Public Benefit in the first sense – benefit must be capable of proof

1–066 If the court regards the benefit flowing from a particular purpose as incapable of proof it will decline to recognise the purpose as charitable.[140] In the leading case on religious charity of *Gilmour v Coats*[141] the trusts in issue were trusts, if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St Charles' Square, Notting Hill were charitable, to apply the income of the trust fund to all or any of such purposes. The priory consisted of a community of cloistered nuns, who devoted their lives to prayer, contemplation, penance and self-sanctification within their convent and engaged in no exterior works. The House of Lords held that the benefit of intercessory prayer to the public was not susceptible of legal proof and the element of edification by example was too vague and intangible to satisfy the test of public benefit.[142]

Public Benefit in the first sense – nature of evidence

1–067 Where possible, the court should and does assess public benefit or detriment by reference to what it decides is the common understanding or general consensus of a properly informed ("enlightened") public as to what is or would be beneficial or detrimental to the public or a relevant section of it.[143]

In practice in some cases the court might apply the test of what it thinks the general consensus of the public would be if the general public knew of the particular purpose and was in a position to form a properly informed view or, the test, which in practice amounts to much the same thing, of whether the court considers that the advancement of the purpose is for the public benefit. For example in *Re Pinion*[144] both Wilberforce J and the Court of Appeal held that they could and should rely on the evidence of experts as to the public benefit which would or would not flow from the public exhibition of what Harman LJ described at p.107 as a "mass of junk".

1–068 The relationship between the general consensus approaches and the practical approach of adducing direct evidence of whether or not the purpose is for the public benefit has not been the subject of much analysis in the cases. It is suggested that the two approaches can substantially be reconciled on the basis that in the cases such as *Re Pinion* where the purpose is a specific future purpose

[140] *McGovern v Att-Gen* [1982] Ch. 321 per Slade J at p.334A.
[141] [1949] A.C. 426.
[142] *Gilmour v .Coats* [1949] A.C. 426 per Lord Simonds at p.446; Lord Reid at pp.455, 459 and 461. Lord du Parcq at p.453 was of the same view as regards the element of edification being too vague and intangible. He considered that the law might assume that all intercessory prayer for spiritual benefits was capable of benefiting the public generally or a section of it; but that there was nothing to show that it was more efficacious that private prayer which was not charitable; and, indeed, that that was outside the region of proof. Lords Normand and Morton agreed with all of Lord Simonds, Lord du Parcq and Lord Reid.
[143] Per Lord Wright in *National Anti-Vivisection Society* at pp.47 and 49; *Re Cranston* [1898] 1 I. R. 431 per Holmes LJ (dissenting) at p.454; approved in *National Anti-Vivisection Society v IRC* [1948] A.C. 31 by Lord Simonds at p.73 with whom Viscount Simon (at p.40) and Lord Normand (at pp.78 and 79) agreed. *Southwood v Attorney General* [2000] W.T.L.R. 1199 per Chadwick LJ at para.29.
[144] [1965] Ch. 85.

(exhibiting a particular mass of junk), usually there will not be a general consensus[145] or common understanding (enlightened or not) as to the merits of the specific purpose not because there is a divergence of views amongst the general public, but because the purpose will not yet have been implemented and will be generally unknown and undiscussed. Accordingly in such cases the courts may focus on the practical question of whether the implementation of the purpose actually would be beneficial to the public on such evidence as is put before them, on the unexpressed basis that once public benefit was established to the satisfaction of the court it would follow that the common understanding or general consensus would or should be the same. In contrast in cases where the purpose is more abstract or intangible as with the suggested moral benefits of totally suppressing vivisection, the question of whether it was or was not beneficial may have been the subject of public debate for years so that there may well be either a consensus one way or the other on the subject, or an informed absence of consensus which can be relied upon by the court to decide the public benefit issue.

If, in an abstract or intangible benefit case, in circumstances where the public would be expected to have a view, there is no evidence of a relevant common understanding or consensus then the public benefit or detriment claimed should not be recognised or taken into account by the court.

1–069 In *R (Independent Schools Council) v Charity Commission*[146] the Upper Tribunal was content to accept that the provision of education to students of school age and according to conventional curricula routinely taught in schools across the land was, in the absence of challenge, for the public benefit (paras 68–70). However, it was singularly and understandably unenthusiastic about grappling with the essentially political question of whether, in the context of an independent school charging substantial school fees, the public benefit in the first sense which education gave was outweighed by the alleged detriments arising from the existence of the independent school system and the associated charging of substantial fees by the provider of the education (an independent school). In the event the Upper Tribunal did not have to answer that question because it held that the material put in by the party advocating the detriments (the Education Reform Group ("the ERG")) came nowhere near establishing clearly the "disbenefits" which it identified, in particular the impairment of diversity and social mobility. The Upper Tribunal held[147] that all that the material did was to indicate where the battle lines would be drawn if the question of the alleged detriments had to be determined, but was not evidence of the alleged detriments. The Upper Tribunal indicated strongly that political questions of this kind were not for the Tribunal or the courts to decide.[148] Thus at paras 107–109 of its decision it said:

[145] Though query whether with the increasing availability and use of the internet, social media and texting estimates of general consensuses may be easier to ascertain now than they once were.
[146] [2011] UKUT 421 (TCC), [2012] Ch. 214.
[147] [2011] UKUT 421 (TCC), [2012] Ch. 214 at para.108.
[148] See also *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch.) [2009] Ch. 173 per Lewison J at para.23: "if the court were to attempt to weigh up the pros and cons of banning performing animals of all kinds or preventing the establishment of municipal zoos, it would be exercising the kind of value judgment which is inappropriate for the judicial process."

established and administered by the court, the object of which was to alter the law in a manner highly prejudicial, as he and the Government might think, to the welfare of the state.[248] In *McGovern v Attorney General*[249] Slade J said at p.337B that this merely illustrated some of the anomalies and undesirable consequences that might ensue if the courts began to encroach on the functions of the legislature by ascribing charitable status to trusts of which a main object was to procure a change in the law of the UK as being for the public benefit. It is suggested that Lord Simonds' reason is more than a mere example of an anomaly. As a practical matter in the example contemplated where the trust was a trust to alter a law which the government thought was a good law the Attorney General would be put in an impossible position. The Attorney General would potentially be put in an embarrassing position in less extreme examples. For example, where the trust was a trust to alter the policy of a foreign government.

1–102 The rationales for the political purposes rule that the law is right as it stands and that the courts should not usurp the role of government need now to take account, so far as individual laws are concerned, the fact that their validity and effect might be challenged by reference to the Human Rights Act 1998.

1–103 The above rationales, except, possibly, for the third (usurpation of the role of government), do not apply directly where the political purpose is to be carried out abroad. In such cases Slade J in *McGovern v Attorney General*[250] held that a trust of which the main object was to secure the alteration of the laws of a foreign country could not be regarded as charitable because, first, *a fortiori* the court had no adequate means of judging whether a proposed change in the laws of a foreign country would or would not be for the public benefit; and secondly the court would be bound to consider the consequences for this country as a matter of public policy, as there could arise a substantial prima facie risk that such a trust, if enforced, could prejudice the relations of this country with the foreign country concerned.[251]

1–104 In addition to the difficulty which a political purpose may create with the public benefit requirement; a political purpose may prevent a purpose which would otherwise be within the s.3(1) Charities Act 2011 list from being such a purpose. For example a propagandist purpose masquerading as an educational purpose would not be an educational purpose within s.3(1)(b).[252]

1–105 In the *National Anti-Vivisection Society* case[253] the society had as its objects the total suppression of vivisection and the securing of legislation to that effect.[254] The society was held not to be established for charitable purposes on two

[248] *National Anti-Vivisection Society v IRC* [1948] A.C. 31 per Lord Simonds at pp.62–63.
[249] [1982] Ch. 321.
[250] [1982] Ch. 321.
[251] [1982] Ch. 321 at p.338.
[252] Note the difference between this and the school for pickpockets sort of case analysed above is a subtle one. A propagandist trust would not be educational. A school for pickpockets would be educational, but would not be for the public benefit.
[253] *National Anti-Vivisection Society v IRC* [1948] A.C. 31.
[254] *National Anti-Vivisection Society v IRC* [1948] A.C. 31 per Lord Wright at pp.49 and 51.

grounds: first because, on the evidence, any assumed public benefit from the suppression of vivisection would be far outweighed by the detriment to medical science and research and consequently to public health. Secondly, because a main object of the society was the political object of the promotion of legislation to change the law. On this second ground for the decision Lord Simonds said[255]:

> "My Lords, I see no reason for supposing that Lord Parker in the cited passage used the expression 'political objects' in any narrow sense or was confining it to objects of acute political controversy. On the contrary he was, I think, propounding familiar doctrine, nowhere better stated than in a text-book, which has long been regarded as of high authority but appears not to have been cited for this purpose to the courts below (as it certainly was not to your Lordships), *Tyssen on Charitable Bequests*, 1st ed. The passage which is at p.176, is worth repeating at length: 'It is a common practice for a number of individuals amongst us to form an association for the purposes of promoting some change in the law and it is worth our while to consider the effect of a gift to such an association. It is clear that such an association is not of a charitable nature. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands. On the other hand, such a gift could not be held void for illegality.' Lord Parker uses slightly different language but means the same thing, when he says that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. It is not for the court to judge and the court has no means of judging. The same question may be looked at from a slightly different angle. One of the tests, and a crucial test, whether a trust is charitable, lies in the competence of the court to control and reform it. I would remind your Lordships that it is the King as *parens patriae* who is the guardian of charity and that it is the right and duty of his Attorney-General to intervene and inform the court, if the trustees of a charitable trust fall short of their duty. So too it is his duty to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust. But, my Lords, is it for a moment to be supposed that it is the function of the Attorney-General on behalf of the Crown to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government may think, to the welfare of the state? This very case would serve as an example, if upon the footing that it was a charitable trust it became the duty of the Attorney-General on account of its maladministration to intervene. There is undoubtedly a paucity of judicial authority on this point. It may fairly be said that *De Themmines v De Bonneval* [5 Russ. 288], to which Lord Parker referred in *Bowman's* case [[1917] AC 406], turned on the fact that the trust there in question was held to be against public policy. In *Inland Revenue Commissioners v Temperance Council of the Christian Churches of England and Wales* [136 LT 27], the principle was clearly recognized by Rowlatt J, as it was in *In re Hood* [[1931] 1 Ch 240, 250, 252]. But in truth the reason of the thing appears to me so clear that I neither expect nor require much authority."[256]

At the end of that passage of his speech in *National Anti-Vivisection* Lord Simonds recognised the uncertain foundation of the rule so far as the law of precedent was concerned, but considered that it was clearly correct as a matter of logic. The rule has been applied many times since.[257]

[255] *National Anti-Vivisection Society v IRC* [1948] A.C. 31 at pp.62, 63.
[256] See also *IRC v Temperance Council of The Christian Churches of England and Wales* (1926) 10 T.C. 748 (as the Council was instituted mainly with the direct purpose to effect changes in the law, it was not established for charitable purposes); *Animal Defence and Anti-Vivisection Society v IRC (No.2)* (1950) 66 T.L.R. (Pt.1) 1091 (the objects of the Society included opposition to vivisection, which was not a charitable purpose).
[257] See the cases referred to in the footnotes to the list of political purposes at the beginning of this section; also below as to the post-*National Anti-Vivisection* Society development of the rule. Also *Animal Defence and Anti-Vivisection Society v IRC (No. 2)* (1950) 66 T.L.R. (Pt.1) 1091 (the objects of the Society included opposition to vivisection, which was not a charitable purpose).

