CHARITIES—THE INCIDENTAL QUESTION

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Charitable trusts and charitable corporations share a number of common law and statutory privileges.[1] In some instances, both in Australia and in the United Kingdom, the legislature has expressly provided that certain privileges will attach only to such trusts and bodies whose objects are *exclusively* charitable. In the case of bodies corporate this qualification is no doubt designed to exclude institutions whose objects are partly charitable and partly non-charitable. In the case of most purpose trusts, however, the qualification adds nothing to the common law criteria of validity; for, apart from the few anomalous cases, only trusts for exclusively charitable purposes will be valid. Indeed, even with regard to corporations, it appears that the express limitation of a privilege or immunity to those bodies with solely charitable objects adds no restriction which would not normally be implicit in a simple reference to 'charitable corporations'.[2] Thus, whether or not the limitation is expressed in statutory form, it will often represent a prerequisite to the characterization of any trust or corporation as charitable in the technical sense.

Considerable difficulty can arise in any attempt to determine whether the requirement has been satisfied in a particular case. One of the most frequently recurring problems concerns the extent to which a corporation or trustees may be authorised to carry out activities or produce benefits which considered in isolation would not be characterized as charitable, without thereby forfeiting the right to claim to be established for charitable purposes only. In some cases, such activities and benefits have been regarded as merely subsidiary and incidental to the achievement of the charitable purposes for which the corporation or trust was established; in other cases the authorization of the non-charitable activities and benefits has been held to

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[1] In a number of Australian statutes certain fiscal immunities are granted not by general reference to 'charitable purposes' or 'charitable institutions' but in clauses drafted with more particularity. See *e.g.* s. 78(1) of the Income Tax and Social Services Contribution Assessment Act 1936-1966 (Cth) which deals with deductions in respect of gifts for certain institutions and purposes. In s. 23(e) of the same statute, however, the income of charitable institutions generally is exempted from income tax.

[2] It is possible, of course, that a particular statutory context may demand a less restricted interpretation. See *Royal Australasian College of Surgeons v. The Federal Commissioner of Taxation* (1943) 68 C.L.R. 436, and *Lloyd v. The Federal Commissioner of Taxation* (1955) 93 C.L.R. 645, 671. *Cf.* the approach of Isaacs C.J. and Dixon J. in *Hobart Savings Bank and Launceston Bank for Savings v. The Federal Commissioner of Taxation* (1930) 43 C.L.R. 364.

[3] It should be noted that the courts for the main part have resisted the temptation to hold that the meaning of the word 'charitable' varies according to its common law or statutory context. See *Salvation Army (Vic.) Property Trust v. Shire of Fern Tree Gully* (1951-1952) 85 C.L.R. 159; *Chesterman v. Federal Commissioner of Taxation* [1926] A.C. 128; and *Adamson v. Melbourne and Metropolitan Board of Works* [1929] A.C. 142.

invalidate the otherwise charitable trust or to deprive the corporation of the immunities attaching to those formed for exclusively charitable purposes.

Charitable trusts and charitable corporations are established so as to benefit charitable purposes, but it is clear that in most cases such purposes cannot be achieved without engagement in activities which cannot in isolation be categorized as charitable. Thus, part of the capital funds of a hospital may have to be invested in securities, land may have to be sold, tradesmen may have to be employed and so on. In the same way, in the operation of a charity, benefits may be conferred on private individuals in the normal run of their business. The employment by a hospital of doctors and nurses, gardeners and plumbers, will necessarily benefit the employees as well as the hospital's work. In the cases mentioned, no one would think of arguing that the activities and the benefits in any way detract from the charitable nature of the hospital. The reason why they do not is simply that the activities and benefits are not the ends for which the hospital is established: they are either legitimate means to that end or consequences of a legitimate method of achieving it.

It is clear then that the distinction between the ends and the objects of the trust or corporation on the one hand and the means and consequences of achieving the ends is of crucial importance.[4] The distinction is, however, not always easy to apply and some of the cases can be reconciled only with great difficulty. Nevertheless, an examination of the case law indicates traps that can and should be avoided.

One of the possible explanations for some of the difficulty of reconciliation lies in the occasional failure to observe the necessity of distinguishing between two different ways in which one may speak of methods of advancing charitable purposes. In the first place, the method may be concerned only with raising funds which will later be applied to charity. This should be distinguished from the actual method by which the funds are so applied. The distinction is important because more latitude may be allowed with regard to the choice of the first type of method than of the second.

AUTHORIZED ACTIVITIES DESIGNED TO PROVIDE INCOME

In principle, there seems no reason why charitable trustees cannot adopt any methods of fund raising which are authorized by the

[4] The same distinction has been drawn in cases concerning s. 1 of the Scientific Societies Act 1843 (U.K.) under which rating exemption is given to societies which, *inter alia*, are 'instituted for purposes of science, literature or the fine arts, exclusively'. Amongst the many useful cases on the interpretation of the section are: *R. v. Institution of Civil Engineers* (1879) 5 Q.B.D. 48; *Art Union of London v. Overseers of Savoy* [1894] 2 Q.B. 609; *Borough of Battersea v. The British Iron & Steel Research Association* [1949] 1 K.B. 434: *British Launderers' Research Association v. Borough of Hendon Rating Authority* [1949] 1 K.B. 462.

settlor or testator. Likewise, there would seem to be no objection to the insertion of purely fund raising powers in the memoranda or articles of association of charitable companies. To argue to the contrary would require the discovery of a significant distinction between, on the one hand, the receipt of income from investments and the rents from lands held by or for a charity and, on the other hand, the conduct of other fund raising enterprises.

