COURT OF APPEAL—18 OCTOBER 1978

HOUSE OF LORDS—28, 29 AND 30 JANUARY AND 6 MARCH 1980

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Commissioners of Inland Revenue *v.* McMullen and Others (Trustees of Football Association Youth Trust) and Attorney-General[1]

Charity—Promotion of sport—Trust created "to organise or provide or C *assist in the organisation and provision of facilities which will enable and encourage pupils of schools and universities in any part of the United Kingdom to play association football or other games or sports"—Whether charitable as being for the advancement of education, or for a purpose beneficial to the community, or within the Recreational Charities Act* 1958 (6 & 7 *Eliz* 2, *c* 17)—*Charities Act* 1960 (8 & 9 *Eliz* 2, *c* 58), *ss* 4 *and* 5(3).

D By a deed dated 30 October 1972 a trust known as The Football Association Youth Trust ("FAYT") was created, whose objects were, *inter alia*, "to organise or provide or assist in the organisation and provision of facilities which will encourage pupils of schools and universities in any part of the United Kingdom to play association football or other games or sports" to provide and maintain the appropriate equipment and facilities therefor, and to promote and E provide training colleges, courses, lectures, demonstrations and coaching for teachers organising, and pupils playing, such games or sports. The Commissioners of Inland Revenue, appealing to the High Court by way of originating summons under s 5(3), Charities Act 1960, against the decision of the Charity Commissioners to register FAYT as a charity pursuant to s 4 of that Act, contended that the objects of the trust were not exclusively charitable because F (i) following In re *Nottage* [1895] 2 Ch 649, a trust with the object of promoting sport was not charitable at common law unless within the principle in In re *Mariette* [1915] 2 Ch 284 (whereby the provision by a school of games facilities as part of its educational function was charitable); (ii) the principle in In re *Mariette* did not apply to the case where games facilities were provided for persons who were merely "pupils of schools and universities" regardless of any G physical educational function of such schools and universities; (iii) it was not part of the educational function of universities, which catered for a wide age-range, to provide sports facilities; and (iv) the objects did not fall within s 1 of the Recreational Charities Act 1958. On behalf of the trustees of FAYT it was contended that FAYT had been established for exclusively charitable purposes as being for the advancement of education, and/or as being for a H purpose beneficial to the community, and/or as being such under the said Recreational Charities Act.

(1) Reported (Ch D) [1978] 1 WLR 664; [1978] 1 All ER 230; 122 SJ 331; (CA) [1979] 1 WLR 130; [1979] 1 All ER 588; 123 SJ 15; (HL) [1981] AC 1; [1980] 2 WLR 416; [1980] 1 All ER 884; 124 SJ 206.

The Chancery Division, allowing the Crown's appeal, held (1) that as the object of FAYT was to promote playing of games it was not charitable (In re *Nottage* applied); a distinction had to be drawn between taking recreation including playing any game, in respect of which the provision of facilities constituted a charitable purpose, and the direct promotion of a particular game or games, which could only be charitable if it was not an end in itself, but part of some larger purpose (In re *Mariette* and *London Hospital Medical College* v. *Commissioners of Inland Revenue* 51 TC 365; [1976] 1 WLR 613 applied); (2) that as there was no correlation between playing a number of specific games and the education of the pupils as a whole, and the former was not subservient to the latter, FAYT could not be classed as an educational charity, and for the same reason it was not a charity as being for a purpose beneficial to the community; moreover if, as was possible, FAYT funds were applied to schools run for private profit, thereby enhancing the value of private property, it could not be said that such funds were used for charitable purposes only; and (3) that the Recreational Charities Act 1958 did not apply as it had not been established, in the absence of any evidence of deprivation which fell to be alleviated, that FAYT had provided facilities in the interests of social welfare; it was impossible to say that as a class pupils at schools and universities were deprived. FAYT appealed.

The Court of Appeal (Bridge L.J. dissenting), dismissing FAYT's appeal, held (1) that the trust was not a trust for the promotion of education (In re *Mariette* and *London Hospital Medical College* v. *Commissioners of Inland Revenue* 51 TC 365 distinguished); (2) that the trust was not a trust within the fourth category of charitable purposes defined in *Special Commissioners of Income Tax* v. *Pemsel* 3 TC 53; [1891] AC 531; (In re *Nottage* and *Dunne* v. *Byrne* [1912] AC 407 applied); (3) that the Recreational Charities Act 1958 did not apply. FAYT appealed.

Held, in the House of Lords, allowing FAYT's appeal: (1) that properly construed, the stated object of the trust was to promote the physical education and development of pupils at schools and universities as an addition to such part of their education as related to their mental development and occupation by providing facilities to enable and encourage them to play football and other games and sports; (2) that such a physical education and development of the young, deliberately associated as it was with the status of pupillage in schools and universities, came within the meanings of the words "education" and "educational"; (3) that, for the purposes of the law of charity, the words "education" and "educational" are not static but bear the meanings current in present day English speech; (4) that accordingly the trust was for the promotion of education and was established for charitable purposes only. (In re *Nottage* distinguished; In re *Mariette* explained.)

Per Lord Hailsham L.C.: in construing trust deeds the intention of which is to set up a charitable trust a benignant construction should be given.

The facts are stated in the judgment.

The appeal was heard in the Chancery Division before Walton J. on 12 and 13 July 1977 when judgment was given in favour of the Crown.

A *D. K. Rattee Q.C.* for the Commissioners of Inland Revenue.

G. H. Newsom Q.C. and *Spencer Maurice* for the first, second and third Defendants (the Trustees).

J. F. Mummery for the fourth Defendant (the Attorney-General).

The following cases were cited in argument in addition to those referred to in the judgment:—In re *Mellody* [1918] 1 Ch 228; In re *Gray* [1925] Ch 362;
B In re *Patten* [1929] 2 Ch 276; *Commissioners of Inland Revenue* v. *City of Glasgow Police Athletic Association* 34 TC 76; [1953] AC 380.

Walton J.—This is an appeal by the Plaintiffs, the Commissioners of Inland Revenue, under the Charities Act 1960, s 5(3), against a decision of the Charity Commissioners to register The Football Association Youth Trust as
C a charity pursuant to s 4 of that Act. The Plaintiffs had objected to such registration and no question arises as to their standing on this appeal. The Defendants are, first, the three trustees of the deed constituting such trust and, secondly, the Attorney-General, pursuant to the requirements of RSC Ord 108, r 5(2). The deed in question is dated 30 October 1972 and is made between the Football Association (defined as "the first donor") of the one part, and the
D original Defendants (defined as "the original trustees") of the other part. The first original trustee, Sir Andrew Stephen, has since, I think, ceased to be the chairman of the Football Association, and the first Defendant has been appointed as such in his place. The deed first of all recites as follows:

> "(1) The First Donor is desirous of establishing a charitable trust which would have as the main objects the furtherance of education of
E Schools and Universities in any part of the United Kingdom encouraging and facilitating the playing of association football or other games and sports at such Schools and Universities and thus assisting to ensure that due attention is given to the physical education and character development of pupils at such Schools and Universities as aforesaid as well as the development and occupation of their minds and the organisation or
F provision or assistance in the organisation or provision of facilities for physical recreation for young people in the interests of social welfare in any part of the United Kingdom. (2) The first Donor has paid to the original Trustees a sum of One hundred pounds and wishes the same to be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained and wishes the original Trustees to
G publicise the establishment of the charitable trust aforesaid and seek to raise further money to be held upon the said trusts and with and subject to the said powers and provisions."

In its operative part, there is first of all, in clause 1, a definition of "Schools" as bearing the same meaning as in the Education Act 1944: *see* s 114(1); the definition includes independent schools. Then, "'Universities' means
H Universities Training Colleges for Teachers or other institutions of Further Education (including Professional and Technical Education approved by the

Trustees)." Clause 2 provides: "The Trust shall be known as 'The Football Association Youth Trust'." The vital clause is the next one, clause 3, and that, I think, I must read in full. It provides as follows:

> "The objects of the Trust are:—(a) to organise or provide or assist in the organisation and provision of facilities which will enable and encourage pupils of Schools and Universities in any part of the United Kingdom to play Association Football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds and with a view to furthering this object (i) to provide or assist in the provision of Association Football or games or sports equipment of every kind for the use of such pupils as aforesaid (ii) to provide or assist in the provision of courses lectures demonstrations and coaching for pupils of Schools and Universities in any part of the United Kingdom and for teachers who organise or supervise playing and coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iii) to promote provide or assist in the promotion and provision of training colleges for the purpose of training teachers in the coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iv) to lay out manage equip and maintain or assist in the laying out management equipment and maintenance of playing fields or appropriate indoor facilities or accommodation (whether vested in the Trustees or not) to be used for the teaching and playing of Association Football or other sports or games by such pupils as aforesaid (b) to organise or provide or assist in the organisation or provision of facilities for physical recreation in the interests of social welfare in any part of the United Kingdom (with the object of improving the conditions of life for the boys and girls for whom the same are provided) for boys and girls who are under the age of twenty-one years and who by reason of their youth or social and economic circumstances have need of such facilities."

Pausing there, no question arises with regard to clause 3(b). It is admitted that if this stood alone it would, following the provisions of the Recreational Charities Act 1958, to which I shall have to refer later, clearly be charitable. It is on (a), and more particularly such part of (a) as immediately precedes the words "and thereby", that the debate has turned. It is quite clear that this part of the deed does not match up with the first recital. At one point Mr. Newsom, who appeared for the first three Defendants, thought that possibly the word "of" in the phrase "pupils of Schools and Universities" might have been a mis-engrossment of the word "at", but on investigation this thought proved to be ill-founded. Mr. Newsom was in fact inviting me to read the recital together with the operative provisions of clause 3(a); but inasmuch as the provisions of clause 3(a) appear to me to be quite clear in their language and intent (their legal result is quite a different matter), it does not appear to me correct to attempt to rely upon the recital to control such language.

The only other part of the deed to which my attention has been directed is clause 9, which provides, putting it very shortly, that the chairman for the time being of the Football Association, if willing to act, is to be a trustee and chairman of the trustees, and that the power of appointing new trustees is to be vested in the Executive Committee of the Football Association. Mr. Rattee, who appeared for the Plaintiffs, relies upon this provision as emphasising the close connection between the trustees and the Football Association and uses that to indicate that, in substance, the Football Association Youth Trust is clearly designed to promote the game of association football.

