THE MEANING OF "CHARITY" IN MALAYA — A COMPARATIVE STUDY

The law of charities in Malaya is modelled largely on the English law of charities. Acceptance of English principles however, should not mean that precisely the same purposes are charitable in the two countries anymore than the reception of English law in common law jurisdictions has lead to identity of application. But judges in the Malayan courts have exhibited a marked reluctance to adopt or modify English practices and customs. This reluctance together with the difficulties with the interpretation and application of the law of charities has resulted in a narrow meaning of the term "charity". A comparative study of this kind sets out to discover the scope of "charity" in Malaya. Throughout, emphasis is placed on the meaning of "charity" in Malaya, especially with regard to gifts for the advancement of religion and the relief of poverty. References to Anglo-Irish authorities will be made particularly where the law diverges, as with the doctrine of supersitious uses, applicable only to conditions and exigencies peculiar to England, and to occasions where judges in the Malayan courts have sought to strengthen their decisions by drawing analogies in the law. Analogies have been drawn between gifts for the advancement of religion in Malaya, the Republic of Ireland and England.

Modern charity law began in England with the preamble[1] to the Statute of Elizabeth I in 1601. The Statute remained unrepealed until 1888[2] but even then the new Statute carefully preserved the preamble

1. "Whereas lands tenements rentes annuities, profittes hereditamantes, goodes chattels money and stockes of money, have been heretofore given limited appointed and assigned, as well as by the Queenes most excellent Majestie and her most noble progenitors, as by sondrie other well disposed persons, some for the reliefe of aged impotent and poore people, some for the maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in universities, some for repaire of bridges, portes havens causwaies churches seabankes and highwaies, some for educacon and prefermente of orphans, some for or towards reliefe stockes or maintenance for howses of correccon, some for marriages of poore maidens, some for supportacon ayde and helpe of younge tradesmen, handicraftesmen and persons decayed, and others for reliefe or redemption of prisoners or captives, and for aide or ease of any poore inhabitante concinge payments of fifteeness settinge out of souldiers and other taxes; which landes tenements rents annuities profitts hereditaments goods chattells money and stockes of money, nevertheless have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of fraudes breaches of truste and legligence in those that should pay deliver and imploy the same."
2. The Statute was repealed by the Mortmain and Charitable Uses Act, 1888, s. 13(2) of this Act expressedly preserved the preamble. The Charities Act, 1960 (England) has now repealed the preamble; for a discussion of the effects of this repeal, see *Tudor on Charities* (6th Ed.) p. 334; Marshall, The Charities Act, 1960 (1961) 24 M.L.R. 444, 445-446; Spencer G, Maurice, The Charities Act, 1960 (1960) 24 Conv. (N.S.) 390, 391-392.

and its list of uses properly defined as charitable. The preamble undertook the recital of the proper objects of charitable interests and for a society with limited resources, defined a broad spectrum of responsibility and proclaimed a noble conception of what society ought to be.[3] The preamble was designed to be more hortatory than definitive, nonetheless, the stamp of its eloquence upon law and aspirations has been such that courts in England and other common law jurisdictions[4] have tended to be guided by its precepts. So too the term "charity" has acquired a meaning which is anchored in the language of the preamble with the results that trusts have tended to fail when testators and their lawyers have attempted to enlarge their intentions by such terms as "benevolent", "philanthropic", "public". . . .

In Malaya, charity law has a short history of a hundred years.[5] It is surprising that judges in the Malayan courts have determined questions on the meaning of "charity" wholly on the assumption that the social conditions in Malaya could be effectively interpreted in the light of the English society that prevailed at the close of the Tudor period.

The meaning of "charity" is influenced and moulded by two factors, intimately related. First, the role of the judiciary and second, the interpretation of the concepts of charity law. The first has a decisive bearing on the second because the task of interpretation falls on the judge. When deciding questions on what constitutes charity for purposes of the law, a judge is making a decision, often of great importance upon the trend of public policy He indicates the channels into which private philanthropy can be directed with the greatest effect.[6] This is not a simple task. A judge may well find himself in a dilemma. If he decides that the trust is not charitable he defeats the donor's intention altogether. If on the other hand he decides that it is a charity, he not only gives substantial effect to the donor's intention but blesses it with a public subsidy in the form of freedom from tax, which he may feel it does not deserve. Which way the decision goes depends on whether the question arises before the court in a "Chancery" case or in a "Revenue" case. If the former, the claims of charity are opposed to that of the next-of-kin whose claims may not be seriously pressed or taken to appeal. But if the latter, the claims of charity are opposed to that of the Commissioners of Inland Revenue. Such cases are often taken to appeal and judges tend to adopt a more restrictive meaning of "charity".

The meaning of "charity" depends on the judicial interpretation of its concepts. Much hangs on the concept of "public benefit". There are various aspects of "public benefit" and its absence in a gift alleged

3. See Jordan, Philanthropy in England 1480-1660 (1959); Keeton, The Law of Trusts (8th ed.) pp. 127-130.

4. For Malaya, see *Re Abdul Guny Abdullasa* (1936) 5 M.L.J. 174 (Gordon-Smith J., Penang).

5. The first reported case is *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216 (Maxwell C.J., Penang).

6. The Nathan Report on the Law and Practice relating to Charitable Trusts emphasised the value they attached to voluntary services and to charity in the widest sense: Cmd. 8710, Chapter 1.

to be for a charitable purpose is fatal. Proof of its presence is unusually difficult in England since the House of Lords' decisions in *National Anti-vivisection Society* v. *I.R.C.*,[7] *Gilmour* v. *Coats*[8] and *Oppenheim* v. *Tobacco Securities Co. Ltd.*[9] It is with gifts for the advancement of religion especially, that all the problems of public benefit in its various aspects arise. The matter is now concluded in the Republic of Ireland by s. 45 of the Charities Act, 1961,[10] applicable only to gifts for the advancement of religion.

The judicial interpretation of concepts of charity law and the application of its principles is largely a subjective approach. In form a judge may appear to follow earlier decisions, but except where the terms of a later gift are identical with that of a gift in a reported case, his margin of freedom is wide and it is impossible to exclude the personal factor of choice between competing analogies. How subjective the approach can be is seen by the conflicting decisions of England and Irish courts on gifts to a closed order of nuns. The courts in the Irish Republic have held such gifts to be charitable while the English courts have not. Yet the law of charities in both countries has developed by judicial precedents from the same source.[11]

In the final analysis, the meaning of "charity" depends on the role of the judiciary. This is a branch in which precedents lose their cogency through a change in social conditions and in which analogies are frequently remote. The social conscience of the judge working in the light of contemporary conditions will do more for the fair and just administration of charity cases than any definition of "charity" and providing that the law is stated with clarity, legislative interference is unnecessary.

Gifts for the Advancement of Religion

Trusts for the advancement of religion form the third head of legal charities in Lord Macnaghten's famous classification in *Commissioners of Income Tax* v. *Pemsel.*[12] It is generally accepted that a charitable religious trust is one which complies with two requirements. First, the gift contributes to the advancement of religion as interpreted by the courts from available evidence. Second, the gift involves the religious instruction or edification, either directly or indirectly, of the public or a section of the public.

The conception of charitable purposes advanced by the Statute of 1601 was starkly and coldly secular, just as were the benefactions of the age. Religion was not mentioned and the nearest reference to it was the repair of churches, and even this was quite inconspiciously

7. [1948] A.C. 31.
8. [1949] A.C. 426.
9. [1951] A.C. 297.
10. Discussed *Infra.*
11. *Cf.* the Statute of Charitable Uses, 1601 and the Irish Statute of Charitable Uses, 1634.
12. [1891] A.C. 531.

tucked in between "causewaies" and "seabankes". In the same year the first national Poor Law Act, 1601, was passed in England. The growth of charitable giving for secular purposes coincided in time with the first efforts of the State to tackle the problem of poverty on a national scale. During the Tudor period, there was a vast impetus towards charitable giving, much of which was channelled towards the deserving poor whose numbers had increased considerably with the social changes of the sixteenth century, and with matters such as educational opportunities for children of the deserving poor. The mercantile aristocracy of England was prescient enough to sense that poverty could never be destroyed unless the ignorance on which it spawned was relieved. They were determined to create a new England by freeing the minds of its youth and firmly believed that educational opportunities would dispel the ignorance from which poverty sprang. The whole tone of social and cultural aspirations was secular; the complete emphasis was on the material needs of man; his spiritual requirements were ignored. However, early in 1639 a trust established to maintain a preaching minister was held charitable in *Pember* v. *Inhabitants of Knighton*[13] even though "this is no charitable use mentioned in the Statute, yet .... it is within the Equity of the Act."

Thenceforth, there was a steady flow of judge-made law in this aspect of charity. Judges' conception of what constituted the advancement of religion did not remain constant. In the two centuries following the Statutes of 1601 a gift which today would be regarded as charitable, might fail on the preliminary objections that it was against public policy as furthering the errors of Rome or the schisms of nonconformity or the infidelity of Judaism or heathenism. When religious equality was eventually established in the last hundred years or more, judges began to speak the language of tolerance, though an unconscious bias against heterodoxy is often apparent in their approach to problems particularly with regard to gifts alleged to be for the advancement of religion. It is only in comparatively recent times that English courts have ceased to identify the advancement of religion with the promotion of the welfare of the Established Church. The courts have moved from the extreme of exclusiveness in which only gifts for the Established Church were recognised as charitable to the present postition in which any religion, so long as it is not subversive of public morality, is capable of being the object of a charitable gift. The court will not enquire into the value of any religion or whether its followers are numerous so long as they exist: *Thornton v. Howe.*[14]

The Position in Malaya

In Malaya, the reports indicate that gifts alleged to be made for the advancement of religion were the most recurrent as far as charity cases go. Few have actually been recognised as charitable religious trusts. The first reported case in 1869[15] involved a gift for the advance-

13. [1639] Duke, 82.

