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WAR AND PEACE: A POLITICAL SAGA

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"War is peace"
(George Orwell *Nineteen Eighty-Four*)[2]

"The quickest way of ending a war is to lose it"
George Orwell 'Second Thoughts on James Burnham' *Polemic* May 1946

"Si vis pacem, para bellum"[3]
derived from Flavius Vegetius Renatus (AD 379-395) Roman military writer

"This is the second time in our history that there has come back from Germany peace with honour. I believe it is peace for our time"[4]
Neville Chamberlain on his return from securing the Munich Agreement from Hitler, 1938.

Introduction

The War in Kosovo and the peace process in Northern Ireland under the Good Friday Agreement are reminders that war and violent conflict are never far from the grief of the world. As the preacher once memorably (and aphoristically) said:

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2 cf Mr Chadband in Charles Dickens *Bleak House* ch 19: "What is peace? Is it war? No. Is it strife? No."

3 "If you want peace" prepare for war.

4 Often misquoted as "peace in our time".

> "To every thing there is a season and a time to every purpose under the heaven ... a time of war and a time of peace."[5]

War and peace are topics of perennial concern. Thus Aristotle in his *Art of Rhetoric* says:

> "Now we may say that the most important subjects about which all men deliberate and deliberative orators harangue, are five in number, to wit: ways and means, war and peace, the defence of the country, imports and exports, and legislation."

The selected quotations which introduce this article are a few out of a huge number which point the paradoxes and truths which educated men have perceived in war and peace over the ages. And it will be a function of this article to discuss, within the context of charity law, the second and third important subjects mentioned by Aristotle, to wit war and peace, and defence of the country.

Recently the courts have been puzzling over the charitable status of organisations dedicated to the promotion of peace or of the ending of war, and both the cases of *Southwood v AG*[6] in England and *Re Blyth*[7] in Australia are concerned with organisations with differently worded objects clauses aimed at the attainment of peace. Are such purposes charitable as the law understands that term or are they to be denied charitable status on the ground that in truth they are political purposes which cannot be charitable?

In *Southwood v AG*, Carnwath J in the Chancery Division of the High Court held that the particular organisation which was before him was not charitable because it was political in its aims. On the other hand, in the earlier case of *Re Blyth* (not apparently cited in *Southwood v AG*) Thomas J sitting in the Supreme Court in Queensland held that a trust for the benefit of bodies working for the elimination of war was charitable.

Peace and the Preamble

Peace was not mentioned as a charitable object in the preamble to the Statute of

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5 Ecclesiastes Ch 3, vv 1 and 8.

6 (1998/99) 1 ITELR 119.

7 (1997) 2 Qd R 567.

Elizabeth I in 1601 and, if one puts this in historical context, this is hardly surprising. With the Great Armada of Philip II in 1588 a recent memory, the Elizabethans would, in all probability, have subscribed wholeheartedly to the famous maxim derived from the Roman military writer Vegetius quoted above. (What the author of *Epitoma Rei Militaris* actually said in the prologue to Book 3 was not "If you want peace prepare for war" but "Let him who *longs for* peace, prepare for war.")[8] Consonantly with this motto the preamble refers to "the setting out of soldiers" as a charitable purpose and "maimed soldiers and mariners" are among those singled out as deserving of charitable relief. Those particular purposes did not, incidentally, appear in the fourteenth century poem *The Vision of Piers Plowman* in Truth's list of charitable purposes recommended to anxious and rich merchants seeking to obtain remission of their sins and a happy death. In other respects that list, as others have pointed out, strikingly anticipated the language of the preamble to the Statute of Elizabeth I.

Certainly until the assumption was made in *Re Harwood*[9] that peace was a charitable purpose or object there was no hint in the English authorities that peace rather than the defence of the realm was a charitable purpose. The earliest recognition in England of the charitable nature of a trust for the defence of the nation is to be found in *Re Stephens*.[10] That case and later cases which undoubtedly uphold the defence of the realm as a charitable purpose prompt the question as to how a peace or disarmament trust can be reconciled, or otherwise held consistent with, that purpose.

Since *Re Stephens* has not had an easy ride of late, and since there are suggestions that trusts for the defence of the realm are to be tightly restricted and controlled, a few words on this important line of authorities may be thought helpful.

Defence of the Realm as a Charitable Object

In *Re Stephens*[11] the relevant testamentary gift which was there in issue was a gift to:

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8 *Qui desiderat pacem, praeparet bellum* not *Si vis pacem, praepara bellum*. Both versions in fact echo Aristotle's saying in Book 1 of his *Nicomachean Ethics* at 1177b 5-6 (translated by M Ostwald) that "We make war that we may live in peace". Rather different is the motto of the flower power generation "Make love not war!"

9 [1936] Ch 285.

10 (1892) 8 TLR 792.

11 (1892) 8 TLR 792.

> "the National Rifle Association, of which the Duke of Cambridge [the Commander-in-Chief of the Army] is president ... to form a fund to be called the Stephens' Prize Fund, to be expended by the council for the teaching of shooting at moving objects in any manner they may think fit, so as to prevent as far as possible a catastrophe similar to that at Majuba Hill."

