CERTAINTY AND CHARITY RECENT DEVELOPMENTS IN THE LAW OF TRUSTS

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Introduction

Litigation in the Ontario courts concerning the will of one Francis Bethel has recently culminated in the Supreme Court of Canada decision in *Jones* v. *Executive Officers of the T. Eaton Co.*[1] In the final result the will was held to have created a valid charitable trust for the relief of poverty among the members of a club. This result is not of any great significance as there is sound authority upholding the validity of such trusts.[2] The significant feature of the case is that it promoted a discussion of a number of important aspects of the law of trusts and indicated that two major developments in the English law of trusts will be applied in Canada in the future.

These English developments had occurred first, in the field of the test for certainty of objects of trust powers,[3] and secondly, in the field of the public benefit requirement with charitable trusts for the relief of poverty.[4] Both of these developments were considered in the course of the litigation over the Bethel will. The litigation also provoked consideration of two further points: first, the requirement that a valid charitable trust must be for purposes exclusively charitable; and secondly, the circumstances in which a court will execute a charitable trust by means of a scheme *cy-près*.

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[1] (1973), 35 D.L.R. (3d) 97.

[2] See *Spiller* v. *Maude* (1881), 32 Ch. D. 158n; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154; *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727 (poor members of Friendly Societies); and *Re Young's Will Trusts, Westminster Bank Ltd.* v. *Sterling*, [1955] 3 All E.R. 689 (poor members of a club).

[3] Alternative appellations for "trust powers" include: powers in the nature of a trust, powers coupled with a duty and discretionary trusts. The leading English case on this topic is *McPhail* v. *Doulton*, [1971] A.C. 424 (H.L.). The decision was an appeal from the Court of Appeal judgment in *Re Baden's Deed Trusts*, [1969] 2 Ch. 388.

[4] See *Dingle* v. *Turner*, [1972] A.C. 601 (H.L.).

It is proposed in this article to discuss each of these points in turn. In so doing it will be necessary to refer to the decision of the Ontario Court of Appeal in the *Bethel* case[5] which contains an interesting discussion of the test developed in *McPhail* v. *Doulton*[6] for trust powers. Next, reference will be made to the judgment of the Supreme Court in the *Bethel* case, which gave rise to a discussion of the principles set out in the House of Lords decision in *Dingle* v. *Turner*.[7] It will then be appropriate to consider the further points arising from the litigation.

I. *The Decision in the Ontario Court of Appeal.*

Briefly, the facts in the *Bethel* case were that the testator had left part of the residue of his estate valued at $50 000.00 to the executive officers of the T. Eaton Co. Ltd. to be used as a trust fund for any "needy or deserving" Toronto members of the Eaton Quarter Century Club. The officers had a broad discretion as to the application of the funds in accordance with the desired purposes. The executor of the estate posed a number of questions for the advice and direction of the court. At first instance it was held by Grant J., that this was neither a valid charitable nor a valid non-charitable gift, and consequently, that it was to be paid to the residuary legatees.[8] There was an appeal by the next-of-kin who claimed that the lapsed gift should go by way of intestacy and not to the residuary legatees.

In the Court of Appeal, it was pointed out that the disposition of the property was only a problem if the purported charitable trust was invalid. By a majority, the trust was held to be a valid charitable trust for the relief of poverty among the "needy and deserving" members of the club. The majority judgment was delivered by Jessup J.A., with Evans J.A., concurring. It is not necessary to discuss the judgment of the majority in detail, for the reasoning is similar to that outlined in the opinion of the Supreme Court which will be examined shortly.

In capsule form, the decision of Jessup J.A., was based solely on the fact that the trust was one for the relief of poverty. The word "needy" was considered to be periphrastic for "poor"[9] and hence the only question was the proper interpretation of the words "or deserving" in the phrase "needy or deserving". The judge concluded that the "or" should be read conjunctively, so confining the authorized purposes to *poor* purposes which were also deserving.

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[5] *Re Bethel* (1971), 17 D.L.R. (3d) 652.
[6] *Supra*, footnote 3.
[7] *Supra*, footnote 4.
[8] (1970), 14 D.L.R. (3d) 129.
[9] *Cf. Re Scarisbrick*, [1951] 1 Ch. 622, per Evershed M.R., at p. 634.

