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D.R. BRADSHAW

Purpose Trusts

The law in this area appears to have developed haphazardly and sometimes with scant regard for authority. It is the intention of this paper to trace the development of the law until its present position. The law as it has developed seems to have been a battle between public interest (in its broadest sense) and wishes of the testator, with two important rules of trust acting as mediators, albeit sometimes effectively and sometimes ineffectually.

On the facts of the cases at least two writers find a number of different ways of categorising the cases. Thus Morris and Leach (1962) on Perpertuities find five categories, while Gray on perpetuities (3rd and 4th Editions) finds three only. Gray's three categories, include, tomb trusts, animal trusts and unincorporated associations. Morris and Leach would add two further categories namely miscellaneous and capricous trusts. In this paper it is proposed to adopt the categories listed by Morris and Leach. A discussion of the cases in the categories will enable some general principles to be drawn. If the principles are followed by the will draughtsman, he may be able to accomplish the testator's or the settlor's intentions without infringing either the general principles of trust law and the public interest. Later in the paper the question of whether this anomalous branch of the law can be justified at all will be discussed.

Tomb and Memorial Trusts

There have been an astonishingly large number of cases brought

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before the courts concerning attempts by testators and in one or two cases settlors to perpetuate their memory either by the erection and/or perpetual care of tombstones or the erection and/or perpetual care of monuments. Some cases deal with the desire of the testator or settlor to perpetuate the memory of some other person, who may or may not be related.

Before dealing with the cases the public interest aspect of the types of bequest found hereunder is important. On the one hand there are the interests of the testator who after all has probably accumulated the wealth and who for purely selfish reasons wishes to commemorate his life by the erection of some memorial to himself. The memorials would often appear to be quite modest. Thus in <u>Lindsays Factor</u> v. <u>Forsyth</u> (1940) S.C. 568 the bequest was £1,000 to provide flowers upon the testatrix's mother's grave. However a massive equestrian statue was contemplated in <u>Aitken's Trustees</u> v. <u>Aitken</u> /1927/ S.C. 374.

On the other hand the public interest would be better served perhaps by the use of the sometimes large sums on more tangible benefits to the community or even to the testator's family.

There is thus a conflict between the testator's intentions and the public interest. The law has tended in cases where the trust is to maintain the monument perpetually to find the trust void or at least unenforceable. This can surely be justified in the

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public interest for what was contemplated by the testator is the perpetual tying of resources in the maintenance of what is on utilitarian grounds at least quite useless to the community. It is arguable that perhaps 'art' might be served by the preservation of some worthwhile momument but on the face of the cases few if any of the monuments demonstrate the testator's intention to serve culture, most demonstrate the desire to perpetuate the testator's memory. Put bluntly the need to perpetuate a dead man's memory through a momument seems scarcely to justify the tying up of resources perpetually. On the public interest ground alone perpetuating over memory is not a worthy object for the law to uphold.

In the case of trusts to erect magnificant memorials (without a trust to maintain) the law may seem to be permitting the accomplishments of objects that seem unworthy of the law's gravity. One can think of many more worthwhile means of perpetuating a memory if that is the testator's intention. Again the conflict between public interest and the testator's wishes may be better resolved in favour of public interest. Yet to say that public interest ought to prevail and that trusts for the erection of memorials ought not be enforced is too simple. In some cases (e.g. <u>In re Oldfield</u> 1949 2.D.L.R. 175) the public interest may be served by the perpetuation of the memorial. That case

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concerned the preservation of war graves in France. In such a case the preservation of the memory of those slain by war can be justified on the ground that the horror of war should be perpetuated in order to prevent it occurring again. Whether such perpetuation of the memory of war dead has any such effect is probably academic, but the attempt should be made. In other cases the memorial sought by the testator seems so modest as to justify the small expense necessary to erect it. (In re Budge /1940/ N.Z.L.R. 350)

However just what the public interest is depends on the period with which we are concerned. In England before the first World War the erection and maintenance of a tombstone to commemorate the memory of the dead seems to have more significance than it does in our more rushed less permanent more plastic times. It is difficult to imagine a present judge repeating Lindley J.'s remarks. 'There is nothing illegal in keeping up a tomb; on the contrary it is a very laudable thing to do.' In re Tyler /1891/ 3 Ch 252 at 258-9.

Yet Jessica Mitford in The American Way of Death, Evelyn Waugh in the Loved Ones and the Californian Forest Lawn Cemetary all demonstrate a willingness on the part of Americans at least to perpetuate the memory of the 'dear departed' that illustrates not only the desire to perpetuate 'The Loved Ones' memory but also an

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unwillingness to accept death. The American behaviour certainly seems to be emulated by funeral directors in this country and so perhaps the remarks of Lindley K.J. may be repeated in the not too distant future. Yet such sentiment would seem unlikely to issue from the present New Zealand courts.

In Trimmer v. Danby (1855) 25 L.J. Ch 424 the testator sought to provide a fund to erect a plaque in his memory in St. Paul's Cathedral. Kindersley V.C. held that the trust was not charitable but that gift was a good one. The learned judge however insisted that he would not enforce the trust unless either the trustees or the residuary legatees sought to carry out the testator's wishes in which case the court would see to the carrying out of the trust. It was observed by Kindersley V.C. at 427 that " I do not suppose that there would be anyone who could compel the executors to carry out this bequest and raise the monument ....". An earlier case which as been cited occasionly as authority that a trust to erect a monument is good is Mitford v. Reynolds (18 8) 16 Simon 105 (and Phillips 185).

This case concerned three gifts by the testator. The first gift was to provide a monument upon a specified hilltop in Wales in which the testators body was to be interred, effectively this gift was come from the residue of the estate. The residue after providing for the monument was to provide for the upkeep of the testators horses and the suplus was to be given to the Government of Bengal for the benefit of the

inhabitants of Dacca. At the first learning in 1838 the sole question argued was whether the gift to the Government of Bengal was charitable. It was held to be so. In 1842 the appeal was heared and the volidity of the gift to the monument was contested. It was argued that if that bequest was invalid for uncertainty then the amount of the charitable bequest could not be ascertained and that the whole gift to the Government of Bengal was invalid for uncertainty. Counsel relied on the case of Chapman v. Brown 6 Ves 404 inter alia. Lord Lydhurst L.C. said that in Chapman v. Brown 6 Ves 404 Sir William Grant M.R. acknowledged that the difficulty was that in no way would the gift to build a chapel be ascertained on terms of the amount of money to be spent on the erection of the chapel and hence the gift of surplus after the building of the chapel could not be ascertained either. In the present case said Lord Lyndhurst the amount to spend on the momument was capable of being ascertained and he advised that this amount be ascertained. In 1848 the matter again went to the Vice Chanceller, it being established that the owner of the hill would not sell, and the Vice Chanceller said that he would hold that the whole of the bequest to the monument would fail as a matter of fact and not of law and that he would construe the as if the monument erection clause never existed and accordingly the whole gift over to the Government of Bengal after making appropriate arrangements for the Horses' maintenance.

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The case has been cited as authority for the proposition that trustsfor the erection of monuments are good. (North J. In re Dean (1889) 41 Ch. D. 552). It is certainly not because the whole point of the case was to escape the difficulties found by Sir. William Grant in Chapman v. Brown (Supra) There the Judge found that not only was a bequest to build a chapel void for uncertainty but also that direction to apply the surplus to a charitable purpose after the erection of the chapel was void because the amount of the surplus could never be ascertained. In this case Mitford v. Reynolds, the monument trust was assumed to be void (it was never agreed that it was not void) and the court originally held that the amount to be applied to the monument trust could be ascertained and that therefore the amount of the residuary bequest to the charity could be determined by deducting the amount necessary for the monument from the residue. When itwas found that the owner of the hill would not sell, it was agreed again that the amount necessary to set up the monument trust was unascertainable and that hence the residuary chartable devise was void for uncertainty. It was held that the testators purpose was frustrated by facts and that hence the will would be construed as if that clause was not in the will. It was never said that a monument trust was valid.

The case of Lloyd v. Lloyd (1852) 2 Sim NS 255 concerns or so it appears the frustrated failure of a testator to win the love of

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a spinster. The testator's directors provided for a gift to two persons one his wife and the other the fitting/fitter lover upon two conditions. On the one hand they were to maintain his tomb, (and both were to be buried therein) and on the other hand both were to remain chaste.

The Court held that the gift was good and the direction to repair the tomb was good and lawful. The court held however that the gift over was void because of the condition to prevent the spinster marrying was void. In the there was a direction that certain property was to be held the income from which was to provide Church wardens with £5 per year, to maintain the tomb and that the balance was to provide for the testators nephew until his death and it was then to provide for a charity. It was held that the whole gift was void and that in particular the tomb trust was invalid as a perpetuity.

The main points in this case are that a condition upon a gift to repair a tomb could be legal, although a trust to repair would be void.

In 1860 a case came before the courts where a testator sought to perpetuate Shakespeare's memory by the erection and maintenance of an appropriate museum in Stratford On Avon. The court in <u>Thomson</u> v. <u>Shakespeare</u> (1860) 1 D.F. & J. decided upon the

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construction of the will, which included provision of a certain sum the income from which was to support a custodian of the museum, that the testator's intention was to make a perpetual gift. The gift was held void because essentially the testator intended that the capital was to provide income forever for the upkeep of the museum.

The next cases can perhaps be considered together for the principle they set out is the same. The cases are Fisk v. Attorney General 1867 L.R. 4 Eq 521, Hunter v. Bullock (1872) L.R. 14 Eq 45, in Re Birkett 1878 9 Ch D 576, Dawson v. Small 1874 L.R. 18 Eq 114 and In re Williams (1877) 5 Ch D. 735. All of the cases concerned gifts to be held on trust, the incomes from the gift was to be applied first on account of repairing certain tombs and second the surplus was to be given to some legally recognized charity. In each of the cases the courts held (they were judgments of first instance) that the trust in respect of the tombs were honorary trusts only and that the whole gift was to be for the benefit of charities. The trust for the tombstone repair failed. It is perhaps important to note that Jessell M.R. in In re Birkett (Supra) said that but for the authorities he would have required that the amount necessary to keep the tombs in repair should be calculated and that that gift failing, only the balance should go to the charities. Moreover Malins V.C. in In re Williams (supra) felt that there was some conflict (as did Jessell M.R.) with

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earlier authorities. The earlier authorities (of which Chapman v. Brown 6 Ves 404 and Fowler v. Fowler (186A) 33 Beav 616 are) concerned situations which on the face of them at least were similar. Thus in Chapman v. Brown a gift was made to provide funds to build a chapel, the balance (if any) was to provide some small stipend for the chapel minister. Sir William Grant M.R. held that the balance one could not determine how much could be spent on the chapel one could not determine how much would be available for the minister and hence that gift was void as well.

