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Dispositions of Property to Unincorporated Non-Profit Associations

Harold A.J. Ford
University of Melbourne

DISPOSITIONS OF PROPERTY TO UNINCORPORATED NON-PROFIT ASSOCIATIONS†

*Harold A. J. Ford**

B. *Construction of Disposition as One to the Purposes of the Association*

IT now becomes necessary to examine the cases in which the disposition could not be treated as one to the existing members. This treatment will disclose that some courts have been prepared to regard some dispositions to associations as being for the purposes of the association. The only way in which property may be devoted to a purpose without conferring beneficial interests on particular individuals is by a trust. Accordingly in many instances the disposition takes effect as a trust.

1. *Distinction Between Pure Purpose Trusts and Trusts for the Purposes of Associations.* At this point reference should be made to the controversy[66] concerning non-charitable purpose trusts which stems from the supposed doctrine that for a trust to exist there must be some person in whose favor a court can decree performance of the trust.

The proponents of the view that non-charitable purpose trusts are void because they lack this requirement rely on the words of Sir William Grant, M.R., in *Morice v. Bishop of Durham*[67] when he said,

> "There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the

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* Senior Lecturer in Law, University of Melbourne; LL.B. 1948, LL.M. 1949, University of Melbourne.—Ed.

66 Hart, "Some Reflections on Re Chardon," 53 L. Q. REV. 24 at 29-35 (1937); Eggleston, "Purpose Trusts," 2 RES JUDICATAE 118 (1940); Marshall, "The Failure of the Astor Trust," 6 CURRENT LEGAL PROB. 151 (1953); Sheridan, "Trusts for Non-Charitable Purposes," 17 CONVEY. 46 (1953); Gray, "Gifts for a Non-Charitable Purpose," 15 HARV. L. REV. 389 (1892); Ames, "The Failure of the Tilden Trust," 5 HARV. L. REV. 389 (1892); Clark, "Unenforceable Trusts and the Rule Against Perpetuities," 10 MICH. L. REV. 31 (1911); Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 COL. L. REV. 60 (1930); 1 SCOTT, TRUSTS §§119-124 (1939); GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., Appx. H (1942); Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548 (1945).

67 9 Ves. Jr. 399 at 404-405, 32 Eng. Rep. 656 (1804).

> ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance."

Whatever cogency their argument may have in relation to trusts for the maintenance of animals, for the upkeep of monuments, private museums and the like, it can have no application to trusts for the purposes of non-charitable associations. Professor Gray, in the third edition of his work on the rule against perpetuities, thought that trusts of the latter kind would be invalid because there would be no legal person who would be beneficiary.[68] But even on the strictest interpretation of *Morice v. Bishop of Durham* all that is required is that there should be somebody in whose favor the court can decree performance of the trust. This requirement is met in the case of trusts for the purposes of non-charitable associations. It is well established that any member can ask the court to enforce devotion of the association's property in accordance with the constitution of the association.[69]

That he is not suing to protect a severable property interest of his own as substantial as that which he might have if he were simply one of a number of joint tenants or tenants in common is made apparent by the cases defining his rights in the association property.[70] Even when the property concerned in such a suit has not been received under an express trust for the association's purposes, the individual interest of each member is slight.[71] When

[68] GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., §§894-909a (1915).

[69] Fells v. Read, 3 Ves. Jr. 70, 30 Eng. Rep. 899 (1796); Re St. James' Club, 2 De G. M. & G. 383, 42 Eng. Rep. 920 (1852); Rigby v. Connol, 14 Ch. D. 482 (1880); Huegli v. Pauli, 26 Ont. L.R. 94, 4 D.L.R. 319 (1912); Langville v. Nass, 51 N.S.R. 429, 36 D.L.R. 368 (1917); McGuire v. Evans, 19 Ont. W.N. 174 (1920); Kowalchuk v. Ukrainian Labor Farmer Temple Assn., [1935] 1 W.W.R. 529, 43 Man. R. 76, [1935] 2 D.L.R. 691; Van Kerkvoorde v. Moroney, 23 C.L.R. 426 at 433, 23 Arg. L.R. 408 (1917); Stevens v. Keogh, 72 C.L.R. 1 (1946); Ludlam v. Higbee, 11 N.J. Eq. 342 (1857); Liggett v. Ladd, 17 Ore. 89, 21 P. 133 (1888); White v. Rice, 112 Mich. 403, 70 N.W. 1024 (1897); Davis v. Hudgins, (Tex. Civ. App. 1920) 225 S.W. 73; Oster v. Brotherhood of Locomotive Firemen and Enginemen, 271 Pa. 419, 114 A. 377 (1921); Carson v. Gikas, 321 Mass. 468, 73 N.E. (2d) 893 (1947).

[70] Pages 73-75, supra [55 MICH. L. REV. 67 (1956)].

[71] United States v. White, 322 U.S. 694 (1944) (records and papers of unincorporated trade union not the private records of the individual members or officers of the organization. A member cannot refuse to produce them in judicial proceedings on the ground that they might tend to incriminate him. They embody no element of personal privacy and carry with them no claim of personal privilege which enures to his benefit under the Fifth Amendment to the Constitution of the United States); Appeal of Coy, 126 Me. 256, 137 A. 771 (1927) (member of an unincorporated club organized for social purposes has no such pecuniary interest in a bequest to a trustee upon trust to pay income to the club as to make him incompetent to witness the will containing the bequest. The possi-

he sues he seeks to protect not only his slight interest but also the beneficial interest of the group enterprise. It is as if he were suing on behalf of the association's purpose as well as himself. It is the identification of the individual by reason of his membership with the purposes of the association which answers Professor Gray's objection. In the following treatment, the non-charitable purpose trust, of which those for the maintenance of monuments are examples, will be referred to as a "pure purpose trust" to distinguish it from a trust for the purposes of an association.

2. *The Impact of Rules Aimed at Forwarding the Circulation of Property Which May Be Relevant to Pure Purpose Trusts and Trusts for the Purposes of Associations.* Most of the cases in which the disposition to an association could not be read as a disposition to the existing members have involved debate as to whether the disposition had the effect of restricting the circulation of property to such an extent that it should not be upheld. In some of these cases, authorities concerned with the extent of such restriction permissible in pure purpose trusts have been considered relevant. Accordingly it is necessary to sketch in the background of law against which those questions have been considered.

The policy of the common law has been to promote the circulation of property. Various doctrines implement this policy.

There is one body of law concerned with ensuring that when an interest in property is given, it shall not be accompanied by restraints which would substantially deprive the grantee of the power of alienating that interest. There are exceptions in the form of grants of leasehold interests and, in a majority of jurisdictions in the United States, settlements, devises and bequests in the form of valid spendthrift trusts.[72] Another exception which was formerly important was the settlement, devise or bequest of property to the separate use of a married woman. Apart from these exceptions, any attempt to create a legal or equitable interest in a person in such a way that that person should enjoy the property and its fruits and yet be unable to alienate his interest could

bility that that member with other members will enjoy greater club comforts by reason of the bequest does not make it a pecuniary benefit to him. The chances that the witness may benefit from a reduction of the club dues, that he may be saved from liability for club debts, that he may receive a share of the accrued income upon the dissolution of the club are so remote, uncertain and contingent that they have no present pecuniary value). See annotation, 53 A.L.R. 211 (1927), in which other cases on the same point are collected.