> railwaymen be charitable, but a trust for the education of men employed on the railways by the Transport Board not be charitable? and what of service of the Crown whether in the civil service or the armed forces? Is there a difference between soldiers and soldiers of the King? My Lords, I am not impressed by this sort of argument and will consider on its merits, if the occasion should arise, the case where the description of the occupation and the employment is in effect the same, where in a word, if you know what a man does, you know who employs him to do it. It is to me a far more cogent argument, as it was to my noble and learned friend in the *Hobourn* case,[377] that if a section of the public is constituted by the personal relation of employment, it is impossible to say that it is not constituted by 1,000 as by 100,000 employees, and, if by 1,000, then by 100, and, if by 100, then by 10. I do not mean merely that there is a difficulty in drawing the line, though that too is significant: I have it also in mind that, though the actual number of employees at any one moment might be small, it might increase to any extent, just as, being large, it might decrease to any extent. If the number of employees is the test of validity, must the court take into account potential increase or decrease, and, if so, as at what date?"

However, Lord Normand in the same case (at p.311) appeared to think that such a distinction existed:

> "It may be conceded that the distinction inherent in the view that I have taken between an educational trust for the children of all employees in the tobacco industry (see *Hall v Derby Borough Urban Sanitary Authority*[378]), and the present trust may appear to many over-refined and unpractical. But unless it is accepted that all trusts for education are charitable, that is a criticism which cannot be avoided. If a line must be drawn between public trusts and trusts that are not public there will always be marginal cases and the appearance of over-refinement."

1–149 The *Hall v Derby Borough Urban Sanitary Authority*[379] case referred to by Lord Normand does not greatly help because it was decided in 1885 when there were many independent railway companies. The purpose in that case was the provision of an orphanage for the children of deceased railway servants. That purpose was held to be a public charitable purpose. Because of the large number of railway companies in 1885 the class of objects was not linked by or through employment by a common employer. In contrast, by 1950 and the time of the House of Lords' decision in *Oppenheim* almost all the railway companies had been nationalised (nationalisation took place in 1948) and with very few exceptions all railwaymen (excluding workers on the London Underground) would have been employees of a common employer, namely British Railways, hence leading to the anomaly referred to by Lord Simonds in the extract from his speech quoted above.

1–150 An example does exist in the Northern Irish case of *Springhall Housing Action Committee v Commissioner of Valuation*[380] where the objects were described as residents of a particular geographical area although they all happened to be tenants of the same landlord.

1–151 At the other end of the scale the fact that the size of the beneficiary class is very small will not necessarily prevent the requirement of public benefit being satisfied if no arbitrary criterion, unrelated to the particular purpose, is used to

[377] *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch. 194.
[378] (1885) 16 QBD 163.
[379] (1885) 16 QBD 163.
[380] [1983] N.I. 184.

delimit the class. *Re Christchurch Inclosure Act*[381] is an example, where a right of cutting turf vested in the occupiers for the time being of a few cottages was of a sufficiently public character to come within the legal definition of a charity.

1–152 It is inherent in the public benefit requirement for charitable status that benefits must flow to the public and that any benefits to an individual must come either as a result of the carrying out of the charitable purpose, for example, receipt of a grant or an education, or be legitimately incidental to the pursuit of the charitable purpose. Determining whether there will be excessive private benefit which will prevent an organisation from attaining charitable status is particularly difficult for certain types of charity such as those for the relief of unemployment, the promotion of urban and rural regeneration, the provision of housing,[382] or the promotion of professions.

Public Benefit in the second sense – old fourth head purposes

1–153 It is suggested that there is a broad distinction between purposes which are only capable of being charitable because their advancement is of general public utility within the meaning of the old fourth head of charity[383] and other purposes which were within the old fourth head but were trusts for the relief of a particular need, though not purposes of general public utility. Examples of the former are public works such as the repair of highways,[384] the building of bridges[385] or of sea walls.[386] Examples of the latter are trusts for the relief of the sick or aged of a particular religion[387] or of a particular occupation.[388] The trust for "New South Wales returned soldiers" considered in *Verge v Somerville*[389] is also an example of the latter kind of trust. There is a third kind of purpose which was within the old fourth head; that is a purpose which provides a mental or moral benefit. The archetypal example of such a purpose is the prevention of cruelty to animals.[390]

1–154 Where a purpose is potentially charitable because it is of general public utility, the requirement of benefit to the public in the second sense will only be satisfied if the whole of the public or the whole of the public of a specified area are capable of benefiting from the advancement of the purpose, even if some of them, in the nature of things, are likely to benefit to a greater extent than others. In such a case the requirement of benefit to a section of the public will not be satisfied if any person physically capable of and desirous of enjoying the benefits of the trust is by the terms of the trust instrument excluded from those benefits because he is

[381] (1888) 38 Ch.D. 520.
[382] *Helena Housing Ltd v HMRC* [2012] EWCA Civ. 569, [2012] 4 All E.R. 111.
[383] That is the fourth of the heads described by Lord Macnaghten in *IRC v Pemsel* [1891] A.C. 531 at p.583, of "other purposes beneficial to the community, not falling under any of the preceding heads".
[384] Preamble to the Statute of Elizabeth I and *Attorney General v Harrow School (Governors)* (1754) 2 Ves. Sen. 551; and *Attorney General v Day* [1900] 1 Ch. 31.
[385] *Forbes v Forbes* (1854) 18 Beav. 552.
[386] Preamble to the Statute of Elizabeth I.
[387] *Re James* [1932] 2 Ch. 25; *Baddeley v IRC* [1955] A.C. 572 per Lord Reid at p.607.
[388] *Hall v Derby Borough Urban Sanitary Authority* (1885) 16 QBD 163.
[389] [1924] A.C. 496.
[390] *Re Wedgwood* [1915] 1 Ch. 113.

> the institution, and to make schemes for the cy-près application of assets in appropriate cases. In any given case it may be a question of degree whether an institution can fairly be said to be, within that jurisdiction, under the control of the court. But my conclusion is that an institution so closely under the control of the executive as is one of these training boards, with such minimal occasion for intervention by the court, is outside the statutory definition of 'charity.' I say 'such minimal occasion for intervention' having in mind the ability already mentioned to restrain ultra vires acts by the board in the improbable event of the Minister acquiescing. I have also in mind the possibility referred to in argument that, on a winding up of a board leaving a surplus of assets, the Minister would omit or forget for a time to specify what was to be done with that surplus. In such a case it is arguable that the court would have jurisdiction to intervene to protect the surplus assets pending such specification. I do not myself think that such argument is sound, because in my view the assets on a winding up become at once taken out of the field of charity by being placed at the disposal of the Minister. But, even if that were not so, it is I think clear that the jurisdiction of the court to secure the application of the surplus assets to charitable purposes cy-près is ousted."

- At p.185A said that he found it difficult to hold, in effect, that Minister had less control in respect of the Board than a visitor would have in the case of a charity with visitors.[538]
- At p.185A–B noted that some of the institutions expressly exempted from the Charities Act 1960[539] were corporations with visitors which, if the general requirement of control by the High Court was designed to exclude them, would make their specific exclusion superfluous.

Buckley LJ

- At p.187A–C held that any relief given by a court in respect of a charity's administration, whether it was relief which could be given if the institution was not a charity or whether it was special relief of a kind which could only be given in respect of charities, was relief given by the court in the exercise of its jurisdiction with respect to charities, and he rejected the submission that the court's jurisdiction with respect to charities was confined to its jurisdiction to approve charitable schemes.
- At pp.187H–188C held that the powers given to the Minister in respect of the Board did not oust the jurisdiction of the court to control the Board in the execution of the statutory obligations[540] which were binding on them.
- At p.187D had no doubt that if the Attorney General were to institute proceedings against the board alleging misuse of funds, the court would entertain them; similarly if the Board sought the directions of the court as to the conduct of its affairs.
- At p.187E concluded:

> "The fact that the Act confers upon the Minister the right to control the board in certain specified respects, such as investment, and that the court could not properly seek to

[538] As to charities with visitors and visitatorial powers, see Ch.14.

[539] Exempt or Excepted charities. As to which see Ch.5.

[540] Buckley LJ used the word "trusts", but it must be very doubtful whether he intended to use the word "trusts" in its narrow Chancery sense rather in the wider sense of legal obligations for the benefit of others. For the distinction, see *Bath and North East Somerset DC v Attorney General* [2002] EWHC 1623 (Ch.); [2002] W.T.L.R. 1257, per Hart J at paras 23–25.

> interfere with any decision of the Minister with respect to any such matter, cannot, in my opinion, result in the board not being subject to the control of the court in the exercise of its jurisdiction in respect of charities."

Plowman J

- At p.188G agreed with Russell LJ that the "control of the High Court in the exercise of its jurisdiction in respect of charities" requirement excluded a case where a charitable institution was established in terms which substantially ousted the jurisdiction of the court. He said that he agreed with Russell LJ that certain charities established with visitors were examples of cases where such jurisdiction was ousted though that appears to be the opposite of what Russell LJ said on the point; but disagreed with Russell LJ on the issue of whether on the facts of the particular case the jurisdiction was substantially ousted. Plowman J held that it was not.
- At p.188G–H agreed with Buckley LJ that there was nothing to prevent the Attorney General taking appropriate proceedings to prevent the misapplication of the funds of the Board, and at p.189B–C held that the existence of the possibility of intervention by the Attorney General to prevent an abuse of the trust reposed in those having the management of the revenues of the board was a substantial matter in respect of which the jurisdiction of the court was not ousted, and brought the case "fairly and squarely within the four walls of the definition".

The Court's "jurisdiction with respect to charities" must be a jurisdiction to give relief which will bind the body of trustees as a whole.[541] **1–211**

Foreign elements may mean, possibly in combination with other factors, that an institution would not be sufficiently subject to the control of the High Court in the exercise of its jurisdiction with respect to charities to be a charity. An example would be a wholly foreign institution with wholly foreign operations and no presence in or connection with England or Wales except, possibly, for a clause providing that "English law shall be the proper law of the institution". In *Re Carapiet's Trust*[542] Jacob J expressed the tentative view (at para.34) that if the trustees of a charitable trust went abroad permanently and the objects and assets of the trust were all abroad, the trust might cease to be "within the remit of the Charity Commissioners". At paras 35 to 37 Jacob J expressed doubt as to whether it was "necessary" for there to be a trustee within the jurisdiction for a charitable trust to fall within the scope of the Charities Act 1993 definition of "charity". That definition contained the same requirements as s.1(1) of the Charities Act 2011 as to "established" and "control by the High Court in the exercise of its jurisdiction with respect to charities".[543] He referred to the in personam jurisdiction of equity; to the provisions of the CPR[544] permitting service outside of the jurisdiction and to the power of the court under s.39 of the Supreme Court **1–212**

[541] *Construction Industry Training Board v A-G* [1973] Ch. 173 per Buckley LJ at p.187B.

[542] [2002] EWHC 1304 (Ch.), [2002] W.T.L.R. 989.

