"CHARITIES FOR DEFINITE PERSONS"

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The title is borrowed from an appendix of Gray, *The Rule Against Perpetuities*.¹ Professor Gray challenged the common statement that a charitable trust must be for an indefinite number of persons. That statement usually is made in cases where it is contended that the possible beneficiaries of an attempted charitable trust are too *indefinite*. The answer often given to that contention is that the beneficiaries of a charitable trust may be and indeed must be indefinite. Professor Gray gave numerous examples of trusts held to be charitable where the only possible beneficiaries at a given time are definite and ascertainable. He contended that such beneficiaries have a right to relief, subject to the qualification that the Attorney General is a necessary party to a suit to carry out the trust. The purpose of this article is to pursue the subject further with particular reference to the American cases.

This investigation raises the question of whether or not there is a clear dividing line between all charitable trusts and all private trusts. It is true that the typical charitable trust differs in several respects from the typical private trust. The principal features peculiar to the typical charitable trust may be stated as follows: (1) the beneficiaries are indefinite; (2) there is a valid perpetuity in the sense that the trust will continue indefinitely; (3) enforcement is by or through the Attorney General; (4) the trust purpose is subject to variation under the *cy pres* power; (5) certain statutes apply in some jurisdictions, *e. g.*, mortmain statutes of various kinds² and tax exemption statutes. It is at least conceivable that a particular trust might be charitable for one or more of these purposes but not for others. This notion limits the authority of a particular case. The tax cases are the most striking example;³ other examples will be discussed later. On the other

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¹ (3d ed. 1915) Appendix A.

² The term is used here in a broad sense to include all express statutory limitations on the creation of charitable trusts. See SCOTT, *CASES ON THE LAW OF TRUSTS* (2d ed. 1931) 299-302.

³ The tax cases often turn on the peculiar wording of the statute, see *Philadelphia v. Masonic Home*, 160 Pa. 572, 28 Atl. 954 (1894), or upon its history. See *Mayor etc. of Savannah v. Solomon's Lodge, etc.*, 53 Ga. 93 (1874). The limited authority of such cases is recognized in *Green's Adm'r's v. Fidelity Trust Co. of Louisville*, 134 Ky. 311, 329, 120 S. W. 283, 288 (1909). For an excellent statement of the relation of the exemption provisions in the federal estate tax statutes to the local law of charitable trusts, see Eagan v. Commissioner of Internal Revenue, 43 F. (2d) 881, 883 (C. C. A. 5th, 1930).

Likewise, the cases on exemption from tort liability involve peculiar considerations of policy. This is shown by an examination of the opinion in the leading case of *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365 (C. C. A. 8th, 1894).

hand, the different classes of cases do react upon each other to some extent, particularly where the opinion discusses the general problem.

By no means all trusts regarded as charitable include all of these features. In many charitable trusts there is no perpetuity in any sense. In fact, there appears to be a growing popular distrust of charities unlimited in time.⁴ Furthermore, there is some reason to doubt, as will be developed later, that all charitable trusts may be without time limit. There is some indication in a few American cases that the Attorney General is not a necessary party in the enforcement of all charitable trusts.⁵ There is some language in the books that the judicial *cy pres* power extends to private as well as charitable trusts. It is true that courts in the name of construction in private trust cases do things which look like some of the things they do in charitable trust cases in the name of the *cy pres* power. Yet it is believed that the power recognized by the courts is broader in the case of charitable trusts. On the other hand, the terms of a charitable trust may preclude *cy pres* application.

It may be inferred from this discussion that in some situations it makes no practical difference whether the trust is treated as private or as charitable. Indeed, such seems to be the case. In a Maine case⁶ contributions were made by many persons after a fire in a town "for the relief of sufferers by the fire". Only part of the fund was used for immediate relief; the rest had been invested and the income used for general poor relief. Some of the fire sufferers brought a bill in equity praying for an accounting and distribution of the remaining funds among the fire sufferers. The bill was sustained with directions that masters be appointed to receive applications and devise a scheme for distribution among the fire sufferers, subject to the approval of the court. The court said that the masters might consider the degree of suffering. The majority opinion regarded the trust as a private one for the benefit of an ascertainable class and reasoned that under the rule of construction analogous to the doctrine of *cy pres*, the surplus should be used to repair losses as well as to relieve immediate distress. Mr. Justice Haskell concurred on the ground that this was a public charitable trust, that the purpose of the donors included property loss, and that it was proper to send

⁴ See Rosenwald, *Principles of Public Giving* (1929) 143 ATL. MONTHLY 599; Rosenwald, *The Trend Away From Perpetuities* (1930) 146 ATL. MONTHLY 741; Embree, *The Business of Giving Away Money* (1930) No. 963 HARPER'S MAGAZINE 320; POWELL, CASES AND MATERIALS ON TRUSTS AND ESTATES (1932) 47, n. 53. But cf. Pritchett, *The Use and Abuse of Endowments* (1929) 144 ATL. MONTHLY 517.

⁵ See *Cannon v. Stephens*, 159 Atl. 234 (Del. Ch. 1932). In this case Chancellor Wolcott assumed without deciding that the trust was charitable and overruled a demurrer for nonjoinder of the Attorney General. See also the cases discussed in (1928) 12 MINN. L. REV. 653; (1924) 72 U. OF PA. L. REV. 332; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) § 615; Roland Gray, *The Rights of the Donors in Trusts for Charitable Purposes With Special Reference to the Law of Massachusetts* (1929) 14 MASS. L. Q. 50.

⁶ *Doyle v. Whalen*, 87 Me. 414, 32 Atl. 1022 (1895); cf. *Bates v. Schillinger*, 128 Me. 14, 145 Atl. 395 (1929).

the matter to masters to devise equitable methods of distribution. It seems to follow that it is not always enough to consider a particular trust from the standpoint only of charitable trusts. The trust might be sustained as a private trust or on some other basis. Also, to repeat, the object of the trust might be regarded as charitable for some purposes and not for others.

