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POWER TO APPOINT FOR A NON-CHARITABLE PURPOSE: A DUOLOGUE OR ENDACOTT'S GHOST

L. A. SHERIDAN

Being an Englishman, during his life Endacott could consult his counsel only through the medium of a solicitor. Now that he has gone to that land from which no frustrated litigant returns, communication is even more cumbersome. Fortunately, however, a record exists of what is believed to be the most literal post mortem examination of a decided case, when Endacott was enabled to consult his counsel through the solicitation of a medium. . . .

Counsel: I am ready. Are you there? Welcome to my chambers.
Endacott: I am here.
Counsel: Tell me your problem.

I

Endacott: When I was alive, I made a will, and after other gifts, I said, "Everything else I leave to North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself. . . ." When I was newly peaceful in my grave, the Court of Appeal said this was a void trust. I have been turning this over in my mind as I turn in my grave. Can it be that the Endacott desire for a useful memorial is in justice to result in the useless memorial called Re Endacott? What justice is there in this? And why did Lord Evershed M.R. add also "that, in my judgment, the proposition stated in Mr. Morris and Professor Barton Leach's book (p. 308) that if these trusts should fail as trusts they may survive as powers, is not one which I think can be treated as accepted in English law"? What are "these" trusts? Why are they void? Why cannot they survive as powers? What does it mean? What are Mr. Morris and Professor Leach doing about it?

Counsel: Your questions are many and some are difficult. Let us commence with the first: "these" trusts are found in cases where

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2 (1960) Ch. at 246.

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property is vested in trustees and no persons are named as beneficiaries, but purposes are stated which are not charitable.

Why are they void? Well, indeed, they are not all void. There are cases in which some examples have been upheld. But of them, Lord Evershed M.R. said: "Still, in my judgment, the scope of these cases (and I can call them anomalous because they have been so called both in the book of Mr. Morris and Professor Barton Leach and in the course of the argument) ought not to be extended. So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of perpetuities did not arise; and, in my judgment, that result would be out of harmony with the principles of our law. No principle, perhaps, has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries. These cases constitute an exception to that general rule."

Endacott: Wherein lies the disharmony? What is wrong with valid limitless heads of non-charitable trusts?

Counsel: It is generally accepted nowadays that Underhill was right when he wrote: "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."

Underhill was referring to the private, or non-charitable trust (the Court of Appeal held your residuary gift not charitable), and only a person can be a beneficiary. You specified no person to benefit; there was no obligation because there was no one who could enforce it. Roxburgh J. held in Re Astor's Settlement Trusts that an attempt to

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3 Ibid.


5 [1952] Ch. 534, [1952] 1 T.L.R. 1003, [1952] 1 All E.R. 1067, 96 S.J. 246. This trust was also held void on the ground of uncertainty of the purposes. In England, the rule against non-charitable purpose trusts is thought to originate with Morice v. Bishop of Durham 9 Ves. Jr. 399, 32 E.R. 656 (1804) (Grant, M.R.), 10 Ves. Jr. 522, 32 E.R. 947 (1805) (Lord Eldon), where uncertainty also existed. Other such holdings or dicta are to be found in Re Barnett 24 T.L.R. 788 (1908) (Parker, J.), where the Rule Against Perpetuities was also infringed; Bowman v. Secular Society, Ltd. [1917] A.C. 406, 441, 86 L.J. Ch. 568, 117 L.T. 161, 170, 33 T.L.R. 376, 61 S.J. 478 (H.L.), per Lord Parker
create a trust for non-charitable purposes failed as an express trust and
gave rise to a resulting trust in favour of the donor or his representa-
tives.

Endacott: But did not both you and Lord Evershed say that these
non-charitable purposes have sometimes been upheld?

Counsel: Yes. Such gifts have been held valid when given for tombs
and monuments...

Endacott: But...

Counsel: Let me give the full list first: tombs and monuments, the
of Waddington (also uncertainty); Re Wood [1949] Ch. 498, [1949] 1 All E.R. 1100,
[1949] L.J.R. 1509, 93 S.J. 357 (Harman, J.) (also uncertainty); and Re Shaw [1957]

In Australia, the rule against non-charitable purpose trusts was the sole ground of the
decision of Roper J. in Public Trustee v. Nolan [1943] 43 S.R. (N.S.W.) 169, 60 (Sup.
Ct.) 84, and this was followed by Smith J. in Re Producers' Defence Fund [1954] Argus
L.R. 541, [1954] V.L.R. 246 (Sup. Ct.), where the Rule Against Perpetuities was also
W.N. (N.S.W.) 226 (Sup. Ct.), Else Mitchell, J. held void for uncertainty and per-
etuity a gift "to the Proprietors for the time being of the Sydney Morning Herald
for appropriation by them in their absolute discretion for the advancement of deserving
journalists but in such manner as will perpetrate [sic] the name of my late father. . .

The learned judge said (at 228): "I should have been disposed to the view that the
so-called trusts of imperfect obligation relating to animals, graves and monuments
are not really trusts at all; they are merely testamentary directions which a trustee
may follow within the limits set by the Rule Against Perpetuities without being liable
for breach of trust at the suit of a beneficiary such as a residuary legatee or a remain-
derman. In some cases, they have been described as powers in the nature of trusts, but this
seems equally to misconceive their real character as mere unenforceable testamentary
directions." (This is a novel formulation, and one which does not as obviously as the
learned judge evidently considered, result in the application of trust-like criteria of
certainty.)

