sion is very much in favour of the proposal and the Government also seems inclined to support it.

All of this would seem to be proof, if proof were needed, that those who practice this type of law in England are satisfied that the company, even the charitable company limited by guarantee, is not, in the final analysis, an appropriate form of structure for the carrying out of not-for-profit activities which include the protection and maintenance of the heritage. Until such time as the new structure has been developed, however, it remains the most appropriate alternative.

Frits W. Hondius

Foundations

At the approach of the year 2000 it is interesting to examine what expectations people had some time ago about foundations at that fateful point in time.

About thirty years ago, Alan Pifer, President of the Carnegie Corporation of New York , pronounced in Kansas City an address entitled "The Foundation in the Year 2000"[1]; I myself presented ten years ago in The Hague a study taking stock of foundation laws worldwide.

Mr Pifer followed a seemingly safe method of predicting the future. On the basis of available statistics on the number of US foundations and their annual expenditure in 1968, as compared to the situation thirty years earlier, he extrapolated that there would be a vast number of foundations in 2000, but a decline in average resources. By pure mathematical calculation, he arrived at the astronomical figure of 1,400,000 US foundations with a total sum of $ 48 billion to spend. The annual grant-making per foundation would decline however from $ 117 thousand in 1936 to $ 34 thousand in the year 2000, all this without taking into account the devaluation of the dollar over sixty years. So, many more applications for foundation grants would have to be turned down, but one could advise each applicant : "there are more than a million other foundations with whom you can try your luck".

Mr Pifer's scenario, like that of Malthus, will not come true. While between 1936 and 1968, the number of foundations had increased 70-fold, it has just doubled over the 30 years that followed. The Council on Foundations in Washington[2] estimates that by the year 2000, there will be 43,000 US foundations having approximately US $ 235 billion (depending on the stock market), to spend among them (i. e. $ 546 thousand per foundation).

Yet, Mr Pifer's note of warning was useful. He reminded us that increasing the number of foundations does not necessarily mean increasing the amount of foundation money available for noble causes, such as heritage conservation. We were recently informed of the excellent initiative of the French Minister of Culture to set up a Fondation pour le Patrimoine[3]. But will this new foundation generate new funds for heritage? Or will it simply be a new competitor for existing funds?

The number of charitable causes is on the increase which means that more and more causes compete for support from the same finite pool of charitable funds and donations. Just to mention one new cause which is very popular in ex-Communist countries and has already consumed vast sums of money: it is loosely called 'civil society', i. e. activities in support of citizens' voluntary action for the benefit of society. This receives support from new funders, such as the Soros foundations. An interesting question which a reporter might wish to put to Mr Soros is this one: "If you had not invented the "open society", would you have considered giving your money for heritage conservation?" While new causes may open up new fountains of support it is also the case that some funders simply shift from time to time their grant-making policies. Since heritage, almost per definition, has always been around, there is a risk that its continued presence is also taken too much for granted and not given a sufficiently high priority, except after major calamities such as floods, earthquakes, fire or war.

When the first draft of my own study on foundations, written together with Professor van der Ploeg (Free University, Amsterdam) for ultimate publication in the International Encyclopedia of Comparative Law, was finalised in 1987, we indicated that there were then in Central and Eastern Europe hardly any foundations. Only a few years later, we have had to swallow those words and thoroughly revise our study. In Central and Eastern Europe there are today thousands of foundations and many foundation laws or draft laws.

In a more recent study, submitted in 1994 to the Vienna Symposium on Legal Aspects of International Trade in Art, I have called the foundation a "time honoured model for heritage conservation"[4]. Foundations fulfil a wide array of functions with regard to heritage conservation. First and foremost, the property of heritage objects can be entrusted to foundations. The purpose clause in a foundation's constitution can help ensure that the building or site will only be used for the specified purpose (e. g. museum, concert hall). This is an advantage over state ownership or private ownership which does not necessarily guarantee use of the building in keeping with its historical importance. Secondly, foundations can channel support for a monument or site. Apart from grant-making (as envisaged by the French Fondation du Patrimoine) a foundation can handle a fund-raising campaign. Thirdly, foundations can act as organizers of activities taking place within a monument (e. g. concerts)

even where the building itself is not a foundation, but for example State property. Fourth, foundations can promote the training of heritage craftsmen, one of the best known examples being the European Centre for heritage craft training which was created in 1977 by Sfora-Galeazzo Sforza in Venice. Finally, foundations can help to promote public awareness about heritage and reward outstanding achievements in heritage conservation. I recall in this connection the prizes awarded by the Aga Khan Foundation.