[543] Jacob J misquoted s.96(1) of the Charities Act 1993, referring to jurisdiction "over charities" rather than "with respect to charities", but nothing turned on that.

[544] The Common Procedure Rules.

such bodies for their general purposes were charitable.[184] Accordingly, gifts to or for the benefit of the Royal Society,[185] the Royal Geographical Society,[186] the Royal Literary Society,[187] the Royal College of Surgeons,[188] the Royal College of Nursing,[189] the British School of Egyptian Archaeology,[190] the Zoological Society of London[191] and the Institution of Civil Engineers[192] were charitable.

2–045 Various trusts for the advancement of what might be termed aesthetic education have been upheld as charitable. The word "aesthetic" is used here as meaning "of or pertaining to the appreciation or criticism of the beautiful". The cases hereinafter discussed or referred to illustrate the favour shown by the court, especially in recent years, to the advancement of "aesthetic education", an expression used by Lord Greene MR in *Royal Choral Society v IRC*.[193]

Aesthetic education includes the provision for the public of opportunities to examine the work of craftsmen who lived long ago. Thus in *Re Cranstoun*,[194] a testator devised two ancient cottages to the Royal Society of Arts in order that the society might preserve them in their present condition; and he also gave a fund to the society for the maintenance of the cottages. It was proved that the testator knew at the date of his will that the society had opened a fund for the preservation of ancient cottages and that the objects of the fund were to preserve ancient cottages as specimens and models of English craftsmanship so as to teach the lessons of such craftsmanship. The cottages were Elizabethan and picturesque. Farwell J may have based his decision primarily on the ground that the main object of the fund was for the good of the community at a large and within Lord Macnaghten's fourth class.[195] In *Re Verrall*,[196] which was followed in *Re Cranstoun*,[197] it had been held that the National Trust for Places of Historic Interest or Natural Beauty was a charity, and it appears from the judgment that it came within Lord Macnaghten's fourth class. Nevertheless, in the latter case it was said by Farwell J that the preservation of ancient buildings was desirable for two main reasons: (1) because they were of interest, as being something historical, as it were visible examples of past history[198]; and (2) because they exhibited arts of craftsmanship which had been to some extent lost, the

[184] (1963) 27 Conv (N.S.) 469 (A. Samuels).
[185] *Beaumont v Oliviera* (1869) L.R. 4 Ch. 309; *Royal Society of London and Thompson* (1881) 17 Ch.D. 407.
[186] *Beaumont v Oliviera* (1869) L.R. 4 Ch. 309.
[187] *Thomas v Howell* (1874) L.R. 18 Eq. 198.
[188] *Royal College of Surgeons of England v National Provincial Bank Ltd.* [1952] A.C. 631.
[189] *Royal College of Nursing v St. Marylebone Borough Council* [1959] 1 W.L.R. 1077.
[190] *Re British School of Egyptian Archaeology* [1954] 1 W.L.R. 547. The "school" was a society the objects of which were (inter alia) to conduct excavations in Egypt and to publish works; Cf. *Yates v University College, London* (1873) L.R. 8 Ch.App. 454; affirmed (1875) L.R. 7 H.L. 438, where a trust to found a professorship in archaeology was treated as charitable.
[191] *Re Lopes* [1931] 2 Ch. 130; applied by the Court of Appeal in *North of England Zoological Society v Chester RDC* [1959] 1 W.L.R. 773.
[192] *Institution of Civil Engineers v IRC* [1932] 1 K.B. 199.
[193] [1943] 2 All E.R. 101 at p.105.
[194] [1932] 1 Ch. 537.
[195] *Income Tax Special Purposes Commissioners v Pemsel* [1891] A.C. 531 at p.583.
[196] [1916] 1 Ch. 100. See also [1990] Ch. Com. Rep., para.42 (Settle and Carlisle Railway Trust).
[197] [1932] 1 Ch. 537 at 545.
[198] For preservation of buildings as a fourth head purpose see para.2–081 below.

consideration and study of which might tend to teach and educate people at the present day in methods of building new cottages which had to be built to satisfy modern requirements. If the second ground of the decision may be regarded as, it is submitted, it ought to be regarded, as an essential part of the *ratio decidendi*, the trust was a trust for the advancement of education, and the case is properly cited under this head.

Trusts to establish and support museums[199] and art galleries[200] are similarly charitable. For example, in *Re Spence*[201] there was a bequest to the corporation of Stockton-on-Tees of a collection of arms and antiques which were to be exhibited in a place accessible to the public. It was held that the object of the bequest was educational and so charitable.

2–046 The promotion of artistic taste is a charitable purpose,[202] and so also are the encouragement of music,[203] the provision of a concert hall,[204] choral singing,[205] the encouragement of singing and the advancement of organ music,[206] the advancement of the works of a particular composer,[207] and the performance of the plays of an eminent playwright, the reviving of classical drama and the stimulating of the art of acting.[208]

2–047 The cases did not justify the general proposition that the fine arts are not an object of charity or that a gift to encourage artistic pursuits is never charitable.[209] The debate on that point[210] is now academic because the advancement of the arts is now a specific head of charity under s.3(1)(f) of the Charities Act 2011.

2–048 It is thought that the decision of Upjohn J in *Associated Artists v IRC*[211] was not only correct in every particular but illuminated the whole question of gifts intended for the advancement of aesthetic education. The plaintiff company was a non-profit-making company limited by guarantee. Clause 3 of the memorandum of association (the objects clause) contained (inter alia) the following objects:

[199] *British Museum v White* (1826) 2 Sim. & St. 594; *Re Allsop* (1884) 1 T.L.R. 4; *Re Holburne* (1885) 53 L.T. 212.
[200] *Gwynn v Cardon* cited in (1805) 10 Ves. 522 at p.533; *Abbott v Fraser* (1874) L.R. 6 P.C. 96; *Re Shaw's Will Trust* [1952] Ch. 163.
[201] [1938] Ch. 96.
[202] Charities Act 2011 s.3(1)(f); and *Re Allsop* (1884) 1 T.L.R. 4.
[203] *Shillington v Portadown UDC* [1911] 1 I.R. 247, *IRC v Glasgow Musical Festival Association* [1926] S.C. 920 (society where objects were to stimulate public interest in music and encourage those members of the public who had musical gifts to cultivate them a charity).
[204] *Re Henry Wood National Memorial Trust* [1966] 1 W.L.R. 1601 (trust to establish a concert hall as a national music centre).
[205] *Royal Choral Society v IRC* [1942] 2 All E.R. 101.
[206] *Re Levien* [1955] 1 W.L.R. 964.
[207] *Re Delius* [1957] Ch. 299. In this case the court appears to have formed the aesthetic opinion that Delius was a great composer and that his music deserved to be made known to the public who would benefit from such knowledge.
[208] *Re Shakespeare Memorial Trust* [1923] 2 Ch. 398.
[209] *Royal Choral Society v IRC* [1943] 2 All E.R. 101 at p.106, disapproving the statement in the 5th edn of this work at p.39. See also *Perpetual Trustee Co. Ltd v Groth* (1985) 2 N.S.W.L.R. 278.
[210] For the debate, see *Tudor on Charities* (9th edn) at para.2–027.
[211] [1956] 1 W.L.R. 752. The advancement of aesthetic education abroad is charitable, see [1989] Ch. Com. Rep., para.33 (The European Script Fund).

the maintenance and support of the inmates. There was no requirement of poverty, but the sisters were engaged in charitable work and their individual incomes were pooled, so that it is likely that they had taken vows of poverty. Farwell J held that the gifts were charitable on the ground that the sisters and the clergy were good objects of a charity.

2–159 In *Re Robinson*[567] and *Re Fraser*[568] trusts for what must have been fairly small numbers of blind persons (i.e. "impotent" persons within the meaning of the Preamble to the Statute of Elizabeth I) described in general terms were held to be charitable, but apparently without argument being addressed to the question of whether the class of potential beneficiaries constituted a sufficient section of the public.

2–160 As explained above, exceptionally trusts for the relief of poverty could be charitable where the class to be benefited was a very small number of persons and where there was a personal nexus between them. It is suggested that this exception did not extend to trusts for the relief of impotent people. The relevant phrase in the Preamble to the Statute of Elizabeth I was "relief of aged impotent and poor people". This was construed disjunctively, so a trust for the relief of aged or impotent people might be charitable without also requiring the aged or impotent people to be poor.[569] Thus, it would be quite possible for the exception as to the width and nature of the class to be benefited to be restricted to trusts for the relief of poverty. In *Oppenheim v Tobacco Securities Trust Co Ltd*[570] the House of Lords made it clear that it considered (albeit strictly obiter) that the personal nexus exception only applied to trusts for the relief of poverty.

2–161 There is some suggestion in the judgment of Byrne J in *Re Gosling*[571] that gifts for the relief of poverty are not the only ones which will not fail to be charitable because of a personal nexus. Dealing with a fund for "pensioning off" of the old and worn-out clerks of a banking firm of which the testator had been a member, Byrne J said:

> "The fact that the section of the public is limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family, does not itself render that which would be otherwise charitable void for lack of a sufficient or satisfactory description or take it out of the category of charitable gifts. I therefore hold it to be a good charitable gift."

Re Gosling was a "poor employees" case, and it is suggested that the passage of Byrne J's judgment quoted above should be restricted to anomalous cases of that type; though it should be mentioned that the passage was cited by Lord Cross of Chelsea in *Dingle v Turner*[572] who added: "It is to be observed that [Byrne J] does not confine what he says there to trusts for the relief of poverty as opposed to other forms of charitable trusts."

[567] [1951] Ch. 198 – gifts of £100 each to "10 blind girls Totten ham residents if possible," and of £100 to "each of 10 blind boys Tottenham residents if possible".
[568] (1883) 22 Ch.D. 827 – fund to be invested for the benefit of the blind in Invernesshire.
[569] *Re Glyn Will Trusts* [1950] W.N. 373, [1950] 2 All E.R. 1150n; *Re Robinson* [1951] Ch. 198.
[570] [1951] A.C. 297.
[571] (1900) 48 W.R. 300 at 301.
[572] [1972] A.C. 601 at p.618.

2–162 In *Oppenheim v Tobacco Securities Trust Co Ltd*[573] Lord Simonds, in suggesting that the poverty cases might one day need to be reviewed by the House of Lords (though he indicated that it would be unwise to cast doubt on them), spoke of the law of charity having followed its own line so far as it related to, quoting from the Preamble, "the relief of aged, impotent and poor people". It has been argued[574] that if Lord Simonds accepted the disjunctive construction of that phrase, then, in saying that charity had followed its own line, he did not distinguish between age, impotence and poverty, and that accordingly a personal nexus between the potential beneficiaries was not fatal to a trust for the relief of the aged or the impotent. It is respectfully suggested that Lord Simonds meant nothing of the sort. It is clear from the context that Lord Simonds was only referring to the possible need to review the poverty cases. There are no cases involving the relief of aged or impotent people other than cases with an element of poverty where a class of persons with a personal nexus has been held to constitute a sufficient section of the public. On the page before the passage referred to, Lord Simmonds said: "with the single exception of *Re Rayner*,[575] which I must regard as of doubtful authority, no case has been brought to the notice of the House in which such a claim as this has been made, where there is no element of poverty in the beneficiaries". Lord Cross in *Dingle v Turner*[576] said that many "purpose" trusts falling under Lord Macnaghten's fourth head in *Income Tax Special Purposes Commissioners v Pemsel*[577] if confined to a class of employees would clearly be open to the same sort of objection as educational trusts.

