difficulty encountered by virtue of the intrinsic indefiniteness of any provision involving computations of actual costs of doing business. Where intent is not a requirement and overhead cost calculations enter into the definition of the offense, the rule that a criminal statute should be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,"[23] applies, as in the instant case. If in quest of definiteness the legislators use invoice price plus a fixed percentage markup as a criterion of "cost," such legislation will be properly branded as an attempt to fix minimum prices in business not affected with a public interest. A statute flatly prohibiting sales below invoice price, an easily ascertainable item, would be so definite as to escape the attack on the statutes requiring calculation of overhead, and would be much easier to enforce than the statutes including intent as an ingredient of the offense.[24] Such a statute would provide some kind of floor for the market, although having the disadvantage of excluding many price cutters from its operation.

The fact that those statutes which involve operating cost calculations and the proof of bad intent have been held constitutional does not close the question of their economic desirability.[25] This type of legislation has been fostered principally by trade groups, such as associations of druggists or grocers, and manufacturers who fear the inroads of larger distributors.[26] Insofar as these laws protect merchants from stiff competition made possible by economy of operation in the larger units, they are of questionable desirability; insofar as they protect from price competition having no relation to greater efficiency of the large scale operator, they are a proper exercise of the police power.

Trusts—Charitable Trust—Invalidity for Uncertainty—[North Carolina].—The testator gave $10,000 to his executors "to be held in trust and paid out and appropriated by them within twenty years after my death . . . to such corporations or associa-

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sales of damaged goods where notice is given to the public, sales by court officers and sales made to meet the legal prices of a competitor.

[23] Connally v. General Construction Co., 269 U.S. 385, 391 (1925).

[24] Grether, *op. cit. supra* note 4, at 687, mentions the difficulties in proving intent.

[25] "The use of 'loss leaders' for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies. . . . These arguments are mentioned not because we necessarily believe that they are sound, but to demonstrate that the practice condemned by this statute, according to the views held by a large portion of the body politic, tends toward the stifling of free and open competition, the creation of monopolies and is injurious to the consuming public." Wholesale Tobacco Dealers Bureau of So. Calif., Inc. v. Nat'l Candy and Tobacco Co., 82 P. (2d) 3, 13 (Cal. 1938). See also note in 32 Ill. L. Rev. 816, 847 (1938).

[26] See Burns, The Anti-Trust Laws and the Regulation of Price Competition, 4 Law and Contemp. Prob. 301, 319–20 (1937); McLaughlin *op. cit. supra* note 21, at 413; Grether, The Distributive Trades and Control of Price Competition, 4 Law and Contemp. Prob. 375, 390–91 (1937).

tions of individuals as in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." The residuary beneficiaries brought suit to invalidate the trust against the bank as executor and trustee under the will. *Held*, judgment for the plaintiffs. The trust is void for uncertainty and indefiniteness.[1] *Woodcock v. Wachovia Bank and Trust Co.*[2]

The following paragraph from the court's opinion summarizes the rationale of the decision:

> It is apparent that the uncertainty and indefiniteness extend not only to the beneficiary, that is, "to such corporations or associations" as the executor may select, not only to the discretionary power conferred on the executors to select the beneficiary, but the indefiniteness and uncertainty extend to the ultimate purpose of the trust, to "promote the causes of preventing cruelty to animals."[3]

North Carolina passed an amendment to the statute of charities[4] in 1925 stating that no trust for charitable purposes should be invalid for indefiniteness and uncertainty of the beneficiary, or because discretionary power is conferred upon trustees to select the beneficiary or in carrying out the purposes of the trust. This section, it is admitted by the court, cures part of the indefiniteness and uncertainty found in the will.

Reduced to its legal effect, after the application of the statute, the holding of the principal case may be stated as follows: The charitable trust set up by the clause, "to executors in trust for X[5] for the prevention of cruelty to animals," is void for uncertainty and indefiniteness.

The opposite result is more consonant with the law of other jurisdictions.[6] Precedents in North Carolina did not stand in the court's path. Since courts say that they are wont to favor charitable trusts wherever possible[7] the decision seems very narrow, as at least three separate grounds were available to the court by which it could have upheld the bequest.

[1] North Carolina does not recognize the *cy pres* power, 2 Bogert, Trusts and Trustees § 433 (1935). It is improbable that this power would have influenced the decision in this case, although it might have diverted the funds to a different purpose.

[2] 199 S.E. 20 (N.C. 1938). [3] *Id.* at 24.

[4] "No gift, grant, bequest, or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses . . . shall be invalid by reason of any indefiniteness or uncertainty of the object or the beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purposes thereof . . ." North Carolina Code 1935, § 4035a.

