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WANT OF TRUSTEE AS AFFECTING THE CREATION OF TRUSTS

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Suppose A dies leaving a will in which he left the bulk of his estate "in trust for B." A's intention to create a trust is clear. It is equally clear that B was to be the beneficiary. The only element lacking is the appointment of a trustee. Is a trust—in this case, a testamentary trust —created? Is it essential to the creation of a trust that the testator name a trustee, in whom the title to the trust property is vested? The courts have generally upheld such a trust relying on an oft-repeated rule of equity that "a trust will not be allowed to fail for want of a trustee, even though none be named."[1]

Want of a trustee may occur in a conveyance by will; it may also occur in a conveyance inter vivos. It is equally true that want of a trustee may assume a great variety of forms. There may be no trustee because none is named, or because, though one is named, he subsequently resigns or dies. In other words, want of a trustee may occur initially or subsequently. This article is not concerned with situations in which a vacancy in trusteeship occurs as a result of the disclaimer, resignation, death or removal of a named trustee. Many states now have statutes expressly authorizing the court to appoint a new trustee in any of these situations.[2]

Initial failure may occur where no trustee is named by the settlor, or where a trustee, although having been named, predeceases the settlor or is incapable of taking title to the property. It is this kind of want of trustee that this article is concerned with. Eminent writers have dis-

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1 *In re* McCray's Estate, 268 P. 647, 648 (Cal. 1928).

2 *See* 2 SCOTT, THE LAW OF TRUSTS § 108.2 n.15 (3d ed. 1967) for these statutes.

cussed the law on this subject.[3] Section 32(2) of the Restatement provides:

> If the conveyance is ineffective only because no trustee is named in the instrument of conveyance or because the person named as trustee is dead or otherwise incapable of taking title to the property, a trust is created.[4]

As to testamentary trusts, Section 33 of the Restatement provides:

> If the owner of property devises or bequeaths the property in trust, a trust may arise although no trustee is named in the will, or the person named as trustee is dead or otherwise incapable of taking title to the property.[5]

TESTAMENTARY TRUSTS

While it may be desirable to name a trustee in the will, this is not essential. It is well settled that a testamentary trust will not fail for want of a trustee. It is immaterial whether the intended trust is for a charitable purpose or for the benefit of individuals. As long as the testator's intention is clearly manifested in the will, equity will enforce it regardless of the cause of the failure of trustee. "That the testator named no trustee will not prevent the execution of the trust, for the court will appoint a trustee wherever necessary to sustain the trust, and a trustee will be appointed."[6] Thus, equity will appoint a trustee if none is named in the will,[7] or if the person named as trustee predeceases the testator[8] or is otherwise incapable of holding title to the property.[9]

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3 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 123-127 (2d ed. 1965); 1 SCOTT, THE LAW OF TRUSTS § 32.3, § 33 (3d ed. 1967).

4 RESTATEMENT (SECOND) OF TRUSTS § 32(2) (1959).

5 *Id.* § 33.

6 Hiles v. Garrison, 62 A. 865 (N.J. Eq. 1906).

7 *In re* Harber's Estate, 409 P.2d 31 (Ariz. 1965); *In re* McCray's Estate, 268 P. 647 (Cal. 1928); *In re* Estate of Thomason, 54 Cal. Rptr. 229 (Cal. Dist. Ct. App. 1966); *In re* McKenzie's Estate, 38 Cal. Rptr. 496 (Cal. Dist. Ct. App. 1964); Jeffreys v. International Trust Co., 48 P.2d 1019 (Colo. 1935); Goldstein v. Handley, 60 N.E.2d 851 (Ill. 1945); McCartney v. Jacobs, 123 N.E. 557 (Ill. 1919); Smallwood v. Soutter, 125 N.E.2d 679 (Ill. App. Ct. 1955); *In re* Walden's Estate, 180 N.W. 679 (Iowa 1920); Green's Adm'rs v. Fidelity Trust Co., 120 S.W. 283 (Ky. 1909); Bishop v. Safe Deposit & Trust Co. of Baltimore, 185 A. 335 (Md. 1936); Webber Hospital Ass'n. v. McKenzie, 71 A. 1032 (Md. 1908); Hull v. Adams, 190 N.E. 510 (Mass. 1934); *In re* Estate of Hall, 193 So. 2d 587 (Miss. 1967); Hiles v. Garrison, 62 A. 865 (N.J. Eq. 1906); Ladies' Benevolent Soc. v. Orrell, 142 S.E. 493 (N.C. 1928); *In re* Harris, 142 A. 374 (R.I. 1928); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.); Taysum v. El Paso Nat. Bank, 256 S.W.2d 172 (Tex. Civ. App.—El Paso 1952, writ ref'd).

