THE VARIATION OF THE CHARITABLE TRUST

RESEARCH PAPER BY M.F. FLANNERY

CONTENTS

MICHAEL FRANCIS FLANNERY

"The Variation of the Charitable Trust"

Research paper submitted for the Degree of Master of Laws and Honours in Law at the Victoria University of Wellington 1975

THE VARIATION OF THE CHARITABLE TRUST

INTRODUCTION

Benevolence in the literal sense of well willing but not in the more commendable degree of beneficence in the sense of well doing characterises the approach of the New Zealand Courts to the variation of charitable trusts.

The fault is both the Legislature's and the Courts'. The remedy is in the hands of both.

The Legislature has enacted such inadequate, badly and incompletely drafted legislation in the form of the Charitable Trusts Act 1957 that on a number of occasions both Judge and Counsel have been forced to speculate (and incorrectly) on its meaning and effect. And the Courts (perhaps partly as a result of such mis-spent energy) have often totally misapprehended and misconceived the Legislature's intent when the Courts have either considered or ought to have been considering other sections in the same lamentable enactment. The Courts do at times acknowledge the existence of these other statutory provisions but then often doggedly invoke the cy-pres doctrine so that the wishes of the settlor or the testator (as the case may be) are accorded dominance and not the available freedom of application and variation so untidily indicated by the Legislature.

It is this unnecessary and unauthorised resurrection by the Courts of the cy-pres doctrine (which was intended to be lawfully buried by the Charitable Trusts Act 1957) and the muddled expression of the Legislature's intent in that enactment which have both gone long unnoticed in New Zealand and thereby hindered the evolution and perfection of an important branch of law to society.

The task now is to see how and why the Courts are inhibiting themselves in their approach to the variation of existing charitable trusts and at the same time to reveal what inadequate statutory mechanism the Legislature has provided the Courts with.

The mistakes of the Courts can be prevented to a large extent by enjoining them to read a New Zealand decision (Public Trustee v. A.G. (1923) NZLR 433 which eloquently enshrines all the principles which today they should be correctly invoking and applying. The fault lies partly with Counsel and so too does the remedy of drawing to the Court's attention the principles to be applied.

Indeed the misconceptions and misapprehensions appear to manifest themselves in the law profession generally and notably in the works of New Zealand text-book writers on the law of trusts.

It is immediately necessary to explain that the terms "charity" and "charitable" as applied in charitable trusts have through legal decisions on their inception and variation received a technical and somewhat narrower meaning than that popularly ascribed to those two words. The four heads of charity now commonly adopted in common law countries are those set out in Lord Macnaghten's judgment in Commissioners for Special Purposes of the Income Tax v. Pemsel (1891) A.C. 531 at 583. His words, as has often been pointed out, are not original, being drawn from the argument of Sir Samuel Romilly in his reply in Morice v. Bishop of Durham (1805) 10 Ves. 522.

Shortly stated the four heads are (i) religion, (ii) poverty, (iii) education, and (iv) "other purposes beneficial to the community". Sir Samuel Romilly described the last head as being "the most difficult" and the phrase he used is "the advancement of objects of general public utility". Not every object coming within one or other of these categories is charitable but every object which is to rank as charitable must either fit into one or more of the first three categories, or, if not, may still be held charitable because of general public utility. All charitable trusts must therefore be of a public nature: that is, intended to benefit the community or some part of it: Re Macduff, Macduff v. Macduff (1896) 2 Ch. 451.

The doctrine of cy-pres was developed so that the three related privileges (certainty of object, application of the rule against perpetuities and the treatment of imperfect appointments) conferred on charitable trusts by Ecclesiastical Courts might not be defeated. It is essentially a device for keeping in existence a gift to charity so that it may continue as a public benefit. Its limitations often arise from the principle that the donor's, settlor's or testator's wishes must be respected though the endowment could often be put to better use.

In its modern application the doctrine denotes and is applied "as near as possible"; and the Courts have constantly insisted upon getting as close as possible to the settlor's original intention.

New Zealand has now largely abandoned (at least

notionally for it is still unnecessarily invoked) the cy-pres doctrine through evolving statutory modes culminating in the Charitable Trusts Act 1957 which in relation to the variation of subsisting purposes of charitable trusts was intended to introduce both certainty and flexibility and to avoid much litigation. That culmination is demonstrated by the presence of those two all-embracing exemption clauses: "(whether or not there is any general charitable intention)" in section 32 (Part III) and again (without the parentheses) in section 40 (Part IV).

The general jurisdiction of the Supreme Court concerning charitable trusts was originally grounded upon section 5 of the Supreme Court Act 1860 which had provided that:

> The Court shall also have within the Colony all such equitable and common law jurisdiction as the Lord High Chancellor of England; the Court of Chancery, or any other Supreme Court of Equity hath in England ... so far as the same shall be applicable to the circumstances of the Colony.

That section was re-enacted in the Supreme Court Act 1882 by section 16 which statute was subsequently replaced by the Judicature Act 1908 the statute now in force which by virtue of section 16 conferred on the Supreme Court:

> ... all the jurisdiction which it had on the coming into operation of the Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

The Supreme Court has therefore the general jurisdiction derived through the Judicature Act 1908, the specific jurisdiction conferred by the statute now in force dealing with charitable trusts and the residual jurisdiction lying dormant in New Zealand under the cy-pres doctrine.

The birth,death and then the unauthorised resurrection of the cy-pres doctrine may be considered by examining the appropriate statutes (with the relevant case law) under these heads:

(I) The Charitable Funds Appropriation Act 1871

(II) The Charitable Trusts Extension Act 1886

(III) The Religious, Charitable and Educational Trusts Act 1908

(IV) The Charitable Trusts Act 1957

(V) Summary of principles

(VI) Conclusions, and then Recommendations.

(I) THE CHARITABLE FUNDS APPROPRIATION ACT 1871

The original legislation in New Zealand was the Charitable Funds Appropriation Act 1871 the preamble to which recited:

> Whereas it has happened or it may happen that moneys have been or may be raised by voluntary contributions or otherwise for particular purposes of a charitable kind and afterwards it has or may become impossible or inexpedient to apply the same or a residue thereof to such particular purpose or such purpose may be uncertain or illegal and it is expedient that in such cases the moneys so raised should be

> lawfully applicable to other purposes of a charitable kind ...

The conditions precedent necessary before the Act could be invoked were therefore impossibility, impracticability, inexpedience, fulfilment, illegality or uncertainty as are more fully set forth in section 4.

The definition of "charitable purpose" given in section 2 was significantly wider than that ascribed to in the subsequent repealing Act (The Charitable Trusts Extension Act 1886) for it included many purposes which would not be considered charitable under the common law: for example the promotion of athletic sports and wholesome recreation and amusements of the people; contributions towards losses by fire and other inevitable accidents; the encouragement of skill, industry and frugality; rewards for acts of courage and self-sacrifice.

Section 3 of the Act declared that the Act "shall be applicable to cases in which money has been raised by way of voluntary contribution or by the sale of goods voluntarily contributed or as the price of admission to any entertainment given for any charitable purposes or in any other manner of voluntary contributions."

Any contributor to or the holder of money raised "may call together a meeting of contributors of money or goods" by means of advertisements and "the advertisements shall contain a statement of the reason why it is proposed that the money should be applied to a different charitable purpose than the original and shall

specify the newly proposed charitable purpose": section 6(4). Moreover, it "shall be competent for any other contributor to give notice by advertisement in the same newspapers in which the original advertisement was published at least three times before the day fixed for the meeting that he will propose at the same meeting some other charitable purpose than that mentioned in the first advertisements of the meeting and such other purpose shall be distinctly specified in such notice": section 7.

All parties interested in and either in support of or in opposition to the proposed scheme had to give such public notice: those who initiated "a different charitable purpose" had to give a statement of the reason why it was proposed and were compelled to specify the newly proposed charitable purpose; those who opposed had to advertise and distinctly specify the nature of the charitable purpose that they would propose. There was thus the requirement that a full disclosure had to be made of the type and nature of the contributor's proposed scheme and the different purpose proposed by any other contributor.

Detailed provisions were made (in section 8) concerning proceedings at the meeting called by the moving contributor or money holder. "It shall be competent for any contributor to propose at the meeting that the purpose to which the money shall be applied shall be one combined of any of the advertised purposes or any portions thereof and the meeting may take the same into consideration and vote thereupon at the same time as upon the advertised propositions": section 8(6). There was provision for the adjournment

on the proposal of an unadvertised purpose, with advertisement of the consequent meeting on "the specific character of the purposes which he (the proposer of such new purpose) intends to propose at such adjourned meeting": section 8(8). And "at the adjourned meeting all the purposes which have been duly advertised shall be put together to the vote and that one shall be declared to be adopted for which a majority of votes shall then be given": section 8(9).

