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## POWERS OF APPOINTMENT TO UNSPECIFIED CHARITIES

WILLIAM F. FRATCHER\*

Every law school graduate remembers, albeit dimly, the sad fate of Ann Cracherode's will. How she bequeathed her personal estate to the Bishop of Durham upon trust to dispose of the residue to such objects of benevolence and liberality as the bishop in his own discretion should most approve of. How the good bishop disclaimed any beneficial interest in himself personally and declared his intention of devoting the residue to charity if allowed to do so. How the Attorney-General's<sup>1</sup> argument that Ann intended to confine her trust to charity was exploded by Sir Samuel Romilly's sly suggestion that the bishop's entertaining his hunting companions with liquor would be an object of liberality. And how the great expounder of equity, Lord Eldon,<sup>2</sup> decreed that, because Ann's trust was "for purposes not sufficiently defined to be controlled and managed by this Court," it failed and the Bishop of Durham held on resulting trust for Ann's next of kin.<sup>3</sup>

As law students ordinarily study *Morice v. The Bishop of Durham*<sup>3</sup> before they have mastered the structure of the trust device or even heard of powers of appointment and charitable trusts, it is not surprising that

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1. The Attorney-General, the Honourable Spencer Perceval, also had a sad fate. He became prime minister in 1809 and was murdered at the door of the House of Commons three years later, the only British prime minister to die at the hands of an assassin.

2. John Scott, son of a lowly coal barge owner, ruined his chances of becoming a country clergyman by climbing a ladder and carrying off the young daughter of a leading banker who had forbidden him to call. The parties to this romantic elopement went through a furtive marriage ceremony in Scotland and, after a period of near-starvation, the bridegroom changed his ambitions from the church to the law. The bride's family eventually forgave the errant couple and, indeed, rejoiced when John Scott became a millionaire, Lord Chancellor and first Earl of Eldon. 9 CAMPBELL, LIVES OF THE LORD CHANCELLORS 109-137 (4th ed. 1857). As Lord Chancellor from 1801 to 1827, Lord Eldon was noted for his inexcusable delay in deciding cases. 10 *Id.* 225-235. The law might be clearer and better today if he had delayed longer before deciding on the validity of Ann Cracherode's will.

3. *Morice v. The Bishop of Durham*, 10 Ves. Jun. 521, 32 Eng. Rep. 947 (1805), affirming the decree of Sir William Grant, Master of the Rolls, 9 Ves. Jun. 399, 32 Eng. Rep. 656 (1804).

they often fail to grasp the full significance of the decision. It is surprising that such able equity judges as Sir William Grant and Lord Eldon apparently failed to realize that the real issue was the validity of a power of appointment, not the enforceability of a trust. To be sure, no beneficiary could sue to enforce Ann's trust until the bishop selected objects of benevolence and liberality, but that did not necessarily nullify the bishop's power to select. If the Master of the Rolls and the Lord Chancellor had considered the law of powers, instead of confining themselves to the law of trusts, they might have reached a different result. Perhaps their failure to do so was because the principal effort to sustain Ann's will was made by the Attorney-General, who was interested in sustaining it only as a charitable disposition.

Apart from the law of trusts, there is no rule that all of the possible appointees under a power of appointment must be definitely ascertainable from the terms of the instrument creating the power.<sup>4</sup> This is obvious in the case of a general power of appointment, under which the donee may appoint to any person or corporation in the world, including himself.<sup>5</sup> It is also true as to a special power of appointment, under which the donee may not appoint to himself.<sup>6</sup> Even a power to appoint to anyone whatever except the donee of the power is valid.<sup>7</sup>

The decision in *Morice v. The Bishop of Durham*<sup>8</sup> has been defended by an argument that, as a trust involves the splitting of the legal title from the equitable, no trust can exist without a beneficiary capable of

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4. RESTATEMENT, PROPERTY § 320, comment *d*, § 323, comment *h* (1940). The latter comment states that a power is void if the possible appointees are so indefinitely described that it is impossible to select anyone who could reasonably be said to answer the description, but that a power may be valid although the group of possible appointees is so large that its members could not be the beneficiaries of a trust.

5. *Gibbs v. Rumsey*, 2 V. & B. 294, 35 Eng. Rep. 331 (1813) (bequest to executors "to be disposed of unto such person and persons . . . as they in their discretion shall think proper and expedient"; decision by Sir William Grant, Master of the Rolls); *Harvey v. Griggs*, 12 Del. Ch. 232, 111 Atl. 437 (1920); *In re Dormer's Estate*, 348 Pa. 356, 35 A.2d 299 (1944); *Watts's Estate*, 202 Pa. 85, 51 Atl. 588 (1902); *In re Lidston's Estate*, 32 Wash.2d 408, 202 P.2d 259 (1949).

6. *In re Gestetner Settlement*, [1953] Ch. 672; *In re Coates*, [1955] Ch. 495; *Re Gibbard, Public Trustee v. Davis*, [1966] 1 All E. R. 273 (Ch.) (power to appoint the residue amongst any of my old friends; gift over in default of appointment); *In re Rowland's Estate*, 73 Ariz. 337, 241 P.2d 781 (1952); *Cochran v. McLaughlin*, 128 Conn. 638, 24 A.2d 836 (1942) (power to appoint to such benevolent institutions as the donee might select); *Re Dowsley*, 15 D.L.R.2d 560 (Ont. 1958); *Goetz v. Bank of Martinsburg*, 140 W. Va. 422, 84 S.E.2d 759 (1954).

7. *Eyre v. Eyre*, 49 L.T.R. (n.s.) 259 (Ch. 1883); *In re Park*, [1932] 1 Ch. 580; *Re Ogilvy & Ogilvy*, [1953] 1 D.L.R. 44 (Ont. 1952).