The Plaintiffs submitted a memorandum of objection dated 11 June 1973 to the registration of the Football Association Youth Trust as a charity to the Charity Commissioners, and it is in these terms:

"In the submission of the Board, the objects set out in Clause 3 of the draft deed of trust which has been submitted are not legally charitable, or exclusively legally charitable, for the following reasons:—1. The objects set out in sub-clause (a) of clause 3, being the promotion of Sport are not charitable at common law (Re *Nottage* [1895] 2 Ch. 649) unless within the principle in Re *Mariette* [1915] 2 Ch. 284 that the provision of facilities for the playing of games organised by a school for its pupils is charitable, on the basis that the organising of such games is part of the educational function of a school. 2. The objects set out in Clause 3(a) are not within this principle in that they include the provision of facilities for the playing of games by persons who happen to be 'pupils at schools and universities', but wholly outside and without any reference to the school or university and quite independently of the fulfilment by the school or university itself of its physical educational function (if any). Re *Mariette* did not decide that the provision of facilities for the playing of games by persons who are pupils at schools is charitable, but that the provision of facilities for the playing by such pupils of games as part of the educational activities of a school is charitable. 3. Moreover, it is not part of the educational function of universities, as defined in the draft Trust Deed to include all institutions of further education approved by the Trustees, to provide facilities for sport. In this context it is relevant to bear in mind the wide age-range that may be covered by 'pupils' at such 'universities'. The principles applied by Eve J. in Re *Mariette* to the playing of organised games at schools have no application in the case of 'universities' where organised games are no part of the 'university's' normal educational function. 4. The objects set out in Clause 3(a) are not within Section 1 of the Recreational Charities Act 1958 because they do not fall within paragraph (a) or either limb of paragraph (b) of sub-section (2) of that Section. The facilities concerned are not to be provided 'with the object of improving the conditions of life for the persons for whom the facilities are primarily intended' within paragraph (a), and, even if they were, neither limb of paragraph (b) would be satisfied, because pupils at schools and universities are not the public at large within limb (ii) and such pupils at 'universities' as defined in the draft Trust Deed are not necessarily young, old, infirm, disabled or poor and do not have need of the facilities concerned by reason of their youth, age, infirmity or disablement, poverty or social or economic circumstances within limb (i)."

To this memorandum of objection the Charity Commissioners replied on 6 November 1973, as follows:

". . . the Board of Charity Commissioners . . . came to the conclusion that the Trust is a charity and directed that it should be entered in the Register of Charities . . . The Commissioners could not accept the argument put forward in the Memorandum of Objection that, despite the passing of the Recreational Charities Act 1958, the promotion of a single sport could never be charitable unless the provision of facilities came within the principles of re *Mariette*(1) . . . The Commissioners do not

(1) [1915] 2 Ch 284.

suggest, of course, that the promotion of sport by a private club would be charitable under the provisions of the 1958 Act. Nor could the Commissioners accept the limited interpretation placed on re *Mariette*[1] in the Memorandum. The Judge said in that case 'The object of this [school] is the education, in the widest sense, of boys and young men between the ages of ten and nineteen. No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind.' The Judge subsequently declared to be charitable—'the advancement of that part of the educational work of the [school] which has to do with the bodily and physical development of the students'. In the Commissioners' view the true ratio decidendi of the case was that where the real object of a gift for encouraging particular sports or games was bodily and physical education, the gift was charitable, but aliter if this education was missing from the object of the gift. Young persons would ordinarily be the objects of such education, but the Commissioners could see no reason to restrict these objects to schoolboys or schoolgirls: university students could be included. But in any event, in the opinion of the Commissioners such objects are charitable under the provisions of the 1958 Act even though no specific mention was made of the Act in clause 3(a) of the trust deed. The objects set out in clause 3(b) of the deed are clearly charitable under the provisions of the 1958 Act and the Memorandum contains no argument to the contrary";

and, indeed, as I have noted, that is conceded before me.

I am uncertain on what date the actual registration was effected, but the matter has certainly taken an inordinately long time in coming before the Court. The originating summons appealing against the decision of the Charity Commissioners was issued on 30 January 1975; the affidavit in support was sworn on 10 June 1975; and the affidavits in opposition in May 1976. No explanation of this delay was vouchsafed.

In the originating summons, as required by RSC Ord 108, the Plaintiffs repeated their objections to registration, virtually in the same form as contained in the memorandum which I have already read. Although, of course, the Plaintiffs, as the Appellants, presented their case first, it will, I think, nevertheless be convenient to deal with the matter under the heads selected by Mr. Newsom, for the first three Defendants. He submitted that the Football Association Youth Trust was established for exclusively charitable purposes under one or all of three heads: first, as being for the advancement of education, within the second of Lord Macnaghten's categories in *Pemsel* v. *Special Commissioners of Income Tax*[2]; secondly, as being for a purpose beneficial to the community, within the fourth of such categories; and, thirdly, as being such under the Recreational Charities Act 1958. Leaving the last aside for the moment, it is quite clear that the object of the Football Association Youth Trust is to promote the playing of games and sports, especially association football, by pupils of schools and universities as defined in the trust deed. It is therefore on its face simply a trust to promote the playing of games, and it appears to me that, if that was all there was to it, a trust for this purpose could not possibly be charitable. I think this was decided in the Court of Appeal in In re *Nottage* [1895] 2 Ch 649. It is perfectly true that the facts in that case were extreme—the gift in question was a gift to a particular non-charitable society for the purpose of furnishing a yearly cup to be awarded for yacht

(1) [1915] 2 Ch 284. (2) 3 TC 53, at p 96; [1891] AC 531.

racing—but all the Judges dealt with the matter on a very broad footing. Thus, Kekewich J., before whom the matter first came, said this(1):

> "The racing of the yachts when built employs a large number of men, who are educated in the management of vessels which may become useful for the defence of the realm. But this testator had not these objects in view when he made this gift. He has told us that his object was to encourage the sport of yacht-racing. I cannot bring myself to hold that the sport of yacht-racing is beneficial to the community in the sense in which that phrase is used by Lord Macnaghten in the case in the House of Lords and by other learned judges. I cannot see that the benefit of the community is the natural direct and necessary result of this gift; and though I am far from saying that the result of the gift is not beneficial, I must hold that it is not beneficial to the community so as to constitute this a charitable gift. The consequence is that the gift fails."

Lindley L.J., on page 655, said this:

> "I cannot go the length of holding this to be a charitable gift. There is great difficulty in drawing the line between gifts which are charitable, in the wide sense in which lawyers use the term, and gifts which are not charitable; but this gift is, in my opinion, decidedly beyond the line. It is a prize for a mere game. The testator himself tells us what was in his mind: 'My object in giving this cup is to encourage the sport of yacht-racing.' Now, I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now. I do not attempt to draw the line. The authorities show that sometimes a case is a little on one side of it, sometimes a little on the other; but I deal with the present case on the broad ground that I am not aware of any authority pointing to the conclusion that a gift for the encouragement of a mere sport can be supported as charitable."

Lopes L.J. said(2):

> "I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community."

Rigby L.J. I think probably puts it a little more narrowly when he says(2):

> "If the present gift is to be supported as charitable, it must be on the ground that it is for a general public purpose. It is however plain from the words of the testator himself that he was not contemplating any such purpose. The Yacht Racing Association is a society of yacht-owners, the prizes are to be won by yacht-owners, and the testator tells us that his

(1) [1895] 2 Ch 649, at p 654. (2) *Ibid,* at p 656.

object in founding the prize is to encourage the sport of yacht-racing. There are many things which are laudable and useful to society which yet cannot be considered charitable, and this, in my opinion, is one of them."

This approach was echoed by Lord Wright in what is admittedly a *dictum* delivered by him in *Commissioners of Inland Revenue* v. *National Anti-Vivisection Society*(1) [1948] AC 31, at pages 41–2, where, dealing with the meaning of "charity", he said: "The legal significance is narrower than the popular." Then he deals with cases in which that was explained, and continues: "Healthy and manly sports are certainly in fact beneficial to the public, but apart from special concomitants are not generally entitled to qualify as charitable objects." At first sight the law might be thought to take a somewhat odd attitude on this point, because at the same time as In re *Nottage*(2) and the *National Anti-Vivisection Society* case lay down the general approach to sports, it is still well established that a gift of land for recreational purposes is a valid charitable gift, at any rate provided it does not exceed 20 acres: see the Mortmain and Charitable Uses Act 1888, s 6. If one thinks that that is perhaps going back a little too far, the charitable nature of recreation grounds in general was expressly affirmed by a number of their Lordships who decided the well-known case of *Baddeley* v. *Commissioners of Inland Revenue*(3) [1955] AC 572.

But I do not think that in fact there are any divided counsels of the law in this matter at all. I think the distinction is between taking recreation—playing any game, merely taking exercise or merely walking about, as one may fancy as a method of relaxation, the provisions of facilities for which may very well be charitable—and the direct promotion of a particular game or games. The first recreation is a charitable purpose, but the law has no particular regard for the second. The second, therefore, can be charitable only if, as Lord Wright says, it is not an end in itself but is part of some larger purpose. This is, I think, well brought out by In re *Mariette* [1915] 2 Ch 284, to which the Charity Commissioners referred. In this case a gift for the purpose of building "five courts or squash racket courts or some similar purpose" was held charitable, the gift being to a school which was itself a charity. Eve J. held, with obvious common sense, that for boys between the ages of 10 and 19 the development of the body was as much a part of education as the development of the mind, and that it would not be possible to leave the boys to their own devices during the whole of the time they were not actually at their school tasks. Thus he held that the gift was one to a charity "for purposes which seem to me to be included in the objects of the charity". In other words, he treated a reasonable amount of physical education as being incidental to the overall charitable purpose of the school. *London Hospital Medical College* v. *Commissioners of Inland Revenue*(4) [1976] 1 WLR 613, seems to me to follow that case exactly, but of course there in the case of a student union which, whilst by itself it would not have been a charitable object, because it was nevertheless in substance an integral part of the teaching establishment itself, was held to be charitable. Apart from In re *Mariette,* there are also cases which once again show the correctness of Lord Wright's *dictum.* They are concerned with the provision of sporting facilities for the army or for the police, and the cases establish that those can be charitable objects if, but only if, the real object is to increase the efficiency of the public service concerned. Where that is not the case—where, for example, the sport is provided as a mere recreation, even for members of a police force or similar—it is well established that there is no charity.

(1) 28 TC 311, at pp 352–3. (2) [1895 2 Ch 649.
(3) 35 TC 661. (4) 51 TC 365.

