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

Anglo-Irish Authorities on the Saying of Masses

It is now necessary to examine some of the Anglo-Irish authorities on gifts for the saying of Masses. In the Republic of Ireland, Section 45(2) of the Charities Act, 1961 (Republic of Ireland) states that gifts for Masses, whether in public or private, are charitable. It is still necessary to consider the case law before the Act, as Section 45 applies only to gifts taking effect from the 1st. January, 1960.

The Irish Court of Appeal in *O'Hanlon v. Logue*[1] held that a gift for Masses whether in private or in public was charitable. The earlier decision in *Attorney-General v. Delaney*[2] was overruled. Until the decision in the latter case, there was no reason to suppose that the Irish courts would draw any distinction between gifts for the saying of Masses in public or in private. Incidentally, both cases were decided by Palles, C.B. In *Attorney-General v. Delaney* he held a bequest for private Masses to be not charitable because the element of public benefit was absent. However, he indicated that different considerations would have arisen had there been in express direction that the Mass be said in public. He said:

> "Now if the will had prescribed that those masses should be celebrated in public, in a specified public church or chapel in Ireland, it would, I confess, appear to me that the bequests would be charitable as gifts for the public celebration of an act religious worship, an act which 'tends to the edification of the public congregation'. That, however, is not this case".

Irish testators reacted to this dictum with vigour. The common form of bequest came to be "for Masses to be said in a public church in Ireland, the church being open to the public at the time of the celebration". But in *Kehoe v. Wilson*[4] and *Perry v. Twomey*[5] the court held that such bequests were still not charitable. No reasons were given in *Kehoe v. Wilson* but in *Perry v. Twomey* the judges felt bound to follow the earlier decision against his own inclinations.

* A continuation of the article commenced in Vol. 11 no. 2 at p. 220.

1. [1906] 1 I.R. 247.
2. (1875) I.R. 10 C.L. 104.
3. (1875) I.R. 10 C.L. 129.
4. (1880) 7 L.R. Ir. 10.
5. (1888) 21 L.R. Ir. 481.

Professor Newark observed that both these cases disclosed a new flaw in bequests for Masses. He said:[6]

> "To provide for a public Mass is one thing and a charity; but to provide for a public Mass to save your soul from purgatory is another thing, and the indulgence of a purely selfish motive".

He pointed out that until the decisions in these cases, the testator's motive was never allowed to be decisive of the charitable character of the trust.

In *Attorney-General v. Hall*,[7] the Crown argued that the predominant motive of the testator was to secure a spiritual advantage for himself, and any edification of the public was merely incidental. The Irish Court of Appeal was not impressed with this argument and upheld the bequest for Masses to be celebrated in a named church as charitable. The court expressed the view that a bequest for which the necessary result was altruistic public benefit did not cease to be charitable because it originated in an egoistic motive. The decision was made on the basis that here, unlike *Attorney-General v. Delaney*,[8] there was a direction for Masses to be celebrated in public and this accordance to the doctrines of the Roman Catholic church would confer benefit on all those participating in the worship.

In *O'Hanlon v. Logue,* Palles C.B. rejected his earlier reasoning in *Attorney-General v. Delaney.* He admitted that he had taken too narrow a view of such gifts. The opinion expressed in the earlier case was that the only element of public benefit in the celebration of the Mass was the edification of the congregation present. He said that this failed to appreciate the gift as being one to God, and an act from which the common law knew that benefits, spiritual and temporal flowed to the body of the faithful. Palles C.B. now concluded that if according to the doctrines of the religion in question, an act of divine service did result in public benefit, spiritual or temporal, the act must, in law, be deemed charitable. The decision was based on the "dual grounds" that a gift for Masses was charitable at common law and also because it imported the necessary element of public benefit to bring it within the Irish Statute of Charitable Uses, 1634.

Palles C.B.'s reasoning has been adopted in one English case. In *Re Caus*,[9] Luxmoore J. held a bequest for the saying of Masses to be charitable as being for the advancement of religion. This decision was based on two grounds: First, it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion. Secondly, it assists in the endowment of priests whose duty it is to perform the ritual act. Luxmoore J. said:[10]

> "On each of these grounds religion is advanced, and it is no objection in law that the particular religion advanced is a particular form of the Christian religion".

6. (1946) 62 L.Q.R. 234, 240.
7. [1897] 2 I.R. 426.
8. (1875) I.R. 10 C.L. 104, Cf. Fitzgibbon L.J.'s comment in *Attorney-General v. Hall* [1897] 2 I.R. 426, 450.
9. [1934] Ch. 162.
10. [1934] Ch. 164.

He disapproved of early decisions like *West v. Shuttleworth*[11] and *Heath v. Chapman*[12] as those were based on insufficient and incorrect information about the nature of the Mass. Also, those cases did not involve the question of charity but were concerned solely with the question of whether the gifts were void as superstitious uses. He concluded that once the nature of the Mass was explained, there would be no room to doubt its charitable character.

The House of Lords in *Gilmour v. Coats*[13] refused to comment on the correctness of the decision in *Re Caus*.[14] Lord Simonds and Lord du Parcq said they would expressly reserve their opinions on that decision. Lord Reid went a little further. He said:[15]

> "There are grounds on which it can be argued that such a gift is charitable which do not apply to the present case. I express no opinion whether this decision can be supported on these grounds. But in my view it cannot be supported on the ground that a court is entitled to accept the beliefs of Roman Catholics or the teaching of the Roman Catholic Church regarding the Mass as sufficient to establish the necessary element of public benefit".

In the Court of Appeal, Lord Greene M.R. said[16]:—

> "I must not be understood as intending to throw doubt on the actual decision in *re Caus* which may well be supported on one or other of the two grounds which Luxmoore J. expressly decided it".

Earlier in his judgment, Lord Greene M. R. was critical of Luxmoore J. for accepting Palles C.B.'s[17] opinion so readily.

If *Re Caus*[18] can indeed be supported on those "grounds" in which it was decided, might it not be supposed that the House of Lords might uphold a gift for the saying of Masses as charitable if such a case does arise? The decision in *Gilmour v. Coats* merely indicated that the High Court, the Court of Appeal and the House of Lords, were not convinced that the spiritual benefits to be derived from intercessory prayers and the example of pious lives were sufficient for the purposes of the law of charities. The decision was not that all religious purposes failed when tested for public benefit. Some support for this view can be seen in Lord Simonds' judgment. He said:[19]

> "It is possible that, particularly in regard to the celebration of Masses in public, good reason may be found for supporting a gift for such an object as both a legal and a charitable purpose".

11. (1835) 2 Mp. & K. 684.
12. (1854) 2 Dr. 417.
13. [1949] A.C. 426.
14. [1934] Ch. 162.
15. [1949] A.C. 460.
16. [1948] Ch. 340, 349.
17. [1906] 1 I.R. 247.
18. [1934] Ch. 162.
19. [1949] A.C. 447.

Lord du Parcq who considered Palles C.B.'s opinions in *Attorney-General v. Delaney*[20] and *O'Hanlon v. Logue,*[21] remarked that the opinion in the earlier case was consonant with the law of charities as it had developed in England.

It is submitted that if an English testator desires to have Masses said for his soul, he would be advised to frame the terms of his gift so as to include a clear direction for Masses to be celebrated in a named church in the presence of a public congregation. This, in effect, is an echo of Palles C.B.'s dictum in *Attorney-General v. Delaney.* The English courts, unlike their Irish counterparts, will not give a generous construction to gifts alleged to be for the advancement of religion; neither will they "conclusively presume" public benefit in such gifts.

If the terms of the gifts are so framed, the English courts will not be able to say that public benefit is too vague or intangible as here, there would be spiritual edification as well as physical participation in public worship.

Analogy between Gifts for Sin-Chew Ceremonies and Gifts for Maintaining Family Tombs.

This analogy was first drawn by Sir Montague E. Smith in *Yeap Cheah Neo v. Ong Cheng Neo.*[22] It was also drawn by Murray-Aynsley C.J. in *Phan Kin Thin v. Phan Kuon Yung*[23] in relation to a gift for Chin-Shong purposes. Professor Newark[24] was also of the opinion that a gift for Sin-Chew purposes could hardly be distinguished from one to maintain a tombstone.

This analogy leads to a consideration of the principles of the non-charitable purpose trust,[25] with particular reference to gifts for maintaining tombs and graves as well as gifts for religious and memorial purposes (where these have been held not to be charitable) which have been upheld.

20. (1875) I.R. 10 C.L. 104.

21. [1906] 1 I.R. 247.

22. (1875) L.R. 6 P.C. 381 (Judicial committee, from Penang).

23. (1940) 9 M.L.J. 44, a Perak case.

24. In "Public Benefit and Religious Trusts" (1946) 62 L.Q.R. 234.

25. See generally for discussion on this subject:
Ames: "The Failure of the 'Tilden Trust'" (1892) 5 Harv. L.R. 389;
Gray: "Gifts for a Non-Charitable Purpose," (1902) 15 Harv. L.R. 509;
Smith: "Honorary Trusts and the Rule Against Perpetuities," (1930) 30 Col. L.R. 60;
Marshall: "The Failure of the Astor Trust," (1953) 6 Curr. Legal Problems 151;
Sheridan: "Trusts for Non-Charitable Purposes," (1953) 17 Conv. (N.S.) 46; "Purpose Trusts and Powers," (1958) 4 U. of W. Aust. L.R. 235; "A Duologue, or Endacott's Ghost," (1964) De Paul L.R. 210;
Morris & Leach: The Rule against Perpetuities, (2nd Ed. 1962) Ch. 12, p. 307.

A trust for a non-charitable purpose may come into effect when a testator establishes a trust, not being a charitable trust, which has no human or corporate beneficiaries, and providing that the rule against perpetuities is not infringed. Such a trust has been described by some English judges as "anomalous and exceptional", as "troublesome, anomalous and aborrant". This is because they have insisted that the word "trust" has the same meaning in Chancery — that a trust can only be for persons or charity as there must be someone in whose favour the court can decree performance.

There is, however, no general rule which says that non-charitable purpose trusts cannot exist at all. In all the cases where such trusts have failed, there was either perpetuity or uncertainty of a kind fatal to all private trusts.

The concept of non-charitable purpose trusts could be usefully employed to bridge some of the existing gaps in the law of charities in Malaya. Indeed, some judges have upheld gifts for Sin-Chew and Chin-Shong ceremonies as non-charitable purpose trusts. These decision were reached without any reference being made to English or Irish authorities.

In Malaya, it is now settled that gifts for Sin-Chew and Chin-Shong purposes, as well as Muslim gifts for sacrificial offerings to the souls of the testator and his deceased relatives, are not charitable. The authority of the Privy Council's decision in *Yeap Cheah Neo v. Ong Cheng Neo*[26] has made it clear that such religious and memorial purpose are not charitable in Malaya.

Yeap Cheah Neo v. Ong Cheng Neo[27] a Chinese testatrix directed the following purposes to be carried out:

(i) The upper storey of a certain house was to be kept as a family house and was not to be mortgaged or sold.

(ii) Certain plantations were to be reserved as family burial grounds, and were not to be mortgaged or sold.

(iii) A certain house, to be called the Sow-Chong house,[28] was to be erected for religious ceremonies to be performed for the souls of the testatrix and her deceased husband.

