# Doubt and Certainty in the Law of Charities

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## I

Not very long ago, in the pages of this Review, the present writer discussed certain aspects of the law relating to charities and submitted suggestions for the re-definition of what is meant in law by a charitable institution or purpose.[1] Since then a statute passed in England, as a result of recommendations contained in the Report of the Nathan Committee on Charitable Trusts,[2] and recent cases, in particular the House of Lords' decision in *Inland Revenue Commissioners* v. *Baddeley*[3] and that of the Privy Council in *Baker* v. *National Trust Co. Ltd.*,[4] have added further material on the basis of which a renewed discussion of the law of charities can take place.

The statute in question, the Charitable Trusts (Validation) Act, 1954,[5] validated certain charitable trusts which failed, or would have failed, to take effect because of the rule that a trust which is not expressed to be for exclusively charitable purposes is not a valid charitable trust.[6] But, curiously enough, in spite of criticism of that rule, which has been expressed numerous times and was considered by the Nathan Committee, the act of 1954 was not framed to deal with future dispositions, but only to operate on dispositions which took effect before a certain date in 1952. Such dispositions under the act are to have effect for the period

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[1] Fridman: Charities and Public Benefit (1953), 31 Can. Bar Rev. 537.

[2] Cmd. 8710 (1952).

[3] [1955] 2 W.L.R. 552. Cf. the recent Canadian case, *Brewer* v. *McCauley*, [1955] 1 D.L.R. 415, discussed by Todd in (1955), 33 Can. Bar Rev. 334.

[4] [1955] 3 W.L.R. 42.

[5] 2 & 3 Eliz. 2, c. 58.

[6] The leading English authority is *Chichester Diocesan Fund & Board of Finance* v. *Simpson*, [1944] A.C. 341. Cf. *Brewer* v. *McCauley* (*supra*).

before the commencement of the act "as if the whole of the declared objects were charitable", and for the period after that, "as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes".[7] Other provisions of the act deal with limitation of actions where money has been paid and rights already created.[8]

Apart from the question of the retrospective activity of the statute, the main point worth considering here is why the act was not framed in general terms so as to provide a satisfactory measure of law reform. Without wishing to repeat the criticisms that have already been made of the statute in a learned note in the Modern Law Review,[9] the present writer would like to refer to the arguments against such a general reform put forward by the Nathan Report. Two points were made: (1) the principle that every person must be presumed to know the law is fundamental; (2) testators would become uncertain of their position if the court were empowered to direct that a bequest partly to charity and partly to other purposes should be applied for charitable purposes.[10] It is submitted that it is only necessary to state these two "arguments" to realize that they are fallacious and indefensible. In the first place, point (1) is no argument against law reform; in the second place, point (2), when it refers to the uncertain position of testators, does not represent what effect a change of the law would have, but does represent what effect the law *now* has.

Any close acquaintanceship with the diverse opinions which have been expressed in numerous cases on charities will bring home the point of this criticism. Indeed reference need only be made to *Inland Revenue Commissioners* v. *Baddeley*,[11] where the House of Lords (with one dissentient) came to a different conclusion from that of the Court of Appeal, and to *Baker* v. *National Trust Co. Ltd.*,[12] in which, after a troubled history, the Privy Council upheld the decision of the Supreme Court of Canada that a trust, which one would have thought was intended to effect a "charitable" purpose, was not a charitable trust in law. Can it really be said with any degree of assurance and satisfaction that testators would not like to feel that the courts will be directing the use of

[7] 2 & 3 Eliz. 2, c. 58, s. 1(2) (a) (b).
[8] *Ibid.*, s. 3.
[9] (1955), 18 Mod. L. Rev. 152. See also Todd (1955), 33 Can. Bar Rev. 334, at p. 337.
[10] Nathan Report, paras. 534, *535*.
[11] [1955] 2 W.L.R. 552.
[12] [1955] 3 W.L.R. 42. The Supreme Court of Canada's decision is reported in [1953] 1 S.C.R. 96. For comments see Todd (1953), 31 Can. Bar Rev. 1166, and Kennedy (1954), 32 Can. Bar Rev. 116.

their dispositions? Is it fair to say that testators do not mind taking the chance that their dispositions will fail because of a technical and unjustifiable rule, but would object to having a court interfere and restrict the scope of their liberality to what the law considers more specifically charitable? The answers to these questions, it is submitted, are obvious. If the Nathan Committee are right in what they say, then in fact they have been guilty of going against their own arguments by recommending the passing of the 1954 act. If the committee are right, then the legislatures of at least two Australian states and of New Zealand have been unwise in passing validating legislation, in terms which will be discussed later.