At the end of my Vienna paper I have made two recommendations for action and I am pleased to note that on both, action is now being taken. First, I asked that a serious effort be made to define more clearly in foundation laws or tax laws the notion of "heritage" as a charitable purpose. To most people in the street "heritage" means practically the opposite of what we in this room wish it to mean. The general notion of heritage is property which on the death of the owner is dispersed among his heirs-at-law. We in the conference room do not wish it to be dispersed but to be kept together and conserved. Lack of an internationally agreed definition leads to difficulties with regard to transborder giving for heritage and with regard to tax treatment. I have noted with pleasure that attempts are now being made at the international level at defining "heritage", for example in an interesting document emanating from the Council of Europe's Heritage Committee defining, for approval by the Committee of Ministers[5], cultural heritage as "any material or non material vestige of human endeavour and any trace of human activities in the natural environment". I note, however, that this definition was drafted not with regard to heritage in general but for purposes of heritage education. I hope that it will also satisfy the need for defining heritage in other contexts and that the cultural heritage experts concerned, before finalising their work, will consult their colleagues in Ministries of Justice and Finance.

The conformity of this definition with the definitions already adopted in the Council of Europe Conventions on the Protection of the Archaeological and Architectural Heritage, of 1969, 1985 and 1992 (ETS N°66, 121 and 143) should also be carefully considered.[6]

The second recommendation which I made in my Vienna paper is that tax treatment of cross-frontier giving in favour of the heritage should be improved. In my capacity of Chief Trustee of the Europhil Trust, I called and presided in December 1996 a Round Table in Bratislava on "Tax Treatment of NGOs" which ended with the adoption of the "Bratislava Declaration" on that subject. I will come back to this matter at the end of my paper.

Foundations and their development in the Civil Law

I am very pleased to take the floor after Dr Kearns of the University of Leicester. I am from Strasbourg, which has a partnership with Leicester. Dr Kearns has spoken about the Common Law, about charitable trusts. I will address the Civil Law, about foundations which are so-called legal persons. A century ago, there was a conversation about the same topic between the two famous professors of Law from England and from the Continent: Maitland and Von Gierke. "My dear Professor Gierke" said Maitland, "I still do not understand your legal persons". "Lieber Herr Kollege", Gierke answered "nor do I understand your trust".

It would be an over- simplification to pretend that Europe, and indeed the world, is divided into two camps: at one side the trusts, charities and non-profit organisations of the Common Law (Great Britain and Ireland, the Commonwealth, North America), and at the other side the foundations and other non-governmental legal persons of the Civil Law (Continental Europe and the Russian Federation, Latin America and some countries of Africa and Asia) .

At the Common Law side, it is true that countries there share certain legal characteristics, such as reliance on the courts to give guidance as to the meaning of the law and a variety of legal forms for public benefit purposes served by charitable trusts or non-profit organisations and that neither in England nor in the USA the term "foundation" has as such a legal significance, except as a term of art. But there are important differences too between the laws relating to foundations on both sides of the Atlantic. In England the crucial factor with regard to charities is that these bodies, whatever their form, must be dedicated to a public benefit purpose recognised under the 1993 Charities Act and subject to the scrutiny of the Charity Commissioners for England and Wales. It is also a fundamental English rule, which turns sometimes into an obsession, that charities should not transgress the border between voluntary action and political activism, on the ground that only the Parliament in Westminister decides what is for the common good. This means that during the present suspense before the May 1997 general elections, nobody can say what is the common good.

