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Private Trusts for Indefinite Beneficiaries

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COMMENTARY

PRIVATE TRUSTS FOR INDEFINITE BENEFICIARIES

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RECENTLY, in *McPhail v. Doulton (In re Baden's Deed Trusts)*,[1] the House of Lords reached a decision that marks an important change in the English law of trusts which could be important also for American law. It held that there is a single test of validity for private trusts and for powers of appointment where the issue is whether the beneficiaries of the trust or the objects of the power are sufficiently definite, and that this single test is that applicable to powers of appointment. For nearly 170 years, since the decision in *Morice v. Bishop of Durham*,[2] English law has had a stricter test of validity for a trust than for a power, and the same has been true in virtually all American jurisdictions.[3] For private trusts in which the beneficiaries are designated by some group description, the settled rule has been that the trust fails unless the entire class of beneficiaries is capable of ascertainment. This has been true even though the trustee is given a power of selection from within the group, so that through the exercise of the power the beneficiaries would in fact be defined or identified. This test was thought to be settled for English law by the decision of the Court of Appeal in *Inland Revenue Commissioners v. Broadway Cottages Trust*, where the court said that "a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects eligible for selection is ascertained or capable of ascertainment . . . ."[4]

In contrast, it became established in English law that this test

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1. [1971] A.C. 424 (1970). *See* Harris, *Trust, Power and Duty*, 87 LAW Q. REV. 31 (1971); Hopkins, *Certain Uncertainties of Trusts and Powers*, 1971 CAMB. L.J. 68; 1970 CAMB. L.J. 206; 33 MOD. L. REV. 686 (1970) for discussions of the case.

2. 10 Ves. 522, 32 Eng. Rep. 947 (Ch. 1805).

3. *See* Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA L. REV. 241 (1963), for an extensive discussion of both English and American law.

The term "private trust" is used to describe any trust that cannot be sustained as a charitable trust. Indefiniteness of beneficiaries or purposes does not affect the validity of a charitable trust. *E.g.*, Vidal v. Girard's Exrs., 43 U.S. (2 How.) 127 (1844).

4. [1955] Ch. 20, 35-36 (C.A. 1954). Earlier decisions of the Chancery Division had announced the same rule. *In re* Ogden, [1933] Ch. 678; *In re* Gestetner Settlement, [1953] Ch. 672.

would be applied only where the trustee was under a duty to make the selection, that is, to exercise his power of distribution or appointment. If he was not, if the exercise of the power was optional with him, validity was to be determined by the rule applicable to powers of appointment, and this was less stringent.[5] In recent years a few English judges have expressed dissatisfaction with this distinction[6] and the House of Lords has now rejected it in *Baden's Trusts*. A trust for a class of beneficiaries will no longer fail because it is not possible to determine the entire membership of the class. The controlling opinion in the House of Lords was written by Lord Wilberforce, who concluded that the trust rule should be assimilated to that previously adopted for powers of appointment under which the disposition is valid "if it can be said with certainty that any given individual is or is not a member of the class."[7] The decision was by a divided court; two judges concurred with Lord Wilberforce while two others dissented on the ground that the validity of a trust should continue to be governed by the rule formulated in the *Broadway Cottages* case.

In American law nearly all jurisdictions have had a stricter test for trusts than for powers of appointment. Our courts have determined the validity of a trust by the same test formulated in the *Broadway Cottages* case: the trust is valid only if the entire membership of the class is capable of ascertainment. This is true even though the trustee has been given a power of selection from within the class, provided he is under a duty to exercise the power.[8] If the trustee is not under such a duty, the validity of his power presumably will be

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5. Wishaw v. Stephens, [1970] A.C. 508 (1968), *affg. In re* Gulbenkian's Settlements, [1968] 1 Ch. 126 (C.A. 1967); *In re* Gestetner Settlement, [1953] Ch. 672.