He indicated that the context of the word "deserving" in the will was that it was used in conjunction with the word "needy" in a clause where all the other purposes intended to be accomplished by the testator were charitable. Jessup J.A., added: "In my opinion, therefore, the intention of the testator, by his use of the word 'deserving', must be taken to benefit not only the necessitous whom he designated by the word 'needy', but also those of moderate means who might require financial assistance in the exigencies from time to time arising."[10]

It is interesting to note that there is no reference in the judgment to the issue of whether or not the public benefit requirement must be met. Jessup J.A., simply considered the question of whether the trust was within the "poverty" head of charitable purpose trusts as set out in *Commissioners for Special Purposes for Income Tax* v. *Pemsel,*[11] and whether the trust was exclusively charitable. Having answered both these questions in the affirmative, he went on to meet the argument raised by the next-of-kin that in any event, the bequest should fail for uncertainty. It was correctly pointed out that once a clear general charitable intention is found, the court will prevent a gift from failing for uncertainty by the application of the *cy-près* doctrine.[12]

The minority judge, Gale C.J.O., was unable to give the word "or" a conjunctive meaning, and thus held that the bequest was not a valid charitable purpose trust, on account of a failure to meet the exclusively charitable requirement.[13] The Chief Justice stated: "It might be thought that in this instance the word 'deserving' should draw its meaning from 'needy' and that, accordingly, the trustees were only to distribute the funds to persons worthy of assistance by reason of need. With respect, I cannot accede to that view . . . ."[14]

As the bequest could not be saved as a valid charitable trust, the issue then arose as to whether the gift could be saved as a valid non-charitable gift. There were, in the view of Gale C.J.O., two possible objections[15] to its being upheld in this way. First, it

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[10] *Supra*, footnote 5, at p. 666.

[11] [1891] A.C. 531.

[12] Jessup J.A., referred to Vol. 4, Halsbury's Laws of England (3rd ed., 1953), p. 275 *et seq.*

[13] See *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson,* [1944] A.C. 341.

[14] *Supra*, footnote 5, at p. 654.

[15] There may well have been a third ground of challenge, namely, that this was a purpose trust. The traditional rule in the law of trusts is against the validity of purpose trusts, see *Morice* v. *Bishop of Durham* (1804), 9 Ves. Jr. 399; on appeal (1805), 10 Ves. Jr. 522. However, there may be emerging a line of cases suggesting that purpose trusts can be saved if they are for the benefit of ascertainable human beneficiaries—see *Re Denley's Trust Deed,* [1969] 1 Ch. 373. For an excellent discussion of this case, see

might be invalid as offending the rule against perpetuities. The judge went on to hold that there had been a breach of the perpetuity rule in the disposition[16] and it is not proposed to pursue this issue further here. The second possibility was that the gift was void for uncertainty.

In considering this second issue it became vital to ascertain what was the appropriate test for certainty of trust powers. Grant J., had relied on the test which required that the trustees should know or be able to ascertain, *all* the objects from which they were enjoined to select by the terms of the trust—the "complete list" test as set out in *I.R.C. Commissioners* v. *Broadway Cottages Trust.*[17] The recent House of Lords decision in *McPhail* v. *Doulton*[18] was not cited to the judge at first instance.

It was pointed out by Gale C.J.O., that the "complete list" test was no longer the correct test.[19] It was now unnecessary for the trustees to be able to identify all the potential beneficiaries. There had been an assimilation of the test for certainty of mere powers[20] to the test for certainty of trust powers or powers in the nature of a trust. The appropriate test was whether it could be said with certainty that any given individual is or is not a member of the class. This was the test which had been formulated by Lord Wilberforce in *McPhail* v. *Doulton.*[21]

Having accepted Lord Wilberforce's formulation of the test, the Chief Justice went on to apply it to the disposition before him. He held that in the light of that test the gift would fail for uncertainty as a non-charitable trust:[22]

> [T]he bequest fails for uncertainty . . . because of the inclusion of the words "Toronto member" and "the Quarter Century Club". As to the words "Toronto member", it is impossible, not merely difficult, to de-

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[1968] Annual Survey of Commonwealth Law 438. The Chief Justice may well have considered that it was not necessary to discuss this point in view of the fact that certain purpose trusts were saved by s. 16 of the Ontario Perpetuities Act, R.S.O., 1970, c. 343. Yet, one can counter with the comment that there exists some doubt as to the scope of this legislation—see [1968] Annual Survey of Commonwealth Law, at p. 378 *et seq.*

[16] *Supra,* footnote 5, at pp. 659-660.

[17] [1955] Ch. 20 (C.A.).

[18] *Supra,* footnote 3.

[19] *Supra,* footnote 5, at p. 656.

[20] As set out in *Re Gulbenkian's Settlements,* [1970] A.C. 509.

[21] *Supra,* footnote 3. The implications of the House of Lords decision are discussed in Hanbury's Modern Equity (9th ed., 1969), see 1972 supplement. See also J. W. Harris (1971), 87 L.Q. Rev. 31. For recent applications of the *McPhail* v. *Doulton* test, see *Brown* v. *Gould,* [1972] Ch. 53, at p. 57 (a summary); *Re Baden's Deed Trusts (No. 2),* [1973] Ch. 9 ("relatives or dependants"); and see *Blausten* v. *I.R.C.,* [1972] Ch. 256 (power to add any persons with settlor's consent). And for a recent academic comment on the topic, see Christine Davies (1972), 50 Can. Bar Rev. 539.

