1958 *Present*: **H. N. G. Fernando, J., and Sinnetamby, J.**

**COMMISSIONER OF INCOME TAX, Appellant, *and* TRUSTEES OF THE ABDUL GAFFOOR TRUST, Respondent**

***S. C. 3—Income Tax Case Stated B. R. A./248***

*Income tax*—Res judicata—*Applicability of its principles to decisions of Board of Review—Trust—Income derived therefrom—Exemption from income tax—"Charitable trust"—"Public benefit"—"Public character"—Trusts Ordinance (Cap. 72), ss. 99, 100—Income Tax Ordinance (Cap. 188), ss. 7 (1) (c), 64, 66, 69, 71, 72, 73, 74, 75.*

The Board of Review constituted under the Income Tax Ordinance performs merely administrative, and not judicial, functions; the principles of *res judicata* are not, therefore, applicable to its decisions. Accordingly, its decision on appeal against the assessment made on the trustees of immovable property for a particular year of assessment does not operate as *res judicata* in respect of subsequent years upon the question whether the income of the trustees is income of a "trust of a public character established solely for charitable purposes" within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance.

Income from a trust of a public character established solely for charitable purposes cannot be exempted from income tax under section 7 (1) (*c*) of the Income Tax Ordinance if the trust offends the rule against perpetuities and is not a "charitable trust" as defined in section 99 of the Trusts Ordinance.

A trust created for "the advancement of education" but which is not "for the benefit of the public or a section of the public" is not a "charitable trust".

In construing the expression "for the benefit of the public or a section of the public" in section 99 of the Trusts Ordinance the test is whether, although a class or section of the public is designated in the trust instrument, members of that class or section can, *as such*, qualify for the benefit.

The trustees of certain immovable property were required by the trust instrument to apply the income from the property for all or any of the various objects of the trust as they in their "absolute and uncontrolled discretion" might select. Clause (*b*) of the instrument directed the trustees to apply specified sums of money monthly for the education of "deserving youths of the Islamic faith". The trustees were, however, directed to give preference to "deserving male descendants" of the grantor's family. Moreover they were given absolute discretion to refrain from utilising the income except for the purposes of the education of such descendants.

*Held*, that clause (*b*) of the trust instrument did not contain the element of public benefit which should characterise a charitable trust as defined in section 99 of the Trusts Ordinance. The trust therefore did not qualify for exemption from income tax under section 7 (1) (*c*) of the Income Tax Ordinance.

*Held further*, that the income of the trust was not exempt from income tax because the trust failed to attain the qualification of "public character" required by section 7 (1) (*c*) of the Income Tax Ordinance.

CASE stated under the Income Tax Ordinance.

*M. Tiruchelvam*, Acting Solicitor-General, with *V. Tennekoon*, Senior Crown Counsel, and *Mervyn Fernando*, Crown Counsel, for the Assessor-Appellant.



2—J. N. R 1854—1,593 (5/59)

*H. V. Perera, Q.C.*, with *H. W. Jayewardene, Q.C.*, *N. R. M. Daluwatte* and *D. E. V. Dissanayake*, for the Assessee-Respondents.

*Cur. adv. vult.*

November 26, 1958. H. N. G. FERNANDO, J.—

By a conveyance No. 1832 of 24th December 1942 one N. D. H. Abdul Gaffoor conveyed certain immovable property to four persons, referred to in the document and in this judgment as " the Trustees ", upon certain trusts declared in an instrument No. 1833 of the same date. It is necessary for the purposes of considering the question arising upon this Case Stated to set out *in extenso* some of the provisions of this instrument :—

2. " The Trustees shall stand possessed of the trust property with the power to let lease and manage the same or any part or portion thereof and shall apply the nett rents profits dividends and income thereof (after payment thereout of all rates taxes and other outgoings and after reserving a sum of One Thousand Rupees (Rs. 1,000) a month for the proper upkeep repair and maintenance of the trust property) for all or any of the purposes following as the Board in its absolute and uncontrolled discretion may decide that is to say :—

(*a*) A sum not exceeding one thousand rupees (Rs. 1,000) a month for the remuneration of the Trustees and the expenses incurred by them in connection with the administration of the trust . . . .

(*b*) A sum not exceeding in all one thousand rupees (Rs. 1,000) a month for the education instruction or training in England or elsewhere abroad of deserving youths of the Islamic Faith in such professions vocations occupations industries arts or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever as the Board may in its aforesaid discretion decide in the case of each such deserving youth with a like discretion in the Board from time to time to change modify or alter or completely discontinue in the case of each such youth either the object or objects of instruction education or training selected for him by the Board (from among the objects enumerated above) or the place or places or countries whereat such education training or instruction is being given from time to time. The Board may under a like discretion partially or wholly discontinue any assistance it may have given or may be giving in the case of any of such youths. It shall be lawful for the Board out of the said sum to pay for or provide the whole or any part of the cost of any such youth going abroad from or in returning to Ceylon once or oftener as the Board may under such discretion aforesaid from time to time decide. The

recipients of the benefits provided for in this clause shall be selected by the Board from the following classes of persons and in the following order :—

(i) male descendants along either the male or female line of the Grantor or of any of his brothers or sisters failing whom

(ii) youths of the Islamic Faith not being male descendants as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident in the City of Colombo (wherever such youths may have been or be resident from time to time) failing whom

(iii) youths of the Islamic Faith not being male descendants as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident anywhere else in the said Island of Ceylon other than in Colombo (wherever such youths may have been or be resident from time to time)

(*c*) . . . .