The submission is therefore made that the case against reform of this branch of the law has not been made out. On the contrary, reform here is as necessary as it ever was.[13] The purpose of this essay is to re-examine some of the points raised in the present writer's previous article, this time in the light of recent cases and of the experience of the validating legislation referred to, and, on the basis of that re-examination, to draft certain legislative proposals.

## II

One of the chief difficulties in the definition of "charity" in law, as was seen in the previous article, is the meaning and scope to be given to the idea of public benefit.[14] What is meant here by "public"? Answering this query can give rise to a discussion around two main points. For, in determining whether the benefit envisaged in a particular trust is for the public, regard must be had to whether the trust is expressed to serve the public in some recognizably and undeniably charitable way, and whether it benefits the public generally or only a particular section of the community. This second problem, as already seen, has given rise to especial difficulty when raised in connection with trusts dealing with professional bodies or organizations.[15] On both these matters the discussion in *I.R.C.* v. *Baddeley* provides instruction and, for those who criticize the present law, ammunition for the attack.

In the *Baddeley* case, the issue was whether a larger or smaller amount of stamp duty was payable on two conveyances of property to trustees who held the property on the terms of the trusts set out in the deed. That depended on whether the trusts were charitable. One deed conveyed land, on which there was a mission

[13] Cf. Todd, 33 Can. Bar Rev. 334, at p. 340.
[14] Fridman, *op. cit.*, at pp. 539, *544-545*.
[15] *Ibid.*, at pp. 545-551.

church, lecture room and store, to the trustees on terms that they should permit the property

> to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission . . . for the promotion of the religious social and physical well-being of persons resident in the County Boroughs of West Ham and Leyton.

These objects were to be achieved by providing facilities for religious services and instruction, social and physical training and recreation of such residents in these areas who were or were likely to become members of the Methodist Church, and had insufficient means to enjoy the advantages to procure which the property was being conveyed. The second deed conveyed four pieces of land laid out as playing fields to be appropriated and used for "the promotion of the moral social and physical well-being" of such residents in the areas already mentioned who were or were likely to become members of the Methodist Church and had insufficient means to enjoy the advantages already set out.

The House of Lords,[16] by a majority (Lord Reid dissenting), reversed the decision of the Court of Appeal[17] and held that these trusts were not charitable. The first point raised in the cases was whether the purposes envisaged in the conveyances could be regarded as for the public benefit. Jenkins L. J., who delivered the main judgment in the Court of Appeal, thought that the trusts were charitable. He disposed of the argument that, in order to be called "charitable", trusts not falling under one of the first three categories in Lord Macnaghten's speech in the *Pemsel* case[18] had to be for one of the purposes set out in the preamble to the Elizabethan statute. All that was necessary, as Jenkins L.J. convincingly showed,[19] was that in Lord Greene's words in *In Re Strakosch*:[20] "The benefit . . . does not have to be in any way ejusdem generis with the recited purposes but it has to be charitable in the same sense". Jenkins L.J. then took the trusts as setting out separate objects, each of which was charitable under one or other of Lord Macnaghten's categories. Hence they were collectively capable of being charitable.[21] An important point in this respect was that though the means prescribed in each deed for the fulfillment of the objects of the trust included "recreation", this was not a purpose of the trust but a method of achieving the trust purposes. In Jen-

[16] [1955] 2 W.L.R. 552.
[17] *Sub. nom., Baddeley* v. *Inland Revenue Commissioners*, [1953] Ch. 504.
[18] *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 531, at p. 583.
[19] [1953] Ch. 504, at pp. 528-533. [20] [1949] Ch. 529, at p. 537.
[21] [1953] Ch. 504, at pp. 533-535.

kins L.J.'s words: "the means presented must be viewed as means to an end, not as ends in themselves".[22]

This attitude of viewing the stated purposes of the trusts conjunctively and not disjunctively (as had happened in the somewhat similar Irish tax case of *Trustees of Londonderry Presbyterian Church House* v. *I.R.C.*[23]) was not approved by the majority of the House of Lords. Lords Simonds and Somervell of Harrow, in particular, took exception to the use of the word "social" in the deeds. Jenkins L.J. had thought that the ideas of "social well-being" and "social training" meant "social improvement", in the sense of "the inculcation of socially acceptable standards of conduct and behaviour in relation to other people—standards of conduct and behaviour such as are to be expected of a good neighbour or good citizen".[24] This meant that the trusts were charitable, for they were intended "to promote . . . the practical applications of sound ethical principles in . . . relation with other people"; they were therefore "in the nature of a trust for the moral improvement of a section of the public".[25] This view was made more acceptable to the learned lord justice by the fact that an element of poverty (one of the characteristics of charity) was introduced through the limitation of the benefits of the trust to the impecunious.