With this much by way of introduction the cases on the more specific question may be considered. That question is how indefinite the beneficiaries of a charitable trust must be. To put it another way, how small a class may the settlor choose to benefit and still have the trust treated as charitable by the courts? It should be stated at the outset that most of the cases cited by Professor Gray and others do not discuss the problem, although on their facts it might have been raised. Such cases, of course, have not the authority of the comparatively few cases where the problem is raised and discussed. The latter will be emphasized here.

The problem is not properly involved in cases where the purpose is not regarded as charitable regardless of the size of the class to be benefited. That explains a number of the cases sometimes cited in this connection.⁷

Is the problem raised where the number of persons to be benefited is small, but the class from which they are to be chosen is large? In *Thomas v. Howell*,⁸ an English case, there was a legacy of £200 to "each of ten poor clergymen of the Church of England" to be selected by certain named persons. In a suit for the administration of the estate it was contended that this legacy was charitable within the meaning of the Georgian Mortmain Act and therefore payable only out of "pure personalty". In opposition to this contention counsel said,⁹ "There are . . . two questions—whether a gift is charitable, so as to be exempt from the rule against perpetuities, and another whether it is within the Statute of Mortmain." The legacy was held not to be within the Mortmain Act. The English textbooks seem to treat this case as determining that the trust was not charitable for any purpose.¹⁰ But the limited nature of the holding was recognized in a Massa-

⁷ *In re Gassiot*, 70 L. J. Ch. 242 (1901) (bequest for the "benefit of individuals who have been engaged in the Opporto Red or Port St. Mary's White Sherry Wine Trade"; the court said that the trust was not limited to those who are in poverty or who are aged); *In re Cullimore's Trusts*, L. R. 27 Ir. 18 (1891) (bequest "for the benefit and maintenance, and to enable the families of my late workmen at Ballyanne . . . or their children to become apprenticed or to immigrate abroad"; the court said that not limited to the poor); *In re Good* [1905] 2 Ch. 60 (gift of two houses for the use of old officers of a regiment at a small rent; court construed "old officers" to mean "former", not "aged"); *In re Drummond* [1914] 2 Ch. 90 (bequest for purpose of contribution to holiday expenses of the work people employed in the spinning department of a company; court said that the trust was not limited to poor people); *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149 (1905); see *Amory v. Amherst College*, 229 Mass. 374, 382, 118 N. E. 933, 936 (1918).

⁸ L. R. 18 Eq. 198 (1874).

⁹ *Id.* at 205.

¹⁰ TUDOR, CHARITIES (5th ed. 1929) 16, n. (p); TYSSSEN, CHARITABLE BEQUESTS (2d ed. 1921) 61; JARMAN, WILLS (7th ed. 1930) 208, treating the case as not in accord with other authorities and unsound.

chusetts case, *Sherman v. Shaw*.¹¹ That case presented a remarkably similar set of facts. The bequest was of one thousand dollars "to my executor . . . to be by him applied in shares of one hundred dollars each at his discretion for the benefit and advancement of ten poor boys to be selected by him." The executor died after disposing of only part of the fund. A decree that the trust be carried out by a trustee appointed by the court was affirmed on the ground that this was a valid charitable trust. The court discussed *Thomas v. Howell* and pointed out that the Statute of Mortmain played a considerable part in that case, that the legacy did not fail, and that the opinion was not clear. However, if that case decided that the gift was not a charity under the Statute of Elizabeth, the Massachusetts court refused to follow it. The Massachusetts court considered the bequest before it as charitable unless the limitation rendered the beneficiaries definite and certain. The court emphasized the fact that the selection might be from *all* poor boys so that no individual could claim participation as a matter of right,¹² and distinguished cases where the benefit is for a class so limited in number as not to make the gift for a public benefit.¹³

Most of the remaining cases which have been examined group themselves into two classes: (1) trusts for the support and education of relatives; (2) trusts for the benefit of members of associations or societies of various kinds. These two classes will be discussed first. Any remaining cases will be treated later.

Support and Education of Relatives

The English cases on gifts for the benefit of the settlor's poor relatives are divided in the latest edition of Jarman, *Wills*,¹⁴ into gifts for perpetual benefit and immediate gifts. The former are said to be good charitable gifts, and there are several cases so holding.¹⁵ The cases are

¹¹ 243 Mass. 257, 137 N. E. 374 (1922).

¹² This persuasive reasoning would warrant a different decision than that reached in *Estate of Huebner*, 127 Cal. App. 244, 15 P. (2d) 758 (1932), where the court refused to sustain as a charitable trust a testamentary provision for a fund, the interest of which was to be used "to help defray the expense of educating some girl or boy", to be selected by a named person, in music or art. The court took quite literally the language in the cases defining charitable trusts as being for the benefit of an indefinite number of persons.

¹³ Referring to *Kent v. Dunham*, 142 Mass. 216, 7 N. E. 730 (1886) as interpreted in *Sears v. Attorney General*, 193 Mass. 551, 79 N. E. 772 (1907).

¹⁴ *Op. cit. supra* note 10, 209-210.

¹⁵ *White v. White*, 7 Ves. 423 (1802) (bequest of fund for purpose of "putting out 'our poor relations' apprentices"; confined by codicil to two families); *Attorney General v. Price*, 17 Ves. 371 (1810) (also territorial limitation—those dwelling within a certain county); *Gillam v. Taylor*, L. R. 16 Eq. 581 (1873) (lineal descendants of brother of testator's mother); *cf. Bernal v. Bernal*, 7 L. J. Ch. 115 (1838) (governed by law of Holland); *Re Rosenblum*, 131 L. T. 21 (1924) (testamentary transfer to Jüdischer Nationalfonds Company for purpose of purchasing land in Palestine and enabling descendants of testator's father to settle there; apparently not regarded by the court as transfer on trust but rather as beneficial gift to the company).