8. *Morice v. Bishop of Durham*, *supra* note 3.

suings to enforce it.<sup>9</sup> This is not so. A testamentary trust for "my grandchildren born more than ten years after my death" or for "such of my grandchildren born more than ten years after my death as my trustee may select" is valid and effective from the moment of the testator's death although there is no beneficiary in being and none may come into being.<sup>10</sup> So is a trust to support Old Dobbin<sup>11</sup> or to promote fox hunting.<sup>12</sup> In none of these cases is there any beneficiary capable of suing to enforce the trust, yet the trusts are valid and their trustees may carry them out as the Bishop of Durham sought to do. Even if the argument that a trust cannot exist without a beneficiary capable of suing to enforce it were sound, it would not explain the holding in the *Morice* case that the Bishop's power of appointment was void. It is true, of course, that a trust for indefinite objects or persons fails if there is no way to determine the intended objects of the settlor's bounty,<sup>13</sup> but it does not follow that the exercise of a power of appointment is not a proper method of determining these objects. If the persons who are to take legal title to legacies may be determined by the exercise of a power of appointment created by the will bequeathing the legacies, why should it not be possible to determine the persons who are to take equitable title to property under a trust created by the will in the same way?

One of Lord Eldon's claims to fame is that his decrees were never—well, hardly ever—reversed or overruled.<sup>14</sup> His decree in *Morice v. The*

9. In deciding the *Morice* case, Sir William Grant said, "There must be somebody, in whose favour the Court can decree performance." 9 Ves. Jun. 399, 405, 32 Eng. Rep. 656, 658.

10. See *Pibus v. Mitford*, 1 Ventris 372, 86 Eng. Rep. 239 (1673); *Hopkins v. Hopkins*, 1 Atk. 581, 26 Eng. Rep. 365 (1738); *Thellusson v. Woodford*, 4 Ves. Jun. 227, 31 Eng. Rep. 117 (1799); *Hayes v. Kershaw*, 1 Sandf. Ch. 258 (N.Y. Ch. 1844); *Heyward-Williams Co. v. McCall*, 140 Ga. 502, 79 S.E. 133 (1913); *Folk v. Hughes*, 100 S.C. 220, 84 S.E. 713 (1915); Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 MICH. L. REV. 907 (1949).

11. *In re Dean*; *Cooper-Dean v. Stevens*, 41 Ch.D. 552 (1889).

12. *In re Thompson*; *Public Trustee v. Lloyd* [1934] Ch. 342; RESTATEMENT (SECOND), TRUSTS § 124 (1959).

13. RESTATEMENT (SECOND), TRUSTS §§ 112, 122, 123 (1959).

14. 10 CAMPBELL, LIVES OF THE LORD CHANCELLORS 250-251 (4th ed. 1857). The fact that for twenty-six years he was president of the House of Lords, then the sole tribunal with power to reverse or overrule decrees of the High Court of Chancery, may have had a bearing on this phenomenon. On one occasion Lord Eldon was glad to be reversed. Having called to obtain the Sign Manual on a state document at a time when King George III was convalescing from one of his bouts with insanity, the Lord Chancellor was much embarrassed when the King pressed him to accept his favorite watch as a gift. Lord Eldon flatly refused. After the King had recovered fully the watch was sent to the Lord Chancellor with a peremptory royal command to keep it, with which Lord Eldon complied. LORD ELDON'S ANECDOTE BOOK 8 (1960). In the King Edward VII Gallery of the

*Bishop of Durham*<sup>15</sup> was no exception. It has been followed by the House of Lords and courts in the British Commonwealth.<sup>16</sup> The doctrine of *Morice v. The Bishop of Durham*, as refined by subsequent decisions, would appear to be that, although the possible appointees under a power of appointment unconnected with a trust need not be definite, a power to appoint among a class of persons or purposes is void if: (1) because of the fiduciary capacity in which he holds it or otherwise, the donee has an imperative duty to exercise the power; (2) the donee is not authorized to appoint to himself; (3) all members of the class of possible appointees are not definitely ascertainable from the terms of the instrument creating the power; and (4) the class of possible appointees is not confined to charities. The rule does not operate if any of these elements is absent. Thus, even though the donee of the power is a trustee, the rule does not apply if he is not under an imperative duty to exercise the power.<sup>17</sup> Moreover, the rule has an exception: a trustee's power to appoint among relatives of the donor of the power is valid even though all of the relatives are not ascertainable.<sup>18</sup> Applying the developed rule and its exception we get the following results:

1. A power to appoint to such objects of benevolence as the donee of the power may select is valid if the donee has no duty to exercise the power<sup>19</sup> but void if he has such a duty.<sup>20</sup>

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British Museum there is displayed a watch with the letters "G. III R.", surmounted by a crown, set in diamonds on the blue enamel of the case, deposited by an anonymous benefactor. It might not be there if the Lord Chancellor had never been reversed.

15. *Morice v. Bishop of Durham*, *supra* note 3.

16. *E.g.* *James v. Allen*, 3 Mer. 16, 36 Eng.Rep. 7 (1817) (trust for "benevolent purposes"; decision by Sir William Grant, M.R.); *Vezey v. Jamson*, 1 Sim. & Stu. 69, 57 Eng.Rep. 27 (1822) (bequest to executors to apply to any Person or Persons in such Shares and Proportions as the executors should in their discretion think fit); *In re Jarman's Estate*, 8 Ch.D. 584 (1878) (trust for "any charitable or benevolent purpose" selected by the executors); *Chichester Diocesan Fund v. Simpson*, [1944] A.C. 341 (House of Lords). Other English cases are cited and discussed in SCOTT, TRUSTS §§ 122-123, 398.1 (2d ed. 1956); Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 U.C.L.A. L. REV. 241 (1963); Notes, 11 Mod. L. REV. 343 (1948), 104 L.J. 676 (1954), 71 L.Q.R. 16 (1955), 17 L.Q.R. 465 (1955), 18 Mod. L. REV. 152 (1955). For the situation in other Commonwealth countries, see Notes, 20 AUST. L.J. 216 (1946), 24 AUST. L.J. 239 (1950), 33 CAN. BAR REV. 334 (1955), *In re Ashton*, Gordon v. Siddall, [1950] N.Z.L.R. 42.

17. *In re Gestetner Settlement*, [1953] Ch. 672.

