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## TRUSTS-CREATION-SIGNIFICANCE OF CREATION OF HONORARY TRUST BY INTER VIVOS TRANSFER

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TRUSTS—CREATION—SIGNIFICANCE OF CREATION OF HONORARY TRUST BY INTER VIVOS TRANSFER—Settlor made an inter vivos transfer of certain property in trust for a specified period with directions that the trustees should, in accordance with their own discretion, apply the income of the trust fund toward all or any of several specified purposes. These purposes included the “establishment . . . of good understanding, sympathy and co-operation between nations,” “the preservation of the independence and integrity of newspapers,” and “the protection of newspapers . . . from being absorbed or controlled by combines.” Summons was taken out by the settlor to have the validity of the trusts determined. *Held*, the trusts were void because they were non-charitable trusts that were not for the benefit of individuals and consequently could not be enforced, and also because they were for indefinite purposes.<sup>1</sup> *In re Astor's Settlement Trusts*, [1952] Ch. 534.

What, if any, significance should be accorded the fact that an honorary trust is created by an inter vivos transfer? This question is raised for what is believed to be the first time by the principal case. The answer given by the court is that it is immaterial whether the trust is created by deed or by will. The *Restatement of Trusts* has taken the position that the manner in which such a trust is created is significant.<sup>2</sup> An initial distinction is made by the *Restatement* between trusts for “indefinite or general purposes” and trusts for “specific non-charitable purposes.”<sup>3</sup> The former are said to be void when created by will,<sup>4</sup> but when created by deed the transferee is said to be authorized to carry out the directions of the creating instrument.<sup>5</sup> The trustee's authority to proceed in the inter vivos situation is based on an agency theory.<sup>6</sup> Therefore, this authority to carry out the broad and indefinite directions contained in the deed is subject to being cut off by express revocation or by the death or incapacity of the settlor. Where the trust is one for “specific non-charitable purposes,” the *Restatement* takes the position that if the trust is created by will the legatee has the power to

<sup>1</sup> It was agreed that the trusts were non-charitable and that they did not violate the rule against perpetuities. [1952] Ch. 534 at 536.

<sup>2</sup> 2 TRUSTS RESTATEMENT §§417, 418, 419 (1935). See also 3 SCOTT, TRUSTS §§417, 418, 419 (1939).

<sup>3</sup> 1 TRUSTS RESTATEMENT §§123, 124 (1935). See also 1 SCOTT, TRUSTS §§123, 124 (1939).

<sup>4</sup> 2 TRUSTS RESTATEMENT §417 (1935).

<sup>5</sup> *Id.*, §419, comment *b*.

<sup>6</sup> *Id.*, §419, comment *a*.

carry out the directions of the testator, but is not under a duty to do so.<sup>7</sup> Upon the trustee's refusal to exercise this power, he will be compelled to hold the property upon a resulting trust for the estate of the testator.<sup>8</sup> If, on the other hand, the trust for "specific non-charitable purposes" is created by an inter vivos transfer, the transferee's authority to perform in accordance with the trust directions is also subject to the limitations which are the normal incidents of an agency relationship.<sup>9</sup> In contrast to this analysis, the court in the principal case refused to recognize any significant distinction between trusts for "indefinite or general purposes" and trusts for "specific non-charitable purposes."<sup>10</sup> Both were deemed void on the grounds that the doctrine of *Morice v. Bishop of Durham*<sup>11</sup> means that the only non-charitable trusts that are valid are those for the benefit of individuals.<sup>12</sup> The cases which have upheld trusts created for such specific purposes as the erection and maintenance of monuments,<sup>13</sup> the care of specific animals,<sup>14</sup> and the promotion of fox-hunting<sup>15</sup> are explained away as anomalous and exceptional cases which are not destructive of the general principle laid down in the *Bishop of Durham* case.<sup>16</sup> With respect to the significance of the inter vivos nature of the trust, the court was not receptive to the suggestion that despite the fact that the trust would otherwise fall within the ban of the *Bishop of Durham* doctrine as interpreted by the court, its effectiveness was nevertheless saved by virtue of the inter vivos character of the transfer.<sup>17</sup> Thus, the decision in the principal case represents a rather thoroughgoing rejection of the *Restatement's* analysis of honorary trusts.

