CHARITABLE TRUSTS FOR RELATIVES

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It would probably be true to say that the aspect of the law relating to charitable trusts which has received most emphasis by the courts of England in recent years is the requirement that such a trust must confer benefit of a public and not a private nature. The preamble to the Statute of Charitable Uses 1601 which, as all lawyers are aware, lists certain purposes which were regarded at that time as being charitable and has served ever since as a guide to the courts in determining when a trust should be regarded as charitable, refers only to purposes which benefit the community generally or large sections of the community, and, particularly of recent years, the courts have stressed this aspect and insisted that normally a trust cannot be regarded as charitable if it results in a benefit of only a private nature.

Thus Lord Wrenbury when delivering the advice of the Judicial Committee of the Privy Council in *Verge* v. *Somerville*[1] in a passage which has often since been quoted[2], said[3]:

> To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first enquiry must be whether it is public — whether it is 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.

On this basis of lack of public benefit the Court of Appeal in England held in *Re Compton*[4] that a trust to provide for the education of the descendants of three named persons could not be regarded as a charity, and the House of Lords held in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd*[5] that a trust for the education of the children of the employees and former employees of a certain company was not of a charitable nature.

The main principle which the courts appear to have adopted for determining whether a trust is of sufficiently public benefit to constitute a charity is usually described as the "personal relationship" test or, by reason of the name of the decision in which it was first authoritatively enunciated, the "Compton" test. For in *Re Compton*[6] the Court of Appeal held that the trust for the education of the descendants of the three named individuals was not of a sufficiently public nature because the beneficiaries were to be determined solely by reason of their personal relationship to the named persons. In that case and a subsequent decision of the Privy Council in *Caffoor* v. *Income Tax Commissioner, Columbo*[7], the personal relationship was constituted by birth, but the House of Lords has since stated in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd*[8] that the personal relationship may arise by contract and may be related to a legal person such as a company as well as to a natural person. In addition it would seem from the words of the Privy Council in *Verge* v. *Somerville*[9] quoted above, and from remarks that

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have been made by certain members of the House of Lords[10], that not only must the beneficiaries not be determinable by reason of some personal relationship to a particular person or persons, but they must also form an "appreciably important class of the community" which seems to mean a numerically important portion of the community. Whether such an additional requirement is necessary or desirable[11] is not necessary for us here to stop to enquire, but it is clear at the least that a trust which is designed to benefit persons bearing a personal relationship to a named person or persons, particularly a relationship by birth, cannot normally be regarded as a charitable trust.

Such a principle is, it seems to the writer with respect, eminently reasonable and desirable. For trusts of a charitable nature have been expressly and deliberately exempted by the courts and by Parliament from some of the more rigorous requirements of the law which are normally applicable to trusts generally. Thus the courts have in part or in whole exempted charitable trusts from the normal rules which they have evolved requiring that the object of a trust be expressed with certainty[12], that interests in property must vest within a certain limited period[13] and that interests in property must not continue longer than a certain period[14]. Again Parliament has exempted charitable trusts from liability for gift[15] and estate[16] duty imposed by the Estate and Gift Duties Act 1955 and from liability for income tax imposed by the Land and Income Tax Act 1954[17]. The underlying premise upon which the courts and Parliament have favoured charitable trusts in this way is that such trusts operate to the benefit of the community, and any loss sustained by the community by reason of their exemption from the normal legal requirements is more than compensated for by the benefits accruing to the community in other ways by the operation of such charities. If, therefore, trusts which did not provide these compensating benefits and which profited only persons bearing some personal inter-relationship, such as birth, were to be regarded as charitable, then the community would not receive a counterbalancing benefit from their exemption from the normal requirements of the law, and the beneficiaries would form a specially privileged class within the community, escaping the normal restrictions of the law applicable to their fellow citizens — a situation quite contrary to the basic concept of equality of treatment before the law which is fundamental to our contemporary concept of the role and operation of the law in the modern community.

It must be, therefore, with some surprise and concern that one discovers that there appear to be, at least at first glance, certain decisions of the courts in which the general requirement of public benefit was not applied and trusts for the benefit of relatives of the settlor were held to be charitable. For there are decisions in which the courts have held as charitable, trusts which provided for the endowment of educational institutions for the education of certain relatives of the settlor (usually described as "Founder's Kin" trusts)[18], which provided for the relief of poor relatives[19], which provided for masses to be said for the benefit of the souls of deceased relatives [20] and which provided for the erection of memorials for the glory and memory of deceased relatives[21].

