ON CHARITY'S EDGE – THE ANIMAL WELFARE TRUST

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Notwithstanding the general principle that a valid trust requires a beneficiary (*cestui que trust*), "somebody, in whose favour the Court can decree performance",[1] a principal use of the trust today is to make provision, particularly by will, for causes or non-human objects. Where no person, capable of enforcing the obligations of the trust, is pointed out as its object, there must be someone, though not the object of the trust, to whom the law gives the same right of suit under the trust as if he were its object. Only the Crown, as *parens patriae*, enjoys such a right and only in respect of such trusts as are, in a legal sense, charitable. Inherent in their charitable status is the notion that it is in the public interest that they should be enforced. It is in view of their public character that the Attorney-General may act to ensure their execution. A trust which seeks merely to benefit purposes, but which lacks this element of public benefit, will fail, for there is then no reason why the State should lend its aid to seeing that that purpose is carried out.

While acknowledging the existence of certain "anomalous and exceptional"[2] cases, a trust which makes provision for a cause or non-human object will be valid only if it is, in a legal sense, charitable. Animal welfare, "representing perhaps the most extreme instance of charity's drift towards matters peripheral to social welfare",[3] is one such object. It is clear that, with the primary concerns of welfare falling increasingly into the hands of the State, philanthropists have felt justified in turning their attention to such an object; millions of dollars are now annually devoted to animal charities.[4] These funds have not only been devoted towards the prevention

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[1] The "beneficiary principle" succinctly stated by Grant M. R. in *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399, 404–405, 32 E.R. 656, 658–9, affirmed on appeal (1805) 10 Ves. 522, 32 E.R. 947. See also *Bowman* v. *Secular Society, Limited* [1917] A.C. 406, 441; *Re Chardon* [1928] Ch. 464; *Re Wood* [1949] Ch. 498, 501; *Re Astor's Settlement Trusts* [1952] 1 All E.R. 1067; *Re Denley's Trust Deed* [1968] 3 All E.R. 65. In Australia, the "beneficiary principle" has been applied in N.S.W. in *Public Trustee* v. *Nolan* (1943) 43 S.R. (N.S.W.) 169, 172. See also *Roman Catholic Archbishop of Melbourne* v. *Lawlor* (1934) 51 C.L.R. 1, 30, per Dixon J.; *Re Hamilton-Grey* (1938) 38 S.R. (N.S.W.) 262; *A-G (N.S.W.)* v. *Perpetual Trustee Co. Ltd* (1940) 63 C.L.R. 209, 223, per Dixon and Evatt JJ.; *Re Cain* [1950] V.L.R. 382, 389–390; *Re Spehr* [1965] V.R. 770; *Re Elmore* [1968] V.R. 390; *A-G (N.S.W.)* v. *Donnelly* (1958) 98 C.L.R. 538, 579, per Kitto J. and on appeal to the Privy Council as *Leahy* v. *A-G (N.S.W.)* [1959] A.C. 457, 478–479.

[2] *Re Astor's Settlement* [1952] 1 All E.R. 1067, 1074, per Roxburgh J.

[3] M. Chesterman, *Charities, Trusts and Social Welfare* (London, Weidenfeld and Nicholson, 1979) p. 168.

[4] Id. 86–7. The Royal Society for the Prevention of Cruelty to Animals (Qld.) alone receives in excess of $300,000 in bequests, estates and special donations each year: Annual Report 1986.

of cruelty to animals and the related question of their use in medical research, but also towards less obvious concerns in animal welfare: the establishment of wildlife sanctuaries and nature reserves, the institution of humane slaughter techniques, and the promotion of veterinary research, particularly in relation to diseases of livestock. However, as animal welfare is an issue which clearly stands at the extreme periphery of the concerns of social welfare, it is to be asked by what process the courts have generally found trusts for such purposes to be charitable.

Their recognition is the more intriguing for the fact that, to be charitable, the objects of a trust must not only be beneficial to the community, they must be so in a way which the law regards as charitable; they will not be beneficial in this way unless they are within either the letter or spirit and intendment of the preamble to the *Charitable Uses Act* 1601.[5]

A. THE CHARITABLE USES ACT 1601

This statute,[6] born of the concern that the traditional Chancery method of supervision of charitable trusts had proved wholly inadequate in ensuring the efficient administration of those funds,[7] provided statutory machinery for the correction of abuses which had grown up in their administration.

The enactment, often referred to as the *Statute of Elizabeth*, was not to apply to every charitable trust, but only to the wide group of charitable purposes which were set out in its preamble. The objects specified, in modern English, were as follows:

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

It is clear from these objects that the statute was not intended to provide a comprehensive definition of "charity". The term itself was nowhere defined in the preamble, and many charitable purposes then recognised by the English courts were deliberately omitted.

These omissions were, however, clearly explicable in view of the social concerns which had inspired the legislation. The statute had essentially re-enacted similar legislation which had been passed four years earlier,[8]

[5] *The Royal National Agricultural and Industrial Association* v. *Chester* (1974) 48 A.L.J.R. 304, 305.

[6] 43 Eliz. 1, c. 4.

[7] G. H. Jones, *History of the Law of Charity, 1532–1827* (Cambridge, University Press, 1969) p. 21. For what is stated herein on the history of the charitable trust, general reference can be made to this work.

[8] 39 Eliz. 1, c. 6.

following a series of disastrous harvests and the increasing strain of the Spanish War, as a relatively minor part of the Poor Law legislation which had been enacted in an attempt to relieve the poverty which afflicted the country. The *Charitable Uses Act* 1601 gave recognition to the role that private philanthropy could play in that relief, and, accordingly, its underlying policy was merely to protect those trusts which were, directly or indirectly, for the relief of poverty.

In view of the concerns which had inspired the enactment, it is not surprising that the preamble makes no reference to the welfare of animals.[9] Equally, in view of that omission, its recognition as a charitable purpose is surprising.[10]

However, the catalogue of objects contained in the preamble was never regarded as exhaustive, but merely as typical of the kind of charity which the State wished to encourage.[11] Sir Francis Moore, to whom the drafting of the statute has been attributed,[12] in his Reading on the Statute delivered in the hall of the Middle Temple in 1607, "urged that the preamble should be generously construed to protect those uses whose endowments could be applied for the public benefit [for] [p]ublic benefit was the key to the statute, and the relief of poverty [merely] its principal manifestation".[13]

In his Reading, Moore listed many examples of uses not specifically included in the statute which he concluded to be within its equity.[14] So long as the use benefited the poor, even if only indirectly, it would be within the equity of the statute. The charitable purposes to which the Act was applied were, therefore, quickly extended by the courts to those that, though not within the letter of the statute, were within its "equity" — its "spirit and intendment". However, those uses which were deemed to be within the equity of the statute would be only those whose endowments could materially contribute to the relief of poverty.[15] Consequently, there were many uses, admittedly charitable, which were neither within the letter nor the equity of the statute.

Such uses were not enforceable through the commission procedures employed by the Elizabethan Statute. Prior to that enactment, uses had been enforced through an information brought in the Court of Chancery by the Attorney-General at the relation of a private individual. During the 17th century, people increasingly sought to enforce uses, through this traditional means, which prior to the Elizabethan Statute had been recognized as charitable, but were neither within the letter nor the spirit of the new enactment. Judges faced with such an information would often look elsewhere than to

[9] H. Picarda, *The Law and Practice Relating to Charities* (London, Butterworths, 1977) p. 105.
[10] Id. 168.
[11] See, e.g. *The University of London* v. *Yarrow* (1857) 1 DeG & J 72, 79, 44 E.R. 649, 652, per Cranworth L.C.
[12] F.M. Bradshaw, *Law of Charitable Trusts in Australia* (Sydney, Butterworths, 1983), p. 2, suggests that Moore probably only assisted in this.
[13] Jones, Op.cit. p. 27.
[14] Id. 27–29 some of these examples are recounted.
[15] See, e.g., *Jones* v. *Williams* (1767) Amb. 651, 652, 27 E.R. 422; *Attorney-General* v. *Pearce* (1740) 2 Atk. 87, 88, 26 E.R. 454; *Turner* v. *Ogden* (1787) 1 Cox 316, 317, 29 E.R. 1183.

the preamble to the *Statute of Charitable Uses* for a definition of legal charity. "[I]f there is any thread linking these crude judicial attempts to define charity, it is in the conception of charity as a *public use.*"[16] This idea was, of course, not novel. As we have seen, Sir Francis Moore himself had emphasized in his Reading on the Statute that all charitable uses were "publique" uses. Although these "eighteenth-century charity cases are not, on the whole, characterized by comprehensiveness or lucidity; ... the available evidence does lend to a tentative conclusion that uses which benefited the public were *ipso facto* deemed charitable".[17] By the late 17th Century, the commission procedures of the statute having also gradually become excessively costly and cumbersome, the information had become established as a suitable and alternative method of enforcing all charitable trusts, and not merely those outside the *Statute of Charitable Uses.*[18] In 1787, the last commission under the statute was sealed.

It is clear that, during this period, divergent formulations of a definition of legal charity were developing. At the same time, another major historical influence was also giving impetus to this more general "public" definition of charity.

1. THE MORTMAIN ACT 1736

The *Mortmain Act* of 1736 had been designed to avoid devises of land to charity, and vest the property so devised in the testator's heir-at-law. With the statutory commission procedure faltering towards the end of the 17th Century, suspicion had begun to grow towards the worth of charity. The aims of the Elizabethan Statute were now no longer warmly embraced. The poor were viewed as merely "contentedly wallowing in their own, self-imposed degradation".[19] The *Mortmain Act* had been born of these suspicions, inspired by three deep-seated concerns of the time: a fear and hatred of the wealth of the Church and, particularly, of the ecclesiastical charities, (a fear which reached its climax in the second quarter of the 18th Century); a resentment of the vainglorious ambitions of charitably minded testators; and, the desire that the charitable death-bed gift should not disinherit the testator's heir-at-law.

The courts strictly enforced the Act in seeking to further its political objects. In ensuring that the devise to charity was avoided and that the land resulted to the heir-at-law, the courts contrived to define "charity" as broadly as possible. Judges, in seeking "to repel the mischief, and advance the remedy",[20] paradoxically broadened the definition of "charity", with "little thought ... of limiting the definition ... within the spirit and intendment

[16] Jones, Op.cit. p. 121.
[17] Id. p. 122.
[18] See, e.g., *Attorney-General* v. *Brereton* (1752) 2 Ves. Sen. 425, 426, 28 E.R. 272. See also *Attorney-General* v. *Hewer* (1700) 2 Vern 387, 23 E.R. 848.
[19] Jones, Op.cit. p. 105.
[20] See, e.g., *Attorney-General* v. *Meyrick* (1750) 2 Ves. Sen. 44, 47, 28 E.R. 30, 31, per Sir John Strange M.R.

of the preamble to the *Statute of Elizabeth*".[21] These broad decisions also sought essentially to equate "charitable" more or less with "public".[22]

By the beginning of the 19th Century, therefore, we have a crude line of authority running in opposition to the more narrow formulation of "charitable" under the Elizabethan Statute.

The information having finally supplanted the commission procedures of the *Charitable Uses Act* as a suitable and practical method of enforcing all charitable uses, the way lay open to consolidate this divergent development in the formulation of one complete definition of "charity".

2. THE DIVERGENCE RESOLVED

This decisive step was finally taken in 1804 in *Morice* v. *Bishop of Durham*.[23] The testatrix had bequeathed her residuary personalty on trust to her executor, the Bishop of Durham, for "such objects of benevolence and liberality as [he], in his own discretion, should most approve of". The Master of the Rolls, Sir William Grant, held that the bequest was void for uncertainty. In doing so, he conclusively rejected the absolute equation of public benefit and charity, and instead enshrined the preamble to the Elizabethan Statute "as the *fons et origo* of all charity".[24] He concluded that the trust purposes in question were not charitable since only those objects enumerated in the Elizabethan preamble or which by analogy are deemed within its spirit and intendment are charitable. It followed that the trust was void for uncertainty, for it could be lawfully executed by bestowing the residue on objects which were not charitable in law.