[22] *Supra,* footnote 5, at p. 657.

termine whether the testator meant members of the club who resided in Toronto at the time when the funds became distributable, or those at that date who were employed in the Toronto store, or those who were both members of the club and were employed in the store, or those who were members but had since retired from working at the Toronto store, or those who had been members and had resided in Toronto or had been employed in the Toronto store but had moved elsewhere.

In the opinion of the Chief Justice this disposition provided an excellent illustration of linguistic uncertainty. He reached this decision by applying the test set out in *McPhail* v. *Doulton*, which he was free to do because he had characterized the trust as a private trust and not a charitable purpose trust.[23] This minority judgment is important for its unequivocal acceptance of the principles set out by the House of Lords in *McPhail* v. *Doulton*, hitherto not applied in Canada.

An application of those principles resulting in the use of a less stringent test for the certainty of trust powers will mean many trusts will be saved. This will certainly be welcomed by conveyancers and draftsmen who will now not have to ensure that the trustees can compile a complete list of potential beneficiaries. Although the suggested application of the new test is based solely on the opinion of a minority judge in the Ontario Court of Appeal, this conclusion is reinforced by the fact that the majority in the same case indicated that they would have followed the approach of the Chief Justice if they had held that the trust had not been one for charitable purposes.[24]

II. *Re Bethel in the Supreme Court of Canada.*

On the appeal to the Supreme Court, the judgment of the court was delivered by Spence J. The first issue addressed by the judge was whether or not all the purposes of the trust could be said to be charitable. In determining this question, he indicated that it is perfectly proper to interpret the words of the will in the context of the will as a whole and to consider the factual situation in which the testator wrote these words. This principle was used in the case of *Re Wall, Pomeroy* v. *Willway*.[25] The learned judge also mentioned that a further principle of interpretation was relevant in construing charitable bequests; they must be given a benignant construction. This rule had been applied by the House of Lords

[23] If one assumes that the trust in this case was one for persons and purposes (similar to the trust in *Re Denley*) and not a private trust, there is some doubt as to whether the *McPhail* v. *Doulton* certainty test should be applied to this trust. For a consideration of this question see the Supplement to Hanbury, *op. cit.*, footnote 21.

[24] *Supra*, footnote 5, at p. 667.

[25] (1889), 42 Ch. D. 510; see also *Gibson* v. *South American Stores (Gath and Chaves) Ltd.*, [1950] Ch. 177.

in a case *Bruce* v. *Presbytery of Deer*,[26] where Lord Chelmsford had indicated that "when it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void and the other which would render it effectual, the latter must be adopted".[27] The final conclusion of the Supreme Court on this point was to agree with Jessup J.A., in the Court of Appeal (although the grounds on which they do so are somewhat unclear) that the gift was exclusively for charitable purposes, within the poverty head.

The next issue to be determined was whether the trust was valid bearing in mind that the class of possible beneficiaries did not include every member of the public, but was limited to the Toronto members of the T. Eaton Quarter Century Club.[28] The first consideration was whether the public benefit element is a necessary requirement with trust for the relief of poverty.[29] Spence J., said that as the club in this case contained over 7,000 members, the trust "might be considered to apply to a significant portion of the general public".[30] However, he did not base his judgment on that point, but went on to indicate that where a trust is for the relief of poverty "the courts have not required the element of public benefit in order to declare in favour of the validity of the trust".[31]

The learned judge referred to the Privy Council decision of *Re Cox*[32] where the issue of whether or not the public benefit requirement had to be satisfied in the case of trusts for the relief of

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[26] (1867), L.R. 1 H.L.C. 96.

[27] *Ibid.*, at p. 97. It is doubtful whether this principle should be taken too far, especially in relation to the issue of whether or not a particular gift is charitable. The principle will certainly apply once it is clear that the court is dealing with a *charitable* gift, but the most that can be done in relation to the issue of determining whether a gift is charitable or not, is to say that the court infers from very slight circumstances that a testator means to give the whole of his estate to charitable purposes. There is good authority for this point in the case of *A.-G.* v. *Skinner's Co.* (1872), 2 Reuss. 407.

[28] This was the point which was not considered by Jessup J.A., in the Court of Appeal.