But Viscount Simonds thought that the word "social" was more comprehensive and vague in its meaning. There was insufficient certainty about the word to make quite clear that charitable activities were intended to be undertaken. Like Lord Somervell of Harrow, Lord Simonds thought that the wording of the trust would justify the establishment of a "community centre" in which "social intercourse and discreet festivity" might be carried on,[26] or, in Lord Somervell's words, "a social centre".[27] Lord Tucker, while agreeing that the word was vague, thought that it included many "activities of the so-called 'Welfare State' and . . . material benefits and advantages which have little or no relation to social ethics or good citizenship".[28] From these quotations it will be seen that the majority of the House of Lords regarded the expression "social" in the same way that previous courts have regarded such expressions as "philanthropic",[29] "benevolent"[30] and "for parish

[22] *Ibid.*, at p. 535.
[23] [1946] N.I. 178; 27 T.C. 431.
[24] [1953] Ch. 504, at p. 534.
[25] *Ibid.*
[26] [1955] 2 W.L.R. 552, at p. 557.
[27] *Ibid.*, at p. 583.
[28] *Ibid.*, at pp. 580-581.
[29] *In Re MacDuff*, [1896] 2 Ch. 451.
[30] *Houston* v. *Burns*, [1918] A.C. 337; *Chichester Diocesan Board* v. *Simpson*, [1944] A.C. 341.

work".[31] Both Lord Simonds and Lord Tucker approved of the view taken in the Irish case just mentioned, in which, where the disjunctive "or" was used, the trust was held not charitable. In addition they and Lord Somervell of Harrow considered that the instant case was like the earlier decision in *Williams' Trustees* v. *I.R.C.*,[32] in which the social or recreational element in the trust was held to be so important and prominent that the trust could not be considered charitable.

The important points which emerge from these speeches, so far as this part of the discussion is concerned, are therefore: (1) each trust had to be considered as a whole, so that if any part of or object contained in it were non-charitable in content the entire trust would fail; (2) the fact that there were present in each of the trusts elements of Lord Macnaghten's first three categories could not be used to validate any non-charitable part of the trust purposes; (3) if the words used could be interpreted in a non-charitable sense, then they would have to be so interpreted—a "charitable" interpretation was not to be placed on them. Putting these three points together, it may be said that a general charitable content could not be spelled out of the language of the trust deeds, nor could the possibly non-charitable meaning of some of that language be ignored or severed from the rest.

Lord Reid in his dissenting speech dealt with the two deeds separately. The one which related to the playing fields he justified as charitable on the ground that Parliament had recognized in some statutes that the provision of playing grounds for recreation for the public was a charitable purpose. Hence, a fortiori, "the promotion of moral social and physical training" on such playing grounds was a charitable purpose.[33] On the meaning of the expression "social training", he took a similar view to that of the Court of Appeal. Although "social" on its own might be vague and too general, in the context in which it occurred in the deeds it plainly meant "training calculated to make a person more fit to associate with his fellows in society or the community in a God-fearing civilized and law-abiding way".[34] This was in his eyes an educational and, therefore, a charitable purpose. It is clear from the language of Lord Reid that he was calling in aid the various parts of the deed to construe its more debatable sections—an attitude which,

[31] *Farley* v. *Westminster Bank Ltd.*, [1939] A.C. 430; cp. *Dunne* v. *Byrne*, [1912] A.C. 407 (gift to an archbishop to be used in the manner "most conducive to the good of religion in this diocese").

[32] [1947] A.C. 447; on which see Fridman, *op. cit.*, at p. 539.

[33] [1955] 2 W.L.R. 552, at pp. 565-569.

[34] *Ibid.*, at p. 568.

with respect, one would have thought more reasonable than that of the majority when it came to a question of construction.

As for the other deed, which dealt with the mission church, Lord Reid took the view that, though to fulfil the purposes of the trust social activities might be properly encouraged, the *dominant* purposes were religious and educational and not social.[35] In this way he distinguished *Williams' Trustees* v. *I.R.C.*

Lord Reid's dissent, on this part of the case, was therefore founded on two grounds: (1) that the language of the deeds was to be read as a whole, so that each part was to be interpreted in the light of the meaning of the other parts; (2) that the law could distinguish between dominant and ancillary purposes, or, to put the same point in a better way, between ends and means.

