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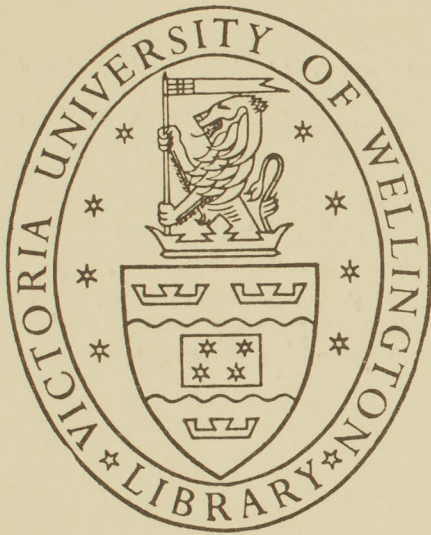
PHILLIP TOYE

Charitable Bodies and the Consequences of
their Incorporation



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SYNOPSIS

A study of various aspects of the law relating to charitable bodies in New Zealand with particular reference to fiscal privileges, exclusiveness of charitable objects and the consequences of such incorporation.

PHILLIP TOYE

Charitable Bodies and the Consequences of
their Incorporation

The main purpose of the paper is to examine one particular consequence of the incorporation of

Research Paper for the Law of
Bodies Corporate and Unincorporate

LL.M. (LAWS 523)

Recent common law developments provide the basis for the concluding analysis and the significance of this analysis with respect to the incorporation of objects

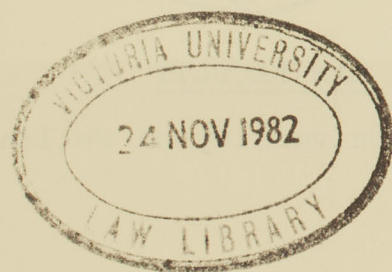
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I. INTRODUCTION

The purpose of this paper is to examine a particular class of charitable organisation, the charitable corporation, and the political and legal issues which arise in respect of its role in modern society. The political issues generally apply to all charities but are more pertinent in respect of charitable corporations because of their greater size and influence. The issues to be examined include the justification for their fiscal privileges, the accountability to the public for their policies, the degree of supervision exercised over them and in particular the degree of control which they possess over the application of their corporate property.

In the United States in particular, and also in Britain, these issues have received widespread attention but in New Zealand they have for a number of reasons attracted limited interest. There are four principal reasons for this:

First, there is the lack of sources of information on charities in New Zealand. It has been observed that the reason for this is:¹

Unlike the U.S.A. where public information about philanthropic trusts is available from information compulsorily filed with the Inland Revenue Service, or the United Kingdom where at least a number of trusts must be

registered with the Charity Commissioners, there is no statutory requirement in New Zealand for a trust or foundation, as such to be registered or to provide information for a public record.

Secondly, charitable trusts and foundations in New Zealand appear from the information available to be significantly less in number and size than those in the United States and Britain. The largest foundation in the United States, the Ford Foundation, possessed \$3700,000,000.00 of assets in 1968 compared with the \$3600,000.00 of assets possessed by the largest New Zealand foundation, the J.R. McKenzie Trust.

Thirdly, New Zealand charitable bodies have usually restricted their financial support to groups and purposes of a non-controversial nature.

Fourth, in New Zealand the responsibility for welfare services and charitable funding has been largely assumed by the State.

II. CHARITABLE BODIES GENERALLY

A. Classifications

The term 'charitable corporation' is essentially a legal as opposed to a functional classification.

Included in the term 'charitable corporation' are various charitable foundations and trusts and various voluntary and welfare agencies of a charitable nature,

which have attained corporate status.

A foundation has been defined "as a non-governmental, non-profit organisation, having a principal fund of its own and established to maintain or aid, social, educational, charitable or other activities serving the common welfare".² An example of a New Zealand foundation is the Todd Foundation founded in 1972 by Todd Motors Limited. The net annual income is applied in New Zealand or any other part of the world for any charitable purpose or purposes according to the discretion of the trustees. The Foundation operates in the field of education, social welfare, science and medicine, arts and the humanities through grants to institutions and organisations both large and small. Its net assets are valued at \$1,000,000 with its annual revenue and expenditure being approximately \$70,000.00. A foundation is generally a large and organised form of charitable trust although the trust element is not essential.

While charitable foundations and trusts carry out the funding role of charity, voluntary and welfare agencies on the other hand carry out the more active service role. Such agencies are generally funded through either Government funding, public donations, or contributions from charitable trusts and foundations or a combination thereof.

B. Charitable Trusts and Foundations Under Scrutiny

1. Introduction

The modern role of foundations and charitable trusts as tax-exempt income earners and distributors of considerable size and influence in the United States and Britain has prompted a close scrutiny of their operations and a revaluation of their role in modern societies which have developed the welfare state to meet their social welfare needs.

2. Arguments Supporting Charities as Privileged Bodies

Some arguments which have been proffered in support of the privileged position of foundations and charitable trusts as they exist today are:

- (a) They encourage our basis humanity and love for our fellow man.
- (b) They positively enhance society for the benefit of all by the relief of poverty, the advancement of education and religion and by assisting other purposes beneficial to the community.
- (c) They are able to provide support for those who need it.
- (d) They can generally act quicker than other agencies.
- (e) They can serve to relieve the State from expenditure in specific areas.

3. Arguments Opposing Charities as Privileged Bodies

Some arguments against are:

- (a) They merely serve to perpetuate the faults in a

political system by dealing with the effects rather than the causes of social problems.

- (b) They receive publicly conferred fiscal benefits without providing any controlling interest or right in respect of the application of its funds to the public in return, except by way of preventing a misapplication of funds, thereby being publicly assisted in shaping social policies according to their controllers own value concepts.
- (c) They are able to compete with tax-paying bodies in the commercial world on an artificially advantageous basis due to their fiscal privileges and so they can operate in a way detrimental to the values of free enterprise, efficiency and productivity.
- (d) They contribute to the erosion of the tax base by attracting gifts and bequests and by generating income which would have been taxable or dutiable had the body not been charitable.
- (e) They are prone to spending a high proportion of their budget on administrative overheads and to duplicating the work of other private trusts or that of Government agencies.
- (f) The motives of contributors to or founders of charities are often self-centred in origin such as the desire to 'buy' a good name.

4. Conclusion

It is the author's view that social problems arise partly due to the faults of particular political systems

but largely due to human nature itself. The action of attending to such problems and of enhancing the quality of life generally is a positive one which should be encouraged and this encouragement should not be withdrawn merely because the possibilities for abuse of the charitable process do exist. However, abuses of the charitable process should clearly be guarded against so that the whole concept of charity is protected.

C. The Accountability and Supervision of Charitable Bodies

Some of the argument against charitable trusts and foundations has been in terms of the lack of supervision over their administration which exists in practice. Trustees or Officers of charitable trusts and foundations in applying the funds under their control are required to apply those funds only in the manner and for the purposes authorised in the trust instrument or constitution of the charity.

The Crown as the 'parens patriae' of charities controls and supervises through the Attorney-General the proper application of charitable funds. The Attorney-General exercises this control through the medium of the Courts who have jurisdiction to make orders in respect of the administration of charities.

Except for incorporated charities which are required to be entered in a register with details of their

objects and powers and which in some cases are required to file accounts and reports, there exists no official record of charities. They are not required to file accounts and there is no satisfactory means of obtaining information about their operation.

The whole question of the desirability of establishing a more effective means of control of charitable trusts in New Zealand was investigated by the Property Law and Equity Reform Committee.³ The Committee was of the view that there was unlikely to be a significant incidence of maladministration of charitable trusts in New Zealand for two reasons:

1. The majority of charitable gifts made in New Zealand are channelled through existing charitable organisations rather than used for setting up new and separate charitable trust foundations. Experience has shown the latter form of charitable gift to be the situation in which abuses were more likely to occur.
2. In many cases the administration of such trusts is subject to audit which provides an opportunity for auditors to check that payments are made in terms of the trust instrument.

The Committee therefore concluded in their report "that the benefit of the establishment of organised supervision would be disproportionate to the resources

and manpower involved".⁴

While accountability appears to be sufficient in practice in respect of the operation of charitable bodies there is a further question which has not been investigated. This is the question of public participation in the exercise of the discretion as to where charitable funds are to be channelled. The argument for public participation is based on the public origin of the fiscal privileges of charity and the desirability of co-ordinating charitable and welfare funding and services. The argument against is that the discretion is adequately exercised in practice, it would involve too much manpower and resources, and discourage prospective charitable donors as well as detrimentally affect immediate and innovative responses to charitable needs. The question of public participation in the exercise of the discretion as to the channelling of charitable funds is one which requires factual investigation before a proper conclusion can be reached and this will not be pursued in this paper.