[5] "To X" has been substituted for the clause in the will giving the executors as trustees discretionary powers. The statute seems to have cured the indefiniteness resulting from this grant of power. The substitution is made to show more forcibly the issue that was before the court and the meaning of its decision.

[6] Collier v. Lindley, 203 Cal. 641, 266 Pac. 526 (1928); *In re* DeMars' Estate, 20 Cal. Ap. (2d) 514, 67 P. (2d) 374 (1937); Goode's Adm'r v. Goode, 238 Ky. 620, 38 S.W. (2d) 691 (1931); Stevens v. Smith, 134 Me. 175, 183 Atl. 344 (1936); Moore v. Downham, 166 Va. 77, 184 S.E. 199 (1936); Lord v. Miller, 277 Mass. 276, 178 N.E. 649 (1931); Gossett v. Swinney, 53 F. (2d) 772 (C.C.A. 8th 1931).

[7] 2 Bogert, *op. cit. supra* note 1, at § 361; Perry, Trusts and Trustees § 689 (6th ed. 1911); Gossett v. Swinney, 53 F. (2d) 772 (C.C.A. 8th 1931).

First, the court might have worked out a subtrust relationship between the executors, as trustees, and the donee as subtrustee; or it might have shown that a trustee might employ a corporation or association as an agent in carrying out the purposes of the trust. Lastly, the powers of the court of chancery to instruct the trustee to work out the details of the administration of the charitable trust might have been recalled.

The subtrust theory although never used to any great extent by the courts,[8] has been discussed fully by Mr. Bogert.[9] There are really two trusts; the beneficiary of the main trust is the corporation or association, which holds the bequest in trust for the ultimate beneficiaries, the members of the community, which are those of significance. As formal words are never necessary to raise a trust, merely a show of intention to do so,[10] this explanation would not have been difficult in this case.

It is well settled that the failure to name any trustee for the charitable trust will not prevent the trust from arising, if the other requisite acts of creation have been performed. Courts regard the expression of a charitable trust intent and the indication of a class of beneficiaries as the important factors. The court can supply a trustee. The important matter is that the benefits of the property in question should go to some named social purpose.[11]

In the creation of trusts of this type the settlor often designates a society or corporation as agent of the trust.[12] As such, it carries out the charitable purpose. Courts throughout the United States seem to have had little or no trouble with this arrangement.

The other ground that the court might have used is the power of the courts of equity to administer charitable trusts when the settlor has failed to designate his own plan.[13] The court could have required the trustee to make a contract with the donee to carry out the purpose of the trust. This power is recognized in North Carolina: "The absence of detailed provisions does not make it [the trust] indefinite, but most wisely leaves the development of the idea to the trustee, subject always to the supervision of the court whenever it may be invoked to require the trustee to conform to the general intentions of the bequest."[14] In North Carolina, as in all common-law jurisdictions, charitable trusts are under the surveillance of the Attorney-General, who is charged with seeing that the funds are applied to the proper purposes.[15]

[8] See Burnet v. Wells, 289 U.S. 760 (1933); *In re* Bell's Estate, 141 Misc. 720, 253 N.Y. Supp. 118 (1931).

[9] 2 Bogert, *op. cit. supra* note 1, at §§ 399, 413, 362 at page 1095.

[10] Todd v. Citizen's Gas Co., 46 F. (2d) 855 (C.C.A. 7th 1931); *In re* Bell's Estate, 141 Misc. 720, 253 N.Y. Supp. 118 (1931); 2 Bogert, *op. cit. supra* note 1, at § 324; Perry, *op. cit. supra* note 7, at § 709.

[11] 2 Bogert, *op. cit. supra* note 1, at § 328 and footnotes 21 and 22; Rest., Trusts, § 388 (1935).

[12] *In re* Somerville's Estate, 12 Cal. App. (2d) 430, 55 P. (2d) 597 (1936); *In re* Tiffany's Estate, 285 N.Y. Supp. 971 (1936); *In re* Dazian's Estate, 3 N.Y. S. (2d) 742 (1938); Whitsett v. Clapp, 200 N.C. 647, 158 S.E. 183 (1931).

[13] 2 Bogert, *op. cit. supra* note 1, at § 397; Rest., Trusts § 381 (1935).

[14] Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921). Note that this case came before the amendment to the statute in 1925.

[15] North Carolina Code 1935, § 4033 ff.