Kekewich J upheld the gift as charitable. It is true that he did not articulate in detail how this gift fitted the definition of charity. But he referred in effect to the superior rifle skill of the Boers at Majuba Hill as "one great cause of the disaster".

The key passage in the report of the judgment of Kekewich J runs as follows:

> "The object in the testator's mind was clear. He desired that Englishmen should be taught to shoot with those particular weapons which were used in war for the destruction of their enemies and the protection of themselves. The testator did not say that 'soldiers' or any other particular class of persons were to be taught. What he means was that accurate shooting was to be taught among Englishmen in general - an object which would be promoted directly or indirectly in the Army - and so a repetition of the catastrophe at Majuba Hill would be averted. That was an excellent object... This gift was to the advantage of the United Kingdom and to all Englishmen, not only to those who were likely to be shot at, but to all subjects of her Majesty. In his opinion, therefore, this must be supported as a good charitable gift."

The decision in *Re Stephens* was not concerned with promoting the efficiency of an existing unit of the Armed Forces. Moreover, it has stood for over a hundred years judicially unchallenged. It has been generally accepted, and clearly understood, as being authority for the proposition that a gift tending to increase the efficiency of the Armed Forces or to aid the defence of the Realm was charitable under the fourth head in *Pemsel's* case.

It has, nevertheless, been suggested that *Re Stephens* is a decision to be confined to its own special facts or that its scope is at most narrow or that it is obsolete if not wrongly decided. All of these propositions are challenged as being *ad hoc* rationalisations of a case which is in fact soundly based, of unimpeachable authority, and part of a corpus of authority broad in scope and in no way obsolete or even obsolescent.

"Uniqueness" of *Re Stephens*

It is not possible plausibly to argue that apart from the "unique" case of *Re Stephens* the authorities for the proposition that promoting the security of the nation is a charitable purpose were *all* concerned with promoting the efficiency of an existing unit of the Armed Forces. That argument is flawed and unsound. It assumes that what is charitable in a regiment or unit cannot be charitable on a broader front. It ignores, and is inconsistent with, both the case law in England and other common law jurisdictions and textbook discussions.

There are several English cases and one important Commonwealth one which negate the restrictive interpretation of *Re Stephens* contained in the argument recited in the preceding paragraph.

It is appropriate to start with *Re Driffill*.[12] In that case a testatrix devised and bequeathed her residuary estate to her trustees on trust to devote the net proceeds of sale thereof "in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft". Danckwerts J, who had a particular expertise in charity law, having been junior counsel to the Attorney General in charity matters for many years, said the case was one "clearly falling within the well-known authorities in which gifts for promotion of the efficiency of the armed forces of the Crown were held to be valid charitable bequests".[13] He went on to cite *Re Stephens* in which "Kekewich J held that the reference to Majuba Hill and the latter part of the gift generally showed that the gift was charitable as directed to promoting the efficiency of the armed forces". This mirrored the submission of Mr Denys Buckley, then standing junior counsel for the Attorney General in charity matters, who submitted that the gift was charitable "as tending to the personal efficiency of the armed forces." Danckwerts J also referred to *Re Good* [14] which had been cited to him by Mr Buckley and quoted the words of Farwell J in that case to the effect[15] that a gift to maintain a library and plate in an officers' mess was a good charitable gift

> "on the first ground - namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially,

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12 [1950] Ch 92.

13 See [1950] Ch 92 at 95.

14 [1905] 2 Ch 60.

15 *Ibid* at 66.

but also for the safety and protection of the country."

It should be added in parentheses that in *IRC v City of Glasgow Police Athletic Association*[16] Lord Normand, echoing submissions which had been made by the Crown, criticised the decisions in *Re Good* and *Re Gray*[17] in which the promotion of sport in a regiment was held charitable. The principle on which those two cases were decided, namely that a gift for promoting the efficiency of the armed forces is charitable, was, he opined, unassailable. On the other hand, he expressed reservation and doubt (as had the Crown) as to the correctness of those decisions on the facts. In other words, he queried whether a gift for the maintenance of a library and plate in an officers' mess or a gift to promote sport in a particular regiment truly increased the efficiency of the army. But it was not suggested in that case, nor indeed has it been suggested in any of the cases, that *Re Stephens* was wrongly decided or based on faulty principle. The principle underlying that case and indeed *Re Driffill* was treated by Danckwerts J as "well-known" and that judge, who was (as already remarked) very experienced in charity law, did not hedge the principle about with any restrictions.

In *Re Corbyn*[18] the residuary estate of the testator was given to trustees to invest and form a fund for the benefit and interest of selected boys from a training ship to be trained in some other establishment with a view to their taking commissions in the Royal Navy or becoming officers in the mercantile marine. Counsel for the next of kin conceded that training of a naval officer might be a good charitable object but argued that training for the mercantile marine was not. Mr Geoffrey Cross for the Attorney General argued in relation to training officers for the mercantile marine that it was an object most beneficial to the community and of the greatest public importance at any time "but especially at present." Morton J said that as regards the instructing and training of boys to become officers in the Royal Navy there could be no doubt at all that that was a purpose beneficial to the community and a charitable purpose.[19]

On the disputed part of the gift Morton J said this:[20]

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16 [1953] AC 380 at 391.