This basis for the decision was subsequently upheld on appeal by Lord Eldon,[25] and thus "a door was shut against any attempt to define charity in terms merely of what would be beneficial to the community."[26]

These decisions, perhaps questionable in law at that time, have been repeatedly followed and have undoubtedly become part of the settled law. What had begun as a practice of the court in referring to the preamble "as a sort of index or chart",[27] in order to determine whether or not a given purpose was charitable, was now enshrined as a rule of law. However, a benefit, to fall within the spirit and intendment of the preamble, did not have to be in any way *ejusdem generis* with the purposes recited there.[28] A further

[21] H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts* (Melbourne, Law Book Company, 1983), p. 821.

[22] Chesterman, Op.cit. p. 56. See, e.g., *Townley* v. *Bedwell* (1801) 6 Ves. 194, 198, 31 E.R. 1008, 1010.

[23] (1804) 9 Ves. 399, 32 E.R. 656.

[24] Jones, Op.cit. p. 122.

[25] (1805) 10 Ves. 522, 541, 32 E.R. 947, 954.

[26] Bradshaw, Op.cit. p. 3.

[27] *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, 581, per Lord Macnaghten; Also see *Turner* v. *Ogden* (1787) 1 Cox 316, 317, 29 E.R. 1183; *Attorney-General* v. *Ruper* (1722) 2 P.Wms. 125, 126, 24 E.R. 667; *Attorney-General* v. *Whorwood* (1750) 1 Ves. Sen. 534, 27 E.R. 1188.

[28] *Re Strakosch* [1949] Ch. 529, 537–538, per Lord Greene M.R. delivering the judgment of the court of Appeal. See also *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow Corporation* [1968] A.C. 138, 147, 156.

dimension to the definition was also added through the doctrine of analogy, for it was not only the objects enumerated in the preamble which were, in in law, charitable, but also all others "which by analogies are deemed within its spirit and intendment".[29]

The flexibility of this approach is expounded in the following passage of Lord Reid in *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation*:[30]

> "The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. And then they appear to have gone further and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable."

The broad decisions made under the *Mortmain Act* 1736, which had more or less equated "charitable" with "public" did however, ultimately preserve for posterity a more liberal definition of "charity"[31] in two important respects.[32] First, even after the decision in *Morice* v. *Bishop of Durham*, this broad approach is still apparent in cases where the Act applied,[33] and (despite its repeal in England)[34] public purposes which had been held to be charitable under the Act were still to be regarded as being so. Secondly, the cases based on the Act assisted in significantly distorting the modern interpretation of "charity" under the Elizabethan preamble: before a trust can be charitable it must not only be deemed to be within the spirit and intendment of the preamble to the Elizabethan Statute, but must also be for the public benefit.[35] Moreover, the cases under the Act having virtually equated "charitable" with "public" purposes, "[i]t accordingly became possible in cases decided with reference to the preamble to maintain that 'public benefit' existed were *any* section of the community, [and] not specifically the poor or the rich and the poor together, derived benefit."[36] This more broad approach released any formulation of a definition of "charity" based upon the preamble from the shackles of the original underlying policy of the Elizabethan Statute of the relief of poverty.

3. THE LEGACY OF MORICE v. BISHOP OF DURHAM

The legacy of *Morice* v. *Bishop of Durham* has been to preserve forever a fundamental distinction between those trusts which are charitable, in being both within the spirit and intendment of the Elizabethan preamble and for the public benefit, and those which merely benefit the public and therefore

[29] *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399, 32 E.R. 656, 405.
[30] [1968] A.C. 138, 147.
[31] Jones, Op.cit. p. 132.
[32] Chesterman, Op.cit. p. 56.
[33] See, e.g. *Trustees of the British Museum* v. *White* (1826) 2 Sim. & St. 594, 57 E.R. 473.
[34] The statute has never applied in Australia: *Balfour* v. *The Public Trustee* [1916] V.L.R. 397, 404–405, per Cussen J.
[35] *The Royal National Agricultural and Industrial Association* v. *Chester* (1974) 48 A.L.J.R. 304, 305.
[36] Chesterman, Op.cit. p. 57.

are not.[37] The repeal of the *Statute of Elizabeth*[38] has been of no legal significance; the case law built upon the foundations of its preamble remains. However, many judges have been pessimistic about finding a governing principle by which to distinguish "the charitable gift (which must be *pro bono publico*) from the gift which is merely for the public benefit."[39]

An attempt to identify a substratum of principle was made by Barwick C.J. in *Incorporated Council of Law Reporting (Qld.)* v. *Federal Commissioner of Taxation*[40] in concluding that:

> "Out of certain of the instances given in the preamble to the Act of 1601 a broad concept emerges of the kind of object of public utility which will satisfy the quality of charity ... these instances seem to regard the provision of some of the indispensables of a settled community as charitable ... as socially fundamental".

However, "to ask of a given purpose whether it is an indispensible [sic] of a settled community or socially fundamental ... is to pose a series of further questions and lure the inquirer into the pursuit of greater imponderables, manifestly unsuited to judicial illumination".[41]

Viscount Simonds in *Gilmour* v. *Coats*,[42] concluded that "it is ... conspicuously true of the law of charity that it has been built up not logically but empirically." "Instead, there has been, from time to time, an assumption that some coherence is retained if reference is made to certain observations of Lord Macnaghten ...".[43]

4. LORD MACNAGHTEN'S CLASSIFICATION

Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*[44] had classified " '[c]harity' in its legal sense [as falling into] four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other

[37] Jones, Op.cit. p. 127. See e.g., *Vezey* v. *Jamson* (1822) 1 Sim. & St. 69, 57 E.R. 27.

[38] The Act was repealed by the *Mortmain and Charitable Uses Act*, 1888, though note s. 13(2) with respect to the preamble. That Act was itself repealed by s. 38 of the *Charities Act* 1960; s. 13(2) was expressly repealed by s. 39(1) and Schedule 7, Pt II: note, however, s. 38(4). Note also *Trusts Act* (Qld) 1973, s. 3 and Part I of First Schedule; *Imperial Acts Application Act* (N.S.W.) 1969 (No. 30), s. 8(1). In each of these States the repeal was declared not to alter the established rules of law relating to charity: s. 9(2) (N.S.W.); s. 103(1) (Qld). No part of the Statute of Elizabeth is in force in Victoria. It has been regarded as being in force in Western Australia and Tasmania.

[39] Jones, Op.cit. p. 133. See, e.g. *Re Tetley* [1923] 1 Ch. 258, 266-267, per Lord Sterndale M.R. (in House of Lords, sub. nom. *A-G* v. *National Provincial & Union Bank of England* [1924] A.C. 262); *Re Foveaux* [1895] 2 Ch. 501, 504; *Hobart Savings Bank* v. *Federal Commissioner of Taxation* (1930) 43 C.L.R. 364, 375, per Dixon J.; *Re Nottage* [1895] 2 Ch. 649, 655, 656; *Nuffield* v. *I.R.C.* (1946) 175 L.T. 465, 467-8; *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow Corporation*, [1968] A.C. 138, 147.

[40] (1971) 125 C.L.R. 659, 669.

[41] *Jacob's Law of Trusts in Australia* (5th ed. by R. P. Meagher Q.C. and W. M. C. Gummow, Sydney, Butterworths, 1986) p. 167.

[42] [1949] A.C. 426, 449.

[43] G. W. Keeton and L. A. Sheridan, *The Modern Law of Charities* (3rd ed. Cardiff, University College Cardiff Press, 1983) p. 26.

[44] [1891] A.C. 531, 583.

purposes beneficial to the community, not falling under any of the preceding heads".[45]

This classification was substantially derived from a similar classification which had been put forward by Sir Samuel Romilly in argument in *Morice* v. *Bishop of Durham*,[46] and it has remained the basis for the consideration of charitable purposes, though it should not be applied too rigidly. Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow Corporation*,[47] having acknowledged the value of the classification, reminds us that:

> "first ... it is a classification of convenience, there may well be purposes which do not fit neatly into one or other of the headings; secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891."

With these qualifications in mind, the overall framework into which the legal definition of "charitable" has crystallized requires that the purposes of the trust must both fall within one or more of these four categories (which are intended to encapsulate the "spirit and intendment" of the Elizabethan preamble) and contain an element of "public benefit".

5. "OTHER PURPOSES BENEFICIAL TO THE COMMUNITY": THE FOURTH CATEGORY

Although the various purposes which have been recognized as falling within this fourth head of charity defy any orderly classification,[48] it is within this head that trusts for the protection or benefit of animals have generally been upheld. It falls to be considered by what process the courts have come to uphold such trusts as charitable in being both beneficial to the public and within the spirit and intendment of the Elizabethan preamble.

In considering the element of "public benefit" in such trusts, there are six underlying principles which must be borne in mind.

First, it is not every purpose otherwise beneficial to the community which will fall within the fourth category, but only such purposes as contain the necessary element of "public benefit". As Viscount Cave L.C. explained in *A.G.* v. *National Provincial and Union Bank of England*:[49]

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

[45] This traditional division applies in all Australian States except Queensland and Western Australia where certain recreational purposes are declared to be charitable and, therefore, effectively forming a fifth category.

[46] (1805) 10 Ves. 522, 532, 32 E.R. 947, 951.

[47] [1968] A.C. 138, 154.

[48] See, e.g., *Trustees of the Londonderry Presbyterian Church House* v. *Commissioner of Inland Revenue* [1946] N.I. 178, 187–188, per Andrews L.C.J.

[49] [1924] A.C. 262, 265.

> ... it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust."

Secondly, there is, at present, some divergence between English and Australian law regarding the approach in determining what is embraced within this fourth head of charity. The High Court of Australia has not been prepared to adopt the test laid down by the English Court of Appeal in *Incorporated Council of Law Reporting for England and Wales* v. *A.G.*[50] that objects beneficial to the community are, as such, prima facie within the spirit and intendment of the Elizabethan preamble and, therefore, charitable unless there are "grounds for holding it to be outside the equity of the Statute".[51] In *The Royal National Agricultural and Industrial Association* v. *Chester*,[52] the High Court expressly disapproved this approach, laying down that, to be charitable, the purpose must be shown to be both beneficial to the community and within the spirit and intendment of the preamble.

Thirdly, it is within this fourth category that the "public benefit" test seems to have its strictest application. Public benefit will be presumed until the contrary is shown in the case of the first three categories of charitable trust, but must be affirmatively proved in all other cases.[53]

Fourthly, in considering what is meant by the benefit of the community or a section of the community, "a section of the public sufficient to support a valid trust in one category [is not] as a matter of law ... sufficient to support a trust in any other category."[54]

In *Inland Revenue Commission* v. *Baddeley*,[55] Viscount Simonds and Lord Somervell of Harrow (two of the majority of four Law Lords)[56] concluded that the test of "public benefit" under the fourth category was more restricted than would be allowed under the first three heads. It was there held that a trust directed to "Methodists resident in the London boroughs of West Ham and Leyton" did not fall within the fourth category for this was not "a form of relief extended to the whole community [though] by its very nature advantageous to only the few", but was rather "a form of relief accorded to [merely] a selected few out of a larger number equally willing and able to take advantage of it."[57] The beneficiaries were merely "a class within a

[50] [1972] Ch. 73, 88, 95, 104. Cf. *Williams' Trustees* v. *I.R.C.* [1947] A.C. 447, 455; *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow Corporation*, [1968] A.C. 138, 146–148, 149, 151, 154 (H.L.); *Re South Place Ethical Society; Barralet* v. *A-G* [1980] 1 W.L.R. 1565, 1574.

[51] *Incorporated Council of Law Reporting for England and Wales* v. *A-G* [1972] Ch. 73, 88, per Russell L. J.

[52] (1974) 48 A.L.J.R. 304, 305. See also *Brisbane City Council and Myer* v. *Attorney-General for Queensland* [1979] A.C. 411, 422 (P.C.).

[53] *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31, 42, 65; *Nelan* v. *Downes* (1917) 23 C.L.R. 546, 563; *Re Watson* [1973] 1 W.L.R. 1472.

[54] *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572, 615, per Lord Somervell of Harrow. See also Lord Simonds in *Gilmour* v. *Coats* [1949] A.C. 426, 449, to similar effect.

[55] [1955] A.C. 572.