D. The Business Income of Charitable Bodies

One area of the practice of charities which has been subject to recent investigation is the operation of business and commercial activities as methods to provide tax-exempt income for the purposes of the charity. While a charitable body must be established for exclusively charitable purposes it can carry out

non-charitable activities which are incidental to and consequent upon the way in which the charitable purpose for which alone the body was formed is carried on.⁵ It is therefore possible for a charitable body to carry out a business activity so long as the income is held or applied for the body's charitable purpose and the business activity is not a purpose in itself. The tax-exemption for the business income of charities is provided for in section 61(27) of the Income Tax Act 1976:

income derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual is wholly tax-exempt.

This can be compared with section 360(1)(e) of the Income and Corporation Taxes Act 1970 (UK) which provides that a charity is entitled to exemption from tax:

in respect of the profits of any trade carried on by the charity if the profits are applied solely to the purposes of the charity and either: (i) the trade is exercised in the course of the actual carrying out of a primary

purpose of the charity, or (ii), the work in connection with the trade is mainly carried out by beneficiaries of the charity.

The U.K. provision therefore confines the tax-exempt business income of charities to that derived from activities which are of a charitable character in their own right, such as the selling of religious books⁶ and carrying on a public school.⁷

The extent to which the tax-exemption in respect of income from the business activities of charities in New Zealand applied, was publicly exposed in an article appearing in a 1972 issue of the National Business Review⁸.

The article drew attention to the fact that the Wellington Regional Housing Trustees had been accepted for registration and incorporation as a Trust Board under the Charitable Trusts Act 1957. The trust deed contemplated that the Housing Trustees would comprise three named persons, two persons elected by depositors, and not more than four persons who from time to time might be appointed by the Trustees as additional trustees. The trust deed also made provision for the creation and incorporation of a second trust board. The scheme was for the Housing Trustees to engage in land purchase, development and sale, and the profits after administration costs, were to be paid,

at the discretion of the Housing Trustees, to the Trust Board for its charitable purposes. The profits would not be subject to income tax and could be ploughed back into land development schemes to whatever extent the Housing Trustees thought fit.

The result of this trust's registration was viewed as illustrating that the Charitable Trusts Act existed as a potential tax haven for property speculators, who sought the advantages of incorporation and tax-exemption. However, despite the fact that the property development activities of the trust were described in the trust deed as further and incidental to the charitable purpose of the trust, it is arguable that they did in fact constitute an independent or collateral or even the real purpose of the trust. This proposition is arguable because (1) the trust is not required at any time during its existence to distribute any of its funds to charity but instead may plough them back into the business and (2) the decision in M.K. Hunt Foundation Ltd v. Commissioner of Inland Revenue⁹ which held that in a similar fact situation the property development activities constituted the real purpose of the body in question, thus rendering it non-charitable.¹⁰

Accepting the charitable nature of such a trust however, is it right that its business income should be tax-exempt when (1) it assumes the role of a business rather than that of a charity and (2) it provides scope for generous remuneration to trustees out of that tax-exempt

income. The New Zealand Government is clearly of the view that the current position is not right. The Minister of Finance in his 1982 Budget Speech made the following statement:

Some businesses carried on by charities enjoy an artificially advantageous position in the market through their exemption from income tax. Moreover there has been a recent trend for individual business taxpayers to embark on schemes to secure the tax exemption for charities. A typical scheme involves the creation of a company whose ostensible object is charitable, to conduct the business of a self-employed person. The company's net income after payment of substantial remuneration to that person is then tax-exempt.

It is proposed to introduce legislation which will be effective from 1st April 1983 to ensure that the business activities of charities will continue to be tax-exempt only where the activity is directly related to the principal function of the charity concerned, or where the business employs that category of people for whose benefit the charity was originally established.

The proposed legislation will therefore put the business income of charitable bodies in New Zealand in the same position as it currently exists in the United Kingdom.

One method which has been suggested¹¹ for getting around the United Kingdom provision is for a charitable company to form a subsidiary company to carry out business activities. The profits from the business are donated to the charity and are tax-exempt income of the charitable company and deductible to the subsidiary company. In New Zealand however such method would be ineffective since donations by companies or unincorporated bodies to charitable institutions are not tax deductible.¹²

E. Charitable Privileges

The conferment of the mantle of charity on a trust or body by the law currently entitles that trust or body not only to the privilege of tax-exempt business income but to other privileges as well.

Section 61(25) of the Income Tax Act 1976 grants an exemption from tax in respect of:

"Income derived by trustees in trust for charitable purposes or derived by any society established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual".

The lands of certain specified classes of charities are exempt from liability for rates under Section 5(1) of the Rating Act 1967.

Section 73(1) of the Estates and Gift Duties Act 1968 provides that:

"Any gift creating a charitable trust, or establishing any society or institution exclusively for charitable purposes, or any gift in aid of any such trust, society or institution, shall not constitute a dutiable gift".

Similarly Section 18 of the Stamp and Cheque Duties Act 1971 provides that:

"No conveyance duty shall be payable on any instrument of conveyance to the extent that the instrument -

- (a) ...
- (b) Creates a charitable trust or establishes any society or institution exclusively for charitable purposes; or
- (c) Conveys any property on charitable trust, or to any society or institution established exclusively for charitable purposes, in so far as the trustee, society, or institution purchases the property conveyed, or the trust, society or institution benefits under the conveyance".

It is interesting to note that under the earlier provisions of both the Estate and Gift Duties Act 1955 and the Stamp and Cheque Duties Act 1954 the exemptions only applied to charitable trusts, thereby imposing the additional requirement of showing the existence of a trust. The use of the terms "charitable trust" and "any society or institution established exclusively for charitable purposes" can be interpreted as statutory recognition of the notion that societies or institutions established exclusively for charitable purposes do not always have the character of a charitable trust.

As well as these fiscal privileges charities also enjoy certain legal privileges. For the purpose of determining the validity of a charitable trust, the Courts exempt such trusts from complying with the rules against perpetuity and uncertainty of objects.

Charitable trusts are subject to the rule against perpetuities, which prevents the creation of interests in property which are too vest at too remote a time in the same way as any other trust, except in one respect, that being the case of a gift over from one charity to another¹³. The immunity from the rule of perpetuities is in the sense of a trust which has perpetual duration rather than that which vests at too remote a time. A charitable gift for the perpetual repair of a church will therefore be valid¹⁴.

A charitable trust need not comply with the certainty of objects rule in that it can be for charitable purposes generally, but there must be certainty of an exclusively charitable intention.¹⁵

The automatic attachment of fiscal privileges to a legally valid charity has been judicially criticised by Lord Cross in the House of Lords in the case of Dingle v. Turner¹⁶. His Lordship in considering the question of the validity of a charitable trust commented:¹⁷

Charities automatically attract fiscal privileges, which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the Court is endowing it with a substantial annual subsidy at the expense of the taxpayer ... It is of course unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges for the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The

logical solution would be to separate them and to say - as the Radcliffe Commission proposed - that only some charities should enjoy fiscal privileges. But as things are, validity and fiscal immunity march hand in hand and the decisions in the Compton 17A, and Oppenheim 17B, cases were pretty obviously influenced by the consideration that if such trusts as were there in question were held valid they would enjoy an undeserved fiscal immunity.

Lord Cross's criticism appears valid since bodies which satisfy various criteria and which are therefore legally regarded as charities are not always 'charitable bodies' in the popular sense of the term. A charity is generally defined in laymans terms as a bequest, foundation or institution for the benefit of the poor or helpless. The term 'charitable purpose' in law however is much wider than being for the benefit of the poor or helpless, and while a body to be a valid charity, must be for the public benefit, there is no requirement that the benefit to the public be of any particular degree. If as has already been noted¹⁸, the public or the taxpayer is not to have any degree of control over the exercise of any discretion as to where funds devoted to general charitable purposes are to be

directed, then their financial interest in charitable bodies in the form of tax subsidies should receive an adequate return in the form of requiring a substantial public benefit to be conferred by charitable bodies which enjoy such privileges. However, such a matter is the concern of Parliament and not of the Courts and Lord Cross's attempt to introduce the factor of whether or not a body or trust deserves fiscal immunity into the question of whether or not it is a valid charity was expressly refuted by 3 of the other Law Lords in Dingle v. Turner.

As Viscount Dishorne said:

With Lord MacDermott, I too do not wish to extend my concurrence to what my noble and learned friend Lord Cross has said with regard to the fiscal privileges of a legal charity. These privileges may be altered from time to time by Parliament and I doubt whether their existence should be a determining factor in deciding whether a gift or trust is charitable.

A possible solution to the problem raised by Lord Cross is to restrict the purposes for which fiscal immunity is available and to require a charity to spend a certain proportion of its income for those purposes during any particular year.

F. Charitable Requirements

For a trust or body to qualify as a charity it must satisfy the public benefit rule and it must be for exclusively charitable purposes. These requirements have been defined in a substantial body of case law with the addition of limited statutory intervention.