In the United States, foundations have always been in the forefront of social and political change and not in any way subservient to the US Congress – as is being demonstrated at present by the foundations of the Soros network (one of these has just been thrown out of Belarus on the accusation of interfering with that country's internal politics). However, in the USA there is another criterion designed to set foundations apart from the main movers on the national scene, i. e. business corporations. Foundations and business corporations are opposites: profit-making vs non profit making. The only federal institution capable of telling the difference is the US Internal Revenue Service.The holy writ of American foundations law is Section 501 (c) (3) of the Internal Revenue Code. This American concern about non-profit organisations, 'non-profits' for short, causes some confusion in the former communist countries of Central and Eastern Europe, which are in the process of reforming their laws both in the field of the market economy and the field of voluntary organisations. Private ownership of and income from capital, and various taxes on income thus earned, are still a novelty to many of those countries as proved by the present disarray in Albania. Distinguishing the voluntary sector in those countries by means of the criterion of 'non profit making', as recommended by some well-meaning American organisations (e. g. ICNL) is unhelpful. The concept most meaningful both to Common Law and to Civil Law countries, to Albania as well as Australia, is that of 'non-governmental organisation' (NGO). This concept was coined fifty years ago in Article 71 of the UN Charter and is recognised as useful by all other international organisations, such as Unesco, UNHCR, World Bank,Council of Europe, Unicef, etc.[7]

Historical differences

The legal régime governing foundations in the so-called Civil Law countries is far from uniform. The presumed common legal bond between these countries – mainly continental Europe (with the exception of Scandinavia), all of Latin America and some other parts of the world (in the wake of colonial empires) – is the heritage of Roman Law, the Corpus Juris Civilis, followed in the 19th century by the French Code Civil and at the dawn of the 20th century by the German BGB. It is true that Roman law and in particular its reception into canon law has provided a fertile basis for the law on foundations. This has had important consequences. In the countries of Roman Catholic tradition – which means the whole of Europe until the Reformation and, thereafter, the countries which remained Roman Catholic – the law governing foundations was not civil law at all, but law deriving from the church and outside the statute books of the State. This has remained so until the French Revolution.

The great codification work of Napoleon, which has left a deep impact on countries both in the traditional Roman Catholic sphere and the Protestant parts of Northwestern Europe – countries which since became known as 'Civil Law' countries – had no consequences for foundation law, except for the universal recognition of the existence of legal persons. Even today, one will look in vain for the word *fondation* in the French Civil Code, the prototype of all civil codes. This anomaly is explained by the fact that the French Revolution and its philosophers were promoting the notion of *contrat social,* the great consensus between the citizen and the (central) State which had no scope for geographic or functional intermediaries such as cities, guilds, corporations or foundations. It was only in 1901, a century after the Code Civil, that France legalised associations and only as recently as ten years ago, in 1987, that France adopted a first sectoral law regulating a group of foundations, i. e. enterprise foundations.[8] There still is no general French law on foundations, but only an administrative practice and a "regal" tradition. In certain respects, the charity law of England and Wales has an affinity with foundation law of France in that in both countries a public body (the Charity Commissioners for England and Wales and the Conseil d'Etat in France) sovereignly decides whether a foundation serves the public benefit *(charitable* in England, *d'utilité publique* in France) and thereby is worthy of public recognition.

The comparison seems to stop here for against a paltry few hundred foundations in France there are a huge number of charities in England, about 180,000, but we should bear in mind that the latter include many associations which in France form a separate category, almost half a million strong.