It is submitted that the correct principle here is that which pertains to private trusts. A trust for ascertained beneficiaries is not invalidated by, for example, a power to carry on an existing business; only if that power has some independent significance, so that it is one of the purposes or ends of the trust, will the trust be invalid. Similarly, a charitable trust should not be invalidated by the settlor's authority to carry on a commercial enterprise for the sole purpose of raising funds for the charitable objects of the trust;[5] only if that commercial enterprise is to be regarded as itself an end rather than a means should the trust be invalid.[6]

In the United States this principle is accepted.[7] It is the destination rather than the source of income that is regarded as crucial. In the Commonwealth the authorities, on balance, support the same view but the matter is not free from doubt.

In *Coman v. Governors of the Rotunda Hospital, Dublin*,[8] the respondents were held to have been rightly assessed for tax in respect of trading profits earned by letting certain rooms of the hospital for entertainments for periods ranging from one night to six months. The governors were incorporated and it was recognized in all the judgments delivered in the House of Lords, that the corporate objects were charitable. Nowhere in those judgments is it suggested that the

[5] *E.g.*, it is not unknown for institutions established for the relief of poverty to collect and sell old clothes, furniture *etc.* to obtain money to be devoted to their charitable object. It would be surprising if such an enterprise were held to prevent characterization of the body as a charity.

[6] *Cf.* 'Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects.' *National Deposit Friendly Society Trustees v. Skegness Urban District Council* [1959] A.C. 293, 319 *per* Lord Denning. The case concerned rating relief given by the Rating and Valuation (Miscellaneous Provisions) Act 1955 (U.K.) to organizations which, *inter alia*, are not 'established or conducted for profit'. See also, *Commissioner of Inland Revenue v. Carey's Ltd* [1963] N.Z.L.R. 450, where, in delivering the judgment of the Court of Appeal of New Zealand, Gresson P. said: 'It is indeed not uncommon for trustees to be given such powers as to carry on farming or any other business for the benefit of the widow or children of a testator; in such a case the whole net income from the investment is held in trust for the nominated beneficiaries. It cannot be doubted that a trust is thus constituted and if the objects of such a trust are indubitably charitable, can it be contended that it is not a charitable trust?'

[7] See *Restatement, Trusts* 2d 376d; *McKay v. Morgan Memorial Co-operative Industries and Stores* (1930) 172 N.E. 68; *Mueller Co. v. Comm'r* (1951) 190 F.2d 120.

[8] [1921] 1 A.C. 1.

business of letting rooms in any way detracted from the charitable nature of the body.

Rex v. Special Commissioners of Income Tax[9] affords similar oblique authority. Here the Court of Appeal was concerned with and considered without the slightest hint of disapproval a trust for a charitable society which was to receive in perpetuity the income from a business in proprietary medicines run by the trustees.

More direct though still not compelling authority is contained in a *dictum* of Lawrence L.J. in *I.R.C. v. Yorkshire Agricultural Society*[10] where the Court of Appeal had to consider whether the society, which was formed with the object of holding an annual meeting for the exhibition of farming stock, implements, *etc.*, and for the general promotion of agriculture, was established for charitable purposes only. Certain privileges were attached to membership of the society, such as free admission to the shows and parts of the grandstands at the shows; the opportunity of using a reading and writing room on the showground; a right to have manures and foodstuffs analysed at reduced fees; special railway and entry facilities and similar benefits. Rowlatt J. held at first instance that the society was not set up to promote agriculture but rather to promote the tastes and pleasures of the members who were associated in it. His decision was reversed in the Court of Appeal. Lawrence L.J. said:

> The objects of the Society and the inducements in the shape of personal benefits held out to persons in order to procure their membership and to obtain their subscriptions are two entirely different things. It is a common thing for a charitable institution to offer all kinds of privileges and benefits which are in no sense charitable in order to obtain funds for the purpose of carrying out its objects. As an instance I might mention the giving of dinners, dances and theatrical entertainments, all of which entail an expenditure of money on non-charitable objects incurred for the purpose of obtaining funds to be applied for the charitable objects of the institution. Many charitable institutions, in return for annual subscriptions or donations, offer special benefits to the persons who become their members. None of the operations of this kind results in making the purposes of the institution non-charitable.[11]

However, in *Tennant Plays Ltd. v. I.R.C.*[12] Cohen L.J. seems to have found some difficulty in accepting the passage just quoted. For shortly after referring to it he said:

> I feel some doubt whether a company can be said to be established 'for charitable purposes only' if it carried on a substantial non-charitable purpose, for instance, to take the case suggested by Somervell L.J., during the argument, if it took power permanently to run a public-house in order to produce funds for its charitable purpose.[13]

[9] [1923] 1 K.B. 393. [10] [1928] 1 K.B. 611.
[11] *Ibid.* at 637-638. See also *In re Ossington's Deed Trusts* [1964] The Times May 30th.
[12] [1948] 1 All E.R. 506. [13] *Ibid.* at 510.