(*d*) . . . .

(*e*) . . . .

(*f*) A sum not exceeding one thousand rupees (Rs. 1,000) a month to be accumulated from month to month and distributed for charity once a year during the month of Ramalhan

(*g*) any surplus or any sums not expended on any of the above objects shall be credited to a reserve fund to be used in such proportions to such extents at such time or times and from time to time and in such manner as the Board may in its absolute and uncontrolled discretion decide (1) for the purpose of meeting any unforeseen expenditure or contingency in connection with the trust property (2) in furtherance of all or any one or more of the various objects of the trust (3) for educating in a secondary school or secondary schools in Ceylon poor deserving boys of the Islamic Faith born of Muslim parents permanently resident in Ceylon (wherever such boys may have been or be resident from time to time) and (4) for the relief of poverty distress or sickness amongst members of the Islamic Faith in Ceylon.

PROVIDED however that during the lifetime of the Grantor the Trustees shall apply the nett rents profits dividends and income of the trust property for such purposes and in such manner as the Grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not may through the Board direct. The Board shall not be nor be liable to be questioned regarding or asked the grounds or reasons for any decision

of the Board in regard to any of the matters provided for in sub-clauses (*b*) (*c*) (*d*) (*e*) (*f*) and (*g*) of this Clause it being the aim intention and object of These Presents that the Board and every member thereof shall at no time be liable to have their decisions or their grounds or reasons in regard to such matters revised discussed gone into challenged modified or altered in any manner howsoever by any person body authority or Court."

In connection with the assessment of the income of the Trustees to tax under the Income Tax Ordinance for the year of assessment 1949–50, the Board of Review constituted under the Income Tax Ordinance (Cap. 188) held, on 22nd December 1954, upon an appeal preferred by the Trustees, that the income was income of a "Trust of a public character established solely for charitable purposes" and was therefore exempt from tax in terms of Section 7 (1) (*c*) of the Ordinance. On that occasion no application was made to the Board by the Commissioner to state a case on any question of law for the opinion of this Court.

In respect, however, of the years 1950/51, 51/52, 52/53, 53/54, 54/55, the Assessor again made assessments on the basis that the income of the Trustees was not exempt from tax and these assessments were upheld by the Commissioner. The Trustees appealed against these assessments to the Board of Review which made Order dated 19th February 1957, again holding that the income of the Trustees is exempt under Section 7 (1) (*c*) of the Ordinance. The Board has now, upon the application of the Commissioner, stated a case for the opinion of this Court in the following terms:—"The creator of the trust, N. D. H. Abdul Gaffoor, having died on 1st November 1948, can the terms of the trust deed No. 1833 of 24th December 1942 be construed in accordance with the facts as they exist at the time it becomes necessary to construe it for Income Tax purposes, or must it be construed for such purposes only in accordance with the facts existing at the date it was executed?".

Having regard to the matters which have been argued before us, I am of opinion that the questions arising for our determination would be better formulated thus:—

(1) Does the decision dated 22nd December 1954 of the Board of Review constituted under the Income Tax Ordinance on appeal against the assessment made on the Trustees for the year of assessment 1949/50, operate as *res judicata* in respect of subsequent years upon the question whether the income of the Trustees is income of a "trust of a public character established solely for charitable purposes" within the meaning of Section 7 (1) (*c*) of the Income Tax Ordinance?

(2) Is the income derived from the property described in the schedule to the instrument No. 1833 of 24th December 1942, exempt from tax for the years of assessment 1950/51, 51/52, 52/53, 53/54, 54/55, under Section 7 (1) (*c*) of the Income Tax Ordinance as being the income of trust of a public character established solely for charitable purposes?

With regard to the first of the two questions we have to decide, the Solicitor General relies on the decision of this Court in *The Attorney General v. Vallyamma Atchie*[1]. The question which there arose was whether a decision of the Board of Review of Income Tax, to the effect that the estate of a certain deceased person was not joint property of a Hindu undivided family, operated as *res judicata* in subsequent proceedings where the point for determination was whether the same property was the joint property of the family for the purposes of Section 73 of the Estate Duty Ordinance. Howard C.J. (with whom Wijeyewardene J. agreed) held that " the decision of the Board of Review can be regarded as final and conclusive as between the Crown and the assessee as to the latter's income in regard to the particular year, but not as to future years ".

It is contended for the Trustees that that decision should not be followed, or alternatively that its true *ratio decidendi* was that the question decided by the Board of Review was not the same question which subsequently arose in the Estate Duty case. There would seem to be some ground for the alternative argument, for Howard C.J. refers to the circumstance that the decision which was relied on as creating an estoppel by means of *res judicata* had been given in a matter arising under the Income Tax Ordinance and not in a matter arising under the Estate Duty Ordinance. In the present case, the question we are now asked to decide is whether the trust is one of the description specified in Section 7 (1) (c) of the Income Tax Ordinance, and since it is clear that that very question had been answered by the Board in favour of the Trustees, the decision in Valliamma Atchie's case may be distinguishable.

For this reason it is desirable that we consider the matter afresh without regarding *Valliamma Atchie's*[1] case as having already decided it.