A Mr. Rattee, for the Commissioners, uses these cases in this way. He says that the trust deed here in question does not, in any manner, provide for the intermeshing of the education being provided for the pupils concerned and the sports for which provision is intended to be made. This is not a case where the sports and games are made part of, and hence subservient to, the concept of education as a whole, as is the case where the facilities are under the control of B the educational establishment itself. There is in this trust deed no requirement for the trustees to carry out the duties thereby laid upon them in conjunction with any particular institution; their activities will be entirely extra-curriculum. Mr. Newsom, on the other hand, maintained that the facilities were being provided in the context of organised education, facilities of which the pupils would or might otherwise go short. Mr. Rattee also says that there will be many C pupils in the institutions covered by the scope of the Football Association Youth Trust who will not be young, and for whom the kind of physical education which is adumbrated would not be in the slightest apposite. Mr. Newsom countered by submitting that obviously the vast bulk of the pupils concerned would be young persons in need of such education as part of their general or more specific education. Mr. Mummery, for the Attorney-General, D flung his weight behind Mr. Newsom's arguments.

Although I have a great deal of sympathy for those arguments, I do not think that I can let that sympathy blind me as to the law applicable. It appears to me that the purpose of this trust is not the provision of general physical education for the pupils: it appears to me to be the promotion of a number of specific games, without any necessary correlation between the playing of those E games and the education of the pupils as a whole. Quite consistently with the purposes of the trust—and I have a suspicion that it might in fact be even more consistent with its overall intention than not—the trust might be so operated as to be directed towards, putting it in its simplest terms, the early discovery of outstanding athletes, and not towards providing opportunities of rational recreation for those whose skills may be somewhat less than the general F average or, indeed, completely absent. In coming to this conclusion I have not overlooked the second part of clause 3(a), but I think that Mr. Rattee was correct when he submitted that the words

> "and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds and with a view to furthering this object"

G only express the draftsman's erroneous view of the effect of the earlier part of clause 3(a), and cannot control the operation of that part.

So, for this basically simple reason—that the law does not regard the encouragement of the playing of any or all sports as in itself charitable, but only where such playing is subservient to some wider charitable purpose; and that, although loosely connected with such charitable purpose, the trusts of the H Football Association Youth Trust are not in the present case so subservient—I come to the conclusion that this cannot be classed as an educational charity.

Similarly, I do not think that it can possibly be classed as a charitable trust under Lord Macnaghten's fourth head. I am willing to take to heart Mr. Newsom's injunction not to allow the examples in the books under this fourth

head to become ossificatory, if only because, as counsel in the *Incorporated Council of Law Reporting* case(1), I made a somewhat similar submission (though couched in much less felicitous language) to the Court of Appeal, which, broadly speaking, they were inclined to accept. But it appears to me that the reasoning in In re *Nottage*(2) and Lord Wright's *dictum* in the *National Anti-Vivesection Society* case(3) are entirely contrary to the supposition that the mere encouragement of the playing of games can possibly come under any head of charity if divorced from any other charitable purpose to which it may properly be regarded as an adjunct. I therefore think that this submission fails *a fortiori* to the failure of the Class 2 submission.

There is also a further ground which appears to me to be fatal to a claim under both heads, and it is this. While most schools are charities, many are not; some are undoubtedly run for private profit. The situation as to universities may be less clear, but it must be borne in mind, for example, that some American universities have campuses in this country. However, I rely upon the example of a school conducted for profit. It would be open to the trustees of the Football Association Youth Trust to apply their funds in the provision of sports equipment and in laying out and equipping both playing fields and indoor facilities and accommodation at such schools. The effect would be, in substance, to enhance the value of private assets in the hands of persons who were turning those private assets to account to their own profit. I cannot conceive of a purpose which is more clearly not charitable. Mr. Newsom met this point head on by boldly submitting that it would be a charitable purpose to supply a library to such a school, but I regret that I cannot possibly accept such a submission. Once it is apparent that, consistently with the terms of the trust, trust funds can be directly used to enhance the value of private property in the kind of manner which is here possible, I think it cannot possibly be said that the funds are applicable for charitable purposes only.

There is yet a final point which has given me some difficulty, and that is, in substance, although not entirely, Mr. Rattee's point on clause 9. I have no doubt at all but that the highly distinguished original trustees, and indeed all trustees of the fund hereafter appointed by the Football Association, will scrupulously observe the terms and conditions of the trust deed. But I find it difficult to ignore the fact that the trust fund has been set up by means of a donation from the Football Association itself, which is a body obviously formed and, I take it, with its leading object directed to that point, to promote the game of association football. It must presumably, therefore, in establishing the trust (because otherwise it would seem to be likely to be *ultra vires*), have been considering that it was in substance and effect promoting the playing of association football. Certainly, the whole of the funds of the trustees could, consistently with the terms of the trust deed, be applied towards that and none other game. I must confess that this possibility causes me some disquiet, and that disquiet is hardly assuaged by a consideration of paras 6 and 7 of the affidavit of Sir Harold Thompson. A trust whose real purpose is the early discovery and encouragement of budding soccer stars, however necessary from the point of view of national prestige in view of our present disastrous international showing, would not appear to me to be charitable on any footing. However, having indicated my disquiet, I do not think it would be right to pursue the matter in this particular case. I understand that there are several other broadly similar cases on the stocks in which the terms of the trust deeds vary somewhat, and in another case the point which is troubling me might well have even more relevance.

(1) 47 TC 321; [1972] Ch 73. (2) [1895] 2 Ch 649. (3) 28 TC 311.

A I now turn to Mr. Newsom's third point—that under s 1 of the Recreational Charities Act 1958. That section provides as follows:

> "(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in
> B this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit. (2) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless (*a*) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and (*b*)
> C either—(i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or (ii) the facilities are to be available to the members or female members of the public at large. (3) Subject to the said requirement, subsection (1) of this section applies in particular to the provision of facilities at village halls, community centres and women's
> D institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity."

Mr. Newsom says that the trust in clause 3(a) falls within the ambit of this section. Of course, there is no doubt but that the trust in clause 3(b) does, and
E it would be somewhat surprising to find that clause 3(a) did as well, but such surprise is of course not a legitimate means of, or aid to, construction. The matter all hinges round the words "social welfare", which are in effect defined in subs (2). Mr. Newsom submitted that these are very wide words indeed and fully comprehended the kind of social interchange which the playing of sports of all kind engenders. In my view, however, these words in themselves
F indicate that there is some kind of deprivation—not, of course, by any means necessarily of money—which falls to be alleviated; and I think that this is made even clearer by the terms of subs (2)(*a*). The facilities must be provided with the object of improving the conditions of life for persons for whom the facilities are primarily intended. In other words, they must be to some extent and in some way deprived persons. I think it is impossible for any Court to say that, as a
G class, pupils at schools and universities are "deprived", any more than Eve J. was able, in In re *Drummond* [1914] 2 Ch 90, at page 96, to hold that workmen working at ordinary rates of pay which seemed to him very low were "poor" for the purpose of having their poverty relieved by a charitable trust. The pupils represent an ordinary cross-section of the community, neither in aggregate more nor less deprived than any other section of the community. In any event,
H the words used are "conditions of life", and they postulate, I think, that there is something special about such conditions. If anything is special about the conditions of pupils at our schools and universities taken as a whole, it is probably that they are rather better cared for than those who have not yet commenced their schooling, or those who have just left. Here, however, I am perhaps assuming judicial knowledge of something which may be debatable.
I What is perfectly clear, however, is that there is no evidence (as distinct from some assertion) before me whatsoever on this point, and therefore I cannot regard the fact that the facilities have been provided in the interests of social welfare as having been established.

I therefore think that the Football Association Youth Trust fails the test propounded in subs (2)(*a*). If this hurdle had been surmounted, I think I should have been in Mr. Newsom's favour on the test in subs (2)(*b*). I think one would have to look at the matter broadly, and, notwithstanding the presence of many mature students in the band of possible beneficiaries of the trust, I think it would be right to regard the trust as intended primarily to benefit the young.

Mr. Newsom did make a point under subs (3) to the effect that the mention of village halls, community centres and women's institutes showed that the section was taking a very broad view of the meaning of "social welfare", since these are all examples of bodies whose composition and membership, or scope, is nearly universal. I do not think, however, that on a proper reading of the subsection this is what emerges. All that it is saying is that the facilities with which the section as a whole is dealing may be provided at these places; that is to say, on these particular premises belonging to or associated with the examples given. It is, I think, therefore, directed to quite a different point.

Accordingly, for the reasons that I have given, I feel bound to allow this appeal.

Appeal allowed.

The Trustees' appeal was heard in the Court of Appeal (Stamp, Orr, and Bridge L.JJ.) on 18 October 1978 when judgment was given in favour of the Crown (Bridge L.J. dissenting), with costs.

D. K. Rattee Q.C. for the Commissioners of Inland Revenue.

Andrew Morritt Q.C. and *Spencer Maurice* for the first, second and third Defendants (the Trustees).

J. F. Mummery for the fourth Defendant (the Attorney-General).

The following cases were cited in argument in addition to those referred to in the judgment:—*Commissioners of Inland Revenue* v. *City of Glasgow Police Athletic Association* 34 TC 76; [1953] AC 380; 1953 SC (HL) 13; In re *Patten* [1929] 2 Ch 276; *Peterborough Royal Foxhound Show Society* v. *Commissioners of Inland Revenue* 20 TC 249; [1936] 2 KB 497; *Commissioners of Inland Revenue* v. *National Anti-Vivisection Society* 28 TC 311; [1948] AC 31; In re *Dupree's Deed Trusts* [1945] 1 Ch 16; *Morice* v. *Bishop of Durham* (1805) 10 Ves 522; *Londonderry Presbyterian Church House Trustees* v. *Commissioners of Inland Revenue* 27 TC 431; [1946] NI 178; *Baddeley* v. *Commissioners of Inland Revenue* 35 TC 661; [1955] AC 572; *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* [1959] AC 293; *Wyn* v. *Skegness U.D.C.* [1967] 1 WLR 52.

Stamp L.J. (*read in his absence by Orr L.J.*)—This is an appeal from an Order of Walton J. made on 13 July 1977 whereby he allowed an appeal by the Commissioners of Inland Revenue against a decision of the Charity Commissioners to register a trust known as the Football Association Youth Trust as a charity pursuant to s 4 of the Charities Act 1960.

A The case in the Court below is fully reported in [1978] 1 WLR 664(1) and I need not set out the facts. The relevant parts of the trust deed—for I do not think in the end that anything turns on the construction of the recitals—are contained in clause 3 of the deed which is in the following terms:

> "The objects of the Trust are (a) to organise or provide or assist in the organisation and provision of facilities which will enable and encourage
> B pupils of Schools and Universities in any part of the United Kingdom to play Association Football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds and with a view to further this object (i) to provide or assist in the provision of Association Football or games or sports equipment of
> C every kind for the use of such pupils as aforesaid (ii) to provide or assist in the provision of courses lectures demonstrations and coaching for pupils of Schools and Universities in any part of the United Kingdom and for teachers who organise or supervise playing and coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iii) to promote provide or assist in the promotion and provision
> D of training colleges for the purpose of training teachers in the coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iv) to lay out manage equip and maintain or assist in the laying out management equipment and maintenance of playing fields or appropriate indoor facilities or accommodation (whether vested in the Trustees or not) to be used for the teaching and playing of
> E Association Football or other sports or games by such pupils as aforesaid (b) to organise or provide or assist in the organisation or provision of facilities for physical recreation in the interests of social welfare in any part of the United Kingdom (with the object of improving the conditions of life for the boys and girls for whom the same are provided) for boys and girls who are under the age of twenty-one years and who by reason of their
> F youth or social and economic circumstances have need of such facilities."