Roxburgh J.'s decision is discussed by Marshall, The Failure of the Astor Trust
(1953) 6 CURRENT LEGAL PROBLEMS 151 and in Trusts for Non-charitable Purposes
(1953) 17 CONVEY (N.S.) 46. Support for the rule against non-charitable purpose trusts
is given by Gray, Gifts for a Non-Charitable Purpose (1902) 15 HARV. L. REV. 509 and
by Sweet, Restraints on Alienation" 33 L.Q.R. 342 (1917). See also L. A. Sheridan
Purpose Trusts and Powers 4 UNIV. OF W. AUSTR. ANN. L. REV. 235. As to trusts for
non-charitable purposes generally, see MORRIS & LEACH, RULE AGAINST PERPETUITIES
(2nd ed.), 307-27.

6 Mellick v. President and Guardians of the Asylum, Jac. 180, 37 E.R. 818 (1821)
(Plumer, M. R.) (to erect a monument to the testator's memory); Adnam v. Cole
6 Beav. 353, 49 E.R. 862 (1843) (Lord Langdale, M. R.) (to erect such monument
as the trustees thought fit); Trimmer v. Danby [1856] 4 W.R. 430, 25 L.J. Ch. 424,
20 J.P. 709, 2 Jur. N.S. 367 (Kindersley, V.-C.) ("to erect a monument to my memory
in St. Paul's Cathedral, among those of my brothers in art"); Mussett v. Bingle [1876]
W.N. 170 (Hall, V.-C.) (to erect a monument to the testator's wife's first husband);
Pirbright v. Salwey [1896] W.N. 86 (Stirling, J.) (to keep up and decorate a family
burial enclosure); Re Hooper [1932] 1 Ch. 38, 101 L.J. Ch. 61, 146 L.T. 208 (Maughan,
J.) (for the care and upkeep of a vault and certain graves and monuments); Re Filshie
support of the donor's animals, non-charitable religious purposes, the furtherance of foxhunting, the abolition of vivisection and the pro-


In Scotland, in M'Caig v. Glasgow University [1907] S.C. 231, 44 S.L.R. 198, 14 S.L.T. 600 (Lord Justice-Clerk and Lords Kyllachy, Stormonth-Darling, and Low), a monument trust was held void for want of a beneficiary. A testator set up a trust and described the objects as being the erection of monuments and statues of himself and his brothers, sisters, father and mother, and of artistic towers at prominent points on his estates. Declining to hold the purposes contrary to public policy, the Court of Session proceeded on the basis that mere disinheritance was not valid without giving the property to someone. This point of view was upheld in M'Caig's Trustees v. Kirk-Session of the United Free Church of Lismore [1915] S.C. 426, 52 S.L.R. 347, [1915] 1 S.L.T. 152 (Lords Salvesen, Guthrie and the Lord Justice-Clerk), where, however, it was suggested that there were exceptions in respect of the provision of a burial place and the erection and repair of a suitable monument for the testator, as well as the making of statues of or memorials to historical personages or local celebrities. Here, the testatrix left property for the erection and upkeep of bronze statues of her parents and nine children, each statue to cost at least £1000. This was held void both for want of a beneficiary and as contrary to public policy by virtue of the grossness of the proportions of the gift. (This latter topic is not considered in this conversation.) In Aitken's Trustees v. Aitken [1927] S.C. 374, [1927] S.L.T. 308, [1927] S.N. 26, only Lord Blackburn was for striking down the trust for want of a beneficiary. The gift was for “a massive equestrian bronze statue of artistic merit, representing me as Champion at the Riding of the Towns Marches...” The testator estimated the cost of construction at £5,000 or more. Lord Sands said there was no principle that required a beneficiary; the purpose, to keep the testator's memory alive, was reasonable, but the gift was void because it was for an “irrational, futile, and self-destructive scheme...” (p. 383): “The statue's erection would cause the memory of the testator to stink in the nostrils of the community of Mussleburgh...” ([1927] S.C. at 382, [1927] S.L.T. at 312).

Lord Blackburn held the gift void for want of a beneficiary and as contrary to public policy. Lord Ashmore based the voidness not on the absence of a beneficiary, but on the absence of a benefit to anyone.

See also Scott, TRUSTS (2nd ed.), vol. 2, 871, F.N. 1, 872, F.N. 3.


8 Ireland: Phelan v. Slattery [1887] 19 I.R.,Ir. 177 (Chatterton, V.-C.) (for the saying of Masses, before this was held to be a charitable purpose); Bradshaw v. Jackman [1887] 21 L.R.Ir. 12 (Porter, M.R.) (masses); Reichenbach v. Quinn 21 L.R.Ir. 138 (1888) (Chatterton, V.-C.) (masses); Re Gibbons [1917] 1 I.R. 448 (Barton, J.) (to dispose of residue “to my best spiritual advantage, as conscience and sense of duty may direct”); Re Ryan's Will Trusts [1925] 60 I.L.T.R. 57 (H.C.) (Johnston, J.) ("for my spiritual benefit"); Re Byrne (1935) I.R. 782 (Supreme Court) ("to be expended for my spiritual benefit, ..."; Re Keogh's Estate [1945] I.R. 13 (Overend, J.) ("for the purposes of the [Carmelite] Order in the Irish Free State").

As to England, see Bourne v. Keane [1919] A.C. 815, 89 L.J.Ch. 17, 121 L.T. 426, 35
tection of animals,10 discretionary trusts,11 and trusts for paying debts.12

Endacott: Did I not leave my residue for a monument? Besides, how is it that the upholding of some non-charitable purposes has not given rise to a general principle that they are valid? Or, if there is a general principle that they are invalid, how were some upheld?

Counsel: Some people have thought there was a principle that non-charitable-purpose trusts were valid. This was the opinion of North J. in Re Dan13 and Romer J. in Re Clarke.14 But the predominant view expressed recently is that of Roxburgh J. in Re Aastor's Settlement Trusts15 that equitable rights under a trust had been hammered out

T.L.R. 560, 63 S.J. 606 (H.L.).