8 First Methodist Episcopal Church v. Hull, 280 N.W. 531 (Iowa 1938); Brook v. Conkwright, 200 N.W. 692 (Ky. 1918).

9 Burke v. Burke, 102 N.E. 293 (Ill. 1913); Eckles v. Lounsberry, 111 N.W. 2d 638 (Iowa 1961); Childs v. Waite, 67 A. 311 (Me. 1907); Bartlett v. Nye, 4 Met. 378 (Mass. 1842); Sheldon v. Chappell, 47 Hun. 59 (N.Y. 1888); Willis v. Alvey, 69 S.W. 1035 (Tex. Civ. App. 1902).

Where circumstances require the court may even compel the heirs or personal representatives of the testator to convey the property to the trustee so appointed.

Section 33 of the Restatement is widely accepted by the courts. Much can be said in support of the general rule that equity will not allow a testamentary trust to fail for want of a trustee. If the intended trust is not upheld, the property goes to the heirs or personal representatives of the testator. Since the testator has manifested his intention that the beneficiaries should have the property, it would be unjust enrichment to the heirs or personal representatives if they were allowed to keep the property free of trust.

INTER VIVOS TRUSTS

It has long been settled that failure of a trustee after the creation of an inter vivos trust will not affect the trust except in the rare situation where the settlor manifests an intention that the named trustee personally and no other shall administer the trust. A trust once validly created will not fail merely because of the subsequent failure of the trustee. Today, by statutes in many states the court is empowered to appoint a new trustee in such a situation and vest title to the property in him.[10]

A more difficult question arises where there is an initial failure of the trustee, such as where no trustee is named in the trust instrument, or where the person named as trustee is incapable of taking title to the property or dies before the execution of the instrument. The question here is whether there is a trust. In jurisdictions where an inter vivos trust is revocable by the settlor, unless made irrevocable by the terms of the instrument, the question is not important.[11] Even if the trust is held to have been created in spite of the failure of appointment of a trustee, the settlor may revoke it. Where the trust is irrevocable, either because of a failure to reserve a power of revocation, as in many jurisdictions or because of an express provision of irrevocability as in Texas, it is pertinent to determine whether a trust is created in spite of an initial failure of trustee.

If there is an intended transfer in trust by deed, no trust is created when the deed is defective. An effective delivery is required or the trust fails with title remaining in the donor free of trust. He does not hold

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10 2 SCOTT, THE LAW OF TRUSTS § 108.2 n.15 (3d ed. 1967).

11 CAL. CIV. CODE ANN. § 2280 (Deering 1960); OKLA. STAT. tit. 60, § 175.41 (1941); TEX. REV. CIV. STAT. ANN. art. 7425b-41 (1960).

the property in express trust for the intended beneficiary because he does not intend to be the trustee himself. Nor does he hold it in constructive trust because he is not thereby unjustly enriched. The intended gift in trust fails simply because he has not made an effective conveyance.

If the deed is defective only because no trustee is named in the trust instrument or because the person named as trustee is dead or otherwise incapable of taking title to the property, the Restatement espouses the view that a trust is created.[12] Professor Bogert supports it in the following words:

> There is some authority to the effect that a deed intended to create a trust, which leaves out the name of the trustee or names a nonexistent person or corporation, passes an equitable interest to the named beneficiaries and creates a trust with the settlor as trustee of the legal estate. The theory often cited is that a trust is not to fail for want of a trustee. However, this may mean that the trust is not to fail because of the loss of the trustee after its creation, or the theory may imply that the trust is not to fail in its origin for want of a trustee. Nevertheless, in either case the result is sound.[13]

It seems timely, therefore, to examine the cases in which the question was raised and decided and to compare them with the provision of the Restatement.