72 As to spendthrift trusts, see GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed. (1947); 1 SCOTT, TRUSTS §§149-162 (1939); TRUSTS RESTATEMENT §§149-162 (1935).

not take effect as intended.[73] The underlying policy was made effective by allowing the disposition to take effect free of the attempted restraint.

There is another body of law collected under the rubric, Rule against Perpetuities, which is not aimed at direct attempts to restrain the alienation of present interests but at attempts to create remote future interests which would indirectly restrain the alienation of property. It is concerned with the situation where the enjoyment of either the whole quantum of interest in particular property or any part thereof is in abeyance pending the ascertainment of the persons who are to have that interest and the ascertainment of the quantum of interest of each. Under the rule this state of affairs is not to be permitted to continue for more than a stated period. The classic statement of the rule is that of Professor Gray, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[74] The object of this rule is to ensure that the stage at which all persons having interests in the particular property will be ascertained, so that between them they will have the full control of the property implied by absolute ownership, shall not be postponed for too long a period. The rule is concerned with the time at which interests, either legal or equitable, become identified with or vested in a particular person or group of persons. The rule thus deals with the commencement of interests. It is not concerned with their duration and this is so even if they are limited interests.[75] It has been said that it would be less confusing to describe the rule as one against remoteness of vesting.[76] The possibility of its being called into operation in connection with a pure purpose trust or a trust for the purposes of an association would be raised if the disposition on trust were so expressed as to postpone the devotion of the property to those purposes until some time later than that at which the disposing instrument comes into effect. If that time could be later than the period prescribed by the rule, the disposition intended to promote those purposes would be void.

In addition to the rules aimed at restraints on alienation and the rule against remoteness of vesting there has developed a third

73 GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed. (1895).

74 GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §201 (1942). Periods of gestation are included in the perpetuity period so far as they actually occur.

75 Re Cassel, [1926] Ch. 358. GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §234 (1942). But it has been held by some courts in the United States that a private trust created to last longer than the perpetuity period is void. E.g., Mercer v. Mercer, 230 N.C. 101, 52 S.E. (2d) 229 (1949), noted 48 MICH. L. REV. 235 (1949).

76 GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §2 (1942).

doctrine designed to implement the policy favoring circulation of property. One reason why the rule against remoteness of vesting was made necessary was the ability of the absolute owner to dispose of his interest by distributing limited interests to various persons, some of which interests might commence in the future. The third doctrine has been made necessary because it became possible to create trusts by which the legal title can be separated from the equitable ownership. In recognition of the fact that a restriction on uniting the legal title with the equitable ownership would, if maintained for too long a period, hamper the circulation of property, the common law has developed rules aimed at making trusts destructible. That the trustee may be able to change the character of the trust *res* by alienation is not enough. The policy requires that property such as funds of personalty should be expendable. The rule against remoteness of vesting plays some part to this end inasmuch as it is concerned with equitable interests becoming vested so that the absolute equitable ownership will be identified with ascertained persons within a reasonable time from the creation of the interests. But it is supplemented by other rules made necessary to cope with trusts. In England, if all the beneficiaries of a trust are ascertained and are of full age and capacity, they may collectively compel the termination of the trust and the transfer of the legal title to them even though this is in violation of the terms of the trust.[77] They can thus assume full power to expend what was the trust property. In England, the policy in favor of circulation of property overrides any policy of giving effect to the expressed intent of settlors. In the United States a somewhat different attitude is taken. Rather more attention is given to the settlor's intention. It has been held that even though all beneficiaries of a private trust are sui juris and have vested interests, they cannot necessarily compel the termination of the trust if that would defeat one of the purposes of the trust.[78] But a settlor who attempts to set up a trust which will be indestructible forever will not have his intention carried out. If corporation *A* is made trustee of property upon trust to manage and pay the net income to corporation *B* and the trust instrument provides that the trust is never to be terminated, corporation *B* may obtain a court order terminating the trust despite the terms of the trust instrument to the contrary.[79] The *Restatement of Prop-*

[77] Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (1841).

[78] Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); TRUSTS RESTATEMENT §337 (1935); Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 (1934).

[79] PROPERTY RESTATEMENT §378 (1944).

erty suggests that a restriction on destruction of a trust limited to last for the lives of beneficiaries alive when the trust is created would be valid.[80] It has been suggested that a convenient measure of the limit would be the period prescribed by the rule against remoteness of vesting.[81]

Thus in both English law and the law of American jurisdictions, there is a bias against indestructible private trusts. Where the beneficiaries of a trust are individuals that bias can be given effect by allowing them to terminate the trust if they wish to do so. There is no need to speak in terms of limiting the duration of the trust since the courts are prepared to leave the matter in the hands of the beneficiaries who may be relied upon to act according to their self-interest. But trusts may be created for purposes so that there is no particular individual or group of individuals in whom the law can repose the power of terminating the trust as against the trustees. Thus when property is devoted upon trust for the care of particular animals, the policy to promote the circulation of property must be reflected in a rule concerned with the duration of that trust. It seems to be now widely settled that where trusts for specific non-charitable purposes are not held void as lacking individual beneficiaries, a trust of this kind will be held good if it cannot last for a period longer than that prescribed by the rule against remoteness of vesting.[82] Thus pure purpose trusts are catered for. The rules applicable to trusts for the purposes of non-charitable associations will be considered after an examination of the authorities.

3. *The Cases Considered.* In the well known English case, *Carne v. Long*,[83] the testator devised a particular freehold property "unto the trustees for the time being of the Penzance Public Library, to hold to them and their successors forever, for the use, benefit, maintenance and support of the said library." The Penzance Public Library had been established by voluntary subscription of the members. Under its rules the property of the association was vested in trustees and the association was not to be dissolved so long as ten members remained. On dissolution, donations were to be returned to donors and the proceeds of the sale of the remaining property were to be paid to another institution

[80] Id., §381.

[81] SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 405 (1951).

[82] Hart, "Some Reflections on Re Chardon," 53 L. Q. REV. 24 at 35-52 (1937); Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 COL. L. REV. 60 (1930); 1 SCOTT, TRUSTS §124.1 (1939).