14. (1869) 31 Beav. 14.

15. *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 46.

ment of religion. In 1875,[16] the Judicial Committee of the Privy Council had to determine the nature of gifts for religious purposes in the will of a Chinese testatrix. Since that decision, various gifts by Chinese and Muslim testators for religious purposes have failed to gain recognition as legal charities; the meaning of "charity" as far as gifts for the advancement of religion is concerned has been influenced largely by the decision in that case.

Among Chinese testators or settlers there have been gifts for the purpose of Sin-Chew[17] and Chin-Shong ceremonies,[18] among Muslims, there have been gifts for sacrificial offerings to the deceased's soul or souls of members of his family, as well as gifts of Wakaf[19] for some valid objects of Wakaf.

When the law of charitable trusts came to tackle gifts for the advancement of other scriptural religions, non-scriptural religions or supernatural observances whose religious nature was disputed, English law was applied, often indiscriminately. Religion for the purposes of the law of charities has never been defined. But judges in the Malayan courts have made it clear that only monotheistic religions would qualify. This is inappropriate in a multi-racial society like Malaya, where polytheistic or pantheistic religions like Buddhism or Hinduism flourish side by side. Some judges have spoken of the need to modify English principles to conditions prevailing in Malaya. Although this may seem necessary and desirable, it is not a simple task for a judge bred and trained in the teachings of Common Law and Equity. The early reports on charity cases indicate that evidence of local religious practices and customs was not always forthcoming in court. Little was written about them. Chinese customary law suffers from the defect that assails most systems of customary law in any large country, and particularly in a country as large as China which is subjected to divergences not only from province to province but from clan to clan in the same neighbourhood. This is bound to occur in the absence of a detailed code or doctrine. Among the Muslims, customs and beliefs vary according to the different schools of thought and according to the country in which the religion is practised or professed. There are various schools of thought and all these are treated with respect, but Muslims generally follow one school of thought. This indicates the difficulty of giving serious recognition to religious observances alleged to be dictated by custom. The difficulty is enhanced if there is a conflict of evidence in court. In the absence of evidence, the courts decided according to the words of the will. Some

16. *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381 (Judicial Committee, from Penang).

17. Sin-Chew — these are sacrificial offerings for the testator's soul in accordance with Chinese custom.

18. Chin-Shong — these ceremonies are carried out for the purposes of ancestral worship. Both Sin-Chew and Chin-Shong ceremonies are intimately related as one presupposes the other. Most of the reported cases have treated them as such.

19. Wakaf — this is a Muslim concept. To set a Wakaf signifies a dedication or consecretion of property, whether in express terms or by implication, for any charitable or religious object, or to secure a benefit to any human being.

of the early wills[20] involving gifts for purposes alleged to be for the advancement of religion were expressed in rather "obscure and uncertain" language. These were construed strictly with little regard for the fact that the purposes were dedicated for charity.

Charitable Religious Trusts upheld in Malaya

Apart from Gordon-Smith J.'s decision in *Re Abdul Guny Abdullasa*,[21] all the other charitable religious trusts upheld by the Malayan courts involved trusts for the benefit of temples or mosques or some objects connected with the use of temples or mosques, for example, a trust for keeping a lamp burning in a mosque at Puthu Pallee;[22] or a trust for the maintenance of and provision of mats and Zamsam water for the use of persons visiting the mosque at Mecca.[23]

In *Haji Salleh* v. *Haji Abdullah*[24] the court held that usage of a mosque constituted presumption evidence of its dedication to charitable trusts. In *Tan Chin Ngoh* v. *Tan Chin Teat* Worley J. said: [25]

> "It is well settled that a trust for the upkeep of a temple or joss house is a trust for the advancement of religion and therefore a good charitable trust."

As early as 1874 it was decided in *Attorney-General v. Thirpooree Soonderee*[26] that a gift to a person for the benefit of a Hindu temple was charitable. In the same case, a gift to an idol "Sree Dhar", an object in the temple was held void as an absurdity. Professor Sheridan[27] has criticised this decision as an absurdity itself, having evidently been given in ignorance of the principle that a trust shall not fail for want of a trustee.

This argument was put forward by counsel who pleaded that some allowance ought to be made for the ignorance of the natives who were unable to express themselves clearly — that they meant to express a gift to a person on trust for the temple. Counsel also cited *Home* v. *Osbourne*.[28] The principle seen in this case is that if a gift is made to an object in a church, it will be charitable as it falls within the "equity" of the Statute of 1601. Ford J. did not appreciate the essence of this principle. Perhaps counsel did not state his case clearly for Ford J. said that a gift to an idol on trust for the temple is equally absurd as the idol could not possibly be a trustee.

20. See *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381; *Attorney-General* v. *Thirpooree Soonderee* (1874) 1 Ky. 377 (Ford J., Penang).
21. (1936) 5 M,L.J. 174.
22. *Re Abdul Guny Abdullasa* (1936) 5 M.L.J. 174.
23. *Re Alsagoff Trusts* (1956) 22 M.L.J. 244 (Murray-Aynsley C.J., Singapore).
24. (1935) 4 M.L.J. 26.
25. (1946) 12 M.L.J. 159, 163.
26. (1874) 1 Ky. 377.
27. In "Nature of Charity" (1957) 23 M.L.J. Ixxxvi.
28. [1866] L.R. Eq. 585.

Mills J., following the decision in *Attorney-General* v. *Thirpooree Soonderee* in *Re Tan See Hong*[29] refused to uphold a bequest to two Chinese Josses, who were ancestors of the testator. He said the money could not belong to an idol. The decision would have gone the same way even if Mills J. had not cited *Attorney-General* v. *Thirpooree Soonderee,* for Mills, considered the bequest as being for the purpose of ancestral worship and therefore void.

Mills J. considered two ways by which the Josses could be benefited First, they could be benefited "materially" by the construction, repair or improvement of a temple, tomb, graveyard or a shrine. Secondly, they could be benefited "spiritually" by the performance of religious ceremonies. There was some indication of the existence of a temple, tomb, graveyard or shrine in China, but their existence was not satisfactorily proved in court. Mills J. thought that even if their existence were proved, it would still be necessary to know if these objects were available to the public, or whether the tomb or shrine formed part of a temple. As no evidence was forthcoming, Mills J. held that the bequest in its material aspect could not be for a charitable use. The bequest failed also in its spiritual aspect because there was no evidence to show that the performance of religious ceremonies could confer any public benefit.

In *Re Low Kim Pong's Settlement,*[30] a donor conveyed land to a Buddhist priest on trust to erect or cause to be erected, a temple for the perpetual worship of certain divinities. The priests or his successors were empowered to use such portion of the land, as might not be used in connection with the temple, for growing fruit trees or for such other purposes as they thought fit.

McElwaine C.J. upheld the whole gift as being for the purposes of establishing a temple and for its endowment; that the provision for growing fruit trees was intended as an endowment for the temple. He cited the English case of *Re Garrard*[31] and expressed the opinion that his case was a much stronger one than *Re Garrard.* In that case, a testatrix bequeathed £400 to a vicar and church wardens "to be applied by them as they shall in their sole discretion think fit." The court held that this was a good charitable gift for ecclesiastical purposes of the parish. *Re Garrard* illustrates the general rule in English law that gifts to a minister and his successors are gifts annexed to that office and therefore charitable *Thornber* v. *Wilson.*[32] But a gift to the individual for the time being holding the office is not charitable.[33]

29. (1934) 3 M.L.J. 5, a Singapore Case.

30. (1938) 7 M.L.J. 119, a Singapore Case.

31. [1907] 1 Ch. 382.

32. (1855) 4 Dr. 350. See comments by Farwell L.J. in *Re Davidson* [1909] 1 Ch. 567, 573.

33. See *Doe d. Toone* v. *Copestack* (1805) 6 East 328; *Re Davidson* [1909] 1 Ch. 567; *Moore* v. *The Pope* [1919] 1 I.R. 316.

Where the gift specifies the carrying out of certain purposes, it may fail for uncertainty.[34]

Re Low Kim Pong's Trust Settlement is clearly distinguishable from *Attorney-General* v. *Thirpooree Soonderee* and *Re Tan Swee Hong* insofar as the gift involved a gift to a person holding a religious office. Other than this, the gifts in all three cases were directed towards the benefit of some divinities. In *Re Low Kim Pong's Trust Settlement,* the power given to the priest and his successors to grow fruit trees or to use the land for any purpose they thought fit, could have caused the failure of the trust. The trust might have failed for uncertainty. By upholding the provision to be an endowment for the temple, McElwaine C.J. saved the gift.

In *Lim Chooi Chuan v. Lim Chew Chee,*[35] Bostock-Hill could not overcome the problem of uncertainty. A grantor had directed a temple to be used for all or any of the following purposes, *viz*:—

(a) for ancestral worship and religious rites and sacrificial offerings;

(b) for studying and preaching and teaching;

(c) for all kinds of meeting connected with the temple;

(d) for any other purposes calculated or tending, in the opinion of the trustees, to improve or benefit the moral, social or intellectual condition of the adherents of the temple.

The grantor directed that only those persons of the Chinese race and bearing the surname Lim could be eligible to use the temple for purposes of worship or otherwise in accordance with the principles of the temple.