[29] It should be noted that there are two separate aspects to the "public benefit" question: (a) *Benefit* to the public—this aspect was considered in the case of *Gilmour* v. *Coats*, [1949] A.C. 426; and (b) the question whether the benefit is for a sufficient section of the public—this point was considered in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*, [1951] A.C. 297. The distinction was recognized by Lord Cross in *Dingle* v. *Turner*, *supra*, footnote 4, at p. 622 *et seq.*

[30] *Supra*, footnote 1, at p. 105. To have based his decision on this point would have been to disregard the House of Lords decision in the *Oppenheim* case, *ibid.*, although it would be within the spirit of certain dicta of Lord Cross in *Dingle* v. *Turner*, *ibid.*, at p. 624.

[31] *Ibid.*

[32] [1955] A.C. 627. For a further recent decision which leaves the issue open, see *Re Wedge* (1968), 67 D.L.R. (2d) 433 (B.C.C.A.).

poverty was left open. Reference was then made to the English Court of Appeal decision in *Gibson* v. *South American Stores (Gath and Chaves) Ltd.*[33] where a trust for the relief of poor employees had been upheld as a valid charitable trust. Trusts for poor employees had been regarded as somewhat suspect until the decision of the House of Lords in *Dingle* v. *Turner.*[34]

Although the case before the Supreme Court was clearly within the older exceptions, Spence J., accepted the decision in *Dingle* v. *Turner.* In that case a trust for poor employees of a particular company had been upheld as a valid charitable trust. As Lord Cross stated:[35]

> [T]o draw a distinction between different sorts of "poverty" trusts would be quite illogical and could certainly not be said to be introducing "greater harmony" into the law of charity. Moreover, though not as old as the "poor relations" trusts, "poor employees" trusts have been recognized as charities for many years; there are now a large number of such trusts in existence; and assuming, as one must, that they are properly administered in the sense that benefits under them are only given to people who can fairly be said to be, according to current standards, "poor persons", to treat such trusts as charities is not open to any practical objection . . . . The dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *Re Scarisbrick.*

One can conclude from the judgment of the Supreme Court in the *Jones* case that the principles enunciated in *Dingle* v. *Turner* have been accepted as good law in Canada. The Supreme Court has finally supplied the answers to the questions left open by *Re Cox* and *Re Wedge.* The *Jones* case has established an exception to the principle that charitable trusts must be for the public benefit—this requirement is no longer necessary with trusts for the relief of poverty.

Having decided that the disposition in Bethel's will was a charitable trust for the relief of poverty, Spence J., went on to consider what was meant by the words "Toronto members of the Eaton Quarter Century Club". He said that this was a question of interpretation to which the following principle applied:[36] "The

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[33] *Supra,* footnote 25.

[34] *Supra,* footnote 4. The "poor relations" and "poor club members" cases, *supra,* footnote 2, had been sanctioned by the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd., supra,* footnote 29 but the House of Lords had left open the question of the validity of trusts for poor employees.

[35] *Ibid.,* at p. 623. The distinction set out in *Re Scarisbrick, supra,* footnote 9, is that the difference between a public or charitable trust and a private trust depends on whether, as a matter of construction, the gift is for the relief of poverty amongst a particular description of poor people, or is merely a gift to particular poor persons or named individuals, the relief of poverty among them being the motive of the gift.

[36] *Supra,* footnote 1, at p. 108.

words must be interpreted in the light of the test as cited by Lord Wilberforce in *McPhail* v. *Doulton*, that the trust is valid if it can be said with certainty that any given individual is or is not a member of a class." It is not clear why an appeal was made to the principles set out in the *McPhail* case. Had the learned judge forgotten the rule mentioned by Jessup J.A., in the Court of Appeal, that, in connection with charitable purpose trusts, "once a clear charitable intention is found the Court will prevent a gift failing for uncertainty by application of *cy-près*"?

It is submitted that, given that the Supreme Court was dealing with a charitable purpose trust, any challenge to the trust made by counsel for the next-of-kin, or the residuary legatees, on the basis that the testator's meaning as to the objects of the trust was unclear, was in reality a claim that the trust was invalid on the grounds of uncertainty. This being so, there are clear principles of equity which apply to determine the issue. The question is whether the trust can be executed as it stands, or whether it is necessary for the court to clarify the details of the trust by means of the *cy-près* doctrine.

The only possible way in which the principles outlined in *McPhail* v. *Doulton* could be relevant is in determining the issue of whether the trustees should be left to distribute the trust property in accordance with the terms of the charitable trust by way of the scheme *cy-près*. Yet the *McPhail* case, as we have seen, deals with the minimum certainty requirements for objects of a private trust. It has nothing to do with trusts for charitable purposes. One must therefore conclude that the approach taken by Spence J., in the *Jones* case is highly questionable. The principles which should have been applied, and further reasons against the application of the *McPhail* v. *Doulton* test will be examined in the next section.