Several famous definitions of what constitutes a charitable purpose upon which a charitable trust may be founded have been framed.[16] The one most reflective of the attitude of modern courts is that of the Restatement of the Law of Trusts,[17] according to which any purpose beneficial to the interests of the community is charitable.[18] It is well recognized that the prevention of cruelty to animals is socially beneficial.[19]

Charitable, or public, trusts are frequently said to be the favorites of the courts. In states where the courts have been unable to reach this point of view, remedial statutes have been passed.[20] North Carolina has such a statute.[21]

The history of charitable trusts in that state both before and since the amendment to the charities act in 1925 may be best summed up by a statement from the principal case: "This court has considered the subject many times, and it is not always easy to draw the distinction between trusts held void for uncertainty and those sustained and held capable of enforcement."[22] The first reported case was decided in 1816; the purpose, to emancipate three named slaves, caused the trust to be held void as against public policy and not charitable.[23]

During the succeeding century the judges tended to be conservative in their determination of the validity of charitable trusts for various purposes;[24] but by 1920 a liberal tendency was appearing when the supreme court upheld a trust to "conserve, protect, and beautify" a tract of land and "to erect an auditorium thereon."[25] Nevertheless, in 1924, immediately preceding the passage of the liberalizing amendment, the court invalidated a trust giving the trustee the power to invest funds "in such worthy objects of charity as he shall determine as being in accord with my wishes and tastes in that direction when living."[26] It does not seem that this case was momentous enough to cause the act to be passed; but nevertheless, it is a case that probably would have been decided differently had the act been in force at the time.

In the cases since 1925 the courts have applied the act with varying results, but

[16] *E.g.*, Lord MacNaghten in Commissioners for Special Purposes of Income Tax v. Pemsel [1891] A.C. 531, 581; Justice Gray in Jackson v. Phillips, 14 Allen (Mass.) 539, 556 (1867).

[17] 2 Rest., Trusts § 1141 note b (1935).

[18] See 23 Va. L. Rev. 439 (1935) for a complete discussion of charitable purposes.

[19] Shannon v. Eno, 120 Conn. 77, 179 Atl. 479 (1935); Minns v. Billings, 183 Mass. 186, 66 N.E. 593 (1903).

[20] Especially in Connecticut, Virginia, Kentucky, and North Carolina.

[21] North Carolina Code 1935, § 4035(a); note 4 *supra.*

[22] Woodcock v. Wachovia Bank and Trust Co., 199 S.E. 20, 22 (N.C. 1938).

[23] Haywood v. Craven, 4 N.C. 360 (1816).

[24] *Trusts valid:* Griffin v. Graham, 8 N.C. 96 (1820); Keith v. Scales, 124 N.C. 497, 32 S.E. 809 (1899); Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921).
Trusts invalid for uncertainty: Holland v. Peck, 37 N.C. 255 (1842); Weaver v. Kirby, 186 N.C. 387, 119 S.E. 564 (1923).

[25] Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921).

[26] Thomas v. Clay, 187 N.C. 778, 122 S.E. 852 (1924).

for the most part the trusts have been upheld.[27] The height of the liberalizing tendency was reached when a trust "to keep up preaching in weak churches" was sustained.[28]

A recent Connecticut case, *Mitchell v. Reeves*,[29] should be compared with the principal case in order to indicate the liberal attitude of other courts. A Connecticut statute states that a settlor need not designate the particular charitable purpose for which property is to be used if he gives that power to the trustee.[30] A testator left part of his estate to trustees who at their discretion were allowed to pay any amounts they chose "to corporations, organizations, societies, institutions, and trusts located or operating in the city of New London, which are devoted exclusively to religious, scientific, charitable, literary, historical, or educational purposes." The trust was declared not to be void for uncertainty.

In view of the general attitude toward charitable trusts and the legislative policy evident in the statute, the North Carolina court could easily have avoided a construction of the act that defeated the testator's intention.

[27] Benevolent Society v. Orrell, 195 N.C. 405, 142 S.E. 493 (1928); Hass v. Hass, 195 N.C. 734, 143 S.E. 541 (1928); Whitsett v. Clapp, 200 N.C. 647, 158 S.E. 183 (1931).

But see Dry Forces v. Wilkins, 211 N.C. 560, 191 S.E. 8 (1937), where a charitable bequest to an unformed corporation was held invalid, the court refusing to go beyond the wording of the statute to raise a trust.

[28] Whitsett v. Clapp, 200 N.C. 647, 158 S.E. 183 (1931).

[29] 123 Conn. 549, 196 Atl. 785 (1938).

[30] "No donor or testator shall be required to designate in such will, deed or other instrument the particular charitable purpose or class of purposes for which such property shall be used or such income applied. Any such gift, devise or bequest shall be valid and operative, provided the donor or testator shall give to the trustee or trustees thereof or to any other person or persons, the power to select, from time to time and in such manner as such donor or testator may direct, the charitable purpose or purposes to which such property or the income thereof shall be applied; and no such gift, devise or bequest, accompanied by such power of selection, shall be void by reason of uncertainty." Conn. G.S. 1930, § 4825.