An assessment to income tax is in the first instance made by an assessor under Section 64 of the Ordinance and the assessment is scrutinized, amended, and then signed (Section 66) by an Assistant Commissioner, who thereafter gives notice of the assessment to the person chargeable. Against this assessment the assessee can appeal to the Commissioner of Income Tax who is empowered (Section 69) " to confirm, reduce, increase, or annul the assessment ". The right of appeal to the Board of Review from the Commissioner's determination is conferred by Section 71; after certain preliminaries, the appellant gives notice of appeal to the Board against the Commissioner's determination. At such an appeal, the assessee may be heard in person or by an authorised representative and the assessor or some other person authorised by the Commissioner attends in support of the assessment. After hearing the appeal, the Board " shall confirm, reduce, increase, or annul the assessment " as determined by the Commissioner on appeal, or as referred by him under Section 72. as the case may be, or may remit the case to the Commissioner with the opinion of the Board thereon ". Where a case is so remitted by the Board the Commissioner shall revise the assessment as the opinion of the Board shall require.

[1] *(1944) 45 N. L. R. 230.*

Section 74 provides that the decision of the Board shall be final, but enables the appellant or the Commissioner to apply to the Board to state a case on a question of law for the opinion of the Supreme Court. So far as a determination of the Board of Review is concerned, the effect of Section 75 is that an assessment as regards the assessable income assessed thereby, as determined by the Board on appeal, is final and conclusive, for all purposes of this Ordinance as regards the amount of such assessable income, if such assessment is not subsequently altered or has not to be altered by or in consequence of the ultimate decision of the Supreme Court or of the Privy Council upon a case stated on a question of law.

The main point for determination is whether the Board of Review performs judicial and not merely administrative functions, for, if the Board's decision on appeal is merely administrative, it would not operate to create an estoppel by means of *res judicata*. Having regard to those provisions of the Ordinance to which I have referred above, the functions of the Board of Review are properly comparable with those of the Board established under the Australian Income Tax Assessment Act, and which were considered in the Privy Council case of *Shell Company of Australia v. The Federal Commissioner of Taxation* [1]. In the Australian Act as well as in the Ceylon Ordinance the provisions for the making of assessments and for the making of appeals therefrom, including appeals to the Board of Review, would seem to be no more than expeditious administrative machinery for determining each year the assessable income upon which tax is to be levied for that year. No doubt the Board of Review is expected to act in a judicial manner, and an appeal might well raise, as it did in the present case, questions of law for determination by the Board ; but as was pointed out in the *Shell Company* case [1] " an administrative tribunal may act judicially, but still remains an administrative tribunal as distinct from a Court, strictly so called ". Their Lordships of the Privy Council held in that case that the Board under the Australian Act was not exercising the " judicial power " of the Commonwealth. Can it be said, nevertheless, that such a Board is a " court of competent jurisdiction " for the purposes of the principles of *res judicata* ?

The decision of the English Court of Appeal in the case of *The Commissioners of Inland Revenue v. Sneath* [2] is directly of assistance. Under the English Income Tax Act of 1918 there was a right of appeal to the Special Commissioners after preliminaries not substantially different from the steps prescribed by the Ceylon Ordinance. But it was held that what the Special Commissioners had to determine was the amount of the assessment which should be made upon the facts of the case before them. Lord Hanworth M.R. thought it difficult to attribute to such a determination of an assessment in amount, the decision of a *lis inter partes*. The reasons which underlie this view of the functions of a statutory authority set up for taxation purposes were stated by Greer L.J. as follows :—" I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the

[1] *(1931) A. C. 275.* [2] *(1932) 2 K. B. 362.*

subject and the Crown. They are merely in the position of valuers, whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax and, though the figure determined in one year is final for that year, it is not final for any other purpose. It is final not as a judgment *inter partes*, but as the final estimate of the statutory estimating body. No *lis* comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no *lis* until the rights and duties are ascertained and thereafter questioned by litigation. It would be unfortunate if we were compelled to arrive at any other result, because it might well be in one year the taxpayer might not think it worthwhile to challenge the decision of the Commissioners for that particular year, though it might in later years prove to be worth his while to contest their view. On the other hand, it is equally likely that there may be many cases in which the Crown would be quite prepared to make concessions in one year, whereas they might rightly conclude in subsequent years that it would not be in the interests of the taxpayers generally that they should make such a concession."

I would with respect adopt these observations. Section 75 of our Ordinance gives finality to a determination of the Board *as regards the assessable income assessed thereby*, that is to say, as regards the amount of the income for the year to which the determination relates, and not as regards income for subsequent years. Moreover, there is the provision in Section 72 whereby the Board of Review may even take the place of the Commissioner and hear an appeal preferred to that officer, and the provision in Section 73 that the Board's hearings shall be in *camera*. These features of the statutory provisions weigh considerably against the view that the Board was intended to function as a court to decide litigation between the subject and the Crown.

Counsel for the Trustees relied on a statement in Spencer-Bower [1] in which "Income Tax Commissioners and authorities" are included in a class of Civil tribunals whose decisions are stated to operate as *res judicata*. I find however that none of the cases cited by the learned author were concerned with the question whether decisions of such Commissioners would so operate. The case of *Hoysted v. The Commissioner of Taxation* [2] also does not assist the Trustees, for the decision which was there held to operate as *res judicata* was one of the High Court of Australia and not of any statutory Board or Commissioners.