The Alabama Supreme Court, in Festorazzi v. St. Joseph's Catholic Church of Mobile, 104 Ala. 327, 25 L.R.A. 360, 18 So. 394, 53 Am. St. Rep. 48, (1893) struck down a bequest of $2000 to the defendant church "to be used in solemn masses for the repose of my soul." Head, J., giving the judgment of the court, having held the bequest neither to the church for its general purposes nor charitable, said (104 Ala. 327, 330): "It is not valid as a private trust for the want of a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust."

In Wisconsin, before the Supreme Court held gifts for masses charitable (Re Kavanaugh's Estate, 143 Wis. 90, 126 N.W. 672 (1910) 28 L.R.A. (N.S.) 470), the same result had been achieved as in Alabama: McHugh v. McCole, 97 Wis. 166, 72 N.W. 631, 40 L.R.A. 724, 65 Am. St. Rep. 106 (1897).


10 Ireland: Armstrong v. Reeves 25 L.R.Ir. 325 (1890) (Chatterton, V.-C.).
   "In a discretionary trust the beneficiary has no definitely ascertainable interest. . . . Viewed in another way, the discretion in a trustee to distribute principal and income to any or all members of a designated class is tantamount to a special power of appointment." (Per Mereick, J., Thomas v. Harrison, 240 Ohio 2d 148, 191 N.E. 2d 862, 866 (1962).)
15 [1952] Ch. 534, [1952] 1 T.L.R. 1003, [1952] 1 All E.R. 1067, 96 S.J. 246. But see Scott, Trusts (2nd ed.), vol. 2, p. 1507, F.N. 5, citing cases where the court has suggested that it could take the initiative to compel a trustee to perform a non-charitable-purpose trust. Cf. Fidelity Title and Trust Co. v. Clyde, 143 Conn. 247, 256, 121 A. 2d 625, 630 (1956) per O'Sullivan, J., Inglis, C. J., and Baldwin, Wynne and Daly, J. J. concurring. In Re Sill's Estate, 41 Misc. 270, 271, 84 N.Y.S. 213 (1903) the testatrix had given "one hundred and fifty dollars for the repairing and keeping in repair the cemetery on the Maples farm in Hartwick. I will that an iron fence be placed
in litigation between beneficiary and trustee and that there could, therefore, be no trust without a correlative right; also, that there was a practical objection to large funds being in the hands of trustees whom no one could control.

Endacott: Then does this view not apply in the cases when non-charitable-purpose trusts were upheld?

Counsel: Roxburgh J. said these cases were "anomalous [the word used in your case] and exceptional," and that they concerned "matters arising under wills and intimately connected with the deceased" and were probably "concessions to human weakness or sentiment."15a

Endacott: How could the Jesuit Order, the Carmelite Order, the furtherance of foxhunting, the abolition of vivisection or the protection of animals be regarded as intimately connected with the deceased?

Counsel: All your examples, except the furtherance of foxhunting, are drawn from Irish cases. They may not be followed anywhere else. As to foxhunting, perhaps Re Thompson16 is one of the cases Harman L.J. had in mind when he said of your gift, "As for establishing it without the crutch of charity, I applaud the orthodox sentiments expressed by Roxburgh J. in the Astor case,18a and I think, as he did, that though one knows there have been decisions at times which are not really to be satisfactorily classified, but are perhaps merely occasions when Homer has nodded, at any rate these cases stand by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another."17

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Endacott: Then I come back to asking you: did I not leave my residue for a monument?

Counsel: You actually said, "for the purpose of providing some useful memorial to myself..." Now I do not say that there is necessarily any distinction between a monument and a memorial, but you prescribed a useful memorial. This is uncertain. Lord Evershed M.R. declared, "[t]hough this trust is specific, in the sense that it indicates a purpose capable of expression, yet it is of far too wide and uncertain a nature to qualify within the class of cases cited."\(^{18}\)

Endacott: Do the judges not know what is useful?

Counsel: The judges may be certain that some things are useful and certain that other things are not useful, but there may be yet other things of which they can conceive and which they cannot confidently classify as useful or useless.

Endacott: But what the North Tawton Parish Council wanted to do with the money would surely be useful.

Counsel: That is irrelevant. Where there is a trust, it must be possible, at its inception, to list all the possible proper objects of the trust.\(^{19}\) General words like "useful" which have failed in the past in England on this test of certainty include "objects of benevolence and liberality,"\(^{20}\) "deserving objects,"\(^{21}\) "patriotic"\(^{22}\) and "benevolent"\(^{23}\) purposes, and "worthy objects."\(^{24}\) The experience of other countries has been similar.\(^{25}\)

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\(^{18}\) [1960] Ch. at 247.


Endacott: So the position is that if I wanted something done and the parish council were going to do what I wanted, they could be stopped, because they might have decided to do something of which it could be said that it was doubtful whether I wanted it or not: and the money is therefore given to someone I clearly did not want to get it. Is that the law?

Counsel: If you make a trust—if you place an obligation on someone to do something—it must be clear what he can be compelled to do.

Endacott: But you said earlier that only a person could be beneficiary and compel performance of a trust. If I had said I wanted a monument to myself, you say that would have been valid because it is certain enough to be enforced: but it cannot be enforced because there is no beneficiary: so why does it have to be certain enough to be enforced?

Counsel: The courts have said that in general there must be a beneficiary for a non-charitable trust to be valid. There are anomalous exceptions, but though these are cases where the trust cannot be enforced, they are valid only if so certain that they pass the test of certainty for enforceable trusts. Some people think these dispositions


should have been treated as powers. That might affect the uncertainty question, but . . .

Endacott: Yes, I know that view has not been accepted. I have asked you why already and I mean to return to that question. But first tell me: did I really create a trust?

Counsel: The Court of Appeal held you did.

Endacott: But did I?