The scheme when prepared had to be laid before the Attorney-General (section 10) who if "he shall consider the scheme proposed proper to effect the resolution of the meeting of contributors and not contrary to law shall certify the same and a verified copy of such scheme and certificate shall be filed in the office of the Registrar of the Supreme Court ... and an office copy thereof shall be admissible prima facie as proof of the scheme and certificate." (The meaning and intent of the later part of this section 11 is examined post).

If the Attorney-General considered that the scheme "will not properly carry into effect the resolution of the contributors" then he could remit the proposed scheme to the Scheme Committee accompanied by a memorandum containing his objections to the scheme as proposed: section 12. If the Attorney-General considered that the purpose is "contrary to law public policy or good morals he may refuse to certify the scheme proposed" and the grounds of such refusal are to be gazetted pursuant to section 13. A fresh meeting of contributors could subsequently be called within three months: section 14.

The whole tenor of the Charitable Funds Appropriation Act 1871 was the fullest public disclosure of the proposed scheme and the reasons for such and the provision for people aggrieved by it to advertise a different scheme and then for a meeting to decide what scheme should be formulated and laid before the Attorney-General. The Court was not acting (as it is compelled to do under the Charitable Trusts Act 1957 and under its immediate successors) upon the trustees' scheme alone.

The Act of 1871 gave the fullest opportunity for the reasons for a competing scheme to be considered and then either accepted in part or <u>in toto</u> or rejected outright or combined with the moving contributor's or money-holder's scheme and for the scheme voted on to go before the Court. (There is no demonstrable reason why similar provisions should not have been made to apply under the Charitable Trusts Act 1957 to the variation of existing charitable schemes under Part III of that Act so that the Court is acquainted with the fullest degree of information instead of conceivably having to reject a potentially good scheme which it may feel may be otherwise advantageous to that proposed by the trustees but which it is unable then to accept for the scheme has not then been reported on by the Attorney-General. The Court can only approve or reject the scheme submitted to it under Part III and has no authority either to approve any alternative scheme or to accept and approve a combination of the scheme submitted to it with that of part of such alternative scheme put forward by parties in opposition. The Court

should be empowered to approve not only the whole or part of the advertised scheme but as well any part or parts of the whole of any alternative purposes separate from or combined with the advertised scheme. The validity of this criticism will become apparent as this evolutionary study of the various Acts continues).

While this Act was in force the New Zealand Supreme Court dealt with three cases concerning charities and invoked the common law.

The Supreme Court has the general controlling jurisdiction over all charities and has ample jurisdiction to execute the intention of the testator cy-pres: Wellington Education Board v. Harrison (1875) 1 N.Z. Jur (N.S.) S.C. 66; Wi Parata v. Bishop of Wellington (1877) 3 N.Z. Jur. (N.S.) S.C. 72. In Attorney-General v. Bunny (1874) 2 N.Z. (N.S.) 419 it was held that the revenues of a New Zealand province came within the definition of "charitable fund", over which the Court of Chancery then exercised jurisdiction and were therefore subject to the control of the New Zealand Supreme Court.

(II) THE CHARITABLE TRUSTS EXTENSION ACT 1886

The Charitable Trusts Extension Act 1886 provided that property held in terms of the Act for certain charitable purposes could be disposed of for other charitable purposes and it provided (in section 2) a fairly exhaustive definition of "charitable purpose" to include:

(i) The promotion of any of the objects and purposes for which the institutions specified in the Hospitals and Charitable Institutions Act 1885 had been established: provision for the

management of public hospitals and charitable institutions and distribution of charitable aid.

(ii) the support of the sick, aged, destitute, poor or helpless persons or of the expenses of funerals of poor persons;

(iii) the education, physical, mental, technical or social of the poor or indigent; and

(iv) the reformation of criminals, prostitutes or drunkards.

Then section 3 provided that "... where it has become or shall become impossible or impracticable to carry out the trusts upon which any property is held, or the amount available has proved or shall prove inadequate to carry out the original charitable purpose, or such purpose has or shall have been already effected, or such purpose is illegal or uncertain, then the property so held or any part or residue thereof may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereinafter contained".

What is immediately apparent after reading the list of conditions necessary before such application is the finding the use of the word "may" which is permissive in meaning, and not the use of the word "shall" which is obligatory in meaning. Notwithstanding, then, the presence of any illegality or any uncertainty the property or any part or residue could be applied (and not had to be) for another charitable purpose or combination of charitable purposes.

Not infrequently, Courts have been obliged to construe "may" as obligatory but these instances amount more to judicial amelioration of drafting errors. If the Legislature had wished to guard against the Court construing "may" in this context as obligatory then it could have introduced the words "in the Court's discretion" or "if the Court thinks fit". This was not done and in the immediate consequent reformatory and consolidation Acts, the word "may" was repeated in the same context notably in the Religious, Charitable and Educational Trusts Act 1908 as amended until the time of the Charitable Trusts Act 1957 when "shall" appeared for the first time (in part III and Part IV, examined in detail post).

Whenever the trustees had vested in them property under such circumstances "... they may prepare or cause to be prepared a scheme for the disposition of the property ..." Again "may" was used in section 4 but "shall" was used in the next section 5 because "Every such scheme ... shall be submitted to the Attorney-General, together with full information of all the facts upon which it is proposed to make such disposition, and with copies of any instruments necessary to explain the scheme so prepared ...".

Certain powers and duties were then reposed in the Attorney-General. He could remit the proposed scheme to the trustees for amendment if he considered that it would not properly carry out the objects contemplated and he had to include in writing his objections to the scheme as

proposed: section 5(1). He might report on the scheme submitted ".. and such report shall be laid before a Judge of the Supreme Court ... or he may decline to make any such report and allow the scheme to be laid before the Judge ..": section 5(2).

Section 7 provided that "A Judge ... shall have jurisdiction and authority to hear and determine all matters relating to such scheme, and all proceedings therein shall be had in a summary way and the Judge may decide what persons shall be heard in support of or in opposition to the scheme". Provision was made in the Act for the Gazetting of the proposed scheme and its publication "twice in each week in one newspaper circulating in the judicial district .. for three weeks before .. (the) scheme shall be considered by the Supreme Court." (section 6).

If the Judge was satisfied with the scheme (under section 8 the scheme proposed had to be "proper and not contrary to law, public policy, or good morals ..") he had to make an order approving the scheme "with or without any modification or variation as he thinks fit .." Section 9 allowed the Judge to adopt the report of the Attorney-General, section 12 for the Judge's order to be gazetted and section 13 for the Gazetting of notice of the refusal "of any scheme .. as soon as conveniently may be after the Attorney-General or a Judge of the Supreme Court shall have decided it ought to be refused together with a statement of the grounds for such refusal". Section 14 provided for ".. any

variation or alteration .. whether as originally adjusted or as varied or altered".

All proceedings to enforce or oppose any scheme "may be taken in the Supreme Court either by ex parte petition or by summons before a Judge in Chambers and the Court or Judge may make such orders as it or he may think fit respecting notice to parties and the hearing of such petition or summons:" section 18.

Principal features of the Act

That brief examination reveals the following features:-

(a) "Charitable purpose" was defined as to "include(s) the following purposes ..." and therefore the use of the word "includes" denoted that the purposes named had to be regarded as instances and not as the only objects of charity. The same principle is applicable to Pemsel: University of London v. Yarrow (1857) 1 De G. & J. 72 at 79.

(b) The grounds upon which property held upon charitable trust could be invoked to allow such property to be applied for other charitable purpose or combination of purposes were stated exhaustively and therefore each must be regarded as a condition-precedent before such property "may" be disposed of. There was no mandatory condition that such property had to be so disposed of because "shall" was not used and that construction would obtain even if, for example, there had been illegality, uncertainty, impossibility, impracticability, or inadequacy to carry out the original charitable purpose.

(c) There was no obligation upon the trustees to prepare a scheme for the disposition of the property. They "may prepare or cause to be prepared ..".

(d) Once they so decided then every such scheme had to be submitted to the Attorney-General who had to be supplied with the fullest detail.

(e) The Attorney-General, then, had a number of options open to him: he might reject the proposed scheme and request the trustees to amend it or he might accept the scheme as proposed and report on it or not report on it and in either event he could file the proposed scheme in the Supreme Court.