[56] The two other members of the majority, Lord Porter and Lord Tucker expressed no opinion. Lord Reid dissented.

[57] [1955] A.C. 572, 592, per Viscount Simonds.

class",[58] and a trust for such purposes was said to be unlikely to be for the public benefit.

Viscount Simonds and Lord Somervell concluded that all fourth category purposes must either benefit or be capable of benefiting the whole public and not merely some section of it, a proposition which various writers[59] have suggested should be accepted as correctly stating the nature of the public element required under the fourth category. Others, however, have suggested that "the better view is that 'public benefit' within this category of charitable purposes is only a matter of degree and that the purpose of a particular trust independently affects the minimum number of people who must benefit from its implementation."[60] One writer has actually suggested that *Baddeley's* case merely provides the court with a technique to "hold non-charitable ... [a] fourth category trust with eccentric or quirky limitations on the range of eligible beneficiaries".[61]

Fifthly, "public benefit" has not been limited only to those persons who must necessarily benefit within that jurisdiction. Although the test which should be applied, in determining whether a purpose which is charitable within Australia under the fourth head of charity would be charitable if carried out abroad, has never been clearly formulated, Jacobs J. in *Re Lowin*[62] has put forward a test which has much to commend it. Considering the validity of a bequest to establish musical prizes for the composition of orchestrated works and song cycles in Austria, His Honour asked whether the purpose is beneficial to the foreign community and not inimical to the general concept of legal charity as understood by the local law:

> "It is necessary in the particular context of foreign charitable purposes to consider the nature of the gift and the relationship between this State and the foreign jurisdiction ... anything which is a need in this State and which is recognised as involving a community obligation will involve the same need and the same community obligation towards the foreign jurisdiction ... the provision of hospitals or the assistance of those who are in some need, even though it be not a financial need, are all obligations which go beyond the bounds of any particular country, but the encouragement of musical competition or the encouragement of the fine arts in a particular country seems to me to be very much a matter internal to the country itself. I do not think that it is sufficient that it may result in an overflow of cultural endeavour."[63]

As such, not all purposes charitable in Australia as a purpose otherwise beneficial to the community would be charitable if carried out abroad.[64]

[58] Chesterman, Op.cit. p. 171.
[59] Bradshaw, Op.cit p. 66. See also *Tudor on Charities* (6th ed., London, Sweet & Maxwell, 1984) by S. G. Maurice and D. B. Parker p. 73.
[60] B. Marks and R. Baxt, *Law of Trusts* (Sydney, CCH, 1981), p. 145.
[61] Chesterman, Op.cit. p. 171.
[62] [1965] N.S.W.R. 1624 (reversed on appeal [1967] 2 N.S.W.R. 140 – though not in this respect), applied in *Re Stone, Perpetual Trustee Co. Ltd* v. *Stone* (1970) 91 W.N. (N.S.W.) 704, 717.
[63] [1965] N.S.W.R. 1624, 1627.
[64] *Camille and Henry Dreyfus Foundation Inc.* v. *I.R.C.* [1954] 2 All E.R. 466, 471, 485 (C.A.) affd. without considering this point: [1956] A.C. 39 (H.L.).

However, trusts for the prevention of cruelty to animals abroad have been upheld,[65] with the suggestion that even a trust to promote the abolition of bull-fighting in Spain might well be upheld.[66]

Finally, it is not for the creator of the trust to determine subjectively whether the purpose which he seeks to advance is for the public benefit, or indeed that it is charitable. The court must itself determine objectively on the evidence before it whether, in fact, the objects of the trust are such that benefit to the public in general must necessarily result from its execution, and, if that is the case, whether its objects are also within the spirit and intendment of the Elizabethan preamble.[67]

Whether "public benefit" exists is a question of evidence, to be determined neither by the subjective motivations of the settlor nor according to the personal opinion of the judge. Where the existence of the benefit is open to doubt, the court may decide that it is necessary to obtain expert evidence to reach its decision. However, having concluded on the evidence before it that, despite the donor's good intentions, no public benefit can derive from the achievement of those intentions, there can be no charity.

B. TRUSTS FOR THE PROTECTION OR BENEFIT OF ANIMALS

With these considerations in mind, it is possible to examine the processes whereby the courts have identified a "public benefit" to be derived from the execution of trusts for the protection or benefit of animals.

1. A UTILITARIAN BENEFIT?

It has been argued that "the benefit derived from the execution of a trust falling under the fourth head of [Lord Macnaghten's classification is] in practice most frequently utilitarian";[68] there must be some tangible net benefit to society after weighing the probable benefits and detriments that can be expected to flow from the execution of the trust.[69] Although trusts for the protection or benefit of animals do not appear to have been much considered by the courts before the middle of the nineteenth century, if they had been, they would probably only have been upheld if their purposes had been of general public utility. In *Attorney-General* v. *Whorwood*,[70] it was stated in argument that the court had refused to carry into execution an indifferent use, such as to feed sparrows in perpetuity. However, no reported

[65] *Armstrong* v. *Reeves* (1890) 25 L.R. Ir. 325; *Re Jackson, Bell* v. *Adam* (1910) Times, 11th June.
[66] Picarda, Op.cit. p. 106.
[67] *Re Hamilton-Grey* (1938) 38 S.R. (N.S.W.) 262, 273; *Re Hummeltenberg. Beatty* v. *London Spiritualistic Alliance* [1923] All E.R. 49, 51, approved in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31, 44, 66–67 (H.L.) (disapproving *Re Foveaux* [1895] 2 Ch. 501, 507). In Australia, see, e.g., *R.S.P.C.A. (N.S.W.)* v. *Benevolent Society of N.S.W.* (1959–1960) 102 C.L.R. 629; *Perpetual Trustee Co. Ltd* v. *John Fairfax & Sons Pty Ltd* (1959) 76 W.N. (N.S.W.) 226; *Re Elmore* [1968] V.R. 390.
[68] Maurice and Parker, op.cit. p. 87.
[69] *Dingle* v. *Turner* [1972] A.C. 601, 624–625, per Lord Cross of Chelsea.
[70] (1750) 1 Ves. Sen. 534, 536, 27 E.R. 1188, 1189.

case was cited in support of that submission. In *Thellusson* v. *Woodford*[71] it was submitted that a hospital for the maintenance of cats or hedge-hogs would be too irrational and absurd an object to be charitable.

The doctrine of public utility received its first clear articulation in relation to trusts for the protection or benefit of animals in 1857 in *University of London* v. *Yarrow*.[72] Lord Cranworth L.C. (with whose judgment Knight Bruce and Turner L.J.J. concurred) was satisfied that the establishment of a hospital in which "any quadrupeds or birds useful to mankind" could be properly treated and the nature of their diseases investigated was a valid charitable trust. Animals "useful to mankind" was taken to mean "domestic" animals, the emphasis in the judgment being on the aspect of public utility in the usefulness of such animals to mankind.[73]

This approach was again evident in *Re Douglas; Obert* v. *Barrow*[74] where Kay J. held that a Home for Lost Dogs was charitable, emphasizing the usefulness of dogs to mankind. He stated:

> "It seems to me that all the reasoning in the case of the *University of London* v. *Yarrow* (1 DeG & J 72) applies distinctly to shew that that is a charity. It is quite true that attending a sick canary, or sick dog, or sick animal, may not be itself within the meaning of a charity, but when an institution is referred to which is for the benefit of domestic animals, that is so far a benefit to the human species who are served by the domestic animal, that the institution itself may well be treated as a charity, as an institution founded for the charitable purpose of assisting those animals which are useful to mankind, and which are commonly called domestic animals. And of all animals useful to mankind, and of all animals domesticated ... dogs hold the foremost place."[75]

On appeal, Lindley L.J. (with whom Bowen L.J. concurred) also cited *University of London* v. *Yarrow* as authority for holding the Home for Lost Dogs to be charitable.[76]

However, this doctrine had already begun to recede into the background almost immediately after the decision in *University of London* v. *Yarrow*. Lord Cranworth L.C. had even stated in that case that had he concluded that animals "useful to mankind" had "had a more extensive meaning [than merely domestic animals], I should not at all say that the charity would be bad."[77] This was "a clear intimation of opinion that the limitation to domestic animals was not necessary",[78] and within months of that decision we have the rejection in *Marsh* v. *Means*[79] of the argument that charity, having "man for its object", existed only where the utility of the animals to mankind

[71] (1799) 4 Ves. Jun. 227, 300, 31 E.R. 117, 153.
[72] (1857) 1 DeG & J 72, 44 E.R. 649.
[73] *A-G (N.S.W.)* v. *Sawtell* [1978] 2 N.S.W.L.R. 200, 206, per Holland J.
[74] (1887) 35 Ch.D. 472.
[75] Id. 478–479.
[76] Id. 487.
[77] (1857) 1 DeG & J 72, 80, 44 E.R. 649, 653.
[78] *Re Wedgwood, Allen* v. *Wedgwood* [1915] 1 Ch. 113, 117, per Lord Cozens-Hardy M.R.
[79] (1857) 3 Jur. N.S. 790; 108 The Revised Reports 939.

was established. Wood V-C there suggested that a devise towards a periodical published by an association seeking to expose cruelties to animals would have been charitable had the periodical existed at the date of the testator's will, notwithstanding that the devise was not limited to benefiting only animals useful to mankind.[80]

This more broad approach continued to gain currency during the latter half of the 19th Century. In *Tatham* v. *Drummond*,[81] a bequest to the R.S.P.C.A. "towards the establishment ... of slaughterhouses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered" was assumed to be charitable, although without any restriction to animals useful to man. Significantly, however, this result meant that the bequest failed under the *Mortmain Act* 1736. In argument before the Court in *Armstrong* v. *Reeves*,[82] it was sought to rationalize this decision consistently with an application of the doctrine of public utility as having been "for the sanitary benefit of the district", an argument perhaps true of the first part of the bequest, but certainly not of the second. In *Re Vallance*[83] a bequest to promote prosecutions for cruelty to animals was upheld as charitable, though again without any restriction to animals useful to man, and, in 1888, notwithstanding the application of the more narrow doctrine of general utility in *Re Douglas; Obert* v. *Barrow*[84] the previous year, Chitty J. concluded in *Re Joy; Purday* v. *Johnson*[85] that "a gift for the suppression of cruelty to animals generally" was a good charitable gift.

However, Chitty J.'s observation was obiter as he had held that the legacy, which was for the benefit of "The Society for Suppressing Cruelty by Private Prayer", failed as no such society existed at the date of the testatrix's death. Moreover, he concluded that although "a gift for the suppression of cruelty to animals generally" was a good charitable gift, this would not have been the case here in any event. The object of the society was to suppress such cruelty by prayer. Private prayer, being a purpose merely related to improving the individual, would not be "a purpose of public or general utility within the statute, or within the analogy in the statute of Elizabeth . . . Though it may result in public benefit, and be a matter of public utility, it is clearly to my mind not within the statute ... or within the analogy of the statute".[86]

2. THE DOCTRINE OF MORAL IMPROVEMENT

No clear expression had yet emerged of the nature of the public benefit that the courts must have presumed to be inherent in such trusts for the

[80] See *Re Foveaux, Cross* v. *London Anti-Vivisection Society* [1895] 2 Ch. 501, 506.
[81] (1864) 4 DeG.J. & S. 484, 46 E.R. 1006.
[82] (1890) 25 L.R. Ir. 325, 331.
[83] (1876) 2 Seton's Judgments & Orders 7th ed. 1304, cited in *Re Herrick* (1918) 52 I.L.T. 213.
[84] (1887) 35 Ch. D. 472.
[85] (1888) 60 L.T. 175.
[86] Id. 178.

protection or benefit of animals. The expression first emerged towards the close of the 19th Century. In *Armstrong* v. *Reeves*,[87] Chatterton V-C concluded that "any society for the prevention of cruelty to animals, whether domestic or not, is within the scope of charitable institutions"[88] as "anything that tends to prevent the demoralization of public opinion ... would be for the public benefit ..."[89] This doctrine was more clearly expressed five years later in the judgment of Chitty J. in *Re Foveaux; Cross* v. *London Anti-Vivisection Society*[90] when he concluded that "[c]ruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men".[91]

However, it was not until the beginning of this century, and some twenty years after Chitty J.'s dictum, that this doctrine received fulsome expression in *Re Wedgwood; Allen* v. *Wedgwood*.[92] The doctrine is perhaps there best expressed in the judgment of Swinfen Eady L.J.:[93]

> "A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race."

