

OXFORD COLLEGES AS ELEEMOSYNARY LAY CHARTERED CORPORATIONS AGGREGATE : PERMANENT ENDOWMENT, CHARITY TRUSTEESHIP, AND PERSONAL LIABILITY?

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CONTENTS (Numbers refer to paragraphs unless stated as pages)

1-4	INTRODUCTION
5-7	THE SPECTRUM OF VIEWS
8-13	US LAW
14	THE 1997 OPINION
15-17	THE CHALLENGE TO THE 1997 OPINION
18-27	FOLLOWING <i>TUDOR</i>
28-37	IN SUPPORT OF <i>TUDOR</i>
38-48	YET IN SUPPORT OF THE 1997 OPINION
49-53	THE 1860 OPINION OF 'Mr WILLIAM STEBBING, MA., OF THE CHANCERY BAR'
54-59	THE NEW COLLEGE STATUTES
60-69	SO, WHAT DOES IT ALL MEAN IN PRACTICE?
70-72	SELLING THE GREAT QUADRANGLE!
73	CASES
74	IS PORTERHOUSE REALLY A 'CHARITY'?
75-80	CONCLUSION
PAGES 45-49	APPENDIX A: THE KEY PROVISIONS OF THE UNIVERSITIES AND COLLEGE ESTATES ACT 1925 (amended 1964)
PAGE 50	APPENDIX B: THE FELLOWS' OATH OF ALLEGIANCE
PAGES 51-55	APPENDIX C: DISCUSSION OF KEY CASES
PAGES 56-72	APPENDIX D: IS PORTERHOUSE REALLY A 'CHARITY'?
PAGES 73-75	LIST OF CASES CITED

PAGES 76-79

REFERENCES

PAGE 80

INDEX

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INTRODUCTION

1. In the political furore over the threatened abolition or reduction of Oxbridge college academic fees as charged to students (but mainly paid by Government) the Oxford colleges collectively sought the opinion of eminent Chancery Counsel on: firstly, whether they hold their core, original, foundation assets (other than those acquired since foundation and held on a specific trust) as permanent endowment; secondly, whether they could utilise such assets to fund recurrent deficits; and, thirdly, whether there were any circumstances (for example, breach of trust IF Fellows indeed are (quasi-) trustees) in which the Fellows of a college could be faced with personal liability in the event of the insolvency of the college. (In what follows the quotations from 'the Opinion' are taken from a Note of the Conference held with Counsel prepared by the Instructing Solicitor and duly 'approved as a correct record' by Counsel. A supplementary 'Note' was subsequently supplied by Counsel: referred to as 'Note' below.)
2. This dissertation explores the questions of whether an Oxford college is permanently endowed; and, if so, whether there is any degree of charity trusteeship extending to the possibility of personal liability for the Fellows of the college were they deemed to be charity trustees (or quasi-trustees) and there being a breach of any trust either explicit or (potentially to be) implied by the Court. Consideration is also given to the fiduciary relationship between the Fellows and the college, and to the possibility of personal liability arising if the Fellows as corporators/directors of the charitable corporation (college) were to act contrary to or *ultra vires* its Statutes. The concept of 'capital money' in the Universities and College Estates Act 1925 (amended 1964) is discussed.

3. The line of argument explored here in relation to Oxford colleges may be of relevance to chartered English universities more generally, since they too are in the main lay eleemosynary chartered charitable corporations aggregate (except Oxford and Cambridge which are not eleemosynary (hence no Visitor) but are civil corporations created by Statute - see 'A Bibliographical Essay on the Visitor' in Palfreyman & Warner, 1998, pp 342-345; second edition, Jordans, 2002, pp 563-568).
4. The author thanks the following for their valuable comments on this material when in draft form: Oliver Hyams, Barrister, and author of 'Law of Education' (1998); Hubert Picarda, QC, Editor of the 'The Charity Law and Practice Review' and author of 'The Law and Practice Relating to Charities' (1995 and 1999). Neither, of course, carries any responsibility for any errors, omissions and misinterpretations still remaining. What is set out here has been published in a slightly different version in 'The Charity Law and Practice Review' (5 (2) 85-134, 1998 and 6 (2) 151-166, 1999) and in 'Education and the Law' (10 (4) 245-252, 1998).

THE SPECTRUM OF VIEWS

5. The commonly-held view within the 'culture' or 'folk-memory' of Oxford colleges and certainly within the Estates Bursars' Committee is that the colleges are permanently endowed charitable organisations, with no power to spend such permanent endowment, and with the Fellows being charity trustees (or, at least, quasi-trustees), and, as such, subject to personal liability in certain circumstances. Indeed, if this were not the case it is hard to think why colleges would not have been bankrupted by the high-living Parson Woodfordes of eighteenth century Oxford! Hence in recent years, for example, many colleges have sought and obtained Privy Council approval to amend their Statutes so as to permit them to delegate routine decisions over the management of their portfolios to investment managers, in the same way that registered charities have individually been able to apply to the Charity Commissioners to incorporate into their Trust Deed/Instrument the 'model order' suggested by the Commissioners (see item 6, 'Delegation of Investment Decisions by Charity Trustees and Appointment of Nominees (1993)', in Decisions of the Charity

Commissioners, Vol. 2, Charity Commissioners, 1994). This line of argument is set out in Palfreyman (1995/96); see also two related (and contrasting, Picarda corrects Palfreyman!) articles on the statutory regime under which colleges are permitted to disperse income (and only income) in the form of 'college contributions', a kind of university/inter-colleges taxation scheme: Palfreyman (1996/97) and Picarda (1996/97). The Opinion and the Note are very largely at variance with what might be termed this traditional view. Somewhere between, in terms of discussing the issue of personal liability for the governors of higher education institutions generally, are the (quasi-) trustee arguments of Chamberlain (in the chapter on Trusteeship within Palfreyman & Warner, 1998/2002) and of Hall & Hyams (in the chapter on Governance within Palfreyman & Warner, 1998/2002): see also Hyams (1994, 1996, and 1998).

6. Hyams (1994, 199) comments: 'As a matter of policy, however, it seems sensible to say that a court should in relevant circumstances ignore the existence of the governing body's corporate status, and treat the governors as if they, rather than the corporate governing body, are charity trustees. Alternatively, the court could note that the governors are properly to be regarded as the managers of the corporation, and ... could then decide that the jurisdiction of the High Court with respect to charities extends to such managers, and hence the governors, at least as far as the management of property held for the general purposes of the governing body is concerned. (This would be subject to the question whether the jurisdiction of the High Court has been ousted by the statutory regime [or even the authority of the Visitor for eleemosynary charitable corporations? - see para. 74 and Appendix D] relating to the governing body.) If that occurred, and, in any event, there would be very good reason to say in addition that the governors as well as the incorporated governing body should be regarded as within the definition of charity trustees in s. 97(1) of the Charities Act 1993 where the governing body holds property on charitable trust rather than for its general purposes, the governors themselves could then be regarded as within the jurisdiction of the High Court with respect to charities in relation to the administration of that trust, as well as in relation to property held for the general purposes of the governing body. (It certainly seems, as a matter of policy, odd that there

should be a distinction between the two situations in this regard. It is noted that, if the jurisdiction of the court extended only to the corporation, then an action for breach of charitable trust by the corporation could only result, if successful, in the use of charitable funds for a different charitable purpose from that for which they were originally intended. On the other hand, if the corporation misapplied property held for its general purposes, then there would be no power in the court to order the replacement of the property.)’

7. Hambley (1998), whilst conceding that the term 'quasi-trustee' has 'no recognised legal basis' (para. A36), sees the concept as a useful one in reminding the members of a corporation that their fiduciary obligations are closer to that of trusteeship (if not exactly analogous with it) then, say, to the lesser fiduciary standards of company directorship (para A. 51).

US LAW

8. In contrast, however, the USA experience cited in Kaplin & Lee (1995, 82-85) is to be noted: ‘Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F. Supp. 1003 (DDC 1974) (the Sibley Hospital case), is the first reported opinion to review comprehensively the obligation of the trustees [governors] of private charitable corporations and to set out guidelines for trustee involvement in financial dealings... The court’s decision to analyse the trustee’s standard of duty in terms of corporate law, rather than trust law, apparently reflects the evolving trend in the law... the trustees owed a duty to the institution comparable to, and in some cases greater than, that owed by the directors of a business corporation...’. Kaplin and Lee quote from the actual judgement: ‘The court holds that a director or so-called trustee... is in default of his fiduciary duty... [if he] failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care’. They also cite Corporation of Mercer University v Smith, 371 SE 2d 858 (Ga 1988), as echoing the Sibley Hospital case: ‘The plaintiffs wanted the court to apply the stricter fiduciary duty requirements of trust law: the college argued that trustees were bound only by the dictates of corporate law. Siding with the college, the court applied corporate law, rather than trust law...’. The Kaplin &

Lee 'Supplement' (2000) records the Sibley Hospital case as still good law, citing also Evans & Evans (1998).

9. The leading US authority on trusts, Scott (1989), is also not entirely supportive either of the first line of argument in this article (Oxford colleges hold all their corporate property on trust), or of the view that the fiduciary duties of corporators are so analogous to those of charity trustees as to make little difference in practice (the second line of argument in this article) and especially in relation to their approach to investment.
10. Scott notes: `...it may be asked whether a gift to a charitable corporation creates a charitable trust... It is not infrequently stated in the cases that a charitable corporation does not hold on a charitable trust property conveyed or bequeathed to it. In fully as many cases, however, it is stated that a charitable corporation holds its property in trust [citing The Abbey, Malvern v Minister of Town and Country Planning [1951] 2 All ER 154]... A charitable corporation certainly does not hold its property beneficially in the same sense in which an individual or non-charitable corporation holds it beneficially, since in the case of a charitable corporation the Attorney-General can maintain a suit to present a diversion of the property from the purposes for which it was given... The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee... It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications...' (section 348·1 in Vol. VIA). Thus, Scott talks of a quasi-trust, not being a true trust, not a technical trust: `no trust arises in a technical sense because the trustee and beneficiary are one' (p 22 of VIA).
11. In section 389 of Vol. VIA Scott comments: `There is a question whether the rules governing investment by trustees are applicable to charitable corporations... [In the absence of specific legislation] it would seem that in making investments they are bound only to comply with the general rule of prudent management...': i.e. acting in good faith (honestly) in a fiduciary capacity to ensure the corporation invests to balance preservation of endowment for tomorrow with the obtaining of maximum income from it for

today, the investment policy being carefully assessed as to risk and being mindful of the strategy of similar organisations, but the standard of duty expected being less than the strict common law standard applying to trustees proper. Thus, personal liability would arise only for poor judgement so reckless as to amount to bad faith (fraud, corruption, dishonesty) or to gross or wilful negligence (and it would have to be incompetence in a big way!). (N.B. In contrast, in Harries v Church Commissioners for England [1992] 1 WLR 1241, at first instance in English Law, the Court regarded the trustees of a charitable corporation as being subject to the principles of charity law concerning investment.)

12. The Sibley Hospital case is discussed in Porth (1973 & 1974/75) and Fishman (1987). Berry and Buchwald (1974) explore who, besides the State Attorney-General, can sue to enforce the fiduciary duties of college trustees, while Christie (1980) and Daugherty (1990) consider the management of the investments of charitable corporations. Marsh (1981) compares the different standards of care applied by the Court to the common law trustee and the corporate director, arguing that the latter better serves the complexities of modern management duties in running what is really a business: 'Given the complexity of managing a modern non-profit institution, and the sometimes carping nature of the media, our courts, legislatures and law enforcement officials ought to think long and hard before imposing rigid trust standards on those hardy few who have the will and the means to shepherd these institutions in times of financial uncertainty and reduced governmental support.' (627).
13. Dale and Gwinnell (1995/96) also discuss US law, citing Kurtz (1998). They comment: 'It is generally accepted [is it? - note Scott as cited above] that a charitable corporation is the beneficial owner of its assets for the charitable purposes contained in its constitution and does not act as a trustee of its assets, except insofar as they may be subject to special trusts (ie restrictions on the purposes for which they may be expended)'. They note, however, that in relation to investment strategy: 'Although United States law generally imposes different (and higher) duties of care and loyalty upon trustees of charitable trusts than upon directors of charitable corporations, it appears that this difference has not generally mattered in cases applying the prudent investor

rule. Thus, the Restatement Third takes the view that, even though the rule is phrased as applicable to trustees, “funds held for investment by a charitable corporation... are to be invested in accordance with the prudent investor rule of § 227”. The Prefatory Note to the Uniform Prudent Investor Act agrees: “Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations.”...’.

THE 1997 OPINION

14. Firstly, Counsel ‘considered that most Colleges did not have a ‘permanent endowment’ within the meaning of section 96(3) of the Charities Act 1993 because their charters and statutes did not draw a distinction between the expenditure of capital and income, and [secondly] capital assets (if not tied in specific trusts) could be realised to meet debts’. It was also noted in relation to this second issue that Counsel ‘saw no reason why Oxford Colleges could not use ‘permanent endowment’ to fund deficits’. Thirdly, it was noted that: ‘There is almost a complete lack of authority on the area of the insolvency of a chartered body. [Counsel’s] feeling was that the Attorney General would not seek a monetary remedy and that individual members of a Governing Body were unlikely to be called to account if they had acted prudently, having regard to the money available and their fiduciary duties’. Clearly, since Counsel saw the Fellows in terms of being the corporators/directors/governors/officers of a college as a charitable corporation holding its assets (other than those held on specific trusts) beneficially and not as permanent endowment, it followed that they are not charity trustees (other than possibly in relation to the specific trusts where the college is holding such assets on a charitable trust and the Fellows ‘having the general control and management of the administration of a charity’ are arguably then charity trustees under s97 of the Charities Act 1993).

