JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 85/87

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A.

BETWEEN	THE COMMISSIONER OF INCOME TAX	APPELLANT
AND	BLUE CROSS OF JAMAICA	RESPONDENT

H. Hamilton and W. Alder for the Appellant

Mrs. A. Hudson-Phillips, Q.C., and Miss Tracy Barnes for Respondent

July 10, 11, 12, 13, 14 & December 11, 1989

CAMPBELL, J.A.

The appellant assessed the respondent to income tax on chargeable incomes of $2,083,736.00 and $3,000,000.00 for the years of assessment 1982 and 1983 respectively.

The respondent appealed the assessment to the Revenue Court. It expressly relied in support of its appeal on the meaning of charitable purposes in English Law. Thus the principal ground of appeal was stated thus:

> "5 (1) That the appellant is a corporation limited by guarantee, organized and operated exclusively for charitable or scientific or educational purposes and no part of its net income enures to the benefit of any private stock-holder or individual. More particularly, the appellant is organized and operated exclusively for charitable purposes within the meaning of that term as defined and established in the case of

> "Special Commissioners of Income Tax v. Pemsel, (1891) A.C. 531, 3 T.C. 53, and in particular, within Lord Macnaghten's fourth class therein. Accordingly, the appellant's income ought properly to be exempted from taxation pursuant to section 12 (h) of the Income Tax Act."

In that case, hereafter referred to as Pemsel's case, Lord Macnaghten classified charity in these words:

> "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

Down to the stage of reply, Blue Cross of Jamaica hereafter referred to as Blue Cross relied on Pemsel's case in support of its claim that it was a charity. Thus at page 22 of the record Mrs. Hudson-Phillips is quoted as saying:

> " 'Charitable' - several judicial interpretations. We say it (Blue Cross) falls within the meaning stated by Lord Macnaghten in Pemsel's case."

Mr. Alder for the Commissioner of Income Tax also relies on Pemsel's case to refute the claim of Blue Cross. At page 40 he is recorded as submitting thus:

> "The question which Court has to decide is whether the appellant is organized and operated exclusively for charitable purposes within the legal meaning of the term 'charitable purposes' ..... In determining what is a charitable purpose we look to the preamble of the Statute of Uses Act (1601) U.K..... Authorities state that to qualify as a charity 'one has to bring oneself within the meaning of the words in the preamble.
> Refers to Special Commissioners v. Pemsel 3 T.C. 53 submits: Appellant to qualify as charity, can only qualify under the fourth category stated in Pemsel's case by Lord Macnaghten."

At some stage in the final addresses the learned judge appeared to have entertained doubts on the applicability to the determination of the issue before him, of the preamble to the Act of 1601 (43 Eliz.1C.4) together with the line of English cases originating with Pemsel's case. Mrs. Hudson-Phillips, as a result of the doubt expressed by the learned judge researched the point. She became satisfied that the learned judge's doubt was well-founded, in consequence she reneged from her reliance on the English Law of charity on which her appeal was grounded. She accordingly in her closing address at page 50 said:

> "We say it (Statute of Elizabeth) does not apply to Jamaica prior to 1728. Therefore, English authorities require English Courts to consider legal meaning of charity under Statute of Elizabeth, we are subject to no such requirement. Our research supports this."

The learned judge in his judgment concluded that the English Law on 'charitable purposes' was not applicable. This provides a ground of appeal to which I will later return.

Before the learned judge, Mrs. Hudson-Phillips submitted, and this was not disputed by Mr. Alder, that in order to determine whether Blue Cross was organized exclusively for charitable, scientific or educational purposes it was necessary to examine its objects as stated in its constitution namely its Memorandum of Association; and to determine whether it was operated exclusively for those purposes it was also necessary to have regard to the evidence, oral and documentary, on what it did, pursuant to the stated objects. There was however, in that court, as in this court, no agreement on the paragraphs in clause 3 of the Memorandum of Association which constituted objects as distinct from mere ancillary powers.

Mrs. Hudson-Phillips in the Revenue Court as she has done before us, submitted that the objects of Blue Cross are to be found in clauses 3 (a) - (f). These are the main or predominant purposes for which it is established. The other objects are really in the nature of enabling powers which need not necessarily manifest charitable purposes.

Clauses 3 (a)-(f) of the memorandum of association are set out hereunder:

> "3. The objects for which the Company is established are as follows:
>
> (a) To provide voluntary, non-profit mechanism for obtaining an adequate level of necessary and appropriate health service in an effective and economical manner; and to promote, establish, maintain and operate a Medical Care Plan for the payment of the costs of Hospital, Surgical and Medical Care and attention received by policy-holders of the said plan or by such other person or persons or group of persons as the company may think fit.
>
> (b) To provide and supply policy-holders of the said Plan or to such other person or persons or group of persons as the company may think fit, necessary and proper medicine and medical and surgical attendance, appliances, nursing and comforts and hospital and convalescent care.
>
> (c) To provide and supply to policy-holders of such Plan or to such other person or persons or groups of persons as the company may think fit, any other similar or related benefits or assistance.
>
> (d) To provide for the improvement, upkeep and assistance of hospitals and to promote and assist in developing the efficiency and standards of medical care and attention generally and in particular in the island of Jamaica.

" (e) To collect, arrange, index and publish information, statistics, and data and to compile reports and print and publish any newspaper periodicals, books or leaflets that the company may think desirable or likely to be useful to policy-holders of the Plan and to furthering the objects of the company, and to establish and maintain a bureau of information for the benefit of policy-holders of the Plan.

(f) To be of assistance in the promotion of such benevolent, scientific, educational relief and other activities as are considered by the company to be for the best interests of the community in relation to the health and welfare of the people."

The above stated objects, except for the insertion by amendment in 1980 of the first sentence in 3 (a), and the substitution in the paragraphs of the words 'policy-holders' for 'subscriber' to the Medical Care Plan, are identical to clauses 3 (a) to 3 (f) of the original memorandum of the precursor of Blue Cross namely "The Federated Health Insurance Association Limited" which was incorporated on 27th December, 1956. The name was changed to Blue Cross of Jamaica on February 17, 1976.

Having isolated the main objects of Blue Cross, Mrs. Hudson Phillips encapsulated them at page 26 of the record in these words:

> "The company is established for the relief of sickness, educational and scientific purposes relating to the relief of sickness, and further for purposes beneficial to the community within the spirit and intendment of the Statute of Elizabeth namely 'relief of the sick'."

Mr. Alder's submissions in the Revenue Court as earlier stated, are also premised on the concept of charitable purposes derived from the preamble to the Charitable Uses Act (1601) 43 Eliz. 1. C 4 which purposes were classified in Pemsel's case.

On the basis of that case, he submitted, Blue Cross could only succeed if it could bring itself within the fourth head of Lord Macnaghten's classification in the said case. Further, Mr. Alder submitted that even accepting for the purposes of argument that the objects stated in clauses 3 (a-f) of the Memorandum of Blue Cross were alone the main objects, these were neither singly nor collectively for charitable purposes much less were they exclusively so. Thus Blue Cross was not eligible for exemption under section 12 (h) of the Income Tax Act. Section 12 (h) of the Income Tax Act so far as is relevant reads as follows:

> "(h) The income of any corporation .....organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which enures to the benefit of any private stock-holder or individual:
>
> Provided that it shall be in the discretion of the commissioner to determine whether or not a corporation comes within the meaning of this provision."

The learned judge allowed the appeal of Blue Cross and granted the declarations sought namely:

> "1. That the Appellant is a corporation organised and operated exclusively for charitable or scientific or educational purposes within the meaning of those words as used in section 12 (h) of the Income Tax Act.
>
> 2. That the Appellant's income is exempt from taxation pursuant to the provisions of the aforementioned section 12 (h)."

Against the above declarations the Commissioner of Income Tax appeals to this Court on the undermentioned grounds namely:

> "1. That the learned trial judge erred in law and on the facts and/or misdirected himself in law in holding that the Respondent herein is a corporation or association organised and operated exclusively for charitable, scientific or educational purposes within the meaning of section 12 (h) of the Income Tax Act;

"2. That the learned trial judge erred in law in failing to give any or the necessary consideration and effect to the application of the proviso to section 12 (h) of the Income Tax Act;

3. That the learned trial judge erred and/or misdirected himself in law in properly ascertaining and applying the law relating to charities in Jamaica."

Ground 3 of the appeal is against the conclusion of the learned judge that the Charitable Uses Act (1601) 43 Eliz. 1 C4 has never been esteemed, introduced, used, accepted or received as part of the statute laws of Jamaica pursuant to Section 41 of our Interpretation Act and that in consequence, the English case law developed therefrom were of limited assistance to him in deciding the point in issue namely what constituted a charitable purpose under section 12 (h) of the Income Tax Act. By this ground of appeal, a further complaint is made that the learned judge was in error in his construction of "charitable purpose" in the aforesaid section. This further complaint is more fully elaborated in the submissions on Ground 1 of the appeal.

The learned judge having referred to Jacquet v. Edwards (1867) S.C.J.B. vol. 1 p. 70 and Magnus v. Sullivan (1866) S.C.J.B. vol. 1 p. 63 concluded thus:

"Against that background, I find, on the basis of such evidence as is available to me, that the Statute 43 Elizabeth Chapter 4 of the year 1601 has never been received, esteemed acted upon, etc., in Jamaica in terms of the aforesaid Section 41.

In the circumstances, it would seem to follow that the PEMSEL line of cases may therefore be of very limited assistance in deciding the point which is now before me. This is so because they are based on the interpretation of the Preamble to that Statute and, in particular, on Lord Macnaghten's dictum..... as to the limited legal meaning of the phrase 'charitable purposes' as it appears in that preamble; as well as the further caveat applied by Lord Cave subsequently, in which he declared that in order to come under

> "the fourth heading of Lord MacNaghten's definition i.e. 'other purposes beneficial to the community not falling under any of the preceding heads' the case or circumstances must fall within the 'spirit and intendment' of the categories delineated in the preamble aforesaid." (emphasis supplied)

Mr. Hamilton referred us to R. v. Stephens (1888) S.C.J.B. vol. 4 p. 278 as establishing that the correct approach in determining whether an English statute has ever been part of the statute laws of Jamaica is to rely on presumptive evidence in cases where there is no direct evidence that the English statute in question had been specifically mentioned as applying to Jamaica. He submitted that such presumptive evidence can be found in Act No. 12 of 1661 intituled "An Act for confirmation of pious, charitable, and public Gifts and Grants" which like the English Act of 1601 had as its objective the declaration of the wide scope of gifts, the validity of which would otherwise have been doubted, as being inter alia "pious or charitable." It is reasonable to assume that since both the English Statute and the local act had similar objective they would use the word "charitable" as having the same meaning subject to such modifications as may be necessary to adapt the English concept to peculiar local conditions.

In R. v. Commissioner of Police Exparte Cephas (no.2) (1976) 15 J.L.R. 3 the Full Court of the Supreme Court comprising a strong bench of Henry, J Rowe, J (as they then were) and Wilkie J interpreted section 41 of our Interpretation Act on the basis of which English Acts are to be considered as having been at sometime a part of our statute law. At page 9 Henry J speaking for a unanimous court said:

> "It seems to me that the section contemplates five separate but overlapping conditions for the admission of an English Statute as the law of Jamaica -

" These are that prior to 1728:

(1) It has been 'esteemed' i.e. generally regarded or considered as a law of Jamaica;

(2) it has been 'introduced' i.e. admitted or adopted in principle although perhaps never actually used as a law of Jamaica;

(3) it has been 'used' i.e. actually acted upon or utilised, although perhaps only once, as a law of Jamaica;

(4) it has been 'accepted' or recognized by long usage or by a court or by the local legislature as a law of Jamaica;

(5) it has been 'received' by virtue of being expressed to apply as a law of Jamaica."

