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ALSO BY J. C. W. WYLIE
Irish Land Law (1975; Supp. 1981)
(2nd ed., 1986)
Irish Conveyancing Law (1978)
A Casebook on Irish Land Law (1984)
A Casebook on Equity and Trusts in
Ireland (1985)

THE LAND LAWS OF TRINIDAD AND TOBAGO

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2.41. In addition to these matters, the Act provides for a number of important changes designed to avoid the sorts of difficulties which arose in the Registrar General's Office.¹⁹ Thus the Minister is given full powers to introduce new technology (photocopying, microfilming, computers and so on) to the Land Registry.²⁰ The Land Registrar is given much wider powers to dispense with production of duplicate certificates,²¹ especially where non-production is not the fault of the applicant for registration.²² A system of official searches by Land Registry officials is instituted, together with issue of guaranteed certificates of search.²³

2.42. So far as registration of deeds is concerned, clearly this system will continue in operation for some considerable time, pending extension of registration of title throughout the two islands, and so the opportunity was taken to make some improvements here. Perhaps the most significant one is the restriction of the right of the public and private searchers to inspect and examine original deeds, indexes and other documents in the Land Registry.²⁴ Instead, provision is made for making available certified reproductions and again a system of "official" searches, with issue of "guaranteed" certificates of search, is introduced.²⁵

2.43. Once again the Act replaces all the previous legislation dealing with registration of land,²⁶ and any British statutes of general application which may have been relevant (which is very unlikely).²⁷

D. CONDOMINIUMS ACT

2.44. This Act is closely linked with the Land Registration Act,²⁸ but deals with the specific problem of condominium developments.²⁹ It provides for their registration in the Land Registry³⁰ and contains a comprehensive scheme for the management and control of property contained in such developments.³¹ In doing so, it ensures that the rights

¹⁹ See paras. 2.12-2.14 and 2.26-2.31, *ante*.

²⁰ See s.117(2).

²¹ See para. 2.28, *ante*.

²² S.47.

²³ S.111. See also s.110, which restricts the right to inspect and examine original documents in the Registry relating to registration of title.

²⁴ S.22. See para. 2.13, *ante*.

²⁵ S.23.

²⁶ Though clearly not legislation also dealing with other functions of the Registrar General's Department, *e.g.*, the Registrar General Ordinance (Ch. 28, No. 1; *Laws*, 1950 Ed.). It also repeals the Registration of Deeds Ordinances only so far as they relate to registration of deeds or other documents "affecting unregistered land" (see 1st Sched.).

²⁷ S.122(3).

²⁸ Indeed, it is to be read together with the L.R.A. (the "principal Act"), see s.2(1).

²⁹ See paras. 2.09 and 2.30, *ante*.

³⁰ Part II and 1st Sched. See ch. 8, *post*.

³¹ Part V and 2nd Sched.

and duties of each owner of a unit in the development and of the management company are clearly spelt out.³² Finally, it is important to note that provision is made for registration of condominium schemes already developed prior to the coming into force of the Act,³³ and of schemes developed by the State.³⁴

E. TRUSTEE ACT

2.45. This Act replaces the previous legislation relating to trusts and trustees, including the Public Trustee.³⁵ Although this legislation was mostly as up-to-date as the English equivalent³⁶ upon which it was clearly based, numerous detailed changes were made to take account of criticisms of the English legislation.³⁷ In addition the Act contains new provisions relating to investment of trust funds³⁸ and introduces for the first time in Trinidad and Tobago some provisions governing charitable and other purpose trusts.³⁹

F. SUCCESSION ACT

2.46. This Act also replaces the previous legislation relating to the various aspects of the law relating to succession.⁴⁰ In doing so, some important changes have been made, *e.g.*, to deal with the previous common practice of failing to obtain or delaying for a long time the obtaining of a grant of probate or letters of administration.⁴¹ In future, a personal representative will have no authority to act in relation to a deceased person's estate before he obtains a grant of representation.⁴² Other new provisions include one dealing with secret trusts⁴³ and one abolishing the notorious doctrine of conversion.⁴⁴ An entirely new set of rules governing distribution of an estate on intestacy is provided⁴⁵ and,

³² Parts III and IV.