Wood V.C. in Fisk v. Attorney General (supra) suported to say that Chapman v. Brown (supra) was overruled by The Magistrates of Dundee J. Morris 3 Macq 134 a decision of the House of Lords. That case concerned a gift to provide a hospital, which was to take 100 boys at least. It was argued that the amount necessary to achieve the gift could not be ascertained. Their Lordships in fact considered the case to be similar to Mitford v. Reynolds when on appeal in 1842 for they said the amount could be ascertained and that hence the gift was valid. Chapman v. Brown was considered by their lordships, but it would seem that they considered that the present case clearly concerned a situation where the amount necessary would be ascertained. It would appear therefore Wood V.C. misunderstood the import of the decision. However Wood V.C. was followed by the other judges in the cases

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of In re Williams Dawson v. Small, Hunter v. Bullock and In re Birkett (Supra). Certainly Jessell M.R. and Malins V.C. in Inre Birkett and In re Williams respectively had some reservations. Maline V.C. held that Wood V.C. virtually overruled Chapman v. Brown and Jessell M.R. felt that the law had been completely changed. Accordingly it is submitted the cases cant be reconceled and the later authorities should prevail. Such indeed was the view of Joyce J. in In re Rogerson (1901) 2 Ch 715, where he followed the rite of authority so created.

In re Rigleys Trust 1866 36 L.J. Ch 147 - This case concerned a rather elaborate series of trusts for the maintenance and upkeep of a whole series of objects. Thus the trusts which were not good included the maintenance of the family vault, the maintenance of the tombstone and the yew tree standing next to the vault. However the gifts that were good, on the authority Trimmer v. Danby, (supra) were the maintenance of the family memorial tablet inside a church, the fabric upon which the tablet stood and the railing around the tablet. The balance if any was to be applied to the maintenance of the poor of the parish.

Kindersley V.C. did not consider the cases of Fisk v. Attorney General (supra) etc, but ordered an inquiry to be made as to the amounts necessary to achieve each purpose. He said at p149 that the gift over to the poor may be affected by the court of the inquiry into the amounts necessary to achieve the invalid objects.

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North J in In reVaughan 1886 33 Ch D 187 considered a trust which provided that £500 was to be invested and the income from that was to repair the family vault and any residuary income was to be applied to the repair of the testator's brothers tomb and the repairs of the churchyard. Now North J said that on the authority of Fisk v. Attorney General (supra) and the other cases, the family vault trust was void and the whole of the income was to be applied to the nesessary purposes. However the trust to repair the brothers tomb was void and on the authority of In re Regleys Will Trusts (supra) he ordered an apportionment to be made between the valid portion of the trust and the invalid portion of the trust. Only the balance left after the invalid portion had been deducted would be applied to the repair of the churchyard.

In re Vaughan (supra) seems inconsistent with In re Williams etc but if any reconciliation can be made it on the basis that those cases were concerned with invalid trust followed by valid charitable dispositions, while in this case the gifts of the income ranked equally. North J in effect says that two trusts were created and that if one was void the other does not benefit, while in the Fisk cases there were two purposes in the one trust and if one was invalid the other took the benefit. Such rationalization is not very satisfactory on the facts of Vaughans case but would seem proper in the case of two such trusts.

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At about this time a case went the Privy Council from the Straits Settlement (now Malaysia). The facts of the case are quite complicated. Essentially however a wealthy Chinese concubine had died and purported to create certain trusts upon which substantial amounts of property were to hold. The case concerns memorials insofar as she attempted to render a house and a plantation inalienable. She wished the memory of herself and her 'husband' to be commemorated in the house and she wished the plantation to be kept unalienated because it contained certain family graves. The solution was quite simple for the trusts were held invalid and indeed void because they tended to create perpetually inalienable property. (Yeap Chean Leo v. Ong Chang Leo (1875) L.R. 6 P.C. 381)

In re Tyler /1891/ 3 Ch 252 the testator gifted property to a charity with a requirement that the charity should keep his grave in good repair. Failure to do voided the gift and the gift would go to another charity. It was held by the Court of Appeal that while a trust to maintain a tomb was certainly bad (Thompson v. Shakespeare, (supra) Hoare v. Osborne L.R. 1 Eq 585) the condition imposed upon the gift was good. The main point however of the case however was whether the gift over was valid. It was held that condition imposed was legal and that hence the gift over would be valid. Both gifts were to charties and hence there was no prohibition against perpetuaties.

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<u>Hoare</u> v. <u>Osborne</u> (1866) L.R. 1 Eq 585 - This concerned a gift partly for charitable purposes and partly for the upkeep of a grave. The court held that it being impossible to ascertain what is to be spent on each item that the amount devided would be split equally and that the one half would fall into residue, for the gift to maintain the grave was void.

The case of <u>Pirbright</u> v. <u>Salvey</u> is reported only in (1896) W.N. 86. The note is extremely tense. However Stirling J. apparantly held that a gift to repair a tomb 'for so long as the law would permit' was a good trust for twenty one years at least. So another means of escaping the full rigour of the law had been found.

The cases beginning with <u>Fisk</u> v. <u>Attorney General</u> were followed by Joyce J. in <u>In re Rogerson</u> <u>Bird</u> v. <u>Lee</u> /1901/ 2 Ch 715 which concerned the gift of a certain sum to keep tombs in good repair and the balance if any to be spent on the poor recipients of certain almhouses. This case was argued on the distinction between <u>Vaughan</u>'s (supra) case and <u>Fisk</u>'s (supra) case. Essentially in <u>Vaughan</u>'s case it was argued these gifts ranked pari passu and the invalidity of one did not mean that the other beneficiary got the whole benefit and so the fund was divided and that part which failed fell into residue. In the case of <u>Fisk</u> the gift was for first the maintenance of the tomb while the surplus was to go to the charity. that whole gift went to charity.

(refer to any attempted reconciliation)

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Joyce J. did not attempt to deal with the distinction but merely said that the preponderance of authority was in favour of Fisk's case if indeed there was any distinction, and held that the whole of the gift was to go for the benefit of the poor.

The next two cases really deal with public benefit and charities for in In re Manser 1905 1 Ch 68 it was held that a trust to keep in repair a particular churchyard was a good charitable trust while in In re Pardoe 1906 2 Ch 184 a trust to provide graves and tombstones for pensioners was held to be good trust. The basic feature of both of these cases, however morbid, they reveal the testators to be, was that the trusts in no way seemed to be for the benefit of the testator's memory by the erection and care of his monument.

Four cases from Scotland form part of a group which might more properly be considered capricious trusts. They are dealt with here only in so far as they certainly dealt with memorials. The cases are M'Caig v. University of Glasgow 1907 S.C. 231, M'Caig's Trustees v. Kirksersion Church of Lismore 1917 S.C. Trustees v. Aitken 1927 S.C. 374 and Lindsay's Factor v. Forsyth 1940 S.C. 568. In the first three cases the courts held invalid trusts for the erection of monuments, that would have been vast and expensive. One can imagine the horror of the Scottish judges whe n faced with such large sums to be spe nt on the memorials to the testator and his family. In each case the courts held that the public interest demanded that the trusts be held void.

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In the last case mentioned the gift was of £1,000 to provide flowers for ever on the testratrix's mother's grave. The earlier authorities were all cited and the court held the trust of for public interest reasons. Quite clearly these cases deal with the whole problem of purpose trusts from a rather more rigorous approach than the English cases. It may be that the Scottish judges could not abide the apparent waste of money involved in the trusts. These cases will be considered a little more fully under the heading Capricious Trusts.

In 1932 a similar case to that of Pirbright v. Salvey (supra) came before Maugham J. In re Hooper-Parker v. Ward /1932/ Ch 38. The bequest concerned the upkeep of family graves, the family vault a monument, a window in a church and a tablet in the church for so long as the law would allow. In a decision which seems rather remarkable for its absence of scholarship Maugham J. relies on Pirbright v. Salvey (supra) to hold that the trusts relating to the church (i.e. the tablet and the window) were valid in so far as they were charitable and that they were therefore valid for all time. He then found that Pirbright was decided by an eminent judge, Stirling J., and was argued by eminent Counsel (Hastings Q.C. and Buckton Q.C.) and hence the trusts for the upkeep of the tomb were valid for twenty one years from the date of the testator's death.

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This decision was followed in New Zealand in In re Budge 1940 N.Z.L.R. 350 where Fair J., relying on In re Hooper (supra) and on the Irish case of In re Kelly 1932 IR 255 held that gift of £25 to provide for the testrix's "grave and its surroundings to keep it in a clean and tidy state" was valid for twenty one years. By way of justification Fair J. said the words of the will did not expressly provide for a perpetuity and that hence the testatrix must have meant that the maintenance would be temporary and at least as far as the law would allow.

Two other New Zealand cases concerning graves were In re Filshie 1939 N.Z.L.R. 91 and Fraser v. Campion (1910) 29 N.Z.L.R. 1009. In the first case the Supreme Court severed two trusts, one for the erection of a tombstone (holding it valid) and the other for the maintenance of the grave. The latter trust was found invalid as tending to create a perpetuity.
The second case concerned an attempt to set aside forever land as a private burial ground. Stout C.J. followed Yeap Cheah Leo v. Ong Chang Leo (supra) in holding that the trust was void as tending towards a perpetuity. This case was distinguished from In re Manser (supra) on the ground that a public burial ground was involved in that case. Whereas in Frasers case the burial ground was for two families only. Stout C.J. was concerned that a perpetuity might be created.

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There is the similar decision to In re Manser (supra) notably In re Eighmie /1935/ Ch 524 in which Eve J. held that a gift to upkeep a municipal cemetary was a good gift.

A further case dealing with 'public' as opposed to 'private' benefit in graves is In re Oldfield /1949/2 D.L.R. 175. In that case Williams C.J.K.B. after a very full consideration of the authorities held that a trust to erect a cross on a grave was a valid gift, but that a trust to maintain the plot was an invalid trust. The main part of the case however concerns a trust to maintain a 'war dead' cemetary in France. After a full consideration of all the aut orities Williams C.J.K.B. held that a proper charitable trust existed and that the Court would enforce it.

Two further Commonwealth cases ought to be cited, namely In re Canon /1956/ 54 R Qd 466, which was a simple case like that of In re Filshie (supra) and Public Trustee v. Nolan (1943) 43 N.S.W. S.R. 169 in which Roper J. characterised most of the cases where trusts for the erection and maintenance of monuments as 'anomalous exceptions' to the general rules that a trust except a charitable trust must have an identifiable cestui que trust to be enforceable. The trust provided for funds to erect a carillon on the shores of Sydney Harbour. Roper J. refused to follow the exceptions and held the trust void.