I would for the reasons stated answer in the negative the first question which we are called upon to decide.

The second question which this Court has to answer is the substantial question in the case—is the income of the trust exempt from income tax?

[1] *The Doctrine of Res Judicata, 1924, by Spencer Bower at page 14.*

[2] *(1926) A. C. 155.*

I was at first impressed by the argument for the Trustees that the answer is to be ascertained only from a consideration of paragraph (c) of Section 7 (1) of the Income Tax Ordinance, that is to say, by deciding whether or not the trust firstly is of a public character and secondly is one established solely for " charitable purposes " as defined in the interpretation section (Section 2). Whether the last mentioned definition should be regarded as being exhaustive, or whether (because of the use of the word " includes ") other purposes generally considered charitable are also included within its scope, the objects of the present trust are *prima facie* within the definition, for each of them is either for education or for the relief of poverty. There is nothing, it is said, in paragraph (c) of Section 7 (1) or in the definition of " charitable purposes ", indicative of an intention that a purpose must be " legally " charitable, which is the characteristic required by the law of England in similar cases.

The question whether the trust is of a public character may be difficult to answer, but the meaning of the expression should be clear, and little advantage is to be gained from a study of English cases, save those in which the ordinary significance of " public character " has been examined. Much reliance was placed on the observations of Lord Wright in the Privy Council decision of *All India Spinners Association v. The Commissioner of Income Tax* [1]:— " . . . the Indian Act must be construed on its actual words and is not to be governed by English decisions on the topic . . . . English decisions have no binding authority on its construction and though they may sometimes afford help or guidance, cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life ".

Having regard to the terms of paragraph (c) of Section 7 (1) of our Ordinance it is urged that these observations would apply equally in cases where the interpretation of that paragraph is involved.

The Solicitor-General argues, however, that the expressions " public character " and " charitable purposes " are not the only expressions which we have to construe. We have first to consider whether there is in this case a " trust ". The term " trust " cannot be understood in any loose or colloquial sense, and can denote only such a trust as is contemplated in the Trusts Ordinance ; although the disposition in this case may apparently fall within the scope of the definition of " trust " in Section 2 of that Ordinance, the matter does not end there ; having regard to Section 110 of the Trusts Ordinance the trust now under consideration will be void as offending the rule against perpetuities, unless it is a " charitable trust " (Section 110 (5) ). Accordingly, the preliminary question we must decide is whether the " trust " is a " charitable trust " as defined in Section 99 of the Trusts Ordinance ; and for that purpose we do have to construe that definition.

The argument of the Solicitor-General is in my opinion perfectly sound, and I need make but one further comment : the Legislature could surely

[1] *31 A. I. R. (P. C.) 88 at page 91.*

not have contemplated the grant of tax exemptions for "trusts" which have no legal validity or existence under the special law relating to trusts which had earlier been enacted in the Trusts Ordinance. I shall now set out a summary of the principal reasons relied on for the argument that the trust in question is not a "charitable trust" as defined in Section 99.

Paragraph 2 of the instrument confers on the Board (constituted by paragraph 9) *an absolute and uncontrolled discretion* to make decisions concerning the utilisation and application of the income of the trust property for all or any of the purposes enumerated in the various clauses of that paragraph. This discretion is reinforced (if reinforcement were needed) in the Proviso at the end of paragraph 2, whereby the Grantor declares his intention and object that any such decision of the Board must not be revised or challenged. Although then, clause (*b*) purports to direct or authorise the application of sums not exceeding Rs. 1,000 per month for the education instruction or training abroad of *deserving youths of the Islamic faith*—a designation which might well denote an intention on the part of the Grantor to benefit a section of the public—the construction that the object is to benefit the public must be rejected upon a consideration of the aforementioned discretionary power and of the directions of the Grantor contained in clause (*b*). The argument is that, upon a construction of the whole clause, the Board is directed to *give preference to deserving descendants of the Grantor's family*, and further that, since there is no obligation cast on the Board to apply moneys in each and every year for the purposes specified in the clause, the Board can in its discretion refrain from utilising the specified monthly sums except for the purposes of the education of such descendants. The Solicitor-General sought to underline his argument by reference to clause (*g*) of paragraph 2. The Board, he said, would not be acting in breach of the trust if surpluses, accumulated either after application of income annually for the several purposes mentioned in clauses (*b*) to (*f*) or even by the expedient of remaining "inactive" with respect to the purposes specified in clauses (*c*) to (*f*), are kept in the reserve fund and applied solely or mainly for the education of family descendants. He pointed to the provisions in sub-clause (2) of clause (*g*) whereby the reserve fund can be used, in "absolute and uncontrolled discretion", "in furtherance of all *or any one* or more of the various objects of the trust", which he said would render unquestionable the right of the Board to apply the reserve fund only for the object specified in clause (*b*), and in so doing to prefer family descendants exclusively. His submission in brief was that no benefit under clause (*b*) is assured to deserving youths of the Islamic faith as such, and that in effect, if not also in intention, the benefit is or can properly be restricted to family descendants. At the least, having regard to the imperative direction for the selection of "deserving male descendants", the provision that, *failing them*, beneficiaries of the "public class" would be eligible is of a remote and indirect nature, so that the element of "public benefit" required by Section 99 is not present. Hence, assuming that the gift in clause (*b*) is for a purpose mentioned in the definition of "charitable trust", namely,