When the donor is dead, courts generally uphold the trust without regard to the manner in which the failure of trustee occurs. The difficulty lies where the donor is still alive and the trust instrument which purports to transfer property to a trustee fails to name the trustee or names one who is either nonexistent or otherwise incapable of taking title to the property. For purposes of discussion, it is assumed that the trust instrument is defective only because of these indicated circumstances. In such a case it is clear that the title to the property remains with the donor and the question is whether he holds it in trust for the intended beneficiary. The view of the Restatement concedes that there is no express trust, but holds the donor as a constructive trustee. In a comment to Section 32(2), the reporter says:

> Although the owner does not become an express trustee because he did not intend to become trustee, he is chargeable as a constructive trustee and he may be compelled by a suit in equity by the beneficiary to transfer the property to a new trustee to be appointed, to be held by him in trust for the beneficiary, or if the intended trust

12 RESTATEMENT (SECOND) OF TRUSTS § 32(2) (1959).
13 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 123 at 608 (2d ed. 1965).

> is one which by the terms of the trust or otherwise the beneficiary can terminate at will, . . . to transfer the property directly to the beneficiary. If the settlor dies, the person succeeding to his interest can be compelled to make such transfer.[14]

Certain situations involving the failure to designate a trustee in the instrument should be distinguished from the problem which is the principal topic of discussion in this article. If there are circumstances clearly indicating that the intended gift in trust is not to fail because no trustee is named, then a trust is created. Thus, in *Burnside v. Wayman*,[15] a deed of trust was made without naming a trustee, but a blank was left in which to insert the name. There was evidence that the grantor gave the beneficiary authority to select a trustee and fill in the name. It was held that the trust did not fail for want of a trustee and that the beneficiary could appoint one and fill in the blank or, in default thereof, a court of equity had the authority to supply the name of the trustee. When the name of the grantee is left blank in a deed, ordinarily the court has no power to supply the name necessary to complete the instrument. However, where a grantor delivers a deed with the name of the grantee in blank, intending that the title is to vest in the person to whom the deed is delivered, and that person is expressly authorized at the time of delivery to insert his own or any other name as grantee, an irrevocable power coupled with an interest is vested in the person to whom the deed is delivered.

Again, in *Smith v. Davis*,[16] two owners executed a deed conveying certain land to a corporation in trust for certain specified purposes. The deed provided that "the trust hereby created shall not lapse or become void by reason of the failure or refusal of the party of the third part (meaning the trustee) to accept or carry out the same," and that, in case the contingency should happen, a new trustee should be appointed by the mutual consent of the parties or by a court of competent jurisdiction. The corporate trustee subsequently found out that it was without power to act as trustee on the ground that it was incapable of taking title sought to be conveyed. One of the grantors filed suit for appointment of a new trustee, which the court granted.

Sometimes circumstances may indicate that although the donor has not appointed a trustee he intends to act in that capacity either indefinitely or until one is appointed. In such a situation there is no

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14 RESTATEMENT (SECOND) OF TRUSTS § 32 Comment *j* at 92 (1959).
15 49 Mo. 356 (1872).
16 27 P. 26 (Cal. 1891).

want of trustee and, therefore, the trust is created. Thus, in *Yandell v. Wilson*,[17] the holder of certain promissory notes gave them to a bank to hold in trust for his daughter and granddaughter. The bank was not authorized under its charter to act as trustee and was without authority under the law to do so. Until his death the donor had on different occasions acknowledged the gift, collected the interest when due, and remitted the same to his daughter and granddaughter. Upon his death the notes were found in his private lock box. It is evident that he had re-acquired the possession of the notes from the bank, although when such re-acquisition took place was not known. In a suit by the donor's daughter and granddaughter against his executors, the court allowed the plaintiffs to recover the amount of the notes. The decision in this case is sound since there was no want of trustee. Although the donor had ineffectually appointed a trustee, he had, by collecting the interest and remitting the same to the beneficiaries, "assumed to act and constituted himself the trustee with the acquiescence of the beneficiaries of the trust, thereby creating the relationship of trustee and *cestuis que trustent* between himself and the owners of the equitable and beneficial interest in the notes."[18]

The basis of a constructive trust is unjust enrichment. Since the donor receives no consideration, he is not unjustly enriched if he retains the title to the property free of trust. The situation is different after the donor's death. In such a case the property descends to his heirs or next of kin who would be unjustly enriched if they were allowed to keep the property free of trust. Where there is an initial lack of trustee, such as where no trustee is named or where, even though one is named, he is dead or incapable of taking title to the property, the trust will fail altogether as against the donor himself and his transferee, unless there are special circumstances which require the enforcement of the intended trust in order to do justice.