6. Lord Denning, the present Master of the Rolls, was of the opinion that the decision in *Broadway Cottages* was contrary to common sense and should be "brought into line" with the rule governing powers of appointment. *In re* Gulbenkian's Settlements, [1968] 1 Ch. 126, 133 (C.A. 1967). In *In re* Hain's Settlement, [1961] 1 W.L.R. 440, 445 (C.A.), Lord Evershed, Master of the Rolls, found the distinction "logically unattractive." When *Baden's Trusts* was in the Court of Appeal, Justice Harman expressed the opinion that the distinction between trust and power "ought to make no difference to the deed's validity and that it does is an absurd and embarrassing result . . . ." [1969] 2 Ch. 388, 397 (C.A.).

7. [1971] A.C. at 456.

8. Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891). In the first RESTATEMENT OF TRUSTS § 122 (1935), it was said that members of an indefinite class could not be beneficiaries of a trust, and in comment *a* a class was described as indefinite "if the identity of all the individuals comprising its membership is not ascertainable." Nor was the trust saved in such a case, according to comment *c*, because the trustee was given a power of selection from the class.

determined by the rules pertaining to powers of appointment, and if by such rules the power is valid the accompanying trust is also valid.[9] The test of validity of a power of appointment is that found in the *Restatement of Property*, which upholds a power if "the group is so described that some persons might reasonably be said to answer the description . . . ."[10] It is not necessary that the entire membership of the group be ascertainable; as said in the *Restatement*, the "fact that the group is so large that its members could not be the beneficiaries of a trust . . . does not prevent them from being the objects of a power."[11]

If, for example, property is bequeathed to *X* for life, with power to appoint the remainder to such of the testator's friends as *X* shall select, and in default of appointment to *B*, the power of appointment is valid under the *Restatement of Property*.[12] If the property is given to a trustee to pay the income to *X* for life, with power in the trustee to appoint the remainder in the same manner and with the same gift in default, the power is still valid and the trust is therefore effective as intended. But if the power given the trustee is regarded as imperative—and this is the usual construction where there is no express gift in default—the power is in trust, is governed by trust rules, and is invalid under those rules because the beneficiaries are indefinite.[13] The reason usually given for such invalidity is that there is no one to enforce the trustee's duty to exercise the power. This conclusion has been under attack by writers since the time of Ames' initial criticism in 1892.[14] Ames and others argued

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9. On this point the American cases are somewhat inconclusive, although it is believed that the disposition will be upheld if the trustee is under no duty to exercise the power. The cases which have invalidated a trust for indefiniteness of beneficiaries have emphasized that the trustee's power to dispose among the beneficiaries was imperative, and the implication is that the disposition would have been upheld had it been found that he was under no duty to exercise the power. Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891). The English decisions provide more satisfactory support for the validity of the trust. *See* note 5 *supra* and Palmer, *supra* note 3, at 262, for the English cases.

10. RESTATEMENT OF PROPERTY § 323, comment *h* at 1843 (1940). *Accord, In re* Rowland's Estate, 73 Ariz. 337, 241 P.2d 781 (1952).

11. RESTATEMENT OF PROPERTY § 323, comment *h* at 1843 (1940).

12. *Accord, In re* Rowland's Estate, 73 Ariz, 337, 241 P.2d 781 (1952). Under the standard rule of construction, the express gift in default means that the special power is not imperative.

13. The leading case to this effect is Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926).

14. 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 (1917); A. SCOTT, TRUSTS §§ 122, 123 (3d ed. 1967) [hereinafter A. SCOTT]; Palmer, *supra* note 3.

that the absence of anyone to enforce the trustee's duty should not invalidate his power. In essence, the trustee should be *permitted* to exercise the power as the donor intended.

The position just described was adopted in 1959 in the *Second Restatement of Trusts*, by applying to trusts the test used in determining the validity of a power of appointment. Under this reformulation of doctrine, a bequest in trust for an indefinite class of persons is valid unless "the class is so indefinite that it cannot be ascertained whether any person falls within it."[15] Stated differently, the disposition is valid if it is possible to determine with a reasonable degree of certainty that some person answers the class description. The general objective is much the same as that accomplished in *Baden's Trusts*; as Lord Wilberforce put it, "to assimilate the validity test for trusts to that which applies to powers."[16] So far, however, the objective has not been accomplished in American law. During the thirteen years since the issuance of the *Second Restatement*, no court seems to have adopted the *Restatement* position; the only decisions found have adhered to the traditional view.[17] For American law the principal importance of *Baden's Trusts* is that it may lead courts to rethink the trust problem and assimilate the trust rule concerning validity to that accepted for powers of appointment. Should this occur, however, our courts should not adopt the test of validity established by the House of Lords.