" the advancement of education ", the trust fails to satisfy the requirement in the definition that it must be *for the benefit of the public or a section of the public.*

The expressions " public ", " public benefit ", and " benefit of the public ", occurring in statutory provisions, have often to be construed by the Courts. It seems to me that the first step in the process of interpretation is to ascertain the ordinary grammatical meaning of the expression. In its ordinary meaning, " public " would mean " of, concerning, the people as a whole " and also " open to, shared by the people ". In addition the term carries with it a connotation opposed to " private ", which ordinarily means " not open to the public " or " one's own, individual or personal ". If then it can be said that the contemplated benefit is of a " private " nature, it may lack the characteristic of being public even though it may in certain events be available to the public. I note also at this stage that the definition in Section 99 of the Trusts Ordinance does not require a trust to be *solely* for the public benefit, so that a trust which is essentially or substantially for the public benefit may reasonably be considered to fall within the definition. Let me take the case of the landlord of a block of flats who maintains a playing field, the use of which is regulated by some document which entitles the children of the tenants to play there on all such days as their parents may freely decide, and provides further that children of members of the public may use the field on other days. The man in the street or a city official might well come in time to regard the playing field as " public ", if in practice it has habitually been used by the " privileged " children only on specified days each week and been available for public use on other days. But if the matter is considered *in limine*, at a time when it is not clear that other children can ever enjoy a benefit, the rights of these others are merely theoretical and uncertain. A right to use a playing field would not be theoretical and uncertain, if the only restriction as to user is that a child must first satisfy some authority that he is proficient at cricket or football, for then the designated section of the public would consist of all children who satisfy the test of proficiency at cricket or football. But in the example I have taken, there is a right of preference dependent on *a qualification which cannot be fulfilled by any child of a member of the public, as such,* and there is no certainty or assurance that children of members of the public can benefit.

It is in this ordinary and reasonable sense that I would in the first instance construe the expression " for the benefit of the public or a section of the public "—so that the test is whether, although a class or section of the public is designated in the instrument, members of that class or section can, *as such*, qualify for the benefit. Applying this test to the terms of the present instrument it would seem at the least doubtful whether the test is satisfied. The answer to the question whether deserving youths of the Islamic faith are *as such* qualified to receive educational assistance under clause (*b*), can only be " Yes, but only if moneys remain available from the specified sum of Rs. 1,000 per month or from apportionments from the reserve fund after providing for the

education of such deserving family descendants as the Board may decid to assist, and furthermore only if the Board in its absolute discretio desires to educate Islamic youths who are not family descendants. If that be the correct answer, then clause (*b*) does not contain the element of public benefit which should characterise a charitable trust. I also seriously doubt whether, having regard to the uncertainty of the rights of the general class of youths, the clause can even be regarded as being essentially or substantially for the benefit of a section of the public.

I have referred already to the dictum of Lord Wright in the *Indian Spinners Association case* [1] which generally speaking must be borne in mind by Judges in Ceylon when concerned with the interpretation of language in enactments of the Ceylon Legislature. Nevertheless, the expression " for the benefit of the public or a section of the public " had been employed so frequently in judgments in England dealing with charitable trusts, that it is difficult to resist the impression that the expression was used in our Ordinance to denote the same concept as in English Trust Law.

The following passage from Tudor on Charities has often been cited with approval :—" In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it be of a public character. That is to say, a purpose must, in order to be charitable, *be directed to the benefit of the community or a section of the community* ".

In the judgment of the Privy Council in *Verge v. Somerville* [2] Lord Wrenbury said :—" . . . . to ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be *whether it is public, whether it is for the benefit of the community or for an appreciably important class of the community* ". In his observations in the case of *Oppenheim v. Tobacco Trust Co.* [3] Viscount Simonds lays down the same test in similar language :—" It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that *it must benefit the community or a section of the community.* Negatively it is said that a trust is not charitable if it confers only private benefits ".

Since the language of the Ceylon Trusts Ordinance so nearly corresponds with the language in which the test invariably applied in England is phrased, it is legitimate, if not necessary, to consult those authorities in England in which the test has been applied in cases similar to that under consideration. Trusts which can benefit relatives or descendants of a settlor came in for exhaustive examination by Lord Greene in *Powell v. Compton* [4] and the views and conclusions there expressed by the Master of the Rolls were approved by the House of Lords in *Oppenheim's* case [3], subject only to the dissenting opinion of Lord MacDermott. It would seem to be settled law in England that a trust *for the relief of*

[1] *31 A. I. R. (P. C.) 88 at page 91.*
[2] *(1924) A. C. 496.*
[3] *(1951) 1 A. E. R. 31.*
[4] *(1945) Ch. D. 123.*

*poverty* would be regarded as charitable even if the benefit is restricted to kin of the settlor; but the validity of such trusts has recently been doubted and it is clear that the cases are regarded as anomalous and will have no bearing except upon trusts for the relief of poverty. Clause (*b*) of the present instrument is in any event not of this class, its object being education, and not the relief of poverty.