In my view the local legislature in enacting Act 12 of 1681 "introduced" and or "used" and or "accepted" the principle of the Act of 1601 with its preamble as the basis of the local Act. Having regard to its wide coverage analogous to the English Act it is reasonable to assume that it used the term "charitable" as understood in the preamble to the English Act with only such modification as local conditions warranted. Thus in my view "charity" and "charitable purposes" ought to be construed within the context of the preamble to the Act of 1601 as subsequently elucidated and classified in decisions of the Courts of the United Kingdom including Pemsel's case.

The learned judge in concluding that the Act of 1601, more particularly the preamble thereto did not apply, also relied on the fact that section 12 (h) of the Jamaica Income Tax Act distinguishes between "charitable purposes" and "religious purposes" as well as between "charitable purposes"

and "scientific or educational purposes" while Lord Macnaghten's definition in Pemsel's case is compendious including as it does in the phrase charitable purposes not only the 'relief of poverty' but also the advancement of education or religion. The wording of section 12 (h) indicates in the view of the learned judge that parliament, which is presumed to know the state of the law when it legislates, could not have intended "charitable purposes" to have "the limited legal meaning" as appears in the preamble to the Act of 1601 and as interpreted in Pemsel's case, otherwise it would not have gone on to specify "religious" or "educational" purposes and juxtapose them with "charitable purposes" because the former two concepts are already comprehended in "charitable purposes" in Pemsel's classification.

With great respect I do not consider this a satisfactory reason for concluding that "charitable purposes" where it appears in section 12 (h) (supra) is not to be construed in terms of Lord Macnaghten's definition, but rather that it should be construed in "its ordinary signification" as meaning the "relief of poverty simpliciter." By so interpreting "charitable purposes" the learned judge has given it a meaning narrower than the legal meaning in Pemsel's case in that he has excluded from the concept of charitable purposes, the fourth head of Lord Macnaghten's classification namely "other purposes beneficial to the community not falling under any of the preceding heads" (poverty, education, and religion). Significantly it was on the fourth head of Lord Macnaghten's classification as earlier stated, that Blue Cross relied in particular for exemption.

I am of the opinion that the learned judge erred in his conclusion on the non-applicability in Jamaica of the English Law governing charities and charitable purposes.

Notwithstanding this error, the learned judge was very much alive to the issue namely that whether charitable purpose was to be construed in the legal sense, or "in its ordinary signification as meaning the relief of poverty simpliciter" the critical issue was the construction of the objects in the memorandum of Blue Cross to ascertain whether they conformed to the strict requirements of Section 12 (h) of the Income Tax Act.

He concluded in favour of Blue Cross, that clauses 3 (a-f) of the memorandum, comprised the main objects with the others being ancillary enabling powers which, even if non-charitable, would not deprive Blue Cross of exemption provided the main objects were exclusively charitable. The learned judge however had to contend with the fact that all these objects were predominantly designed for policy-holders save for (i) the opening sentence of Clause 3 (a) which recited that Blue Cross was established "to provide voluntary, non-profit mechanism for obtaining an adequate level of necessary and appropriate health service in an effective and economical manner" which at first blush would appear to be an object being undertaken for the public in general, and (ii) Clauses (d) and (f) which relate to assistance to hospitals and health and welfare needs of the community.

Thus he said at page 74:

> "I now come to the only point in the case in which it did seem that the Appellant's claim might fail - and that is the question of the true nature of the transactions between the appellant and its policy-holders. The point was made during argument that that element of the appellant's operations was indistinguishable from the business ordinarily carried on by Health Insurance Companies, and further, that health insurance was the

> "essential and main purpose of the appellant's operations. The question therefore arises is the appellant an Health Insurance Company wolf disguised in the sheep's clothing of a charity? Does the fact that part of the appellant's operations can be described as 'commercial' transactions between itself and policy-holders preclude it from qualifying for the exemption?

The main contention of Mr. Hamilton before us, as was the contention of Mr. Alder in the Revenue Court was that Blue Cross was not organised and operated for religious, educational or scientific purposes, hence for it to secure exemption under the Income Tax Act it must, if at all, come within the fourth head of Lord Macnaghten's classification of charitable purpose and it cannot be accommodated under that head because it was a sort of "Mutual Insurance Organisation," or in the alternative, the Medical Care Plan set up by it was a "Mutual Insurance Plan" whose predominant object was benefit to its policy-holders. It lacked the public element necessary to constitute it as organised for a charitable purpose. He relied on Nuffield Foundation vs. Commissioners of Inland Revenue (1946) 28 T.C. Part X 479. In that case Lord Nuffield as sole ordinary trustee of a Foundation which was accepted as charitable made a gross grant of £51,000, net £25,500, to a Nuffield guarantee fund established by him to promote provident associations whose object was "the promotion of mutual insurance associations formed to assist members thereof to meet expenditure necessitated by illness involving medical or surgical treatment or maintenance in hospital pay beds or nursing homes." He claimed exemption from income tax on the gross amount of this grant on the ground that it represented an application of income for charitable purposes in that the guarantee fund to

which it was paid was by virtue of the object recited above, established for charitable purposes only.

It was held by the Commissioners for Special purposes that since such mutual insurance associations were "business like arrangements" and not charities; to encourage the promotion of them was not a charitable purpose. They concluded that the purpose was in essence the encouragement of a particular kind of insurance namely insurance against the risk of illness, and thus, even if beneficial to the community was not within the spirit and intendment of the objects enumerated in the Statute 43 Eliz 1 C4. Nor was it analogous to any objects which have been held to be charitable.

Nuffield Foundation and Nuffield Guarantee Fund both appealed by way of case stated to Wrottesley J in the High Court. The learned judge reasoned that (a) the advancement of health and the prevention and relief of sickness is only charitable according to the law of England; (b) the use of the word 'charitable' in Income Tax Act is the same as when the word is used to describe charitable uses or trusts for charitable purposes (c) the mere fact that a purpose is one which is beneficial to the community does not necessarily render that purpose charitable; (d) decided cases have held that gifts for associations whose sole objects are the advantage of their members such as friendly or mutal benefit societies are not charitable as established in In Re Clark's Trust (1875) ChCD. 497 and Cunnack v. Edwards (1896) 2 Ch. 679. He concluded his judgment at page 495 in these words:

> "In the result I come to this conclusion, that in view of the decided cases and particularly Cunnack v. Edwards, and in the absence of any clear ratio decidendi, it will need someone higher in the judicial hierarchy than a Judge of first instance to hold that an association

> "which aims by means of mutual insurance at paying out to its members a scale of benefits which will assist them to meet charges incurred to surgeons or nurses or nursing homes is a charitable institution, there being, as is agreed, no element of poverty or indigence predicated with regard to the members when they receive the benefit."

Cunnack v. Edwards (supra) on which Wrottesley J based his decision is instructive. The facts briefly were that in the year 1810 a certain number of men formed a society for the purpose of providing for their widows. By subscriptions, fines and forfeitures of members, a fund was created to provide annuities for widows of deceased members. By 1879 all the members had died and the last widow-annuitant died in 1892. The society then had a surplus unexpended fund. The question was whether since no resulting trust arose, this fund passed to the Crown as bona vacantia or was to be applied cy-pres to charitable purposes. The resolution of this question depended on whether the society formed in 1810 was for a charitable purpose. Lord Halsbury L.C. in delivering judgment in the Court of Appeal said this at page 681:

> "It is contended, however, that this association may be regarded as a charity. Wide as has been the meaning given to the word 'charity' in the Court of Chancery, and indeed, in one case by the House of Lords ..... I do not think that a perfectly business-like arrangement like this, in which a number of persons associate together and contribute funds to provide for their own widows, has ever been regarded as charity. I think the observations of Hall V.C. in In Re Clark's Trust are entitled to great weight.
>
> His observations were directed to a society whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefits in cases of sickness,

> "lameness, or old age. In Pease v. Pattinson and Spiller v. Maude it was assumed by the learned judges in those cases, whether rightly or wrongly it is immaterial to consider, that the relief of poverty and suffering formed one of the elements of the association therein discussed. Here no such question can possibly arise; it cannot be pretended that a wealthy widow would not be entitled to claim her annuity equally with a poor one. If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category. I am therefore of the opinion that this was not a charitable institution." (emphasis supplied)

The observations of Hall V.C. in Re Clark's Trust which Lord Halsbury said were entitled to great weight appeared at page 500 and were to the effect that by the rules of the society, poverty of the member at the time of his sickness or lameness or in his old age was not required to entitle him to an allowance. The society was thus not a charitable institution.

Excerpts from the contribution of H.L. Smith L.J. is also worthy of mention. Having summarised the facts he continued at page 684:

> "The question is, do the facts of this case show such a trust? The society, it will be noticed, was not a corporation. It had no entity different from that of each of its members. Take the society as it originally existed in 1810 down to 1830, before it adopted the Friendly Societies Act of 1829: during that period, what was the object and intention of each member joining and becoming a member of the society? Was his object to aid the widows of the other members, or only to aid his own particular widow? I cannot doubt that his sole and real object was that by becoming a member he might thus be enabled to provide for his widow more efficiently than he otherwise would have been able to do ..... What each man did in becoming a member was to set up and keep going a sort of mutual insurance whereby to ensure a better provision for his own widow after his death than he otherwise would have been able to make." (emphasis supplied)

In Municipal Mutual Insurance Limited v. Hill (H.M. Inspector of Taxes) (1932) 16 T.C. 430 at p. 441 Lord Warrington of Clyde described mutual insurance business in these words:

> "Mutual insurance business is now perfectly well known. It consists essentially in the association of a number of persons who insure each other against certain risks by contributing by way of premiums to a common fund to be used, together with further contributions if necessary, for the purpose of indemnifying any member or members who may have suffered injury in consequence of a risk insured against, any surplus being either carried forward or used to reduce future premiums as the members may determine."

From a perusal of the Memorandum of Association and the Article of Association of Blue Cross it is clear that the members of that company constitute a distinct group from the policy-holders, albeit true that some at least of the policy-holders are "Class C" members of the company by and through their "Group Leaders".

Policy-holders are persons described this in Article 1 (2):

> " 'Policy-holders' shall mean any person or persons subscribing to Blue Cross of Jamaica for the provision of voluntary non-profit pre-paid health services and medical care under any of their Plans with paid-up premiums."

The facts in Nuffield Foundation on which Mr. Hamilton relies, including the cases on which Wrottesley J based his decision, are different from the facts in the present case. The facts in the present case equally do not conform to the definition of a mutual insurance company given by Lord Warrington of Clyde in Municipal Mutual Insurance Limited v. Hill (supra). The members of Blue Cross have not incorporated themselves for the purpose of mutually insuring themselves. They have not incorporated themselves for the purpose of contributing funds for any purpose. They have

incorporated themselves into a company to carry on business, inter alia as operators of a "Medical Care Plan" but it is the policy-holders who by and large provide through premiums, the funds to finance the objects of Blue Cross. At the same time the policy holders have not deliberately or consciously joined together for the purpose of providing funds for the purpose of providing mutual insurance. Except to the limited extent that they may have a say as members, through their group leaders, they do not fix the quantum of their contribution i.e premium; they do not fix the level of claims to which they might be entitled by becoming policy-holders nor do they determine the manner of disbursement of the fund which is the property of Blue Cross albeit substantially collected from them. All that a policy-holder becomes entitled to, by paying up his premium, is a claim to be indemnified against expenditures which he may incur as a result of illness. This claim is governed by the terms and conditions of the policy which he has taken out with Blue Cross. While this is undoubtedly a business arrangement, a contractual arrangement, there is nothing in this arrangement which makes Blue Cross a Mutual Insurance Company.

However, the fact that Blue Cross is not a mutual insurance company does not conclude the matter. Proof that it was, would without more, establish that it could not be organized and operated for charitable purposes. But the issue which still had to be resolved was whether even on the hypothesis that the objects of Blue Cross are confined to Clauses 3 (a -f), such objects individually and/or collectively were exclusively for educational, scientific or charitable purposes. Mr. Hamilton submits that this is not so, because as earlier stated, the objects are predominantly designed to cater for policy-holders who may become ill. It is necessary at this stage to advert to the evidence on record.