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15. RESTATEMENT (SECOND) OF TRUSTS § 122 (1959). In section 123 an analogous rule is adopted to cover trusts for indefinite purposes: the bequest is effective unless "the purpose is so indefinite that it cannot be ascertained whether any application falls within it." *See* text accompanying notes 39-45 *infra* for a discussion of this second type of trust.

16. [1971] A.C. at 450. While this is the general objective of the *Restatement*, it refuses to call the arrangement a trust, presumably because there is no one to enforce the trustee's duty. This is in fundamental conflict with the position of the *Restatement* that there can be a valid trust for unborn beneficiaries. RESTATEMENT (SECOND) OF TRUSTS § 112, illustration 6 at 245 (1959). *See* Palmer, *supra* note 3, at 281-85.

17. In Armington v. Meyer, 103 R.I. 211, 213, 236 A.2d 450, 452 (1967), a testamentary trust provided that certain income should be distributed "by my trustee[s] aforesaid at their discretion and will for the benefit of . . . all men and women among my employees and acquaintances known to my said trustees to have been loyal to me and my inventions during the hard, up-hill struggle to establish my . . . business." This was held invalid for lack of an ascertainable class of beneficiaries. In Estate of Kradwell, 44 Wis. 2d 40, 42, 170 N.W.2d 773, 774 (1969), a will bequeathed the residuary estate to the executrix "to distribute the same to and among my heirs, named legatees, and such other persons she may deem deserving and for benevolent objects, and to such of them and in such proportion as she shall deem just and proper . . . ." It was held that the bequest was in trust and that the trust failed because "the beneficiaries are uncertain and no one is in a position to enforce the trust." 44 Wis. 2d at 45, 170 N.W.2d at 775.

I. The Test of Validity

About a year before the decision in *Baden's Trusts*, the House of Lords made a definitive statement concerning the test to be used in determining whether a power of appointment is valid. In *Gulbenkian's Settlements* it held that "a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class."[18] The power in that case was held by the trustee of an express trust who had authority to distribute income within a class which probably was too indefinite to satisfy the trust rule announced in the *Broadway Cottages* case. The court held in *Gulbenkian* that the trustee was under no duty to exercise the power, that validity was to be determined by the rule applicable to powers rather than that applicable to trusts, and that the power satisfied the test quoted above. In *Baden's Trusts* the House of Lords was confronted with a similar case except that the trustee was under a duty to exercise the power, hence validity was governed by the law of trusts. The trust provided for distribution of income to employees and former employees of a certain company, as well as "relatives or dependents of any such persons,"[19] with discretion in the trustees to select the distributees from this group and to determine the amounts they were to receive. As has been seen, the court held that the test of validity established for powers was to govern trusts as well.[20]

This test of validity is much narrower than that adopted in our law for powers of appointment and that proposed in the *Second Restatement of Trusts* for adoption with respect to trusts. The essential difference is that under the English rule a court must be able to determine (with certainty, the court says[21]) whether *any given* person is or is not a member of the class, whereas under the American rule pertaining to powers it is sufficient if the court can deter-

18. [1970] A.C. 508, 521 (1968). *See* 1969 Camb. L.J. 30, for a discussion of the case. Any doubt that the court was promulgating this as the test of validity of a power was set at rest in *Baden's Trust*, [1971] A.C. at 450.

19. [1971] A.C. at 428.

20. There was no decision on whether the designation of beneficiaries satisfied the trust test formulated in *Broadway Cottages*. Because of the manner in which the case reached the House of Lords, all of the judges were agreed that it must be returned to the trial court for decision on the issue of validity. The difference between the majority and the dissenting judges was over the test to be applied in deciding that issue.

