II

Charitable Trusts And Legislation To Make Them Valid

The basic premise of this paper is that charitable trusts benefit a country. Therefore legislation should be passed to cut away the undergrowth of 150 years of technical decisions and remove the peril of invalidity to which charitable trusts today are constantly exposed.

The law looks with favour on charitable trusts — at least the judges say so. The origin of this rule lies probably in medieval law when persons gave a tenth of their income to the church. Today, while religious groups still receive a large proportion of charitable gifts, the conception of charity is broader. I feel that one of the strongest arguments in favour of charitable trusts is that they can carry out projects beneficial to the community which no government would dare to carry out. They can experiment, lead the way, as the Carnegie and Rockefeller Foundations have done. They can support unpopular or controversial ideas as the Ford Fund for the Republic or the various Temperance trusts do. They have much greater freedom than governments and can stimulate the life of a country as well as alleviate suffering and aid merit.

Because charitable trusts are favoured by the law, they have been given two great concessions.

Firstly, provided that the words which create them come within the legal definition of charity, they will create a valid trust even though the words used are so vague and uncertain that they would not ordinarily create a valid trust — e.g. the words "a trust for religious purposes" create a valid charitable trust although "religious" may mean any one of a large number of things. On the other hand the words "a trust for benevolent purposes" create no trust at all. The word "benevolent" does not fall within the legal definition of charity and it is too vague and uncertain to be recognized by a court unless it does.

Secondly, charitable trusts are relieved in part from the operation of the Rule against Perpetuities. They must, as is normal, vest within the perpetuity period, but the capital of the charity may be preserved forever and the income only used, and a gift over from one charity to another after the perpetuity period is valid.

The problem always has been — and remains today — what is a charity? No statute has laid down a definition but from early times the Courts of Equity referred as a guide to the preamble to a statute of 43 Elizabeth I., Chapter 4., which set out various purposes considered in those days to be charitable — e.g. the relief of poverty, education of orphans, support of schools — and repair of bridges and maintenance of houses of correction.

Then in 1805, Lord Eldon, in his successful attempt to inflict the doctrine of strict precedent on equity, decided in the case of *Morice v. Durham,*[1] that a bequest to objects of "benevolence and liberality" was bad because of uncertainty. That case is still quoted today as a leading authority. The next landmark is *Pemsel's Case,*[2] where Lord Macnaghten said that charity in its legal sense comprises four principal divisions—trusts for the relief of poverty, for the advancement of religion, for the advancement of education, and for other purposes beneficial to the community. Surely that was a wide and sound definition. Except in trusts for the relief of poverty, the group to be benefited must be members of the public in general; e.g. they cannot be employees of a company. In 1944, however, in the Chichester case[3] (better known as the Diplock case) the House of Lords held that a trust for charitable or benvolent objects was invalid as the trust monies might be applied for certain benevolent purposes which were not charitable and were too uncertain. This decision was followed in 1955 by the Supreme Court of Canada in a New Brunswick case *Brewer v. McCauley.*[4] In the Chichester case the intestacy created by the House of Lords, it is reported made a third cousin of the testator over a million dollars richer and also cost his executors $250,000 personally because they had distributed his estate to charities before the action began.

The law of charities is full of such decisions. A gift to a vicar of a church for such objects connected with the church as he shall see fit is charitable *Re Bain,*[5] a gift to a vicar for parish work is not charitable, because it might be used for non-charitable parish purposes.[6]

A gift for the benefit of Welsh people in London by creating a centre to promote their moral, social, spiritual and educational welfare is bad for the same reason.[7]

A gift for the religious, moral, social and physical improvement of a community is bad. It might be used for non-charitable purposes.[8]

Even a gift — for charitable purposes only, the persons to benefit being employees of the Canada Life Insurance Co. — was held by the Judicial Committee of the Privy Council to be bad.[9] The gift lacked the element of public benefit necessary and was not restricted to the relief of poverty. The same principle was applied in *Oppenheim v. Tobacco Securities Trust*[10] when a trust for the education of children of employees of a Company employing more than 100,000 persons was held invalid.