1. The Public Benefit Rule

The public benefit rule is comprised of three components:

- (1) The requirement that the 'benefit' to the public must be capable of legal proof;¹⁹
- (2) The requirement that the 'benefit' must be conferred upon the public;²⁰
- (3) The requirement that no substantial private benefit accrue to the members of the charity²¹

An exception to the public benefit rule is a trust or body to relieve the poverty of a very limited class of beneficiaries, not being named or designated individuals.²²

Examples of institutions which are not charitable because they do not comply with the public benefit rule are friendly societies²³ and trade unions²⁴, because they are mutual benefit societies, societies for promoting the interest of a particular profession such as a Law Society,²⁵ and cultural societies which are established not only to promote a cultural purpose but also to provide amusement for its members.²⁶ Those can be compared with institutions for the advancing of some branch of science in the wide sense²⁷ and cultural

societies which are established to promote a cultural purpose and to which amusement and pleasure derived by its members is not a purpose of this promotion but a by-product.²⁸

To comply with the third component of the public benefit rule it will generally be necessary for a charitable organisation to have a winding up clause in its constitution or rules which provides that any surplus assets on winding up are to be disposed of to another legal charity or as a Judge of the High Court directs. The necessity for such a clause is reinforced by the views of the Commissioner of Inland Revenue who requires a charitable organisation to have such a clause in its constitution if its income is to qualify for the tax exemption under Section 61 of the Income Tax Act 1976.²⁹

2. Charitable Purposes

The second requirement of a charity is that it be established for exclusively charitable purposes. The two significant reference points for deciding what is a charitable purpose are the preamble to the Statute of Charitable Uses 1601 and the classifications set down by the House of Lords in IRC v. Pemsel³⁰ which divides charitable purposes into four categories:

- (1) The relief of poverty.
- (2) The advancement of education.
- (3) The advancement of religion.
- (4) Other purposes beneficial to the community which are within the spirit and intendment

of the preamble to the Statute
of Charitable Uses.

There is no general statutory definition of what is a Charitable purpose in New Zealand although there have been statutory references to and definitions of 'charitable purposes' for the purpose of a particular Act.

Section 2 of the Charitable Trusts Act 1957 defines charitable purpose to mean:

... every purpose which in accordance with the law of New Zealand is charitable; and for the purposes of Parts I and II of this Act includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand;

Provided that in Part IV of this Act the term 'charitable purpose' has the meaning specified in Section 38 of this Act.

Section 2 of the Income Tax Act 1976 is similarly unhelpful providing that "'charitable purpose' includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community".

For specific determinations of whether or not a purpose is charitable or not it is necessary to refer to the large body of case law on the subject which won't be dealt with in this paper.

3. Exclusiveness of Charitable Purposes

Of particular interest is the charitable nature of societies or institutions whose objects or purposes are provided for in their rules or constitutions. A society or institution will usually be formed for a number of objects. If it is to qualify as a charity its objects must be of an exclusively charitable nature. The issue which arises is whether an institution with charitable objects is nevertheless non-charitable in law because its objects permit expenditure on non-charitable commercial activities. If the non-charitable activities are incidental to and consequent upon the way in which the charitable purpose or purposes for which the body was formed are carried on the body is charitable.³¹ However, if the non-charitable activities represent a collateral or independent purpose the body is not formed for charitable purposes only and therefore is not a charity.³²

In New Zealand the cases show an interesting distinction in the application of those rules between companies which purport to be charities and companies which are trustees pursuant to a trust deed of a purportedly charitable trust. The approach by the Court in the former situation is illustrated by the case of

M.K. Hunt Foundation Ltd v. C.I.R. 33

In the M.K. Hunt Foundation case the appellant company according to its memorandum of association was formed to carry on the trade or business of builders, contractors, financiers of building schemes etc and the memorandum also contained provision for many other mercantile activities commonly found in the memorandum of association of commercial undertakings. The memorandum declared that no part of the property or income of the company should be paid or transferred by way of dividend, bonus, return of capital, or otherwise howsoever by way of profit to the members of the company, but should be held in trust for the Steward's Trust, an admittedly charitable body for charitable purposes. The appellant company purchased land in connection with its building activities, intending to subdivide it into lots and to sell the lots with houses erected on them.

The issue which arose was whether the transfer of the land was "a conveyance of property to be held on a charitable trust in New Zealand or elsewhere" in terms of Section 69(f), of the Stamp Duties Act 1954, in which case it would be exempt from liability to pay conveyance duty. For Hardie Boys J. to be able to decide this issue it was necessary for His Honour to determine whether the company was a charitable body or not.

As Lord Greene said in Royal Choral Society v. Commissioner of Inland Revenue³⁴ the question of whether a particular body is charitable or not is "a question of fact, save and so far as it may depend upon the construction of written documents".³⁵ Hardie Boys J. was of the opinion that "in the case of a company, one must look at the memorandum of association itself to determine what is the dominant object of the company".³⁶

The crucial consideration in the M.K. Hunt Foundation case was that the memorandum did not require the company to distribute any of its income or funds to charity during the course of its existence, but only required that its property be distributed to charity on winding up. On the basis of this consideration Hardie Boys J. held that the real purpose and object of the company's existence was not to carry out charitable purposes but to carry out the activities of a proper developer. The remoteness of the distribution of the charitable funds of the company from its business activities meant that it couldn't be said in real terms that the business activities of the company were incidental to its charitable purpose.

While in the M.K. Hunt Foundation case the issue was whether the company itself was a charity, in Commissioner of Inland Revenue v. Carey's (Petone and Miramar) Limited³⁷ the issue was whether the particular company in that case was a trustee of a charity.

In Carey's case the respondent company was a duly incorporated company and under its memorandum of association one of its objects was to carry on the business of drapers and furnishing and general warehousemen while another was to act as trustee under any declaration of trust. Under its articles of association the Company was required to account annually for its profits to a Trust Board which had been set up under a declaration of trust and the Board was required thereupon to distribute such profits for charitable purposes. On the winding up of the company any surplus funds were also to be applied for charitable purposes.

The only two shareholders in the company covenanted by deed to transfer to it certain shares and also assigned to it a certain debt owing to them. Transfers of the shares were duly executed, and the deed and the share transfers were presented for stamping. The deed was assessed to 'ad valorem' duty on the assignment of the debt and the share transfers were also assessed to 'ad valorem' duty.

As in the M.K. Hunt Foundation case the issue was whether the transfers were exempt from 'ad valorem' conveyance duty under Section 69(f) of the Stamp Duties Act 1954 as "conveyances of property to be held on a charitable trust".

The question which arose under this issue was whether

the declaration of charitable trust was rendered non-charitable because the trustee company was authorised to use the trust property in conducting a commercial business and where the income of the company could be used in extending that business. The Court of Appeal held that despite the Company's powers the property was nevertheless held on a charitable trust. Gresson P. stated the view of the Court as follows:³⁸

In our opinion the fact that such wide powers - unusual in a trustee - were given, does not negative the charitable nature of the trust. The conduct of the business is subjected to the dominating consideration that the income, when ascertained, shall be paid to the Board to be apportioned exclusively amongst charities. All the wide powers given to the respondent are for the purpose of developing the business and increasing the income yield. It is indeed not uncommon for trustees to be given such powers as to carry on farming or other business for the benefit of the widow or children of a testator; in such a case the whole net income from the investment is held in trust for the nominated beneficiaries. It cannot be doubted that a trust is thus constituted and if the objects of such a trust are indubitably Charitable, can it be contended that it is not a charitable trust?

The decision in Careys case has been recently reinforced by the decision in Cowey Mills & Company Limited v. The Commissioner of Inland Revenue³⁹ of Casey J. who quoted Careys case and held in the Cowey Mills case that a company acting as trustee pursuant to a Trust Deed created for charitable purposes is a trustee for charitable purposes where it is required in its memorandum of association to hold its assets and profits as trustee for charity despite the fact it is otherwise authorised in its memorandum to carry out wide commercial activities.

On a comparison of the cases it can therefore be concluded that in the situation of a company which is seeking to establish itself as a charity pursuant to its own memorandum the degree of commercial purposes which will be considered as incidental to its charitable purpose will be less than in the situation of a charitable trust which transfers its property to a company as trustee. In this latter situation the company's commercial purposes can be wider than in the first situation and still be incidental to the charitable purpose because the purposes of the trustee company are always subject to the declaration of trust.

The incorporation of charities and trustees of charities, as illustrated in the preceding discussion, is a convenient way of operating a charity, particularly

one which carries out commercial undertakings. The concept of incorporation with respect to charities will now be examined.

3. THE INCORPORATION OF CHARITIES

A. The Advantages of Incorporation for Charities

Gower has stated that in the case of companies formed for charitable purposes "incorporation is merely a more modern and convenient substitute for the trust"⁴⁰. What then are the advantages of the corporate form for a charity over the trust or unincorporated body?

The fundamental consequence of the incorporation of a charitable body is that the body acquires its own legal personality separate and distinct from its members. From this separate personality a number of consequences arise.

First, the fact that a corporation is a separate juristic person means that its members are not liable for its debts. If the corporation is a company registered under the Companies Act 1955 however, such a company must have either unlimited liability in respect of its members or liability limited by shares or by guarantee. In the case of charitable companies they will usually be formed as companies limited by guarantee since the public benefit rule precludes the members of a charity from acquiring any private benefit, which is usually the object of the share. Where companies are limited by guarantee the members

are required to contribute a specified amount towards the assets of the company in the event of its being wound up. This position may be contrasted with that in respect of the unincorporated charitable association. Liability for the debts of such an association falls on those persons who are the trustees of the association's property.