[83] 2 De G. F. & J. 75, 45 Eng. Rep. 550 (1860).

in Penzance to be chosen by a majority of the members. These rules could be altered at general meetings in the manner prescribed by the rules. This power of amendment would have extended to the provisions regarding dissolution. Lord Campbell, L.C., after finding that the library was not a charity held the devise void. He said,

> "I look upon this as a devise for the benefit of a society of individuals in Penzance. My objection to it is, that it tends to a perpetuity, an objection with which the Vice-Chancellor does not appear to have dealt, but which appears to me wholly fatal to the devise. The clear intention of the testator, as expressed by the will, is, that this should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors, to be held to them and their successors forever, they holding it for the use, benefit, maintenance and support of the library. If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided, that the society is not to be broken up so long as ten members remain.
>
> "The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty one years afterwards, but for so long as ten of the members of the society shall remain. This seems to me a purpose which the the law will not sanction as tending to a perpetuity; and I think the recent decision in *Thomson v. Shakespear*[84] is in point and governs the present case."[85]

This long passage has been extracted because the case is a puzzling one. The precise basis of Lord Campbell's decision is not altogether clear. If, for purposes of discussion, we can presume to look at the case in the light of later decisions we could say that if the devise had been directly to "the Penzance Public Library" without the intervention of trustees and without any statement that the property was to be held forever, it might have been read

[84] 1 De G. F. & J. 399, 45 Eng. Rep. 413 (1860).
[85] 2 De G. F. & J. 75 at 79-80, 45 Eng. Rep. 550 (1860).

as a devise to all the existing members. This result, as later cases show,[86] would be reached without any reference to the rules of the association. The fact that the members might continue to hold the property until such time as their association might be dissolved would not prevent the gift from having effect.

If the devise had been directly to "the Penzance Public Library" without the intervention of trustees but with the statement that the property was to be held forever, the attempted restraint on alienation would on general principle be held repugnant to the interest given and the existing members would take free from the restraint. This result also would be reached without any reference to the rules of the association.

If the devise had been to trustees "upon trust for the Penzance Public Library" without any statement that the property was to be held forever, it would on some later cases[87] be held to be a trust for the individual members. Presumably those members would take interests absolute in the sense that if they were all sui juris they could join together and demand that the property be conveyed to them after amending their rules concerning dissolution and voting for dissolution.

In *Carne v. Long,* however, the effect of the statement that the trustees were to hold "to them and their successors forever" seems to have been to exclude the idea that the devise was in favor of the existing members as individuals. Did Lord Campbell then look at it as a disposition to future members as well as present members so that the rule against remoteness of vesting would strike down the devise? It would seem not. Once he accepted that it was some continuing thing which was the only beneficiary intended, he took that continuing thing to be the purpose of the association rather than the individual members from time to time. The trust was not for individuals but for a purpose which was not charitable. His reference to *Thomson v. Shakespear* bears this out. In *Thomson v. Shakespear* the trust was to keep in being a museum as a perpetual memorial to Shakespeare. That trust was held invalid because it offended the policy that property should not be put beyond the full control of individuals for too long a period. The purpose, being non-charitable, did not come within the exception in favor of charitable purposes based on the higher policy that endowments perpetual or otherwise, for the benefit of the public are to be encouraged.

86 E.g., Re Smith, [1914] 1 Ch. 937.
87 E.g., Re Delany's Estate, L.R. 9 Ir. R. 226 (1882).

Because in the pure purpose trust of the kind considered in *Thomson v. Shakespear* there is no individual beneficiary who can claim the property and terminate the trust, the law has developed the rule that such trusts must be so created as to terminate within the perpetuity period.

Was *Thomson v. Shakespear* an authority which could properly control the decision in *Carne v. Long*? It is submitted that it was not. Though a trust for an association may be regarded as a trust for that association's objects, it is a trust for those objects as controlled by the members. Authorities dealing with the control by members of association property allow that the members may dissolve the association at any time and, if it is a non-charitable association, may withdraw the property from the purpose. Thus a trust for an association differs in a material respect from a pure purpose trust. The presence in the former of control exercisable by the members means that the policy limiting the duration of pure purpose trusts is not infringed by a trust for an association's purposes even though the association may last indefinitely.

To say that a trust for an association is not simply a pure purpose trust is not to say that it is, therefore, a trust for individuals so that the rule against remoteness of vesting becomes relevant. A member of an association does not have any substantial severable interest in the association property before dissolution. This being so, it is inappropriate to treat dispositions to associations as dispositions to individuals of the kind with which the rule against remoteness of vesting is concerned. The true position would appear to be that a trust for an association is one for a purpose rather than for individuals but the purpose is sufficiently identified with particular individuals to remove the trust from the scope of the rule limiting the duration of pure purpose trusts.

Of course, it is conceivable that a settlor intends to benefit the purpose of the association, to the exclusion of the individuals who are members, so clearly that he can be taken to say that if the association comes to an end, he still wishes his property to be devoted to that purpose, or to be enjoyed by persons other than the members. In this event, the reference to the association is merely a device for defining the purpose. The trust would be a pure purpose trust and the duration limiting rule would apply. The devise in *Carne v. Long* could hardly be construed to be of this kind in the face of the decisions upholding gifts directly to an association *eo nomine*.

Carne v. Long poses a fruitful idea insofar as it treats a trust for an association in which continuing succession is contemplated as a trust for a purpose. But insofar as it applies the rule as to limitation of duration appropriate to pure purpose trusts, the decision may, in the light of later developments, have lost some of its authority.[88]

In *Re Dutton*[89] the testator bequeathed a capital sum "unto the trustees for the time being of the Tunstall Athenaeum Mechanics Institution, to be applied by them towards the building fund in connection therewith." The reason why this could not take effect as a gift to the individual members was considered earlier.[90] Following *Thomson v. Shakespear* and *Carne v. Long* the court held it to be void as tending to a perpetuity because of the prospect of indefinite duration of the association. An argument that the members might at any time dissolve the association and claim its property severally could not be put because under the Literary and Scientific Institutions Act 1854,[91] on dissolution, its property would pass to another institution. This tended to make the disposition more like a pure purpose trust than that involved in *Carne v. Long*. It does not appear whether the members could have expended the amount given while the association remained in existence. If that had been possible, this degree of control should have made the disposition less like a pure purpose trust and should have been effective to take it outside the ambit of the policy underlying the perpetuity rule developed for such trusts. But for the court to view the matter in this light it would have been necessary to recognize that these dispositions are not pure purpose trusts and *Carne v. Long* was not conducive to such recognition being attained.

The notion that a trust for the purposes of an association with a prospect of indefinite duration was bad as tending to a perpetuity, regardless of whether the members for the time being could dis-

88 In Re Clark's Trust, 1 Ch. D. 497 (1875), the testator directed a sum of money to be laid out and kept invested in the names of persons to be nominated from time to time to be trustees thereof by the Ringwood Friendly Society who were to hold upon trust to apply the dividends and income therefrom in aid of the funds of the society. Hall, V.C., held that this was not a charitable bequest and that, under the authority of Carne v. Long, it was invalid as creating a perpetuity. It is possible to read this disposition as intended to give the association an interest in the income only, so that if the association came to an end, the corpus could not be disposed of by the members but would be held on a resulting trust for the testator's estate. Viewed in this light, it would be more akin to a pure purpose trust and the Thomson v. Shakespear limitation-of-duration principle would be appropriate.

89 4 Ex. D. 54 (1878).