18. *Harding v. Glyn*, 1 Atk. 469, 26 Eng.Rep. 299 (1739); RESTATEMENT (SECOND), TRUSTS § 121 (1959); SCOTT, TRUSTS § 121 (2d ed. 1956).

19. *Cochran v. McLaughlin*, 128 Conn. 638, 24 A.2d 836 (1942); *Goetz v. Bank of Martinsburg*, 140 W.Va. 422, 84 S.E.2d 759 (1954).

20. *James v. Allen*, 3 Mer. 16, 36 Eng.Rep. 7 (1817).

2. A power to appoint to such friends of the testator as the donee may select is valid if the donee has no duty to exercise the power<sup>21</sup> but void if he has such a duty.<sup>22</sup>

3. A power to appoint to such relatives of the testator as the donee may select is valid whether the donee does or does not have a duty to exercise the power.<sup>23</sup>

The rule in *Morice v. The Bishop of Durham*<sup>24</sup> has been followed by most of the American courts that have considered the problem<sup>25</sup> and was accepted in the first edition of the *Restatement of Trusts*, which was published in 1935.<sup>26</sup> The American courts have, however, been more willing than the English to find that a trust was exempt from the rule because confined to charity.<sup>27</sup> The *Morice* rule has, moreover, been criticized by American scholars,<sup>28</sup> and at least two courts have flatly rejected it.<sup>29</sup> The *Restatement (Second) Trusts*, published in 1959, abandoned the rule in *Morice v. The Bishop of Durham*. It provides that when a trust is created for such members of an indefinite class of persons or for such indefinite purposes, not limited to charity, as the trustee may select, the trustee's power to select beneficiaries or purposes is valid.<sup>30</sup>

The arguments and opinions in *Morice v. The Bishop of Durham*<sup>31</sup> make it very clear that both counsel and judges thought that Ann Crachero's trust and the bishop's power to select objects of benevolence and liberality would be valid to the extent that the power was confined by its

21. *Re Gibbard, Public Trustee v. Davis*, [1966] 1 All E.R. 273 (Ch. 1966); *In re Rowland's Estate*, 73 Ariz. 337, 241 P.2d 781 (1952); *Re Dowsley*, 15 D.L.R.2d 560 (Ont. 1958).

22. *Sheedy v. Roach*, 124 Mass. 472, 26 Am.Rep. 680 (1878); *Clark v. Campbell*, 82 N.H. 281, 133 Atl. 166 (1926); *Salveson's Trustees v. Wye*, [1954] Sess. Cas. 440 (Scotland). Cf. *Adams v. Simpson*, 358 Mo. 168, 213 S.W.2d 908 (1948) (direction in will to distribute residue to friends and relations construed to limit the class to friends who were also relations and, as so construed, valid).

23. Note 18 *supra*; *Adams v. Simpson*, *supra* note 22. Cf. *Minot v. Attorney General*, 189 Mass. 176, 75 N.E. 149 (1905).

24. *Morice v. Bishop of Durham*, *supra* note 3.

25. The cases are collected in SCOTT, TRUSTS §§ 122, 123, 398.1 (2d ed. 1956); SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 894 (2d ed. 1956) and Palmer, *supra* note 16. See also *Adams v. Simpson*, *supra* note 22.

26. § 122, comment d, § 123, comment c.

27. The cases are collected in SCOTT, TRUSTS § 398.1 (2d ed. 1956).

28. Ames, *The Failure of the "Tilden Trust"*, 5 HARV. L. REV. 389 (1892); Scott, *Control of Property by the Dead*, 65 U. PA. L. REV. 527, 537 (1917); Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548 (1945); SCOTT, TRUSTS § 123 (1956); Palmer, *supra* note 16.

29. *Dulles's Estate*, 218 Pa. 162, 67 Atl. 49 (1907); *Allred*, Attorney General v. Beggs, 84 S.W.2d 223 (Tex. 1935), 34 MICH. L. REV. 582 (1936).

30. RESTATEMENT (SECOND), TRUSTS § 122, § 123 (1959).

31. *Morice v. Bishop of Durham*, *supra* note 3.

terms to the selection of charitable objects. Both Attorney General Perceval and Sir Samuel Romilly had participated as counsel in the case of *Moggridge v. Thackwell*,<sup>32</sup> which had been decided by Lord Eldon less than two years before. In that case Ann Cam bequeathed the residue of her personal estate to James Vaston, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters." Mr. Vaston predeceased the testatrix. The Lord Chancellor affirmed a decree directing the executor to dispose of the residue according to a charitable scheme framed by the court, intimating that Mr. Vaston's power of appointment to unspecified and indefinite charities would have been valid if he had survived the testatrix. The scheme framed by the court was not restricted to poor clergymen with large families and good characters. The opinion makes it clear that, if he had lived to exercise the power, Mr. Vaston would not have been restricted to such clergymen in selecting charitable objects. In his opinion in *Morice v. The Bishop of Durham* Lord Eldon stated clearly that if Ann Cracherode's will had required the bishop to devote any part of the trust property to charity, the trust would be valid to that extent;<sup>33</sup> this view has been accepted in later cases.<sup>34</sup> No one who actually read the report of the *Morice* case could honestly conclude that the decision invalidated a power of appointment to unspecified charities. The overwhelming majority of American courts have

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32. 7 Ves. Jun. 36, 32 Eng.Rep. 15 (1803). As in the *Morice* case, Sir Samuel represented the next of kin and sought to have the trust declared invalid. Perceval, then Solicitor-General, represented the executor who wanted the decree to be affirmed. The Attorney-General argued that the bequest to charity should stand but that the King rather than the court should frame the charitable scheme. Lord Eldon thought that the King should frame the scheme only when no trustee is named, as in the case of a bequest to "charity," and when a designated charity is illegal. Perceval and Romilly had also appeared as opposing counsel in *Attorney General v. Stepney*, 10 Ves.Jun. 22, 32 Eng.Rep. 751 (1804), in which Lord Eldon held that a bequest to trustees "to purchase bibles and other religious books, pamphlets, and tracts, as they should think fit" for a circulating library created a valid charitable trust.