The main reason for support of the rule that a trust does not fail for want of a trustee is that to permit the trust to fail would be contrary to the intention of the donor in creating the trust. If his intention clearly manifests that the trust will not fail because no trustee is named, as in *Burnside v. Wayman*[19] and *Smith v. Davis*,[20] the trust will be upheld. If circumstances indicate, as in *Yandell v. Wilson*,[21] that the donor

17 183 So. 382 (Miss. 1938).
18 *Id.* at 384.
19 49 Mo. 356 (1872).
20 27 P. 26 (Cal. 1891).
21 183 So. 382 (Miss. 1938).

intends to hold the property as trustee for the intended beneficiary pending the appointment of a new trustee, there is no doubt that a trust is created. Where he names a person who is already dead as trustee, it is clear that he does not intend to be the trustee himself. If he executes a deed and leaves the name of the trustee in blank, a reasonable deduction, in absence of circumstances showing a contrary intention, would be that he has not made up his mind as to the selection of a trustee. It would be farfetched to say that the donor in such a case intends to hold the property as trustee for the intended beneficiary until a new trustee is appointed. For a person to make himself a trustee there must be an express intention to become a trustee. However anxious the court may be to carry out the donor's intention, it is not at liberty to construe the terms of the instrument other than according to their plain meaning. The fact that a donor makes out a trust instrument to a person who is yet to be designated shows an intention to give the property to another and not retain it as trustee.

The cases in which the question of want of trustee was raised and decided fall into two main categories:

1. Cases in which the donor had died since the execution of the trust instrument and the litigation was between his heirs or executors and the intended beneficiaries.
2. Cases in which the donor himself or his transferee sought to set aside the trust instrument or otherwise acted adversely to the intended beneficiaries.

Cases in which the Litigation Arises After the Death of the Donor

Where litigation arises after the death of the donor the courts are prone to uphold the trust even though the trust instrument is defective for want of a grantee-trustee. Most of the cases falling into this category involve suits for the enforcement of charitable trusts. This fact alone furnishes the court a strong reason to enforce the trust. It is well settled that gifts for charitable purposes are favored and will be liberally construed in order to accomplish the intent of the donor. This is especially true when the property has been used and money expended on the faith of the gift during the lifetime of the donor.

In cases where the donor attempts to create a private trust, the court is faced with the choice between the donor's heirs and the intended beneficiary. If the trust is not upheld the result will be that the property will go to the donor's heirs. As between the donor's heirs and the

intended beneficiary both of whom are not purchasers for value, it is submitted that the latter has a better claim. Since the donor's intention to create a trust is clear, his failure to appoint a trustee during his lifetime should not operate as a windfall to his heirs who would be unjustly enriched if allowed to take the property free of trust. Although the intended beneficiary cannot compel the donor to complete the gift in trust, he may obtain the aid of the court to complete it as against the donor's heirs by imposing a constructive trust upon the property.

In *Beatty v. Kurtz*,[22] the donor set apart certain land for the sole use and benefit of the German Lutheran Church of Georgetown. No conveyance of the lot was made because there was no church of that denomination in existence in that town, and, therefore, there was no grantee. Shortly thereafter the Lutherans of Georgetown organized a church, took possession of the land, and erected a building thereon for public worship. Sixteen years after the donor's death, suit was brought by the trustees of the German Lutheran Church against the donor's son as his heir for quieting of title and for an injunction against disturbance by the defendant of the plaintiff's possession. In giving judgment to the plaintiffs, the court said:

> To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon with the consent of Beatty (the donor), that might furnish a strong ground, why a court of equity should compel him to convey the same to trustees in perpetuity for their use; or at least to execute a declaration of trust, that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church, that he would perfect the donation in their favour; and a refusal to do it would be a fraud upon them, which a Court of equity ought to redress. . . .[23] There is no pretence to say, that the present appropriation was ever attempted to be withdrawn by Charles Beatty during his lifetime, and he did not die until about sixteen years ago. . . . We think, then, it might at all times have been enforced as a charitable and pious use, through the intervention of the government as parens patriae, by its Attorney General or other law officer. It was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty.[24]