THE CHALLENGE TO THE 1997 OPINION

15. Here it will be respectfully argued (if a non-lawyer humble Bursar may dare to argue with an eminent Chancery QC!) that Oxford colleges are the holders of

substantial permanent endowment, that hence they are not able readily to use capital to fund deficits on the recurrent annual income/expenditure account, and that the Fellows are charity trustees for the permanent endowment and hence most of the general property of the college (and not solely in relation to specific trusts) insofar as that general property can be said to arise from the original foundation. Or rather unless that property (real estate, equities, gilts/bonds, cash, agricultural land, or whatever) really can be shown not to derive from the original endowment - for example, possibly capital raised in the late 1980s/early 1990s from the creation of a BES arrangement; almost certainly identifiable (recent or otherwise) donations which had 'no strings attached' and left the Fellows to spend income and capital 'at their discretion' on anything; and probably surplus income returned temporarily to capital as a 'Revenue Reserve' or similar over the years; but presumably not capital gains on the investment of the permanent endowment over the centuries (or more recently over the decades once converted from land to equities)?

16. To view the assets in this way is in line with the reference to 'capital money' in the Universities and College Estates Act 1925 (amended 1964), which, interestingly, Counsel saw as 'not relevant to corporations which had all the powers of a natural person'. (NB See Appendix A, and especially note that s1 of the Act states that: 'The universities and colleges to which this Act applies are the Universities of Oxford, Cambridge... and the colleges or halls in those universities...'; while s41 gives a wide definition of what college land is covered by the Act.) The controls within the Act concerning the use of capital money other than for investment purposes are analogous to the requirement for trustees of a registered charity to seek the sanction of the Charity Commissioners to spend capital only on the repair, improvement, modernisation, or rebuilding of functional property owned by a charity, and for any such capital expended to be replaced from future income within a specified period by the creation of a sinking fund (see Picarda (1995), 504/505). In Appendix A see also paragraphs n), o) and p) concerning the analysis of prior legislation to the 1925 Act by Shadwell (1898) and Neate (1853).

17. In presenting a line of argument closer to Palfreyman (1995/96) than to the Opinion, the following texts will be heavily lent on: Grant (1850), Halsbury (Reissue 2001, Vol. 5(2) by Picarda), Picarda (1995/1999), Shelford (1836), and especially Tudor (1995). The argument will be developed by initially citing Tudor and then calling in support, where appropriate, Halsbury and Picarda, and referring back as necessary to Grant and Shelford. Certain key cases are examined in detail, and other texts referred to. It is to be noted that the University of Oxford obtained an Opinion in 1947 from Cyril Radcliffe of Lincoln's Inn (a New College alumnus, and later a Lord of Appeal) on its Powers of Investment, in which he contrasted the University, as a civil lay corporation, holding its corporate property beneficially unless a specific trust attaches, with the colleges, as eleemosynary lay corporations, holding all corporate property 'on charitable trusts' (whether, as it were, specific or general). Thus, this 1947 Opinion, in contrast to the 1997 one, follows the Tudor line as now to be set out.

FOLLOWING TUDOR...

18. The Oxford colleges are lay eleemosynary chartered charitable corporations aggregate. They are also charities which 'are exempt from many of the provisions of the Charities Acts. [But] The general law of charity declared in the Acts applies to them [exempt charities] and hence they are subject to the jurisdiction of the court at the relation of the Attorney General, but they are exempt from all the supervisory or regulatory powers of the [Charity] Commissioners.' (Tudor, 15, and see also Hill & Hackett, 1992/93: '... the duties and responsibilities of trustees of exempt charities are just as high as for any other charity and the liabilities are just as real if anything goes wrong.', 213). The Second Schedule to the Charities Act 1993 states: 'The following institutions, so far as they are charities, are exempt charities within the meaning of this Act... (b) the universities of Oxford, Cambridge... the colleges and halls in the universities of Oxford, Cambridge...' (emphasis added).
19. Tudor notes that: 'Eleemosynary corporations are those corporations constituted for the perpetual distribution of free alms and bounty of the Founder to such persons as he has directed and are generally hospitals or colleges. Such corporations hold their corporate property upon charitable trust.

Although other corporations have from time to time been regarded as trustees in relation to their general funds, the better view is that non-eleemosynary corporations hold their general property beneficially and not on trust.’ (emphasis added, 162/3).

20. Later Tudor comments (371): ‘Corporations are divided into ecclesiastical and lay, and lay corporations are divided into eleemosynary and civil... The corporate property of ecclesiastical and civil corporations is not by its nature subject to any trust, and the court has, therefore, no more jurisdiction over it than it has over the goods of private individuals...[But] Unlike ecclesiastical and civil corporations, eleemosynary corporations hold their corporate property upon charitable trusts, and they are therefore subject to the jurisdiction of the court like any other trustee, corporate or incorporate, lay or ecclesiastical...’. (emphasis added).
21. The range of cases cited in Tudor is extensive:
Thetford School Case (1610) 8 Co. Rep. 130b, 131a;
Lydiatt v Foach (1700) 2 Vern. 410;
AG v Whorwood (1750) 1 Ves. 537;
Mayor of Colchester v Lowten (1813) 1 V & B 226;
Ex p. Berkhamstead Free School (1813) 2 V & B 134;
AG v Wyggeston’s Hospital (1852) 12 Beav. 113;
AG v St Cross Hospital (1853) 17 Beav. 435;
Re Manchester Royal Infirmary (1889) 43 Ch. D. 420; and
Hume v Lopes [1892] AC 112.
22. There is some discussion of the conflicting, ‘not wholly consistent’ case-law re non-eleemosynary charitable corporations, concluding that: ‘The better view, however, would seem to be that such property is not subject to a trust in the strict sense but that it is held by the company subject to a binding legal obligation to apply it for charitable purposes only; the position of a charitable company in relation to its assets is, therefore, ‘analogous’ to that of a trustee.’ (159). The relevant cases in the order discussed in Tudor (159-161) (see also Picarda (1995), 382-386) are:

Re Vernon's Will Trusts [1972] Ch 300;
Re Manchester Royal Infirmary [1889] 43 Ch. D. 420;
Soldiers', Sailors' and Airmen's Family Association v AG [1968] 1 WLR 313;
Construction Industry Training Board v AG [1973] Ch 173;
Von Ernst et Cie S.A. v IRC [1980] 1 WLR 468; and
Liverpool and District Hospital for Diseases of the Heart v AG [1981] Ch.193.

23. All these cases concern non-eleemosynary charitable corporations. The Liverpool and District Hospital case (which is merely a first-instance case) is cited in the Opinion as confirming that colleges, being chartered corporations, 'have all the powers of a private individual... and were free to sell land and invest the proceeds provided that the land was not held on any specific trust. This applied equally to the college site... and land held for investment.' Leaving aside for discussion below (paragraphs 70-72) whether the Statutes of New College would permit the sale of its 1380s Great Quadrangle, and also whether the Universities and College Estates Act 1925 constrains a college's use of capital, the Liverpool and District Hospital case may not support such complete freedom for the corporation, unless it is one created under the Companies Act, for Slade J. is quoted in Tudor (161) as commenting: 'In a broad sense, a corporate body may no doubt aptly be said to hold its assets as a 'trustee' for charitable purposes in any case where the terms of its constitution [the college Statutes] place a legally binding restriction on it which obliges it to apply its assets for exclusively charitable purposes [as for an eleemosynary charitable corporation?]. In a broad sense it may even be said, in such a case, that the company is not the 'beneficial owner' of its assets' (emphasis added). Indeed, even for a charitable company it may be anyway 'in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the Court to intervene in its affairs [as if it were a charitable trust?]'...
24. Nor is the jurisdiction of the Court ousted by the existence of a Visitor: 'The courts maintain their jurisdiction over trusts and any question of construction of the terms of the trust is a matter for the courts and not the Visitor whose jurisdiction extends only to those matters governed by the laws of the

foundation [Tudor, 374]... The court has, whether there is a Visitor or not, jurisdiction to enforce the performance of the trust of the charity property and to redress breaches of trust. Accordingly, governors who are entrusted with the management of an application of the charity property are accountable to the court in respect of their dealings with the estates and revenues whether they are invested with any visitational authority or not.’(387). The 1847 case of AG v Magdalen College, Oxford (10 Beav 402) clearly supports this view that the jurisdiction of the Court in relation to the enforcement of the performance of trusts is not ousted by the existence of the Visitor’s special position of authority in relation to the enforcement of the corporation’s Statutes. See also Green v Rutherford (1750) 1 Ves. Sen. 462; AG v St John’s Hospital, Bedford (1864) 2 De G.J. & S. 621; and Baldry v Feintuck [1972] 1 WLR 552.

25. The 1906 edition of Tudor is the earliest in which these definitive statements are made about the corporate property of lay eleemosynary charitable corporations being held on trust, and, if anything, the 1906 language in a chapter entitled ‘Eleemosynary Corporations’ is stronger than in the 1995 edition (the supporting cases cited are similar): ‘Eleemosynary or charitable corporations are corporations established for the perpetual distribution of the free alms or bounty of the founder. Their corporate property is thus charitable... An eleemosynary corporation, being created solely to fulfil a charitable purpose, holds its property in every case as a trustee for the accomplishment of that purpose... it makes no difference whether the corporation is a college or hospital in which the persons benefiting become corporators... Institutions of this kind are accordingly subject to the jurisdiction of the Court in the same manner as other trustees of charitable funds, whether corporate or incorporate... The corporate property of ecclesiastical and civil corporations, on the other hand, is not subject to any trust...’ (1906 edition, 63-65).
26. The concept of permanent endowment presumably should, therefore, follow on from the fact that there is perpetuity linked to eleemosynary corporations, and perhaps it is arguable that the Founder’s original endowment is passed over on a charitable trust immediately after the Royal Charter (or similar) has created the corporation: ‘First, there is the abstract act of founding the

institution, the *fundatis incipiens*, or incorporation... Secondly, there is the tangible property which the founder provides, the *fundatis percipiens*, or endowment. In this second sense the first gift of revenues is the foundation, and he who gives them is the Founder. It is in this sense that a man is generally called Founder of a college or hospital.' (Tudor, 375).

27. Thus, it is argued here that we have the Oxford college created by its Royal Charter as a corporation, and then its endowment comes along from the Founder who duly transfers property to be held on a charitable trust to fulfil perpetually his directions. The corporation becomes the trustee of the Founder's charitable trust, and, by extension, the Fellows as corporators are also charity trustees for the purpose of the Court in enforcing the Founder's trust (and, of course, any other later and specific trusts). (See Appendix D.)

IN SUPPORT OF TUDOR...

28. Picarda acknowledges that: 'The legal nature of a corporate charity is not entirely clear. A particular problem is whether such a charity holds its corporate property on trust... Because of the rule basing the charitable jurisdiction of the court on the existence of a trust, it was generally said that a charitable corporation was necessarily a trustee of its property [citing Lydiatt v Foach (1700) 2 Vern. 410]... As regards the chartered companies the view is probably quite tenable... In the end the matter maybe partly one of terminology or semantics... The company owes fiduciary duties to charity, which can be enforced by the court *in personam*... the governors and directors of a charitable corporation though not strictly trustees themselves do occupy a position so analogous...' (382-386). Luxton (2001) also acknowledges that all this is complex legal territory (para. 11.16), but seems on balance to conclude that, in determining on what basis charitable corporations hold their corporate property, the trend is towards 'the encroachment of trusts law by stealth' (1.35) and 'it is possible that the majority of charter companies can be considered to hold upon trust those assets which were vested in them at the date the charter was granted': and even if there is uncertainty over the exact status of 'assets acquired by the corporation after the charter was granted [unless, presumably, held on a specific trust under the terms of a benefaction or legacy]...' (11.27-11.29).