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Eve J. in 1925 was faced with a case rather similar to the group of cases of which Fisk v. Attorney General and Chapman v. Brown (supra) are representative in In re Porter (1925) Ch 746 the testator having erected a masonic temple in the memory of his son (who had been killed it would appear while serving in the navy) purported to gift £10,000 to his trustees the interest from which was to be applied first to the upkeep of his temple and the balance if any to such masonic charities as the trustees though fit. Eve J. first held that the monument in this case was not a tomb for the purposes of his decision. Eve J. then considered In re Birkett (supra) and seems to have completely misread that case. Sir George Jessell M.R. in In re Birkett (supra) trust said that but for the authorities he would have no difficulty in saying that if the amount necessary to achieve the repair of the tomb could be ascertained he would only allow the balance left to go to the charity. Jessel M.R. then considered whether or not Chapman v. Brown (supra) had been overruled by the Magistrates of Dundee v. Morris and held that it had not for Chapman v. Brown (supra) concerned uncertainty, which was not the point in Morris's case. Sir George Jessell M.R. then said that on the authority of Chapman v. Brown he would hold if he could that if the trust gift was uncertain the second gift would fail. But said Sir George Jessell, there were all the authoriies of which Fisk (supra) was the first and he must follow those. Eve J. however says that Sir George Jessell's

decision was that Chapman v. Brown still stood. He then said he was not going to find out how much the temple would cost to repair, that it was unascertainable and hence the gift over in favour of charity failed. With respect it seems this decision is quite inconsistent with the line of authority of which Fisk v. Attorney General is the first. Eve J. seems to have totally ignored the fact that Wood V.C. in Fisk and Maline V.C. in In re Birkett considered that Chapman v. Brown (supra) had been overruled. It is submitted that Eve J's Statement that the case was not a tomb case was quite indevant.

A case which on the face of it seems not unlike In re Tyler (supra) was In re Dalziel (1943 1 Ch 277 which concerned a gift of £20,000 to a hospital upon which sum the first charge was to be the upkeep of a family mausoleum. Cohen J. first explains Tyler by saying that what was said there was that there was no objection to a charitable body, receiving funds absolutely, to pay for the upkeep of a tomb but that otherwise tomb maintenance was not charitable. Cohen J. thus held the gift for the maintenance of the tomb was invalid. He then considered Fisk's case (supra) and In re Porter. Cohan J. carefully considered the authorities as said at page 281:-

'I think that the real foundation of the tomb cases is that the court felt itself able to construe the provision in the various wills as to the upkeep of the tombs as imposing only a moral obligation.'

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It was also argued before him that many of the tomb cases involved trifling amounts. While Cohen J. did not seem disposed to accept this argument in holding that the gift over to the hospital failed, this must have impinged on his mind for clearly on the facts the whole corpus of the gift could have been required to repair the mausoleum. He thus said that the testatrix's purpose was certainly not to impose a moral obligation, but to require the hospital to apply everything to the repair and upkeep of the mausoleum. Cohen J. felt that it was quite impossible to determine if any sums could be made available to the Hospital. The case also concerned a gift over of the whole amount in the event of failure of the hospital to apply the funds as directed. Cohen J. held that such an event could never happen if the gift had been allowed and that hence the gift over was also invalid. This case can be distinguished from the cases of Fisk v. Attorney General (supra) for the gift was to the hospital for the purpose of repairing the mausoleum inter alia.

The next two cases seem to be quite anomalous. The leading case of the two is a decision of Romer J. and is cited as In re Chardon /1928/ Ch 464. This case is discussed at some length by Hart at 53 L.Q.R. at 24 and by Albery in 54 L.Q.R. at 258. The gift in this case was:-

'I give unto my trustees the sum of £200 free of duty upon trust to divest the same .... and pay the income thereof to the

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South Metropolitan Cemetary Company during such period as they shall continue to maintain and keep the graves of my great grandfather and the said Priscilla Navone in the said cemetary in good order and condition ..... as the same have hitherto been kept by me.'

The will provided that upon failure of the cemetary company the income was to be paid in accordance with his directions concering the residuary estate.

The actual words used in this gift are very important because in fact they reveal that the testator was making a gift to the cemetary company which gift would continue while the company carried out the testators instructions. The testator did not provide a gift the income of which was to perpetually maintain his graveyard. The distinction is a nice one but in fact from the arguments reported seems to have been accepted by all the Counsel. None of the Counsel relied on the tomb cases. In fact the only purpose trust cases cited in argument were those to do with unincorporated associations.

Romer J. at 467 says at first sight this looked like a tombstone case but recognised that in fact it was not. He then said the gift vested at once and hence the time rule against perpetuities (i.e. the rule which relate s to remoteness of vesting did not apply) nor he said does this concern an inalienable interest for

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there was no reason why the cemetery company could not dispose of its interest in the gift. Romer J. then said there was no rule in law against a trust paying income to a person indefinitely. He says in that case the interest in the corpus is given absolutely. He says that a trust to pay income for a period until the happening of an event that may not happen was not bad either. Last it was advanced by Counsel that the legal and equitable estates in property cannot be separated for longer than a life in being and twenty one years. Romer J. says however no authority was advanced for this proposition. Then says Romer J. the residuary legatees and the cemetery company could combine tomorrow and bring the estates together. Accordingly he says the interests are not inalienable. Moreover all the interests are vested for it was agreed by all that the subject to the interest of the cemetery company the gift fell into residue and that therefore the residuary legatees interests are vested.

The first point to consider is whether in fact the case was a tombstone trust at all. On the facts the gift is to the cemetery company which company is in turn to keep the graves in good repair. It could appear that a new trust has been created and that the cemetery company receives the monies on trust to apply the money to the repair of the grave. Yet clearly the words of gift do not mean that was the effect of the gift. It is a gift to the cemetery company with a condition subsequent as to the continued

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payment of the income. The gift was not for the purpose of keeping the graves in repair although clearly the testator intended that the gift would achieve that purpose. The donee of the gift has no obligation to expend £200 on repairs, although it has an obligation to do as much as necessary to keep the grave in good repair. The case therefore differs markedly from the cases of Fisk v. Attorney General (supra) and others in the same game. Romer J. is thus right in recognising that the case was not a tombstone case.

Neither does the case involve a gift to the cemetery company who are in turn to apply the funds on another trust. Effectively and legally the cemetery company takes the money beneficially. This is certainly seen to be the effect of the gift by Hart in 53 L.Q.R. at page 52.

The whole question of the gift over which is the subject of much discussion seems to be answered by Albery when he cites the last words used by Romer J. namely that it was agreed by counsel that the gift over fell into residue.

It is suggested that this case which was followed in Re Chambers 1950 Ch 267 by Wynn Parry J. (the gift was almost identical) is an anomaly. It certainly shows the means a testator can employ to escape the full rigours of the law with respect to tomb trusts. (see also in Re Gassiott 1901 which involved a gift with a condition

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subsequent). (I do not propose to discuss the cases further than on the purpose trust point.)

The last case which it is proposed to discuss under the heading of trusts for memorials is the quite important case of In re Endacott (1960) Ch 232 a decision of the Court of Appeal. This case concerned the gift by the testator of the whole of his residue (which amounted to $20,000)

'I leave to North Tawton Avon Parish Council for the purpose of providing some useful memorial to myself subject to the proviso that if my wife outlives me they must during the lifetime of my wife pay to my wife the interest which may accrue on the capital when properly invested by them.'

Lord Evershed during the course of argument referred to the cases on which it was said the courts would not enforce trusts having unascertainable beneficiaries (namely the then most recent authority Leahy v. Attorney General for N.S.W. /1959/ Al 457) and the judgment of Lord Eldon in Morice v. Bishop of Durham (1805) 10 Ves 522 affirming Sir William Grant M.R. reported in 9 Ves 399 to which judgment reference will be made later). Lord Eversheld noted the cases of Pirbright v. Salvey and In re Hooper (supra) and distinguished the present case on the words of the gift. He did consider that the court ought to expressly overrule those cases including In re Astor (ante). He eventually followed the purpose trust cases decided in the

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previous twenty years and held that the purposes for which the testator intended the gift were so uncertain as to prevent the court from enforcing it. He therefore held that the trust was invalid. The other judges Harman L.J. and Sellers L.J. concurred. Harman L.J. did say that the memorial/tomb cases were 'merely occasions when Homer has nodded, at any rate these cases stand by themsleves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another. Whether it would be better that some authority now should say these cases were wrong......... At any rate, I cannot think a case of this kind, the case of providing outside a church an unspecified and unidentified memorial, is the kind of instance which should be allowed to add to those troublesome, anomalous and aberrant cases' (p. 250-251).

Tomb and Memorial Cases: Conclusion

One cannot help but agree with the sentiments of Harman L.J. that are recited above for it seems that the tombstone cases by and large deal with human weaknesses. The perpetuation of one's memory seems scarcely a laudable motive for the creation of trust whatever some judges may say about the practice. Surely some better uses can be found for spending scarce resources than the retrograde and backward looking preservation of some 'graven' image. Surely moreover the preservation of one's memory if this is necessary can be better achieved by some benefit to the community for then the

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recipients of the benefit could point to the more laudable qualities of that person. The tombstone cases seems to demonstrate a negative type of selfishness that perpetuates nothing but the selfishness.

Second it is clear that the cases have followed a course all of their own which can be best described as eccentric both through the objects the testator sought to achieve and in the pattern that has been followed. The cases can thus be discussed by reference to two rules, with the effect the two rules have on the cases varying greatly. The application of these rules to other cases will be seen clearly in the discussion of them.

(a) Uncertainty

The leading case on uncertainty is Morice v. Bishop of Durham (1804) 9 Ves 399 and affirmed at (1805) 10 Ves 522. Sir William Grant M.R. said in the first instance.

'If there be a clear trust but for uncertain objects, the property, that is 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 decide performance.'

Lord Eldon L.C. on appeal said

'The court has said, before those words of request or recommendation crate a trust, it must be shown that the object and subject of the

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trust are certain......'

These remarks have been endorsed by Viscount Simon in Leahy v. Attorney General for N.S.W. /1959/ Ac 457. Their application in the tombstone cases has however it would seem been rather ignored by the courts. Quite clearly in none of the cases has there been, with the exception of the one authority (In re Chardon (supra)) a person who can enforce the trust. Certainly the purposes have been quite clear but no person could in any of the cases insist that the trust be performed.

Moreover the courts cannot effectively control the administration of the trust because no one could ask the courts to account.

Whatever it is quite clearly true that the courts have at least until the recent authorities pursued a course where the rule against uncertainty has been ignored.

The more recent cases tend to go back to the old rule concerning uncertainty and have struck out as invalid such trusts for uncertainty. Of these the case Endacott may be considered perhaps the most recent authority. Some of the Commonwealth cases and in particular Nolan (supra) and In re Oldfield (supra) show a return to the true principles.

Perpetuities

It is quite clear from the reports of many cases that the judges

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have many times considered that the trusts and particularly those trusts in which it is clear the testator inteded the trustees to keep in repair his tomb forever, were either void or unenforceable for tending towards perpetuities (Fowler v. Fowler 1864 33 Beav 616).

