# TRUSTS—CHARITIES—TRUSTS FOR THE ADVANCEMENT OF EDUCATION—ADVANCEMENT OF WORKS OF COMPOSER—VALIDITY—PROBLEMS IN MODERN LAW OF CHARITIES

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The vexed question as to the exact nature of legal charity has been raised once again, in the recent English case of *In Re Delius, Deceased, Emanuel* v. *Rosen*.[1] The depth and complexity of the problems involved in this perpetually litigated field of law were, however, partly concealed by the fact that the case itself was a deceptively simple one. The precedents were clear and the judge, Roxburgh J., had no trouble in applying them to the facts. It is submitted, nevertheless, that the difficulties underlying the decision were not fully explored. While the highest of judicial authority has deprecated such exploration,[2] it is the purpose of this comment to undertake such a venture in the hope that some of the main trends in the present law of charities can be set in proper perspective and can be examined in relation to the particular situation in *Re Delius*.

The facts of the case are simple. Jelka Delius, the wife of the composer, Frederick Delius, left her residuary estate, subject to certain exceptions and prior interests, on trust, and further directed:

> My trustees shall apply the royalties income and the income of my residuary trust fund for or towards the advancement in England or elsewhere of the musical works of my late husband Frederick Delius under conditions in which the making of profit is not the object to be attained and which might be economically impossible by any concert operatic or other organization (as my intention is to create a charitable trust within the legal meaning of that phrase) by means of (1) the recording upon the gramophone or other instrument for the mechanical reproduction of music of those works of my late husband which in the opinion of my trustees and their advisers are suitable for reproduction (2) the publication and issue of a uniform edition of the whole body of the works of my late husband or any part thereof or the publication and issue of any separate work hitherto unpublished under the editorship of Sir Thomas Beecham, Bart., . . . and (3) the financing in whole or in part of the performance in public of the works of my late husband.

Roxburgh J. held that the purpose of this trust was the "spreading and establishing of knowledge and appreciation of Delius's works among the public of the world"[3] and, this being so, there was a valid charitable trust for the advancement of education.

In *Commissioners for Special Purposes of Income Tax* v. *Pemsel*[4] Lord Macnaghten enunciated the universally approved classification of charities, as follows:[5]

> Charity in its legal sense comprises four principal divisions—trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

However, the utility of this classification has been practically destroyed by

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[1] [1957] 2 W.L.R. 548.

[2] "the law of charity has been built up not logically but empirically." per Viscount Simonds in *Gilmour* v. *Coats*, [1949] A.C. 426 at p. 449. See also at p. 450.

[3] *Supra*, footnote 1, at p. 551.

[4] [1891] A.C. 531, (1891) L.J.Q.B. 265 (H. of L.).

[5] *Ibid.*, [1891] A.C. at p. 583, (1891) 61 L.J.Q.B. at p. 290.

subsequent qualification. Viscount Cave, for instance, declared that:[6]

> Lord Macnaghten did not mean that all trusts for all purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and give it a different meaning . . .

The four categories above enumerated are based on the preamble to the Statute of Charitable Uses, 1601, which enumerated charities as follows:[7]

> Some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans, some for or toward relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

Now it is clear that these are not exhaustive and that any purpose coming within the spirit and intendment of the Preamble will be held charitable.[8] However, even on this extended basis it may seem rather difficult to justify regarding the fine arts as charitable. This is not to deny their importance: far from it. It is simply to suggest that they do not fit comfortably within the somewhat utilitarian framework of the Preamble. In fact, the proposition that gifts for the advancement of the arts are charitable was not easily established. Indeed, as a result of the first two reported cases on the subject[9] the learned editor of Tudor on Charities was moved to declare that "the fine arts, however, are probably not regarded as objects of charity."[10] However, this statement was denounced as "inadequate and, indeed, misleading" by Lord Greene M.R. in a case important from many standpoints—*Royal Choral Society* v. *I.R.C.*[11]. In that case a society formed for the encouragement and advancement of choral singing in England was held to be a body established for charitable purposes only and therefore exempt from income tax. The trial judge, Macnaghten J., had sought to rest a similar finding on the basis that the society's activities came within the fourth category of his father's classification.[12] The Court of Appeal, however, went farther and held that the activities could be regarded as charitable either on the basis of being beneficial to the community within the fourth category or on the basis of being intended for the advancement of education, since "the education of aesthetic taste is one of the most important things in the development of a civilized human being;"[13] or at least as important, it might be hoped, as a proper grounding in the intricacies of social deportment.[14] In any event,

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[6]*National Provincial and Union Bank of England* v. *A.-G.* [1924] A.C. 262 at p. 265. See also *Re Macduff, Macduff* v. *Macduff* [1896] 2 Ch. 451 (C.A.), and *In Re Cox (deceased), Baker* v. *National Trust Company Ltd.* [1955] A.C. 627 (P.C.), affirming [1953] S.C.R. 94.