III. *Exclusively Charitable Purposes and the Cy-Près Doctrine.*

Reference must now be made to two principles arising from the *Jones* case which have caused some problems in charitable trusts cases. It will be convenient to refer first to the requirement that charitable trust must be "exclusively charitable". Secondly, the rules for applying charitable trusts *cy-près* where there is some uncertainty concerning the objects will be discussed.

1. *Exclusively Charitable Purposes.*

It will be recalled that in the judgment of Gale C.J.O., in the Ontario Court of Appeal, it was argued that the word "or" in the

phrase "needy or deserving" should be given a disjunctive meaning. This meant that the trust failed because it could not be said that the trust was for purposes exclusively charitable. On the other hand, Jessup J.A., and the Supreme Court gave the word "or" its conjunctive meaning which resulted in the trust being saved because all the purposes of the trust were consequently charitable. The requirement that a gift does not create a valid charitable trust unless every object or purpose is wholly charitable is of long standing in the law.[37] It means that the court is faced with a difficult question of interpretation in relation to a will or trust instrument to decide whether or not the chosen purposes are exclusively charitable. Inevitably, when one is dealing with questions of interpretation or construction different judges may reach different conclusions, and the fate of a particular disposition may turn on the odd ill-chosen word.

This problem has led to the introduction in some jurisdictions of legislation aimed at remedying trusts which would otherwise fail on account of the presence of a non-charitable purpose. For example, in British Columbia, section 2(38) of the Laws Declaratory Act,[38] provides that "where a person gives, devises, or bequeathes property in trust for a charitable purpose that is linked conjunctively or disjunctively in the instrument by which the trust is created with a non-charitable purpose, . . . the gift, devise, or bequest, is not thereby invalid but operates solely for the benefit of the charitable purpose".[39]

Given the continued existence in some Canadian provinces of the old rule requiring that trusts be for exclusively charitable purposes, the courts will continue to be presented with difficult questions of interpretation. As in the *Jones* case, it will be necessary to determine whether the words "and" and "or" are to be given a disjunctive or conjunctive meaning. The interpretation of trust instruments can be a time consuming and expensive process. This would appear to make the idea of remedial legislation similar to that in force in British Columbia, a very attractive proposition. That is, if it is felt to be desirable to encourage and save charitable trusts.

[37] See *Morice* v. *Bishop of Durham, supra,* footnote 15; also *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson, supra,* footnote 13, and *Brewer* v. *McCauley,* [1954] S.C.R. 645 (S.C.C.). This topic is also canvassed in detail in Snell, Principles of Modern Equity (27th ed., 1973), p. 152 *et seq.*, and in A. W. Scott, Trusts for Charitable and Benevolent Purposes (1945), 58 Harv. L. Rev. 548.

[38] R.S.B.C., 1960, c. 213.

[39] For more complex legislation to save trusts where a non-charitable purpose is present, see Charitable Trusts (Validation) Act 1954, c. 58 (Eng.). Also, in New Zealand and in two Australian states, New South Wales and Victoria, statutes have provided that a trust shall not be held invalid on account of the presence of some non-charitable purpose.

2. *The Application of the Cy-Près Doctrine to Cure Uncertainty in Charitable Trusts.*

The *cy-près* doctrine has been the subject of some academic comment in Canada in recent years.[40] This literature, together with recent texts, have given little consideration to the application of the *cy-près* doctrine where charitable trusts have been held to be impracticable on account of uncertainty of objects. A reference to Halsbury[41] reveals the following rule: "where a clear charitable intention is expressed [the trust] is never allowed to fail on account of the uncertainty or impracticability of the object, but the particular mode of application will be directed *cy-près* by the Crown in some cases, and by the court in others."

The leading English case on this principle is *Moggridge* v. *Thackwell*.[42] Lord Eldon noted in that case that where a donor, having first confined himself to charity, fails to specify the particular form of charity which is to benefit, the court may direct a scheme to implement the trust. Lord Eldon elaborated that "the general principle thought most reconcileable to the cases is, that, where there is a general and definite purpose, not fixing itself upon any object, as this in a decree does, the disposition is in the King by Sign Manual; but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust".[43]

This passage indicates that there are two entirely separate "uncertainty" situations with charitable trusts. First, there are those cases where Crown has jurisdiction as *parens patriae* to dispose of gifts by Sign Manual. Secondly, there are the cases where the court has jurisdiction to apply the trust *cy-près*. Assuming that the Supreme Court of Canada in the *Jones* case had been concerned to apply the equitable principles governing the application of charitable trusts where there is uncertainty, the court should have determined whether this was a Sign Manual case or whether it was one where the court could properly exercise its *cy-près* jurisdiction. The principles governing this choice will now be discussed.