The cases do not deal with the most part the modern rule against perpetuities which concerns the remoteness of vesting but concerns the period for which the gift is intended to be vested. The rule has been categorised variously as the Rule against Alienation (see Gray 3rd and 4th Editions. Rule against Perpetuities). The learned author editor in that case rely on the Privy Council decision in Yeap Cheah Leo (supra) inter alia in holding that perhaps the rule would be better named a Rule against Inalienability. Certainly in that case the testatrix was endeavouring to render certain property inalienable. That case however dealt with the subject of the trust namely the land. In some other of the cases it is arguable that the actual property which the trust holds is alienable in so far as the investment can be alienated. See for example In re Chandon (supra) where it was discussed by Romer J. briefly and where he said the cemetery company could alienate its interest.

There is however some truth in the observations by Gray and others for essentially the courts have struck down gifts where the purpose of the gift is not charitable (in the legal sense) and where the income from the gift is intended to perpetually endow the

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purpose. Morris and Leach suggest, quite properly, it is submitted, that the rule is one against perpetuities, not in the old sense but in another sense, namely an attempt by the courts to prevent perpetual endowments for non charitable purposes.

The confusion between the rule against remoteness of vesting (Rule against Perpetuities) and the rule which is now being discussed can be seen in the rather unfortunate cases of Pirbright v. Salvey, (suprs) In re Hooper (supra), and in Re Budge (supra). These cases all say that the law will recognise trusts for non charitable purposes where the period of the trust is longer than twenty one years. It is submitted that the judges in these cases minunderstood the rulings of the juges in the earlier cases that purpose trusts would not be enforced for tending to perpetuities for in the earlier cases the courts were applying some quite different rule. Perhaps the cases can be justified as creating a completely new gloss on the rule against the creation of perpetuities. The rule could be that a trust to repair tombs etc. could be validated if it existed for some short period only, such period being so short as to enable any gift over to vest within the period allowed by the remoteness of vesting perpetuity rule. Inevitably this discussion will take us into the discussion that seemed to rage until Endacott (supra) namely that Purpose Trusts are Powers not trusts. This will be discussed later.

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Court Orders

It appears that in the earlier cases (Fowler v. Fowler (supra)) the courts held that the trusts were invalid and void. However in a number of cases of which Fisk v. Attorney General (supra) is a leading authority the courts seemed to hold the trusts for tombstone repair were merely honourable trusts or unenforceable trusts and that the courts would not render the trusts void. Later authority seems to hold that such trusts are void Re Endacott (supra). It is submitted that for reasons of public policy the latter course is appropriate.

Public Interest

It will be seen that the courts have notwithstanding the rule in Morice v. Bishop of Durham allowed the trusts for erection of tombs. (Trimmer v. Danby (supra)). However the courts have balked at the provision of memorials in the form of statues etc. The comments of Harman L.J. quoted above seem to reflect the comments of the session courts in the three cases, of M'Caig, M'Caig's Trusts and Aitken (supra) where quite clearly public interest was the reasoning advanced for invalidating the trusts. With respect perhaps the courts could perhaps now address themselves to the waste of resources in all the tombstone cases. While the modern world seems particularly keen to squeeze every person into the

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straight jackets of conformity the demonstration of a person's individuality in the design of tombs and memorials if a perhaps little late.

The rule in Fisk v. Attorney General.

The rule seems to be a gross on the uncertainty rule of Morice v. Bishop of Durham. The cases said that where there is a gift which fails for uncertainty (in the sense that a perpetual trust in favour of an inhuman beneficiary is uncertain according to Morice v. Bishop of Durham) and the gift provided that charity was to benefit from the surplus after the just gift had been provided for, the whole of the gift would go to charity. With respect to the judges who decided all of the cases following Fisk, the point is that where an uncertain trust had been created, whether uncertain as to amount or as to the actual beneficiary, that trust fails. To then distinguish uncertainty as to the amount from uncertainty as to the beneficiary seems rather to avoid the effect of the rule in Morices case. The court it seems to good moral effect have been able to completely change the testators intention and in fact have effectively exercised his testamentary power. With respect to Eve J. who seems to have arrived at this decision in In re Porter (supra) the face of eminent authority, the effect of this decision is probably correct.

However it would appear the rule in Fisk v. Attorney General is now

with us to stay. One cannot argue with the benefit the decision is able to give to charity and that perhaps justifies this line of authority.

Unincorporated Associations

Two classes may be seen in these cases. On the one hand testators have gifted property of some kind or another to an association for some specific purpose or they gift property for the purposes of the association. The distinction is important.

The two leading cases in this area are Carne v. Long (1860) 2 De G.F. & J. 75 and Cocks v. Manners 1871 L.R. 5 Eq 574. In the first case the testator bequeathed freehold property to the trustees of the public library in Penzance. The library was kept on foot by the subscriptions of its members, who had the power to appoint officiers in whom all property was vested. The rules of the library also provided that the society should continue on forever unless there were less than ten members. In the event the library had less than ten members all donations would be returned and the balance of the property would be sold and vested in some scientific institution in Penzance nominated by the majority of the members then left.

Lord Campbell held that the trust was invalid as tending to create a perpetuity and went on to say at 79-80:-
'The clear intention of the testator, as expressed by the will, is,

> that this should be a gift in perpetuity to this institution in Penzance. The gift is to the trustees for the time being of the society and their successors, to hold to them and their successors for ever, they holding it for the use benefit, maintenance and support of the library; if the devise had been in favour of the existing members of the library and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution and the testator must be presumed to have known what the regulations were ...... the property comprised in the divise is therefore taken out of commerce and to become inalienable, not for a life or lives in being and twenty one years afterwards, but for so long as ten of the members of the society remain.........'

The devise was declared to be void. The case sets the tone for a number of investigations into similar trusts. Essentially two matters must be decided into where the trust is for the purposes of the association. They are the terms of the actual gift and the rules of the society. In the above case the testator quite clearly intended the gift to be perpetual endowment of the library and the rules tended to support the construction. It seems that the case was not considered to be a charity for the membership of

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the library was restricted and the purpose perhaps not charitable, although the later question was not investigated.

There appears in the closing remarks of Lord Campbell L.C. some justification for the rule found in the cases of Pirbright v. Salvey (supra), In re Hooper (supra) and In re Budge (supra). It would appear however that Lord Campbell L.C. may have confused the remoteness of vesting rule against perpetuities with the duration rule against Perpetuities.

Cocks v. Manners (supra) concerns two gifts of which one only is the concern of this paper. The testatrix left the residue of her property to be divided amongst several religious constituations of which 'the Sisters of Charity of St. Paul at Selley Oak near Birmingham (payable to the Superior thereof for the time Being)' was the important one. Wickens V.C. first found that the association was a voluntary one albeit for some charitable purposes, but that the gift would provide for the wants of the sisters as well as the charitable purposes.
He then discussed Carne v. Long and said:-
'That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad - forinstance a gift to a club, or to a limited company, but merely that the gift in question there was a gift which the trustees could only give effect to by holding the property (which seems to be all real estate) for ever, and

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applying the income according to the rules. Nothing of the sort is decided here, the gift is ordered to be paid to the superior for the time being, and the Superior when she receives it, will be bound to account for it to the Convent - to put it, so to speak, into the common chest, but when there it will be subject to no trust which will prevent the existing members of the Convent from spending it as they please.'

The two questions seem to state very much the whole of the existing law hereafter for nearly all of the cases follow in one way or another the general rules there laid down. Some of the cases however it must be said stretch the meaning of what both learned judges said to allow some organisation to take the benefit of the gift.

While it is not the purpose of this paper to discuss in full the rules relating to uncertainty in so far as the rule is not confined to purpose trusts the facts of <u>Morice</u> v. <u>Bishop of Durham</u> (supra) ought to be recited so that no confusion arises between the extensive class of cases of which that case is the leading case and the voluntary association cases. Morice's case concerned a disposition to the Bishop of Durham to dispose of the residuary property to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of. The Court held that the devise was void for uncertainty. The cases following that case concern almost solely the situation where the testator has failed to exercise his testamentary powers

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and has purported to delegate them. The uncertainty arises because the court is not able to decide just what object the testator sought to benefit, whatever the object sought be. The object thus may be in many cases an unascertainable beneficiary. It will be necessary to briefly consider these cases later because in one sense the whole law of purpose trusts is bound unto the law relating to uncertainty.

In the case of In re Dutton (1878) L.R. 4 Ch D 54 there was a gift to a Mechanics Society the rules of which provided that all property was to be vested in the trustees and the rules of which also provided that the society was not to be dissolved unless ninety percent of the members voted twice at consecutive meetings of the society to dissolve it. The gift was to be applied by the trustees towards the building sinking fund to pay off the mortgages on the building. The bequest was held to be void for it tended to create a perpetuity.

North J. in 1888 considered the bequest of £14,000 to a parish upon the condition that the sittings remained free and upon failure to keep the sittings free the gift was to fall into the residuary estate. North J. held that the trust so created was honorary only and that the gift did not fail because the gift over would fail to vest. The case actually concerned the validity of the gift over and North J. held it to be valid (In re Randell (1888) 38 Ch. d. 213)).

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Another early case was In re Clark (1875) 1 Ch D which concerned the gift of £500 to trustees for the Ringwood Society which met regularly at two taverns. The gift was to provide the income and dividends for the members. Hall V.C. on the terms of the gift had no hestitation in finding the gift void for tending to create a perpetuity.

Three Irish cases need some short mention. In Morrow v. M'Concille (1883) 11 L.R. Ir. 236 The testator purported to perpetually reserve property to endow three purposes. It was held to be a void gift. In re Wilkinson's Trusts (1887) 19 L.R. Ir. 531 concerned the gift 'to S.A. the superioress of the Convent of Mercy .... or to the superioress at the time of my death to and for the purposes of the convent'.
Lord Ashworth L.C. held that notwithstanding the direction given by the testator the gift was for the benefit of the present incumbents of the convent if they chose to use it. Last in Bradshaw v. Jackson (1887) 21 L.R. Ir. 12 the courts considered four bequests, three of which were similar to the gift in Wilkinson (supra) and one of which was for the Provincial of the Franciscan Friars who was to say masses for his (testator's) soul. The first three gifts were held valid for the same reasons as those advanced in In re Wilkinson (supra). In much the same way as Romer J. decided In re Chandon the court held that the gift to the Franciscan was a gift to that man as an individual, and that he could or would as a result say masses for the testator's soul.

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North J. (a judge who seems to have decided quite a number of purpose trust cases) considered a gift to a Boiler Makers' Society, a trade union under an early Trade Union Act in 1891 In re Amos (1891) 3 Ch 159. On the construction of the gift North J. decided that the testator had not intended that the members could ever get their hands on the corpus of the gift and so held it a void gift.