Attorney-General v. Duke of Northumberland, L. R. 7 Ch. D. 745 (1877) probably supports the statement in the text although the court construed the will as merely giving a pref-

not so clear as to immediate gifts. In most of the cases the benefit has been limited to poor¹⁶ relatives within the statute of distributions, and there has been no reference to the gift as charitable.¹⁷ In a few cases, however, the word "charity" has been used, and the trust has not been limited to persons within the statute.¹⁸ There are a number of English cases holding that gifts to colleges for the education of relatives are charitable.¹⁹

In none of the cases so far discussed is there any discussion of the effect of the smallness of the class. However, in the Irish case of *Lav-*

erence to poor kindred. The only question litigated was whether surplus income should be used for persons not kindred. The court declared that the income was applicable primarily for the relief of kindred and the surplus for other charitable uses for the poor. The court construed the word "poorest" in the will as meaning "very poor". Jarman cites in this connection the case of *Isaac v. Defriez*, Ambl. 595, 17 Ves. 373 n. 1 (1754). The two reports of this case differ somewhat, but neither makes it clear whether or not there was a perpetuity. The case is relied upon in some of the cases cited above in this note.

¹⁶ Those chosen to benefit must be poor. *Carr v. Bedford*, 2 Ch. Rep. 146 (1678) (but see comment on this case in *Gray, Powers in Trust and Gifts Implied in Default of Appointment* (1911) 25 HARV. L. REV. 1, 4, n. 4); *Griffith v. Jones*, 2 Ch. Rep. 394 (1686); *Brunsdon v. Woolledge*, Ambl. 507 (1765). But see *Widmore v. Woodroffe*, Ambl. 636, 640 (1766). In *Gower v. Mainwaring*, 2 Ves. Sr. 87, 110 (1750) two of the trustees had died and the third refused to act; the court directed that the master consider the necessities and circumstances of the relatives.

¹⁷ *Carr v. Bedford*; *Griffith v. Jones*, both *supra* note 16; *Goodinge v. Goodinge*, 1 Ves. Sr. 231 (1749) (court relied on word "nearest" in will referring to relations); *Edge v. Salisbury*, Ambl. 70 (1749) (here again for "nearest relations"); *Brunsdon v. Woolledge*; *Widmore v. Woodroffe*, both *supra* note 16. To the same effect, probably, is *Gower v. Mainwaring*, *supra* note 16, although the opinion is not very clear. The words "friends and relations" were construed as synonymous. *Green v. Howard*, 1 Bro. C. C. 31 (1779), cited in *GRAY, op. cit. supra* note 1, at 532, n. 3, does not seem to be in point because there was nothing in the will about the relatives being poor.

Likewise in *Liley v. Hey*, 1 Hare 580 (1842), the court did not seem to treat the devise as limited to the poor. The trust was for distribution of rents among the families of certain named persons "according to their circumstances, as, in the opinion of the said trustees, they may need such assistance". The effect of the quoted words was not considered in the opinion. It was held that the trust was not void. It was not charitable within the Mortmain Act. It did not violate the rule against perpetuities at least during the lives of the persons named who had an immediate claim; that subsequent interests might be void for remoteness did not invalidate the present interests. See the comment on that case in *JARMAN, loc. cit. supra* note 10.

¹⁸ *Attorney General v. Buckland* (1742) cited in Ambl. 71; *Mahon v. Savage*, 1 Sch. & Lef. 111 (1803). In the latter case, which was in the High Court of Chancery in Ireland, the bequest was to be distributed among testator's poor relations or such other objects of charity as should be mentioned in his private instructions. No such instructions were given. In *JARMAN, WILLS* (7th ed. 1930) 210, it is said that this case is distinguishable from a simple gift to poor relations because of the additional indication of a charitable object. But *quære*.

In *Attorney General v. Bucknall*, 2 Atk. 328 (1741) there is no suggestion of any restriction on the class of relatives to be benefited. Nor was there any such suggestion in *Waldo v. Caley*, 16 Ves. 206 (1809) (merely preference to poor relations). The two reports of *Isaac v. Defriez*, *supra* note 15, seem to be somewhat inconsistent on this point.

¹⁹ *Flood's Case*, Hobart 136 (1616) ("to find a scholar of his [testator's] blood from time to time"); *Attorney General v. Sidney Sussex College*, 34 Beav. 654 (1865), L. R. 4 Ch. App. 722 (1869) (for the education of the descendants of the brothers and sisters of testator and of his two wives "or in default of such, to their next poore kindred"); *In re Lavelle* [1914] 1 Ir. R. 194 (interest to go forever "towards the education of my relations" in the college); *cf. Spencer v. All Souls College*, Wilm. 163 (1762) (founder of college provided for preference of relatives; preference held not limited to those of close relation; no statement that this was a charitable trust); *White v. White*, *supra* note 15 (fund for purpose of "putting out 'our poor relations' apprentices"; confined to two families by codicil; held valid as charitable trust).

*erty v. Laverty*²⁰ there is some hint at least of that problem. The testator, O'Laverty, left property on trust, the income to be disposed of "towards the support and education . . . of any . . . boy or boys . . . of the surname of O'Laverty or Laverty . . . until such boy . . . shall have obtained a trade or profession." The trust was held to be invalid. It could not be sustained as a private trust because the class was not ascertainable and because there was a perpetuity. It was not charitable as for the relief of poverty because the benefits were not limited to poor persons.²¹ Furthermore, the court regarded it as not educational in the charities sense because it might work as a mere matter of private bounty, *e. g.*, for the employing of a tutor for some wealthy young Laverty. However, there was a dictum that there might be a valid charitable trust for the advancement of education with a preference for persons of a particular surname.

The American cases are more critical of trusts for the support of poor relatives or the education of relatives. The leading case is *Kent v. Dunham*,²² a Massachusetts case. The trust was for the appropriation of "such part of the principal and interest as they [the trustees] may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid." The court took the position that the gift was too remote, as tending to create a perpetuity, unless it could be sustained as a public charity. After referring to a number of the English cases, pointing out that in some of them the question of validity was not raised, and attempting to distinguish all of them, the court held that the trust was not charitable. The court said:

" . . . In the expectation of the remote contingency that there shall be a descendant who is a destitute person, the fund is to be permitted to accumulate. . . . There is no general public object sufficient to justify this accumulation, in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary, and thus from becoming a public charge. To establish, as a permanent charity, a provision for a single family . . . would be foreign to the general principles of our law."²³ . . . "

In a later Massachusetts case,²⁴ the court referred to the previous case as follows:

" . . . We infer, although the statement in the opinion is not in these terms, that one reason of the decision is that the class was not

²⁰ [1907] 1 Ir. R. 9.