1. [1855] 10 Ves. Jun. 522; 32 E.R. 947.
2. **The Commissioners for Special Purposes of the Income Tax v. Pemsel,** [1891] A.C. 531.
3. **Chichester Diocesan Fund and Board of Finance v. Simpson,** [1944] A.C. 341.
4. [1955] 1 D.L.R. 415.
5. [1930] 1 Ch. 224.
6. **Farley v. Westminster Bank,** [1939] A.C. 430.
7. **Williams' Trustees v. I. R. C.,** [1947] A.C. 447.
8. **I. R. C. v. Baddeley,** [1955] A.C. 572.
9. **Baker v. National Trust,** [1955] A.C. 627.
10. [1951] A.C. 297.

The courts are not becoming more broadminded in their approach to charities as the above recent cases show. They are becoming narrower, more bound by precedent, less inclined to look at the intention of the testator. Who can doubt that in all the above cases the testator intended charitable gifts? He did not intend to die intestate. He wished the purposes for which he left his money to be carried out as far as legally possible.

I shudder to think how many invalid charitable trusts are probably being administered in New Brunswick today. That makes the problem pressing. What can be done?

The courts could have dealt with the problem realistically by holding that, where trusts were set up which included in their objects some which were not charitable, the objects would be limited to the legally charitable ones. The courts have power to direct a scheme, when applying the cy-pres doctrine, that is, to approve specifically the objects to which trust monies are applied. They could have directed a scheme in other cases as well. They did not. They cannot do so now as they are caught in the web of precedent. Only the legislature can correct the present situation.

Several jurisdictions have passed legislation for this purpose. In England the Charitable Trusts (Validation) Act 1954 validates dispositions of property for objects not exclusively charitable which took effect before December 16, 1952. The objects are restricted to the charitable objects. This Act is useful to protect charitable trusts at present being administered, but does not extend any protection to trusts set up after the date of the Act. For some strange reason Parliament must have thought that no trust set up in the future would clash with the technical rules of charitable trusts.

Victoria and South Wales in Australia, and New Zealand, have enacted similar legislation which extends to all trusts, past and future, which have not been declared invalid by a Court order. This approach, it is submitted, is more satisfactory. The British Columbia civil justice sub-section of the Canadian Bar Association recommended in its report in 1955 that the same legislation be enacted in British Columbia. It provides as follows:

"Sec. 1 (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purposes as well as some charitable purposes are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

(3) This section shall not affect any trust which has been declared invalid by order of a court prior to the commencement of this section."

I hesitate to comment on the effectiveness of such an Act. Much would depend on the attitude of the Courts, but such an Act would probably render valid the trusts in cases similar to the *Chichester* and *Brewer* cases and perhaps even in cases similar to *Morice v. Durham,* although that is more doubtful. It would not render valid trusts such as those in the *Baker* and *Oppenheim* cases where the element of public benefit is lacking, but perhaps such trusts should not be permitted. Yet there is much to be said for the proposition that trusts for the education of employees of a company, for example, should be made valid, unless there is a blood relationship between the donor and the donees.

Such an Act would not render valid gifts to a person by virtue of his office unless such office is held by the Courts to be an exclusively charitable one, such as a bishop.[11] It would not validate the gift in *Re Spensley,* [12] where a bequest was made to the National Trust to provide a residence for the High Commissioner of Australia. This was held by the Court of Appeal not to be a charitable gift. Why, even a bequest to the New Brunswick Barristers' Society to use the income forever might not be charitable.

One cannot, however, obtain perfection, especially in a highly technical subject, and the Act as proposed by the British Columbia sub-section has much to recommend it. It would not validate gifts for political purposes or for the promotion of the teaching of atheism if they infringed the rule against perpetuities or were uncertain. These gifts, say the courts, lack the element of public benefit as do gifts to employees.

I would recommend that an Act be drafted similar to the New Zealand Act validating charitable trusts. If such an Act becomes law in New Brunswick we can at least hope that our courts will give effect to its spirit.

Norwood Carter
Saint John, N.B.

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11. See Re Rumball, [1955] 3 All E.R. 73.
12. [1954] 1 Ch. 233.