An important case in the unincorporated societies cases is the case of In re Clark (1901) 2 Ch 110 a decision of Byrne J. In a lucid judgment Byrne J. Considered the bequest of property to the Committee for the time being of the Corps Commissionaires to aid in the purchase of barracks or in any other way beneficial to the Corps. After considering the earlier cases Byrne J. formulated some rules which went wider than perhaps the judges in Carne v. Long and Cocks v. Manners would have thought necessary. First Byrne J. said one must look at the rules. He said no doubt one would find much evidence of an intention to remain permanent therein for all such institutions hope for perpetuity. Byrne J. said then certainly the barracks if built would be permanent. However neither of these facts he said necessarily rendered the gift void for perpetuity. Byrne J. then said the fact that the members of the society could come together to take the gift individually meant the gift was valid. One important matter in this judgment was however Byrne J. propensity to hold that the Corps was a charity, but he said he did not need to so decide because the gift did not create a perpetuity.

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The case then is dangerous as authority in the sense that clearly Byrne J. took great care to ensure that he found in favour of the Corps.

It is rather interesting in view of Carne v. Long to find that in In re Good 1905 2 Ch. 60 the courts held that a gift which was to be held on trust and the income from which was to provide books for the mess library and plates for the officer's mess was held to be a charitable gift. The judge justified the decision upon the ground that the trust was educative purposes and that the public benefit was served by having well read soldiers. However a second gift to provide houses for old soldiers was invalid because it tended to create a perpetuity for non charitable purposes.

The town of Penzance provided in 1908 yet another Carne v. Long (supra) situation for the testator in In re Swain (1908) 99 L.T. 604 attempted to gift property to a chess club in Penzance to perpetuate the continuance of chess in the town. The gift was of income only. Joyce J. held the gift failed as it attempted to create a perpetuity.

A testator, one Clifford, attempted to gift a substantial sum of money to the trustees of an Angling Club the income from which was to stock the water in which the Club fished. The Club argued that it could wind up and thereby vest the money in the members. This argument was rejected in In re Clifford 1912 81 L.J. Ch 220.

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The judge held that the terms of the gift quite clearly indicated the intention to create a perpetuity.

The gift 'to the Franciscan Friars at Clevedon' because it was to the members individually was held valid in In re Smith 1914 1 Ch 110.

A decision which has been alternatively prsised (MacCauleys Estate a House of Lords decision reported as a footnote to In re Price /1943/ Ch 422) and nearly damned (Leahy v. Attorney General for N.S.W. /1959/ AI 457) was that of Eve J. in In re Drummond /1914/ 2 Ch 90. The gift there was expressed partly in the will of the testator and partly by codicil. The will provided that the residuary estate was to be sold and the trustees were to stand possessed of the proceeds in trust for Old Bradfordians Club London and the treasurers' receipt was to a valid discharge for the trustees. The codicil provided that gift was to be used for a clubhouse although the Committee could use the gift in any manner they though fit, for the benefit of the school and the old boys. In a short extempore judgment Eve J. who apparently ignored the large number of authorities cited in argument held that he could not construe the gifts as a gift to the members individually, but that there was ample authority to say the trust which was created was not such as 'would render the legacy void as tending to a perpetuity. In re Clarke (supra)'. He then said the legacy was not subject to any trust which would prevent the Committee spending it as they

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though fit. It is certainly arguable that the gift was vested absolutely in the Committee of the Club for whatever purposes they saw fit, but In re Clarke (supra) concerned the situation where the fund could be got at by all the members of the Corps and Burne J. expressly held that this was the case.

What is a little extraordinary about In re Drummond is the first gift which was to the holiday fund for a certain company's undoubtedly poor employees, this gift failed because it was not charitable and tended to create a perpetuity according to Eve J. The whole decision was criticised by the Privy Council at 479 and 480 in Leahy's case because Eve J. failed to see that Clarke's case which was extreme enough was not authority for the proposition which he stated and moreover because no distinction was made between a gift to a fund for a voluntary group of persons and a gift to the voluntary group of persons, who could take individually if they saw fit. Thus the Privy Council said at 484 in Leahy's case, In re Drummond seems to ignore the rule that the beneficiaries must be ascertainable and that the testator must not delegate his testamentary powers. This criticism seems to strike at the root of Eve J.'s decision for the terms of the gift indicate that the Committee of the Club had a wide discretion as to how they were to use the fund. They would build the clubhouse or provide scholarships. On the basis then it is submitted that the case is wrongly decided and that it is deviation from far more fundamental principles than even the tombstone cases.

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(of Houston v. Burns 1918 A.C. 337 inter alia).

Bowman v. Secular Society /1917/ Al 406 concerned a gift to a society which was dedicated to principles of secularism as opposed to religion. The report concerns chiefly the religious tradition of Great Britain. However Lord Parker of Waddington in particular made some remarks concerning trusts which are relevant to this paper at 441, thus

'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 recognise as charitable in the legal as opposed to the popular sense of that term.'

The remarks are strictly dicta for Lord Parker had already held that the society which was incorporated took the gift 'as absolute beneficial owner' and not as trustee. Nevertheless the remarks were referred to with approval by Lord Evensheld M.R. in In re Endacott (supra).

A gift the income from £3,000 to the London Spiritualist Alliance was held invalid in In re Hummeltenberg /1923/ 1 Ch 237 because the gift was neither charitable nor capable of control of the court and because it was intended to last forever.

In re Prevost, Lloyd's Bank v. Barclay's Bank /1930/ 2 Ch 383 was a case in which Eve J. considered a gift of real and personal property to

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the trustees of the London Library for the general purposes of the library including the staff. Eve J. agreed that it was not a charity but went on to say at 387 after citing Carne v. Long, Cocks v. Manners and In re Clarke that

'it will be found that the validity of the gift was impeached on the two grounds of their being charitable or in perpetuity there is no suggestion in any of them that the gifts would not be effective as gifts to the institution in aid of its funds if they were to be found to be neither charitable nor in perpetuity, and I am unable in the circumstances to appreciate why they should not be'.

He then held that there was nothing in either the terms of the gift or the rules of the library to prevent the trustees spending the sum as they though fit.

With respect the case has nothing to do with any of the authorities cited above and again concerns the delegation of a testamentary power.

Some reference ought to be made at this point to the judgment of Clauson J. in In re Rays Will Trusts 1936 Ch 520. Here two points were in issue namely the gift was to an abbess 'for the time being' of a convent. The person who had witnessed the will was at the time of the testatrix's death the abbess. Clauston J. held that the gift was valid and that the abbess took the gift in a representative

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capacity. He said in passing that had the terms of the gift provided that it was to be held as a perpetual endowment the gift would have been bad. Clauston J. held that the abbess certainly took the gift as a trustee but the members of the convent could require the gift to be applied to themselves immediately.

A case which seems to have missed much scrutiny by the courts although noticed by many writers is In re Turkington 1937 4 All E.R. 501 a decision of Luxmore J. The terms of the gift were 'I give the residue to the Masonic Lodge to be as a fund to build a temple.'

Luxmore J. held first that certainly if the words after 'fund' were removed the gift would have been a valid gift. However he said in this case there could be notrust as the members of the Lodge held the fund both as trustees and as beneficiaries and that on the authority of In re Selous 1901 1 Ch 921 (which case concerned a gift to two nieces of the testator for whatever purposes they though fit) the equitable estate and the legal estate merged. He further held that In re Clarke (supra) wason point and that in this case as in Clarke's case the fund could be used for any purpose the Lodge saw fit.

The case seems rather strange for on the one hand the testator seems to be delegating his authority and on the other the trustees/ beneficiaries seem entitled to completely ignore the testator's

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instructions as to the purpose to which the fund is put.

By way of contrast to the cases where gifts were made to abbess, friars etc. the case of Farley v. Westminster Bank /1939/ A.C. 430 is interesting for a gift for the 'parish work' was held invalid for uncertainty as it included more than just charitable purposes.

In re Taylor /1940/ Ch 481. This case concerned a devise to trustees to stand possessed of the residuary estate on trust for the Midland Bank Staff Association, Liverpool and District Centre to assist the members of the Association. Farwell J. held that the members of the society could put an end to the society and could require the trustees to dispose of the property to each of the members and that hence the gift was valid. The appeal was dismissed by consent.

In re Wilkinson /1941/ N.Z.L.R. 1065 was a judgment of Kennedy J. and concerned a gift to the League of Nations Union in New Zealand. Kennedy J. held that the purposes of the Union were political and that hence not charitable. He held the terms of the gift disclosed that a perpetuity was intended and hence the gift failed. The decision is a trifle ironic.

This case incidentally contrasts rather nicely with In re Ogden /1933/ Ch 678 where the gift was of a percentage of the residuary estate to be distributed by the trustee amongst polical parties espousing liberal principles in politics. It was held that it was

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not a trust for the promotion of liberal principles and that as a matter of evidence all the liberal political parties could be established. Lord Tomlin seemed to have no difficulty in holding that gifts were absolute and prima facie good. No doubt had the trust been to espouse liberal principles the decision might have been the other way.

Cohen J. considered in In re Price /1943/ Ch 422 a gift of one half of the testatrix's residuary estate 'to the Anthroposophisical Society in Great Britain to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder Dr Rudolf Steiner.' The Society which had been formed by Steiner in 1923 was to further the development of the human soul. The Society was a precursor in some senses of Hubbards Scientology.

Cohen J. first considered the argument that the gift was an absolute one. Mr. Roxburgh of Counsel submitted that In re Clarke (supra) applied, which case, he said, inter alia that a gift to a society subject to a trust would not be good and moreover one which tended to a perpetuity was not good. Mr. Roxburgh argued that the purpose clause in the gift was descriptive only. Cohen J. said no absolute gift had been made to the society.

The second argument advanced relied upon In re Drummond (supra) and the ratio of the case was said to be that a gift would be good

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if although given for a specific purpose there was nothing to prevent the society spending the income as well as the capital on that object. Cohen J. observed that In re Drummond (supra) had been approved in the House of Lords in the unreported decision of Macauley v. O'Donnell (1933) and held that the gift could be so applied by counsel.

It was argued that MacCauley v. O'Donnell ought to have been followed in In re Price because the clauses discussed in the wills were similar. In MacCauley's case the House of Lords had held that a gift was invalid because the words of the will indicated that the testator desired a permanent endowment of the society one proposed to benefit. Cohen J. rejected that argument on the ground that the gift in this case disclosed no such intention.

Counsel seeking to set aside the gift argued that the gift was invalid for uncertainty upon the basis that Steiner's field was so wide as to amount to leaving the Society's Committee the testatrix's testamentary power. Cohen J. rejected the argument on the basis that the court could easily determine whether any money had been spent properly.

Cohen J. then said that in his opinion In re Drummond (supra) applied and that the gift was good.

With respect to the learned judge it would appear that he failed to understand the true nature of the gift. The gift was intended

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to be held by the society to apply to certain purposes. In that sence gift is just like that Farley v. Westminster Bank case (supra) for the society could spend the gift on any purpose it saw fit. Surely then the testator had delegated his society testamentary powers.