²¹ Compare the remarks of Jessel, M. R., in *Attorney General v. Duke of Northumberland*, L. R. 7 Ch. D. 745 (1877).

²² *Supra* note 13.

²³ *Id.* at 219, 7 N. E. at 733.

²⁴ *Sears v. Attorney General*, *supra* note 13, at 554, 79 N. E. at 773.

sufficiently large and indefinite to make the gift of common and public benefit."

This no doubt was one of the reasons in *Kent v. Dunham*, but it was combined with the perpetuity aspects upon which the court placed strong emphasis. Where that combination exists, there is considerable American authority to the same effect as *Kent v. Dunham*.²⁵ On the other hand, trusts otherwise charitable are sustained in spite of provisions for preference of relatives of the settlor.²⁶ It is quite conceivable that in some cases those preferred might exhaust the benefits at any given time. Possibly there might be some limits upon validity depending on the apparent motive of the settlor.²⁷

There is less uniformity in the cases where distribution within the period of the rule against perpetuities is contemplated. In some cases the trust is treated as charitable.²⁸ In others the benefit has been limited to those relatives within the statute of distributions with a power of selection in the trustee.²⁹ In an early Connecticut case the trustees died without

²⁵ *Reasoner v. Herman*, 191 Ind. 642, 134 N. E. 276 (1922) ("such of my brothers and sisters and their wives and husbands and their children as may need, or in the opinion of my said trustees should receive, any aid or support"); *In re Moller's Estate*, 178 N. Y. Supp. 682 (1919) (following a dictum in *Matter of MacDowell*, 217 N. Y. 454, 463, 112 N. E. 177 (1916)); see also *Matter of Beekman*, 232 N. Y. 365, 375, 134 N. E. 183, 186 (1922) (tax case); *Johnson v. De Pauw University*, 116 Ky. 671, 678, 76 S. W. 851, 853 (1903) (education of descendants of testator's father and maternal grandfather; dictum that not valid charitable trust). In the last case the court said, "This devise was in no sense for a general public use, nor was it given with motives free from the stain of everything that is personal, private, or selfish." In *In re Moller's Estate*, *supra*, the court made a vigorous argument against the view it felt bound to follow.

²⁶ *Perin v. Carey*, 24 How. 465 (U. S. 1860); *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371 (1900); *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110 (1891); *Matter of MacDowell*, *supra* note 25; *Franklin v. Armfield*, 2 Sneed 305 (Tenn. 1854); *Gallaher v. Gallaher*, 106 W. Va. 588, 146 S. E. 623 (1929); *Flaherty's Estate*, 2 Pars. Eq. Cas. 186 (Pa. 1851); *Tarver v. Weaver*, 221 Ala. 663, 130 So. 209 (1930) (no discussion of preference provision); see *Kent v. Dunham*, *supra* note 13, at 217, 7 N. E. at 731; *Matter of Beekman*, *supra* note 25, at 376, 134 N. E. at 187; *Paschal v. Acklin*, 27 Tex. 173, 198 (1863).

²⁷ Yet the trust was sustained in *Franklin v. Armfield*, *supra* note 26, where a school was to be established for the education of the children of testator and his brothers and sisters and the descendants of such children, and "if the revenues . . . should be sufficient," poor children of a certain place who were selected by the trustees were to be educated and supported at the school. The testator's primary motive seems to have been the education of relatives. Cf. *Flaherty's Estate*; *Darcy v. Kelly*, both *supra* note 26 (relatively small amount involved).

²⁸ *Swasey v. American Bible Society*, 57 Me. 523 (1869) (bequests for: education of a pious relative who shall be a student for the ministry; benefit of the "poor and needy of my relatives"); *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706 (1887) (interest of a fund to be applied for a term of ten years "for the relief of the most destitute of my relatives not to extend beyond the children of my brothers and sisters and their families"). Both cases raised the question of the validity of the trusts. The Maine case would seem not to involve a perpetuity. The opinion is not full and does not discuss the smallness of the class to be benefited. The New Hampshire case, likewise, does not discuss the smallness of the class; rather the discussion is of whether the trust is too uncertain. The earlier New Hampshire case, *Goodale v. Mooney*, *infra* note 29, is not mentioned.

²⁹ *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699 (1889) (for maintenance and support of "such of my heirs at law as shall or may be in need of pecuniary assistance" with times and amount left to option of executors; court limited benefits to those under the statute in being at testator's death in order to avoid violation of statute against perpetuities);

making the distribution; the court distributed among the most needy of the class.³⁰ The Virginia court, however, refused to follow that case and declared for all of those within the statute on the ground that the court could not ascertain the most needy.³¹

Benefit of Members of Associations and Societies

Those cases of this type which refuse to treat the trust as charitable are explainable usually on some basis other than the smallness of the class to be benefited. Thus a trust to expend the income for the general purposes of a fraternal organization has been held to be invalid because all such purposes were not charitable.³² Likewise, the funds of mutual benefit societies have sometimes been regarded as not held for charitable purposes on the ground that the contributions were for the personal advantage of the contributors or their families—in effect a business arrangement.³³ However,

Webster v. Morris, 66 Wis. 366, 28 N. W. 353 (1886) (bequest said to be "charitable in its purpose"); see Goodale v. Mooney, 60 N. H. 528, 536 (1881); cf. Wright's Estate, 284 Pa. 334, 131 Atl. 188 (1925), where the trust was for distribution for a certain charitable purpose but with authority in the trustees to pay from income to testator's nephews and nieces such sums as in their discretion may be necessary. The court said that the provision for the "needy" (the court's term) relatives was not a charity, but it was valid nevertheless since it did not violate the rule against perpetuities because restricted (by the court's construction) to those in existence at the testator's death. The provision was regarded as incidental to the main trust and temporary. Likewise in Wilce v. Van Anden, 248 Ill. 358, 362, 94 N. E. 42, 44 (1911), where the trustees were to give "such part . . . as they may think best . . . to any one or more of my brothers or sisters that may stand in need of the same" and the remainder to certain charities, the provision for the relatives was said to be a private trust. The court conceded that if both purposes were charitable the trust could be upheld. But the entire trust was held to fail because of the failure to divide the fund between the two purposes. Cf. Minot v. Attorney General, *supra* note 7. But cf. Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320 (1897).

