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Charitable Trusts for Religious Purposes

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has been noted that the principal factors affecting that problem, the death statutes, the Civil Practice Act, and the Soldiers' and Sailors' Civil Relief Act, are all to be liberally construed. It follows logically that similar construction is to be afforded those factors when considered in conjunction with the period limited by law for the commencement of the death action. Much progress has been made by the courts of New York with respect to such construction. The treatment of the period of limitation in the death statutes as a mere statute of limitations was a major step in effectuating the remedial nature of that statutory cause of action. The application of tolling provisions of the general statutes of limitations which affect the cause of action to the period of limitation in the death action was another progressive milestone. The doctrine of the *Mossip* case marked a detour and a backward step which should be rectified. The development of the "real party in interest" theory in the *Stutz* case points the way toward the elimination of the *Mossip* doctrine with a resultant extension of the personal disability tolling provisions of the general statutes of limitations to actions for wrongful death.

From a particularized analysis of a single phase of the death action it has been possible to observe the general trend of judicial construction of all aspects of that statutory cause of action. It is submitted that the courts of New York have made noteworthy progress in extending the effectiveness of the death statutes. The indicated trend shows that a liberal construction policy will continue to be followed by those courts within the sound dictates of reason and possibility.

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CHARITABLE TRUSTS FOR RELIGIOUS PURPOSES

Recently, an English appellate court decided that a gift in trust for a Carmelite convent was not for a charitable purpose.[1] The court held that public benefit was a necessary element even where the trust is for the advancement of religion. The Carmelites are a cloistered order, and they engage in no exterior material works such as teaching or care of the sick. The court said that the nuns applied themselves to being good, not to doing good, and that the purpose of the gift was not sufficient as to constitute a charity.

The obvious argument that would occur to anyone familiar with religious organizations such as the Carmelites is that the court

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[1] *In re* Coats' Trusts (Coats v. Gilmour), W. N. 108, Mar. 20, 1948.

has overlooked, or ignored, the element of spiritual benefit to the public. But a legal mind, perhaps, might first turn to an appraisal of the court's *ratio decidendi.* The question that presents itself would be, "Must the court look for a public benefit where the purpose of the trust is clearly for religion, in order to find a valid charitable trust?"

The answer to that question will necessarily involve a consideration of the history and origin of Charitable Trusts and an inquiry as to whether a workable definition of a charitable purpose can be found.

Most of the English courts that have dealt with the question of what is a charitable purpose have gone back to either one or both of two sources. The first is the *Statute of Charitable Uses,*[2] which was passed during the reign of Queen Elizabeth in 1601, and the other is the famous case of *Commissioners of Income Tax v. Pemsel,*[3] decided in 1891. But both of these sources are particularly the results of the modes of the times that produced them and they must be weighed in the light of their own history.

It was a decision of the Supreme Court of the United States [4] that first focused attention on the fact that the *Statute of Charitable Uses* does not mark the origin of Charitable Trusts or Uses.

Long before courts of Chancery in the fourteenth century first began to enforce uses, gifts for charitable purposes were protected by the ecclesiastical courts. The *post obit* gift was known before the Norman invasion. This device provided for the disposition of land or chattels, usually to the Church, by a person, to be effective after his death. It was not until the twelfth century that such gifts were destroyed. Glanville, in criticism of such gifts, said that only God can make an heir, not man.[5] Littleton, whose first edition has been tentatively dated at about 1481,[6] makes reference to grants of land to a person of the Church to be held as tenant in *frankalmoigne* and by tenure of divine service. In listing the duties of the abbot or prior who holds by such tenure he includes the singing of a Mass every Friday for the departed souls, as well as the distribution of alms to a hundred poor men.[7] Coke, in his commentary on this section, states that where the services to be performed are certain, even though spiritual in nature, they may be enforced by a court of law,

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[2] 43 ELIZ. c. 4 (1601).

[3] [1891] A. C. 531.

