DINGLE v TURNER FORTY YEARS ON

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Introduction

The House of Lords in *Dingle v Turner*[2] held that a trust for the relief of poverty amongst poor employees of a company was charitable, even though the persons to benefit were defined by reference to a 'personal nexus', namely as being employees of a particular company. The so-called 'nexus' test had emerged from the Court of Appeal in *Re Compton*,[3] and had been affirmed by the House of Lords in *Oppenheim v Tobacco Securities Trust Ltd*, [4] both cases involving the advancement of education. *Dingle v Turner* thereby affirmed the exceptional status of the relief of poverty in the law of charities, and so effectively preserved the charitable status, not merely of the 'poor-employee' cases, but also of the 'poor-members-of-a-club' cases and of the much older line of authorities that had recognised the charitable status of a trust for the testator's poor relations.

Shortly after the speeches in *Dingle v Turner* were delivered, a note in the *Modern Law Review* cautiously opined that it was 'possible' to regard *Dingle v Turner* 'as the most important pronouncement of the House of Lords in the field of charities since 1891',[5] ie since *Pemsel's* case.[6] In the light of other significant charity decisions of their Lordship's House in the years between 1891 and 1972, the caution appears justified; but the importance of *Dingle v Turner* in the development of charity law cannot be doubted.

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2 [1972] AC 601 (HL).

3 [1945] 1 Ch 123 (CA).

4 [1951] AC 297 (HL).

5 SEA Johnson, 'A new look for public benefit in the law of charities' (1973) 36 MLR 532.

6 [1891] AC 531 (HL). See also Sir John Mummery's article in this issue of CL&PR.

Background

Frank Hanscomb Dingle, the testator, who died in 1950, had been the part owner of a company, E Dingle & Co Ltd (the company), that carried on the business of a department store in Plymouth. On the death of the testator's wife in 1966, all the shares in the company fell into his residuary estate upon trust to provide pensions for poor employees of the company who were either aged at least 60 or who were at least 45 and incapacitated from working. At the time of the testator's death, the store employed more than 600 people; by the date of the proceedings this had grown to 705 full-time and 189 part-time employees, and pensions were being paid to 89 ex-employees. The trustees asked the court to determine if the pension-fund trusts were valid.

The Rejection of the 'Nexus' Test in the Relief of Poverty

In *Gibson v South American Stores (Gath & Chaves) Ltd*,[7] the class of objects to benefit was similarly limited to persons employed by a particular employer, but the Court of Appeal held the disposition charitable since it was for relief of poverty.[8] At first instance in *Dingle v Turner*, Megarry J, being bound by the *Gibson* case, similarly held the trust before him charitable. As the Court of Appeal would also have been bound by *Gibson*, Megarry J certified an application for an appeal to the House of Lords. The House granted leave, so the case leap-frogged directly to their Lordships' House.

In *Oppenheim*, Lord Simonds, speaking of trusts for the advancement of education, said that, for the class of persons to comprise a 'section of the community' for the law of charities, the beneficiaries 'must not be numerically negligible' and 'the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual'.[9] Later he added:[10]

> A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

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7 [1950] Ch 177 (CA).

8 The Court of Appeal applied its earlier (unreported) decision in *Re Sir Robert Laidlaw* (1935).

9 *Oppenheim* (n 4) 306.

10 ibid.

The House of Lords in *Dingle v Turner* was presented with a choice: on the one hand, it could overrule the ancient authorities, and apply the 'nexus' test to the relief of poverty; on the other, it could affirm established authorities on the relief of poverty, which long ante-dated the emergence of the 'nexus' test, that the relief of poverty amongst a testator's relations, amongst employees of a company, or amongst members of a club, was a charitable purpose. The former approach would upset the charitable status of those existing trusts for the relief of poverty amongst the testator's relations and the like, and would also raise the difficult question of how such assets should be applied;[11] it would however promote greater harmony in the law of charities. The latter approach would avoid the problem of entitlement to the assets, but would preserve what is arguably an anomaly.