The plaintiffs in the *Beatty* case had all the equity on their side. They had during the lifetime of the donor, and evidently with his

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22 2 Pet. 566 (1829).
23 *Id.* at 582.
24 *Id.*

knowledge or consent, taken possession of the land and on the faith of the donation expended money to carry out the very purposes for which the donation was intended. This state of affairs existed at least sixteen years before the death of the donor. He had never claimed the lot as his property, but had it recorded with the city as a tax-exempt property belonging to the church. If that is not sufficient, the donation is for a charitable use which should be considered "as an exception to the general rule requiring a particular grantee."

Bailey v. Kilburn[25] is another case in which suit was brought after the death of the donor. The decision was based on estoppel. In that case Harvey executed a deed giving a portion of land "for the use of a school house, if the neighboring inhabitants see cause to build a school house thereon." The deed named no grantee. The inhabitants in the neighborhood organized a school district, built a school house on the land, and generally assumed ownership and management of the same. The school house was subsequently removed and the land was leased to the plaintiff for a term of ten years by one Brown acting as agent of the school district. The plaintiff held over after the termination of the term, and the school district authorized the defendant to enter on the land and take possession thereof for the district. The plaintiff brought an action of trespass and based his claim on his actual possession of the land. The suit in this case was between the plaintiff who was the hold-over lessee of the school district and the defendant whose entry upon the land was authorized by the school district. In other words, both parties based their respective claims from the same source, the school district. This led the court to say that "[n]o principle is more clearly established, than that a lessee, after enjoyment, cannot be permitted to deny the lessor's title. . . . Nor is it necessary to prove that the agent was duly appointed; for the plaintiff is estopped to deny it, for the same reason by which he is estopped to deny the title of his lessors."[26] It was only dictum when the court held that, although no legal estate passed by the Harvey deed, a trust was created and that the court would protect the trust and, if necessary, appoint a trustee to take the legal estate from the donor's heirs.

In *Visitors M.E. Church v. Town*,[27] a deed conveyed land to certain persons as trustees of a church and their successors in office, without using the word "heirs." As the deed stands in its original form, the

25 10 Met. 176 (Mass. 1845).
26 *Id.* at 179.
27 20 A. 488 (N.J. Ct. of Ch. 1890).

grantees had merely a life estate. After the death of the donor, the church filed a suit in equity to reform the deed so as to pass a fee simple estate and to enjoin the heirs of the donor from claiming the land. The court granted the relief on the ground that the conveyance was for a charitable purpose. The court further reasoned there was a meritorious consideration because of religious instruction received during the donor's lifetime.

The most frequently cited case in support of the rule that a trust will not fail for want of a trustee is *Wittmeier v. Heiligenstein.*[28] In that case a woman executed a deed seeking to convey certain land to a church. The deed contained a provision requiring the church to pay a sum monthly to her husband after her death. Four days after the execution of the deed she died, survived by brothers and sisters as her heirs. The brothers and sisters filed a bill to set aside the deed on the ground that the church, being unincorporated, could not take the property as grantee. Her ex-husband filed a cross-bill claiming that the instrument, though void as a deed, nevertheless created a valid trust. The court upheld the trust because equity does not allow a trust to fail for want of a trustee. The suit was brought after the death of the donor. There were circumstances in that case that would lend support to the conclusion of the court. A substantial portion of the property which the donor owned was acquired by her from her divorced husband. Her relation with her brothers and sisters was anything but pleasant and cordial; she did not speak to them for years. She received an anonymous letter warning her that her relatives were waiting to get what she had.[29] Had the court refused to enforce the trust, the persons to be benefited would be the very same persons whom the donor tried not to benefit.