21. The certainty requirement is unwise and seems bound to produce unnecessary litigation, but that is a problem for the English courts to deal with.

mine with a reasonable degree of certainty that there is *a* person who satisfies the class description. The English rule is destructively narrow, it had no support in English decisions until recent times, and it has no support in the American decisions. While it would be well for our courts to follow the lead of the House of Lords in testing the validity of a private trust by the rule developed for powers of appointment, the powers rule to be followed is that now found in the *Restatements of Property* and *Trusts*.

To illustrate the difference, assume a testamentary trust in which the trustee is given power to dispose of the trust assets to such of the friends of the testator as he selects. The disposition would be effective under the *Second Restatement of Trusts* since the test is whether there is some person who "might reasonably be said to answer the description,"[22] and the meaning of friendship is surely precise enough for this purpose. In contrast, under the English decisions the power and the trust will be valid only if it can be said with certainty whether any given person is or is not a friend. It is doubtful that the meaning of friendship is definite enough to meet this test; if not, both the trust and the power will fail. There is no sensible reason for such a result. If *X* clearly was a friend and the trustee disposes of the property to him, why should the appointment fail merely because it cannot be said with certainty whether *Y* was or was not a friend? If an appointment is made to *Y* and a court is unable to say with reasonable certainty that *Y* was a friend, the appointment will be ineffective, but that is not a sufficient reason for invalidating the power.

The test of validity of a power of appointment which the House of Lords adopted in the *Gulbenkian* case had not appeared during some five centuries of development of the English law of powers. It was first announced by Justice Harman in 1953 when he sat in the Chancery Division,[23] and was subsequently followed in other decisions of that court.[24] When the *Gulbenkian* case was in the Court of Appeal, Lord Denning (who is notable among English judges for his dislike of decisions which contradict common sense) suggested a test of validity for powers of appointment much like that formu-

22. RESTATEMENT OF PROPERTY § 323, comment *h* at 1843 (1940). The language from the *Restatement of Property* is used because it is more felicitous than that found in the corresponding portion of the RESTATEMENT (SECOND) OF TRUSTS § 122 (1959).

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

24. *See* Palmer, *supra* note 3, at 255-57, for a discussion of the *Gestetner* case on this point; *id.* at 256 for a list of other cases to the same effect.

lated in the *Restatement of Property*,[25] but the House of Lords rejected his opinion.[26]

II. Enforcement of a Trust for Indefinite Beneficiaries

In his opinion in *Baden's Trusts* Lord Wilberforce took another position which could have important consequences for English and American law. Contrary to received opinion, he concluded that in proper circumstances a court will enforce a trust for indefinite beneficiaries if the trustee fails to perform his duty to dispose of the property among such beneficiaries. This is a significant departure from established doctrine which our courts might well accept.

In criticizing the rule that a trust for indefinite beneficiaries is ineffective, Ames and his followers have argued that the trust includes a power of appointment which the trustee is under a duty to exercise, and that the power should not fail merely because the duty is unenforceable.[27] The assumption has always been that there is no means of enforcing the trustee's fiduciary duty, so that if he fails to exercise the power there will come a time when the court will declare a resulting trust in favor of those entitled to take in default of appointment. This is the position taken in the *Second Restatement of Trusts*, which says that a bequest in trust for an indefinite class of beneficiaries does not create an "enforceable trust" but does give the trustee a power of disposition when he is "authorized or directed to convey the property to such members of the class as he may select."[28]

The view that the trustee's duty to distribute is unenforceable

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25. *In re* Gulbenkian's Settlements, [1968] 1 Ch. 126, 134 (C.A. 1967):

> [I]f there is some particular person at hand, of whom you can say that he is fairly and squarely within the class intended to be benefited, then the clause is good. You should not hold it to be bad simply because you can envisage borderline cases in which it would be difficult to say whether or no a person was within the class.

Lord Denning also was of the opinion that *Broadway Cottages* should be overruled and the trust rule of validity "brought into line" with the rule he had formulated for powers. [1968] 1 Ch. at 133.

26. The controlling opinion in the House of Lords was written by Lord Upjohn, and his discussion of Denning's test of validity appears in [1970] A.C. at 525.

27. *See* authorities cited in note 14 *supra*.