29. While Halsbury (Volume 5 (2), on Charities) comments generally in para. 222 (para. no. for the 2001 Reissue given in **bold** hereafter, ie **224**): 'As charitable corporations exist solely for the accomplishment of charitable purposes, they are sometimes said to be but trustees for charity... the governors or directors of the corporation, though not strictly trustees themselves, are in a fiduciary position...'; in para. 228/**230** it is specifically observed that: 'Eleemosynary corporations are trustees of their corporate property ... They may also undertake the execution of special trusts connected with the objects of their foundation.' (emphasis added). (Lydiatt v Foach (1700) 2 Vern 410 at 412 is cited, as also in Tudor and Picarda above.) Volume 9 of Halsbury, on Corporations, notes that (para. 1358): 'At common law, corporations of whatever nature, have a general right to alienate their lands held in fee; and this inherent power of alienation (except in the case of land forming part of a permanent endowment or functional land of a charity) is independent of anything in the nature of a trust imposed upon the corporation in favour of either its incorporated members or the purpose for which it was constituted' (emphasis added). The words emphasised would seem to challenge the argument in the Opinion that, as already quoted above, 'the college site' could be sold off to balance the books, for, whether or not it is part of any permanent endowment, it is certainly the 'functional land' of a charity. The 1998 Reissue of Volume 9 on Corporations, however, states (para. 1151, citing the Liverpool & District Hospital case): 'A corporation whose purposes are exclusively charitable is not, in the strict sense, a trustee of its assets and is, therefore, the beneficial, as well as the legal, owner of those assets.'. The 2001 Reissue of Volume 5(2) on Charities is, in contrast and as noted earlier, more equivocal, but is clear that an *eleemosynary* corporation *does* hold its corporate property assets on trust.
30. Hambley (1998) declares that: 'Unlike statutory corporations... eleemosynary corporations hold their general property on charitable trust. This makes the corporate body (with its separate legal personality) a true trustee. However, it does not make the individual appointees [Members/Fellows] true trustees, although they owe a duty to the PSO [Public Sector Organisation, including a chartered HEI] to see that the terms of the trust are obeyed.' (para. 3.47,

emphasis added). Later, she notes that, following the Liverpool & District Hospital case as referred to above, 'it is now generally agreed that charitable companies (and by implication, statutory corporations also) do not hold their general property on trust...' (para. A 38, emphasis added), with a footnote that, in contrast, eleemosynary chartered corporations do 'strictly speaking' hold their property on trust (f. 84). Her footnotes 166 and 215 reinforce the point, seeing the Court (rather than the Visitor) as 'the proper forum if the dispute involves allegations of a breach of the terms of the trust' relating to the general property. Again, see also para. 74 and Appendix D.

31. Turning to Grant (1850), we note: 'the idea of perpetual duration is implied in the word corporation' (15, and hence perhaps in the case of eleemosynary charitable corporations also the idea of permanent endowment?). In support of Tudor's assertion that the Visitor does not oust the jurisdiction of the Court in relation to the enforcement of trust obligations imposed upon the corporation Grant comments (531/3): 'When a Visitor is duly appointed, his power, on the one hand, is confined to enforcing obedience to the Statutes of the corporation and the general maintenance of order; but he may do every act necessary for the full accomplishment of the object, only he cannot take cognisance of offences which are such by virtue of an Act of Parliament or the provisions of the common law, independently of the college Statutes... To control the execution of the Trusts with respect to estates devised to the corporation in trust, is not within the scope of the Visitorial power, either generally or when the devise has been made subsequent to the foundation of the college... generally, where the governors or visitors of a charitable foundation are trustees for the charity, and are found to be making fraudulent use of their powers, the Court of Chancery interferes on information...' (emphasis added). The words underlined seem to imply that land might have been transferred 'generally' but still in trust to the corporation at the time of foundation (*fundatis percipiens*) and can also be handed over to the college subsequently as specific trusts. Similarly, this statement from Grant (136) seems to imply that the foundation itself is a kind of trust: '... it is clear that corporations are vigorously held to the performance of the charitable uses to the benefit of which they hold land; and there appears to be a strict analogy between such cases and those of lands which were originally in trust, as it were to be applied

in furtherance of the purposes for which the corporation was erected ...
(emphasis added).

32. Shelford (1836) assists as follows (408/9): 'We have already seen that the Court of Chancery has no jurisdiction over charities established by charter if the visitors or governors appointed to regulate it are not entrusted with the management of the revenues; but that the Court has jurisdiction over governors, so far as they are the trustees of the revenues. The cases in which the governors or visitors are said not to be amenable to the Court of Chancery, must be confined to such governors as have the power of government only, and not extended to those who have the legal estate, and are entrusted with the receipt of the rents and profits: for it would be of the most pernicious consequence imaginable that any person, instructed with the receipts of rents and profits of a charity, should be unaccountable for their receipts and for a gross misapplication.' We are referred back to p 334: '... if the governors have also the management of the revenues, the court does assume a jurisdiction of necessity, so far as they are to be considered trustees of the revenue.' Kyd (1793) supports this line: '... when the management and application of the revenues is immediately intrusted to them [governors of a charity], then, as to these, they are subject to the control of that court' (Vol. 2, 195). Farrington (1994, 68) refers to a case under the law of Scotland: '... on general principles, the existing members of all corporations, in so far as they have any right of control over the funds of the corporation, are to be held as public administrators or quasi trustees...' (the Lord Ordinary in Howden and others v Incorporation of Goldsmiths (1840) 2D996). Thus, back to the idea of the Fellows as corporators and hence akin to company directors in running the corporation, but also as trustees in relation to the corporation's revenues and capital insofar as they arise under specific trusts and arguably including the Founder's general endowment?
33. Adler (1903) makes a similar point: '... all eleemosynary corporations are trust corporations, and therefore come under the equitable jurisdiction of the Courts.' (24). Carr (1905) comments that: 'Whether a corporation at Common Law has any power to alienate its property is a vexed question, to which

neither cases nor text-books give any certain or unanimous answer' (48). He notes that Kyd (1793) argues that a corporation does have power at common law to alienate its property, while Grant (1850) 'entirely disagrees' (50). Kyd does assert that corporations 'always have had an unlimited control over their respective properties... [and can deal with it] as fully as any individual may do with respect to his own property' (Vol. 2, 108), but he is here referring to civil corporations, not eleemosynary: indeed he puts 'civil' in italics seemingly to emphasise this. Yet he goes on to specify that 'At common law, the master, fellows, and scholars of a college... had the same unlimited control over [their] property' (108, emphasis added). He then notes that the Disabling Act of 13 Eliz. c.10 (see Appendix A, para. o) and the section on Stebbing below) removed this unlimited control (Vol.1, 122/3), as Shadwell (1898) also argues (Appendix A, para. p) for detail). Thus, Kyd, on balance and despite the quotation in the previous paragraph, does not seem to support the Tudor thesis concerning colleges as eleemosynary corporations holding their corporate property on trust as permanent endowment, and sees no distinction at common law amongst corporations in terms of the duty towards their corporate assets: but he does acknowledge the statutory limitations curtailing the ancient common law freedom (see Appendix A).

34. Incidentally, on the perpetuity of a corporation Carr muses (126): 'A fantastic instance, which it is hoped may never be realised, puts the situation before us. The Master, Fellows, and Scholars, who form the corporation of Trinity College at Cambridge, assemble annually in their Hall at a feast for the Commemoration of Benefactors. Suppose that all the corporators, thus assembled in full number, are suddenly poisoned by the negligence or caprice of their cook. Is the corporation at an end? Or does it exist 'passively' in spite of the momentary loss of members?... the corporation is not dead, but temporarily in abeyance' (otherwise redistributing the substantial wealth of Trinity on a *cy-près* basis could be interesting!). Yet Kyd (1793) asserts quite plainly (Vol. 2, 447) 'That a corporation aggregate is dissolved by the death of all its members... and cannot be revived without a new creation' (after all who can elect their successors from the grave?!). Brice (1893, 775) sides with Kyd.

35. Pettit (1993, 277) comments, in the context of the Court's jurisdiction: 'Where a corporate body holds property on charitable trusts there is clearly jurisdiction, but in many cases a corporation with exclusively charitable purposes simply holds property as part of its corporate funds. If jurisdiction depends on the existence of a trust a problem arises. It may be possible in the case of a charity incorporated by charter to evade the difficulty by holding that the corporate charity holds its property on trust for its charitable purposes [citing AG v St Cross Hospital (1853) 17 Beav. 435]... it has been held [citing Liverpool and District Hospital for Diseases of the Heart v AG [1981] 1 All ER 994] that the court has jurisdiction not only where there is a trust in the strict sense, but also, in the case of a corporate body, where under the terms of its constitution it is legally obliged to apply the assets in question for exclusively charitable purposes [as for a college?]... Further, the statutory definition of charity [Charities Act 1993, s 96 (1)] includes a corporate 'institution' established for charitable purposes, 'institution' is defined [s97] to include a trust, and trust is defined in relation to a charity as meaning the provisions [the Statutes?] establishing it as a charity and regulating its purpose and administration, whether those provisions take effect by way of trust or not.' (emphasis added). Clearly this would be a somewhat complex route getting to the same result (the college holds its general endowment (as if) on trust) if the more direct route of arguing that an eleemosynary charitable corporation simply holds all its corporate property on trust were to fail. This idea of quasi-trusteeship is as discussed above and in the authorities (Tudor, 261; Picarda, 384/5; Halsbury, 5 (2), on Charities, 717), relying on Re French Protestant Hospital [1951] Ch 567, and, of course, lies behind the argument advanced by Hyams (1994), as cited and quoted above). Appendix D contains a fuller discussion of the statutory definition of 'a charity'.
36. Brice (1893) sees eleemosynary corporations as subject 'to the general jurisdiction and general principles established for the general control of charities' (186), and the existence of a Visitor does not oust the jurisdiction of the Court of Chancery which 'assumes jurisdiction, and causes the trust to be duly observed and carried out' (187) Moreover, any such charity will, 'to a greater or even lesser degree', partake of the nature of a trust... as *cestuis que trustant* ... [hence] the broad ground upon which the Courts proceed is the due

observance, and carrying into effect of the Founder's objects and regulations [as if the charity/corporation were on trust?]. . . the questions, whether considered to be questions of *Ultra Vires* or trust, whether of the powers vested in or the duties imposed on the corporation, will depend on the construction placed upon the instruments under which the charity was primarily founded, or by which its constitution has been subsequently modified.' (187/188). Thus, Brice moves us in the direction of Tudor (college corporators as trustees) or at least Picarda (college corporators as quasi-trustees), while Street (1930) in updating Brice argues that the doctrine of *ultra vires* is not applicable to colleges (and other eleemosynary corporations) since they are effectively controlled by the combined jurisdiction of their Visitor in enforcing the Statutes and of the Court of Chancery in so far as they are charities with trusts to perform. In fact, Street sees the two doctrines of *ultra vires* and of breach of trust in respect to charitable corporations as being very closely related: 'Counsel may argue that an act is *ultra vires*, and the Court may call it a breach of trust. The effect of the two doctrines is similar...' (15).

37. Finally, the Encyclopaedia of the Laws of England (1907), written 'by the most eminent legal authorities', in its entry for 'Corporation' asserts that 'this is a refined conception not belonging to a rude age... this convenient abstraction... Examples of a corporation aggregate are the head and fellows of a college, the dean and chapter of a cathedral, a trading company, a municipal corporation... Lay corporations are either civil like a borough, or eleemosynary like a college or hospital... In common parlance a corporation never dies: it is endowed in English law with immortality...'. Under 'Ultra Vires' it is interesting to note use of the word 'trust' in the sentence: 'Chartered Corporation - A chartered corporation risks forfeiture of its charter, according to Lord Holt (R v Mayor of London, 1679, 1 Show 274, 280; 89ER 573), for abuse of its franchises "if the trust be broke and the end of the institution be perverted"...'. The entry for 'Charities' refers to 'Exemptions from the [Mortmain] Acts of 1736 and 1888: 'It will be seen that the Universities of Oxford and Cambridge, and the colleges and houses of learning in them, and the scholars of Eton, Winchester, and Westminster, were exempted...' (and hence allowed to acquire and hold property on a perpetual basis). The

emphasis all the time is on a perpetual obligation (if not trust) placed upon the college by its Founder, and enforced partly by the Statutes and also by the Founder's appointment of a Visitor.

YET IN SUPPORT OF THE 1997 OPINION...

38. In possible support of the view that an Oxford college does not hold its foundation endowment on trust, note the comments of the Master of the Rolls in an 1847 case, AG v Magdalen College, Oxford (10 Beav 402, at 410): '... and, subject to the specific payments, for specific purposes, including fixed stipends to the master and usher [of Magdalen College School], the revenues of the college [arising, presumably, largely from the original Waynflete endowment at the foundation of the college in 1458] belong to the college, for its own use, subject indeed to the performance of all duties incumbent on the college to perform, but not subject to any trust to be executed in this Court.' There is ambiguity in terms of quite what 'duties incumbent' means: arguably, it recognises that Magdalen is entrusted with fulfilling Waynflete's objective of a perpetual college, but that running a school was not a prime objective, and that the duties are imposed at least by the Statutes (if not by way of a trust between Waynflete and the College?).
39. Claricoat & Phillips (1996/97), noting the Tudor line on eleemosynary corporations holding their general assets on trust, comment that: 'No very good reason can be seen for this distinction, except perhaps that the court of Chancery was seeking to found a jurisdiction which would give it control over these undoubtedly charitable institutions.' (84). Hence they conclude: 'A corporate body [eleemosynary or not] does not hold its corporate property on trust.' (85, citing the Liverpool and District Hospital case). Yet they also note that the veil of incorporation is anyway lifted by s96(1) of the Charities Act 1993, which defines 'charity trustees' widely: ie the Pettit (1993) approach referred to above (paragraph 35).
40. But even if the line here argued is valid to the effect that colleges do hold the Founder's original endowment on charitable trust as permanent endowment,

are the Fellows charity trustees or 'merely' the Officers of the corporation (college itself as the only trustee)? Certainly Halsbury (Volume 5(2) on Charities) notes (para 332) that: 'When a corporation is trustee, the Court tends to leniency, more than in the case of individual trustees.' Halsbury (Volume 9 on Corporations) comments (para 1209): 'If a man trusts a corporation, he trusts that legal person, and must look to its assets for payment; he can only call upon individual members to contribute if the Act or charter creating the corporation has so provided.'