2–163 In the Northern Ireland case of *Re Dunlop*[578] which concerned a gift to provide a home for "Old Presbyterian persons", Carswell J took the view, it is suggested correctly, that the poverty exception to the usual rule of public benefit did not extend to trusts to relieve aged or impotent persons.[579]

2–164 As regards public benefit in the second sense (benefit to the public or a sufficient section of it) in respect of purposes which do not come within the scope of "relief of the impotent": this is considered in Ch.1 under the headings "Public Benefit in the second sense – Old fourth head purposes"; "The Public Benefit Requirement – Exclusion of the poor" and "The Public Benefit Requirement – Charging for services". The discussion under the last two-mentioned headings is also relevant to purposes within the scope of "relief of the impotent".

[573] [1951] A.C. 297 at p.308. See also *Re Cox* [1955] A.C. 627, PC.
[574] In, amongst other places, the 9th edition of this book at para.2–014.
[575] (1920) 89 L.J. Ch. 369.
[576] [1972] A.C. 601 at p.625.
[577] [1891] A.C. 531 at p.583.
[578] [1984] N.I. 408.
[579] See "'Old Presbyterian persons' – A Sufficient Section of the Public?", N. Dawson [1987] Conv. 114.

promotion of industry, commerce and art are all charitable purposes,[767] though the promotion or art might now come under the s.3(1)(f) head (the advancement of the arts, culture, heritage or science).

2–256 The promotion of industry as a charitable purpose includes not only the promotion of manufacturing industry, but also the promotion of horticulture[768] and agriculture.[769] Thus the promotion of agriculture generally, as opposed for benefiting those engaged in agriculture, was held to be charitable in *IRC v Yorkshire Agricultural Society*.[770] The preservation and improvement of fine craftsmanship is also charitable,[771] though this might now come under the s.3(1)(f) head (the advancement of the arts, culture, heritage or science).

2–257 A gift of land for the purposes of public recreation is charitable. Statute[772] had long impliedly recognised this before the decision of Clauson J in *Re Hadden*.[773] Following *Re Hadden*, Harman J in *Re Morgan*[774] upheld as charitable a bequest of a fund for the provision of a public recreation ground for the inhabitants of a particular parish. In Northern Ireland, it has been held that the purpose of providing the means of healthy recreation for the inhabitants of a particular town is charitable.[775] The provision of a recreation ground for the employees of a

[767] See, however, *Re Shaw* [1957] 1 W.L.R. 729 at 737; Cf. *Construction Industry Training Board v Att-Gen* [1971] 1 W.L.R. 1303, at p.1307; affirmed [1973] Ch. 173.

[768] *Re Pleasants* (1923) 39 T.L.R. 675 (Also the promotion of good housewifery).

[769] *IRC v Yorkshire Agricultural Society* [1928] 1 K.B. 611; applied in *Brisbane City Council v Att-Gen for Queensland* [1979] A.C. 411, (P.C.) (showground); and see *Re Hadden* [1932] 1 Ch. 133. See also *Re Jacobs* (1970) 114 S.J 515 (gifts for the planting of a grove of trees in Israel held to be charitable as promoting agriculture).

[770] [1928] 1 K.B. 611.

[771] See *IRC v White (Clerkenwell Green Association for Craftsmen)* [1980] T.R. 155.

[772] Recreation Grounds Act 1859, The Mortmain and Charitable Uses Act 1888, ss.13(1) 4 and 6(4)(i), and the Open Spaces Act 1906, ss.3 and 5(1); see *IRC v Baddeley* [1955] A.C. 572 at 595 per Lord Reid. Whilst the Act of 1859 has been repealed by Charities Act 1960, s.39 and Sch.5, and the Act of 1888 has been repealed by s.48 and Sch.7 to the Act of 1960, this has not altered the substantive law.

[773] [1932] 1 Ch. 133 (provision of open air recreation for working people). See also *Re Foakes* (1933) February 21, unreported but cited in *IRC v Baddeley* [1955] A.C. 572 at p.596 and *Re Chesters* (1936) July 25, unreported but also cited at [1955] A.C. 572 p.596.

[774] [1955] 1 W.L.R. 738. See also [1984] Ch. Com. Rep, paras 19–25 (provision of a public ice rink) and *Bath and North East Somerset Council v Att-Gen* [2002] EWHC 1623 but Cf. *Liverpool CC v Attorney General, The Times*, May 1, 1994 (recreation ground but no charitable intent).

[775] *Shillington v Portadown UDC* [1911] 1 I.R. 247; and see the unreported cases of *Re Foakes and Re Chesters* (referred to by Lord Reid in *IRC v Baddeley* [1955] A.C. 572 at p.596). See also *IRC v City of London* [1953] 1 W.L.R. 652 (the preservation of Epping Forest as an open space for the benefit of the public, under the Epping Forest Act 1878, is a charitable purpose); *Re Alexandra Park and Palace Acts, Alexandra Park Trustees v Haringey London Borough Council* (1967) 111 S.J 515 (a trust the main purpose of which was that Alexandra Park should be maintained as an open space for the free use and recreation of the public was charitable); Cf. *Richmond-upon-Thames London BC v Att-Gen* (1983) L.G.R. 151 (gift of land to a vestry was not subject to charitable trusts; the land was transferred to the vestry in its capacity as an urban authority under the Public Health Act 1875).

particular employer is not charitable, however, as it lacks the necessary element of general public utility[776]; it would also fail to satisfy the public benefit requirement.

2–258 In *Bath and North East Somerset District Council v Attorney General*[777] Hart J held that a trust of land (Bath Recreation ground) for "the purpose or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose" was a charitable trust. Hart J held[778] that a particular provision within the trust deed demonstrated that the beneficiaries of the purposes had to be taken to be the public generally. He held[779] that the fact that the powers conferred on the trustee were capable of being exercised so as to restrict actual enjoyment of the facilities to persons identified by their membership of particular clubs organisations or bodies did not mean that the trust necessarily and automatically failed what is now referred to as the second aspect or sense of the public benefit requirement (benefit to the public or a sufficient section of it). He further held[780] that this feature did not cause the trust to fail by reason of the fact that some of the activities permitted on the recreation ground were not themselves charitable; nor did the fact that parts of the ground might be let to sporting entities which were not themselves charitable[781] prevent the recreation ground from being predominantly a public recreation ground.

2–259 *IRC v Baddeley*[782] concerned two deeds of conveyance by which certain trusts were declared. If the trusts so declared were charitable, stamp duty would have been smaller than if they were not charitable.[783] By the first of the deeds some land, on which were a mission church, lecture room and store, was conveyed to trustees upon trust to permit the premises to be used for the promotion of the religious, social and physical well-being of persons resident in the boroughs of West Ham and Leyton by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who were and were likely, in the opinion of specified persons, to become members of the Methodist Church and were of insufficient means otherwise to enjoy the advantages provided and by promoting and encouraging all forms of such activities as were calculated to contribute to the health and well-being of such persons. By the second deed four pieces of land were conveyed to the same trustees upon almost the same trusts; the only significant difference was that the trustees were to permit the pieces of land to be used for the moral (instead of religious) and physical well-being of the same class of persons, who may be shortly described as actual or potential Methodists resident in the specified areas.

[776] *Wernher's Charitable Trust (Trustees of) v IRC* [1937] 2 All E.R. 488. See also *Re Drummond* [1914] 2 Ch. 90; *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch. 194; *Oppenheim v Tobacco Securities Trusts Co. Ltd* [1951] A.C. 297; *Vernon v IRC* [1956] 1 W.L.R. 1169.

[777] [2002] EWHC 1623 (Ch.), W.T.L.R. 1257.

[778] [2002] EWHC 1623 (Ch.) at para.30.

[779] [2002] EWHC 1623 (Ch.) at para.31.

[780] [2002] EWHC 1623 (Ch.) at para.45.

[781] [2002] EWHC 1623 (Ch.) at paras 45 and 46.

[782] [1955] A.C. 572.

[783] [1955] A.C. 572 at pp.583, 584.

provisions contained both in statute and in statutory instrument. The regulatory regime applicable to an exempt charity now depends on whether a principal regulator has or has not been appointed in respect of it. A complementary process involves converting a number of exempt charities into "excepted charities" (see below) and thereby subjecting them (subject again to transitional provisions) to regulation by the Commission and almost fully to the requirements of the Charities Act 2011. Again the process is not yet complete.

5–003 Excepted charities are charities within s.30(2)(b) or (c) of the Charities Act 2011. They are specified by Commission or Ministerial order and must have gross incomes which do not exceed £100,000.[1] Excepted charities are not required to register. Until s.30(3) of the Charities Act 2011 comes into effect[2] they may, if they apply, be registered at the Commission's discretion.[3] They may be removed from the register whether or not they so request.[4] While they are unregistered they are excepted from the ss.162–166 of the Charities Act 2011 requirements as to submitting annual returns etc[5]; though if requested to do so by the Commission, the charity trustees must prepare an annual report in respect of such financial year as is specified in the Commissioner's request.[6] Otherwise they are subject to the requirements of the Charities Act 2011 and to regulation by the Commission in the same way and to the same extent as "ordinary" registered charities.

5–004 Charities, other than Charitable Incorporated Associations, whose gross income does not exceed £5,000 within s.30(2)(d) are also not required to, but may, if they apply, be registered.[7] They may be removed from the register whether or not they so request[8] They are excepted from some of the provisions of the Charities Act 2011. Charities of this kind are sometimes also referred to as "excepted charities", but the description is more usually only applied to charities within s.30(1)(b) and (c).

[1] Charities Act 2011 ss.30(2)(b) and (c) and 31.

[2] As at 1 July 2015 it does not have effect: see para.8 of Sch.9 to the Charities Act 2011.

[3] Regulations 1(2) and 6 of the Charities Act 2006 (Commencement No.5, Transitional and Transitory Provisions and Savings) Order 2008 as continued and applied to the 2011 Act by Sch.8 to the Charities Act 2011. This should be an interim phase. s.30(3) of the Charities Act 2011 provides that an excepted charity must if it so requests be registered on the register; but pending the making of one or more orders specifying "relevant commencement dates" in respect of excepted charities, Pt 4 of the Act (registration and names of charities) has effect with the omission of s.30(3).

[4] Regulations 1(2) and 8 of the Charities Act 2006 (Commencement No.5, Transitional and Transitory Provisions and Savings) Order 2008 as continued and applied to the 2011 Act by Sch.8 to the Charities Act 2011.

[5] Charities Act 2011 s.168(2).

[6] Charities Act 2011 s.168(3).

[7] Charities Act 2006 regs 1(2) and 6 (Commencement No.5, Transitional and Transitory Provisions and Savings) Order 2008 as continued and applied to the 2011 Act by Sch.8 to the Charities Act 2011. This should be an interim phase. Section 30(3) of the Charities Act 2011 provides that an excepted charity must if it so requests be registered on the register; but pending the making of one or more orders specifying "relevant commencement dates" in respect of excepted charities, Pt 4 of the Act (registration and names of charities) has effect with the omission of s.30(3).