Counsel: The Court of Appeal held you did, and that means you did. Lord Evershed M.R. said you intended to create a trust.26

Endacott: A thing that puzzled me in the judgment in my case was that “suitable” might have been suitable when “useful” was useless. Did not Lord Evershed refer to an unreported case where a gift for a suitable memorial was upheld?

Counsel: Lord Evershed M.R. did indeed quote from the judgment of Roxburgh J. in Re Cathedral27 as follows: “I could construe the words as meaning such purposes (of a religious character) as they may think fit, being suitable as a memorial; that is, charitable; or I could construe the words as meaning any purpose suitable as a memorial; that is, non-charitable. But there is another ground on which this trust can be upheld. It is not perpetuitous. I went into these cases in In re Astor.28 Such a trust as this is valid whether charitable or not. Purpose must embody a definite concept, and means to attain it must be described with sufficient certainty. In this case I should have no difficulty in deciding what would be a suitable memorial.”29 But Lord Evershed certainly did not seem to like this decision, at least on the ground given for it.

Endacott: Yet was this not the same Roxburgh J. whose orthodox sentiments in the Astor case were applauded by Harmon L.J. in my case? And in any case, does it not suggest that if I had just asked for a memorial to myself, that would have been valid?

Counsel: Probably.

Endacott: And I messed things up by stipulating usefulness?

Counsel: Quite likely.


27 1958, unreported.


Endacott: And if I had just said unadjectival "memorial" the parish council would have been free to use the money for a useful memorial because I had left them free to put up a useless one?

Counsel: It would seem so, though it would be anomalous and exceptional; and by leaving out usefulness you might have made the memorial something intimately connected with yourself and thus have exacted a concession to your mortal human weakness already then sadly passed away.

Endacott: What, then, is the policy behind all these distinctions?

Counsel: Policy? It is not a question of policy; it is a question of law.

Endacott: Does not the law in general allow testators freedom to choose the posthumous destination of their property?

Counsel: In general, yes.

Endacott: And when this freedom is partially withdrawn, must there not be some reason?

Counsel: Yes.

Endacott: Then for what reason does the law defeat my particular gift?

Counsel: If you mean that it seems strange that gifts for monuments are allowed unless the monument is prescribed to be useful, it must be understood that you sought to compel someone to do something and, first, laid out a vague criterion as to what he could be compelled to do and, secondly, provided no machinery for compelling him.

Endacott: You keep speaking about compulsion as though the parish council were recalcitrant. No one was trying in court to compel them to do anything. Someone was trying, successfully, to stop them from carrying out my wishes. Even if they could not be compelled (had that question arisen), why should they not have been allowed?

Counsel: Now you are saying your disposition should have been treated as a power of appointment.

Endacott: That is the suggestion of Mr. Morris and Professor Leach that Lord Evershed M.R. rejected in my case?

Counsel: Yes. Indeed it is a suggestion that has been made for many years and never accepted. It was viewed with disfavour by Smith J.

30 See Ames, The Failure of the 'Tilden Trust' 5 Harv. L. Rev. 389 (1892); Hart, What is a Trust? 15 L.Q.R. 294; (1899) Smith, Honorary Trusts and the Rule Against Perpetuities 30 Colum. L. Rev. 60 (1930); Glanville Williams, The Three Certainties 4 Modern L. Rev. 20; Potter, Trusts for Non-charitable Purposes (1949) 13 Convey. (n.s.) 418; Kiralfy, 'Purpose Trusts,' Powers and Conditions 14 Convey n.s. 374 (1950);
in Victorian Re Producers' Defence Fund.\textsuperscript{31} In In Re Shaw,\textsuperscript{32} Harman J. did not consider himself at liberty to accept the suggestion, though he said he would have wished to do so. As you know, in your own case, Lord Evershed M.R., the only judge to mention the suggestion, said it could not be regarded as accepted in English law.\textsuperscript{33}

Endacott: Is the statement that the proposition is not accepted the same thing as rejecting it?

Counsel: Morris and Leach think so.\textsuperscript{34} I suppose so. Perhaps it could still be argued in England. It could certainly be argued elsewhere.

Endacott: What good would it do to regard non-charitable-purpose trusts as powers of appointment?

Counsel: If express powers of appointment for non-charitable purposes are themselves valid, treating such "trusts" as powers would have the following consequences: first, the criterion of certainty would be different; secondly, there would be no anomaly in upholding certain types of such trust as the lack of compulsion would no longer be strange; and thirdly, it would harmonise with the application of the Rule Against Perpetuities.

II

The suggestion is not for treating non-charitable-purpose gifts as powers if they fail as trusts, but that in the absence of a beneficiary there is no trust so that all gifts for non-charitable purposes, if valid, create powers and not trusts.

The degree of certainty of objects required for a valid power of appointment is different from the degree required in a trust. In Re Gestetner Settlement,\textsuperscript{35} Harman J., acknowledging that it would not


\textsuperscript{34} MORRIS & LEACH, RULE AGAINST PERPETUITIES (2nd ed.), p. 320.

be precise enough to delimit the objects of a trust, upheld as a designation of the objects of a power of appointment four named individuals, the descendants of the settlor's father and of his uncle, spouses, widows and widowers of any of these people, five charitable bodies, former employers of the settlor or his wife and widows and widowers of these former employees, and any director or employee or former director or employee or the spouse, widow or widower of a former director or employee of Gestetner Ltd., or of any company of which the directors for the time being included any one or more of the persons who were for the time being the directors of Gestetner Ltd.; but excluding the settlor, any spouse or ex-spouse of his and the donees of the power. Harman J. noted that it was "a class which, it is admitted, is not one ascertainable at any given time. . . ."36 Yet, said the learned judge: "If a power be a power collateral, or a power appurtenant, or any of these powers which do not impose a trust upon the conscience of the donee,\textsuperscript{37} then I do not think that it can be the law that it is necessary to know of all the objects in order to appoint to one of them. . . . [I]n an ordinary family settlement, the fact that a father did not know whether one of his sons had married and had children or not could not possible invalidate the exercise by him of a power of appointment in favour of those grandchildren of whom he did know. On the other hand, if it is the trustee's duty to distribute the fund among a certain number of people, his task being to select which of these people shall be the objects of his bounty, then it seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly."\textsuperscript{38} This distinction was approved by the Court of Appeal in \textit{Inland Revenue Commissioners v. Broadway Cottages Trust},\textsuperscript{39} where, however, there was held to be a trust.