This statement tends to blur the distinction between powers and objects and does not sit happily with the cases cited above unless it is explicable merely on the basis that authorization of a particular substantial non-charitable activity which has no connection with the charitable purposes of the body might give rise to an inference that the activity is not merely a means of raising money for charity. If this is the correct interpretation of the *dictum* it is submitted that the following statement by Lord Tomlin in *Keren Kayemeth Le Jisroel Ltd v. I.R.C.*,[14] to which Cohen L.J. did in fact refer, puts the matter more clearly.

> There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object, and I well appreciate the argument which says that if you once find the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable.[15]

In *Tennant Plays Ltd v. I.R.C.*[12] the company, which was associated with the Arts Council of Great Britain, had in the objects clause of its memorandum of association a number of paragraphs containing objects concerned mainly with promoting the 'arts of drama, dance, singing and music.' Paragraph D was in the following form:

> (D) As ancillary to the foregoing objects of the company and with a view to finding income and funds for the purposes of the company to carry on business as theatre, music hall, concert hall, dance hall, public hall, cinema and picture house proprietors and managers.

At first instance, Macnaghten J. held that this paragraph was in itself sufficient to counter an argument that the company was established for charitable purposes only.

> The founders of the company chose to include these seemingly ridiculous objects among the objects for which it was established, and, the company having chosen to insert those objects in the memorandum, the court must accept it that those are, indeed, some of the objects of the company.[16]

Cohen L.J. did not find it necessary to decide this point, but, although feeling the force of the view expressed by the judge below, he was prepared to recognize that the paragraph might be regarded simply as subsidiary and unobjectionable. In this respect his judgment is quite consistent with that of Lawrence L.J. in *I.R.C. v.*

[14] [1932] A.C. 650. [15] *Ibid.* at 658.
[16] [1948] 1 All E.R. 506, 509.

Yorkshire Agricultural Society and, apart from the *dictum* quoted earlier, it is not thought that the decision and judgments in *Tennant Plays Ltd v. I.R.C.* in any way detract from the general proposition that charities may be authorized to raise money by means which are not otherwise connected to their charitable objects.

However, on the meagre state of the authorities, and in the light of the *dictum* of Cohen L.J., that proposition cannot be regarded as firmly established. It is weakened somewhat further by the approach of three judges of the High Court in a case concerning what is now section 251(1)(b)(ix) of the Local Government Act 1958 (Vic.). Under that section, exemption from rating is given to land 'used exclusively for charitable purposes.' The decisions[17] on the interpretation of the provision establish that while activities which actually form part of the charitable work of the occupier will not exclude the exemption, activities which are designed purely to raise funds for an occupying charity will have that effect. There may, of course, be very strong reasons for restricting the rating exemption in this way but it does not seem to follow necessarily that the question whether a body has exclusively charitable objects should be determined according to the same principles. There is, however, a *dictum* in the joint judgment of Dixon, Williams and Webb JJ. in one of the most authoritative of the decisions, *Salvation Army (Vic.) Property Trust v. Shire of Fern Tree Gully*,[18] which suggests that the two questions should be dealt with along the same lines.

> We can see no reason for not construing the word 'exclusively' in [the section] in the same manner as that word has been construed in the English cases under the Scientific Societies Act 1843 . . . The same construction was adopted in the case of exemptions from income tax now contained in the Income Tax Act 1918 (Imp.) . . . which provided in effect that exemptions should be granted from income tax in respect of the income of any body of persons or trusts established for charitable purposes only so far as that income was applied for charitable purposes only. It was pointed out in *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* that the English authorities show that an institution qualified for exemption under these provisions if its main purpose was charitable although it might have other purposes which were merely concomitant and incidental to that purpose. To the authorities there cited there can now be added the recent decisions of the Court of Appeal in *Tennant Plays Ltd v. Inland Revenue Commissioner* and in *Re Bland Sutton's Will Trusts*.[19]

It may be that, in its context, this *dictum* is not to be regarded as directed at the question of purely money raising activities. The learned

[17] The most important cases are *Shire of Fern Tree Gully v. Salvation Army (Vic.) Property Trust* (1951-1952) 85 C.L.R. 159; *Shire of Nunawading v. The Adult Deaf and Dumb Society of Victoria* (1921) 29 C.L.R. 98; *Salvation Army (Vic.) Property Trust v. City of Richmond* [1956] V.L.R. 250; *City of South Melbourne v. Young Men's Christian Association* [1960] V.R. 709.

[18] (1951-1952) 85 C.L.R. 159.