The same court rendered *Stowell v. Prentiss*[30] three years after *Wittmeier.* In *Stowell* a man executed a deed conveying certain land containing a spring to "the directors of school district No. 1 in the town of Hallcock . . . for the use of the public." The spring was practically the only source of water supply in the territory and was used by the residents in the vicinity without interruption for a long time after the donor's death. Under Illinois law, school directors could not hold title to property for other than school purposes. After the donor's death

[28] 139 N.E. 871 (Ill. 1923).
[29] Heiligenstein v. Schlotterbeck, 133 N.E. 188 (Ill. 1921).
[30] 154 N.E. 120 (Ill. 1926).

his executor conveyed the property to the defendant. A bill was brought by the directors of the school district to quiet title, and to enjoin the defendant from interfering with the public use and enjoyment of the land. In granting the relief, the court said:

> While, at law, gifts to charitable uses, without a certain and competent trustee to take and hold the title, may be void, yet a court of equity will carry the trust into effect by appointing a trustee or by itself acting in the place of a trustee. Equity will not permit a trust otherwise valid to fail for want of a trustee or because the trustee designated is incompetent to act.[31]

Great emphasis was placed on the finding that the intended conveyance was made for a charitable purpose and it was on this ground that the trust was upheld even though no competent trustee was named.

In *Shaw v. Johnson*,[32] a woman purchased a life insurance policy and directed that the death benefits of the policy be paid to a certain trust company in trust for her two named children. The policy permitted change of beneficiary by filing of a written notice by the insured, with such change to take effect only when and not until the endorsement of the same was made on the policy by the insurance company. Several years later she revoked the trust and executed a new trust deed naming a certain bank as trustee. The policy, the notice of change of beneficiary and the trust deed were forwarded to the insurrance company for endorsement in accordance with the rules of the company. Upon being notified of the appointment the bank refused to accept unless the trust deed be re-drafted. While the re-drafting was still undecided, the woman died. In a suit by her children against her executor, the court held that the trust was enforceable and relied on *McCray*[33] (a case of disposition by will) for the proposition that a trust should not fail for want of a trustee.

Two recent cases involving suits brought after the death of the donor to determine whether a trust had been created when either no trustee was named or the named trustee was incapable of taking title to the property.[34] In both cases the court enforced the trust on the ground that a charitable trust should not be allowed to fail for want of a trustee.

In all of the foregoing cases it is held that a trust does not fail for

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31 *Id.* at 124.
32 59 P.2d 876 (Cal. Dist. Ct. App. 1936).
33 268 P. 647 (Cal. 1928).
34 Arnold v. Methodist Episcopal Church, 202 So. 2d 83 (Ala. 1967); Olivas v. Board of Nat. Mis. of Presbyterian Church, 405 P.2d 481 (Ariz. 1965).

want of a trustee. There are certain factors common in all these cases: the donor was dead at the time suit was brought; the donor during his lifetime never attempted to withdraw the gift, nor did he manifest a change of mind about it; the intended trust was either for a charitable purpose or for the benefit of persons who were the natural objects of his bounty. In such a situation it is clear that a court of equity should enforce the trust against the heirs of the donor who would be unjustly enriched if allowed to take the property free of trust.

There are a number of states which have a statute expressly providing that a trust will not fail for want of a trustee or that a trust may exist even without any appointed trustee.[35] In both types of legislation the court is empowered to appoint a trustee and direct the execution of the trust.

The Georgia code was cited in *Dominy v. Stanley*.[36] In that case the owner executed a deed purporting to convey certain real estate for school purposes. No trustees were named in the deed. After the death of the donor suit was brought to enforce a charitable trust against his heirs. The court briefly referred to the statute, but rested its decision mainly on the ground that the trust was for charity and the courts of equity look with special favor upon such trusts.

Cases so far decided in these jurisdictions do not show that the statute has made any change in the law.[37] It is submitted that the statute is to be construed not as an attempt to introduce fundamental change, as ordinary enactments would be, but as an attempt to restate the law in the general terms of a code. Indeed, in a comment to a similar Louisiana statute, the Louisiana State Law Institute reports that this section makes no change in the law.[38]

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[35] GA. GEN. CODE, § 108-302 provides: "A trust shall not fail for want of a trustee." Cal. statute provides: "When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the superior court of the county where the trust property or some portion thereof is situated, must appoint another trustee, and direct the execution of the trust. The court may, in its discretion, appoint the original number, or any less number of trustees."—CAL. CIV. CODE ANN. § 2289. Similar provision is found in IDAHO CODE, § 68-101; MONT. REV. CODE, § 86-608; S.D. COM. LAWS, 1967, § 55-3-21. *See also* DEL. CODE, tit. 12, § 3509; LA. REV. STAT., § 9.1785; R.I. GEN. LAWS, §18-2-1.