These devises failed on the ground that they were not for charitable purposes; the first devise was also void for uncertainty as the word "family" was not defined. But the principal ground for the failure of these devises was the infringement of the rule against perpetuities. Sir Montague E. Smith said:[29] "All alike are forbidden on grounds of public policy to dedicate lands in perpetuity to such objects."

26. (1875) L.R. 6 P.C. 381.

27. (1875) L.R. 6 P.C. 381.

28. Sow-Cheng House — a House for sacrificial offerings to be performed.

29. (1875) L.R. 6 P.C. 396.

The Meaning of Perpetuities

The Privy Council in this endorsed Maxwell C.J.'s judgment in *Choa Chin Neoh v. Spottiswoode*;[30] delivering the opinion of the Privy Council, Sir Montague E. Smith said that Maxwell C.J. had rightly held that the rule against perpetuities should be imported into the laws of the Colony of Penang on the ground that it was a rule[31]

> "of a general and fundamental character, of great economical importance, and as well fitted for a young and small community as for a great state, for both are interested in keeping property, whether real or personal, as completely an object of commerce, and a productive asset of the community at large".

The learned judge went on to say that it was not lawful in the Colony to tie up property and take it out of circulation for all ages, for any purpose not of any real or imaginary advantage to the community in general or any portion of it, but intended only for the aggrandisement and the glorification of the memory of a private individual in the eyes of his descendants.

Sir Montague E. Smith agreed with this view and added that the purpose of the rule was[32]

> "to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island, if land convenient for the purpose of trade or for the enlargement of a town or port, could be dedicated to a purpose which would for ever prevent such a beneficial use of it ..."

In *Re Yap Kwan Seng*,[33] Sproule Ag. C.J. had to consider if the rule against perpetuities should also be introduced in the law of the Federated Malay States.

In coming to a conclusion he said:[34]

> "I think, also, that a certain measure of uniformity of rules and principles of law throughout the Colony and the Federated Malay States, subject to the same proviso, has rightly been the policy of the legislature of these States, and is on the face of it desirable in view of the close ties and common interests that binds us and the Colony".

He said that it was, therefore, desirable that the rule against perpetuities, as a rule of good public policy, should be equally applicable to conditions in the Federated Malay States and added that[35]

> "it is clearly and obviously contrary to the general principles of jurisprudence, against public policy, and injurious to the interests of the Federated Malay States that any land should be made inalienable, unless for objects which are in some way useful or beneficial to the State".

30. (1869) 1 Ky. 216.
31. (1869) 1 Ky. 221.
32. (1875) L.R. 6 P.C. 394.
33. (1924) 4 F.M.S.L.R. 313, a Selangor case.
34. (1924) 4 F.M.S.L.R. 317.
35. (1924) 4 F.M.S.L.R. 319.

It is important to note that the rule against perpetuities was not spoken of in its modern sense, that is, the rule against future interests vesting at too remote a date. It was spoken of in the sense of not allowing a non-charitable purpose trust to continue in perpetuity. No judge of the Malayan court has ever sought to distinguish "remoteness" and "inalienability". But in the final analysis, this does not matter.

The meaning of "perpetuity"[36] has undergone certain changes, but it is ultimately based on the general principle in English law that dispositions of property which may render property inalienable, a desire which seems to be deeply ingrained in human nature, are forbidden. A "perpetuity" may arise in one of two ways; first, restrictions may have been imposed on the future alienation of that property. Secondly, the future devolution or enjoyment of that property may have been fettered for an unreasonable length of time.

In *Yeap Cheah Neo* v. *Ong Cheng Neo*[37] the testatrix had expressly imposed restrictions on the future alienation of the properties in the first and second devises. But there was no restriction against future alienation in the third devise, nor in the devises in *Choa Choon Neoh v. Spottiswoode*[38] and *Re Yap Kwan Seng*.[39] However, the courts have construed that the gifts were intended to render property inalienable, and as the purposes specified were not held charitable, the gifts were void for perpetuity. The nature of the "perpetuity" referred to in these cases is clearly explicable since the gifts involved the "perpetual sterilization" and withdrawal from commerce of particular pieces of land.

However, it is clear that these cases did not decide that such gifts could not be valid as non-charitable purpose trusts. It would follow therefore, that there would be no objection to allowing gifts by Chinese and Muslim testators for purposes of religious or memorial ceremonies to take effect as non-charitable purpose trusts so long as the rule against perpetuities is not infringed.

In England, the development of the idea that a trust for a non-charitable purpose may be valid has been slow. Professor Hart[40] has pointed out that the rule against perpetuities in relation to non-charitable purpose trusts has developed in connection with the so-called "tomb" cases. Today, it is generally agreed by the English[41] and Irish[42] decisions that a non-charitable purpose is void if it could last longer than the perpetuity period. Text-book writers[43] also agree on this matter.

36. See Sweet: 'Restraints on Alienation' (1917) 33 L.Q.R. 236, 342;
Hart: 'Some Reflections on Re Chardon' (1937) 53 L.Q.R. 24.
37. (1875) L.R. 6 P.C. 381.
38. (1869) 1 Ky. 216.
39. (1924) 4 F.M.S.L.R. 313.
40. 'Some Reflections on Re Chardon' (1937) 53 L.Q.R. 24.
41. *Re Dean* (1889) 41 Ch.D. 552; *Re Good* [1905] 2 Ch. 60; *Re Drummond* [1914] 2 Ch. 90.
42. *Dillon v. Reilly* (1875) 10 Ir.R.Eq. 152; *Bereford v. Jervis* (1887) 11 Ir.L.T.R. 128; *Re Kelly* [1932] I.E. 255.
43. Gray: The Rule against Perpetuities (4th Ed.) pp. 769-785;
Underhill: Law of Trusts and Trustees (llth Ed.) p. 78;
Keeton: The Law of Trusts (8th Ed.) pp. 109-112;
Morris & Leach: The Rule against Perpetuities (2nd Ed.) pp. 321-327.

In *Yeap Cheah Neo v. Ong Cheng Neo*[44] Sir Montague E. Smith cited a number of English authorities; two of these were *Rickard v. Robson*[45] and *Hoare v. Osbourne*,[46] which were cited after he had drawn the analogy between gifts for Sin-Chew purposes and gifts for maintaining family tombs. These two cases support the general principle in English law that a gift for the maintenance or upkeep of a tomb, which does not form part of a church, is not a charity and is void as a perpetuity. In *Yeap Cheah Neo v. Ong Cheng Neo,* counsel cited *Lloyd v. Lloyd*[47] where Sir K. T. Kindersley V.C. upheld as valid a direction to keep a tomb and vault in repair during the lives of two named persons. The Vice-chancellor said:[48]

> "A direction simply for keeping a tomb in repair is not a charitable use, and it is not of itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the widow and M. M. Lockley shall, out of their interests keep the tomb in repair etc. ... is quite lawful and they are under an obligation out of their annuities, to do so according to the directions of the will".

Sir Montague E. Smith made no reference to *Lloyd v. Lloyd*[49] in his judgment as he held the devise void as tending to a perpetuity. He had also cited *Thomson v. Shakespeare*[50] and *Carne v. Long*[51] after he had endorsed Maxwell C.J.'s judgment in *Choa Choon Neoh v. Spottiswoode.*[52] The two English cases support the general principle that if the effect of a gift is to be perpetual, it would be void as tending to a perpetuity and not being a charity, it is void.

It is clear therefore, that gifts for religious and memorial purposes are not charitable in Malaya. It remains now to consider the few occasions when judges of the Malayan courts have upheld gifts for Sin-Chew and Chin-Shong ceremonies as non-charitable purpose trusts.

Non-Charitable Purposes upheld in Malaya

It has been pointed out that since the House of Lords' decision in *Bourne v. Keane*[53] the Malayan judiciary has adopted a different attitude to gifts for religious and memorial ceremonies by Chinese and Muslim testators. The change was gradual but certain.

But before the decision in *Bourne v. Keane,* Fisher J. in *Cheng Thye Phin v. Lim Ah Cheng*[54] had upheld a bequest for the provision of yearly ceremonies according to the Chinese custom, for the testator,

44. (1875) L.R. 6 P.C. 381.
45. (1862) 31 Beav. 244.
46. (1866) L.R. 1 Eq. 585.
47. (1852) 2 Sim. (N.S.) 255.
48. (1853) 2 Sim. (N.S.) 264.
49. (1853) 2 Sim. (N.S.) 255.
50. (1860) 1 De G.F. & J. 399.
51. (1860) 2 De G.F. & J. 75. See *Cocks v. Manners* (1871) L.R. 12 Eq. for comments on this case.
52. (1869) 1 Ky. 216.
53. [1919] A.C. 815.
54. Unreported; O.S. No. 361 of 1912 (Penang).

his ancestors and his wives. He was of the opinion that such a bequest was not void for uncertainty and that on the true construction of the will the provision would cease and determine upon the happening of the period of distribution under clause 11 of the will. However, on appeal, Hyndman-Jones C.J. and Sproule J. held the bequest void for uncertainty. They did not attack the bequest on the ground of perpetuity.

In 1927, McCabe Reay J. held a devise for Sin-Chew purposes as being a non-charitable trust in *Re Siu Ang Ho*.[55] The testator had directed the trustees of his house to permit his family to live in that house, and to use it as a Sin-Chew house for the upkeep of his death tablet and for the performance of sacrificial offerings to his soul "as is usually done amongst the majority of the Chinese community" for a period of twenty one years. The devise was saved by the express stipulation of twenty one years. But in *Re Yap Kwan Seng*[56] the testator had expressly directed that the two trusts which he purported to set up, were to take effect in accordance with the Chinese custom, and "so far as may be without infringing any laws which may be in force for the time being in Selangor".

Sproule Ag. C.J. was asked to consider that even if the rule against perpetuities applied, the trusts were saved from offence against it by the proviso above. In this case, he held that the rule against perpetuities should also be introduced into the laws of the Federated Malay States. Dealing with the argument by counsel he said:[57]

> "It is settled law that the presence of words of this kind does not justify the court in putting a forced construction on the will in order to save the testator's provision from the penalty of remoteness, unless the trust is really executory, of which there is no question in our case. Such words again, may, it seems, be fairly referred to where the terms of the gift are ambiguous, in aid of a construction which will not be obnoxious to the rule against perpetuities. In our case the testator leaves no room for ambiguity, but in terms makes these trusts perpetual. It is very clear therefore that the words of 'hedging' are powerless to save the trusts from offence against perpetuities".

The testator had clearly left no room for ambiguity. His intention was indeed to create perpetual trusts for he had further directed that[58]

> "if at any time it shall be held by a competent court in Selangor that the foregoing direction cannot take effect — then I direct that the said houses and lands shall form part of my residuary estate and be disposed of in the same manner".

Sproule Ag. C.J. concluded by saying:[59]

> "Since the trusts there were void ab initio as offending against the rule, the property fell into residue by operation of law, and it unnecessary to consider whether the testator's gift over to residue is void or not for remoteness".

55. (1927) 4 Q.N. 1.
56. (1924) 4 F.M.S.L.R. 313.
57. (1924) 4 F.M.S.L.R. 315.
58. (1924) 4 F.M.S.L.R. 314.
59. (1924) 4 F.M.S.L.R. 322.