This doctrine, described as the doctrine of moral improvement, is clearly wider and less specific than the doctrine of general public utility.[94] It is reminiscent of a proposition put forward by Cohen J. in *Re Price*[95] where, in a distinctly liberal ruling, he concluded (in obiter) that the Anthroposophical Society of Great Britain, which exists to carry on the teachings of Dr Rudolph Steiner, was a charity because those teachings sought to advance (and might indeed advance) the "mental and moral improvement" of mankind.

It has been said[96] (although not entirely accurately, as we shall see) that this doctrine may be regarded as the basis upon which all modern decisions upholding trusts for the benefit and protection of animals have been made. In virtue of its application, gifts have been held to be charitable when made for the following purposes:

[87] (1890) 25 L.R. Ir. 325.
[88] Id. 341.
[89] Id. 339.
[90] [1895] 2 Ch. 501.
[91] Id. 507.
[92] [1915] 1 Ch. 113.
[93] Id. 122.
[94] *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 45, per Lord Wright.
[95] [1943] Ch. 422. See also, e.g., *Re Scowcroft* [1898] 2 Ch. 638; *Re Hood* [1931] 1 Ch. 240; *Re South Place Ethical Society* [1980] 1 W.L.R. 1565.
[96] Maurice and Parker, op.cit. p. 132. See also *Re South Place Ethical Society* [1980] 1 W.L.R. 1565.

(a) *For the Prevention of Cruelty to Animals Generally*

In *Re Green's Will Trusts; Fitzgerald-Hart* v. *A-G*,[97] Nourse J. concluded that it "is settled, on the authority of the decision of the Court of Appeal in *Re Wedgwood; Allen* v. *Wedgwood* [1915] 1 Ch. 113, [1914-15] All E.R. Rep. 322, that the ... object of preventing cruelty to animals is charitable."[98]

(b) *To the R.S.P.C.A. and Other Societies for the Prevention of Cruelty to Animals*

In *Re Inman*,[99] Gowans J. concluded that the Society's general object of preventing cruelty to animals was charitable "because of its elevating influence on human sentiment and conduct ...".[100]

(c) *To Homes or Hospitals to Care for Animals in Special Need — Whether:*

(i) sick

In *Re Weaver*,[101] Hudson J. considered that although in fact the Animal Welfare League devoted its activities only to the promotion of the welfare of sick animals, he had "no doubt that ... even if ... it might devote itself to promoting and improving the welfare of animals not in this condition [its objects included inter alia the promotion and improvement of the welfare of animals generally, as well as the carrying on of a hospital for sick animals] this would not ... deprive its purposes of their charitable character."[102]

(ii) aged;[103]

(iii) or otherwise needing care and attention.

In *Re Moss; Hobrough* v. *Harvey*,[104] Romer J. held that a bequest for "the welfare of cats and kittens needing care and attention" was one which passed the "test [of public benefit] with honours. It seems to me that the care of and consideration for animals which through old age or sickness or otherwise are unable to care for themselves are manifestations of the finer side of human nature, and gifts in furtherance of those objects are calculated to develop that side and are, therefore, calculated to benefit mankind".[105]

In *Re Green's Will Trusts; Fitzgerald-Hart* v. *A-G*,[106] Nourse J. referred to this decision in concluding that the maintenance and benefit of cruelly treated animals was charitable for "I can see no distinction between [the object of preventing cruelty to animals] and [that] of rescuing, maintaining and

[97] [1985] 3 All E.R. 455.

[98] Id. 458. See also, e.g. *Animal Defence and Anti-Vivisection Society* v. *I.R.C.* (1950) 66 (Pt. 2) T.L.R. 1091, 1092, per Danckwerts J.; *Re Graves' Estate*, 242 Ill. 23, 89 N.E. 672 (1909) U.S.; *Minns* v. *Billings*, 183 Mass. 126, 66 N.E. 593 (1903) U.S.

[99] [1965] V.R. 238.

[100] Id. 242. See also, e.g., *Re Pitt Cobbett* (1923) 19 Tas. L.R. 43; *Re Buckley* (1928) 47 N.Z.L.R. 148; *Caldwell* v. *Fleming* (1927) 46 N.Z.L.R. 145, 165 (F.C.).

[101] [1963] V.L.R. 257.

[102] Id. 265.

[103] E.g., United Kingdom, Charity Commissioners for England and Wales, *Report* 1971, para. 26 (Home of Rest for Horses).

[104] [1949] 1 All E.R. 496.

[105] Id. 497-498.

[106] [1985] 3 All E.R. 455.

benefiting cruelly treated animals. The one is just as much calculated to promote public morality by checking the innate tendency to cruelty as is the other . . .".[107]

Gifts for such purposes have been held to be charitable whether given generally or only as to a specific species of animal. In *Re Murawski's Will Trust*,[108] Brightman J. held to be charitable a legacy to the "Bleakholt Animal Sanctuary", the objects of which were "the provision and care and shelter for stray, neglected and unwanted animals of all kinds and the protection of animals from ill-usage, cruelty and suffering". However, it appeared that the body had been registered as a charity and that as s. 5(1) of the *Charities Act* 1960 conclusively presumed an institution on the register of charities to be a charity, His Honour considered that it was "outside [his] jurisdiction . . . to go behind that registration."[109]

Gifts to a specific species of animal include gifts to the Cat Protection Society of N.S.W.: *Badger* v. *Badger*,[110] the Cat Protection Society of Victoria: *Re Goodson*,[111] and the Dublin Home for Starving and Forsaken Cats: *Swifte* v. *A-G*[112] which have all been upheld as charitable.[113]

(d) *For the Humane Treatment of Animals*

Gifts have also been upheld when given towards campaigning for the humane treatment of animals, whether generally or in some specific request. The Charity Commissioners for England and Wales have decided that a gift to secure the improvement of the condition and treatment of pit ponies is charitable; the prevention of actual or apprehended cruelty was said not to be an essential factor in animal charities.[114]

In *Re Wedgwood; Allen* v. *Wedgwood*[115] the terms of the trust were "for the protection and benefit of animals", but the movements both for the humane slaughtering of animals and the provision of municipal abattoirs where animals could be properly and decently slaughtered were mentioned by the testatrix as the sort of purposes that she would like to have forwarded. The Ontario Court of Appeal in *Re Gemmill*[116] referred to this decision in concluding that it was "not in any doubt that [a trust to establish slaughterhouses for the humane slaughtering of animals was] a valid charitable trust".[117]

[107] Id. 458. See also, e.g., United Kingdom, Charity Commissioners for England and Wales, *Report* 1973, para. 40 (Advisory Committee on Oil Pollution of the Sea, inspired by the plight of oiled sea birds, registered as a charity).
[108] [1971] 1 W.L.R. 707.
[109] Id. 709.
[110] [1975] A.C.L.D.T. 225 (unreported judgment of Holland J. of N.S.W. Supreme Court).
[111] [1971] V.R. 801.
[112] [1912] 1 I.R. 133.
[113] See also, e.g., cats: *Re Moss, Hobrough* v. *Harvey* [1949] 1 All E.R. 495, 498; *Swifte* v. *Colam* (1909) (unreported judgment of Meredith M.R., cited in Delaney, *Law Relating to Charities in Ireland*, (Revised ed., Dublin, Thom, 1962); *Shannon* v. *Eno* 120 Conn. 77, 179 A 479 (1935) U.S.
[114] *Report* 1964, p. 60.
[115] [1915] 1 Ch. 113.
[116] [1946] 2 D.L.R. 716.
[117] Id. 721. See also, e.g., *Re Winton* (1953) *The Times*, 31st January.

Even when given towards the promotion of vegetarianism, gifts have been held to be charitable. In *Re Cranston; Webb* v. *Oldfield*,[118] a devise to two vegetarian societies, the object of each of which was to stop the slaughter of living creatures for food, was held to be charitable. However, this decision was based on the assessment of "public benefit" being a matter merely of the opinion of the testator. The decision was followed by Joyce J. in *Re Slatter; Howard* v. *Lewis*,[119] although His Honour did not give detailed reasoning for his decision that the gift, given "in furtherance of the principles of food reform as advocated by the vegetarian societies of Manchester and London", was charitable. It is suggested that such trusts, tested objectively, would be of "dubious public benefit",[120] and that their recognition today would, therefore, be "improbable".[121] Various writers have attempted to rationalize their recognition by classifying such trusts as promoting health,[122] a rationale clearly invoking the justifications of the doctrine of general public utility.

The doctrine of general public utility was, in fact, never buried and received clear expression in a number of cases following its application in *Re Douglas; Obert* v. *Barrow*.[123]

In 1929, the Privy Council in *Adamson* v. *Melbourne and Metropolitan Board of Works*[124] held that "The Lost Dogs' Home is admittedly a charitable institution in the technical legal sense" citing *Re Douglas* as authority for this proposition. In *Re Hodge*[125] Napier C.J. in the Supreme Court of South Australia specifically applied the reasoning in *Re Douglas* in upholding as charitable a trust for the establishment of a home for "homeless, stray and unwanted animals", holding that this was "a reference [only] to domestic animals, that is to say, to such animals as are commonly kept and cared for in or about human habitations"[126] and that their benefit "is so far a benefit to the human species who are served by the domestic animal . . . as [to be] a charity".[127] Three years later, the High Court of Australia in *Attorney-General (S.A.)* v. *Bray*[128] upheld Napier C.J.'s conclusion that such "homeless, stray and unwanted animals" covered merely domestic animals.[129] This decision has itself been recently cited by Mohr J. in *Public Trustee* v. *Clayton*[130] as authority for the proposition that "a gift to care for animals

[118] [1898] 1 I.R. 431.
[119] (1905) 21 T.L.R. 295.
[120] Picarda, Op.cit. p. 106.
[121] Keeton and Sheridan, Op.cit. p. 111.
[122] See, e.g. Chesterman, op.cit. p. 169, Marks and Baxt, op.cit. p. 140. In this regard, see *Re Cranston* [1898] 1 I.R. 431, 442, 451.
[123] (1887) 35 Ch. D. 472.
[124] [1929] A.C. 142.
[125] [1960] S.A.S.R. 237.
[126] Id. 240.
[127] *Re Douglas, Obert* v. *Barrow* (1887) 35 Ch. D. 472, 479, per Kay J., referred to in *Re Hodge* [1960] S.A.S.R. 237.
[128] (1964) 111 C.L.R. 402.
[129] Id. 414–415, per Dixon C.J., 417, Per Kitto J. (with whose reasons for judgment Taylor and Menzies JJ. concurred, Menzies J. also agreeing with the reasons for judgment of Dixon C.J.), 425, per Windeyer J.
[130] (1985) 38 S.A.S.R. 1.

is a charitable purpose",[131] upholding as charitable a bequest "to the Society for Prevention of Cruelty to Animals Incorp. Devonport for the use of building a Home and Hospital (together) for sick, injured or abandoned animals of kinds and birds."

However, it had been conceded in *Bray's* case that "moral advancement" was a matter of public benefit inherent in a trust for the care and protection of animals, which was merely supplemented in that case by "the practical benefit to the community of the removal of stray and unwanted animals".[132] In *Re Goodson*,[133] Adam J. held a gift to the Cat Protection Society of Victoria to be charitable (citing *Re Wedgwood*), notwithstanding that the objects of the society largely concerned stray cats. No limitations based on the public utility of the animals was suggested.

3. WEIGHTY QUESTIONS – THE CALCULATION

A moral benefit to mankind has been recognized as inherent in trusts which seek to promote the welfare of animals and this has been so even although the animals to be benefitted are not merely domestic animals. Equally, the doctrine of public utility has survived and the courts have continued to seek evidence of material advantage to the public to be derived from the execution of the trust. In some cases, that evidence has merely supplemented the morally elevating value of the trust and confirmed the court in its resolve as to the charitable nature of the trust. In others, the court has either concluded that the evidence before it of material disadvantage to the public that would flow from the execution of the trust has outweighed the morally elevating influence that would derive from its execution and held the trust not to be charitable, or has found itself unable even to find the existence of the element of moral elevation and has reached its decision as to the charitability of the trust solely on the evidence before it of the material utility or otherwise of its execution.