The learned judge summarised the evidence given by Mr. McIntosh, the General Manager of Blue Cross relative to policy-holders in these words:

> "He stated that the company operated at two different levels. A large part of its operations consists of contractual arrangement between itself and persons i.e. members of the general public referred to as policy-holders, whereby for payment of an annual premium or fee, the policy-holder would be entitled to medical care, hospitalisation and supply of drugs etc. for a cost considerably below that available on the open market. In addition to that, and at a separate if not different level the company also operates certain schemes which are not directed at policy-holders, and under which members of the public who are not policy-holders may benefit."
> (emphasis supplied)

He then summarised the evidence relating to these other schemes as showing activities such as Student health care scheme; publication of pamphlets relating to the national problem of drug abuse; publication of an anuual health calender compiled by medical experts and distributed to schools, pharmacies, and doctor's offices; operation of two screening units operated as mobile clinics islandwide free to the public, staffed by medically trained persons whose findings are reported on a regular basis to the Ministry of Health; grant of two scholarships annually - awarded one for pharmacy and the other for medical technology; organizing annual medical symposium; and giving assistance to the Dental Association of Jamaica, the Cancer Society of Jamaica and the Medical Association of Jamaica.

The learned judge thereafter, as earlier stated in this judgment, considered the applicability of English Law, and having concluded that charitable purposes under Section 12 (h) meant relief of poverty simpliciter, continued his judgment thus:

> "If therefore, I am right in the foregoing then section 12 (h) will apply to any or all of the following purposes:
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> 1. The advancement of religion,
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> 2. The relief of poverty,
>
> 3. The advancement of science or
>
> 4. The advancement of education.
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> It only remains therefore, for me to consider whether, on the evidence in this case, the appellant qualifies for the exemption under the section as thus construed. I might add in passing, that since I am only concerned with the years of assessment 1982 and 1983, the organization and operation of the predecessor company, namely, Federated Health Insurance, can only be of historical interest, since the question now before me is simply whether the appellant qualifies for the exemption during those years of Assessment."

The learned judge considering it more appropriate to deal firstly with those activities of Blue Cross as given in evidence, other than in relation to policy-holders, said at pages 73/74 of the record:

> "Earlier in this judgment I made reference to the evidence of Mr. McIntosh, the General Manager of the appellant Company. He was the only witness called, the respondent electing not to call any. Except, therefore, insofar as that evidence may be cut down or neutralised by cross-examination, his description of the activities of the company would be difficult to challenge since I accept Mr. McIntosh as a witness of truth. In my judgment no serious challenge to his evidence was made during cross-examination, particularly those elements previously adumbrated herein which deal with the appellant's activities that are unrelated to policy-holders and which are clearly for the advancement of scientific and educational purposes, as well as perhaps, the relief of poverty."

Pausing here, it is important to state the evidence given by Mr. McIntosh in more detail with comment thereon so to compare the scope of activities relative to policy-holders and those relative to non-policyholders i.e. community oriented, pursuant to Clauses 3 a-f. The evidence is summarised as hereunder:

1. As regards 3 (a) -

> The evidence is that Blue Cross negotiates special rates for its policy-holders with providers of health services who in Article 1 (q) are described as
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> 'Participating Providers' who are 'participating doctors, participating hospitals, participating pharmacies or other categories of providers of health care participating with the company in fulfilling any of the objects of the company as set out in the Memorandum of Association. As a direct result of these negotiations, policy-holders benefit by obtaining these services without having to pay up front the cost of the services and perhaps most importantly the service costs less than otherwise obtainable as a non-policyholder.
>
> Special plans exist for pensioners who are enrolled at highly subsidised rates and receive the same benefits as policy-holders. They are included in the expression 'or by such other person or persons' as the company may think fit.
>
> It assists non-policyholders at the request of U.W.I. to travel abroad for special medical treatment. These persons are also included in 'or such other person or persons'."

Under cross-examination Mr. McIntosh admitted that expenses on non-policyholders would be about 2½% of total expenditure on claims and about half a million dollars is

usually set aside annually for this purpose. On the basis of the audited accounts submitted for 1982 Exhibit 8 which showed expenditure on net claims of approximately 10 million this expenditure on non-policyholders would amount to $250,000.00 approximately.

> 2. As regards Clause 3 (b) there is a nursing service which will visit people at their homes. The company also assists U.C.H. and K.P.H. with expenses of non-policy holders.

The assistance as given in the evidence, related to 1986 and would not be relevant to the claim for exemption for 1982 and 1983. In any case this expenditure being expenditure on non-policyholders would be subsumed in the $250,000.00 of the net claims of 10 million in the 1982 accounts.

> 3. As regards Clause 3 (c), only policy-holders are, on the evidence, covered in the company's activities.
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> 4. As regards Clause 3 (d) the company provides soft loans to hospitals, repayable over six to twelve months, and in addition, in some cases the company pays the hospitals in advance, amounts based on their anticipated claims. The company makes grantssto U.C.H. to assist in maintenance of medical equipment totalling about $26,000.00. The further evidence is that the company operates two projects namely 'Student Health Care' and 'Drug Abuse'."

The grants to U.C.H., on the basis of the evidence that such were given within the last 8 to 9 months from the date when evidence was given would be in 1986/87 and accordingly would not be relevant for the 1982 and 1983 exemption claims. The audited accounts for 1982 do not in any case show any such grants having been made, unless such

are included in the $26,174.00 under the legend "contribution to health fund" specified under the subhead "Administrative expenditure" bearing in mind that under "Promotional Expenditure" there was no expenditure on Community Health programme."

The"Student Health Care" and "Drug Abuse" projects on the basis of the documents exhibited namely Exhibits 2 and 3 and the audited accounts, did not involve any expenditure in 1982 or 1983. The projects vide the exhibits, appear to have been commenced in 1985 and 1984 respectively. (See page 123 and page 221 of the record).

The medical symposium, which on the evidence the company sponsors annually also appears to have commenced in 1984 and its predominant purpose, like other programmes, would appear to be "designed to benefit subscribers and or providers" (see page 235 of the record).

5. As regards Clause 3 (e), the evidence is that it distributes islandwide a Health Calendar and quarterly magazine which are exhibited as Exhibit 4 and Exhibit 5 (a) - (b).

The Health Calendar enface the exhibit, shows that it is a 1987 Health Calendar. The quarterly magazines also relate to 1985 and 1986. Thus while lauding these activities, they are irrelevant to the issue which has to be resolved in the context of the circumstances existing in 1982 and 1983. Further, a perusal of Clause 3 (e) of the Company's object shows that the pursuit of these objectives was mandated to be predominantly for the benefit of the policy-holders.

6. As regards Clause 3 (f), the evidence is that through its two screening units which are like mobile clinics traversing the island daily, blood pressure tests, venereal disease

> "test etc., are made available free to the public. The cost of the screening units are $600,000.00 each inclusive of equipment and the overall running costs of operating them are in the region of $220,000p00 annumnumRepReports arising from the screening operations, and research on medical problems conducted at the instance of the company, are reported to the Public Health Department and through the latter, are made available to the public. The company offers two scholarships through C.A.S.T. on a tri-annual basis. The scholarships are not confined to the families of policy-holders. These scholarships are in pharmacy and Medical Technology.. It also gives financial support to the Diabetic Association, The Cancer Society and the Medical Association. It sponsors week-end seminars and symposiums.

However, on the basis of the documentary evidence admitted in support of the oral evidence, these activities, save for the scholarships (the expenditures on which are not disclosed) did not appear to be on any large scale in 1982. In the case of the screening units, the audited accounts considered in the context of disclosures at page 238 of the record, reveal that in 1982 and 1983 the company had only one screening unit which was acquired in or about 1972. This unit stood at a valuation of $17,444.00 at the beginning of 1982. There was no net expenditure incurred in respect of this screening unit because the said audited accounts show that for 1982 there was a net surplus of $392.00.

It is however fair to say that there was a net expenditure (loss) of $14,140.00 for 1981. But this apparent loss appears to have resulted largely from improper allocation of expenditure. The capital expenditure on screening units, and the annual running expenses thereon given in evidence by Mr. McIntosh would therefore relate to post 1983 activities and

resulted from the acquisition in 1986 of the more sophisticated screening unit. Accordingly, these expenditures are irrelevant to the issue of exemption in 1982 and 1983 (see page 238). The weekend seminars and symposiums were basically for the benefit of the company namely to make Group Leaders aware of key aspects of the Blue Cross health schemes administered by the company (see again page 238).

I have highlighted the evidence given by Mr. McIntosh with comments thereon not for the purpose of expressing any contrary opinion to the conclusion of the learned judge that the above activities which were unrelated to policy-holders were for "the advancement of scientific and educational purposes, as well as, perhaps the relief of poverty." Rather the evidence was highlighted in order to deal with the submission of Mr. Hamilton that Blue Cross was organised and operated predominantly for the benefit of its policy-holders and thus was not organized and operated for charitable purposes. The irresistable conclusion from the evidence, supports Mr. Hamilton's submission. The learned judge himself found that a large part of the company's operation related to its policy-holders. Though he did not say that the company operated predominantly for the benefit of the policy-holders such a conclusion in relation to the years 1982 and 1983 seems inescapable.

What principle of law relative to charitable purposes apply where an organization operates primarily for its own members or for persons personally linked with it?

In re Compton, Powell v. Compton (1945) 1 All E.R. 198 Lord Greene, M.R. quoting from Tudor on Charities (5th Eds) p. 11 said at p. 200:

> "In the first place it may be laid down as a Universal rule that the law recognizes no purpose as charitable unless it is 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."

The court in that case concluded that a fund for the benefit of descendants of three named persons lacked the public element to render it charitable.

Re Trusts of Hobourn Aero Components Ltd's AirRaid Distress Fund, Ryan and Others v. Forrest and Others hereafter referred to as Re Hobourn (1946) 1 All E.R. 501 was a case decided on appeal a few months before the Nuffield Foundation case. Perhaps Wrottesley, J did not have the benefit of this decision. If he had, he would not have agonised so much on whether in principle Provident Fund Associations ought not to be considered charitable. Rather he would have seen that Friendly Societies and Mutual Insurance organizations merely exemplify the absence of one pre-requisite of a trust for a charitable purpose namely that such societies and organizations are not directed to the "benefit of the community or a section of the community." This aspect was clearly brought out in Re Hobourn in which, though the facts indicated a mutual fund, the decision was not based on that narrow issue but on the principle in Re Compton (supra) namely that the benefit given, lacked the public element to render it charitable. This latter case was concerned with a trust fund which was not contributed by the prospective beneficiaries. In Re Hobourn, employees established by voluntary deductions from their weekly wages a fund described as an "air-raid distress fund." From this fund reimbursement for losses was made to families of ex-employees who were serving in the forces and to serving employees who

suffered air-raid damage to their home and or to their personal belongings. This was in keeping with the object of the fund which was stated in these words:

> "The purpose of this fund is to help any employee who is in dire distress as the result of enemy action. It does not aim at replacing all losses incurred, but to give a helping hand at a time when you most need it."

It was not a condition of disbursement from the fund that the recipient should be in a state of poverty or comparative poverty. As a subscriber to the fund, the employee was entitled to reimbursement of some at least of his losses albeit not actuarially predetermined. Relief was limited to subscribers only, save for the few cases of families of ex-employees serving in the forces. The fund was closed in 1944 with a surplus and the question arose as in Cunnard v. Edwards (supra) as to how this surplus should be disposed of. In the resolution of this issue, a determination had to be made whether the fund had been established for a charitable purpose. The Inland Revenue Commissioner refused to recognize it as having been established for a charitable purpose. An appeal was taken to the High Court. Cohen J as he then was, confirmed the decision of the Inland Revenue Commissioner. From his decision a further appeal was taken to the Court of Appeal by the Attorney General who argued that the fund had been established for a charitable purpose and ought to enjoy tax exemption.