[7](1601), 43 Eliz., c.4.

[8]See, for instance, Viscount Simonds in *I.R.C.* v. *Baddeley* [1955] A.C. 572.

[9]*In re Alsopp (deceased), Gell* v. *Carver* (1894) 1 T.L.R. 4, *Re Ogden, Taylor* v. *Sharp* (1909) 25 T.L.R. 382 (C.A.).

[10]5th ed., at p. 39.

[11](1943) 112 L.J.K.B. 648 (C.A.).

[12][1942] 2 All E.R. 610.

[13]*Supra*, footnote 11, at p. 651, per Lord Greene M.R.

[14]Held a valid educational trust in *In Re Shaw's Will Trusts, National Provincial Bank Ltd.* v. *National City Bank Ltd.* [1952] 1 Ch. 163.

bequests to various laudable artistic purposes have been declared valid in several other English cases, notably *In Re Shakespeare Memorial Trust,*[15] *In Re Corelli,*[16], and *Re Levien, Lloyds Bank Ltd.* v. *Worshipful Company of Musicians.*[17]

Now that the law particularly bearing on the problem in *Re Delius* has been outlined, it is intended next to examine some of the problems raised either expressly or impliedly in that decision. The first argument put forward by those disputing the validity of the trust was that the principal object of music is in giving pleasure or amusement, and that these factors have nothing to do with education. One of the earlier cases, *Re Alsopp,*[18] had been decided on this basis, it having been held that the musical society there was formed for amusement only and was therefore not a proper object of charity. It would appear from the judgments in the *Royal Choral Society* case that this is still the law insofar as the only object of the body in question can be said to be amusement. At least Macnaghten J. was of opinion that "it is not suggested that the gentlemen who constitute the society get amusement or anything else out of it,"[19] a remark that prompted R. E. Megarry to say "those responsible for advising musical societies on their constitution and rules will no doubt in future bear in mind the financial importance of being earnest."[20] In the present case, however, Roxburgh J. disposed of the objection in exemplary fashion: [21]

> It might be suggested as regards some music, at any rate, that its purpose was limited to giving pleasure, and as regards all music it must be said that it gives pleasure. That is a feature about music. When I say "all music", I mean all that can be truly called music. Indeed, a lot of pleasure is derived by some from something which can hardly be truly called music, but, at any rate, pleasure is a circumstance intimately connected with music. But that in itself does not operate to destroy the charitable character of a bequest for the advancement of the art of music. I adopt, with great satisfaction, the words of Lord Greene: "curiously enough, some people find pleasure in providing education. Still more curiously, some people find pleasure in being educated; but the element of pleasure in those processes is not the purpose of them, but may be called a by-product which is necessarily there." That seems to me to be all that need be said about the aspect of pleasure connected with the music of Delius.

It is unnecessary to add anything to the words of these two distinguished judges.

A further objection was raised in *Re Delius* as to the method of education. However, after the *Royal Choral Society* case it was really an untenable one, as it is quite clear that education does not embrace formal instruction only but is much wider in scope. The words of Lord Greene give admirable expression to this view:[22]

> Dealing with the educational aspect from the point of view of the public who hears music, the learned Solicitor-General argued that nothing could be educational which did not involve teaching—as I understand him, teaching in the sense of a master teaching a class. He said that in the domain of art, the only thing that could be educational in a charitable sense

[15] [1923] 2 Ch. 398.
[16] [1943] Ch. 332.
[17] [1955] 3 All E.R. 35.
[18] *Supra,* footnote 9.
[19] *Supra,* footnote 12, at p. 612.
[20] (1943), 59 L.Q.R. at p. 114.
[21] *Supra,* footnote 1, at pp. 551-2.
[22] *Supra,* footnote 11, at p. 651.

> would be the education of the executants: the teaching of the painter, the training of the musician and so forth. I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste.

As to other points raised in the instant decision, I will deal below with those concerning the motive of the testatrix, the limitation of the objects of the trust to the advancement of the works of a single composer, and the problem—touched upon but not argued—concerning the standard of artistic competence requisite for charitable purposes. The point concerning a gift over and the possibility that the property might vest in non-charitable objects after the perpetuity period I do not feel it necessary to discuss.