[8] Charities Act 2006 regs 1(2) and 8 (Commencement No.5, Transitional and Transitory Provisions and Savings) Order 2008 as continued and applied to the 2011 Act by Sch.8 to the Charities Act 2011.

EXEMPT CHARITIES

General

5–005 Exempt charities "are not required to be registered" on the register of charities.[9] The Commission does not permit the voluntary registration of exempt charities.

Subject to important transitional and transitory arrangements[10] and to certain modifications, exempt charities are or may become subject to some or all of the requirements of the Charities Act 2011 and to some or all of the supervisory, inquisitorial and enforcement powers of the Commission. Essentially exempt charities in respect of which "principal regulators" have been appointed under s.25 of the Charities Act 2011 are subject to modified forms of those requirements and duties. Exempt charities in respect of which principal regulators have not been appointed are subject to some but far from all of the requirements of the Charities Act 2011, and remain free from almost all the supervisory, inquisitorial and enforcement powers of the Commission. The amendments to the Act which apply pending the "relevant commencement dates", which should coincide with the appointment of principal regulators for exempt charities or categories of exempt charities are set out in Sch.9 to the Charities Act 2011. They and certain other modifications to the Commission's powers in relation to those exempt charities with and those without principal regulators are listed at E1 of the Commission's Legal/Policy/Accountancy Framework document in its Operational Guidance. This is available on-line at http://ogs.charitycommission.gov.uk/g717a001.aspx

5–006 Section 25 of the Charities Act 2011 provides that in the Act, "the principal regulator" in relation to an exempt charity means such body or Minister of the Crown as is prescribed as its principal regulator by regulations made by the Minister.[11]

Section 26(2) of the Charities Act 2011 requires the principal regulator to do "all" that it reasonably can to meet the compliance objective in relation to an exempt charity of which it is the regulator. Section 26(3) defines the compliance objective in this context as being "to promote compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity". This is nearly identical to the Commission's compliance objective as set out in s.14 in the Charities Act 2011. The only difference is that by reason of the different context the Commission's objective refers to "administration of their charities" rather than to "administration of the charity". Section 27 enables the Minister by regulation to make such amendments or other modifications of any enactment as he considers appropriate for the purpose of facilitating, or otherwise in connection with, the discharge by a principal regulator of the duty under s.26(2).

5–007 The most important modification to the Commission's powers as applied to exempt charities with principal regulators is that by s.28 Charities Act 2011,

[9] Charities Act 2011 s.30(1).

[10] Mainly contained in Sch.9 to the Charities Act 2011.

[11] The Minister for the Cabinet Office: s.351(1) of the Charities Act 2011.

There is a useful body of non-charitable case law in relation to testamentary gifts which are made upon conditions that are required by the will to be performed within a certain time.[386] The classic statement of principle in these cases appears in *Re Goodwin*,[387] where Romer J said:

> "It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter. In determining that question the court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against; and if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition."[388]

This dictum was applied in the charity case of *Re Selinger's Will Trusts*[389] where the trustees' delay in finding a suitable recipient for a gift over was held not to defeat the gift over, notwithstanding an express clause of revocation engaged upon the trustees' failure to comply with the relevant condition. Harman J noted the orthodoxy that the presence of a gift over upon failure to perform the condition made strict compliance with the condition necessary and the controversy as to whether a clause of revocation was to have the same effect. Ultimately, he held that the case turned on the particular wish of the testatrix, which he saw as having been to avoid delay in the administration of the estate while the executors decided upon a suitable beneficiary. Since their delay in selection had not itself held up this administration, their default should not be allowed to defeat the charitable gift over.

6–042 In several old cases the question of what was sufficient to satisfy a condition requiring the performance of divine service arose. In *Re Conington's Will*[390] lands were demised to the use of a vicar of a parish on condition that he read prayers in the parish church at specified times, with a gift over of the rents and profits during the life of any vicar who neglected to comply with the condition, and it was held that neglect meant wilful neglect,[391] and that omission to perform services in consequence of its having been found impossible to obtain a congregation was not wilful neglect. With the last-mentioned case may be compared an unreported case,[392] where a testator directed that the rents of certain

[386] *Taylor v Popham* (1782) 1 Bro. CC 168; *Re Goodwin* [1924] Ch. 26; *Re Goldsmith* [1947] Ch. 339. For discussion of this line of authority and the distinction between these cases and those on testamentary options, see *Re Bowles dec'd, Hayward v Jackson*[2003] Ch. 422 and *Re Gray dec'd. Allardyce v Roebuck* [2005] 1 W.L.R. 815.

[387] [1924] Ch. 26.

[388] [1924] Ch. 26 at 30.

[389] [1959] 1 W.L.R. 217.

[390] (1860) 8 W.R. 444.

[391] But see the discussion of this and other cases in *Re Quintin Dick (No.1)* [1926] Ch. 992 (possible for "neglect" to have broader meaning, but "refuse and neglect" did not encompass a failure to act through ignorance).

[392] *Bethlehem and Bridewell Hospitals v Ironmongers' Co.*, Jessel MR (4 April 1881).

land should be paid to some person to celebrate the divine service in the parish church every day in the week for ever; and in case of failure to perform service for more than three days together, the rents were directed to be paid to a hospital. Divine service not having been performed as required, the gift over was held to have taken effect. Jessel MR said:

> "It is no answer to say that there was no congregation. A congregation sufficient for saying the prayers is not limited by law to any number of persons. The minister and his clerk, and the sextoness, would have done very well, or the minister and his clerk would have done very well. There was no occasion to have any one else there. But what the testator required was that the service should be performed and anybody might have come and attended the church."

Relief from forfeiture and against conditions precedent

6–043 The court has jurisdiction to grant relief from forfeiture under a condition subsequent and against a condition precedent. However, where the condition would operate as a condition precedent so that non-compliance would mean that the gift or interest was never acquired and where there would be the equivalent of a gift over to someone else, the courts have no power to relieve from the operations of the condition, as that would involve a fundamental re-writing of the settlement.[393] The circumstances in which equity can relieve against a forfeiture for breach of condition include where the condition can be subsequently satisfied, or where the breach admits of compensation.[394]

Patronage and non-discrimination

6–044 It has already been noted that the rule of certainty of objects is satisfied if the selection of charitable objects is left to the trustees.[395] Patronage is the right of nominating who shall be a beneficiary of a charity. Patronage is, like visitation,[396] in that it is derived from the property which the founder has in the endowment of the charity,[397] and in the same way as visitation it belongs to the founder and his nominees and possibly his heirs.[398] Visitation, however, is most commonly associated with corporations,[399] and that in such cases patronage and visitation are necessarily consequent upon each other.[400]

[393] This was Smellie CJ's summary of the English authorities in *AN v Barclays Private Bank & Trust (Cayman) Ltd* 2007] W.T.L.R. 565 at 605 (Cayman GC). See also the other non-charitable cases of *Simpson v Vickers* (1807) 14 Ves. 341 and *Nathan v Leonard* [2003] 1 W.L.R. 827 at 837.

[394] See the non-charitable cases of *Cage v Russel* (1682) 2 Ventris, 352; *Hollinrake v Lister* (1826) 1 Russ. 508, and *Re Goodwin*(above and in main text).

[395] See para.6–015 above.

[396] See Ch.14 below under the heading "Nature of visitation".

[397] *Green v Rutherforth* (1750) 1 Ves. Sen. 462 at 472; *Philips v Bury* (1788) 2 T.R. 346 at 352.

[398] *Philips v Bury*, above at 352, 353; and see *Att-Gen v Leigh* (1721), reported at (1732) 3 P.Wms. 145n. Descent of property to the heir was abolished by s.45(1) of the Administration of Estates Act 1925 with regard to the real estate and personal inheritance of persons dying after the Act's commencement.

[399] See Ch.14 below under the heading "Nature of visitation".

[400] *Philips v Bury*, above at 352.

model.[680] In the CIO (General) Regulations, which provide in detail for aspects of the constitution and operation of CIOs, the distinction is drawn between foundation CIOs and association CIOs on the same constitutional line.[681]

The model constitutions may be found on the Charity Commission's website. Whilst this allows for flexibility of structure, the flexibility is limited within a range of "two-tier" structures i.e. including both members and trustees; it is not possible to dispense with a membership even if the trustees and the members will always be the same persons.

6–071 In any case, there are detailed legislative requirements that a CIO constitution should state or make provision about particular things. A constitution must state the CIO's name, purposes, whether its principal office is in England or Wales, and whether or not its members are liable to contribute to its assets if it is wound up and (if they are) up to what amount.[682] It must also make provision, regardless of whether it is an Association CIO or a Foundation CIO:

- as to its membership:
  - about who is eligible for membership, and how a person becomes a member[683];
  - about how a member retires from membership[684];
  - about the other circumstances and methods by which membership may or must be terminated[685];
  - about the holding of general meetings and their procedure[686];
  - if the constitution permits members to appoint a proxy, about the way in which the appointment is to be made, the rights of the proxy, and the termination of the appointment[687];
  - if the constitution permits members to vote by post, about the circumstances in which, and the way in which, such votes may be given[688];

[680] See the Schedule to the CIO (Constitutions) Regulations. These models reflect s.206(6) of the Charities Act 2011, under which: (subject to anything in a CIO's constitution), a charity trustee of a CIO may but need not be a member of it; a member of a CIO may but need not be a charity trustee of it; and those who are members and those who are charity trustees of a CIO may but need not be identical.

[681] A "foundation CIO" means "a CIO whose constitution provides that the same persons are to be its members and its charity trustees", whereas an "association CIO" means "a CIO which is not a foundation CIO": reg.2 of the CIO (General) Regulations.

[682] Charities Act 2011 s.206(1).

[683] Charities Act 2011 s.206(2)(a).

[684] "Standard member provisions" CIO (General) Regulations reg.13(3)(a).

[685] CIO (General) Regulations reg.13(3)(b).

[686] CIO (General) Regulations reg.13(3)(c) , including the procedure for the calling of such a meeting, the appointment of its chair, the representation at such a meeting of a member which is itself a corporate body, the quorum for such a meeting, and if the members are to have the right to demand a poll, the right's exercise and the manner in which the poll is to be conducted.

[687] CIO (General) Regulations reg.13(5).

[688] CIO (General) Regulations reg.13(6).

  - if the constitution permits members to make decisions at a general meeting otherwise than by voting on resolutions, as to the alternative process by which the members may make decisions at a general meeting[689];
  - if the constitution permits members to make decisions otherwise than at a general meeting, as to the alternative process by which the members may make decisions otherwise than at a general meeting[690];
  - if the members of a CIO are to have different voting rights, stating the voting rights which are to attach to each class of member[691];
  - if the members of a CIO are to be treated, as a result of becoming members, as having agreed to receive communications from the CIO by electronic means, including:
    (i) a statement to this effect; and
    (ii) provision setting out, as a result of the deemed agreement, the circumstances in which its members will receive communications by electronic means from the CIO[692];
  - if a CIO is to communicate with its members by means of a website, as to the circumstances in which a website may be used as a means of communication with its members.[693]
- as to its charity trustees:
  - stating the names of the persons who are to be the CIO's first charity trustees[694];
  - about the appointment of person(s) to be charity trustees of the CIO and any conditions of eligibility for appointment[695];
  - about how a charity trustee of the CIO retires from office[696];
  - about the other circumstances in which a charity trustee of the CIO will cease to hold office and in particular, if the constitution permits members to remove a charity trustee from office, the circumstances in which a charity trustee may be removed from office and the procedure for doing so[697];
  - about the holding of meetings of the charity trustees and their procedure[698];

[689] CIO (General) Regulations reg.13(7).