Lord Greene M.R. in the course of his judgment said at page 506:

> The present case has a feature which was not present of course in Re Compton which was not a case of employees but a case of descendants of particular persons. That feature is that the fund now in question was one put up by the potential and contemplated beneficiaries themselves. We are not dealing with a fund put up by outside persons, although,

> "even if it were, on the authority of Re Compton, I should feel constrained to hold that such a fund would not be a good charity ..... the paramount and principal object of this fund was to benefit subscribers and nobody else. That seems to me to stamp it with the character of private arrangment, a private trust."

He continued thus at page 507:

> "I am prepared to accept it as correct that the relief of air-raid distress would be in itself a good charitable object. That of course, does not decide the question because the question here is not whether a particular object in the abstract is a good charitable object, but whether the purposes of this fund were a good charitable object, not from the point of view of the type of misfortune at which it was aimed, but from the point of view of the beneficiaries -
>
> whether the fund, on the facts of this case, was a purely personal or private affair (a private fund for a private benefit) or had the necessary element of publicity ..... the object is one thing; the people to benefit from that object are another. It is certainly not the law, as I understand the authorities, that when you find that the persons to benefit are a private group of individuals, that circumstance can be discounted or the effect of it destroyed, merely by introducing some object which, if it was for the benefit of a sufficiently public class of beneficiaries, would be a good charitable purpose within Lord Macnaghten's fourth class in Pemsel's case." (emphasis supplied)

In Oppenheim v. Tobacco Securities Trust Co. Ltd and Others (1950) 1 All E.R. page 31 the House of Lords in declaring that an educational trust was not for a charitable purpose as lacking a public character confirmed the principles enunciated in Re Hobourn.

In Oppenheim's case, a trust was created for the education of children of employees of a company and its subsidiaries. The number of persons who would so benefit exceed 110,000. Lord Simonds in delivering his opinion said at page 33:

> "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. With a single exception to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord Macnaghten's division in Income Tax Special Purposes Commissioners v Pemsel, and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class 'other purposes beneficial to the community.' This is certainly wrong except in the anomalous case of trusts for the relief of poverty. In the case of trusts for educational purposes the condition of public element must be satisfied." (emphasis supplied)

At page 54 he continued:

> "The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' have no special sanctity, but they conveniently indicate (i) that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and (ii) that 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. It is for this reason that a trust for the education of members of a family, or, as in Re Compton, of a number of families cannot be regarded as

> "charitable. 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."
> (emphasis supplies)

Lord Normand in applying the principle in Re Compton to the case before him reasoned thus at page 36:

> "If the issue is to be decided on principle and without reference to authority the question is whether a class with the common attribute that the members are the children of the employees of the same employer is a section of the public or merely an aggregate of persons without significance. The fact that the children of the employees and not the employees themselves are the beneficiaries does not help the appellants, for there is no public element in the relationship of parent and child. The common attribute that each parent has a contract of service with the same employer remains for consideration. A contract of service is in a high degree personal and it constitutes a personal and private relationship between the parties. Whatever the number of the employees in the service of the same employer, such still stands independently in this personal and private relationship to the employer. For certain purposes they are in relationship to one another, the relation of common employment with the rights and duties which arise from that relationship. These are private rights and duties and have no public element ..... In principle I am unable to say that any public element can be born out of the several private contracts between a particular employer and his employees."

In Inland Revenue Commissioners v. City of Glasgow Police Athletic Association (1953) 1 All E.R. 747 the facts were that in 1938 various clubs connected with the Scottish City Police force merged into an association. The association's object was stated to be "to encourage and promote all forms of athletic

sports and general pastime." The Chief Constable was the president and membership was confined to police officers and ex-police officers of the City police force.

The learned Law Lords in determining the question whether the purpose of the association was charitable laid down that the constitution of the association had to be construed and evidence of its activities had to be considered.

Lord Normand at page 752 said:

> "In principle therefore, if an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other, the association is not a body established for charitable purposes only."

Lord Reid in dealing with associations with multi purpose objects said at page 756:

> "But it is not enough that one of the purposes of a body of persons is charitable: the Act (Income Tax Act) requires that it must be established for charitable purposes only. This does not mean that the sole effect of the activities of the body must be to promote charitable purposes, but it does mean that that must be its predominant object and that any benefits to its individual members of a non-charitable character which results from its activities must be of a subsidiary or incidental character."

Lord Cohen reiterated similar principles in these words commencing at page 757:

> "This question has to be determined on the construction of the constitution and rules of the association and of the findings of fact contained in the Stated Case, but before I turn to them it will be convenient to refer briefly to some of the authorities to which your Lordship's attention was directed in the course of the argument. From them certain principles appear to be settled:

" (i) If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose, that body of persons is a charity not-withstanding the presence of these elements .....

(ii) If however a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Act. .....

(iiii) If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only."

Applying the principles established in the above cited cases to the particular issue raised in this appeal which centres on the predominance of the business which Blue Cross conducts with its policy-holders through the Medical Care Plan, the conclusion is patently inescapable that even within the hypothesis that Clauses 3 a-f are solely to be regarded as the objects of Blue Cross, it is not organised and operated for charitable purposes. From the documentary and oral evidence in this case the following conclusions of fact are inevitable, some of which are expressly stated by the learned judge:

1. Blue Cross is a 'Health Care Insurance' company. The company in Article 1 (s) (ii) defines 'Group Coverage' as the Health Care Insurance Policy being held by a Group with Blue Cross of Jamaica. In defining the qualification of trustees, their powers and duties, and the qualification of the General Manager, the company specifically refers to the requirement of the

Insurance Act. See Articles 36, 39, 44 and 77. The Trustees by Article 78 are required to prepare and lay before the company in general meeting such profit and loss accounts as required by the Insurance Act.

2. Clauses 3 (a) - (f) are admittedly main objects and the learned judge has so concluded.

3. On the face of Clauses 3 (a) - (f) Blue Cross is organised predominantly to establish a Medical Care Plan for policyholders.

4. Regarding its operations, the learned judge found that a large part consisted in contractual arrangements between itself and such policyholders in the operation of the Medical Care Plan.

5. Though other schemes unrelated to policyholders but within Clauses 3 (a) - (f) were operated by Blue Cross which the learned judge described as for 'the advancement of scientific and educational purposes, as well as, perhaps, the relief of poverty', the majority of these, were either commenced or greatly expanded subsequent to 1983 and thus are irrelevant for the years 1982 and 1983 in which exemption from Income Tax is claimed. The evidence as earlier stated is that in any given year only an amount of $½ million is reserved for expenditure on non-policyholders and that in 1982 against income of $18 million and expenditure on claims of $10 million only about 2½ percent of claims or $250,000.00 related to non-policyholder.

Thus as earlier concluded, it is incontrovertible that for 1982 and 1983 the operation of the Medical Care Plan in Clauses 3 (a) - (f) constituted the principal operation of Blue Cross.

The learned judge however found that such operation, albeit confined to policy-holders, constituted a charitable purpose which together with the public oriented educational and scientific operations made Blue Cross eligible for the exemption which it claimed.

In coming to that conclusion he erroneously equated the relief of sickness which in the abstract is undoubtedly a charitable purpose with the anomalous situation of the relief of poverty which does not require a public character to be charitable. He thus failed to consider that the operations of the company involving the policy-holders which related to the relief of the sick could only be considered charitable, if the policy-holders constituted the community or a section of the community which they certainly did not. At page 77 he said:

> "In the instant case the category of persons who may be policyholders is open to all those persons residing in Jamaica under age 55 whether Jamaicans or not; an extremely wide category. All persons who enlist with the company as policyholders derive benefits, some practical and economical and some psychological. For example, a young married couple with two children on a moderate but not munificent salary may by becoming a policyholder in the Appellant's operation acquire firstly the benefit of medical care, attention, hospitalisation and medication at a cost considerably below that available to them on the open market. Alternatively, they receive a less tangible, but nonetheless important benefit in the nature of relief from the mental stress and anxiety which attends many families over their ability to cope with sudden illness in the family. Such benefits furthermore, tend to relieve the pressure on public hospitals and medical services by providing alternative hospitalization and medical care for such persons, all of which seem to be in the nature of a public benefit. One must bear in mind that poverty is not necessarily synonymous with indigence and it is

> "not only the destitute among us who are poor. There are many who are poor but not necessarily indigent or destitute. It is a question of degree."

The learned judge thereafter adverted to the fact that no profit of Blue Cross, even on a winding up, can accrue to the benefit of any private stockholder or member, and continued thus at page 78:

> "Against that background it seems but a short step to say that the operations of the Appellant involving policy-holders, may be properly described as falling within the rubric 'relief of poverty' in that it provides a real benefit for such persons who are too poor to provide for themselves, together of course with the element of public benefit inherent in such operations."

Neither before the learned judge nor before us has Blue Cross contended that it was organised and operated for the relief of poverty. Such a contention could not be substantiated either by reference to its object or to its operation. Its contention is that its purpose was to give relief to the sick. Relief of the sick, like the relief of distress caused by air-raid in Re Hobourn is undoubtedly a charitable object in itself, but as Lord Greene, M.R. said in that case, it is not sufficient that an object is charitable in the abstract, it must be shown to be so in the context of the people to be benefited who should be the community or a section thereof. The nexus of each policy-holder is with Blue Cross and is based on his independent personal contract of health insurance. They do not together constitute the community or a section thereof because adopting a reasoning analogous to that of Lord Normand in the City of Glasgow Police Athletic Association case (supra) no public element can be born out of the several private contracts of health insurance between Blue Cross and its policy-holders. Accordingly the "Medical Care Plan" which is one of the objects of the company is neither organised nor operated for charitable purposes. Thus

even though some of the objects of Clauses 3 a-f are, as found by the learned judge, for educational and scientific purposes and are beneficial to the public at large, the Medical Care Plan not being organised or operated for a charitable purpose vitiates the claim of the company that it is organised and operated exclusively for educational, charitable and scientific purposes pursuant to its objects as stated in clause 3 a-f of its memorandum.

The respondent is thus not eligible for exemption under section 12 (h) of the Income Tax Act.

The appeal in my view ought to be allowed and the judgment and orders of the learned Revenue Court judge set aside with costs here and below for the appellant to be taxed if not agreed.

DOWNER, J.A.:

For the year 1982 the appellant, the Commissioner of Income Tax, assessed the respondent, Blue Cross of Jamaica, on a chargeable income of $1,900,000.00. In 1983 the respondent was assessed on a chargeable income of $3,000,000.00. Marsh, J., in the Revenue Court discharged these assessments and the purpose of this appeal is to determine whether that order was correct.

What was the factual basis which gave rise to this keenly contested case? Blue Cross of Jamaica was originally incorporated in 1956 under the name Federated Health Insurance Association Limited and its name was changed in 1970 with the consent of the Registrar of Companies to Blue Cross of Jamaica. It is a Company limited by guarantee. In 1964 the appellant exempted the respondent's income from taxation and this was confirmed in 1971. 1984, therefore, was significant as the respondent was assessed for income tax for 1982 and 1983.

Blue Cross then appealed to the Revenue Court to have those assessments set aside. The issue to be decided was whether Blue Cross which is obliged by its memorandum to provide health care for policy-holders and in its discretion provides health services for the public, was organised and operated exclusively for charitable purposes. If it were so organised, it would be entitled to be exempted by virtue of Section 12(h) of the Income Tax Act, unless it was so operated that the proviso applied. Crucial to its contention that it was exclusively charitable was that it was bound by its Memorandum and Articles to plough back all profits into health care and health educational ventures and further that its operations were for the benefit of the public. It was also

contended that no profit from its operations was to enure to the benefit of its members and that if it were to be wound up, any surplus funds were to go to another charity.