33. 10 Ves.Jun. at 537-538, 32 Eng.Rep. at 953 (1805).

34. *E.g. In re Clarke*, [1923] 2 Ch. 407. In this case the residue was bequeathed to (1) nursing homes for persons of limited means, (2) the Royal National Lifeboat Institution, (3) the Lister Institute of Preventive Medicine, and (4) "such other funds, charities and institutions as my executors in their absolute discretion shall think fit." The will directed division among these four objects "in such shares and proportions as my trustees shall determine." It was held that the first three purposes were confined to charity but the last was not; that the executors' powers to divide among the four purposes and to allot funds to the fourth purpose were void under the rule in *Morice v. The Bishop of Durham*; but that three quarters of the residue were held on valid charitable trust for the first three purposes. The remaining quarter was held on resulting trust for the next of kin under the *Morice* rule. Other cases are collected in SCOTT, TRUSTS §§ 395-397 (2d ed. 1956).

followed the view of the English courts that a power to appoint to unspecified charities is valid, whether or not it is conferred on a trustee or executor and whether or not the donee of the power is under a duty to exercise it.<sup>35</sup>

During the years 1825 through 1828 a commission whose members were hostile to the trust device revised the statutes of New York. This revision, which was enacted in 1829, abolished all trusts except for enumerated purposes, none of which was charitable, and restricted the duration of trusts to two lives in being.<sup>36</sup> At first the New York Court of Appeals held that the Revised Statutes had not abolished the English law of charitable trusts,<sup>37</sup> but it soon manifested a tendency to apply the rule in *Morice v. The Bishop of Durham*<sup>38</sup> with great rigor.<sup>39</sup> In 1866 it overruled its earlier decisions by holding that charitable trusts were governed by the Revised Statutes and so were void unless they conformed to the same rules as to duration and definiteness of beneficiaries as private trusts.<sup>40</sup> It followed, of course, that the rule in *Morice v. The Bishop of Durham* applied to all trusts, even though confined exclusively to charity. This was assumed by the Court of Appeals in 1891 when it held, in the much-publicized case of *Tilden v. Green*,<sup>41</sup> that a power to apply the residue of Governor Tilden's great estate "to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind" was wholly void, and that the residue passed to the governor's next of kin. Probably because of this and similar cases, courts in several states without statutes of the New York type, not fully aware

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35. The cases are collected in SCOTT, TRUSTS §§ 395-397 (2d ed. 1956); Note, 16 U. DET. L.J. 199 (1953). Accord, RESTATEMENT (SECOND), TRUSTS §§ 395-397 (1959). When a charitable trust is to last for an extended period there is a substantial advantage in the trustee having wide discretion in the selection of objects so that he can adjust to changing conditions without applying to the court under the cy pres doctrine. Trusts restricted to retired fire-engine horses or indigent Civil War veterans serve no purpose presently. See Bogert, *The Community Trust: Service Opportunity for Lawyers*, 41 A.B.A.J. 587 (1955).

36. The New York revisers sought to abolish all trusts except those for the benefit of creditors or the support of a particular minor, married woman or lunatic. See FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 210-213, 550-551 (1955).

37. *Williams v. Williams*, 8 N.Y. 525 (1853).

38. *Morice v. Bishop of Durham*, *supra* note 3.

39. *Owens v. Missionary Society*, 14 N.Y. 380, 67 Am. Dec. 160 (1856).

40. *Bascom v. Albertson*, 34 N.Y. 584 (1866); Scott, *Charitable Trusts in New York*, 26 N.Y.U.L. REV. 251 (1951). Michigan, Minnesota and Wisconsin, which had trust legislation copied from that of New York, soon reached the same result. *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879); *Little v. Willford*, 31 Minn. 173, 17 N.W. 282 (1883); *Ruth v. Oberbrunner*, 40 Wis. 238 (1876). See FRATCHER, *op. cit. supra* note 36, at 414-418.

41. 130 N.Y. 29, 28 N.E. 880, 14 L.R.A. 33, 27 Am.St.Rep. 487 (1891).



of the reason why the rule was so applied in New York, applied the rule in *Morice v. The Bishop of Durham*<sup>42</sup> to strike down charitable trusts which would have been valid in England and most of the states.<sup>43</sup> Missouri, unfortunately, is one of the states in which this mistake was made, and its law on this point has been doubtful for the last fifty years.<sup>44</sup>

Before examining the cases in which the applicability of the *Morice* rule to charities was really involved, it is necessary to consider some in which charitable dispositions failed because of another rule which is sometimes confused with it. Under both English law and that of most American states if no intention to impose a trust is manifested on the face of a will, but a legatee or devisee promises the testator to hold his legacy or devise upon trust for stipulated persons or purposes, the legatee or devisee will be allowed and compelled to hold the property so received upon constructive trust for the beneficiaries of the promise.<sup>45</sup> In England, if the intention is manifested on the face of the will to create a private trust for beneficiaries named outside the will, the legatee holds on trust for the intended beneficiaries if they are named to him during the testator's lifetime.<sup>46</sup> Under English law, moreover, if an intention is manifested on the face of the will to create a charitable trust for purposes to be named outside the will, the trust does not fail. If the charitable purposes are named to the trustee, he holds upon trust for them;<sup>47</sup> if they are not, the court will frame a charitable scheme.<sup>48</sup> In this country, if the will manifests an intention to create a private trust for persons named outside the will, some states allow and compel the trustee to hold for the intended beneficiaries if they are named

42. *Morice v. Bishop of Durham*, *supra* note 3.

43. These decisions are collected in SCOTT, TRUSTS § 396, note 4 (2d ed. 1956).

44. Tremayne, *Definiteness of Charitable Purpose in Missouri*, 23 WASH. U.L.Q. 556 (1938).

45. *Oldham v. Litchfield*, 2 Vern. 506, 23 Eng.Rep. 923 (1705); *Drakeford v. Wilks*, 3 Atk. 539, 26 Eng.Rep. 1111 (1747); *Strype v. Lewis*, 352 Mo. 1004, 180 S.W.2d 688, 155 A.L.R. 99 (1944); RESTATEMENT (SECOND), TRUSTS § 55 (1959). Other English and American cases are collected in SCOTT, TRUSTS § 55.1 (2d ed. 1956).