[4] Vidal v. Girard's Executors, 2 How. 127, 11 L. ed. 205 (U. S. 1844) .(It was necessary to determine whether the jurisdiction of Chancery over Charitable Uses was part of the common law adopted by the State of Pennsylvania).

[5] POLLOCK & MAITLAND, HIST. OF ENG. LAW Vol. II, 317-327 (2d ed. 1899).

[6] See COKE, COMMENTARY UPON LITTLETON—Mr. Butler's preface to the 13th edition, p. xxiii (1st Am. ed., 19th Eng. ed. 1853).

[7] LITTLETON, Sections *133-136.

but where they are uncertain, then the ecclesiastical law will be applied.[8] Coke, in discussing the distribution of alms to the poor men, calls it a charity because what is done for the poor for God's sake is done to God Himself. To him, then, an act is charitable not because it was of benefit to a group of persons, but because it was for the love of God.

There can be no doubt that there were many gifts to religious bodies during the centuries before and after the conquest. This fact is attested by the many monasteries and churches that flourished during those feudal years. It was because of the growing and vast accumulations of lands by religious bodies, that the first *Statutes of Mortmain* were passed.[9] When land was held by a corporation (religious bodies and even individual clergymen were regarded as corporations), the overlords and the king were deprived of many of the feudal rights, including rents, fees and wardships which they would have enjoyed had the land been held by private persons. In effect, these *Statutes of Mortmain* provided that lands held by corporations would be forfeited to the overlord, and if he failed to enter, then to his overlord and so on until finally to the King. However, there was no forfeiture if the overlord or the crown granted a license in mortmain. Thus, the lord or the King could control the growth and wealth of a religious organization. The concepts behind this limitation of ownership by the religious corporations is analogous to, if not an incident of, the same concept underlying the *Statute of Quia Emptores.*[10] However, during this period it is still too early to talk about any doctrine against perpetuities.

It was during the succeeding century that the custom of making a conveyance to uses developed. It is submitted that the most prevalent of these early uses were for religious purposes. There are two reasons why this was so. First, it was possible to avoid the *Statutes of Mortmain,* by conveying land to a person to hold to the use of the religious organization; and second, many of the religious bodies, such as the Franciscan Friars, were sworn to poverty and could not hold land, but if the land was conveyed to a feoffee to their use, no violation of the rules of their order resulted. This device allowed those with pious intentions to provide for the clergy without violat-

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[8] COKE, COMMENTARY UPON LITTLETON *96b.

[9] 9 HEN. III, c. 36 (1225); 7 EDW. I, st. 2 (1279); 13 EDW. I, c. 32 (1285); 18 EDW. III st., c. 3 (1344).

[10] 18 EDW. I, c. 1 (1290). This statute abolished subinfeudation since it allowed a tenant to dispose of his land to another who would hold by the same tenure to the overlord. The result seems to indicate the purpose of favoring free alienation. But the earlier statute of *"De Donis Conditionalibus,"* 13 EDW. c. 1 (1285), which converted estates in fee simple conditional into estates in fee tail indicates an opposite tendency since such estates were inalienable. However, it must be remembered that the real purpose of all the statutes was the strengthening of the power of the nobility, and it was only incidental that a concession was made that favored alienability.

ing the law. It also may have indicated a method of accomplishing other purposes, such as disposing of land after death which could not be done by will. There may have been earlier traces of uses for temporary purposes, and there is much learned discussion as to the exact nature of their origins and forerunners, but it is not necessary for the purpose of this note to enter into a further discussion of this interesting question.[11] The enforcement of these religious uses, if such enforcement was necessary since the threat of excommunication or denial of the sacraments was very effective, was usually in the ecclesiastical courts but gradually the Chancery, as it developed, took jurisdiction.