In England, it is settled that provisos such as "so long as the law for the time being permits" or "so far as they can legally do so" do not save dispositions which would otherwise infringe the rules relating to perpetuities or accumulations where the trust is excuted;[60] but if the trust is executory,[61] that is to say if the testator indicates the object, and leaves his trustees the task of deciding upon the appropriate method of fulfilling them, then the court will give effect to the testator's wishes as far as the law permits.[62]

Sproule Ag. C.J. was therefore correct when he said that the proviso in *Re Yap Kwan Seng*[63] would operate only if the trust was really executory.

In *Re Khoo Cheng Teow*[64] Terrell J. held a devise, similar to the one in *Re Siu Ang Ho*,[65] as being a non-charitable purpose trust. But in *Re Khoo Cheng Teow,* the trust was not merely to operate for twenty-one years; it was to take effect "during the lives of Her Majesty Queen Victoria and her descendants now in being and during the lives and life of the survivors and survivor of them and during the period of twenty-one years after the death of such survivor". Terrell J. held that the devise did not infringe the rule against perpetuities. However, he did not consider how he would set about tracing the survivors of Queen Victoria.[66]

In *Tan Chin Ngoh v. Tan Chin Teat*[67] the "Queen Victoria" clause was also used and Worley J. following the decision in *Re Khoo Cheng Teow*[58] stated simply:[69]

> "The rule against perpetuities is part of the law of the Colony but the period does not infringe the rule. It is now well settled law in the Colony that a trust for Sin-Chew ceremonies is not a charity but it is not void as being for superstitious uses and is valid if it does not offend against perpetuities."

Re Khoo Cheng Teow[70] is an interesting decision. Terrell J. was preoccupied with the sole aim of giving validity to gifts for Sin-Chew purposes. In his earlier decision in *Low Cheng Soon v. Low Chin*

60. *Re Portman* [1922] 2 A.C. 473.
61. See, *Pirbright v. Salway* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38, *Re Kelly* [1932] I.R. 255; cf. *Re Compton* [1946] 1 All. E.R. 117, 120.
62. *Re Beresford Hope* [1917] 1 Ch. 287.
63. (1924) 4 F.M.S.L.R. 313.
64. (1933) 2 M.L.J. 119. See *Yee Hong Hoon v. Yeo Joey* (1889) 2 S.L.J. 99.
65. 4 Q.N. 1.
66. See *Re Villar* [1929] 1 Ch. 243 where a direction postponing vesting within the expiration of twenty-one years from the death of the survivor of the lineal descendants of Queen Victoria living at the time of the testator's death was reluctantly upheld.
67. (1946) 12 M.L.J. 159, a Singapore case.
68. (1933) 2 M.L.J. 119, a Singapore case.
69. (1946) 12 M.L.J. 163.
70. (1933) 2 M.L.J. 119, a Singapore case.

Piow,[71] he had held a gift for Chin-Shong purposes void as tending to a perpetuity and as being for superstitious uses. Here he seemed determined to clear the confusion caused by that decision, and stated the principle which has since been applied by a Singapore court,[72] that such purposes could only fail for perpetuity or uncertainty,[73] and that they were not void as superstitious uses. In coming to his decision he cited a large number of cases in other common law jurisdictions and also reviewed previous authorities concerning Sin-Chew purposes. But he made no reference to any English or Irish authorities on non-charitable purpose trusts. His decision was an attempt to modify English rules to accord with some of the religious customs prevailing among the Chinese of Malaya. These gifts have invariably been held void either for perpetuity or uncertainty.

It must have struck Terrell J. that such an attitude was harsh and oppressive as it offended the religious beliefs of the Chinese. It is not too surprising that he came out with the view that it was only fitting and proper that some validity ought to be given to these gifts, the performance of which was an essential feature of the religious rites of the Chinese for countless generations, and long before any Chinese inhabited the Straits Settlements and sought the protection of the laws under which they now lived.

Interesting comparison may be made with the position of Chinese gifts for Sin-Chew and Chin-Shong purposes in Hong Kong. English law was introduced into Hong Kong by various Supreme Court Ordinance beginning with No. 15 of 1844 and ending with the Supreme Court Ordinance, 1873. The rule against perpetuities is also a part of the law in Hong Kong. However, the rule does not apply to gifts of land on trust for ancestral worship in the New Territories. It appears that about one third of the land in the New Territories is held on trust for ancestral worship.[74] Such land is not totally inalienable; the practice has been to transact sales if it is in the general interest of the beneficiaries as a whole.

A Committee was appointed by the Governor in October, 1948 to report on Chinese law and customs in Hong Kong. The Committee said that it should still be possible for pious Chinese to purchase land in the New Territories with the purpose of dedicating it to ancestral worship.[75] They recommended that:[76]

> "With a view, however, to facilitating alienation of land so dedicated (which might well be required for trade, industry or other development)

71. (1932) 1 M.L.J. 15.
72. (1946) 12 M.L.J. 159.
73. See *Re Chew Ah Sang* [1949] 15 M.L.J. 14 (Bostock-Hill J., Penang). The gift failed for uncertainty.
74. In most cases land is owned by clans or private families and individuals, and can be sold, mortgaged, or settled upon specific trusts. In addition to these there are also the following varities of tenure:—
    Ancestral land, or "Sheung T'in," "Temple land," or "Miu T'in," land held by associations, or "Ui T'in."
75. The desire to dedicate land for such purposes is possibly not so strong today as it was in the past.
76. Chapter 5, p. 62.

> the Committee considers that the Land Officer should be given express power to sanction any transaction which he considers to be in the interest of the beneficiaries as a whole even though such transactions might not be justified by customary law. An advantageous sale and reinvestment in other land would thus be rendered possible and would be in the interest of all, including the public".[77]

The Committee also referred to Maxwell C.J.'s decision in *Chua Choon Neoh v. Spottiswoode* as it was a case of "especial interest because of its exposition of the 'unjust and oppressive theory', in connexion with the question whether English law was applicable". In the view of the Committee, "apart from cases where Chinese law and custom has been expressly preserved by special local enactments, before such law and custom can be said to be in force in the Colony it must be shown that the English law on the subject is for some reason inapplicable to the local circumstances of the Colony or its inhabitants. Now, in 1843[78] English law and Chinese law and custom had few, if any, points of similarity and their divergencies were many and if the word "inapplicable" were given an extended meaning it might be possible to argue that the whole of English law was inapplicable to the local inhabitants. This view is not acceptable to the Committee, which considers that the mere fact that there is a divergence between English law and Chinese law would not *per se* suffice to bring Chinese law into operation. In the view of the Committee it would probably be essential to show that the application of English law would lead to injustice or oppression or at all events to some result that is fundamentally inequitable".

In *Phan Kin Thin v. Phan Kuon Yung*,[79] Murray-Aynsley J. upheld a bequest for Chin-Shong purposes. He said:[80]

> "The result is that such a bequest is perfectly good like a bequest for the upkeep of a tombstone, provided that the bequest is to drawn that the rule against perpetuities is not infringed, a matter which should not be beyond the ingenuity of local conveyancers".

It is to be noted that none of the judges in the Malayan courts who upheld the gifts as being for non-charitable purposes, considered the absence of a *cestui que trust.*

Absence of Cestui Que Trust

In England, the absence of a *cestui que trust* has been regarded as fatal by a number of decisions beginning with *Morice v. Bishop of Durham,* where Grant M.R. observed that:[81]

> "Every trust must have a definite object. There must be somebody in whose favour the court can decree performance".

77. (1869) 1 Ky. 216.

78. See Supreme Court Ordinance 1844, which introduced English law into Hong Kong.

79. (1940) 9 M.L.J. 44, a Perak case.

80. (1940) 9 M.L.J. 45.

81. (1804) 9 Ves. 399, 405.

In the last eighteen years, three English cases[82] have stated the proposition that subject to certain exceptions and anomalies, there is no such thing as a non-charitable purpose trust. The English judges who decided these cases re-affirmed the general rule that a trust by English law, not being a charitable trust, must be for ascertained or ascertainable beneficiaries. The gifts in the three cases were also held void for uncertainty.

There are two Irish decisions which did not regard the absence of *a cestui que trust* as fatal. In *Re Gibbons*[83] a testator gave the residue of his estate to be disposed of "to my best spiritual advantage as conscience and sense of duty may direct". Barton J. held this to be a valid private trust which the executors might execute. He based his decision on two English cases: *Re Dean*[84] and *Mellick v. President and Guardian of Asylum*,[85] as well as the Irish case of *Roche v. McDermott*,[86] where the Master of the Rolls held that the validity of a direction to maintain two vaults depended on the honour and willingness of the executors to give effect to it. In *Re Ryan's Will Trust*[87] Johnston J. upheld a bequest to A. B. "to be expended for my spiritual advantage according to his discretion" in the same manner. He held that the trust was a valid private trust and directed the appointment of a suitable trustee. Johnston J. pointed out that the property under the will might be termed "a discretionary trust" which might more accurately be described as "a power in the nature of a trust". He directed that any undisposed property was to go to persons entitled as on an intestacy.

This method of effecting the testator's wishes seems to have been made on the basis that the disposition could be treated as a power of appointment; therefore, the disposition, whether expressed to be by way of trust or not, has the effect of leaving the beneficial interest in the donor (or the residuary dones or intestate successor, as in this case) subject to a power to appoint in furtherance of the purpose so as to override the beneficial interest.

Academic writers[88] have come out in strong support of such a view. They argue that trusts of this kind should more properly be regarded

82. *Re Astor's Settlement* [1952] Ch. 534. See Marshall, "The Failure of the Astor Trust" (1953) 6 Curr. Legal Problems 151; *Re Shaw* [1957] 1 W.L.R. 729; *Re Endacott* [1960] Ch. 232.

83. [1917] 1 I.R. 448. See *Re Kelly* [1932] I.R. 255, 261, Meredith J. did not regard the absence of *cestui que trust* as fatal either.

84. (1897) 41 Ch.D. 552.

85. (1821) Jac. 189.

86. [1901] 1 I.R. 394.

87. [1925] 60 Ir.L.T. 57. See also *Re Byrne* [1935] I.R. 782; *Re Keogh* [1945] I.R. 13.

88. See, Smith: "Honorary Trusts and the Rule against Perpetuities" (1930) 30 L.R. 60.
Marshall: "The Failure of the Astor Trust" (1953) 6 Curr. Legal Problems, 151.
Potter: "Trusts for Non-Charitable Purposes" (1949) 13 Conv. (N.S.) 418;
Sheridan: "Trusts for Non-Charitable Purposes" (1953) 17 Conv. (N.S.) 374;
Sheridan: "Purpose Trusts and Powers" (1958) 4 U. of W.A.L. Rev. 235.

as powers of appointment. But the Court of Appeal in *Re Endacott*[89] did not favour such a view. They adopted the view expressed by Jenkins L.J. in *Inland Revenue Commissioners v. Broadway Cottages Trusts*[90] that a purported trust which failed as a trust in the strict sense could not be validated by treating it as a power.

Two Malayan cases have considered the concept of the non-charitable purpose trust. In *Re Alsogoff Trusts*[91] one of the questions which fell to be decided involved the following bequest:

> "One of such shares to be paid to such poor persons as shall undertake with the consent and approval of my trustees to read the Quran at my grave according to the Mohammedan custom. One of such shares to be paid to such persons as shall read the Quran in my name at Mecca and Saywoon".