The poor-relations cases appeared to go back to the eighteenth century, although the charitable status of some of the early decisions is unclear.[12] It was not uncommon in the early nineteenth century for a failed gift for charitable purposes without the imposition of a trust to be applied by the Crown under the Sign Manual[13] to the testator's poor relations.[14] Charitable trusts for poor members of

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11 It would not have been possible to apply the assets *cy-près* on the ground that the original purposes had ceased in law to be charitable, since the overruling of earlier decisions to the contrary would have meant that the purposes would not have been charitable in the first place: cf the overruling of the first instance decision in *Re Foveaux* [1895] 2 Ch 501 (HC) by the House of Lords in *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL).

12 *Isaac v Defriez* (1754) Amb 595 is often treated as the first case of charitable status of trusts for poor relations, but could have been a private trust – the report refers to it as a 'charity', but that may have meant a 'private charity', which is not a charity in law. The case turned on whether a gift of residue, after a life interest to the testator's wife, to the testator's and his wife's '*poorest relations'* meant only those who were next of kin within the Statute of Distribution. In *White v White* (1802) 7 Ves Jun 423, a testatrix gave £3,000 of stock for putting out 'our poor relations' apprentices'; she later restricted this by codicil to two families. Grant MR held it valid as a charity. In *AG v Price* (1810) 17 Ves Jun 373, under a testator's will made in 1581, income of £20 per year out of a devise of land was to be distributed amongst the testator's poor '*kinsmen and kinswomen'* and their issue as dwelt in the county of Brecon (italics added). The Information was filed by three poor relations, who referred to *White v White* (1802) 7 Ves 423. It was argued that the disposition was void for uncertainty, but the court held it charitable. Grant MR referred to *Isaac v Defriez* as 'both imperfectly and erroneously reported', but he relied on it. Grant MR said the disposition in the present case had perpetual continuance, and was not for immediate distribution amongst the poor relations. (It might have been difficult to identify them more than 200 years after testator's death.)

13 i.e. by means of prerogative *cy-près*.

14 See Gareth Jones, *History of the Law of Charity 1532-1827* (CUP 1969) 152: 'The Crown's power to distribute to "similar" charitable objects was less constrained than the court's, and in *Moggridge v Thackwell* [(1803) 7 Ves 36, 50 in 1803 counsel admitted that the poor relations of the testator "will fare better under the Crown's disposition of this charity''.' See also John Picton's article in this issue of CL&PR.

a voluntary association or friendly society go back to the latter part of the Victorian age,[15] and the charitable status of trusts for poor employees of a company was recognised only slightly later.[16] More recently, and by analogy with the 'poor-employee' cases, a trust for poor members of a club had been held charitable.[17]

The House of Lords in *Dingle v Turner* chose to preserve the anomalous status of the 'poor-relations' cases on the ground of their longevity. Lord Cross referred[18] to Lord Simonds' caution in the *Oppenheim* case of 'how unwise it would be to cast any doubt upon decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole'.[19] Furthermore, Lord Cross considered the 'poor-employee' cases a natural development of the 'poor-relations' cases, and that to distinguish between them would be illogical and would not introduce greater harmony into the law of charity. He also bore in mind that there were many such trusts in existence.[20]

A 'Public Purpose' or a 'Company Purpose'?

Dingle v Turner is also notable for Lord Cross's additional observations on the 'nexus' test approved in *Oppenheim* and for the judicial exposition of views that he had previously advocated extra-judicially.[21]

Lord Cross was critical of the 'nexus' test as laid down by the majority of the House of Lords in *Oppenheim*, and he stated his preference for the dissenting view

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15 *Spiller v Maude* (1881) reported at (1886) 32 Ch D 154, 158-160; *Pease v Pattinson* (1886) 32 Ch D 154; *Re Buck* [1896] 2 Ch 727.

16 *Re Gosling* (1900) 48 WR 300 (trust for 'pensioning off' the old and worn out clerks of a banking firm of which the testator had been a member held charitable); *Re Sir Robert Laidlaw* (CA, 1935), unreported but referred to and applied in *Gibson v South American Stores (Gath & Chaves) Ltd* [1950] Ch 177 (CA); *Re Coulthurst* [1951] 1 Ch 661 (CA) (fund for the widows and orphans of deceased officers and deceased ex-officers of a bank as the bank should consider most deserving by reason of their financial circumstances).