Just when courts of Chancery began to assume importance is a difficult historical problem.[12] It is certain, however, that they were known during the reign of Edward II (1307-1326), and that they gained considerably in importance during the reign of Edward III (1326-1377). That land was being conveyed to feoffees for the use of religious corporations is evidenced by an extension of the *Statutes of Mortmain* to cover such a situation.[13] During the next two centuries, even though the early Chancery reports are meager, there is evidence that charitable trusts were enforced by the courts of Chancery.[14]

The next phase brings us down to the reign of Henry VIII (1509-1546). In his struggle for supremacy against the Pope, Henry felt obliged to strike at all religious and charitable organizations that were affiliated with the Roman Church. The *Statute of Wills*,[15] which allowed land to be devised, prohibited devises to religious bodies. The *Statute of Uses*,[16] which was passed a few years earlier, was clearly intended to destroy uses and trusts altogether, but the courts have refused to carry out that intent in many instances. One such instance was the charitable use, for the reason that the beneficiary being uncertain, there is no one in whom the use can be executed. It is said that those uses not executed by the statute were forerunners of the modern trusts.[17] It was also during his reign that the courts began to hold gifts void on the ground that they were for superstitious purposes. Many gifts for Catholic priests, monas-

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[11] The origins of uses are discussed by Holmes and Ames in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Vol. II (1st ed. 1908). HOLMES, *Early English Equity* 705-721 (*salaman*), and AMES, *The Origin of Uses and Trusts* 737-752. See also MAITLAND, EQUITY 25 (1936).

[12] SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Vol. II (1st ed. 1908), SPENCE, *The History of the Court of Chancery* 219-254.

[13] 15 RICH. II, c. 5 (1391).

[14] See PERRY, TRUSTS AND TRUSTEES Vol. II, §§ 693, 694 (6th ed. 1911).

[15] 32 HEN. VIII, c. 1 (1540).

[16] 27 HEN. VIII, c. 10 (1536) (converted uses where one person was "seized to the use of another" into legal estates and thereby eliminated most of the existent uses).

[17] PERRY, TRUSTS AND TRUSTEES Vol. I, § 30 (6th ed. 1911).

teries or convents, and bequests for Masses for departed souls were held void, and the *cy pres* doctrine, as well as the "sign manual of the crown," was often applied.

During the short reign of Edward VI (1546-1553), and the turbulent reign of Mary (1553-1558), all charities were no doubt much neglected. It was not until Elizabeth was firmly seated on the throne and the "Reformation" established that attention was turned to the correction and encouragement of charities. There was much legislation toward this end which finally culminated in the *Statute of Charitable Uses.*[18] No doubt many abuses had existed in the administration of all kinds of charitable gifts and the statute was designed to correct them. This statute, then, did not mark the birth of Charitable Uses, but rather the rebirth in a more well defined form.

The statute enumerated certain charitable objects as being within its scope and included the following: "relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, *churches,* sea-banks, and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes." The purpose of the statute was to provide for the better enforcement of gifts for the above purposes, since it was known that many abuses existed. By implication, it may be said to have repealed the early *Statutes of Mortmain* as it made no reference to any restrictions upon any gifts or grants to corporations for any of the purposes included.[19] It provided for Commissioners to make inquiries and take jurisdiction of any complaints as to abuses of such gifts. The Lord Chancellor had jurisdiction over appeals from the orders or decrees of the Commissioners.

There has been some controversy as to whether this statute gave the courts of Equity jurisdiction over the subject of charities, but it is now settled, as we have seen, that the courts of Equity had assumed an original and inherent jurisdiction over charities, independent of the statute.[20]

No reference is made in the statute to religion except for the clause as to the repair of churches. The omission was intentional, the framers wishing to avoid the possibility of confiscations in case the "Reformation" went backwards.[21] It was no doubt felt that

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[18] 43 ELIZ. c. 4 (1601).

[19] The next *Statute of Mortmain* was 9 GEO. II, c. 36 (1736).

[20] See Mr. Binney's argument in GIRARD'S WILL CASE 151-160; PERRY, TRUSTS AND TRUSTEES Vol. II, §§ 693, 694 (6th ed. 1911).