The common European origin of foundations is in the church which acquired the property of houses and places for worship *(venerabiles domus atque locus)* many of which today enjoy the status of monuments and sites, the 'M' and 'S' of ICOMOS, and property dedicated to charity *(piae causae)* such as hospitals, schools, etc. The legal model of these institutions, which had their equivalent in the *wakf* and *habous* established under Islam, originally resembled the trust, i. e. property administered by a priest and his successors not for himself but for a noble purpose designated by the living or deceased founder. The foundation, thus established, had no independent existence of its own. This variant is still encountered today, even in Civil Law countries in respect of smaller endowments, for example for scholarships, prizes or hospital beds. It is less appropriate, however, as a vehicle for larger endowments, especially those involving immovable property: almshouses, hostels for pilgrims, etc. and it was this type of charitable bodies, indicated in German as *Anstaltsstiftungen* ('institution foundations'), which set the tone for Civil Law foundations: legal persons consisting of, or owning, property dedicated to a purpose and administered in accordance with the rules laid down in its charter. Eventually, and in particular in times of prosperity, there developed a new type of charitable body, i. e. the foundation endowed with a capital from which grants could be made for beneficial purposes, the *Hauptgeldstiftungen.* The distinction between foundations solely serving and financing a fixed activity, such as the management of a hospital or a museum, and foundations supporting activities undertaken by others still exists today and is reflected in the terms *operational foundation* (for example the Fondation Gianadda) and *grant-giving foundation* (e. g. the Volkswagen Stiftung). In most legal systems, the term 'foundation' itself gives no guidance as to which of the two categories a foundation is in, a constant source of frustration for people seeking a grant.

The considerable size of the properties acquired over time by the church and ecclesiastical orders for purposes of worship and charity, outside the jurisdiction and taxation powers of secular rulers, aroused the envy of the latter. Repeatedly, strong rulers have placed limits on *mortmain,* i. e. the making of gifts of land to charitable corporations. In countries traditionally belonging to the Roman Catholic world, e. g. Belgium or France, such restrictions still exist and pose an additional problem to foundations incorporating monuments or sites. In recent times, communist régimes showed a similar dislike of the independence of foundations and put an end to many of them (e. g. in Communist Poland and Czechoslovakia). It was only during the declining years of communism that the régimes in power discovered the seductive charms of foundations for collecting private financial support from non-communist sources.

In France, there still is a strong *étatique* attitude towards foundations. It took de Gaulle himself and five of his Government Ministers to sign the decree setting up the Fondation de France. The Fondation Vasarely, a genuine monuments-and-sites foundation in Aix-en-Provence, had to wait many years before obtaining recognition by the State in 1981. However, things have turned sour and recently, after an incredible juridico-political drama, the State dealt this foundation a fatal blow by presenting it with a bill for 18 million francs in tax arrears. The creator and founder, Victor Vasarely, did not survive his foundation. He died in Paris on 15 March last, aged 84.[9]

Disengagement of foundations from the church in Civil Law countries

A second historical stage in the development of foundations is that after the Reformation the bond between foundations and the church was slackened in the countries of Northwestern Europe. Comforted by trade, commerce and the growth

Dr. Hondius and his wife donated in 1992 two gargoyles to their Gothic-style college in Oxford, St. Cross. This being the year of Columbus, they opted for a pre-Columbian motif, the quetzalcoatl, who bears a striking resemblance with medieval gargoyles of Europe, although there had been absolutely no contact between the two cultures. The recipient at the English side being a charity, the transaction should pose no legal problem, especially as it took place within the European Union.

of a strong civil society, prosperous citizens, mixing civic pride and social responsibility, created foundations, independent of church and State, usually of the *Anstaltsstiftung* type (old people's homes, museums, etc.), some of which still exist today, for example the Teylers Foundation in Haarlem (Netherlands), a museum and literary society created by testament.

After the industrial revolution, the phenomenon of creation of foundations by wealthy citizens or big corporations (Rockefeller, Ford, Wellcome, Nobel, Bosch, Van Leer) became a hallmark of non-Latin, non-Catholic countries, both Common and Civil Law. The State was involved only as supervisor or *parens patriae,* not as the fountain of legality. In fact, foundations are subject to a mixture of private law and public law; they are carriers of private funds dedicated to goals of public interest.

Eventually, the concept of foundations generated by commercial and industrial wealth has entered into the mores of all market economy countries, including those of the Latin world, such as Spain and Italy.