41. Grant (1850) supports the idea of the corporation having the liability, not its directors/officers (5): 'corporators in general are not liable, either civilly or criminally, for any share they may have taken in a regular corporate act within the competence of the corporation to perform'. Moreover (157): '... generally every corporator is privileged and exempted from all question for acts within the competency of the corporation to perform, regularly going under the Common Seal, in which he has taken a part. A case, in which a corporator is individually responsible, in an action, for his share in a corporate act, is when it can be shown that he has made the corporate character his shield under which to effect malicious purposes of his own...'. Yet he later comments (118): '...noone injured by the breach of trust of a charitable corporation has a right to be indemnified out of the funds of the charity... nor out of the separate property of the corporation who administers such a fund; he must proceed at common law against the individuals, who procured the wrongful acts.'

42. If the corporation as the trustee protects the Fellows as merely corporators and not being themselves trustees from personal liability, presumably this is only if their actions are not contrary to and are *intra vires* the Statutes of the corporation/college (note the use of the phrase 'a regular corporate act' in Grant as cited above). In fact, Grant (1850) seems to support the concept of personal liability for corporators who act *ultra vires*: '... a principle of corporation law which has been frequently insisted on in this treatise, that where a majority takes upon it to do acts which it is beyond the competence of the corporation consistently with its constitution to adopt, the persons forming such a majority are individually and in their private characters responsible for such acts, and cannot shield themselves behind the corporate powers and

corporate responsibility which they have exceeded and violated...' (547). This line was followed by Farrington (first edition 1994, 207/8): 'The position of members of the governing body of a chartered corporation is clear. It is the body itself which is responsible and the members carry no individual liability or responsibility... The members of a governing body of a company limited by guarantee are assimilated to the position of company director, so that their liability is also limited. The members of the governing body of an institution created by Declaration of Trust, who are also the trustees, are liable to the extent of charitable trustees... [On the other hand] It has however been held that where the officers or directors of a corporation or company actively participate in an act which is beyond the power of the corporation to perform [*ultra vires*], they are each, to the extent of participation, personally liable for the consequences.' (citing Young v Naval Military & Civil Service Co-operative Society of South Africa [1905] 1 KB 687).

43. The second edition of Farrington (1998) takes the same line: no personal liability for the members of the governing body of a chartered corporation (para 2.128, citing Re Sheffield and South Yorkshire Permanent Building Society (1889) 22 2BD 470: note, however, that this case concerns the personal liability to third parties for the debts of a corporation, not their potential personal liability to the corporation in the event of their mismanagement of its assets). Farrington (1998) sees the liability of the members of the governing body of a non-chartered charitable body, however, as being potentially very different: '... where charitable status is enjoyed, the liabilities of charitable trustees are generally unlimited and there is a potential area of doubt [para. 2. 110]... In practice, it is perhaps more appropriate to consider members of [such non-chartered] governing bodies as charitable trustees [para. 2.112] ...'. In again citing Young v Naval Military and Civil Co-Operative Society of South Africa [1905] 1 KB 687 (para 2.116) he moves away from the stance in the first edition by noting that: 'Merely causing the corporation to act *ultra vires* would not create liability. There would have to be a breach of some duty owed to the corporation.'. Farrington is uncertain whether such a breach could arise in the context of being 'a fiduciary, or by analogy with directors of companies, or if members of governing bodies are properly to be regarded as if they were trustees...'.

44. Thus, Farrington (1998) is closer than Farrington (1994) to Hyams (1994, 202), who in similar words minimises the risk of personal liability simply for an *ultra vires* action: 'Finally, it is noted here that it has been suggested that a governor of a relevant statutory education corporation could be liable in respect of act which was *ultra vires* the corporation merely because the governor had caused the corporation to act *ultra vires*. It is suggested that that overstates the position dramatically. Before liability to the corporation could arise, there would have to be a breach of some duty owed to the corporation. Unless there could be liability as a fiduciary or by analogy with company directors, or governors are properly to be regarded as if they were trustees, or unless there is some other way in which a court might determine that governors could be liable to the corporation, causing the corporation to act *ultra vires* could not properly be said without more to give rise to potential liability to the corporation'. (As noted above, Street (1930) asserts that the doctrine of *ultra vires* does not apply to eleemosynary corporations.)
45. But before Fellows take too much comfort from all of this in the context of steering the college into dire financial waters the wording in the Opinion needs again to be carefully noted, as already quoted earlier: 'There is almost a complete lack of authority on the area of the insolvency of a chartered body... [Council's] feeling was that the Attorney General would not seek a monetary remedy and that individual members of a Governing Body were unlikely to be called to account if they had acted prudently, having regard to the money available and their fiduciary duties' (emphasis added). Hambley (1998) here supports the Opinion. Note Holdsworth (1926, Vol. IX, 69): '... the law on the subject of the effect of dissolution on a corporation's proprietary position was, and still is, comparatively meagre'. Which brave collective of Fellows, however, would wish to test the legal water at risk of unlimited personal liability by behaving in any way other than adopting the highest possible standard of fiduciary care by acting as prudent (quasi-) trustees, whether formally required to or not (simply using the stricter standards of trusteeship, rather than the looser ones of company directorship, as guiding 'Good Practice')? It is worth noting that s61 of the Trustee Act 1925 and s 727 (re 'wrongful trading') of the Companies Act 1985 make provision for a trustee or

company director, respectively, to be excused by the Court if, in the case of the Trustee Act, he/she had acted 'honestly and reasonably' and 'ought fairly to be excused' the breach of trust. There is no similar escape clause for a corporator who is not also a trustee! - unless the Court adopts a purposive approach and helpfully declares him/her a quasi-trustee? Hambley (1998) makes this same point (para A4 - 43, A51) and 6.25-6.28: 'At present, however, it cannot be said with any certainty that a 'quasi-trustee' will enjoy this type of protection'. In fact, s145 of the Learning and Skills Act 2000 has extended the s727/s61 style of protection to the governors of FECs (but not to those of HECs, nor of chartered HEIs).

46. It should also be noted (see Hambley, paras A31 & A32) that the standard expected of a company director is increasing, as Gower (1997) comments: 'It is often stated that directors are trustees and that the nature of their duties can be explained on this basis... In truth, directors are agents of the company rather than trustees of it or its property. But as agents they stand in a fiduciary relationship to their principal, the company. The duties of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees, and to this extent the description 'trustee' still has validity...' (598). These concepts of a company director as the (quasi) trustee of company property and as an agent for company transactions are stated, respectively, in In re Lands Allotment Company [1894] 1 Ch 616 and in Great Eastern Railway Co. v Turner [1872] 8 Ch 149, both as endorsed in Young v Naval, Military and Civil Service Co-operative Society of South Africa [1905] 1 KB 687, with the former referring back to In re Forest of Dean Coal Mining Company [1879] 10 Ch. D. 450 (where the Master of the Rolls commented that trustees should not be 'made liable sometimes for vast sums of money' if they have acted 'honestly and faithfully' and have 'taken every possible pains' to appoint proper advisers: they should not be liable for 'mere omissions' or 'mere mistakes' - the essence of the protection offered to trustees by s61 of the Trustee Act 1925).
47. Thus, the corporator Fellow: trustee: company director: fiduciary analogy holds good for duties of loyalty and good faith, but breaks down in relation to the fact that the levels generally expected of a company director in terms of

duties of care and skill are rather different from the higher ones always required of trustees. Yet, Gower goes on, 'that laxness of the law in relation to skill and diligence is a thing of the past' (640): in essence the common law test is moving closer to the wrongful trading statutory test (s214(4)) of the Insolvency Act 1986), viz: what should the director have known or done on the basis of what would have been done by 'a reasonably diligent person having both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company and (b) the general knowledge, skill and experience that that director has'. Butcher (2000) provides a similar analysis, and cites the Sutton case of 1742 as the first instance of the Court applying the director's duty of reasonable diligence (see Appendix C, case p).

48. Finally, it would also seem unwise to take too much comfort from Government guidance (Cabinet Office, 1996) to board members of non-departmental public bodies, given the words here emphasised: 'an individual board member who has acted honestly, reasonably, in good faith and without negligence, will not have to meet out of his own personal resources any personal civil liability which is incurred in execution or purported execution of his board function.'. Define 'reasonably'! Hambley (1998) explores the territory as a research study by the Treasury Solicitor's Department for the Committee on Standards in Public Life, concluding that 'absolute reassurance on this subject is impossible' (para. S37).

THE 1860 OPINION OF `Mr WILLIAM STEBBING, MA, OF THE CHANCERY BAR`

49. Pattison (1868, 7-18) quotes this interesting Opinion which reinforces much of what has been said in the preceding section against the essential assertions of this dissertation: that Oxford colleges as eleemosynary charitable corporations hold their corporate property on trust and as permanent endowment, but, failing that, the Fellows must keep the corporation's actions properly within the College Statutes (and bearing in mind relevant legislation) - otherwise the Court (or possibly the Visitor) can intervene and impose personal liability on them for breach of trust, or the Visitor (or possibly the Court) might intervene and impose personal liability on them for the financial consequences of an *ultra vires* act.
50. Stebbing's comments of 1860 do not square with those of Shadwell (1898) (see Appendix A, paragraphs m), n), and o), nor with Kyd (1793) as cited above, and also not with Highmore (1809) and nor with Street (1930), for Stebbing makes no mention of the Disabling Act of 13 Eliz. c. 10, which, according to Shadwell, 'put a stop to the alienation by the Colleges of any part of their real estate' until they were given limited powers of sale under the first (1858) Universities and College Estates Act, subject to treating the cash proceeds as permanent endowment ('capital money'). Shadwell, Highmore, Kyd, and Street, do, however, seem to support Stebbing (and hence the 1997 Opinion) in asserting that, at least originally, the colleges had under common law complete control of their corporate property, in terms of being free to alienate it and probably there being no concept of 'permanent endowment'.
51. Stebbing comments (emphasis added): 'The colleges being eleemosynary institutions... the estates given for their corporate enjoyment are presumed by law to have been dedicated by the donors to charity... But the corporate estates are, though eleemosynary, not trust property. They are not trust-property, because no trust can be implied unless where the two interests - the beneficiary, or right to the enjoyment, and the legal, or right to the custody and management of the substance - exist, or are capable of being contemplated as existing, separate from each other; and here both interests are united in the

corporation itself... The conscience of the corporation thus being burdened with no trust for other than itself, complete ownership of its estates being enjoyed by it... the public cannot claim the aid of the courts to protect this its contingent [charitable] interest until failure of the original limitation... [Hence] The exemption of the corporate property of colleges from the ordinary charitable jurisdiction [of the Court of Chancery]...'. Thus, Stebbing disputes what we might describe as the pure trust approach argued in Tudor, and reminds us of Scott's talk of a quasi-trust as discussed above (para.10).

52. Stebbing, however, goes on to note, in considering the possibility of Parliament intervening in the affairs of the colleges, that it would probably follow 'the principles which govern the exercise of the ordinary charitable jurisdiction in equity' and would recognise the Founder's 'primary intention... to devote his estates to the maintenance of the particular corporation, doubtless to its maintenance as an instrument for the perpetual carrying out of the special objects stated in the charter or his grant, but at all events to the perpetual maintenance of the corporation itself...'. Thus, Stebbing supports Picarda's quasi-trustee interpretation, and so would, as Scott (1989) implies and Hyams (1994) suggests, the Court not seek to infer a legal obligation amounting to, and then impose, a quasi-trust liability?

53. Finally, with reference to Stebbing's point that a trust will not be created unless the legal and beneficial interests are split, note Pettit (1993): 'No trust can exist where the entire estate, both legal and equitable, is vested in one person.' (40, citing Re Cook [1948] 1 All ER 231). The same point is made in Underhill and Hayton (1995, 244), again citing Re Cook. Thus, Stebbing is in line with Scott (1989) in recognising that there is not, technically, a trust in place, and hence the concept of quasi-trusteeship.

THE NEW COLLEGE STATUTES

54. Taking New College as typical, the Statutes, as amended with the approval of the Privy Council over the decades, are ones drawn up in the wake of the Universities of Oxford & Cambridge Act 1923, as also amended by the Education Reform Act 1988, re the Model Statute concerning the tenure of academic staff. Presumably they establish that a college, whether an exempt charity or not, and whether the Fellows are charity trustees or not, must be run in accordance with them, and that exceeding the powers within them is an *ultra vires* act (contrary to Street (1930), who, as noted above, argues that the doctrine of *ultra vires* does not apply to eleemosynary corporations), which may or may not incur personal liability for Fellows as corporators/officers/governors/directors in a fiduciary position.
55. Here, however, there may be a problem. Counsel in the Opinion comments that: 'As chartered corporations, they [colleges] have all the powers of a private individual... all the powers of a natural person'. As already discussed, such 'legal personality' wide-ranging powers may be constrained by the existence of a trust in relation to the corporate endowment, and anyway were curtailed in relation to the sale of land by the Disabling Acts before being restored (but with restrictions) by the successive Universities and College Estates Acts. Counsel in the Note adds that 's42 of the Universities and College Estates Act 1925 expressly preserves any powers of sale which the university and college might have exercised had the Act not been passed. The question therefore is: 'What are the powers of a college at common law?' (see Appendix A, para i) for the text of s.42). Counsel argues that, at common law, the colleges would be free, having 'all the powers of a natural person', to sell land unless the Attorney-General challenges the decision as not being beneficial for the charitable corporation/college (eg a 'proper price' has not been obtained). But, if the colleges lost such powers of sale under the Disabling Acts, then s42 does not help: they are restored but with the restrictions concerning the need to maintain the *corpus* (see Appendix A, para n), for Shadwell's analysis).