The Revenue in response to Blue Cross submitted that the original exemption was granted in error and that on second and better thoughts, they were now convinced that their concession was wrong in law. They contended that when the memorandum, articles of association and operations of Blue Cross were examined it was in substance a mutual health insurance company. They also submitted that in any event the Commissioner had a discretion to rescind the exemption if Blue Cross was not operated exclusively for charitable purposes. In addition to its written case and reply before the Revenue Court, Blue Cross also relied on the evidence of Hylton McIntosh, their General Manager, which is set out at pages 27-39 of the record, and the learned trial judge accepted his evidence as truthful. It is against this background that the important issue of whether provision of health services as organised and operated by Blue Cross is exclusively charitable within the intendment of Section 12(h) of the Income Tax Act, so as to be exempt from tax and whether on the interpretation of the proviso, the Commissioner could have any discretion in the circumstances of this case to deprive Blue Cross of its exemption. Although this dispute arises under the Income Tax Act, it has relevance to other taxing Acts. See Section 10 of the Property Tax Act.

What is the technical meaning of the words "exclusively for charitable purposes" in revenue acts?

It is pertinent in considering this issue to set out Section 12(h) of the Income Tax Act, as this section must be construed. It reads:

"There shall be exempt from tax:-

(h) the income of any corporation or association organised and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual:

Provided that it shall be in the discretion of the Commissioner to determine whether or not a corporation or association comes within the meaning of this provision;"

The most appropriate starting point for an analysis of this issue is Income Tax Special Purposes Commissioners v. Pemsel (1891) A.C. 531, Vol. (III) Tax cases 53. In construing the United Kingdom Income Tax Act 5 and 6 Vict. C. 35 which exempted the income of charitable organisations from the payment of income tax, Lord Macnaghten emphasised the primary rule of construction when construing an Act of Parliament was that words must be taken in their legal sense unless a contrary intention appeared. Then at page 96 of Tax cases he gave his celebrated definition of charity. It reads:

" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

If this classification is relevant to our Income Tax Act then the words "religious, scientific, or educational" do not add to the meaning of the word 'charitable'. The point being that 'charitable' is a term of art and 'religious', 'scientific' and 'educational' are descriptions of charitable trusts. The basis of the Pemsel classification was an analysis of the preamble to Act 43 of Elizabeth which enumerated a list of charities recognised by the Court of Chancery and the operative part provided machinery for the reform of abuses. Although that statute has been repealed, the preamble

recognised the role of the Court of Chancery in the development of charitable trusts. The Courts, therefore, interpreted the statute so as to facilitate the development of charities and have resorted to the preamble to extend the law of charities by analogy in response to the claims for charitable status. This process is a continuing one, as the legislature has acknowledged the public benefit derived from charitable bequests, and charitable organisations continue to enjoy exemption from income and property tax.

It is, therefore, appropriate to cite another passage from Lord Macnaghten in Pemsel at page 95 which emphasises the importance of the Elizabethan statute and demonstrates that the courts in this branch of law had made it explicit that in the absence of legislative intervention, they are responsible for the law on charitable trusts. Here is how the learned Law Lord explains the basis on which he made his classification:

> "The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction, it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive, that it became the practice of the Court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the 'objects there enumerated,' as Lord Chancellor Cranworth observes (1 D. and J. 79), 'are not to be taken as the only objects of charity, but are given as instances'."

It is, therefore, instructive to set out the preamble of the Elizabethan statute so as to be aware of the instances which required machinery for the reform of abuses at that time. Further, it enables us to see the appropriateness of the four-fold division in Pemsel's case.

The preamble to the Charitable Uses Act 1601 enacted in the reign of Elizabeth as recorded in Lord Nuffield v. Commissioners of Inland Revenue 28 Tax cases, page 491, reads as follows:

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

The development of the law of charity in England, therefore, has been based on the judicial exposition of the preamble of the Elizabethan Statute. Since the classification in Pemsel's case is based on charitable trusts enumerated in the preamble of the Statute, there must be an enquiry as to whether there has been a reception of this branch of equity in the Jamaican legal system. To determine if there has been, there must be an examination of the modern authorities pertaining "to the relief of the impotent" as enumerated in the Statute which falls under the heading "Relief of poverty" as well as the heading "Trusts for other purposes beneficial to the community not falling under any of the preceding heads." If there has been a reception then these authorities will enable us to determine whether or not Blue Cross is a charitable trust within the intendment of the Income Tax Act.

Has there been a reception of the English Law of charity in Jamaica?

The English colonists settled in Jamaica in 1655 after the Spaniards were defeated in battle. By 1681 the Jamaican Legislature passed an act pertaining to charities. This act is so important in determining whether the law on charities was received in Jamaica that it is necessary to set it out in full, in modern spelling. Act 12 of 1681 reads:

"An Act for Confirmation of pious, charitable, and public Gifts and Grants.

To the intent that pious, charitable, and public Gifts and Grants, so necessary in new Colonies to be encouraged and made good, may not be defeated, but may take effect, according to the true Intent and Meaning of the Donor or Donors, Devisor or Devisors, notwithstanding any Incapacity in the Grantee or Devisee, or those to whose Use the same is granted or devised: Be it therefore enacted and ordained by the Governor, Council, and Assembly, and it is hereby enacted and ordained by the Authority of the same, That for and during the Term and Time of Twenty Years next ensuing, all Gifts, Grants, Conveyances, and Devises of any Houses, Lands, Tenements, Rents, Goods, or Chattles, to any good, pious, charitable, or public Use or Uses, as for the Maintenance of lawful Ministers, erecting or maintaining of Churches, Chapels, Schools, Universities, Colleges, or other Places for the Education of Youth, or Maintenance of Men of Learning, or any Alms-houses, or Hospitals, or any other Uses whatsoever, heretofore made and hereafter to be made within the Time aforesaid, be and are hereby forever confirmed and made good, according to the true Intent and Meaning of the Donor or Donors, Grantor or Grantors, Devisor or Devisors; the Statute of Mortmain, or any other Statute, Law, Custom, or Usage to the contrary notwithstanding.

II. Provided nevertheless, and it is hereby enacted and ordained, That no Gifts, Grants, or Devises to any Person or Persons whatsoever for any superstitious Use, or for Maintenance of any Minister or Teacher whatsoever, other than such as are lawfully ordained and allowed of by the Church of England, be hereby confirmed and made good;

> "any Thing herein, or in any other Act seeming to the contrary in any wise notwithstanding."

It must be borne in mind that colonists as settlers took the common law with them. They, therefore, passed the Act to confirm charitable bequests. In that light there must have been an acknowledgment that there had been a prior reception of the English Law of Charities in Jamaica. That stance on the reception of common law was asserted in 1866 by Bryan Edwards, C.J., in Magnus v. Sullivan 1 Stephens Reports, page 862, where he said:

> "It is, I think, conceded that an English colonist carries with him the common law of England from whence he comes; but it is otherwise with the English statute law."

In a judgment of 1867 Kemble, J., in Jacquet v. Edwards 1 Stephens Reports 421 demonstrated that from the earliest times the colonists in Jamaica claimed to be governed by English law. At page 416 this passage appears in his judgment -

> "His Majesty, King Charles, assuming his acquisition of this Island by conquest, legally possessed the power, which he thought fit to exercise, of conferring on all children of English subjects who settled in Jamaica, the rights and privileges of free-born Englishmen, and that they consequently considered themselves entitled to those rights and actually enjoyed them at a very early period appears from the answer of Sir Thomas Modyford, in 1664 (he was then Governor of Jamaica), in reply to the following questions put to him by His Majesty's Commissioners: 'What statutes, laws and ordinances, are now made and in force?' and to which he answers: 'Right reason, which is the common law of England, is esteemed in force amongst us, together with Magna Charta and the ancient statutes of England, as far as they are applicable.' (See Journals of Ass., Vol. 1, App. 22.)" [emphasis supplied]

This passage suggests that there was no doubt that the common law was esteemed in force amongst the settlers. So far as Statute Law was concerned, it was also esteemed but it was limited to those statutes which were then applicable. In Cooper v. Stuart (1889) 14 A.C. 286 at 291, Lord Watson proposed a similar test. "The relief of ... impotent ... people" is one of the instances of a charity enumerated in the English Act. The comparable charities named in the Act for Confirmation in Jamaica are the "erecting or maintaining of Alms-houses or Hospitals." Noteworthy was the stress laid on the necessity for encouraging charitable bequests in new colonies, a stance which is still necessary today because of the inability of the public purse to satisfy all the claims for health care for a growing population. That there was to be a residual category or fourth head was recognised by the Jamaican Legislature long before Sir Samuel Romily arguendo in Morice v. The Bishop of Durham 32 E.R. at page 951, or Lord Macnaghten in Pemsel, for in the Act of Confirmation they adverted to this instance of charity thus: "... or any other use whatsoever, heretofore made and hereafter to be made within the Time aforesaid be and forever confirmed and made good."

The reception of English Law has recently been considered by the Supreme Court in Ex parte Cephas Nos. (1) and (2) 14 J.L.R. at p. 72; 15 J.L.R. 3; also reported in 24 W.I.R. p. 402 and p. 500. Relevant to this issue is Section 41 of the Interpretation Act, which reads as follows:

> " 'All such laws and Statutes of England as were, prior to the commencement of 1 George II c. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be repealed or amended by any Act of the Island'."

What Section 41 of the Interpretation Act contemplates as regards the common law is that there were five modes of reception. That is if it was esteemed, or introduced, or used, or accepted, or received prior to 1728 provided it has not been repealed or amended by the Jamaica Legislature it became part of our common law in Jamaica. The reception of Statute law was the issue before the court and the Full Court decided that some evidence either direct or presumptive was necessary to satisfy any of the five tests. As regards 33 Henr. VIII, the statute in issue, Parnell, J., in Cephas No. 1 in reasoning similar to that relied on in Jacquet v. Edwards held that the statute was in force. Parnell, J., also regarded the resort to 27 and 28 Henr. VIII to prosecute pirates for murder on the high seas as presumptive evidence, that the statute was applicable in the Island. The persuasiveness of the reasoning of Cephas No. 1 and that in Jacquet v. Edwards is that it recognised that the "esteeming" of either common or statute law was effected at the inception of the colony. The Revenue Act, the predecessor of Section 41 of the Interpretation Act is a classic example of legislation with a retrospective effect which also legislates by way of reference. It permitted this mode of reception - "esteeming" to continue until 1728. As regards common law as developed by the courts of equity the courts recognised that the settlers brought it with them. As regards statute law the test for reception was whether it was applicable to the circumstances of the colony at its inception and up to 1728.

With regards to other methods of reception enumerated in the Interpretation Act, namely, introduced or used, or accepted or received, evidence either direct or presumptive was required, for this was what was additional to the common law mode of reception. This distinction between the reception by the "silent operation of constitutional principles" or statutory "esteeming" the reception by statute was adverted

to by Lord Watson in Cooper v. Stuart (1889) 14 A.C. at 293. Section 41 of the Interpretation Act is, therefore, of great significance to the Jamaican constitutional and legal system and has a direct bearing on the meaning of "exclusively for charitable purposes" in the Income Tax Act. The Full Court of the Supreme Court (Henry, Rowe, Wilkie, JJ.) in Cephas No. 2 however, held that there was no sufficient evidence to satisfy Section 41 of the Interpretation Act and to justify the reception of the ancient statute of 33 Henr. VIII.

In coming to its adverse decision, the Court said that Act 33 Henr. VIII C. 23 would probably be regarded as a law of Jamaica. Such a decision must have been based on the presumptive evidence adduced. Be it noted that certain rules of pleading were applicable to both the ancient statutes of Henr. VIII. See Vol. 1 (1843) East's Pleas of the Crown 343 London Professional Books Limited. In the light of this reasoning, the decision in Cephas No. 2 is surprising. Perhaps it is worth mentioning that East was born in Jamaica being the great grandson of one of the original English captors of the Island. Cephas being a criminal habeas corpus case, there could have been no appeal to resolve this conflict save by way of special leave to the Privy Council. It is pertinent to point out that in both Cephas No. 1 and Cephas No. 2 reference is made to the Calendar of State Papers Colonial Series 1132. Some of these papers are also to be found in the case of the Constitution of Jamaica Vol. 6 State Trials p. 350.