[690] CIO (General) Regulations reg.13(8).

[691] CIO (General) Regulations reg.13(9).

[692] CIO (General) Regulations reg.13(10).

[693] CIO (General) Regulations reg.13(11).

[694] CIO (General) Regulations reg.13(1).

[695] Charities Act 2011 s.206(2)(b).

[696] "Standard charity trustee provisions" CIO (General) Regulations reg.13(3)(a).

[697] CIO (General) Regulations reg.13(3)(b).

[698] CIO (General) Regulations reg.13(3)(c), including the procedure for the calling of such a meeting, the appointment of its chair, the quorum for such a meeting, and if the charity trustees are to have the right to demand a poll, the right's exercise and the manner in which the poll is to be conducted.

testator gave a legacy simply to "The National Society for the Prevention of Cruelty to Children." However, the testator was Scottish with purely Scottish interests, and this charity appeared in the will alongside only Scottish charities. In this context, it was significant that there also existed The Scottish National Society for the Prevention of Cruelty to Children. This latter society argued that in light of evidence of the testator's circumstances the legacy was to be construed as intended for it and not its English counterpart. The English society of that name was held entitled. Earl Loreburn, with whose judgment Lords Atkinson and Shaw agreed, said[199]:

> "My Lords, I think the true ground upon which to base a decision in this case is that the accurate use of a name in a will creates a strong presumption against any rival who is not the possessor of the name mentioned in the will. It is a very strong presumption and one which cannot be overcome except in exceptional circumstances. I use as a convenient method of expressing one's thought the term 'presumption.' What I mean is what a man has said ought to be acted upon unless it is clearly proved that he meant something different from what he said."

It is clear from this passage and from Earl Loreburn's judgment as a whole that extrinsic evidence (except of the testator's subjective intention) was admissible notwithstanding the apparently clear words of the will. Further, Lord Loreburn rejected the argument that this was a case of ambiguity,[200] though there is much to be said for the view that this was a case of ambiguity in light of the circumstances, and Lord Dunedin at least implied that an ambiguity had arisen.[201] The difficulty for the party seeking to challenge an apparently clear description is therefore not one of the admissibility of evidence or establishing ambiguity but a high threshold of clear proof on the evidence.[202] In the circumstances of the *NSPCC* case that threshold had not been met.

It is suggested that this case would almost certainly have been decided differently under s.21 of the Administration of Justice Act 1982. The surrounding circumstances, viz. the existence of a Scottish society with virtually the same name, rendered the legatee's description ambiguous so as to bring the case within s.21(1)(c). In light of extrinsic evidence of the testator's subjective intention admissible under the section, it seems very likely that the Scottish society would have taken the legacy.

The correctness of Lord Loreburn's dicta were accepted, but the *NSPCC* case distinguished, by the Court of Appeal in *Re Satterthwaite's Will Trusts*,[203] where the testatrix by her will made in 1952 gave her residuary estate for division between a number of organisations connected with animal welfare including "the London Animal Hospital". This and some of the other organisations were listed in the 1951 ordinary London telephone directory to which reference may have been

[199] [1915] A.C. 207 at 212, 213.
[200] [1915] A.C. 207 at 213.
[201] [1915] A.C. 207 at 214.
[202] Lord Parmoor alone expressed the view that "so far as the extrinsic facts are concerned I think that most of the evidence is quite irrelevant and inadmissible" but he went on to equivocate, saying "so far as it is relevant and admissible, it appears to me to be of little or no assistance": 216. It is not clear which evidence his Lordship thought was admissible and which inadmissible. It seems likely he had in mind the distinction between evidence of surrounding cirumstances and evidence going to subjective intent.
[203] [1966] 1 W.L.R. 277.

made in compiling a list of animal charities. "The London Animal Hospital" had from 1943 been carried on as a private business by R until July 1952 (six months before the testatrix made her will) when this name was removed from the telephone directory. R continued to carry on the same business under his own name. He claimed to be beneficially interested in the bequest. The Court of Appeal rejected his claim but ordered a cy-près scheme. Harman and Russell LJ gave the leading judgments, with Diplock LJ agreeing with them both. Harman LJ held that the case was not one of exact correspondence between name and person which would give rise to Lord Loreburn's strong presumption because at the date of the will R's business no longer bore the relevant name.[204] Both his Lordship and Russell LJ held that the gift showed an intention to benefit a purpose, namely, the welfare of animals, not to benefit R as a private individual. Russell LJ held that R's claim would have failed on this basis even if there had been an exact, continued correspondence between name and person.[205]

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A slight inaccuracy of description is immaterial, provided that it is plain what institution was intended.[206] Thus it is immaterial that a vicar is misdescribed as a rector,[207] or that an institution is described by a name which it formerly bore but has ceased to bear (even if that is a result of limited constitutional change),[208] or that in the case of a legacy to an institution properly described there was added a direction that it should be laid out in completing the almshouses then in course of erection, the institution in question having no such almshouses.[209] In one case "the London Orphan Society in the City Road" was held to mean the Orphan Working School in the City Road[210]; in another case "the King's Cross Hospital" was held to mean the Great Northern Hospital, King's Cross.[211] In considering whether an existing institution is to be identified with an inaccurate description in a will, the court will have regard to any directions as to the trusts upon which the property is to be held. The fact that the trusts declared do not correspond with the general purposes of the claimant is evidence against the claim.[212]

Where there is an institution which alone fits the description tolerably well it cannot be rejected because there was formerly an institution which answered the description more exactly, but has since been dissolved.[213] The position may be

[204] [1966] 1 W.L.R. 277 at 284.
[205] [1966] 1 W.L.R. 277 at 285.
[206] *Re Kilvert's Trusts* (1871) L.R. 7 Ch. 170 at 173; *Re Pritt* (1916) 113 L.T. 136; *The British Diabetic Association v The Diabetic Society* [1996] F.S.R. 1 at 12 per Robert Walker J (a case on passing off where his Lordship summarised the principles applicable to charitable testamentary bequests).
[207] *Hopkinson v Ellis* (1842) 5 B. 34.
[208] *Re Kilvert's Trusts* (1871) L.R. 7 Ch. 170 at 174; *Re Adams* (1888) 4 T.L.R. 757; *Re Joy*(1888) 60 L.T. 175 (where two charities had merged under a single name); *Re Watt* [1932] 2 Ch. 243 at 246 per Lord Hanworth MR; Re *Dawson's Will Trusts* [1957] 1 W.L.R. 391 at 396.
[209] *Smith v Ruger* (1859) 5 Jur.(N.S.) 905. See also as to what is a sufficient description: *Wallace v Att-Gen* (1864) 33 B. 384; *Makeown v Ardagh* (1876) Ir.R. 10 Eq. 445.
[210] *Wilson v Squire* (1842) 1 Y. & C.C.C. 654.
[211] *Re Lycett* (1897) 13 T.L.R. 373; see also the Master's findings in *Re Glubb* (1897) 14 T.L.R. 66.
[212] *Verge v Somerville* [1924] A.C. 496 at 506–507.
[213] *Coldwell v Holme* (1854) 2 Sm. & G. 31; *Re Magrath* [1913] 2 Ch. 331.

"prescribed steps",[119] what the trustees holding the property must do to give the declarer the opportunity mentioned in his declaration. They further provide that if after taking the prescribed steps the donor is not found or does not within the prescribed period[120] request the return of the property (or a sum equal to its value), s.63 will apply to the property as if it belonged to a disclaiming donor under s.63(1)(b), with the result that the property will be applicable cy-près.

Unidentified donors

9–047 Before the coming into force of the Charities Act 1960, the consensus of judicial opinion was that, unlike identifiable donors, anonymous donors to an appeal for a specific charitable purpose which failed *ab initio* must be presumed to have given their money out and-out with no expectation of getting it back.[121] Any argument that the contributions became *bona vacantia* on the failure of the purpose for which they were contributed was dealt with by the Attorney General[122] waiving the claim for *bona vacantia* and bringing in a scheme for the cy-près application of the part of the funds derived from anonymous sources.[123] There was judicial difference, however, on the question of whether on the initial failure of a gift, which was presumed to be an out-and-out gift, a general charitable intention ought to be imputed to the donor.[124]

Section 14 of the Charities Act 1960 Act, now s.63 of the Charities Act 2011, rendered the latter question academic in relation to anonymous donors. It has already been noted[125] that property given for specific charitable purposes which fail is applicable cy-près as if given for charitable purposes generally if a donor cannot be found after prescribed advertisements and inquiries.[126] In addition, the net proceeds of cash collections by means of collecting boxes and money raised by lotteries, competitions and similar money raising activities is exclusively presumed to belong to donors who cannot be identified and applicable cy-près as if given for charitable purposes generally.[127] There is thus, in effect, a statutory presumption that unidentified donors have a general charitable intention. Trustees

[119] The steps and requirements are prescribed in regs 9–14 of the Charities (Failed Appeal) Regulations 2008.

[120] 3 months: reg.13 of the Charities (Failed Appeal) Regulations 2008.

[121] See above references to *Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622 at p.633 per Jenkins LJ (who indicated that in certain circumstances the presumption might be rebutted); *Re Hillier's Trusts* [1954] 1 W.L.R. 700 at p.707; *Re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546 at p.553.

[122] Now the Treasury Solicitor (acting through the Government Legal Department (bona vacantia)) representing the Crown's interest in bona vacantia as regards that interest, and the Attorney General as regards the interest of charity.

[123] See *Re Ulverston and District New Hospital Building Trusts* [1954] 1 W.L.R. 622 at pp.633, 634.

[124] *Re Ulverston and District New Hospital Building Trusts* [1954] 1 W.L.R. 622 at 633, 634; *Re Hillier's Trusts* [1954] 1 W.L.R. 700 at p.715 (the only case of initial failure); and see also *Re Welsh Hospital (Netley) Fund* [1921] 1 Ch. 655 at pp.659, 660; *Re Monk* [1927] 2 Ch. 197 at p.211; *Re North Devon and West Somerset Relief Fund Trusts* [1953] 1 W.L.R. 1260 at pp.1266, 1267.

[125] See above.

[126] Charities Act 2011 s.63(1)(a).

[127] Charities Act 2011 s.64(1).

of funds raised in this manner which fail should apply to the Charity Commission for a scheme under which the money will be applied cy-près.

Donations to mixed funds

9–048 The expression "mixed fund" is used to denote a fund into which there are paid and mixed together the contributions of named or identifiable donors and contributions from unidentifiable donors.

It was unanimously held by the Court of Appeal in the *Ulverston* case[128] that, although the contributions received from named or identifiable donors had been paid into a mixed fund which included contributions received from unidentifiable donors who would not have expected to get their money back, no general charitable intention should merely for that reason be imputed to the identifiable donors in a case where it was clear that they had given their money only for the avowed object of the appeal. The money received from identifiable donors was held on resulting trusts for them and they were entitled to get it back. It was, however, in that case indicated[129] that where the circumstances in which a fund is raised (the language of the published appeal) leave it open to question whether named or identifiable donors did or did not contribute with a general as distinct from a particular charitable intention, the inclusion in the fund of contributions from anonymous sources would be a relevant factor in deciding that the gifts of the named or identifiable donors had been made with a general intention in favour of charity.