There are then the so-called "founder's kin" cases, in which the English Courts had for long recognised trusts for the endowment of educational institutions as being charitable notwithstanding the reservation of benefits to descendants or relatives of the settlor. Lord Greene in *Compton's* case [1], after examination of the earlier authorities, doubted the correctness of the proposition in Tudor (at page 30) that "bequests for the education of the donor's descendants and kinsmen at schools and colleges are valid bequests". With respect, it seems to me that the authorities only support the view that the trust in such a case would be construed as being one to some particular college or foundation upon trust to educate descendants there. The instrument I am now considering cannot be so construed, there being no specified educational institution designated for the purpose of the trust. The trust in *Re Compton* [1] itself was for the education of Compton and Powell and Montague children and was held not to be charitable on the ground that "a gift for the education of descendants of named persons must be regarded as a family trust and not as one for the benefit of a section of the community, on any fair view of what that phrase may mean". Lord Greene thought that "a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift" (at page 131).

The only earlier case on comparable facts was that of *Re Rayner* [2], a decision of Eve J. which was disapproved by the Court of Appeal and subsequently doubted by Viscount Simonds and Lord Normand in *Oppenheim's* case [3].

Before referring to a subsequent decision upon which Mr. Perera very strongly relied and which the Board of Review has applied, it would be useful to summarise his arguments.

The proper mode of interpretation of clause (*b*), it is said, would be *to ascertain the primary object of the disposition.* The primary object here is "the education instruction and training of deserving youths of the Islamic faith born of Muslim parents of the Ceylon Moorish community permanently resident in Ceylon". (I should mention that the limitation to the Ceylon Moorish community is derived from references to that community in sub-clauses II and III of clause (*b*). Mr. Perera concedes that having regard to these limiting references the class intended to be benefited is not the wider class "deserving youths of the Islamic faith" *simpliciter* but rather the narrower class I have just described.) This class I will assume for the purpose of discussion to be "a section of the public". The further argument is that the "order of selection"

[1] *(1945) Ch. D. 123.* [2] *122 L. T. 577.*
[3] *(1951) 1. A. E. R. 31.*

set down in the latter part of clause (*b*) merely confers a right of preference on such deserving youths of the Islamic faith as are also descendants of the family of the Grantor. A descendant who does not belong to the primary class would not be eligible for the benefit and even a descendant who does so belong may only be selected if he is deserving; preference for him on the ground of his being a descendant is contemplated, but only if he is in other respects as deserving of the benefit as other youths of the primary class. Such a right of preference does not, it is said, detract from the public character of the primary object of clause (*b*).

The counter to the Solicitor General's argument as to the combined effect of clauses (*b*) and (*g*) was that the right of preference for family descendants will be available only in respect of the sum not exceeding Rs. 1,000 per month specified in clause (*b*) and not in the event of surpluses or accumulations in the reserve fund being utilised for the purposes mentioned in clause (*b*). The ground of this distinction is that the reference in clause (*g*) to the "various objects of the trust" would denote in this context, not the whole "scheme" set out in clause (*b*), but only the primary object of the disposition in that clause. This distinction, it is argued, is apparent in clause (*b*) itself, for the order of selection is prescribed only for "the recipients of the *benefits provided for in this clause*", that is to say, the monthly one thousand rupee benefit, and would not apply when surpluses are used for the education abroad of Muslim youths. Moreover, the exclusion of the order of selection is also implicit in clause (*g*) itself where the language "*in such manner* as the Board may in its absolute and uncontrolled discretion decide" enables the Board to disregard the manner of selection contemplated in clause (*b*). It is urged also that the discretion conferred on the Board is of a fiduciary character and that the intention therefore is that the Board will not so act as to defeat or unduly diminish the benefits intended to be conferred on the primary class of beneficiaries. The English decision in support of these arguments is that of *Re Koettgen*[1] decided by Upjohn, J. which needs very close consideration. The objects of the trust set up in that case were thus defined:—"The persons eligible as beneficiaries under the fund shall be persons of either sex who are British born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense; in selecting beneficiaries it is my wish that the charity trustees shall give a preference to any employees of John Batt & Co. (London), Ltd., or any members of the families of such employees; failing a sufficient number of beneficiaries under such description then the persons eligible shall be any persons of British birth as the charity trustees may select. Provided that the total income to be available for benefiting the preferred beneficiaries shall not in any one year be more than seventy-five per cent. of the total available income for such year".

It was conceded that the trust was for a charitable purpose, namely the advancement of education, and was as to twenty-five per cent. of the income a valid charitable trust. But the validity of the trust as to

[1] *(1954) 1 A. E. R. 581.*

seventy-five per cent. of the income was challenged on the ground that the provisions for the application of the income did not have the requisite degree of public benefit. Upjohn J. was of opinion that the desire of the testatrix to prefer the members of the families of the named firm must be read in an imperative sense. But he did not attach much significance to the possible practical effect of the preference clause :—" In some years there might be sufficient members of that limited class to fill the seventy-five per cent. available for them, and in other years there might not be. The evidence, as I have said, is inconclusive on this point. The time may come when John Batt & Co. (London) Ltd. ceases to carry on business, and in that event the income of the whole trust fund must be applied for the benefit of the primary class which fulfils qualifications contained in sub-clause (*d*) ".

That view of the " facts " probably explains why the learned Judge rejected the construction (against a trust) that the public could only benefit when the preferred class of beneficiaries failed. He was satisfied that the first sentence in paragraph (*d*) of the instrument specified the primary class of beneficiaries and that the primary trust was not invalidated by the provisions for the selection from a narrower group although that provision was imperative.