On this aspect of the case, it is submitted, the approach of Lord Reid and the Court of Appeal was eminently more reasonable than that of the majority of the House of Lords. Since some undoubtedly public benefits cannot be achieved without a diversity of activity, it is suggested that too strict a construction of trust deeds is undesirable. In view of the present writer's earlier discussion of this point, and the cases relevant to it,[36] it is unnecessary to develop this argument at greater length. All that need be said here is that the problem of dominant purposes arises in other contexts to be examined, and in them also, it will be submitted, the same narrow approach has led to what are, in the present writer's opinion, unjustified results.

## III

Thus far, the examination of the *Baddeley* case has revealed an important dispute over the proper mode of construing language designed to set forth "charitable" purposes (using that word for the moment in a general, colloquial sense). On the one hand, there were opinions in which was expressed the view that all or some of the elements of "charity" in the legal sense could be present in a trust and yet the trust could still be held uncharitable. On the other hand, there were opinions in which those elements of "charity" were considered important for the purpose of giving effect to the intentions of the donor. Lord Reid referred to the problem as a question of degree.[37] The present writer suggests with respect, but at the same time with assurance, that when such questions of de-

[35] *Ibid.*, at pp. 570-571.
[36] Fridman, *op. cit.*, at pp. 541-544, *545-548.*
[37] [1955] 2 W.L.R. 552, at p. 570.

gree give rise to fluctuating decisions as a case proceeds from one court to the next above it, and produces dissent in the highest court, something is wrong with the law, and the law should be reformed. The problem, it is submitted, was not one of fact, as in *Stapley* v. *Gypsum Mines*,[38] in which different opinions were also expressed in the House of Lords, but was one of law. If it had been one of fact, discussion and comment in this Review would have been largely pointless. Since it was one of law, however, there is not only point but importance in criticism and suggestion.

But there was another important issue in *I.R.C.* v. *Baddeley* which also produced dispute, and discussion of this issue, it is submitted, will emphasize the unreasonable nature of the Nathan Committee's approach. The trusts in question, it will be remembered, were expressed to be for the benefit of present or possible future members of the Methodist Church within the county boroughs mentioned in the deed. The problem raised by this desire on the part of the donor may be put thus: Is a trust a valid charitable trust if, while its purposes are avowedly charitable in the legal sense, its benefits are expressed to be reserved for a group of the community defined in terms of a class, whether such class be limited geographically or not? On this again the Court of Appeal and Lord Reid took one view, in favour of the charitable nature of trusts, while Viscount Simonds and Lord Somervell took the opposite view. However, Lords Porter and Tucker deliberately refrained from expressing any view on this matter, and this reluctance, it is submitted, is significant.

In the present writer's previous article a number of cases were referred to in which, although the immediate benefit conferred by a trust was upon a section of the community, the trusts were held to be for the public benefit and therefore charitable.[39] The only limitation upon the generality of this doctrine is that the objects of the trust must not be "a number of private persons whose essential quality or character for the purposes under review can properly be stated as relationship by the fact of blood, employment or otherwise to some specified person or persons".[40] It is for this reason that in such cases as *Re Compton*[41] and *Oppenheim* v. *Tobacco Trust Ltd.*[42] trusts for education were considered to be uncharitable. Hence also the decision in *Baker* v. *National Trust Co. Ltd.*,[43] where the trust was for the benefit of employees or de-

[38] [1953] A.C. 663.
[39] Fridman, *op. cit.*, at pp. 539-540.
[40] [1953] Ch. 504, at p. 521, *per* Evershed M.R.
[41] [1945] Ch. 123.
[42] [1951] A.C. 297.
[43] [1955] 3 W.L.R. 42.

pendants of employees of a certain company. Since, on the construction of the will, the charitable purpose envisaged could have included education as well as the relief of poverty, the "poor relation" cases did not apply. As will be seen from the draft statute set out at the end of this essay, the present writer is in favour of abolishing the anomaly of the "poor relation" cases, so that problems of the sort raised by the cases just cited need not arise.

The Court of Appeal in *I.R.C.* v. *Baddeley* did not regard the geographical and religious nexus between the beneficiaries of the trusts as being a private or personal one. Nor did Lord Reid in the House of Lords. He took the view that the Methodist Church was a sufficiently large, general and important section of the community to make a benefit to its members (or a section of them in a large area) a public benefit. That "beneficial to the community" in Lord Macnaghten's fourth category meant "beneficial to the whole community", Lord Reid denied.[44] If that were so, then there would be a big difference between trusts falling under one of the first three categories, and trusts within the fourth category. For only in the fourth would it be necessary to show that the public *generally* were directly benefited. In the others it would be sufficient if the class benefited were "adequate in numbers and importance".[45] But this argument, which had been accepted by Babington L. J. in *Londonderry Presbyterian Church House Trustees* v. *I.R.C.*,[46] was rejected by Lord Reid, rightly it is submitted, on the basis of the decision of the House of Lords in *Oppenheim* v. *Tobacco Trust Ltd.*