I confess I have found great difficulty in attaching any precise or clear meaning to the phrase "physical education and development of such pupils . . ." where those words appear in clause 3(a) of the trust deed. Walton J. took the view that the settlor or draftsman wrongly assumed that the "organisation and provision of facilities which will enable and encourage pupils . . . to play Association
G Football . . ." would automatically assist in ensuring that due attention is given to physical education and development. In my view, however, the proper approach to the construction of para (a) is to construe "physical education and development", which I find an elusive phrase, as connoting something which the playing of association football will assist in ensuring. Mr. Morritt on behalf of the trustees of the deed, arguing that the trust fell to be regarded as an
H educational trust, was indeed, I think, disposed to accept this latter view. He submitted that the trustees in deciding what facilities to provide were bound to consider whether a contemplated facility would or would not assist in ensuring that due attention was given to the physical education and development of the pupils and that the trust had a single object consisting of the physical education and development of the pupils. Paragraph (a) must be read as a whole and
I clearly I think it is not *any* games and sports for which facilities may be provided consistently with the terms of the trust deed but only those of a physical

(1) Page 415 *ante*.

character. But in relation to association football the settlor has made it clear that, for the purposes of the trust, facilities which do enable and encourage pupils to play that game are to be regarded as "thereby" assisting in ensuring that due attention is given to their physical education and development. A game of association football is a game of association football, as well (or as ill) calculated to assist in ensuring that due attention is given to the physical education and development of the 22 pupil players whether it is played at Wembley before an audience numbering many thousands, at a school as a house match, or on one of many pitches in one of the parks. So far as regards the effect on the players, one game of association football is so like another that it is quite impossible for the trustees to say in relation to association football that some facilities do and some do not assist in ensuring that due attention is given to the physical education and development of the pupils. In relation to other games and sports, however, the trustees are in my judgment constrained to have regard to the phrase "the physical education and development" so that facilities for the playing of a sedentary game indoors would not be authorised. Thus the words "physical education and development" cannot be rejected as mere surplusage or as showing a failure to appreciate that association football does not assist in ensuring that result, but must be construed as indicating something which a young man acquires when playing such games as association football. And whatever that something may mean it has in my judgment nothing whatever to do with education in the sense in which that word is used in relation to the law of charities. Sub-clauses (ii) to (iv) inclusive of sub-para (a) of clause 3 fortify me in my conclusion that the object of the trust is the "physical education and development of pupils of schools and universities" in the sense that the playing of association football has that result and so promotes that object. Each of the facilities described in those sub-paragraphs appears to be calculated to promote skill in the playing of association football and other games or sports, thus, so it is assumed, furthering the physical education and development of those who play them.

I would summarise my judgment on this part of the case by saying that as a matter of construction the expression "physical education and development" where it appears in para (a) connotes something which a young man or boy must expect to obtain by playing the game of association football and that a trust to promote the physical education and development when the words are construed in that sense is not a trust for the promotion of "education" in any ordinary sense of that term or in the sense that that word is used in the law of charity.

I must emphasise that Mr. Morritt did not contend that on the true construction of the deed the games and sports for which facilities are to be provided are to be enjoyed as part of the curriculum of a school or university. It follows that the reasoning by which Eve J. concluded in In re *Mariette*(1) that the gift there, which was to an institution which was a school, and so itself clearly an educational charity, for a purpose of the school, was itself a charitable gift, is not applicable although the particular purpose for which the gift was made was the erection of five courts. *London Hospital Medical College* v. *Commissioners of Inland Revenue*(2) [1976] 1 WLR 613 is similarly distinguishable. You do not however convert what would not otherwise qualify as a charitable gift into a charitable gift by limiting the object of the trust to those persons who

(1) [1915] 2 Ch 284. (2) 51 TC 365.

A are pupils of or, if you will, are being educated at, a school or university. I turn to consider the submission that the trust is charitable as falling within the fourth class of charitable purposes defined in *Special Commissioners of Income Tax* v. *Pemsel*(1) [1891] AC 531 as a trust beneficial to the community within the spirit and intendment of the preamble to 43 Eliz c 4. As Lord Wilberforce remarked in the Privy Council in the recent case of *Brisbane City Council* v. B *Attorney-General* [1978] 3 WLR 301, at page 305, the lack of precision of the latter words has to be made good by reference to decided authorities which, as has been said, are legion and not easy to reconcile: see *Williams's Trust* v. *Commissioners of Inland Revenue*(2) [1947] AC 447, at page 455. In the latter case, however, the House of Lords (see in particular at page 455) laid it down very clearly that in order to come within the fourth class the gift must be not C only for the benefit of the community but beneficial in a way which the law regards as charitable and within the spirit and intendment of the Statute: (see also In re *Strakosch* [1949] Ch 529).

It can hardly be doubted that exercise and physical recreation are today objects which are of benefit to the community and a trust to provide facilities for exercise and physical recreation accordingly would qualify as a trust for D objects beneficial to the community. And so the trust in the instant case ought in my opinion and judgment to be so regarded. And since it was the decision of the majority of this Court in *Incorporated Council of Law Reporting* v. *Attorney-General*(3) [1972] Ch 73 that objects of general utility or for purposes beneficial to the community are "*prima facie*" charitable, this would lead to the conclusion that the trust sought to be set up by the trust deed is indeed E "charitable" within the fourth class. I must, if I can, reconcile this decision with *Williams's Trust* v. *Commissioners of Inland Revenue* or if I cannot I must, as I understand it, follow the more recent decision in this Court. For this purpose I take refuge in the words "*prima facie*" in the *Council of Law Reporting* case, for I find that although the trust here qualifies as a trust for objects beneficial to the community and so is *prima facie* charitable, when one comes to consider in F what manner the trust money might be applied one finds that it might be applied for purposes which are not charitable. Here the trustees could in my judgment, consistently with the terms of the trust deed, apply the whole of the trust fund in providing facilities which would enable and encourage pupils of schools and universities to engage in such sports as fishing, shooting, fox-hunting and yachting. None of those sports is in my judgment less well G adapted than association football to "ensure that due attention is given to the physical education and development" of those people who engage therein. There is clear authority of this Court that a trust for such purposes is not charitable (see In re *Nottage* [1895] 2 Ch 649) and it is also clear that if on the true construction of a trust instrument the trust property may consistently therewith be applied for purposes which are not charitable, the trust fails: (see H Lord Macnaghten in *Dunne* v. *Byrne* [1912] AC 407, at page 411). I have not forgotten that the word "play" is the word used in para (a) and of course that is not an appropriate word to describe engaging in fishing, shooting, fox-hunting or yachting. Nevertheless in the context in which one finds the word "play": to "play association football or other games or sports", the word "play" must extend to embrace engaging in a sport.

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(1) 3 TC 53. (2) 27 TC 409, at p 427. (3) 47 TC 321.

I turn to consider the submission that the trust is one falling within s 1 of the Recreational Charities Act 1958. That section provides as follows: A

> "(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or B institution to be charitable must be for the public benefit. (2) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless (*a*) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and (*b*) either (i) those persons have need of such facilities as aforesaid by reason of their C youth, age, infirmity or disablement, poverty or social and economic circumstances; or (ii) the facilities are to be available to the members or female members of the public at large."

I will assume, as I think did the Judge in the Court below, that the trust declared by 3(a) of the trust deed is a trust to provide facilities for recreation and that there is in it the necessary element of public benefit spoken of in s 1(1) D of the 1958 Act. The question then turns on whether the facilities to be provided satisfy the requirement that they are to be provided "in the interests of social welfare". Even if the phrase "in the interests of social welfare" fell to be construed without the limitation imposed by subs (2) of the section I would take the view, reading the provisions of the trust deed as a whole, that it could not be said of it that the facilities provided, or to be provided, pursuant to E clause 3(a) are provided in the interests of "social welfare". No doubt the funds could, consistently with the terms of the trust, be applied in such a way that they did, and were intended to, promote the interests of social welfare. The purchase of a playing field in part of a great town where there were no facilities for fresh air or recreation to be used by the public at large for the playing of games might well qualify. But an application of the funds in encouraging the F pupils of what I may call a "rugger" school to play "soccer" would on the one hand be authorised by clause 3(a) and on the other hand could hardly satisfy the social welfare requirement of s 1(1) of the Act. Similarly, to provide facilities for one or other of the sports which I have mentioned would hardly be an application of the trust fund for the promotion of social welfare. When one comes to the limitation of the meaning of the phrase "the facilities are provided G in the interests of social welfare" found in subs (2) of the section, and finds that to satisfy that requirement the facilities must be provided "with the object of improving the conditions of life for the persons for whom the facilities are primarily intended", the difficulty of fitting the instant trust into the Act is underlined. One has to ask the question: Who are the persons for whom the facilities are primarily intended? If the answer be that the facilities are H primarily intended for pupils of schools and universities in any part of the United Kingdom—and I can think of no other answer—it cannot in my judgment with any show of reason be argued that the facilities are provided with the object of improving the conditions of life for the pupils of such schools and universities. Of course they are not. The facilities are to be provided for those of them who are persuaded to, or do, play football or some other game I or sport quite irrespective of their conditions of life.

I must add this. The Act does not validate trust deeds but merely provides that the provision of facilities which might not otherwise be regarded as charitable shall be so regarded. It does not validate trusts which embrace other

objects which are not charitable or which authorise application of the trust fund for non-charitable purposes. Accordingly, if it be correct that on the true construction of the deed in the instant case the trustees could, consistently with the terms of the trust deed, utilise the trust fund in providing facilities for, for example, fox-hunting, which if there be such a thing as "physical education and development" would be a fine sport to promote it, then the trust could only be saved by the Act if the fox hunting has to be provided "in the interests of social welfare".

In my judgment the learned Judge in the Court below came to a correct conclusion and I would dismiss this appeal.

Orr L.J.—I agree that this appeal should be dismissed for the reasons given by Stamp L.J. and I only add a brief judgment of my own because of the different conclusions reached in the judgment to be delivered by Bridge L.J.