³⁰ Bull v. Bull, 8 Conn. 47 (1830) (to two brothers of testator to dispose of it "among our brothers and sisters, and their children, as they shall judge shall be most in need of the same"; sufficient designation of the persons to prevent the trust from being void for uncertainty; class to be determined as of the death of the testator).

³¹ Fontaine's Adm'r v. Thompson's Adm'r, 80 Va. 229 (1885); cf. McNeilledge v. Galbraith, 8 S. & R. 43 (Pa. 1822) (at wife's death "to be divided between her and my poor relations equally"; word "poor" disregarded because of practical difficulties in distinguishing between degrees of poverty); McNeilledge v. Barclay, 11 S. & R. 103 (Pa. 1823).

³² Mason v. Perry, 22 R. I. 475, 48 Atl. 671 (1901) (dictum that relief of needy members of lodge is charitable); cf. Bangor v. Masonic Lodge, 73 Me. 428 (1882) (tax case); Estate of Wirt, 207 Cal. 106, 277 Pac. 118 (1929) (proof directed as to character of the lodges). But cf. Cruse v. Axtell, 50 Ind. 49 (1875); Duke v. Fuller, 9 N. H. 536 (1838); City of Petersburg v. Petersburg Benevolent Mechanics Ass'n, 78 Va. 431 (1884) (tax case); Kauffman v. Foster, 3 Cal. App. 741, 86 Pac. 1108 (1906) (but see concurring opinion). In a few cases a trust for a lodge seems to be treated as a private trust. Brown v. Webb, 60 Ore. 526, 120 Pac. 387 (1912); King v. Parker, 9 Cush. 71 (Mass. 1851); cf. Vander Volgen v. Yates, 3 Barb. Ch. 242 (N. Y. 1848), *aff'd* 9 N. Y. 219 (1853). This may be quite proper where there is no restriction on the purposes for which the property is to be used and no perpetuity. See TRUSTS RESTATEMENT, Tentative Draft No. 1 (Am. L. Inst. 1930) § 115, dealing with trusts for unincorporated associations. *Quaere*, whether that explains King v. Parker, *supra*.

³³ Anon., 3 Atk. 277 (1745) (said to be in "nature only of a private charity"; therefore Attorney General was not a necessary party); *In re Clark's Trust*, 1 Ch. D. 497 (1875) (benefits not limited to poor members; *cy pres* application of fund bequeathed to the society refused); Cunnack v. Edwards [1896] 2 Ch. 679 (question of distribution of funds when society became extinct; benefits not limited to poor widows; *cy pres* application refused); Braithwaite v. Attorney-General [1909] 1 Ch. 510 (distribution of two funds, one con-

a different conclusion is reached when the benefit is limited to poor members.³⁴ Furthermore, there appears to be another exception based on the actual or potential size of the society.³⁵ An English case³⁶ and a Massachusetts case³⁷ present an interesting comparison. In both cases the original trust was admittedly charitable, and the question was whether the proposed application of the fund was proper. In the English case the court sanctioned the proposal and ordered the fund to be transferred to the trustees of a Friendly Society for the relief of members suffering from colliery accidents in a certain district. This order was made in spite of the objection that poverty was not necessary for relief under the rules of the society. In the Massachusetts case the proposal included turning over part of the fund to two incorporated mutual benefit associations, the Boston Teachers' Association and the Bank Officers' Association of Boston, each of which was organized for the giving of charitable assistance to sick and disabled members. The court approved the proposal, citing the English case and emphasizing the fact that through the years an indefinite number of persons would be members and that all public school teachers and bank officers and clerks in the city were eligible for membership in the respective societies.

Gifts the benefit of which is limited to members of a particular religious society have been sustained as charitable.³⁸

Likewise, gifts for the benefit of the poor members of a lodge or their families generally have been regarded as creating charitable trusts.³⁹ This

tributed by honorary members, the other by benefited members; benefits not limited to poor members; *cy pres* application of either fund refused); *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966 (1889) (distribution; said not to be a public charity which can be administered *cy pres*; payments by members like insurance premiums); *cf. Neptune Fire Engine and Hose Co. v. Board of Education*, 166 Ky. 1, 178 S. W. 1138 (1915); *Swift's Executors v. Easton Beneficial Society*, 73 Pa. 362 (1873) (mortmain statute); *Sharp's Estate*, 71 Pa. Super. 34 (1918) (mortmain statute).

³⁴ *Spiller v. Maude*, 32 Ch. D. 158 n. (1881) (*cy pres* application); *In re Buck* [1896] 2 Ch. 727 (bequest to Friendly Society rules of which pointed to poverty; *cy pres* application); *cf. In re Lacey* [1899] 2 Ch. 149 (mortmain act).

³⁵ In addition to the English case and the American case discussed in the text, consult *Jeanes's Estate*, 34 W. N. Cas. 190, 3 Pa. Dist. R. 314 (1893) (mortmain statute; court cited Gray and relied on his analysis). The Pennsylvania cases suggest a third exception, *viz.*, where the benefit is not limited to the members of the society. *Potts v. Philadelphia Association*, 8 Phila. 326 (1871) (member not permitted to withdraw from the fund); *Lawson's Estate*, 264 Pa. 77, 107 Atl. 376 (1919) (mortmain statute); *cf. Minns v. Billings*, 183 Mass. 126, 66 N. E. 593 (1903) (members and other needy persons connected with the printing business).