If one examines these decisions more closely, however, it becomes apparent that, with two classes of exceptions, they are not really inconsistent with the general requirement of public benefit and that they may be regarded as instances in which there was private benefit but this was only ancillary to a form of public benefit which in the view of the court

predominated and coloured the trust. It is plain for example that some at least[22] of the decisions in which the courts have treated as charitable trusts providing for the education of relatives at certain universities or colleges have proceeded on the basis that the principal object of the trust was to endow the educational institution and the settlor's requirement that the relatives be given some preference in the application of that endowment was only ancillary to that. This was obviously the way in which the trust in question in *Spencer* v. *All Souls College*[23] was viewed by Wilmot J[24]:

> It is in the nature of a family settlement, modified so as to be subservient to the great and principal object of his munificence, the good of the public; wishing at the same time, that the public might receive that good through his own relations, as long as he had any.

Again it is evident from the judgments of the High Court in England and of the Supreme Court in New Zealand in which trusts providing for the saying of masses specifically naming the testator or his relatives were held to be charitable, that the respective Courts proceeded on the basis that the saying of masses brought benefit to all the faithful, regardless of whether they were specifically named[25]:

> Every celebration of mass is offered up for all the faithful, living and dead. It is the most solemn act of worship in the Roman Catholic Church; it can only be celebrated by ordained priests of the Church; and, according to the creed of every member of that Church, the mass, whenever and wherever regularly celebrated in accordance with the law of the Church, results in benefit and edification to all the faithful. According, therefore, to the religious belief of Roman Catholics, the celebration of the mass, whether or not it includes prayers for the repose of the soul of a particular person, is an act of religion done by a public minister of their Church, and is for the spiritual advantage of all, and, according to their belief, confers a public benefit on all who hear it.

Likewise trusts for the erection of tombs, headstones, stained glass windows, plaques, statues and other forms of memorial for the benefit of the soul and/or the good name of a deceased relative have been regarded as charitable when the memorial is of public benefit, as for example, when it forms part of a church[26] or churchyard[27] or park[28] open to the public, but not otherwise.

To decisions such as those where the private benefit accruing as the result of a trust is ancillary to the public benefit no real objection, it seems to the writer, can be raised. As a matter of logic it is permissible to regard a trust as being one for public benefit when it does primarily have that effect even although it also has an ancillary result of private benefit; and as a matter of policy it is desirable to encourage such trusts in view of the substantial public benefit which they do effect.

There are however two classes of trusts resulting in private benefit which the courts have regarded as charitable but which cannot be supported on the basis that the private benefit is ancillary to a dominant public benefit: trusts for the endowment of educational institutions for the education of relatives where the education of the relatives is not ancillary, and trusts for the relief of poor relatives.

Turning to consider first trusts for the endowment of educational institutions so as to provide for the education of relatives, it will be recalled that in some cases the education of the relatives has been regarded by the courts as ancillary to the dominant purpose of endowing the institutions with property which could be used for general education purposes. But there are some cases, however, such as *Griffith Flood's*

Case[29] and *Attorney-General* v. *Sidney Sussex College*[30], where the courts in England have in earlier centuries apparently regarded endowment trusts as charitable even although it is clear that the property must be used primarily for the purpose of financing the education of certain of the settlor's relatives and the financing of their education cannot be regarded as ancillary or subsidiary to a more general educational purpose. There does not appear to have been any occasion when the New Zealand courts have been called upon to consider whether they should regard such trusts as charitable and there would seem to be good reasons for considering that they would not follow the view adopted in England. For it is only so much of the law of England as is appropriate to the conditions of New Zealand which is regarded as applicable here and this aspect of the law of England does not seem appropriate. At the time when the courts in England decided that such trusts were charitable, educational facilities were supported almost entirely by gifts and endowments from private individuals, and educational facilities were available only to the wealthy. Now, however, in New Zealand conditions are very different and educational institutions receive such financial support from the government, and educational facilities are so extensive and comprehensive, that it is not necessary for the courts to create an exception to the general requirement of public benefit in order to encourage the establishment of educational institutions and ensure the enjoyment by a wealthy man's relatives of the educational facilities available. Indeed the English decisions have since been described by the Privy Council as having "virtually no direct authority as to the principle upon which they rested" and as "belonging more to history than to doctrine"[31]. It is very significant in this connection that the Privy Council regarded these decisions as "specifically associated with English local conditions or English history"[32], and declined to hold that they were appropriate and applicable to the law of Ceylon[33]; it would seem that our courts would take a similar view with regard to the law of New Zealand.