9–049 Following the Charities Act 1960 and the statutory presumption of a general charitable intention[130] in the case of unidentified donors it seems likely that the court will be inclined to impute a general charitable intention to the named and identifiable donors of a mixed fund which fails *ab initio* where the donors have not earmarked their gift for specific purposes and the terms of the appeal to the public were equivocal (though the purposes were charitable).

EXAMPLES OF INITIAL FAILURE AND OTHERWISE

Insufficient Funds or no suitable site

9–050 It is common for a charitable gift to "fail" initially where there are insufficient funds or where no suitable site is available.

When the amount of the gift is too small the intention of the donor will be effected so far as possible.[131] If, however, the amount or value of the gift is so

[128] *Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622, explaining the majority decision of the Court of Appeal in *Re Hillier's Trusts* [1954] 1 W.L.R. 700, which must, it seems, be regarded as having been decided on its rather special facts. It was possible to construe the appeal as a general appeal in aid of hospital facilities in a particular area and not, as in the *Ulverston* case, an appeal to build and maintain a particular hospital in a particular place.

[129] [1956] Ch. 622 at 640, 641.

[130] Now s.63 of the Charities Act 2011: see above at para.9-047.

[131] *Att-Gen v Pyle* (1738) 1 Atk. 435; *Re Reed* (1893) 10 T.L.R. 87; *Rodwell v Att-Gen* (1886) 2 T.L.R. 712.

CY-PRÈS SCHEMES (ALTERATIONS OF PURPOSES)

Introduction

10–045 In circumstances where it is exercisable, the cy-près jurisdiction enables the court and the Commission to make schemes altering the purposes for which a charity's assets are applicable.

Property will only be applied cy-près if a cy-près occasion has arisen. Formerly, the only cy-près occasions in respect of an existing charity were where the purpose in question had become impossible or impracticable to perform. The narrow definitions of "impossibility" and "impracticability" adopted by the courts severely restricted the application of the doctrine of cy-près. Inexpediency or uneconomic circumstances were not sufficient. Section 13 of the Charities Act 1960 added further cy-près occasions. These have subsequently been further added to. Cy-près occasions are now specified in s.62 of the Charities Act 2011.

10–046 Where the cy-près jurisdiction is exercisable, it can be exercised either by the High Court under its inherent jurisdiction, as amended by statute, or by the Commission under s.69 of the Charities Act 2011. Section 69 provides that the Commission may by order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for, amongst others, the purposes of establishing a scheme for the administration of a charity.

10–047 Section 61 of the Charities Act 2011 places a trustee of a trust for charitable purposes under a statutory duty, where the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied. Section 61 probably does not extend to charities other than trusts or unincorporated associations (the property of which is held on trust): s.353(1) of the Charities Act 2011 defines "trusts" in relation to a charity as meaning the provisions regulating its purposes and administration, whether those provisions take effect by way of "trust" in the narrow sense of that word or not, but the use of the word "trustee" in s.61 rather than the more widely defined term "charity trustees"[125] mitigates against "trust" in this context applying to anything other than a trust properly so called. However, s.61 is essentially declaratory of the common law position[126]so in practice the charity trustees of any kind of charity which is not within the express ambit of s.61 and is susceptible to the cy-près jurisdiction are subject to an equivalent common law duty.

10–048 If a gift fails *ab initio*, the property may only be applied cy-près if the donor has shown a general or paramount charitable intention.[127] The courts have not always been clear in relation to the further conditions which require to be satisfied in cases of "subsequent failure". The relevant question in relation to "subsequent

[125] The Charities Act 2011 s.177 defines "charity trustees" for the purposes of the Act, except in so far as the context otherwise requires, as meaning the persons having the general control and management of the administration of a charity.
[126] *National Anti-Vivisection Society v IRC* [1948] A.C. 31 per Lord Simonds at p.74.
[127] See Ch.9 above at paras 9–001 to 9–004, 9–009 to 9–014 and 9–018 to 9–035.

failure" is whether there has been an outright gift of the property to charity. This question is considered below under the heading "Outright Gift – general charitable intention?".[128]

Cy-près occasions – common law examples

10–049 There have been many cases where the funds of a defunct charity have been applied cy-près. Thus, where there was a trust for the redemption of British slaves in Barbary, and there ceased to be beneficiaries, the fund was applied cy-près.[129] Similarly, where there was a gift to convert infidels in America and the court was satisfied that there were no infidels left there, a scheme was directed to apply "the produce of the estates according to the intentions of the testator."[130] Again, trusts for the relief of prisoners for debt were applied for the benefit of other prisoners when this kind of imprisonment was abolished.[131]

10–050 The funds of a society for the mutual assistance of members of the theatrical profession, which was a charity, were applied cy-près when the society came to an end.[132] So also if where there was a gift to support pupils at a particular school which was subsequently closed,[133] or the revenues of a charity became insufficient for the purpose of the charity,[134] or where the charity property was compulsorily purchased, a cy-près application was ordered.[135] Again, where a school was founded for the education of the poor within a certain district, and the district was afterwards converted into a dock under a local Act of Parliament so that the objects of the charity failed, a scheme was directed for its administration cy-près.[136]

10–051 In certain cases a condition attached to a charitable gift has in course of time come to make the continuance of the charity impossible; and the court, acting upon the cy-près principle, has consented to the removal of the condition. Thus, in two cases, schools were founded and it was stipulated by the trust deeds that religious instruction according to the doctrines of the Church of England should be given. This condition disqualified the schools from receiving a grant from the Board of Education; and the court, finding that the schools could not exist without the grant, sanctioned an alteration in the trusts to satisfy the Board.[137] Likewise, where the objects of a trust have in fact changed, the court might vary the terms of the trust. In *Attorney-General v Bunce*,[138] there was a bequest for the

[128] At paras 10–070 to 10–097.
[129] *Ironmongers' Co v Att-Gen* (1844) 10 Cl. & F. 908.
[130] *Att-Gen v City of London* (1790) 3 Bro. C. C. 171.
[131] *Re Prison Charities* (1873) L.R. 16 Eq. 129; *Att-Gen v Hankey* (1876) reported as a note at (1873) L.R. 16 Eq. 140.
[132] *Spiller v Maude* (1881) 32 Ch.D. 158n; Cf. *Dale v Powell* (1897) 13 T.L.R. 466.
[133] *Re Templemoyle School* (1869) Ir. R. 4 Eq. 295.
[134] *Berkhamstead School Case* (1865) L.R. 1 Eq. 102.
[135] *Clephane v Lord Provost of Edinburgh* (1869) L.R. 1 H.L. Sc. 417.
[136] *Att-Gen v Glyn* (1841) 12 Sim. 84.
[137] *Re Queen's School, Chester* [1910] 1 Ch. 796; *Att-Gen v Price* [1912] 1 Ch. 667. See also *Re Robinson* [1923] 2 Ch. 332; and *Re Dominion Students' Hall Trust* [1947] Ch. 183 and the Charities Act 2011 s.62(1)(a)(ii).
[138] (1868) L.R. Eq. 563.

OTHER STATUTORY SCHEME MAKING POWERS OF THE COURT AND THE COMMISSION

Charities Act 2011 s 73

10–141 This is discussed above at paras 10–116 to 10–119. As there mentioned it is potentially of very wide application.

Extensions of Areas of Local Charities (Charities Act 2011 s.62(5))

10–142 Section 62(5) of the Charities Act 2011 contains a separate power to make schemes "under the court's jurisdiction with respect to charities" to increase a charity's area of benefit, but the increase is limited to the areas specified in Sch.4 to the Act. The statute does not specify the circumstances in which this power should be exercised. The circumstances in which it might be exercised appear to be intended to be at least as wide as those specified for a cy-près application of property because s.62(6) provides that s.62(5) "does not affect the power to make schemes in circumstances falling within [s.62(1)]". The Commission's view accords with this. It considers that to use s.62(5), it is not necessary to show that any of the conditions in s.62(1) apply, only that the enlargement is in the interests of the charity.[339]

Miscellaneous

10–143 The court and the Commission have power to make schemes:

- For certain property of certain ecclesiastical charities[340]
- For certain property of reserve force charities.[341]
- For the establishment of common investment schemes.[342]
- For the establishment of common deposit schemes[343]

10–144 The Commission alone has power to make schemes under certain Acts. For example:

- Under s.18 of the Commons Act 1899 in relation to allotments for recreation grounds etc.
- Under City of London Parochial Charities Act 1883, with the approval of Her Majesty in Council.[344]
- Under s.5 of the Coal Industry Act 1987 in respect of coal industry trusts as there defined.

[339] Operational Guidance OG2 A1 para.1.2 at *http://ogs.charitycommission.gov.uk/g002a001.aspx*.
[340] Pastoral Measure 1983, s.55 and Redundant Churches and other Religious Buildings Act 1969 s.4.
[341] See Reserve Forces Act 1996 s.120 and Sch.5.
[342] Charities Act 2011 s.96.
[343] Charities Act 2011 s.100.
[344] See, for example, *Trustees of the London Parochial Charities v Att-Gen* [1955] 1 All E.R. 1.

CERTAIN EDUCATIONAL TRUST DEEDS OR INSTRUMENTS

Foundation, Voluntary and Foundation Special Schools

10–145 Under s.82(1) of the School Standards and Framework Act 1998 (as amended) the Secretary of State for Education[345] may by order make such modifications of any trust deed or other instrument relating to (a) a school which is or is to become a foundation, voluntary or foundation special school, or (b) property held on trust for the purposes of such a school, as appear to him to be necessary or expedient in connection with the operation of any provision of the School Standards and Framework Act 1998, the Learning and Skills Act 2000, the Education Act 2002, the Education and Inspections Act 2006, the Academies Act 2010 or the School Standards and Organisation (Wales) Act 2013 or anything done under or for the purposes of any such provision.

Under s.82(1) of the School Standards and Framework Act 1998 (as amended) the Secretary of State for Education may by order make such modifications of any trust deed or other instrument relating to (a) a school which is or is to become a foundation, voluntary or foundation special school, or (b) property held on trust for the purposes of such a school, as appear to him to be necessary or expedient in connection with the operation of any provision of the School Standards and Framework Act 1998, the Learning and Skills Act 2000, the Education Act 2002, the Education and Inspections Act 2006, the Academies Act 2010 or the School Standards and Organisation (Wales) Act 2013 or anything done under or for the purposes of any such provision.

Providers of Educational Services or Research

10–146 Under s.489(3) of the Education Act 1996 the Secretary of State for Education[346] may by order make such modifications of any trust deed or other instrument relating to or regulating any institution that (a) provides or is concerned in the provision of educational services, or (b) is concerned in educational research, as, after consultation with the persons responsible for the management of the institution, appear to him to be requisite to enable them to fulfil any condition or meet any requirement imposed by regulations under section 485 of the Education Act 1996. Regulations under s.485 of the Education Act 1996 are required by s.485 to make provision for the payment by the Secretary of State to persons other than local authorities of grants in respect of expenditure incurred or to be incurred by them (a) for the purposes of, or in connection with, the provision (or proposed provision) of educational services, or (b) for the purposes of educational research.