Lord Reid therefore concluded that a trust which benefited a substantial portion of the community (not limited by blood, employment or otherwise as already mentioned) would be charitable. He was strengthened in the view by the decisions in *Goodman* v. *Mayor of Saltash*[47] and *Verge* v. *Somerville*.[48] In the former case (which seems to have been regarded as anomalous by Lord Simonds in *Williams Trustees* v. *I.R.C.*[49]) the trust in question was one which conferred on certain inhabitants of a particular borough the right to dredge for oysters in a river. It was held that there was a valid charitable trust, for, in Lord Selborne's words:[50]

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[44] [1955] 2 W.L.R. 552, at p. 575.
[45] The phrase is that of Babington L.J. in *Londonderry Presbyterian Church House Trustees* v. *I.R.C.*, [1946] N.I. 178, 27 T.C. 431.
[46] *Ibid.*, at pp. 196-199, *451-452*, of the respective reports.
[47] (1882), 7 App. Cas. 633. [48] [1924] A.C. 496.
[49] [1947] A.C. 447, at pp. 459-460.
[50] (1882), 7 App. Cas. 633, at p. 642 (italics supplied).

> A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town *or of any particular class of such inhabitants* is . . . a charitable trust.

In *Verge* v. *Somerville* the bequest under discussion was to "the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales Returned Soldiers". Lord Wrenbury, in the course of giving the opinion of the Privy Council that this was a valid charitable bequest, said that the first question was whether the trust was public—whether it was for the benefit of the community or of an appreciably important class of the community. "The inhabitants of a parish or town, *or any particular class of such inhabitants*, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."[51] Poverty was not an essential qualification under Lord Macnaghten's fourth head of charity.

These, it is submitted, are important and authoritative statements of the law. It is not surprising that Lord Reid came to the conclusion that a trust for Methodists in certain areas was charitable, especially since the benefits of the trust were to be reaped by the impecunious. What is surprising is that Viscount Simonds and Lord Somervell of Harrow came to a different view.

Lord Simonds, after saying that it was an open question whether a different degree of public benefit is requisite according to which of Lord Macnaghten's four categories is involved,[52] discussed the idea of "indirect benefit", which he disposed of by doubting whether rationalization about such matters helped to explain a branch of the law which had developed empirically and by analogy upon analogy.[53] Hence "indirect benefit" was unhelpful. More, it might be harmful: for the fourth category of Lord Macnaghten had to be rigorously confined, lest the law of charities fall down a "slippery slope" until it become logically possible to declare as charitable trusts for a small class in a small locality defined by membership of a particular profession or the pursuance of a particular trade. The distinction upon which Lord Simonds rested his approach was between

> . . . a form of relief extended to the whole community yet by its very nature advantageous only to the few, and a form of relief accorded to a selected few out of a large number equally willing and able to take advantage of it.[54]

The former type, illustrated by the facts of *Verge* v. *Somerville*

[51] [1924] A.C. 496, at p. 499, *per* Lord Wrenbury.
[52] [1955] 2 W.L.R. 552, at p. 560.
[53] *Ibid.*, at p. 561.
[54] *Ibid.*, at p. 562.

was charitable; the latter, which was illustrated by Evershed M.R.'s reference in the Court of Appeal[55] to "a bridge to be crossed only by impecunious Methodists", was not. The *Baddeley* case fell within the second type.

But Evershed M.R.'s *reductio ad absurdum* was not concerned with the question of public benefit. It related to the issue of what is contained in Lord Macnaghten's fourth category: that is, Does it refer only to those illustrations in the preamble to the Elizabethan statute which were not covered by the first three of Lord Macnaghten's categories? It is submitted that Lord Simonds' reference to this form of argument, in the circumstances, was inapt. For the fact that in an extreme case difficulty might occur should not mean that in a clear case the mantle of charity should be denied.