In \textit{Re Coates},\textsuperscript{40} Roxburgh J. went a bit further. The testator pro-

\textsuperscript{36}[1953] Ch. at 683.
\textsuperscript{37}Cf. \textit{Re Rowland's Estate}, F.N. 40, \textit{post}.
\textsuperscript{38}[1953] Ch. at 684-85.
vided: "If my wife feels that I have forgotten any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship." And he added: "I have forgotten Richard Hurton and C. G. Chapple, Mark Francis and Miss Jennings but my wife will put that right." The difference between this case and the Gestetner Case is that in the Gestetner Case it had been admitted that it could be told of any given person whether he was an object of the power. Roxburgh J., however, came to the conclusion that that could also be determined in Re Coates. This was on the basis that objects must be realized by the wife to be her husband's friends at the date of his death; that they must be the same sort of friends as those he named as having been forgotten by him; that the wife must feel he had forgotten them; that the individual and aggregate amounts were small, thus betokening sentiment; and that the gift was for a memento, indicating people the testator would wish to remember him and who he thought would wish to remember him.

Re Sayer turns on the same distinction between powers and trusts.

holding that the objects and subject-matter would have been too uncertain for a trust and despite holding that the special mention of Maria Discombe precluded equal division among the objects. The Supreme Court of New Hampshire had taken a different view in Clark v. Campbell, 82 N.H. 281, 281, 133 Atl. 168, 45 A.L.R. 143 (1926). The testator listed a variety of articles of personal property and referred to his trustees' "familiarity with the property, my wishes and friendships" and competency "to wisely distribute some portion at least of said property. I therefore give and bequeath to my trustees all my property embraced within the classification aforesaid in trust to make disposal by the way of a memento from myself, of such articles to such of my friends as they, my trustees, shall select." Snow, J., delivering the opinion of the court, held that the disposition must be treated as an attempt to create either a trust or a power in the nature of a trust and was void for uncertainty either way. The learned judge referred with affection and respect to Morice v. Bishop of Durham (F.N. 5, ante) and its progeny.

The Supreme Judicial Court of Massachusetts took a somewhat similar view in Old Colony Trust Co. v. Wadell, 293 Mass. 310, 311, 199 N.E. 907, 908 (1936) where property was given by a testatrix for "paying any person or persons who may have rendered service in taking care of me or nursing me. What I mean by this is that if there is anything left, after the payment of my just debts and charges of my last sickness and burial, and payment of the bequests set forth, if, in the judgment of my said Executors and Trustees, any person or persons, not already remembered by me herein, may be caring and doing for me, to be justly and fairly rewarded." This was held void for uncertainty.

42 Cited in F.N. 35.
43 Cited F.N. 43 (also cited in F.N. 40).
So far as the power is concerned in that case, the objects included the employees and ex-employees of a company, their widows, children or "other infant dependents" and "other dependent relatives." The position of the employees and ex-employees and their widows and children is similar to that of the objects of the power in the Gestetner case,\(^4^5\) viz., that though all the objects could not be listed, a sufficiently clear criterion was provided by which any appointee could be determined to be within the class or outside it. "Infant dependents" and "dependent relatives," on the other hand, are expressions (like "friend" without further indication of detail) of which it could be said that whether a given person came within either was a matter of opinion on which reasonable people might differ. Upjohn J. stated, "It seems to me logically that where an alleged uncertainty lies not in some uncertainty in fact—for instance, in the impossibility of ascertaining ex-employees, as in this case—but lies in the alleged uncertainty in the language used to describe the qualifications necessary for inclusion among the objects of the power, the problem is the same whether one has to consider a power of selection or trust to divide."\(^4^6\) In other words, a clear criterion of what is *intra vires* must be provided in the case of power as in the case of a trust, but in the case of a trust one must go further and be able to list all objects. Impotence to do the latter, though described as uncertainty, is in reality a shortage of information, sometimes remediable. Upjohn J. held the power valid. Having pointed out that it was created by deed and that it was not governed by cases on wills relating to gifts by a testator to his own dependent relatives, the learned judge said: "Here is a committee consisting of three business men, the settlor (the governing director), Mr. McGee, an employee representing the employees, and the first plaintiff, the auditor. They are administering a trust which is for the benefit of employees, ex-employees, and the dependent relatives of employees or ex-employees. I do not believe, although there may be difficult cases, that it is impossible to decide who qualifies as a dependent relative. Dealing with the class of employees of this very considerable company and exercising ordinary common sense, I think that the committee and, if necessary, the court, can come to a conclusion in any given case whether or not a particular praepositus is properly described as a 'dependent relative.'"\(^4^7\)

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45 Cited in F.N. 35.
46 [1957] Ch. 432.
47 [1957] Ch. 436. This distinction, relating to ascertainment of beneficiaries, between a power and a trust was also discussed in the following English trust cases: Inland
Endacott: From what you say, it looks as though powers of appointment are always held valid.