Murray-Aynsley C.J. disposed of the complicated question of charity in these words:[92]

> "I think these are not charitable trusts, having regard to *Gilmour v.* Coats.[93] The first cannot, I think be treated as relief of poverty".

This decision has been criticised by Professor Sheridan who is of the opinion that:[94]

> "if a gift for the saying of Masses is charitable, it would seem to follow that a gift for the reading of the Quran is also charitable, that at all events that would seem to be sufficient charitable flavour about it to make the whole gift charitable when coupled with the element of relief of poverty which is present in the gift to such poor persons as read the Quran".

He indicated that in *Brantham v. East Burgold*[95] a direction that bread be distributed to poor persons attending divine service and chanting the testator's version of the psalms was held to be charitable.

Murray-Aynsley C.J. was called upon by counsel to determine if these bequests could be effective as purpose trusts, apart from the question of perpetuities. He said:[96]

> "I do not think that *Re Astor Settlement Trusts*[97] decided any thing new. It merely repeats what was decided in *Morice v. Bishop of Durham.*[98] The supposed exceptions to the rule e.g. in *Re Dean*,[99] can only be justified as gifts to so-called trustees. We cannot merely say that in these expected cases the property is not undisposed of. The explanation given in that particular case by North J. is incorrect. There cannot be a trust in favour of particular animals unless animals can be the subject of rights which, of course, they cannot".

89. [1960] Ch. 232.
90. [1955] Ch. 20, 36.
91. (1956) 22 M.L.J. 244, a Singapore case.
92. (1956) 22 M.L.J. 245.
93. [1949] A.C. 426.
94. In "Reading the Quran" (1956) 22 M.L.J. xl.
95. A decision of Arden M.R. fully described by himself in his later decision in *Attorney-General v. Boultbee* (1794) 2 Ves. Jun. 380.
96. (1965) 22 M.L.J. 245.
97. [1952] Ch. 534.
98. (1804) 9 Ves. Jun. 522.
99. (1889) 41 Ch.D. 552.

Professor Sheridan[100] expressed his astonishment at this over-simplification of the law. He pointed out that Roxburgh J. in *Re Astor Settlement Trusts*[1] regarded many of the earlier decisions upholding gifts for non-charitable purposes on the ground that they were legacies and not trusts as Murray-Aynsley C.J. seemed to have assumed. Professor Sheridan drew attention to the "string of cases"[2] upheld as non-charitable purpose trusts in Ireland, most of which involved gifts for the saying of Masses. It is submitted that if the Irish cases were cited to Murray-Aynsley C.J., he might have upheld the bequests for the reading of the Quran as non-charitable purpose trusts. The question of perpetuity would not arise because the testator clearly indicated that the shares were to be paid immediately to any such persons who might agree to read the Quran at his grave. The rule does not apply to vested interests.

Concluding the matter, Murray-Aynsley C.J. said: "these gifts fall within the exception and these are gifts to the trustees".

It would seem from a reading of clause 14[3] of the will that the testator did not intend the trustees to take beneficially; he clearly directed that the bequests were to be held on trust for any poor persons who would undertake to read the Quran at his grave and with his trustees' consent. Murray-Aynsley C.J. arrived at his conclusion because he was of the opinion that non-charitable purpose trusts were justified as gifts to trustees.

It is submitted that this is not so; everything depends on a construction of the terms of the gifts. In this case it seems clear that the trustees were not meant to take beneficially.

In *Re Chionh Ke Hu*[4] the testator directed his executors in the following manner:

> "I direct my executors to distribute the remaining thirty shares out of the said two hundred shares among such persons professing or practising the Buddhist religion and in such proportions as my executors shall in their absolute discretion think fit".

Winslow J. held that this clause did not create a charitable trust for the advancement of religion as the element of public benefit was lacking; he was also unable to find any purpose in the gift to enable him to hold that the purpose of the gifts was meant to advance the Buddhist religion.

100. (1956) 22 M.L.J. xli.

1. See (1956) 22 M.L.J. xli. note 12.

2. *Phelan v. Slattery* (1887) 19 L.R.Ir. 177; *Bradshaw v. Jackman* (1887) 21 L.R.Ir. 12; *Reichenbach v. Quinn* (1888) 21 L.R.Ir. 138; *Armstrong v. Reeves* (1890) 25 L.R.Ir. 325; *Re Gibbons* [1917] 1 I.R. 448; *Re Ryan's Will Trusts* (1925) 60 I.L.T.R. 57; *Re Bryne* [1935] I.R. 782; *Re Keogh's Estate* [1945] I.R. 13.

3. Clause 14 is set out in the report.

4. (1964) 30 M.L.J. 270.

He was asked to consider if this gift might in the alternative, be a valid non-charitable purpose trust. He held it could not, after citing the English decision in *Re Astor Settlement Trusts*[5] and *Re Endacott*[6] to the effect that a trust can only be for charity or persons; that the scope of the "anomalous" cases should not be further extended. He said:[7]

> "It is, however, clear that in all these cases referred to above[8] they were purpose trusts in the sense that the purposes of the various gifts were sufficiently defined . . . The principle underlying the exceptional cases is that, not only must there be non-charitable purposes which the court can control or enforce but the relevant purposes must be stated in phrases which embody definite concepts and the means by which trustees are to try to attain them must also be prescribed with a sufficient degree of certainty . . . In the case before me, however, no purpose of any kind is either defined, apparent or capable of being inferred".

Winslow J. placed great emphasis on the need for certainty and the question of enforceability. This is the only instance when a judge of the Malayan court has echoed the view of English judges that a trust, not being for charitable purposes must have ascertained or ascertainable beneficiaries who could enforce it. None of the decisions[9] upholding gifts for Sin-Chew or Chin-Shong purposes have ever considered the question of enforceability.

In *Re Chionh Ke Hu*,[10] Winslow J. seriously attempted to uphold the bequest. But his attempts were defeated by his initial finding that the direction in clause 5 contained words which were "imperative if not mandatory calling for conversation, division and distribution"; that these words amounted to something more than a discretion to distribute. He expressed regret over this finding, for he felt that if it were otherwise, he would have reached a different conclusion as the test for certainty would be lower. He considered if the direction might be treated as a power of appointment but decided not to go into the matter because of Lord Evershed M.R.'s statement in *Re Endacott*[11] that if trusts should fail as trusts they should not be treated as powers.

It is submitted that both the decisions in *re Alsagoff Trusts*[112] and *Re Chionh Ke Hu*[13] merely support the proposition in English law that a trust can only be for charity or persons. They made no objections to the existence of non-charitable purpose trusts in Malaya. Indeed,

5. [1952] Ch. 534.
6. [1960] Ch. 232.
7. (1964) 30 M.L.J.
8. Williams. Executors and Administrators (14th Ed.) Vol. 2, p. 482, para. 804.
9. See *Re Siu Ang Ho* (1927) 4 Q.N. 1; *Re Khoo Cheng Teow* (1933) 2 M.L.J. 119; *Phan Kin Thin v. Phan Kuon Yung* (1940) 9 M.L.J. 44; *Tan Chin Ngoh v. Tan Chin Teat* (1946) 12 M.L.J. 159.
10. (1946) 30 M.L.J. 270.
11. [1960] Ch. 232.
12. (1956) 22 M.L.J. 244.
13. (1964) 30 M.L.J. 270.

the English judges appear content to assign such trusts to the category of anomalous exceptions so long as the class is not further enlarged. In *Re Endacott*, Harman L.J. said:[14]

> "these cases stand by themselves and ought not to be increased in number, or indeed followed, except where the one is exactly like the other. Whether it would be better that some authority now should say those cases were wrong, this perhaps is not the moment to consider".

Lord Evershed M.R. also gave his reasons for not allowing an extension in the scope of these cases:[15]

> "so to do would be to validate almost limitless heads of non-charitable trusts, even though they are not (strictly speaking) public trusts, so long as the question of perpetuities does not arise; and, in my judgment, that result would be out of harmony with the principles of our law. No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries".

It has been decided that where a gift for Sin-Chew purposes is to be performed in China, the trust will be valid.

In *Ng Eng Kiat v. Goh Lai Mui*,[16] a Chinese testator directed his trustees to purchase immoveable property in China and to use the income arising therefrom for the worship of his Sin-Chew and those of his ancestors. He further declared that the property purchased was to descend to his male descendants according to the law of China.

Counsel argued that the gift was bad as it infringed the rule against perpetuities. Murison C.J. rejected the argument. He said that *Yeap Cheah Neo v. Ong Cheng Neo*[17] and *Choa Choon Neoh v. Spottiswoode*[18] involved trusts impressed upon properties situated in a territory governed by English law. Here the trust was impressed upon property situated in China, and it appeared that the law in China was different. The fact that the trust was void by the law of the Colony of Singapore was immaterial. In reaching his decision, he cited the English case of *Fordyce v. Bridges* [19] and the Irish case of *Freke v. Lord Carbery*.[20] He said:[21]

> "In my opinion the trust under the will is good and all the executors have to do is to purchase the property in China and obtain a receipt for it from 'the male descendants' of the testator according to the law of China".

14. [1960] Ch. 232, 250-251.
15. [1960] Ch. 246.
16. (1940) 9 M.L.J. 181, a Singapore case.
17. (1875) L.R. 6 P.C. 381.
18. (1869) 1 Ky. 216.
19. (1847) 1 H.L. Cas. 1.
20. (1873) L.R. 16 Eq. 461.
21. (1940) 9 M.L.J. 131 (Azmi J., Johore Bahru).

This decision has been followed in *Re Lee Moey Chye*.[22] In that case a Chinese testator directed as follows:

> "The remaining fifteen shares and the money in cash under my name shall be reserved as the ancestral property of my family. The money in cash must be remitted back to the fatherland (China) in order to form ancestral property. If and when my property is disposed of (sold), the value thereof must be remitted back to my fatherland (China) in order to form ancestral property".

In this case, counsel made three objections. First, the gift was void as infringing the rule against perpetuities. Secondly, the gift was void for uncertainty. Thirdly, the gift failed by reason of impracticability of performance.

Azmi J. rejected the first objection. He said:[23]

> "the principle laid down in *Fordyce v. Bridges*[124] and followed by Murison C.J. in the local case should apply in the present case. In other words, the objection that the trust in the present case is invalid as infringing the rule against perpetuities must fail".

Azmi J. pointed out that in *Ng Eng Kiat v. Goh Lai Mui*[25] Murison C.J. did not consider if it was relevant that the property left by the testator was movable or immovable. Azmi J. held that the gift failed as a result of the second and third objections. He said the words "ancestral property" were vague; that the testator had not stated the purpose of his gift nor the persons who were to benefit by the gift. Evidence was given to the effect that it was impracticable to remit moneys to China.[26] The gift devolved as on an intestacy.

It may seem that a Chinese testator could achieve his desire for the performance of Sin-Chew or Chin-Shong purposes if he directed his gift to take effect upon property situated in China. However, the difficulties of remitting sums of money to China serve as a practical hindrance to the making of such gifts.

The cases which have upheld gifts for Sin-Chew and Chin-Shong purposes do concern matters "intimately connected with the deceased" and were "concessions to human weakness or sentiment". There is no objection to this. A number of Irish cases[27] on non-charitable religious purposes, as well as English cases[28] on gifts for erecting or maintaining tombs, graves or monuments were decided on the same basis.