(f) Gazetting and publication of the proposed scheme in one newspaper were both mandatory.

(g) The Judge had jurisdiction to decide what persons should be heard before him either in support of or in opposition to the scheme. He could accept or reject the proposed scheme, and he could adopt the Attorney-General's report and make an order on it.

(h) The order of the Judge had to be Gazetted.

(i) Notice of the refusal of a scheme had to be gazetted.

(j) Any scheme so adopted could be varied or altered.

Principal criticism of the Act

These machinery provisions were scant and they warrant consideration now for in somewhat comparable form they have been largely repeated in successive Acts dealing with the administration and variation of charitable trusts. The discretion left to the Attorney-General in section 5

was wide. There was no provision for his to take into consideration any objections made by aggrieved parties and indeed there was no likelihood of such objections coming to his notice for the Attorney-General was simply required to state in writing "the objections which he entertains to the scheme as proposed". It was left to the Judge to decide what persons should be heard in support of and in opposition to the scheme.

There should have been provision in that Act allowing for all persons both interested in and opposed to the intended scheme to make representations not only to the Court (as must be intended by section 7 when the Judge exercised his discretion to admit such) but likewise to submit a scheme to the Attorney-General so that when that judicial officer made his report he was able to acquaint the Court fully that the proposed scheme (as modified or not, according to his view of any contrary scheme or schemes submitted by aggrieved persons) was proper and not contrary to law, public policy or good morals.

Only if that provision had been included would the Court have been able to have been placed in a position to make an order instead of conceivably having been placed in the dilemma of having to reject the trustees' scheme and having to favour representations made at the Court hearing by aggrieved persons upon which the Attorney-General would not have been able to report, and so because of the procedural inadequacies of that Act of having been forced to ask the aggrieved persons to

submit their competing scheme to the Attorney-General for his report and for their scheme and the Attorney-General's report having to be submitted afresh.

Successive applications, therefore, were necessitated instead of simultaneous ones which would have allowed the Attorney-General to have fulfilled his statutory function of making a report satisfying the Court that the scheme did or did not meet all the requirements of section 8. The Act of 1886 precluded the Court of being able to see that in all cases that requirement was completely met.

One reported case

The 1886 Act appears to have resulted in only one case having been reported and then without any examination or application of the Act. In In re The Door of Hope, the St Mary's Women's Home, and the Salvation Army (1905) 26 NZLR. 96; sub nom. In re Auckland Women's Home Trust (1905) 7 G.L.R. 406, the Court considered an application for approval of a scheme to give the funds of an unincorporated association, called "The Auckland Women's Home", which had been closed, to an incorporated society called "The Door of Hope". The application was opposed by the St Mary's Women's Home and by the Salvation Army both of which were claimants to the fund. Edwards J. rejected the claims of the two organisations opposing the scheme and then approved the scheme principally on the ground that The Door of Hope was undenominational. He said (at p.100):

> "The sole matter which I have to consider is the application of the fund in such manner as will most nearly approximate to the objects of the defunct Auckland Women's Home.".

With respect, he was not required to find such an approximation. The Attorney-General had approved the scheme pursuant to the Charitable Trusts Extension Act 1886, section 3 of which recited "... the property so held or any part or residue thereof may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereinafter contained." That section did to some degree modify the doctrine of cy-pres which Edwards J. clearly chose to invoke because his judgment contains no examination of the statute under which he could have approved the scheme irrespective of the need for approximation.

Notwithstanding the existence of the then Charitable Trusts Extension Act 1886, the advice of the Privy Council in Wallis v. Attorney-General (1903) A.C. 173 turned upon the successive rejection and application of a series of cy-pres schemes, initiating in the Supreme Court and culminating in the Judicial Committee.

(III)THE RELIGIOUS, CHARITABLE AND EDUCATIONAL TRUSTS ACT 1908

The definition of charitable purpose contained in section 2 of the Charitable Trusts Extension Act 1886 was re-enacted by section 14 of the Religious, Charitable and Educational Trusts Act 1908 (which repealed and replaced the former Act) and pursuant to the Amendment Act 1928 (section 3) that definition was expressly made to include "every other charitable purpose which in accordance with the law of England is a charitable purpose".

Section 3 of the 1886 Act was re-enacted by section 15

("Property may be disposed of for other charitable purposes") of the substitutional 1908 Act.

Section 15 of the Religious, Charitable and Educational Trusts Act 1908 recited:

> In any case where it becomes impossible or impracticable to carry out the trusts upon which any property held for particular purposes of a charitable nature is held, or the amount available proves inadequate to carry out the original charitable purpose, or such purpose has been already effected, or such purpose is illegal or uncertain, then the property so held or any part or residue thereof may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereinafter contained.

The word "inexpedient" was later inserted (pursuant to section 4 of the Amendment Act 1928) so that property could be disposed of for other charitable purposes "in any cases where it becomes impossible or impractical or inexpedient to carry out the trusts ..".

The 1951 Amendment Act made no material alteration to that section but the transposition and condensation of the phrase "for particular purposes of a charitable nature" clearly resulted in greater emphasis and better readability. The section now read$:-

> In any case where property is held upon trust for a particular charitable purpose and it is impossible or impracticable or inexpedient to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or uncertain, then the property so held or any part or residue thereof may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereinafter contained.

The remaining sections of the 1908 Act (as contained in Part III) were a substantial re-enactment of the 1886 Act:

* Trustees could prepare a scheme, pursuant to section 16 (a re-enactment of section 4 of the 1886 Act);
* Scheme to be laid before Attorney-General, pursuant to section 17 (a re-enactment of section 5);
* Gazetting of notice of scheme, pursuant to section 18 (a re-enactment of section 6);
* Jurisdiction vested in judge of Supreme Court, pursuant to section 19 (a re-enactment of section 7);
* When Judge might make or refuse order, pursuant to section 20 (a re-enactment of section 8). The 1928 Amendment Act provided that a scheme approved under Part III of the principal Act might be altered (subject to the provisions of section 15 of the

principal Act) "in the same manner in all respects as the original purpose or purposes were altered, and in any such case the original purpose or purposes may be restored, with or without modifications".

* Judge might adopt Attorney-General's report, pursuant to section 21 (a re-enactment of section 9);
* Order filed, pursuant to section 22 (a re-enactment of section 10);
* Order of Judge to be Gazetted, pursuant to Section 24 (a re-enactment of section 12);
* Proceedings to enforce or oppose any scheme, pursuant to section 30 (a re-enactment of section 18).

The accompanying case law

The limitation involved in the cy-pres doctrine had been modified by section 15 of the 1908 Act as amended. Indeed in Public Trustee v. Attorney-General (1923) NZLR 433 at 442 Hosking J. said:

> "All that appears to me to be required under s.15 is that the new purpose to which the property is applied is a charitable purpose within the meaning of Part III of the Act, without regard to its resemblance to the old purpose. No doubt the approximation of the new purpose to the old would not go unconsidered as an element in the matter of deciding upon the new purpose, but the Act does not appear to me to compel such approximation as the guiding principle".

That passage was expressly approved by Reed J. in In re Palmer (1939) NZLR 189 at 193.

(Any lingering doubts present as to the applicability of the doctrine of cy-pres (notwithstanding the customary judicial comparison of the new purpose effected under the 1957 Act with the settlor's or testator's original purpose done (seemingly, at best, more as a matter of deference than necessity) is now completely dispelled by the comprehensive statement in Part III (and too in Part IV) of the current Act. That deference displayed by the Judiciary while commendable is not productive of good judgments and the time and effort expended would (with respect) be better devoted to reading and re-reading the words of Hosking J. and the appropriate sections in the Charitable Trusts Act).

In In re Williams'Trust (1908) G.L.R. 133 section 76 of the Trustee Act 1883 was invoked by the Court to give directions to trustees on the application of income of a trusts established by an Anglican archdeacon, amounting to $100,000. No other statute is mentioned in the judgment.

In Solicitor-General v. Wanganui Borough (1919) NZLR 763 the Court of Appeal held that a cy-pres scheme should be established so that the income could be paid to the Fire Board for the purposes of fire prevention. The Judgment makes no mention of the Religious, Charitable and Educational Trusts Act 1908.

In Sadlier v. Attorney-General of New Zealand (1919) G.L.R. 281 the Court approved the scheme prepared for the trustees for

the establishment of a scientific institute. Chapman J said (at page 283): "I am satisfied that the scheme set out in the report does in its main features fall within the limits of the testator's intentions". The accent throughout is on the construction of the will and not on any statutory application and interpretation.