90 Note 42 supra.

91 17 & 18 Vict., c. 112, §30.

pose of the property given, was kept alive in *Re Amos*.[92] Here a bequest of leaseholds and devises of freeholds directly to a trade union were held bad on the ground of perpetuity (inter alia) although the question whether the members might sell the property or might dissolve the association and divide the property was not considered. The dispositions here were to the association directly and were apt for the salvage construction whereby it could have been held that the gifts were to the existing members. North, J., held, however, that they were gifts to purposes.[93] This treatment of the dispositions proved significant for later developments. It will be recalled that in all the earlier association cases in which the disposition had been held invalid as a perpetuity, there was something in the terms of the disposition which prevented it being construed as a disposition to a class of individuals and the court had looked on it as a disposition to a purpose. These constituted one line of cases. Alongside that line of cases was another consisting of *Cocks v. Manners*,[94] *Re Delany's Estate*,[95] *Re Wilkinson's Trusts*[96] and *Bradshaw v. Jackman*[97] in which the difficulties attached to purpose trusts were avoided by construing the disposition as a gift to existing members.[98] Perpetuity questions did not arise because this construction was given only in those cases in which, under the terms of the gift, all the members of the ascertainable class would receive present interests disposable by joint action. It was not necessary to speak of perpetuities in these cases but if one did, it could be said that there was no perpetuity because the members could expend the property given.

The significance of *Re Amos* is that a disposition, which in form called for the application of the *Cocks v. Manners* doctrine, was treated as governed by the *Carne v. Long* doctrine; the disposition was one which if treated as one to individuals would be held good but if treated as one to a purpose would be held bad as a perpetuity. A likely result of this would be to cause the two lines of authority to converge as one.

This result occurred when *Re Clarke*[99] was decided. The disposition here was a bequest "to the committee for the time being

92 [1891] 3 Ch. 159. Note 44 supra.

93 The reasons for this view have been considered earlier. Note 44 supra.

94 L.R. 12 Eq. 574 (1871), note 34 supra.

95 L.R. 9 Ir. R. 226 (1882), note 35 supra.

96 19 L.R. Ir. 531 (1887), note 40 supra.

97 21 L.R. Ir. 12 (1887), note 41 supra.

98 The inclusion of Cocks v. Manners in this category may be questioned in view of the remarks of Chatterton, V.C., in Morrow v. McConville (note 37 supra) but most later cases justify its presence.

99 [1901] 2 Ch. 110.

of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps." This gift, looked at in the light of the *Cocks v. Manners* line of cases, might have been regarded as one to the committee upon trust for the existing members of the corps. As such, there would be no perpetuity problem. Alternatively, it might have been regarded in the light of the *Carne v. Long* line of authority as a disposition in the nature of a purpose trust. As a purpose trust under the latter line of authority it would have to be held void as tending to a perpetuity since the association might last indefinitely. Byrne, J., considered both lines of authority, distinguishing the *Carne v. Long* line and following the *Cocks v. Manners* line. In so doing, he introduced a new test of whether a disposition to an association would tend to a perpetuity. The mere fact that the association might be perpetual did not invalidate the gift. The test was whether the existing members would be free to expend the property as they pleased. If it appeared that the legacy was one which, by the terms of the gift, or which by reason of the association's constitution, tended to a perpetuity, the gift would be bad. In this case there was nothing in the terms of the gift or in the group's constitution to prevent all the members from dealing with the fund intended for building or with the building just as they pleased and so the gift was good.

The effect of *Re Clarke* was to derive from the *Cocks v. Manners* type of case, a new test of perpetuity for the cases where the disposition could not be held to be one for the members individually. That this was so is demonstrated by *Re Drummond.*[100] By his will, a testator gave his residuary estate to his trustees upon trust for sale and conversion and directed them to hold the proceeds upon trust for the Old Bradfordians' Club, London. By a codicil, he declared that the money given in the will should be used by the club for such purpose as the committee for the time being might determine. Eve, J., said that he could not hold that the disposition was one to the members individually. There was a trust of a kind which he did not describe but which, presumably, must have been a trust for non-charitable purposes. Following *Re Clarke,* the disposition, though for an association which might last indefinitely, was not void as a perpetuity since there was nothing to prevent the committee spending the legacy in any manner they might decide. *Re Drummond* received the approval of the House of Lords in *Macauley v. O'Donnell.*[101]

[100] [1914] 2 Ch. 90.

[101] (1931), reported in a note in [1943] Ch. 435. In Re Price, [1943] Ch. 422, where

Summing up, the effect of the cases from England considered to this stage is that a disposition to an association *eo nomine* which cannot be read as a gift to the existing members, may operate as a disposition on trust for a purpose if it does not tend to a perpetuity. It will not tend to a perpetuity if there is nothing to prevent the members from disposing of the property subject to the trust either by expending it or disposing of it among themselves upon dissolution. Such a disposition, though for a purpose, has two attributes which render it more acceptable to the legal system than the questionable pure purpose trust. They are, first, the presence of individuals who have an interest in the purpose by reason of their membership which justifies their suing to enforce the trust and, secondly, the disposition is made to an association which can be dissolved at any time upon which dissolution the property will ordinarily be divided among the members. The first attribute meets the objection based on *Morice v. Bishop of Durham.* The second means that the continuance of the trust is at the sufferance of individuals and this satisfies the policy underlying the law relating to perpetuities.

In the United States, in the older cases, when a trust disposition to an association could not be construed as one to the existing members, it was held to be void without any consideration of whether it could be upheld as a trust for the association's purposes. In *Kain v. Gibboney*[102] the testatrix disposed of all her property by will in the event that she might later become a member of any of the religious communities attached to the Roman Catholic Church in the following terms: "to the aforesaid Richard V. Wheelan, bishop as aforesaid, or his successor in said dignity who is hereby constituted a trustee for the benefit of the community of which I may be a member, the said property or money to be expended by the said trustee for the use and benefit of said community." The Supreme Court of the United States held that the Bishop would not take beneficially but the attempted trust, if non-charitable, would fail because the beneficiaries were uncertain. The disposition was considered to be one to the association as such and not one to the individual members. The beneficiaries

the testatrix left half of her residuary estate to the Anthroposophical Society in Great Britain "to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner," the disposition, though not one for the individual members but for a purpose, was valid even if that purpose were regarded as non-charitable. It was valid because the full amount of the gift could be spent.

[102] 101 U.S. 362 (1879). See also Mayfield v. Safe Deposit and Trust Co., 150 Md. 157, 132 A. 595 (1926); Lane v. Eaton, 69 Minn. 141, 71 N.W. 1031 (1897); Murray v. Miller, 178 N.Y. 316, 70 N.E. 870 (1904).

were uncertain because the members would be constantly changing and it would always be uncertain as to who might be its members at any given time. No member could ever claim any individual benefit from the bequest, and the community, having no legal existence, could never have standing in court to call the trustees to account.