³⁶ *Pease v. Pattinson*, 32 Ch. D. 154 (1886) (no discussion of smallness of class).

³⁷ *Minns v. Billings*, *supra* note 35.

³⁸ *Trustees v. Wilkinson*, 36 N. J. Eq. 141 (1882), *aff'd* 38 N. J. Eq. 514 (1884) (interest to be applied forever to the poor members of two incorporated churches of Camden); *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558 (1902) (home for aged or infirm ladies connected with the society; public in sense that not selfish and hence protected against effect of rule against perpetuities); see *Richtman v. Watson*, 150 Wis. 385, 136 N. W. 797 (1912); *cf. Witman v. Lex*, 17 S. & R. 88 (Pa. 1827); *Gass and Bonta v. Wilhite*, 2 Dana 106 (Ky. 1834); *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (1899); *Bates v. Schillinger*, *supra* note 6 (distinguishing gift to those who were members at death of testatrix).

³⁹ *Roberts v. Corson*, 79 N. H. 215, 107 Atl. 625, 5 A. L. R. 1172 (1919) (court said the trust was for benefit of a definite section of the public, and it was immaterial as to validity how large or small the section was); *Humphrey v. Board of Trustees of I. O. O. F. Home*,

result was reached in some of the cases over the objection that the benefited class was too small.⁴⁰ An outstanding exception to this current of authority is a Kansas case⁴¹ involving a deed to trustees on trust to "provide a home upon said premises for the orphan children of deceased Odd Fellows of the State of Kansas." In a four to three decision the deed was held to be void on the ground that it violated the rule against perpetuities since the trust was not a public charity. The majority opinion took the novel position that a public charity is a gift to a public object which the state itself, with public resources, might foster.⁴² It also rebutted the argument that the public burden is relieved pro tanto by saying that such an argument would support a trust for destitute descendants of the settlor, referring to *Kent v. Dunham* discussed above.⁴³ The dissenting opinions are more convincing and certainly better supported by the cases in other jurisdictions.

Other Related Cases

Professor Gray placed considerable reliance on the "much-considered" English case of *Goodman v. Mayor of Saltash*,⁴⁴ and indeed it is most interesting on its facts and because of the opinions rendered. In the House of Lords the evidence was said to show a grant to the corporation (Borough of Saltash) of a fishery subject to a condition or proviso that the free inhabitants of ancient tenements in the borough should be entitled to fish during a certain season. This was said to be a charitable trust which cannot be

203 N. C. 201, 165 S. E. 547 (1932) (education of one of white girl inmates of the Home to be selected from time to time; no discussion of smallness of class); *Green's Adm'rs v. Fidelity Trust Company*, *supra* note 3 (institution for orphans of Free Masons of Indiana; court rejected contention that mere private charity and void as offending the statute prohibiting perpetuities); *Estate of Willey*, 128 Cal. 1, 60 Pac. 471 (1900) (for the "use of the widows' and orphans' fund" of certain Masonic bodies; the court said it was sufficient that the purpose was charitable regardless of whether or not the Masonic body was a charitable institution); *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 11 S. W. 825 (1889) (dividends to be used for benefit of widows and orphans of members of the lodge; some language in the opinion that uncertainty of beneficiaries is indispensable to all charities); *cf. Masonic Education and Charity Trust v. Boston*, 201 Mass. 320, 87 N. E. 602 (1909) (tax case; beneficiaries indefinite although limited to a class); *Grand Lodge v. Board of Review*, 281 Ill. 480, 117 N. E. 1016 (1917) (tax case; for a public charity benefit must not be conferred upon certain and defined persons, but class may be limited); *Price v. Maxwell*, 28 Pa. 23 (1857) (mortmain statute; charitable though benefits confined to a particular class); *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009 (1895); *Tate v. Woodyard*, 145 Ky. 613, 140 S. W. 1044 (1911); *Milligan v. Greenville College*, 156 Tenn. 495, 2 S. W. (2d) 90 (1928) (court emphasized fact that no perpetuity involved; also that gift was to a charitable corporation); *State ex rel. Crutze v. Toney*, 141 Ore. 406, 17 P. (2d) 1105 (1933).

⁴⁰ Notably *Roberts v. Corson*; *Green's Adm'rs v. Fidelity Trust Company*, both *supra* note 39.

⁴¹ *Troutman v. De Boissiere*, 66 Kan. 1, 71 Pac. 286 (1903). This was on rehearing. The opposite result had been reached, five to two, in a previous hearing. 64 Pac. 33 (Kan. 1901). The opinions on both hearings are reported in 5 L. R. A. (N. S.) 692 (1901); *cf. dicta* in *Moseley v. Smiley*, 171 Ala. 593, 55 So. 143 (1911).

⁴² This language was explained away to some extent in *Washburn College v. O'Hara*, 75 Kan. 700, 90 Pac. 234 (1907); *cf. Treadwell v. Beebe*, 107 Kan. 31, 38, 190 Pac. 768, 772 (1920).

⁴³ Text, *supra* page 17.

⁴⁴ 7 App. Cas. 633 (1882).

void on the ground of perpetuity. In the opinion of Earl Cairns it was said: ⁴⁵

"Where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities."

On the other hand, Lord Blackburn in his dissenting opinion made the following remarks: ⁴⁶

"And though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any that say that such a trust as is now supposed would be taken out of the rule against perpetuities."

The case has influenced the decisions in a few other somewhat similar English cases. ⁴⁷

Trusts for religious purposes seem to be in a class by themselves. This is shown by *Sears v. Attorney General*,⁴⁸ a Massachusetts case. There the trust was "for the benefit of the widows and orphan children that may be left by the future ministers" of a certain church. After raising but not deciding the question of whether the trust was a public charity solely in its eleemosynary aspect, the court held that the trust was a religious charity and subject to a *cy pres* application. The fund was regarded as a gift for the support of the rector,⁴⁹ and it was pointed out that most churches seek to promote religion and morality among the people generally.⁵⁰ Probably similar ideas

⁴⁵ *Id.* at 650-651.