While it is clear that charity essentially refers to something in the nature of public benefit, the exact nature of this benefit and the precise extent of the public element have in recent years given the courts much difficulty. In addition, the problem of who is to determine whether or not a benefit is being conferred has also been raised.

Formerly, it had been thought that the court "must stand neutral"[23] and hold charitable what the settlor had so regarded even though it might consider "the opinion sought to be propagated foolish or even devoid of foundation."[24] However, this is manifestly unsatisfactory, and a different view was taken by Russell J. (as he then was) in *Re Hummeltenberg*,[25] where a trust for the training of mediums was sought to be supported as being charitable. Russell J. stated that:[26]

> . . . no matter under which of the four classes a gift may *prima facie* fall, it is still, in my opinion, necessary, in order to establish that it is charitable in the legal sense, to show (1) that the gift will or may be operative for the public benefit, and (2) that the trust is one the administration of which the court itself could, if necessary, undertake and control.

The second requisite had been established as long before as in *Morice* v. *Bishop of Durham*[27] and will be discussed below, but the first, that it is the court's duty to determine whether a given purpose is for the benefit of society was more novel and was not firmly established until approved by the House of Lords in *The National Anti-Vivisection Society* v. *I.R.C.*[28] In that case Lord Wright declared that[29]

> . . . trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value. The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears.

If, then, a gift for education is charitable only if the education proposed will be beneficial to the community even if prima facie it will be assumed so, then a question of almost overwhelming import is raised: what does "beneficial to

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[23] *Re Foveaux, Cross* v. *London Anti-Vivisection Society* [1895] 2 Ch. 501, (1895), 64 L.J. Ch. 856, per Chitty J.

[24] *Thornton* v. *Howe*, (1862), 31 L.J. Ch. 767.

[25] *In Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance*, (1923), 92 L.J. Ch. 326.

[26] *Ibid.*, at p. 328.

[27] (1805), 10 Ves. 522.

[28] [1947] L.J.R. 1112.

[29] *Ibid.*, at p. 1115.

the community" mean, and by what value standards is such benefit to be judged? Before we attempt to answer this question, let us look first at how it has been dealt with in the cases. This will be a short excursion, for in very few cases has the criterion of benefit been dealt with at all.[30] I have mentioned *Re Hummeltenberg*, and at this point reference might also be made to *Gilmour* v. *Coats*,[31] and to the reported testamentary vagaries of Mr. and Mrs. G. B. Shaw. In the *Gilmour* case, the House of Lords held that a completely contemplative order of Carmelite nuns was not a proper charitable object because the nuns' prayers were insufficiently beneficial to come within the third of Lord Macnaghten's categories unless one were to assume true beliefs peculiar to the Roman Catholic church, which the House of Lords refused to do, and because the benefit of the cloistered example was too "indirect, remote, imponderable, and, I would add, controversial."[32] As mentioned, the House refused to assume the truth of any given religious belief:[33]

> It is no doubt true that the advancement of religion is, generally speaking, one of the heads of charity. But it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing what they cannot prove: the court can act only on proof.

Presumably, then, "the promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it."[34]

In *Re Shaw's Will Trusts, National Provincial Bank Ltd.* v. *National City Bank Ltd.*,[35] a trust to teach social graces to the Irish was held a valid charitable trust. Vaisey J. stated that "whatever may be my own personal views about this type of education, they have nothing to do with the case. It is education

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[30]The *Hummeltenberg* test was approved by the Court of Appeal in *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] 1 Ch. 557, but as mentioned, was not finally accepted as law till adopted by the House of Lords in the *National Anti-Vivisection* case. Until that time several cases adopted an approach similar to that taken in the *Foveaux* case. An example of one of the latter type of cases, this time a trust for the advancement of religion, is *Re Knight*, [1937] 2 D.L.R. 285. There are at least hints in the judgment of the Supreme Court of Canada in *Cameron* v. *Church of Christ, Scientist* (1918), 57 S.C.R. 298, that foreshadow the test laid down in England in *Re Hummeltenberg*, however. Now that that test is established, the cases which consider at length the question of benefit are still sparse. In many decisions it is apparently assumed and in others it is shortly so held, without reasons. See *Re Delius, Re Levien, Royal Choral Society* v. *I.R.C., Re Central Employment Bureau for Women and Students Careers Ass'n. Inc.*, [1942] 1 All E.R. 232, *In Re Price* [1943] Ch. 422, *Re British School of Egyptian Archaeology, Murray* v. *Public Trustee* [1954] 1 All E.R. 887. No doubt, in many cases such a bare finding or such an assumption is more or less justified because of the prima facie presumption of benefit under the first three heads—see Lord Wright, *supra*, footnote 29—and because of binding or persuasive precedent. For instance, see *Wilson* v. *Toronto General Trusts Corp'n and Saskatchewan University Board of Governors*, (1954) 11 W.W.R. (N.S.) 302, aff'd. (1954) 12 W.W.R. (N.S.) 302. While this might be thought to simplify the problem somewhat, when it is remembered that while the question of what is a charity is a question of law —*vide, the Royal Choral Society* case—the question of whether a given purpose is for the benefit of the public is a question of fact—see the *National Anti-Vivisestion* case, passim—and hence precedent is, or should be properly, only of the the slightest assistance. As to the presumption in favour of benefit, a very serious question is raised as to whether it is proper to resort to adjectival equivocations to resolve substantive dilemmas.