One would have expected that our courts would also have adopted such an attitude with regard to the other class of trusts conferring a mainly private benefit which the courts in England have held to be charitable — trusts for the relief of the poverty of poor relations of the settlor. In a line of cases which seems to commence in 1754 with *Isaac* v. *Defriez*[34] and continues up to modern times with *Re Scarisbrick*[35] the courts in England, at least to the level of the Court of Appeal, have held that a trust to provide relief for poor relatives of the settlor is to be regarded as charitable[36]. These cases were accepted and applied in 1963 by our Supreme Court in *Re Mitchell*[37] where it held that the requirement of public benefit was not applicable to trusts for the benefit of poor people. Indeed the Court went further and declared, though obiter, that the requirement of public benefit was not necessary for trusts for the benefit of aged and impotent people likewise. With all due respect such a view appears to the writer to be erroneous.

The portion of the judgment of Wilson J. in *Re Mitchell* which deals with this particular aspect reads as follows[38]:

> The next question is whether the gift is too restricted in its class of beneficiaries to qualify as a valid charitable trust. Mr Somers contended that the element of benefit to the community was essential to the validity of this trust and that that element was lacking. Notwithstanding the dicta of Lord Simonds in *Gilmour* v. *Coats* [1949] A.C.426, 442; [1949] 1 All E.R.848, 855 that 'it is beyond doubt that that element must be present', and in *Oppenheim* v. *Tobacco*

Securities Trust Co. Ltd [1951] A.C.297, 305; [1951] 1 All E.R. 31, 33, that 'It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit' (upon which the statement in *4 Halsbury's Laws of England,* 3rd ed. 209 to this effect is mainly based) it is quite clear that the principle does not apply to the case of trusts for the relief of 'aged, impotent and poor people'. Lord Simonds makes reference in *Oppenheims'* case (*supra*) 308; 35 to the exception furnished by this category, and although he expressed the view that, at some future time, the House of Lords might have to review the validity of such exception he recognised that it was accepted by the Courts as valid. It should be said that in neither *Gilmour's* case nor *Oppenheim's* case was the House dealing with a trust for the relief of poverty. Accordingly, I respectfully adopt the conclusion of Jenkins L.J. in *In re Scarisbrick* [1951] 1 Ch.623; [1951] 1 All E.R. 822 as follows: "There is, however, an exception to the general rule in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are, therefore, not trusts or gifts for the benefit of the public or a section thereof". (ibid 649; 837).

It is plain that the Supreme Court did not attempt to advance any independent reason of its own for holding that "the principle [of public benefit] does not apply to the case of trusts for the relief of 'aged, impotent and poor people' " and rested its opinion exclusively upon the views of the courts in England, particularly as expressed by Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd*[39] and by Jenkins L.J. in *Re Scarisbrick*[40]. It cannot be gainsaid that there have been a number of decisions in which the courts in England up to the level of the Court of Appeal have accepted as charitable trusts for the relief of poor relatives of the settlor[41]. It is no doubt true that in some of these cases the question of lack of public benefit was not specifically argued before the court, the primary question at issue in the case being something different such as a problem of interpretation[42] or of administration[43] or the validity of a different type of trust[44], but there are several cases including in particular a relatively recent decision of the Court of Appeal, *Re Scarisbrick*[45], in which it was specifically argued and the court specifically held that the trust was charitable notwithstanding lack of public benefit[46]. Moreover the cases are so numerous in which the courts accepted such trusts as charitable without argument[47] that it is unrealistic to assume that this was done only through ignorance or oversight. But although it must be accepted that the courts in England have on a number of occasions accepted trusts for the benefit of poor relatives as being charitable, a close examination of the judgments in these cases discloses two facts of major importance to us when determining whether we in New Zealand should adopt a similar view.