In the ultimate analysis, "there is no decision which upholds (as charitable) a trust in perpetuity in favour of animals upon any other ground than ... that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind."[134]

(a) *Moral Elevation – A Searching Question?*

Not every trust for the benefit of animals generally is charitable. The search for public benefit is not always successful. In some cases, the court has been unable to identify even the element of moral elevation in the execution of the trust.

Even in *Re Wedgewood*[135] it had been doubted whether "the preservation of beasts of prey or mad dogs" would serve to elevate the human race, Kennedy L.J. suggesting that "the Court would not find any difficulty as to

[131] Id. 3.
[132] (1964) 111 C.L.R. 402, 424, per Windeyer J.
[133] [1971] V.R. 801.
[134] *Re Grove-Grady, Plowden* v. *Lawrence* [1929] 1 Ch. 557, 582, per Russell L. J.
[135] [1915] 1 Ch. 113.

the answer which is dictated by reason and common sense".[136] In *A-G (S.A.)* v. *Bray*,[137] although the High Court of Australia upheld as charitable a gift for the establishment of a home for the maintenance and care of homeless, stray and unwanted animals, Windeyer J.[138] concluded that the trust imposed no obligation to care for all kinds of domestic animals, such as white mice, goats or pigs, although to provide for such animals (if homeless, stray and unwanted) would not be outside the trust.

Sanctuaries – A Moral Dilemma?

It is in considering the establishment of sanctuaries for the preservation of animals and birds that the courts appear to have had the greatest difficulty in discovering this element of moral elevation.

In *Re Grove-Grady*,[139] a majority of the English Court of Appeal held that a trust to establish refuges for the preservation of animals and birds in their natural state so that they shall there be safe "from molestation or destruction by man", and, hence, be free to prey on each other with no safeguards against the stronger animals continuing to prey upon the weaker, was not charitable. "The struggle for existence [was] to be given free play ... The one characteristic of the refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harry one another."[140] Such a purpose afforded neither an elevating lesson to mankind, either by protecting animals useful to man or by protecting animals from cruelty generally, nor any material benefits that might have been to be derived had the trust permitted the observation of or research in relation to these animals.

A trust to establish a sanctuary for wild animals and birds, the sole purpose of which is to protect them from man and from which sanctuary man is excluded, exhibits no element of public benefit to render the trust charitable.[141]

This principle of no charity without moral elevation has since been applied by the High Court of Australia in *R.S.P.C.A. (N.S.W.)* v. *Benevolent Society of N.S.W.*[142] where a trust to establish what the settlor termed "the Sellar Sanctuary for Birds" to feed, water and keep free from molestation birds visiting the half-acre area of land set aside in suburban Sydney for that purpose was held to be not charitable.

[136] Id. 121.
[137] (1964) 111 C.L.R. 402.
[138] Id. 425. See also *Re Hummeltenberg* [1923] 1 Ch. 237, 242.
[139] [1929] 1 Ch. 557 (Lord Hanworth M. R. and Russell L.J., Lawrence L.J. dissenting); comprised an appeal sub nom *A-G* v. *Plowden* [1931] W.N. 89 (H.L.). However, the decision of the Court of Appeal has since been commended in the House of Lords: *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 45.
[140] [1929] 1 Ch. 557, 573–574, per Lord Hanworth M.R.
[141] See also *Peterborough Royal Foxhound Show Society* v. *Commissioners of Inland Revenue* [1936] 1 All E.R. 813; United Kingdom, Charity Commissioners for England and Wales, *Report* 1967, p. 47; *Holbrook Island Sanctuary* v. *Brooksville* 161 Me 476, 214 A2d 660 (1965) U.S.
[142] (1960) 102 C.L.R. 629.

However, the decision is "far from deciding that the maintenance of a genuine wild life sanctuary would not be charitable",[143] merely that:

> "to do no more than provide upon a suburban allotment water and some food for birds, or, for that matter, for dogs or cats, seems ... to fall altogether outside the scope of a trust for the public benefit within the fourth category ... The natural reaction to the settlor's trust is not 'How kindly and worthy of emulation!' but 'How odd! What is the explanation of this!"[144]

Although it was held that "a suburban householder cannot by assuming an obligation to keep a basin filled with water and to put out food for birds convert his home into a public charity",[145] it was recognised that a "trust for the provision and preservation of a sufficient area of bushland or of inland water, marshland or sea-coast, suitably situated, as a place where birds could breed unmolested might well ... be good."[146] Windeyer J. drew support for this conclusion from the existence of the *Fauna Protection Act* 1948 (N.S.W.),[147] it being based on the belief that "it is for the good of the community that various species of birds should be preserved; and that – especially in the case of some of the more timid native birds – positive measures are needed for their protection and preservation."[148] His Honour concluded that this was not in any way inconsistent with the decision in *Re Grove-Grady*,[149] referring to the passage of Lord Hanworth M.R., when speaking of the scheme in question in that case:

> "It is not a sanctuary for any animals of a timid nature whose species is in danger of dying out: nor is it a sanctuary for birds which have almost entirely left our shores and may be attracted once more by a safe seclusion to nest and rear their young."[150]

Significantly, the trial judge, Hardie J. had before him evidence that the proposed sanctuary would in no way contribute to the preservation of Australian native birds which were in danger of becoming extinct, or delay the departure of species of birds which were unable to adapt to suburban surroundings.

As early as 1916, Ashbury J. in *Re Verrall National Trust for Places of Historic Interest or National Beauty* v. *A-G*[151] had held to be charitable the

[143] Id. 646, per Menzies J. See also Windeyer J. at 647.

[144] Id. 646-647, per Menzies J. Cf. *Re Vernon* (1957) *The Times*, 27th June. See also, e.g., *Re Estate of Graves* 242 Ill. 23, 89 N.E. 672 (1909) U.S. (horses); *Estate of Coleman* 167 Cal. 212, 138 p. 992 (1914) U.S. (dogs and birds). Note, though, Picarda, op.cit. p. 107.

[145] (1960) 102 C.L.R. 629, 648-649, per Windeyer J.

[146] Id. 647.

[147] This is now dealt with under the *National Parks and Wildlife Act*, 1974 (N.S.W.). See also *National Parks and Wildlife Conservation Act* 1975 (C'wth); *Fauna Conservation Act* 1974 (Qld); *National Parks and Wildlife Act* 1972 (S.A.); *National Parks and Wildlife Act* 1970 (Tas.); *Wildlife Act* 1975 (Vic.); *Wildlife Conservation Act* 1950 (W.A.); *Wildlife Act* 1953 (N.Z.).

[148] (1960) 102 C.L.R. 629, 648, per Windeyer J.

[149] [1929] 1 Ch. 557.

[150] Id. 573.

[151] [1915] All E.R. 546. See also *Re Spehr* [1965] V.R. 770.

National Trust, one of its purposes being the preservation of places of beauty and of their natural aspect, features and animal and plant life.

In 1951, Smith J. in the Supreme Court of Victoria in *Re Ingram*[152] held to be charitable a trust "for the benefit of the public of Australia to preserve animals ... and birds indigenous to Australia", although he reached this decision on the basis that the trust was expressly confined to the preservation of such animals only "in such circumstances and in such manner as will be beneficial to the public".[153]

It was against this background that, in a relatively recent decision, Holland J. in *A-G (N.S.W.)* v. *Sawtell*[154] upheld as charitable a trust for the preservation of native wild life. His Honour considered "preservation" to be the operative word. "If it were 'protection', that might include care and attention of old or sick animals",[155] and so tend to promote humane feelings and improve public morality. However, the benefit to mankind was the *preservation* of "native wild life from destruction or extinction"[156] and it was within that object that the element of public benefit had to be identified.

His Honour pointed out that this was not a trust for the preservation of wild life in vacuo, but was for "the preservation of 'native' wild life which [he concluded] must ... be interpreted as meaning wild life, both flora and fauna, indigenous to Australia".[157] That fact he found to be "of considerable significance in an Australian context [in view] ... of the uniqueness of so much of our native wild life ..."[158] The consequent "interest here and overseas excited by ... [Australia's] many odd and curious species",[159] and the facts both that "certain [of these] species are in danger of extinction, and that elaborate and costly legislative and administrative measures have been and are being taken to preserve in the public interest, not only endangered species, but our native flora and fauna generally",[160] led His Honour to conclude that there was clearly "value to the community and the national interest ... [in the object of the trust] notwithstanding the potential of some [species benefited] to be pests or dangerous to man".[161]

His Honour went on to consider whether, if the trust fund was applied in establishing or supporting wild life sanctuaries, the element of public benefit would be present, for (although the trust did not in terms require the funds be expended in that manner) that "would be the most probable, as well as the most practicable, method of carrying out the trust".[162]

The evidence before the Court clearly established that "public benefit" would necessarily flow from the execution of the trust in that manner, for,

[152] [1951] V.L.R. 424.
[153] Id. 426.
[154] [1978] 2 N.S.W.L.R. 200.
[155] Id. 216.
[156] Id. 217.
[157] Id. 208-209.
[158] Id. 209.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Ibid.

"since the decision in *Re Grove-Grady*,[163] ... there [had] been a radical change in the recognition throughout the world, and here in Australia, of value to mankind of the preservation of wild life in general [and that] [i]n Australia this would ... be particularly true in relation to our native wildlife".[164] There had, in this period been a tremendous intensification of interest in wild life and the recognition both here and throughout the world of "an increasing need to establish wilderness areas [and] nature reserves ...".[165] This need had been "generated by the extensive use of land by the human population", and such areas were necessary, therefore, in order to "maintain a diverse gene pool" and "reservoirs of genetic information" for the purposes of study so that we might "better understand and manage the productive systems already in existence".[166]

Such "reserves or sanctuaries with restricted public access, [and] ... national parks"[167] would also contribute to public recreation and health by helping to meet the increasing world-wide demand for places where people could go "to commune with nature".[168] Thus could there be afforded some relief from the pressures on the human being of his artificially created environment, so promoting his mental health and well-being.

Finally, His Honour found that such areas provide opportunities for a full appreciation of natural eco-systems by students, "text books and classroom lectures [being] wholly inadequate teaching [for this purpose, for] ... there was no adequate substitute for actual observation in the natural environment ...".[169]

Having concluded that the execution of the trust in establishing or supporting wild life sanctuaries would necessarily be beneficial to the public, His Honour found himself unable to agree with the earlier decision of Anderson J. in *Re Green*[170] where a gift for the purchase and establishment of a suitable area of land upon which native fauna and flora might, in the course of time and without hindrance, establish themselves had been held not to be charitable. Further support for this conclusion may be drawn from the decision of Waddell J. in the New South Wales Supreme Court in *Perpetual Trustee Co. Ltd* v. *Salesian Society Inc.*[171] who (in an unreported decision of 31 July, 1978) held to be charitable a gift for the purpose of the promotion of the study and conservation of native flora and fauna upon an area of land.

In England, however, Vaisey J. in *Re Glyn's Will Trusts*[172] applied *Re Grove-Grady*[173] in holding to be not charitable a trust to establish a

[163] [1929] 1 Ch. 557.
[164] *A-G (N.S.W.)* v. *Sawtell* [1978] 2 N.S.W.L.R. 200, 214.
[165] Id. 210.
[166] Ibid.
[167] Ibid.
[168] Id. 211.
[169] Ibid.
[170] [1970] V.R. 442.
[171] [1978] A.C.L.D.T. 591.
[172] (1953) *The Times*, 28th March; noted in the *Current Law Year Book* (London, Sweet & Maxwell, 1954), par. 437.
[173] [1929] 1 Ch. 557.

sanctuary for birds and wildflowers upon a small strip of land near a by-pass coming out of London, notwithstanding that (unlike the situation before the Court in *Re Grove-Grady*) the trustees had a discretion to invite such members of the public to visit the sanctuary as they saw fit. It is of interest to note, though, that the Charity Commissioners for England and Wales have since upheld a trust for the preservation of flora and fauna of Upper Teasdale as "an undoubtedly charitable purpose".[174]

Significantly, although Holland J. concluded in *Sawtell*[175] that he himself did not consider that the tendency to promote humane feelings and to improve public morality existed in a trust for the preservation of indigenous wild life, Smith J. in *Re Ingram*[176] had found that such a trust was charitable as having this tendency. (Holland J. concluded that *Re Ingram* was merely "a stronger case by reason of the expressed intention to benefit the public of Australia . . ."[177]) As such, he concluded that that decision also provided support for the validity of such a trust, if he himself was "taking too restrictive a view of the kinds of public benefit which may be found to inhere in the preservation of native wild life."[178]

It is clear that the courts have accepted that they must determine objectively on the evidence before them whether, in fact, the objects of the trust are such that public benefit must necessarily result from their execution. The public benefit resulting from the moral advancement of mankind inherent in a trust for the welfare of animals is merely one factor in that calculation.