As to the construction of clause 3(a) of the trust deed, two points arise of which the first concerns the effect of the words "and thereby to assist in ensuring that attention is paid to the physical education and development of such pupils . . . as well as the development and occupation of their minds". Walton J. took the view that these words expressed no more than an erroneous view of the draftsman as to the effect of the earlier part of clause 3(a) of the deed and could not control the operation of that part. I agree, but I agree with Stamp L.J. that the proper approach to the words in question is to construe "physical education and development" as denoting something which the playing of association football will assist in ensuring, with the result that the trust has the single object of physical education and development of the pupils. The second question of construction is whether the use of the word "play" in the passage "to play Association Football or other games or sports" in clause 3(a) is restrictive of the kinds of sports therein referred to. But the verb "play" is inappropriate to any sport which is not a game, and clearly in my judgment it denotes "participate in". As to the law applying to the case, we were referred in argument to a very large number of cases, but those which seem to me to be most helpful for the present purposes are In re *Nottage* [1895] 2 Ch 649 in which it was held by this Court that a gift for the encouragement of a sport, though it might be beneficial to the public, could not be upheld as charitable; In re *Mariette* [1915] 2 Ch 284 (subsequently followed in *London Hospital Medical College* v. *Commissioners of Inland Revenue*(1) [1976] 1 WLR 613) where it was held that such a gift to a school which was itself a charity was a valid charitable bequest; and as to general principles the speech of Lord Simonds in *Williams's Trust* v. *Commissioners of Inland Revenue*(2) [1947] AC 447, at page 454, in which he pointed out that it remains the law that a trust is not charitable unless it is within the spirit and intendment of the preamble to the Statute 43 Eliz c 4, and that not every object of general utility must necessarily be a charity. To these authorities I would add the statement of Lord Macnaghten in *Dunne* v. *Byrne* [1912] AC 407, at page 411, that if trust property on the true construction of the trust instrument and consistently therewith may be applied for purposes which are not charitable, the trust fails.

(1) 51 TC 365. (2) 27 TC 409, at p 426.

On the first issue in the appeal, whether the trust in question is charitable within the first class of charitable purposes defined by Lord Macnaghten in *Special Commissioners of Income Tax* v. *Pemsel*(1) [1891] AC 531 I agree with Stamp L.J. that the trust here in question, however beneficial it may be, is not a trust for the promotion of education either in the ordinary sense of that word or in the sense in which it is used in the law of charity and I also agree that on the facts of the present case it cannot be distinguished from the principle laid down in In re *Nottage*(2) on the basis of the reasoning applied in In re *Mariette*(3) and the *London Hospital Medical College* case(4).

On the next issue, whether the trust is charitable within Lord Macnaghten's fourth class as being for purposes beneficial to the community, I accept that the trust is *prima facie* charitable, but agree with Stamp L.J. that on the authority of *Dunne* v. *Byrne*(5) the trust must fail on the ground that the trustees could, consistently with the trust deed, apply the fund towards sports of which, on the authority of In re *Nottage*, the promotion is not a charitable purpose.

The remaining issue is whether the facilities to be provided under the trust are provided "in the interests of social welfare" for the purpose of s 1 of the Recreational Charities Act 1958 and on this issue I agree with Stamp L.J. that, while the trust funds could under the terms of the trust be applied in such a manner as to comply with this requirement, they could also, consistently with the trust provisions, be applied to forms of sport of which the promotion could not possibly be said to be in the interests of social welfare.

For these reasons, agreeing with Stamp L.J., I would dismiss this appeal.

Bridge L.J.—I am very conscious that, in contrast with my Lords, I have no experience in the field of charity law, and it is with diffidence and regret that I express a different conclusion.

The first question which arises in this appeal is whether the object of the Football Association Youth Trust which is defined in clause 3(a) of the trust deed of 30 October 1972 is charitable as being for the advancement of education. The arguments of Counsel took us helpfully through all the authorities having any relevance in this field, but in the end I believe this question is a short one which turns on the construction of the language of the clause. For convenience of reference I set out the words of the clause which define the object divided into two parts: The first part is ". . . to organise or provide or assist in the organisation and provision of facilities which will enable and encourage pupils of Schools and Universities in any part of the United Kingdom to play Association Football or other games or sports". The second part is: ". . . and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds . . ." The ensuing words "and with a view to furthering this object" must refer back to both the first and second parts envisaged as defining a composite object to which all that follows in sub-clauses (i) to (iv) is subordinate. Walton J., apparently confining his attention to the first part, declared that this was "on its face simply a trust to promote the playing of games". He later explained his disregard of the second part as based on acceptance of the submission that it only expresses "the draftsman's erroneous view of the effect of the (first part) and cannot control

(1) 3 TC 53. (2) [1895] 2 Ch 649. (3) [1915] 2 Ch 284.
(4) 51 TC 365. (5) [1912] AC 407.

A the operation of that part"(1). With all respect to the learned Judge, I am quite unable to accept this approach. I know of no canon of construction whereby one part of a document, being in no way repugnant, can be thus dismissed as expressing a mistaken interpretation by the draftsman himself of what he intended by some other part. All parts of a document must be read as conveying the totality of the draftsman's intention and so far as possible harmonised on
B the premise that each part was included as having some positive role to play in expressing that intention. Applying these principles I can see no difficulty in harmonising the two parts of clause 3(a) or in assigning to both a significant effect in denoting the object which this clause empowers the trustees to promote. The first part of the clause places no limitation on the kind of games or sports which are to be facilitated and encouraged and, if it stood alone,
C would include purely sedentary games. But the second part makes clear that it is only such games or sports as are capable of promoting physical education or development as are intended. This is an obvious and simple demonstration of the necessity for giving some effect to the second part of the clause in controlling the operation of the first part. I see no reason, however, why it should not be construed as indicating to the trustees not only the nature of the
D games or sports which they are to encourage but also the wider considerations they must keep in mind in deciding whether or not in any particular circumstances it is appropriate that particular sporting facilities should be provided at the expense of the trust. If this is a fair reading of clause 3(a), it is by no means simply a trust to promote the playing of games. The three elements which determine the essential character of the trust are: (*a*) the facilities to be
E provided are to be for games or sports (including but not limited to football) having a potential value for physical education and development; (*b*) the beneficiaries qualifying to enjoy the facilities are to be all persons engaged in any formal educational process; (*c*) the overriding objective to be served by the provision of the facilities is to ensure that the physical side of the beneficiaries' education is not neglected.

F On the face of it this construction of clause 3(a) seems to me to create a valid charitable trust for an exclusively educational purpose. It is not disputed that the class of beneficiaries represents a sufficiently important section of the community to provide the necessary public element. The importance of the part which organised sporting activities can and should play in the overall educational development of the young citizen at every stage of the educational
G process can hardly be over-emphasised.

As against this view, however, a number of objections have been advanced. First, it has been argued by Mr. Rattee that if once the second part of clause 3(a) is allowed to affect the construction of the clause, the result is that the clause becomes so vague that the purposes of the trust could not be carried into execution by the Court, and hence no valid charitable trust is created. It is
H certainly possible to envisage situations in which it might be difficult to give a confident answer to the question whether the facilities proposed to be provided would or would not serve the purpose of ensuring due attention to physical education and development. Given a class of beneficiaries as wide as pupils of schools and universities, as defined in the trust deed, it may perhaps be difficult to postulate a situation where facilities to be provided for members of the class
I for any sport with potential value for physical education could be said to fall

(1) Page 421 *ante*.

clearly outside the terms of the trust on the ground that they were not necessary to ensure due attention to physical education and development. Conversely, however, there could be not the slightest difficulty for the Court or for trustees to identify situations where a clear need for enhanced opportunities for physical education and development was established and to direct the resources of the trust to the provision of facilities to meet that need. In my judgment neither the considerable width of the object defined by clause 3(a), nor the difficulty of drawing with precision its outer boundary are considerations effective to defeat its charitable status. As Kennedy L.J. observed in In re *Wedgwood* [1915] 1 Ch 113, at page 121:

> "There are, I suppose, very few, if any, charities of a wide character, such as, to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination."

A second objection, closely related perhaps to the first, is summarised in the following passage from the learned Judge's judgment(1):

> "This is not a case where the sports and games are made part of, and hence subservient to, the concept of education as a whole, as is the case where the facilities are under the control of the educational establishment itself. There is in this trust deed no requirement for the trustees to carry out the duties thereby laid upon them in conjunction with any particular institution; their activities will be entirely extra-curriculum."

I do not myself see the force of this point. Assisting existing educational establishments to provide enhanced sporting facilities may be one way, and perhaps the best way, of ensuring that the declared educational objective of clause 3(a) is achieved. But I cannot see why it need necessarily be the only way. The process of education is not confined to school or university hours, terms or premises and the fact that organised sporting facilities may be provided away from school or university on a extra-curricular basis does not mean that they can have no educational value. On the contrary, the importance of such facilities is expressly recognised by s 53 of the Education Act 1944.

The learned Judge saw a third and fatal objection to the charitable status claimed for clause 3(a) in the ability of the trustees to apply their funds in "the provision of sports equipment and in laying out and equipping both playing fields and indoor facilities and accommodation" at schools conducted for profit. Mr. Rattee advanced no argument in support of this view and I need say no more than that Mr. Morritt satisfied me that any such application of trust funds would involve a breach of trust, since the property in question would pass out of control of the trustees and could be diverted by the new owners to purposes not within the trust.

A fourth objection, which the learned Judge considered without expressing any concluded view about it, suggests that clause 9 of the trust deed, whereunder the chairman for the time being of the Football Association is to be *ex officio* chairman of the trustees and the executive committee of the Football Association is to have the power of appointing new trustees, may be considered as throwing light on the objects set out in clause 3 and may lead to the conclusion that the real object of the trust is to promote the game of football as such by, for example, the early discovery and encouragement of potential professional footballers. It is not, of course, suggested that the trust deed is in

(1) Page 421 *ante*.

A any way a sham or that the trustees will commit any breach of trust. In these circumstances it is not legitimate, as it seems to me, to look at the identity of the trustees or at the supposed motives of the founders of the trust as throwing light on the objects defined in clause 3; see Re *McDougall* [1957] 1 WLR 81, *per* Upjohn J., at page 91, and *Incorporated Council of Law Reporting* v. *Attorney-General*(1) [1972] Ch 73, *per* Buckley L.J., at page 99.

B Accordingly I reach a conclusion favourable to the Appellants on the ground that the trust created by clause 3(a) falls within the second category of Lord Macnaghten's classification of charities in *Special Commissioners of Income Tax* v. *Pemsel*(2) [1891] AC 531, at page 583, as being for the advancement of education. Having reached that conclusion, I do not feel that I can usefully express any opinion on the question whether, if it were not within the C second category, it would fall within the fourth category as being for other purposes beneficial to the community.