On the other hand, some courts have found that the settlor intended to benefit the individuals who are members of the association from time to time. In *Old South Society v. Crocker*[103] land had been conveyed in 1669 to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever," for the stated purpose of erecting a church and a dwelling house for the ministers from time to time admitted. The Supreme Judicial Court of Massachusetts, after holding that this did not constitute a public charity, regarded the disposition as creating a trust for persons who from time to time might be members of the religious society which the deed of conveyance contemplated. As such it did not lack beneficiaries and was valid on that account. The disposition was not considered offensive to the Rule against Perpetuities because as the court said, "the entire interest at any time is represented by known persons living; to wit, the legal estate by trustees, there being always power in the court, in cases of necessity, to supply trustees in whom the estate will vest; the equitable interest by those persons who then constitute the body of the associates or the society, who may be ascertained according to its rules governing membership." This way of looking at the disposition ignored the relevance of the rule against remoteness of vesting. If a trust for future members was constituted, the trust was not so created as to require their interests to vest within the perpetuity period. The ultimate decision could now be based on a holding that the trust was for the purposes of the association and that as the members, though only incidental beneficiaries, presumably had the power to dispose of the property, a perpetuity was not created.

Some courts have reached a result similar to that arrived at by English cases, by holding that the association can be a beneficiary and that a trust for it is accordingly valid.[104] The Supreme

[103] 119 Mass. 1 (1875). See also Ward v. McMath, 153 Ark. 506, 241 S.W. 3 (1922) (deed conveying land to individuals as trustees of a camp of United Confederate Veterans and their successors and assigns construed in the same way as that in Old South Society v. Crocker and therefore not void as a perpetuity); Clark v. Brown, (Tex. Civ. App. 1908) 108 S.W. 421.

[104] Ruddick v. Albertson, 154 Cal. 640, 98 P. 1045 (1908); Amish v. Gelhaus, 71 Iowa 170, 32 N.W. 318 (1887); Bancroft v. Cook, 264 Mass. 343, 162 N.E. 691 (1928), in which

Court in *Kain v. Gibboney* had proceeded on the basis that there was no person who could enforce the trust. If this is the only objection to an argument that a trust for an association as such is valid, it has gone because it is now settled that a trust for the purposes of an association may be enforced at the suit of the members.[105] The fact that the membership may be large does not militate against this since the class suit or representative action provides a convenient procedure for protecting the rights of a large group.

The framers of the *Restatement of Trusts* endorse the view that an unincorporated association may be the beneficiary of a trust[106] and the compilers of the *Restatement of Property* indicate that a disposition of property on trust for an association is not invalid if "an unqualified power to expend the corpus thereof for one or more of the purposes of the association is given to the trustee, or to the members of the association, or to some other person or persons."[107]

4. *Dispositions Which Infringe the Law Relating to Perpetuities.* Numerous cases illustrate the kinds of dispositions to associations which fail.

(a) *Trusts to Pay Income.* One type is the provision of a fund with a direction that only the income of the fund shall be applied to a specific purpose or the general purposes of the association.[108] Sometimes in this type of disposition the fund is given to

Re Drummond, [1914] 2 Ch. 90 (note 100 supra) was cited approvingly by the court. Lounsbury v. Trustees of Square Lake Burial Assn., 170 Mich. 645, 137 N.W. 513 (1912).

[105] Note 69 supra.

[106] TRUSTS RESTATEMENT §119 (1935).

[107] PROPERTY RESTATEMENT §380 (1944).

[108] Re Clark's Trust, 1 Ch. D. 497 (1875) (legacy to be laid out in investments in names of trustees of a friendly society who were to hold upon trust to apply the income in aid of the funds of the society held void). Re Swain, 99 L.T. 604 (1908) (legacy to trustees to apply the income to the chess club of Penzance "for the support and furtherance of chess and the perpetuity of the club" and if the club should cease to exist, to apply the income to the Penzance Public Library both held void); Re Clifford, 81 L.J. Ch. 220 (1912) (legacy to angling and preservation society with direction that it be invested and the income applied in re-stocking the waters of the society or for other purposes as the president or committee should decide held void); Re Patten, [1929] 2 Ch. 276 (legacies to named clubs on trust to pay the interest yearly to non-charitable funds respectively kept by each club held void); Re Wilkinson, [1941] N.Z.L.R. 1065, [residue to trustees (i) upon trust to pay annuities to persons named and from time to time to divide the balance of the income into five equal parts one of which was to be paid to the League of Nations Union of New Zealand for its general purposes and (ii) upon the cesser of the interest of the survivor of the annuitants to hold four-ninths of the residue upon trust to divide the income therefrom in the manner directed in (i)] Kennedy, J., held that there were two gifts to the League of Nations Union of New Zealand. The first was good. The second was void.

trustees outside the association upon trust to apply the income in the manner indicated.[109] Sometimes the fund is given to the association.

If the donor directs that the income is to be applied for a specific purpose rather than the general purposes of the association the disposition could never be construed as giving any interest present or future to any members of the association. The disposition would be a pure purpose trust and as such it would be invalid unless the duration of the trust were limited to a period within that prescribed by the rule against remoteness of vesting.

Suppose, however, that the donor directs that the income is to be applied for the general purposes of the association. If the beneficiary of a trust to pay income indefinitely were a corporation the direction to pay income for an indefinite period would be presumed to be a gift of the corpus. If a donor gives the rents and profits of Blackacre or the income of a trust fund to an individual without limitation of time, and makes no other disposition of the capital, he is considered to give an absolute interest in the fruits which carries with it an absolute interest in the tree.[110] Under this rule the law takes liberties with what the donor has said. The law being anxious to find a resting place for the absolute interest in any particular property re-writes the disposition in order to make it effective rather than let it fail under the law relating to perpetuities. But this can be done only at the cost of disregarding the donor's expressed intention. Some excuse for this re-writing is provided by the view that although a disposition of income indefinitely is not exactly the conferring of absolute ownership it is the giving of a large feature of absolute ownership. The difference between them is so small that when it is a question of a court choosing between giving effect to the disposition and striking it down as a perpetuity, the court can choose the former and can re-write the disposition. But the excuse for re-writing depends on the donee of the income being somebody whom the law can regard as an owner. Property can be given to an individual absolutely without regard to what he does with it. By re-writing the disposition when it is one to an individual there can be no suggestion that

[109] E.g., Re Swain, note 108 supra.