46. *Blackwell v. Blackwell*, [1929] A.C. 318, 67 A.L.R. 336. If the beneficiaries are not named to the trustee during the testator's lifetime he holds on resulting trust for the residuary devisees or legatees or for the heirs or next of kin of the testator. *In re Hawksley's Settlement*, [1934] Ch. 384. See *In re Boyes*, 26 Ch.D. 531 (1884).

47. *In re Williams*, [1933] Ch. 244.

48. *Attorney General v. Syderfin*, 7 Ves.Jun. 43 n., 32 Eng.Rep. 33 n. (1683). This case was followed in *Anon.*, 2 Freem.Ch. 261, 22 Eng.Rep. 1197 (1702), and *Mills v. Farmer*, 1 Mer. 55, 35 Eng.Rep. 597 (1815) (Eldon, L.C.), and cited with approval in *In re Gott*, *Glazebrook v. University of Leeds*, [1944] 1 Ch. 193. The opinion in the last case observes, correctly, that the rule in *Attorney General v. Syderfin* is not accepted by RESTATEMENT, TRUSTS § 395 (1935), and the same observation is true of RESTATEMENT (SECOND), TRUSTS § 395 (1959).

to him during the testator's lifetime; others require him to hold on resulting trust for the next of kin.<sup>49</sup> By the majority rule in this country, if the will manifests an intention to create a trust for purposes, as distinguished from persons, named outside the will, the trust fails and the trustee holds on resulting trust for the residuary legatees or next of kin whether or not the purposes are disclosed to him by the testator and whether or not they are confined to charity.<sup>50</sup> This last rule is the one which tends to be confused with the rule in *Morice v. The Bishop of Durham*. It has nothing to do with powers of appointment conferred on trustees.

The Supreme Court of Missouri decided in 1860 that the general principles of the English Law of charitable trusts are in force in Missouri, and that, in consequence, a trust for a charitable purpose is valid here although it may last forever, the interests of persons who benefit from the charity may vest beyond the period of the Rule Against Perpetuities, and the selection of these persons is left to the trustee.<sup>51</sup> The decision involved a bequest upon trust "to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, bona fide, to settle in the west." As the will itself specified a particular charitable purpose, the question of whether power to select charitable objects or purposes may be conferred upon a trustee was not really in issue, but counsel for the heirs of the testator urged the precise argument which has been used to support the rule in *Morice v. The Bishop of Durham*,<sup>52</sup> that a trust cannot exist without a beneficiary capable of suing to enforce it<sup>53</sup> and contended that, even if that were not the case, the purpose of the trust in question was too vague and uncertain for enforcement.<sup>54</sup> In rejecting these arguments, the court suggested that a

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49. The cases are collected in SCOTT, TRUSTS § 55.8 (2d ed. 1956). The RESTATEMENT favors a trust for the intended beneficiaries in this situation if the legatee promised the testator to hold on trust. RESTATEMENT (SECOND), TRUSTS § 66, comment *h* (1959). Missouri appears to hold that the property passes to the residuary legatees or next of kin by way of resulting trust. *Plummer v. Roberts*, 315 Mo. 627, 287 S.W. 316 (1926).

50. The cases are collected in SCOTT, TRUSTS § 359 (2d ed. 1956). The RESTATEMENT favors the English and minority American view, under which the trustee holds on trust for charitable purposes named outside the will if he promised the testator to do so. RESTATEMENT (SECOND), TRUSTS § 359, comment *e* (1959). The RESTATEMENT takes the position that if the intention to create a trust is manifested on the face of the will and the beneficiaries or purposes are disclosed to the trustee by the testator, the trustee will not be allowed to perform the intended trust unless he promised the testator to do so. § 54, comment *a*, § 55, comment *h*, § 358, comment *d*, § 359, comment *e*, § 411, comment *q*. The reasons given for this position in the last comment cited are not convincing.

51. *Chambers v. City of St. Louis*, 29 Mo. 543 (1860).

52. *Morice v. Bishop of Durham*, 10 Ves. Jun. 522, 32 Eng. Rep. 947 (1805).

53. 29 Mo. at 546. See notes 8-13 *supra*.

54. 29 Mo. at 549-551.

bequest merely for pious causes would be valid,<sup>55</sup> cited *Moggridge v. Thackwell*<sup>56</sup> with approval, and intimated that if Mr. Vaston, the trustee named in Ann Cam's will, had survived the testatrix, his power to dispose of the residue to "such charities as he shall think fit" would have been valid.<sup>57</sup>

The first Missouri case which has caused confusion on the question under discussion is *Schmucker's Estate v. Reel*,<sup>58</sup> decided in 1876. The will there involved bequeathed to the executor, "two hundred dollars, to be applied to a specific purpose which I have explained to him. . . . [f]ive hundred dollars for another and specific charitable purpose which he well understands," and the residue, "to apply in charity, according to his best discretion." The will provided that the receipt of the Roman Catholic Archbishop should be a full discharge to the executor "for any monies applied by him to charities according to my request," and the testator gave the executor a memorandum requesting that all three legacies be used for masses. The court cited *Morice v. The Bishop of Durham*<sup>59</sup> for the proper purpose of showing that the legacies were not for the executor's personal use, discussed inconclusively the problem of bequests for purposes named outside the will, and held the three legacies void as a fraudulent attempt to evade a provision of the Constitution of Missouri which, as interpreted by the court, made bequests for masses illegal.<sup>60</sup>

The next troublesome case is *Corby v. Corby*,<sup>61</sup> decided in 1884. The testator's homemade will first devised all his property to his wife. It then bequeathed some personal property to her for life subject to the conditions, first, that she pay his debts,

*Secondly*, that after providing for her own wants and comforts, I leave to the discretion of my dear wife to give to such of my relations such aid or assistance as my dear wife may, of her own will, think proper and just, hereby declaring that my relatives have no claim of any kind upon me, or upon any of my property; and anything that they may receive from my said wife, out of my worldly effects, shall be in accordance with her sense of justice, and in accordance with my wishes, the nature of which she has been advised of by me during my life. *Secondly* [sic], that the balance of my said property will be given to advance the cause of

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55. *Id.* at 584.