[345] The functions of the Secretary of State for Education under the School Standards and Framework Act 1998, s.82 so far as exercisable in Wales are vested in the Welsh Ministers – National Assembly for Wales (Transfer of Functions Order) 1999 (SI 1999/672), art.2; and Government of Wales Act 2006, s.162(1) and para.30 of Sch.11.
[346] The functions of the Secretary of State for Education under the Education Act 1996, s.489 so far as exercisable in Wales are vested in the Welsh Ministers – SI 1999/672 art.2, and Government of Wales Act 2006, s.162(1) and para.30 of Sch.11.

thresholds: thus, the £500,000 income level has been raised to £1 million. Contrary to Lord Hodgson's view, it favours retaining an assets threshold but increasing it.[170]

It has been noted that there is a mismatch between the public perception of the effect of a charity being registered and the degree to which its affairs are transparent to the Commission.[171] Many members of the public are not aware that smaller charities, even though registered with charity numbers, are subject to less rigorous submission obligations and are in that sense further from the regulatory reach of the Commission. The reality is that as at 30 September 2014 charities with an income in the previous financial year of £10,000 or below constituted 41.4per cent of all registered charities, and 75 per cent of all registered charities had an income of £100,000 or less.[172]

15–028 Charities preparing accruals accounts are expected to do so in compliance with the appropriate Statement of Recommended Practice (SORP). Two new versions of SORP were published in July 2014, and apply to charities in respect of financial years commencing 1 January 2015[173] and subsequently. Previous financial years starting from 1 April 2005 are governed by the 2005 SORP. However, at the time of writing, the relevant regulations determining the mandatory content of a charity's accounts, the Charities (Accounts and Reports) Regulations 2008, continue to refer to the 2005 SORP. This extraordinary, confusing situation is addressed below at para.15–035ff.

The publication of new charities SORPs followed the publication by the Financial Reporting Council of a new financial reporting standard (FRS 102) in March 2013 to replace existing UK accounting standards. The charities SORP most broadly applicable is now the SORP based on FRS 102, but a separate alternative SORP has also been published which is based on the Financial Reporting Standard for Smaller Entities (FRSSE).

In the case of a conflict between the obligations imposed by Pt 8 of the Charities Act 2011 and the provisions of the governing instrument of a charity, generally the more onerous duty will apply. Thus if the constitution of a charity with income less that £1 million requires that the accounts be audited, they must be audited. Similarly, if the governing instrument of a charity with an income of over £1 million directs that the accounts are to be examined by an independent person, the accounts must still be audited. Trustees of charities whose governing instrument imposes duties which are more onerous than the statutory regime may wish to consider amending the governing instrument to impose the lesser duty where they have power to do so or by asking the Charity Commission to amend the governing instrument by order or scheme.

[170] See p.32 of *Government Response*.
[171] See p.71 of *Trusted and Independent: Giving charity back to charities: Review of the Charities Act 2006*, July 2012.
[172] Charity Commission, *Recent charity register statistics*.
[173] See para.18 of SORP (FRS 102), though new regulations adopting the new SORPs have not yet been made at the time of writing.

Gross income

15–029 A number of the provisions impose duties by reference to the gross income of a charity. Section 353(1) of the Charities Act 2011 states that gross income in relation to a charity means its gross recorded income from all sources including special trusts. Thus a charity should include in its gross income the income of branches as defined in the SORP (FRS 102)[174] and subsidiary charitable funds held for particular purposes but not the income of affiliated autonomous local groups.

The Charity Commission has published the following guidance as to the meaning of "Gross income"[175]:

> "Annual gross income differs from total incoming resources / total receipts in a charity's accounts.
>
> For accounts prepared on a receipts and payments basis gross income is simply the total receipts recorded excluding the receipt of any endowment loans and proceeds from sale of investments or fixed assets.
>
> For accounts prepared on an accruals basis the charity's gross income should be calculated as:
>
> - the total incoming resources as shown in the Statement of Financial Activities (SoFA) (prepared in accordance with the SORP) for all funds but excluding the receipt of endowment
> - including any amount transferred to income funds during the year from endowment funds in order to be available for expenditure."

Exempt and excepted charities

15–030 The obligations of Pt 8 of the Charities Act 2011 in many cases do not apply to exempt charities:

- Nothing in ss.130–134 of the Charities Act 2011 (preparation and preservation of individual accounts) applies to an exempt charity.[176] But s.136(2) requires the charity trustees of an exempt charity (a) to keep proper books of account with respect to the affairs of the charity, and (b) if not required by or under the authority of any other Act to prepare periodical statements of account, to prepare consecutive statements of account consisting of (i) an income and expenditure account relating to a period of not more than 15 months, and (ii) a balance sheet relating to the end of that period. Section 136(3) contains a requirement as to the preservation of the books of account and statements of account.
- Nothing in ss.137–142 of the Charities Act 2011 (preparation and preservation of group accounts) applies to an exempt charity.[177]
- Nothing in ss.144–155 of the Charities Act 2011 (audit or examination of accounts) applies to an exempt charity.[178]

[174] See module 25, SORP (FRS 102).
[175] Charity Commission, "What is included as gross income?", *FAQs about annual returns and accounts*.
[176] Charities Act 2011 s.136(1).
[177] Charities Act 2011 s.143.
[178] Charities Act 2011 s.160(1).

17–034 The powers of disposal in charitable companies, corporations, community benefit societies, friendly societies and Charitable Incorporated Organisations are as outlined above under "Powers to acquire land".[65]

Powers to borrow and mortgage

17–035 The powers of mortgage considered in this section must be considered together with the restrictions imposed by ss.124–125 of the Charities Act 2011 which are considered below[66] and which, generally, subject to various exceptions, and unless certain conditions are complied with, make mortgages of charity land void.

17–036 When considering the powers and duties of trustees of a charitable trust generally, and specifically in the context of borrowing, it must be remembered that because a trust has no separate legal personality any contracts entered into with third parties in pursuance of the exercise of such powers and duties are entered into by the trustees in their personal capacity. Thus, if trustees borrow from a bank for the purpose of paying some of the expenditure incurred or to be incurred in the administration of the charity, they would be personally liable to the bank on the loan. Although charity trustees have the usual right of indemnity[67] from the trust funds for liabilities properly incurred, this right is of little avail if the trust is insolvent. Trustees may try to negotiate terms with a third party limiting their personal liability to the available assets of the charity, but this is unlikely to be acceptable to many third parties.

17–037 Trustees may have powers to raise funds by borrowing and to be indemnified for the cost of the borrowing or to mortgage the charity's land to secure the borrowing under the terms of the trust deed. Whether they do are questions of construction of the trust deed.[68]

17–038 Section 16 of the Trustee Act 1925 which gives trustees a power to raise money by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession does not apply to trustees of property held for charitable purposes.[69]

17–039 Trustees of a charitable trust who hold land have power to borrow for a purpose "in relation to" that land.[70] The Commission take a view that this power is to be construed widely.[71]

[65] At paras 17–014 et seq.
[66] At paras 17–059 et seq.
[67] Under s.31(1) of the Trustee Act 2000 a trustee is entitled to be reimbursed from the trust funds, or may pay out of the trust funds, expenses properly incurred by him when acting on behalf of the trust. As to a trustee's rights of indemnity, see further Lewin on Trusts, 19th edn at paras 21–043 et seq. They consist of rights of reimbursement, exoneration, retention and realisation.
[68] *Stroughhill v. Anstey* (1852) 1 De G.M. & G. 635; Re *Bellinger* [1898] 2 Ch. 534. See also *Darke v Williamson* (1858) 25 Beav. 622 as to the discretion of the court as to when and how the trustees who had borrowed money might realise their rights to be indemnified out of the charity's property.
[69] Trustee Act 1925 s.16(2).
[70] Trusts of Land and Appointment of Trustees Act 1996 s.6.
[71] See Charity Commission "Operational Guidance OG 22 Borrowings and Mortgages" at: *http://ogs.charitycommission.gov.uk/g022a001.aspx* [Accessed 8 August 2015].

17–040 The position of a trustee who borrows money is made more difficult by the decision of the Court of Appeal in *Fell v Official Trustee of Charity Lands*.[72] In that case the trustees of a charitable trust had borrowed £3,000 from a bank and had applied the borrowed money for the purposes of the charity. After they had ceased to be trustees, the bank sued them and they brought an action against the person in whom the charity's land was vested and the current trustees to be indemnified out of the rents of the land against the claims of the bank. The Court of Appeal held that if the borrowing gave the trustees a right to indemnity out of the charity's land, that would have been a mortgage or charge on the land. By s.29 of the Charitable Trusts Amendment Act 1855[73] any sale, mortgage or charge of a charity estate was prohibited without the approval of the Charity Commissioners. The trustees had not had such approval. Accordingly, so the Court of Appeal held, an equitable lien or charge upon the property to give effect to a right of indemnity would be inconsistent with the requirement of the Act[74] and the (former) trustees' claim to a right to such a lien or charge failed on, amongst others, that ground.

Charities Act restrictions on dispositions of land: general

17–041 Whenever charity trustees sell, mortgage, lease or otherwise dispose of land they must have regard to the restrictions imposed by ss.117–129 of the Charities Act 2011.[75] Different restrictions apply to mortgages from those which apply to other dispositions. The restrictions apply to dispositions of all land in England and Wales[76] and not merely permanent endowment or functional land.[77] They do not apply if no interest in land is created, for example, if a licence only is granted.[78] If the restrictions are not complied with then subject to certain exceptions, the transaction in question is void.

17–042 The restrictions applicable to disposals of charity land have varied over the years. If an issue arises as to the validity of a past transaction, plainly it is important to determine that by reference to the law as it was at the time. That might be

[72] *Fell v Official Trustee of Charity Lands* [1898] 2 Ch. 44.
[73] This was the statutory ancestor of what is now s.124 of the Charities Act 2011—as to which see paras 17–059 et seq.
[74] *Fell v Official Trustee of Charity Lands* [1898] 2 Ch. 44 per Lindley MR at p.54; per Rigby LJ at p.57.
[75] The Commission's Operational Guidance on this subject is at *http://ogs.charitycommission.gov.uk/g548a001.aspx* [Accessed 8 August 2015]. Any provision in the trusts of a charity or an Act of Parliament or an order or scheme under the Education Act 1944 or 1973 which required the Commissioners to consent to any disposition of land of a charity ceased to have effect by s.36 of the Charities Act 1992—repealed subject to transitional provisions and savings specified in art.9 of SI 2008/945 – by para.1, Sch.9 to Charities Act 2006. The restrictions only apply to the release by a charity of a rent-charge if less than 10 times the annual amount of the rent-charge is received and to the release of a rent-charge which a charity is entitled to receive if it is not redeemed under ss.8 to 10 of the Rentcharges Act 1977, s.127(1) and (3) of the Charities Act 2011.
[76] Land in this context means land in England and Wales—see s.129(1) of the Charities Act 2011.
[77] Compare the former provision in Charities Act 1960 s.29. For the details of those former provisions see the 7th edn of this work, pp.419, et seq.
[78] See *Gray v Taylor* [1998] 1 W.L.R. 1093 (almshouse resident held to have a licence and not a lease).