This has also been illustrated in a context quite different from that of the wild life sanctuary or nature reserve. In *McGarvie Smith Institute* v. *Campbelltown Municipal Council*,[179] Else-Mitchell J. held that the McGarvie Smith Institute (the objects of which included the development, manufacture and sale of vaccines against diseases in animals — essentially those in sheep and cattle, and the promotion of veterinary science and scientific research — particularly into diseases in livestock and poultry) was charitable. His Honour concluded that:

> "the prevention of disease in animals such as sheep and cattle is a charitable purpose . . . despite the explanations given for the validity of charitable trusts for animals in cases such as *Re Wedgwood* . . .; *Re Grove-Grady* . . .; and *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* . . . [for] in a primary production country like Australia which depends substantially upon a stable and healthy livestock population there [is] a public element in preventing disease in sheep, cattle and similar animals of far greater significance than the encouragement of the moral qualities and finer feelings which seem to have been regarded as important in those cases.[180]

[174] *Report* 1969, p. 11, para. 24.
[175] [1978] 2 N.S.W.L.R. 200, 216-217.
[176] [1951] V.L.R. 424.
[177] [1978] 2 N.S.W.L.R. 200, 216.
[178] Id. 217.
[179] [1965] N.S.W.R. 1641.
[180] Id. 1645.

(b) *Material Detriment — A Negative Question!*

Just as the courts have found that, in calculating whether the execution of the trust will necessarily be for the public benefit, evidence of material benefits to be derived by the public from its execution has supplemented "the moral benefits that flow from the promotion of kindly feelings for animals",[181] so too have they weighed against those moral benefits any "disadvantages to mankind of performing the trust . . .".[182] Moreover, in that calculation, the courts appear to have concluded that the moral benefit resulting from the execution of the trust is to be outweighed by evidence of any material detriment to mankind that would result from the execution of the trust. Notwithstanding our peculiar recognition of trusts for the welfare of animals, where that welfare comes into conflct with the welfare of mankind, "the former generally takes precedence in the law of charity".[183]

(i) Vivisection — A Case in Point

This utilitarian-type weighing of benefits is most clearly illustrated when the fine line between trusts for the prevention of cruelty to animals and those to prevent vivisection is crossed.

Several decisions in the latter half of the 18th Century had failed to draw this line, holding that legacies to various anti-vivisectionist societies were charitable. Intriguingly, the earliest of these had been *Re Douglas, Obert* v. *Barrow*,[184] a decision staunchly in support of the necessity to identify some practical benefit to mankind in trusts for animals before they should be considered charitable. There Kay J. and Lindley L.J. (on appeal) had considered that a gift to the "Society for the Protection of Animals liable to Vivisection", as described by the testatrix, was charitable, although neither Lindley L.J. nor Bowen L.J. (on appeal) was prepared to express an opinion on whether that society was as good an object for a charitable bequest at the time of the Court's decision as it had been before its constitution had been changed to provide that its object was the total prohibition of vivisection.

Whether an anti-vivisection society is charitable was discussed again one year later by Chitty J. in *Re Joy, Purday* v. *Johnson*,[185] and again without resolution. Shortly after this decision, however, Chatterton V-C in *Armstrong* v. *Reeves*[186] held that legacies to two anti-vivisection societies were charitable, and the following year, Lord Halsbury L.C. in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*[187] referred to the purposes of anti-vivisection societies as being comprehended in England within the term "charitable purposes".

[181] *A-G (S.A.)* v. *Bray* (1964) 111 C.L.R. 402, 424, per Windeyer J.
[182] Ibid.
[183] Chesterman, Op.cit. p. 169. See also, e.g., *Salmond on Jurisprudence* (12th ed., London, Sweet & Maxwell, 1966 by P. J. Fitzgerald) at 301.
[184] (1887) 35 Ch. D. 472.
[185] (1888) 60 L.T. 175.
[186] (1890) 25 L.R. Ir. 325.
[187] [1891] A.C. 531, 550.

In 1895, Chitty J. in *Re Foveaux, Cross* v. *London Anti-Vivisection Society*,[188] in a decision which was subsequently expressly approved by the English Court of Appeal in *Re Wedgwood*,[189] held to be charitable bequests to two societies the objects of which were substantially the same — the total suppression of vivisection. His Honour concluded that "[o]n principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable."[190]

However, even at this early stage, the courts had recognized that "vivisection ... can only be justified on the ground of being attended with beneficial public effects, of such importance as to render it desirable that the cruelty should be excused, in view of the public benefits to be derived from such investigations"[191] for "the infliction of justifiable pain is not cruelty".[192]

The early thinking of the courts, though, had been that the "question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ", and, "whether ... right or wrong in [their] opinions", the subjective beliefs of the donors as to the benefit of their gifts to the community were conclusive.[193] "[W]hether, if they achieved their object, the community would, in fact, be benefited [was] a question on which ... the Court [was] not required to express an opinion."[194] This subjective assessment of the "public benefit" inherent in a donor's gift was, of course, an approach later discredited and this fact, together with two World Wars and rapid developments in medicine, saw a none too surprising development in the recognition of anti-vivisectionist aims.

In 1947, the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[195] had to determine whether a society which had as its main object the total suppression of vivisection (and was, in fact, the same society with which the earlier decision in *Re Foveaux*[196] had been concerned) was charitable. The Court held, overruling *Re Foveaux*,[197] that, although "there could be no doubt ... that a gift for the protection of animals is prima facie a charitable gift for the reason ... stated by Swinfen Eady L.J. in *In Re Wedgwood* ...",[198] a society seeking the total suppression of vivisection was not charitable.[199] The Court reached that conclusion on the

[188] [1895] 2 Ch. 501.
[189] [1915] 1 Ch. 113.
[190] [1895] 2 Ch. 501, 507.
[191] *Armstrong* v. *Reeves* (1890) 25 L.R. Ir. 325, 340.
[192] *Re Foveaux, Cross* v. *London Anti-Vivisection Society* [1895] 2 Ch. 501, 507.
[193] Ibid.
[194] Ibid.
[195] [1948] A.C. 31.
[196] [1895] 2 Ch. 501.
[197] Trustees who had acted on the basis that *Re Foveaux* was good law were relieved against breach of trust in *Re Wightwick's Will Trusts* [1950] 1 All E.R. 689.
[198] [1948] A.C. 31, 67, per Lord Simonds.
[199] *Re Recher's Will Trusts, National Westminster Bank Ltd* v. *National Anti-Vivisection Society Ltd* [1971] 3 All E.R. 401, 404, per Brightman J. Cf. The American Restatement takes a more benevolent view and concedes charitable status both to trusts for the promotion of vivisection and trusts for its abolition. See also *Old Colony Trust Co.* v. *Welch* 25 F. Supp. 45 (D. C. Mass, 1938) U.S.

evidence before it, indicating that it could not stand neutral, but had itself to determine whether or not, on a balancing of the utilities, it could be said that the execution of the trust was necessarily for the public benefit. Before the Court was evidence of the enormous advances in science and research which were due to experiments on living animals, particularly in the prevention and cure of diseases such as malaria, typhus, typhoid, yellow fever, diphtheria and tetanus. The evidence on the utility of vivisection, which was "such as no fair-minded man could refuse full credence",[200] showed that such "experiments ... were necessary for the proper pursuit of science and for producing benefit not only to the human race but also to animals".[201]

In view of that evidence, in weighing "against each other the detriment inseparable from suppressing vivisection on the one hand and on the other hand the benefit to the community of higher moral standards said to be due to enhanced regard for the well-being of animals", there was "not ... any difficulty."[202] Any moral benefit resulting was clearly outweighed by the material detriment to mankind that would result from preventing the conduct of such experiments on living animals. "[T]he benefits to mankind [of vivisection] outweighed any undesirable consequence which might ensue to animals through there being necessarily some cruelty involved by the very nature of vivisection"[203] for, it is suggested, "however it is looked at, the life and happiness of human beings must be preferred to that of animals."[204]

This change in recognition had, in fact, been mooted almost two decades previously when Russell L.J. in *Re Grove-Grady*[205] had remarked that "anti-vivisection societies ... held to be charities by Chitty J. in *Re Foveaux*[206] ... might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities."[207]

With the clear public benefits of vivisection in mind, the general feeling of their Lordships towards the morally elevating influence of trusts for the prohibition of such activities is well illustrated by the observation of Lord Wright:[208]

> "Apart from the 'animal' cases I cannot find any precedent for such an object [i.e. that of moral elevation] being held charitable ... the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community ..."

[200] [1948] A.C. 31, 46, per Lord Wright.
[201] *Animal Defence and Anti-Vivisection Society* v. *I.R.C.* (1950) 66 (Pt. 2) T.L.R. 1091, 1093.
[202] [1948] A.C. 31, 43, 47, per Lord Wright.
[203] *Animal Defence and Anti-Vivisection Society* v. *I.R.C.* (1950) 66 (Pt. 2) T.L.R. 1091, 1093.
[204] [1948] A.C. 31, 48, per Lord Wright.
[205] [1929] 1 Ch. 557.
[206] [1895] 2 Ch. 501.
[207] [1929] 1 Ch. 557, 582.
[208] [1948] A.C. 31, 49.

Later cases in both England and Victoria have followed the approach of the House of Lords in this balancing of utilities. Danckwerts J. in *Animal Defence and Anti-Vivisection Society* v. *Inland Revenue Commissioners*[209] held not to be charitable a society, the leading object of which was the opposition of vivisection and all experiments on animals, where the evidence suggested that the benefits of vivisection outweighed its disadvantages. Similarly, Gowans J. in *Re Inman*[210] concluded that a society which had as its fundamental aim the opposition of vivisection and the securing of its abolition was not charitable. Although there was no evidence before him as to whether vivisection was beneficial to the community or otherwise, his Honour held that he could not ignore the sanctions of legislation[211] which permitted vivisection when performed under certain conditions for the purposes of scientific investigation. This legislation impliedly recognised public benefit in the practice when directed to that purpose and, as such, in the absence of countervailing evidence, His Honour was of the view that the fundamental object of the society was not charitable.

(ii) Anti-Vivisection — A Political Purpose

It is in the existence of such legislation that the claim for charitable status of trusts for anti-vivisectionist purposes has failed on another, and more obvious, ground. Since legislation exists permitting vivisection in certain specified circumstances, a trust (the object of which is to secure the abolition of vivisection) must of necessity seek also to secure legislation to give effect to that purpose and so seek to change the existing law.

The abolition of vivisection could not be achieved except by legislation, and this necessitates persuading Parliament to revoke the law permitting vivisection and to substitute a new enactment prohibiting vivisection altogether. Such a trust is political in character and "has always been held invalid"[212] for:

> "[a] coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare ... when the main purpose of a trust is agitation for legislation or political changes, it is difficult for the law to find the necessary tendency to the public welfare ... When the subject matter ... must fall under the fourth class, viz., that of undefined purposes for the public good, the difficulty becomes even greater."[213]

However, two apparently quite divergent reasons for this difficulty have been suggested. Lord Parker of Waddington in *Bowman* v. *Secular Society*

[209] (1950) 66 (Pt. 2) T.L.R. 1091.
[210] [1965] V.R. 238.
[211] See *Prevention of Cruelty to Animals Act*, 1979 (N.S.W.), s. 24; *Animals Protection Act* 1925 (Qld), s. 7; *Prevention of Cruelty to Animals Act* 1936 (S.A.), s. 27; *Protection of Animals Act* 1966 (Vic.), s. 12; *Prevention of Cruelty to Animals Act* 1920 (W.A.), s. 6; *Animals Protection Act* 1960 (N.Z.), ss. 19, 3 and *Animals Protection Amendment Act* 1971 (N.Z.), s. 3.
[212] *Bowman* v. *Secular Society, Limited* [1917] A.C. 406, 442, per Lord Parker of Waddington.
[213] *Royal North Shore Hospital of Sydney* v. *A-G (N.S.W.)* (1938) 60 C.L.R. 396, 426, per Dixon J.