Bostock-Hill J. said that the gift to found a temple where all the members of a Seh (that is, persons having the same surname) may carry on ancestral worship and sacrificial offerings was charitable because all the members of the Seh would form a section of the public. They would all benefit from the gift. Each member could therefore carry out those religious ceremonies in the temple for his own benefit. However, he held that the gift failed on the ground that the grantor had specified "other purposes" for which the temple was to be used. He said:[36]

> "It seems to be settled that in order to be charitable a trust must not only be declared in favour of objects of a charitable nature but it must also be expressed that in its application it is confined to such objects."

As the objects of the gift were not so confined, he held the gift void for uncertainty.

34. See *Farley* v. *Westminister Bank* [1939] A.C. 430; c*f. Re Simon* [1946] Ch. 299; *Re Howley* [1940] I.R. 109.

35. [1948-49] M.L.J. Supp. 66, a Penang Case.

36. [1948-49] M.L.J. Supp. 68.

It is difficult to accept this line of reasoning. If a gift simply for ancestral worship or sacrificial offering is not charitable, but would be charitable if a temple is provided for these ceremonies to be carried out, then it would seem to follow that the matter of uncertainty was irrelevant. The conversion of a non-charitable purpose to a charitable one by the provision of a temple, should it seems, apply to all the other purposes. In any case, all the other purposes specified were essentially a part of the proceedings in this kind of temple.

In *Re Abdul Guny Abdullasa*,[37] Gordon-Smith J. upheld a trust for the performance of two religious ceremonies. The first ceremony was for the recital of prayers on certain specified dates in the names of certain Mohammedan saints and the second was for the recital of prayers in the names of each of the souls of the dead persons and Katam in the name of each of the saints. He treated both objects of the gifts as part of one religious ceremony in honour of the Mohammedan saints and held the whole gift to be a trust for the advancement of religion. He did not cite any English or Malayan authorities for his decision; he merely distinguished two earlier local decisions: *Fatimah* v. *Logan*; [38] *Ashabee v. Mohamed Kassim.*[39] He said:[40]

> "There is, I think, a clear distinction between the ceremonies enjoined and "kandoories" which are feasts in honour of a deceased attended by his relatives and are held on the anniversary of the testator's death. Moreover, the deceased in the present case is not a Malay. The ceremonies envisaged are not in perpetuation of the name of the deceased, nor are his relatives enjoined to attend and although food is to be distributed at the conclusion it does not appear to me that the main object is of a festive nature."

The distinction is reduced to the difference between a ceremony and a feast. The former would be charitable and religious but the latter not.

In *Fatimah* v. *Logan,* one of the two cases distinguished, the testator devised the residue of the rents and profits of his estate upon trust to expend the moneys for the yearly performance of "kandoories" and entertainment for the testator and in his name. Hackett J. held the gift void as tending to a perpetuity and not being a charity. He was of the opinion that the whole purpose of the gift was to provide funds for ceremonial entertainments and feasts. In the absence of any evidence to show that such entertainments or feasts were enjoined by the Mohammadan religion, he concluded that the gift could not be deemed charitable in any sense.

It is difficult to be enthusiastic over the distinction drawn by Gordon-Smith J. in *Re Abdul Guny Abdullasa.* There is a strong indication in the will that the testator envisaged the performance of a religious ceremony of a festive nature. Although the word "kandoorie"

37. (1936) 5 M.L.J. 174.
38. (1871) 1 Ky. 269 (Hackett J., Penang).
39. (1887) 4 Ky. 212 (Sheriff J., Penang).
40. (1936) 5 M.L.J. 176 A.

was nowhere present in the will' it would appear from clauses 8 and 13[41] of the will, that a ceremony in the nature of a "kandoorie" was intended.

This decision stands isolated in the law of charities in Malaya. It is commendable insofar as it sought to give effect to the testator's wishes by adapting English principles to the fact situation. The decision would be of greater value if Gordon-Smith J. had given clear reasons for his decision, and had analysed the concepts of "advancement of religion" and "public benefit" and the relationship between these concepts. It is difficult to guess Gordon-Smith J.'s interpretation of the "advancement of religion" or whether he considered the presence of public benefit spiritual or temporal, necessary. As the decision stands, it would mean that a gift for the performance of a religious ceremony is charitable, without more.

In *Re Abdul Guny Abdullasa,* Gordon-Smith J. was guided by the rule of construction[42] that where there is an expressed charitable intention in a will, the court will construe the will as liberally as possible so as to give effect to such intention, for the court leans in favour of charity. He admitted that he was not sufficiently versed in Mohammedan religious observances to say what the nature and purpose of the gift was. Nevertheless, he did not think that this would suffice to avoid the intention of the testator.

Some English[43] and Irish[44] cases have decided that a gift for a religious purpose is *prima facie* charitable. In *Re White*[45] the English Court of Appeal held that a gift to a religious institution or for a religious purpose was *prima facie* charitable. Lord Macnaghten, delivering the opinion of the Judicial Committee of the Privy Council in *Dunne v. Byrne*[46] did not favour the view in *Re White.* Since the House of Lord's decision in *Gilmour* v. *Coats,*[47] it is now settled that the absence of public benefit in a religious gift is fatal.

In *Gilmour* v. *Coats,* the House of Lords reaffirmed the English authorities to the effect that to be a legal charity, a gift must be for the public benefit. In gifts alleged to be for the advancement of religion, any public benefit that is alleged to be present, must be capable of proof in court. The benefit must be tangible and objective. In this case, a gift to an order of contemplative nuns was held not charitable as the benefit to be derived from the example of pious lives and intercessory prayers was too vague and intangible to satisfy the test for charity. The House of Lords refused to be persuaded by Irish authorities to the

41. Both clauses are in the report; clause 8 directed the ceremonies to be performed yearly, clause 13 sets out the objects of the gift.

42. *Cf. Re Cox* [1955] A.C. 627.

43. *Baker* v. *Sutton* (1836) 1 Keen 224; *Townsend* v. *Carus* (1843) 2 Ha. 257.

44. *Arnott* v. *Arnott* [1906] I.R. 127; *Re Salter* [1911] I.R. 289; *Rickerby* v. *Nicholson* [1912] 1 I.R. 343; *cf. Re Moore* [1919] 1 I.R. 316.

45. [1893] 2 Ch. 41. See counsel's argument in *Re Haji Esmail bin Kassim* (1911) 12 S.S.L.R. 74, 80.

46. [1912] A.C. 418. See *Grimond* v. *Grimond* [1905] A.C. 105.

47. [1949] A.C. 426.

contrary. The attitude of the Irish courts is best seen in *O'Hanlon v Logue*[48] where the Irish Court of Appeal held that a gift for the celebration of Masses, whether in public or in private, is for the advancement of religion. In this case, Palles C.B. rejected his earlier opinion expressed in *Attorney-General* v. *Delaney*[49] that the only element of public benefit in the celebration of the Mass was the edification of the congregation present. Such a view, he said, was too narrow as it failed to appreciate it as a gift to God and as an act from which the common law knew that benefits, spiritual and temporal, flowed to the body of the faithful. He expressed the view which has since been followed in a number of Irish decisions, that the divine service of any religion must be defined by its own doctrines; that the effect of any divine service cannot be known otherwise than from the doctrine of that religion, coupled with a hypothetical admission of its truth. He said that the charitable nature of any divine service must depend on the character of the act, objectively, but according to the doctrines of the religion. Therefore, the law must admit the sufficiency of spiritual efficacy according to the doctrine of the religion in question, and if according to those doctrines, that divine service did result in public benefit, either spiritual or temporal, the act must in law be deemed charitable.

Two Tests for Public Benefit

These two cases reflect the divergent views of the Irish and English courts. These views have been embodied in what is now commonly described as the "subjective" and "objective" tests for public benefit. The secular court in the process of determining public benefit in any gift alleged to be made for the advancement will adopt one of the two tests.

(i) The "Subjective" test: This test takes the view that the court should accept the teachings and doctrines of the particular religion in question and decide accordingly.

(ii) The "Objective" test: This takes the view that the court should consider the teachings and doctrines of the particular religion in question, but it would determine the presence of public benefit according to the principles laid down by the law of charities.

The "subjective" test has an element of objectivity and *vice versa.* The belief of the donor may conflict with the teachings of the particular religion, as if the court adopts the "subjective" test, it would determine public benefit according to the teachings of that religion, and not according to the subjective opinions entertained by the donor.[50]

Dr. Delaney[51] has traced the divergence in the attitude of both the Irish and English courts, with particular reference to gifts for the cele-

48. [1906] I.E. 247, pp. 262-276.

49. (1875) I.R. 10 C.L. 104.

50. *Cf. Attorney-General* v. *Becher* [1910] 2 I.E. 251.

51. The Law Relating to Charities in Ireland (1956) pp. 53-63; The Development of the Law of Charities in Ireland (1955) 4 Int. and Comp. L.Q. 30, at pp. 37-45.

bration of Masses. He observed that from the onset the position in Ireland was different from that in England. The Republic of Ireland is a Roman Catholic country and gifts for religious worship of one kind or another, are of common occurrence and of considerable importance. There were restrictions and disabilities affecting Roman Catholics but these were gradually removed and it is clear that the policy of the law is not to interfere with gifts connected with the worship of the Catholic religion. He pointed out that no statute corresponding to the Statute of Superstitious Uses, 1547, was ever passed by the Irish Parliament. There were no statutes passed to invalidate gifts for Masses and from an early date the legality of such gifts were recognised by the Irish courts. It was not until 1906 when *O'Hanlon* v. *Logue*[52] was decided that the law recognised that gifts for Masses were both valid and charitable. Today in the Republic of Ireland, the position regarding gifts for the advancement of religion is settled by Section 45 of the Charities Act, 1961.