The *Baddeley* case, it is submitted, was well within the rules laid down in earlier decisions. Indeed, in the light of earlier cases, such as *Re Good*,[56] *Re Gray*,[57] *Re Caus*,[58] the "cruelty to animal" cases,[59] *Re Scowcroft* and *I.R.C.* v. *Yorkshire Agricultural Society*,[60] the speech of Lord Somervell of Harrow must be carefully scrutinized; for at one point[61] he said, speaking of a trust under Lord Macnaghten's fourth head, that normally it would be "for the public or all members of the public who needed the help or facilities which the trust was to provide". Despite Lord Simonds' statement about rationalization from the "indirect benefit" cases, it is submitted that the ideas and principles contained in them are not lightly to be disregarded; and on these ideas and principles, as well as on Lord Reid's reasons, the charitable nature of the trust in the *Baddeley* case can be justified. Perhaps one should add that Lord Somervell, in concluding that there was no public benefit in the trusts, seems to have been influenced by the purpose of the trusts, for he said:[62]

> I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity though it is clear that a recreation ground for the public is a charitable purpose.

[55] [1953] Ch. 504, at p. 519.
[56] [1905] 2 Ch. 60.
[57] [1925] Ch. 362.
[58] [1934] Ch. 162.
[59] *Re Cranston*, [1898] 1 I.R. 431; *Re Wedgewood*, [1915] 1 Ch. 113; *Re Grove-Grady*, [1929] 1 Ch. 557.
[60] [1928] 1 K.B. 611, which was recently approved, but distinguished, by the Privy Council in *Hadaway* v. *Hadaway*, [1955] 1 W.L.R. 16. This was not a case in which there was the intention either to improve agriculture or to relieve poverty.
[61] [1955] 2 W.L.R. 552, at p. 582.
[62] *Ibid.*

In this it would seem he was adopting the view that under the first three of Lord Macnaghten's categories the class to be benefited can be smaller than under the fourth head: this, it is respectfully submitted, is not necessarily so. If cases involving other classes and sections of the community are considered (including even religious communities), Lord Simonds was unjustified when he concluded,[63] using language similar to that of Lord Somervell, that

> . . . a trust cannot qualify as a charity within the fourth class in *Income Tax Commissioners* v. *Pemsel* if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed.

On the contrary, it is submitted, subject to what was earlier said about a relationship based on blood, employment or some other personal nexus, there is no valid legal reason why a trust for the benefit of a particular class of the community should not be charitable.

Nor should the fact that there is vested in any person or number of persons a discretion in respect of those deserving of benefiting by the charity, or the ways in which the *charitable* purposes should be fulfilled, make any difference here. So long as the choice is not limited by any blood-relationship, or master-and-servant relationship, or the like, there is no reason why the trustees should not have a discretion of the kind just mentioned. If the class envisaged in the trust, and the objects stated in it come within the ambit of charity, then in the past a measure of choice in respect of that class or those objects has not been regarded as fatal to the charitable character of the trust. Nor should it in the future, particularly if validating legislation, on the lines to be suggested, is enacted.

The submission made about "class" benefits is supported by a consideration of cases relating to professional or semi-professional classes. Some of these were discussed in the present writer's previous article.[64] But the points discussed there may be usefully reviewed in the light of the recent Court of Appeal decision in *Institute of Fuel* v. *Morley*,[65] a case not strictly dealing with charities but sufficiently analogous to cases on charities to deserve discussion in this context.

It was seen in the earlier article how in cases like *Royal College of Surgeons* v. *National Provincial Bank*[66] and *I.R.C.* v. *City of*

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[63] [1955] 2 W.L.R. 552, at p. 562.
[64] See Fridman, *op. cit.*, at pp. 545-548.
[65] [1955] 1 Q.B. 317.
[66] [1952] A.C. 631.

*Glasgow Police Athletic Association*[67] the problem of principle and collateral or ancillary purposes or objects was raised. The submission was made that:[68]

> There seems to be no good reason why a trust or organization should not be held charitable even though one of its essential aims is to effect some private benefit, provided that another aim is intended to benefit the public and has that result.

Applying that principle to the *Baddeley* case, the benefit to Methodists might be considered a private benefit; but surely, as it seemed to the Court of Appeal and Lord Reid, the public would benefit also, since the promotion of the objects of the trusts in that case would result in the education and upbringing of good and useful citizens, and possibly the raising of standards generally by the teachings of example. Indeed, it might be argued that such a result was in the mind, and part at least of the intention, of the donor; there was no mere partisan or sectarian desire behind the trusts; there was a genuine interest in the welfare of people generally.

The same approval is illustrated in the "professional" cases of which *Institute of Fuel* v. *Morley*[69] is an interesting example, or at least analogue. For in such cases the question is often raised how far the protection of private professional or semi-professional interests can be regarded as being of public benefit. In that case the question was whether the Institute of Fuel was entitled to exemption from paying rates under the Scientific Societies Act, 1843. Exemption could only be claimed if the institute were a society instituted for the purposes of science *exclusively*. To determine this question involved construing the royal charter of the institute. Among the objects and purposes of the institute were the promotion, fostering and development of the various branches of fuel technology, and the promotion of work in the economical treatment and application of fuel. Another object was:

> To uphold the status of members of the institute by holding or presenting examinations for candidates for election and by requiring standards of knowledge and experience which can be approved.