[31][1949] A.C. 426.

[32]*Ibid.*, at p. 447.

[33]*Ibid.*, at p. 446.

[34]*Keren Kayemeth Le Jisroel, Ltd.* v. *I. R. C.*, [1931] 2 K.B. 465 at p. 477, per Lord Hanworth M.R.

[35][1952] 1 Ch. 163.

of a desirable sort, and which . . . might have most beneficial results."[36] With respect, the learned judge appears to have attempted to absorb in his judgment irreconcilable lines of authority for, before finding the trust in the interests of society, he had said:[37]

> How the people of Ireland will react to such intensive treatment as the testatrix appears to envisage I ought not to speculate, nor am I concerned to consider how far its application to them will be considered to be, or be in fact, beneficial. The court ought not to weigh the merits of particular educational methods . . .

However, in *Re Shaw*,[38] where the great dramatist's attempt to found a trust to reform the English alphabet came up for consideration, Harman J., in the course of a brilliant and literate judgment, faced the problem squarely:[39]

> I feel unable to pronounce that the research to be done is a task of general utility. In order to be persuaded of that, I should have to hold it to be generally accepted that benefit could be conferred on the public by the end proposed. But that is the very conviction which the propaganda based on the research is designed to instil. The testator is convinced, and sets out to convince the world, but that he considers the proposed reform to be beneficial does not make it so any more than the fact that he describes the trust as charitable constrains the court to hold that it is.

The above, I believe, are the only cases following the *National Anti-Vivisection* case in which this aspect of the problem of benefit to society has really been considered, but this is not to imply any criticism of Lord Greene M.R. or of Roxburgh J. They may be forgiven for assuming that the arts are so clearly in the best interests of society as to obviate the need for any further discussion. However, it is submitted that the problem should not be so readily dismissed. I have noted before the utilitarian nature of the Preamble to the Statute of Elizabeth. While it is true that religion and education may be exceptions, when it is remembered that, in Viscount Simond's words, an object, to be charitable, must be within the "spirit and intendment"[40] of the Preamble, it is seen not only that there is some difficulty in fitting non-material or intangible objects into the spirit and intendment of the Preamble, but also that non-material or intangible objects might well be regarded, in this context, with suspicion. Previously, I have quoted from the judgment of the House of Lords in *Gilmour* v. *Coats* with respect to religious purposes. Let me now cite Lord Wright with reference to charities coming under the fourth head: "I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits . . . ."[41] It must be remembered that this is one of the heads under which trusts for the advancement of the fine arts are said to be charitable.

But whether a trust for the advancement of the arts is sought to be justified as charitable under the fourth head or under the second head, the question must still be asked whether the arts are sufficiently beneficial to society to be classified as charitable. In answering this question, all consequences of so doing must be regarded. The probable consequences of fostering

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[36] *Ibid.*, at p. 172.

[37] *Ibid.*, at p. 168.

[38] [1957] 1 W.L.R. 729.

[39] *Ibid.*, at pp. 740-1.

[40] See *supra*, footnote 8.