17 [1925] Ch 362.

18 [1941] Ch 400.

19 See *ibid* at 403-404.

20 *Ibid* at 404.

> "As regards the training of boys to become officers in the mercantile marine, it seems to me that this also must be a purpose beneficial to the community within the words used by Lord Macnaghten. The mercantile marine is essential to the community in the present time of war, but at all times, unless and until this country can produce within its borders all the food and other essential of life which it requires, the mercantile marine must be kept in existence and it is of the greatest importance that boys should be suitably and efficiently trained to be its officers."

It is submitted that this decision implicitly recognises (as *Re Driffill* expressly recognised) that the defence of the realm is a valid charitable object and that that object is not confined to existing units of the armed forces. It is enough that the object in view is the defence of the realm, no matter what the means, so long as they are not contrary to public policy and are in fact directed to that object. Thus, for example, a trust to support, in effect, radar research in 1939 would (quite apart from any claim to be for the advancement of education) undoubtedly have been adjudged for the defence of the realm and therefore charitable, even though not linked to any particular regiment or service unit. That example exposes (as does *Re Driffill* itself) the essential flaw in the argument that the improvement of the efficiency of the Armed Forces must be restricted to existing regiments and service units.

In *Downing v CIT of the Commonwealth of Australia*[21] no less a court than the High Court of Australia decided that a gift 'for the amelioration of the condition of the dependants of any member or ex-member of Her Majesty's naval or military or air forces of the Commonwealth' was charitable not only as for the relief of poverty but also as a gift to increase the efficiency of the armed forces. On this point Walsh J, with whom Menzies and Gibbs JJ concurred, said this:[22]

> "The rule that the promotion of the efficiency of the armed forces is a good charitable purpose may have been derived from the notion that gifts for that purpose *tend* towards the aid or ease of 'poor inhabitants' concerning 'setting out of soldiers, and other taxes' and so come within the very words of the preamble to the Statute of Elizabeth. But that does not seem to be a satisfactory basis for the rule as it has developed and, in my opinion, trusts which *tend* to increase the efficiency of the armed forces, as well as trusts which *tend* to increase recruitment to them... may be regarded as beneficial to the public in a way in which the law regards as charitable, because they

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21 (1971) 125 CLR 185.

22 *Ibid* at 198.

> assist in the promotion of public defence and security."[23]

Later on[24] Walsh J said:

> "I am of the opinion that a trust may be considered to tend towards that result by means of providing aid comfort and encouragement to the armed forces or a section of them, notwithstanding that those who will directly benefit from the trust are those who have ceased to serve or their dependants."

The first of these two passages makes it clear that it is enough that a trust can be considered to tend to increase the efficiency of the armed forces or to tend to increase recruitment to them. In other words a *tendency* is enough. And there is no restriction of these objects to existing regiments and units. The second of the two passages again identifies a tendency to a particular result as sufficient. So a tendency to increase recruitment to the armed forces is sufficient (and Walsh J may have had *Re Stephens* in mind on that score). Again if there is a "tendency" in the prescribed objects to promote public defence and security or if those objects *assist* in promoting public defence and security, that too will be enough. It is no doubt on these grounds that various other gifts whose intent and result is to boost service morale have been upheld as charitable.[25]

Significantly, *Tudor* on *Charities*[26] states that the validity of trusts for the promotion of national or local defence can be justified on the general principle that the public interest requires that, so far as possible, the lives and property of all members of the community or of all the inhabitants of a particular locality shall be protected not only from storm, tempest, fire or other catastrophe, but also from attacks by the Queen's enemies. If that is indeed the correct rationale of the cases, it would (it is submitted) be bizarre in the extreme to confine the counter-measures necessary to secure the defence of the realm and to protect the lives and property of the inhabitants to those effected through regiments and units already in existence. That would unnecessarily shackle or hobble what is the overriding object recognised by all the books, namely the defence of the realm or, as the Australian case put it, the promotion of public

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23 Emphasis added.

24 At 200.

25 See *Re Princess Mary's Fund* [1921] 1 Ch 655 at 656-657 and 661-662; and the Commissioners' decisions summarised in Picarda *Law and Practice Relating to Charities* (2nd edn), 135.

26 (8th edn), 94.

defence and safety.[27]

It is correct that Kekewich J in *Re Stephens* did deduce that the teaching of shooting at moving targets was to be solely with the actual weapons of war but it is not at all apparent how he got that limitation or implication out of the terms of the gift. Provided that the weapons used are close enough to service weapons, or are otherwise of a nature sufficient to provide useful training for defence of the realm purposes, that should be enough.