I must assume the correctness of the view taken on the facts, though it was formed apparently without strict regard to the dictum of Viscount Simonds in *Oppenheim's* case [1], " it must not I think be forgotten that charitable institutions enjoy rare privileges and that the claim to come within that privileged class should be clearly established ". But I have with great respect to disagree with the view that the recital in the forefront of paragraph (*d*) of a desire to benefit a section of the public, taken together with the probability that benefits will accrue to that section, will constitute the section as the primary class, irrespective of the limitation of the element of public benefit, which the subsequent imperative requirement of preference for a special group imposes. If the order in which a settlor's wishes are set down can properly be regarded as significant for the purpose of ascertaining his primary object, then would the *Koettgen* [2] disposition have been construed differently had the designation of British born subjects occurred only *after* the preference clause ?

Whatever the form or arrangement of a disposition, its primary object can be ascertained only after examination of all its provisions, and if the primary object as so ascertained is the benefit of the public, then any subsequent inquiry as to whether the object is invalidated by any particular provision is idle, for account would already have been taken of the significance of all such provisions. Why then did Upjohn J. make such a subsequent inquiry ? The reason, I think with much respect, is that he had not taken the provision for selection into account before deciding which was the primary class of beneficiaries. The same error is inherent in the mode of construction suggested on behalf of the Trustees in this case.

[1] *(1951) 1 A. E. R. 31.* [2] *(1954) 1 A. E. R. 581.*

In the *Koettgen* [1] case the following summary of the earlier law from the judgment of Jenkins L.J. in *Re Scarisbrick's Will Trusts* [2] was cited :—

(i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public ; . . . .

(ii) An aggregate of individuals ascertained by reference to some personal tie (e.g. of blood or contract) such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof for the purposes of the general rule ; .. .. .. .. ..

(iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined (*that is an important word*) to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (e.g. an educational trust confined as in *Re Compton* to the lawful descendants of three named persons, or, as in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* to the children of employees of former employees of a particular company ) ; ".

The judgment of Jenkins L.J. in *Scarisbrick's* case continued as follows :—

" (iv) There is, however, an exception to the general rule in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are, therefore, not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract ".

To judge from the comment of Upjohn J. that " confined " in the third paragraph of the summary is an important word, it would seem that the paragraph was assumed to be authority for the proposition that the element of public benefit is negatived only when the potential beneficiaries are *confined* to some aggregate of individuals, and not when some such aggregate is preferred to other members of the public. But the decision in *Scarisbrick's* [2] case was not concerned with any such distinction ; the only question it decided was that the line of authorities recognising the validity of " poverty " trusts for poor relatives applied not only to " permanent " trusts, but also to trusts for immediate distribution. Neither the facts nor the law under consideration in that case rendered it necessary for the Court to make any observation relevant

[1] *(1954) 1 A. E. R. 581.* [2] *(1951) 1 A. E. R. 822.*

to the problem which subsequently arose in *re Koettgen*. In stating his proposition (iii), Jenkins L.J. recorded the principle of earlier decisions (*Re Compton*), merely for the purpose of pointing thereafter (in his proposition (iv)) to the exception to that principle, which was an exception directly relevant to the case he had to decide. In such a context, there was no need for the learned Lord Justice, either expressly or by implication, to approve or disapprove a disposition, the beneficiaries under which are a group of individuals, together with, but having preference before, a section of the public. I would not, therefore, attach any special significance to his use of the word " confined ". Indeed, if " confinement " of the benefit is to be regarded as the proper test, a disposition for the education of ten British born subjects nine of whom must at all times be relatives of the settlor, would have to be construed to be a valid charitable trust. That example, to my mind, reduces such a test to an absurdity. The converse example, namely, where one out of ten beneficiaries must always be a family descendant, will of course present difficulty, though such a trust might properly be regarded as being essentially or substantially for the benefit of the public and therefore valid, in application perhaps of the maxim *de minimis non curat lex*. Before leaving the *Koettgen case* I would observe that there has been an inclination on the part of some Judges (Lord Mac Dermott in *Oppenheim's* case was one of them) to look with some degree of favour on trust for the benefit of employees of particular organisations, presumably because there might be some justification for the view that modern business organisations are so large and employ such numerous personnel that the employees of such organisations can fairly be regarded as a section of the public. If that were the view which moved Upjohn J. to regard as unimportant the preference clause in *Koettgen's* case, I would not for present purposes need to disagree with it. But that consideration apart, an examination of the decisions which have been brought to our notice satisfies me that *Koettgen's* case was one of first instance and that the decision cannot be justified as being based on precedent. For reasons already stated I do not propose to follow it, but at the least it can properly be distinguished on the ground that a preference clause in favour of family descendants was not there involved. The English cases do not therefore lead me to a conclusion in any way different from that reached on first impression upon consideration of the ordinary meaning of the expression " for the benefit of the public or a section of the public". I would hold therefore that the purpose mentioned in clause (*b*) of paragraph 2 of the Trust instrument before me is not one which satisfies the requirement of " public benefit ", prescribed in Section 99 of the Trusts Ordinance, and that the instrument does not create a valid trust.