Ltd[214] suggests simply that the court could not make such a finding for it "has no means of judging whether a proposed change in the law will or will not be for the public benefit".[215] Similarly, one of the grounds upon which Buckley J. in *Re Jenkins's Will Trusts*[216] concluded that a bequest towards obtaining legislation prohibiting vivisection was not charitable was that:

> "the ultimate object to be achieved by the Act of Parliament is one which in itself is not recognized by the law as being a charitable purpose ... because the court cannot weigh the benefits to the community which result from using animals for vivisection and research against the benefits which would result to the community from preventing such practices."[217]

On the other hand, the House of Lords in *National Anti-Vivisection Society* v. *I.R.C.*[218] considered that it had the means of making that very judgment when it found that the proposed change in the law would not have been for the public benefit. On that view, however, the trust is not charitable even if the evidence suggests such a change to be for the public benefit for, in determining whether that benefit exists, the court is involved in making a political judgment and it is not, therefore, considered a justiciable issue. The court "must decide on the principle that the law is right as it stands".[219]

Slade J. in *McGovern* v. *A-G*[220] has recently commented upon this apparently divergent reasoning, concluding:

> "the court will not regard as charitable a trust of which a main object is to procure an alteration of the law ... for one or both of two reasons. First, the court will ordinarily have no sufficient means of judging, as a matter of evidence, whether the proposed change will or will not be for the public benefit. Second, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands since to do otherwise would be to usurp the functions of the legislature."[221]

In *National Anti-Vivisection Society* v. *I.R.C.*,[222] the House of Lords held that the Society (the main object of which was the repeal of the *Cruelty to Animals Act* 1876 and the substitution of a new enactment prohibiting vivisection altogether) was not charitable, not only because no public benefit was to be derived from that object, but also upon the additional ground that such an object was political in character.[223]

[214] [1917] A.C. 406.
[215] Id. 442.
[216] [1966] Ch. 249.
[217] Id. 255.
[218] [1948] A.C. 31.
[219] *Tyssen on Charitable Bequests* (1888) at 176–177, quoted with approval in *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 50, per Lord Wright, 62 per Lord Simonds. See also *Re Shaw* [1957] 1 All E.R. 745.
[220] [1981] 3 All E.R. 493.
[221] Id. 506.
[222] [1948] A.C. 31.
[223] Id. 49–50, per Lord Wright, 61–63, per Lord Simonds (with whose reasoning Viscount Simon associated himself at 40), 75–78, per Lord Normand. Lord Porter dissented from the conclusion that the society was not charitable. In his view, an object was only political if it necessitated a change in the law, not (as here) if that object could be achieved merely by persuasion (at 54–56).

Although Danckwerts J., in *Animal Defence and Anti-Vivisection Society* v. *I.R.C.*,[224] could have decided the case on the ground of public benefit alone,[225] he chose to base his decision on the additional ground that the society had a political object. Although its objects did not specifically refer to changing the law, one of its principal objects was general opposition to vivisection, an object which "must necessarily in the end involve an attack on the *Cruelty to Animals Act*, 1876, and the promotion or the support of legislation for repealing that Act and for suppressing vivisection altogether."[226]

Similarly, Gowans J. in *Re Inman*[227] concluded that the bequest (being one to an anti-vivisectionist society whose fundamental aim and object was expressly "to oppose vivisection absolutely and entirely" and which necessarily, therefore, sought to secure the abolition of vivisection) was not charitable since it was given towards furthering a political purpose.

The following year, Buckley J., in *Re Jenkins's Will Trusts*,[228] held to be not charitable a bequest "unto the British Union for the Abolition of Vivisection London England ... to be used to ... get an Act of Parliament passed prohibiting such atrocious and unnecessary cruelty to animals ...". One ground of His Honour's decision, as we have seen, was that the Court was not in a position to weigh against each other the public benefits of vivisection and the prohibition of that practice. However, an additional ground was that, on the authority of the House of Lords in *National Anti-Vivisection Society* v. *I.R.C.*,[229] the trust (in expressly seeking a change in the existing law) was for a political object and was, therefore, clearly not charitable.

However, if such an object is "merely ancillary to a main charitable purpose ... [it] will not vitiate the claim of an institution to be established for purposes that are exclusively charitable".[230] The main object of the trust being charitable, ancillary political activities will not prejudice its charitable status.[231] A society for the prevention of cruelty to animals will, therefore, be charitable notwithstanding that one of its objects is that this should be achieved by "procuring such further legislation as may be thought expedient".[232] Such an object, "if taken alone, would be a political object and nothing more. But it is only a method of achieving the main or

[224] (1950) 66 (Pt. 2) T.L.R. 1091.
[225] Id. 1094.
[226] Id. 1094-5.
[227] [1965] V.R. 238.
[228] [1966] Ch. 249.
[229] [1948] A.C. 31.
[230] *Incorporated Council of Law Reporting for England and Wales* v. *A-G* [1972] Ch. 73, 84.
[231] See e.g., *Commissioners of Inland Revenue* v. *Temperance Council of the Christian Churches of England and Wales* (1926) 136 L.T. 27; *Commissioners of Inland Revenue* v. *Yorkshire Agricultural Society* [1928] 1 K.B. 611; *Re Hood* [1931] 1 Ch. 240; *Re Bushnell* [1975] 1 W.L.R. 1596, 1603, per Goulding J. (this decision was approved by Slade J. in *McGovern* v.*A-G* [1981] 3 All E.R. 493, 511).
[232] *Re Inman* [1965] V.R. 238, 242. See also, e.g., *Re Goodson* [1971] V.R. 801, 809; *Re Buckley, Public Trustee* v. *Wellington Society for the Prevention of Cruelty to Animals (Inc.)* (1928) 47 N.Z.L.R. 148; *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 76, per Lord Normand.

fundamental object, the prevention of cruelty to animals",[233] and, as such, does not prejudice the charitable nature of the society's activities.

Trusts which do not seek to change the existing law, but merely to further its enforcement have also been upheld as charitable.[234] Such trusts are not for a political purpose; they seek what is no more than the duty of every citizen, his or her adherence to the law. Trusts which have sought to promote prosecutions for cruelty to animals have, therefore, been held to be charitable. In *Re Herrick, Colohan* v. *A-G*,[235] O'Connor M.R. upheld as charitable a bequest to reward policemen for helping to bring to justice cases of cruelty to animals. However, in *Re Hollywood, Smyth* v. *A-G*,[236] Barton J. held that a bequest to reward the Belfast constable who secured the highest number of convictions for cruelty to animals in any one year was not charitable. It has been suggested, though, that *Re Hollywood* would not be followed today for "its distinguishing feature was that officers of the R.S.P.C.A. were [expressly] excluded and this negatived a paramount charitable intent."[237] The gift itself could not be carried into effect because it was contrary to the Rules of the Royal Irish Constabulary for constables to receive pecuniary reward from an outside source for the performance of ordinary police work. The New Zealand Full Court in *Caldwell* v. *Fleming*[238] subsequently upheld as charitable a gift to the Wanganui Society for the Prevention of Cruelty to Animals "to prosecute those brutally abusing animals starving or otherwise".

C. PUBLIC BENEFIT – AS IT STANDS

In trusts which have sought to prevent cruelty to animals or to provide care for sick, aged or cruelly treated animals, the courts have identified a public benefit as inherent in the performance of such trusts in virtue of some morally elevating influence arising from their execution. However, in the provision of sanctuaries for wild animals, the courts have had difficulty identifying this influence and have generally fallen to determine the charitability or otherwise of such trusts on the evidence of more tangible benefits that would flow from their performance. Where the courts have identified a morally elevating influence as inherent in the execution of the trust, this factor has merely been supplemented by evidence of these more tangible benefits. In other cases, and specifically illustrated in the case of trusts for anti-vivisectionist objects,[239] these more tangible concerns have actually

[233] *Re Inman* [1965] V.R. 238, 242.
[234] *Re Vallance* (1876) 2 Seton's Judgments & Orders 7th ed. 1304. See also *Re Jenkin's Will Trusts* [1966] Ch. 249, 255.
[235] (1918) 52 I.L.T. 213.
[236] (1917) 52 I.L.T. 51.
[237] Picarda, Op.cit. p. 106.
[238] (1927) 46 N.Z.L.R. 145.
[239] Note that, although anti-vivisection is not in itself charitable, a trust to research into methods of eliminating the use of animals in research has been registered by the United Kingdom, Charity Commissioners for England and Wales, *Report* 1974, p. 12, par. 35.

weighed detrimentally against that influence in a calculation in which it is fair to conclude that ultimately our welfare will generally take precedence to that of animals.[240]

Although it has been through the doctrine of moral improvement that the courts have identified the necessary public benefit arising from the performance of the trust in many trusts for the protection or benefit of animals, this morally elevating influence ultimately remains merely one factor in the determination by the court as to whether the performance of such a trust can objectively be said to be for the public benefit.

1. AN EXERCISE IN "SPIRIT AND INTENDMENT"

A fundamental question remains unanswered. It is well settled that it is not enough to be charitable merely that the purposes of a gift or trust be beneficial to the community or to some section of it; the purposes must also be beneficial in a way which the law regards as charitable, and it will not be beneficial in this way unless it is either within the letter or the spirit and intendment of the preamble to the Statute of Elizabeth. As animal welfare receives no express recognition within the terms of the preamble, it falls to be considered in what way the courts have identified such trusts as falling within its spirit and intendment.

Two factors which have influenced this recognition are, first, that "[t]he spirit (and intendment) of the preamble derived from the range of purposes of general public utility found therein is not to be taken narrowly",[241] and, secondly, in the observation that "the law of charity ... has been built up not logically but empirically."[242] The recognition of such trusts has usually, though not invariably, fallen within Lord Macnaghten's fourth head of charity: "other purposes beneficial to the community".

(a) *The Advancement of Education*

This fourth category has not inevitably been the refuge for such trusts. In *Re Lopes, Bence-Jones* v. *Zoological Society of London*,[243] Farwell J. held to be charitable a bequest to the Zoological Society of London for the upkeep and improvement of the Zoological Gardens and for the objects of the society (being the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom) under the educational head of charity.

His Honour concluded that the advancement of zoology and animal physiology was:

> "clearly educational, for the advancement of scientific knowledge, and therefore charitable.
> The second object ... 'the introduction of new and curious [animals]' ... [was to] be read in connection with the first ... [and, in any event,] the

[240] Chesterman, Op.cit. p. 169.
[241] *A-G (N.S.W.)* v. *Sawtell* [1978] 2 N.S.W.L.R. 200, 215.
[242] *Gilmour* v. *Coats* [1949] A.C. 426, 449.
[243] [1931] 2 Ch. 130.

> introduction ... of non-indigenous animals, exhibited under proper conditions, [was also] distinctly an educational object ... Those objects being charitable, the upkeep and improvement of Zoological Gardens necessary thereto must also be charitable."[244]

The Society also provided restaurant facilities and charged children for rides on elephants and other animals, activities which it was contended were not charitable.[245] Farwell J. concluded that, the real object being educational, and therefore charitable, it was nonetheless so because it was necessary to feed the persons who came to be educated or to provide animals for their amusement at the intervals of their education. Such rides might, in any event, themselves be charitable for a "ride on an elephant may be educational ... It widens [the child's] mind, and in that broad sense is educational."[246]

Since the element of public benefit is presumed until the contrary is proved under the first three heads of charity, but must be affirmatively proved in the case of trusts within the fourth category, this conclusion is of some significance in the recognition of trusts for animal welfare as charitable. *Re Lopes* was applied by the English Court of Appeal in *Re North of England Zoological Society* v. *Chester Rural District Council*.[247]

In Australia, Richards J. in the Supreme Court of South Australia in *Re Benham*[248] suggested that a trust to support the encouragement of the study of marine zoology would be charitable as being for the advancement of education (or, at any rate, as being within the fourth category). In *Re Ingram*,[249] Smith J. in the Supreme Court of Victoria held to be charitable, although without elaborating his reasons, the "foster, support and [improvement], both for scientific and educational purposes, education knowledge and research in the origin history habits life and use and the scientific benefits [if any] of [indigenous] mammals birds and flora ..." His Honour also held that a contribution to the funds of any university or school teaching or endeavouring to carry out such objects was charitable.