[41] *Supra*, footnote 28, at p. 1120.

the arts might include a growth in the number of those professionally involved and in their social status, an increase in the quantity and possibly in the quality of artistic expression, an increase in size and perception of audiences, and, as a corollary, a possible decrease in popular ignorance and imperception. On the other hand there might be some shift in the prevailing value standards of our society with consequent diminution of our present material standard of living, or, at least, of our rate of technological advance. I do not, of course, attempt to assess the degree of any of these suggested changes, but only to list them as possible consequences of fostering the arts generally. Furthermore, it is usually in civilizations in their later periods—from full maturity to decadence—that the arts are most highly regarded, although they may not necessarily be in their most vigorous state,[42] just as puritanism, an important social force in our civilization, tends to deprecate the social utility of all forms of artistic expression. I think, then, it is fair to say that there would be much disagreement as to the social value of the arts. While it is no doubt true, in the words of Lord Wright, that "this is not the place . . . to debate whether utilitarian or intuitionist ethics is truer theory,"[43] it must at least be admitted that at best the benefits derived from the arts are in large measure "indirect, remote, imponderable, and, I would add, controversial."[44] We have the category of education, it is true, but, as has been remarked, all life, in the sense that it is experience, is education,[45] and it would be manifestly impossible to define the term so broadly. Nevertheless, once it has been admitted that "education" embraces more than vocational training, more than training that will be of use to society in a purely material sense, then surely it must be conceded, in Lord Greene's words, that "the education of aesthetic taste is one of the most important things in the development of a civilized human being."[46] On the broader question of social values, a society and a system of law which for any purpose refused so to hold would, it is submitted, be woefully inadequate.

However, to agree that the arts are, generally speaking, proper objects of charity does not dispose of a question raised in the judgment in *Re Delius,* although not by the facts of that case, since it was admitted that the works of Delius were of high musical quality. Roxburgh J. said:[47]

> I do not find it necessary to consider what the position might be if the trusts were for the promotion of the works of some inadequate composer. It has been suggested that perhaps I should have no option but to give effect even to such a trust. I do not know but I need not investigate that problem, because counsel who have argued before me have been unanimous in the view that the standard of Delius's work is so high that the question does not arise in the present case.

However, his remarks concerning the social and beneficence of "all that can be truly called music" serve as some indication of the position he might take were the works of some lesser composer to come in question. This point was in fact

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[42]Most of the above is taken, no doubt in an oversimplified state, from my readings in Schopenhauer and Toynbee. As to the last point the Nietzsche of the Birth of Tragedy at least would probably disagree.

[43]*Supra,* footnote 28, at p. 1119. There is no doubt as to the writer's position.

[44]*Supra,* footnote 32.

[45]By Lord Simonds, in *Gilmour* v. *Coats, supra,* footnote 31.

[46]See *supra,* footnote 13

[47]*Supra,* footnote 1, at p. 552.

raised in the *Royal Choral Society* case, but Lord Greene was able to dispose of it without facing the essential question.[48]

> An attempt was made in the argument for the Crown to say that one particular performance, namely "Hiawatha", was something which had no educative or useful value; and fell so far below some assumed standard of music that it must be regarded as nothing more or less than a popular entertainment. I really do not know on what ground that argument was based. "Hiawatha" . . . is, obviously, . . . a Choral work. Of its merits I know nothing; nor is there any evidence or finding about that.

While it can no doubt be assumed, granted the charitable nature of the arts generally, that a particular representative is *prima facie* an adequate one, it is perfectly conceivable that since evidence as to social benefit is receivable, evidence tending to show artistic inadequacy might well be tendered, and the situation, in the light of the possible variance of artistic standards, might well take on some of the difficulties experienced in *Gilmour* v. *Coats*, especially in regard to the work of contemporary artists. For instance, while it may be admitted that Igor Stravinsky and Bela Bartok are adequate composers, would the same necessarily hold true of Aaron Copeland or George Gershwin? Again, while James Joyce and William Faulkner may be acceptable novelists, what of Ernest Hemingway or Samuel Beckett? Surely the winning of a Nobel Prize is not to be the test. And what of the claims of that embarrassing poor relation of established musical expression, Jazz? Although the problem may well seem impossible of solution, so long as the settlor's intention is not to be conclusive it would seem to be the court's duty to decide. It is submitted that this can only be done in a way flexible enough to accommodate almost every author and artist who takes himself seriously, but even such an approach, it must be admitted, has its defects.[49] In any event, it would be easy to hold that popular art (which can stand by itself financially in any event) has no claim to rank as a charitable object, unless perhaps the proposed trust be for a study of its anthropological significance.

Before leaving this subject, one point in regard to modern art should be taken. The distinguished Spanish philosopher, the late Jose Ortega y Gasset, has stated of modern art that[50]

> . . . the characteristic feature of the new art, is in my judgment, that it divides the public into . . . two classes . . . This implies that one group possesses an organ of comprehension denied to the other — that there are two different varieties of the human species. The new art addresses itself not to everybody, as did romanticism, but to a specially gifted minority . . . Through its mere presence, the art of the young compels the average citizen to realize that he is just this — the average citizen, a creature incapable of receiving the sacrament of art, blind and deaf to pure beauty.