Counsel: No. Three propositions should make the position quite clear. First, in the case of both trusts and powers a clear criterion of who qualifies as an object must be provided. The court must be able to say that it can think of no person or purpose of whom or which it is in doubt whether he or it would be within the gift or not. Secondly, in the case of a trust, but not in the case of power, all the objects must be known to the trustees. The court must be able to say that, at the inception of the trust, the trustees can probably survey the whole field of the donor's bounty. I say “probably” because, of course, there is no theoretical limit to the expense and trouble that may be put into ascertaining the beneficiaries, but a trust will not be dissipated in search of its own validity. Thirdly, in the case of neither a trust nor a power is it necessary for validity that all the objects can actually be communicated with by the trustee or appointors. So the difference between trusts and powers lies in the second proposition and a power may be invalid for uncertainty under the first. This was the case in *Re Gresham's Settlement*,[48] *Re Allan*,[49] and *Re Wolff*.[50]

In both the English cases a residence test was prescribed to qualify as an object of the power. In the *Gresham* case, Harman J. regarded as too uncertain the delimitation of the objects as persons with whom or in whose company the settlor was residing. The learned judge said: "It seems to me, giving the most benevolent meaning to the clause that I can, that there must be a number of persons, of whom it could not be postulated that they were (or were not) within the dragnet of this rather unusually constructed clause. The question is whether that is fatal to the clause. I must hold that it is, because of


In Australia, on the other hand, it may be that the rule governing powers is that applied in England to trusts. See *Tatham v. Huxtable*, 81 C.L.R. 639 (1950) (High Court); *Sandhurst and Northern District Trustees Executors and Agency Co. Ltd. v. Pitt* [1958] V.R. 310 (Victoria, Smith, J.).


my decision in *In re Gestetner.*52 That was a case of a very large class, but it was conceded that the class, though large, was not one as to the limits of which there was any doubt: one did not know all the people who were in it, but one could postulate of any given person whether he were or were not; and I appear to have said that that made all the difference. I did decide that case on the ground of certainty. I said that it was sufficiently certain if an object could be certainly identified—*it being a power,* be it said, *not accompanied by a duty, a power collateral,* as is this power here. But the bank to whom such a power is given does have this to consider—whether it will exercise the power in favour of any postulated person: if the bank is left uncertain whether the person is an object or not, then there does seem to me to be imported that very vice of uncertainty which was urged upon me in *In re Gestetner* and which in that case I found myself able to reject.”

**Endacott:** Then would my gift to the North Tawton Parish Council for the provision of some useful memorial to myself have been sufficiently certain for the purposes of a power of appointment?

**Counsel:** That is very doubtful. “Useful” might be regarded as being as uncertain as “deserving,”53 “patriotic”54 and “benevolent.”55

**Endacott:** Those were cases of trusts, as I remember you saying. Could “use” not be regarded as being as certain as “for the benefit of” in discretionary trusts? Moreover, if three businessmen would have no difficulty in deciding who qualified as a dependent relative,56 why should a parish council have any difficulty in deciding what was useful?

**Counsel:** Both powers and trusts require a clear criterion; but you may be right that “useful” would be passed on that test and failed only on the inability to list all possible useful memorials. On the other hand, if that were so, one would have expected the Court of Appeal

to give more consideration to the possibility that your "trust" sur-
veyed as a power.

Endacott: The uncertainty position seems uncertain. Then can you be more definite on the anomaly-eliminating effect of treating gifts for non-charitable purposes as powers of appointment?

III

Counsel: If there is indeed a general principle that there cannot be a (noncharitable) trust without a beneficiary to enforce it, one must ask: what is the effect of upholding gifts for tombs and monuments, for the support of the testator's animals, and so on?\(^57\) There is no one who can enforce the gift. The "trustee" may therefore please himself whether he carries out the purpose or not. If he does, no one can complain. If he does not carry out the purpose, the "trustee" cannot keep the unspent "trust" money (unless that is the true con-
struction of the gift). He must hand it over to the beneficiary entitled under a resulting trust. That is expressly adverted to in two cases.\(^58\) This means that wherever there is an attempt to create a non-charitable purpose "trust" the courts are treating it as a resulting trust, subject (where the non-charitable purpose part of the gift is upheld) to the interest of the beneficiary under the resulting trust being over-
ridden by the "trustee" (if he wishes) making payments for the donor's specified purpose. The courts have never called this a power of appointment, but it looks very like one.

However, it must be remarked that, if the beneficiary under a re-
sulting trust is in general liable to be overridden in these cases, that is not so in the case of a trust for paying debts, which, so long as no creditor has acquired special rights as a beneficiary (that is, so long as it remains a trust for a purpose, not a person), is revocable by the settlor\(^59\) or after his death.\(^60\) It has been suggested\(^61\) that all trusts for non-charitable purposes should be treated likewise, but no court out-

\(^{57}\) See F.N. 6–12, ante.

\(^{58}\) Pettingall v. Pettingall 11 L.J.Ch. 176 (1842) (Knight Bruce, V.-C.); Re Thompson [1934] Ch. 342, 103 L.J.Ch. 162, 150 L.T. 451 (Clauson, J.).


\(^{61}\) Gray, Gifts for a Non-charitable Purpose 15 HARV. L. REV. 509 (1902).
side the United States has yet treated any valid "trust" for a non-charitable purpose, other than the payment of debts, as revocable in the absence of express provision to that effect. Even in the United States, the revocability has been confined to settlements inter vivos,\textsuperscript{62} while most non-charitable purpose trusts held void have been created by will.

IV

And that leads on to the question of the Rule Against Perpetuities. Where non-charitable purpose trusts have been held valid, it has been in cases where they are limited to last not longer than the perpetuity period.\textsuperscript{63} Though courts have not pointed this out, the rule for special powers of appointment, that they are void if exercisable outside the perpetuity period, is the same.

V

Endacott: I suppose that if my residuary gift had been drafted as a power to make a useful memorial to myself, that would have been valid?

