SOME OBSERVATIONS ON RELIGIOUS CHARITY.

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The law relating to charities has long been a subject for criticism by judges and text writers; and to many a law student the attempt to follow its vagaries has caused feelings of despair and exasperation. Aptly described in 1933 as a "wilderness,"[1] it still deserves that epithet today, since the many cases decided in the intervening years have by no means succeeded in dispelling the erstwhile confusion.

Although most modern authorities accept as the basis of the law the preamble to 43 *Elizabeth c.* 4, recourse to this preamble is seldom helpful in determining the scope of the modern law since the preamble itself was never regarded as giving an exhaustive description of the categories of charity. "The objects there enumerated are not to be taken as the only objects of charity, but are given as instances."[2] In the centuries which have elapsed since the Statute was enacted, bold developments have taken place as a result of efforts by Chancery judges to bring the law into accord with the spirit of later times. So far-reaching were these developments that at one time it seemed possible that the courts would be able to rationalize the whole subject-matter and develop a satisfactory concept of charity unfettered by the original Elizabethan idea of its proper content. Very unfortunately this happy culmination has not been achieved.

The nearest approach to a satisfactory description of the modern law of charity is that put forward by Sir Samuel Romilly in argument in *Morice v. Bishop of Durham*[3] and substantially adopted by Lord Macnaghten in *Pemsel's Case.*[4] "There are four objects, within one of which all charity, to be administered in this Court, must fall: firstly, relief of the indigent; in various ways: . . . secondly, the advancement of learning: thirdly, the advancement of religion; and, fourthly, which is the most difficult, the advancement of objects of general public utility." However, much of the usefulness of this description is lost once it is accepted, as it has been in recent cases,[5] that it does not constitute a complete definition. An object may fall within this classification and still be held not charitable. In determining whether it is or is not charitable, the courts have shown a disconcerting readiness to refer, not to broad concepts of public utility, but to the categories of charity disclosed by the Statute of Elizabeth. Much of the modern case law is concerned with Sir Samuel Romilly's fourth head, which, as he pointed out, "is the most difficult," but the other heads are not free from doubt. What, for instance, is the scope of religious charity?

In this case the Statute of Elizabeth gives little help, since the only words which can be construed as having reference to religion are those which refer to gifts "for repaire of . . . churches," unless indeed gifts

1. Norman Bentwich, 49 L.Q.R. 520.
2. *London University v. Yarrow*, (1857) 1 DeG. & J. 72 at 79, per Lord Cranworth, L.C.
3. (1805) 10 Ves. J. 522, at p. 531.
4. [1891] A.C., at p. 583.
5. e.g. *Williams' Trustees v. I.R.C.*, [1947] A.C. 447.

for " schooles of learning " might be deemed to extend to the instruction in religion given by the Churches. However it is from these meagre materials that the present day law of religious charity grew. Although indeed it has been suggested by Palles C.B. in *O'Hanlon v. Logue*[6] and Gavan Duffy J. in *Maguire v. A.-G.*[7] that this branch of the rules as to charities may have had its origin in the old common law rules as to pious uses anterior to the Statute of Elizabeth, this view does not appear to be held generally. It seems likely that the Statute contemplated as charitable only gifts such as were designed to relieve the community of a burden which would otherwise be cast on it. From this it would be concluded that gifts for the maintenance of parish churches would be charitable, but gifts to maintain nonconformist churches would not, since in the latter case the law creates no obligation to maintain. Courts however have not been prepared to make this distinction and gifts to maintain churches of any denomination have accordingly been held charitable.

However, the greatest difficulties arise when it is necessary to determine the charitable character of trusts to propagate religious doctrines. In approaching this subject it may be desirable to make some statement of the principles which, it would seem, should apply to all charities. Charities are regarded with special favour by the courts, one aspect of this special favour being found in the rule that a trust to devote property to charitable purposes in perpetuity is valid, whereas if the purposes were non-charitable the trust would be invalid. This rule is only justifiable on the ground that the particular object, held to be charitable, confers on the community a benefit of an order sufficient to warrant the permanent dedication of some part of the community's resources. There may be exceptional cases where this principle has not been applied but these cases are now recognised as anomalous and are to be restricted to their narrowest limits.[8] For the same reason it is obvious that it must be for the Court and not the creator of the trust to determine on the available evidence whether the objects of the trust do in fact conduce to the public benefit.