Secondly a corporate charity is able to hold its property in its corporate capacity separate and distinct from the property of the members. In an unincorporated charity the property of the association is held on trust and dealt with according to the conditions of its bequest or transfer, which will usually be according to the purposes of the association. Where a number of trustees hold the legal interest to the property a number of complications arise. Firstly the trustees, unless themselves incorporated bodies, will ultimately have to be changed and secondly all dealings in the association's property will require the consent of at least a majority of the trustees. This second complication will be especially inconvenient if the charity is carrying out commercial dealings on a regular basis, with the result that most such charities are either themselves incorporated or their property is held by an incorporated trustee. Prima facie, an incorporated body holds its general property both legally and beneficially but in the case of charitable corporations, the application of the trust concept to such bodies has caused some confusion with respect to how a charitable corporation holds its general property. This issue will be discussed

later in the paper. The change of members of a charitable corporation leaves its property unaffected and the claims of the corporations property will be merely against its own property as distinct from that of its officers and members.

Thirdly, a corporate charity is able to sue and be sued in its corporate name. Trustees may sue and be sued on behalf of or as representing the property of which they are trustees.⁴¹ Where the members of an unincorporated charity wish to take an action they are limited to taking a 'representative action' where they are a group of persons having the same interest.⁴²

A fourth advantage of incorporation is that the corporate body as an artificial person has perpetual succession, subject to its dissolution, unaffected by the death or incapacity of its members or officers. In the case of an unincorporated body its life depends on that of its members because they individually make up the body.

These are the principal advantages of incorporation for a charity but there are disadvantages as well, the principal disadvantages being the formality, publicity and expense associated with incorporation. Incorporation is a status granted by statute. In the case of charities there are four methods of incorporation by statute and the degree of formality, publicity and expense associated with their incorporation depends upon the particular method used.

B. The Methods of Incorporating Charities

A charitable corporation may be created in New Zealand by one of four methods:

- (1) Incorporation under the Companies Act 1955;
- (2) Incorporation under the Incorporated Societies Act 1908;
- (3) Incorporation under the Charitable Trusts Act 1957;
- (4) Incorporation by Special Act of Parliament.

1. Incorporation Under the Companies Act

The substantive requirements for incorporation under the Companies Act 1955 are provided for in section 13(1) which states:

Any 7 or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability.

In the case of a private company only 2 persons are required.⁴³

Charitable companies are expressly contemplated as being capable of being formed under the Companies Act by virtue of section 33(1) of the

which provides that such companies may apply to the Governor-General to have the word "Limited" dispensed from their name. Apart from this provision the Companies Act makes no express distinction between charitable and non-charitable companies.

The formal requirements of incorporation under the Companies Act include providing a sufficiently detailed memorandum of association⁴⁴ and articles of association⁴⁵ having a registered office⁴⁶, keeping a register of its members⁴⁷ appointing at least 2 directors in the case of a public company⁴⁸ and at least 1 director in the case of a private company⁴⁹, appointing a secretary⁵⁰ and keeping a register of its directors and secretaries.⁵¹

The publicity involved in being registered as a company under the Companies Act is mainly through having the details of its memorandum of association, articles of association, date of incorporation, indebtedness, directors, secretary, shareholding and financial accounts held by the Registrar of Companies for public inspection. A company must also hold an annual general meeting⁵², keep full and proper books of account⁵³ and have its accounts audited.⁵⁴

The fee payable for the registration of a company is \$130.00.⁵⁵

2. Incorporation Under the Incorporated Societies Act

Before any society can be incorporated under the

Incorporated Societies Act 1908, it must comply with both the substantive and procedural requirements of the Act:

Any society consisting of not less than 15 persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act.

An association formed for charitable purposes is clearly associated for lawful purposes and not for pecuniary gain, which in this context means for the pecuniary gain of the members.

The procedural requirements are set out in section 7 of the Act which requires two copies of the rules of the society with an application for incorporation in the prescribed form thereon, signed and attested in the proper manner. Also required are the prescribed fee and a statutory declaration made by an officer of the society or by a solicitor to the effect that a majority of the members of the society have consented to the application, and the society have consented to the application, and that the rules so signed or sealed are the rules of the society.

The publicity associated with incorporation as an incorporated society involves disclosure of its rules

and registered office through the Registrar of Incorporated Societies who may also require a register of members⁵⁶ and financial statement⁵⁷ to be delivered.

The fee for registering an incorporated society is \$20⁵⁸.

3. Incorporation Under the Charitable Trusts Act

The substantive requirements to be observed by any trustees or society wishing to be incorporated as a Board under the Charitable Trusts Act 1957 are that the trustees must be trustees of a trust which is exclusively or principally for charitable purposes⁵⁹ or in the case of a society, the society must exist exclusively or principally for charitable purposes.⁶⁰

The procedural requirements under the Charitable Trusts Act in respect of trustees are that they must make an application for incorporation in the prescribed form signed by a majority of the trustees, and if they are trustees for the general purposes of any society then that society must not be incorporated and the society must authorise the incorporation.⁶¹ In respect of a society an application for incorporation must be made in the prescribed form signed by not less than 5 members of the society or by a majority of the trustees of the society. The society or its trustees must not be incorporated and the application must be authorised by the society.⁶² In addition the applications for incorporation must be properly signed and attested and

have annexed to them copies of the relevant documents regarding the trusts on which any property is held by the applicant, and in the case of a society, its rules or constitution.

The details of a board of trustees or of a society incorporated under the Charitable Trusts Act, which are supplied on the application for incorporation are open for public inspection. However, such an incorporated body is not required to keep accounts or make an annual financial statement. A further advantage is that incorporation under the Act is exempt from fees.⁶³

4. Incorporation By Special Act of Parliament

A charity can be incorporated by its own special Act of Parliament which may be either a public or a private Act. Publicly created bodies such as the Maori Education Foundation are created by public Acts whereas private bodies such as family trusts or church organisations⁶⁴ can seek to be incorporated by private Act. In the latter case the body seeking to be incorporated will need to draft its own Bill and submit it to Parliament via its local M.P.

5. A Comparison of Methods

It is clear that in respect of the three first mentioned methods of incorporation for charities, incorporation under the Companies Act involves the greatest formality, publicity and expense while incorporation under the Charitable Trusts Act involves the least formality,

publicity and expense. This ranking in respect of incorporation under the Companies Act, the Incorporated Societies Act and the Charitable Trusts Act reflects the width of the substantive requirements associated with each Act.

Where a charity has been incorporated, an interesting issue is the capacity in which it holds its general property. This will now be examined in Part 4 of the paper

4. THE PROPERTY OF CHARITABLE CORPORATIONS

A. The Methods By and Capacity In Which Charitable Corporations Acquire Property

1. Sources of Property

There are a number of sources of property for charitable corporations. These are:

- (a) Members contributions.
- (b) Public donations.
- (c) Government Grants.
- (d) Investment and business income.
- (e) Transfers for consideration.

2. Legal Methods of Transfer

There are three legal methods by which such bequests gifts or transfers can be made to a charitable corporation

(a) The Unconditional Method

First, there is the unconditional bequest, gift or

transfer of property to a charitable corporation which it takes absolutely as a juristic person. The distinction between gifts to unincorporated and incorporated charities was explained by Buckley J. in the case of Re Vernons Will Trusts⁶⁵. His Honour stated that:⁶⁶

Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose. No individual or aggregate of individuals could claim to take such a bequest beneficially. If the gift is to be permitted to take effect at all, it must be as a bequest for a purpose, i.e. that charitable purpose which the named charity exists to serve. A bequest which is in terms made for a charitable purpose will not fail for lack of a trustee but will be carried into effect either under the sign manual or by means of a scheme. A bequest to a named unincorporated charity however, may on its true interpretation show that the testator's intention to make the gift at all was dependant on the named charitable organisation being available at the time when the gift takes effect to serve as the instrument for applying the subject-matter of the gift to the charities purpose for which it is by inference given. If so and the named charity ceases to exist in the lifetime of the testator, the gift fails (Re Ovey, Broadbent v. Barron⁶⁷)

A bequest to a corporate body, on the other hand, takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee. There is no need in such a case to infer a trust for any particular purpose. The objects to which the corporate body can properly apply its funds may be restricted by its constitution, but this does not necessitate inferring as a matter of construction of the testator's will a direction that the bequest is to be held in trust to be applied for those purposes: the natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially and without the imposition of any trust. That the testator's motive in making the bequest may have undoubtedly been to assist the work of the incorporated body would be insufficient to create a trust.