The gift in MacCauley v. O'Donnell (reported as a footnote to In re Price (supra) was 'unto the Folkestone Lodge of the Theosophical Society (but not to the headquarters or other Lodges of the Society) absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone').

The crux of the decision can be found in the remarks of Lord Tomlin reported at /1943/ Ch 437-8 where he said first that the critical words were
'for the maintenance and improvement' and he said 'my mind is satisfied that by these words in the context in which they are used the testatrix intended to create an endowment to secure the continuance of the Lodge ..... so that the fund comprised in the gift must be retained as an invested fund, fulfilling by means of its income the purposes which the testatrix had in mind......
To my mind these words have been added in order to express that it is the premanency of the Lodge at Folkestone which the testatrix is seeking to ensure, and this I think necessarily involves endowment'.
Accordingly the House held that the gift was invalid.

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The remarks of Lord Buckmaster in Macauley v. O'Donnell as cited by Cohen J. in In re Price at 428 and by Viscount Simmonds in Leahy v. Attorney General for N.S.W. 1959 A.C. 457 at 483 are this 'A group of people defined and bound together by rules and called by a distinctive name can be subject of gift as well as any individual or incorporated body. The real question is what is the actual purpose for which the gift is made. There is no perpetuity if the gift is for the individual members for their own benefit, but that I think is clearly not the meaning of this gift. Then again is there a perpetuity if the society is at liberty in accordance with the terms of the gift to spend the capital and income as they think fit....../ Lord buckmaster here discussed In re Drummond (supra) and held it to be an excellent example of such a gift/ .... If the gift is to be for the endowment of the society to be held as an endowment and the society is according to its form perpetual, the gift is bad: but if the gift is an immediate beneficial legacy, it is good'.

It is not difficult to agree respectfully with Viscount Simmonds, that Lord Buckmaster does not present a true alternative when he holds that a gift to a society for its immediate benefit is a true alternative. At 483 in Leahy v. Attorney General for N.S.W. /1959/ AC 457 the Privy Council said 'It is only because the society, i.e. the members constituting it, are the beneficiaries, that they can dispose of the gift.'

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Moreover Lord Buckmaster seems to have overlooked the true nature of the gift in In re Drummond for clearly in that gift the Committee took the gift on trust for a number of specified purposes. With respect it seems that the line of authority commenced by Eve J. quite clearly ignores the terms of the gifts and fails to see that the person in whom the gift is vested takes the gifts subject to a trust for indefinite and uncertain purposes. It is submitted that the Committee of the Old Bradfordians Club took the gift as trustees and that no person can be found who is the beneficiary. The same can be said for the small number of cases which follow In re Drummond (supra).

Two Australian cases are quite interesting in this context. Thus In re Cain /1950/ V.L.R. 381 concerned a number of gifts to the Victorian Vocational Guidance Centre, the Childrens Welfare Centre, the Victorian Council for Mental Hygene and the Childrens League. The judge in that case fully considered all the authorities and held that because no purpose had been prescribed for the gifts the gifts were valid as gifts to unincorporated societies. The judge said simply that had any of the gifts been for purposes then the gifts would have been held on trust and would have been invalid whether perpetuities were created or not. The second case was In re Producers Defence Fund /1954/ V.L.R. 246 a decision of Smith J. The case concerned a body formed by Primary Producers in Victoria which, presumably on legal advice, dissolved and formed a trust, the trust was to hold all the body's property for

the purpose of furthering the Producers' interests.

The court held first that because the trust was for uncharitable purposes the trust was invalid. Further the trust was invalid because it would offend against the 'other' rule against perpetuities (i.e. the duration rule not the remoteness of vesting rule). The most inresting part of the case concerns what happened to the property. There was no resulting trust to the members said Smith J. and the property fell into bona vacantia and was taken by the Crown.

The effects of invaliding the gift in such a case follow from the nature of the settlement creating the trust and do not really affect the cases where the gift was made by a will. The important point however is that the judge recognised clearly that the trust was for a purpose and effectively the words used were little different from the words used in cases such as In re Drummond (supra).

The question of the validity of the gift over was considered in In re Wightwicks Will Trusts /1950/ Ch 260 which was a trust to apply income for ever or as nearly as possible for ever to an anti Vivisection Society. The question was whether the gift over was contingent or not. Cohen J. held that unless there was some certain event upon which the gift over was to take place the gift over was contingent and hence was invalid.

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During the 1950's a series of cases were decided which dealt with trusts which were truly purpose trusts but would more properly be dealt with in the miscellaneous section. It is quite clear from those cases that the courts would not recognise a trust for a purpose. However it is proposed to deal with *Leahy* v. *Attorney General for N.S.W.* /1959/ A.C. 457 first.

It is not proposed to discuss the section upon which *Leahy* was eventually decided, but it is perhaps fair to comment that much of what is said in *Leahy* could be obiter dicta if only because the court need not have discussed the cases as fully as they did.

However the case concerned two dispositions by a very wealthy testator in Australia the terms of which gifts were to give the testator's property known as 'Elmslea' upon trust 'for such order of nuns of the Catholic Church or the Churtian nuns as my executors shall select ..... in their absolute discretion', and the residue was to go to some order of nuns as the trustees could select in their absolute discretion for the erection of buildings etc.

The Privy Council canvassed fully most of the earlier decisions concerning purpose trusts. They held but for Section 370 in the Australian Conveyancing Act that the gifts were invalid because there was uncertainty in the *Morice* v. *Bishop of Durham* sense and that the gift of the 'Elmslea' property by its nature was intended to be a perpetual endowment of some unascertainable beneficiary. Viscount Simonds after a full discussion said that the

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true rule in the purpose trust cases concerning voluntary unincorporated associations was that the gift would be valid if the beneficiaries could be ascertained with certainty. Thus if the individuals comprising the society could take the gift beneficially a proper gift had been made. Secondly if the nature of the gift was one of a perpetual endowment of a non charitable organisation the gift would be valid.

Of the cases such as Drummond (supra) and others including In re Thompson /1934/ Ch 342 it was said at 484

'At the risk of repetition their Lordships would point out that, if the gift is made to individuals, whether under their own names or in the name of their society, and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and ascertainable the trust must fail. Of such a trust no better example could be found than a gift to an order for the benefit of a community of nuns, once it is established that the community is not confined to living and ascertained persons. A wider question is opened if it appears the trust is not for persons but for a non charitable purpose. As has been pointed out, no one can enforce such a trust. What follows?
Ex hypothesi the trustees are not themselves the beneficiaries yet the trust fund is in their hands, and they may or may not think fit to carry out the testator's wishes. If so, it would seem that the

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testator imperfectly exercised his testamentary powers; he has delegated for the disposal of property lies with them, not with him. Accordingly, the subject matter of the gift will be undisposed of or fall into residuary estate as the case may be. Their Lordships do not ignore that from this fundamental rule there has from time to time been a deviation: see for example In re Dean (1881) 41 Ch D 552, In re Thompson /1934/ Ch 342 and that attempts have been made to justify these cases ...... But the rule as stated in Morice v. Bishop of Durham (per Sir William Grant M.R. (1804) 9 Ves 399 and Lord Eldon L.C. (1805) 9 Ves 522) continues to supply the guiding principle.'

At this point a brief discussion of the question of delegation of the testatmentary powers of the testator ought to be made. The courts have nearly always upheld two fundamental rules in the law of the trusts.

The first rule as stated by Lord Evershed M.R. in In re Endacott (supra) at 246 is

'No principle has perhaps greater sanction or authority behind it than that a trust by English law (not being a charitable trust) must have ascertained or ascertainable beneficiaries.'

This rule was quite definitely upheld in Leahy's case (supra). The same was said by Lord Greene M.Q. in In re Diplock /1941/ 1 Ch 253. The second rule was outlined by Lord MacMillan when In re Diplock (supra) sent to the House of Lords as

Chichester Diocesan Fund Board of Finance v. Simpson /1944/ A.C. 341 at 349

'My Lords, the law, in according the right to dispose of property by will, is exacting in its requirement that the testator must define with precision the person or objects he intends to benefit .... he cannot leave the disposal of his estate to others.'

The second point was before the Court of Appeal in I.R.C. v. Broadway Cottages Trust /1955/ Ch 20 where it was held that a gift to specified classes of charities listed in a schedule to a deed was invalid because at any given time the trustees could not ascertain the beneficiaries although given a beneficiary they could say if he fell into the class or not.

This latter case was overruled in McPhail v. Boulton. In re Badens Deeds Trusts /1971/ A.C. 424 on the particular situation before the court namely that for the purpose trust law provided a person can be identified as a beneficiary or not failure to identify all of the members in a class will not necessarily invalidate the whole trust.

Nevertheless it was said by Lord Wilberforce in his judgment at (1970 2 All E.R. at 247) that the rule in Morice v. Bishop of Durham is still applicable is still good law.

The discussion above is far too brief to do justice to this wide topic. The point is clear however from the authorities that trusts

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must have both ascertainable beneficiaries and that gifts to be held on trust must be made with some precision by the testator. The two points made above are really the same for a delegation of testamentary powers clearly indicates that beneficiaries may be difficult or impossible to ascertain.

It is interesting therefore to find a long list of authorities which seem to have been decided quite independently of this long existing and almost sacrosant rule of trusts. One feels rather that the judges who have deviated may well have done so out of sympathy for the causes revealed than from any proper consideration of the law.

Two further cases concerning unincorporated associations have been decided since Leahy's case. In 1960 a gift was made to an R.S.L. club in Victoria, Australia. The gift was of a testator's business. He purported to prevent the club from selling the business for the ten years after his death. The R.S.L. club wished to sell the business before the period had expired. The court held that restraint of alienation was repugnant and that the terms of the gift and the nature of the association clearly indicated that the gift was to the members of the club who could deal with the property as they thought fit.

The justifications for the rules relating to unincorporated societies were discussed by Cross J. in Nevilles Estates Limited

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v. Madden /1962/ Ch 832 which case concerned some rather tricky dealing with land upon which a synagogue was to be erected. The facts are not important for this paper.

He says that gifts to unincorporated associations take place in one of three ways:-

1. The gift is for the individuals comprising the association as joint tenants and accordingly any member could sever his share.
2. The gift is to existing members subject to their respective contractual rights and liabilities. The members cannot sever their shares. The gift accrues both to new members and on the death of members accrues to the survivors. If that is the effect of the gift the gift is good unless the rules of the society preclude the members from dealing with the gifts.

   Even if the purposes of the association are charitable such a gift although it ought a good gift is not a charitable gift.
3. The gift is taken by the society as a quasi corporate body, in which case effectively the gift is held as it were on a trust for the members and thus the gift must be charitable to be good.

With respect the first explanation would seem to apply only to the cases involving religious communities for clearly the purpose

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members of the association beneficially
and individually.

3. Any attempt to perpetually endow an association will be invalid.

The cases concerning unincorporated associations bear close resemblance to some of the cases decided under the miscellaneous heading and the principles are in fact the same.