In the first place it is apparent that these "poor relations" decisions are regarded nowadays by the courts in England as anomalous and not in accordance with current concepts of charitable trusts. Both the judicial authorities to whom the Supreme Court in *Re Mitchell*[48] referred in particular indicated this. Lord Simonds in *Oppenheim's* case[49] observed "that the law of charity so far as it relates to 'the relief of aged, impotent and poor people'. (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition [of the requirement of public benefit] on which the determination of this case must rest."[50] Jenkins L.J. in his judgment in *Re Scarisbrick*[51] expressed basically the same view[52]:

> There is, however, an exception to the general rule [of public benefit] in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application . . . and are, therefore not trusts or gifts for the benefit of the public or a section thereof . . . This exception cannot be accounted for by reference to any principle, but it is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned . . . though doubtless open to review in the House of Lords . . . .

Even more direct were the words of Lord Greene M.R. in his judgment in the Court of Appeal in *Re Compton*[53] with which the other members of the Court unqualifiedly concurred:[54]

> I agree that they [the "poor relations" cases] are far from satisfactory and the original decisions were given at a time when the public character of a charitable gift had not been as clearly laid down as it has been in more modern authorities. If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently since I should have thought that their purpose was a private family purpose lacking the necessary public character.

The second aspect of the "poor relations" decisions in England which is of special significance to us is that it is plain that the sole reason why they are still accepted and applied by the courts there, even although they are now recognised as being anomalous and contrary to present day views on charities, is that they have been in existence so long that many trusts and settlements have been established for poor relatives on the basis that they are the established law and that it would cause great injustice and inconvenience if the courts overturned them now. Thus Lord Greene M.R., after criticising the anomalous nature of these cases in the passage quoted from his judgment in *Re Compton*[55] in the preceding paragraph, then went on to say:[56]

> But is is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations upon the faith that they were charitable and many testators have no doubt been guided by these decisions.

But this factor it seems to the writer does not exist in New Zealand nearly to the extent that it does in England. So far as one can tell without conducting a nation-wide survey there are few if any trusts in New Zealand for the relief of poor relatives established as charities. There appear to be none mentioned in the law reports, and conditions have been in material respects so different here from those obtaining in England that it seems unlikely that any such trusts would have been established. In the first place, it is only a little over 120 years since the concepts of English law were introduced into this country, as compared with the centuries during which they have been present in England, and it is particularly significant that most of the reported instances of such trusts in England date from before 1840. Moreover, political, economic and social conditions have been different in certain significant aspects: the State at an earlier stage than in England undertook responsibility for the welfare of the poor; poverty has not been as extensive or as intensive as in England; there have not been so many families of great wealth and traditions of *noblesse oblige* as in England; and, finally, the population has been very much smaller than in England. All these factors suggest to the writer that it is unlikely that trusts for the relief of poor relatives have been established in New Zealand to nearly the same extent as in England and that no great inconvenience or injustice

would be caused if the law relating to them was altered and brought into line with that relating to charitable trusts generally. At the very least it seems so unlikely that many such trusts would have been established that no court in New Zealand, it is submitted with respect, should assume their existence, but should require the matter to be specifically proved.

If it is shown, as the writer suspects, that trusts for poor relations established on the basis that they are charitable are so few and so insignificant in New Zealand that no great injustice or inconvenience would be done by holding them not to be charitable, then the only reason for maintaining their anomalous position in the law disappears and our courts should, it is respectfully suggested, decline to regard them as charitable. If on the other hand it is shown that there are in this country so many trusts for poor relatives that great injustice or inconvenience would be caused if the courts acted to hold them not charitable, and if the courts feel unable, as they apparently do, to speak proleptically, then it is, in the view of the writer, a case for Parliament to act and to declare that in the future all trusts, including those endowing educational institutions for the benefit of relatives and those providing for the relief of poor relatives, must primarily confer a public benefit before they can be regarded as charitable.