[110] THEOBALD, LAW OF WILLS, 10th ed., 334 (1947); 1 SCOTT, TRUSTS §128.2 (1939); Re Chambers, 16 Ont. L.R. 62 (1907); Re Hagerman, 13 Ont. W.N. 406 (1918); Re Knight, [1937] O.R. 462, [1937] 2 D.L.R. 285; Danker v. Cooper, 114 N.J. Eq. 283, 168 A. 640 (1933); Haydon's Estate, 334 Pa. 403, 6 A. (2d) 581 (1939); Congregational Union of N.S.W. v. Thistlethwayte, 87 C.L.R. 375 (1952), [1952] Arg. L.R. 729.

the law is ignoring any desire by the donor to benefit some continuing purpose. When the disposition is one to a corporation it is possible that the donor was solely concerned to advance the continuing purpose of the corporation by yearly grants of income and that he did not intend to confer any benefit on those who might be entitled to the corporation's property on its dissolution. In this respect a disposition of income indefinitely to a corporation might have been thought to be outside the operation of the rule in question. But the courts have assimilated corporate legal personality to individual legal personality so far that the rule has been carried over to such dispositions to corporations. Disregard of a donor's intention to advance the corporation's continuing purpose is the result of substantial equating of corporations to individuals. When the disposition is one to an unincorporated association the donor's intention to advance the association's continuing purpose indefinitely cannot be ignored. On the foregoing analysis such a disposition is one to a continuing purpose. A purpose cannot be the owner of an interest unless it is personified. It is thus less easy to say that the donor can be presumed to have intended to give an absolute interest to somebody. The doubt as to whether he intended the members on dissolution to have the corpus between them remains in the foreground and is not obscured by the interposition of an interest-holding entity. This doubt is enough to deter a court from re-writing the disposition. Accordingly, the rule cannot save dispositions of income indefinitely to unincorporated associations even if the income is to be applied not for a specific purpose but for the general purposes of the association.[111]

What perpetuity rule is applicable, then, when the donor directs income to be applied for the general purposes of the association? In the abstract it might appear that there is a preliminary question of construction to determine the donor's intention. On the one hand, the donor may intend that the benefit to the association is to last only so long as the associa-

[111] It was held in England, however, in Re Jones, [1950] 2 All E.R. 239, that where a testator directed payment of annual sums of fixed amount in the nature of perpetual annuities to certain unincorporated societies, any such society, whether charitable or not, could, if it wished, demand payment from the trustees of a capital sum in cash instead of a sum paid over a number of years. The judgment of Danckwerts, J., does not contain any consideration of the effect of dispositions to associations or the operation of the law of perpetuities in this area. The proposition that the disposition was in the nature of a perpetual annuity involves a departure from previous judicial views as to the nature of unincorporated associations inasmuch as it appears to equate the association to a corporation for this purpose. It may be that the explanation of this case is that it was not a truly adversary proceeding.

tion remains undissolved and that on dissolution there is to be a resulting trust to the donor or his successors. English courts appear to have assumed that trusts to apply income for the general purposes of associations are never intended to give any interest in the corpus to the members on dissolution.[112] Under this approach although the donor's resulting trust is a vested interest[113] the prior trust being one in which no individual has any interest is a pure purpose trust and is therefore invalid if it can last beyond the period prescribed by the rule against remoteness of vesting. On the other hand, the donor may intend to put the property away from him altogether so that he does not have any interest by way of resulting trust; he intends the income of the fund to be used while the association remains undissolved but that on dissolution the members at that time shall be entitled to the corpus. If such a construction is possible it might be said that the policy underlying perpetuity doctrine is satisfied by the ability of the members for the time being to dissolve the association and divide the trust fund between themselves. The trust before dissolution would not be a pure purpose trust.

That it is the practice of the English courts to read every trust to pay income to an association as a trust for the association while it exists is suggested by several cases. This is the practice even when the corpus is given to the association itself upon trust to apply the income indefinitely to one or all of its purposes.[114] Here since the association is the recipient of the corpus, it might seem arguable that the donor intended that if the association be dissolved, the members might divide the corpus between them in the same manner as their other property can be divided. From that it would seem to follow that if the association could be dissolved at any time, the gift would not be void as tending to a perpetuity. If the donor directs that the income be applied to a specific purpose, this argument might not be available but if he merely directs the application of the income to the general purposes of the association, it would be more cogent. In *Re Clifford,*[115] however, where the legacy was to the association itself and the income could be applied to the general purposes of the association

112 Pages 68-69 infra.

113 GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §603.9 (1942); 3 SCOTT, TRUSTS §401.5 (1939).

114 E.g., Re Clifford, 81 L.J. Ch. 220 (1912); Re Patten, [1929] 2 Ch. 276.

115 81 L.J. Ch. 220 (1912).

consistently with the terms of the legacy, Swinfen-Eady, J., held that it was not a gift which the members could divide among themselves on dissolution and it was therefore void as tending to a perpetuity. The inference appears to be that on dissolution of the association, the corpus would be held on a resulting trust for the testator's estate. If a disposition under which the income is to be applied to the association's general purposes can be treated in this way, then a fortiori a gift by which the income is to be applied to a specific purpose stated by the donor cannot be treated differently.

In *Macauley v. O'Donnell*[116] the testatrix devised and bequeathed her residuary estate "unto the Folkestone Lodge of the Theosophical Society . . . absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone" and declared that the receipt of the treasurer of the lodge should be a sufficient discharge. Proceeding on the basis that the association did not have charitable objects, the House of Lords held the disposition void as tending to a perpetuity. The reference to "maintenance and improvement" of the lodge showed an intention to impose a trust which would not permit the corpus to be expended. The gift, therefore, was in the form of an endowment and since the society was, according to its form, perpetual, the gift was bad. It might be thought that the language of the testatrix was apt to show an intention to part with the property absolutely. By making a disposition to an association which, under the general principles governing unincorporated associations, can be dissolved with a consequential distribution of assets among the members, she must be taken to have intended an endowment which was not perpetual but for as long as all members thought fit. By choosing the association as the recipient of her bounty, she expresses her belief in the good faith of its members and assumes the risk that the disposition will prompt them to decide on a dissolution not otherwise contemplated. This decision of the House of Lords probably does not exclude the possibility that a donor may give a legacy to an association with the intention that only the income is to be expended during the lifetime of the association but that on its dissolution the corpus may be divided among the individual members. But the decision does require a donor who has that intention to make his intention apparent in very clear terms.

[116] (1931), reported in a note in [1943] Ch. 435.

The Connecticut case of *Wilbur v. Portland Trust Co.*[117] may be contrasted with *Macauley v. O'Donnell.* The testator beqeathed $18,000 to a trust company upon trust "to invest and re-invest and to pay over the income and as much or all of the principal as they may deem necessary, it to be the sole judge, to Warren Lodge F. A. & A. M. of Portland, Connecticut . . . ." The Supreme Court of Errors held that the gift was not void as a perpetuity. The intention of the testator, it was said, was obviously to dispose of the trust fund completely as to both income and corpus. The court treated the association as an entity without discussion of its reasons for so doing. If the doctrine of *Re Drummond* is followed, an English court faced with a similar disposition could agree that the association could be beneficiary. The Connecticut court said that the interest of the association was vested so that the rule against remoteness of vesting was satisfied. Having found that an absolute interest was given, the court held, adopting the *Restatement of Trusts,*[118] that since the trustee could terminate the trust at any time by paying over the principal, the gift did not offend the law relating to perpetuities. This decision has been questioned on the basis that the power to expend the corpus was not possessed by the members but depended upon the exercise of a discretion in the trustee who was not under the control of the members.[119]

The opinion suggests that in trusts for associations in which the members or persons under their control are not given power to destroy the trust the rule against remoteness of vesting is not required to be supplemented by any other perpetuity rule. In this respect it seems at variance with the English decisions. The fact that the testator was taken to have given an absolute interest would not explain this decision unless it can be understood as implying that on a proper construction of the disposition the members on dissolution could claim the corpus.