Assuming this to be true, it must be conceded that the bulk of mankind is entitled properly to regard this art as not being in any way beneficial to them. I will return to this point, but in the present context it is sufficient to say in

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[48] *Supra*, footnote 11, at p. 650.

[49] This is not submitted as a test, only as one possible empirical position. As a test it is obviously contradictory to the rule in the *National Anti-Vivisection* case—i.e. it would allow the motive or belief whether of the settler or of the body in question, if any, to govern. All that is meant is that if the courts insist on deciding categorically whether the purpose will inevitably be beneficial, the scope of charitable educational trusts will be reduced to the vanishing point. No one, least of all the courts, would appear to desire this.

[50] Ortega y Gasset, The Dehumanization of Art, (Doubleday—1956), at p. 6.

this sphere at least enlightened opinion is to govern[51] and modern art is unlikely to be discarded from the category of legal charity merely because the bulk of mankind will remain perpetually indifferent to it. To a lesser degree, this is true of all art worthy of the name.

In *Re Delius* the fact that the trust was to promote the work of one composer only was sought to be used to defeat its validity. Roxburgh J. disposed of this objection shortly, and, it is submitted, in admirable fashion:[52]

> The point which has been made — and it is one of interest and importance — is that first of all this trust is not a trust for the promotion of music in general but the music of a particular individual composer. That could not of itself vitiate the charitable nature of the trust, because, after all, aesthetic appreciation of music in a broad sense can only be derived from aesthetic appreciation of the works of a larger number of composers. It is the aggregate of the work of a larger number of composers which is the basis of the aesthetic appreciation, and, therefore, if it is charitable to promote music in general it must be charitable to promote the music of a particular composer, pre-supposing (as in this case I can assume) that the composer is one whose music is worth appreciating.

From the above discussion it is clear that the motive of the settlor, save insofar as it defines the disposition, is immaterial. This necessarily follows from a rejection of the view in *Re Foveaux*.[53] Accordingly, in the instant case, Roxburgh J., was able to hold that the testatrix' wish to enhance her husband's reputation — a laudable although obviously not charitable aim—was of no consequence.[54]

> . . . this trust was created by the widow of Delius, and nobody would doubt that, amongst the many motives which actuated her, affection for her deceased husband was to be found. But one must be careful to distinguish motive from purpose, because motive is not relevant in these cases except in so far as it is incorporated into the purpose. Considering the purposes it is possible to approach the purposes upon the hypothesis that their intention was . . . to enhance her husband's reputation. This is, of course, rather subtle. It is a question which is the cart and which is the horse, because, of course, the more aesthetic appreciation of Delius's music is achieved the more Delius's reputation will necessarily be enhanced . . . But, in my judgment, it is not fair to approach the problem from that point of view. I think that there is every reason to suppose that the testatrix took the view . . . that if the work of Delius was brought before the public in an efficient manner the aesthetic appreciation of the public would grow and, inherent in that growth, would be the enhancement of Delius's reputation, which was in itself a desirable thing, and I for my part refuse to disentangle it. . . . What is quite clear to me is that these purposes would plainly be charitable if for the name 'Delius' the name 'Beethoven' were substituted and, in my judgment, they do not cease to be charitable because in this context the name is 'Delius' and not 'Beethoven'.

So long as this is so, it follows that even if the settlor's motives were reprehensible in the extreme—for example, to weaken a nation's power position by fostering the arts at the expense of technological skills, or, more likely, simply to thwart the expectations of relatives—the court could not but give effect to the disposition if it was convinced that the purpose was socially beneficent in the charitable sense. However, this is manifestly more satisfactory than allowing free play to human eccentricity, "of which the training of poodles to dance might be a mild example."[55]

A point stressed even more strongly in the recent cases on charitable trusts than the above element of benefit is the requirement that a charity have a

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[51]See *supra*, footnote 28, at p. 1120. It is most earnestly submitted that no other position would be tolerable.

[52]*Supra*, footnote 1, at p. 553.

[53]*Supra*, footnote 23.

[54]*Supra*, footnote 1, at p. 553.

[55]Per Russell J., *supra*, footnote 25, at p. 329.

sufficient public element.[56] While this is logically related to the question of benefit, I have found it more useful to discuss the two questions separately.