Counsel: There is no direct and conclusive authority that there is a general rule that powers to appoint in furtherance of a non-charitable purpose are valid (if they comply with the general rules of certainty and perpetuity governing special powers of appointment). But the indications are that a power need not have persons designated as objects.

First of all, the validity of a power to appoint for one or more specified non-charitable purposes is assumed by all writers, including Gray.\textsuperscript{64}

Secondly, discretionary trusts are valid, although the discretion may be not to pay objects but to further the benefit of objects. This is so whether the case is one of a bare power or a power in the nature of a trust.

Endacott: So far you have been distinguishing between trusts and powers and now you speak of a "power in the nature of a trust!"

Counsel: A bare power (which I have been referring to simply as


\textsuperscript{64} Gray, \textit{Gifts for a Non-charitable Purpose} 15 \textit{Harv. L. Rev.} 67 (1902).
a power) gives the empowered person a discretion whether or not to exercise it. An authority is called a power in the nature of a trust where the donee of the power is meant to exercise it, having only a discretion as to how much (if anything) each object shall get. If such a power is not exercised, the objects share equally. Whether a power is bare or in the nature of a trust is a matter of construction of the instrument creating it.

In *Re Hain's Settlement*, the power was to "pay or apply the income of the trust fund unto or for the maintenance support or benefit of all or any one or more exclusively of the other or others of the beneficiaries. . . ." The Court of Appeal held this valid, even assuming (but not deciding) that this power was in the nature of a trust. (Presumably if it really were a power in the nature of a trust, and was not exercised, the court would order equal division "unto" and not "for the maintenance support or benefit of" the beneficiaries.)

Thirdly, as I have already mentioned, trusts for paying debts and the "anomalous" non-charitable purpose trusts upheld are treated as if they were powers of appointment.

Fourthly, powers of maintenance and advancement of beneficiaries under a trust have always been regarded as valid. In some jurisdictions, these powers are now statutory. In *Pilkington v. Inland Revenue*


66 [1961] 1 W.L.R. 440, [1961] 1 All E.R. 848. See also *Re Saxone Shoe Co., Ltd's Trust Deed* [1962] 1 W.L.R. 943, [1962] 2 All E.R. 904, 106 S.J. 687 (Cross, J.) Cf. *Re Hunter's Will Trusts* [1963] Ch. 372, [1962] 3 W.L.R. 1442, [1962] 3 All E.R. 1050, 106 S.J. 938. There, property was given by the testator to his sister Julia for life, with remainder to her issue "in such shares and with such trusts for their respective benefit and such provisions for their respective advancement, maintenance and education at the discretion of my trustees or of any other person or persons as the said Julia" might appoint. Cross, J. held that the discretion of the trustees extended to the advancement, maintenance and education, as these must be at someone's discretion, but not to the trusts for their benefit. The learned judge said, [1963] Ch. at 378-79 [1962] 3 All E.R. at 1054: "I do not see how one can have a trust for the separate benefit of a particular appointee which is at the discretion of the trustees." He therefore held *ultra vires* an appointment on protective trusts. This decision was made a month after that by the House of Lords in the Pilkington case (see F.N. 65, post), which was not cited to Cross, J.

67 In England, the Trustee Act, 1925, 15 & 16 Geo. 5 § 19, s. 31 gives power to the trustees, at their sole discretion, to "pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit" income (not otherwise disposed of) on a beneficiary's future vested or contingent interest under a trust. S. 32 gives trustees a power to pay or apply capital money subject to a trust "for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit," of any person who is absolutely or contingently entitled to capital or entitled to capital subject to divesting or to being overridden by the exercise of a power of appointment.
Commissioners, the House of Lords held that exercise of the statutory power in England under section 32 of the Trustee Act, 1925, need not be by way of payment to the beneficiary, but could be by way of settlement (thus involving benefits to someone other than the beneficiary under the principal trust). This was *intra vires* the purpose of the power—advancement or benefit of the beneficiary. Lord Radcliffe, the other judges agreeing, said (for the purposes of the rule against perpetuities): “there is an effective analogy between powers of advancement and special powers of appointment.”

Finally, in *Re Douglas*, the testatrix gave legacies to several societies, all of which were clearly charitable except for two, *viz.*, the “Home for Lost Dogs” and the “Society for the Protection of Animals Liable to Vivisection.” She gave her residue on trust to distribute it “among such charities, societies, and institutions (including or excluding those herein-before mentioned as may be preferred), and in such shares and proportions as the said Earl of Shaftesbury shall by writing nominate. . . .” The Earl nominated 153 societies, not including the Home for Lost Dogs or the Society for the Protection of Animals Liable to Vivisection. The Court of Appeal held (i) that all the gifts were charitable, and (ii) that if the two societies mentioned were not charitable there was still a valid power of appointment. Here are some extracts from the judgment of Cotton, L. J. “[W]here there is a gift without any definite object pointed out, but merely a description of the character of the object to which the gift is to be applied, and if that character is not charity, then the Court will not execute such an indefinite purpose, and it must be considered as if the legacy had been left to the legatee as a trustee, and with no trust declared, in which case he would hold it as a trustee for the next of kin. That really is what is laid down by the case of *Morice v. Bishop of Durham*. . . .” Then there are certain specified things which he may include in the distribution if he thinks fit. Does that come within

or revocation or subject to his share being diminished by the increase of the class to which he belongs, and whether he is entitled in possession, remainder or reversion.


the principle of *Morice v. Bishop of Durham*? In my opinion it does not. All that that case decided was this, that where there is not definite object pointed out as the object of the trust, then the Court says that the trust cannot be executed unless the Court can itself determine how it is to be applied, which it can only do where the object is a charity. But if there are definite objects pointed out and a discretion is given to trustees to distribute property amongst those definite objects, in my opinion that judgment in no way decides that such a gift fails.”