28. Restatement (Second) of Trusts § 122 (1959). In comment *d* at 257 it is said that "no member of the class can maintain a proceeding to enforce the trust, nor can any other person maintain such a proceeding."

Section 122 is limited to a case in which the trustee has what is termed an exclusive power in the law of powers; that is, a power to appoint to only certain members of the group and exclude the others. There is a brief discussion of the significance of this limitation in Palmer, *supra* note 3, at 280 n.182.

had also been taken for granted in English law until the decision in *Baden's Trusts*. In that case Lord Wilberforce asserted that if the trustee fails to exercise the power the court will exercise it "in the manner best calculated to give effect to the settlor's or testator's intentions."[29] As to the manner in which that could be done, he suggested that a new trustee might be appointed; or that persons within the class of beneficiaries might be authorized or directed to "prepare a scheme of distribution," presumably to be presented to the court for approval; or finally, that the court itself might prepare such a scheme "should the proper basis for distribution appear . . . ."[30] Although he did not discuss who would have standing to initiate action seeking enforcement, it seems reasonably clear that a person within the described class would qualify.

The reason for the development of the requirement that the entire membership of the class be ascertainable has been the belief that the only manner in which the court can order distribution when the trustee fails to exercise his power is through distribution equally among the class. Since the beginning of the nineteenth century, it has been taken for granted in both English and American law that a court will not assert power to dispose of the property in any other manner.[31] There were English decisions during the seventeenth and eighteenth centuries in which courts did order some other form of distribution, but since Eldon's time these have been regarded as obsolete. The view became settled that the discretion was given only to the trustee and could not be exercised by the court, hence the only means by which the court could order distribution without exercising the trustee's discretion would be through

29. [1971] A.C. at 457.

30. [1971] A.C. at 457.

31. In Brown v. Higgs, 8 Ves. 561, 32 Eng. Rep. 473 (Ch. 1803), a testamentary trustee was directed to dispose of certain property to such of the children of X as he should select, with no express gift in default, and the trustee died before the will took effect. It was held that the property went to the entire class in equal shares. Writers on the law of powers have disagreed as to the theory of decision, and Lord Eldon did not rest his decision on any single theory. He did say, however, that "wherever a trust is created, and the execution of that trust fails by the death of the trustee, . . . this court will execute the trust." 8 Ves. at 570, 32 Eng. Rep. at 476. But the extent of such "execution" was a decree for equal distribution. Two years earlier, in Kemp v. Kemp, 5 Ves. 849, 859, 31 Eng. Rep. 891, 896 (Ch. 1801), the Master of the Rolls referred to Warburton v. Warburton, 4 Bro. P.C. 1, 2 Eng. Rep. 1 (H.L. 1702), as an "extraordinary" decision in which the court exercised the trustee's power. He observed that "of late the Court has disclaimed" such authority; instead, it will "give the fund equally." The *Warburton* case is one of those relied on by Lord Wilberforce in *Baden's Trusts*. *See* note 33 *infra*.

equal distribution among all members of the class. In order to do this, the entire membership of the class must be ascertained. The result was that a trust for an indefinite class of beneficiaries could not be enforced, and therefore was not valid, since the general position in both English and American law has been that validity turns on whether a court can enforce performance of the trustee's duties.[32] In *Baden's Trusts*, the House of Lords rejected the self-imposed limitation on the exercise of judicial power which developed after 1800 and returned to the earlier decisions,[33] where it found a still viable principle "that a discretionary trust *can*, in a suitable case, be executed according to its merits and otherwise than by equal division."[34]

This conclusion made it possible to uphold a trust in which the entire class of beneficiaries is not ascertainable, without departing from the position that validity depends on enforceability, a position that Lord Wilberforce assumed for purposes of decision.[35] It would

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32. This was settled for English law by Morice v. Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (Ch. 1805); Vezey v. Jamson, 1 Sim. & Stu. 69, 57 Eng. Rep. 27 (1822). The two most important American decisions are Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891) and Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926). The honorary trust is an exception. A. Scott, *supra* note 14, § 124.