Section 45 of the Charities Act, 1961 (Republic of Ireland)

S. 45(1) In determining whether or not a gift for the purpose of the advancement of religion is a valid charitable gift *it shall be conclusively presumed that the purpose includes and will occasion public benefit.*

(2) For the avoidance of the difficulties which arise in giving effect to the intentions of the donor of certain gifts for the purpose of the advancement of religion and in order not to frustrate those intentions and notwithstanding that certain gifts are for the purpose aforesaid, including gifts for the celebration of Masses, whether in public or in private, it is hereby enacted that a valid charitable gift for the advancement of religion shall have effect and, as respects it having effect, shall be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned.

(3) The foregoing subsections do not apply in the case of a gift which takes effect before the first day of January, 1960.

There are several important points in this section. These are as follows:

(i) This section applies only to gifts for the advancement of religion.

(ii) The element of "public benefit" will be "conclusively presumed". This section does not dispense with the requirement of public benefit, but merely relieves the court from the arduous task of searching for public benefit. It now places gifts for the advancement of religion in a special category.

52. [1906] 1 I.R. 247.

(iii) The "subjective" test is now authorised by statute. From now on the nature of gifts for the advancement of religion will be construed according to the "laws, canons, ordinances and tenets of that particular religion."

(iv) The decision in *O'Hanlon v. Logue* is now confirmed by statute. The section expressly states that gifts for the celebration of Masses, whether in public or in private, are valid charitable gifts.

In Malaya, since the decision in *Gilmour* v. Coats,[53] there is only one case which has expressly indicated the difficulty of applying the test for public benefit in a gift alleged to be for the advancement of religion. In *Re Alsagoff Trusts,* Murray-Aynsley C.J. said:[54]

> "I think that the intention here is the advancement of religion. In view of *Gilmour* v. *Coats* and *National Anti-vivisection Society* v. *I.R.C.*[55] it is difficult to see how, logically, any religious purpose can have the necessary element of public benefit to make it charitable. I do not think that there is logically any escape from the dilemma posed by Palles C.B. in *O'Hanlon* v. *Logue*:[56] the law must cease to admit that any divine worship can have spiritual efficacy to produce a public benefit or it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrine of the religion whose act of worship it is. However, the courts have not been logical in the past and I do not suppose they will be so in the future."

Murray-Aynsley C.J. went on further than saying that he regretted the illogical element in the law. He did not even consider the so-called "dilemma" posed by Palles C.B. Palles C.B. did not intend to create a "dilemma". He stated clearly that he was of the opinion that the first alternative was an "impossible one" to accept as "the law, by rendering all religions equal in its sight did not intend to deny that which is the the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognise the essence of all religions." He chose instead the second alternative, the "subjective" test for public benefit in gifts for the advancement of religion.

It is submitted that the Malayan courts should adopt the "subjective" test if the occasion arises. So far, none of the judges in the Malayan courts have ever been confronted with the question whether spiritual benefits according to the teachings and beliefs of a particular religion would be sufficient public benefit However, there is ample authority to indicate that the sufficiency of public benefit would be satisfied so long as persons other than the donor and members of his immediate family benefit, either spiritually or temporally, from the gift. The courts have never required that the alleged public benefit must be capable of tangible and objective proof in gifts for the advancement of religion.

53. [1949] A.C. 426.
54. (1956) 22 M.L.J. 245.
55. [1948] A.C. 31.
56. [1906] 1 I.R. 247, 276.

In *Re Syed Shaik Alkaff*[57] an Arab testator had directed his executors to make a Wakaf of houses and certain pieces of land and to distribute the rents and profits after payment of necessary expenses in "good works" in a certain manner. Counsel suggested that a Wakaf for "good works" meant in terms of English law, a dedication of property for religious purposes which were *prima facie* charitable. He further suggested that any purposes which might not foe charitable in the English sense were impliedly excluded by the terms of the trust deed read together with the will. The court refused to accept this suggestion as it could not be proved that only charitable purposes in the English sense came within the meaning of "good works" and the gift failed for uncertainty. Brown J. said:[58]

> "But the phrase 'religious purposes' according to English ideas would not in its widest sense include more than the 'advancement of religion' in some form or another, and religion is always connected with worship. If it could be shown that 'good works' would necessarily tend to the spiritual advancement of those affected by them there would be some force in Mr. Mundell's contention, but as I understand the Mohammedan point of view, the only persons who are directly concerned with the spiritual benefit to be derived from a Wakaf for good works are the founder himself and (sometimes) the members of his family."

In *Re Abdul Guny Abdullasa,*[59] where a gift for the veneration of certain Mohammedan saints was held charitable as being for the advancement of religion, Gordon-Smith J. did not discuss the necessity of public benefit, nor did he consider if the purpose of the gift did advance the Mohammedan religion. He merely said:[60]

> "I hold, therefore, that clause 13 of the will, being a trust created for the holding of a religious ceremony in honour of and in the name of certain Mohammedan saints, is valid as a whole and that it creates a trust for a charitable objects, namely the advancement of religion."

However, his decision leaves the impression that spiritual benefits were conferred on those persons participating in the religious ceremony.

In a recent decision, Winslow J. spoke of the need for a "wider public benefit" in a gift alleged to be for the advancement of religion. The gift in *Re Chionh Ke Hu*[61] was for "such persons professing or practising the Buddhist religion" as the executors thought fit. He indicated the difficulty of finding an element of purpose or advancement in such a gift as it could not be said that the gift was necessarily beneficial to the public or a substantial section of the public. He said that gifts for religious purposes were *prima facie* charitable provided they did not lack the element of public benefit and were for the advancement of religion in the sense of the promotion of the spiritual teachings of the religious body concerned and the maintenance of the spirit of its doctrines and observances. The case failed as a legal charity.

57. (1958) 2 M.C. 38.
58. (1958) 2 M.C. 64.
59. (1936) 5 M.L.J. 174.
60. (1936) 5 M.L.J. 176.
61. (1964) 30 M.L.J. 270.

These three cases afford some support for the submission that the sufficiency of public benefit would be satisfied without the necessity of proving any tangible and objective benefit in gifts alleged to be for the advancement of religion.

Judges in the Malayan courts have experienced considerable difficulties with the interpretation and application of Engish principles of charity law. In *Re Syed Shaik Alkaff,* Brown J. admitted that:[62]

> "Any attempt to interpret terms and expressions used by a Mohammedan in the light of English law is, of course, very difficult."

In Re Alsagoff Trusts, Murray-Aynsley C.J. had indicated that:[63]

> "In view of *Gilmour* v. *Coats* [64] and *National Anti-vivisection Society* v. *I.R.C.*[65] it is difficult to see how logically any religious purpose can have the necessary element of public utility to make it charitable."

He drew attention to the illogical element in the law but offered no solution to the problem of such gifts in Malaya.

Sometimes, English doctrines have been applied inadvertently. In *Low Cheng Soon* v. *Low Chin Piow,*[66] Terrell J. held a gift for Chin-Shong purposes void as tending to a perpetuity as well as being for a superstitious use. He cited no authorities. The doctrine of superstitious uses has never been imported into the law of Malaya.[67] Such a decision only goes to add further uncertainty in the law. Fortunately, the learned judge sought to clarify the situation in his decision the following year. Since the decision in *Re Khoo Cheng Teow,*[68] it is now settled that the doctrine of supertitious uses was never a part of the law of Malaya.

There have been instances where purposes which seem to be for the advancement of religion have been unaccountably held not charitable. *In Re Haji Esmail bin Kassim,*[69] a gift for pilgrimages to Mecca was held not charitable. Counsel contended that this was a gift for a religious purpose and therefore *prima facie* charitable. He cited *Re White*[70] in support of his argument. Hyndman-Jones C.J. could not be convinced. He pointed out that *Grimond* v. *Grimond*[71] decided that a gift for religious purposes was not necessarily charitable. While it was true that in Ireland *Re White* has been followed, Irish decisions though entitled to the highest respect, were not binding on English tribunals. He concluded that the gift was not charitable as there was

62. (1958) 2 M.C. 38.
63. (1956) 22 M.L.J. 244.
64. [1949] A.C. 426.
65. [1948] A.C. 31.
66. (1932) 1 M.L.J. 15, a Singapore Case.
67. See *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381, 394.
68. (1933) 2 M.L.J. 119.
69. (1911) 12 S.S.L.R. 74. See *Re Angullia* (1957) 23 M.L.J. 240.
70. [1893] 2 Ch. 41.
71. [1905] A.C. 124.

no evidence that those pilgrimages did anything more than solace the pilgrim and possibly his family. *In Re Alsagoff Trusts,* gifts for the reading of the Quran at the testator's grave by poor persons who would agree to undertake this task was held not charitable.[72]

In the light of these difficulties with interpretation and application of English principles of charity law and the reluctance of judges to modify or adapt such principles to conditions in Malaya, it is not perhaps surprising that gifts for Sin Chew[73] and Chin-Shong[74] purposes as well as Muslim gifts[75] for sacrificial offerings have failed to qualify as legally charitable. These purposes failed because the courts have persistently adhered to the view that the predominant motive for the gifts was to secure a selfish benefit to the donors (and sometimes their families) ; that the element of "public advantage" or "public utility" was lacking. In *Gilmour* v. *Coats,*[76] the House of Lords held that the element of public benefit must be present in a gift alleged to be present in a gift alleged to be for the advancement of religion. It is clearly difficult to prove public benefit in religious gifts. Yet the House of Lords required that the quality of public benefit must be tangible and objective and capable of proof in court.