22. (1966) 1 M.L.J. 131 (Azmi J., Johore Bahru).
23. (1966) 1 M.L.J. 133.
24. (1847) 1 H.L. Cas. 1.
25. (1940) 9 M.L.J. 181.
26. This objection was not brought up in *Ng Eng Kiat v. Goh Lai Mui* (1940) 9 M.L.J. 181.
27. *Phelan v. Slattery* (1887) 19 L.R.Ir. 177; *Bradshaw v. Jackman* (1887) 21 L.R.Ir. 12; *Reichenbach v. Quinn* (1888) 21 L.R.Ir. 138; *Re Gibbons* [1917] 1 I.R. 448; *Re Ryan's Will* [1925] 60 Ir.L.T.R. 57; *Re Keogh* [1945] I.R. 13.
28. *Mellick v. President and Guardians of Asylum* (1821) Jac. 180; *Mussett v. Bingle* (1876) 6 Beav. 353; *Pirbright v. Salway* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38.

It is submitted that gifts for Sin-Chew and Chin-Shong ceremonies as well as Muslim gifts for sacrificial offerings, should be recognised as valid non-charitable purpose trusts by the Malayan courts. In order to ensure their validity either in a will or a deed, these gifts should be drafted as powers of appointment with gifts over in default of appointment, unless it is desired that the income not appointed should fall into residue. In the alternative, if a Chinese or Muslim desires the performances of religious rites of sacrificial offerings in his memory, he may form a guarantee company with its objects limited to the performance of such religious rites or ceremonies. Such a company is particularly suitable because its object is not to distribute any of its assets either by way of dividends while it is a going concern, or by returning capital in the event of winding up.[29] The members are placed in the position of guarantors of the company's debts up to an amount specified in the memorandum, and the company is accordingly described as a company limited by guarantee. The working capital of such a company will generally be obtained from a number of sources — from endowments, grants, fees, subscriptions or the like.

The advantages of forming such a company are as follows.

(i) The company becomes a corporation which can own property and enter into contracts and take or defend legal proceedings.

(ii) The members or directors have no personal liability.

(iii) The members retain *de facto* control and the perpetuation of their names and reputations.

The alternative submission is in line with the recent statutory provisions in the Trustees Act, 1967 (Republic of Singapore).[30] Section 68 of the Trustees Act, 1967 provides for the incorporation of trustees.[31]

Section 68 of the Trustees Act, 1967.[32]

Section 68(1) Trustees, not less than three in number, may be appointed by any body or association of persons established for any religious.[33] educational, literary, scientific, social or charitable purpose, and such trustees may apply, in the manner hereinafter provided, to the Minister for a certificate of registration of the trustees of such body or association of persons as a corporate body.

29. Such a company can be formed with a minimum of two members and one director.

30. Part VI of the Act deals with charitable trusts, and makes provisions for the better administration of charitable trusts in Singapore. S. 67 contains a provision for imperfect trusts. There is no equivalent provision for the administration of charitable trusts in Malaya.

31. For the Federation of Malaya, see the Trustees (Incorporation) Ordinance 1952 (No. 73).

32. See ss. 68-85 of the Act.

33. Assuming that Sin-Chew and Chin-Shong purposes are religious within the meaning of this Act.

(2) If the Minister, having regard to the extent, nature and objects and other circumstances of such body or association of persons, shall consider such incorporation expedient, he may grant such certificate accordingly, subject to such conditions or directions generally as he shall think fit to insert in such certificate, and particularly relating to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of the land which such trustees may hold, and the purposes for which such land may be applied.

(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal and power to sue and be sued in such corporate name, and subject to the conditions and directions contained in the said certificate to acquire, purchase, take, hold and enjoy movable and immovable property and by instruments under such common seal to sell, convey, assign, surrender and yield up, mortgage, charge demise, reassign, transfer or otherwise dispose of movable and immovable property now or hereafter belonging to, or held for the benefit of, such body or association of persons, in such and the like manner, and subject to such restrictions and provisions, as such trustees might do, without such incorporation, for the purposes of such body or association of persons.

When a certificate of incorporation is granted, all property and powers will vest in the corporate entity, but the trustees remain personally liable for breaches of trust. These statutory provisions for incorporation of trustees will apply only when trustees are appointed by "any body or association of persons" and not when the appointment is made by the testator. Therefore, if under a will, trustees are directed to carry out Sin-Chew purposes, they will not be able to apply to the Minister for a certificate of registration as a corporate body.

RELIEF OF POVERTY

The relief of poverty is one of the objects set forth in the preamble to the Statute of Elizabeth under the words: "Reliefe of aged, impotent and poore people . . . " The Irish Statute of 1634 has the words: "the reliefe or maintenance of any member of the poore, succourless, distressed or impotent persons". The relief of poverty is the first of the four objects enumerated by Lord Macnaghten in *Commissioners of Income Tax v. Pemsal*.[34]

It is well established in the English law of charities that poverty does not mean destitution. "Poverty" to begin with is a vague word which has different meanings at different times and at different places. Lord Evershed M.R. said in *Re Coulhurst*:[35]

34. [1891] A.C. 531.
35. [1951] Ch. 661, 665.

> "It may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptance of that term, due regard being had to their status in life and so forth".

The courts have always been generously disposed towards gifts for the relief of poverty perhaps because they have always regarded the relief of poverty as an interest of the public and therefore involving a sufficient element of charity. From the earliest times the relief of poverty was itself a religious and social duty in England. The ancient evil of poverty was first systematically attacked in the sixteenth century with gifts for the outright relief of the poor and later on with really massive endowments designed to eradicate its causes by a great variety of undertakings among which the extension of educational opportunity was not the least. These efforts, so important in the development of the ethnic as well as the institutions of the liberal society, were implemented by Elizabethan and Jacobean legislation planned to make each parish responsible for its poor. But constructive efforts as well as most of the funds flowed from private endowments rather than from the mechanism contemplated by legislation.

Professor Jordan[36] concluded from a mass of available evidence that during the period 1460-1660 the relief of poverty was by far the most significant of all the charitable concerns of donors in England. During the eighteenth century it was common for a testator or donor to create a perpetual trust for the relief of such of his poor relatives as might from time to time be in want, and such trusts, some of which may still be subsisting were treated as charitable. Since 1881 there has been a series of reported decisions in which the English courts have held that trusts for the relief of poverty among members of a society or the employees of a firm or company are charitable.

These trusts for the relief of poverty[37] have developed into two different categories. The first is now commonly referred to as the so-called "poor relations" cases, while the second may for present purposes be described as the "poor employee" cases.

It would not be incorrect to say that the law of charities so far as it relates to "the reliefe of aged, impotent and poore people" and to poverty in general, has developed along its own lines. The two categories of trusts for the relief of poverty are illustrative of this proposition.

The "Poor Relations" Cases[38]

In general, a trust to be charitable, must be for the relief of poverty among some class or section of the community; the class of potential beneficiaries should not be defined by reference to a personal relation

36. Philanthrophy in England 1460-1660 (1959) p. 253.

37. For an excellent summary of the law on the relief of poverty, see the judgement of Jenkins L.J. in *Re Scarisbrick* [1951] Ch. 622, pp. 646-658.

38. See the case law on this subject in the following cases:
Re Compton [1945] Ch. 123;
Oppenheim v. Tobacco Securities Trusts Co. [1951] A.C. 247;
Re Scarisbrick [1951] Ch. 622;
Re Cox [1955] A.C. 627.

with the testator or settlor. The "poor relations" cases form an anomalous exception[39] to this general rule. The class of specific individuals may be defined by reference to a personal relationship with the donor. The position in Northern Ireland and the Republic of Ireland on this aspect of the law is the same as in England.

Malaya

The principles of the "poor relations" cases has been applied to four Malayan cases. In all these cases the judges have merely upheld the trusts as being for the relief of poverty without however, considering if such trusts should be regarded as anomalies in the law of charities as it has developed in Malaya, or whether they are consistent with its principles. Two of the four cases were decided since the decision in *Re Scarisbrick*;[40] this decision has established the "poor relations" cases as anomalies in the English law of charities.

In *Re Alsagoff Trusts*[41] the court was called upon to determine the validity of the following bequests:

> "Five of such shares to be divided equally in the Island of Singapore. Three of such shares to be divided equally among my poor relations residing outside the Island of Singapore not including Hydramount in Arabia. Ten of such shares to be divided equally among my poor relations residing in Saywoon in Hydramount in Arabia".

Murray-Ansley C.J. disposed of the complicated charity aspect in these words:[42]

> "Gifts for poor relations may be charitable. I think that there was a charitable intention. The difficulty arises from the fact that it does not appear that the trusts can be carried out in accordance with the terms of the will. I do not think that this is a case in which the charitable intention is subordinate to the method by which, it is to be effected, as in *Re Wilson.*[43] I consider these are valid charitable trusts."

This simplification of the law is surprising. Murray-Anysley C.J. does not appear to realize that there is a whole body of case law involving the so-called "poor relations" cases in England. *Re Scarisbrick*[44] was not cited even though it was decided five years earlier by the English Court of Appeal.

The statement above indicates that Murray-Anysley C.J. was preoccupied with the determination of a general charitable intention so as to bring the case outside the principle as seen in *Re Wilson.* In that case, Parker J. was called upon to determine if a *cy-près* scheme could

39. For justification of the "poor relations" cases, see Lord Evershed M.R. in *Re Scarisbrick* [1951] Ch. 639-640; also Lord Green M.R. in *Re Compton* [1945] Ch. 123.

40. [1951] Ch. 622 (C.A.).

41. (1956) 22 M.L.J. 244, a Singapore case.

42. (1956) 22 M.L.J. 245.

43. [1913] 1 Ch. 314.

44. [1951] Ch. 622.

be directed from a gift expressed to be for a particular charitable purpose which had failed. He held that a *cy-près* scheme could not be ordered as there was no general charitable intention in the gift.

It is submitted that a general charitable intention is seen from the purposes of the bequests in *Re Alsagoff Trusts*.[45] However, Murray-Aynsley C.J. merely indicated that there was a "difficulty" with carrying out the trust. He did not indicate what the "difficulty" was, neither did he give any directions in the event of the "difficulty" arising. In the absence of any evidence as to the nature of the alleged "difficulty" it is not possible to consider if the court could have ordered a *cy-pres* scheme.

In *Re Shaikh Salman*[46] a settlor directed that out of the income trusts $300 was to be paid annually to such of the settlor's family "as are from time to time in Arabia and are poor and in distressed circumstances at the sole and uncontrolled discretion of my trustees". The court held that the gift amounted to a charitable trust within the principle of *Re Scarisbrick*.[47]

Counsel argued that the trust was a private trust as the word "family" could mean only the settlor's children. Whitton J. did not accept this; he interpreted "family" as meaning "a stock from a common ancestry". In *Re Scarisbrick,* Jenkins L.J., speaking of the extent of the word "relations" said:[48]

> "It is, I think, well settled that a power of selection amongst the relations of a given person, as distinct from a plain gift to such relations, extends to relations in the full sense (i.e. all persons who can claim a common ancestor with the person in question) and is not confined to statutory next of kin . . . the ambit of the trust thus extends to relations in every degree of the three children on both sides of the family . . . Thus the class of potential beneficiaries, so far from being confined to a limited number of individuals from the testatrix might be taken to have regarded as having some personal claim on her bounty, at any events to the extent necessary to relieve them from want, is so extensive as to be incapable of being exhaustively ascertained, and includes persons whom the testatrix has never seen or heard of, and persons not even in existence at the time of her death".