³³ S.39.

³⁴ S.38(2).

³⁵ *I.e.*, the Trustee Ordinance (Ch. 8, No. 3; *Laws*, 1950 Ed.); Public Trustee Ordinance (Ch. 8, No. 4); Trustee (Amendment) Act (No. 15 of 1974). See s.83(1) and 1st Sched. Public Trustee Act, 1906 and Trustee Act, 1925.

³⁶ See, *e.g.*, Jones, "Delegation by Trustees: A Reappraisal" (1952) 22 M.L.R. 381; Pating, "Duty to Act Personally" (1975) 125 N.L.J. 56; Sheridan, "The Trustee Act, 1966" (1965) 4 Sol. Quirly 192. The Law Reform Committee also issued in 1978 a consultative document, entitled "Powers and Duties of Trustees," which mentioned various criticisms of the existing law.

³⁷ Part III. See ch. 11, *post*.

³⁸ Part VII. See ch. 10, *post*.

³⁹ Administration of Estates Ordinance (Ch. 8, No. 1; *Laws*, 1950 Ed.) and Wills and Probate Ordinance (Ch. 8, No. 2). See s.123(1) and 2nd Sched. See also chs. 15-17, *post*.

⁴⁰ See para. 2.15, *ante*.

⁴¹ S.35(3). See ch. 17, *post*.

⁴² S.25.

⁴³ S.26.

⁴⁴ Part VII.

I. REVOCABLE TRUSTS

10.67. Normally, in the absence of an express clause to the contrary in the instrument creating the trust,³⁵ a trust is not revocable by the settlor.³⁶ An exception to this rule is a trust for paying the settlors' debts, though even such a trust may be irrevocable in certain cases, e.g., as against a creditor who is a party to the trust deed or creditors to whom the trust is communicated and who act on its terms.³⁷ However, it is important to note that many trusts for paying creditors would amount to deeds of arrangement and would be caught by the special legislation regulating such deeds.³⁸

J. CHARITABLE TRUSTS

10.68. Trusts for charitable purposes form a special category of trusts which is usually given favoured treatment by the law and the State.³⁹ So far as the law is concerned, unlike other trusts, a charitable trust will not fail for want of certainty. It is not subject to the same extent to the rule as to certainty of objects and, provided it is clear that the settlor intended to confine the objects to purposes that are charitable,⁴⁰ the court will ensure that the property is applied by devising its own scheme, if necessary.⁴¹ Such a trust may also be of perpetual duration⁴² and, though the initial vesting is subject to the rule against perpetuities, a gift from one charity to another is not.⁴³ Apart from such points, charities are usually accorded a privileged position for tax purposes.⁴⁴ It is, therefore, crucial to determine in any particular case whether or not the trust is for charitable as opposed to other purposes.

³⁵ See *Commr. of Estate and Succession Duties v. Bowring* (1960) 19 (Pt. 2) Trin. L.R. 585, 2 W.I.R. 542 (P.C.), which indicated the dangers of such a trust from the point of view of liability of the settlor's estate to estate duty. Note that estate duty was abolished in Trinidad and Tobago by s.121 of the Succession Act, 1981, in respect of the estate of any person dying on or after 1st January, 1981.

³⁶ See *Smith v. Hurst* (1852) 10 Hare 30 at 47 (per Turner V.C.).

³⁷ See *Garrard v. Lord Lauderdale* (1830) 3 Sim. 1. See also Sheridan, "Trusts for Paying Debts" (1957) 21 Conv. 280.

³⁸ E.g., they must be registered with the Registrar General within 7 days after execution, otherwise they are void, see s.4 of the Deeds of Arrangement Act (Chap. 9:71; *Laws*, 1980 Ed.).

³⁹ See the standard English texts on the subject, Sheridan and Keeton, *The Modern Law of Charities* (3rd ed. 1983); Picarda, *The Law and Practice Relating to Charities* (1977); Tudor, *The Law of Charities* (6th ed. 1967).

⁴⁰ As regards non-charitable purpose trusts, see para. 10.77, *post*.