56. *Moggridge v. Thackwell*, *supra* note 32, cited 29 Mo. at 590.

57. 29 Mo. at 591.

58. 61 Mo. 592 (1876).

59. *Morice v. Bishop of Durham*, *supra* note 52.

60. Mo. CONST. art. I, § 13 (1865), RSMo 1867, at 22.

61. 85 Mo. 371 (1884).

religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes.

The heirs of the testator sued the widow to compel her to account as trustee for them. A decree sustaining a demurrer to the petition was affirmed by a unanimous court. The opinion, written by a special judge, indicates that the widow took at least a beneficial life estate free of trust and that there was no intent to create a trust for the testator's relatives, but it does not make clear whether the widow took an absolute fee free of trust or held the remainder subject to an attempted charitable trust. Judges Norton and Ray concurred specially on the understanding that widow took only a life estate with the remainder passing intestate. Chief Justice Henry concurred in the result but thought that the widow took a life estate "with a power of disposition limited only by her discretion and the purposes for which such disposition may be made." After this decision the testator's heirs conveyed their interest in the estate, if any, to the widow. When she died, the Attorney-General sued to establish a charitable trust of the remainder.<sup>62</sup> The court interpreted the first decision as being what Judges Norton and Ray understood it to be, a holding that the widow took a life estate with the remainder passing as intestate property, and indicated great reluctance to disturb this holding because of numerous transfers of property made in reliance on it. It dismissed the suit on the ground that the testator intended particular charities named to his wife outside the will which, in view of her death, could no longer be ascertained and expressly declined to pass on the question of whether the widow had had a valid power to select charities.<sup>63</sup> The same result could have been reached on at least three other theories: 1. It could have been held that Mrs. Corby took a fee simple absolute, free of trust. 2. It could have been held that Mrs. Corby took a beneficial life estate and a power of appointment of the remainder which she had no duty to exercise. 3. It could have been held that Mrs. Corby took a life estate and a power of appointment of the remainder on trust which she had a duty to exercise, but that, as she could have appointed the whole to relatives of the testator, her purchase of their interest entitled her to appoint to herself. The theory upon which the case was decided would seem to be inconsistent with *Attorney-General v. Syderfin*,<sup>64</sup> but that case was decided by Lord Keeper Guilford, whose reputation as an equity judge was

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62. *Hadley v. Forsee*, 203 Mo. 418, 101 S.W. 59, 14 L.R.A.(n.s.) 49 (1907).

63. *Id.* at 429, 101 S.W. at 61.

64. *Attorney-General v. Syderfin*, *supra* note 48.

not of the highest.<sup>65</sup> The theory was not inconsistent with *Moggridge v. Thackwell*,<sup>66</sup> and it did not extend the rule in *Morice v. The Bishop of Durham*<sup>67</sup> to charitable trusts.

In *Howe v. Wilson*,<sup>68</sup> decided in 1886, it was held that a testamentary direction to a trustee to divide trust funds "among such charitable institutions of the city of St. Louis, Missouri, as he shall deem worthy" was valid. This case was followed in *Powell v. Hatch*,<sup>69</sup> decided in 1890, holding that a devise of the residue to a trustee for "such charitable purposes as my said trustee may deem best" was valid. The opinion clearly recognized that the true issue was the validity of a power of appointment to unspecified charities. *Sappington v. The Sappington School Fund Trustees*,<sup>70</sup> decided in 1894, held valid a trust to educate poor children in Saline County; any surplus income to be applied by the trustees "to such other objects of charity in said county as in their judgment may be most needy." In *Sandusky v. Sandusky*,<sup>71</sup> decided in 1914, a residuary devise to a trustee for the benefit of four named churches "and, secondarily, for the general advancement of Christianity," was held valid.

It thus appears that, until 1917, the Missouri decisions were all consistent with the English and majority American view that a power of appointment to unspecified charities is valid.<sup>72</sup> Then came *Jones v. Patterson*,<sup>73</sup> which involved a devise to an executor "to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my

65. 4 CAMPBELL, LIVES OF THE LORD CHANCELLORS 280, 315, 333 (4th ed. 1857); KEETON, LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE 102, 375-380 (1965). Attorney-General v. Syderfin was, however, followed by Lord Eldon, after extended argument, in *Mills v. Farmer*, 1 Mer. 55, 35 Eng.Rep. 597 (1815). It is rejected by RESTATEMENT (SECOND), TRUSTS § 395, comment a (1959).

66. *Moggridge v. Thackwell*, *supra* note 32.

67. *Morice v. Bishop of Durham*, *supra* note 52.

68. 91 Mo. 45 (1886).

69. 100 Mo. 592, 14 S.W. 49 (1890).

70. 123 Mo. 32, 27 S.W. 356 (1894).

71. 261 Mo. 351, 168 S.W. 1150 (1914).

72. The coming change was presaged, however, by *Board of Trustees v. May*, 201 Mo. 361, 99 S.W. 1093 (1906), in which a devise to "the Methodist E. Church, South, and Missionary cause" was held void because of the failure to specify which church organization and what missionary cause. The opinion did suggest that the devise might have been valid if a trustee had been empowered to select the church and missionary cause. 201 Mo. 361, 369, 99 S.W. 1093, 1094 (1906).

73. 271 Mo. 1, 195 S.W. 1004; see Annot., 1917F L.R.A. 660 (1917), noted, 20 U. Mo. BULL. L. SER. 53 (1920). It is noteworthy that the Attorney-General was not made a party to this case, as he should have been, in order to defend the charitable devise. See *Thatcher v. City of St. Louis*, 343 Mo. 597, 122 S.W.2d 915 (1938).