Common legal characteristics of foundations

The historical development mentioned above has set the pattern for foundation law in all Civil Law countries, the principal aspect of this law being that foundations are considered legal persons which can participate in civil life on the same basis as natural persons. However, just as there are certain mechanisms whereby the proper functioning of natural persons in day-to-day life are controlled: parents over children, guardians over incapable adults, employers over employees, thus society has also instituted certain mechanisms of control over legal persons, including foundations. In all countries, there is an equivalent of *état civil* (registration of natural persons) for legal persons. There are public records in which foundations are registered. In all countries the courts exercise jurisdiction and can take decisions where foundations fail or violate the law.

There is still a fundamental dividing line running through Civil Law countries with regard to the question whether a foundation needs for its existence the prior consent or participation of a State body. Such consent is required under the laws of Austria, Belgium, France, Germany (*Land* level), Italy, Greece and Luxembourg. In other countries, while foundations cannot exist legally unless registered (e. g. Albania, Belarus, Bulgaria, Croatia, Cyprus, Estonia, Finland, Hungary, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, Ukraine), such registration can be refused by the public authority keeping the register only if the foundation does not meet the formal conditions laid down in the law.

In Denmark, Netherlands, Sweden, and Switzerland registration is required only for certain types of foundation and the possession of legal personality does not depend on registration.[10]

It is interesting to note that after the demise of communism most Central and Eastern European countries have sided with the liberal group of countries where prior State consent is not required. But it should also be noted that several Central and East European legislators have laid down such detailed rules on registration, operation and supervision, showing a certain lack of confidence in the self-regulatory capacity of the civil society, that this amounts to a *de facto* prior consent rule.

Some countries in both Western and Eastern Europe require a minimum initial capital as a precondition for the existence of a foundation : Austria (1 million Schillinge), Denmark (250 thousand crowns for non-commercial and 300 thousand for commercial foundations), France (5 million francs), Norway (50 thousand crowns), Slovakia (100 thousand crowns). The critics of this requirement point out that the objective can better be met by the requirement appearing in several laws that a foundation must be capable of acquiring the means necessary for its fulfilment.

Monuments and sites as objects of foundations

There are certain differences to be found in national laws with regard to the question how permissible purposes of foundations are formulated, varying between complete liberty of choice for the founders (e. g. Netherlands, all the law requires is "a given purpose") and a strict enumeration of purposes by the law, often with a general clause added to cover non-enumerated purposes.

For our present paper, we are interested in the question to what extent monuments and sites can count as charitable objects. While this ought to be the case for all countries, it is puzzling that very few countries list monuments and sites explicitly among foundation purposes. We have come across just two laws where this is the case, those of Poland and Spain. Other countries will treat monuments as such under 'culture' or 'art', whereas beneficial uses of monuments may

be counted, as the case may be, under the heads of 'religion', 'education' etc. as sites may qualify as 'cultural', 'recreational' or 'protection of the environment'.

Monuments and sites sometimes will fit into the omnibus clauses contained in foundation laws (Albania CC art 54 "social usefulness"; Austria StFG art 1(1) "gemeinnützige Aufgaben"; Costa Rica, Law 5338, "educational, charitable, artistic, literary, scientific or other").

More frequently, monuments and sites appear in tax laws on deductibility of charitable donations, not only in the case of donations to foundations but also in the case of direct donations to a monument (e. g. for the reconstruction of a publicly owned building).

The Polish Foundations Act 1984 specifically mentions in its article 1 "... protection of the environment and protection of historical monuments."

The Spanish Foundations Act 1994 indicates in article 2 (1) that purposes to be served by foundations should be of "general interest". There follows a list which does not mention monuments and sites (but which can be considered as included under headings such as "culture" and "environment").

Paragraph (3) forbids the establishment of foundations for the benefit of close relatives of the founder. However, paragraph (4) indicates that foundations set up for "conservation and restoration of objects of the historical Spanish heritage in conformity with Law 16/1985 on Spanish Historical Heritage" are not bound by this restriction. They may favour such relatives if the persons concerned comply with the obligation to admit visitors and to publicly display objects.

Economic activity and taxation

There are two specific aspects of foundation laws which require our special attention where heritage foundations are concerned: economic activity and taxation.