17 *Re Young* [1955] 1 WLR 1269 (HC).

18 *Dingle v Turner* (n 2), 622.

19 [1951] AC 297 (HL) 309.

20 *Dingle v Turner* (n 2) 623. In *AG v Charity Commission* [2012] UKUT 420 (TCC); (2012) 15 ITELR 521 [17], it was stated that the Charity Commission estimated that some 1,500 benevolent charities could be affected by the Upper Tribunal's decision.

21 Cross, Geoffrey, 'Some recent developments in the law of charity' (1956) 72 LQR 187, 203-208.

expressed by Lord MacDermott in that case. In *Oppenheim*,[22] Lord MacDermott had indicated that, whilst the 'nexus' test would preclude charitable status if the class was defined by reference to an employment, it would not if the class was defined by reference to a calling, even though the persons to benefit might be the same. Lord MacDermott gave several examples, now overtaken by privatisations in the intervening years, including a description of 'miners at a particular pit or of a particular district' on the one hand and 'miners in the service of the National Coal Board' on the other.[23]

In Lord Cross's view, the same description of persons that might be a section of the public in some contexts might be merely 'a fluctuating body of private individuals' in others.[24] He said that '[m]uch must depend on the purpose of the trust'.[25] He went on to say that, in determining charitable status, the courts 'cannot avoid having regard to the fiscal privileges accorded to charities'.[26] Indeed, in his view, the decisions in *Re Compton* and in *Oppenheim* were 'pretty obviously' influenced by tax considerations.[27] He added:[28]

> To establish a trust for the education of the children of employees in a company in which you are interested is no doubt a meritorious act; but however numerous the employees may be the purpose which you are seeking to achieve is not a public purpose. It is a company purpose and there is no reason why your fellow taxpayers should contribute to a scheme which by providing 'fringe benefits' for your employees will benefit the company by making their conditions of employment more attractive.

He said that in the relief of poverty the temptation to try to use the law of charity in such private endeavours is not as great as in the field of education:[29]

> for while people are keenly alive to the need to give their children a good education and to the expense of doing so they are generally optimistic

22 *Oppenheim* (n 4) 317-318.

23 ibid 318.

24 ibid 623. See the judgment of Lord Wrenbury, delivering the advice of the Privy Council in *Verge v Somerville* [1924] AC 496 (PC) 499: 'The inhabitants of a parish or town, or any particular class of such inhabitants, may … be the objects of [a charitable trust], but private individuals, or a fluctuating body of private individuals, cannot'.

25 *Dingle v Turner* (n 2) 624.

26 ibid 624.

27 ibid 624-5.

28 ibid 625.

29 ibid.

> enough not to entertain serious fears of falling on evil days much before they fall on them.

For this reason, he thought that a trust to promote some religion among employees of a company might be charitable provided the benefits were purely spiritual.[30]

Although all the members of their Lordships' House in *Dingle v Turner* agreed with the decision, only Lord Simon of Glaisdale agreed with Lord Cross's opinion in its entirety. The other three expressly dissociated themselves from what Lord Cross had said about taking fiscal privileges into account in determining charitable status, including Lord MacDermott, who had dissented in the *Oppenheim* case, although he thought that the fiscal privileges of a charity might be material in considering whether the trust is sufficiently altruistic.[31] Nevertheless, as Lord Cross placed such importance on the fiscal consequences in determining whether the body of persons comprises a sufficient section of the community, it is difficult to separate his criticisms of the 'nexus' test from his views on the tax privileges enjoyed by charities. It therefore seems that the majority, in dissenting from his view on the relevance of taxation, can hardly be said to have approved of Lord Cross's 'company purpose' test.