Whitton J. did not enter into a discussion of whether the "poor relations" cases were also to be regarded as exceptional and anomalous in the law of charities in Malaya. But he indicated that it would be difficult to maintain that the trust in *Re Shaikh Salman*[49] [52] did not come within that class of charitable trusts as seen in *Re Scarisbrick*.[50]

The two other Malayan cases decided before *Re Scarisbrick* were *Re Syed Shaikh Alkaff*[51] and *Re Haji Esmail bin Kassim*. These cases

45. (1956) 22 M.L.J. 244.
46. (1953) 19 M.L.J. 200, a Singapore case.
47. [1951] Ch. 622.
48. [1951] Ch. 651-652.
49. (1953) 19 M.L.J. 200.
50. [1951] Ch. 622.
51. (1923) 2 M.C. 38 (Court of Appeal, Singapore).
52. (1911) 12 S.S.L.R. 74 (Hyndman-Jones C.J., Singapore)

involved provisions for poor relations who might be in "indigent circumstances". The judges in these cases did consider the position of gifts to "poor relations" in Malaya.

In *Re Syed Shaikh Alkaff*[53] an Arab testator directed his executors, to set up a Wakaf and to distribute the rents and profits in "good works" for certain purposes, the first of which was for the purpose of benefiting blood relatives of the testator, his father and his brother, who might be in "indigent circumstances". He further directed that the balance of the income less the amount for this purpose was to go entirely to "good works".

Evidence was given to the effect that no indigent relatives were in existence. The question therefore to be considered was whether in the very "unusual circumstances" of the case it could be said that the gift for indigent relatives was charitable. Whitley Ag. S.P.J. and Brown J. were of the opinion that the gift could not be charitable by reason of its association with the further provision for "good works". They held that "good works" would include purposes which were not necessarily charitable by the English law of charities. On the other hand, Barrett-Lennard J.[54] took the view that the gift for indigent relatives would still be charitable under the circumstances.

Brown J. considered the matter fully. He said:[55]

> "The fact that, so far as is known no indigent relatives are yet in existence is not, I think, a ground for holding that the purpose has failed. Temporary failure is not total failure, and no one can say that in this case there has been a total failure of the first object of the trust... It is, of course, well established that a continuing trust for poor relations is a good charity: *White v. White*,[56] but in all the cases on the subject which I have been able to examine there has been a definite or ascertainable sum set apart for the trust; and the judgment of Sir George Jessel M.R. in *Attorney-General v. Duke of Northhumberland*,[57] shows clearly that the only ground upon which such a bequest is held to be charitable is that it is for the benefit of a class of the poor".

Brown J. then cited *Jarman on Wills*[58] to the effect that:[59]

> "A gift for the perpetual benefit of the poor relations of the testator or any other persons is a good charitable gift, subject of course to the rule that the persons entitled to participate in it must be actually and not merely relatively poor, and that if there is more than enough to provide for purposes so entitled, the surplus must be applied in some manner to be determined by the court".

In the earlier case or *Re Haji Esmail bin Kassim*[60] a Mohamedan testator also directed his executors to set up a Wakaf for five purposes,

53. (1923) 2 M.C. 38 (Court of Appeal, Singapore).
54. (1923) 2 M.C. 50-57.
55. (1923) 2 M.C. 66-67.
56. (1802) 7 Ves. 423.
57. (1877) 7 Ch.D. 745.
58. (6th Ed.) p. 220.
59. (1923) 2 M.C. 67.
60. (1911) 12 S.S.L.R. 74.

one of which was for the maintenance of any of his children and their descendants and any other relatives who might be in "indigent circumstances".

Hyndman-Jones C.J. explained that the word "indigent" applied to the whole gift; that the testator intended to benefit his indigent children, their indigent descendants as well as his other relatives who were in indigent circumstances. He held that the provision was "clearly charitable" and added:[61]

> "although an immediate gift to poor relations is a private gift, a perpetual trust to them is to be treated as a charitable gift for the poor with a preference for poor relations".[62]

Re Syed Shaik Alkaff[63] and *Re Haji Esmail bin Kassim*[64] illustrates two points. First, the two judges regarded the testator's indigent relatives as constituting a class of the poor. Secondly, the two judges thought that a distinction existed between gifts for immediate distribution to poor relations and gifts of perpetual continuation to poor relations.

In *Re Scarisbrick*[65] the Court of Appeal in England overruled Roxburgh J,'s[66] decision based on these two points. The Court of Appeal explained the position of "poor relations" cases and assigned them to the category of an anomaly in the law of charities.

This leads to two submissions. First, "poor relations" cases are not regarded as an anomalous or exceptional class of charitable trusts in the law of charities in Malaya. All the judges who decided the four cases seemed to have assumed that such trusts were charitable under the general head of trusts for the relief of poverty. No objections[67] were advanced that a class of "poor relations" was identified by reference to a personal relationship with the donor; the absence of public benefit was not considered. There are indications from the statements by Brown J.,[68] Hyndman-Jones C.J.[69] and Whitton J.[70] that they regarded the "poor relations" as constituting a class of the poor for the purposes of the law of charties. There seems to be no necessity to assign "poor relations" cases to the position of an anomaly in the law. The case law of charities in Malaya is small; the four cases mentioned above

61. (1911) 12 S.S.L.R. 81.

62. He cited *Attorney-General v. Sidney Sussex College* (1869) L.R. 4 Ch. 722; *Gillam v. Taylor* (1873) L.R. 16 Eq. 581.

63. (1923) 2 M.C. 38.

64. (1911) 12 S.S.L.R.

65. [1951] Ch. 622.

66. [1950] Ch. 226.

67. Cf. comments by Hyndman-Jones C.J. in *Re Haji Ismail bin Kassim* (1911) 12 S.S.L.R. 74, 81.

68. (1923) 2 M.C. 66-67.

69. (1911) 12 S.S.L.R. 81.

70. (1953) 19 M.L.J. 200.

were decided on the basis that the relief of poverty is always charitable and for public benefit, however limited in scope, and however arbitrarily the recipients of relief are selected. Secondly, the Malayan courts should disregard the distinction between gifts for immediate distribution to poor relations and those of perpetual continuation. The Court of Appeal in *Re Scarisbrick*[71] has indicated that to allow such a distinction to be drawn would result in "yet another anomaly" in the law of charities.

The "Poor Employee" Cases

The term "poor employee" is perhaps a misnomer. For present purposes it is used to include all those persons (and their dependants) who are in common employment with a firm or a company, or are members of a society or institution, who having regard to the circumstances in which they are placed and perhaps to the class from which they come, may properly be regarded as persons within the language or spirit of the preamble to the Statute of Elizabeth.

In 1881, Jessel M.R.[72] held a gift to the York Theatrical Fund Society to be charitable because poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the Society. It is perfectly clear from his judgment that he regarded poverty as the saving factor in the case.

More recently, the Court of Appeal in *Gibson v. South American Stores Ltd.*[73] held that a trust of a fund established by the defendant company for their employees, ex-employees and their dependants "who are or shall be necessitous and deserving" was charitable. Harman J.[74] at first instance, held this to be a trust for the relief of poverty. He regarded the presence of some public benefit as necessary even in poverty trusts but expressed the view that "a much narrower object may in them be considered to work a public benefit than in the other categories". He concluded that the class of potential beneficiaries was sufficiently wide to constitute a public element.

The Court of Appeal affirmed his decision on one point,[75] and reversed it on another. But the affirmation was on a different ground — it was based on an unreported case by the same court on similar facts. In the earlier decision of *Re Sir Robert Laidlaw*[76] the court held that the legacy was "a valid charitable legacy for the benefit of the persons who shall from time to time and for the time being be poor members or poor former members of the staff" of the company.

71. [1951] Ch. 622.

72. In *Spiller v. Maude* (1881) 32 Ch. 158n; see the following cases where the gifts were held charitable: *Re Gosling* (1900) 48 W.R. 300 (old and worn out clerks of a banking firm); *Re Buck* [1896] 2 Ch. 727 (members of a friendly society and their widows and children); *Re Coulhurst* [1951] Ch. 661 (widows and orphaned children of deceased ex-officers of Bank).

73. [1950] Ch. 177.

74. [1949] Ch. 572.

75. [1949] Ch. 579.

76. [1935] unreported; cited in 1950 Ch. 177, 195-197.

Lord Morton in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*[77] appeared to have cast some doubts on the decision in *Gibson v. South American Stores Ltd.*[78] However, as the case before the House of Lords involved an educational trust he did not go into the matter. He did say:[79]

> "It is neither necessary nor desirable to express any view, on the present occasion, on the cases to which I have just referred. I am content to fall in with this opinion, only observing that they may require careful consideration in this House on some future occasion".

The Privy Council in *Re* Cox[80] refused to express an opinion on the decision in *Gibson v. South American Stores Ltd.* They merely said that the correctness of that decision was expressly reserved in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*[81]

The House of Lords in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*[82] expressly approved the Court of Appeal's decision in *Re Compton.* These two cases concerned gifts for educational purposes which failed to qualify as legal charities because the element of public benefit was said to be lacking.

In *Re Compton,* Lord Greene M.R.[83] held that a trust for the education of the descendants of three named persons was in fact a family trust. He stated that the fundamental requirement of a charitable gift was its public character; that the number of potential beneficiaries, however large, could not raise a family or private benefaction into the class of charitable gifts. In reaching his conclusion he considered some of the authorities cited in Tudor[84] to support the proposition that bequests for the education of the "donor's descendants and kinsmen at a school or college" are valid charitable bequests". Lord Greene M.R. was of the opinion that the cases[85] cited did not support Tudor's proposition. He made a further reference to the two Irish cases of *Laverty v. Laverty*[86] and *Re McEnery*[87] where gifts for educational purposes were held not charitable.

In *Laverty v. Laverty*[88] the testator gave all his estate upon first for the "support and education" of boys and men "of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty".

77. [1961] A.C. 297.
78. [1950] Ch. 177.
79. [1951] A.C. 313.
80. [1955] A.C. 627.
81. [1951] A.C. 297.
82. [1945] Ch. 123.
83. Reversing the decision of Cohen J. in the lower court [1944] Ch. 378.
84. Tudor on Charities (5th Ed.) pp. 30-31.
85. *Spencer v. All Souls College* (1762) Wilm. 163; *Attorney-General v. Sidney Sussex College* (1869) L.R. 4 Ch. 772; *Re Lavelle* 1914 1 I.R. 197.
86. [1907] 1 I.R. 9.
87. [1941] I.R. 323.
88. [1907] 1 I.R. 9.

Barton J. said :[89]

> "In my opinion, a valid charitable trust might be created, with a preference for persons of a particular surname, either by the endowment of, or gift to, a school or college, or by gift, as in the present case to trustees, if sufficiently definite. But is this bequest of that character? Having regard to the wide discretion given to the trustees, it seems it might be worked and might have been intended to work, as a mere matter of private bounty".

The main ground for the decision in *Laverty v. Laverty* was that the trust was not merely to educate, but was for "support and education" originally, and in a certain event for the support and education of the suggested beneficiaries, and that the support of the persons named was clearly not a charitable bequest.