The Court of Appeal, by a majority (Jenkins L. J. dissented), held that this purpose was not merely incidental to the main purposes of the institute but was itself a main purpose, which meant that the society was not *exclusively* instituted for the purposes of science. Birkett L. J. thought also that one of the purposes of the

[67] [1953] A.C. 380.

[68] Fridman, *op. cit.*, at p. 548.

[69] [1955] 1 Q.B. 317. Contrast *Hadaway* v. *Hadaway*, *supra* footnote 60, where help to planters was not also indirectly for the benefit of the community by improving agriculture.

institute was commercial or social rather than scientific, namely the promotion and encouragement of economic and efficient use of fuel.[70] But Jenkins L. J. thought that the purposes of the institute were scientific and the other purposes were purely ancillary to the development of science.[71] Thus purposes which Birkett L. J. regarded as commercial or social Jenkins L. J. regarded as part of the advancement of the science of fuel technology; and the object in the charter relating to the status and professional qualification of fuel technologists Jenkins L. J. regarded as also ancillary to the advancement of the science in question. These were means to an end and not ends in themselves.[72] It is submitted that, in view of Jenkins L. J.'s judgment in an earlier and important case on this topic, *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*,[73] in which the association was held not to be one instituted for scientific purposes exclusively, because it had the power to undertake "technical" work and acquire patents or licences relating to inventions, improvements and processes, the learned lord justice's dissent in *Institute of Fuel* v. *Morley* is significant.

That dissent is also more in harmony with the decision of the House of Lords in *Royal College of Surgeons* v. *National Provincial Bank*.[74] Birkett L. J. did not refer to that case at all, although he did cite with approval passages from *I.R.C.* v. *Forrest*[75] and *Institution of Civil Engineers* v. *I.R.C.*,[76] in both of which the institution in question was exempt from payment of income tax as a charity, even though it used its authority to protect its members. Evershed M. R.[77] distinguished the *Royal College of Surgeons* case on the grounds that the charter of the Institute of Fuel did set out several main purposes, whereas the charter in the earlier case had only *one* main purpose, which was undoubtedly scientific, that is, "the formation and encouragement of the study and practice of the art and science of surgery". Yet in that case there was also a provision in the charter on the maintenance and protection of the status of surgeons. It is hard to see, with great respect to Evershed M. R., how a distinction between these cases can satisfactorily be drawn. Indeed criticism of the decision is fortified by the fact that in the *Morley* case leave was given for an appeal to the House of Lords, a comparatively rare occurrence in the Court of Appeal.

[70] *Ibid.*, at p. 345. [71] *Ibid.*, at pp. 340-341.
[72] Although Jenkins L.J. did not use this expression in the *Morley* case (as he did in the *Baddeley* case), the similarity of his approach in these cases is significant.
[73] [1949] 1 K.B. 434. [74] [1952] A.C. 631.
[75] (1890), 15 App. Cas. 334. [76] [1932] 1 K.B. 149.
[77] *Institute of Fuel* v. *Morley*, [1955] 1 Q.B. 317, at p. 330.

## IV

From this survey of two important recent cases, the difficulties inherent in the concept of "public benefit" can readily be seen. The problem which remains to be dealt with is how to rid the law of these difficulties. It is not sufficient to be critical of the present state of the law and then neglect the problem of reforming it, as the Nathan Committee seem to have done: something constructive should be suggested. In this respect the example of other jurisdictions provides lessons from which much can be learned.

In the present writer's previous article the submission was made that a trust should be considered charitable notwithstanding the fact that it benefited individuals, or groups of individuals, so long as one, at least, of its main objects was to benefit the community generally; and the kind of benefit to the public which was involved here was suggested to be "physical or spiritual, measurable or intangible, direct or indirect".[78] Possibly this method of approach to reform of the law of charities was too drastic, even revolutionary. Further consideration has led the present writer to the conclusion that satisfactory results could be achieved by legislation which, after the fashion of some existing legislation in Australia and New Zealand, enabled courts to validate trusts too broadly phrased, and direct their application to undeniably charitable purposes.[79]

Such legislation has been enacted in Victoria,[80] New South Wales[81] and New Zealand.[82] There the problem has been dealt with by directing that where a trust is for charitable and non-charitable purposes the non-charitable purposes shall be disregarded and the property involved shall be applied only for the charitable purposes. But the following problem has been posed by the wording of the acts: Are the validating provisions of the acts applicable only where charitable and non-charitable purposes are explicitly stated, so that easily, and by the application of some "blue-pencil" doctrine of severance (as in the law relating to restraints of trade in contract), the non-charitable purposes can be cut out and disregarded? Or is the legislation also applicable where

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[78] Fridman, *op. cit.*, at p. 552.