As regards the common law which is the issue in this case, two passages from the judgment of Henry, J., makes the position clear. The first on page 7 explains to what extent Jamaica was to be regarded as a settled colony. It reads:

> "It is not in dispute that Jamaica is to be regarded as a settled colony for the purpose of determining its colonial status. The dicta of Lord Mansfield in R. v. Vaughn (1769), 4 Burr 2494 and Campbell v. Hall (1774), Cowp. 208; and the decision in Stultz v. Wallace (1839), Mac. R. 67; and Jacquet v. Edwards (1867), 1 Stephens 414 clearly indicate this, notwithstanding the view expressed in Beaumont v. Barrett (1836) 1 Moo. P.C. 59.
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> In Cooper v. Stuart (1889) 14 A.C. 286 Lord Watson stated at p. 291:
>
> 'In the case of [a settled] Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute laws of England shall have effect within its limits. But, when that is not done, the law of England must, (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals'."

This authoritative ruling was anticipated by Kemble, J., in Jacquet v. Edwards in 1867. Why was Jamaica regarded as a settled colony? The former spanish colonists fled to Cuba which was only ninety miles away and the only remaining inhabitants of consequence were the Maroons who were their slaves. They valued their freedom and so encamped in the hills. For a legal system, therefore, the English settlers resorted to the constitutional principles expounded at a later date by Sir William Blackstone in 1 Com. 107. In Cephas No. 2 that learned author was mistakenly referred to as Lord Blackburn, another distinguished judge who was alson an author of legal texts. Continuing with Cephas No. 2, on page 8, Henry, J., explains that the origin of Section 41 of the Interpretation Act was Section 22 of the famous Revenue Act of 1728. He said -

> "The Jamaican legislature has treated the year 1728 and the Act 1 Geo. II c. 1 as the year and the event which concluded the reception of English laws and statutes into Jamaica by virtue of its colonial status. This cut-off period was beneficial to the colonists in that it extended the application of these laws and statutes beyond the

> "year 1655 and right up to 1728 and at the same time the 1728 Act 1 Geo. II c. 1 set certain limitations on the reception of English laws and statutes by enumerating the circumstances in which they were to be applicable to Jamaica."

Quite apart from the Confirmation Act of 1681 (supra) there are at least two other Public Acts which refer to charitable trusts in bequests made in 1728 and 1729. The first is the wi will of John Wolmer Law 9 Geo. II 1735 c. 6 which pertains to a charitable bequest in his will dated 1729 and the will of Thomas Manning Law II Geo. II c. 6 1738 which referred to charitable bequests in his will dated 1710. These charitable bequests were the foundation of our oldest secondary schools.

So far as the 19th century was concerned, there is the case of In re Judford 1 Stephens Reports at 793 which relied on English authorities. It pertains to an educational charity and the legislature continued to recognise the existence of charitable trusts in the (1897) Trustee Act; see Section 39 where the Act speaks of a trustee of charitable trusts and the earlier Trustees, Religious Educational and Charitable Vesting Act 1853 which made provision for freehold, leasehold or other landed property to be vested to the Trustees of a charitable trust. This Act in Section 2 recognises that a Trust for a hospital, poor-house, or asylum are instances of associations for charitable purposes. For an example of the use of the word 'charitable' in a criminal statute, see Section 62 of the 1864 Larceny Act re-enacted as Section 25 of the current Act.

In the light of all these statutory provisions which recognise charitable trusts and left these trusts to be interpreted by the courts, I have no doubt that the technical meaning attributed to the phrase "exclusively for charitable purposes" must have the meaning in Jamaican

legislation which obtains in enactments in England. It follows, therefore, that in so far as Marsh, J., decided that the Pemsel line of cases was not applicable to Jamaica, I cannot support him for he has failed to construe Section 41 of the Interpretation Act correctly. Furthermore, I doubt whether his approach which states that "whether one applies the 'Macnaghten test' or disregards it as I have done the result would in all probability be the same", was correct.

Could the proviso to Section 12(h) of the Income Tax Act be applicable if Blue Cross was organised exclusively for charitable purposes?

For ease of reference it is convenient to set out the proviso, again, so as to arrive at its true construction. It reads:

> "Provided that it shall be in the discretion of the Commissioner to determine whether or not a corporation or association comes within the meaning of this provision;"

Mr. Alder for the Revenue contended that even if Blue Cross was "organised exclusively for charitable purposes" as the statute ordains, then the proviso gave the Commissioner a wide discretion to determine whether Blue cross was so organised so as to retain its tax exemption. He cited G v. G [1985] 2 All E.R. 226 to show the limited jurisdiction of an appellate court to review the discretion of a judge of first instance in cases involving the welfare of children and suggested that the Commissioner of Income Tax was empowered by the proviso to exercise the same sort of discretion when he decided to deprive Blue Cross of its charitable status. Such an approach ignores the constitutional principles of Income Tax Law. The remission or the exemption from tax is not to be decided on common law principles pertaining to discretion, but by the true construction of the relevant

provisions of the taxing act. It is the duty of the Courts to ensure that the Commissioner carries out the intention of Parliament. If that were not so, the taxpayer would have no redress from the arbitrary actions of a tax-gatherer, nor would the tax-gatherer, a member of the executive be under the rule of law which the Courts are bound to uphold.

Section 12(h) makes a distinction between a corporation as organised by virtue of its memorandum and articles of association and how it is operated. It is clear that a corporation could be organised so that it was exclusively charitable but that its operations were such that it did not conform to its constitution and the rules made thereunder. In such circumstances, its operations would be ultra vires although it would still be organised exclusively for charitable purposes. It may even be that only part of its operations was ultra vires. It is the income from ultra vires operations which would not be exempt from taxation, but the Commissioner has no powers to deprive a corporation of its charitable status. That would be a matter for the courts acting at the instance of the Attorney General who has a special role as parens patriae in the supervision of charities.

Is there any warrant in the authorities cited to us for this construction? It is instructive to begin with the words of Atkin, L.J., in The Commissioner of Inland Revenue v. Yorkshire Agricultural Society 13 Tax cases 58 at page 78. After dealing with the relevant time when there ought to be exemption of income tax in an organisation established for charitable purposes only, he goes on to the problem of operations thus:

> "The mere fact that it may dissolve at any time and come to an end seems to me to have nothing to do with this particular problem. As it may dissolve itself, so I think it is fairly plain that it may, if it chooses, re-associate itself for other purposes, either by dissolving itself and forming itself into a society for another purpose, or it may be by adding to its objects, objects which are non-charitable, or by substituting for its objects an object which is non-charitable instead of a charitable object. But if it does so, then it appears to me that the Society will cease to be a society established for a charitable purpose, and its funds presumably will not be devoted to charitable purposes only. But until it does so it appears to me to be the same question of whether it was established for a charitable purpose and whether you can find that it is still operating in that sphere, and that is the position. As I have said, if in fact it did choose to adopt as its purpose some additional and non-charitable purpose, the position would be that its income derived after that time would not be subject to the obligation to expend it for a charitable purpose, but its income acquired while it professed to be a society for a charitable purpose only would have to be so applied."

Further, this issue of ultra vires operations of an organised charity was discussed by Denning, L.J. (as he then was), in the case of British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority [1949] 1 All E.R. 21 at 25, a rating case, but the principles are similar to exemptions for charities under the Income Tax Act. The Lord Justice said:

> "If, however, there is no memorandum of association or if the memorandum is not clear on the point, as, for instance, if some of the purposes may or may not be incidental to the purposes of science, literature, or the fine arts, then regard may properly be had to the purposes which the society has, in fact, pursued, for, if it, in fact, pursues alien purposes, it cannot claim the exemption: Purvis v. Traill (3 Exch. 350 per PARKE, B.) A society cannot get exemption from rates by saying that what it is doing is ultra vires. The court will assume that the purposes which it pursues are purposes for which it was instituted."

Tucker, L.J., gave a very clear statement of the limited circumstances where the tax-gatherer is empowered to deprive a corporation organised exclusively for charitable purposes of its privilege of being tax exempt. In Oxford Group v. Inland Revenue Commissioners [1949] 2 All E.R. 537, he said at p.540:

> "In the case of a company or other association, if the main object or objects are solely for the advancement of religion the mere fact that the company or association is given certain powers, even though described as objects which are purely ancillary to the main objects, will not prevent the company or association being regarded as a body formed for religious purposes only, but tax exemption will be confined to such parts of its income as are applied to its strictly religious activities. Where one of the main objects of a company or association permits for its attainment of activities which are not purely religious then the company or association cannot be regarded for tax purposes as being a body formed for religious purposes only."

I have found two further statements in the cases cited before us which show that the distinction between a corporation as organised and operated is well recognised in our law and accordingly it must be a principle taken into account in interpreting a proviso conferring a discretion to the tax-gatherer in rating or tax law. Firstly, Sachs, L.J., in Council of Law Reporting v. Attorney General [1971] 3 All E.R. 1029 at 1039 after stating that if an organisation as Clifford's Inn started as a charity it so remained, said -

> "(The question whether in fact it has applied or is applying some of its funds to non-charitable purposes is, of course, a separate issue which arises when tax or rate exemptions are under consideration.)"

This lucid statement shows that the Commissioner's discretion is limited to taxing funds applied to non-charitable purposes. Were it otherwise, he would have had the power to amend the main clause of Section 12(h) of the Income Tax Act. Secondly, Scott, J., had to consider the issue in Attorney General v.

Ross [1985] 3 All E.R. 334 at 343:

> "The question whether under its constitution the union is or is not charitable must, in my view, be answered by reference to the content of its constitution, construed and assessed in the context of the factual background to its formation. This background may serve to elucidate the purposes for which the union was formed. But if the union was of a charitable nature when formed in 1971 it cannot have been deprived of that nature by the activities carried on subsequently in its name."

If this sounds merely suggestive, then at page 344 he emphatically stated -

> "In my view, the first essential is to consider and construe the scope of the objects and powers of the union under its constitution. If the objects of an organisation and the means by which those objects may be achieved are exclusively charitable, that, without more ado, answers the question whether the organisation was formed for a charitable purpose."

Of course, an organisation can remain charitable although its funds are taxed and its officers are in breach of their fiduciary duties. Here is how the learned judge puts this position further on page 344:

> "If an organisation is formed with an exclusively charitable purpose but with a constitution that permits ancillary non-charitable activities it is, on authority, charitable. If subsequently the managers of the organisation transform the ancillary non-charitable purpose into the main purpose of the organisation, the conclusion does not, in my view, follow that the organisation loses its charitable status. The right conclusion, in my opinion, would be that the managers are in breach of their fiduciary duties of management."

The clue to understanding the true interpretation of the proviso is that once Parliament confers an exemption on institutions organised exclusively for charitable purposes, it is only in circumstances where that institution in its

operations ignores the mandates of Parliament that Parliament permits the Commissioner to levy a tax. Under such circumstances, there is no room for the wide discretion for which the Revenue contended. The complaint on appeal was that the learned trial judge did not give any consideration to the full effect of the proviso, but that fault lies with the Revenue. They failed to point out any aspect of the operations of Blue Cross as recorded in the evidence which was ultra vires in the relevant years, so as to entitle the Revenue to exercise its discretion to tax ultra vires activities. It was in such circumstances that Marsh, J., was content to make a passing reference to the proviso and I find that the ground of appeal concerning the failure of the trial judge to give the necessary effect to the proviso, fails. But is the assumption and indeed the finding of the Court below, that Blue Cross is entitled to charitable status correct? That issue must now be explored.

Are there features in the memorandum which suggest that Blue Cross is organised exclusively for charitable purposes?