A. *The Sign Manual Cases.*

There is a long line of English authority which secures for the Crown the right to apply gifts by Sign Manual where the gift was

[40] See, for example, R. Thompson, Public Charitable Trusts which Fail: an Appeal for Judicial Consistency (1971), 36 Sask. L. Rev. 110; and L. Sheridan, *Cy-près* in the Sixties: Judicial Activity (1968), 6 Alta L. Rev. 16.

[41] *Op. cit.*, footnote 12, Vol. 4, p. 275.

[42] (1803), 7 Ves. Jr. 36.

[43] *Ibid.*, at p. 86.

given to charity generally without a trust being interposed, in situations where the original gift cannot be carried out or is uncertain.[44] The Crown would be called upon to dispose of property by Sign Manual where, for example, the property was simply given "to charity" or where property was given "unto my country England for—own use and benefit absolutely".[45] Similarly, the jurisdiction would arise where property was given to a non-existent body.[46] In each case, one of the prerequisites for disposition of the property by the Crown is the presence of a general charitable intention.

The Sign Manual jurisdiction has recently been the subject of a British Columbia decision in *Re Conroy*.[47] There, a testator had left the residue of his estate to a non-existent organization. The court decided that there was a clear intention to benefit a charitable purpose and that the gift should not be allowed to fail. The question then arose as to how the property should be applied. Was this an appropriate situation for the exercise of the Sign Manual jurisdiction by the Crown? It was held that, although the Crown has the prerogative to direct the distribution of gifts made to charity in general terms without trustees or specific objects, the court could assume this jurisdiction with the consent of the Attorney General and could therefore direct the distribution of the residue of the property with the concurrence of the Attorney General. Macfarlane J., followed an English decision in which this course had been adopted.[48] The learned judge said: "In my opinion, there should be no difference in principle between [the Sign Manual] procedure and one where the Court gives directions, with the concurrence of the Attorney General who has been represented by counsel upon hearing of the application."[49]

It cannot be doubted that this is an eminently satisfactory approach. It is difficult to envisage a situation where the Crown would have any special interest in taking unto itself the jurisdiction to apply uncertain charitable gifts. Any possible objection to the court exercising the Sign Manual jurisdiction is met by the rule requiring the consent of the Attorney General to be given to any particular application of the property by the court. The procedure set out in *Re Conroy* makes even more sense in view of the fact that numerous cases can be cited where the Canadian courts have exercised jurisdiction to apply uncertain gifts *cy-près*, when tech-

[44] See *Moggridge* v. *Thackwell, supra,* footnote 42, following *A.-G.* v. *Syderfen* (1683), 1 Vern. 224. See also *Paice* v. *Archbishop of Canterbury* (1807), 14 Ves. Jr. 364; *Nightingale* v. *Goulbourn* (1847), 5 Hare 484; *In re Smith,* [1932] 1 Ch. 153; and *In re Bennett,* [1960] 1 Ch. 19.

[45] See *In re Smith, ibid.*

[46] See *In re Bennett, ibid.*

[47] (1973), 35 D.L.R. (3d) 752 (B.C.S.C.).

[48] See *Re Songest,* [1956] 2 All E.R. 765.

[49] *Supra,* footnote 46, at p. 756.

nically the jurisdiction should have been exercised by the Crown under the rules of Sign Manual.[50]

Therefore, although there is very little functional difference now between the Sign Manual cases and the *cy-près* jurisdiction of the courts, the first step which should have been taken in the *Jones* case, was to decide that the court was clearly not dealing with a Sign Manual situation. What it was faced with, was a case involving the potential jurisdiction of the court to apply the trust *cy-près*. It is to this matter that we now turn.

B. *Cy-près Jurisdiction Exercised by the Court.*

It is the creation of a trust by a settlor or testator for uncertain charitable purposes which is the key to the *cy-près* jurisdiction of the courts. The principles on which a court acts to cure uncertainty in a trust which has displayed a general charitable intention can be ascertained from a number of English authorities. The jurisdiction of the court arises no matter how general the charitable purpose expressed in the will or trust instrument.[51] The court will also be able to act to save a specific charitable purpose from failing on account of uncertainty of ambit, for example, where the beneficial class is not exactly defined.[52] The important point is that the court treats charity in the abstract as the substance of the gift and regards the particular disposition as the mode of implementing that gift, and a distinction is drawn between the charitable intention, which must be clear and the mode of executing it, which though vague and indefinite, does not affect the validity of the gift.