⁴⁶ *Id.* at 662. Italics are the author's. However, Lord Blackburn did not venture to differ from the others on the perpetuities question. Rather he questioned whether a trust should be presumed.

⁴⁷ *In re* Christchurch Inclosure Act, 38 Ch. D. 520 (1888) (land allotted under Inclosure Act to lord of manor in trust for occupiers of certain cottages; as a turf common; part of fund arising from sale of part of land held to be subject to a charitable trust with liberty to the Attorney General to apply for a *cy pres* order; no perpetuities question because trust created by statute; class limited but liable to fluctuation), *aff'd* on appeal on other grounds in *Attorney General v. Meyrick* [1893] A. C. 1; *In re* Norwich Town Close Estate Charity, 40 Ch. D. 298 (1888) (city trustee for freemen for the time being of the city; jurisdiction on a summons under the Charitable Trusts Act).

⁴⁸ *Supra* note 13. Professor Gray was of counsel.

⁴⁹ Some reliance was placed upon the provisions that the fund, if large enough, was to be used also for the bishop of Massachusetts when a rector of the church and for other objects connected with the church. Some earlier Massachusetts cases were regarded as having been overruled, at least to some extent, including *Old South Society v. Crocker*, 119 Mass. 1 (1875). But *cf.* *Bullock v. Long*, 260 Mass. 129, 156 N. E. 743 (1927) (tax case).

⁵⁰ *Cf.* *Attorney General v. Cock*, 2 Ves. Sr. 273 (1751) (support of minister); *Attorney General v. Goddard, T. & R.* 348 (1823) (support of minister); *In re* St. Stephen, 39 Ch. D. 492 (1888) (grant of advowson to trustees for benefit of the parish and bequest on trust for providing a vicarage house; held to be a charitable trust within the City of London Parochial Charities Act and not void as a perpetuity); *In re* Bell's Will, 141 Misc. 720, 253 N. Y. Supp. 118 (1931) (minister's salary); *Holton v. Elliott*, 193 N. C. 708, 138 S. E. 3 (1927) (home for minister); *Attorney General v. Dublin*, 38 N. H. 459 (1859) (support of minister).

of indirect public benefit sustain some educational gifts, *e. g.*, the endowment of professorships⁵¹ and the creation of scholarships.⁵²

Trusts the benefits of which are limited to the employees of a business have been considered in a few cases. An English case⁵³ involved a bequest to be invested by the trustees to form a fund for the purpose of pensioning off the old and worn-out clerks of a firm of which the testator was a member. This was held to be a good charitable gift the benefits of which would include clerks becoming such after the testator's death, and the trustees were directed to bring in a scheme. The court said:

"The fact that the section of the public is limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family, does not of itself render that which would be otherwise charitable void for lack of a sufficient or satisfactory description or take it out of the category of charitable gifts."⁵⁴

Finally, there are many cases where trusts with territorial and other limitations upon the possible beneficiaries have been regarded as charitable. Examples are cited in the footnotes. A few discuss the narrowness of the class;⁵⁵ more do not.⁵⁶

⁵¹ *Cheeseman v. Partridge*, 1 Atk. 436 (1739); *Catron v. Scarritt Collegiate Institute*, 264 Mo. 713, 175 S. W. 571 (1915) (endowment of president's chair said to be for benefit of students and to release other funds of the school; fund should be applied *cy pres* when school combined with another school); see *Dexter v. Harvard College*, *supra* note 26.

⁵² *Hoyt v. Bliss*, 93 Conn. 344, 105 Atl. 699 (1919) (restricted to residents of Danbury, Connecticut; not invalid because no distinction between rich and poor); see *Dexter v. Harvard College*, *supra* note 26.

⁵³ *In re Gosling*, 48 W. R. 300 (1900); *cf.* *Attorney-General v. Ironmonger's Company*, 2 Beav. 313, 327 (1840); *Eagan v. Commissioner of Internal Revenue*, *supra* note 3 (tax case; charitable in spite of limitation of beneficiaries to employees and their families; at testator's death employees numbered 1,470 and dependents about 6,000—hence a considerable portion of the public).

⁵⁴ *Supra* note 53, at 301.

⁵⁵ *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951 (1889) ("to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate"); *Kitchen v. Pitney*, 94 N. J. Eq. 485, 119 Atl. 675 (1923) ("home for aged and respectable white bachelors and widowers, who may have, through misfortune, lost the means which they once had for their own support, and have become wholly or partially unable to support themselves"); *cf.* *Carter v. Whitcomb*, 74 N. H. 482, 69 Atl. 779 (1908) (tax case; bequest to Women's Relief Corps of Nashua, N. H., an auxiliary to the Grand Army of the Republic).

⁵⁶ *Wright v. Hobert*, 9 Mod. 64 (1723) (conveyance of land to trustees "to the intent, that as many of the inhabitants of that village as were able to buy three cows might put them there to grass" during a certain period of the year forever and during another period "to be in common for all the inhabitants"); *Bristow v. Bristow*, 5 Beav. 289 (1842) (interest to be given every year "for the relief of the poor on my little estate in Suffolk"); *Thompson v. Thompson*, 1 Coll. 381 (1844) (income to be used in part in perpetuity for weekly gift of bread to sixteen poor old persons residing in certain parish and in part for assisting unsuccessful but deserving "literary men"); *In re Good*, *supra* note 7 (bequest upon trust for officers' mess of testator's regiment; income for library and plate; court stressed public benefit in increase of efficiency of army); *Holmes v. Coates*, 159 Mass. 226, 34 N. E. 190 (1893) (benefit of disabled soldiers and seamen who served in the Union Army in the Civil War and their widows and orphans); *Attorney General v. Goodell*, 180 Mass. 538, 62 N. E. 962 (1902) (to be divided "among the poor colored people of the city of Lynn"); *Attorney General v. Bedard*, 218 Mass. 378, 105 N. E. 993 (1914) (relief fund for striking operatives in textile mills of Lawrence, Mass.); *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557

Conclusion

The idea that there are minimum limits to the size of the class to be benefited by a charitable trust is largely of American origin and development. No clear-cut discussion or even recognition of any such requirement has been found in the English cases. The American cases, on the other hand, abound with dicta on the subject; also there are a considerable number of American cases where the requirement was stated and applied to the particular situations. However, the number of instances of a trust failing on that ground are few indeed. In fact, the only situation as to which the courts have reached fairly general agreement is the trust, unlimited in time, for the support or education of relatives. Such a trust involves an element of selfishness in the family restriction.