Lord Greene M.R. agreed with the approach. But he was in whole hearted agreement with Gavan Duffy J.s' judgment in *Re McEnery*,[90] In that case, the testator made a bequest "for enabling the sons and daughters and male descendants" of his brothers "to obtain professions, each suitable student to receive £100 yearly, for a reasonable time".

The trust was held not charitable. Gavan Duffy J. said:[91]

> "The trust here is in my opinion too narrow to be charitable; the motive may have been charitable, but the intention was to benefit specific individuals".

He emphasised the necessity of proving public benefit in gifts for legal charities and then pointed out the difference between an endowment to maintain two scholars in Oxford and Cambridge and a trust for the personal educational benefit of the heir for the time being of the testator for ever, committed by the testators to his trustees. He said:[92]

> "There is nothing public about that purpose and it would, in my view, be too narrow to be charitable; those prospective heirs would not constitute a section of the community for whom a charitable trust could be established".

He explained that the three cases, cited in Tudor[93] to support the proposition that bequests for the education of the donor's descendants and kinsmen were charitable, were decisions showing that the founder of a charity or a benefactor may lawfully associate his descendants with his bequest to a charitable institution and thus to enable them to participate in his liberality. However, those cases had no application to the case before him.

This is one of the rare occasions when an English judge has come out in strong approval of an Irish decision. The decision of *Re Compton*[94] is founded largely on the same reasoning as in *Re McEnery*.[95]

89. [1907] 1 I.R. 13.
90. [1941] I.R. 323.
91. [1941] I.R. 327.
92. [1941] I.R. 327.
93. Tudor on Charities (5th Ed.) pp. 30-31.
94. [1945] Ch. 123.
95. [1941] I.R. 323.

Lord Greene M.R. went a little further and laid down what is now commonly described as the "Compton" test.

The "Compton" Test

The "Compton" test is used in determining if a particular class of potential beneficiaries constitutes the public or a section of the public for purposes of the law of charities. The test focuses on the common and distinguishing quality which unites those within the class and asks if that quality is *essentially personal* or *essentially impersonal.* If, the former, the class will not rank as a section of the public; if the latter, the class will rank as a section of the public.

No doubt *Oppenheim v. Tobacco Securities Trust Co. Ltd.*[96] and *Re Compton*[97] concerned gifts for the advancement of education. It is pertinent to wonder if the "poor relations" and "poor employee" cases are inconsistent with the principle laid down by the two cases. Lord Simonds in *Oppenheim v. Tobacco Securities Trust Co. Ltd.* indicated that doubts will not be cast on the "poor relations" cases as these are of "respectable antiquity". But what of the "poor employee" cases?

Jenkins L.J. in *Re Scarisbrick* took the view that the exception to the general principle as laid down in *Re Compton and Oppenheim v. Tobacco Securities Trust Co. Ltd.* operated:[98]

> "whether the personal tie is one of blood (as in the numerous so-called 'poor relations' cases) or of contract (e.g. the relief of poverty amongst the members of a particular society, as in *Spiller v. Maude*,[99] or amongst employees of a particular company or their dependants, as in *Gibson v. South American Stores* Ltd.)".[100]

The general rule emerging from the English authorities that a class of potential beneficiaries should not be identified by reference to some personal relationship does not seem to be conclusive to conditions prevailing in the law of charities in Malaya. The presence of some personal relationship is clearly the main stumbling-block for gifts alleged to be made for the advancement of religion. Illustrative examples of such gifts are those for Sin-Chew and Chin-Shong purposes as well as Muslim gifts for sacrificial offerings to the souls of the deceased testators. The personal tie is always one of blood — the class has the common and distinguishing quality of being the members of the testator's family, either as his children, his descendants, or his relatives.

In Malaya, the courts have upheld a few trusts for the relief of poverty. These are of such a varied character that it is impossible to classify them. A number of such trusts were contained in provisions made by Muslim testators or settlors when they directed their executors to set up a Wakaf.

96. [1951] A.C. 297.
97. [1945] Ch. 123.
98. [1951] Ch. 649.
99. (1881) 32 Ch.D. 158n.
100. [1950] Ch. 177.

The Idea of Wakaf

A Wakaf, to put it very simply, is the subjection of property to the fetters of a perpetual settlement in connection with charitable or religious objects of which the Almighty is assumed to approve. Some of the many objects of Wakaf such as the relief of poverty conform to the law of charities and are therefore charitable. But others are too wide and uncertain to qualify as charitable by the courts. Therefore, a provision by Muslim donors for the relief of poverty would seem to be motivated by religious sentiment and belief, in the hope perhaps, of securing greater spiritual blessings from the Almighty. However, the courts have not attached any significance to these gifts being embodied in cases where there were directions to set up a Wakaf. The nature of these gifts[1] was determined solely according to the English law of charities.

The following gifts have been held charitable in Malaya. A gift for surplus monies to be expended in purchasing clothes for the poor; *Fatimah v. Logan.*[2] Alms for the poor: *Re Haji Esmall bin Kassim*[3] A weekly distribution of meal or rice to the poor on the eve of Friday: *Re Syed Shaikh Alkaff.*[4]

In *Re Haji Daeing Tahira*,[5] the following were held charitable:

(i) A provision for an annual feast for poor persons of Mohamedan religion in accordance with the Mohamedan custom in memory of the testator, his parents and his relatives.

(ii) A provision for the burial of poor Muslims at a cost not exceeding $15.

(iii) A provision for contribution to needy and distressed persons of the Mohamedan religion who have suffered loss owing to fires, earthquakes or other inevitable accidents.

In *Re Alsagoff Trusts*[6] the following gifts were held charitable:

(i) A provision for the burial of poor Mohamedan strangers dying in Singapore.

(ii) A provision for assisting poor Mohamedan strangers in the territory formerly known as the Straits Settlements.

(iii) A provision for the maintenance and provision of oil and other means of illumination for the Rubad Sadayat Medina.

1. See *Re Syed Shaik Alkaff* (1923) 2 M.C. 38 for an excellent treatment of the concept of Wakaf by the Court of Appeal of the Straits Settlements.
2. (1871) 1 Ky. 255 (Hackett J., Penang).
3. (1911) 12 S.S.L.R. 74 (Hyndman-Jones C.J., Singapore).
4. (1923) 2 M.C. 38 (Court of Appeal, Singapore).
5. (1948) 14 M.L.J. 62.
6. (1956) 22 M.L.J. 244, a Singapore case.

Referring to the last provision, Murray-Aynsley C.J. said:[7]

> "After some discussion it was agreed that this is an institution for the relief of poverty. The provision of illumination seems to be, therefore, a charitable purpose".

In the same case, bequests to such poor persons who would undertake to read the Quran at the testator's grave according to the Mohamedan custom was unaccountably held not charitable.[8]

In *Fatimah v. Logan*[9] Hackett J. held a direction "to give 'kandoories' or feasts to the poor aforesaid once in every three months to the extent of $100" to be not charitable.

A "kandoorie" has its religious connotations. Muslims regard these as some sort of feasts given to the friends of the deceased and to the poor generally. During these feats, prayers are recited because they are believed to benefit the soul of the deceased, and alms are generally distributed to the poor.

Hackett J. was not given any evidence about the nature and purpose of "kandoories" or whether they were enjoined by the Mohamedan religion.

Hackett J. had also held void the first direction

> "to expend for the yearly performance of 'kandoories' and entertainments for me and in my name to commence on the anniversary of my decease, according to the Mohamedan religion or custom, such 'kandoories' and entertainments to continue for ten successive days every year, and also in the performance of annual 'kandoories' in the name of all the prophets, and to expend the same in giving a 'kandoorie" or feast according to the Mohamedan religion or custom to the poor for ten successive days in every year from the anniversary of my decease ..."

The decision in *Fatimah v. Logan*[10] has been followed,[11] distinguished[12] and overruled as to Singapore, by *Re Haji Daeing Tahira*.[13] In *Re Haji Daeing Tahira* the Court of Appeal in Singapore held charitable a provision:

> "to provide yearly at the date of my death in memory of my parents and my sisters and myself a feast for poor persons of the Mohamedan religion in accordance with the Mohamedan custom".

Murray-Aynsley C.J. criticised Hackett J. in *Fatimah v. Logan* for placing undue emphasis on the word "feast". He said the mere use of the word "feast" did not necessarily bring the gift outside the scope

7. (1956) 22 M.L.J. 245.
8. See criticism of this decision by Sheridan in "Reading the Quran" (1956) 22 M.L.J. xl.
9. (1871) 1 Ky. 255.
10. (1871) 1 Ky. 255.
11. *Mustam Bee v. Shina Tamby* (1882) 1 Ky. 580, *Ashabee v. Mohamed Hashim* (1887) 4 Ky. 212; *Re Haji Ismail bin Kassim* (1911) 12 S.S.L.R. 74.
12. *Re Abdul Guny Abdullasa* (1936) 5 M.L.J. 174.
13. (1948) 14 M.L.J. 62.

of charity; that this might not be the most satisfactory method of relieving the poor but in the absence of any regular system of poor relief, it could not be said that such a gift lacked the necessary element of public utility. For this reason he said *Fatimah v. Logan*[14] should be overruled as to this point. Willan C.J. and Tobling J. agreed with him.

Murray-Anysley C.J. made a passing reference to the other cases involving "kandoories". Those were correctly decided as there were no provisions restricting the gifts to the poor.

Murray-Aynsley CJ.'s Test

Murray-Anysley C.J. suggested a test to determine the character of such gifts. As these gifts had a "double purpose", the proper course to pursue was first to consider the proposed expenditure and then to enquire if it was to be made "substantially for a charitable object". If it was, it would be unnecessary to consider the dominant motive for making such a gift.

Applying the test to the facts in *Re Haji Daeing Tahira*[15] he decided that the proposed expenditure was substantially on nourishment for the poor. Therefore, the gift was for the relief of poverty.

It would seem that Murray-Anysley C.J. intended the test to apply only to gifts for the relief of poverty. It has not been applied to gifts for the advancement of religion; gifts for Sin-Chew and Chin-Shong purposes as well as Muslim gifts for sacrificial offerings for the soul of the deceased, can be said to contain "a double purpose" — a selfish motive and a religious and philanthropic motive. The courts in Malaya have always ruled that the selfish motive was predominant in the gift.

In *Sir Han Hoe Lim v. Lim Kim Seng*[16] a Chinese settlor directed his trustees to set up a trust to maintain and benefit an ancestral house of worship in a village at Fukkien, China. There was a provision for the distribution of alms or food to poor travellers or to other poor persons who might come to worship at the ancestral house or who lived in the vicinity.

Whitton J. decided that the provision was contemplated by the settlor[17] "primarily as affording financial assistance to an activity of good works in connection with the ancestral home and not as an assistance of a general nature to the alleviation of the condition of the poor in the neighbourhood or of impoverished itinerants passing through it.

The dominant motives of the gifts in both *Re Haji Daeing Tahira*[18] and *Sir Han Hoe Lim v. Lim Kim Seng* were to secure a selfish benefit to the respective donors; the provision for the poor was incidental.

14. (1871) 1 Ky. 255.
15. (1948) 14 M.L.J. 62.
16. (1956) 22 M.L.J. 142, a Singapore case.
17. (1956) 22 M.L.J. 143.
18. (1948) 14 M.L.J. 62.