Miscellaneous

Sporting Cases:-

Kekewick J. in In re Stephens /1892/ W.N. 140 held that a trust to provide a prize for the best shot in a regiment was a good and valid charitable trust. Presumably the defence of the realm was held to have sufficient public interest to fall within the definition of a charity.

In re Nottage /1895/ 2 Ch 649 was a decision of the Court of Appeal which had no difficulty in holding that a trust which was to provide a cup for ocean racing was no charitable trust and hence would be void.

Romer J. considered a trust to provide funds to provide a nursery fund for a county cricket club. The fund was to provide income only and was to enable 'lower middle class and lower class boys' to learn the game of cricket. He followed In re Clifford (1912)

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81 C.J. (Ch) 220 (which case is discussed above) and held that the gift was not charitable and moreover tended to create a perpetuity. He also followed In re Nottage in In re Patten Westminster Bank v. Carlyon /1929/ 2 Ch 278.

It is now appropriate to consider the case of In re Thompson /1934/ Ch 342 an extempore judgment of Clauson J. A gift was made to a friend of the testators which gift was to be applied by the friend to further fox hunting. The learned judge was referred to Morice v. Bishop of Durham (supra) and to In re Nottage (supra). He however struck a course which had been first set by North J. in In re Dean (1888) 41 Ch D 552 and held that the trust was enforceable at the suit of the residuary legatees, that there was a definite object of the trust and that it was a valid trust even if it was not a charitable trust. With respect it seems that the learned judge did not read any of the decisions referred to and that his scholarship in finding the order from In re Dean was scarcely matched by his failure to consider the other authorities in this subject. This case has been strongly disapproved by the Privy Council in Leahy v. Attorney General for N.S.W. (supra) and it is unlikely that the case would be followed.

At about the same time however the Irish courts considered two similar cases for religious purposes.
A Roman Catholic priest by his will provided that his executors should hold the residue of his estate 'to his best spiritual

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advantage as conscience and sense of duty shall direct'. The court in *In re Gibbons* /1917/ 1. I.R. 448 were asked if the trust could be put into effect. The court held that the trust was valid notwithstanding the inability of the court to enforce it. The trust was held not to be a charitable trust. Clearly this again was a purpose trust, but it is to be noted that the case follows the animal cases decided before the turn of the century and the tombstone cases including *Fisk* v. *Attorney General* (supra). The trust was honorary only.

The second case *In re Will of Ryan* /1935/ 1r L.T.R. 57 concerned the courts' consideration of a discretionary religious purposes trust, which trust was held to be valid if unenforceable by the courts.

Miscellaneous: Good Works

Although the courts have many times considered the different between trusts for benevolent purposes and trusts for charitable purposes it it proposed to deal with four or five of the cases only in so far as they deal with the purpose trust rules.

In re Gassiott (1901) 70 L.J. Ch 242 concerned the gift a picture and £4,000 to a vinter's society. The major part of the case deals with the failure by the society to clean the picture and the effects that had on the gifts over. Of more importance to this paper was the fact that the gift of £4,000 was intended

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to produce income perpetually to enable the picture to be cleaned. Such a gift was held bad.

The case of In re Pardoe /1906/ 2 Ch 184 concerned a number of gifts of which two are important. The first was a gift of £200 the income from which was to provide bell ringers who were to toll a peal of bells on anniversary of the date on which the monarchy was restored. The gift was held valid. The case is also a 'public benefit' tombstone case in so far as a trust to provide tombstones for pensioners was held valid. Both gifts were held to be charitable.

North's J. propensity to allow honorary trusts has been recognised already from In re Randell 1888 38 Ch D 213, which case concerned the gift of £14,000 to a parish while the sittings remained free. North J. said the gift was not charitable and not enforceable but the courts would recognise honorary trusts.

The next three cases are the precursor of the judgment in Leahy v. Attorney General for N.S.W. (supra). The first case is In re Wood /1949/ Ch 498 a decision of Harman J. (as he then was). The testatrix in that case endeavoured to gift the sum of £104 per annum of which £2 per week was to be provided for the week's good cause as broadcast by the B.B.C. on Sunday mornings. It was held that the gift failed for uncertainty.

The case of In re Astors Settlement Trusts /1952/ Ch 534

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concerned the attempt by Lord Astor, the ont time propreitor of one of the better English newspapers, to settle money on trusts for a number of purposes including the promoting of good understanding between nations, and the preservation of a free press. Roxburgh J. in a rigorous judgment held that the trust was not for the benefit of individuals, that it was not charitable and that there was absolutely no cestui que trust who could enforce the trust. Accordingly he said citing Morice v. Bishop of Durham and Lord Parker's dictum in Bowman v. Secular Society Limited the absence of a cestui que trust meant the trust was void for uncertainty. Roxburgh J. then said that courts of equity would not recognise trusts which they could neither enforce nor control. The trust was held invalid, and in the course of judgment Roxburgh J. distinguished the honorary trust cases and the cases such as Hooper (supra) Thompson (supra) and Dean (supra) on the basis that the list of those types of cases ought not to be extended and that they on these facts were different. In other words he said he was not about to add a new class of either honorary trusts or valid purpose trusts.

The case of In re Shaw /1951/ 1 All E.R. 745 (the case was compromised before the appeal began) was a decision of Mr Justice Harman. The trust was to provide a fund for a period of twenty one years during which G.B. Shaw's 40 letter alphabet was to be investigated. The trust was held invalid and void because there was no ascertainable beneficiary. There was also some doubt

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as to whether the trust was for a charitable purpose. In any event the whole trust was held invalid.

The last three cases cited above quite clearly show the movement by the court to more rigorous examination of the trusts and in particular an examination of the true train of authorities.

Animal Cases

There are four cases concerning animals and they are Mitford v. Reynolds (discussed supra), Pettingall v. Pettingall 1842 11 L.J. (Ch) 176, In re Dean (1889) 41 Ch D 552 In re Kelly /1932/ 1.R. Pettingall's case concerned the gift to trustees of a certin sum the income from which was to keep the testator's favourite black mare. The trust was held valid although unenforceable. The trustee it was said was bound in honour to keep the horse in good condition from the funds.

In re Dean is the third of the decisions of North J. and concerned a bequest to trustees the income from which was to keep eight horses and ponies and a pack of hounds. North J. recognised that the trust had no cestui que trust to enforce the trust and was hence unenforceable. He however held that the bequest was a valid one and drafted an order, the form of which was copied in In re Thompson that the residuary legatees could require the trustees to perform the trust for failure to as so would vest the gift in the residuary legatees. The case is not satisfactory

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for North J. assumes that Mitford v. Reynolds (supra) 105 is authority for the proposition that a trust without a cestui que trust is a valid trust if unenforceable. It seems from the report of that case, which is all that North J. relies on, that the proposition was not argued and in any event certainly not the subject of any pronouncement from any of the judges in that case although curiously in that case a trust for the maintenance of animals was allowed. North J. was only concerned with the trust to erect a memorial. From the discussion earlier of that case North J. appears to have misread the case.

Last in In re Kelly /1932/ 1.R. 255 the learned judge held that a trust for the maintenance of dogs for a period of twenty one years was a valid trust. With respect however the question of uncertainty was never argued in that case.

The animal cases are quire anomalous. Certainly there can be no cestui que trust. However in each of the cases and in particular those cases decided before the turn of the century it seems to have been assumed that a life in being for the purposes of the Rules against Perpetuity (i.e. the remoteness rule) could be the life of an animal. The concept seems unfortunate because the law is designed for people by and large and not animals. Moreover there seems to have been a confusion between the duration rules and the remoteness of vesting rules. It seems clear now that the case should not be followed (see Leahy v. Attorney General for N.S.W.).

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Capricious Cases

This paper has already dealt with the three cases concerning attempts by Scots to perpetuate their memories by the erection of enormous statues. The cases need some little amplification.

M'Caig v. University of Glasgow /1907/ S.C. 231 concerned the provision of a large sum of money which money was to be spent in providing likenesses of the testator and his brothers. The session court held that the trust for the purpose was invalid for being against the public interest.

M'Caig's Trustees v. Kirk Session Church of Lismore /1915/ S.C. 426 followed the earlier case when it dealt with a gift to provide elevent bronzes to be cast by Scotland's leading young sculptors at a cost of not less than £1,000 each and to be placed in a tower belonging to the M'Caig family.

The last of the trilogy concerned an attempt by a testator who had taken part in some major political event in a village to provide a massive statue of him on horseback. There was obviously some reluctance on the part of the village to accept the statue, but in any event the court held the trust bad and followed the last two cases. Aitken's Trustees v. Aitken /1927/ S.C. 374.

The fourth Scottish case was Lindsay's Factor v. Forsyth /1940/ S.C. 568. The testatrix in that case had for many years placed flowers on her mother's grave. She bequested £1,000 to her

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trustees, the income from which was to provide flowers on her mother's grave forever. The Court followed the previous three cases and held that the bequest was void for it offended against the public interest.

There is also one marvellous English case involving a testatrix who required her trustees to board all the rooms of her house (except those necessary for the servants) for a period of twenty years. The trustees were provided with funds to visit the house quarterly to ensure that the house remained boarded up. (Brown v. Burdett (1882) 21 Ch D 667). Bacon V.C. held in a very brief judgment that he must 'unseal' this useless undisposed property and declare an intestacy for a period of twenty years in respect of the property. No reasons were given.

Conclusions:

When looked at a group the purpose trusts reveal in most cases a complete absence of ascertainable beneficiaries. The absence may exist in two ways, either there is just no beneficiary, in which case the trust is no more than for a purpose or in terms of time there is no limit to the possible number of beneficiaries. While the courts may now enforce trusts where an individual may be recognised as falling within a class (In re Badens Deed Trusts /1971/ A.C. 474) they will not recognise a trust where the class of beneficiaries is potentially infinite. Clearly in Baden's case the court was dealing with a limited number of beneficiaries. Where

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moreover at any one time the beneficiaries of a trust are unascertainable the courts will not regard the trusts as enforceable or valid (Leahy v. Attorney General for N.S.W. /1959/ A.C. 457).

While the above rule based on Morice v. Bishop of Durham has had lip service paid to it over the last two hundred years or so, it appears that in a large number of cases the rule has been completely ignored. The cases include the monument and tombstone cases where the trust is to erect the monument. In many cases these have been held to be legal and properly enforceable trusts. However it would appear from Re Endacott /1960/ Ch (where the monument proposed incidentally was a carpark) that the long list of those cases might well be reconsidered.