The donor or transferor in this unconditional situation prima facie runs the risk that by not imposing any trust obligation on the application of the property given or transferred the charitable corporation may change its constitution to include non-charitable purposes and apply that property for those non-charitable purposes. However it may be that while the charitable

corporation does not take that property on trust it nevertheless holds that property as part of its general assets on trust for the charitable purposes in its constitution. The question of the existence and the extent of this obligation will be examined later but the distinction between the taking of a specific gift and the holding of general assets, by a corporate charity was clearly made in Re Vernons Will Trusts where Buckley J., after stating that a corporate charity takes an unconditional gift absolutely continued⁶⁸.

Whether and how far it would be right to regard the funds of the incorporated guild as subject to a charitable trust, I do not pause to consider, beyond pointing out that any assets which it took over from the unincorporated guild would appear to have been subject to such a trust. Trust or no trust, however, it is true to say that the assets of the incorporated guild were all effectually dedicated to charity.

(b) The Transfer Subject to a Moral Obligation

A second method which has been advanced in an article by Rickett⁶⁹:

arises on the transfer of property absolutely to a natural or juristic person, where the right of absolute discretionary use (existing in law) is limited by the presence of a moral

or non-legal obligation to the transferor
from the transferee.

Such a "moral or non-legal obligation" would have to arise through an unexpressed understanding which is assumed because of the values attributed to the transferor and the transferee since any expression of an intention on the part of the transferor to make the gift on transfer for certain purposes would be sufficient to create a trust.

3. The Transfer Subject to a Trust

The third method is where a donor or transferor of property to a charitable corporation expressly makes the gift or transfer subject to the condition that it be applied for certain specified charitable purposes, in which case the charitable corporation only holds the legal interest in the property as trustee.

B. The Requirements of a Valid Trust

Before a valid trust can be constituted there must be "sufficient words to raise it; a definite subject and a certain or ascertained object".⁷⁰ These three requirements are usually referred to as the three certainties - certainty of words, certainty of subject and certainty of object. Charitable trusts like ordinary trusts require certainty of words and certainty of subject but they constitute an exception to the rule that the objects of a trust must be certain. A

A charitable trust merely requires certainty of an exclusively charitable intention.

A trust is generally created when the settlor by words of an imperative nature manifests an intention to create a trust by irrevocably devoting the beneficial interest in his property to specified persons or purposes so as to exclude all beneficial interest to himself.⁷² In the case of a charitable trust the specified persons or purposes will be of an exclusively charitable nature.

The instruments commonly used to create a charitable trust are trust deeds and wills. In the first case the trust is an intervivos trust created by a specific trust instrument declaring that certain property is to be held on trust for charitable purposes. In the second case the trust is a testamentary trust created by the terms of the will stating that a specific bequest is to be held on trust for charitable purposes.

C. Trust And Contract

The question which arises in respect of property acquired by a charitable corporation from its members in accordance with its constitution is whether the terms of such a constitution, establishing the corporation for exclusively charitable purposes create a charitable trust in respect of such property.

It is doubtful in the absence of an express declaration of trust in respect of the property acquired from members and a specific identification of the nature and value of the property, whether such acquisitions exhibit the necessary certainty of words and certainty of subject.

In the case of a charitable company incorporated under the Companies Act 1955, the memorandum and articles constitute a contract between the company and each member.⁷³ In the case of a charitable company this is clearly a contract for the benefit of third persons. The cases show however, that the Courts will not imply a trust in a contract for the benefit of third persons where an intention to create one cannot be discovered in the surrounding circumstances. Thus Lord Greene M.R. said in Re Schebsman⁷⁴:

It is not legitimate to import into the contract the idea of a trust where the parties have given no indication that such was their intention. To interpret this contract as creating a trust could, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third.

And in the same case du Parcq L.J. said⁷⁶:

It is true that, by the use possibly of unguarded language therefore a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable.

In the case of a non-charitable company the memorandum and articles do not create any trust obligation over the company's property⁷⁶ and unless they provide for something to the contrary, they contemplate being subject to section 18 of the Companies Act which entitles a company to change its objects. Similar considerations apply in the case of other charitable corporations not subject to an express declaration of trust in their memorandum.

Where the terms by which a charitable corporation acquires its general property do not create a charitable trust

do the special considerations which apply to charities mean that the Courts will nevertheless provide that the general assets of a charitable corporations are held on trust?

D. The Nature of a Charitable Corporations Obligations to Charity

1. The Construction Industry Training Board Case

The special consideration which is applicable to charities is the protective role of the Crown which is exercisable through the Courts. The nature of the Crown's role and the jurisdiction of the Courts as it applies to charitable corporations was specifically examined in the English case of Construction Industry Training Board v. Attorney-General.⁷⁷

The facts of the case were that the Board was created as a body corporate by statutory instrument made under the Industrial Training Act 1964 (U.K.) and its functions under Section 2(1) of the Act, were to make provision for the training of persons employed or to be employed in the construction industry and for research into matters relating to such training. Under the Act financial grants to the Board, investments of any money made by it, proposals for the exercise of its functions and the appointment of its members, were under the control of the Minister of Labour who was empowered to amend or revoke any order or to wind up training boards and to make provision for the application

of surplus moneys.

The Board submitted an application to the Department of Education and Science for registration as a charity under the Charities Act 1960 (U.K.). The application was refused on the ground that an essential element of a charity, as defined by section 45(1) of the Charities Act was that it was controlled by the High Court in the exercise of the Court's jurisdiction with respect to charities and that that essential element was lacking.

The Court was required to consider first the nature of the Court's jurisdiction with respect to charities, second whether the Construction Industry Training Board was a charity of a nature which came within such jurisdiction and thirdly whether the provisions of the Industrial Training Act operated to oust this jurisdiction.

It was the view of the Court that the jurisdiction of the Courts with respect to the proper application of charitable funds was a branch of the Courts jurisdiction in relation to trusts. The Training Board was however a charitable corporation not subject to any express or implied trust. However, the Court in the Construction Industry Training Board case was of the view that charitable funds were held in 'trust' in the sense of the application of the Court's jurisdiction even where no express or implied trust was created. Buckley J. stated that⁷⁸:

Where funds are given for charitable purposes in circumstances in which no express or implied trust is created, the Crown can regulate the application of these funds by means of a scheme under the sign manual. Where the Crown invokes the assistance of the Courts for such purposes, the jurisdiction which is invoked is I think a branch of the Courts jurisdiction in relation to trusts.

Buckley J. refers to examples of the Courts jurisdiction with respect to charities and then continues thus:⁷⁹

In every such case the Court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is vested but is devoted to charitable purposes, that is to say, held upon charitable trusts.

Is this statement to read as meaning that where "funds are given for charitable purposes, in circumstances in which no express or implied trust is created", that the Court will nevertheless hold that as charitable funds they are held upon a charitable trust and that their beneficial ownership is not in the person or body in whom their legal ownership is vested? It is important in

reading Buckley J's. statement to emphasise that it is qualified by the words, "In every such case the Court would be acting". These words show that in respect of the Court's jurisdiction with relation to charities, it acts on the basis that property devoted to charitable purposes is held upon charitable trusts, but that that does not necessarily mean that such property is in fact held upon such trusts. What is recognised is that the beneficial entitlement at any one time, as opposed to the beneficial ownership, of funds devoted to charitable purposes is necessarily, as a consequence of the public benefit rule, not in the legal owners of those funds, but in charity itself. It cannot therefore be concluded from the Construction Industry Training Board case that property devoted to charitable purposes is necessarily held upon charitable trusts, but only that for the purposes of the Court's jurisdiction the Court will act on such a basis.

It is now pertinent to see whether this analysis is consistent with the earlier case law and then to examine its validity with respect to recent developments in the area.

2. The Earlier English Case Law

(a) In the case of R v. Special Commissioner of Income Tax, Ex parte University of North Wales⁸⁰ it was held that the property of the Unity College of North Wales was "vested in trustees for charitable purposes". The College was incorporated in 1885

with the object of giving instruction in all branches of a liberal education except theology and to promote higher education generally. The sources of income were - first, voluntary donations, secondly devises and bequests, thirdly a Government grant of 4,000 pounds per annum, and fourthly the payments of pupils.

It was argued by the Attorney-General that:⁸¹

the exemption in section 66 under Schedule A cannot be properly claimed under the general words 'vested in trustees for charitable purposes'. The college is a corporation and the revenue is not vested in trustees, except in particular cases such as a special scholarship.

Cozens Hardy M.R. in holding that the property of the College was "vested in trustees" derives this support from:⁸²

what Lord Herschell said in Scotts Case⁸³;

It cannot be doubted that property held by a body corporate or unincorporate 'for the promotion of education literature science or the fine arts' is technically speaking, held upon a charitable trust'.

However, Lord Herschell was specifically referring to the question of whether or not the purposes of the corporation were charitable and not whether or not the

property was held in trust since the property in question was specifically conveyed on trust. Cozens Hardy J.R. in the University of North Wales case therefore seems merely to have assumed that the property of the corporation was vested in trustees where it was held for charitable purposes.