56. Farrington (1994, 33) in considering the nature of a corporation, differentiates between the statutory corporation (eg the 'new' universities) which can do such acts only 'as are authorised directly or indirectly by the statute creating it' and the chartered corporation which can 'speaking generally, do anything that an ordinary individual can do' (quoting from AG v Leeds Corporation [1929] 2 Ch 291, and also citing AG v Leicester Corporation [1943] 1 Ch 86 and AG v Manchester Corporation [1906] 1 Ch 643). Hence the *ultra vires* rule does not apply to the chartered corporation, argues Farrington (pp 34 & 58, citing Sutton's Hospital Case [1612] 10 Co. Rep. 1a) - as does Street (1930) as noted above. Farrington (p 35) quotes from Pearce v University of Aston in Birmingham (No 2) [1991] 2 All ER 469): '... as against the outside world the University, being a body incorporated by Royal Charter, has the capacity of a natural person: as a result even acts done in contravention of a provision of its Statutes are as against the outside world not *ultra vires* or void'. The Visitor, however, says Farrington (p 67) has the power to intervene and restrain the institution and to correct any situation or action contrary to the Charter and Statutes (citing Pearce again).
57. Thus, New College, it appears, as a chartered corporation can do everything an individual can, unless the Statutes expressly forbid it. Yet the Statutes are worded so as to permit rather than prohibit: as if, indeed, they were a form of Trust Deed empowering trustees, which they may well effectively be if the College is seen as under a charitable trust to fulfil the perpetual objectives set by Wykeham in 1379. Moreover, if, as noted below, the Statutes seem to need expressly to refer to spending revenues/income, is there, therefore, an implied prohibition concerning the spending of capital/(permanent) endowment? The Statutes do not include any express power to spend endowment capital, nor to divert capital or income to any purposes beyond the purposes of college itself as detailed within the Statutes, but the Statute on the disposal of revenue does mirror Title XII in the University of Oxford Statutes (made under the 1923 Act) to enable the college to despatch money (income only, not capital) as required of it by the University 'to University purposes' (see Palfreyman, 1996/97, and Picarda, 1996/97). Otherwise expenditure from revenue may include 'reasonable and customary expenditure... for College purposes... and any reasonable [*de minimus*?] donations for educational or charitable objects

or connected with the duties of the College as a holder of property' (emphasis added, New College Statute XVII, clause 7). If there is still anything left over from revenue, the Visitor may direct it to be 'applied to purposes relative either to the College or to the University' (clause 6). Or, subject to the Visitor's right to step in, the Fellows may divert surplus revenue 'at their discretion to any purposes relative to the College and not inconsistent with these Statutes, or... to any purpose relative to the University and conducive to the advancement of learning science or education' (emphasis added, clause 11: quite why the University of Oxford might seek New College money to do something which was a University purpose but not conducive to the advancement of learning, science or education is not clear!).

58. All in all, these clauses would seem to make it difficult for a college to donate significant sums from revenue/income (let alone from endowment capital) to any charitable, or even just educational purpose, other than the University itself (which may include its constituent colleges? - 'to University purposes' as above). It is assumed, however, that the provisions of the Universities and College Estates Act 1925/64 (see Appendix A) which enable the expenditure of 'capital money' on certain limited building/refurbishment projects and subject to its repayment by way of a sinking fund, add to the scope of the Statutes without the Statutes as such needing to be revised to recognise the existence of this legislative framework concerning the restricted use of permanent endowment.
59. Thus, it might be arguable that a New College Fellow takes on oath as a corporator/officer along the lines of the loose translation attached as Appendix B. Then he/she becomes a charity trustee in relation to the Founder's endowment transferred on charitable trust, and any other specific endowments, within the meaning of s 97 (1) of the Charities Act 1993 (where 'charity trustees' are 'the persons having the general control and management of the administration of a charity'). If the Fellows, collectively as the Governing Body, are not controlling and managing New College as it fulfils its charitable objectives, who is?! Thus, for the Fellow, corporator status in itself may not carry personal liability (other than probably, via the Visitor, for an *ultra vires*

action or one contrary to the Statutes), but the (implied?) trustee or quasi-trustee status may well do so.

SO, WHAT DOES IT ALL MEAN IN PRACTICE?

60. If, as has been argued, Oxford colleges hold most of their assets as permanent endowment and the Fellows themselves are to be seen as charity trustees (even to the extent of carrying personal liability), then how could such personal liability in practice be invoked? Similarly, if Fellows are 'merely' corporators and not also charity trustees, but the corporation does have permanent endowment and the corporators (Fellows) still potentially face personal liability for any *ultra vires* decisions which they misguidedly take, are they liable only to third parties or also to the corporation itself, and, again, how in practice could such personal liability be invoked? What anyway of a general fiduciary relationship short of trusteeship between Fellows and college?
61. The most likely two scenarios giving rise to financial problems are, firstly, where a college is suddenly obliged to dip into endowment capital to part-fund a new building which it mistakenly had believed would be fully financed from other sources (eg a donation or benefaction amounts to less than expected, the project has a cost overrun, there is the cost of substantial repairs to the new building and the college loses the related expensive legal battle to recover them from the builder/architect); and, secondly, where a college gradually fails to match recurrent income and expenditure, strikes increasingly large annual deficits, shifts these deficits from the (as it were) 'profit and loss account' to reserves, steadily erodes any revenue reserves it started with, and so begins to eat endowment capital.
62. Of course, endowment can also be eaten away, slowly and indirectly but relentlessly, by a college taking too high an annual income as the yield from capital (typically 6/7% on gilts or property) rather than the acceptable 'spend rate' of 4/5% for a perpetual charity properly balancing today's income needs against tomorrow's capital growth. It is assumed, however, for the purposes of this article that the Bursar has kept the spend-thrift tendency of the

Fellows/corporators firmly under control and that this particular breach of trust is not taking place. See Dale and Gwinnell, 1995/6: they discuss the US Restatement of the Law Third, Trusts, Prudent Investor Rule based on Modern Portfolio Theory (note Longstreth, 1986) and the concept of 'total return', and compare it with English trust law with its emphasis on income and capital which 'is woefully anachronistic and in need of legislative resuscitation' (governed as it is by the Trustee Investments Act 1961, the caution of the Charity Commissioners with their 'inadequate understanding of the discipline of managing investments', and common law enshrined in such cases as Re Whiteley [1886] 33 Ch D 347, Nestle v National Westminster Bank plc [1994] 1 All ER 118, Cowan v Scargill [1984] 2 All ER 750, and Harries v Church Commissioners for England [1992] 1WLR 1241): see The Times Law Reports (24 October, 1996), however, concerning diversification of investments in the Court of Appeal's decision on three cases heard together (Wells v Wells, Thomas v Brighton Health Authority, and Page v Sheerness Steel Co plc), where the Court agreed that a normal spread of investments by the prudent investor would include some 75% equities; see also Harbottle (1995), Harrison (1994), and Richens v Fletcher (1996) for discussion of 'Good Practice' in charity investment). In fact, the Trustee Act 2000 provides the 'legislative resuscitation' referred to above; and the Charity Commission now offers major permanently endowed charities the opportunity to seek approval from them under s26, Charities Act 1993 to operate a total-return investment strategy. (At least one Oxford college has recently had its Statutes changed by the Privy Council similarly to enable it to pursue a total-return strategy.)

63. It is also assumed that a college which intends to spend capital on a new building or on the extensive refurbishment/repair/upgrading of existing building stock will plan to do so in accordance with the restrictions contained within its Statutes, as qualified/expanded by the Universities and College Estates Act (see Appendix A), and will make provision to repay the capital in the way required by the Act. Capital may not, however, be used to finance routine revenue deficits even if there are well-intentioned plans to pay endowment back from surpluses (optimistically ?) anticipated for future years. Similarly, it is assumed that Fellows are not collectively so incompetent as the Governing Body that they fail to abide by the terms of a specific trust and mistakenly spend its permanent endowment when they have no power under the relevant trust deed to use capital, or they misguidedly apply the income from the specific trust to the wrong purposes (and so are liable to compensate the trust for the amount misdirected).
64. Assuming that the Fellows are in fact charity trustees, have managed the college into a financial mess, and ought not to be excused by the Court under s 61 of the Trustee Act 1925 (because the learned judge rules that the Fellows should indeed have made a better job of controlling the charity's assets), then the most likely way in which the Fellows will be faced with personal liability to make good the college's losses will be via legal action brought against them by the Attorney-General proceeding as the *parens patriae* on behalf of the Sovereign, probably acting on a 'relation', or 'information', provided by a sub-set of Fellows, by the Visitor, by concerned students or even 'disgruntled' Old Members, or indeed by almost any passing third party (including possibly the Charity Commissioners). If the Fellows are merely quasi-trustees, then much the same could apply, but the Court probably does not have the discretion to excuse them under s61 - as discussed above (paragraph 45).

65. If, however, the Fellows are not charity trustees but may still be liable for any *ultra vires* acts, then the first question is whether any third party alleging a contractual or tort loss arising from the *ultra vires* action would bother also to sue individual Fellows as well as the college. In certain complex circumstances (agency, etc: see Hyams (1996), and also Kaplin & Lee (1995, 126-32) for a US perspective on personal contract and tort liability), the individual Fellows are potentially liable, jointly and severally, along with the college itself, to the third party, but usually the third party would not pursue the Fellows, and, exceptionally, would join only those rare individual Dons blessed with wealth inherited/married into/earned externally from books, the media, or patents!
66. Thus, the college could, initially, suffer the financial loss arising from being obliged to compensate a third party. The loss if following from a tort may well be covered by public liability insurance carried by the college, or even from directors/trustees 'errors and omissions' liability insurance provided by the college to protect its corporators/governors (as is now recommended for the members of Boards of Governors/Councils of universities by the Higher Education Funding Councils).
67. The second question, however, is whether the corporation, having suffered a financial loss, can itself invoke the personal liability of its incompetent, or even corrupt, corporators? Unless one (majority) section of the Fellowship tried to sue the rest in the name of the college, as is theoretically possible, the most likely route is via the Visitor being significantly more assertive in his involvement in the college's business than has been the case in recent times: for a discussion of the unique role and authority of the Visitor, usually these days invoked only rarely and even then almost only ever in the context of student and less commonly staff grievances, see pp 369-388 of Tudor (1995), chapter 41 of Picarda (1995), and the bibliographical essay by Palfreyman in Palfreyman & Warner (1998; second edition 2002). The late-twentieth century Visitor may be a dormant concept in Oxford colleges, but his (latent) power is clearly set out in college Statutes, and in times past the Bishop of Winchester would in the case of New College, for example, probably have been a very

real force in the life of the College as the Founder's permanent check on the society. It is conceivable that the Visitor himself might have the power to award compensation or damages in favour of the college against the miscreant Fellows (Thomas v University of Bradford [1987] AC 795, as cited by Tudor and by Picarda; along the lines of the District Auditor surcharging errant councillors?) - Street (1930) seems to argue that this is conceivable, the Visitor acting as the enforcer of the Statutes in favour of the corporation: certainly he is able to remove them from office, to strip them of their Fellowships.

68. It is, however, more likely a matter for the Court, yet uncertain whether the Court would regard the miscreant corporator Fellows as immune from liability towards the college, or would find some way to bring home personal liability on the basis of general fiduciary duties, or by analogy with the greater fiduciary duties either of charity trusteeship or even of company directorship (especially in relation to the Fellows having led the college into insolvency in the way directors may be guilty of 'wrongful trading': see the earlier references (paragraph 47) to Gower, 1997). See also Hambley (1998) as referred to earlier (paragraph 7), and Palfreyman (1998b).
69. Whatever the theoretical legal position, the cautious common-sense approach for the Fellows of Oxford colleges must surely be, as already suggested, to proceed on the assumption that they are charity trustees and hence to apply to themselves the highest level of fiduciary duty towards the charitable corporation they control, and for which, whatever may be their accountability under the Law, they are accountable: to both History and also to Society; to generations past, present and future; and to the Founder through his Visitor.

SELLING THE GREAT QUADRANGLE!