Counsel for the Trustees did not argue that the income intended by the settlor to be utilised under clauses (*c*) to (*f*) of the instrument can be regarded as being income of a separate trust and therefore entitled to exemption from tax. Indeed having regard to the powers exercisable by the Board under paragraph (*g*), and the uncontrolled discretion to restrict the use of the income and of the reserve fund for the purposes

mentioned in paragraph (*b*), one can well understand why no question of separation was raised in these proceedings. I am not called upon therefore to make any further observations with regard to it.

I have considered the Trust instrument on the basis that the trust does not qualify for the tax exemption unless it comes within the scope of the definition in Section 99 of the Trusts Ordinance. But even if that is an erroneous basis, I would hold that the income of the trust is not exempt from tax because the Trust fails to attain the qualification of " public character " required by paragraph (*c*) of Section 7 (1) of the Income Tax Ordinance. The argument for the Trustees that this requirement was satisfied was founded upon the decision in *re Koettgen* [1], or at least upon corresponding reasoning. In my opinion, " public character " means much the same thing as " for the benefit of the public or a section of the public ". The " private nature " of the benefit conferred by paragraph (*b*), and by paragraph (*g*) read in conjunction therewith, takes the trust out of the class denoted by the expression " trust of a public character ". Even if (contrary to the view I hold) it be proper to regard the trust in this case as a valid charitable trust on the analogy of the " poor relations " or " founder's kin " cases in England, the tax exemption provision cannot apply in the absence of the element of " public character " required by that provision.

Among other matters raised by the Solicitor-General there are two upon which some expression of opinion would perhaps be desirable. One argument was that the trust does not fall within the description of a " trust *established* solely for charitable purposes "; in fact the question as formulated by the Board of Review in the Case Stated was the same as that raised in this argument of the Solicitor-General. Briefly stated, the point argued is that the exemption only applies to a trust which is created or set up solely for charitable purposes and which contemplates the application of the income only for such purposes right from the inception of the trust. In the present case the purposes were not always charitable for the reason that the Proviso at the end of clause 2 requires the Trustees, during the lifetime of the Grantor, to apply the income for such purposes as the Grantor may direct.

I cannot agree that such a significance should be given to the word " established ". In the first place it would seem that for grammatical purposes it is necessary to use *some* verb in conjunction with the word " trust ", for else the expression " trust solely for charitable purposes " *simpliciter* might have been ungrammatical. Secondly, I agree with the argument for the Trustees that the language in Section 7 (1) (*c*) is only intended to denote a trust having for the time being legal effect or operation, its purposes being solely charitable. Any other view of the matter would have anomalous and even absurd results.

Another objection taken by the Solicitor-General was that the purpose specified in clause (*f*) is not for the benefit of the public. He relied in this connection on decisions, such as that in the Australian case of

[1] *(1954) 1 A. E. R. 581.*

*Dunne v. Byrne* [1] decided by the Privy Council, which have held that dispositions generally "for religious purposes" or "for charitable purposes" to be determined in the discretion of a trustee are not charitable trusts because the trustee would be entitled to apply money for purposes commonly, though not legally, regarded as charitable. In the present case, however, although the Board enjoys a discretion, the purpose specified is "charity once a year during the month of Ramalham". The Board of Review recorded evidence as to the significance to Muslims of the month of Ramalham and to the practice of the distribution of alms during that month enjoined by the religion of Islam. The Board of Review was I think entitled on that evidence to decide as it did, that "charity" in clause (*f*) means only the relief of the poor. The Trustees would not therefore be entitled to utilise money under clause (*f*) except for purposes properly charitable within the meaning of Section 99 of the Trusts Ordinance and the definition in Section 2 of the Income Tax Ordinance.

The Solicitor-General relied also on some observations of Viscount Simonds in *Inland Revenue Commissioners v. Baddeley* [2] in which he doubted whether "a trust can qualify as a charity within the fourth clause in *Commissioners for Special Purposes of the Income Tax v. Pemsel* [3] if the beneficiaries are a class of persons, not only confined to a particular area, but selected from within it by reference to a particular creed". The present trust is distinguishable on the ground that the dispositions here are not of the fourth class but clearly for education and the relief of poverty, and the observations of the learned Lord Chancellor are probably not applicable in this case. It is to be noted also that the learned Lords who concurred in the decision ultimately given desisted from expressing any opinion on the point made by the Lord Chancellor. In any event the judgment of the Privy Council in the *Indian Spinners Association* case [4] would be sufficient authority for the Courts in Ceylon to interpret the intention of the Ceylon Legislature by reference to the particular circumstances and conditions of life in this country. I think that there can be no question, having regard to such circumstances and conditions, that the members of the Moorish community in Colombo or in Ceylon, being of the Islamic faith, would constitute a section of the public for the purposes of the relevant law and that a trust for their benefit would be one of a public character.

Apart then from the arguments based upon the true construction of paragraph (*b*) of the instrument, and of paragraph (*g*) read in relation to paragraph (*b*), there are in my opinion no other grounds for holding that the income of the trust is not entitled to exemption from income tax.

In the result, I answer in the negative the second question which we are invited to decide. The Respondents must pay the costs of these proceedings which I would fix at Rs. 2,100.

SINNETAMBY, J.—I agree.

*Appeal allowed.*

[1] *(1912) A. C. 407.*
[2] *(1955) 1 A. E. R. 525.*
[3] *(1891) A. C. 531.*
[4] *31 A. I. R. (P. C.) 88 at page 91.*