In Methodist Theological College Council v. Guardian Trust and Executors Co. Ltd of N.Z. (1927) G.L.R. 394 the Court refused to apply the cy-pres doctrine concerning a bequest for the purchase of an organ for the college and a scheme varying the trust. Reed, J. said (at p.396): "I desire to say, that had I found there was a surplus, to which it would be necessary to apply the cy-pres doctrine, I should have declined to do so until the scheme had been submitted to the Attorney-General and I had heard him on the matter". The judgment contains no mention of any New Zealand statute or New Zealand case law.

In Holy Trinity (Otahuhu) Parish Trust Board v. General Trust Board of the Diocese of Auckland, the judgment of Kennedy J. of March 27, 1929 is noted in the New Zealand Law Journal of April 30, 1929. A certain trust deed had provided inter alia that the building of a new church should not be commenced until two thirds of the cost of such building and furnishings was available out of the trust fund. The conditions of the trust deed had not been literally complied with and the trust fund could not in conformity with the trust deed be applied towards the building of the new church then being erected. It was held that there was a possible

remedy available under section 15 of the Religious, Charitable and Educational Trusts Act 1908 as amended which enabled property, held for a particular purpose of a charitable nature, to be applied cy-pres not only when it became impossible or impracticable but also when it became merely inexpedient to carry out the trusts upon which that property was held.

The note on the judgment of this case has confused the cy-pres doctrine with the effect of the Religious, Charitable and Educational Trusts Act 1908 as amended under which there had been no need for the application of the property to purposes as near as possible to the intention of the settlor, donor, testator (as the case may be).

In re "The Takapuna Women's Memorial Fund" (1929) G.L.R. 67, (1930) NZLR 39, Part IV of the Religious, Charitable and Educational Trusts Act 1908 was ordered to be applied in the seeking of an order of approval of a scheme for the disposition of funds raised by voluntary subscription. The same principle was applied in In re Butler (1930) G.L.R. 145; and in Wellington Diocesan Board of Trustees v. Attorney-General (1937) NZLR 746.

In Kjar v. Masterton Borough Council, the unreported judgment of Ostler, J. of April 16, 1930 is noted in the New Zealand Law Journal of June 24, 1930. The question concerned the validity of a lease vested in the council in trust for a library purposes. Ostler J. held that even assuming that a corporation had no statutory power to grant such a lease yet in his opinion the lease was not

ultra vires the council. The trust for a library was a charitable trust. A municipal corporation had power to accept and administer such a trust: Public Trustee v. Wanganui Borough Council (1916) G.L.R. 486. Therefore the Council was the trustee of a charitable trust. The law in England before the passing of the Charitable Trusts Act 1853 was the law which was in force in New Zealand in 1887 when that lease was granted and was the law then still in force in New Zealand. The lease was therefore valid and plaintiff was entitled to have the provisions of its renewal carried out.

The case is a minor one but it does illustrate the possible effect, no matter how indirect, of statutes in force (and since repealed) at the date of the creation of a number of long-established New Zealand charitable trusts. The Charitable Trusts Extension Act 1886, the Religious, Charitable and Educational Trusts Act 1908 as amended and the current Charitable Trusts Act 1957 cover a wide canvas but specific charitable trusts may often be dealt with by the statute in force at the date of their creation, which may of course be a private Act empowering such trust.

In In re Palmer (1939) NZLR 188; (1939) G.L.R. 138 a legacy was ordered to be administered in accordance with section 15 of the Religious Charitable and Educational Trusts Act 1908 as amended for the benefit of a children's home.

In In re Travis (1947) NZLR 382 approval of a scheme under Part III of the Religious, Charitable and Educational Trusts Act 1908 as amended was refused on the grounds that it

had not been shown that the trusts were impracticable or inexpedient or otherwise ineffective. The trustees' "Report on Scheme" had been approved by the Attorney-General, the scheme or report had been advertised and one objection to it had been lodged. The trustees had apparently elected to seek Court approval of the intended scheme under the Act instead of having the will interpreted under the Declaratory Judgments Act 1908.

The Bullock-Webster Case

The jurisdiction of the Supreme Court both statutory and inherent relating to the effectuation of charitable trusts by means of schemes was considered in In re Amelia Bullock-Webster (deceased) (1936) NZLR 814. A Memorandum on the matter of jurisdiction was prepared by counsel K.M. Gresson (as he then was) and appended by Northcroft J. to his judgment.

That Memorandum in traversing both history and application

(1) Recites that "the numerous English statutes from the Charitable Trusts Act 1853 have no application to New Zealand, and there is nothing in New Zealand corresponding to the Charity Commissioners to whom many of the functions formerly exercised by the Court are today delegated. Possibly the Charities Procedure Act 1812 (Eng.) and the Charities Procedure Act 1832 (Eng.) are in force in New Zealand ...". (Clearly, as later suggested in the Memorandum the

then Trustee Act 1908 (and now that of 1956) had made provision principally for breaches of trust; but the earlier part of the quoted material does not take into consideration Ostler J's judgment in Kjar v. Masterton Borough Corporation (unreported and noted in the New Zealand Law Journal of June 24 1930) a case concerning the validity of the council's lease. Ostler J. said "The law in England before the passing of the Charitable Trusts Act 1853 was the law which was in force in New Zealand in 1887 when that lease was first granted and was the law still in force in New Zealand". He said the lease of land vested in the corporation for library purposes was not ultra vires. The case does illustrate the conceivably continuing effect, no matter indirect, of certain enactments in force (and of course since repealed) at the date of the inception of some long-established New Zealand charitable trusts).

(2) includes an unfortunate error in the penultimate line (on 817) which concludes the recital of section 15 of the Religious, Charitable and Educational Trusts Act 1908 as amended: "or a continuation of such purposes in the manner and subject to the provisions hereinafter contained." Combination in the statute should have been transcribed and not continuation. There is a significant difference. The Memorandum may have been handwritten.

(3) fails to emphasise the cardinal point of that

statute, the Court in dealing with trusts under the Act is not bound by the cy-pres doctrine. All that is necessary is the approval of the application of the property to a charitable purpose as defined by the Act: see Public Trustee v. Attorney-General (1923) NZLR 433, 442, per Hosking J.

(4) does not adequately differentiate between the instances when the cy-pres doctrine is demonstrably applicable (as in Bullock-Webster) and when the then existing Act provided a means for the effectuation of a scheme. No mention is made of a number of cases decided in favour of the charity on the cy-pres principle with no reference to the then existing Act: Murdoch v. Attorney-General (1892 11 NZLR 502; In re the Trusts of the Will of Jacob Joseph (1907) 26, NZLR 504; 9 G.L.R. 329; In Re Buckley, Public Trustee v. Wellington Society for the Prevention of Cruelty to Animals (Inc.) (1928) NZLR 148; (1928) G.L.R. 127; In re Campbell, Peacock v. Ewen (1930) NZLR 713; (1930) G.L.R. 539; Standing Committee of the Diocese of Auckland v. Campbell (1930) G.L.R. 162 and In re Wilson, Guardian Trust and Executors Co. Ltd v. Society for Prevention of Cruelty to Animals, Auckland (Inc.) (1934) G.L.R. 54

(5) fails to demonstrate the emerging statutory role in place of the doctrine of cy-pres in dealing with the variation of the purpose of subsisting charitable trusts: Public Trustee v. Attorney-General (supra) contains a most important enunciation of the law.

(6) and misconstrues the effect of section 75 of the Trustee Act 1908 in suggesting that it may be invoked "for a scheme to be approved in the case of any trust where the circumstances so require ..." and that "the more correct view would be that (it) strengthens or incorporates the jurisdiction which exists independently ..." (Section 75 allowed a trustee, executor or administrator to apply to the Court "on any question respecting the management or administration of the trust property or the assets of any testator or intestate. Section 66 in the 1956 Act is similar in intent and effect. The case of In re Williams (1908) 11 G.L.R. 133 in support of the first suggestion is no authority regarding schemes; all that the Court may do is to make a declaration as to the powers of the trustees in administering trusts funds. Directions will only be given on points of management and questions of will construction must be decided in the usual way: In re George Gould (1889) 7 NZLR 733; In re Oliver (1927) G.L.R. 910; In re Griffiths (1910) 12 G.L.R. 533.

The Memorandum (intituled "Memorandum of Counsel as to the Jurisdiction of the Supreme Court in relation to Scheme for Administration of Charitable Trusts") has been given imprimatur by being appended to the judgment of Northcroft, J. but (with respect) it is neither definitive nor comprehensive. The Memorandum does not now appear to draw judicial notice; and in any case the innovations introduced in the consolidating

Charitable Trusts Act 1957 have made it less useful aside from the criticisms noted (supra).