Re Harwood and Peace as a Charitable Object

Just as the disaster at Majuba Hill was a spur to volunteer forces and to a widespread concern that the British Army should never again be found wanting, so too the mass carnage and sanguinary horrors in Flanders during the Great War (the war to end all wars) engendered a revulsion from war and a passionate longing for world order through the League of Nations. Above all it canonised peace. Pacifism became a fashion and many of those who said "Never again" joined in the Peace Pledge movement.

In the nineteen thirties particularly, peace and disarmament were highly emotive and political issues and those issues dominated public and Parliamentary debate during the period between 1931 and 1939.[28] The Labour party candidate at the East Fulham by-election in October 1933 asked for votes for peace and disarmament and described his opponent as demanding armaments and preparations for war. The Miners' Federation in the same month pledged itself to take no part in any war and threatened to organise a general strike should there be one.

In 1934 a campaign started, which later became known as the Peace Ballot, and its results were announced on 27th June 1935. Over 11 million people responded to an army of half a million canvassers and endorsed a broadly pacifist line in answer to cunningly worded questions which implied a background of workable collective security and kept discreetly in the background any need for rearmament. The one

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27 No textbook has ever suggested such a restriction in relation to trusts for the promotion of the defence or security of the realm: see in particular *Tudor* on *Charities* (8th edn) 93-96, especially at 94; Keeton and Sheridan *Modern Law of Charities* (4th edn) chapter 1 (191-196); Picarda *Law and Practice Relating to Charities* (2nd edn) 134-135 and 138-139; Snell's *Principles of Equity* (29th edn) 150; Hayton and Marshall *Commentary and Cases on the Law of Trusts and Equity* (10th edn) 461.

28 For one account see Lord Templewood, *Nine Troubled Years* (1954) 120-134.

question which was conspicuous by its absence on the ballot was "Do you support British rearmament in the interests of peace?"

It was against this background that the case of *Re Harwood* was argued and determined in the Chancery Division on 12th November 1935, the day after the anniversary of Armistice Day.

The testatrix who died on 29th July 1934 by her will made in January 1925 had, among other legacies, left free of all duty: £200 to the Wisbech Peace Society Cambridge, £300 to the Peace Society of Belfast and £300 to the Peace Society of Dublin. There had been a Wisbech Peace Society but it had ceased to exist in the lifetime of the testatrix and there was no admissible evidence that there had ever been Peace societies answering the names of the other two. The first gift was held to lapse: the testatrix had had a particular charitable intent which had failed. But in the case of the two other gifts Farwell J discovered a general charitable intent, namely to benefit societies whose object was to promote peace. No cases are cited, and no argument is recorded as having been put forward, concerning the charitable nature of a gift to promote peace. The judge appears simply to have assumed that such a gift would have been charitable. The two gifts were accordingly applied cy-près. Until 1977 the assumption attracted no attention in the textbooks, which merely cited the case on the question of cy-prés.

Doubts about *Re Harwood*

However, the first edition of Picarda *Law and Practice Relating to Charities* (1977) recites the decision of *Re Harwood* as authority for the proposition that peace is a charitable object, and after noting the facts and the decision, adds the following comment:

> "It is submitted that peace is a political object and therefore not charitable. Its political nature is apparent when in relation to a particular area of conflict one asks the question: peace on what terms? That question cannot be answered without making a political decision."

It is not clear whether this passage was cited to Peter Gibson J (as he then was) in *Re Koeppler's Will Trusts*,[29] although *Re Harwood* certainly was cited for the proposition that the promotion of peace was charitable. However that may be, he pointed out that in that case "it was accepted, apparently without argument to the

29 [1984] Ch 243.

contrary, that gifts to peace societies were charitable gifts". And he added that the purposes with which he was concerned were differently worded and that in any event it seemed to him at least strongly arguable that the purposes of a peace society were political and not charitable.[30] The Court of Appeal upheld the claims of the Wilton Park institution to be charitable but did not endorse or even mention *Re Harwood*. The second edition of Picarda repeated the passage quoted above and noted that in the discussion of *Re Koeppler's Will Trusts* Peter Gibson J, at first instance, had declined to follow *Re Harwood*.[31]

In *Webb v O'Doherty*[32] the question before Hoffmann J was whether a student union which was an educational charity could use its charitable funds to campaign for an end to the Gulf War. He held that seeking to influence public opinion on political matters was a political activity and that the union was accordingly precluded from spending its funds on such a campaign. The Gulf War was an act of Government policy and a campaign to change Government policy is clearly political.

International Friendship and Understanding: A View by One Nation of Another

Also germane to the discussion of the promotion of peace as a charitable object are the group of cases in which the courts have held that organisations for the improvement of international friendship and understanding are not charitable. Thus an organisation whose object was to promote international friendship and understanding between England and Sweden[33] or between the inhabitants of the twinned cities of Toronto and Volgograd (formerly Stalingrad)[34] was in each case held not to be charitable. Such an organisation exists to promote an attitude of mind, a view of one nation by another and that, according to Rowlatt J in the *Anglo-Swedish Society* case, was not a charitable object. Hence a trust for "the improvement of international relations and intercourse" also failed.[35]

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30 [1984] Ch 243 at 257F-G.