[21] DUKE, THE LAW OF CHARITABLE USES 132 (1st ed. 1676). Sir Francis Moore, draftsman of the Act, explained the omission "lest the gifts intended

there was little need in a Christian community for a statute to declare gifts for religious purposes to be charitable. The statute was never intended to be exclusive and the English courts have construed gifts to be charitable whenever they are either within the letter or the spirit of its provisions. It was merely a general classification of purposes that were deemed to be, and had been considered as worthy of contributions. The basic ingredient is not that they all must benefit the public generally, but that they either benefit some group whose individual members are uncertain but in need of aid, or are for the benefit of some institution or project that is deemed prima facie to be for the general good. A study of these provisions makes it apparent that it never was intended that an inquiry be made to ascertain exactly how the public generally would benefit. It is enough to show that the group, institution or project to be benefited were considered to be worthy of aid and that the benefits were not for specific individuals.

A consideration of the *Pemsel* case [22] will bring our inquiry into the modern period. Although decided almost three hundred years after the passage of the *Statute of Charitable Uses,* it nevertheless owes its basic rationale to an interpretation of that statute. In the decision, we find the classic definition of Lord MacNaghten: " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." [23] It is only in the fourth category that benefit to the community is mentioned. The assumption was no doubt made, and rightly so, that in the first three categories there is a conclusive presumption of such benefit and none need be looked for by the court.

The action involved the interpretation of a statute that made an allowance in income taxes payable by a trust estate, where the trust was for a charitable purpose. The trust in question was for the purpose of maintaining a missionary establishment among heathen nations. The court held that charitable purposes were not limited to the relief of poverty and decided that the allowance ought to be granted. It is interesting to note what was said by Lord Hershell, in affirmance of the holding of the court. "I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men and so appeals to their benevolence for

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to be employed upon purposes grounded upon charity, might, in change of times (contrary to the minds of the givers), be confiscate into the king's treasury. For religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox, may at another be accounted superstitious, and then such lands are confiscate."

[22] Commissioners of Income Tax v. Pemsel, [1891] A. C. 531.

[23] *Id.* at 583.

relief. Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity." [24]

It was not considered necessary in this case to determine whether the establishment of the mission was beneficial either to the public at home or to the heathens. There is nothing to be found in the opinions of any of the members of the court which would indicate that any further inquiry as to public benefit should be made after it is determined that the purpose is within the letter or spirit of the *Statute of Charitable Uses.* Lord Hershell poses the example that in the case of the relief of poverty, there might be some who would hold that the purpose is not beneficial. The argument would be that thrift and industry are discouraged by doles or other forms of beneficence; that they tend to pauperize and thus perpetuate the evil which they are intended to cure and should, therefore, be discouraged rather than stimulated.

A court should not be allowed to place its private evaluation on the merits of a cause or institution, and this is particularly true where religion is concerned. The English courts declined to do so when they held valid a trust for the publication of the writings of one Joanna Southcote, a religious fanatic, who believed herself to be with child by the Holy Ghost.[25] The court stated that any bequest for a religious purpose is charitable and a court of Chancery should make no distinction between one sort of religion or another merely because it thinks the doctrines foolish or without foundation.

Continuing our inquiry in the more modern period, we become aware of factors which have developed since the 17th century, and which may place the classification of a charitable purpose in a new light. The first of these is the development of the doctrine against perpetuities,[26] which resulted in the Rule against Perpetuities. Affirmatively speaking, it was the judicial recognition of the doctrine of free alienation of land which had been slowly taking root for several centuries.[27] It was felt that it was against public policy to allow land or any large portion of the wealth to be taken out of commerce. This had been done through restrictions or conditions

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[24] *Id.* at 572.

[25] Thornton v. Howe, 31 Beav. 14, 54 Eng. Rep. 1042 (1862).

[26] A perpetuity has been defined as an "inalienable, indestructible interest." GRAY, THE RULE AGAINST PERPETUITIES § 589 (2d ed. 1906).