(b) In the case of Re Manchester Royal Infirmary, Manchester Royal Infirmary v. Attorney-General⁸⁴ it was held by North J. that the fund of a charitable corporation which previous to the body's incorporation by statute had been held in trust, was a 'trust fund' in the hands of the corporation as 'trustees' within the meaning of the Trust Investment Act 1889 and that the power of the corporation to invest its fund was subject to the Act. North J. was of the view "that the money is clearly held on trust for charitable purposes."⁸⁵ However, the two reasons given by His Honour for this conclusion clearly limit the proposition that a charitable corporation holds its general property on trust for charitable purposes.

First the fund of the corporation had been held in trust prior to incorporation and as has already been noted in Re Vernons Will Trusts⁸⁶ the situation of a charitable corporation taking over trust funds is a special case. Secondly, the investment of trust funds falls within the scope of the administration of charitable funds and is therefore subject to the Courts jurisdiction in relation to charities. The fund is therefore considered to be

subject to a 'trust' in the jurisdiction sense of that term. The scope of Re Manchester is therefore clearly limited.

(c) In the case of Re Dominion Students Hall Trust ⁸⁷
Dominion Students Hall Trust v. Attorney-General a company limited by guarantee maintained a hostel for male students of the overseas dominions of the British Empire. The company asked by summons for the sanction of a scheme by which the charity (the benefits of which were restricted to dominion students of European origin) might be administered as part of a wider charity for the benefit of all such students regardless of their racial origin. The company asked also by petition, for the confirmation of a special resolution to alter its memorandum of association, with respect to its objects by deleting in a paragraph of the memorandum, the words "of European origin" which immediately followed the word "students".

The Court authorised the scheme and sanctioned the petition on the basis that the alteration of the terms of a charitable trust will be authorised by the Court where it is necessary to preserve the primary intention of the charity. The fact that the Court treated the charitable company as a trust was probably on the basis (although it is not stated) that the company was created as a 'trust' in its memorandum, since it was named as a 'trust', and not on the basis that it was established for charitable purposes. The latter

proposition was certainly never put forward.

(d) In Re French Protestant Hospital⁸⁸ the directors of a charitable corporation established by royal charter attempted to amend the by-laws of the corporation so as to allow directors who had rendered professional services to the Hospital to receive remuneration. The Court refused to allow the directors to make the amendment on the basis that they were bound by the rules which affected trustees.

It was argued by counsel for the directors that it was the corporation which was the trustee of the property in question and not the directors, and it was accepted by Danckwerts J. that technically this was so. Nevertheless His Honour held that it was the directors who controlled the corporation and therefore it was they who were in the fiduciary position of trustees. As trustees they were required to make use of the property of the corporation "for the purposes of the charitable trust for which the property is held".⁸⁹

This case however has limited application as support for the proposition that a charitable corporation holds its property on a charitable trust. First, the case concerned the nature of the obligations owed by the officers of the charity and not the capacity in which it held its property. Secondly a corporation established by royal charter is a special type of charitable corporation. Thirdly the case concerned a

matter within the scope of the charity's administration and therefore subject to the jurisdiction of the Courts. Fourthly the notion that the corporation held its property on a charitable trust was not subject to argument but was assumed.

(e) In Soldiers', Sailors' and Airmans' Families Association v. Attorney-General⁹⁰ Cross J. said:⁹¹

One starts with this, that the plaintiff, Soldiers', Sailors' and Airmens' Families Association, which is a chartered corporation, is a charitable corporation and accordingly is in the position of a trustee with regard to its funds ... Prima facie, therefore the funds of the Association can only be invested as trust funds under the Trustee Acts.

The significant point to note from this statement is that Cross J. does not state that the corporation is a trustee of its funds but rather that it is "in the position of a trustee with regard to its funds". The reason for this terminology would appear to be that the corporation was not in fact a trustee in the technical sense since no express trust had been created. However it was in the position of a trustee since any misapplication of its funds would constitute a breach of 'trust' subject to the jurisdiction of the Courts, the jurisdiction of the Courts with respect to charities being a branch of its jurisdiction in relation to

trusts. "Trusts' in the jurisdiction sense must therefore include in its reference property devoted to charitable purposes for which a trust obligation as to its proper administration has been assumed by its legal owner, even though no trust has in fact been created. The consequence of this analysis must therefore be that a charitable corporation holds its general property both legally and beneficially but subject to a trust obligation to administer that property in accordance with its constitution and according to the requirements of being in the position of a trustee. There have been two recent English decisions which have supported this analysis.

3. Recent Developments

In the recent English Court of Appeal decision in Von Ernst and Cie S.A. v. Inland Revenue Commissioners⁹² Buckley C.J.. described these earlier authorities as giving support to the view that "a company incorporated for exclusively charitable purposes is in the position of a trustee of its funds or at least in an analogous position"⁹³ clearly showing that he was conscious of not appearing to imply an actual trust in respect of the property of a charitable company but that the trust concept applied to charitable companies in only a limited sense. This analysis is supported in the same case by Bridge L.J. who said that for the purposes of his own judgment he assumed the correctness of a submission by the Crown that "a company formed under

the Companies Acts, though its objects may be exclusively charitable is nevertheless not a trustee of its assets".⁹⁴

This development was then reinforced in the case of Liverpool and District Hospital for Diseases of the Heart v. Attorney-General.⁹⁵ The Liverpool and District Hospital was a charitable association incorporated under the Companies Act 1908 (U.K.) as a company limited by guarantee with the main objects of providing, maintaining and managing a hospital for the treatment of heart diseases and to promote research into the causes and cure of such diseases. Clause 9 of its memorandum of association provided that on the winding up of the association its assets should not be distributed among its members but should be transferred to an institution or institutions having similar objects to those of the association. There was no corresponding provision in its articles of association. A hospital run by the association was transferred to the National Health Service in 1948 and subsequently the association's limited functions as a research institute ceased. In 1978, the Attorney-General presented a petition under section 30(1) of the Charities Act 1960 (U.K.) for the winding up of the company. A compulsory winding up order was made and a liquidator appointed. The liquidator applied to the Court for directions as to whether the assets of the association were to be distributed among its members or to be applied cy-pres.

In the case of any company incorporated under the

Companies Act the surplus assets on a winding up by the Court are prima facie dealt with according to section 265 of the Companies Act 1948 (U.K.) which is identical to section 259 in the New Zealand Companies Act. Section 265 provides that on the winding up of a company; "the Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto". The 'surplus' referred to in section 265 is the assets of the company which remain after they have been "applied in discharge of its liabilities" under section 257(1) of the Companies Act.

Slade J. in the Liverpool Hospital case was of the opinion that this 'surplus' only included those items of property which under the general law were available for the discharge of a company's liabilities. His Honour said:⁹⁶

Thus they will include assets of which the company is beneficial owner, even though the legal title may be vested in other trustees. They will not, however, comprise assets of which the company at the date of its liquidation was merely a trustee (in the strict sense) for third parties or for charitable purposes, even though the legal title may have been vested in it. This much I think is clear.

The issue which initially arose for consideration was whether "a company established for exclusively charitable purposes ex hypothesi holds its general corporate assets as trustee for the general purposes set out in its memorandum of association".⁹⁷ Slade J. after reviewing the earlier authorities on the relationship between a charitable corporation and its general corporate property, stated the nature of that relationship as follows:⁹⁸

The expressions 'trust' and 'trust property' may be, and indeed have been used by the Court in rather different senses in different contexts. Examples of cases where the Court has used the expression otherwise than in their strict traditional sense are to be found in Lord Diplock's review of certain earlier authorities in Ayerst v. C & K (Construction) Ltd⁹⁹. In a broad sense a corporate body may no doubt aptly be said to hold its assets as a 'trustee' for charitable purposes in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said in such a case, that the company is not the 'beneficial owner' of its assets. In my judgment, however, none of the authorities on which Mr Mummery has relied,

including the decision in Construction Industry Training Board v. Attorney-General¹⁰⁰ establish that a company former under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets, so that on a winding up these assets do not fall to be dealt with in accordance with the provisions of section 257 et seq of that Act. They do, in my opinion, clearly establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the Court to intervene in its affairs, but that is quite a different matter.

Slade J. went on to say that he derived strong support for his conclusion that a charitable company was the legal and beneficial owner of its corporate assets in the strict sense from the following considerations:

- (1) Observations made in Bowman v. Secular Society Limited¹⁰¹
- (2) The general intention of the legislature as appearing from the Companies Act
- (3) Statutory definitions which contemplated the possibility of charities existing independent of trusts.

The Bowman case concerned the gift of property to a non-charitable society. Lord Parker of Waddington made the general observation that a gift to a company to be applied at its discretion for any of the purposes authorised by its memorandum is a gift which the

company takes absolutely and his Lordship appears to have had charitable companies in mind when he made the point. However the taking of gifts of property by a charitable corporation and the holding of a charitable corporation's general assets were considered as separate questions in the case of Re Vernons Will Trusts¹⁰² and on this basis the Bowman case could not be considered as a strong supporting consideration in the Liverpool Hospital case.

The second supporting consideration advanced by Slade J. was that:¹⁰³

the concept of a company incorporated under the Companies Act 1948 which is capable of holding any asset whatsoever beneficially, but is nevertheless fully capable of incurring liabilities in its own name and on its own behalf would seem to be inconsistent with the general intention of the legislature as appearing from the Act.