31 Picarda *op cit* (2nd edn 1995) at 154 and 156.

32 (1991) *The Times* 11th February [1991] 3 Admin LR 731.

33 *Anglo-Swedish Society v IRC* (1931) 47 TLR 295.

34 *Toronto Volgograd Committee v Minister of National Revenue* (1988) 30ETR 99, Fed CA.

35 *Buxton v Public Trustee* (1962) 41 TC 235.

Harmony Within the Community

A similar view was formerly taken of race relations trusts which were thought to be political. A trust for the purpose of conducing to the appeasement of racial feeling between the Dutch and English speaking members of the South African community was in *Re Strakosch* [36] held to be for a political object, even though that purpose had no international flavour but was directed to harmony within the domestic community. However, even in the absence of legislation about race relations, which constitutes a statutory recognition of the public interest in having a harmonious community, such trusts would appear to be charitable as analogous to various other recognised charitable objects. These include: (a) the preservation of public order and the prevention of breaches of the peace[37] (b) the mental and moral improvement of man[38] on the basis that discrimination on the grounds of race or colour is immoral[39] and (c) the promotion of good citizenship.[40]

The Elimination of War as a Charitable Object

On 18th December 1996 Thomas J sitting in the Supreme Court of Queensland heard argument in the case of *Re Blyth*[41] about the validity of a gift for such organisations as in the opinion of the executor were "working for the elimination of war". On 6th March 1997 Thomas J delivered a judgment upholding the gift as charitable.

The learned judge started by saying that a wide range of cases might be found in which the courts have considered peace purposes, some of them finding bequests valid and others finding them invalid. This, with great respect to the learned judge, is an exaggeration. Apart from the dubious case of *Re Harwood* the only cases in which the promotion of peace has been recognised as a charitable object have been

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36 [1949] Ch 529, CA. See also the discussion concerning the promotion of good race relations in Picarda *Law and Practice Relating to Charities* (2nd edn 1995) 166-168.

37 *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, HL.

38 *Re South Place Ethical Society* [1980] 1 WLR 1565. See Picarda *op cit* at 149 for the other cases on moral improvement.

39 *Jackson v Phillips* 96 Mass 539 (1867) (trust to "create a public sentiment that will put an end to negro slavery" upheld as charitable).

40 *Re Webber* [1954] 1 WLR 1500.

41 (1997) 2 Qd 567.

American cases.[42]

He first cited *Re Harwood* as being as decision where "Harman J had no hesitation" in regarding a gift revealing a desire to benefit any society which was formed for the purpose of promoting peace as a charitable gift. The judge who in 1935 decided the case of *Re Harwood* was, however,Farwell J (and not Harman J) and Farwell J did not, as we have seen, appear to have heard any argument at all on the point, as indeed Peter Gibson J pointed out in *Re Koeppler's Will Trusts* at first instance. So the fact that he had "no hesitation" (whatever that means) was not significant. What is much more significant is that Thomas J makes no mention at all of the dictum of Peter Gibson J in *Re Koeppler' Will Trusts* that it seemed to that judge "at least strongly arguable that the purposes of a peace society are political and not charitable".

Thomas J appears also to have considered that the decision of the Court of Appeal in *Re Koeppler's Will Trust* was a significant authority in the field, since he asserts that both *Re Harwood* and *Re Koeppler's Will Trusts* are "consistent in approach with the American decisions". His account of *Re Koeppler's Will Trusts* is tailored to support that conclusion. He summarised the gift as being a gift to an institution known as Wilton Park "as long as Wilton Park remains a British contribution to the formation of an informed international public opinion and to the promotion of greater co-operation in Europe and the West in general...". He then continued:

> "The Court of Appeal held that the gift for the furtherance of such work created a purpose trust that was educational in character and likely to be for the public benefit. Accordingly it was charitable in nature and, since neither the wide and vague aims of the testator in carrying out that project nor the fact that political matters could be touched on by participants at the conferences affected the charitable nature of the trust, a valid gift had been effected."

In fact the decision is a very special one on the facts which turned on the predominantly educational and non-partisan poise of the institution.

The two American decisions with whose approach *Re Harwood* and *Re Koeppler's Will Trusts* are said to be consistent are: *Parkhurst v Burrill* "concerning benefits given to the 'World Peace Foundation'" and *Assessors of Boston v World Wide Broadcasting Foundation of Massachusetts* "where the gift was made 'to foster, cultivate and encourage the spirit of international understanding and cooperation.'"

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42 Thomas J cites two of them viz, *Parkhurst v Burrill* 117 NE 39 (1917) and *Assessors of Boston v World Wide Broadcasting Foundation of Massachusetts* 59 NE 2d 188 (1945).