Professor Sheridan had this to say on the matter:[77]

> "It is difficult to say whether any given religion is for the public benefit or not and practically impossible to say that all religions are. Yet the court does not like to choose between one religion and another."

In an article written before the decision in *Gilmour v. Coats,* Professor Newark advanced a forceful argument to the effect that the advancement of religion was charitable without the necessity of having to determine public benefit if a strict meaning was given to the advancement of religion. He defined religion:[78]

> "Religion we can define as a doctrine recognising the spiritual sovereignty of a Superior Being and which usually enjoins acts which honour or supplicate this Being, and the advancement of religion comprises all those devices which tend to advance such doctrine or to increase the frequency or make more convenient or dignified the practice of such acts."

72. This decision has been criticised by Sheridan in "Reading the Quran" (1956) 22 M.L.J. xl.

73. *Choa Choon Neoh* v. *Spottiswoode* (1869) 1 Ky. 216 (Maxwell C.J., Penang); *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381 (Judicial Committee, from Penang); *Re Khoo Cheng Teow* (1933) 2 M.L.J. 119 (Terrell J., Singapore); *Tan Chin Ngoh* v. *Tan Chin Teat* (1946) 12 M.L.J. 159 (Worley J., Singapore).

74. *Low Cheng Soon* v. *Low Chin Piow* (1932) 1 M.L.J. 15 (Terrell J., Singapore) ; *Re Tan Swee Hong's Settlement* (1934) 3 M.L.J. 5 (Mills J., Singapore); *Phan Kin Thin* v. *Phan Kuon Yung* (1940) 9 M.L.J. 44 (Murray-Aynsley C.J., Perak); *Sir Lim Han Hoe* v. *Lim Kim Seng* (1956) 22 M.L.J. 142 (Whitton J., Singapore).

75. *Re Haji Esmail Kassim* (1911) 12 S.S.L.R. 74 (Hyndman-Jones C.J., Singapore); *Re Alsagoff Trusts* (1956) 22 M.L.J. 244 (Murray-Aynsley C.J.. Singapore).

76. [1949] A.C. 426.

77. "Nature of Charity" (1957) 23 M.L.J. lxxxix.

78. (1946) 62 L.Q.R. 245.

This is a narrow view of religion for clearly every other religious gift must therefore be shown to provide some tangible public benefit before it is charitable. This would mean, in practice, that some non-religious benefit must be shown. However, taking the advancement of religion in this sense, Professor Newark was of the opinion that the requirement of public benefit was unnecessary. He pointed out that an insistence on this requirement in the past had lead the court to search for and to pretend to find a public benefit in the form of spiritual advantages which were not properly cognisable in a court of law since their reality could not be proved, nor the merit presumed. In *Gilmour* v. *Coats* the House of Lords made no pretence that the spiritual benefits derived from intercessory prayers were too intangible to be accepted in a court of law. Professor Newark observed further that the presence of some selfish benefit should not necessarily be fatal. He suggested two possible tests which could be applied to determine the character of the object.

Newark's Two Tests[79]

"The first test would be to inquire which is the predominant object[80] of the trust. Is it for the advancement of religion carrying with it some selfish benefit to the individual, or is it a trust to secure a benefit to an individual which, because of the method by which it is directed to be carried out, incidentally tends to the advancement of religion? The second test is to inquire, no matter which object is predominant, whether the trust will substantially advance religion. Even though the primary object of the trust is a selfish benefit, yet if the advancement of religion is not slight or speculative, then the trust will be charitable."

Professor Newark applied these tests to the Privy Council's decision in *Yeap Cheah Neo* v. *Ong Cheng Neo*[81] and agreed that the dedication of a Sow-Chong House[82] for carrying out Sin-Chew ceremonies was not charitable, and void, because it was an attempt to create a perpetual trust. However, he disapproved of the analogy by way of illustration between a gift for Sin-Chew ceremonies and one for the saying of Masses. He said that the gift was clearly one where the selfish benefit to the testatrix and her deceased husband was not merely predominant but exclusive. He described the ceremony as a "pagan rite" because no worship was rendered nor supplication made to any Superior Being and consequently no benefit was expected in return.

Professor Sheridan has expressed the view that:[83]

> "A gift for the advancement of a particular religion or faith or sect (at any rate, so long as its beliefs are not outrageous to sensible people) is always regarded as for the public benefit, while a gift for the financing of

79. (1946) 62 L.Q.R. 246.
80. Not the predominant motive.
81. (1875) L.R. 6 P.C. 381.
82. Sow-Chong House — this is a type of house in which the ashes of the deceased are placed; in fact a species of tomb. The Sin-Chew is a tablet placed in this house.
83. "Nature of Charity" (1957) 23 M.L.J. lxxxiv.

> a particular activity or ritual of the faith, or to a particular organisation professing it, is not *ipso facto* charitable: some advancement of religion among the public or else some material benefit to the public must be shown."

This statement indicates the difficulties inherent in Chinese gifts for Sin-Chew and Chin-Shong ceremonies as well as Muslim gifts for sacrificial offerings. All such gifts are undoubtedly gifts for the financing of particular activities or rituals. These have invariably failed to be recognised as legal charities because the courts were unable to ascertain the necessary requisite of public benefit; any benefit intended has always been construed as being directed solely to the testator and members of his immediate family.

In *Yeap Cheh Neo* v. *Ong Cheng Neo,* Sir Montague E. Smith expressed the opinion of the Privy Council that the observance of Sin-Chew ceremonies could lead to no public advantage as it could benefit or solace only the testatrix and her family. To strengthen his judgment he proceeded to make a further analogy, by way of illustration:[84]

> "The dedication of this Sow-Chong House bears a close analogy to gifts to priests for Masses for the dead. Such a gift by a Roman Catholic widow of property for Masses for the repose of her deceased husband's soul and her own, was held, in *West v. Shuttleworth*[85] not to be a charitable use, and, although not coming within the Statute relating to Superstitious uses, to be void. ... It is observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for Masses for the dead, or as the Christian of any church who may have devised property to maintain the tombs of deceased relatives."

Two important points emerge from this statement:

(1) A reference to the English case of *West* v. *Shuttleworth*

(2) An analogy was drawn between:

(a) a gift for Sin-Chew ceremonies and a gift for the saying of Masses;

(b) a gift for Sin-Chew ceremonies and a gift for the maintenance of family tombs.

Reference to West v. *Shuttleworth.*[86]

In *West* v. *Shuttleworth* the bequest for Masses to be said for the souls of the testatrix and her deceased husband was void because it was a superstitious use within the generality illegality of the Statute of Superstitious Uses, 1547. Sir C. Pepys M.R. observed that the Statute was considered as having established the illegality of certain gifts. Among these, the giving of legacies to priests to pray for the souls of the donors had on many previous occasions been held void as being within the superstitious uses intended to be suppressed by the Statute.

84. (1875) L.R. 6 P.C. 381, 396.

85. (1835) 2 My. & K. 684.

86. (1835) 2 My. & K. 684.

In an earlier part of his judgment Sir Montague E. Smith[87] had endorsed Maxwell C.J.'s judgment in *Choa Choon Neoh v. Spottiswoode*[88] to the effect that "whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it." Therefore, reference to *West* v. *Shuttleworth* even by way of illustration to strengthen the decision concerning the devise for the dedication of a Sow-Chong House, is a startling inconsistency. This inconsistency is probably due to Sir Montague E. Smith's reading of *West* v. *Shuttleworth.* After he had remarked that the gift in that case was not charitable and void although it did not come within the Statute of Superstitious Uses, 1547, he continued:[89]

> "The learned judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use."

This statement does not represent the true facts in *West* v. *Shuttleworth.* It is to be noted that in *West* v. *Shuttleworth:*

(i) The gift was not a "devise"; but a bequest,

(ii) The question of perpetuity was not considered by Sir C. Pepys M.R.

(iii) Sir C. Pepys M.R. did not consider if the bequests were for charitable uses. He stated clearly that there was no intention of charity in the gifts.

This inconsistency is not fatal. The decision in *Yeap Cheah Neo* v. *Ong Cheng Neo* would still have gone the same way even if the analogy had not been drawn by Sir Montague E. Smith. It is submitted that this inconsistency is the cause of some judicial confusion in Malaya concerning the doctrine of superstitious uses.

In *Bourne* v. *Keane,* Lord Buckmaster[90] remarked that the Privy Council in *Yeap Cheah Neo* v. *Ong Cheng Neo* merely referred to *West* v. *Shuttleworth* without any expression of doubt as to the soundness of that decision. He seemed to regret that the correctness of the decision in *West* v. *Shuttleworth* was not brought up for review.

Doctrine of Superstitious Uses

The doctrine of superstitious uses is now almost a relic of the past, although Lord Birkenhead in *Bourne* v. *Keane* remarked that:[91]

> "This is not to say that there are now no superstitious uses or that no gift for any religious purpose, whether Roman Catholic or other, can be invalid. Such cases may arise and will call for decision when they do arise."

87. (1875) L.R. 6 P.C. 394.

88. (1869) 1 Ky. 216,

89. (1875) L.R. 6 P.C. 396.

90. [1919] A.C. 815.

91. [1919] A.C. 860.