[79] In saying this the present author agrees with Todd (33 Can. Bar Rev. 334, at p. 340). But he disagrees with him when he says that "the sensible statutes in New Zealand and two of the Australian states provide sound legislative precedents . . .". For reasons apparent from what is said in the text that legislation should not be slavishly copied.

[80] Property Law Act, 1928, s. 131.

[81] Conveyancing Act, 1919-1943, s. 37D.

[82] Trustee Amendment Act, 1935, s. 2.

the language creating the trust includes non-charitable purposes by implication?

Thus in a recent New Zealand case, *In Re Ashton*,[83] a residuary bequest in a will was in these terms: "To hand any surplus to the trustees of the Church of Christ Wanganui to help in any good work". Since the last phrase included by implication of law non-charitable as well as charitable purposes,[84] the problem arose whether the bequest could be saved by the relevant validating legislation. The New Zealand Court of Appeal did not follow Victorian decisions which in respect of similar legislation had applied a restricted "blue-pencil" doctrine,[85] but did adopt the view held in New South Wales that the legislation was applicable even if a clear severance of words could not be made.[86]

Any possibility of dispute about such a matter should be avoided in future legislation on this topic. Hence, it is submitted, such legislation should make it quite clear that validation should follow whether a non-charitable purpose be expressly stated in the instrument creating the trust, or implied in the language of the instrument.

With the foregoing remarks (in conjunction with the present writer's previous article) as explanation, and, it is hoped, justification, the following is diffidently submitted as a draft on the basis of which legislative proposals on this topic can be discussed:

(1) A charitable purpose is either:

(i) One which, whether or not for the benefit of the public generally, advances religion or education or relieves poverty.

Provided that where the beneficiaries of a trust to advance education or relieve poverty are identified by some blood relationship, contractual or similar tie the trust will not be one for a charitable purpose;

(ii) One which otherwise than as in the previous clause benefits the public generally without reference to or limitation in respect of any geographical locality or professional or other section of the community;

(iii) One which otherwise than as in clause (i) of this section benefits a particular section of the community identifiable by some geographical limitation.

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[83] [1955] N.Z.L.R. 192.

[84] *Westminster Bank* v. *Farley*, [1939] A.C. 430.

[85] *In Re Hollole*, [1945] V.L.R. 295; *In Re Belcher*, [1950] V.L.R. 11.

[86] *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust Diocese of Sydney* (1946), 46 N.S.W.S.R. 298; *Perpetual Trustee Co. Ltd.* v. *King George's Fund for Sailors* (1949), 50 N.S.W.S.R. 145. To the same effect was the New Zealand decision of Kennedy J. in *In Re Cumming*, [1951] N.Z.L.R. 498.

(iv) One which, in a similar way to the ways set out in clause (i) of this section, benefits a particular section of the community whether or not also identifiable by some geographical limitation but identifiable by some common interest or bond.

Provided that such section of the community is not identified by blood-relationship, or contractual or other purely personal tie of the like kind.

(2) A trust shall be a valid charitable trust notwithstanding that some non-charitable purpose as well as some charitable purpose is stated to be one of the purposes for which an application of the trust property or any part thereof is by such trust directed or allowed.

Provided that any such trust shall be construed and given effect to in the same manner in all respects as if no application of trust property or of any part thereof to or for any such non-charitable purpose had been so directed or allowed.

Provided also that any trust which cannot be construed as applying to or for a charitable purpose shall not be capable of being a valid charitable trust.

(3) A trust shall be a valid charitable trust notwithstanding that any word or expression indicating the purpose or purposes of the trust for which the application of the trust property or any part thereof is authorized includes within its scope both charitable and non-charitable purposes.

Provided that any such trust shall be construed and given effect to in the same manner in all respects as if it authorized the application of the trust property or any part thereof for such charitable purpose or purposes only.

Provided also that any trust which cannot be construed as applying to or for a charitable purpose shall not be capable of being a valid charitable trust.

(4) A trust for the benefit of some corporation, society or institution shall be a valid charitable trust notwithstanding that the purposes of the said corporation, society or institution are or may be both charitable and non-charitable.

Provided that one at least of the main purposes of such corporation, society or institution is a charitable purpose.

Provided also that the trust property shall be applied for such charitable purpose or purposes.