As the learned judge rightly observed, trusts for political purposes will generally fail, although an ancillary purpose of this kind will not necessarily invalidate a gift. But he disputes the suggestion made in Picarda[43] that the promotion of peace is a political purpose and therefore not charitable. In particular he criticised the statement that if one asks the question "Peace on what terms?" it cannot be answered without making a political decision. His criticism is contained in three sentences:[44]

> "However it seems to me that this reasoning is in the first place too general in that it preempts findings of fact and of construction where matters of circumstances and degree may arise. Secondly the question posed by the author will frequently not even arise. A testator may state a wider object than the ending of a particular war, and the question overlooks the wider aspects of the purpose such as achievement of a general benefit by encouraging changes of attitude."

It may be said in answer to this that the reasoning in question was on its face addressed to the promotion of peace *tout court*. The phrase "the promotion of peace" is an expression of the widest ambit. It goes much further than, for example, a trust to promote the university discipline of "peace studies". The promotion of peace does not take place within a vacuum. It presumes the presence of conflicts and the resolution of those conflicts. Such resolution necessarily entails political or policy decisions in the relevant area of conflict. That is a far cry from "the achievement of general benefit by encouraging changes of attitude."[45]

Moreover, as is pointed out in Picarda,[46] trying to inculcate an attitude of mind is not uncharitable in regard to cruelty to animals,[47] or in regard to temperance,[48] or in regard to ending slavery.[49] In those cases "it is sufficiently generally accepted that

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43 Picarda, *Law and Practice Relating to Charities* (2nd edn 1995) 154.

44 (1997) 2 Qd 567 at 580.

45 But trusts to change attitudes in relation to controversial issues are not charitable: *Positive Action against Pornography v Minister of National Revenue* [1988] 1 CTC 232; *Human Life International in Canada v Minister of National Revenue* [1998] 3 FC 202; and see *Bowman v Secular Society Ltd* [1917] AC 406.

46 Picarda, *Law and Practice Relating to Charites* (2nd edn 1995) 154-155.

47 *Marsh v Means* (1857) 3 Jur NS 790).

48 *Re Hood* [1931] 1 Ch 240.

49 *Jackson v Phillips* 14 Allen 539 (Mass 1867).

benefit would be conferred on the public by the end proposed".[50] But if the issue is controversial it is a different matter.[51] Now, as Thomas J himself observes:[52]

> "Some take the view that the best way to preserve peace is to be prepared for war, and that notion may underlie the 'public defence and security' that are regarded as constituting a charitable purpose. Others may equally argue that peace may be promoted in other ways as well and that such promotion equally contributes to a state of security that benefits the community as a whole."

Yet others, it may be added, might sincerely and controversially consider that peace is best achieved by unilateral disarmament. Thomas J thought that the cases which he mentioned "on the whole ... favour the conclusion that the elimination of war is regarded as beneficial to the community"[53] and that "the trend of judicial interpretation suggests that the purpose of the elimination of war should be regarded as within the spirit and intendment [of the preamble]".[54]

That conclusion is itself controversial. The case of *Re Harwood* is dubious authority; *Re Koeppler* is inconclusive and at first instance appears to consider it strongly arguable that the promotion of peace is a political object; *Parkhurst v Burrill* is a very liberal decision concerning an organisation promoting peace by what were assumed to be educational means; and the preponderance of authority in England and elsewhere is *against* the fostering of international understanding being accounted charitable.[55] For good measure, one may add that there was no limitation on the ways in which the organisations working for the object of elimination of war might operate.

When the writer was an undergraduate at Oxford during the late fifties, college common room notice boards were full of publicity for "peace" or "world peace"

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50 In *Re Shaw* [1957] 1 WLR 729 at 740 Harman J suggested that this was the test to apply to the propaganda about changing the alphabet.

51 *Ibid.*

52 (1997) 2 Qd 567 at 580.

53 *Ibid* at 580 lines 51-52. *Non est demonstratum.*

54 *Ibid* at 581 lines 35-37.

55 See the cases cited above in footnotes 28-30, which Thomas J ignores while alighting on the lone case of *Assessors of Boston v World Wide Broadcasting Foundation of Massachusetts* 59 NE 2d 188 (1945).

conferences organised by Eastern European student unions. The conferences were highly political in thrust and, indeed, many of the organisations running them were front organisations for the official Communist party of the Warsaw Pact country in question. Their object was to attempt to secure the end of the Cold War by the swiftest and most effective means, namely (to adapt Orwell's adage) by securing that the West should lose it by unilaterally disarming.

Had the *Re Blyth* gift been operative then, organisations of that type would presumably have been within the remit of the executor, as would Prodem, the trust institution classified as political and uncharitable by Carnwath J in *Southwood v AG.*[56]

Education in the Subject of Militarism and Disarmament

The decision of Carnwath J in *Southwood v AG*[57] is the latest and in most ways the most perceptive patrol of the borderline between education and politics in the sphere of war and peace. Dr Southwood, who was one of the trustees, appeared in person and appears to have argued the case with considerable expertise and a full citation of authority with one exception: *Re Blyth*.