⁴¹ *Re the cy-près doctrine*, see para. 10.74, *post*.

⁴² See para. 4.25, *ante*.

⁴³ See para. 4.88, *ante*.

⁴⁴ See, e.g., s.3(2) of the Lands and Buildings Taxes Act (Chap. 76:04; *Laws*, 1980 Ed.), s.2 of the Taxes Exemption Act (Chap. 76:50 and s.8(2) of the Cinematograph Entertainment Tax Act (Chap. 77:03). See also *D'Aguir v. I.R.C.* (1970) 15 W.I.R. 198 (P.C., on appeal from Guy.C.A., (1967) 10 W.I.R. 209).

1. Definition

10.69. There is no statutory definition of charity in Trinidad and Tobago and the courts tend to follow the guidance of the English courts on the subject.⁴⁵ Those courts have generally relied on the list of purposes contained in the Statute of Charitable Uses, 1601,⁴⁶ and Lord Macnaghten's categorisation in *C.I.T. v. Pemsel*.⁴⁷ He classified charitable trusts into four broad categories. If a gift is to be treated as charitable it must usually come within at least one of these categories and, in addition,⁴⁸ be for the benefit of the public or a section of the public.⁴⁹ Further, it used to be the law that a particular gift had to be confined to charitable purposes, otherwise the whole thing might fail, but the law on this subject has been changed recently in Trinidad and Tobago.⁵⁰

(i) Advancement of Religion

10.70. This has long been recognised as a charitable purpose, though there used to be disabilities in England in respect of certain religious orders. However, in *Desmontils v. Flood*,⁵¹ which involved a bequest to the Archbishop of Port-of-Spain, Roulledge J. refused to accept that the law against "superstitious uses" contained in the English Dissolution of Colleges Act, 1547,⁵² applied to Trinidad and Tobago.⁵³ One of his reasons was that in the deed of capitulation signed by the King of Spain in 1797⁵⁴ "eminent care was taken to preserve to all the inhabitants of whatever religious persuasion 'the free exercise of their religion'."⁵⁵ This

⁴⁵ See *Desmontils v. Flood* (1905) 1 Trin. L.R. 136 (Roulledge J.); *Archbishop v. Crepin* (1909) 1 Trin. L.R. 265 (Lucie-Smith C.J.). See also *Re Collymore* (1959) 1 W.I.R. 316 (Barb.H.C.); *Re McGrath's Estate* (1975) 23 W.I.R. 406 (Jam.H.C.). Cf. now s.3 of the Barbados Charities Act, 1979; Bland, "From Wilderness to Plantation Charitable Trusts in Barbados, 1979" (1981) W.I.L.J. 83.

⁴⁶ 43 Eliz. 1, c.4, though this does not contain a definition as such, see *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 at 650-651 (per Lord Morton). It was, in fact, repealed in English by the Mortmain and Charitable Uses Act, 1888, but has continued to be cited with approval. See *D'Aguir v. I.R.C.* (1970) 15 W.I.R. 198 (P.C., on appeal from Guy.C.A., (1967) 10 W.I.R. 209). See also Jones, *History of the Law of Charity 1532-1827* (1969).

⁴⁷ [1891] A.C. 531 at 583. See again the *D'Aguir* case (fn. 46, *supra*).

⁴⁸ But not in the case of the relief of poverty, see para. 10.72, *post*.

⁴⁹ *Hadaway v. Hadaway* (1955) 19 (Pt. 3) Trin. L.R. 602 (P.C.). See also *Re Hummeltenberg* [1923] 1 Ch. 237; *National Anti-Vivisection Society v. I.R.C.* [1948] A.C. 31; *Gilmour v. Coats* [1949] A.C. 426; *I.R.C. v. Baadeley* [1955] A.C. 572. See also Maurice, "Public Benefit Element in Charitable Trusts" (1951) 15 Conv. 328; Fridman, "Charities and Public Benefit" (1953) 31 C.B.R. 537; Aiyah, "Public Benefit in Charities" (1958) 21 M.L.R. 138.

⁵⁰ See para. 10.78, *post*.