The principal objects of Blue Cross as adumbrated in its Memorandum are to provide voluntary non-profit health service by way of a Medical Care Plan for policy-holders and such other persons as the Company thinks fit. The health care plan makes provisions for medicine, medicare and surgical attendance and nursing, hospital and convalescent care at lower costs than elsewhere.

In furtherance of its objectives, Blue Cross makes provisions for the improvement and upkeep of hospitals. Also part of its object was to publish information regarding health care for policy-holders and others.

It is true that there are other clauses pertaining to the objects of the company but these are subsidiary clauses and would be generally necessary for the proper organisation of a company whether it was organised on a profit or non-profit making basis. One clause in the Memorandum, however, which it is necessary to note is clause 4 which compels Blue Cross to devote its profits to the objects of the Company and it precludes the members from receiving any profits either directly or indirectly and further, if there were to be a winding up of the company any surplus would be distributed to another charity as designated by the members or by order of the Court.

As for its funding, Blue Cross levied a cess on its members and policy-holders and accepted grants and gifts from institutions or government. It is not necessary to refer to the Articles of Association as those aspects of the Memorandum adverted to are sufficient to delineate how Blue Cross was organised at its inception. A glance at the account, however, for 1982 is helpful. Subscriptions receivable was $1,672,728.00 while the total assets were $2,320,527.00. Turning from the Balance Sheet to the Revenue Account for the same year, subscription income was $16,377,767.00 out of a total income of $18,132,092.00. On the expenditure side, the claims outstanding carried forward was $1,474,989.00. These figures are cited to show the dominant role of the policy-holders in the finances of Blue Cross. To reinforce this, the evidence discloses that the expenditure on non-policy-holders was 2½% of expenditure.

One of the earliest statements highlighting the difficulties as to whether an organisation was organised exclusively for charitable purposes comes from Atkin, L.J., The Commissioner of Inland Revenue v. Yorkshire Agricultural Society 13 Tax cases 58 at 76. The relevant passage reads:

> "First of all it is said: No, this Society was in fact formed for the purpose of giving benefit to its members; it is nothing but a club for the mutual advantage of the members of the club. If that were so I think that the claim of the Society would fail, both because it could not be said to be established for a charitable purpose, and because it certainly could not be said to be established for charitable purpose only. There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members, I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that you benefit the members in the course of promoting your charitable purpose would not prevent the establishment being for charitable purposes only."

The decision in this case was in favour of the claim for charitable status and Mrs. Hudson-Phillips, therefore, relied on it. It must be emphasised that the obligations and main object of Blue Cross is to provide a health service for its policy-holders. It can and does provide medical attention to others, but that is in its discretion.

Regarding the provision of a health service, this is undoubtedly one of the instances of a charity enumerated in the Elizabethan Statute, as "the relief of the impotent" or under the alternative heading "trusts for other purposes beneficial to the community". It is instructive to turn to the question as to how the courts adjudicate on new claims for charitable status. In Scottish Burial Reform and Cremation Society, Ltd. v. Glasgow City Corporation [1967] 3 All E.R. 215 where a claim was being made that a non-profit

making society whose main object was to promote cremation, be exempt from income tax, Lord Reid at page 218 stated -

> "The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. Then they appear to have gone farther, and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable. This gradual extension has proceeded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the statute of Elizabeth."

Lord Upjohn at page 220 justified the charitable status of the cremation society thus:

> "The concept of purposes beneficial to the community might then appear to have the qualities of a class and so perhaps to a lesser extent in 1891. This so-called fourth class is incapable of further definition, and can today hardly be regarded as more than a portmanteau to receive those objects which enlightened opinion would regard as qualifying for consideration under the second heading. My Lords, I agree with the majority of the Second Division that the objects of the appellants fall well within this fourth division."

The speech of Lord Wilberforce is of interest especially as we will have to advert to his opinion later on in the matter of hospitals and health care. In the same case at page 223, he said:

> "The purposes in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the statute, 43 Eliz. 1 c. 4. The latter requirement does not mean quite what it says; for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according

> "as new social needs arise or old ones become obsolete or satisfied. LORD MACNAGHTEN'S grouping of the heads of recognised charity in Income Tax Special Purposes Comrs. v. Pemsel [1891-94] All E.R. Rep. at p. 55 is one that has proved to be of value and there are many problems which it solves. But three things may be said about it, which its author would surely not have denied: first that since it is a classification of convenience, there may well be purposes which do not fit neatly into one or other of the headings: secondly, that the words used must not be given the force of a statute to be construed, and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891."

There is authority that health care plans were envisaged under the Elizabethan statute and it comes from Lord Wilberforce in Le Cras v. Perpetual Trustee Co. Ltd. & Others [1967] 3 All E.R. 915 at 922. He said:

> "It is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick. Whether one regards the charitable character of trusts for the relief of the sick as flowing from the word 'impotent' ('aged, impotent and poor people') in the preamble to 43 Eliz. c. 4 or more broadly as derived from the conception of benefit to the community, there is no warrant for adding to the condition of sickness that of poverty. As early as Income Tax Special Purposes Comrs. v. Pemsel [1891-94] All E.R. Rep. 28 LORD HERSCHELL was able to say, at p. 49:
>
> 'I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money.'
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> Similarly in Verge v. Somerville [1924] All E.R. Rep. 121 LORD WRENBURY, delivering the judgment of this Board on an appeal from New South Wales pointed out at p. 125, Letter E that trusts for education and religion do not require any qualification of poverty to be introduced to give them validity and held

> generally that poverty is not a necessary qualification in trusts beneficial to the community. The proposition that relief of sickness was a sufficient purpose without adding poverty was accepted by the Court of Appeal in Re Smith's Will Trusts [1962] 2 All E.R. 563."

In this regard there is the case of In re Roadley [1930] Ch. 524 where Bennett, J., found a trust to apply the yearly income in the payment of "'expenses and maintenance of patients to and at' one or other of the two hospitals" as a charitable trust because it was a "trust for the relief of a form of helplessness." He equated this with relief for the 'impotent' as enumerated in the statute of Elizabeth.

As for the Revenue's contention that Blue Cross was to be deprived of its charitable status because the health schemes were financed in part by the payment of premiums by policy-holders, this contention was rejected by Lord Reid in the Cremation case. Here is how he puts it at page 218:

> "If there is a public benefit, the appellants cannot on the facts of this case be disqualified because there is or might also be a profit or benefit to individuals involved in the prosecution of their objects; nor can they be disqualified because the benefit does not extend to a sufficiently large section of the community."

Any judge sitting in this jurisdiction must have noted the scarcity of medical facilities, the shortage of hospital beds, the lack of medical equipment and the poor state of hospital buildings. In addition to all this, there is a shortage of doctors and nurses because of constant migration to North America for higher emoluments. A health care plan which provides medical attention in its broadest aspect is undoubtedly a public benefit. That there was a levy on policy-holders does not disqualify Blue Cross from being a charitable institution comes from Lord Wilberforce in his opinion in the Le Cras case, after reviewing a number

of cases on this issue said at page 923.

> "It would be a wrong conclusion from them to state that a trust for the provision of medical facilities would necessarily fail to be charitable merely because by reason of expense they could only be made use of by persons of some means. To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expensive, without any profit motive, might well be charitable."

Another instance where payment for services did not disqualify an institution was the provision of law reports in the Council of Law Reporting v. Attorney General [1971] 3 All E.R. 1029. Although it was not necessary for his decision, Russell, L.J., had an apt comment to make concerning health care facilities. At page 1035 he said

> "So it would be if there were a non-profit making association under gratuitous professional supervision for the production at moderate expense of pure medical drugs or efficient surgical instruments. But the only main object or purpose in such case would be, it seems to me, the relief of the sick."

Yet another example of a charitable trust which was operated by way of bargain rather than by way of bounty was Rowntree Memorial Trust Housing Association Ltd. & Ors. v. Attorney General [1983] 1 All E.R. 288 where housing was provided at reduced costs for the aged.

Turning to the construction of the memorandum, the main clauses are all drafted on a similar pattern and I need only quote one to show how the obligations of Blue Cross are distinguished from its discretionary activities. Clause 3(b) reads:

> "(b) To provide and supply policy-holders of the said Plan or to such other person or persons or group of persons as the Company may think fit, necessary and proper medicine and medical and surgical attendance, appliances, nursing and comforts and hospital and convalescent care."

The interpretation of this and similar clauses is the pith of this case. Once it is acknowledged that the object of the company is to provide for its policy-holders and further that the preponderance of its finances is from the cess on the policy-holders, how can Blue Cross qualify as a charity according to the canons of equity jurisprudence? Where is the altruism which is the basis of a charitable trust? True, it is, that Blue Cross may in its operations make charitable bequests, but that cannot entitle Blue Cross to charitable status. It is this feature of the memorandum which runs through all the main clauses, from the outset defeats the claims of Blue Cross to have an entitlement to charitable status. Moreover, once there is this defect in the memorandum it is bound to impact on the operations of Blue Cross.

It was in this context that Mr. Hamilton for the Revenue cited Inland Revenue Commissioners v. City of Glasgow [1953] 1 All E.R. 747 but all that case established was that an association whose primary objective was the non-charitable purpose of providing recreation for its members, was not an organisation exclusively for charitable purposes and therefore not exempt from income tax, nor was the citation of D'Aguiar v. Inland Revenue Commissioner [1970] 15 W.I.R. 198 helpful. That was a case where the Privy Council found that there was no single dominant purpose of a manifestly charitable character to be found in the constitution of the claimant. This is not the situation in the instant case where the provision of health care is the dominant activity in the object clause of the memorandum. That the mere payment for services would not disentitle Blue Cross of its charitable status, that a health care plan is capable of being organised on a charitable basis, that Blue Cross supports institutions as hospitals which are capable of being organised on a charitable basis and that services provided by Blue Cross are of undoubted

public benefit, all these are factors which no doubt weighed heavily with the Revenue when they initially accorded Blue Cross charitable status. But then there is the flaw in the memorandum adverted to. In fact once it is conceded that the main object of Blue cross to provide for its policy-holders is a disentitlement to charitable status, then it follows that the operations are likely to follow a certain pattern. That pattern would require the policy-holders to subscribe to funds for the payment of benefits and there must now be an examination as to whether charitable status is compatible with operations based on "self-help".

Was there an element of self-help in the organisation and operations of Blue Cross which disqualified it from being a charity?

It is important to note that both in the Court below and on appeal, the main contention of the Revenue has been that Blue Cross was an organisation primarily for the benefit of its policy-holders and in this regard it was submitted that in substance it was organised and operated as a mutual insurance scheme. The difficult case of Lord Nuffield v. Commissioners of Inland Revenue 28 T.C. 779 was relied on to highlight the defects in the submissions made on behalf of Blue Cross.

What the Nuffield case decided was that where the object of an institution was to relieve sickness and promote health, then the institution would undoubtedly be a charity and so eligible for exemption from income tax. Where, however, the object of a gift is to promote mutual organisations which assist their members in cases of sickness then such a gift is not within the legal definition of charity.

An examination of the cases cited in Nuffield illustrate how mutual insurance schemes are organised. Cunnack v. Edwards [1896] 2 Ch. 679, is a case in point.

There in 1810 a society was formed to raise funds by subscriptions, fines and forfeitures of its members and provide annuities for the widows of its deceased members. In the Court of Appeal Lord Halsbury, L.C., said at page 682:

> "If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category."

The earlier case of In re Clark's Trust [1875] 1 Ch. 497 is of the same category where Hall, V.C., decided that a friendly society whose funds were to be distributed for their mutual benefit in cases of sickness, lameness and old age, was not a charitable trust. A case which went the other way although it was a friendly society case was Pease v. Pattison 32 Ch. at p. 154, but there the payment of sums to members seemed to depend on the rules which stipulated that poverty was a necessary element to entitle a member to benefits in instances of disablement by accident, old age or infirmity. This must be the explanation as Bacon, V.C., there expressly followed Jessel, M.R., in Spiller v. Maude which is reported in the same volume at pages 158-160.