Economic activity by foundations, in support of their statutory purposes, is not in contradiction to their character as 'non-profit bodies'. However, all legal systems prohibit foundations from making payments to the members of their governing bodies or, on liquidation, from distributing the reliquat to these or to the original founder or his heirs.

Economic activity has two principal aspects: if and to what extent it is permissible and what is the tax treatment accorded to it ? It is often very delicate to draw the line between economic activity directly related to the achievement of the purposes of the foundation and other, unrelated business. Most museums run a catalogue, video and souvenir stand, a buffet and sometimes a restaurant. All this is part of their normal operation and as such permissible. As a commercial activity it will fall under the general tax rules, in particular where the service or product is offered in competition with local enterprises, such as souvenir shops and restaurants. But entrance tickets, registration fees for conferences, work donated by volunteers are a different story. They form part of the direct annual income of the foundation, along with donations, bequests and subsidies and should not be regarded as 'profit'.

In most countries of the Civil Law, foundations and their benefactors enjoy a privileged tax treatment. Exceptionally, Lithuania does not grant any fiscal facilities to benefactors. There are two main problems in the fiscal field: considerable differences between the tax treatment in different countries and absence of fiscal incentives for transfrontier giving. The spectrum of tax concessions offered to foundations and their benefactors is of a bewildering variety. It should be mentioned here that two countries, Belgium and Germany, even have punitive tax on foundations to compensate for the fact that the State cannot impose death duties on heirs to foundations which are, in principle, immortal.

Conclusion

It is not possible to review in this paper in detail the tax treatment of foundations dedicated to monuments and sites. It is a veritable minefield, as Woody Allen recently discovered in Venice when he visited the ruins of the Fenice theatre after the fire to see if he could help and was almost arrested for trespassing into a protected site. There is a strong case for greater unity and harmonisation and for rules to take into account transborder giving. The support of monuments and sites is an international cause *par excellence.* There exist special tax books to guide potential donors and beneficiaries through the forest of laws and case law, some of which seem to come about by what Debra Morris calls the "chaos theory".[11]

As I have mentioned before, the Europhil Trust recently held a Round Table in Bratislava and adopted there on 17 December 1996 a 'Declaration on Tax Treatment of NGOs' (which include foundations).[12] It happened to be the day when Mr Kofi Annan was elected United Nations Secretary General, so by a fortunate chance the Declaration was one of the first items on his desk. A follow-up action is now underway, i. e. the drafting of common minimum rules on tax treatment of NGOs. I wish to make a strong plea to those who will be involved in this activity. Do not try to extort from governments special privileges for this or that category of charitable action: for refugees, for sport, for environment, for national minorities, for women or, for that matter, for monuments and sites. Your case will be stronger if you make a united front and ask for just and equitable tax treatment of all good causes. You will remember, in this connection, that a heritage foundation may serve several other heads of charity along with architectural heritage, such as music (Bath festival), education (Schloss Klessheim), archaeology and art (Fondation Pierre Gianadda)

Footnotes

1 Alan Pifer, The Foundation in the Year 2000, New York 1968.

2 Information kindly supplied by fax by John A. Edie, General Counsel.

3 'Le Monde', 19 February and 29 March 1996. Once more, as in the case of the Fondation de France, the French Republic has created a body invested with the prestige of the State. It has been established by Law and defined as "a private national institution associating the State and patronage for safeguarding the cultural and natural heritage." The Senate approved the bill after changing the system of designation of the Foundation's president from appointment by the Government into election by the board members.

4 Frits Hondius, 'The Foundation: Time-honoured Model for Heritage Conservation,' in: Legal Aspects of International Trade in Art, Volume V, Paris/New York, 1996 .

5 Council of Europe, Cultural Heritage Committee, Draft Recommendation of the Committee of Ministers to member States concerning heritage education, CC-PAT (97)O15 rev, 14 March 1997.

6 Convention N° 66 on the Protection of Archaeological Heritage, 1969 : "...all remains and objects, or any traces of human existence" (Article 1); Article 1 of the Convention N° 121 on Protection of Architectural Heritage 1985 lists "monuments, groups of buildings and sites; Convention N° 143 on Archaeological Heritage 1992 adds that heritage is "a source of collective memory".