To sum up, whether the corpus is given to trustees outside the association or is put in the hands of the association itself, the rule appears to be that if the donor directs, expressly or impliedly, that the income only shall be expended, the disposition will be void as a perpetuity if the trust is not limited by the terms of the disposing instrument to the period prescribed by the rule against remoteness of vesting. The limitation on the duration of the trust

117 121 Conn. 535, 186 A. 499 (1936).
118 TRUSTS, RESTATEMENT §119, comment *c* (1935).
119 SIMES, FUTURE INTERESTS 410-411 (1951).

should be found in the disposing instrument. If the constitution of the association provides that it shall be dissolved at a time within the perpetuity period, reliance should not be placed on this since ordinarily the members of an association can jointly alter that provision to extend the life of the association indefinitely.

(b) *Dispositions of Specific Property With Direction That It Is Not To Be Sold.* Another type of disposition to an association which is often held void as a perpetuity is that in which certain property is given with a direction that that property shall never be sold.

In *Queensland Trustees, Ltd. v. Woodward,*[120] the testator devised land to trustees of a Masonic lodge and stated a request "that the said property shall not be sold but shall be used for the purpose of building a lodge-room and hall thereon and generally to promote the welfare of the members of the said lodge and their successors." In *Munster and Leinster Bank, Ltd. v. A-G,*[121] the testator bequeathed leasehold premises to a branch of the Catholic Young Men's Society of Ireland declaring "that the said house shall be used for the purposes of the said Society and that it is my express wish that the said house shall not be sold or otherwise disposed of."[122] In each case the gift was held to be void as a perpetuity. If similar dispositions were made to incorporated bodies, the disposition would take effect as a disposition of an absolute interest. But when the group intended to be benefited by such a disposition is unincorporated and does not exist for charitable objects, the direction has been held to operate in another way. It is regarded as showing a clear intention on the part of the donor to make a disposition to the continuing group enterprise rather than the existing members.[123] This introduces the long-held notion that a disposition cannot be made to an unincorporated continuing group enterprise with the result that the court does not reach the stage where it could consider the direction for what it is, a restraint on alienation. If that notion is discredited by the cases exemplified by *Re Drummond,*[124] it becomes necessary to consider the effect of the attempted restraint on alienation.

[120] [1912] Queens. St. R. 291.

[121] [1940] Ir. R. 19.

[122] See also Gleeson v. Phelan, 15 St. R. (N.S.W.) 30 (1914).

[123] Munster and Leinster Bank, Ltd. v. A-G., [1940] Ir. R. 19 at 27; Gleeson v. Phelan, note 122 supra, at 33.

[124] Note 100 supra.

A settlor may, when he makes a gift in trust, validly require the trustee to retain the original trust property for the duration of the trust. In some American jurisdictions there is authority for the proposition that the restraint will be valid even though the trust is a private one and may last beyond the perpetuity period.[125] In at least one other American jurisdiction it has been held that the power of alienation cannot be withheld from the trustee for a time longer than the perpetuity period.[126] The author of Part 26 of the *American Law of Property* dealing with restraints on alienation is of the opinion that the denial of powers of alienation to trustees is not nearly as objectionable as a valid restraint upon a beneficial interest. One of the reasons for that opinion is that the restraint, being limited to the duration of the trust, will not tie up property indefinitely. Although a private trust may be so created that it will continue beyond the perpetuity period, such private trusts will, he says, be uncommon. When the private trust is for the benefit of individuals, this may be true. In such cases the rule against remoteness of vesting prevents such a trust lasting very long after the perpetuity period has run. But if the trust is one for the purposes of a non-charitable association which may last indefinitely, the restraint would tie up property indefinitely. Even so it may not be considered objectionable as a restraint on alienation since a court of equity has power to authorize a trustee to sell under certain circumstances.[127] Probably the real effect of the direction that the trustees are never to sell when the trust is for an association is that it excludes any suggestion that the settlor intended to give the property to the association absolutely. It shows that the members were never to have the power to divide the property between them on dissolution of the association. The vice then is that such a disposition is more akin to a pure purpose trust in that it does not give any potential individual interest. As has been seen earlier, such a trust will not be valid if it could last beyond the period prescribed by the rule against remoteness of vesting.

III. SHOULD NOT EVERY DISPOSITION TO AN ASSOCIATION BE CONSIDERED ONE ON TRUST FOR ITS PURPOSES?

The development of doctrine effected by the authorities examined to this stage suggests a line of inquiry concerning those

125 6 AMERICAN LAW OF PROPERTY §26.13, n. 1 (1952).

126 Colonial Trust Co., v. Brown, 105 Conn. 261, 135 A. 555 (1926).

127 6 AMERICAN LAW OF PROPERTY §26.13 (1952); 2 SCOTT, TRUSTS §190.4 (1939); 3 id., §381.

dispositions which are capable of being construed as gifts to the existing members.[128] That construction was first used to save gifts to associations at a time when it was thought that a gift to a continuing group enterprise not represented by a corporation would be void.

That construction served a useful purpose up to a point. It could not be applied if the number of existing members was large and the property given was of a kind which could not be held by a large number of co-owners without serious conveyancing difficulties ensuing.[129] Furthermore, when it was applied there was some temptation to say that the existing members took either as joint tenants or tenants in common and that their rights with respect to the property were governed by the incidents of these well established forms of co-ownership thus frustrating the purpose of association.[130]

Since in cases like *Re Drummond* the English courts have recognized that a disposition to an association may be a disposition to a purpose primarily and individuals only secondarily and since the only way in which property may be devoted to a purpose is by the medium of a trust, one may ask why should not every disposition to an association be taken to be intended to operate as a trust for a purpose. This view of such dispositions would overcome the conveyancing difficulties which would ensue from a thoroughgoing application of the "gift-to-existing-members" construction device.

Recognition that the group purpose is the beneficiary intended and that property can properly be devoted to that purpose would obviate other difficulties which accrue from looking at the gift as one to individuals. If the gift can be read as being for the benefit of future members as well as existing members, difficulties arising from the rule against remoteness of vesting will be felt. But if the gift is looked on as one for the purposes of the association, these difficulties do not appear.[131]

128 Part II-A supra [55 MICH. L. REV. 67 at 81 (1956)].

129 Hogan v. Byrne, 13 Ir. C.L.R. 166 (1862), note 31 supra.

130 Byam v. Bickford, 140 Mass. 31, 2 N.E. 687 (1885), note 14 supra.

131 In Pushor v. Hilton, 123 Me. 225, 122 A. 673 (1923), the testatrix gave the residue of her estate to the "Corinthian Lodge of Free and Accepted Masons, Lodge No. 95 of Hartland, Maine . . ." directing that "no conditions be imposed upon the Lodge in taking the above property except that it shall be applied for the benefit of Corinthian Lodge only. To have and to hold unto the Corinthian Lodge of Free and Accepted Masons, their successors and assigns forever." This was held to give the legal title to the existing members upon trust for the lodge itself. The court said that the reference to "successors and assigns" merely recognized that changes must take place from time to time in the personnel of the trustees and that this was not strictly necessary because