By way of illustration of this jurisdiction, reference may be made to *In Re Robinson*,[53] where property was given on trust "to the German Government for the time being for the benefit of its soldiers disabled in the late War". The question of the validity of this disposition came before the English Chancery Court. Maugham J., held that there was no objection to this gift from the point of view of public policy. Furthermore, this charitable gift did not fail on account of uncertainty as to which objects would benefit. As Maugham J., stated:[54]

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[50] See, for example, *Re Hogle*, [1939] 4 D.L.R. 817 (Ont. S.C.); *Re Rice*, [1944] 1 D.L.R. 62 (N.S.S.C.); *Re Johnson* (1968), 66 D.L.R. (2d) 688 (Ont. H.C.); and *Re Brooks* (1969), 4 D.L.R. (3d) 694 (Sask. Q.B.).

[51] See *Morice* v. *Bishop of Durham*, *supra*, footnote 15, per Lord Eldon, at pp. 404-405.

[52] See *Mills* v. *Farmer* (1815), 1 Mer. 55; *Re White*, [1893] 2 Ch. 41; *Re Forrester* (1897), 13 T.L.R. 555; *Re Pyne*, [1903] 1 Ch. 83; *Re Gott*, [1944] Ch. 193.

[53] [1931] 2 Ch. 122 (Ch. D.).

[54] *Ibid.*, at pp. 128-129. For a more detailed discussion of the principles governing this variety of the *cy-près* doctrine, see Sheridan and Delaney, The *Cy-près* Doctrine (1959), Ch. 3.

> It is well known that a charitable gift . . . does not fail merely because there is an uncertainty as to the mode of carrying out the gift. In numerous cases of gifts for charitable purposes it is necessary to fill up a number of details in regard to which the testator or donor has not described his wishes in clear terms. In such cases the gift does not fail, but the Court fills up the details of the donor's charitable intention by means of a scheme . . . the Court is doing no more than completing the trusts to carry out the objects . . . .

This jurisdiction has also been exercised by Canadian courts on a number of occasions.[55] Perhaps the most instructive illustration is the case of *Re Leslie*.[56] There, a testator provided in his will as follows: "I will designate by codicil to what charities the said remaining portion or what may be left of the said trust shall be given." The testator failed to designate these charities by codicil, and the question arose as to whether there was a valid general charitable bequest which could be applied *cy-près* by the court.

It was held that the testator had envinced a clear general charitable intention and that the court could apply the bequest *cy-près*. Greene J., noted that there was ample authority[57] for the rule that "the court will make the selection which the testator intended to have made himself, because that is only a mode of carrying out the bequest".[58] It is properly the function of the court to correct any uncertainty in regard to the objects of a charitable trust.

The application of the *cy-près* doctrine is dependent on the presence of a general charitable intention in the will. The existence or non-existence of such an intention is a matter of construction. There is no need for the testator to have used any particular words. A general charitable intention will be found to exist wherever a testator intended the subject matter of the gift to be applied to charity, notwithstanding the failure of the particular object or mode of application.[59] The crucial problem is to know where to draw the line between a general charitable intention and the situation where the testator has made a gift to a particular charitable institution, or to accomplish some particular charitable purpose. If the testator intended to benefit not general charity, but the

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[55] See, *Re Leslie*, [1940] O.W.N. 345 (Ont. H.C.); *Re Brown*, [1950] 1 D.L.R. 777 (N.S.S.C.); *Re Wright*, [1951] 2 D.L.R. 429 (N.S.S.C.); *Re O'Brien* (1958), 15 D.L.R. (2d) 484 (N.S.S.C.); and *Re Brooks*, *supra*, footnote 50.

[56] *Ibid.*

[57] The judge cited a number of English authorities including *Moggridge* v. *Thackwell*, *supra*, footnote 42.

[58] *Supra*, footnote 55, at p. 347.

[59] See *Clark* v. *Taylor* (1853), 1 Drew 642. It should be noted that a general charitable intention for the purposes of the *cy-près* doctrine is not the same as a determination that a gift is a charitable gift. See Pettit, Equity and the Law of Trusts (2nd ed., 1970), p. 201 *et seq.*

specified or particular object, and it is impossible to carry out the testator's object, then the gift fails and will not be applied *cy-près*.[60]

The problem of finding a general charitable intention also arises in relation to situations involving *cy-près* modification (that is where there is an initial impossibility concerning an otherwise perfectly precise trust). There exists a long line of English authority on this point,[61] as well as relevant Canadian authority.[62] The type of inquiry which the court makes in these cases is illustrated in the recent British Columbia decision of *Re Harris*.[63] There, the deceased by his will had directed his trustee to pay the income from his estate to "the Prairie Club, Victoria B.C. or its successor or successors". It was held that, as the Prairie Club had been formed for benevolent and not for charitable purposes, this was not a gift for a charitable institution.[64] The question then arose as to whether the trust income could be applied *cy-près*. Wootton J., attempted to find in the will a general charitable intention, but in this instance was unable to do so.[65] This was not, therefore, a case for the application of the *cy-près* doctrine.