70. As mentioned above, the Opinion argues that New College, for example, is free to sell off its medieval site, and the Listed Grade 1 buildings and Scheduled Ancient Monument City Walls standing upon it. It has already been queried within this article whether such 'functional land' can be alienated at the discretion of the Governing Body: see the reference to Halsbury above (paragraph 29). It is also here argued that, even if the site could be sold, the receipts would still be permanent endowment ('capital money') and not

available to finance revenue deficits. The New College 1923 Statutes (XX, Investment Powers) grant wide freedom for the Warden and Fellows to manage the 'endowments' 'as if they were the beneficial owners thereof' (but subject to the mitigation of the Universities and College Estates Act, 1925 in relation to the Elizabethan Disabling Acts?), and do not refer to the College's 'functional land' as such (other than in the context of allowing revenues to be used 'to form a fund for the improvement or completion of the fabric of the College' - this implies 'the College' is a permanent physical entity?). The 1870 Statutes, however, not only state that 'Any property of the College may be alienated to the extent and in the manner allowed by the law' (Statute 19, emphasis added: and the law prohibits alienation of 'the functional land'?), but also require that the repair of the buildings 'shall be the first charge on the revenues of the College' (Statute 21 emphasis added; buildings first, jobs second!). The 1925 Act defines 'land' (see Appendix A paragraph g), re s 41) sufficiently widely as seemingly to include the 'functional land' of the College site.

71. Considering the typical Land Registry entry given in Appendix A, paragraph a), it would be interesting to test whether any reputable and competent solicitor would feel able to issue the appropriate Certificate (and, if so, whether the Land Registry would challenge the Certificate); or whether the Land Registry would accept anything less than the written consent of MAFF confirming that the 'disposition' of the Great Quadrangle was 'in accordance with' the Universities and College Estates Acts 1925 and 1964 (not, of course, that the 1379 New College site is registered land!).
72. Again, whatever the legal niceties, the concept of the present generation of New College Fellows, as 'the corporation', deciding to end some 600 years of association with the New College Lane site and its collection of buildings, which some would regard more as 'the College' than they would the (rather less aesthetically appealing and certainly more transient!) collective of 1990s corporators, and to sell the site to Disney as its 'Oxford Theme Park', is one which conceivably might tempt a Court to find a way to interpret the action of the Fellows as being at least *ultra vires*, or in breach of some general fiduciary

duty, and even in breach of trust! (Oldham MBC v AG [1993] 2 All ER 432 is of interest, but probably not of help, in that it stresses that a charity can alienate land (property) not essential to the fulfilment of its charitable objectives; cf a charity to preserve an historic building can't sell the building and go and preserve another one instead. In the case of Oxford colleges, however, their educational objectives could, presumably, still be adequately performed from cheaper-to-run premises within a reasonable distance of the University's libraries and laboratories (eg New College land held since 1379 at Upper Heyford, some 20 miles from Oxford; New College land at Stanton St John on the very edge of Oxford, but in the Greenbelt!): and anyway what is reasonable?!)

CASES

73. Appendix C provides a brief discussion in date order of the key cases cited, indicating why they are relied upon in the Opinion and by such as Tudor, Picarda, Pettit, and Halsbury.

IS PORTERHOUSE REALLY A 'CHARITY'?

74. This linked essay in Appendix D explores the degree to which the jurisdiction of the High Court in terms of its supervision of a charity (as defined in the Charities Act 1993, and in so far as an Oxford college is such a charity, whether 'exempt' or not from many of the provisions of that Act), and in terms of its general protection of trusts and its enforcement powers over institutions required to perform exclusively charitable purposes (as is an Oxford college), is ousted by the existence of a Visitor with exclusive jurisdiction over the *forum domesticum* and its corporate property: it is argued that the jurisdiction of the Court is not completely ousted, especially with reference to the proper application of the corporate property for charitable purposes. Appendix D relates to paragraphs 14, 18, 20, 23-27, 31/32, 35/36, and (notably) 52 with 57 (plus Appendix A) above, and is relevant to cases b, d, e, i, m, and n in Appendix C below. (See also Palfreyman, 1999.)

CONCLUSION

75. Oxford colleges hold permanent endowment as lay eleemosynary charitable chartered corporations aggregate which are also exempt charities. The major part of their assets will be 'capital money' (i.e. permanent endowment) held on trust, and in accordance both with their Statutes and also with the Universities and College Estates Acts 1925/64, unless the college can show it is not capital money or that it is specific trust money where the terms of the trust are such as to allow the expenditure of capital: otherwise, as perpetual institutions, the corpus must be kept intact. Thus, the college will be hard-pressed, without breach of trust, to use capital, either within the general law relating to trusts or within the 1925 /64 Acts, for funding a recurrent deficit. The college as an eleemosynary charitable corporation is the trustee of that permanent endowment, and the Fellows of the college as corporators/officers of the corporation are also in effect the charity trustees of such capital money/permanent endowment and risk personal liability as such. This accords with 'the traditional view' as expressed in Palfreyman (1995/96) and is as asserted in Tudor and Halsbury which cite such cases as: Lydiatt v Foach (1700) 2 Vern 410, AG v Governors of the Foundling Hospital (1793) 2 Vers. Jun. 42; AG v Wygggeston's Hospital (1852) 12 Beav. 113; AG v St Cross Hospital (1853) 17 Beav. 435; AG v Governors of Sherborne Grammar School (1854) 18 Beav. 256; and Baldry v Feintuck [1972] 1 WLR 552 (see Appendix C for details of these cases).
76. Appendix D, for example, quotes Rubric 48 from the original William of Wykeham Founder's Statutes as given to New College, Oxford, some six hundred years ago, where Wykeham, Bishop of Winchester and sometime Lord Chancellor, instructs the Warden and Fellows not to dispose of the corporate property which he has transferred to the College, entrusted, as it were, to their care, under the supervision of future Bishops of Winchester as the Visitor to the College. They may use only the revenue stream yielded by such capital to fund the activities of the College. Similarly, later sets of revised Statutes (1870 and, most recently, 1923) make provision for the expenditure of revenue, while their silence on the use of capital implies there is no power to dispose of it: it is a permanent endowment *corpus*, the income from the capital, as prudently invested, being applied only in support of the exclusively charitable objectives and purposes of the perpetual College. The Visitor may

approve proposals to allocate surplus revenue, but, again, there is nothing in the Statutes enabling the Visitor to authorise the disposal of capital assets from the permanent endowment. (See paragraph 57 above.)

77. If, however, the cases cited in paragraph 75 above are now just too arcane and archaic to support Tudor and hence the corporation is not strictly *de jure* a trustee, it could well be *de facto* in that the Court might regard the duties and obligations of trusteeship to be the appropriate standard for the management of the corporate assets (as for the US experience discussed in Dale and Gwinnell (1995/96) cited above): Re Manchester Royal Infirmary (1889) 43 Ch D 420; Re French Protestant Hospital [1951] Ch 567; Soldiers', Sailors' and Airmens' Family Association v AG [1968] 1 WLR 313; and Harries v Church Commissioners for England [1993] 1 All ER 300. Certainly there is no question of the Court's charity jurisdiction being ousted either by there being a Visitor or by a degree of control by Statute: AG v St Cross Hospital [1853] 17 Beav. 435; In re Whitworth Art Gallery Trusts [1958] Ch 461; and Construction Industry Training Board v AG [1973] Ch 173. (See Appendix C for details of these cases and also Appendix D (with paragraph 74) on the boundary between the jurisdictions of the Court and of the Visitor.)
- Interestingly, Counsel in his supplementary Note to the Opinion, comments on 'the fiduciary duties of corporators': 'Although the corporators are not trustees in the sense that the property of the college is vested in them they are in a similar position to trustees, and indeed are 'charity trustees' within the meaning of that expression in the Charities Act 1993 [s97(1), the charity being the college]...' (again, see Appendix D below, plus paragraph 74 above).
- Counsel cites and quotes from Re French Protestant Hospital. Here we are in the territory of the quasi-trustee, as discussed above.

78. If this line of argument is incorrect in that colleges do not hold their general corporate property on any kind of trust whether pure, quasi or constructive (as argued in the Opinion, relying on Liverpool and District Hospital for Diseases of the Heart v AG [1981] Ch 193, and in accordance with Stebbing, Shadwell and Re Cook as discussed above), then their Fellows may anyway still risk personal liability as corporators in relation to any act contrary to or *ultra vires* the Charter and Statutes, and are not able to be relieved of such liability as

corporators in contrast to the possibility of the Court being lenient towards any trustee (breach of trust) or company director ('wrongful trading') under relevant legislation. If the New College Statutes are typical for Oxford colleges, they do not provide for the expenditure of capital and refer only to the disposal of revenues: the expenditure of capital (other than in accordance with the provisions of the Universities and College Estates Act 1925/64?) would seem to be, therefore, an *ultra vires* act. The enforcement of such personal liability upon miscreant or incompetent corporators to compensate the corporation for any financial losses arising from their *ultra vires* actions could probably be at the hands of the Visitor: indeed, given the Farrington/Street/Brice line discussed above, only the Visitor may be able to act since, at common law, there will have been no, as it were, 'offence' for the Court to deal with. The Courts, however, may step in and, moreover, could see fit to do so on analogy with charity trusteeship and with certain aspects of company directorship. *Ultra vires* or not, there is also the issue of the controls imposed by the Universities and College Estates Acts 1925 and 1964.

79. Indeed, Counsel in his supplementary Note comments: 'While, unlike trustees in whom the trust property is vested, the corporators are not liable to third parties for the debts of the college, they can be made liable to the college, at the suit of the Attorney-General, for breach of their fiduciary duties; and while I consider it most unlikely that the Attorney-General would take action against them if they acted in good faith with a sole view to the good of the college, it is here that the constraints on their freedom of action are to be found, and the possibility of their being held to account by the Attorney-General if they should act without due attention to their fiduciary duties should not be wholly disregarded.' (emphasis added). The use of the word 'sole' is interesting in that it implies that the duty of the Fellows of St Smugg's is to be more concerned about its long-term survival than, say, the short-term financial viability of the collegiate system as a whole. That said, one has to note that the 'fiduciary relationship' is a slippery legal concept, described by Finn (1977, 1) as 'one of the most ill-defined if not altogether misleading terms in our law'. (See also Austin, 1996, for a valuable discussion of 'fiduciary duty': 'good faith', where the latter concept is described as 'a fifth column waiting for its moment' or as 'an answer waiting for a question', and where the enduring

concept of 'a fiduciary duty of care' is also described in relation to trustees and company directors.)

80. Whatever the strict legal position, the simple issue for Fellows is whether there is sufficient risk of personal liability (or at least uncertainty within the Law) that the common-sense, practical approach is to guard against it by adopting a standard of fiduciary duty which is modelled on charity trusteeship and hence is least likely to trigger liability. Above all, whatever the Law may or may not say with any clarity, there is the moral and ethical question of whether today's generation of Fellows should ever contemplate eating endowment at the expense of tomorrow's, especially if yesterday's have been disciplined over the centuries so as to honour the concept of the Oxford college as a perpetual charitable corporation, and hence, under the supervision of the Founder's duly nominated Visitor, to ensure that the *corpus* is maintained intact and indeed is able to generate long-term the annual income needed to fulfil the Founder's eleemosynary objectives as entrusted to the fiduciary care both of the Visitor and of the Fellows.

APPENDIX A: THE KEY PROVISIONS OF THE UNIVERSITIES AND COLLEGE ESTATES ACT 1925 (amended 1964)

- a) s1: 'The universities and colleges to which this Act applies are the Universities of Oxford, Cambridge and Durham, and the colleges or halls in those universities, and the Colleges of Saint Mary of Winchester, near Winchester, and of King Henry the Sixth at Eton, and for the purposes of this Act the Cathedral or House of Christ Church in Oxford shall be considered to be a college in the University of Oxford.' (Hence, for example, the Land Registry will typically contain this sort of entry in relation to Oxford college transactions: 'Except under an order of the Registrar no disposition by the proprietor of the land is to be registered unless: either (a) it is made in accordance with the Universities and College Estates Acts 1925 and 1964; or (b) a Certificate signed by the proprietor's solicitors has been furnished that the disposition has not contravened any of the provisions of the proprietor's charter or private statutes [not *ultra vires*], or the terms of any trust subject to which the land may have been held [not in breach of a specific trust]...').
- b) sections 5/7(4)/13(7)/14(4)/15(2)/16(4)/20/23(5)/24(5) state that any money received in accordance with the powers of sale, exchange, leasing, surrenders, regrants, varying leases, granting options, etc., being given under the Act 'shall be capital money': ie land being permanent endowment when converted to cash still remains permanent endowment, as capital money, and may be used only as in c) below...
- c) s 26 sets out how capital money may be applied: investment in securities, the improvement of farms, purchase of other land in fee simple or leasehold (60 years minimum), purchase of mineral rights, development of existing land, restoring chancels whose maintenance liability falls upon the college, improving existing buildings (the extent of such refurbishment/up-grading being as set out in the two parts to Schedule 1), etc....subject to the capital spent being replaced within/over a specified period (up to 50 years).
- d) s 30 concerns borrowing money to build new or enlarge/improve existing buildings.
- e) s 32 states over what period such borrowings must be repaid (up to 50 years, but only 25 years for certain types of refurbishment), such repayment can be by way 'of a sinking or redemption fund'.
- f) s 38 allows for 'the Minister' (MAFF) to give consent as required under certain sections (eg s 23 (3) requires that an option specifies the price at which the land will eventually be sold, but, typically, the Minister now gives approval for price to be determined at the future time of sale providing a clear, precise formula for then agreeing it is put in the option agreement at the outset).