The fiscal privileges attached to charitable status had been mentioned in passing by Lord Greene MR in *Re Compton*,[32] in rejecting the charitable status of a trust to educate the testator' issue, but his decision was clearly not based on this point. Nevertheless, the suspicion remains that it was no coincidence that the 'nexus' test was developed in a period when income and corporation tax had become more significant. Commenting, just a few years before *Dingle v Turner*, on the development of charitable purposes by analogy, Lord Upjohn said that the spirit and intendment of the Preamble had been 'stretched almost to breaking point'; his Lordship suggested that that it is used in modern times in order to reduce liability to rates and taxes, and that 'this generous trend in the law may one day require reconsideration'.[33] The Upper Tribunal in the *Independent Schools Council* case[34] doubted that fiscal privileges were relevant in determining charitable status, but considered that 'the fact that fiscal privileges are given underlines the need for genuine public benefit: that is, the degree of altruism to which Lord MacDermott

30 ibid.

31 ibid 614.

32 [1945] 1 Ch 123 (CA) 139.

33 *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 (HL) 153.

34 *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214.

referred'.[35] The rejection of tax considerations as a factor in determining charitable status has been approved in other jurisdictions.[36]

In the light of *Dingle v Turner*, Nigel Gravells suggested remoulding purpose trusts by narrowing the category of charitable trusts entitled to tax relief and widening the range of purposes that can exist as 'public purpose trusts'.[37] As yet, however, this suggestion has not been taken up by the legislature.[38] If a public purpose trust were required to be capable of providing some element public benefit, it would be difficult to distinguish from a charitable trust; and, with the opportunities for tax avoidance through the use of trusts with no human beneficiaries, the legislature might be resistant to introducing such (non-charitable) public purpose trusts.

It was noted shortly after the decision in *Dingle v Turner* that Lord Cross's statement that much 'must depend on the purpose of the trust' does not use the word 'purpose' in the sense which it has in charity law, but is equating the word with 'motive' or 'consequences'.[39] Therefore, whilst the motive of Frank Dingle may have been to promote the interests of his company, and a consequence of charitable status is fiscal relief, the courts have consistently maintained that a settlor's or testator's motive,[40] and the tax consequences which flow from charitable status, are irrelevant in determining whether an institution is a charity. Lord Cross's loose use of the term 'purpose' leads to confusion and is best avoided. This may have been what Gareth Jones had in mind in a contemporary case comment[41] contrasting the 'impressionistic' approach of Lord Cross in *Dingle v Turner* to the structured analyses of the earlier judicial pronouncements of Lord

35 ibid 273 [176].

36 Canada: *Jones v T Eaton Co* [1973] SCR 635; New Zealand: *Re Queenstown Lakes Community Housing Trust* (2011) 14 ITELR 248, 279d-280c [77-78].

37 Nigel Gravells, 'Public purpose trusts' (1977) 40 MLR 397.

38 There was a very limited reform with the introduction in Finance Act 2002 of the tax reliefs for Community Amateur Sports Clubs (CASCs), A CASC is not a charity, but enjoys some of the tax reliefs, including Gift Aid, accorded to charities. At that time, the promotion of sport was not recognised as a charitable purpose: *Re Nottage* [1895] 2 Ch 649 (CA), but it was considered that sports clubs that satisfied the requirements for a CASC should still enjoy some charity-like reliefs. The recognition in the Charities Act 2006, s 2(2)(g) (now Charities Act 2011, s 3(1)(g)) of the advancement of amateur sport as a charitable purpose means that an amateur sports association may now be a charity or a CASC or neither.

39 TG Watkin, 'Charity: the Purport of Purpose' [1978] Conv 277.

40 *Hoare v Osborne* (1866) LR 1 Eq Cas 585, 588 (Kindersley V-C).

41 Gareth Jones, 'Charitable trusts: what is public benefit?' (1974) 33 CLJ 63.

Simonds on charity law.[42] Michael Chesterman, writing only a few years after *Dingle v Turner*, was also critical of Lord Cross's reference to a 'company purpose' and of the lack of clarity in what his Lordship meant by a sufficient section of the community, adding that 'Lord Cross's imprecision on this matter is striking, considering that he has been one of the most perceptive judicial critics of charity law in recent times'.[43]

A more recent instance of the confused use of the term 'purpose' is in one of the questions posed to the Upper Tribunal in the *Independent Schools Council*'s case.[44] One question asked:

> Does charity law operate … A2 So as to cause an institution established for the sole purpose of the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education not to be established for a charitable purpose [?]