The case concerned a trust constituted by a trust deed executed in 1994 in connection with a project entitled Project on Demilitarisation ("Prodem"). The trust had as its stated purpose the "advancement of the education of the public in the subject of militarism and disarmament and related fields". Its trustees applied to have the trust registered as a charity but registration was refused.

The Commissioners considered that it was appropriate for them to look at the papers published by Prodem in order to resolve possible ambiguities in the trust deed[58] one of which was the meaning to be attributed to ""ducation in the subject of demilitarisation and disarmament".

The findings of the Commissioners were detailed and careful and bear repetition

56 (1998/99) 1 ITELR 119.

57 (1998/99) 1 ITELR 119.

58 The activities test appears only to be relevant where there is ambiguity or the constitution in question is a sham. It is not appropriate, in the absence of sham, where there are clear words. The word "education" has been so much abused that it may raise an ambiguity when combined with a subject which is not taught either in the classroom or the lecture room. There was no evidence of demilitarisation being taught in any faculty or syllabus.

here. Essentially what these findings amount to is that the "education" in question was propagandist in tenor, lacking in objectivity and designed to create a certain climate of opinion if not to promote pacifism (which would amount to a political purpose). Prodem's research had been undertaken to support a preconceived position and not to advance public education (in the charitable sense) in militarism and disarmament. The Briefings promoted the concept of demilitarisation and disarmament rather than advancing education in those issues as a subject.

Carnwath J, in his discussion of the nature of the boundary between politics and education, rightly drew attention to various dicta in the cases which stress that there is nothing educative in the propagation of tendentious political opinions[59] or of preconceived personal theories on a subject which is a matter of political controversy.[60] On the other side of the line are cases where what is being done constitutes no more than a genuine attempt, in an objective manner, to ascertain and disseminate the truth.[61]

Turning to the questions of war and peace, Carnwath J opined that it appeared to be an open question under English law whether the promotion of peace is a charitable object.[62] On the other hand the promotion of good international relations as such was not charitable. Nevertheless, he also expressed the view that education as to the benefits of good international relations and the means of achieving them would seem to be a charitable object. By the same token whether or not the *promotion* of peace in itself is charitable there is no reason to exclude, from the scope of charity, *education* as to the benefits of peace, and as to peaceful methods of resolving international disputes.

He nevertheless cited two charity cases in the United States where a much more liberal line has been taken.

American Cases on the Promotion of Peace as a Charitable Object

Two American cases are cited under the rubric of promotion of peace in Picarda

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59 *McGovern v AG* [1982] 1 Ch 321 at 353 7E-F.

60 *Re Bushnell* [1975] 1 WLR 1596.

61 *Re Koeppler's Will Trusts* [1986] Ch 423, CA.

62 He cited the inconclusive nature of *Re Harwood* [1936] Ch 285 and the dicta of Peter Gibson J in *Re Koeppler's Will Trusts* [1984] Ch 243 at 257 and the silence in the Court of Appeal on that particular point.

Law and Practice Relating to Charities:[63] both are dealt with in the *Southwood* case.

In *Parkhurst v Burrill*[64] there was a gift to the World Peace Foundation. It was upheld by the Supreme Court of Massachusetts as a charitable gift which conveniently recited the foundation's objects clause, which was as follows:

> "The purpose of educating the people of all nations to a full knowledge of the wasteful destructiveness of war and preparation for war..to promote international justice and the brotherhood of man, and generally by every practical means to promote peace and goodwill among all mankind."

Rugg CJ commented on these purposes in what is, to English tastes perhaps, a somewhat rhetorical vein:

> "The declaration of corporate purpose expresses one of the highest moral aspirations of the race. It adopts the very words of the angels' song on the night of the nativity. It reveals nothing on a close and technical analysis at all at variance with the lofty idealism of its general sentiments. In a large sense its object is to bring all mankind under fraternal, educational and humanitarian influences. The final establishment of universal peace among all nations of the earth is manifestly an object of public charity."

He also cited in this connection the famous case of *Jackson v Phillips* [65] (referred to in the *McGovern* case) in which it had been held that a fund for the circulation of books to "create a public sentiment which will put an end to Negro slavery in this country" was a charitable trust.

Quite understandably, Carnwath J found it difficult to reconcile this expansive approach, however attractive the language, with the more prosaic guidance of the English cases. But he drew attention to the fact that Rugg CJ was also careful to emphasise (citing in particular *Bowman v Secular Society*)[66] that the work done by

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63 Picarda *Law and Practice Relating to Charities* (2nd edn 1995) 154.

64 117 NE 39 (1917).

65 4 Allen 539 (Mass 1867).

66 [1917] AC 406, HL.

the World Peace Foundation was "all charitable in the accurate legal sense":

> "It consisted chiefly in the publication of literature and the employment of speakers and writers of ability, widely respected for their character and attainments, to attempt to propagate an opinion among the peoples of Earth in favour of the settlement of international disputes through some form of international tribunal and to cultivate a belief in the waste of warlike preparation, and in the practical wisdom for reductions of the armaments of nations, and in the education of children as well as of adults in the knowledge of peace and the superior advantages of peaceful solutions of international difficulties... It cannot justly be said that the purpose was political or the means other than educational.."