If this is so, then the doctrine of superstitious uses, will in future catch only the "occasional crank." Bourchier-Chilcott,[92] in an article written after the decision in *Bourne* v. *Keane,* was of the opinion that the question of the application of the law as to superstitious uses would seldom, if ever, be considered as it was somewhat difficult to discover uses to which the law would be applicable.

Bourne v. Keane overruled *West* v. *Shuttleworth* over the matter of superstitious uses. The House of Lords held that a bequest for Masses was no longer void as a superstitious use. Gifts for such purposes are now valid. However, the House of Lords refrained from considering if the bequest could also be charitable.

The doctrine of superstitious uses never applied to Ireland. The Irish Parliament did not pass a statute corresponding to the English Statute of Superstitious Uses, 1547. Dr. Delaney[93] has drawn attention to an account in Mahaffy's[94] book where the writer made a reference to "an Irish replica of the Act of Edward VI." However, Dr. Delaney was not able to find such a statute in his research.

As early as 1823, Lord Manners L.C., incidentally a violent anti-Catholic, held a bequest for "solemn Masses" to be valid in *Commissioners of Charitable Donations and Bequests* v. *Walsh.*[95] Professor Newark[96] observed that the decree drawn up in this case had assumed that a gift for Masses was charitable and that for the next fifty years no one sought to quarrel with this view. In *Read* v. *Hodgins*[97] the only question argued was whether the bequest "for Masses for my soul's sake" was a superstitious use and therefore void; in other words, whether the policy of the law which in *West v. Shuttleworth*[98] was held to underline the English Statute of Superstitious Uses applied to Ireland where there was no corresponding statute. Blackbourne M.R. rejected the argument that the gift was superstitious. He treated the case as an obvious one, the law of which had been settled by Lord Manners L.C. in *Commissioners of Charitable Donations and Bequests* v. *Walsh.* The Master of the Rolls upheld the bequest in deference to the decree in the earlier case. He made it clear that he had formed no opinion on this matter.

Malaya

It cannot be stated categorically that the doctrine of superstitious uses has no application to Malaya. Some judicial confusion exists over this matter. Both Maxwell C.J. and Sir Montague E. Smith said that

92. "Superstitious Uses" (1920) 36 L.Q.R. 152.

93. The Law Relating to Charities in Ireland, p. 58, note hh.

94. An Epoch of Irish History (1903) p. 154.

95. (1823) unreported: cited in 7 I.E.R. 34.

96. (1946) 62 L.Q.R. 234. 239.

97. (1844) 7 I.E.R. 34.

98. (1835) 2 My. & K. 684.

the English doctrine relating to superstitious uses should not be imported into the law of the colony of Penang. Sir Montague E. Smith gave this reason: [99]

> "Statutes relating to matters and exigencies peculiar to the local conditions of England, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it."

It has been pointed out that Sir Montague E. Smith drew the analogy between gifts for Sin-Chew ceremonies and gifts for Masses to be said. He cited *West* v. *Shuttleworth* [100] in the course of drawing this analogy and appeared to use that case by way of illustration, to support his decision on the devise for the dedication of a Sow-Cheng House.

In *Low Cheng Soon v. Low Chin Piow* [101] Terrell J. held a bequest for the purchase of a Hio-Theng property void as tending to a perpetuity and as being for a superstitious use. He cited no authorities for his decision. He said: "I do not think that much assistance can be gained from the authorities." But in *Phan Kin Thin* v. *Phan Kuon Fung,*[102] a bequest for a similar purpose was upheld as being for a non-charitable purpose, Murray-Aynsley C.J. referred to Terrell J.'s decision and observed that the decisions in *Choa Choon Neoh* v. *Spottiswoode,*[103] *Yeap Cheah Neo* v. *Ong Cheng Neo* [104] and *Re Yap Kwan Seng* [105] avoided declaring that such a purpose was a superstitious use. In any case, he could not overcome the decision in *Bourne* v. *Keane* [106] which established that a bequest for Masses was not for a superstitious use. This in effect, amounts to an analogy between gifts for Masses and gifts for ancestral worship.

In *Re Khoo Cheng Teow,*[107] a case coming a year after *Low Cheng Soon* v. *Low Chin Piow,* Terrell J. held a devise for Sin-Chew purposes to be valid as a non-charitable purpose trust. He sought to prove that the doctrine of superstitious uses was not a part of the law of the colony of Singapore. Of course, no statute of such a nature was ever passed to render gifts for Sin-Chew or any other religious purpose void as being for superstitious uses. Referring to the position at common law, he said:[108]

> "The question of Sin-Chew purposes has often arisen but in all the other cases to which I have been referred the gifts failed as being contrary to the rule against perpetuities or on the ground of uncertainty, and the question whether it was a superstitious use was never the basis of the decisions."

99. (1875) L.R. 6 P.C. 381, 394.
100. (1835) 2 My. & K. 684.
101. (1932) 1 M.L.J. 15, a Singapore Case.
102. (1940) 9 M.L.J. 44, a Perak Case.
103. (1869) 1 Ky. 216.
104. (1875) L.R. 6 P.C. 381.
105. (1924) 4 F.M.S.L.R. 313 (Sproule Ag. C.J., Selangor).
106. [1919] A.C. 815.
107. (1933) 2 M.L.J. 119.
108. (1933) 2 M.L.J. 120.

. Terrell J. reviewed a number of previous authorities concerning gifts for Sin-Chew purposes. He expressed the opinion that Maxwell C.J. in *Choa Choon Neoh* v. *Spottiswoode* might have decided in favour of the devise for Sin-Chew ceremonies if it had not offended the rule against perpetuities. He dealt also with the decision of an unreported case by Fisher J. in *Cheng Thye Phin* v. *Lim Ah Cheng.*[109] There, the bequest was for the provision of yearly ceremonies according to Chinese custom. These ceremonies were for the benefit of the testator, his ancestors and his wives. Fisher J. held the bequest valid until the period of distribution arrived. He stated that such a provision was not void either for uncertainty or as tending to a perpetuity. On appeal, the court declared that there was an intestacy with regard to this bequest. The decision appears to have been based on the ground of uncertainty, Neither Hyndman-Jones C.J. nor Sproule J. attacked the gift as being one for superstitious uses. Terrell J. remarked that if the decision (before appeal) had stood, it might have been regarded as an authority that gifts for Sin-Chew ceremonies were not void as being for superstitious uses.

Finally, he considered authorities in the United States, Canada, New Zealand, Australia and Ireland regarding gifts for the Sacrament of the Mass and said that it was satisfactory to note that in all these countries upon which England had conferred the boon of her common law, gifts for the souls of the donors or any other persons were held not to be void as superstitious uses. He inferred that there was a consistent opinion expressed in favour of the validity of such purposes. In any case under the common law of England:[110]

> "Masses for the dead were not superstitious or void; there can again be no no possible reason for coming to a different conclusion in the case of gifts for Sin-Chew purposes."

In conclusion, he thought it would be fitting and proper that the same validity should be accorded to gifts for the performance of these ceremonies as these were essential features of the religious rites of the Chinese which had been observed for countless generation.

It is surprising that Terrell J. had to resort to decisions in other jurisdictions concerning the Sacrament of the Mass to determine if at common law, the doctrine of superstitious uses applied to Malaya. He could have cited the Privy Council's decision in *Yeap Cheah Neo v. Ong Cheng Neo*[111] where Sir Montague E. Smith stated that the statutes relating to superstitious uses should not be imported into the law of the colony of Penang. Those statutes related to matters and exigencies peculiar to the local conditions in England and were therefore, not adaptable to the circumstances of Penang. His reference to those authorities to support his decision reveals an inconsistency in his judgment. In an earier part of his judgment he had expressed the opinion that an "important distinction" existed between a gift for Sin-Chew ceremonies and one for the saying of Masses.

109. O.S. No. 361 of Penang 1912 (Penang).

110. (1933) 2 M.L.J. 122.

111. (1875) L.R. 6 P.C. 381, 394.

Finally, Terrell J. made no mention of his earlier decision in *Low Cheng Soon* v. *Low Chin Piow*[112] where he had held a gift for Chin-Shong purposes void as being for a superstitious use.

It is submitted that the elaborate judgment in *Re Khoo Cheng Teow*[113] is a conscious attempt to clarify the confusion caused by his earlier judgment. It is further submitted that the inconsistency in the judgment of Sir Montague E. Smith and Terrell J. is not fatal; the gifts in the two cases would still have failed. The inconsistency reveals the judicial confusion over the matter of superstitious uses. The fact remains that the doctrine of superstitious uses was never imported into the law of Malaya.

Analogy between Sin-Chew ceremonies and the Saying of Masses

It is not surprising that this analogy was drawn by way of illustration in *Yeap Cheah Neo* v. *Ong Cheng Neo.*[114] There are similarities in the nature and purpose of the two ceremonies. There is a strong indication that Maxwell C.J. was of the same opinion when he decided *Choa Choon Neoh* v. *Spottiswoode.*[115] There are indications in other Malayan cases[116] to the same effect. In *Choa Choon Neoh* v. *Spottiswoode,* Maxwell C.J., having said that *West* v. *Shuttleworth*[117] was not applicable to the law of the colony of Penang, proceeded:[118]

> "I should consider a bequest for Masses for departed souls void and the devise in this case void, unless the law in these Straits Settlements differs in this respect from the law of England."