The law would appear to require, except in the anomalous and possibly incorrect "poor relation"[57] cases under the first head of the established classification, that a trust must constitute:[58]

> . . . such a section of the community as to satisfy the test of public benefit. These words "section of the community" have no special sanctity, but they conveniently indicate first, that the possible . . . beneficiaries must not be numerically negligible, and, secondly, that the quality that distinguishes them from other members of the community, so that they form themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.

or, it has been held, to a particular employer.[59] In the case of charities under the fourth head, it may be that an even more stringent public element is required. This, at any rate, was the view taken by Viscount Simonds and by Lord Somervell in *I.R.C.* v. *Baddeley et al.*:[60]

> . . . a trust to be valid under this head would normally be for the public or all members of the public who needed the help or facilities which the trust was to provide.

As to the narrower test, there can be no doubt that a trust such as the instant one is sufficiently "public" in nature, but insofar as such a trust is sought to be justified as coming under the fourth head there may be somewhat more difficulty, especially in light of the remarks made earlier in connection with modern art. But all the public who wish to make use of the facilities provided may do so to some extent, or at any rate, the postulated benefit would extend to them. On this basis, there seems no reason why even the more stringent test of publicity should be satisfied.

Before leaving *Re Delius,* I feel it should be examined in relation to two other developments in the law of charities. The first of these springs from the long established rule that not all objects of public benefit are charitable.[61] Charities only are saved from failing for uncertainty by virtue of the intervention of the Attorney-General and of court directed schemes. This is related to the second of the two requirements of charitable trusts set out by Russell J., in *Re Hummeltenberg* and quoted earlier.[62] Any gift, then, which might not be devoted exclusively to charity is, unless severable, subject to failure for uncertainty. In regard to the fine arts, it would appear that a gift "to foster artistic pursuits"[63] is not charitable, since part might "be expended in a way that

[56]Among cases considering the point, the following is a list of the more notable ones: *Re Compton,* [1946] 1 All E.R. 117, *Williams' Trustee* v. *I.R.C.* [1947] A.C. 447, *Gilmour* v. *Coats,* [1949] A.C. 426, *In Re Cox, supra,* footnote 6. *I.R.C.* v. *Baddeley et al.,* [1955] A.C. 572, *Oppenheim* v. *Tobacco Securities Trust Company, Ltd.,* [1951] A.C. 297.

[57]On these judgment was expressly reserved by Lord Simonds in the *Oppenheim* case, *supra,* footnote 56, and by the Privy Council in *Re Cox, supra,* footnote 6.

[58]*Oppenheim v. Tobacco Securities Coy. Ltd., supra,* footnote 56, at p. 306.

[59]*Ibid.;* see also *Re Cox, supra,* footnote 56.

[60]*Supra,* footnote 56, at p. 615, per Lord Somervell.

[61]For the most consistent and lucid explanation of this point, see the judgments of Lord Simonds in any of the House of Lords decisions referred to in footnote 56. See also *Morice* v. *Bishop of Durham,* (1805) 10 Ves. 522, 32 E.R. 947, *Re Macduff, supra,* footnote 6, and *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341.

[62]*Supra,* footnote 25.

[63]See *Re Ogden, supra,* footnote 9.

nobody would consider charitable; for instance, in merely providing perhaps for one or two individuals paints and paint brushes, or a grand piano which they could play in their drawing-room."[64] But a trust cannot be made charitable by narrowing the scope of its object,[65] from a country, say, to a parish, or, it would follow, from an art to an artist. So it would appear that a trust simply to foster the work of Delius, or of anyone else, might, if incautiously expressed, fail similarly. It is true that in some cases a limitation to charitable purposes will be implied, but these are so few and so uncertain as to offer little cause for encouragement.[66] Careful draftsmanship would thus seem to be essential. In concluding my remarks on this point, it should be noted that insofar as the second of Russell J.'s requirements, quoted above, has application beyond the problem discussed here, it is submitted that if a court is prepared to say whether a trust "to form . . . a union of human beings who desire to further the life of the soul . . . on a basis of true knowledge of the spiritual world"[67] was being carried out, it could without difficulty say whether the trusts in the instant case or in any conceivable related case were being properly executed.

One further development in the law of charity which is of interest is the holding that any body having for its primary object a change in the law, by whatever means, is to be regarded as political in nature and not charitable.[68] Such trusts are said to be invalid:[69]

> . . . not because they are illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

"The law could not stultify itself by holding that it was for the public benefit that the law itself should be changed."[70] This principle apparently holds true whether or not the purposes in question could be effectuated otherwise than by legislation. This is not the position in America, where only trusts for purposes purely political in the popular sense are disqualified from being charitable,[71] nor was it the position taken in the dissenting judgment in the *National Anti-Vivisection case.*[72] However, the rule seems to be firmly established in Anglo-Canadian law.[73] Vain regrets apart, the greatest danger in this rule is the possibility of its extension, an example of which may be found in *Re Shaw,* where the late playwright's visionary scheme was equated with a trust for political purposes even though it neither expressed a desire for the attainment of,

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[64] *Supra,* footnote 11, per Lord Greene M.R., at p. 654.