In that type of case, the American courts have departed definitely from the English authorities and have held such trusts to be invalid, emphasizing the narrowness of the class *and* the element of a perpetuity. On the other hand, in both countries, such trusts have been sustained on one theory or another when no perpetuity was involved. It is true that this distinction is not made explicit, but it is at least implicit in the American emphasis on the perpetuity element, where it is present, and in the actual difference in results in the American cases. Furthermore, it is submitted that the distinction has merit. Although there may be a policy against permitting a person to provide in perpetuity for his relatives who are in need of support or education, no such policy would seem to apply where the fund is to be expended immediately or within the period of the rule against perpetuities.

In the latter situation it has been seen that some of the cases limit the benefits to relatives within the class fixed by the statute of distributions. This looks much like a private trust for relatives with a power of selection in the trustees.⁵⁷ On the other hand, in a number of cases, both English and American, the trust has been treated as charitable with, apparently, no limitation to persons within the statute.⁵⁸ Perhaps the important thing is

(1885) (for the benefit of the "worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport"); *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503 (1893) (supporting institution "to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics"); *Wright v. Linn*, 9 Pa. 433 (1848) (conveyance of land for school house free for all inhabitants residing nearer thereto than to any other public school); *Darcey v. O'Brien*, 65 F. (2d) 599 (App. D. C. 1933) (patients in a certain hospital); see *Cannon v. Stephens*, *supra* note 5.

⁵⁷ Compare cases like *Harding v. Glyn*, 1 Atk. 469 (1739); see also TRUSTS RESTATEMENT, Tentative Draft No. 1 (Am. L. Inst. 1930) § 117.

In fact, these "poor relatives" cases seem to go farther in restricting the beneficiaries, so far as they restrict even the trustee in selection. They go no farther in restricting the class where the trustee is dead or has refused to act. See *Gower v. Mainwaring*, *supra* note 16.

⁵⁸ So far as these cases do not limit the trustee in selection, they are not inconsistent with the cases of private trusts for relatives. See TRUSTS RESTATEMENT, *loc. cit.* *supra* note 57. But if the trustee did not distribute and the court itself did not limit the benefits to those within the statute, there would be a departure from the private trust cases. That question was not clearly raised and passed upon in any of the cases examined. It was involved in *Attorney-General v. Bucknall*, *supra* note 18, where the trustee had died, but there was no discussion of it.

that the trusts are sustained on one theory or the other. Yet the charity theory seems more desirable. The other theory does violence to the settlor's intention.⁵⁹ The charity theory also gives leeway for the exercise of the *cy pres* power in case the trustee does not make the selection.

It is conceivable that other situations may arise in which, because of the smallness of the class to be benefited, it is not desirable to sustain as charitable a trust in perpetuity. However, if the trust does not tend to perpetuity and if the beneficiaries are not sufficiently definite for a private trust without a strained construction defeating the settlor's intention, it is submitted that it should be sustained as a charitable trust. In other words, some trust objects may not be charitable for the purpose of the rule against perpetuities⁶⁰ but may be charitable for the purpose of the rule against indefiniteness of the beneficiaries of non-charitable trusts and the *cy pres* power and perhaps other purposes.

In closing, this problem is related to the rule of *Morice v. The Bishop of Durham*⁶¹ against indefiniteness of the beneficiaries of non-charitable trusts. That rule is at best an arbitrary one. The courts have developed an exception to it in the "honorary" or "specific purpose" trust cases.⁶² Also an escape from the rule has been worked out for some situations in the cases where the transferee is said to have an "unrestricted power of disposition."⁶³ The position here taken offers another exception or partial escape where the trust object is not charitable in the fullest sense.

⁵⁹ Particularly in those cases which disregarded the word "poor". See notes 16 and 31.

⁶⁰ In the sense of a limit upon duration, as in the so-called "honorary" or "specific purpose" trust cases. See Smith, *Honorary Trusts and the Rule Against Perpetuities* (1930) 30 COL. L. REV. 60, discussing ably whether it is the rule against perpetuities or some analogous rule which applies to such trusts; see also TRUSTS RESTATEMENT, Tentative Draft No. 1 (Am. L. Inst. 1930) § 119.

⁶¹ 10 Ves. 521 (1805).

⁶² As to the rule and its exceptions, see Ames, *The Failure of the "Tilden Trust"* (1892) 5 HARV. L. REV. 389; AMES, LECTURES ON LEGAL HISTORY (1913) 285; Gray, *Gifts for a Non-Charitable Purpose* (1902) 15 HARV. L. REV. 509; GRAY, *op. cit. supra* note 1, Appendix H; Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 527, 538; Smith, *supra* note 60; TRUSTS RESTATEMENT, Tentative Draft No. 1 (Am. L. Inst. 1930) §§ 115, 118, 119.

⁶³ *Norman v. Prince*, 40 R. I. 402, 101 Atl. 126 (1917), discussed in (1918) 31 HARV. L. REV. 661; *Beals v. Villard*, 268 Mass. 129, 167 N. E. 264 (1929), discussed in (1930) 14 MINN. L. REV. 310; TRUSTS RESTATEMENT, Tentative Draft No. 1 (Am. L. Inst. 1930) § 121. Compare the devious and doubtful reasoning employed to escape from the rule in *In re Clarke* [1923] 2 Ch. 407, discussed in (1923) 37 HARV. L. REV. 277.