33. In Moseley v. Moseley, [1673] Fin. 53, 23 Eng. Rep. 28, 29, a will directed the executors to hold land for fifteen years and then settle it on such one of the three sons of Nicholas "as they should think fit." When the executors failed to exercise the power, the court ordered them to do so "within a Fortnight," and if they failed "then this Court will nominate one of the three [sons]." 23 Eng. Rep. at 30. Other cases relied on by Wilberforce were Clarke v. Turner, [1694] Free Ch. 198, 22 Eng. Rep. 1158; Warburton v. Warburton, 4 Bro. P.C. 1, 2 Eng. Rep. 1 (H.L. 1702); Richardson v. Chapman, 7 Bro. P.C. 318, 3 Eng. Rep. 206 (H.L. 1760).

In addition to these cases Lord Wilberforce resurrected Harding v. Glyn, 1 Atk. 469, 26 Eng. Rep. 299 (1739), a decision which has been regarded as anomalous since Eldon's time. That case established that an imperative power of appointment among relatives of the donor is valid even though the class is not limited to heirs or next of kin and the entire membership therefore is not ascertainable. If the trustee or other holder of the power fails to make an appointment, courts have held that the property goes in default of appointment to the heirs or next of kin of the donor. This does not fit within general doctrine, first, because a trust for indefinite beneficiaries is held to be valid, and second, because on failure of the trustee to discharge his duty to make distribution of the fund, courts have enforced distribution in favor of a smaller group than the entire class membership. Instead of treating this group of cases as anomalous Lord Wilberforce concluded that "a practice, or rule, which has been long followed and found useful in 'relations' cases" could also serve as a guide to decision in other types of cases. [1971] A.C. at 452.

34. [1971] A.C. at 452 (emphasis original).

35. His opinion contains the following passage: "Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there is equal division." [1971] A.C. at 451.

be wise for American courts to accept his view that there are methods through which a trust for indefinite beneficiaries can be enforced.[36] This would make it possible to save most trusts which now fail without departing from the principle that validity depends on enforceability.[37] But the best hope for sensible development of our law is to reject this principle and follow the general course suggested in the *Second Restatement of Trusts*. At the same time, techniques for enforcement of the sort suggested in *Baden's Trusts* should be employed when enforcement is found to be desirable.[38]

III. Trusts for Indefinite Purposes

One of the principal casualties of the rule invalidating trusts for indefiniteness is the trust for benevolent purposes. Less than thirty years ago, in *Chichester Diocesan Fund v. Simpson*,[39] the House of Lords declared such a trust invalid after the trustees had distributed more than 200,000 pounds to various charitable and benevolent institutions. As a result the trustees became personally liable to the next of kin who were entitled to the money by way of resulting trust.[40] The decision should have come as no surprise since essentially the same sort of trust was held invalid in *Morice v. Bishop of Durham*,[41] the case which has been the principal source of our

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36. In commenting on *Baden's Trusts* Professor Scott has written:

> I have been too ready to suggest that the disposition fails if the donee of the power fails to exercise it. It is more sensible to hold that, if this is necessary to effectuate the intention of the settlor, and if it is practicable, the court may take measures best calculated to see that a proper disposition is made, as Lord Wilberforce suggests . . . .

A. Scott, *supra* note 14, § 122 (Supp. 1972).

37. The suggested techniques for enforcement are not dependent on acceptance of the test of validity established in *Baden's Trusts*. They could be used with equal facility in conjunction with the test of validity adopted in the *Restatements of Property* and *Trusts*.

38. The principal effect of Lord Wilberforce's suggestions concerning techniques for enforcement is that it enabled the court to establish a new test of trust validity while adhering to the view that a trust is valid only if the trustee's duty is enforceable. In the usual case in which an issue of validity is presented, the trustee is willing to carry out the trust and the question is whether he will be permitted to do so. He will be if the trust is upheld, and usually that will end the matter so far as the court is concerned. Enforcement of the trustee's duty becomes an issue only when he fails to perform it.

39. [1944] A.C. 341.

40. *In re* Diplock, [1948] Ch. 465, 503 (C.A.).