A devise to "charity connected with the Methodist Episcopal Church of the U.S." was held void on the authority of *Jones v. Patterson* in *Methodist Episcopal Church of United States of America v. Walters*, 50 F.2d 416 (W.D. Mo. 1928).

dear Savior and for the salvation of souls." The court recognized that the problem involved was the validity of a power of selection conferred on a trustee and held it void because the will failed to specify the particular denomination whose doctrines were to be propagated, the class of persons who were to benefit, or what benefit they were to receive, saying, "Strong and far-reaching as is the arm of equity in upholding a charity, the one here sought to be created is beyond its grasp." This astounding decision, which had the unadmitted effect of overruling all the previous Missouri decisions on the validity of powers of appointment to charity, was buttressed by the citation of a Missouri case holding that the purposes of a *private* trust must be definite<sup>74</sup> and of *Morice v. The Bishop of Durham*,<sup>75</sup> *Owens v. Missionary Society*<sup>76</sup> and *Tilden v. Green*,<sup>77</sup> none of which has any proper application to charitable trusts in Missouri. *Wentura v. Kinnerk*,<sup>78</sup> decided in 1928, was a will contest grounded on undue influence. In order to raise a presumption of undue influence the contestant contended that a residuary devise "to such charitable uses and purposes as [the executor] may determine" was designed to give the executor the residue beneficially. The court properly rejected this contention but added, "There can be no doubt but that the bequest to charity is void," citing *Schmucker's Estate v. Reel*,<sup>79</sup> *Morice v. The Bishop of Durham*<sup>80</sup> and *Jones v. Patterson*.<sup>81</sup>

Three months after the decision in *Wentura v. Kinnerk*<sup>82</sup> the Missouri Supreme Court affirmed the validity of a bequest to an individual "to be spent on the welfare of poor, homeless children" in an opinion which relied on *Howe v. Wilson's Executor*<sup>83</sup> and *Powell v. Hatch*,<sup>84</sup> both of which were inconsistent with the rationale of *Jones v. Patterson*<sup>85</sup> and *Wentura v. Kinnerk*.<sup>86</sup> In 1931 the United States Circuit Court of Appeals for the Eighth Circuit passed on the validity of a devise of the residue of a Mis-

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74. *Jones v. Jones*, 223 Mo. 424, 123 S.W. 29 (1909).

75. *Morice v. Bishop of Durham*, *supra* note 52.

76. *Owens v. Missionary Society*, *supra* note 39.

77. *Tilden v. Green*, *supra* note 41.

78. 319 Mo. 1068, 5 S.W.2d 66 (1928). As in *Jones v. Patterson*, *supra* note 73, the Attorney-General was not made a party. In *Kinnerk v. Smith*, 328 Mo. 513, 524, 41 S.W.2d 381, 386 (1931), the Supreme Court conceded that the validity of the residuary devise to charity was not in issue in *Wentura v. Kinnerk* and that, therefore, the language indicating its invalidity was obiter dictum.

79. *Schmucker's Estate v. Reel*, *supra* note 58.

80. *Morice v. Bishop of Durham*, *supra* note 52.

81. *Jones v. Patterson*, *supra* note 73.

82. *Wentura v. Kinnerk*, *supra* note 78.

83. *Howe v. Wilson's Executor*, *supra* note 68.

84. *Powell v. Hatch*, *supra* note 69.

85. *Jones v. Patterson*, *supra* note 73.

86. *Wentura v. Kinnerk*, *supra* note 78; *St. Louis Union Trust Co. v. Little*, 320 Mo. 1058, 10 S.W.2d 47 (1928).

souri estate to trustees for "such charitable, benevolent, hospital, infirmity, public, educational, scientific, literary, library or research purpose in Kansas City, Missouri, as said Trustees shall in their absolute discretion determine to be in the public interest." After an exhaustive review of the Missouri cases, the court concluded that the discretion of the trustees was confined to charity and that their power to select charities was valid.<sup>87</sup> The court refused to follow *Jones v. Patterson*<sup>88</sup> and *Wentura v. Kinnerk*<sup>89</sup> because they were "expressly bottomed upon a misapprehension of the holding in *Morice v. Bishop of Durham*."

*Standley v. Allen*,<sup>90</sup> decided in 1942, involved the validity of provisions in two wills. One of these devised a remainder to a trustee "for the purpose of having him dispose of the same to some worthy charitable organization, in Missouri, to be selected by him; Provided, if at said time there shall be in Southwest Missouri, a home for aged people, I charge my trustee with the duty of transferring the said trust estate to said Institution." The other will bequeathed the residue of an estate to a trustee "with the duty of disposing of said balance of my estate to some worthy charitable organization, in Missouri, and the preference to be given to aged people." Both charitable dispositions were held valid on the authority of Section 396 of the *Restatement of Trusts*,<sup>91</sup> *Howe v. Wilson*<sup>92</sup> and *Powell v. Hatch*.<sup>93</sup> *Gossett v. Swinney*<sup>94</sup> was cited with approval but the opinion did not mention *Jones v. Patterson*<sup>95</sup> or *Wentura v. Kinnerk*.<sup>96</sup> *Altman v. McCutchen*,<sup>97</sup> decided in 1948, involved a will which directed the executor to sell the entire estate and provided:

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87. *Gossett v. Swinney*, 53 F.2d 772 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932). It should be borne in mind that this case was decided before the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that federal courts are bound to follow state decisions on matters governed by the common law of the state.

88. *Jones v. Patterson*, *supra* note 73.

89. *Wentura v. Kinnerk*, *supra* note 78.

90. 349 Mo. 1115, 163 S.W.2d 1012 (1942).