It is submitted that even if Murray-Anysley C.J.'s test were applied to the facts in *Sir Han Hoe Lim v. Lim Kim Seng,* Whitton J. would still have reached the same conclusion. He would have answered that the proposed expenditure was "substantially" to set up a shrine for family purposes; that the essentially private nature of the gift would remain unaffected by a provision for the poor. The courts are not as generously disposed towards religious gifts as they are to poverty trusts. If they were, such a provision as in *Sir Han Hoe Lim Kim Seng* might have prevailed to add a sufficient charitable flavour to the gift for maintaining the ancestral home.

Sir Han Hoe Lim v. Lim Kim Seng[19] illustrates an important practical difficulty threatening any charitable trust for purposes to be performed in China. The fact that a trust is to be performed outside the jurisdiction is not a ground for declaring a trust to be invalid. In Malaya it has been decided that the courts have jurisdiction over any trust so long as the trustees and the property, or part of it comprising a charitable trust, are within the jurisdiction: *Re Valibhoy.*[20] The position of such gifts seems to be this — the court may decide that a gift constituted a valid charitable trust; whether the trust is capable of performance depends entirely on the willingness of the Controller of Foreign Exchange to sanction the application by trustees to remit moneys arising out of the trust fund to institutions or purposes in China.

In *Sir Han Hoe Lim v. Lim Kim Seng* the testator had also directed a trust to be established so as to maintain and benefit a school in his village in China. Whitton J. held that the gift was a valid charitable trust. Evidence was given to the effect that the political conditions prevailing in that part of China where the gift was to be performed made it impracticable to carry out the trust. Therefore, the trust became void and unenforceable because of impracticability. Whitton J. refused to order a *cy-près* scheme in the absence of a general charitable intention in the gift.

In *Tai Kien Luing v. Tye Poh Sun*[21] the testator directed his trustees to establish a trust for named schools and hospitals in places specified in China. There was a further provision to the effect that "in the event of there being any new Schools or Hospitals in the aforesaid places in China being subsequently opened the Head Trustee shall have full discretion and authority to include the same amongst the above".

Rigby J. held that the gift constituted a valid charitable trust. In the light of evidence before the court, it could not be said that the trust was void for impossibility of performance. However, Rigby J. considered the consequences which might arise as a result of the trust being found to be subsequently incapable of performance. He was of

19. (1956) 22 M.L.J. 142.

20. (1961) 27 M.L.J. 187.

21. 27 M.L.J. 78, a Penang case. This case contains interesting information concerning the policy of the Controller of Foreign Exchange in the Federation of Malaya with regard to remittances to persons or institutions in China. The position seems to be the same in Singapore.

the opinion that no general charitable intention could be inferred from the gift; therefore, there was a resulting trust in favour of the residuary legatee.

In these two cases, the courts could not infer any general charitable intention from the terms of the gift because the testators had specified the schools and the hospitals which they wished to benefit, and had provided particular methods for effecting the gifts.

In *Sir Han Hoe Lim v. Lim Kim Seng*,[22] Whitton J. said:[23]

> "I do not consider there was any intention directed to the promotion of learning generally, because even if the 'maintenance of poor students' may be taken as indicating such an intention I do not believe any maintenance distinct from the administration of this school was envisaged by the Settlor".

In reaching this conclusion, he relied solely on the authority of *Re Wilson*[24] where a *cy-pres* scheme was refused in the absence of a general charitable intention in the gift.

In *Tai Kien Luing v. Tye Poh Sun*,[25] Rigby J. said that the trust was an express trust limited to schools and hospitals in specified places in China; that there was no intention to benefit schools and hospitals generally, irrespective of where they might be.

The he went on to say:[26]

> "If, indeed, it were possible to infer a general charitable intention from the words used by the settlor, then, in my view, the intention was for moneys to be used for general purposes in China".

It is submitted that if Rigby J. could have inferred a general charitable intention for purposes in China, he could also have inferred a general charitable intention for purposes in Malaya. For the question whether there is or is not a general charitable intention is answered by construing the document as a whole, and so long as the court can find a general charitable intention, it does not matter that the trust cannot be carried into effect in the mode indicated by the donor; the court can and will substitute a different mode. In this case, the court should have directed a scheme to be drawn up for the fund to be applied for the benefit of some charities in Malaya. This would be in accordance with the intentions of the testator as he clearly indicated that charity, and not his residuary legatees, was to be benefitted.

22. (1956) 22 M.L.J. 142.
23. (1956) 22 M.L.J. 143.
24. [1913] 1 Ch. 314.
25. (1961) 27 M.L.J. 78.
26. (1961) 27 M.L.J. 80. See *Estate of Leow Chia Heng, decd.*, (unreported) O.S. No. 30 of 1960 (Singapore) where the facts of the case were rather similar and the court ordered a scheme to be drawn up. Apparently, there was no opposition from the residuary legatees; they only objected to the moneys being remitted to China.

The Relevance of the "Compton" Test in Malaya

It remains to consider if the "Compton" test should have any application to the law of charities in Malaya.

It is submitted that the Malayan courts should not apply such a test in determining if a particular class of potential beneficiaries could be said to constitute a section of the public. The courts in Malaya might apply the "Compton" test to gifts for the advancement of education but no case has yet considered the necessity of such a test. There is evidence to indicate that the courts will not apply the "Compton" test.

The meaning of a "personal relationship" has not been adequately defined. Lord Simonds in *Oppenheim v. Tobacco Securities Trust Co. Ltd*[27] described it as the nexus between a group of persons "to a single propositus or to several propositi". Lord MacDermott,[28] dessenting, criticised the "Compton" test as being "a very arbitrary and artificial rule". He indicated three difficulties in the application of this test:

(i) The difficulty of dividing the qualities or attributes which may serve to bind human beings into classes, into two mutually exclusive groups — the one involving status and purely personal, the other disregarding status and quite impersonal.

(ii) The test makes the quantum of public benefit to be "a consideration of little moment;" the size of the class becomes immaterial and the need of its members and the public advantage of having that need met appear alike to be irrelevant.

(iii) The likely confusion and doubts that the test would bring to the present law in the case of trusts to institutions of a character whose legal standing as charities have never been in question.

These objections were made in the context of gifts for the advancement of education. However, they seem to be relevant to the position of legal charities in Malaya. His second objection in particular, must be considered in the light of the law of charities in Malaya.

In Malaya, no definition or discussion of what constitutes a sufficient section of the public for purposes of the law of charities has ever been made. But the judges of the Malayan courts seemed to be satisfied that public benefit is present in the gift so long as persons other than the testator and immediate members of his family, derive some benefit, spiritual or temporal. Thus, on two occasions[29] the argument that members of a "Seh"[30] could be said to constitute a section of the public

27. [1951] A.C. 297, 366.

28. [1951] A.C. 313-319.

29. *Cheang Tew Muey v. Cheang Cheow Lean Neo* 1930 S.S.L.R. 58; *Lim Chooi Chuan v. Lim Chew Chee* 1948-49 M.L.J. Supp. 66 (Bostock-Hill J. Penang).

30. "Seh" — persons having the same surname.

prevailed and the gifts for their benefit were held charitable. However, the argument that the descendants of an ancestor were so numerous that they could be said to constitute, not a family, but a class or tribe, and therefore a section of the public was rejected in *Re Tan Swee Hong*.[31] In that case Mills J. took the view that the grantor intended to create a family trust for Chin-Shon purposes. More recently, Whitton J.[32] interpreted the word "family" as meaning "a stock from a common ancestry". The interpretation was made in the context of a gift for the relief of poverty among members of the settlor's family who were "poor and in distressed circumstances".

It is submitted that the courts in Malaya should formulate a test for public benefit based on two considerations. First, the size of the class of potential beneficiaries, and the need for such a purpose to be met. Secondly, the public advantage of having that need met.

The test is founded largely on Lord MacDermott's dissenting judgment in *Oppenheim v. Tobacco Securities Trust Co. Ltd*.[33] The two considerations to be taken into account will allow the courts a considerable amount of flexibility in formulating a test for public benefit.

The process of determination will be of reaching a conclusion after relevant, rather than of applying a single conclusive test, as the a general survey of the circumstances and conditions regarded as "Compton" test, which may well prove to be arbitrary. Each case will therefore be decided on its facts. This will not amount to a sacrifice of the principles of the law of charities; the test is applicable only for determining it a class of potential beneficiaries may be said to constitute a section of the public for purposes of the law of charities.

Three questions may arise in the application of such a test. First, would a class identified by reference to a personal relationship with a single propositus or several propositi be said to constitute a section of the community? Secondly, would the test be applicable to all gifts for charity in Malaya? Thirdly, would the presence of some selfish benefit be necessarily fatal.

Regarding the first question, the class of potential beneficiaries may be identified by reference to a personal relationship but only in so far as the recipients are not the donor and immediate members of his family, that is, his wife, children and parents. Thus the class may be composed of his relatives or his descendants who may be related to him by being "a stock from a common ancestry" or through marriage. The class to be benefited might be large, but it might well be composed of a handful of beneficiaries. In any case, the argument would run that the donor intended to create a family trust; that the number of potential beneficiaries however large, could not raise a family or private benefaction into a class of charitable trusts. But the size of the class is not to be

31. (1934) 3 M.L.J. 5, a Singapore case.

32. *Re Shaikh Salman* (1953) 19 M.L.J. 200, a Singapore case.

33. [1951] A.C. 297, 313-319.

the decisive factor in the determination of public-benefit — the gift must still satisfy the requirements of fulfilling a need of the class to be benefited and the public advantage of having that need met.

As for the second question, it may be argued that trusts for the relief of poverty should stand on a different footing from all other trusts for charitable purposes as judges seem more ready to uphold poverty trusts regardless of whether the presence of public benefit has been satisfactorily proved. In principle, the determination of public benefit should be the same for all categories of charitable trusts, but it is submitted that the courts will continue to regard gifts for the relief of poverty as being beneficial to the community; these trusts will always be placed in a class by themselves. It is recognised that proof of public benefit in gifts for the advancement of religion is not an easy task.[34] It does not follow that the courts in Malaya are more ready to uphold such gifts; but there are indications in some Malayan cases[35] that the test of public benefit in such gifts might not be as difficult as in the English cases. On the other hand, the test will not be as easy as in the Republic of Ireland, where public benefit in gifts for the advancement of religion will be "conclusively presumed".

Thirdly, the presence of some selfish benefits, particularly in gifts for the advancement of religion, should not necessarily be fatal. If it is clear that the donor intended to secure a substantial benefit for himself, then the gift will not be charitable. If the terms of the gift clearly indicate that the selfish benefit is incidental to the main purpose of the gift, the gift should be charitable if it satisfied the necessary requirements of the law of charities.

Admittedly, there are imperfections in this test. But the test suggested is an attempt to seek a broad generalisation under which the facts of individual instances can be related, not with a view towards automatic solution, but rather with a view to the object or purpose to be attained. There is clearly a need to formulate a test for public benefit in the law of charities in Malaya.

In the final analysis, the formulation of such a test, as well as the formulation of principles of charity law in general, depends on the social acumen of the judges. This is a branch of the law in which precedents lose their cogency through a change in social conditions, and in which analogies are frequently remote. It is hoped that judges will be consistent in their handling of all gifts for charitable purposes, and bold in their formulation of a test, for public benefit in particular, and principles of charity law in general.

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34. *Gilmour v. Coates* [1949] A.C. 426.

35. This is discussed above.

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