1 [1924] A.C.496.
2 e.g. *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C.447, 457; *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C.572, 591, 606, 608.
3 [1924] A.C.496, 499.
4 [1945] Ch.123.
5 [1951] A.C.297.
6 [1945] Ch.123.
7 [1961] A.C.584.
8 [1951] A.C.297; see also *Re Mead* [1961] 1 W.L.R.1244; *Inland Revenue Commissioners* v. *Educational Grants Association Ltd* [1966] 3 W.L.R.724.
9 [1924] A.C.496, 499.
10 e.g. *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C.447, 457-8, per Lord Simonds; *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C.572, 591-3, 606, per Lords Simonds and Reid.
11 See *Inland Revenue Commissioners* v. *Baddeley* (supra) 615 per Lord Somervell.
12 e.g. *Re Piercy* [1898] 1 Ch.565; *Re Simmonds* [1933] N.Z.L.R.s.172.
13 e.g. *Christ's Hospital* v. *Grainger* (1849) 1 Mac. & G. 460.
14 e.g. *Re Tyler* [1891] 3 Ch.252.
15 s.47 Estate and Gift Duties Act 1955.
16 s.5(i)(b) Estate and Gift Duties Act 1955.
17 s.86(1)(n) Land and Income Tax Act 1954.
18 e.g. *Griffith Flood's Case* (1616) Hob.136; *Spencer* v. *All Souls College* (1762) Wilm.163; *Attorney-General* v. *Sidney Sussex College* (1869) 4 Ch. App. 722; *Re Lavelle* [1914] I.R.194; see also *Re Koettgen* [1954] Ch.252.
19 e.g. *Isaac* v. *Defriez* (1754) Amb.595; *White* v. *White* (1802) 7 Ves.423; *Attorney-General* v. *Price* (1810) 17 Ves.371; *Re Compton* [1945] Ch.123; *Re Scarisbrick* [1951] Ch.622.
20 e.g. *Carrigan* v. *Redwood* (1910) 30 N.Z.L.R.244; *Re Claus* [1934] Ch.162.
21 e.g. *Re Pardoe* [1906] 2 Ch.184; *Re Campbell* [1943] N.Z.L.R.113.
22 cf. *Griffith Flood's Case* (1616) Hob.136 and *Attorney-General* v. *Sidney Sussex College* (1869) 4 Ch.App.722, discussed later in text.
23 (1762) Wilm.163; see also *Re Koettgen* [1954] Ch.252.
24 (1762) Wilm.172-3.
25 *Carrigan* v. *Redwood* (supra) 254; see also *Re Claus* (supra) 167-9.

26 *Re King* [1923] 1 Ch.243.
27 *Re Pardoe* (supra).
28 *Re Campbell* (supra).
29 (1616) Hob.136.
30 (1869) 4 Ch.App.722.
31 *Caffoor* v. *Income Tax Commissioners, Columbo* [1961] A.C.584, 602.
32 ibid. 601.
33 ibid. 602.
34 (1754) Amb.595.
35 [1951] Ch.622.
36 *Isaac* v. *Defriez* (supra); *Brunsden* v. *Woolridge* (1765) Amb.570; *Mocatta* v. *Lousado* (unreported on this aspect but referred to in the following case); *White* v. *White* (1802) 7 Ves.423; *Attorney-General* v. *Price* (1810) 17 Ves. 371; *Bernal* v. *Bernal* (1838) 3 My & Cr.559n; *Brown* v. *Whalley* [1866] W.N.386; *Gillam* v. *Taylor* (1873) L.R.16 Eq.581; *Attorney-General* v. *Duke of Northumberland* (1877) 7 Ch.D.745; *Re Compton* [1945] Ch.123; *Re Scarisbrick* (supra).
37 [1963] N.Z.L.R.934.
38 ibid. 940.
39 [1951] A.C.297, 308.
40 [1951] 1 Ch.622, 649.
41 see cases referred to in n.36 supra.
42 e.g. *Isaacs* v. *Defriez* (supra); *Brunsden* v. *Woolridge* (supra); *Bernal* v. *Bernal* (supra); *Gillam* v. *Taylor* (supra); *Attorney-General* v. *Duke of Northumberland* (supra).
43 e.g. *Brown* v. *Whalley* (supra).
44 e.g. *Re Compton* (supra).
45 [1951] Ch.622.
46 *White* v. *White* (supra); *Attorney-General* v. *Price* (supra); *Re Scarisbrick* (supra).
47 See cases referred to in n.42-44, supra.
48 [1963] N.Z.L.R.934, 940.
49 *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C.297.
50 ibid. 308.
51 [1951] 1 Ch.622.
52 idem.
53 [1945] Ch.123.
54 ibid. 139.
55 [1945] Ch.123.
56 ibid. 139.