[19] *Ibid.* 171-172.

judges may simply have been concerned to counter the view of Sholl J. in the court below where he had held that commercial activities will exclude the exemption even though they are an integral part of the charitable work of the occupier.[20] The generality of the reference to the English legislation does, however, militate against this restricted interpretation of the passage.[21] Nevertheless, it should be noted that in a separate concurring judgment in the same case Fullagar J. expressly distinguished the problem before the Court from the question whether land is used or occupied 'by a society or institution having exclusively charitable purposes'. The latter, he said, 'is an entirely different question'.[22]

If, despite the apparent conflict of authority, the view which was asserted at the beginning of this part is correct, it is none the less clear that the basic question of deciding whether an authorized activity is a means to a charitable end or an end in itself will in some cases be very difficult. The difficulty will be accentuated in cases of registered companies, where, as is frequently the position, what are intended to be merely powers are stated as objects. In this context the words of Somervell L.J. in *Tennant Plays Ltd v. I.R.C.* are apposite. Referring to a paragraph of the objects clause of the appellant company he said:

> I would also like to say one word about para. (O), because I think it illustrates that this memorandum has been drafted in what may well be a very proper way when one is dealing with a trading company and the draftsman wants to throw the net as wide as possible and take in any unexpected thing which the company may find it desires to do, but which is clearly not the method if it is sought to satisfy a court that the company is established 'for charitable purposes only'.[23]

AUTHORIZED ACTIVITIES WHICH ARE METHODS OF ACHIEVING CHARITABLE OBJECTS

In this part, it is proposed to consider separately the principles which determine whether and when authorized activities which are not intended solely to raise money will be regarded as not detracting from the exclusively charitable nature of the trust or corporation.

Clearly in some cases there can be no difficulty. Some activities are so closely connected with the achievement of charitable objects that it would never be suggested that they in any way detract from the charitable nature of the trust or body. Thus, in most cases, a hospital could not operate without power to engage and remunerate

20 [1952] V.L.R. 55.

21 The restricted interpretation is supported to some extent by the fact that purely fund raising activities do not seem to prevent the exemption given under the Scientific Societies Act 1843 (U.K.). See *Art Union of London v. Overseers of Savoy* [1894] 2 Q.B. 609; reversed on a different point [1896] A.C. 296.

22 (1951-1952) 85 C.L.R. 159, 184.

23 [1948] 1 All E.R. 506, 513.

doctors and nursing staff. Likewise schools in most cases need to employ teachers. Similarly, religious bodies may be authorized to spend money on the equipment and repair of their churches.

Where the activity is not of its nature so closely connected with the achievement of the charitable objects there is the possibility that it was not designed simply as a means to the charitable end but as an end in itself. Moreover, even if it is not expressed to be itself one of the objects of the trust, if it is not a reasonable and prudent method of achieving charitable objects its inclusion throws doubt on whether the objects of the trust are in fact limited to charitable purposes. It is thought that this latter point is all that is meant by the occasional statements and implications in the cases that the means of advancing charity must themselves be charitable.[24]

As in the previous section, the question whether authorized activities are themselves objects of the trust and not simply means of advancing charitable purposes is not always easy to answer and the desirability that the draftsman should clearly distinguish between objects and powers is even stronger. In *Roman Catholic Archbishop of Melbourne v. Lawlor*[25] the High Court of Australia was equally divided on the question. In this case a testator bequeathed to the Roman Catholic Archbishop of Melbourne and others specified personal property 'as a nucleus, to establish a Catholic daily newspaper'. Three members[26] of the High Court held that the purpose of the bequest was simply the propagation of the religious tenets of the Catholic Church by means of the establishment of the newspaper and that the trust was therefore valid. The remaining three members[27] of the Court, however, held that the purpose of the trust was to establish a newspaper which was not in itself an object entirely charitable and therefore that the trust failed. The Court thus being equally divided, the decision of the Supreme Court of Victoria[28] against the validity of the trust was upheld.

On the other hand, *Re Hood*[29] is a decision where the court was not prepared to uphold a contention that the authorized activities were themselves independent objects of the trust. The testator directed that his trustees should hold his residuary estate upon terms which he expressed as follows:

> Whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships. And whereas I believe the drink traffic to be one of the most subtle

[24] *E.g. Re Strakosch* [1949] Ch. 529, 539; *Oxford Group v. I.R.C.* [1949] 2 All E.R. 537, 540.
[25] (1934) 51 C.L.R. 1.
[26] Gavan Duffy C.J., Evatt and McTiernan JJ.
[27] Starke, Dixon and Rich JJ.
[28] [1934] V.L.R. 231.
[29] [1931] 1 Ch. 240. See also *Re Scrowcroft* [1898] 2 Ch. 638; *Re Coxen* [1948] Ch. 747.

> and effective forces in preventing the application of these principles and I therefore hope and trust that active steps will be taken to minimize and ultimately extinguish this enemy of my country's welfare. Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimize and extinguish the drink traffic.

