CASE NOTES

Re GOODSON, deceased[1]

Testamentary gifts to charities—Effect of incorporation of an association prior to death of testator on gift bequeathed to it—Dispositions to unincorporated associations.

This case was heard in the Supreme Court by Adam J. on an originating summons taken out by the plaintiff to determine certain questions of construction arising out of the will of the deceased, Annie Goodson.

Several issues were raised in the case. The first concerned Clause 3 of the will, a devise of the testatrix's land and house to the Church of England to be used as a home for 'refined elderly ladies'. The house was semi-derelict and found to be totally unsuitable for the purposes intended by the testatrix. It was, therefore, held that the gift failed for impracticability. Adam J. found himself unable to construe from the will a general charitable intention in the testatrix which would enable him to set up a scheme to save the gift. She had set out elaborate provisions in her will as to the conditions in which the house and its contents were to be kept, intending the house to remain as it was when she had lived there. Thus it was held that 'the testatrix must be taken to have regarded the use of her home and land as a home for the refined elderly ladies as an essential and indispensable element of her gift, and not merely as subsidiary means of giving effect to an intention to provide a home for persons of the designated description regardless of the site'.[2]

Since the gift was held to have failed, it became necessary to decide whether the property passed to the next of kin as on intestacy or fell into residue. The will was framed as a total gift of all of the testatrix's property, subject to the gift in Clause 3. The next of kin argued that the testatrix had expressly exempted the gift from residue; they relied on the provision in the will that the testatrix did not wish the property to be sold. Adam J. rejected this argument and applied the rule as stated in *Blight v. Hartnoll*[3] that in general the residuary gift carries every lapsed legacy. He could find nothing in the will to show that the testatrix intended the gift to be exempted from the gift of residue.

None of the foregoing raised particularly difficult legal problems, since all that was involved was the application of well-established principle, but the resolution of the remaining issues was more interesting. The residue of the testatrix's estate was divided into 68 equal shares. Five of these were to be given on trust for 'the general purpose of the Cat Protection Society'. At the date of the will, this Society was unincorporated, but in the intervening period before the death of the testatrix, it had become a corporation. The question was whether the gift had lapsed or whether it should be given to the incorporated body.

Adam J. first considered the objects of the Society and decided that they were charitable. He then stated that he considered it proper,

> should it be necessary to save the gift from lapse, to construe the gift expressed as it is for the general purposes of a charitable body as creating a purpose trust rather than conferring an absolute gift on the society.[4]

[1] [1971] V.R. 801.
[2] *Ibid.* 806-7.
[3] (1883) 23 Ch.D. 218, 220.
[4] *Re Goodson, deceased* [1971] V.R. 801, 810.

His Honour used a presumption that a gift to charity, 'will readily be presumed to involve a purpose trust where necessary to save the gift for charity.'[5]

Having construed the gift as one for the charitable work of the Society, Adam J. concluded that this work had been continued without interruption by the corporation as successor to the Society. He therefore found it unnecessary to set up a special scheme giving effect to the testatrix's charitable intention, but ordered the gift to be paid to the corporation for its purposes. The decision accords with several previous cases cited by Adam J.[6] and also with the recent decision of *Re Tyrie, deceased (No. 1)*.[7]

Another five shares of the residue were held on trust for the 'general purposes of the Loyal Orange Institution of Victoria of 326 Flinders Lane, Melbourne'. This body was at all material times an unincorporated association.

In construing this clause, Adam J. purported to apply the principles laid down in cases such as *Leahy v. The Attorney-General for New South Wales*[8] and *Re Cain*.[9] These cases dealt with gifts to unincorporated associations which could be interpreted as gifts to the individual members of the associations.

In the light of the Privy Council's judgment in *Leahy's* case[10] there were several ways in which this gift could have been interpreted. It could have been found that the paramount intention of the testatrix was to give the gift to the association as such. This gift would be invalid. The intentions of the testatrix might alternatively be construed so as to bestow the gift on the members of the association, a construction which would validate the gift; or it could be argued that the testatrix intended to give it to the members, not beneficially, but on trust for themselves and future members. This would create a persons trust which would, however, fail for uncertainty of beneficiaries and because it infringed the rule against perpetuities. A final alternative would be to construe the gift as a purpose trust. Since the body concerned was not a charity however, the gift would fail.

Adam J. adopted the second construction, holding the gift to be valid as a gift to the individual members. Aside from the will, the rules of the association provided that such a gift would be taken by the members subject to the rules and Constitution of the association.

The decision provides an interesting contrast to that of the High Court in *Bacon v. Pianta*,[11] where the gift was 'to the Communist Party for its sole use and benefit'. Although the legal principles applied purport to be the same, there is a difference in the result reached. *Bacon v. Pianta*[12] applied the principles laid down in *Leahy's* case[13] where it was stated that there was a *prima facie* presumption that a gift to an unincorporated body was a gift to its members. Thus the presumption enables a gift to be held valid by requiring the adoption, in preference to the other constructions, of that holding the gift to be one for the individual members. This presumption could be rebutted by other considerations arising out of the terms in the will, that is, the presumption would validate the gift unless there was a contrary intention.

[5] *Ibid.*
[6] *Ibid.*
[7] [1972] V.R. 168.
[8] [1959] A.C. 457.
[9] [1950] V.R. 382.
[10] *Leahy v. Attorney-General for N.S.W.* [1959] A.C. 457.
[11] (1966) 114 C.L.R. 634.
[12] *Ibid.*
[13] [1959] A.C. 457.