In *A-G (N.S.W.)* v. *Sawtell*,[250] Holland J. in the Supreme Court of New South Wales held that a trust for the preservation of native wild life was for a purpose within the spirit and intendment of the Elizabethan preamble. He reached this conclusion, in part, in view of the fact that the evidence of the scientific and educational benefit of the performance of such a trust had "characteristics which match in spirit purposes stated in the preamble, [o]ne such purpose [being] the advancement of learning",[251] referring to the less precise[252] predecessor to Lord Macnaghten's educational head of charity put

[244] Id. 135–136.
[245] See further, e.g., *Re Satterthwaite's Will Trusts* [1966] 1 W.L.R. 277.
[246] [1931] 2 Ch. 130, 136–137.
[247] [1959] 1 W.L.R. 773.
[248] [1939] S.A.S.R. 450.
[249] [1951] V.L.R. 424.
[250] [1978] 2 N.S.W.L.R. 200.
[251] Id. 214.
[252] Picarda, Op.cit. p. 11.

forward by Sir Samuel Romilly (then Mr Romilly) in argument before the Court in *Morice* v. *Bishop of Durham*.[253] His Honour then went on to refer to the decisions just considered as "illustrations ... of purposes upheld as charitable within that facet of the spirit of the statute."[254]

(b) *Other Purposes Beneficial to the Community*

Holland J. also considered that the promotion of public health and recreation which the evidence in *Sawtell's case* had shown would flow from the performance of the trust:

> "has been considered to be within the spirit of the preamble, presumably by reference to the fact that it included relief of sick and maimed soldiers and mariners and the support of persons decayed or, alternatively, by reference to the fact that the preamble included 'the repair of bridges, ports, havens, causeways, churches, seabanks and highways' all works of general public utility."[255]

In support of this conclusion, he referred to observations of Viscount Simonds in *Inland Revenue Commissioners* v. *Baddeley*,[256] of Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow Corporation*,[257] and of the New Zealand Court of Appeal in *Morgan* v. *Wellington City Corporation*.[258]

Recognition within the fourth category of trusts "otherwise beneficial to the community" has, in fact, been the usual refuge for trusts for the protection or benefit of animals. Fundamental in that recognition has usually been "the doctrine of moral improvement". However, unlike the recognition given by Holland J. in *Sawtell's Case* to public health and recreation as purposes within the spirit of certain of the objects of general public utility expressed in the preamble, there is no clear analogue in the statute for the morally elevating influence of trusts for the protection or benefit of animals.[259]

In commenting upon their peculiar recognition, Smith J. in *Re Ingram*[260] concluded simply that:

> "[I]n the case of trusts for the preservation of animals, when confined [to their preservation in such circumstances as will be beneficial to the public] ... it would seem that this latter requirement is held to be satisfied by reason of the fact that such trusts tend to promote humane feelings and to improve public morality."[261]

However, it is difficult to see how the courts have concluded that a doctrine as vague and unspecific as the doctrine of moral improvement can be related to any conception of charity to be found in the preamble. One answer may

[253] (1804) 9 Ves. 399, 32 E.R. 656.
[254] [1978] 2 N.S.W.L.R. 200, 215.
[255] Ibid.
[256] [1955] A.C. 572, 589.
[257] [1968] A.C. 138, 156.
[258] [1975] 1 N.Z.L.R. 416, 419, 420.
[259] See, e.g., Picarda, op.cit. p. 109.
[260] [1951] V.L.R. 424.
[261] Id. 427.

be that such trusts are charitable in the same sense as are those for the advancement of religion, which are accepted without question today as having specific recognition in the preamble as part of the repair of churches.[262]

Viscount Simonds in *Williams' Trustees* v. *Inland Revenue Commissioners*[263] warned that, the law of charity having been built up not logically but empirically, it is dangerous to argue by a method of syllogism or analogy from one category of charity to another. However, it has been suggested that, as the benefit of gifts or trusts for the advancement of religion has been spiritual and moral rather than merely temporal, trusts charitable as being for the mental or moral improvement of the community are arguably charitable in the same sense as those for the advancement of religion and, as such, within the spirit and intendment of the preamble.[264]

Such trusts are, of course, valid within the fourth head of charity for, lacking any theistic element, they would not be charitable as a trust for the advancement of religion.[265] Cohen J. in *Re Price*[266] appears to recognize the existence of such a close affinity of trusts for the mental and moral improvement of mankind with trusts for the advancement of religion.

Notwithstanding the breadth that the courts have ascribed to the "spirit and intendment" of the preamble, the concept is clearly not without limitation. In *Re Joy, Purday* v. *Johnson*,[267] Chitty J. concluded that the purpose of a gift to the "Society for Suppressing Cruelty by United Prayer", being merely to improve the individual by private prayer, was not charitable, for it was not a purpose of public or general utility within the letter or analogy of the Statute of Elizabeth.

Nor could the High Court of Australia in *The Royal National Agricultural and Industrial Association* v. *Chester*[268] find any analogue in the preamble for "improving the breed and racing of homer pigeons", even though it was conceded that:

> "in a general way the breeding of pigeons for racing is a purpose beneficial to the community [in that it] provides recreation for quite a number of pigeon fanciers; it produces birds which are interesting, beautiful, and may at times be useful as a means of communication; [and] it affords opportunity for the scientific study of the birds' remarkable homing instinct."[269]

(c) *A Comparative Dilemma*

However, the bounds of the "spirit and intendment" concept, when drawn, have often been drawn in "illogical and even capricious" ways.[270]

While we have been able to identify in the Elizabethan preamable some analogue for the well-being of animals generally, a concern which must clearly

[262] See, also Maurice and Parker, op.cit. pp. 130, 134.
[263] [1947] A.C. 447, 459–460. Viscount Simonds was giving a warning against arguing by a method of syllogism or analogy from the category of education to the category of religion: but his argument is of general application: see *Neville Estates Ltd* v. *Madden* [1962] Ch. 832.
[264] Maurice and Parker, Op.cit. pp. 130, 134.
[265] Chesterman, Op.cit. p. 168.
[266] [1943] Ch. 422, 432–433.
[267] (1888) 60 L.T. 175.
[268] (1974) 48 A.L.J.R. 304.
[269] Id. 305.
[270] *Gilmour* v. *Coats* [1949] A.C. 426, 443, per Lord Simonds.

stand at the fringe of the ambit of public welfare, we have not been able to find that same analogue in respect of human suffering. Men's minds, it seems, are not to be elevated in the same way by diminishing cruelty to animals if those animals are human.

Although it is said to be "clear that a trust for the relief of human suffering is *per se* charitable [since] the Elizabethan Statute itself [mentions] the relief or redemption of prisoners and captives",[271] the Charity Commissioners for England and Wales, in considering the Amnesty International Trust, were unable to "accept ... that ... the abolition of torture or inhuman or degrading treatment or punishment ... was charitable by analogy with the prevention of cruelty to animals".[272] Slade J. in *McGovern* v. *A-G*[273] has since held the Amnesty International Trust, some of its purposes being political in nature, not to be charitable, with the concluding observation that "the elimination of injustice has not as such ever been held to be a trust purpose which qualifies for the privileges afforded to charities ..."[274] Lord Wilberforce, delivering the judgment of the Privy Council in *D'Aguiar* v. *Guyana Commissioner of Inland Revenue*[275] advised that the Citizen's Advice and Aid Service of Georgetown, Guyana was not charitable, because, in addition to seeking the relief of poverty, its objects extended to giving advice on almost anything and providing almost anyone with any kind of service, concluded similarly that neither *Re Wedgwood*[276] nor *Re Cranston*,[277] could avail the appellant (who had covenanted to make payments to the Service) unless:

> "from a principle that a trust for the promotion of kindness toward the animal part of creation is charitable, there is held to follow the wider principle that a trust for the promotion of kindness of man to man is charitable too. But no such wide proposition has ever been accepted; on the contrary 'philanthropic' and 'benevolent' purposes have never been held to be within the conception of 'charity'."[278]

The position is clearly far from satisfactory. Even if we are prepared to accept, not merely that from a notion so vague and unspecific as that of moral improvement we could conclude that trusts directed towards animal welfare are for the public benefit, but also that that notion, in some oblique way, falls within the "spirit and intendment" of the Elizabethan preamble, how are we to understand:

> "why a gift for the benefit of animals, and for the prevention of cruelty to animals generally, should be a good charitable gift, while a gift for philanthropic purposes which ... is for the benefit of mankind generally, should be bad as a charitable gift."[279]

[271] Meagher and Gummow, Op.cit. p. 213.
[272] *Report* 1978, pp. 23–24, para. 69.
[273] [1981] 3 All E.R. 493.
[274] Id. 519.
[275] [1970] T.R. 31.
[276] [1915] 1 Ch. 113.
[277] [1898] 1 I.R. 431.
[278] *D'Aguiar* v. *Guyana Commissioners of Inland Revenue* [1970] T.R. 31, 34.
[279] *Re Tetley, National Provincial and Union Bank of England, Limited* v. *Tetley* [1923] 1 Ch. 258, 266.

D. WHERE TO? – IN FACT AND THEORY

"It may be . . . true that there has been a tendency to enlarge the meaning of the word charity, and that gifts have within the last fifty years been supported as good charitable gifts which 150 years ago would not have been supported".[280] In that growth, however, has been a marked drift towards matters merely peripheral to the concerns of social welfare, of which the recognition of animal welfare is perhaps the most extreme example.[281] While we recognise as charitable concerns which are clearly at the periphery of the ambit of social welfare, we continue, in tying "charity" to some "ancient and obsolete statute",[282] to give but scant recognition to much that must stand at its core. It is suggested that "today we have reached the stage where any trust which is for the public benefit should be regarded as charitable"[283] for "the [Elizabethan] Government did not concern itself with the public benefit to the extent that modern Governments do in these collectivist times".[284] Though "[t]here may [then] have been good reason . . . for saying that every trust for the public benefit was not necessarily charitable,"[285] it is suggested that this is no longer the case today.

Russell L.J. in *Incorporated Council of Law Reporting for England and Wales* v. *A-G*[286] has concluded that:

> "[T]he courts, in consistently saying that not all . . . [objects of general public utility] are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political purpose) which could not have been within the contemplation of the Statute."

One might well conclude that a trust will be charitable simply "if a Chancery judge thinks that it accords with contemporary social ideas and policy on public good."[287] It is clear that, notwithstanding that animal welfare must stand at the extreme periphery of the ambit of social welfare, in finding trusts for such purposes to be charitable, the courts have managed both to define that element of public good to be derived from their performance and to identify in their objects some unclear analogue with the concerns of the Elizabethan preamble, an analogue which they have not been able to identify with the same ease in many trusts directed to human welfare.

Animal welfare is a topic of growing interest in our modern society, yet its concerns have been recognized within the law of charity for more than a century and, despite the remoteness of its connection with the concerns of social welfare in the modern world, its future recognition within this branch of the law seems assured.

[280] *Re Wedgwood, Allen* v. *Wedgwood* [1915] 1 Ch. 113, 117.
[281] Chesterman, Op.cit.
[282] N. Bentwich, "The Wilderness of Legal Charity" (1933) 49 *L.Q.R.* 520, 521-522.
[283] H. Ford, "Charitable Gifts", (1946-47) III *Res Judicatae* 189, 191. See also, e.g. Keeton and Sheridan, op.cit. p. 64.
[284] Ford, op.cit. p. 191.
[285] Ibid.
[286] [1972] Ch. 73, 88.
[287] A. Samuels, [1968] *New Law Journal Annual Charities Review* 42, 46.