(IV) THE CHARITABLE TRUSTS ACT 1957

The Charitable Trusts Act 1957 came into force on January 1, 1958 and consolidated and repealed the Religious, Charitable and Educational Trusts Act 1908 as amended.

Under the 1908 Act there was "no special provision for the procedure to be adopted in the case of the failure of an original charitable purpose where part of the property or fund may come within s.15 and part within s.32," Myers, C.J. said in Wellington Diocesan Board of Trustees v. Attorney-General (1937) NZLR 746 at 748. Section 15 (Property may be disposed of for other charitable purposes) formed the principal operative section in Part III (Extension of Charitable Trusts) and section 32 (Funds, how raised) the principal operative section in Part IV (Appropriation of Charitable Funds).

The matter has been remedied in the 1957 Act by the complete re-drafting of the sections in a new Part III (Schemes in respect of Certain Charitable Trusts) and of the sections in a substantially new Part IV (Schemes in Respect of Charitable Funds Raised by Voluntary Contribution).

Part III represents in effect more than a statutory extension of the general jurisdiction of the Court to apply the cy-pres doctrine or to approve of schemes for the administration of certain charitable trusts or to prescribe the mode of administering a charitable trust.

In general, it enacts that where property or income is held or given upon trust for a charitable purpose and it is impossible or impracticable or inexpedient to carry out that 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 then (whether or not there is any general charitable intention) the property and income or any part or residue thereof or the proceeds of sale thereof "shall be disposed of for some other charitable purpose or a combination of such purposes ..." The permissive "may" in section 15 of the 1908 Act and in section 3 of the 1886 Act has been transformed into the mandatory "shall" in subsection (1) of section 32 just recited . (examined fully post).

Then subsection (2) of the same section reverts to the permissive "may" when it provides that "in any case where any property or income is given or held upon trust or is to be applied for any charitable purpose and the property or the income which has accrued or will accrue is more than is necessary for the purpose, then (whether or not there is any general charitable intention) any excess property or income or proceeds of sale may be disposed of for some other charitable purpose or combination of such purposes ...".

Section 32 is expressly declared (in subsection (3)) not to operate to cause any property or income to be disposed of as provided in subsection (1) or subsection (2) if in accordance with any rule of law the intended gift would otherwise lapse or fail and the property or .

income would not be applicable for any other charitable purpose and in so far as the property can be disposed of under Part IV (dealt with post).

Section 32 is expressly declared to extend to cases where the charitable purpose affecting any property or income is defined by a scheme approved by the Court under Part III or otherwise or approved by the Attorney-General under Part IV "and in any such case the original purpose or purposes may be restored, with or without modifications": subsection (4).

Section 32 applies to both trusts created and to schemes approved both before and after the commencement of the Charitable Trusts Act 1957: January 1, 1958.

Subsection (1) of Section 32 warrants careful comparison with the accompanying subsection (2) for in the first subsection the property or income must be disposed of for some other charitable purpose or combination of such purposes if any of the stated conditions obtain whereas in subsection (2) excess property or income already endowed with a charitable trust or arising from a charitable trust may be applied for some other charitable purpose or combination of such purposes. There is an obligation under the first subsection and a discretion or permission under the second subsection to apply the excess property or income to some other charitable purpose or a combination of such purposes. The trust property and income is already impressed with that of a charitable trust and any excess arising therefrom be it property, income or a combination of both is similarly impressed with the

same charitable flavour. Hence the discretion reserved to the trustees to apply any excess in the charitable manner they wish.

Subsection (1) denotes obligation for the use of the word "shall" signifies duty and not discretion.

In re Martin (deceased) (1968) NZLR 289 is a case directly concerned with Part III. The question that arose was whether the Court had power under section 32 of the Charitable Trusts Act 1957 to distribute the capital of a charitable bequest where the will clearly provided that only income should be distributed.

Tompkins J. (in his oral judgment) held that it had been abundantly proved that it was impracticable and inexpedient to carry into effect the charitable purposes of the testator in the way envisaged by him.

His Honour said (at p.290) that section 32:

> "gives wide powers to the Court; which are expressed, in the language of the section, to apply to 'any case where any property or income is given or held on trust or is to be applied to any charitable purpose.' The Court is given power in the latter part of subs. (1) to deal with 'the property and income or any part or residue thereof or the proceeds of sale thereof'; the Court is empowered to dispose of that property or income for some other charitable purpose. I do not think the Court is limited in the exercise of this power to carrying out the provisions of the will, where it directs that the capital be held for

a charitable purpose but that the income only be distributed. The Court, in my view, is given a wide and general discretion to dispose of either the property or the income or the proceeds of sale of the property for some other charitable purpose. The section, in my view, certainly does not expressly limit that discretion; and I see no reason why it should be limited by the rules of law relating to the construction of the document creating the trust. This view was taken by Hosking J. in Public Trustee v. Attorney-General (1923) NZLR 433, 442. He said, in considering whether the doctrine of cy-pres should be applied, 'I find no such limitation expressed in the Act'. He held that the doctrine of cy-pres did not apply, although the wishes of the testator were a major factor to be taken into consideration in approving any other scheme.

"I think that the Court ... may in its discretion approve a scheme which authorises the sale of the land, notwithstanding that the testator has directed it be held and leased. I think the section also gives power to distribute the proceeds of sale for the charitable purposes set out in the will or for other charitable purposes approved by the Court." Tompkins J. held that the instant scheme be approved without amendment because it was the best to be done to carry out the charitable purposes envisaged by the testator. Tompkins J. did not find it necessary to examine

section 34 for he found (at page 291) that the scheme had been "consented to by all parties" and clearly that unanimity would have strengthened the duty imposed upon the trustees to prepare a scheme.

Equivocation, uncertainty, caused by "may"

Section 34 contains a curious inconsistency when compared to the necessary mandatory and discretionary elements (denoted by the use of the words "shall" and "may") in section 32. Section 34 reads as follows:

> "Where the trustees of any such property or income are desirous that it shall be dealt with subject to this Part of this Act, they may prepare or cause to be prepared, in accordance with this Part of this Act, a scheme for this disposition of the property or income and for extending or varying the powers of the trustees or for prescribing or varying the mode of administering the trust".

The use of the word "may" clearly denotes a permissive, discretionary element (and not a mandatory one), allowing and permitting, but not demanding the formulation of a scheme.

Both section 16 of the Religious, Charitable and Educational Trusts Act 1908 as amended and the section which it re-enacted section 4 of the Charitable Trusts Extension Act 1886 used "may". Section 34 represents a considerable re-drafting of the two earlier sections and the retention of the word "may" perhaps signifies possibly the Legislature's desire not to trammell in any way the common law duty vested in

trustees of impartiality between beneficiaries and their right if trustees of a charitable trust to apply to the Court for directions; see Moggridge v. Thackwell (1803) 7 Ves. 36.

Beattie J. in Attorney-General v. Waipawa Hospital Board (1970 NZLR 1148 at 1153, 1154 said:

> "It is curious, however, that the word 'may' has been retained in s.34 despite the mandatory nature of s.32, but at least no one is empowered to prepare and submit a scheme other than the trustees. I accept ... that s.34 imposes an obligation on trustees of a charity to prepare a scheme in every case where the original purpose cannot be carried out, but subject to consideration of any special statutory provisions affecting the disposition of the trust property.
>
> "No doubt no change was made in s.34 in mandatory terms because trustees even under an earlier section were under a duty to prepare a scheme. It could not have been intended that a stalemate would arise from inactivity on the part of trustees. It follows that if this view is correct, then the change in s.32 merely removed the Court's discretion, leaving unchanged the duty imposed on trustees at all times under s.34. In any event, the use of the word 'may' in s.34 does not in my opinion conflict with the view just expressed".

With respect, neither does it substantiate such a view.

Later on page 1154 Beattie J. finds slightly firmer ground:

"Craies on Statute Law, 6th ed. 285 points out that it was decided in R. v. Barlow (1693) 2 Salk. 609:

> That when a statute authorises the doing of a thing for the sake of justice or the public good, the word 'may' means 'shall'. That rule has been acted upon to the present time.

"Even apart from statute and subject to the exception I have referred to, it is a duty of trustees of a charitable trust to apply to the Court if the main purpose of the trust cannot be carried out in its terms. See: Andrews v. McGuffog (1886) 11 App. Cas. 313, 329 per Lord Herschell L.C.".