I turn therefore to consider whether the object defined by clause 3(a) is charitable under the express terms of s 1 of the Recreational Charities Act 1958. Are the facilities for recreation contemplated in this clause to be "provided in the interests of social welfare" under subs (1)? If this phrase stood D without further statutory elaboration, I should not hesitate to decide that sporting facilities for persons undergoing any formal process of education are provided in the interests of social welfare. Save in the sense that the interests of social welfare can only be served by the meeting of some social need, I cannot accept the learned Judge's view that the interests of social welfare can only be served in relation to some "deprived" class. The Judge found this view E reinforced by the requirement of subs (2)(*a*) that the facilities must be provided "with the object of improving the conditions of life for the persons for whom the facilities are primarily intended". Here again I can see no reason to conclude that only the deprived can have their conditions of life improved. Hyde Park improves the conditions of life for residents in Mayfair and Belgravia as much as for those in Pimlico or the Portobello Road and the village hall may improve F the conditions of life for the squire and his family as well as for the cottagers. The persons for whom the facilities here are primarily intended are pupils of schools and universities, as defined in the trust deed, and these facilities are in my judgment unquestionably to be provided with the object of improving their conditions of life. Accordingly the ultimate question on which the application of the Statute to this trust depends, is whether the requirements of subs G (2)(*b*)(i) are satisfied on the ground that such pupils as a class have need of facilities for games or sports which will promote their physical education and development by reason either of their youth or of their social and economic circumstances, or both. The overwhelming majority of pupils within the definition are young persons and the tiny minority of mature students can be ignored as *de minimis*. There cannot surely be any doubt that young persons as H part of their education do need facilities for organised games and sports both by reason of their youth and by reason of their social and economic circumstances. They cannot provide such facilities for themselves but are dependent on what is provided for them. There is overwhelming evidence that for the class as a whole the facilities available to meet the need are wholly inadequate: see the Report of the Wolfenden Committee on Sport (1960); the Second Report of

(1) 47 TC 321, at p 345. (2) 3 TC 53, at p 96.

the House of Lords Select Committee on Sport and Leisure (1973); and the White Paper on Sport and Recreation, Commd 6200 (1975). A

Accordingly I have reached the clear conclusion that all the requirements of the Statute are here satisfied and I would allow the appeal on that ground also.

Appeal dismissed, with costs. Leave to appeal to the House of Lords granted. B

The Trustees' appeal was heard in the House of Lords (Lords Hailsham of St. Marylebone L.C., Diplock, Salmon, Russell of Killowen and Keith of Kinkel) on 28, 29 and 30 January 1980 when judgment was reserved. On 6 March 1980, judgment was given unanimously against the Crown, with costs.

Andrew Morritt Q.C. and *Spencer Maurice* for the Trustees. C

J. F. Mummery for the Attorney-General.

D. K. Rattee Q.C. and *C. H. McCall* for the Crown.

The following cases were cited in argument in addition to those referred to in Lord Hailsham L.C.'s speech:—In re *Shaw's Will Trusts* [1952] Ch 163; *Kearien* v. *Kearien* [1957] SR NSW 286; *London Hospital Medical College* v. *Commissioners of Inland Revenue* 51 TC 365; [1976] 1 WLR 613; In re *Pleasants* (1923) 39 TLR 675; *Commissioners of Inland Revenue* v. *City of Glasgow Police Athletic Association* 34 TC 76; [1953] AC 380; In re *Astor's Settlement Trusts* [1952] Ch 534. D

Lord Hailsham of St. Marylebone L.C.—My Lords, by a deed dated 30 October 1972 between The Football Association Ltd. described as "the donor" E and three persons named as the original trustees the donor purported to set up a trust to be known as The Football Association Youth Trust. The sole question for decision in the appeal before the House is whether the deed was effective in setting up a valid charitable trust. The Charity Commissioners decided that it was so effective, overriding the objections of the Crown. Walton J. decided that it was not and in his conclusion was supported by a majority F (Stamp and Orr L.JJ.) of the Court of Appeal, who, however, in reaching this conclusion, did so for reasons not merely different from but, in some respects, diametrically opposed to, the reasons which found favour with Walton J. Bridge L.J., dissenting from the majority, supported the view of the Charity Commissioners. There is thus ample room for a legitimate difference of opinion. Happily, in your Lordship's House, opinion appears to be substan- G tially unanimous that the appeal should be allowed.

Four questions arose for decision below. In the first place neither the parties nor the judgments below were in agreement as to the proper construction of the trust deed itself. Clearly this is a preliminary debate which must be settled before the remaining questions are even capable of decision. In the H second place the Appellants contend and the Crown dispute, that, on the correct construction of the deed, the trust is charitable as being for the advancement of education. Thirdly, the Appellants contend and the Crown

A dispute that if they are wrong on the second question the trust is charitable at least because it falls within the fourth class of Lord Macnaghten's categories as enumerated in *Special Commissioners of Income Tax* v. *Pemsel*(1) [1891] AC 531 as a trust beneficial to the community within the spirit and intendment of the preamble to the Statute 43 Eliz 1, c 4. Fourthly, the Appellants contend and the Crown dispute that, even if not otherwise charitable, the trust is a valid B charitable trust as falling within s 1 of the Recreational Charities Act 1958, that is as a trust to provide or to assist in the provision of facilities for recreation or other leisure time occupation provided in the interests of social welfare.

In the events which happened, their Lordships have been greatly assisted by helpful arguments from Counsel for the Appellants and the Crown and by a valuable contribution from Counsel instructed on behalf of the Attorney- C General as guardian of charities. Since we have reached the view that the trust is a valid educational charity their Lordships have not sought to hear argument nor, therefore, to reach a conclusion on any but the first two disputed questions in the dispute. Speaking for myself, however, I do not wish my absence of decision on the third or fourth points to be interpreted as an indorsement of the majority judgments in the Court of Appeal nor as necessarily dissenting D from the contrary views contained in the minority judgment of Bridge L.J. For me at least the answers to the third and fourth questions are still left entirely undecided.

I now turn to the question of construction, for which it is necessary that I reproduce the material portions of the deed. The first recital to the deed reads as follows:

E "Whereas—(1) The First Donor is desirous of establishing a charitable trust which would have as the main objects the furtherance of education of Schools and Universities in any part of the United Kingdom encouraging and facilitating the playing of association football or other games and sports at such Schools and Universities and thus assisting to ensure that due attention is given to the physical education and character development F of pupils at such Schools and Universities as aforesaid as well as the development and occupation of their minds and the organisation or provision or assistance in the organisation or provision of facilities for physical recreation for young people in the interests of social welfare in any part of the United Kingdom."

Some reliance was placed on this recital in argument, but, since I do not find G the remainder of the deed ambiguous, I need only say that for the purposes of what follows I have drawn no assistance from it. The interpretation clause of the deed (clause 1), so far as material, reads as follows: 1(a) [Defines "the Trust"]. (b) [Defines "the Trustees"]. "(c) 'Schools' has the same meaning as in the Education Act 1944. (d) 'Universities' means universities, training colleges for teachers, or other institutions of further education (including professional H and technical education approved by the trustees)." (e) [Defines "the Trust Fund"]. The clause of the deed which is effectively for construction is clause 3, which I now reproduce *in extenso*. It reads:

"3. The objects of the Trust are:—(a) to organise or provide or assist in the organisation and provision of facilities which will enable and

(1) 3 TC 53.

encourage pupils of Schools and Universities in any part of the United Kingdom to play Association Football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds and with a view to furthering this object (i) to provide or assist in the provision of Association Football or games or sports equipment of every kind for the use of such pupils as aforesaid (ii) to provide or assist in the provision of courses lectures demonstrations and coaching for pupils of Schools and Universities in any part of the United Kingdom and for teachers who organise or supervise playing and coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iii) to promote provide or assist in the promotion and provision of training colleges for the purpose of training teachers in the coaching of Association Football or other games or sports at such Schools and Universities as aforesaid (iv) to lay out manage equip and maintain or assist in the laying out management equipment and maintenance of playing fields or appropriate indoor facilities or accommodation (whether vested in the Trustees or not) to be used for the teaching and playing of Association Football or other sports or games by such pupils as aforesaid (b) to organise or provide or assist in the organisation or provision of facilities for physical recreation in the interests of social welfare in any part of the United Kingdom (with the object of improving the conditions of life for the boys and girls for whom the same are provided) for boys and girls who are under the age of twenty-one years and who by reason of their youth or social and economic circumstances have need of such facilities."

I pause here only to say that no question arises as to clause 3(b) above which clearly corresponds to the language of the Recreational Charities Act 1958. Controversy therefore revolves solely around 3(a), since it is obvious that, if this cannot be shown to be solely for charitable purposes, the whole trust ceases to be a charitable trust. Walton J., adopting for this purpose the construction propounded for the Crown, construed the words between "thereby" and "object" where they occur in clause 3(a) of the deed as if they "only express the draftsman's erroneous view of the effect of the earlier part of clause 3(a), and cannot control the operation of that part". ([1978] 1 WLR 664, at page 673(1)). Stamp L.J. appears, though not quite unequivocally, to differ. After reciting Walton J.'s view, he said ([1979] 1 WLR 130, at page 134(2)):

> "In my view, however, the proper approach to the construction of para (a) is to construe 'physical education and development', which I find an elusive phrase, as connoting something which the playing of association football will assist in ensuring."

And on the following page(3):

> "But in relation to association football the settlor has made it clear that, for the purposes of the trust, facilities which do enable and encourage pupils to play that game are to be regarded as 'thereby' assisting in ensuring that due attention is given to their physical education and development."

Orr L.J. claimed (page 138(4)) to prefer the view of Stamp L.J. by saying that the proper approach to the words in question is to construe "physical education and development" as "denoting something which the playing of association

(1) Page 421 *ante*. (2) Page 425 *ante*. (3) Page 426 *ante*.
(4) Page 429 *ante*.