The third consideration was based on the existence of "a number of definitions in the Charities Act 1960 which presupposes that a charity can exist without

a concomitant trust in the strict sense".¹⁰⁴

4. Further Considerations

The proposition that a charitable corporation holds its general assets both legally and beneficially and not on a charitable trust, yet is subject to the rules applicable to charity trustees in respect of the administration of its funds derives support from a number of other considerations.

- (a) First there is the approach of the American Courts as illustrated by the case of Brigham v. Peter Bent Brigham Hospital¹⁰⁵ where Putnam J. said:

We should observe that the corporation contemplated by the will was not to hold in trust in the technical sense of the word the property which it might receive. It was to hold it for its own purposes in the usual way in which charitable institutions hold their assets. Such a holding is sometimes called a quasi - trust ... but the holding does not constitute a true trust.

The American position is summed up as follows:¹⁰⁶

The truth is that it cannot be stated dogmatically either that a charitable corporation is or that it is not a

trustee. The question is in each case whether a rule which is applicable to trustees is applicable to charitable corporations with respect to unrestricted or restricted property.

- (b) Secondly there is the following statement by Ostler J. in the New Zealand case of Mayor etc of the Borough of Lower Hutt v. Minister of Stamps¹⁰⁷:

So long as the conveyance is to a corporation associated for a charitable purpose the conveyance is exempt even though the land is not conveyed to be held in a charitable trust.

- (c) Thirdly there are the New Zealand statutory provisions with respect to the fiscal privileges of charities which refer to both charitable trusts and societies and institutions established exclusively for charitable purposes thereby implying that such societies and institutions do not always have the character of a charitable trust.¹⁰⁸

- (d) Fourthly there is the observation by Buckley J. in the case of Re Vernons Will Trusts¹⁰⁹ that a charity is independent "from the mechanism provided

for the time being and from time to time for holding its property and managing its affairs".¹¹⁰ This clearly implies that the question of how a particular charitable institution holds its property is dependent on the mechanism by which it is created.

(e) Fifth there is the position with respect to the property of municipal corporations in New Zealand. In the case of Waitemata County v. Commissioner of Inland Revenue¹¹¹ it was held by Perry J. that although a breach of the terms on which such a corporation held its property could be restrained by an injunction at the suit of the Attorney-General that this did not:

... mean that a corporation holds its property on trust (in the absence of a specific creation) but rather being a statutory body it must carry out the purposes for which the Legislature has created it. At most it could be said to hold the property in a fiduciary capacity and not on a specific trust.

The same reasoning applies to charitable corporations except that in the case of charitable corporations they are not always created by the legislature but they are nevertheless created to carry out the purposes in their

constitutions.

5. The Effect of the Liverpool Hospital Analysis

One area which is affected by the analysis of whether a charitable corporation holds its property on trust or not is that in respect of a change of objects to other charitable objects or to non-charitable objects.

If a charitable corporation holds its property on trust then the terms on which the property is held cannot be varied or added to, except with the sanction of the Court, by the founder of the trust¹¹³ or by the trustees.¹¹⁴ In Baldry v. Feintuck¹¹⁵ the officers of a university students union which was an unincorporated body were seeking by an amendment to its constitution to apply union funds to objects charitable and non-charitable outside the objects of the union which were charitable. It was held that they could be restrained from so doing. Brightman J. stated the position thus:¹¹⁶

The union is clearly an educational charity and the officers of the union who have power to dispose of the union's funds are clearly trustees of those funds for charitable educational purposes. It is not, therefore, open to the union, by a purported amendment to the unions constitution, to authorise the use of the union's funds for the purpose of promoting an object which may happen to interest the members of the union regardless

of whether such object is charitable and educational or not. In my view that is really what clause 1(2) of the new constitution is achieving. The consequence is that clause 1(2) of the new constitution is not effective.

An alteration of objects in respect of property held on a charitable trust or for charitable purposes may be effected under section 32 of the Charitable Trusts Act 1957 where it is impossible or impracticable or inexpedient to carry out the charitable purpose, or the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain.

The possibility that charitable companies could alter the objects in their memorandum of association to other charitable purposes or to non-charitable purposes was recognised in the Report of the Nathan Committee.¹¹⁷ There it was observed that:¹¹⁸

If however a company is incorporated under the Companies Act 1948, otherwise than with a licence of the Board of Trade granted under section 19 of the Act for the purpose of starting and carrying on a new charity, it will conduct the affairs of the charity under the powers conferred by its Memorandum of Association which may be altered by the members by special resolution under the

provisions of section 5 of the Act for the purposes mentioned in that section. The funds may, then, not be held upon any trusts but may constitute assets of the company applicable for the purposes authorised by the Memorandum and be subject to the debts and liabilities of the company. Such a company may resolve to alter its Memorandum and a question may arise how this alteration affects the application of its funds. As the company is not obliged to obtain the sanction of the Court to an alteration of its Memorandum, it may well become possible for a company formed in this manner to carry on charitable activities, to divert some or all of the funds to purposes which are not charitable. In short, confusion may result between the functions of the company as a trust and under its Memorandum.

In response to this observation Section 30(2) of the Charities Act 1960 (U.K.) was introduced which had the effect of placing the property of charitable corporations in the U.K. on a statutory trust for charity. Section 30(2) provided that:

Where a charity is a company or other body corporate, and has power to alter the instruments establishing or regulating

it as a body corporate no exercise of that power which has the effect of the body ceasing to be a charity shall be valid so as to affect the application of any property acquired under any disposition or agreement previously made otherwise than for full consideration in money or money's worth, or of any property representing property so acquired, or of any property representing income which has accrued before the alteration is made or of the income from any such property as aforesaid.

There has been no similar provision enacted in New Zealand. However, it is pertinent to notice that in the case of the New Zealand Companies Act changes of objects pursuant to Section 18 of the Act "shall not take effect until, and except in so far as, it is confirmed by the Court."¹¹⁹ Unlike the U.K. Companies Act a company in New Zealand wishing to alter its objects must obtain the sanction of the Court. A change of objects by a company under Section 18 must be by special resolution and the change must be required to enable the company:¹²⁰

- (a) To carry on its business more economically or more efficiently; or
- (b) To attain any of its objects by new or improved means; or

- (c) To enlarge or change the local area of its operations; or
- (d) To carry on some business (whether related to its existing business or not) which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) To restrict or abandon any of the objects or powers expressed or implied in the memorandum; or
- (f) To exclude or modify any of the objects or powers set forth in the Second Schedule to this Act; or to revoke or vary any such exclusion or modification; or
- (g) To sell or dispose of the whole or any part of the undertaking of the company; or
- (h) To amalgamate with any other company or body of persons.

These are the criteria which the Court resorts to, to determine whether it has jurisdiction to confirm the alteration. In the case of Re Levin and Co Ltd¹²¹ Smith J. stated the Courts position with respect to changes of objects under the Companies Act as follows:¹²²

The principles then, upon which the Court will act in confirming an alteration of the objects of a company are (i) the Court

will first determine whether it has jurisdiction to confirm the alteration; and, (ii), if the Court has jurisdiction the Court will then exercise its discretion upon principles which require the Court to see (a) that the rights of creditors are protected (b) that the alteration is fair and equitable as between the members of the company and (c) that the interests of those members of the public who may be affected by the alteration will not be prejudiced.

Section 30(2) of the Companies Act 1960 (U.K.) would An attempted change of objects by a charitable company to include non-charitable objects would be unlikely to come under the Courts jurisdiction to confirm the alteration since non-charitable objects do not by their very nature advance or benefit the business of charity. Even if such a change of objects did come within section 18(1) it would not be confirmed by the Court on the basis that members of the public who were to benefit from the charity would have their interests prejudicially affected.

concerning the administration and application of funds A clause in the memorandum of association of the charitable company prohibiting its members from taking the surplus assets on winding up and directing that they be distributed to an outside body has been held to be an object subject to the Courts jurisdiction in the change of objects section of the Companies Act.¹²³

It may be that such a clause is not included in the memorandum but is included in the articles of association which may be altered without the sanction of the Court.¹²⁴ If the articles of association of a charitable company were altered so that the surplus assets of the company on winding up were to be divided among the members then the company would no longer be charitable under the public benefit rule but the change would nevertheless appear to be valid subject to an overriding intention to the contrary expressed in the memorandum.

Section 30(2) of the Charities Act 1960 (U.K.) would therefore only be of little significance in the New Zealand context.

Whether the Trustee Act 1956 applies to charitable corporations in New Zealand is an issue which has not been subject to judicial scrutiny but it is likely that it would apply for two reasons. First it has been held in the U.K. that charitable corporations are trustees for the purpose of their Trustee Act.¹²⁵ Second, the Trustee Act 1956 deals with matters concerning the administration and application of funds and a charitable corporation is considered to be a 'trustee' in this context.¹²⁶

The effect of the Liverpool Hospital decision would appear to be limited to charitable companies as opposed to charitable corporations generally, on the basis

of its reliance on the intention of the Companies Act. However similar considerations apply to charitable societies incorporated either under the Incorporated Societies Act 1908 or the Charitable Trusts Act 1957 and so it may well be extended to these forms of charitable corporations as well.