It is unfortunate and unnecessary that the matter should have to be subjected to such speculation in which (with respect) reality and accuracy are not met until the final sentence is read in this extract. The Courts have been compelled to construe "may" as obligatory and in effect to offer judicial amelioration of what is a drafting oversight. The substitution of "shall" for "may" is eminently justified by the right, indeed the duty, of trustees to apply to the Court for approval of the intended mode of application by way of variation of the subsisting charitable trust.

The only justification for the retention of "may" occurred in the former Acts which used the permissive "may" in section 3 of the Charitable Trusts Extension

Act 1886 and in the re-enacted section 15 of the Religious, Charitable and Educational Trusts Act 1908 as amended but since the enactment of the consolidating Charitable Trusts Act 1957 the new section 32 has differentiated (dealt with supra) between the conditions under which there is a mandatory disposition of property for some other charitable purpose and when there may be a discretionary application and presumably the draftsman has retained "may" in section 34 to avoid conflict but in so doing he has unwittingly introduced an element of uncertainty which has caused judicial speculation.

Section 34 should be re-drafted so that it is in conformity with the conditions obtaining in section 32 to show when trustees must prepare a scheme and when (pursuant to subsection (2) of section 32) they may prepare a scheme. It is essential that section 34 have the requisite degree of certainty and no element of ambiguity. The section at present is quite equivocal and this was not the Legislature's intention. Bad law has been the result.

Section 34 then, should be re-drafted to provide inter alia that:

(1) In any case to which the provisions of subsection (1) of section 32 shall apply the trustees shall prepare or shall cause to be prepared in accordance with this Part of this Act a scheme for the disposition of the property and income and for extending or varying the powers of the trustees or for prescribing or

varying the mode of administration of the trust;

(2) In any case to which the provisions of subsection (2) of section 32 apply the trustees may prepare or may cause to be prepared in accordance with this Part of this Act a scheme for the disposition of the excess property or income or proceeds of sale and for extending or varying the powers of the trustees or for prescribing or varying the mode of administration of the trust.

Alternative scheme precluded

Clearly Tompkins, J. in Martin had too no need to examine the possibility of any alternative scheme for all the parties had given their consent to the scheme submitted; but had one or more of such otherwise consenting parties submitted an alternative scheme independent of or complementary (in part) to the trustees' scheme then the Court would have been precluded from approving any other scheme (no matter how meritorious) than that submitted by the trustees. Such, then, are the consequences of section 53 (which unlike those of the badly drafted section 34) are probably intentional even though they deprive the whole Act of the desirable element of beneficence.

Section 53 (forming one of the Miscellaneous Provisions in Part V) reads as follows:-

Where application for approval of any scheme is

made to the Court under Part III or Part IV of this Act -

(a) The Court may decide what persons shall be heard before it in support of or in opposition to the scheme:

(b) The Court shall have jurisdiction and authority to hear and determine all matters relating to the scheme:

(c) The Court may make an order approving the scheme with or without modification, as it thinks fit.

Accordingly, had one of the parties in Martin not given its consent but had instead submitted a proposal or report on its own scheme then the Court would have been precluded from acting upon it and would have been forced to limit its activity to the approval, amendment or rejection of the trustees' scheme. A successive application would have been necessary which would have caused delay and further expense. Hence, again the Act is benevolent but it is not beneficent.

Tompkins J. had encountered the problem of the inadequacy of section 53 in a case three years earlier, in the Estate of Arthur Powys Whatman, an unreported Wellington judgment, dated July 16, 1965 in which he (at page 7 and 8) said:

> "I would think, however, but without deciding the point, that if a trustee felt that there was reasonable doubt as to which of two or more schemes was preferable for the disposition of the

trust property, he would not be exceeding his powers under s.38" (sic) "by preparing alternative schemes, asking the Attorney-General to report upon each and applying to the Court for approval of one of them. Indeed, a trustee might well think it was his duty in the best interests of the trusts to do so. However this was not done in this case, and I agree that the power of the Court on this application is limited to approval, amendment or rejection of the Board's scheme. But in deciding this the Court must necessarily consider the alternative scheme put forward by the Council and the Society pursuant to their notices of opposition ...

"It seems to me that the Act might well be amended, so as to authorise those opposing approval to apply for approval of an alternative scheme, so that the Court could consider both schemes at the same time and avoid the possibility of the expense and delay of successive applications. However, the Act clearly contemplates that successive applications may be necessary because s.54 provides inter alia that notice of the refusal of the Court to approve any scheme shall be published in the Gazette .. while s.56(2) provides that any refusal to the Court to approve any scheme shall not prevent

fresh steps being taken to obtain the approval to any other scheme in respect of the same property, income or money".

(Tompkins J. on page 7 referred to section 38 which defines the meaning of the term "charitable purpose" under Part IV. With respect he must have intended to refer to section 35 (Part III) on the scheme to be laid before Attorney-General).

T.A. Gresson, J. in In re Goldwater (1967) NZLR 754, 756, expressed agreement with the conclusion of Tompkins J. in Whatman and acknowledged that the Court under section 53 could only approve or reject the trustees' scheme as submitted. He added: ".. and it (the Court) at present lacks the power to approve any alternative scheme put forward by the parties in opposition".

Tompkins, J's awareness that the "Act clearly contemplates that successive applications may be necessary" still detracts from the efficacy of the section and provides no comfort for an aggrieved person or society. Clearly, it is in the spirit of the Act that the Court be acquainted with all the facts and those in an intended alternative scheme which may be both complementary (partially) to and in opposition with the trustees' scheme; and clearly too the Court can fulfil its functions under section 53 by having not only all parties present but also all schemes and intended proposals before it; and so to ensure that, each should be first submitted to the Attorney-General.

These amendments to section 53 would mean the matter of approval, amendment or rejection could be dealt with expeditiously and with the minimum of expense and delay. This to some extent would minimise but not avoid the risk of and need for successive applications.

Provisions as to Schemes

Part IV relates to Schemes in Respect of Charitable Funds Raised by Voluntary Contribution and replaced Part IV (Appropriation of Charitable Funds) of the Religious, Charitable and Educational Trusts Act 1908 as amended and simultaneously introduced a number of significant changes.

Section 38 defines "charitable purpose" in the same manner as section 31 of the 1908 act (and as section 2 of the 1871 Act) by its recital that that term ".. shall include any of the following purposes: "
but section 38 extends the meaning to be ascribed to that term by declaring that "charitable purpose means every purpose which in accordance with the law of New Zealand is charitable."

Section 40 considerably expands section 33 of the 1908 Act ("Failure, & of Original Purpose,") (being section 4 of the 1871 Act) and expressly negatives the application of the cy-pres doctrine. The section alternates between the use of the words "shall" and "may", a differentiation not easily overlooked (see post) and a distinction practically not immediately explicable.

Subsection (1) says that in any case if it becomes impossible or impracticable or inexpedient to carry out the

charitable purpose for which the money raised is held, or if 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; and if the money has not been entirely applied and is not in the course of being applied for the charitable purpose for which it is held at any time after the expiration of one year after the contribution or receipt of any part of the money or the sale of any part of the goods, then whether or not there is any general charitable intention, the money and the income therefrom or any part or residue thereof shall be disposed of for some other charitable purpose or a combination of such purposes in the manner and subject to the provisions of Part IV of the Act.

If the conditions contained in clause (a) of subsection (1) of section 40 obtain (impossibility or impracticability or inexpedience or inadequacy of amount or completion of purpose or illegality or uselessness or uncertainty of purpose) and if the money has not been all applied and is not being applied after 12 months from the time of its contribution or receipt, then whether or not there is any charitable intention both the money and its income must be disposed of for some other charitable purpose or combination of charitable purposes. The use of "shall" demands such application.

Subsection (2) says that in any case where the money raised and the income which as accrued or will accrue or any residue is more than is necessary to

carry out the original purpose, then any excess money or income may be disposed of for some other charitable purpose or a combination of charitable purposes. The use of "may" permits such application.

In neither case is it necessary that there be any general charitable intention.