⁵¹ (1905) 1 Trin. L.R. 136.

⁵² 1 Ed. 6, ch.14. Since repealed in England by the Charities Act, 1960, 5th Sched.

⁵³ In fact subsequently in England it was held that the 1547 Act did not invalidate a bequest for the saying of masses, *Bourne v. Keane* [1919] A.C. 815.

⁵⁴ See para. 1.03, *ante*.

⁵⁵ *Op. cit.*, p. 139. Note that freedom of "religious belief and observance" is enshrined now in section 4(h) of the Constitution of the Republic of Trinidad and Tobago.

decision was followed soon afterwards by Lucie-Smith C.J. in *The Archbishop v. Crepin*.⁵⁶

(ii) Advancement of Education

10.71. This category covers gifts to educational institutions, like schools and universities,⁵⁷ and the creation of scholarships and funding of prizes.⁵⁸

(iii) Relief of Poverty

10.72. In a sense the relief of poverty is central to the whole notion of charity⁵⁹ and in the case of gifts coming within this category a small group of people, who would not be a sufficiently large section of the community in other cases, may be the objects of the gift.⁶⁰

(iv) Benefit to the Community

10.73. This is something of a "catch-all" category and clearly covers a wide range of different objects, but a particular trust alleged to be covered by it must still come within the "spirit and intendment" of the old Statute of Charitable Uses.⁶¹ Doubts were expressed in England about recreational and welfare organisations⁶² which led to special legislation being enacted,⁶³ and this has now been adapted for Trinidad and Tobago by section 75 of the Trustee Act, 1981. Under this section it is "and shall be deemed always to have been"⁶⁴ charitable to provide, or assist in the provision of, "facilities for recreation or other leisure-time occupation," if the facilities are provided in the interests of "social welfare".⁶⁵ But the Act then goes on to state expressly that this is not to be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.⁶⁶ Facilities are to be treated as provided in the interests of "social welfare" only if certain conditions are

⁵⁶ [1909] 1 Trin. L.R. 265.

⁵⁷ *Att.-Gen. v. Margaret and Regius Professors in Cambridge* (1682) 1 Vern. 55.

⁵⁸ See *Re Collymore* (1959) 1 W.I.R. 316 (Barb.H.C.).

⁵⁹ See again *Re Collymore*, *loc. cit.*

⁶⁰ E.g., the donor's relations, see *Re Scarisbrick* [1951] Ch. 622 and *Re Cohen* [1973] 1 W.L.R. 415, or employees, see *Re Coulthurst* [1951] Ch. 661. Cf. a gift for the education of the donor's relations or employees, see *Re Compton* [1945] Ch. 123; *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297; *Dingle v. Turner* [1972] A.C. 601.

⁶¹ See para. 10.69, *ante*. See also *Re Strakosch* [1949] Ch. 529; *I.R.C. v. Baddeley* [1955] A.C. 572.

⁶² *I.R.C. v. Baddeley* [1955] A.C. 572. See also *D'Aguir v. I.R.C.* (1970) 15 W.I.R. 198 (P.C., on appeal from Guy.C.A., (1967) 10 W.I.R. 209).

⁶³ Recreational Charities Act, 1958. See *I.R.C. v. McMullen* [1979] 1 W.L.R. 130 (C.A.); cf. [1981] A.C. 1 (H.L.).

⁶⁴ There are, however, savings as to actions or proceedings before the Act, see s.75(4).

⁶⁵ S.75(1). See further on social welfare, *I.R.C. v. McMullen* (fn. 63, *supra*).