There are many schools whose expressed purpose is the advancement of education; but can there be a single school whose expressed purpose is 'the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education'? As the Upper Tribunal accepted the Attorney General's questions at face-value, the use of the word 'purpose' in question A2 might have encouraged the Tribunal to treat fee-charging as relevant to charitable purpose and public benefit. Although the Tribunal was unable to provide definite answers to most of the Attorney General's questions, it was able to answer this one fairly simply: it responded that such an institution would not be established for a charitable purpose because 'it does not have purposes which provide that element of public benefit necessary to qualify as a charity. Such a school has purposes which therefore fail to satisfy the public benefit test under the 2006 Act'.[45]

Other Explanations for the 'Poverty' Exception to the Nexus Test

Whilst the majority in *Dingle v Turner* rejecting Lord Cross's proposal to take tax consequences into account in determining charitable status, the explanation for the

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42 ibid 65.

43 Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson 1979) 320.

44 *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214.

45 ibid 273 [177]; the UT explains that the reason is 'that a trust which excludes the poor from benefit cannot be a charity' (ibid 273 [178]) - a proposition for which it admits there is no authority.

charitable status of the poor-relations cases and the like remained in doubt. There are various possibilities.

First, the poor-relations cases and the like might be treated as anomalous in that the public benefit (in the sense of a sufficient section of the community to benefit) that is necessary for every other head of charity is not required. On this view, the anomaly survives merely through a respect for precedent and a desire not to disturb established law. The case law abounds with statements supportive of this view. It was one of the alternative bases offered by Evershed MR for the decision in *Re Scarisbrick*:[46] he said that the 'poor-relations' cases 'may be accepted as a hallowed, if illogical, exception'. Jenkins LJ, in the same case, treated this line of cases as an exception to the general rule that requires public benefit for legal charity, and so as anomalous.[47] In *Oppenheim*, Lord Simonds expressed a similar opinion.[48] It would not, however, be accurate to speak of a complete exemption from public benefit, as the persons who may be benefited must be identified as members of a class and not by name.[49]

Secondly, the relief of poverty might be treated as by its nature beneficial to the community even if restricted to what would, in relation to other purposes, be considered a private class. Lord Greene MR in *Re Compton*[50] had offered this as a possible explanation for the poor-relations cases, but he did not elaborate. In *Re Scarisbrick*,[51] Evershed MR said that the poor-relations cases and the like might be justified as being 'of so altruistic a character' that public benefit may be inferred.[52] In *Dingle v Turner*, Lord MacDermott expressly referred to altruism,[53] and Lord Cross's speech, whilst not mentioning it, is consistent with such a view. Though little developed in charity law, altruism is occasionally mentioned in the cases as a relevant factor in determining charitable status,[54] and it provides one reason for the

46 [1951] Ch 622 (HC) 639.

47 ibid 656.

48 *Oppenheim* (n 4) 305.

49 ibid 651 (Jenkins LJ); see also 639 (Evershed MR). This restriction was evidently overlooked in *Re Segelman* [1996] Ch 171.

50 *Compton* (n 32) 139.

51 *Scarisbrick* (n 46).

52 ibid 639 (Evershed MR).

53 *Dingle v Turner* (n 2) 614.

54 e.g. Fitzgibbon LJ in *Re Cranston* [1898] 1 IR 431, 446; Lord MacDermott in *National Deposit Friendly Society Trustees v Skegness UDC* [1959] AC 293 (HL) 315; and Salmon J in *Waterson v Hendon BC* [1959] 1 WLR 985 (HC) 991.

denial of charitable status to self-help organisations[55] other than those for the relief of poverty.[56] In the present context, however, it raises problems, since trusts for poor relations are nearly always for the relations of the testator, just as trusts for the relief of poverty amongst employees almost invariably concern a company in which the testator (like Frank Dingle) had a substantial interest. If altruism is defined as a selfless regard for others, such dispositions look distinctly less altruistic than those for the relief of poverty where there is no family or commercial connection between the settlor and those who may benefit.