7 Cf; Charter of the United Nations signed in San Francisco on 26 June 1945, Article 71. Theoretically, commercial companies also qualify as NGOs and in fact they do under Article 25 of the European Human Rights Convention enabling 'non-governmental organisations' to lodge complaints. Normally, however, they are not classified together with associations and foundations.

8 Loi N° 87-573 du 23 juillet 1987 sur le développement du mécénat relative aux fondations.

9 'Le Monde', 18 March 1997.

10 Sources: Council of Europe, Multilateral meeting on Associations and Foundations, Strasbourg 27-29 November 1996, Summary table of replies to questionnaire; Ulrich Drobnig, 'Zur Entwicklung des Stiftungsrechts in Osteuropa', Festschrift für Ernst-Joachim Mestmäcker, Baden-Baden, 1996.

11 Ms Morris's report will be included in the work mentioned below (next footnote).

12 The proceedings of this Round Table will be published by Kluwer Law International. The Declaration calls on (i) governments to enact tax legislation favouring NGOs and their benefactors, (ii) intergovernmental organisations to promote the recognition of transborder giving and (iii) the Europhil Trust to initiate a working party to prepare common international standards for favorable and equal treatment of NGOs and their benefactors.

PAUL KEARNS

Monuments in the Law of Trusts

This paper is designed to illustrate the private sponsorship of the protection and maintenance of monuments in the context of the English law of trusts. It will first examine the nature of a trust, a concept unfamiliar to many continental lawyers, then proceed to focus on the types of trust that most directly affect monuments, giving case law illustrations. Regrettably, most of the law in this area is somewhat archaic so the legal language may seem foreign even to English lawyers. It is hoped that despite this difficulty, the basic framework of the characteristic operation of trusts law relating to monuments will be tolerably clear. The relevant non-charitable purpose trusts and charitable trusts originate in the aims of a settlor or testator who, for present purposes, can be considered a private sponsor of the trusts he sets out to achieve, though this is not the language habitually used in the English law.

A peculiarly English phenomenon, that has spread to kindred legal systems, a trust is a relationship, recognised by Equity[1], initiated by the settlor or testator, which arises when property is vested by him or her in persons called trustees who are obliged to hold such property for the benefit of other persons called beneficiaries. The interest of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law. The subject matter of the trust must be some form of property. The beneficiaries' interests are proprietary in the sense that they can be bought and sold, given away or disposed of by will, but they will cease to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value without notice of the beneficial interest. For the purposes of this article, such a description of a trust is adequate, the precise definition of a trust being generally considered by all experts to be elusive[2].

Trusts can be classified in a plethora of ways. On one analysis, there can be simple and special trusts, statutory trusts, implied and resulting trusts, constructive trusts and express trusts. Within the category of express trusts are executed and executory trusts, completely and incompletely constituted trusts, private and public trusts, discretionary and fixed trusts, protective trusts, secret trusts and, the most important trusts regarding monuments, non-charitable purpose trusts and charitable trusts.

For a trust to be valid, three certainties must be present: certainty of words, certainty of subject and certainty of object. First, with regard to certainty of words, since "Equity looks to the intent rather than the form", it is unnecessary to use specific technical expressions to constitute a trust. All that needs to be conclusively ascertained is an intention to set up a trust. Respecting certainty of subject, only if the property subject to the trust is clearly identified can the trust be valid; and, finally, regarding certainty of object, for the trust to be valid it must be for the benefit of individuals, except if it is a particular brand of non-charitable purpose trust or a charitable trust, which happen to be the two most usual situations in which we find monuments featuring. When a settlor declares a trust he must also comply with any formalities as well as satisfy "the three certainties", and unless he has declared himself trustee, he must do everything he can to ensure that the trust property is transferred to the trustees. If no steps are taken to transfer the property, or further action is required by the settlor to effect such a transfer, the trust will be deemed incompletely constituted.

Let us now examine monuments in first, non-charitable purpose trusts, and second, in charitable trusts, in both of which contexts monuments are most often in issue in contrast to other trust environments.