91. See note 35 *supra*.

92. *Howe v. Wilson*, *supra* note 68. The opinion cites other appropriate Missouri cases, most of which have been discussed. Apparently the next of kin relied heavily on *Robinson v. Crutcher*, 277 Mo. 1, 187 S.W. 31 (1918), noted 21 U. Mo. BULL. L. SER. 31 (1921), in which a devise to the capital of township school funds was held void for want of a trustee, and *Mort v. Baker University*, 229 Mo. App. 632, 28 S.W.2d 498 (1935), in which a devise to the Rural Schools of Caldwell County was held void on a like theory. As the court observed, the *Robinson* case was overruled by *Burrier v. Jones*, 338 Mo. 679, 92 S.W.2d 885 (1936).

93. *Powell v. Hatch*, *supra* note 69.

94. *Gossett v. Swinney*, *supra* note 87.

95. *Jones v. Patterson*, *supra* note 73.

96. *Wentura v. Kinnerk*, *supra* note 78.

97. 210 S.W.2d 63 (Mo. 1948).

Because my said executor is quite familiar with my wishes as to ultimate disposition of the proceeds of my property, that is that I wish it devoted to the charitable and other institutions devoted to alleviation of human suffering and want, which I have been devoted, and in which I am interested. I give him unlimited discretion to dispose of such proceeds after paying obligations of my estate and costs of administration, among those charitable institutions in such amount and proportions as he sees fit. I do this in the confidence that he will in good faith endeavor to do with same after my death as I would do if there in the flesh.

The executor's power to appoint to unspecified charities was held valid without discussion of the question whether the testator meant to confine the power to particular charities named to him outside the will. The opinion relied on *Standley v. Allen*<sup>98</sup> and the authorities cited in it and expressly approved the reasons advanced by the United States Circuit Court of Appeals for refusing to follow *Jones v. Patterson*<sup>99</sup> and *Wentura v. Kinnerk*<sup>100</sup> in *Gossett v. Swinney*.<sup>101</sup> Unfortunately, the court did not expressly overrule *Jones v. Patterson* and *Wentura v. Kinnerk* so these unsound decisions could still be cited by next of kin eager to destroy a charitable trust.<sup>102</sup>

In *Epperly v. Mercantile Trust and Savings Bank of Quincy, Illinois*<sup>103</sup> the residue of an estate was devised to an Illinois bank as trustee:

to hold and manage and pay over the net income thereof as follows:

I leave to the discretion of my Trustees the distribution of the income to Protestant churches and religious organizations but direct that the gifts be used to save souls and not to build buildings or to improve existing buildings.

98. *Standley v. Allen*, *supra* note 90.

99. *Jones v. Patterson*, *supra* note 73.

100. *Wentura v. Kinnerk*, *supra* note 78.

101. *Gossett v. Swinney*, *supra* note 87.

102. SHEPARD'S MISSOURI CITATIONS 1401, 1652 (Case Edition 1963) lists *Jones v. Patterson* and *Wentura v. Kinnerk* as "distinguished" in *Altman v. McCutchen*. *Gossett v. Swinney*, *supra* note 87, was cited with approval in *Taylor v. Baldwin*, 247 S.W.2d 741, 749 (Mo. 1952) and *Carlock v. Ladies Cemetery Ass'n.*, 317 S.W.2d 432, 437 (Mo. 1958). The opinion in the latter case remarked, "It has been considered *Jones v. Patterson* may have misapplied the law."

103. 415 S.W.2d 819 (Mo. 1967). The opinion states that the Illinois bank was incapable of receiving the trust property under § 456.120, RSMo 1959, but that a successor trustee could exercise the power to select charities. It was held in *Moggridge v. Thackwell*, *supra* note 32, that a power of appointment to unspecified charities did not fail because the trustee could not act and the weight of authority favors this view. SCOTT, TRUSTS § 397 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 397, comment b (1959).



The administratrix *cum testamento annexo* sued the heirs and the Attorney General for a declaratory judgment as to the validity of the residuary disposition. It was held void by the circuit court, and the heirs defended this determination on appeal by citing *Board of Trustees of Methodist Episcopal Church, South v. May*,<sup>104</sup> *Hadley v. Forsee*<sup>105</sup> and *Jones v. Patterson*.<sup>106</sup> The decree was reversed and the residuary disposition held to create a valid charitable trust for such Protestant churches and religious organizations as the trustee may select. In the course of its opinion the Supreme Court said:

Where, as here, a trust provision gives to the trustee discretion in applying the trust property to the specified charitable purpose, the rules in *Jones v. Patterson*, *supra*, and other cases cited by respondents, should not be followed. Although there is conflict in the decisions, the weight of authority is that a charitable trust such as this trust is valid. \* \* \* The class of religious organizations is here sufficiently certain: Protestant churches and religious organizations to be selected in the discretion of trustees.

The result reached in the *Epperly* case is sound but the opinion is disappointing. *Jones v. Patterson*<sup>107</sup> and *Wentura v. Kinnerk*<sup>108</sup> were not categorically overruled as they should have been. The quoted language suggests that a will conferring power on a trustee to select charities must specify the general types of charities to be selected. Such language invites more attacks on powers to appoint to charity on the ground that the class of possible appointees is not sufficiently definite. It seems unfortunate that the Supreme Court did not use this opportunity to make it crystal clear that the rule in *Morice v. The Bishop of Durham*<sup>109</sup> has no application whatever to a power of appointment that is confined to charity and that, under the rule in *Moggridge v. Thackwell*,<sup>110</sup> which it accepted in 1860<sup>111</sup> and applied correctly in 1890,<sup>112</sup> a power of appointment to unspecified charities is valid although the instrument creating the power does not limit in any way the possible charitable appointees.

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104. *Board of Trustees v. May*, *supra* note 72.

105. *Hadley v. Forsee*, *supra* note 62.

106. *Jones v. Patterson*, *supra* note 73.

107. *Ibid.*

108. *Wentura v. Kinnerk*, *supra* note 78.

109. *Morice v. Bishop of Durham*, *supra* note 52.

110. *Moggridge v. Thackwell*, 7 Ves. Jun. 36, 32 Eng. Rep. 15 (1803).

111. See notes 51, 56 *supra*.

112. *Powell v. Hatch*, *supra* note 69, holding that a devise of the residue to a trustee for "such charitable purposes as my said trustee may deem best" was valid.