⁶⁶ *Ibid.* See para. 10.69, *ante*.

satisfied, *i.e.*, they are designed to improve the conditions of life of the persons for whom they are primarily intended and either those persons need them because of their youth, age, infirmity or disablement, poverty or social and economic circumstances, or else they are available to members of the public at large.⁶⁷

2. Cy-Près Doctrine

10.74. It was mentioned earlier that a charitable trust will not fail for want of certainty.⁶⁸ Even if it fails initially (usually referred to as a case of initial impossibility⁶⁹), the court will devise a scheme for carrying out the settlor's intention "as nearly as possible" (*cy-près*), *i.e.*, the money or other property will be devoted to some other charity resembling as closely as possible the one specified by the settlor.⁷⁰ The same applies where it becomes impossible subsequently to continue devoting the funds to the charity chosen by the settlor (supervening impossibility). The distinction is important because, in a case of initial impossibility, the *cy-près* doctrine will not be applied⁷¹ unless the settlor manifested a general charitable intent, *i.e.*, one justifying the court finding another way of benefiting a charity when his way is ineffective.⁷² However, if the settlor's gift has come into operation, but later becomes impossible to operate, *e.g.*, because the purposes have been achieved and surplus funds are left or the institution benefited has ceased to exist, a *cy-près* scheme is usually the only practical way of dealing with the funds.⁷³ There is, therefore, no need to establish a general charitable intent.⁷⁴

10.75 It was found in England that problems frequently arose with public appeals, *e.g.*, to establish a disaster fund, which subsequently proved impossible to administer for some reason or which turned out to have a substantial surplus of funds left over.⁷⁵ If such a case was treated as one of initial impossibility, so that a resulting trust of the funds came

⁶⁷ S.75(2). Specific mention is made of village halls, community centres and women's institutes, etc. in s.75(3).

⁶⁸ Para. 10.68, *ante*.

⁶⁹ E.g., a gift left to an institution that does not exist.

⁷⁰ *Biscoe v. Jackson* (1887) 35 Ch.D. 460. See also *Re Maynard* (1973) 21 W.I.R. 31 (Barb.H.C.); Sheridan and Delany, *The Cy-Près Doctrine* (1959).

⁷¹ With the effect of a resulting trust arising, see para. 10.33, *ante*.

⁷² See *Re Maynard* (1973) 21 W.I.R. 31 (Barb.H.C.); *Wiles v. Barbados National Trust* (1975) 26 W.I.R. 50 (Barb.H.C.). See also *Re University of London Medical Sciences Institute Fund* [1909] 2 Ch. 1; *Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622.

⁷³ *I.e.*, those entitled if a resulting trust came into effect might be very hard to trace.

⁷⁴ *Re Wokingham Fire Brigade Trusts* [1951] Ch. 373; *Re Wright* [1954] Ch. 347.

⁷⁵ In the latter case there should not have been the same problems, but the courts did not always recognise the distinction between initial and supervening impossibility, see *Re North Devon and West Somerset Relief Fund Trusts* [1953] 1 W.L.R. 1260; *Re Hillier's Trusts* [1954] 1 W.L.R. 700; *Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622; *Re Gillingham Bus Disaster Fund* [1959] Ch. 62.

into operation because a specific rather than general charitable intent was the object of the appeal, it would often be practicable to distribute the funds because so many of the original donors (the beneficiaries of the resulting trust) were unknown or anonymous.⁷⁶ These problems were eventually dealt with by special legislation⁷⁷ and this has now been adapted for Trinidad and Tobago by section 77 of the Trustee Act, 1981. Under this section property given for specific charitable purposes which fail is applicable *cy-près* as if it had been given for charitable purposes generally, where it belongs to a donor who cannot be found or identified after reasonable advertisements and inquiries or who has executed a written disclaimer.⁷⁸ In certain cases, it is to be conclusively presumed, without advertisements and inquiries, that donors cannot be identified, *viz.*, in relation to the proceeds of cash collections through collecting boxes and the like and the proceeds of lotteries, competitions and similar money-raising activities.⁷⁹

10.76. Apart from such special problems, it had come to be recognised in recent decades that the *cy-près* doctrine suffered from some fundamental flaws. Far too often it was found difficult to establish a case strictly within the rules⁸⁰ and, even if this was achieved, courts often found themselves hampered by having to confine the scheme closely to the purposes of the original trust. So the rules were relaxed considerably in England by the Charities Act, 1960,⁸¹ and those provisions have also been adapted to Trinidad and Tobago by section 76 of the Trustee Act, 1981. This section provides various new heads under which a *cy-près* scheme may be established, additional to the old one of "impossibility".⁸² What is significant is that the new heads concentrate on notions like "effectiveness", "suitability" and "practicability" instead.⁸³ However, it is important to note that the need for a general charitable intent remains,⁸⁴ though only to the extent required under the previous law.⁸⁵

⁷⁶ Because they simply put coins in street-collecting boxes on "flag-days" or took part in raffles and jumble sales.