[27] There was little consideration of perpetuities and no questions of remoteness of vesting prior to the enactment of the Statute of Uses (see note 16 *supra*). The evils arising from the statute, *De Donis Conditionalibus* (see note 10 *supra*), were becoming apparent, but it was not until 1620 when an executory devise was held to be indestructible that attention began to be directed to perpetuities. Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620); it was not until 1681 that the foundation of the Rule against Perpetuities was laid down. Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681). See also GRAY, THE RULE AGAINST PERPETUITIES § 123 (2d ed. 1906).

that made the interest of the present owner of land inalienable, and by allowing interests to arise on future contingencies beyond the control of the present owners. There are two distinct rules of law which are applied to further this policy of free alienation. The first is that all total restraints on the alienation of present or vested interests are void, and the second is the Rule against Perpetuities,[28] which requires the vesting of future interests within lives in being.

There is no doubt that most charitable trusts will very likely violate the spirit of the policy that disfavors perpetuities. This is so, since by their nature there may be no definite *cestui que trust* and they will be inalienable because there is no one to alienate the property that constitutes the trust *res*. But it is not always necessary to find that the beneficiary is an indefinite group. Many instances can be cited where a gift to a definite person was held to be charitable.[29] Where this is the case, unless a restriction is placed on the power to alienate or the vesting of the gift is remote, there is no violation of the rule. It may also be true that a gift to a religious organization, having a theoretical perpetual existence, will violate the spirit of the policy of free alienation. But again, there may be no violation of the law since there is no requirement that land must be sold as long as there is no limitation on the power to sell and there is no remoteness in the vesting of the gift. There is, however, a counter-policy of the law which favors and encourages gifts to charities even when the gift will tend to keep property out of commerce.

This policy is manifested by the commonly stated principle that gifts to charity are not subject to the Rule against Perpetuities. This requires some qualification since in most cases there is no occasion to apply the rule which is directed against the creation of remote future interests and is not concerned with restraints on alienation.[30] A gift to an individual in trust, and then over to a charity on a remote contingency, is subject to the rule and it is only in the case where the gift in trust to a charity is followed by a gift over to another charity that the Rule against Perpetuities is not applied.[31] Limited as it may be, however, it does illustrate this counter-policy of favoring charitable gifts. The only effect on a definition of a charitable purpose that this doctrine of free alienation should have

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[28] Gray states the rule, now familiar to all students of future interests, "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906).

[29] Attorney General v. Cock, 2 Ves. Sr. 273, 28 Eng. Rep. 177 (1751); Attorney General v. Goodard, Turn. & R. 348, 37 Eng. Rep. 1134 (1823) (gift to a minister of a church); Chesseman v. Patridge, 1 Atk. 436, 26 Eng. Rep. 279 (1739) (gift to a schoolmaster).

[30] GRAY, THE RULE AGAINST PERPETUITIES § 589 (2d ed. 1906). In New York by statute, suspension of the absolute power of alienation is prohibited. N. Y. REAL PROP. LAW § 42 but § 113 allows charitable gifts.

[31] Christ's Church v. Grainger, 16 Sim. 83, 60 Eng. Rep. 805 (1848).

is whether or not the cause or institution is sufficiently worthy to allow the property to be taken out of commerce, if such will be the result of the gift. Whether or not it is worthy is not limited to cases where the community will benefit materially, although such instances will certainly be included.

The second factor was not new, but it had not been given much attention during the period of religious turmoil before and after the "Reformation," when all charities were sadly neglected. It is the theory that it is against public policy to permit a person on his death bed to give to charity, property, which he was unwilling to give during his life, and thereby exclude his lawful heirs. This was the same policy that had destroyed the *post obit*[32] gifts and influenced, in part at least, the early *Statutes of Mortmain.*[33] However, while this objection is sound, it should in no way limit an interpretation of what are the elements of a charitable purpose. The laudable policy of favoring heirs is sufficiently carried out by the more recent *Statutes of Mortmain,*[34] the application of which will also tend to minimize the perpetuities problem, and by statutes similar to the one in New York,[35] which limits charitable gifts by will to one-half the estate, where the testator is survived by a spouse, descendant or parent.