Due to the fact that the Liverpool Hospital decision draws a distinction between charitable corporations and the concept of the trust it may well be seen as part of a trend away from the trust concept in relation to charitable corporations. An analysis of the cases merely suggests that a charitable corporation is in the 'position of a trustee' in relation to its general assets for the purposes of its general administrative function but is not a trustee in the strict property sense.

5. CONCLUSION

- (1) There is a need for some official central source of information about charities in New Zealand.
- (2) There should be some central co-ordinating body supervising charities in New Zealand.
- (3) The public subsidisation of charities should be recognised by a requirement that charities apply an adequate proportion of their annual income for charitable purposes in each year.

- (4) It is more advantageous for a charity wishing to carry out wide commercial activities through the medium of a company to make the company a trustee pursuant to a trust deed rather than create the company as a charity in its own right.
- (5) The new legislative proposals in respect of limiting the application of tax exemptions to the business income of charities are not only consistent with the position in the United Kingdom, but effective and justified in principle as well.
- (6) Of the various methods available for incorporating a charity in New Zealand the Charitable Trusts Act 1957 provides the method which involves the least formalities, publicity, and expense.
- (7) Unless a charitable corporations property is subject to an express declaration of trust or was previously held on trust by the charity as an unincorporated body, then such property, particularly in the case of a charitable company is held by the corporation both legally and beneficially for the purposes in its constitution. A consequence of this analysis is that prime facie a charitable corporation may change its objects to those of a non-charitable nature, but this option is in fact effectively curtailed in New Zealand by the

1. New Zealand Council for Educational Research Directory of Philanthropic Trusts (2nd ed., Whitcombe Limited, Christchurch 1978) pp xiii xiv.
2. Andersson application of the Courts statutory jurisdiction. (undated 1950) p 80.
3. Property Law and Equity Reform Committee Report on the Charitable Trust 1957 (1978)
4. Ibid p 5; For a further discussion see Frater "Supervision of Charitable Trusts" (Wellington) Victoria University of Wellington 1972.
5. Institution of Civil Engineers v IRC (1932) 1K.B. 149; Commissioner of Inland Revenue v Careys (Petone and Miramar) (1963) NZLR 450 CA
6. Religious Tract and Book Society of Scotland v Forbes (1896) 3 TC 415.
7. Brighton College v Harriott (1926) A.C. 197
8. Dennis Wedderell Charitable Trusts Are Going Into Business (National Business Review; June 12 1972)
9. (1961) N.Z.L.R. 403
10. Supra p23
11. Gower Principles of Modern Company Law (4th ed London, Stevens & Sons 1979) p 181,
12. Income Tax Act 1976 s 56A (2).
13. Royal College of Surgeons of England v National Provincial Bank Ltd (1952) A.C. 631 (1952) 1 ALL E.R. 984 H.L.
14. Hoare v Osborne (1846) L.R. 1 B; 585
15. Morice v Bishop of Durham (1805) 9 Ves 399, 18 Ves 572
16. (1972) A.C. 601
17. Ibid pp 624, 625
17A (1945) ch 123
17B (1951) A.C. 927
18. Infra p8
19. Gilmour v Coats (1949) A.C. 246
20. L.R.C. v Baddley (1955) A.C. 572
21. L.R.C. v City of Glasgow Police Athletic Association (1953) A.C. 380
22. Dingle v Turner (1972) A.C. 601
23. Braithwaite v A-G (1969) 1 Ch 510
24. Re Meads Trust Deed (1961) 1 W.L.R. 124
25. Re Mason (1911) W.L.R. 714
26. Re Alltop (1894) 1 T.L.R. 4

FOOTNOTES

1. New Zealand Council for Educational Research Directory of Philanthropic Trusts (2 ed., Whitcoulls Limited, Christchurch 1978) pp xiii xiv.
2. Andrews Philanthropic Giving (New York, Russell Sage Foundation 1950) p 90.
3. Property Law and Equity Reform Committee Report on the Charitable Trust 1957 (1979)
4. Ibid p 6; For a further discussion see Frater "Supervision of Charitable Trusts" (Wellington) Victoria University of Wellington 1972.
5. Institution of Civil Engineers v IRC (1932) IK.B. 149; Commissioner of Inland Revenue v Careys (Petone and Miramar) (1963) NZLR 450 CA
6. Religious Tract and Book Society of Scotland v Forbes (1896) 3 TC 415.
7. Brighton College v Marriott (1926) A.C. 192
8. Dennis Wederell Charitable Trusts Are Going Into Business (National Business Review; June 12 1972)
9. (1961) N.Z.L.R. 405
10. Supra p23
11. Gower Principles of Modern Company Law (4th ed London, Stevens & Sons 1979) p 181.
12. Income Tax Act 1976 s 56A (2).
13. Royal College of Surgeons of England v National Provincial Bank Ltd (1952) A.C. 631 (1952) 1 ALL E.R. 984 H.L.
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15. Morice v Bishop of Durham (1805) 9 Ves 399, 10 Ves 522
16. (1972) A.C. 601
17. Ibid pp 624, 625
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25. Re Mason (1971) N.Z.L.R. 714
26. Re Allsop (1884) 1 T.L.R. 4

27. Royal College of Surgeons of England v National Provincial Bank (1952) A.C. 631
28. Royal Choral Society v I.R.C. (1943) 2 All E.R. 101
29. Staples A Guild to New Zealand Income Tax Practice (Wellington Sweet & Maxwell 41sted 1980-81) para 262
30. (1891) A.C. 531
31. Neville Estates Ltd v Madden (1962) Ch 832
32. Oxford Group Ltd v I.R.C. (1949) 2 All ER 537
33. (1961) N.Z.J.R. 405
34. (1943) 2 All E.R. 101
35. Ibid p 106
36. n 33 p 407
37. (1963) N.Z.L.R. 450
38. Ibid p 455
39. (1982) Unreported Christchurch Registry M 443/80
40. n. 11. p. 11.
41. District Courts Act 1947 s 49(1); Judicature Act 1908 Second Schedule r 65
42. District Courts Rules 1949 r 47; Judicature Act 1908 Second Scedhule r 79
43. Companies Act 1955 s 354(2) (a)
44. Ibid s. 14
45. Ibid s. 20
46. Ibid s. 115
47. Ibid s. 118
48. Ibid s 180
49. Ibid s 354 (2) (c)
50. Ibid s 181
51. Ibid s 200
52. Ibid s 135
53. Ibid s 151
54. Ibid ss 163, 166
55. Companies (Fees) Order 1980 Schedule (S.R. 1980/211)
56. Incorporated Societies Act 1908 s 22
57. Ibid s 23
58. Incorporated Societies Regulations 1979 First Schedule
59. Charitable Trusts Act 1957, s 7
60. Ibid s. 8
61. N 59
62. n 60
- 63 Charitable Trusts Act 1957 s 30

64. The Baptist Union of New Zealand was incorporated as a body corporate under the Baptist Union Incorporation Act 1923
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66. Ibid p 1064
67. (1885) 29 Ch D 560
68. n 66
69. Rickett Charitable Giving in English and Roman Law: A Comparison of Method (1979) C.C.I. 118,121
70. Cruwys v Colman (1804) 9 Ves, 319 per Sir William Grant M.R.
71. Morice v Bishop of Durham (1805) 10 ves 522
72. Knight v Knight (184) 3 Beav148
73. Hickman v Kent or Romney Marsh Sheepbreeders Assoc (1915) 1 Ch 881
74. (1964) Ch 83, 89
75. Ibid p 104
76. Bank voor Handel en Sheepvaart N.V. v Slatford (1953) 1 Q.B.; Bowman v Secular Society Ltd (1917) A.C. 406
77. (1973) Ch 173
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79. Ibid p 187
80. (1908) 78 L.J K.B. 576
81. Ibid p 577
82. Ibid p 578
83. 61 L.J. Q.B. 437
84. (1889) 43 Ch D 420
85. Ibid p 428
86. n 65
87. (1947) Ch 183
88. (1951) Ch 567
89. Ibid p 570
90. (1908) 1 All E.R. 448
91. Ibid p 450
92. (1980) W.L.R. 468
93. Ibid p 479
94. Ibid p 475
95. (1981) 2 W.L.R. 379
96. Ibid p 389
97. n. 96
98. Ibid pp 392;393
99. (1976) A.C. 167, 179, 180
100. n 77
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p 2778
107. (1925) G.L.R. 387
108. Infra pp 8-9
109. n 77
110. Ibid p 1065
111. (1971) N.Z.L.R. 151
112. Ibid p 159
113. re Hartshill Endowment (1861) 30 Beav 130
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115. (1872) 1 W.L.R. 552
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117. Nathan Committee Report of the Committee on Charitable
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118. Ibid para 573
119. Companies Act 1955 s 18 (2)
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123. Hampstead Garden Suburb Trust Ltd (1962)2 All E.R. 879
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