It was held in the Court of Appeal that the trust was charitable. In the words of Lord Hanworth M.R.:

> I do not think that two separate spheres of activity are indicated. I think that throughout the recitals, and in the operative part, a plain intention is indicated of the advancement of Christian principles, with a particular method by which that advancement may take place — namely, by gradually extinguishing the drink traffic.[30]

On the other hand, again, in *I.R.C. v. The Temperance Council*[31] and in *National Anti-Vivisection Society v. I.R.C.*[32] arguments that the respective bodies' powers to seek legislative reform were solely means for the achievement of their charitable ends were rejected. In the latter case, Lord Normand quoted from the judgment of Lawrence L.J. in *Re Hood* where the learned judge described the basis of the decision in the *Temperance Council case* in the following words:

> . . . in that case the gift was not for the promotion of temperance generally, but was for the promotion of temperance mainly by political means, . . .[33]

Lord Normand then continued:

> The appellant society is similarly not a society for the prevention of cruelty to animals generally, but is a society for the prevention of cruelty to animals by political means.[34]

It does not follow from these cases that a trust for clearly charitable objects would be invalidated by the grant of a power to seek legislative action. Nor does it follow that charitable bodies or trustees may not in some circumstances spend money in seeking to obtain such action. The cases cited are, at the most, only authority that a trust or body which has the obtaining of legislation as one of its objects is not charitable.[35] Thus, in *Re Inman*[36] Gowans J. held that the Royal Society for the Prevention of Cruelty to Animals was a charitable corporation in spite of the fact that its by-laws authorized the achievement of its general objects by, *inter alia*,

> procuring such further legislation as may be thought expedient.

[30] [1931] 1 Ch. 240, 248-249.
[31] (1926) 10 T.C. 748.
[32] [1948] A.C. 31.
[33] [1931] 1 Ch. 240, 252.
[34] [1948] A.C. 31, 78.
[35] Even this proposition has to be qualified by the possibility that what is stated as an object may be held to be merely a means to an end and not strictly one of the purposes of the trust. *Cf.* [1948] A.C. 31, 75-77 (*per* Lord Normand).
[36] [1965] V.R. 238.

With regard to the other type of case where the authorized activity although stated in the form of a means rather than an end, nevertheless detracts from the charitable nature of the body, the *dictum* of Lord Tomlin which was quoted above[37] is again apposite. In the case in question, the learned judge applied the principle he had stated to a registered company which was given extensive powers of land development and of carrying on various businesses and public utilities for the purpose of settling Jews on lands to be acquired in and in the vicinity of Palestine. The learned judge concluded:

> I confess I feel great difficulty, in the face of the elaborate powers of a non-charitable character which are contained in this memorandum, in saying, quite apart from any other reason, that sub-clause (1), which in itself has no language directly indicative of charitable purposes, is to be construed as charitable.[38]

Nevertheless, it is submitted that where the distinction between objects and powers is adhered to in the memorandum or trust deed and where the objects as stated are clearly charitable, it would be unusual for the authorized means to lead the court to the conclusion that other non-charitable objects were intended to be pursued.

In Australia, a strong and useful precedent is *Congregational Union of New South Wales v. Thistlethwayte*.[39] In a long and complicated will the testator had included a direction that on the happening of certain events his trustees were to pay a specified part of the income from the residuary estate to the Congregational Union of New South Wales, which was a statutory corporation. The High Court was unanimous that the testator had intended that the recipient was to have no right to any part of the corpus of the residuary estate. That being so the members of Court were agreed that unless the body was a charity the gift would fail. Kitto J. took the view that such a trust for a non-charitable corporation would be void for self-contradiction, but the other four judges seemed prepared to base the invalidity on 'the old rule against perpetuities'.[40] However, all five judges agreed that the Congregational Union was a charity and that the gift was valid. The majority judges summarized the objects of the association as set out in its constitution as follows:

1. The cultivation and maintenance of fraternal intercourse with and among the associated churches.
2. The acknowledgement of the solidarity of the churches. Members of one body we live or suffer together.

37 *Supra*, n. 16.
38 [1932] A.C. 650, 658.
39 (1952-1953) 87 C.L.R. 375.
40 *I.e.* the rule often called 'the rule against perpetual duration' or 'the rule against inalienability'.

3. United action for the creation, maintenance and improvement of our educational, religious and philanthropic agencies.
4. The preservation of civil and religious liberty.

In reply to an argument that the third and fourth objects authorized the Union to expend its funds on non-charitable purposes, the majority said:

> The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said, *mutatis mutandis,* of the other object, the preservation of civil and religious liberty. The object is to preserve civil liberty so that Congregationalists may worship according to their religious beliefs.[41]

On this point Kitto J. concurred.

The decision in *Congregational Union of New South Wales v. Thistlethwayte* offers an instructive contrast with a group of cases decided in the English Court of Appeal in 1948 and 1949.

Tennant Plays Ltd v. I.R.C.[42] has already been considered to some extent. In that case paragraphs (B) and (C) of the company's objects clause read as follows:

> (B) to present, promote, organise, provide, manage, conduct such plays, dramas, comedies, operas, operettas, burlesques, promenade and other concerts, musical and other pieces, . . . for philanthropic or charitable purposes, and whether on any premises of the company or elsewhere.
> (C) . . . (to) enter into agreements, if desirable, with authors, dancers, actors or others in connection with all or any of the objects of the company to produce, distribute, rent or otherwise deal in cinematographic films.

The court was unanimous that these clauses were not simply ancillary to the company's charitable objects and contained independent non-charitable purposes.