The trusts for repair of tombs are clearly cases where the courts have recognised another rule (namely a different rule) against perpetuities, (The other rule being the more generally recognised rule against remoteness of vesting) to justify their refusal to hold such trusts valid or in some cases unenforceable. There appears to be some confusion notably in Pirbright v. Salvey, In re Hooper and In re Budge (supra) between the two rules but it is submitted by this writer that those cases should be treated as judicial mistakes rather than an attempt be made to find some general rule of law into which they will fit. (But see the writer's justification for them in terms of the remoteness of vesting rule)

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The confusion between the perpetuity rule against remoteness of vesting and the rule to be found in many of these cases cited above appears to be found in the animal cases as well. It could be argued however that in those cases the judges having found a valid trust (it seems although ignoring the rule in Morice v. Bishop of Durham (supra)) could not let the gifts over fail through vesting outside a period allowed in the Rule against Perpetuities (remoteness in vesting).

The failure to follow the guide lines set down in Morice, followed in Bowman v. Secular Society Limited /1917/ A.C. and eventually reasserted in Leahy v. Attorney General for N.S.W. concerning uncertainty is well illustrated in the unincorporated society cases. In the first place in re Clarke /1901/ 2 Ch can be justified perhaps on the ground that it was a Cocks v. Manners (supra) situation and that the members of the Corps could take the gift individually. The decision did tend however to defeat the purpose of the gift, and it is clear on the face of the gift that the testator did not intend such a result. He truly intended that the trustees should have a discretion as to how the gift should be applied to the benefit of the Corps as a whole. It appears the learned judge could see the benevolence of the Corps' purposes and really tried to make the gift valid. The validity of the gift it is submitted on theprinciples of Morice v. Bishop of Durham Cocks v. Manners (supra) and Carne v.

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Long is doubtful.

However it is the string of cases which purport to follow *In re Clarke*, commencing with *In re Drummond* (supra) and ending *In re Price* /1943/ Ch that really start a track of their own. It is submitted that once again no rule should be formulated to cover these cases but that they should be recognised as the aberrations that they are. Moreover it is submitted that in view of the eminent authority both before and after these cases on uncertainty including *Bowman* (supra) and *Leahy* (supra) that these authorities should be treated as overruled.

These cases are also directly in conflict with the cases of *In re Astor*, *In re Shaw* and *In re Wood* (supra). *In re Drummond* concerned a gift to the Committee of a club to apply to any of a number of purposes. It is submitted (upon the authority of *Leahy*) that the Committee received the gift as trustees for the purpose and that accordingly the cases are identical to the postwar trilogy cited above for those cases concerned trusts for purposes simpliciter.

There is one further criticism one must make of the cases of *In re Drummond*. The criticism which incidentally also applies to *In re Clarke* /1901/ 2 Ch is based upon the reasoning adopted by the judges in those cases. Reduced to its lowest abstration the cases concern gifts to persons for purposes which the testator definitely intended should be carried out. The judges in those cases however

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reasoned that the members of the society could apply the gifts to their own individual purposes in order to justify the validation of the gifts. Surely had the testator been alive he would have said that gifts were not so intended. To put it another way had the gift been part of a settlement by a living settlor the courts may have shown a marked reluctance to so justify their decision. What the decisions amount to then is a rationalisation which if carried to its logical conclusion would apparently justify such misbehaviour as the defrauding of solicitors trust accounts for if the decisions are right a person can happily ignore the directions one receives when one receives property on trust. It is quite clear therefore that a legal fiction was introduced to enable the judges to give effect to a gift which should be held invalid.

The line of authority commenced with In re Chardon /1928/ Ch it is submitted is quite proper, provided a non charitable organisation is not benefited perpetually. The difficulty with that case is that this virtually seemed to have been permitted. The gift over in the event of the failure of the cemetery company might never vest. The case is unsatisfactory because it validates a method of escaping the full rigours of the law against purpose trusts. It also is submitted unsatisfactorily because it leaves the way open for a non charitable institution to be benefited perpetually.

The duration rule against perpetuities, probably deserves that nomenclature rather more the so called true rule against

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perpetuities (i.e. the remoteness of vesting rule). Certainly it deals with true perpetuities. It is submitted that the rule need no more justification than that it is against the public interest to have property (whether its character changes or not) tied up for indefinite periods of time to what are essentially neither productive purposes nor for the benefit of the public. The rule it is submitted is moreover an extension of the rule against uncertainty for in all the cases where this rule is applied there is either no person who can enforce the trust or the number of persons who can enforce the trust are infinite and that therefore the beneficiaries are quite uncertain.

There are a number of writers who have attempted to explain Purpose Trusts by reference to powers. It is the writer's submission that these explanations do not recognise that the courts in embarking on the cases such as *In re Dean*, *In re Thompson*, *In re Drummond* etc. also were creating a rule all of their own. This rule it is submitted is now overruled. Moreover Lord Evenshed said in *In re Endacott* that 'the proposition that non charitable trusts which fail as trusts may survive as powers is not now accepted by English law.'

The rule which has been advanced by such writers as *Sheridan* (purpose Trusts and Powers) 1958 4 U of W.A.L. Rev 236 at 241-2, and the author of Gray *Rule against Perpetuities* 4th Edition Appendix H, basically provides as follows:-

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Under the rule against Perpetuities these writers point out a special power of appointment would be too remote if could be exercised after the perpetuity period has expired. If such a power is too remote no appointment can be made. They would say that a purpose trust is not a trust but a special as opposed to a general power. (The donee cannot exercise in favour of himself. This is a resulting trust to the residuary legatees or next of kin in the event of failure to exercise the power. If the power can be exercised outside the perpetuity period then it offends against the remoteness rule. Morris & Leach 2nd Edition Rule against Perpetuities page 235. The learned authors in that book consider that it is over bold to accept the explanation as a rationalisation what the courts have done for no court has ever accepted the rule.

It is this writer's submission that there are two rules which govern all of these trusts and that the cases which fall outside the rule are now not to be followed. They may be regarded as merely judicial rationalisation of decisions which the judges wanted to give in favour of what might be called quasi charitable organisations.

The last matter concerns public benefit and it is to this the Rule against Perpetuities (duration) and the uncertainty rules relate. It is perhaps to be regretted that only in Scotland, where one can imagine if the judges were at all traditional Scots,

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the reluctance to accept the fearful waste in the four cases cited, that public policy has been used to justify the striking down of such trusts. Yet public policy is important under both the other heads, for surely the essence of the rules relating to all trusts is that the Court may control the trusts and second that no trust should exist for too long. It is moreover surely not in the public interest to allow such wasteful trusts as trusts to repair tombstones and perhaps the public interest is best served by restricting the number of charities which are legally recognised.

It is the writer's submission then that all the purpose trust cases must be reconsidered in the light of Leahy v. Attorney General for N.S.W. (supra). If on a reconsideration of the cases it is found they do not fit in the pattern there established then they must be considered overruled. The Privy Council decision it is submitted has gone a long way towards the rationalisation of these cases. It is submitted that now only the rule concerning uncertainty whether it is expressed as a rule against perpetuities (duration) or whether it is expressed as the rule requiring a human beneficiary (except in the cases of recognised charities) is the only true rule.

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Since the decision of Leahy v. Attorney General for N.S.W. /1959/ A.C. 457 at least two cases concerning purpose trusts have been before the English courts, one case has also been before the New Zealand Supreme Court but this latter case was uncortunately compromised after Counsel had been heard and consent orders were made. The latter case concerned a trust to provide for a Chinese orphan to be selected and brought from China to New Zealand and brought up here. Clearly this case concerned an unascertainable beneficiary. The two English cases are In re Harpers Will Trusts /1962/ Ch 78 a decision of the Court of Appeal and In re Denteys Trust Deed /1969/ Ch 373 a decision of Goff J.

In re Harpers Will Trusts concerned an imperfect disposition of property to charitable or benevolent institutions by the testatrix. The question of purpose trusts was not strictly covered but Lord Evenshed M.R. did say at page 91

'But the argument in this court has satisfied me that there may well be provisions for purposes, as distinct from provisions for distributions among institutions, which would be imperfect trust provisions within the definition, but would nonetheless, being valid, could be saved by Section 2 (1) /Charitable Trusts (Validation) Act 1954/ from the impact of sub-section (2) of the first Section. An illustration was given of a gift upon trust to apply an income during a limited period ..... for certain

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name purposes such as the trustees think fit, some of the purposes being charitable and some not charitable. It seems to me that such a gift would by ordinary law be valid.'

Harman L.J. at page 96 also seemed to say that some object trusts might be valid.

With respect Lord Evenshed's remarks are first obiter dicta, and as such should be at the most persuasive and second quite unnecessary for the decision for the case dealt with gifts held on trust for distributions having for the main object the case of incapacitated soldiers, sailors etc. The institutions could take the gifts. Thirdly the decision really turned on the Act cited in Lord Evenshed's remarks above.

Be that as it may Goff J. felt that these remarks would enable him to validate a settlement which provided for a sum of money to provide inter alia a sports ground for the employees of a company and any other person the trustees thought fit. The major part of the case concerned the desire of the trustees to sell the ground, but 'purpose trusts' were canvassed by Goff J. He considered all cases decided since *In re Wood* /1959/ Ch 498, and in particul r the cases of *Leahy* v. *Attorney General for N.S.W.* /1959/ A.C. 457 and *In re Endacott* /1960/ Ch 232. He found that these cases settled two principles, namely that purpose trusts 'are not merely enforceable but void on two grounds, first, that it was not a trust for the benefit of individuals, which

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I will refer to as 'the beneficiary principle' and secondly for uncertainty.' Page 382 (In re Astor /1952/ Ch 534 cited as authority)

Goff J. then went on to say that 'Where, then, the trusts, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle' page 383-4.

Goff J. then said that the remarks of Lord Evenshed M.R. quoted above fortified him in his conclusion, namely that some purpose trusts escaped the operation of the beneficiary principle. He also relied on In re Aberconway /1953/ Ch 647 a case in which the point was never argued and which concerned solely application of a statute to what was very probably a purpose trust to support his conclusion that not all purpose trusts are bad.

With respect to Goff J. he seems to have missed the whole point of the discussion of such cases as In re Drummond (supra) in Leahy's case. Here there was a trust which provided that the trustees would apply the income from the trust fund to the furtherance of a purpose, the fact that individuals were meant to benefit is irrelevant unless the words of the settlement clearly indicated that the individuals were to take the income as well as the capital for their own benefit. Here they were not

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meant to. Moreover with respect the case of In re Endacott 1960 Ch 232 involves in the abstract sense a precisely similar trust for Endacott's case concerned a trust to provide a useful memorial to the testator in a village and clearly the inhabitants of the village were meant to benefit from the trust, albeit indirectly.

One sense perhaps the reluctance of His Honour to invalidate the trust when the settlors were possibly either still alive or at least still in existence. Nevertheless the argument used by Goff J. could have validated the trusts discussed in any of In re Wood (supra), In re Shaw 1957 1 All E.R., In re Endacott (supra) and In re Astor (supra) for all of those trusts were meant to benefit eventually and indirectly individuals (in either the real sense or the corporate sense). Such a rationalisation is to the writer's mind unfortunate for the case seems to indicate a return to the principles (or both of them) that prevailed in this area prior to the 1950's.

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