

## Discriminatory Conditions re Rattray

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When an institution is given property upon terms which it regards as objectionable an obvious solution is to disclaim the gift. This course of high principle does however carry with it the consequence that the gift is lost. This is particularly serious where the donee is a university, and the gift is designed to provide scholarships or bursaries to needy students. Universities are chronically short of such funds, and the absence of such funds helps to reinforce the unpalatable fact that the surest way to get into a university is to be born into a middle-class family.

Nevertheless, in *Re Metcalfe* [1972] 3 O.R. 598 McGill University chose to disclaim a gift for the establishment of scholarships in its medical faculty. The terms of the bequest required not only that the recipients be in need of financial assistance, but also that they be protestants of good moral character. In a comment on that case in an earlier issue of this journal ((1973) vol. 1, no. 2, p. 47) Professor Cullity pointed out that the university may have been too hasty in disclaiming. It is entirely likely that a court would have been willing to vary the trust by deletion of the objectionable terms, under the recently extended *cy-près* doctrine. This was done in *Re Lysaght* [1966] Ch. 191, where a trust for medical scholarships was varied by deletion of a term which stipulated that the recipients must not be of the Jewish or Roman Catholic faith. (In Ontario, there are also unreported precedents for the use of the Variation of Trusts Act to delete objectionable conditions from charitable trusts. As Professor Cullity pointed out in his comment, these precedents are hard to justify; the *cy-près* doctrine is the correct basis for variation of charitable trusts.)

Variation is not, however, the only way of keeping the money but not the objectionable condition. In *Re Rattray* [1973] 3 O.R. 805 (H.C.); (1947) 3 O.R. (2d) 117 (C.A.), Queen's University was confronted with a testamentary gift for university scholarships and bursaries which stipulated that a recipient must not be "a Communist, Socialist or Fellow Traveller". The testator died in 1959, and Queen's University initially accepted payments from the estate without directing its collective mind to the implications of the condition for an institution devoted to freedom of speech and thought. However, in 1972, when the trustee of the estate specifically drew the university's attention to the condition, the university applied to the court for a declaration that the condition was void for uncertainty. In fact the university had not had any trouble in disbursing the funds which it had received, but it had done so, apparently, by disregarding the condition. Now the university argued that the vagueness of the terms "communist", "socialist" and "fellow traveller" made it impossible for the university to determine whether any particular student fell within the prohibited categories. In the High Court, Wells, C.J.H.C. agreed, holding that the condition was void

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for uncertainty, and that it could be severed from the rest of the trust, which was a valid and otherwise complete charitable trust. The Court of Appeal affirmed. Queen's University ended up with both the warm glow of moral rectitude and the money — a very happy situation.

The court did not mention the possibility that a condition of the kind impugned might be void for public policy. This does not seem to have been one of the grounds of the application by Queen's University, and certainly English and Canadian courts have been exceedingly reluctant to ride that unruly horse. Nevertheless, cases such as *Re Rattray* do wear an air of unreality in their refusal to acknowledge that the most important problem with conditions which discriminate on the basis of colour, race, sex, religion (or political belief?) is not that they make the trust impossible to carry out (*Re Lysaght*), nor even that they are uncertain (*Re Rattray*), but that they are morally objectionable. Should the courts not simply hold that they are also illegal?