- g) s 41 specifies what land is covered by the Act:
- (1) The powers and provisions of this Act relating to land belonging to a university or college shall extend and be applicable not only to land vested in the university or college, or in any body constituted for holding land belonging to the university or college, and held as the property or for the general purposes of the university or college, but also to land so vested which may be held upon any trusts, or for any special endowment or other purposes, connected with the university or college.
 - (2) The power conferred by this Act on a university or college may as respects each particular university or college be exercised by such body and in such manner as may be provided by the statutes regulating that university or college.
- h) s 43 defines, *inter alia*, 'building purposes' and 'land'...
- (i) "Building purposes" include the erecting and the improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for any building purposes or purposes connected therewith...
 - (iv) "Land" includes land of any tenure, and mines and minerals whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or otherwise) and all other corporeal hereditaments; also manor, an advowson, and a rent and all other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land;
- i) s 42, 'Saving of existing powers' is interesting...
- 'Nothing in this Act contained shall restrain a university or college, or other body constituted for holding land belonging to a university or college, from exercising any powers of sale, exchange, purchase, or borrowing, or from granting any leases or making any grants, whether by way of renewal or otherwise, which the university or college might have exercised or granted under the provisions of any Act of Parliament, whether public general or local or private, or under any other authority, or in any other manner whatsoever, in case this Act had not been passed: Provided that, upon any exchange being effected under the provisions of the Inclosure Acts 1845 to 1882, it shall be lawful for the [Secretary of State] to authorise any money by way of equality of exchange to be received by the university or college, and any money so received shall be capital money [the money (if any) to be paid by way of equality of exchange has been paid to the university or college] no order of exchange shall be finally confirmed by the [Secretary of State], and a recital of such payment in the order of exchange shall be conclusive evidence thereof.'

Counsel in his Note regards this section as meaning that colleges can still do whatever they might have been able to do at common law - ie sell lands as 'a natural person'.

Here there is conflict with Shadwell (1898) as discussed in n) below, and his reference to the Disabling Act 13 Eliz. c10 (as confirmed in Kyd, 1793). The essential question is not whether colleges can sell land (the 1925/64 Act allows them to IF it indeed applies, and their Statutes do not forbid it), although there may be a question mark over the sale of functional land (the Great Quadrangle issue; see paras 70-72). The key question is whether, once sold, the capital raised may be used to cover recurrent revenue deficits, or should be treated as permanent endowment (capital money). Counsel acknowledges in the Note that the Attorney-General can intervene (corporate property or trust property) 'if he considers that the sale is contrary to the interests of charity', but is unlikely to do so providing the college has been 'acting in good faith with a sole view to the benefit of the college' and a proper price has been obtained by way of effective marketing of the sale property.

j) The preamble to the Act reads:

'An Act to consolidate the Universities and College Estates Acts 1858 to 1898, and enactments amending those Acts'.

k) It is noted within the Preamble that the Act has been 'extended with modification by Universities and Colleges (Trusts) Act 1943 (c9), s 2 (3)'. This 1943 Act is 'to make provision as to trust property held by or on behalf of certain universities and colleges', including Oxford colleges (s 1 (1)). The Act permits a college to make a scheme whereby specific trusts can be combined into one pooled Fund for convenience of investment management and accounting, each trust having shares in the overall Fund and income being allocated on the basis of the shareholdings. Power is also given to create reserves 'for the purpose of eliminating or reducing fluctuations of income'. The 1925 Act applies to the property held within any such Fund (s 2 (3)) - see g) above and reference to s 41.

l) The First Schedule lists the type of 'Improvements for which a University or college may borrow or apply Capital Money' (including, usefully, heating and lighting, structural alterations and extensions 'reasonably required', 'buildings for farm purposes'; and even 'sea walls', 'dams', 'tramways', 'canals', 'parks of amusement and entertainment', 'team rollers'..!).

m) The Encyclopaedia of the Laws of England (1907) under 'College' notes that: 'In managing their property, colleges were formerly restricted by the provisions of the 13 Eliz. c. 10, and 14 Eliz. c. 11, but the Universities and College Estates Acts of 1858 and 1880 have given large powers of leasing, etc.'. This statement supports the argument that the 1925 Act is of general application in relation to Oxford colleges managing their endowment as land or land as transformed into 'capital money' and then otherwise invested.

n) Shadwell (1898) and Skene (1898) discuss the earlier versions of the 1925/64 legislation. The latter notes (15): 'Except to the extent to which they are affected by special legislation, the Universities and the colleges therein are in the position of any other corporation, so far as their power of dealing with their real property is concerned. Their powers in this respect are now, to a great extent, regulated by the... Universities and Colleges Estates Acts...'. Shadwell's pamphlet earned him his Oxford DCL and in it he comments: (emphasis added) '[Originally] No restriction existed at Common Law upon

the sale of land by corporation's aggregate, whether lay or ecclesiastical... the concurrence of the several members of a corporation aggregate was looked upon as a sufficient security against wasteful alienation... This uncontrolled power of the Colleges to part with their property came to an end with the passing of the [Disabling] Act 13 Eliz. c. 10... This Act effectually put a stop to the alienation by the Colleges of any part of their real estate... [unless, rarely, permission could be obtained by a specific Statute, in which case] provision was made for the due application of the consideration money, so as to leave the corpus of the endowment undiminished... [Then along comes the Universities and College Estates Act 1858 which enabled] the Colleges, with the consent of the Copyhold Commissioners (afterwards styled the Land Commissioners, and now the Board of Agriculture [MAFF by the 1964 amendments], to sell, enfranchise and exchange... all or any part of their landed property [including functional land?]. [the sale proceeds can be used only] for the purchase of other land [under the 1858 Act, and, by the 1880 Amendment Act also to allow Colleges to] borrow from themselves... [in which case it must be paid back so that] The corpus of College property is preserved intact... [So, these Acts have been 'a Good Thing'], they have been of great service... Some of the conditions of the borrowing may perhaps be modified, though the principle of preserving the corporate property intact should be carefully maintained.... (NB 'The introduction of this Act [the 1880 amendments] was due to one of the ablest and most eminent of College Bursars, the late Mr. Alfred Robinson, Bursar of New College.')

- o) The Disabling Act of 1570/71 to which Shadwell refers to is entitled 'An Act against Fraudes, defeating Remedies for Dilapidations, etc.', and states that 'from henceforth al Leases Gyftes Grauntes Feoffmentes Conveyances or Estates, to be made had done or suffered by any Master and Fellows of anye Colledg... to any Pson or Psons Bodyes Politike or Corporate [other than 21 year, three lives leases] shalbe utterly voide and of none Effect to al Intentes Constructions and Purposes; Any Law Custome or Usage to the contrary any wayes notwithstanding ...'. If, however, the College Statutes already contain a power only to grant a lease for less than 21 years, then the lower figure in the Statutes shall prevail as the legal maximum. The Act is largely concerned with 'Frauds by Ecclesiastics' but 'Colledges' and 'Hospitalitye' (the lay eleemosynary corporations) are swept up in it since they too, like 'Spyrituall Lyvynge', are deemed to suffer from 'the Dilapidations and the Decaye' which gives rise to 'the utter impoverishing of all Successors Incumbentes in the same', and hence the restriction covers not only 'any spiritual or ecclesiastical living, [but also] any houses, lands, tithes, tenements or other heridataments, being any parcel of the possessions of any such college...'. The 1570/71 Act was strengthened by the 1576/77 Act of 18 Eliz. c11, which complains that the earlier Act had not stamped out the abuses by, *inter alia*, 'collegiate persons' in relation to, in their case, 'collegiate lands, tenements or heridataments'. This later Act also provides exemption for St John's, Oxford, in so far as its Founder had arranged for his brother to have a life interest for 99 years in a certain part (the Manor of Fifield) of the original endowed lands: St John's was allowed to honour this, despite the 21 year, three lives rule. Kyd (1793), as referred to in the main text, confirms Shadwell's interpretation, as does Street (1930): the latter recognises the common law freedom for 'corporations of every kind' to deal with property as they wish 'apart from statutory prohibitions or the principles of *ultra vires* or trusts', and notes the

restrictions of 'the Disabling or Restraining Acts' applying to colleges in the form of 13 Eliz. c10, 14 Eliz. c 11, and 39 Eliz. c5 (140). Highmore (1809) gives a history of these and relevant later Acts (432-436): 'The acts recited, certainly restrain any corporation from wholly alienating any of their lands or tenements...' (439). The second edition of Tudor (1862) does likewise (311-313), noting that s 38 of the Charitable Trusts Amendment Act, 1855, gave the Board (the early Charity Commissioners) power to override the Elizabethan Disabling Acts in relation, presumably, to specific trust land; the 1858 first Universities and College Estates Act grants the same power to the Minister in relation to all collegiate land.

- p) Neate (1853), 'Fellow and late Treasurer of Oriel College', discusses the powers of colleges in relation to leases granted with the levying of 'fines' and the disbursements to the Fellows personally of the 'fines' rather than this income being part of the general revenues of the college ('the College itself, as a whole, has been sacrificed to the interests of the managing body', p5). Not surprisingly, Neate argues for the freedom of estate management which subsequently came with the first of the Universities and College Estates Acts in 1858.
- q) Pycroft (1851) notes that certain colleges have 'protection afforded by legislative incorporation', the relevant legislation being 'several private and public statutes, which have been enacted for the protection of some of the collegiate privileges': Merton, 1st Mary c24; Queen's 27th Eliz. c.2; Corpus, 3rd Jac. I c.3; Oriel, 3rd Jac. I c.9 and 13th Anne c 6& 8; Pembroke, 13th Anne c6 & 8; and (but he gives no references) All Souls, Balliol, Brasenose, Magdalen, New College and Worcester. Essentially Pycroft is arguing that hence the 1850s Royal Commission on Oxford is an 'illegal mode of obtaining information', an improper 'Inquisition' leaving 'some of the noblest institutions of this country' potentially 'at the mercy of the ministry of the day' and its 'political designs... [and] dictates'. (Back to the cause of the colleges in 1997 seeking the Opinion which has generated this research!)

APPENDIX B: THE FELLOWS' OATH OF ALLEGIANCE

I, NN, now admitted as a Fellow of the College of Saint Mary of Winchester, founded by the reverend father Lord William of Wykeham in Oxford, pledge that I shall faithfully uphold all statutes and ordinances of said College, as well as those of the College of the Blessed Mary at Winchester, as far as they apply to me, and that I shall, as far as I am able, see to it that they are upheld and observed by others.

Further, that I shall be faithful as well as diligent in whatever duty it should fall to me to be assigned and to fulfil, and, when it is assigned me, I shall take it up and, as far as I can, faithfully carry it out. And that I shall be faithful to said Colleges and shall, as far as I am able, in no way cause or suffer to occur in any way any damage, scandals or prejudices against said Colleges, but in any ways I can, by my own efforts or those of others, I shall prevent their occurrence and if I myself cannot prevent them, I shall spill the beans fully to the Warden, Sub-Warden, Dean, and Bursars of said Oxford College.

The Warden, Sub-Warden and other Official Fellows, in legitimate and honourable matters, and especially in the business of said Oxford College, I shall obey, assist, and obediently give to them due reverence. And I shall preserve, as far as I can, the tranquillity, peace, benefit, welfare, and honour of said Colleges and the unity of their Fellows, and take pains that they be preserved by others.

Further, regarding the election and admission of Fellows to said Oxford College, I shall give and extend loyal counsel, without favour, so that said College may take forethought regarding the good, chaste, modest, and honourable persons who are most skilful and suitable for study and advancement in scholarship, according to the ordinances and statutes of said College.

Further that I shall diligently assist in the improvement of said Colleges, their increase in goods, lands, possessions, and rents, and the preservation and defence of their rights, and the promotion and execution of any business of said Colleges, in whatever condition, rank, honour, and office I shall later hold, with sound counsels, deeds, favours, and assistance, as far as I am able and as far as concerns me, and I shall work faithfully for the same ends and persevere as far as I can to the final and fortunate outcome of said business, as long as I live in this world.

(Translated by Catherine Atherton, Fellow and Tutor in Classical Philosophy, New College.)

NB In electing to a Fellowship the assembled existing Fellows of New College as the Corporation must first have read to them by the Sub-Warden the following summary of the Elizabethan Statute, 'An Act against Abuses in the Election of Scholars...':

Whereas by the intent of the founders of colleges...elections of fellows [and indeed Wardens/Provosts/Masters and also Scholars] are to be had and made of the fittest and most meet persons...Yet notwithstanding, the fittest persons to be elected are seldom or not at all preferred. For remedy whereof be it enacted...that, if any persons...which have election...take any money, fee, reward or any other profit...in electing,...the place of such persons in the said colleges shall be void, and any other person may be elected in the room of such persons so offending, as if they were naturally dead.