The High Court in *Bacon v. Pianta*,[14] having stated the presumption of validity, chose to give weight to the various aspects of the particular disposition before it which tended to rebut that presumption and thus to invalidate the gift. On the other hand, Adam J. did not really consider the presumption. Nor did he take account of any rebutting factors in considering whether or not this was a gift to individuals. He said:

> In my opinion, the creation of a purpose trust should not be inferred in the care of non-charitable bodies unless that is clearly required to effectuate a testator's intention.[15]

The factors regarded in *Bacon's* case[16] and *Leahy's* case[17] as tending to rebut the presumption of a gift to individuals were the form of the gift, the type of property bequeathed, the type of membership and the possibility of winding up the association. The form of the gift in *Bacon's* case[18] was regarded as very important. The testator's use of the word 'it' to describe the association was interpreted as indicating an intention in the testator to benefit the association as such. In *Re Goodson*,[19] however, Adam J. stated that the fact that the gift was 'to the general purposes of the Institution' and not 'to the institution for its general purposes,' was not material.[20]

Because the property involved in this case was money (the residue had been left on a trust for sale), the nature of the subject matter of the gift did not militate against the presumption of a gift to individual members. In *Bacon*, much was made of the concept of an extensive and fluctuating membership which would reduce the likelihood of the testator having intended to benefit individual members.[21] Here, although the gift was confined to the Loyal Orange Institution in Victoria, this body still had a large membership. (There were 108 private lodges in Victoria.) Finally, the High Court in *Bacon v. Pianta*[22] argued that it was impossible to say that the members had any practical capacity to put an end to their association and to distribute its assets. Therefore, it was held that because winding up was virtually impossible, it could not have been contemplated by the testator; he could not have intended the gift for the individual members since it would have been difficult for them ever to get their share.

In the present case Adam J. seemed to argue the other way.[23] He seemed to imply that the testatrix knew when she inserted the clause benefiting the association that she ran the risk of the organization being wound up. This result would not have pleased her. But she could have been dogmatic and have intended that the individual members never get their shares. The gift would then have been construed as a purpose trust and would consequently have been void; or she could have intended that the members should not receive their shares while the association remained as it was, but could receive the gift on a winding up of the institution. He preferred the latter construction, being impressed by the fact that it would be difficult to wind up the association (there

[14] (1966) 114 C.L.R. 634.
[15] *Re Goodson, deceased* [1971] V.R. 801, 813.
[16] (1966) 114 C.L.R. 634.
[17] [1959] A.C. 457.
[18] (1966) 114 C.L.R. 634.
[19] *Re Goodson, deceased* [1971] V.R. 801.
[20] *Ibid.* 813.
[21] See Hogg, 'Testamentary Dispositions to Unincorporated Associations' (1971) 8 *M.U.L.R.* 1.
[22] (1966) 114 C.L.R. 634.
[23] *Re Goodson, deceased* [1971] V.R. 801, 813.

was no provision for winding up in the rules), and hence the risk of the members benefiting individually would not have been high. He was prepared to assume that the testatrix was willing to take this chance.

Adam J. made no mention at all of the High Court judgment in *Bacon v. Pianta*,[24] and mentioned *Leahy's* case[25] only in passing, without really examining the judgment. *Bacon* could have been distinguished on the form of the gift and the attributes of the association, but rather than attempting to distinguish it, His Honour chose simply to ignore it.

It should be noted that if there had been a rule of the association prohibiting a member from ever sharing in the common fund, then the gift would have been construed as a purpose trust. Here, the gift was to be paid into the club funds but there was no condition that the members were never to take their share. It was this, in the view of Adam J., which distinguished it from a purpose trust. Another point which perhaps may be mentioned is that the learned judge seemed to accept the strict view of *Morice v. The Bishop of Durham*[26] in that he implied that if there is a purpose trust, the gift is invalid regardless of whether there had been a breach of the perpetuity rule.

The case represents an enlightened solution to overcome a serious problem. The decision is to be welcomed as perhaps reflecting a judicial attitude, which will help to decide cases such as *Bacon v. Pianta* in a more sensible way.

PATRICIA BELLON

SHARP v. ELLIS; RE EDWARD LOVE & CO. PTY LTD (IN VOL. LIQ.)[1]

Contract—Consideration—Promissory Notes—Performance of void agreement not consideration for later valid agreement.

The recent case of *Sharp v. Ellis*[2] raised anew the question of Lord Mansfield's doctrine of moral consideration. In the Supreme Court of Victoria Gillard J. had to consider the 1863 case of *Flight v. Reed*[3] which Professor Holdsworth has characterized as one of the last manifestations of Lord Mansfield's heretical views on consideration.[4]

The applicant Sharp had loaned various sums of money amounting to $17,000 to Edward Love & Co. Pty Ltd. He took as security ten promissory notes. The notes had been drawn from 1954 onwards. When they had fallen due new notes had been issued. By virtue of clause 4 of its memorandum of association the company was empowered to receive deposits only from its shareholders. Though the applicant sought to establish that the directors had drawn the notes on their own behalf, on the evidence before him Gillard J. held that the company was the principal debtor.[5] Since such deposits were *ultra vires* the company's memorandum of association Adam J. had held in

[24] (1966) 114 C.L.R. 634. [25] [1959] A.C. 457.
[26] (1805) 32 E.R. 656, 947.

[1] [1972] V.R. 137. Supreme Court of Victoria, Gillard J.
[2] *Ibid.* [3] (1863) 1 H. & C. 703.
[4] Holdsworth, *History of English Law* (4th ed., 1966) viii, 31.
[5] [1972] V.R. 137, 138-9.