There are several reasons why it may become important to establish that a trust is charitable rather than private.[36] The Rule against Perpetuities may be avoided, the *cy pres* doctrine[37] might be applied, the courts will allow more liberal rules of construction;[38] and taxation in some cases will be avoided or reduced.[39] The Rule against Perpetuities has already been discussed and the importance of its application to our problem was considered.

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[32] See note 5 *supra.*

[33] See note 9 *supra.*

[34] Mortmain and Charitable Uses Act of 1891, 54 & 55 VICT. c. 73, which allowed gifts of land by will for any charitable use but required a sale of the land within one year unless the High Court or the Charity Commissioners extended the time or sanctioned the retention of the land. An earlier mortmain statute had provided that gifts of land or personalty to any person or corporation in trust for charitable uses were void unless made by deed twelve months before the death of the donor. Georgian Statute of Mortmain, 1736, 9 GEO. III, c. 36.

[35] N. Y. DEC. EST. LAW § 17.

[36] *Cf.* Attorney General v. National Provincial and Union Bank, [1924] A. C. 262.

[37] See Willard, *Illustrations of the Origins of Cy Pres,* 8 HARV. L. REV. 69 (1894).

[38] The early origins of this attitude is evidenced by the following statement: "Our chancellors have been very liberal in their constructions as to charitable dispositions, so as to make them answer the intention of the Donors, and for that purpose have dispensed with several ceremonies required in other grants and therefore it has been held that an appointment to a charity, without livery of seisin or attornment is good." BACON, ABRIDGMENT OF THE LAW Vol. I, 366 (6th ed. 1793).

[39] Commissioners of Income Tax v. Pemsel, note 22 *supra.*

The *cy pres* doctrine, which is applied chiefly to charitable trusts, may prevent a failure of the trust in a situation where property is given in trust for a particular charitable purpose and it is impossible or impractical to carry out that purpose. In such instance, if the general intention to devote the property to charity is found, that intent will be carried out "as near" as possible and the property will go to a similar charity.[40] This is known as the judicial doctrine of *cy pres,* but there had existed also a prerogative doctrine, where the intentions of the testator were not considered. This doctrine is illustrated by the case of *Da Costa v. De Pas*[41] where a Jewish testator had left a sum to establish an assembly for the reading of Jewish law and instructing people in the Jewish religion. The gift was held illegal since it was not for the established religion and was, therefore, deemed superstitious. The King, therefore, by the "sign manual of the crown," directed that the fund be applied to the instruction of children in the Christian religion, which was very likely the last thing which the testator would have desired. There are many other illustrations of the disfavor of certain religions which resulted from the "Reformation." The Church of England was the established religion, and the Roman Catholic, Jewish and dissenting Protestant sects were deemed illegal and often persecuted. Even as the intolerance of the Tudor times was diminishing many trusts for religions other than the established one were held to be for superstitious purposes and therefore void. But today, in an enlightened country, where religious intolerance is considered to be an evil of the past, no traces of its influence should be found in the decisions of the courts.[42]

The application of the judicial doctrine of *cy pres,* possible exemptions from taxation, and the liberal construction to be applied by the courts all indicate that it is the policy of the law to favor charitable gifts and these factors should in no way limit the scope of our definition, although an awareness of these and all the aforementioned factors should be present in our minds when we seek to define a charitable purpose and answer the question posed at the outset of this note.

Before answering the question, let us first consider a few of the many definitions which have been suggested by judges, textwriters and attorneys. The word "charity" is derived from the Latin *caritas* meaning "love in its perfect sense" or "love of God." This derivation should never be overlooked since it is the very foundation

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[40] Jackson v. Phillips, 14 Allen 539 (Mass. 1867).

[41] 1 Amb. 228, 27 Eng. Rep. 150 (1754).