Once it has been determined that there exists a general charitable intention in a gift in which the objects have been expressed with some uncertainty, the issue arises as to what test should be applied to determine whether the trust should be applied *cy-près* by the court. It would appear that the appropriate test is whether or not it is impossible or impracticable to execute the trust as it stands.[66] This is the same test which is applied to determine whether a trust should be modified *cy-près*.[67]

The issue for the court to decide is whether the trustee can act or not. This is a factual question and if the trustee cannot act, the

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[60] This distinction was recognized by Kindersley V.C., in *Clark* v. *Taylor*, *supra*, footnote 54, at p. 644: "The question is whether the gift in this will is to be considered as a gift intended for charitable purposes or whether it is simply intended for the benefit of a particular private charity."

[61] See *Re Wilson*, [1913] 1 Ch. 314; *Re Satterthwaite's Will Trusts*, [1956] 1 All E.R. 919 (C.A.); and *Re Lysaght*, [1966] Ch. 191. And see also, J. C. Hall, [1957] C.L.J. 87.

[62] See, for example, *Jewish Home for the Aged of British Columbia* v. *Toronto General Trusts Corporation*, [1961] S.C.R. 465 (S.C.C.). For a discussion of this case and others on the same topic, see L. Sheridan, *op. cit.*, footnote 40; and R. Thompson, *op. cit.*, footnote 40.

[63] [1973] 2 W.W.R. 463 (B.C.S.C.). For a further recent decision on point, see *Re Hunter*, [1973] 3 W.W.R. 197 (B.C.S.C.).

[64] *Ibid.*, at p. 467.

[65] *Ibid.*, at p. 468.

[66] See *Moggridge* v. *Thackwell*, *supra*, footnote 42, at p. 69: whether "the generality of the gift made the effectuating it impracticable"; *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. and W. 294, at p. 308 (impossibility of implementing purpose); *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; and *Re Robinson*, *supra*, footnote 53.

[67] See *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460 (C.A.); and *Re Wilson*, *supra*, footnote 61.

court must fill in the details. What ground is there, therefore, for applying the certainty test as set out in *McPhail* v. *Doulton*? That test was designed to provide some minimum certainty in the case of private trusts, and to ensure that if there was a failure to execute such trusts by the trustee, the court could act in the trustee's place. With charitable trusts, on the other hand, the trust is valid once the general charitable intention has been found. There is no need for the trust to meet some minimum certainty requirement. The sole question with a charitable trust which contains some uncertainty as to the objects, is to determine whether the court will clarify the objects and fill in the appropriate gaps to enable the trust to be carried out. This is a purely factual question and in the writer's view there is no need for the courts to embrace a complicated test to determine the issue.

Conclusions

The litigation concerning the Bethel will has provided valuable opportunities for the discussion of several important issues in the law of trusts. It can be stated with some confidence that two recent developments in English law will now be applied in Canada. First, it appears that there is a new test for certainty of objects with a trust power contained in a private trust. Secondly, it is apparent that in connection with charitable trusts for the relief of poverty, it is no longer necessary to show the public benefit requirement.

The case also illustrates the point that the requirement that a charitable trust be for exclusively charitable purposes may cause the courts considerable difficulty. The fact that litigants may have to become involved in expensive and time-consuming litigation to determine whether a particular trust satisfies the "exclusively charitable" requirement, indicates that there may well be a need for remedial legislation similar to that enacted in British Columbia.

Finally, the opinion of the Supreme Court of Canada in the case shows that the courts are not yet entirely fluent in the application of the principles surrounding the *cy-près* doctrine. This is particularly so in relation to the variety of the doctrine relating to the application of trusts *cy-près* in the case of uncertainty. It is to be hoped that in the future Canadian judges will follow the lead of their English counterparts and rely on the established principles when uncertain trusts are to be applied *cy-près*.

It is submitted that there are sound functional reasons for the application of these established principles. First, one is dealing with gifts for charitable purposes. This has important consequences. The gift being for purposes rather than persons, there

will generally be no human beneficiary interested in enforcing the trust. Thus, it is not important for the court to require the same kind of certainty as is necessary for private trusts for persons. Also, the powers of general enforcement of charitable gifts have long been in the Attorney General. The role of the Attorney General can be carried out so long as a practical level of certainty is met.

To help the Attorney General fulfil his function, Equity developed the dichotomy of Sign Manual jurisdiction and *cy-près* jurisdiction. These categories are now in the process of merging into one. Yet certain equitable principles survive and the precedents discussed in this article illustrate the scope and nature of these principles. Unfortunately in the *Jones* case, the precedents were not followed. This is to be lamented as the precedents had value and expressed a justifiable policy.