A football will assist in ensuring, with the result that the trust has the single object of physical education and development of the pupils". In his dissenting judgment Bridge L.J. at page 140 took a view fundamentally differing from any of the above. Since I agree with it entirely, I quote the entire passage(5):

> "For convenience of reference I set out the words of the clause which define the object divided into two parts: The first part is: '. . . to organise
> B or provide or assist in the organisation and provision of facilities which will enable and encourage pupils of Schools and Universities in any part of the United Kingdom to play Association Football or other games or sports.' The second part is: '. . . and thereby to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds . . .' The
> C ensuing words 'and with a view to furthering this object' must refer back to both the first and second parts envisaged as defining a composite object to which all that follows in sub-clauses (i) to (iv) is subordinate. Walton J., apparently confining his attention to the first part, declared that this was "on its face, simply a trust to promote the playing of games,' [see [1978] 1 WLR 664, at page 670(2)]. He later explained his disregard of
> D the second part as based on acceptance of the submission that it only expresses 'the draftsman's erroneous view of the effect of the (first part) and cannot control the operation of that part'. With all respect to the learned Judge, I am quite unable to accept this approach. I know of no canon of construction whereby one part of a document, being in no way repugnant, can be thus dismissed as expressing a mistaken interpretation
> E by the draftsman himself of what he intended by some other part. All parts of a document must be read as conveying the totality of the draftsman's intention and so far as possible harmonised on the premise that each part was included as having some positive role to play in expressing that intention. Applying these principles I can see no difficulty in harmonising the two parts of clause 3(a) or in assigning to both a significant effect in
> F denoting the object which this clause empowers the trustees to promote. The first part of the clause places no limitation on the kind of games or sports which are to be facilitated and encouraged and, if it stood alone, would include purely sedentary games. But the second part makes clear that it is only such games or sports as are capable of promoting physical education or development as are intended. This is an obvious and simple
> G demonstration of the necessity for giving some effect to the second part of the clause in controlling the operation of the first part. I see no reason, however, why it should not be construed as indicating to the trustees not only the nature of the games or sports which they are to encourage but also the wider considerations they must keep in mind in deciding whether or not in any particular circumstances it is appropriate that particular
> H sporting facilities should be provided at the expense of the trust."

I agree with this opinion and, as I understand them, also with the summaries of it propounded by my noble and learned friends Lords Keith of Kinkel and Russell of Killowen to the effect that what the deed means is that the purpose of the settlor is to promote the physical education and development of pupils at schools and universities as an addition to such part of their education as relates
I to their mental education by providing the facilities and assistance to games and sports in the manner set out at greater length and in greater detail in the enumerated sub-clauses of clause 3(a) of the deed.

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(1) Pages 430–1 *ante*. (2) Page 418 *ante*.

By one passage in the reasoning of Bridge L.J. which I have set out above I have been particularly assisted to my conclusion on the point of construction. This was pointed out in the course of an argument advanced by Counsel for the Appellant in his reply. One thing which was conceded on both sides about the construction of the deed was that it could not apply to sedentary games like chess or games of cards. That this is so is apparent from the whole clause of the deed, but the restrictive sense admitted to be its meaning could not be applied to what has been called the first part of the clause unless to the words between "thereby" and "object" are given a sense controlling and limiting the first part as well as the second part of the clause in the manner contended for by the Appellants. The word "thereby" cannot therefore bear the purely consequential meaning assigned to it by the three judgments appealed from and must bear the controlling and purposive meaning contended for by the Appellants and supported by Bridge L.J. In short, in the context, the words "and thereby" bear, and can only bear, a meaning something like "in such a way as to" and not the meaning attributed to it on behalf of the Crown as reflecting, whether erroneously on the part of the draftsman (as *per* Walton J.*supra*) or correctly or incorrectly in the mind of the settlor (as *per* Stamp and Orr L.JJ. *supra*) the results automatically effected by the first part of the deed. Moreover, if this were not enough, I find the word "object" in the singular at the end of the phrase far more consistent with this view than with the other.

On a proper analysis, therefore, I do not find clause 3(a) ambiguous. But, before I part with the question of construction, I would wish to express agreement with a contention made on behalf of the Appellants and of the Attorney-General, but not agreed to on behalf of the Crown, that in construing trust deeds the intention of which is to set up a charitable trust, and in others too, where it can be claimed that there is an ambiguity, a benignant construction should be given if possible. This was the maxim of the civil law (Dig : Lib : Tit: xvii S.56) "*Semper in dubiis benigniora præferenda sunt*". There is a similar maxim in English law: "*ut res magis valeat quam pereat*". It certainly applies to charities when the question is one of uncertainty. (*Weir* v. *Crum-Brown* [1908] AC 162, at page 167) and, I think, also where a gift is capable of two constructions one of which would make it void and the other effectual (cf *Bruce* v. *Deer Presbytery* (1867) LR 1 Sc & Div 96 HL, at page 97; *Houston* v. *Burns* [1918] AC 337, at pages 341–2 *per* Finlay L.C. and cf also In re *Bain* (*Public Trustee* v. *Ross*) [1930] 1 Ch 224, at page 230). In the present case I do not find it necessary to resort to benignancy in order to construe the clause, but, had I been in doubt, I would certainly have been prepared to do so.

The views of the trial Judge and of the Court of Appeal on the remaining questions were obviously coloured largely by their construction of the deed from which I have found it necessary to differ. So is my own, and I must now turn to the deed, construed in the manner in which I have found it necessary to construe it, to consider whether it sets up a valid charitable trust for the advancement of education. It is admitted, of course, that the words "charity" and "charitable" bear, for the purposes of English law and equity, meanings totally different from the senses in which they are used in ordinary educated speech or, for instance, in the Authorised Version of the Bible (contrast, for instance, the expression "Cold as Charity" with the Authorised Version of 1 Cor. xiii, and both of these with the decisions in *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General*(1) [1972] Ch 73; *Commissioners of Inland Revenue* v. *Yorkshire Agricultural Society*(2) [1928] 1 KB 611; *Brisbane City Council* v. *Attorney-General for Queensland* [1979]

(1) 47 TC 321. (2) 13 TC 58.

A AC 411). But I do not share the view implied by Stamp L.J. and Orr L.J. in the instant case ([1979] 1 WLR, at page 135; *ibid,* at page 139(1)) that the words "education" and "educational" bear, or can bear, for the purposes of the law of charity, meanings different from those current in present day educated English speech. I do not believe that there is such a difference. What has to be remembered, however, is that, as Lord Wilberforce pointed out In re *Hopkins' Will*
B *Trusts* [1965] Ch 669, at page 678, esp. at page 686, and in *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow Corporation* [1968] AC 138, esp. at page 154, both the legal conception of charity and within it the educated man's ideas about education are not static, but moving and changing. Both change with changes in ideas about social values. Both have evolved with the years. In particular in applying the law to contemporary circumstances it is
C extremely dangerous to forget that thoughts concerning the scope and width of education differed in the past greatly from those which are now generally accepted. In saying this I do not in the least wish to cast doubt on In re *Nottage* [1895] 2 Ch 649, which was referred to in both Courts below and largely relied on by the Crown here. Strictly speaking, In re *Nottage* was not a case about education at all. The issue there was whether the bequest came into the fourth
D class of charity categorised in Lord Macnaghten's classification of 1891. The mere playing of games or enjoyment of amusement or competition is not *per se* charitable, nor necessarily educational, though they may (or may not) have an educational or beneficial effect if diligently practised. Neither am I deciding in the present case even that a gift for physical education *per se* and not associated with persons of school age or just above would necessarily be a good charitable
E gift. That is a question which the courts may have to face at some time in the future. But in deciding what is or is not an educational purpose for the young in 1980 it is not irrelevant to point out what Parliament considered to be educational for the young in 1944 when, by the Education Act of that year in ss 7 and 53, (which are still on the statute book) Parliament attempted to lay down what was then intended to be the statutory system of education organised
F by the State, and the duties of the local education authorities and the Minister in establishing and maintaining the system. Those sections are so germane to the present issue that I cannot forbear to quote them both. Section 7 provides (in each of the sections the emphasis being mine):

> "7. The statutory system of public education shall be organised in three progressive stages to be known as primary education, secondary
G education, and further education; and it shall be the duty of the local education authority for every area, so far as their powers extend, to contribute towards *the spiritual, moral, mental, and physical development of the community by securing that efficient education throughout those stages shall be available to meet the needs of the population of their area.*"

and in s 53(1) and (2) of the same Act it is said:

H "53.—(1) It shall be the duty of every local education authority to secure that the facilities for primary secondary and further education provided for their area include adequate facilities for recreation *and social and physical training,* and for that purpose a local education authority, with the approval of the Minister, may establish, maintain and manage, or assist the establishment, maintenance and management of *camps, holiday*

(1) Pages 426 and 428–9 *ante*.

classes, playing fields, play centres, and other places (including playgrounds, gymnasiums, and swimming baths not appropriated to any school or college), at which facilities for recreation and for such training as aforesaid are available for persons for whom primary secondary or further education is provided by the authority, and may organise games, expeditions and other activities for such persons, and may defray or contribute towards the expenses thereof. (2) A local education authority, in making arrangements for the provision of facilities or the organisation of activities under the powers conferred on them by the last foregoing subsection shall, *in particular, have regard to the expediency of co-operating with any voluntary societies or bodies whose objects include the provision of facilities or the organisation of activities of a similar character."*

There is no trace in these sections of an idea of education limited to the development of mental vocational or practical skills, to grounds or facilities the special perquisite of particular schools, or of any schools or colleges, or term time, or particular localities, and there is express recognition of the contribution which extra- curricular activities and voluntary societies or bodies can play even in the promotion of the purely statutory system envisaged by the Act. In the light of s 7 in particular I would be very reluctant to confine the meaning of education to formal instruction in the classroom or even the playground, and I consider them sufficiently wide to cover all the activities envisaged by the settlor in the present case. One of the affidavits filed on the part of the Crown referred to the practices of ancient Sparta. I am not sure that this particular precedent is an entirely happy one, but from a careful perusal of Plato's Republic I doubt whether its author would have agreed with Stamp L.J. in regarding "physical education and development" as an elusive phrase, or as other than an educational charity, at least when used in association with the formal education of the young during the period when they are pupils of schools or in *statu pupillari* at universities.

It is, of course, true that no authority exactly in point could be found which is binding on your Lordships in the instant appeal. Nevertheless, I find the first instance case of In re *Mariette* [1915] 2 Ch 284, a decision of Eve J., both stimulating and instructive. Counsel for the Crown properly reminded us that this concerned a bequest effectively tied to a particular institution. Nevertheless, I cannot forbear to quote a phrase from the judgment, always bearing in mind the danger of quoting out of context. Eve J. said (at page 288):

> "No one of sense could be found to suggest that between those ages" (10–19) "any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind."