It is to be noted that in each of the two cases last considered the draftsman had described both purposes and powers as objects and it appears likely that another of the consequences of this unfortunate practice may be that the courts themselves have occasionally blurred the distinction between ends and means.[43]

In *Re Strakosch*[44] a testator directed that part of his residuary

[41] *Ibid.* 442. See also, *City of South Melbourne v. Y.M.C.A. of Melbourne* [1960] V.R. 709; *Re Smith* [1954] S.A.S.R. 151.

[42] [1948] 1 All E.R. 506.

[43] Where powers are described as objects it is not surprising that some *dicta* suggest that the problem is simply to discover 'the main object' or 'the predominant object'. By obscuring the distinction between ends and means, the use of such terms can assist towards a conclusion that all that is involved is a question of degree. See *e.g. National Anti-Vivisection Society v. I.R.C.* [1948] A.C. 31, 76-77 *per* Lord Normand; *cf.* the approach of Lord Simonds (at 61-62) which, it is submitted, is to be preferred.

[44] [1949] Ch. 529.

estate should be held by his trustees to be applied

> to a fund for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community.

The court was prepared to assume that the trustees' discretion extended only to the first limb of the object but nevertheless held that the trust was not charitable. Stated shortly the basis of the decision was that 'the appeasement of racial feeling' was a political object and was not within the spirit and intendment of the Statute of Elizabeth. Unfortunately, part of the reasoning on which this conclusion was reached, concentrated on the possibility of the adoption of methods which themselves would not be charitable. In reply to an argument that the proper method of bringing about the object of the trust was education, the court said:

> We, however, find it impossible to construe this trust as one confined to educational purposes. These may be the best methods but they are certainly not the only methods. The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political. One method conducive to its solution may well be to support a political party or a newspaper which had such appeasement most at heart. This argument gains force in the present case from the other political object, namely, the strengthening of the bonds of unity between the Union and the Mother Country. It would also we think be easy to think of arrangements for mutual hospitality which would be conducive to the purposes set out but would not be charitable . . . If the object and means indicated are clearly charitable then the court is not astute to look for possible but subsidiary non-charitable means which might be within the words used *(In Re Hood* and *National Anti-Vivisection Society v. Inland Revenue Commissioners)*. The non-charitable purposes which we have referred to cannot we think be disregarded as merely subsidiary and possible modes of achieving the stated purpose, whatever may have been in the testator's mind.[45]

In so far as the court was merely countering the argument that the trust was educational, by saying that many activities which would have no tendency to advance education were impliedly authorized, there is no room for criticism.Nevertheless, the language used suggests that the means of attaining the objects of the trust must themselves be in some sense charitable and these impliedly authorized means are themselves described as purposes. Surely it is not defensible to characterize the objects of the trust as non-charitable because 'non-charitable' means which the testator has not specified might conceivably be adopted. In fact it is impossible to characterize the unspecified means as either charitable or non-charitable without considering the nature

[45] *Ibid.* 538-539.

of the objects which are to be achieved. Certainly, as has been seen above, where the testator has expressly granted certain powers it may be helpful to consider whether these could be reasonable and prudent methods of advancing charitable objects. If they are not it may indicate that the objects are not charitable. But where no powers are expressly granted and no methods of achieving the stated objects are indicated, it is to put the cart before the horse to attempt to characterize the objects by reference to the means which might be adopted.

The final case is *Oxford Group v. I.R.C.*[46] The Oxford Group was incorporated with, *inter alia*, the following objects:

3. (A) The advancement of the Christian religion, and, in particular, by the means and in accordance with the principles of the Oxford Group Movement, founded in or about the year 1921 by Frank Nathan Daniel Buchman.
3. (B) The maintenance, support, development and assistance of the Oxford Group Movement in every way . . .
3. (C) The exercise of all or any of the following powers . . .
   9. To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purposes of the association or calculated to further its objects.
   10. To do all such things as are incidental, or the association may think conducive to the attainment of the above objects or any of them.

The members of the court were agreed that, whether or not the Oxford Group Movement was 'a religious body whose aims and objects . . . are exclusively religious', paragraph 3(B) authorized 'the application of the association's income in furthering subsidiary activities not in themselves charitable, the pursuit of which would assist the Oxford Group Movement'.[47]

In the view of the learned judges a trust which authorized such an application of income would not be a good charitable trust and thus the plaintiff company could not be said to be formed for charitable purposes only. The members of the court appear also to have been unanimous that paragraphs 3(C)9 and 3(C)10 introduced non-charitable purposes. They refused to regard these paragraphs as merely indicating some of the ways in which the religious purposes of the company might be achieved. With regard to paragraph 3(C)9 Cohen L.J., with whom Tucker L.J. agreed, based his conclusion on the ground that an institution could be connected with the advancement of religion without being itself an institution for the advancement of religion. Similarly paragraph 3(C)10 was held to authorize the achievement of non-charitable purposes on the grounds that, even if the other objects were charitable, the things authorized in the para-

[46] [1949] 2 All E.R. 537. [47] *Ibid.* 543.

graph need not in fact be conducive to the other objects as long as the association thought they were and, in any event, in the view of the court, things conducive to the attainment of charitable objects need not themselves be charitable.