Thirdly, the relief of poor relations and the like might be treated as charitable if it is for the fiscal relief of the public, as it is a charitable purpose (recognised in the Preamble to the Statute of Elizabeth 1601[57]) to relieve the tax or rate burden on a parish.[58] Counsel for the next-of-kin in *Re Compton* had suggested that the exceptional cases concerning the relief of poverty were explained by the relief of even a small number of persons benefiting the community 'by taking the burden of maintenance from it'.[59] According to this explanation, the charitable status of the poor-relations cases turns on the indirect benefit to a sufficient section of the community: namely, the taxpayers and ratepayers thereby relieved. This explanation fits nicely with the cases which have held a trust for the relief of poverty to be charitable even where there has been a minimum income requirement to benefit, with the result that the very poorest (and so those who might be in need of parish relief) were in fact excluded. In these latter types of cases, the exclusions might have been designed to prevent the benefits going to relieve the parish, which would otherwise have to provide support.[60] On this footing, a trust for poor relations would not be charitable for the relief of taxation if limited to those relatives not entitled to means-tested benefits from the State.

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55 e.g. *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194 (CA).

56 *Spiller v Maude* (1886) 32 Ch D 158n; *Re Buck* [1896] 2 Ch 727 (HC).

57 i.e. 'the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes'; the Preamble's earlier reference to 'the repair of churches', which is strikingly the nearest approach made to the advancement of religion, is arguably explained as being intended to relieve the parishioners who would otherwise be liable to contribute to the church's maintenance.

58 *AG v Blizard* (1855) 21 Beav 233 (where it was held that the charitable trusts were not merely for the relief of the poor, so that the property could be applied in relief of the rates of the parish of Richmond).

59 *Compton* (n 32) 124.

60 A notable instance is *Re De Carteret* [1933] 1 Ch 103 (HC), which concerned a trust under the will of a testator who died in 1932 to provide annual allowances of £40 to widows and spinsters of England with an annual income of between £80 and £120. Maugham J held it charitable on the ground that poor did not mean destitute, and that persons within this income bracket could be considered to be poor.

If the relief of taxation is the rationale, there may be some common basis for the poor-relations cases and some of the so-called 'locality' trusts: these have held to be charitable a trust for the general benefit of the inhabitants of an area, even though not for a purpose falling within, or analogous to those listed in, the Preamble, merely by dint of its geographical restriction.[61]

The weakness of this explanation, however, is that the scope of modern rates and taxation is such that many different purposes might be argued to relieve the taxpayer. Thus it could be contended that the provision of a private hospital or fee-paying school relieves the taxpayer by reducing the pressure on NHS hospital beds and places in State schools respectively. Such indirect benefit was recognised by the Privy Council in the context of a private hospital adjoining and run by the same persons who operated the public hospital nearby.[62] Nevertheless, to admit for the purposes of the law of charity in modern times such indirect benefit to the taxpayer or ratepayer would widen the scope for arguments based on fiscal relief well beyond the relief of poverty, and thereby undermine the exceptional status of the poor-relations cases and the like.

Dingle v Turner and the Charities Act 2006

It was in a report of 2001 produced for the National Council for Voluntary Organisations (NCVO) that the notion of strengthening the public-benefit test in charities was first suggested.[63] This was to be achieved by a so-called 'reversal' by statute of a presumption of public benefit that was said to apply to purposes within the first three heads of *Pemsel*'s case, including therefore the relief of poverty. The report referred to the anomaly of the poor-relations cases, and to the oral evidence presented to it by Francesca Quint that legislation should 'require positive proof of public benefit for all charities, removing the present anomalies and disparities'.[64] In an appendix to the report, Quint expressed her view on the effect of its proposal:[65]

> At its simplest, the requirement that recipients of assistance are a section of the public will prevent the establishment of new charities for the relief

61 *Goodman v Mayor of Saltash Corporation* (1882) 7 App Cas 637, 642 (dictum of Lord Selbourne LC), *Re Smith* [1932] 1 Ch 153 (CA). See particularly Michael Albery, 'Trusts for the Benefit of the Inhabitants of a Locality' (1940) 56 LQR 49, 55 and 60.