Apart from the limitation to the particular institution I would think that these words apply as well to the settlor's intention in the instant appeal as to the testator's in In re *Mariette*, and I regard the limitation to the pupils of schools and universities in the instant case as a sufficient association with the provision of formal education to prevent any danger of vagueness in the object of the trust or irresponsibility or capriciousness in application by the trustees. I am far from suggesting either that the concept of education or of physical education even for the young is capable of indefinite extension. On the contrary, I do not think that the courts have as yet explored the extent to which elements of organisation, instruction, or the disciplined inculcation of information instruction or skill may limit the whole concept of education. I believe that in

A some ways it will prove more extensive, in others more restrictive than has been thought hitherto. But it is clear, at least to me, that the decision in In re *Mariette*(1), *supra,* is not to be read in a sense which confines its application for ever to gifts to a particular institution. It has been extended already in In re *Mellody* [1918] 1 Ch 228 to gifts for annual treats for schoolchildren in a particular locality (another decision of Eve J.); to playgrounds for children
B (In re *Chesters* (25 July 1934) unreported, and possibly *not* educational, but referred to in *Baddeley* v. *Commissioners of Inland Revenue*(2) [1955] AC 572, at page 596); to a children's outing (In re *Ward* (1937) 81 SJ 397); to a prize for chess to boys and young men resident in the City of Portsmouth (In re *Dupree's Deed Trusts* [1945] Ch 16, a decision of Vaisey J.) and for the furthering of the Boy Scouts' movement by helping to purchase sites for camping, outfits, etc.
C (In re *Webber* [1954] 1 WLR 1500, another decision of Vaisey J.). In that case Vaisey J. is reported as saying, at page 1501:

> "I am bound to say that I am surprised to hear that anyone suggests that the Boy Scouts movement, as distinguished from the Boy Scouts Association, or the Boy Scouts organisation, or any other form of words, is other than an educational charity. I should have thought that it was well
D settled and well understood that the objects of the organisation of boy scouts is an education of a very special kind no doubt, but still none the less, educational."

It is important to remember that in the instant appeal we are dealing with the concept of physical education and development of the young deliberately associated by the settlor with the status of pupillage in schools or universities
E (of which, according to the evidence, about 95 per cent. are within the age group 17–22). We are not dealing with adult education, physical or otherwise, as to which some considerations may be different. Whether one looks at the Statute or the cases, the picture of education when applied to the young which emerges is complex and varied, but not, to borrow Stamp L.J.'s epithet "elusive". It is the picture of a balanced and systematic process of instruction,
F training and practice containing, to borrow from s 7 of the Act of 1944, both spiritual, moral, mental and physical elements, the totality of which in any given case may vary with, for instance, the availability of teachers and facilities, and the potentialities, limitations and individual preferences of the pupils. But the totality of the process consists as much in the balance between each of the elements as of the enumeration of the things learned or the places in which the
G activities are carried on. I reject any idea which would cramp the education of the young within the school or university syllabus, confine it within the school or university campus, limit it to formal instruction, or render it devoid of pleasure in the exercise of skill. It is expressly acknowledged to be a subject in which the voluntary donor can exercise his generosity, and I can find nothing contrary to the law of charity, which prevents a donor providing a trust which is
H designed to improve the balance between the various elements which go into the education of the young. That is what in my view the object of the instant settlement seeks to do.

I am at pains to disclaim the view that the conception of this evolving, and therefore not static, view of education is capable of infinite abuse or, even worse, proving void for uncertainty. Quite apart from the doctrine of the

(1) [1915] 2 Ch 284. (2) 35 TC 661.

benignant approach to which I have already referred, and which undoubtedly comes to the assistance of settlors in danger of attack for uncertainty, I am content to adopt the approach of my predecessor Lord Loreburn L.C. in *Weir* v. *Crum-Brown* [1908] AC 162, to which attention was drawn by Counsel for the Attorney-General, especially at page 167, that if the bequest to a class of persons, as here capable of application by the trustees, or, failing them, the court, the gift is not void for uncertainty. At page 169 Lord Macnaghten also said: ". . . the testator has taken pains to provide competent judges. It is for the trustees to consider and determine the value of the service on which a candidate may rest his claim to participate in the testator's bounty." *Mutatis mutandis,* I think this kind of reasoning should apply here. Granted that the question of application may present difficulties for the trustees, or, failing them, for the Court, nevertheless it is capable of being applied, for the concept in the mind of the settlor is an object sufficiently clear, is exclusively for the advancement of education and, in the hands of competent judges, is capable of application.

I also wish to be on my guard against the "slippery slope" argument of which I see a reflection in Stamp L.J.'s reference to "hunting, shooting and fishing". It seems to me that is an argument with which Vaisey J. dealt effectively in In re *Dupree's Deed Trusts*[1] *(supra)* in which he validated the chess prize. He said, at page 20:

> "I think that the case before me may be a little near the line, and I decided it without attempting to lay down any general propositions. One feels, perhaps, that one is on rather a slippery slope. If chess, why not draughts? If draughts, why not bezique, and so on, through to bridge and whist, and, by another route, to stamp collecting and the acquisition of birds' eggs? Those pursuits will have to be dealt with if and when they come up for consideration in connexion with the problem whether or no there is in existence an educational charitable trust."

My Lords, for these reasons I reach the conclusion that the trust is a valid charitable gift for the advancement of education, which, after all, is what it claims to be. The conclusion follows that the appeal should be allowed, the judgments appealed from be reversed, the order for registration made by the Commissioners restored, and that costs here and in the Court of Appeal should follow the event. Costs before Walton J. were the subject of an agreement between the parties. The Attorney-General asked for his costs against the Crown in the event of their failure and in my opinion is also entitled to an order for these.

Lord Diplock—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend on the Woolsack, and I agree with it. For the reasons given by him I would allow the appeal.

Lord Salmon—My Lords, I, too, agree with the speech of my noble and learned friend on the Woolsack and, for the reasons which he states, I would allow the appeal.

Lord Russell of Killowen—My Lords, the ground in this appeal has been so amply covered in the speech of my noble and learned friend the Lord Chancellor that I can be brief. The question is whether the trusts of the deed, in particular of clause 3(a) are exclusively for charitable purposes as being for the

(1) [1945] Ch 16.

promotion of education. (I expressly say nothing one way or the other on the questions which, if the answer is in the affirmative, do not arise: namely, under the fourth of Lord Macnaghten's categories, and under s 1 of the Recreational Charities Act 1958.)

I cannot accept the approach to construction of clause 3(a) which jettisons the second part of the first sentence ("and thereby") as being no more than the draftsman's idea of the outcome or possible outcome of the provision of facilities under the first part. As has been pointed out the second part has at least the operative function of demonstrating that "games" does not include sedentary pastimes. In my opinion, in deciding whether the clause demonstrates that the purpose of the deed is the promotion of education the clause must be considered so to speak "in the round", with all parts contributing to the decision. Those persons who are intended to be benefited are all pupils undergoing a formal course of education in the narrower sense of that word. I would construe the stated object of the trust as being to promote the physical education and development of pupils as supplementary to the provision made for them by those formal courses for their mental development and occupation by providing facilities to enable and encourage them to play football and other games and sports. The four sub-paragraphs of clause 3(a) do not depart from this concept: they are all provisions expressed to be with a view to furthering it: sub-para (i) provides for the provision of relevant equipment for the use of such pupils: sub-para (ii) deals with the provision of courses, lectures, demonstrations and coaching (clearly in the relevant field) for such pupils, and also for teachers who organise or supervise playing of the relevant games as sports *at* such schools and universities, the benefit in such latter cases to the pupils being at one remove: sub-para (iii) relates to the provision of training colleges to train such last-mentioned teachers: sub-para (iv) relates to the provision, etc., of outdoor or indoor facilities to be used for such teaching of and playing by such pupils. I have summarized those sub-paragraphs, but not, I consider, so as to depart from their fair construction. I appreciate that the present trust is different from instances (in the cases) in which provision is made by the provision of facilities, etc., for the encouragement of sports at a particular school or other educational establishment where their supervision is under the direct control of the body there responsible for the formal education in the narrower sense of the pupils and where the facilities are for use during educational terms. But suppose an area containing three schools, short of space for (for example) the physical exercise involved in playing football; suppose the provision by this trust of a field equipped for that purpose, for the use only of pupils of such schools, under the management and control of an appointee of the trustees; that would not in my opinion deny to the trust a sufficient nexus with the education (in the narrower sense) of those pupils to qualify the trust as one of which the purpose is the promotion of education. Nor so if the facility was available to those pupils out of term time.

The crux of the decision of the majority in the Court of Appeal appears to be (*a*) the assertion that the promotion of physical education and development by the encouragement of the playing of games and sports is not a charitable purpose and (*b*) it is not converted to a charitable purpose by limiting the objects of the trust to those who happen to be pupils of schools and universities. I reserve my view on the first assertion; but in my opinion the second does a good deal less than justice to current views on the value of what is proposed as a

contribution to the total concept of education of the young. I find myself in sympathy with the views expressed by Bridge L.J., fully quoted by my noble and learned friend on the Woolsack. A

In my opinion this appeal should be allowed on the ground that this trust is established for charitable purposes only, the promotion of education.

Lord Keith of Kinkel—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend the Lord Chancellor, and I agree with it. In my opinion there are only two points in this appeal which require to be considered and resolved in order to arrive at the correct disposal of it. B

The first point is concerned with the true construction and effect of the second branch of clause 3(a) of the trust deed, which opens with the words "and thereby". It was argued for the Crown that this did no more than express an erroneous view on the part of the draftsman as to the consequences of organising or providing sporting facilities such as are described in the earlier part of the clause. This argument I cannot accept. In the first place the words must surely be read, if such a reading is reasonably open, as intended to have some operative effect, rather than as being mere surplusage. It was conceded that the words must have at least some effect, by excluding sedentary games from the category of those for which facilities might lawfully be provided under the first part of the clause. I consider it to be a correct conclusion, taking the words in their context, that they are intended to express the main abstract purpose of the deed, namely that of securing that due attention is given to the physical education and development of pupils at schools and universities in the United Kingdom. C D E

The second point is whether a trust having this object is properly to be regarded as constituted for exclusively charitable purposes as being one for the advancement of education. A trust for the mere promotion of a particular sport or sports does not qualify as charitable under this head (In re *Nottage* [1895] 2 Ch 649). On the other hand a gift to a particular educational establishment for the purpose of improving the sporting facilities available to the pupils there does so qualify: (In re *Mariette* [1915] 2 Ch 284). In the present case the purpose of the trust is plainly to improve the sporting facilities, particularly as regards the playing of association football, available to pupils undergoing formal courses of education at schools and universities in the United Kingdom. It has long been recognized that the provision of such facilities tends to promote the success of formal education processes with which it is associated. In my opinion the link which by this trust deed is required to be established between the facilities to be provided and persons undergoing courses of formal education at schools and universities must necessarily lead to the conclusion that the trust is for the promotion of education, and that its purposes are therefore exclusively charitable. F G

In the circumstances it is unnecessary to consider whether the trust is apt to qualify as charitable under the fourth category in *Pemsel's* case(1) [1891] AC H

(1) 3 TC 53.

A 531, or under the Recreational Charities Act 1958, and I reserve my opinion on these matters.

My Lords, I would allow the appeal.

Appeal allowed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Chethams; Treasury Solicitor.]

B