In *National Anti-Vivisection Society v. Inland Revenue Commissioners*, Lord Wright,[9] in commenting on the decision of Chitty J. in *Re Foveaux*,[10] said, " Chitty J. was wrong in taking the intention of the donor as a sufficient test that the gift was charitable. That is vital. He was wrong in holding that he could stand neutral and not decide, on the facts before him, the question whether the gift was for the public benefit."

Where the nature of the object considered is such that the court is unable to determine whether it is for the public benefit, the general rule has been for that object to be regarded as non-charitable. Thus " a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not

6. [1906] 1 Ir. R. 247.
7. [1943] Ir. R. 238.
8. See *Re Compton*, [1945] Ch. 123.
9. [1948] A.C. 31, at 46-7.
10. [1895] 2 Ch. 501.

be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."[11]

These same rules should apply to religious as to other charities. Do they so apply ? Where there was one Established Church, and membership of other churches was unlawful, no problem could arise since by the very fact of Establishment the doctrine of the Established Church must be deemed valid and for the public benefit, and gifts for other churches must necessarily be invalid, so that there could be no question of their being charitable. With toleration however, this ready solution no longer being available, it has become necessary to determine whether gifts for the furtherance of doctrines other than those of the Established Church are charitable. If this involves the necessity of determining whether these doctrines are right or wrong, then no Court has any measuring stick by which the question can be determined, and, if Lord Parker's rule were to be applied, the gift must necessarily be held non-charitable. The actual practice has been to hold all such gifts to be charitable without investigating the validity of the doctrine propounded—a task which all judges have recognized as being beyond solution by evidentiary proof. In *Thornton v. Howe*,[12] Romilly M.R. had to determine whether a bequest of residue for the purpose of propagating " the sacred writings of Joanna Southcote " was charitable. He said, " I am of the opinion, that the Court of Chancery makes no distinction between one sort of religion and another,"[13] and although, having considered the writings in question, he was of opinion that their authoress was " a foolish ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote some great good on earth,"[14] and though he regarded the works themselves as " incoherent and confused,"[15] he none the less held the bequest charitable.[15A] In *O'Hanlon v. Logue*,[16] Walker C. said that it would be mere pedantry to cite authority for the proposition " that a gift for the advancement of " religion " is a charitable gift ; and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law . . . the Court does not set up its own opinion." Walker C. stated expressly that such a gift would be charitable if its object was one " which, according to the ideas of the giver, is for the public benefit "[17]—and regarded this also as being axiomatic. Such a surrender to the views of the individual donor is unreasonable, and the case cited by Walker C. in support of this view[18] cannot now be regarded as convincing authority. Nor, in many cases, is such a surrender necessary, since a court may well find a public benefit in a religious trust at an earlier stage, before it has to consider the question of the truth or soundness of particular doctrines. It may determine that a trust for the propagation of religion is a trust for

11. *Bowman v. Secular Society*, [1917] A.C. 406, at 442, per Lord Parker.
12. (1862) 31 Beav. 14.
13. at p. 19.
14. at p. 18.
15. at p. 20.
15A. and invalid as contrary to the *Statute of Mortmain* (9 *Geo. II. c.* 36).
16. [1906] 1 Ir. R., at pp. 259-60.
17. at p. 259.
18. *Webb v. Oldfield*, [1898] 1 Ir. R. 431, where a gift for the spread of vegetarian principles was upheld as charitable. This case may well suffer the same fate as *Re Foveaux* (*supra*).

education in which there is a public benefit—although it may be doubted whether all religious sects to which this rule might be applied are characterized by a broad tolerance of the views advanced by others, or by any spirit of scientific inquiry for ultimate truth which should be the marks of any scheme of education. Further, although this principle may be sufficient in the case of trusts in aid of missionary activity, and the maintenance of preachers, it does not dispose of trusts for Masses to be said in private or trusts for religious Orders who do not minister directly to the public.