However, if one assumes that the *Restatement* is correct in making a distinction between trusts for "indefinite or general purposes" and trusts for "specific non-charitable purposes," it is of interest to inquire further into the significance of the additional distinction that is made between inter vivos and testamentary trusts. It should be noted initially that in order to give effect to the trust for "specific non-charitable purposes" it is not necessary to distinguish between the

<sup>7</sup> *Id.*, §418.

<sup>8</sup> *Id.*, §418, comments *a* and *b*.

<sup>9</sup> *Id.*, §419, comment *c*.

<sup>10</sup> This aspect of the decision is discussed and subjected to rather severe criticism in 68 L.Q. REV. 449 (1952).

<sup>11</sup> 9 Ves. Jr. 399, 32 Eng. Rep. 656 (1804), *affd.* 10 Ves. Jr. 522, 32 Eng. Rep. 947 (1805).

<sup>12</sup> The court rejected the suggestion of counsel that while the "specific purpose" distinction might be unsound as to testamentary trusts, it was at least valid with respect to inter vivos trusts. Principal case at 540.

<sup>13</sup> *Pirbright v. Sawley*, [1896] W.N. 86. Other cases of this type are collected in 1 SCOTT, TRUSTS §124.2 (1939) and in 1A BOGERT, TRUSTS AND TRUSTEES §164 (1951).

<sup>14</sup> *In re Dean*, 41 Ch. D. 552 (1889). Other cases of this type are collected in 1 SCOTT, TRUSTS §124.3 (1939) and in 1A BOGERT, TRUSTS AND TRUSTEES §165 (1951).

<sup>15</sup> *In re Thompson*, [1934] Ch. 342.

<sup>16</sup> Principal case at 547. In accord with the court's position on this point see 1A BOGERT, TRUSTS AND TRUSTEES §§164, 166 (1951).

<sup>17</sup> Principal case at 548.

testamentary case and the inter vivos case, although, as has been indicated, the *Restatement* does so. The cases that have upheld specific purpose trusts that were created by will have been explained on the theory that if the legatee does not perform in accordance with the testator's direction, he holds as trustee of a resulting trust for the benefit of the residuary legatees, and, therefore, that these prospective beneficiaries of a resulting trust will provide the necessary protection against a misapplication of the trust property.<sup>18</sup> This theory is equally applicable where the trust is created by an inter vivos transfer. If the transferee fails to carry out the specific directions of the deed, the settlor becomes the beneficiary of the resulting trust, and thus supplies the necessary party who will see to it that either the directions of the trust are performed, or the trust property is taken from the hands of the transferee. However, the recognition of a distinction between a testamentary transfer and an inter vivos transfer does lead to substantially different results when the trust is one for "indefinite or general purposes." In the testamentary case, the indefinite purpose trust is quite generally held to be void.<sup>19</sup> One of the compelling reasons for this result is found in the fact that the resulting trust theory fails to provide the necessary protection, since the directions of the trust are, by hypothesis, so vague and uncertain as to make it impossible to show that the legatee is misapplying the trust property.<sup>20</sup> However, by distinguishing the inter vivos case from the testamentary case, and then utilizing the agency theory in the manner noted above, the *Restatement* is able to give effect to the inter vivos transfer. Thus, the distinction between the testamentary trust and the inter vivos trust acquires its real significance because it permits the use of the agency analysis to support the "indefinite or general purpose" trust in the inter vivos cases. Whether the transferor in the inter vivos transaction intends to create an agency relationship any more than does the testator in the case of the testamentary transfer is a matter that may well be subject to question.<sup>21</sup>

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<sup>18</sup> 1 SCOTT, TRUSTS §124 (1939); 48 HARV. L. REV. 1162 at 1164 (1935). See also 45 YALE L.J. 1515 (1936).

<sup>19</sup> 3 SCOTT, TRUSTS §417 (1939); 51 HARV. L. REV. 561 (1938).

<sup>20</sup> 1 TRUSTS RESTATEMENT §123, comments *b* and *c*. Cf. 45 YALE L.J. 1515 (1936).

<sup>21</sup> On the question of the applicability of the agency theory to the testamentary transfer, see Ames, "The Failure of the 'Tilden Trust,'" 5 HARV. L. REV. 389 (1892); SCOTT, "Control of Property By the Dead," 65 UNIV. PA. L. REV. 527 at 537 (1917); and particularly Gray, "Gifts for a Non-charitable Purpose," 15 HARV. L. REV. 509 at 512 through 515 (1902).