⁷⁷ Charities Act, 1960, s.14.

⁷⁸ S.77(1). Note that the section applies to property given before the commencement of the Act, s.77(7).

⁷⁹ S.77(2). The court is also given power to direct that other property be treated in this way where, e.g., it would be unreasonable to incur the expense of trying to return the property, given the amounts likely to be returned, s.77(3). In certain cases property applied *cy-près* may be reclaimed by donors, see s.77(4).

⁸⁰ E.g., the requirement of "impossibility" was often felt to be too strict, see *Re Weir Hospital* [1910] 2 Ch. 124.

⁸¹ S.13.

⁸² This is, however, still recognised to a degree, see s.76(1)(a) – original purposes fulfilled "as far as may be" or cannot be carried out or "not according to the directions given and to the spirit of the gift". As to ascertaining the spirit of the gift, the court may take into account the donor's conduct, habits, actions and declarations at any time in relation to the gift, s.76(4).

⁸³ See s.76(1)(a)-(e).

⁸⁴ S.76(2).

⁸⁵ See para. 10.74, *ante*.

On the other hand, in authorising a *cy-près* application, the court is given power to alter the purposes for which the property given may be applied, and the provisions and conditions governing its application, so as to secure its application as beneficially as possible, consistently with the spirit of the gift.⁸⁶ Finally, it is confirmed that a charitable trustee has a duty to see that, in an appropriate case, effective use of the charity property is secured by taking steps to enable it to be applied *cy-près*.⁸⁷

K. PURPOSE TRUSTS

10.77. One of the most controversial areas of the law of trusts is that relating to *non-charitable purpose trusts*.⁸⁸ The difficulty for the courts has always been that for a trust to be upheld as a charitable trust its objects had to be confined *exclusively* to charitable purposes.⁸⁹ If any part of the property could under the terms of the trust be devoted to non-charitable purposes, the trust failed as a charity⁹⁰ and usually was void altogether for uncertainty or as an infringement of the rule against inalienability.⁹¹ The question then arose as to whether trusts for *non-charitable purposes* should be recognised as valid trusts at all. It was clear that they had been recognised in certain types of case, e.g., trusts for the upkeep of tombs, graves and monuments⁹² and for the maintenance of animals,⁹³ but such cases were castigated by the English courts as "anomalous" and "concessions to human weakness or sentiment"⁹⁴ or "merely occasions when Homer nodded".⁹⁵ The result was that the English courts in recent decades refused to enforce trusts not coming within the exceptional cases and such trusts of "imperfect obligation" were held to be void because there was no beneficiaries to

⁸⁶ S.76(3).

⁸⁷ English judges had already suggested such a duty existed, see *National Anti-Vivisection Society v. I.R.C.* [1948] A.C. 31 at 34 (*per* Viscount Simonds); *Vernon v. I.R.C.* [1956] 1 W.L.R. 1169 at 1179 (*per* Upjohn J.).

⁸⁸ See Andrews, "Gifts to Purposes and Institutions" (1965) 29 Conv. 165; Kiralfy, "Purpose Trusts, Powers and Conditions" (1950) 14 Conv. 374; Leigh, "Trusts of Imperfect Obligation" (1955) 18 M.L.R. 120; McKay, "Trusts for Purposes – Another View" (1973) 37 Conv. 420; Sheridan, "Trusts for Non-Charitable Purposes" (1953) 17 Conv. 46 and "Purpose Trusts and Powers" (1958) 4 A.L.R. 235.

⁸⁹ *Re Strakosch* [1949] Ch. 529.

⁹⁰ *Hadaway v. Hadaway* (1955) 19 (Pt. 3) Trin. L.R. 602 (P.C.); *D'Aguir v. I.R.C.* (1970) 15 W.I.R. 198 (P.C.); on appeal from Guy.C.A., (1967) 10 W.I.R. 209. See also *Oxford Group v. I.R.C.* [1949] 2 All E.R. 537; *Leahy v. Att.-Gen. for N.S.W.* [1959] A.C. 457; *Re Harpur's Will Trusts* [1962] Ch. 78.

