are conceivable appointments of which it could not be said whether they are *intra vires* or not. In *In re Clarke*,[101] Romer J. said: "Where a fund is directed to be held upon trust for charitable and non-charitable indefinite purposes indiscriminately the trust fails by reason of the uncertainty as to the non-charitable objects of the trust and the consequent inability of the Court to control its administration." And later:[102] " . . . a power to appoint to charitable and non-charitable indefinite objects is just as invalid as a direct gift to such objects."[103]

A hybrid power is valid in England—a power, that is to say, to appoint to anyone with one or a few exceptions or among such a range of people that they could not all be known to the appointor.

98 [1932] 1 Ch. 580 (Clauson J.).
99 [1945] Ch. 105 (Vaisey J.).
100 Inland Revenue Commissioners v. Broadway Cottages Trust, [1955] Ch. 20; Innes v. Harrison, [1954] 1 W.L.R. 668 (Wynn Parry J.).
101 [1923] 2 Ch. 407, at 417.
102 *Ibid.*, at 419-420.
103 See, further, In re Gresham's Settlement, [1956] 1 W.L.R. 573 (Harman J.); In re Allan, [1958] 1 W.L.R. 220 (Danckwerts J.); Australia: Tatham v. Huxtable, (1950) 81 Commonwealth L.R. 639; Canada: Re Loney Estate, (1953) 9 Western W.R. (N.S.) 366 (DuVal J.).

In *In re Park*,[104] the testator gave property "to his trustee in trust to pay the annual income to arise therefrom to such person (other than herself) or persons or charitable institution or institutions" and in such shares and proportions as *J.A.* (not the trustee) might direct. Clauson J. held this a valid power. In *In re Jones*,[105] the textatrix gave property in trust "for such person or persons living at the death of my said son" as he should appoint. This was held a valid power by Vaisey J.[106]

It follows that the only degree of certainty required for the validity of a special power of appointment is in the criterion by which is to be tested the question whether any particular appointment is *intra vires*. In *In re Gestetner Settlement*,[107] Harman J. held that a power not coupled with a fiduciary duty, other than a duty to consider whether to make an appointment, was valid even if not all the objects were known, so long as it was known of any appointee whether he was an object or not.

Summary of submissions.

1. A discretion to appoint property in furtherance of a definite non-charitable purpose, if expressly drafted as a bare power, is valid if, apart from the fact that the object is not a person, it complies with the ordinary rules for special powers of appointment. The beneficial interest in the property is in the person entitled in default of appointment, subject to being divested by exercise of the power. This person is either specified by the donor or is the person who would be entitled under a resulting trust.

2. A discretion to appoint property in furtherance of any non-charitable purpose or purposes to be selected from a definite list or from a class generically described, if expressly drafted as a bare power, is valid if, apart from the fact that the objects are not persons, it complies with the ordinary rules for special powers of appointment. In practice, any dispute is likely to turn on whether power-certainty has been achieved or the rule against perpetuities complied with, though of course other questions are possible. So far as certainty is concerned, it is possible to achieve it, though if judges are biased

104 [1932] 1 Ch. 580.

105 [1945] Ch. 105.

106 See also Drake v. Attorney-General, (1843) 10 Cl. & F. 257, 8 E.R. 739; Re Harvey, [1950] 1 All E.R. 491 (Vaisey J.); In re Triffitt's Settlement, [1958] 2 W.L.R. 927 (Upjohn J.); Canada: Re Jones Estate [1948] 2 Western W.R. 927 (Williams C.J.). *Cf.* the contrary opinion of Fullagar J. in Tatham v. Huxtable, (1950) 81 Commonwealth L.R. 639. See generally, on this subject, Fleming, *Hybrid Powers*, (1948) 13 CONVEY. 20.

107 [1953] Ch. 672. See also In re Coates, [1955] Ch. 495 (Roxburgh J.); In re Sayer, [1957] Ch. 423 (Upjohn J.).

against this type of disposition (as many seem to be) they will find holes to poke in almost any drafting. A court would find it difficult to hold uncertain any object which has a technical legal significance. An example has already been used in this article of a power to appoint "in furtherance of the objects of such non-charitable bodies in Oxford as occupy premises which qualify for rating relief." In *In re Ogden,*[108] property was given " . . . to the Right Honourable Sir Herbert Samuel to be by him distributed amongst such political federations or associations or bodies in the United Kingdom . . . having as their objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select, and in such shares and proportions as he shall in the like discretion think fit." Samuel said he was able to ascertain all the bodies which fell within the class of objects, and Lord Tomlin held the power valid. Here there was trust-certainty, but it is not necessary to go so far.

3. A discretion to appoint property in furtherance of any non-charitable purpose without restriction, if expressly drafted as a bare power, is valid if, apart from the fact that the objects are not persons, it complies with the ordinary rules for hybrid powers of appointment.

4. A discretion to appoint property in furtherance of any purpose, charitable or non-charitable, without restriction, if expressly drafted as a bare power, is valid if it complies with the ordinary rules for general powers of appointment. In *Re Ogilvy,*[109] an Ontario case, the testator stated: "I further direct that, from time to time, my Trustees, in addition to such revenue, may pay to my widow portions of the principal which she may require to use for such charitable or other purposes as, in her judgment, I would, if living, have been likely to fully endorse." Judson J., holding this valid, said:[110] "The fallacy in this argument that the disposition was void for uncertainty is the failure to distinguish between a trust and a power. A trust for selection fails for uncertainty unless the objects are charitable or the class from which the selection is to be made is defined with certainty, because no one can enforce it. A charitable trust or a trust for selection within a defined class can be enforced. But these obvious general principles have nothing to do with the problem before me. I am concerned here with a discretionary power. There is no duty to exercise it. It is not a trust."

108 [1933] Ch. 678. See also SCOTT, THE LAW OF TRUSTS, (2nd ed., 1956) 859-860, s. 123.
109 [1952] Ontario W.N. 625.
110 *Ibid.,* at 628.

5. Where there is a disposition which purports to be a trust for a non-charitable purpose of one of the kinds corresponding to powers 1-4 in this summary, it should be treated as a power. It could not be a trust in the strict sense comprehending enforceability. It is not suggested that where a trust is possible an abortive attempt to create one should be validated *pro tanto* by treating it as a power, but that a disposition should be held a power where the effect of holding it a trust is to invalidate it on the ground that no such kind of trust is known to the law. Every time any "trust" for non-charitable purposes has been upheld by the courts in the past the effect has been to treat it as a power. It should be the general principle to do so, where power rules are not infringed, in all future cases.[111]

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111 See Ames, *The Failure of the "Tilden Trust"*, (1892) 5 HARV. L. REV. 389; Potter, *Trusts for Non-Charitable Purposes*, (1949) 13 CONVEY. 418; Marshall, *The Failure of the Astor Trust*, (1953) 6 CURRENT LEGAL PROBLEMS 151; Wooden, *Wills—Devise to Executor for Further Distribution—Application of Trust and Power Doctrines*, (1958) 56 MICH. L. REV. 1167. *Cf.* Gray, *Gifts for a Non-Charitable Purpose*, (1902) 15 HARV. L. REV. 67.

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