[42] It is indicated that the doctrine of superstitious uses as applied to the organized religions has expired by the decision that held a bequest to a church and to the Jesuit order for the saying of masses to be valid. Bourne v. Keane, [1919] A. C. 815; and a trust for masses was later held to be charitable. *In re* Claus, [1934] 1 Ch. 162.

of charity. We have seen that in an early period of the English law, Coke stressed the motive of the donor in defining a charity when he said what is done for the poor for God's sake, is done to God Himself.[43] But a trend toward materialism is found in the *Statute of Charitable Uses* wherein the results rather than the intentions of the giver seem to be stressed. The definition of Lord MacNaghten in the *Pemsel* case [44] also indicates this tendency to overlook the motives of the donor. The culmination of this trend may be found in cases which hold that the intention of the testator is immaterial.[45] But, intention is emphasized in the much quoted definition of Mr. Horrace Binney contained in the arguments of counsel in the *Girard* case.[46] He said, "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish" is given for a charitable purpose. While it is true that too much emphasis is placed on the motive of the donor by Mr. Binney's definition, those motives cannot be completely ignored.

A better definition is found in *Jackson v. Phillips* [47] where Mr. Justice Gray says, "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [48] But even this definition leaves something to be desired since it stresses benefit to an indefinite group and fails to include gifts to particular persons or institutions dedicated to the fulfillment of the same aims.

The Restatement is even more obscure. A charitable trust is defined as ". . . a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." [49]

While fully aware of its limitations, the writer submits the following definition: "A trust is charitable when its purpose is to

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[43] COKE, COMMENTARY UPON LITTLETON *96b.

[44] See notes 22, 23 and 24 *supra*.

[45] Kerr v. Bradley, [1923] 1 Ch. 243, 15 B. R. C. 412 (where a bequest for the erection of a stained glass window in a church was held charitable despite the motive of the testatrix to perpetuate her own memory rather than to beautify the church or advance religion); Hoare v. Osborne, L. R. 1 Eq. 585, 587 (1866).

[46] Vidal v. Girard's Executors, 2 How. 127, 11 L. ed. 205 (U. S. 1844).

[47] 14 Allen 539 (Mass. 1867).

[48] *Id.* at 556.

[49] RESTATEMENT, TRUSTS § 348 (1935).

bestow a gift which is intended and will probably result in aiding a cause beneficial to mankind; or assist an indefinite group of persons in need of aid; or will benefit any public, educational or religious institution, generally deemed to be worthy of support, because when given in this altruistic spirit and for these ends, it will justify the special treatment which is afforded by the law."

Conclusion

We have seen that Charitable Trusts began as an incident to the religious fervor of the middle ages, and that charity was neglected during the times of religious turmoil. We have weighed certain factors and trends affecting our question that have developed in the law, and religious intolerance has been deplored. We feel that strong religious spirit is indispensable to civilized society and that such spirit is in special need of encouragement and strengthening today. Therefore, we feel that once a religious purpose has been found, the gift should be deemed prima facie charitable and no further inquiry as to material benefit should be made.[50]

The lower court in the case under discussion had based its reasoning on the case of *Cocks v. Manners*,[51] which held that a gift to a convent was not charitable since the class to be benefited was too narrow. This view was eloquently criticized by an Irish court which said, "The assumption that the Irish public finds no edification in cloistered lives, devoted to purely spiritual ends, postulates a close assimilation of the Irish outlook to the English, not obviously warranted by the traditions and *mores* of the Irish people." [52] It is submitted that no nation or people should seek to discourage gifts for a religious purpose on the ground that a material benefit to the public is not obvious. Because without religion, without love of God and neighbor, and where materialism overshadows spirituality, there will be no charity.

ANDREW L. HUGHES.

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[50] *Cf.* If a purpose is charitable in the legal sense, the court does not inquire whether if carried out it would actually benefit the community. Foveaux Cross v. London Anti-Vivisection Society, [1895] 2 Ch. 501, 507.

[51] L. R. 12 Eq. 574 (1871).

[52] *In re* Howley, [1940] I. R. 109, 113.