When a disposition is made to an association *eo nomine* directly by way of gift rather than trust and that association has charitable objects, English courts hold that a gift has been made to charity even though the terms of the gift do not include any express statement of purposes.[132] There are comparable American decisions.[133] The courts do not appear to be troubled by the fact that the association, as such, lacks capacity to hold the legal title. The dispositions to associations which have been upheld in this way have usually been testamentary dispositions of personalty. In England, from 1736 to 1891, the problem could not arise in relation to devises because the Georgian Statute of Mortmain[134] in force during that period allowed land, or personalty to be laid out in the purchase of land, to be given in trust for any charitable use only by a deed inter vivos executed and enrolled in the manner prescribed by the act. As has been suggested earlier,[135] the difficulties as to the residence of the legal title are not so pressing when the property given to an association is personalty. In many of the bequests the testator has directed payment to the treasurer of the association. This avoids the administrative difficulty that the association could not be trustee, by making the treasurer trustee.[136] Even where the will contains no express direction to pay the bequest to any particular officer, the court will direct that the bequest be paid to a particular officer thus in effect appointing a competent trustee.[137] Since the courts see in such gifts

equity does not allow a trust to perish for want of a trustee. The court did not discuss the possibility of the trust being void as a perpetuity.

132 Cocks v. Manners, L.R. 12 Eq. 574 (1871) (gift by will to "the Sisters of the Charity of St. Paul at Selley Oak" held to be a charitable gift); Re Tyler, [1891] 3 Ch. 252 at 258 (bequest "to the trustees for the time being of the London Missionary Society" is a gift for the Society's charitable purposes); Re Delany, [1902] 2 Ch. 642 (gifts by will to M.D., H.M., and A.C., "Nazareth House, Hammersmith or their successors," to E.M., and M.L., "of the Convent of the Assumption, Wellington Road, Bromley by Bow or their successors" held to be given to the legatees as holders of offices in and for the benefit of the associations in which they held office, and that, as the purposes of those associations were charitable, the gifts were indistinguishable from the gifts in Cocks v. Manners supra); Re Schoales, [1930] 2 Ch. 75; Re Barnes, [1922], reported in a note in [1930] 2 Ch. 80; Re Brown, (1898) 1 Ir. R. 423; Armstrong v. Reeves, 25 L.R. Ir. 325 (1890); Re Motherwell, [1910] 1 Ir. R. 249; Re Gwynne, 22 O.W.R. 405, 3 Ont. W.N. 1428, 5 D.L.R. 713 (1912); Hardey v. Tory, 32 C.L.R. 592 (1923); Gleeson v. Phelan, 15 St. R. (N.S.W.) 30 (1914); The Perpetual Trustee Co. v. Shelley, 21 St. R. (N.S.W.) 426 (1921). The last case was concerned with charitable corporations but it recognizes the authority of the English cases on the point under discussion.

133 Matter of Winburn, 139 Misc. 5, 247 N.Y.S. 584 (1931); Matter of Patterson, 139 Misc. 872, 249 N.Y. S. 441 (1931).

134 9 Geo. 2, c. 36 (1736).

135 Page 78 supra [55 MICH. L. REV. 67].

136 Waller v. Childs, Amb. 524, 27 Eng. Rep. 338 (1765).

137 Walsh v. Gladstone, 1 Ph. 290, 41 Eng. Rep. 642 (1843); In the Goods of McAuliffe, [1895] P. 290.

a disposition to charity and since charity is a purpose the disposition can take effect only as a trust. But as such it attracts the equitable jurisdiction to save a trust from failing for want of a trustee.

The repeal of the Georgian Statute of Mortmain by the Mortmain and Charitable Uses Act 1891[138] has made possible in England devises upon trust for charitable purposes under conditions prescribed in the latter act and the jurisdiction to appoint trustees exercised in relation to bequests would seem to extend to devises.[139]

When the disposition is one inter vivos and the property given is personalty the absence of cases would seem to indicate that no problem is considered to exist. Just as the law apparently assumes that an association can receive members' subscriptions through its treasurer so it can receive sums of money by way of gift for its purposes without any difficulty being felt as to the location of the legal title.

When the inter vivos disposition concerns realty it might be said that since there is no capable grantee the conveyance is a nullity. Though there may be an intention to confer a benefit on charity, the gift is imperfect and it could be put that by appointing a competent trustee a court of equity would be acting to perfect an imperfect gift.

An alternative view would be that the conveyance vests the legal title in the individual members upon trust for the purposes of the association but since by reason of their number they do not represent suitable trustees, the court may appoint some smaller group of persons to be trustees. On this latter view it could not be said that the court was perfecting an imperfect gift. On the authorities discussed earlier, this view would appear to be appropriate in England. In America although there are instances where a disposition for charitable purposes has been held to vest the legal title in the individual members as trustees,[140] the more usual view is that the donor intends to vest the legal title in the association, as such, which is regarded by most courts as having no capacity to take title to property. When the disposition is testamentary, however, the weight of American authority supports the proposition that the court can appoint a new trustee to administer the intended trust even though the testator has not

[138] 54 & 55 Vict., c .73.

[139] Re Motherwell, [1910] Ir. R. 249 (devise to the Church of Ireland Representative Body effectuated by a scheme). In the Will of Seadon, 11 Arg. L.R. 511, 27 Aust. Law Times 118 (1905).

[140] Bartlet v. King, 12 Mass. 537 (1815).

named a capable trustee.[141] If the disposition is one inter vivos, the incapacity of the association to take title will leave the legal title in the donor. If the court appoints a trustee to take the legal title, it is in effect forcing an intending donor to complete a gratuitous disposition which courts of equity have been reluctant to do. Despite this theoretical difficulty an Illinois court has held that a trustee could be appointed in these circumstances even though the intended trust was a private one for the benefit of an individual.[142] A fortiori, the jurisdiction could be exercised when the intended trust is one for charitable purposes. In England, in a similar situation it might be possible to avoid the theoretical difficulty by saying that the existing members acquired the legal title as co-owners by force of the conveyance and that their unwieldy numbers made it necessary to appoint a new trustee.

The construction by many courts of dispositions to charitable associations as trusts for the purposes of those associations even though they appear, at first sight, to be gifts, looked at in conjunction with the cases which recognize that the property of a non-charitable association may be held upon a trust for a non-charitable purpose may suggest a uniform method of considering all dispositions to associations as intended trusts. By so regarding the disposition the equitable jurisdiction to prevent a trust failing for want of a trustee would become relevant whenever the nature of the property given was such as to require its exercise.[143]

This view of the disposition could supply a technique for giving unincorporated groups a more secure place in the law of property.

141 The cases are collected in 1 SCOTT, TRUSTS §97, n. 5.

142 Wittmeier v. Heiligenstein, 308 Ill. 434, 139 N.E. 871 (1923).

143 For an instance in which a transfer of shares to an association *eo nomine* was treated in a manner similar to that suggested in the text, see Thadeus Kosciuszko Soc. v. Polish Home Assn., (Mo. App. 1949) 218 S.W. (2d) 811.