The important distinction between these two subsections has apparently been not comprehended by the revising editors of Garrow's"Law of Trusts and Trustees" because in both the 3rd Edition 1966 (consulting editor E.W. Henderson; editors N.C. Kelly and D.J. Whalan) and the 4th Edition 1972 (editor N.C. Kelly) at page 146 and at page 170 respectively this same paragraph occurs:

> "Part IV of the Charitable Trusts Act 1957 applies to cases in which money has been raised by way of voluntary contribution or by the sale of goods voluntarily contributed, or as the price of admission to any entertainment given for any charitable purpose or in any other manner of voluntary contribution: s.39. In any such case, if it becomes impossible or impracticable or inexpedient or the amount proves inadequate to carry out the original charitable purpose, or such purpose has already been effected or such purpose is illegal or useless or uncertain, then the moneys so raised or any residue thereof may be appropriated to some other charitable purpose or combination of charitable purposes: s.40. Similarly, when money raised in one of these

> ways has not been entirely applied for the purpose for which it was raised, and it is not in course of being applied for that purpose, after one year from the time when it was raised, it may be applied for some other charitable purpose or combination of charitable purposes. In neither case is it necessary that there be any general charitable intention. Again if the amount raised voluntarily is more than is necessary to carry out the original charitable purpose, the excess may be applied for some other charitable purpose or combination of charitable purposes".

The effect of section 39 has been correctly paraphrased. The effect of section 40 has been incorrectly paraphrased as is demonstrably clear from a reading of the second sentence starting "In any such case .." because clause (a) of subsection (1) by the use of the word "shall" (and not "may") makes it mandatory that "the money and the income therefrom or any part or residue thereof" must"be disposed of for some other charitable purpose or a combination of such purposes ...". The meaning and effect of the two subsections are quite separate: there is an obligation demanding application under subsection (1); there is permission or discretion allowing application under subsection (2). The balance of the paragraph quoted shows that the distinction has not been grasped. What the two subsections do have in common is the absence of the need for any general

charitable intention: this is made explicit by subsection (1).

There seems no immediately apparent reason why there should be this distinction between the effect of subsection (1) and subsection (2). "May" was used in section 4 of the 1871 Act and in the identical section 33 of the 1908 Act but the new section in the 1957 Act is no mere repetition of the sections used formerly; but clearly the Legislature intended the permissive, discretionary element denoted by "may" in subsection (2) to apply to instances where an excess of funds has occurred and it is this excess "money or income" which may be disposed of for some other charitable purpose. This certainly gives the trustees a discretion as to how the excess funds are to be applied and for that reason there is present both benevolence and beneficence in this part of the Charitable Trusts Act 1957 because the total funds are already impressed with a charitable trust and money accruing thereto or investment arising therefrom will likewise be impressed with the same trust and so it is clearly proper that the decision of what application should be made of any surplus should be made by the trustees themselves, whether to "the original charitable purpose" or to "some other charitable purpose", and that is, then the intention and effect of subsection (2).

The distinction, then, between the two subsections is both logical and practical and is further evidence that the common law cy-pres doctrine has not merely been modified by the Charitable Trusts Act 1957; it has indeed

been supplemented, nay, supplanted.

Decisions on "contributions"

There does not seem to be any reported New Zealand case on section 40 and few on Part IV; but the Court has laid down that when funds are raised by voluntary contributions, then the procedure laid down by Part IV must be followed if a variation of the purposes is subsequently sought and this procedure is applicable even though part of the money raised, may have been actually applied for the purposes for which it was raised. If a sum of money is made up of contributions and bequests and subsequently a variation of purposes is necessitated, then it is necessary for the trustees to proceed under both Part III concerning the bequests and under Part IV concerning the money voluntarily contributed: Wellington Diocesan Board of Trustees v. Attorney-General (1937) NZLR 746; (1937) G.L.R. 444 in which case Myers, C.J. held that where money (made up of contributions and bequests for the purpose of erecting a cathedral in the City of Wellington on a specified site) was held by the trustees as a separate fund for the erecting and furnishing of the cathedral. Subsequently it became impracticable and inexpedient to erect the cathedral on that site. A new proposal was made for its erection on another site. The Supreme Court held that there had been a change of purpose, and that the position was thenceforth governed by Part III of the Religious, Charitable and Educational Trusts Act 1908 as to the bequests and by Part IV of the same Act (both Parts enumerated the same under the consolidating

Charitable Trusts Act 1957) as to the voluntary contributions.

For largely similar reasons to those submitted concerning the re-drafting of section 34 (considered supra) section 42 should be logically and consistently extended so that the varying consequences of subsection (1)(a) and (b) and of subsection (2) of section 40 and of section 41 are clearly and unequivocally shown. The use of the word "may" being permissive and discretionary in effect is applicable to only one of the eventualities postulated in section 40. No provision is made for the consequences flowing from the mandatory, obligatory "shall".

Section 41 contains provisions allowing for the extension of powers or alteration of the mode of the administration of the trust, but the section has no application where the essential purpose of a modification of the powers contained in the trust instrument is in effect to change the method of operating a charity from that of a large institution into a series of smaller family-type units: Baptist Union of New Zealand v. Attorney-General (1973) NZLR 42. Woodhouse J. (in an oral judgment) held that such new proposals should be put forward by way of a scheme under the Charitable Trusts Act 1957.

Convening Contributor's Meeting

As in the 1871 Act (and the 1908 Act as amended) any contributor to or holder of money voluntarily raised may set in motion the procedure laid down in the Charitable Trusts Act under Part IV of which a meeting of contributors is called by way of successive newspaper advertisements

approved by the Attorney-General and which specify "every newly proposed charitable purpose and every proposal for extending or varying the powers of the trustees or of prescribing or varying the mode of administering the trust and shall state the reason for every proposal relating to any new charitable purpose or to the powers of the trustees or the mode of administering the trust:" section 43(a).

Again, any other contributor may advertise his intention to move at the meeting for the adoption of some other newly proposed purpose and "that other purpose or proposal shall be distinctly specified in the advertisements published or the notice given under this section:" section 44.

Again too, detailed provisions are made (in section 45) concerning proceedings at the meeting including the election of a scheme committee to prepare and formulate a scheme to give effect to the decisions of the meeting of the contributors. The scheme (pursuant to section 47) must be laid before the Attorney-General who has power to remit the scheme back to the committee with his suggested amendments.

When the Committee has considered any suggestions, then the Attorney-General (under section 48) either approves the scheme as finally submitted to him and thereupon such approval "shall have the same effect as an approval of the scheme by the Court" or reports on the scheme and thereupon sends his report to the scheme committee which may then seek the approval of the

Supreme Court to the scheme.

Section 48 then, allows schemes which meet with the Attorney=General's approval to be endowed with Supreme Court approval and avoids the necessity of the scheme committee having to seek directly the Court's approval by originating summons or ex parte motion. This represents a means of saving time and money and is a considerable improvement upon the somewhat hazy meaning in the 1871 Act which provided (under section 11) that if the Attorney-General "shall consider the scheme proposed proper to effect the resolution of the meeting of contributors and not contrary to law" then he "shall certify the same and a verified copy of such scheme and certificate shall be filed ... and an office copy thereof shall be admissible prima facie as proof of the scheme and certificate". It was not stated to what that degree of proof extended either to the existence of the scheme and certificate or to the legality of the scheme and certificate or to approval by the Supreme Court of the scheme and certificate. Clearly section 48 has provided a simple, expeditious and inexpensive way of obtaining the Supreme Court's approval of a scheme once such has met with the approval of the Attorney-General.

The Charitable Trusts Act 1957 (Part IV), therefore, does measurably improve the 1908 Act and enhances the provisions relating to the disclosure of the proposed scheme and any proposals offered in opposition or in combination. The Court and the Attorney-General are both ensured of the fullest amount of detail produced by the advertisements and meetings.

Cy-pres doctrine unjustifiably lingers on

The Charitable Trusts Act 1957, then, is more than a gloss on the common law doctrine of cy-pres: it has supplemented, indeed supplanted it, with the result that the Court is no longer bound to follow or be guided by the testator's or settlor's expressed intention. But New Zealand Courts when approving or rejecting the trustees' scheme (pursuant to section 53 of the 1957 Act) do often acknowledge a duty (which, with respect, is non existent) to the settlor or testator of the trust property to dispose of it as nearly as possible in accordance with the settlor's or testator's intentions.

T.A. Gresson, J. in Goldwater acknowledged(at 757) the presence of such a duty to the settlor and he added "It (the Court) owes a duty also to those proposed to be benefitted by the trust, and to the public generally, to dispose of the fund or property as nearly as possible in accordance with the charitable purposes of the trust, and in such a way as will best serve the interests of those intended to be benefitted".

T.A. Gresson, J. had been relying upon a similar statement in Whatman, in which Tompkins J. added (at p.11) "It (the Court) is not bound however by the cy-pres doctrine as a guiding principle and may, if the original charitable purpose cannot be carried out, approve a scheme without regard to its resemblance to the old purpose. Tompkins, J. added:

> "It must, of course, see that the scheme complies with s.56, i.e. that it is a proper one, and should carry out the desired

purpose or proposal, and is not contrary to law or public policy or good morals; and that it can be approved under Part III; that its purpose is charitable and can be carried out, and that the requirements of the Act have been carried out".