62 *Re Resch's Will Trusts* [1969] AC 514 (PC).

63 NCVO, *For the public benefit; a consultation document on charity law reform* (NCVO 2001).

64 ibid 23, para 3.5.1.

65 ibid 38, app 3.

of poor relations (eg of the founder), or for poor members of a club, society or employees of a firm, company or trade union.

The public-benefit proposals in the NCVO report were evidently adopted (without acknowledgment) by the Cabinet Office in a report of 2002,[66] but the latter did not refer to what the impact might be on the poor-relations and poor-employees cases. In the event, although the Charities Bill was intended by the government to strengthen the public-benefit requirement, and was the subject of much Parliamentary debate in its pre-legislative scrutiny,[67] there was no discussion in either House of whether the public-benefit provisions would cause the poor-relations cases and the like to lose their charitable status.

Under provisions in the Charities Act 2011 (originally introduced in the Charities Act 2006), a purpose to be charitable must both fall within one of the 'descriptions of purposes' in paragraphs (a) to (m) of the relevant sub-section[68] and be for the public benefit.[69] If the charitable status of the pre-Act cases on 'poor relations' and the like had depended on their exemption from public benefit, it might appear that such status would have been lost; whereas if it turned on their providing an indirect benefit to the public, such status would be retained.

In the event, the Upper Tribunal in *A-G v Charity Commission*[70] treated the poor-relations cases and the like as based on an exemption from public benefit, and yet nevertheless held that the legislation did not affect their charitable status. This *tour de force* was achieved by the Tribunal's treating public benefit as having two aspects: one that relates to the purpose itself and another that concerns the section of the community to benefit. The Tribunal held that trusts for the relief of poverty have to be for the public benefit in the first sense (so meeting the statutory requirement for public benefit). It also held that trusts for poor relations and the like remain charities because the statutory requirement of public benefit is satisfied in the relief of poverty if there is public benefit in the first sense alone. The Tribunal explained that the benefit to the community from relieving the poor is an aspect of public benefit in the first sense.[71] The Tribunal also held that the exception now extends to the new description of the 'prevention' of poverty.[72]

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66 Strategy Unit Report, 'Private Action, Public Benefit: a Review of Charities and the Wider Not-for-Profit Sector' (Cabinet Office, 2002).

67 Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (2004, HL 167-I; HC 660-I).

68 Charities Act 2011, s 3(1) (formerly Charities Act 2006, s 2(2)).

69 ibid s 2(1) (formerly Charities Act 2006, s 2(1)).

70 [2012] UKUT 420 (TCC); (2012) 15 ITELR 521.

71 ibid [43].

72 ibid [69]-[82].

One problem with the Tribunal's reasoning is that the case law before the Charities Act 2006 treated public benefit in the first sense as satisfied by a purpose that fell within any of the four heads of *Pemsel*'s case, and nothing in the Charities Act 2006 changed that. Indeed, it is difficult to envisage a trust for the relief of poverty that is not for the public benefit in the first sense, and the Tribunal decision furnishes us with no examples. It is suggested that there are no such examples, and any hypothetical purpose can be explained by other means. The purpose of an institution might, for instance, appear to be the relief of poverty and yet seek to achieve this by changing the law or by influencing government policy; such an institution would not attain charitable status. Those opposed to the view that the relief of poverty is itself for the public benefit might argue that the purpose of such institution is the relief of poverty, but that the institution is not a charity because such purpose lacks public benefit. This is not, however, a correct analysis. Such an institution would indeed fail to be a charity, but for the reason that one of its purposes is political: it would therefore not satisfy the requirement that, for an institution to be a charity, its purposes must be wholly and exclusively charitable.[73] Another problem is that the Tribunal decision means that it is no longer possible to identify a purpose as charitable even though it clearly falls within one of the statutory descriptions of purposes and is not restricted to a private class.