⁹¹ See para. 4.28 *et seq.*, *ante*.

⁹² *Re Hooper* [1932] 1 Ch. 38.

⁹³ *Re Dean* (1889) 41 Ch.D. 552.

⁹⁴ *Re Astor's Settlement Trusts* [1952] Ch. 534 at 547 (*per* Roxburgh J.). See Marshall, "Failure of the Astor Trust" (1953) 6 C.L.P.

⁹⁵ *Re Endacott* [1960] Ch. 232 at 250 (*per* Harman L.J.).

bring an action in court to enforce them.⁹⁶ Several cases such as those where funds were to be devoted to "charitable or benevolent" purposes, fell into this trap.⁹⁷

10.78. Though this remains the position in England,⁹⁸ correcting legislation was enacted in various other parts of the common law world.⁹⁹ Such a provision is now to be found in section 78 of the Trustee Act, 1981.¹ Under this, where property is given for purposes so described that, consistently with the terms of the gift, it could all or substantially be used for charitable, but equally well wholly or partly, for non-charitable purposes² and the gift would otherwise fail, it is to take effect for such charitable purposes as the court determines,³ whether or not it contains any indication of a charitable intention.⁴

⁹⁶ They also rejected the argument that such "trusts" should be construed as powers (as argued by Sheridan, see fn. 88, *ante*), see *Re Endacott*, *loc. cit.*, but see Sheridan, "Power to Appoint for a Non-Charitable Purpose: A Duologue or Endacott's Ghost" (1964) 13 De Paul L.Rev. 210.
⁹⁷ See *Leahy v. Att.-Gen. for N.S.W.* [1959] A.C. 457. See also *Chichester Diocesan Fund and Board of Finance v. Simpson* [1944] A.C. 341.

⁹⁸ Apart from the limited provisions of the Charitable Trusts Validation Act, 1954, which operated retrospectively only, see Maurice, "Validation of Charitable Trusts" (1954) 18 Conv. 532 and (1962) 26 Conv. 200.

⁹⁹ *E.g.*, in Australia (see Victoria's Property Law Act, 1958, s.131, N.S.W.'s Conveyancing Act, 1919-1964, s.37D and Western Australia's Trustees Act, 1962, s.102), New Zealand (see Charitable Trusts Act, 1957, s.61B) and Ireland (see the Republic of Ireland's Charities Act, 1961, s.49 and the Charities Act (N.I.), 1964, s.24). See Cullity, "Statutory Salvage of Imperfect Trust Provisions: an Exercise in Comparative Legislation" (1967) 16 I.C.L.Q. 464; Sheridan, "Cy-Près in the Cyxties" (1966) 17 N.I.L.Q. 235; Wylie, *Irish Land Law* (1975), paras. 9.121-9.126.

¹ This is based on what is probably the widest-ranging provision, the Northern Ireland one (see fn. 99, *supra*).

² Note that the section applies even though the charitable and non-charitable purposes are indicated by one composite expression and is not confined to cases where one could adopt the Australasian "blue-pencil" approach (*i.e.*, where a dual expression such as "charitable or benevolent" is used and one strikes out the latter as the offending part), see *Leahy v. Att.-Gen. for N.S.W.* [1959] A.C. 457.

³ The court is, so far as practicable, to give effect to a predominant intention to further a particular charitable purpose if such appears from the terms of the gift and the surrounding circumstances, s.78(2).

⁴ S.78(1). Note that the section rules out the need for a "flavour of charity", which appears to be necessary under the Australian legislation, see *Re Hollote* (1945) V.L.R. 295, *Union Trustee Co. of Australasia Ltd. v. Church of England Property Trust* (1946) S.R. (N.S.W.) 298. Cf. *Re Belcher* (1950) V.L.R. 11. See Wylie, *Irish Land Law* (1975) para. 9.126.

ADMINISTRATION OF TRUSTS

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