“It would be good if it was limited to a charitable gift, although for purposes utterly indefinite; and the addition to that of definite purposes, though they are not all charities, will not, in my opinion, make the ultimate gift bad.”

You will notice that the first quotation from Cotton L.J. gives rise to the question: Is a power of appointment bad if, though it would be possible to say of any appointment that it was *intra vires*, the power to appoint is limited by a description of the character of the objects to which the gift may be applied? An example I have used before is a legacy of £10,000 “to be distributed at his absolute discretion by my trusted friend A among such one or more or all non-charitable institutions in Oxford as qualify for rating relief. If he distributes none or only part, then the whole or remainder is to go to B on A’s death.” There can be no question of uncertainty. It seems this would be a valid power of appointment. But I still doubt the validity of a power to apply money for a useful memorial to the testator. Indeed, it would seem that in all the reported cases where a non-charitable trust has failed, with the sole exception of *Public Trustee v. Nolan*, the donation would still have failed for perpetuity or uncertainty if drafted as a power. In the *Nolan* case, Roper J. held void a gift to “erect a carillon on similar lines to the one at Avalon, Catalina Island, California, at such place on Sydney Harbour, or on the foreshores thereof, or at Park Hill, North Head, as my trustees may deem expedient, or to join with any other person or public body in erecting such carillon...” It is to be hoped that one day the issue of the validity of a power to appoint for non-charitable purposes will be squarely raised in the courts.

72 35 Ch.D., at 482–83, 56 L.T. at 788.
73 35 Ch.D. 485, 56 L.T. at 789.
74 35 Ch.D. 486, 56 L.T. at 789.
75 43 S.R. (N.S.W.) 169, 60 W.N. (N.S.W.) 84 (1943).
VI

Endacott: If such a power is indeed valid, why do the courts set themselves against treating as a power a gift which fails as a trust?

Counsel: The courts say that you cannot construe a valid power out of an invalid trust.76

Endacott: I can see the point of that, to some extent, in cases where you could have a trust, for example, for employees, ex-employees and so forth, and it fails because these people cannot be listed, or something of that kind. But I cannot see it where the trust the testator intended is a kind unknown to the law but where the thing can be done by power. And you yourself said that where non-charitable purpose "trusts" are upheld for animals, for example, the effect is to treat the gift as a power.

Counsel: Yes, the proposition that a valid power cannot be fashioned out of a void trust is definitely more clearly supportable in the case of a gift for the maintenance, education or benefit of persons, as such a power may be bare or in the nature of a trust, while a gift for other non-charitable purposes can never be in the nature of a trust. But even in the latter type of case, by purporting to create a trust the donor has shown that he intended his trustee to be compelled to carry out the purposes. By holding the trustee to have a discretion the court would be making a new will for the testator.

Endacott: What you are saying is that, in certain circumstances, if I say my trustee may do something, he may, but if I say he must, then he can be prevented. Do you really mean that I am supposed to know enough law to realise that when I say "trust" I mean "must" but not enough to know that when I mean "must" I cause "can't"? Am I


In McHugh v. McCole, 97 Wis. 166, 72 N.W. 631, 40 L.R.A. 724, 65 Am. St. Rep. 106 (1897), Pinney, J., giving the judgment of the Supreme Court of Wisconsin, said 97 Wis. at 176, 172 N.W. at 634: "Although the testator has used language ordinarily used for the declaration of a trust, it is argued that the court cannot impute to him the intention of creating a trust simply for the sake of subsequently condemning it. It is the duty of the court to declare the construction and meaning of this clause of the will, and then to determine whether it is in conformity with the law."

Scott, Tutors (2nd ed.), vol. 2, 850, considers that in all cases where the gift is too uncertain to be upheld as a trust, a valid power should be held to have been created if there is sufficient certainty for that. For example, he thinks (p. 853) that the disposition in Morice v. Bishop of Durham 9 Ves. Jr. 399, 32 E.R. 656 (1804) (Grant, M. R.); 10 Ves. Jr. 522, 32 E.R. 947 (1805) (Lord Eldon), should have been held to grant a valid power. See also Re Dulles's Estate and Cochran v. McLaughlin, F.N. 52, ante.
supposed to prefer my trustee being prohibited rather than permitted when I wanted him compelled?

_Counsel:_ The court cannot speculate. It has your words. How can it guess what you would have preferred if your primary desires cannot be literally carried out? Why, your mind might never even have been directed to the possibility of your gift failing in any way. And you are dead, anyway, don't forget, when the question arises. So why should the court be astute to find devious ways to uphold your little human weaknesses to the exclusion of benefit to living souls?

_Endacott:_ But I wished a _useful_ memorial.

_Counsel:_ If you wanted to do something useful, there are many ways in which you could have done it without a memorial. If a testator wants to do something for the public benefit and to establish the immortality of his name he should pause and consider what is his predominant motive. Does he want to be a philanthropist, does he want to be remembered as a philanthropist, or does he want to be remembered?

He can be a philanthropist by giving to charity. Or to the parish council or to any public corporation or society. He can perhaps hope to be remembered for that for a brief period. He can perhaps ask that his name be associated with whatever his money is spent on. His name will then probably be remembered for a long time, but he will not. And in any case, why should he be? It was only "his" money when he was alive.

But apart from the anomalous and exceptional non-charitable purpose trusts upheld as concessions to human weakness, classes which no English court lower than the House of Lords is going to expand; apart, too, from drafting non-charitable gifts expressly as bare special powers of appointment; there are a few devices open to the testator who wants to withhold his money from persons and charities. Let his legal adviser select carefully and public policy will quail at the contest.

_Endacott:_ This, then, is your message in the end. I was thwarted on machinery, not policy. I tried to do something useful and I failed to qualify even as an anomaly.

77 See L. A. Sheridan _Trusts for Non-charitable Purposes_ 17 _Convey._ (n.s.) 46, 64 (1953).