41. 10 Ves. 522, 32 Eng. Rep. 947 (Ch. 1805). The trust there was for "objects of benevolence and liberality," but the opinion made it reasonably clear that the trust would have been invalid had it been limited to benevolent purposes. This was explicitly decided in *In re* Jarman's Estate, 8 Ch. D. 584 (1878).

present rules relating to indefiniteness. The problem of indefiniteness has arisen in connection with two separable types of trusts, first, those in which beneficiaries are designated by some group term, and, second, those in which the uses to which the trust fund is to be put are described by reference to purposes. The first type of trust was involved in *Baden's Trusts*, whereas a trust for benevolent purposes is of the second variety. There is no reference to the *Diocesan Fund* case in the opinions in *Baden's Trusts*, nor is there any suggestion as to the effect of the decision on such a "purpose" trust.

Only time will tell whether the decision will have any effect on the validity of various types of purpose trusts which in the past have been held invalid under English law.[42] It would seem that the techniques for enforcement suggested by Lord Wilberforce are adaptable to a trust for benevolent purposes or any other stated purpose. If so, validity could be made to depend on whether a court can say with certainty that any given use of the fund either does or does not come within the stated purpose. This test would lead to the rejection of some relatively recent decisions in which trusts for specific or relatively specific purposes have been struck down; for example, a trust established by George Bernard Shaw to carry on specific projects connected with the development of a new English alphabet.[43] Arguably also, the test could lead to the validation of a trust for benevolent purposes; but that is a closer question, and in any event it is improbable that the House of Lords intended to disturb a decision as firmly settled as that in the *Diocesan Fund* case.[44]

For American law the application to trusts of the rule of validity that obtains for powers would mean the overruling of decisions which have denied effect to trusts for benevolent purposes. This has not yet occurred, but it would occur if our courts accepted the Eng-

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42. *See* Harris, *supra* note 1; Hopkins, *supra* note 1.

43. *In re* Shaw, [1957] 1 W.L.R. 729 (Ch.). *See also In re* Astor's Settlement Trusts, [1952] Ch. 534. Even before the decision in *Baden's Trusts* there was some uncertainty as to the meaning and scope of these decisions. There has been some suggestion of a distinction between a trust which contemplates disposition for the benefit of persons or institutions, and a trust in which the fund would be used for a specified purpose without such a disposition. Honorary trusts such as those for the care of animals are of the latter type, and the inclination has been to treat them as anomalous, to be strictly limited. *In re* Denley's Trust Deed, [1969] 1 Ch. 373 (1968).

44. In *In re* Endacott, [1960] Ch. 232, 250, Harman, L.J., expressed the view that nothing should be done to upset "the whole structure so elaborately built up and, one had hoped after *Diplock's* case, so firmly established." The reference is to the *Diocesan Fund* case, which was entitled *In re* Diplock in the Court of Appeal, [1941] Ch. 253 (C.A.). *But cf. Re* Wootton's Will Trusts, [1968] 2 All E.R. 618 (Ch.).

lish assimilation of the two rules while adhering to our own test of the validity of powers.[45]

45. The trust in *Baden's Trusts* was established by the settlor during his lifetime, but the attack on the trust did not occur until after his death. It was taken for granted that on the issue of validity it made no difference whether the trust was inter vivos or testamentary, and indeed there is no persuasive reason why it should make a difference. Nonetheless, the *Second Restatement of Trusts* draws a sharp distinction between the two types of trust. The rules heretofore discussed apply only to testamentary trusts; in contrast, it is said that an inter vivos trust for indefinite beneficiaries or purposes creates merely a revocable agency which is revoked by the death of the settlor. In section 122 covering indefinite beneficiaries, comment *h* says that an inter vivos trust is governed by section 419, and the same is said in section 123, comment *h*, as to trusts for indefinite purposes. The revocable agency analysis is adopted in section 419. Had the House of Lords accepted this notion it would never have reached the issues which in fact it undertook to decide. There is no sense or principle to the *Restatement* distinction and no case has been found which supports it. This treatment of inter vivos trusts is discussed critically in Palmer, *supra* note 3, at 284-85. None of the cases cited in A. Scott, *supra* note 14, § 419, supports the revocable agency analysis. The decision in *Baden's Trusts* is useful authority in opposition to the distinction.