There appears to be no dispute on this matter until the decision in *Re Khoo Cheng Teow* where Terrell J. took the view that an "important distinction" existed between the two ceremonies. He cited the evidence given by Chinese experts on the nature and object of Sin-Chew ceremonies in *Choa Choon Seng* v. *Spottiswoode* and that of the saying of Masses in the Irish case of *Attorney-General* v. *Delaney.*[119] He thought that the ceremonies bore only "certain superficial resemblances;" that "certain essential characteristics existed which sufficiently differentiated the two ceremonies." In the final analysis, the purpose of Sin-Chew ceremonies was to benefit the testator and the other deceased persons for whom the ceremonies were performed but the Sacrament of the Mass was for the benefit of all the members, past and present, of the Catholic Church.

112. (1932) 2 M.L.J. 15.
113. (1933) 2 M.L.J. 119.
114. (1875) L.R. 6 P.C. 381.
115. (1869) 1 Ky. 216.
116. See *Re Wan Eng Kiat* [1931] S.S.L.R. 57 (Murlson C.J., Singapore); *Phan Kin Thin* v. *Phan Kuon Yung* (1940) 9 M.L.J. 44 (Murray-Aynsley C.J., Perak).
117. (1835) 2 My. & K. 684.
118. (1869) 1 Ky. 221.
119. (1875) I.R. 10 C.L. 104.

Professor Newark is also of the opinion that the two ceremonies are clearly "distinguishable". He said: [120]

> "The distinction between this pagan rite and the Mass is clear. The pagan rite offered no worship to any God, and consequently could expect no benefit in return. It is doubtful whether, as the Privy Council assumed, it solaced or benefited the surviving members of the family. The rite, which is a common one where what is inaccurately called ancestor worship is to be found, was for the practical and selfish purpose of providing for the material well being of the departed in the shades to which they had gone, and it could hardly be distinguished from a gift to maintain a tombstone."

These are the only two views which have come out against the analogy between Sin-Chew ceremonies and the Sacrament of the Mass.

Sin-Chew Ceremonies

It is appropriate now to cite part of Maxwell C.J.'s judgment on the purpose of Sin-Chew ceremonies: [121]

> "The primary object of the ceremony is to show respect and reverence to the deceased, to preserve his memory in this world, and to supply his wants in the other. Its performance is agreeable to God, the Supreme, all seeing, all knowing and invisible being who assists and prospers those who are regular in this duty, and its neglect entails disgrace on the neglected spirit which then leaves its abode (either the grave or the house where the tablet rests) and wonders about, an outcast, begging of the more fortunate spirits and haunting and tormenting his negligent descendants and mankind generally. To assert the latter evil, the wealthier Chinese hold in the seventh month every year, a general public offering or sacrifice called Kee-Too or Poh-Toh for the benefit of all the poor spirit.... Its object is solely for the benefit of the testator himself, and although the descendants are supposed incidentally, to derive from the performance of Sin-Chew ceremonies the advantage of pleasing God and escaping the danger of being haunted, those advantages are obviously not the object of the testator, nor if they were, would they be of such a character as to bring this devise within the designation of charitable, as used by our courts in reference to such objects."

Professor Newark was of the opinion that *Yeap Cheah Neo* v. *Ong Cheng Neo* [122] was a case "where the selfish benefit to the testatrix and her husband was not merely predominant but exclusive" and that "there was neither worship rendered nor supplication made to any Superior Being." It was for these reasons that he said the two ceremonies were clearly distinguishable. There is no dispute that the presence of some selfish benefit is seen in Sin-Chew ceremonies, but what of the selfish benefit in gifts for the anything of Masses? It is clear from the Irish decisions [123] that the testator's motive had not been allowed to be decisive of the charitable nature of a gift for Masses. The two early decisions in *Commissioners of Charitable Donations and Bequests* v. *Walsh* [124] and *Read v. Hodgins* [125] made it clear that the charitable character of

120. In "Public Benefit and Religious Trusts" (1946) 62 L.Q.R. 234, 241.
121. (1869) 1 Ky. 216, 218.
122. (1875) L.R. 6 P.C. 318.
123. *Cf. Kehoe* v. *Wilson* (1880) 7 L.R. Ir. 10; *Perry* v. *Twomley* (1881) 21 L.R. Ir. 480.
124. (1823) unreported; cited in 7 I.E.R. 34.
125. (1844) 7 I.E.R. 34.

a trust was not affected by a request for a particular memorial. In *Attorney-General* v. *Hall*[126] the Crown argued that the primary and sole purpose of a bequest for Masses was to secure a selfish benefit, and the public advantage, if any, was only an incident arising from the mode and manner in which the selfish benefit was attained. But the Irish Court of Appeal rejected this argument. Fitzgibbon L.J. who considered the argument fully said: [127]

> "The motive of the testator being, to some extent, that of securing a spiritual benefit for himself cannot deprive the ceremony of the charitable character which it derives from its edifying effects on others.... A gift, of which the necessary result is altruistic public benefit, does not fail to be 'merely charitable' because is originates in an egoistic motive,"

In conclusion, he held that the public celebration of Mass was a good charitable act. He added:[128] "I am not willing to limit the foundation of my judgment by accepting the decision in *Attorney-General v. Delaney."*[129] *Attorney-General* v. *Delaney* was eventually overruled as to the matter of public benefit by *O'Hanlon* v. *Logue* [130] where the Irish Court of Appeal held that gifts for Masses, whether to be celebrated in private or in public, were charitable.

It has always been the policy of the Irish courts not to interfere with dispositions of property for any purpose connected with the worship of the Roman Catholic religion. Ireland is a Roman Catholic country and gifts for religious purposes of one kind or another, occupy an important place in the law of charities.

In Malaya however, judges have not overcome the problem of selfish benefits in gifts for Sin-Chew or Chin-Shong ceremonies, or in Muslim gifts for sacrificial offerings to the souls of deceased testators. These gifts have been regarded as conferring benefits only on the testators; the edification of their descendants was only an incident in the performance of such ceremonies. In any case, descendants were not considered to be a section of the public for purposes of the law of charities.

It is difficult to give a reason for the distinction between the ceremonies of Sin-Chew and the Mass pointed out by Terrell J., in view of his reference to cases on the Sacrament of the Mass in common law jurisdictions. He referred to those cases in support of his proposition that at common law, gifts for Sin-Chew ceremonies were not void as superstitious uses. However, it is submitted that one reason can be inferred from Terrell J.'s decision in *Re Khoo Cheng Teow.*[131] At the time of his decision, it was clear from the Privy Councils decision in *Yeap Cheah Neo* v. *Ong Cheng Neo* [132] that gifts for Sin-Chew purposes

126. [1897] 2 I.R. 426.
127. [1897] 2 I.R. 449.
128. [1897] 2 I.R. 450.
129. (1875) I.R. 10 C.L. 104.
130. [1906] 1 I.R. 247.
131. (1933) 2 M.L.J. 119.
132. (1875) L.R. 6 P.C. 381.

were not charitable. The Irish Court of Appeal had held that a gift for the saying of Masses, whether in private or in public, was charitable. *O'Hanlon v. Logue* was cited as authority. It would seem that Terrell J. must have concluded that a distinction existed, since one ceremony was charitable and the other not. It is submitted that no purpose was served in making this distinction. Terrell J. would have avoided the inconsistency in his judgment if he had not made the distinction.

The Significance of the Analogy

Some significance exists in the drawing of the analogy between ceremonies for Sin-Chew and the Mass. *Choa Choon Neoh* v. *Spottiswoode*[133] was the first reported case on charities as well as being the first case involving a devise for Sin-Chew ceremonies. At the time of its decision, Maxwell C.J. had only the English authorities to guide him. He made it clear in his judgment that he did not wish his decision to be misunderstood as questioning the validity of any Eastern charity, and that he was determining the nature of the devise with the widest regard for the religious opinions and feelings of the various races living in the colony of Penang. He did however, express surprise that no similar devise appeared to have been brought before the cognisance of the courts of the colony which had been inhabited by the Chinese for over fifty years.

It is submitted that the decision in *Choa Choon Neoh* v. *Spottiswoode* was influenced largely by the position of English law as it stood in 1869. At that time gifts for Masses were impressed with the stamp of superstitious uses. According to Lord Birkenhead in *Bourne* v. *Keane*[134] the current of decisions which held void such uses and trusts *ipso facto* superstitious and void began with the decision in *West* v. *Shuttleworth*[135] and was due to a misunderstanding of the old law. In Ireland around this time, gifts for Masses were valid.[136] The charitable nature of such gifts was not resolved until 1906 by the Irish Court of Appeal's decision in *O'Hanlon v. Logue.*[137] However, Irish decisions were not cited to Maxwell C.J. as the reports were not available in Malaya until the early twentieth century.

It is submitted that Maxwell C.J. must have found it extremely difficult to decide *Choa Choon Neoh* v. *Spottiswoode* in view of the conditions prevailing in England. For if a gift for Masses was void by English law, how then could one for Sin-Chew ceremonies be otherwise when it so closely resembled that ceremony? Even though he did consider modifying English principles, he had no authority or guiding principle to go by. Besides, three other factors predetermined his decision. There are:

133. (1869) 1 Ky. 216.

134. [1919] A.C. 815.

135. (1835) 2 My. & K. 684.

136. *Commissioners of Charitable Donations and Bequests* v. *Walsh* (1823) unreported; *Read* v. *Hodgins* (1844) 7 I.E.R. 34.

137. [1906] 1 I.R. 247.

(i) There was a strong desire to import the rule against perpetuities. The principal ground for the failure of the devise was its infringement of this rule.

(ii) The testator had devised the bulk of his estate for Sin-Chew purposes leaving his children almost wholly unprovided for.

(iii) There was no evidence to show that such ceremonies were dictated by some imperative religious obligation.