The conclusion on paragraph 3(C)9 may be unobjectionable. Purposes connected with charity clearly need not be charitable. However the conclusions on paragraphs 3(B) and 3(C)10 illustrate charity law at its most technical.[48] The vital distinction seems to be between, on the one hand, assisting or conducing to charity and, on the other, advancing or furthering charity. A trust for the purpose of the former is not charitable; a trust for the latter is charitable. By virtue of the similar decision in *Ellis v. I.R.C.*[49] to the first group may be added trusts for 'aiding' charity.

On this point the influential authority in both the *Oxford Group* and *Ellis* cases was an unnecessary and unfortunate *dictum* of Lord Macnaghten in the Privy Council decision of *Dunne v. Byrne.*[50] A testator had made a residuary bequest 'to the Roman Catholic Archbishop of Brisbane and his Successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this Diocese'. In the High Court of Australia[51] by a majority of three judges to two the bequest was held not to be exclusively charitable and therefore void. This decision was affirmed in the Privy Council. In the High Court emphasis in the majority judgments was placed on the discretion given to the Archbishop and on this ground it is, perhaps, difficult to disagree with the ultimate decision. However, Griffith C.J. doubted[52] also whether 'purposes conducive to the good of religion' were necessarily charitable in that they might not directly tend to the edification or instruction of the public. The same two strands appear in the reasons given by Lord Macnaghten in the Privy Council:

> The fund is to be applied in such a manner as the 'Archbishop may judge most conducive to the good of religion' in his diocese. It can hardly be disputed that a thing may be 'conducive', and in particular circumstances 'most conducive', to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious. In *Cocks v. Manners* there is the well-known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider 'conducive to the good of religion', but which is certainly not charitable. In the present case the learned Chief Justice

[48] It should be noted that both Tucker and Cohen L.JJ. use the words 'subsidiary activities' not to refer to means for or consequences of the achievement of the objects of the Oxford Group Movement. Rather they appear to have had in mind activities which would not necessarily *advance* the charitable objects of the Movement.
[49] (1949) 31 T.C. 178.
[50] [1912] A.C. 407.
[51] (1910) 11 C.L.R. 637.
[52] *Ibid.* at 645.

> suggests by way of example several modes by which the fund now in question might be employed so as to be conducive to the good of religion though the mode of application itself might have nothing of a religious character about it. As to what may be considered 'most conducive to the good of religion' in the diocese of Brisbane the Archbishop is given an absolute and uncontrolled discretion.[53]

It was recognized that a trust for religious purposes would be valid but such a trust was distinguished from that which the testator had intended to create, and it would seem from the passage quoted that, irrespective of the existence of the discretion given to the Archbishop, the bequest would have failed.

The interpretation given to *Dunne v. Byrne* has varied. In some cases there has been a tendency to explain the decision in terms of the wide discretionary power which the testator intended to confer on the Archbishop. This was the method by which the case was distinguished by Evatt J. and Gavan Duffy C.J.,[54] who were prepared to uphold the bequest in *Roman Catholic Archbishop of Melbourne v. Lawlor.* Starke[55] and Dixon JJ.[56], however, just as clearly took the wider interpretation of *Dunne v. Byrne*. Then, in *Baddeley v. I.R.C.*[57], Lord Evershed M.R. said:

> It was, I think, of the essence of the decision in *Dunne v. Byrne* that the purposes of the disposition there under review covered objects which could not fairly be regarded as being for the advancement of religion, even though the Archbishop of Brisbane might think them conducive to that end, thereby exposing its language to 'such lattitude of construction as to raise no trust which a Court of Equity could carry into execution'.[58]

Moreover, in *Tennant Plays Ltd v. I.R.C.* the final part of the objects clause was in the following terms:

> (S) To do all such other things as are incidental or conducive to the attainment of the above objects or any of them.

The clause was said to be unobjectionable[59] and in view of the decision on paragraph 3(C)10 in the *Oxford Group* case this would seem to require the same limited construction of *Dunne v. Byrne*. Finally, it is to be noted that in *Congregational Union v. Thistlethwayte* the majority judges in concluding that the objects of the body were charitable said:

> It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose.[60]

So, although there is no doubt that the words of Lord Macnaghten

53 [1912] A.C. 407, 410-411.
54 (1934) 51 C.L.R. 1, 17.
55 *Ibid.* 25.
56 *Ibid.* 34, 35, 36.
57 [1953] Ch. 504.
58 *Ibid.* 519.
59 [1948] 1 All E.R. 506, 512.
60 (1952-1953) 87 C.L.R. 375, 442.

supported the interpretation placed upon them in the *Ellis* and *Oxford Group* cases there is some ground for at least hoping that courts in the future might not give such a wide meaning to the verb 'to conduce'.[61] The presence of the discretion in *Dunne v. Byrne* and the *Oxford Group* case is certainly one way in which those cases might be distinguished and in the *Ellis* case there is some indication that the court thought, however surprisingly, that there was in effect a discretion given to the trustees.[62]

Nevertheless, apart from the tendency to obscure the distinction between ends and means, it is thought that neither the *Oxford Group* case nor the *Ellis* case weakens the propositions which were made earlier in this article. Nor is it thought that the suggestion that the memoranda of charitable companies should distinguish beween powers and objects is affected by the decision in the former case. In that case, it is true that paragraphs 9 and 10 of sub-clause (C) were described as powers, but it appears that they were inserted in a clause described as containing the objects of the company. In *Crystal Palace Trustees v. Minister of Town and Country Planning*[63] the case was distinguished on that ground and Danckwerts J. held that the Crystal Palace Act 1914 (Eng.) set up a charitable trust notwithstanding a power given to the trustees to

> do any act or thing which may in the judgment of the trustees appear calculated to promote the objects and purposes of this Act.[64]

This wide discretionary power was held to be simply ancillary to and for the purpose of carrying out the objects expressed earlier in this section.