The crucial statement in Nuffield is to be found at page 492 where Wrottesley, J., said:

> "Here, however, expediency rather than logic seems to have dictated the policy adopted by the Courts, which have more than once decided that gifts for associations whose sole objects are the advantage of their members, such as friendly or mutual benefit societies, are not charitable—"

It was against this background that Wrottesley, J., decided that the real object of Lord Nuffield's gift was to promote societies for the advantage of their members. So the decision went against Lord Nuffield's gifts. It is true that Blue Cross was not organised on classic mutual insurance principles as in Municipal Mutual Insurance Ltd. v. Hills 16 T.C. 430, but the substance of the matter is that it was an organisation primarily based on self-help and so

disqualified from charitable status.

There are authorities directly on this point. In Waterson v. Hendon Borough Council [1959] 2 All E.R. 760, the Industrial Orthopaedic Society was denied charitable status in a rating case although the objects of the society was to provide for the "relief of members in sickness and infirmity". The expenses were met by voluntary contributions from its members and in a single sentence Salmon, J., pinpointed the impact of the element of self-help in disqualifying an organisation from charitable status. After dealing with the relationship of the beneficiaries to the society as a disqualification, at page 764, he said:

> "Moreover, the object of the members of the society is not to do good to others but to themselves. This object is not altruistic and is in my judgment not charitable."

It is true that as a subsidiary aim Blue Cross provides health care for non-members but the main object of Blue Cross is to provide benefits for its policy-holders, and therefore it must fail as a charity.

The other pertinent case is In re Mead's Trust Deed [1961] 1 W.L.R. 1244, this was another case where the objects were within the definition of charity. The trust deed stated that the home was to be a sanatarium for consumptive members of a trade union, a convalescent home for members recovering from illness and a home for aged members unable any longer to support themselves and for their wives. The funds were to be provided from the society funds, its members and others. The society was denied charitable status by Cross, J. In a significant passage on the matter of self-help as a disentitlement to charitable status, Cross, J., said at p. 1250:

> "But in fact a large part of funds came from the society and its members. The element of self-help loomed very large and that, as Lord Greene pointed out in the sentence which followed the passage

> "which I have read, is a factor to be borne in mind in these cases."

The position of Blue Cross is similar to that adverted to by Cross, J., as the significant part of its funds is derived from the cess on its policy-holders and consequently it cannot retain its charitable status. I have had the benefit of reading in draft the judgment of my brother Campbell, J.A., and as he has decided that the ratio in Oppenheim's case is applicable to the instant case, I must examine that case in relation to the policy-holders of Blue Cross.

Are the policy-holders of Blue Cross a sector of the community who satisfy the test of public benefit which is a pre-requisite for charitable status?

Another issue which arises in this case is whether the policy-holders of Blue Cross are the 'public' or section of it, to satisfy the public benefit test necessary for charitable status. The issue was illustrated in Oppenheim v. Tobacco Trust Ltd. [1951] 1 All All E.R. 31 or [1951] A.C. 297 at page 306 of the latter report, Lord Simmonds laid down the following test:

> "Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' have no special sanctity, but they conveniently indicate (i) that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and (ii) that 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. It is for this reason that a trust for the education of members of a family or, as in Re Compton [1945] 1 All E.R. 198, or (1945) Ch. 123, of a number of families cannot be regarded as charitable. 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."

As the Articles of Association makes it plain, the range of persons eligible to participate in Blue Cross health care plans is very wide and in fact the policy-holders who are pensioners number some eight thousand. But the feature of the relationship of policy-holders is that they are subscribers under the Oppenheim test, if their contributions were negligible so that they could be classified as poor, different considerations might have arisen. Lord Greene, M.R., anticipated this in Re Trusts of Hobourn Aero Components Ltd. [1946] 1 All E.R. 501 at p. 507 where he said:

> "I must not be taken to be suggesting, for one moment, that the mere fact that the benefits of a fund are confined to members or subscribers would be sufficient of itself to exclude a fund from the category of charity. It all depends on the facts of each individual case. For instance, to explain what I mean, if a number of charitably-minded individuals in a parish got up a subscription for the purpose of providing a parish nurse for inhabitants unable to pay for nursing, the fund so subscribed would not be any the less a charitable fund because no person in the parish could obtain the services of the nurse unless he or she became a member of the association and paid, let me say, half a crown a year, or whatever it is villagers do pay in such circumstances. That would not turn what was in essence a charity into something which was not a charity." [Emphasis supplied]

a principle which was reiterated at page 508 B-C. Let it be noted that Lord Simmonds recognised the problems attendant on the disqualification in the Oppenheim test. At page 308 of the A.C. report, adverting to the anomalous position of the 'poor relation' cases, he said:

> "It would not be right for me to affirm or to denounce or to justify these decisions. I am concerned only to say that the law of charity, so far as it relates to 'the relief of aged, impotent and poor people' (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest."

Lord Simmonds must also have been mindful of Lord Greene's caveat, that the test in Hobourn was subject to the qualification "it all depends on the facts of each individual case".

Lord MacDermott in his dissenting speech emphasises the problem posed by the test approved of by the majority of their Lordships. At pages 317-318 His Lordship said:

> "My Lords, I do not quarrel with the result arrived at in the Compton [1945] 1 All E.R. 198 and Hobourn [1946] 1 All E.R. 501 cases, and I do not doubt that the 'Compton test' may often prove of value and lead to a correct determination, but, with the great respect due to those who have formulated this test, I find myself unable to regard it as a criterion of general applicability and conclusiveness. In the first place, I see much difficulty in dividing the qualities or attributes which may serve to bind human beings into classes, into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the determination of what is and what is not a section of the public for the purposes of this branch of the law. After all, what is more personal than poverty or blindness or ignorance? Yet none would deny that a gift for the education of the children of the poor or blind was charitable; and I doubt if there is any less certainty about the charitable nature of a gift for, say, the education of children who satisfy a specified examining body that they need and would benefit by a course of special instruction designed to remedy their educational defects.
>
> But can any really fundamental distinction, as respects the personal or impersonal nature of the common link, be drawn between those employed, for example, by a particular university and those whom the same university has put in a certain category as the result of individual examination and assessment? Again, if the bond between those employed by a particular railway is purely personal, why should the bond between those who are employed as railwaymen be so essentially different? Is a distinction to be drawn in this respect between those who are employed in a particular industry before it is nationalised and those who are employed therein after that process has been completed and one employer has taken the place of many? Are miners in the service of the National Coal

> "Board now in one category and miners at a particular pit or of a particular district in another? Is the relationship between those in the service of the Crown to be distinguished from that obtaining between those in the service of some other employer? Or, if not, are the children of, say, soldiers or civil servants to be regarded as not constituting a sufficient section of the public to make a trust for their education charitable?"

Lord MacDermott would have preferred the older test. Here is how His Lordship puts it at page 314:

> "Until comparatively recently the usual way of approaching an issue of this sort, at any rate where educational trusts were concerned, was, I believe, to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed; and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test. The investigation left the course of the dividing line between what was and what was not a section of the community unexplored, and was concluded when it had gone far enough to establish to the satisfaction of the court whether or not the trust was public; and the decision as to that was, I think, very often reached by determining whether or not the trust was private."

Oppenheim was followed in respect of educational charities by the Privy Council in Davies v. Perpetual Trustee Co. [1959] A.C. 439 and Gaffoor Trust v. Commissioner of Income Tax [1961] A.C. 584. It was, however, subjected to critical analysis in Dingle v. Turner [1972] A.C. 601 by Lord Cross. This was a "poor relations case" as the bequest was for poor employees of a company and the Oppenheim test was not applied so as to disentitle the bequest from being accorded charitable status. Some of the beneficiaries could be those who "being of the age of 45 years at least are incapacitated from earning their living by reason of some physical or mental infirmity." So the question as to whether the Oppenheim test was

applicable to a health care plan was never directly in issue.

The approach of Lord Cross with which their Lordships agreed was stated at page 624 of his speech. It reads thus:

> "In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public."

On this basis, I would be prepared to hold that this test does not disqualify Blue Cross from being a charitable trust as the membership is large (over three hundred thousand [300,000] policy-holders) out of a total population of 2¼ million in the Island, and the purpose to provide health care is prima facie charitable. The direct and indirect benefits to the public are considerable and given the ease with which an applicant can become a policy-holder, it cannot be equated with the club or employee type of case for which the test in Oppenheim was designed. It is, therefore, the element of self-help and the provision in the memorandum that Blue Cross was organised primarily for the benefit of its policy-holders, which made me rule that Blue Cross was not entitled to charitable status.

C O N C L U S I O N

This case illustrates how difficult it is to decide whether an institution is enittled to charitable status. The Attorney General who has a special position in relation to the

administration of charities ought to have been given the opportunity to appear if he wished to do so and ought to be informed if there is a further appeal. There is no doubt that Blue Cross is a worthy venture and deserves to prosper. The organisation serves its policy-holders and the public well. But so do other organisations and they have to pay taxes if they do not qualify under the tests laid down by the courts of equity for charitable status. The revenue has succeeded on grounds one and three on Appeal. So the order of Marsh, J., must be set aside and the assessment of the Commissioner of Income Tax restored. The Revenue must also be awarded taxed or agreed costs both here and below.

WRIGHT, J.A.

During the course of preparing the draft of my judgment I took the opportunity to read the draft judgments of my brothers Campbell and Downer, JJ.A. and thereupon decided that it was no longer necessary for me to write as elaborately as I had proposed since they have dealt with the issues so comprehensively and so admirably well. I propose, therefore, to restrict my contribution to a brief comment.

It is my considered opinion that judged in the light of the fourth category in Lord Macnaghten's classification in Special Commissioners of Income Tax v. Pemsel (1891) Tax Cases 53 which I agree is the criterion for assessment in this case Blue Cross fails to qualify for exemption under Section 12(h) of the Income Tax Act.

In resisting the Blue Cross Claim Mr. Hamilton's thrust, principally, was that Blue Cross is a Mutual Insurance Society and, consequently, is not organised and operated exclusively as the section requires. Great reliance was placed on Nuffield et al v. Commissioner of Inland Revenue (1946) T.C. 479. But this contention is demonstrably wrong because it is manifest that the assets of Blue Cross are not owned by the members or the policy-holders - a characteristic of a mutual scheme. However, although it is not a classical mutual scheme it is akin to such a scheme. I agree with Downer, J.A. that it is a sort of self-help scheme because the benefits paid out to or on behalf of the policy-holders are paid out of funds provided by the policy-holders. No definition of charitable purposes has been advanced which embraces a self-help scheme: Cunnack v. Edwards (1896) Ch. 679.

But there is also another very significant reason why Blue Cross cannot succeed. It fails the public benefit test which is an essential requirement. In Oppenheim v. Tobacco Securities Trust Co. Ltd. et al (1951) 1 All E.R. 31 the number of beneficiaries (110,000) was considered not sufficiently representative of the public to qualify the trust as a charity.

Additionally, there was the impediment of a nexus to a single propositus. If mere numbers decided the issue then Blue Cross could probably contend that with a total of some 300,000 policy holders in a population the size of Jamaica's (a little more than 2,000,000) it would qualify. In considering this issue two points of importance claim attention. Firstly, it must be noted that no person who is not a policy-holder has any claim of right on the assets of Blue Cross. If benefits were available to the public on, say payment of a service charge, the public benefit would be readily identifiable. But such is not the case. In this regard the position is not unlike the Oppenheim case - nexus to a single propositus. The second point of importance is that although there is provision in the objects for the directors to benefit persons and institutions who are not policy-holders such benevolence is left to the discretion of the directors - a discretion which may or may not be exercised. Basically therefore the persons who qualify for benefits are those bound to Blue Cross by a policy-contract.

I agree therefore that the appeal must succeed with costs to the appellant's here and in the Court below.