Maxwell C.J. stated clearly that "very strong evidence" would be necessary to establish that it could be regarded as a duty in any religion to disregard the claim of natural affection and to dispose the bulk of one's property for one's supposed benefit and comfort.

Assuming that gifts for Masses were not void in England at that time, the devise in *Choa Choon Neoh v. Spottiswoode* might still have failed for the reasons above; but it is submitted that if Irish authorities like *Commissioners of Charitable Donations and Bequests v. Walsh* and *Read* v. *Hodgins* were cited, these cases might well have shown Sin-Chew ceremonies in a different perspective. Maxwell C.J. might have then considered if perhaps he could have given validity to the devise by upholding it as a non-charitable purpose trust. He could further declare that the land must not be rendered inalienable. If at any time the particular piece of land was required for purposes beneficial to the public, it would be in the interests of the beneficiaries as a whole, to transact a sale. Such a declaration would, in effect, remove all objections to allowing the devise to continue in perpetuity. It might not be in strict accordance with Chinese custom to make such a declaration, but it would prevent the super-imposition of English law in spheres where Chinese law and custom *prima facie* applied. Such a declaration would not conflict with fundamental English principles. It would have given the Chinese community in the colony of the Straits Settlements a fair idea of the position of such gifts,

However, as the position stood, it was not until 1919 when *Bourne v. Keane* was decided that gifts for the saying of Masses were held to be valid and no longer void as superstitious uses. In Ireland, even before *O'Hanlon* v. *Logue,* gifts for Masses were upheld as non-charitable purpose trusts. In *Phelan* v. *Slattery*[138] two legacies were bequeathed, one to an Abbot and the other to a Superior, for Masses to be said for the repose of the testator's soul. The court held the legacies valid and payable to the respective legatees immediately. The Vice-Chancellor stated clearly that there was no attempt to create a perpetuity. In *Bradshaw* v. *Jackman*[139] a bequest for Masses was also valid. The Master of the Rolls was asked to consider if the bequest could be charitable even if made in perpetuity; since there was no sufficient evidence to enable him to form a conclusive opinion one way or the other, he declined to go into this question.

138. (1887) 19 L.R. Ir. 177.

139. (1887) 21 L.R. Ir. 12. See *Reichenbach* v. *Quinn* (1887) 21 L.R. Ir. 138.

Once gifts for Masses were cleared of their superstitious character in England, the position regarding gifts for Masses was to be seen in a different light. Besides, by the beginning of the twentieth century, Irish authorities were cited in Malayan courts. This marked a further significance in the analogy between gifts for Sin-Chew ceremonies and those for Masses.

As early as 1923, the Court of Appeal of the Straits Settlements had to consider counsel's argument that *Bourne* v. *Keane* brought about a change in the English law of charities which should affect the position in Malaya. In *Re Syed Shaik Alkaff*[140] the argument was made in the context of valid objects of a Wakaf, namely the "haj" the celebration of the Wakaf's death and "jehad". These objects were held not charitable in *Re Haji Esmail bin Kassim.*[141] It was argued that had that case been decided after instead of before *Bourne v. Keane*[142] the decision would have been different. The court was not prepared to assent to this argument.

There are two reasons for this refusal. First, the Colonial judges felt bound by local decisions which stated clearly that gifts for sacrificial offerings were not charitable. Secondly, counsel who argued on the basis of the change in the law brought by *Bourne* v. *Keane* misunderstood the actual decision in that case. He argued that *Bourne v. Keane* decided that gifts for Masses were now charitable by English law. The House of Lords in that case merely decided that gifts for Masses were valid; they did not decide that such gifts were charitable. This erroneous assumption on the part of counsel is most unfortunate. If counsel had appreciated the actual decision in *Bourne* v. *Keane* he would have argued on a most advantageous position. He would not have to contend with local decisions deciding against the charitable nature of such purposes.

In *Re Wan Eng Kiat*[143] a Chinese testator devised two houses to trustees on trust as Sin-Chew houses. Counsel argued that the rule that gifts for Masses were not charitable was derived from *West v. Shuttleworth*[144] which had been overruled by *Bourne* v. *Keane.* Therefore, a gift for private Mass should extend to gifts for Sin-Chew purposes. Murison C.J. was persuaded that an analogy could be drawn between a gift for private Mass and one for Sin-Chew purposes; but he felt bound by the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo.* He said:[145]

> "It is certainly very difficult to reconcile the decisions in *Bourne* v. *Keane* and *Yeap Cheah Neo* v. *Ong Cheng Neo.* The former says that a private Mass or ceremony is for the benefit of the church and so is charitable; the latter says that such Mass or ceremony was not for the benefit of the church

140. (1958) 2 M.C. 38, a Singapore Case,

141. (1911) 12 S.S.L.R. 74 (Hyndman-Jones C., Singapore).

142. [1919] A.C. 815.

143. [1931] S.S.L.R. 57, a Singapore Case.

144. (1835) 2 My. & K. 684.

145. [1931] S.S.L.R. 61.

> and so was not charitable. I confess that if I had a free hand I would follow the decision in *Bourne* v. *Keane* as the preponderating authority, but so long as the decision in the Chinese case stands, I must follow it because technically a Privy Council decision binds this Court and technically a House of Lords decision does not."

He held "unwillingly" that the gift was void as the perpetuity was not protected by the charitable nature of the gift.

In *Re Khoo Cheng Teow,*[146] Terrell J. referred to *Re Wan Eng Kiat.* He observed that that decision rested on two presuppositions. First, that *Bourne* v. *Keane* decided that gifts for Masses were charitable. Secondly, that Sin-Chew ceremonies stood on the same footing as the Sacrament of the Mass. He said that neither presupposition could be supported and that there was nothing inconsistent between *Yeap Cheah Neo* v. *Ong Cheng Neo* and *Bourne* v. *Keane.* In any case, the devise for Sin-Chew purposes was held valid in *Re Khoo Cheng Teow* as a non-charitable purpose trust.

In *Phan Kin Thin* v. *Phan Kuon Yung*[147] a bequest for Chin-Shong purposes was also upheld as a non-charitable purpose trust. Murray-Aynsley C.J. was of the opinion that a gift for Masses stood on the same footing as one for Chin-Shong purposes. But he thought that a distinction must be drawn between the purposes of the two ceremonies:[148]

> "that one is limited as to its object to the benefit of a particular person, . the other is not so limited, and that is the difference between what is and what is not a charitable purpose."

He cited Sproule Ag.C.J. decision in *Re Yap Kwan Seng*[149] where a devise for Chin-Shong purposes was held as tending to a perpetuity. He pointed out that the fact that *West* v. *Shuttleworth* was overruled by *Bourne* v. *Keane* was not cited in *Re Yap Kwan Seng.* He thought that the decision was significant because: "The case of *Bourne* v. *Keane* established that a bequest for Masses is not superstitious and further it seems a charitable purpose."

Both Murison C.J. and Murray-Aynsley C.J. misunderstood the actual decision in *Bourne* v. *Keane.* Whereas Murray-Aynsley C.J. succeeded in upholding the bequest as being for a non-charitable purpose by contrasting the decisions in *Bourne* v. *Keane* and *Choa Choon Neoh* v. *Spottiswoode,*[150] Murison C.J. had the misforune to feel hesitant and unhappy with his decison in *Re Wan Eng Kiat.*[151] He would have surmounted this feeling if he had appreciated the actual decision in *Bourne* v. *Keane,* in which case he would not have sought to reconcile *Bourne* v. *Keane* and *Yeap Cheah Neo* v. *Ong Cheng Neo.* It is to be

146. (1933) 2 M.L.J. 119, a Singapore Case.

147. (1940) 9 M.L.J. 44, a Perak Case.

148. (1940) 9 M.L.J. 45.

149. (1924) 4 F.M.S.L.R. 313.

150. (1869) 1 Ky. 216.

151. [1931] S.S.L.R. 61.

noted that *Re Wan Eng Kiat* and *Phan Kin Thin* v. *Phan Kuon Yung* assumed that *West* v. *Spottiswoode* [152] was the cause for the failure of gifts for Sin-Chew purposes in *Choa Choon Neoh* v. *Spottiswoode* and *Yeap Cheah Neo* v. *Ong Cheng Neo.*[153]

This leads to two submissions. First, the attempts to reconcile *Bourne* v. *Keane* with *Yeap Cheah Neo* v. *Ong Cheng Neor* or *Choa Choon Neoh* v. *Spottiswoode* would be unnecessary if the judges had not relied unconsciously on the decision in *West v. Spottiswoode.* There would also be no judicial confusion over the question of superstitious uses and is application to the law in Malaya. Secondly, no purpose is served by questioning the decision of the Privy Council in *Yeap Cheah Neo* v. *Ong Cheng Neo* the "bible" for all questions of legal charities in Malaya. It is now settled that gifts for Sin-Chew and Chin-Shong ceremonies, as well as Muslim gifts for sacrificial offerings, are not charitable. However, such gifts can still take effect as non-charitable purpose trusts. Judges should come out in favour of allowing such religious purposes to have some effect within the limits of the rule against perpetuities. Some judges have upheld gifts for these purposes. But it remains to be seen, in view of two decisions [154] in Singapore rejecting the concept of the purpose trust, what the future judicial reactions would be.

THEN BEE LIAN*

152. (1835) 2 My. & K. 684.

153. (1875) L.R. 6 P.C. 381.

154. *Re Alsagoff Trusts* (1956) 22 M.L.J. 244 (Murray-Aynsley C.J., Singapore); *Re Chinh Ke Hu* (1964) 30 M.L.J. 270 (Winslow J., Singapore).

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