The Court is not intended by the Statute to be hampered about equating or approximating the new purpose with the old purpose of the settlor or testator when approving a scheme to vary a subsisting charitable trust. The Court's acknowledgment at times of the expressed intentions of the settlor or testator may (at best) be more a matter of judicial deference than of statutory obligation and in no way is the Court compelled to make such acknowledgement any part of its guiding principle. It may be essentially a matter of courtesy and deference which may help the Court to formulate a new scheme; but there is nothing in the Charitable Trusts Act requiring such. The Courts are detectably straying from their duty and the reasons for such deviation can be attributed to faulty expression by the Legislature as well as to text authorities and Counsel.

In In re Strong (1956) NZLR 274 it was again laid down that section 15 of the Religious, Charitable and Educational Trusts Act 1908 as amended applied in any case where property was held upon trust for a charitable purpose and that to bring a trust within that section it was not necessary to show a general charitable intention

which would otherwise be necessary to invoke the general jurisdiction of the Court under the doctrine of cy-pres.

In In re Goldwater (1967) NZLR 754 at 757 the Court reiterated that it must be satisfied of the impossibility or impracticability or inexpediency of carrying out the trusts of a will before it might approve a scheme not conforming to those trusts and that the Court could only approve or reject a scheme submitted and had no authority to approve any alternative scheme advanced by parties in opposition.

Emulated by Western Australia

The New Zealand Legislature may take some justifiable pride in that the Charitable Trusts Act 1957 was adopted virtually in toto by the Western Australian Parliament which enacted the Charitable Trusts Act in 1962. No amendments have since been made to the latter Act. In the Western Australian Law Reports no judgments have been reported on any of the matters examined in this paper. In the absence of any amendments and Courts reports there is no need for any satisfaction by New Zealand because most matters on the variation of charitable purposes are (as in New Zealand) by ex parte motion and sometimes by originating summons and with the modern pressure on litigation and the shortage of space for Court reports, few charitable trusts cases are reported.

The time has arrived now for a fresh look at the New Zealand approach to charitable trusts and more

particularly to the statutory conditions governing variation of purposes to which charitable trusts may now predictably be seeking approval.

(V) SUMMARY OF PRINCIPLES

It is now possible to summarise the principles enunciated in the common law doctrine of cy-pres and the statutory effect upon that doctrine in relation to the variation of the purposes of subsisting charitable trusts:

• In its modern application the doctrine denotes and is applied "as near as possible" and in jurisdictions where the doctrine has not been altered, modified or supplanted by statutory provisions, the Courts have constantly insisted upon getting as close as possible to the original intention of the testator, settlor or donor (as the case may be).

• In New Zealand there has been a gradual modification, supplementing and finally supplanting of the doctrine through the evolution of statutory enactments concerned both with the variation of purposes of subsisting charitable trusts and the disposition of funds of defunct charitable societies to other charitable organisations.

• In cases coming within the Charitable Trusts Act 1957 it is not necessary to prove a general charitable intention nor need the property be applied to a purpose as near as possible to the intention of the donor. This was laid down as long ago as 1923 (in Public Trustee v. Attorney-General (supra) but there has been a detectable judicial reluctance for the Courts to give full application and demonstration of this principle. It is

often disguised as a matter of judicial deference to the wishes of the testator in the formulation of the new scheme but must be regarded too as a legacy of the old cy-pres doctrine which still exerts an indirect, persuasive effect on the Courts. Neither Counsel nor the Court is doing its correct work.

(VI) CONCLUSIONS AND THEN RECOMMENDATIONS

It is now felt that the foregoing critical survey justifies the following conclusions being set down, and then some recommendations.

THAT the Courts and Counsel and the law profession generally and text-book writers on trusts in New Zealand have all totally misconceived an important branch of the law on the variation of charitable trusts.

THAT the fault is partly the Legislature's because of inadequate legislation and partly Counsel's through its failure to draw to the Court the principles enshrined in Public Trustee v. Attorney-General.

THAT the Charitable Trusts Act 1957 represents the culmination of the statutory provisions relating to the variation of the purposes of subsisting charitable trusts and the disposition of funds of defunct charitable societies to existing charitable associations.

THAT such evolution of statute over the last 100 years has not been accompanied by any degree of perfection and that there are a number of matters where the Act could be amended so

that it is characterised by both benevolence (as at present) and beneficence (which is lacking).

THAT the provisions contained in Part III of the Act should be extensively amended to allow the Court to approve any alternative scheme or to accept and approve a combination of the scheme submitted by the trustees with that of part of such alternative scheme put forward by parties in opposition.

THAT comparable provisions mutatis mutandis to those obtaining in Part IV be included in Part III so that there is provided the fullest disclosure of the trustees' scheme and of any proposals offered in combination with or opposition to that scheme and so that the Court is offered the fullest degree of information and the Attorney-General likewise in preparing his Report or Reports on the Scheme or Schemes (as the case may be).

THAT the doubt and uncertainty in the meaning and effect of section 34 be removed by its amendment to cover the separate consequences provided for in subsection (1) and subsection (2) of section 32.

THAT for similar reasons(and too on the suggested basis for amendment already indicated) section 42 should be amended to specify precisely the varying consequences delineated

in section 40 and in section 41.

THAT statutory acknowledgment be forcibly given that the Court in giving approval of a new purpose is under no duty or obligation to consider the original purpose or to equate that purpose in any way with the new purpose and that in the exercise of any judicial discretion a distinction must be drawn between deference to and dictation by the settlor or testator (as the case may be).

THAT accordingly the Courts be enjoined to bear in mind the words of Hosking J. in Public Trustee v. Attorney-General that while approximation of the new purpose to the old would not go unconsidered as an element in the matter of deciding upon the new purpose such approximation should not be regarded as the guiding principle; and that the Courts should be enjoined to refrain from acknowledging (as did Gresson, J. in Goldwater at 757 and Tompkins, J. in Whatman (at p.11) that the Court owes a duty to the settlor to dispose as nearly as possible in accordance with the wishes of the settlor and also to those proposed to be benefitted by the trust and to the public generally to dispose of the fund or property as nearly as possible in accordance with the charitable purposes of the trust. Deference to such is permissible but not dictation which is raised when the term duty is acknowledged.

THAT in amending the Charitable Trusts Act 1957 or ideally in its repeal and consolidation statutory recognition be given both to the principles of benevolence and beneficence to promote and inculcate the concept of charity, which with existing privileges associated with the law of charitable trusts the law for centuries has attempted to encourage.

THAT the above matters be submitted to the appropriate Equity Committee of the Law Revision Commission.

BIBLIOGRAPHY

Reference Books and Textbooks consulted

Garrow's Law of Trusts and Trustees, (1st Edn., 1919 J.M.E. Garrow; 2nd Edn., 1953; E.W. Henderson 3rd Edn., 1966, consulting editor E.W. Henderson editors N.C. Kelly and D.J. Whalan; 4th Edn., 1972 editor N.C. Kelly)

Jacob's Law of Trusts in New South Wales (3rd Edn. 1971 R.P. Meagher and W.M.C. Gummon)

Hanbury's Modern Equity (9th Edn. 1969 R.H. Maudsley)

Tudor's Charities (6th Edn. 1967 D.H. McMullen, S.G. Maurice, D.B. Parker).

Keeton and Sheridan's The Modern Law of Charities (2nd edn. 1971)

Pettit's Equity and the Law of Trusts (2nd Edn. 1970)

Nathan and Marshall's A Casebook on Trusts (5th Edn., 1967 O.R. Marshall)

Sheridan and Delany's The Cy-Pres Doctrine (1959)

Academic journals

Alberta Law Review, Vol 6, 1967,68, Cy-pres in the Sixties: Judicial Activity, L. Sheridan; page 16

New Zealand Law Journal: Charitable Trusts and Public Benefit 1973 p.57; D.M. McRae

Charitable Trusts Act 1957 1968 p.298 E.C. Adams

r
Folder
Fl

FLANNERY, M.F.
The variation of the charitable trust.

333,998

Due	Borrower's Name
28/3/77	[illegible]
3.30pm	S.W. Mt.
3.50pm	[illegible]
1981	[illegible]
26/9	[illegible]
12/2.	[illegible]
11/9	[illegible]
0/8/94	[illegible]
13 OCT 19[illegible]	