[36] 133 S.E. 245 (Ga. 1926).

[37] Bethel Farm Bureau v. Anderson, 123 S.E. 2d 754, 757 (Ga. 1962), in which the statute was cited, is a case of failure of trusteeship after the creation of the trust. The court said: "And Code, § 108-302 declares that 'A charity shall never fail for the want of a trustee.' "

For application of the statute to testamentary trusts, *see In re* Ingram's Estate, 285 P. 365 (Cal. Dist. Ct. of App. 1930); Simpson v. Anderson, 137 S.E. 2d 638 (Ga. 1964); Wood v. Trustees of Fourth Baptist Church, 61 A. 279 (R.I. 1905).

[38] LA. REV. STAT., Vol. 3-A, p. 53.

CASES IN WHICH THE DONOR HIMSELF OR HIS TRANSFEREE SEEKS TO SET ASIDE THE TRUST INSTRUMENT OR ACTS ADVERSELY TO THE INTENDED BENEFICIARY

We have seen that if the litigation arises after the death of the donor, the great majority of the courts have enforced the trust against his heirs or next of kin. This is especially true when the trust is for a charitable purpose or for the benefit of persons who are the natural objects of bounty of the donor. There is, however, very little authority on the question whether a trust arises as against the donor himself where the deed which purports to be a conveyance in trust fails to name the grantee-trustee or names one who is either dead or incapable of taking title to the property.

In *Kirk v. King*,[39] a man conveyed land "to the employers of the school at Plum Creek" to hold the same for an "English school house, and no other purpose." A school house was built on the land but was later abandoned. The donor subsequently sold the land to the defendant who entered upon it and removed the school house. There was evidence that at the time of purchase the defendant had knowledge of the dedication of the land for the use of a school. Plaintiffs brought trespass against the defendant claiming that they resided in the neighborhood of the school and were heads of the families most likely to be benefited by the school if one were kept in operation. In rendering judgment for defendant, the court held that the conveyance "to the employers of the school" was void for want of a grantee capable of taking. The court admitted that the trust would be enforced if the plaintiffs could "show such an equity as a chancellor would enforce."[40] The trust in this case failed because no equity in favor of the plaintiffs was shown.

Eyrick and Deppen v. Hetrick[41] is not a case of initial failure of trustee. An insane person was named as the trustee in the deed. An insane person has capacity to take title to property, although he has no capacity to administer the trust. "No one will deny that he may take as a purchaser, or vendee, in his own right. If so, why may he not, in contemplation of law, accept the legal title for the benefit of another?"[42] It is only by way of dictum that the court said: "Though no trustee

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39 3 Pa. 436 (1846).
40 *Id.* at 441.
41 13 Pa. 488 (1850).
42 *Id.* at 494.

were named, the trust itself would not be permitted to fall, for chancery would interpose a trustee to sustain it, when necessary."[43]

In *Rixford v. Zeigler*,[44] the owner of certain land deeded it to the Roman Catholic Church Community "for school and church purposes." The said church community was an unincorporated association for the purpose of religious worship. Neither the church community, nor any of its members, nor any person claiming to act for it, ever took possession of the property or made use of it. It was held that the donor remained the legal and equitable owner of the land. It seems that according to this case where property is deeded to an unincorporated association for a charitable purpose, a charitable trust does not arise until the property has been used for the indicated purpose. "But nothing of the kind occurred in the case at bar."[45]

In *Rayhol Co. v. Holland*,[46] a husband and wife received certain land and a building bought and paid for by their respective parents subject to certain conditions which were set forth in a written memorandum signed by them. The conditions were that the property held by them as tenants in common should be transferred to a trust company in trust for use of the husband and wife for life with remainder to their surviving child or children and, in the event of their death without surviving child or children, for sale of the property and division of the proceeds to their respective parents in proportion to the amount of their contribution. The husband and wife also agreed that a formal deed of trust embodying these terms should be prepared and signed, but because of the refusal of the trust company selected by them to act as the trustee the deed was never executed. The husband later assigned his interest in the property to another. In a suit for partition by the husband's assignee, the court held that the memorandum signed by the couple was a complete declaration of trust leaving only for future action the execution of a formal document designed to carry it into effect. Although the trust company refused to act this would not prevent the memorandum from constituting a trust. It must be pointed out that the memorandum by the couple was itself a sufficient agreement to create a trust supported by consideration. The conveyance of the land to the couple as tenants in common is sufficient consideration for the grantee's agreement to appoint a trustee to hold the property for the intended purposes.