In *O'Hanlon v. Logue*[19] a trust of the former kind was held charitable on the ground that the court must admit the suffiency of spiritual efficacy, ascertaining it according to the doctrine of the religion whose act of worship it is. However, these trusts may be supported more satisfactorily by treating them merely as gifts towards the maintenance of a clergy which does on other occasions engage in instructing the public.[20]

With trusts for the purpose of religious Orders engaged primarily in self-sanctification, or other duties not immediately and directly beneficial to the public, there is a conflict of authority. In *Cocks v. Manners*,[21] a trust of this kind was held to be non-charitable on the ground that it showed no possible public benefit. In *Maguire v. A-G.*,[22] Gavan Duffy J. held that a trust for the purpose of founding a convent for the perpetual adoration of the Blessed Sacrament was charitable. *Cocks v. Manners* he thought not applicable in present day Ireland, regarding it merely as a decision of fact that " the England of 1871 was not edified by sequestered piety, unaccompanied by civic works of mercy . . . The law laid down was that religious purposes, to be charitable, required services tending to instruct or edify the public."[23] On the English view, to engage in religious education would be charitable, but to lead a godly life would not. On this view, whatever the copy books may say, it would appear that precept is better than example. In *Re Howley*,[24] Gavan Duffy J., emphasizing the inapplicability of the decision in *Cocks v. Manners* to Ireland, had said, " The assumption that the Irish public finds no edification in cloistered lives, devoted to purely spiritual ends, postulates a close assimilation of the Irish outlook to the English, not obviously warranted by the traditions and *mores* of the Irish people."

In re Coats' Trusts[25] is of considerable interest since it gave an English judge the opportunity of considering the conflict between *Cocks v. Manners* and *Maguire v. A-G.* Here the trust was for the purposes of a Carmelite Order if these purposes were charitable. The Order was one whose primary object was self-sanctification, but which also engaged in prayers for the general public. Jenkins J. was urged to reject *Cocks v. Manners* on the grounds (*a*) that the evidence in that case apparently showed the members of the convent as completely egocentric without any interest in individuals beyond the convent (*b*) that the evidence did not disclose the Roman Catholic doctrine that the prayers of such a

19. *Supra*, per Walker C., at p. 259; per Palles C.B., at p. 276.
20. See *Re Caus*, [1934] Ch. 162.
21. (1871) L.R. 12 Eq. 574.
22. *Supra*, see also 62 L.Q.R., at p. 242.
23. *Supra*, at p. 248.
24. [1940] Ir.R. 109, 113.
25. [1948] 1 Ch. 1.

community caused divine intervention to bring about the spiritual improvement of the public and (c) that no account was taken of the edification which was held by the Church to be derived by the public from the example of the members of the Order. In spite of these arguments Jenkins J. decided to follow *Cocks v. Manners* and not *Maguire's Case.* He thought that in the light of existing authority, the suggested benefits springing from the work of the Order could not be regarded as the type of public benefit contemplated by the law.

Gavan Duffy J. had reasoned, that if a bequest for a " Home for Starving and Forsaken Cats " were held to be charitable,[26] it would be shocking in the extreme if a gift to a convent were held not to be charitable.[27] This may be conceded, but the answer would seem to be not that the latter gift is charitable but that the former gift is not.[28] It would be a dangerous principle for all objects enjoying some measure of public approval to be held charitable on that account alone.

It is submitted that the decision of Jenkins J. in *In re Coats' Trusts* is preferable to that of Gavan Duffy J. in *Maguire v. A-G.* The latter if carried to its logical conclusions, would require Courts to hold charitable all kinds of schemes, once it was shown firstly that they resulted in the edification of some members of the community. Any such extended rule would certainly be in conflict with high authority.

Another possible solution should not be ignored, although it is suggested that its adoption could be contrary to the essential principles which should be applicable to all charities. This is that religious charity requires no element of public benefit.[29] Although this solution avoids some of the difficulties met with, it is submitted that the difficulties it would create are sufficient to make it untenable.

26. *Swifte v. A.-G.*, [1912] 1 Ir.R. 133.
27. *Maguire v. A.-G., supra*, at p. 244.
28. *Williams' Trustees v. I.R.C.*, [1947] A.C. 447.
29. See the very illuminating article by F. H. Newark on " Public Benefit and Religious Trusts " in which the whole subject of religious charity is elaborately discussed—(1946) 62 L.Q.R. 234.