[65] See the judgment of Lord Simonds in the *Oppenheim* case, *supra,* footnote 56.

[66] They are discussed by Lord Simonds in the *Oppenheim* case, *ibid.*

[67] *In Re Price, Midland Bank Executor and Trustee* v. *Harwood,* [1943] 4 Ch. 422—a gift to the Anthroposophical Society.

[68] This was the position taken in the *National Anti-Vivisection* case, *supra,* footnote 28, by the majority of the House of Lords.

[69] Per Lord Parker in *Bowen* v. *Secular Society Ltd.* [1917] A.C. 406, at p. 492.

[70] Thyssen on Charitable bequests, quoted by Lord Parker, *ibid.*

[71] Restatement, Trusts, s. 374, p. 1159.

[72] *Supra,* footnote 28, per Lord Porter at pp. 1123-24.

[73] In England the *Anti-Vivisection* case is of course conclusive. For a Canadian case following the position taken by the House of Lords, see *Re Patriotic Acre Fund,* [1951] 2 D.L.R. 624, in the Sask. C.A.

nor needed the passage of legislation for its effectuation.[74] If this principle is to be extended so that any purpose envisaging a change in morals, religion, or caligraphy is to be denied charitable statutes, then presumably it would extend also to a trust envisaging a change in artistic standards which, it is submitted, would be undesirable in the extreme. Difficult as it may be to decide on the merits of a proposed change, especially when the court can act only on proof, the shibboleths attaching to changes in the law have less application to other social changes, and a consistent refusal to accord charitable status to projects advocating such changes would not only drastically limit the number of charitable trusts but also encourage undue social rigidity. In connection particularly with the category of education, it would surely be preferable that all schemes rational and serious in nature be held legally charitable. It is encouraging to note that this was in effect the position taken in *Re Shaw's Will Trusts.*[75]

Almost without exception, recent developments discussed have tended to decrease the scope of legal charity. It now remains only to attempt to understand why this should be so. No such attempt, it is suggested, is possible without reference to the favoured legal position enjoyed by charities. Not only do they not require beneficiaries to enforce them, but they are by and large saved from failure due to uncertainty and to violation of the rule against perpetuities (in the sense of indefinite duration, not of remote vesting). But their greatest asset lies in their general exemption from taxation, and it has been suggested that judicial unwillingness to see too many schemes of doubtful social utility being in effect subsidized at public expense has led to many of the recent developments.[76] One learned writer has suggested that a dichotomy of charities into a tax exempt category and a non-exempt category, with the former class being reserved by statute for a very few purposes of undoubted social value, would permit the resolution of many of the inconsistencies in the modern law.[77] He argues that any object sufficiently public in scope and not socially harmful could then be accorded the status of charity from all points of view save that of taxation. The consequent validation of many trusts not positively irrational in object would, it is submitted, be very definitely in the public interest, as "one of the great advantages resulting from charitable trusts is in the fact that they permit experimental tests of ideas which have not been generally accepted."[78] This dichotomy, it is true, could only be achieved by legislation, but it is submitted that such legislation would be preferable to the present state of affairs. It is contended that in forcing themselves to ask whether a given purpose is, as a matter of proof, in the interests of the community, the courts have undertaken a task the implications of which are too imposing to be settled "as a matter of fact" in any courtroom. Further, it is submitted that the recent extension of the rule in regard to political purposes may prove extremely unfortunate, serving only a stultify the law and to bring it into dis-

[74] *Supra,* footnote 38.

[75] *Supra,* footnote 35, at p. 168.

[76] Cross, Some Recent Developments in the Law of Charity (1956) 72 L.Q.R. 187.

[77] *Ibid.*

[78] Restatement, *supra,* footnote 71, at p. 1160.

repute. Other problems, as indicated, do not present so much difficulty, but serve at least to indicate the uncertainty and complexity of the law in this area. It is significant that the superficially simple case of *Re Delius* could force attention on this uncertainty and complexity and that it could, while reaching an eminently satisfactory conclusion, still illustrate so well the generally unsatisfactory nature of the law of charity.