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[43] *Id.* at 494.
[44] 88 P. 1092 (Cal. 1907).
[45] *Id.* at 1094.
[46] 148 A. 358 (Conn. 1930).

In *Baily v. Massinger*,[47] a woman executed a deed of conveyance of all her right, title and interest in certain property under a contested will to a named person "and————trustee." She subsequently brought suit to set aside the deed, alleging, among other things, that the deed was ineffective in creating a trust for want of a trustee. The court held that a trust was created although no trustee was named in the deed. It must also be pointed out that the deed was executed for a sufficient consideration: probate of the contested will and release of her liability on a note of which she was one of the makers.

CONCLUSION

As is shown at some length in the foregoing discussion, it is fairly well settled by the decided cases that where there is an initial want of trustee the rule that a trust will not fail for want of a trustee does not operate as against the grantor himself or his transferee unless one of the following situations appears:

1. there is consideration to support the intended conveyance, or
2. even in absence of consideration, there are circumstances:
   (a) indicating the donor's intent that his failure to appoint a trustee does not prevent the trust from arising, as where he intends to act as trustee pending the appointment of a trustee or where he authorizes another to appoint a trustee, or
   (b) justifying the grant of equitable relief, as where the intended beneficiary has changed his position in reliance upon the gift.

The results reached by the courts in the foregoing cases are sound. On the basis of the decided cases it seems that the courts have not yet come to accept the broad rule of Section 32(2) of the Restatement. Where there is an initial failure of a trustee, the conveyance is ineffective except in special circumstances. The conveyance is ineffective since there is no grantee-trustee, and the property remains in the grantor. In such a case there is at most a promise to convey the property in trust. Is this promise binding? Pomeroy answered the question in the following words:

> All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of *three* causes,—

[47] 57 A.2d 232 (N.J. 1948).

> a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisee to enforce the obligation against the promisor. The second, while the promise is executory, is a mere nullity, both at law and in equity. The third constitutes the meritorious or imperfect consideration of equity, and is recognized as effective by it within very narrow limits, although not at all by the law. While this species of consideration does not render an agreement enforceable against the promisor himself, nor against anyone in whose favor he has altered his original intention, yet if an intended gift based upon such meritorious consideration has been partially and *imperfectly* executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person claiming merely by operation of law, who has no equally meritorious foundation for his claim. The equity thus described as based upon a meritorious consideration only extends to cases involving the duties either of charity, of paying creditors, or of maintaining a wife and children.[48]

We have seen that the cases are in full agreement with Pomeroy's views. If there is sufficient consideration for the conveyance, however ineffective, it is clear that a binding contract arises.[49] The only questions which might arise would be whether the contract is specifically enforceable if the legal remedy is adequate and whether it is enforceable at all in jurisdictions where a third party beneficiary is not entitled to enforce it. If the property is conveyed as a gift or "as a mere voluntary bounty," and the conveyance is ineffective because of want of a trustee, a court of equity will not compel the donor to complete the gift unless the beneficiary, in reliance upon the gift, so changes his position that it would be inequitable to preclude him from obtaining the property.[50] If, however, the donor dies without having altered his original intention of making a gift, and if the intended gift is for the benefit of a charity or of persons who are the natural objects of his bounty, by the great authority in this country the court has the power to appoint a trustee and to compel his heirs or next of kin to transfer the property to the appointed trustee. In other words, the result is that although the donor holds the property free of trust during his lifetime, his heirs are chargeable as constructive trustees.

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48 2 POMEROY, EQUITY JURISPRUDENCE § 588 (5th ed. 1941).

49 Rayhol Co. v. Holland, 148 A. 358 (Conn. 1930); Baily v. Massinger, 57 A.2d 232 (N.J. 1948).

50 Rixford v. Zeigler, 88 P. 1092 (Cal. 1907); Kirk v. King, 3 Pa. 436 (1846).