Nevertheless, despite that decision, it is thought that the prudent draftsman who wishes to attract the benefits of charity to a trust or corporation will avoid the grant of such discretions.

To sum up this section: If the trust deed or memorandum distinguishes clearly between powers and objects, if the latter are charitable and if the former do not expressly include powers which could not be reasonable and prudent methods of advancing charity, there should be no doubt that the trust or corporation is established for charitable purposes only. Nevertheless, in this area, there is magic in words and whereas it seems to be safe enough to provide for the advancement, furtherance, benefit or, perhaps, promotion of charitable objects, danger lies in the verbs 'to conduce', 'to assist', and 'to aid'.

61 There would seem to be more room for such hope where the verb is used in a clause clearly marked as containing a power and not a purpose. In such a case the possible though pedantic interpretation that the objects of the trust or body were the conducing acts and not the charitable objects would be excluded.

62 (1949) 31 T.C. 178, 192.

63 [1951] Ch. 132.

64 [1951] Ch. 132, 134, n. 1.

SUBSIDIARY CONSEQUENCES OF THE ACHIEVEMENT OF CHARITABLE OBJECTS

The third type of situation in which the courts are accustomed to speak of subsidiary activities and benefits arises where in the attainment of charitable objects the interests of non-charitable purposes or persons are advanced. In most if not all cases it will be equally possible to characterize such benefits as either means or consequences of advancing the charity and whichever characterization is adopted will be a matter of indifference. Thus, it hardly matters whether one describes the private benefit that accrues to employees of a charity as a necessary part of the means of achieving the objects of the body or as a consequence of the achievement of those objects.

Whichever method of description is preferred the vital question will be whether the benefits or activities are ends in themselves. If they are not correctly regarded as part of the purposes for which the body or trust is established, then they should not detract from its charitable nature.[65] Of course, where the benefit to charity is small and the private advantage substantial, the inference that the latter is one of the purposes of the trust will be very strong.

Once again the question of construction is not always easy to answer. In 1899 the Court of Appeal held that the Royal College of Surgeons of England was set up to promote not only the science of surgery but also the interests of surgeons.[66] In 1952 the House of Lords took a different view.[67] In the words of Lord Morton of Henryton:

> I think that the promotion of the interests of practising surgeons is 'an incidental, though an important and perhaps a necessary, consequence' of the work of the college in carrying out its main object, the promotion and encouragement of the study and practice of the art and science of surgery.[68]

The Institution of Civil Engineers[69] and Clifford's Inn[70] have likewise been held to have been established for charitable purposes only notwithstanding the benefits which accrued to the members of each body.[71]

CONCLUSION

Apart from the doubt which still attaches to fund-raising activities, the principles which determine whether authorized activities or

65 The principles are stated concisely by Lord Cohen in *I.R.C. v. City of Glasgow Police Athletic Association* [1953] A.C. 380, 405.
66 *In Re Royal College of Surgeons of England* [1899] 1 Q.B. 871.
67 *Royal College of Surgeons v. National Provincial Bank Ltd.* [1952] A.C. 631.
68 *Ibid.* 659.
69 *Institution of Civil Engineers v. I.R.C.* [1932] 1 K.B. 149.
70 *Smith v. Kerr* [1902] 1 Ch. 774.
71 See P. D. Phillips (1953) 5 Proceedings of Medico-Legal Society of Victoria 230.

benefits can be regarded as detracting from the charitable nature of the trust or body concerned are not difficult to state. Nor, with careful drafting, should their application add any difficulties to those involved in the basic question of whether particular purposes are charitable. It is only where the instruments do not distinguish clearly between objects and powers or where the powers are so framed as to suggest that other objects are to be pursued that difficulty arises. In the cases where difficulty has occurred it is to be regretted that occasionally the distinction between ends and means has been obscured and that reference has been made to 'subsidiary activities' without any indication of the type concerned. When these things are done one is occasionally faced with puzzling statements or implications that the means of achieving charitable objects must themselves be charitable. Whatever doubts may still exist in this area, it is surely clear that one cannot characterize authorized activities or benefits as charitable or non-charitable without considering the purposes of the trust or body. If the activities or benefits are ends in themselves, characterization is possible. If they are not, the enquiry must be as to whether they are intended to achieve or to raise money for charitable objects or whether they are mere incidental consequences of such achievement. Only a negative answer to each of these questions should lead to the conclusion that the trust or body is not established for charitable purposes only.