It is therefore suggested that, in specifying that a purpose to be charitable must both fall within the statutory list and be for the public benefit, the Charities Act 2011 is referring to public benefit in the second sense of the section of the community to benefit. This being so, the Tribunal could have decided that the poor-relations cases and the like were simply anomalous and could not survive the statutory requirement that a purpose be for the public benefit. Such a decision would not have led to the problem of how the assets of such former charities should be distributed, as loss of charitable status would have resulted from a change in the legislation: the assets of such former charities would therefore have been applicable *cy-près* because the 'original purposes' would have 'ceased … to be in law charitable'.[74] In this respect, the consequences of holding that the poor-relations cases and the like were no longer charitable were less serious than they would have been had the House of Lords reached that result in *Dingle v Turner*.

On the other hand, the Tribunal could have still held that the poor-relations cases and the like survived the new legislation as providing a benefit to society in one of the ways that the courts have previously identified: namely, that the relief of poverty is by its nature beneficial to the community, or that it relieves the public of a tax or rate burden. Although, as has been discussed, neither of these grounds is

73 Charities Act 2011, s 1(1)(a).

74 ibid s 62(1)(e)(ii).

intrinsically very persuasive, they have been put forward as explanations in earlier cases, and the courts should where possible seek to uphold dispositions, not to invalidate them by casting doubt 'upon decisions of respectable antiquity'.[75] In effectively affirming the survival of *Dingle v Turner*, it would appear that the Upper Tribunal reached the correct result for the wrong reason.

Conclusion

Dingle v Turner remains an important case in charity law in upholding the charitable status of the poor-employee cases and the like despite the affirmation by the House of Lords of the nexus test in the advancement of education in *Oppenheim*. To this extent, *Dingle v Turner* appears to have survived the bringing into force of the Charities Act 2006, Part I, and its consolidation in the Charities Act 2011. What the decision did not clarify, however, was the rationale for upholding the line of cases based on *Isaac v De Friez*.[76] Lord Cross's suggestion that the courts should take fiscal consequences into account in determining charitable status was a minority view in *Dingle v Turner* itself, and has not, it seems, influenced judicial attitudes in the intervening decades. Neither has the legislature made any attempt to reflect the tenor of Lord Cross's speech by limiting tax reliefs to certain types of charities. Whilst each of the Labour Party manifestos preceding the two General Elections of 1974 promised to withdraw the charitable status and tax reliefs of fee-paying schools, and such promises were repeated in Labour's 1983 manifesto, these proposals were never implemented by the Labour Government in power from 1997 to 2010. Instead, the attack on independent schools has mostly shifted from the threat of withdrawal of charitable status and tax reliefs to an attempt in the Charities Act 2006 (now in the Charities Act 2011) to use (or to misuse) public benefit in charity law to widen access to such schools – an attempt that has largely failed.

There may well be merit in Lord Cross's view that the 'nexus' test emerged as a result of the growing importance of taxation in the twentieth century. The force of his criticisms of the potentially arbitrary result that can be produced by the application of the 'nexus' test, which supported Lord MacDermott's dissenting speech in *Oppenheim*, can also be appreciated. Even here, however, Lord MacDermott's criticisms in *Oppenheim* of the majority view that would distinguish between 'miners' and 'miners employed by the National Coal Board', seem dated in view of the privatisations in the ensuing decades. Indeed, it is nowadays not so easy to find meaningful examples of the sort of distinctions that could commonly be drawn in 1972 involving many thousands of working people employed in the

75 *Oppenheim* (n 4) 309 (Lord Simonds).

76 (1754) Amb 595.

monopolies of nationalized industries. To this extent, the cases reveal their age. Apart from this, the *Oppenheim* test is easy to apply and has the practical merit of certainty; whereas Lord Cross's attempt to distinguish a 'public purpose' from a 'company purpose' can be criticised, not merely for misusing the word 'purpose' in the law of charities, but for being in application both difficult and uncertain. In this respect, whilst *Dingle v Turner* remains a key authority in the law of charities for upholding the charitable status of the poor-employee cases, Lord Cross's minority attempt to import tax considerations into the determination of charitable status, which might have been seen at the time as potentially marking out a new direction in charity law, has led nowhere. The debate over whether tax reliefs should be accorded to all, or to only certain classes, of charities, is in its nature political, and can be resolved only by the legislature.