Thus it is plain that the educational poise of the foundation was decisive to its status.

The other American decision referred to by Carnwath J was *Tappan v Deblois*[67] cited in *Parkhurst v Burrill* as an "express decision that a bequest to promote peace is a charity." The case concerned a gift to a body known as the "American Peace Society". The objects of that society were:

> "to illustrate the inconsistency of war with Christianity and to show its baleful influence on all the great interests of mankind, and to devise means for ensuring universal and permanent peace."

It seemed doubtful to Carnwath J whether on a true and proper analysis of the case it could be taken to be a decision that the purpose was specifically charitable. The court appears to have accepted the argument that, even if the purpose was not charitable but rather "moral and political only", nonetheless the trust could be maintained under the general jurisdiction of the American court independently of the Statute of Elizabeth.[68]

Carnwath J did, however, recognise that *Parkhurst v Burrill* was helpful to Prodem's case in a different but important way. It accepts that a purpose may be educational, even though it is based on the premise that people should be educated as to the "evil effects" of war, and has therefore what the Commissioners referred to in their

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67 45 Me 122 (1858).

68 See 45 Me 122 at 123 (1858).

decision as an "irenical perspective".[69] Carnwath J saw no reason to take a different view and commented:

> "I see nothing controversial in the proposition that a purpose may be educational, even though it starts from the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military techniques for resolving international disputes, and even though one purpose of the education is to 'create a public sentiment' in favour of peace. The important distinction, from the 'political' cases mentioned above, is that the merits or otherwise of the Labour Party's views on education, or in the early 1940s of a state health service, were both matters of political controversy. The desirability of peace as a general objective is not."

Had the purpose of the trust been limited to educating the public in the peaceful means of dispute resolution, or even to creating "a public sentiment" in favour of peace, Carnwath J might have upheld it. That is apparent not only from the passage just quoted but also from what he said at the end of his discussion of the English cases on war and peace. But it further emerges from his analysis of the background material to which he considered himself entitled to refer, because of the obscurity of the expression "militarism and disarmament" in the educational field.

Further definition of an educational purpose may not be needed where the subject is well established and understood as a field of academic study. Thus "peace studies" along with "defence studies" and "strategic studies" feature in the courses at various universities. But no course on "militarism and disarmament" was identified in the evidence.

What emerged from the background material was that the term "militarism" was intended to define the current policies of the Western governments and that the purpose of Prodem was specifically to challenge those policies ("to fundamentally question" as the infinitive splitting draftsman put it, "the new forms of militarism arising in the West"). That was the clear dominant and political message of the background material.[70] In effect the learned judge accepted the Commissioners' criticisms of the lack of objectivity in the research and of Prodem's propagandist espousal of a pacifist and preconceived position. The limitation to "charitable

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69 i.e. a perspective involving peace. The report at (1998/99) 1 ITELR 119 mistakenly converts the word *irenical*, which is derived from "eirene" the Greek word for peace, into "ironical" which is, in the context, incomprehensible (*ibid* at 133 c-d).

70 See the detailed recital in (1998/99) 1 ITELR 119 at 124 -125.

71 See *Re Koeppler's Will Trusts* [1984] Ch 243 at 262 G per Peter Gibson J.

means" expressed in the Declaration of Trust did not in itself ensure that the purposes were exclusively charitable.[71] It is understood that the case is being appealed.

Reconciliation of *Re Blyth* and *Southwood*

Is it possible to reconcile *Re Blyth* and *Southwood v AG*? One obvious distinction between the two cases was that Prodem in the *Southwood* case had a record of political activities whereas in *Re Blyth* the executor simply had a remit to select for support (but had not yet selected for support) any organisations working for the elimination of war, and these could have been political organisations. Moreover, the promotion of peace and the elimination of war do have the appearance of being two sides of the same coin and, indeed, of being synonymous. They are both directed to the same promotional ends. Nor was either trust restricted to bona fide educational purposes. And the generality of the wording in which both trusts are couched cannot be rescued either by express words directing the use of charitable means alone, or by the implication (or presumption)[72] that the trustees will only use charitable means. It is respectfully submitted that the two cases are irreconcilable and that an English court should not follow *Re Blyth*, more particularly because, as suggested above, it does not accurately reflect the tendency of the decisions.

In this field, only a genuinely educational trust advancing a conventional discipline like peace studies or international cooperation can, at present, expect to stand a chance of being registered as a charity. Prodem argued unsuccessfully before Carnwath J that its activities were charitable and educational and that the Commissioners' choice of extracts from the briefings was unfairly selective.

It remains to be seen whether the Court of Appeal will be persuaded to take a different view of the evidence or of the applicable law when the impending appeal from Carnwath J's decision is heard.

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72 As to this presumption, see *McGovern v AG* [1982] 321 and *Re Koeppler's Will Trusts* [1986] Ch 423 at 437H-438A, CA.