THE RULE IN MORICE *v.* THE BISHOP OF DURHAM.

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Professor J. B. Ames, in a paper on the subject of the Tilden Will Case,[1] calls in question the rule known as that of Morice *v.* The Bishop of Durham.[2]

Certainly it will be a thing to be remarked if this criticism is well taken : if either on the broadest principles upon which any system of jurisprudence can be founded or upon the most narrow of technical rules the rule of that case can be varied.

The rule is this. A devise in trust for objects entirely uncertain, so that no one can possibly insist on the application of the fund, is void. An exception to this rule is to be noted when the objects are charities. The *reason* for the rule, it will be observed, has not been alluded to.

Now it is to be noticed that the case was heard and decided by two of the most competent lawyers England ever produced, Sir William Grant and Lord Eldon. It is also a fact most worthy to be noted for the present purpose, that the rule was admitted to exist by all the counsel of all the parties.

A few words on the exception. The existence of the exception in case of charities is not disputed in the English law nor in America—even where that exception is declared not to be in force ; for invariably the refusal to be governed by the exception is based on the assumption that it owed its existence to the statute of 43 Eliz. This view —that the validity of a gift for a mere charitable use without a defined purpose or object is dependent on that statute and was, in fact, created by it—is (as Mr. Binney said in his argument in Vidal *v.* Girard) a misstatement of matter of *fact*, not of law or reason ; and it might as well and with

[1] Harvard Law Rev., Vol. 5, No. 8, p 389.

[2] 9 Vesey, 399; 10 Vesey, 521.

as much truth be said that trusts for accumulation were never restricted till the Thelluson Act.

The rule that makes charities an exception, whatever be its origin, is no more than this: any charitable intention, whether described or undefined, is a *person* capable of taking by deed or will, and always was so by the law of England. The origin of the rule is a matter of speculative law. It is attributed by Mr. BINNEY in his argument to the teaching of St. PAUL that had found its way from the servant's hall to the palace. And there is a passage strikingly conformatory of this suggestion in DE CHAMPIGNY'S "Les Antonins."[1] It may be that the doctrine of the Roman law respecting *things dedicated* had some effect in producing the rule that a gift for a charitable purpose is as completely valid as a gift to a living person for his own use. Whatever its origin, it is quite certain as a matter of fact, not as matter of opinion, that this rule has been the common law of England from all time. That is, it has been a rule of property having no dependence on any statute or any prerogative, but is, on principle, identical with the rule that recognizes the right of any beneficiary, whether by deed or will, whether by direct gift or by the intervention of a trustee.

It is obvious that this rule has nothing to do with that which must govern when there is a trust declared but no object named or described. Probably no one will dispute that such a trust is void in the sense that it enures to the benefit of the person creating it if the property has effectually passed from him. In case of a will, it is void precisely as a devise in trust for a named person is a nullity if that person is not living at the time the will becomes operative. The debatable point is then reduced to the case of a clear trust—that is, a disposition which by its terms excludes all beneficial interest in the grantee or devisee, and yet fails to describe the purpose in such a manner as to enable a Court to enforce it.

[1] Vol. 1, pp. 262–4.

There are two distinct classes of trusts of this character. Professor AMES combines them as if they constituted but one, and thus finds a ground for his doubt as to the rule itself. The first class is that in which the objects are absolutely uncertain, and can only be made certain by the choice of another. Morice *v.* Bishop of Durham was of this kind. *Any object of benevolence* was within the terms of the trust. The effect of the rule recognized in this case—*recognized*, I say, not *decided*; not *argued*; but assumed and conceded—is that when the discretion of some one is essential to create a beneficial right, and the trustee is precluded from exercising it for his own benefit, the devise is void unless the object is charitable. No one could possibly doubt that a resulting trust would arise had this been a deed; and the reason seems to be quite clear. The beneficial interest is the real one—the trustee is but a medium; the effect of naming a trustee is to exclude any such interest vesting in or being acquired by him. It is clear that if the authority to name the beneficiaries were valid, the beneficial estate and the actual ownership would vest in the heir till the power was exercised. The result would be that, at least during the life of the trustee, the heir might be the owner and subject to all the duties of owner, but liable at the will of the trustee to be deprived of the property, possibly made liable to account, and practically incapable of exercising any incident of ownership. Such a rule of property would be utterly fantastic and absurd. It may well be that the same rule which compels all estates within a limited period to become one of the two inheritable estates, estates tail or in fee simple, or the rule that forbids the grant of a right of way in gross, is another expression of the reason for making such devises void. Certain it is, however, that such dispositions have always been held to be void. "Void for uncertainty" is the rule, or reason applied to extinguish them.

The other class of cases (which is treated as belonging to the same category as those above discussed), are those in which the object or purpose is definite, but there is no

person to be benefited—as, for instance, to erect a monument, to provide for a favorite animal, etc. It is supposed that because there is no beneficiary to enforce the trust they are within the rule. Is not this mistaking the meaning of the language that was used by Sir WILLIAM GRANT, or, at least, misapplying it? There must be (he said) *somebody* in whose favor the Court can decree performance. Did he mean there must be a personal beneficiary who can litigate? This would vitiate the most reasonable of testamentary provisions—such as those for the expenses of interment, or the placing of a stone to mark the spot. Sir WILLIAM GRANT was referring to the quality of uncertainty only, and he included within that all cases which could only be made certain by a selection of objects at the option of the devisee, and where no selection could be compelled. It would be most unfair to attribute an intention to vitiate trusts for specific objects, if perchance there was no machinery of law that could compel the execution. But there is no want of such machinery. The residuary legatee or the next of kin are entitled to the unexpended fund and can thus enforce the trust.

The rule itself, however, is of great importance and value; it applies only where there is a gift to persons or objects that cannot be ascertained at the time at which the grant, whether by deed or bill, must take effect to deprive the grantor or his heir of all beneficial interest in the property.

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