APPENDIX C: DISCUSSION OF KEY CASES (in date order; N.B. for Green v Rutherford (1750) see Appendix D)

- a. Lydiatt v Foach (1700) 1 Vern. 410: cited in support of the following statements... 'eleemosynary corporations hold their corporate property upon charitable trusts' (Tudor, 163 & 371); charitable corporations are 'but trustees for charity' and 'Eleemosynary corporations are trustees of their corporate property' (Halsbury, 5 (2), 717 & 719); 'quite tenable' that a charitable corporation is 'necessarily a trustee of its property' (Picarda, 383 & 410); Lydiatt et al were acting on behalf of the Hospital of Felstead in Essex against Sir John Foach; the Report states as held by the 'Lord Keeper': 'The corporation are but trustees for the charity, and might improve for the benefit of the charity but could not do anything to the prejudice of the charity, in breach of the founder's rules.' Note that this was not a matter of the Hospital acquiring after foundation a specific trust, but concerns the Hospital as a charitable corporation following the directions and fulfilling the objectives set by its founder, the Lord Rich.
- b. AG v Governors of the Foundling Hospital (1793) 2 Ves. Jun. 42: see CITB v AG (1973) below; here the Court of Chancery asserted its control over all charitable corporations which have the management of their revenues and mismanage them: 'There is no doubt, that a corporation, being trustee [here of its original foundation corporate property], is in this Court the same as an individual... There is nothing better established, than that this Court does not entertain a general jurisdiction to regulate and control charities established by charter. There the establishment is fixed and determined; and the Court has no power to vary it. If the Governors, established for the regulation of it, are not those, who have the management of the revenues, this Court has no jurisdiction; and, if it is ever so much abused, as far as respects the jurisdiction of this Court; it is without remedy: but if those, established as governors, have also the management of the revenues, this Court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue...'. (See Appendix D.)
- c. AG v Wyggeston's Hospital (1852) 12 Beav: 113 cited in support of the statement: 'eleemosynary corporations hold their corporate property upon charitable trusts' (Tudor, 163 & 371); the Master of the Rolls commented: 'Here is a foundation for charitable purposes... the whole property was devoted to uses pious or charitable...' (emphasis added) - 'uses', of course, as the forerunner word for trusts.
- d. AG v St Cross Hospital (1853) 17 Beav 435: cited in support of the statement: 'eleemosynary corporations hold their corporate property upon charitable trusts' (Tudor, 163 & 371); the Master of the Rolls noted that the original foundation of this eleemosynary lay corporation 'is as clear and distinct a trust for the general support of charity as ever was created... and one which it is incumbent on this Court to carry into effect... the manifest trusts imposed by the original foundation... Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common

law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, and which he may take care to see are properly kept up and appointed...'. (See Appendix D.)

- e. AG v The Governors of the Sherbourne Grammar School (1854) 18 Beav 256: here another visited (by the Lord Chancellor), lay, eleemosynary, charitable corporation was held to hold its original, foundation corporate property on trust: 'This Court has authority to redress a breach of trust, when the objects of the founder have been prevented or neglected...'. (See Appendix D.)
- f. Re Manchester Royal Infirmary (1889) 43 Ch D 420: corporate bodies held in some circumstances to be subject to the duties of trustees; here the application of the Trust Investment Act 1889 (Tudor, 160; Picarda, 384, makes a similar point); cited in support of the statement: 'eleemosynary corporations hold their corporate property upon charitable trusts' (Tudor, 163 & 371); here, however, there was clearly a trust in place prior to the incorporation of the officers of the MRI and hence the corporation became the trustee and so was obliged to follow trustee duties.
- g. The Abbey, Malvern v Ministry of Town & Country Planning [1951] 2 All ER 154: Danckwerts, J., noted that a company or corporation as 'an artificial person' and 'a legal person' 'can only operate by means of human beings': 'therefore, one has to see who operates the company... who, in fact, is in control...'. Note, however, that here those 'human beings' were already trustees via a trust deed, that they operated as such through a company, and hence the company held its assets not beneficially but on the trust set out in the trust deed lying behind its memorandum and articles of association (the same would apply if it had been a chartered corporation, as it were, inheriting a trust). The judgement cross-referred to Re French Protestant Hospital below.
- h. Re French Protestant Hospital [1951] Ch 567: cited in support of these statements... 'the governors and directors of the hospital incorporated under Royal Charter are in the position of trustees and have to act in a fiduciary manner on behalf of the charitable trusts for which they act' (Tudor, 261); governors and directors of a charitable corporation 'though not strictly trustees themselves do occupy a position so analogous' that they should be unpaid as for all (non-professional) charity trustees (Picarda, 384 & 385); not strictly trustees but 'are in a fiduciary position' (Halsbury, 5 (2), 717); Danckwerts, J. commented: '... it is the corporation which is trustee of the property of the charity in question, and ... the governor and directors are not trustees. Technically that may be so... [But] in a case of this kind the court is bound to look at the real situation which exists in fact... those persons[corporators] are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property... [they] in fact control the corporation and decide what should be done... they are, to all intents and purposes, bound by the rules which affect trustees...'.
- i. In re Whitworth Art Gallery Trusts [1958] Ch 461: the Manchester Whitworth Institute was a chartered charitable corporation managing the Gallery; its financial position became weak and the Court was asked to agree to the transfer of premises and funds to Manchester University; Vaisey J. comments: 'a charitable corporation founded by Royal Charter cannot be refounded or re-

established by the court, but can be regulated and controlled by the court, especially on financial grounds...' (citing, *inter alia*, AG v Governors of the Foundling Hospital, 1793, as above). (See Appendix D.)

- j. Soldiers', Sailors' and Airmen's Family Association v AG [1968] 1 WLR 313: the chartered corporation held to be subject to the Trustee Investment Act 1961 (Tudor, 160); the governor and directors of a charitable corporation 'though not strictly trustees themselves, do occupy a position so analogous' (Picarda, 384); held that the Association was a charitable corporation and hence was in a position of a trustee with regard to its funds, and hence such funds can be invested only in accordance with the 1961 Act unless the Charter ('just like a trust deed setting up a trust', at 317H) gave wider powers of investment. (See Appendix D.)
- k. Baldry v Feintuck [1972] 1 WLR 552: eleemosynary corporations subject to the jurisdiction of the Court like any other trustee (Tudor, 371, emphasis added); this case concerned the Students' Union at Sussex University and a proposal to greatly widen its purposes, the Court holding that there was no power so to extend the objectives (*ultra vires*) and that the officers of the Union as an educational charity 'are, clearly, trustees of the funds for charitable educational purposes' (at 557 E); hence also, the concept of breach of trust in handling of the corporate property, 'trust money' (at 558 D).
- l. Re Vernon's Will Trusts [1972] 1 Ch 300: a bequest to a corporate body is a beneficial addition to its general funds, a trust is not to be inferred (Tudor, 159 & 163); the corporate body here was a crippled children's guild incorporated under the Companies Act 1929: it was not an eleemosynary charity; Buckley J. commented: 'A bequest to a corporate body... takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee. There is no need in such a case to infer a trust for any particular purpose... the natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially and without the imposition of any trust...' (at 303 E & F).
- m. Construction Industry Training Board v AG [1973] Ch 173: the Board of the chartered corporation held its funds in trust for exclusively charitable purposes (Tudor, 160); the use of the word 'trust' in this context 'ought to be construed loosely', but certainly the CITB 'owes fiduciary duties to charity, which can be enforced by the court in personam' (Picarda, 384); the CITB wanted to be deemed charitable so as to avoid selective employment tax; to be so it needed to show it was a charity and 'subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'; the AG argued it was subject to control by relevant statute and not, therefore, to the control of the High Court which was ousted by the statute; 'Every charitable institution is in general subject to the control of the High Court in the sense that, even if regulated by statute or charter, the court will at the instance of an appropriate person - and in particular of the Attorney-General - intervene to prevent disobedience to the statute a charter...' (at 181G), but this intervention in relation to an *ultra vires* act is different from controlling a charity as such, when here the relevant Minister under the statute also provides some of the detailed supervision/control; here the Court was not entirely or even

substantially ousted, and so the CITB is a charity; note that Plowman J. cited In re Whitworth Art Gallery Trusts (see above), which in turn referred to AG v Governors of the Foundling Hospital (see above) from which he quoted with approval: 'The result is, this court must not hastily take upon itself to interfere with those, who have by charter, and in this case by Act of Parliament, the whole control over this charity. But where, having also the management of the revenues, they are abusing their trust, the court has jurisdiction' (at 189A, emphasis added). (See Appendix D.)

- n. Liverpool and District Hospital for Diseases of the Heart v AG [1981] Ch 193: cited in support of these statements... 'a company formed under the Companies Act is not holding its assets on trust, but a corporate body might if its constitution obliges it to apply the assets for exclusively charitable purposes' (Tudor, 161, emphasis added); and a company/corporation may owe 'fiduciary duties to charity, which can be enforced by the court in personam' (Picarda, 384); here the Hospital was in a position analogous to that of a trustee but was not in a strict sense a trustee, being both the legal and beneficial owner of its assets (hence not holding its general corporate assets as a trustee for the benefit of charitable purposes); Slade J. commented: 'In a broad sense a corporate body may no doubt aptly be said to hold its assets as a 'trustee' for charitable purposes ;in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes... [but] none of the authorities... establish that as company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets... They do, in my opinion, clearly establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily do give rise to the jurisdiction of the court to intervene in its affairs...' (at 209 E-G); CITB v AG (as above) was expressly considered, as was In re French Protestant Hospital (also above), and were seen as referring to 'trust' in a wide sense, rather than a strict sense, and hence the judgement went on: '... the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of a trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes... [then] the court can act in personam so far as necessary for the purpose of enforcement...' (at 214 B/C); yet the jurisdiction of the court may be partially ousted by the existence of a Visitor or specific statutory supervision/control (citing AG v Magdalen College, Oxford, 10 Beav 402, and CITB v AG as above). (See Appendix D.)
- o. Harries v Church Commissioners for England [1993] 2 All ER 300: the presence of a trust was assumed (Tudor, 160); 'due regard required of trustees re the balance of income against capital growth and the need to balance risk against return' (Picarda, 497); here 'the assets in question are held by the Commissioners as a [non-eleemosynary] corporate body's property and applicable in accordance with its constitution. The assets are not, strictly, vested in trustees and held by them upon defined trusts [citing the Liverpool and District Hospital case, as above]... For present purposes, however, nothing turns upon this distinction. Whatever significance this distinction may or may not have in other contexts, in the context of the issues arising in these proceedings the Commissioners' position is no different from what it would be

if the Commissioners were unincorporated and they held the assets formally as trustees...’.

- p. The Charitable Corporation v Sutton (1742) 2 Atk 400, 9 Mod Rep 349, 26 ER642, 8 Digest (Repl) 498: the Sutton case is especially interesting in relation to personal liability. Some fifty ‘committee men’ of a chartered corporation were held liable for some £350K (*sic*, in 1742!) as losses to the corporation arising from their failure to supervise an employee making loans on inadequate security to poor folk. The Sutton case-reports note that the ‘directors’ failed to keep in place checks and balances to prevent conspiracy and fraud amongst employees and mismanagement generally. Indeed, their failure was in breach of various by-laws of the corporation, and largely stemmed from a lack of ‘reasonable diligence’ and in fact ‘a supine negligence’ or ‘gross negligence’ in fulfilling their duties to the corporation.

APPENDIX D: IS PORTERHOUSE REALLY 'A CHARITY'?

I have argued elsewhere (Palfreyman, 1998a) that Oxbridge colleges and chartered ('old', pre-1992) universities are perpetual institutions (corporations) with a permanent endowment *corpus*, operating within general charity law, within the law of corporations, within their Statutes as approved by the Privy Council (including the provision of a Visitor implementing a domestic/internal set of rules or laws, a *forum domesticum*), and within particular legislation (eg the 1925 Universities and College Estates Act (amended 1964) applying to Oxbridge colleges and also to the universities of Oxford, Cambridge and Durham, and the more recent legislation setting up HEFCE in relation to HEIs generally being accountable via HEFCE for their use of public money - 'the regulatory regime' surrounding them, eg Education Reform Act 1989 and the Further & Higher Education Act 1992). (See also Palfreyman & Warner, 1998, chapters 2, 3 and 4, plus the bibliographical essay on the Visitor, pp 340-360; second edition 2002, chapters 2/3/4 and 30.)

Hence, I have also argued elsewhere (Palfreyman, 1996), it follows that those controlling the corporation (Fellows of Oxbridge colleges, Members of Council in chartered universities) are possibly *de jure* charity trustees, or probably *de facto* (quasi-) trustees, or at least their fiduciary duties are so great as for a Court to view them to be analogous to trustees, with the attendant risk of personal liability if they mismanage the institution and its assets: breach of trust, breach of fiduciary duty, an act *ultra vires* the Statutes, an act contrary to 'the regulatory regime', or all four! (see also Hambley, 1998). They should, therefore, behave as if charity trustees, rather than, say, company directors or merely meeting the basic fiduciary duty of simply being honest (acting in good faith).

Here, however, I wish to explore in more detail the role of the Charity Commissioners and of the High Court in supervising such colleges and universities as chartered charitable corporations. This article has been prompted by Oliver Hyams (1993/94), who asks 'Is There Such a Thing as 'Charity'?'. (See also Hyams, 1998, para. 2.177 & 2.178, plus 18.020 - 18.024.) I want to explore whether, say, Porterhouse (Tom Sharpe's mythical, fictional Cambridge college) as a typical Oxbridge college or, say, the University of Barchester (in Anthony Trollope's fictional cathedral city) as a typical chartered university, are each 'a charity' under the Charities Act 1993, and, if

so, to what degree they are exempt from the provisions of that legislation but are still subject to the jurisdiction of the High Court in generally overseeing the management of charities.

The Charities Act 1993 (hereafter 'CA 1993') in s96 (1) defines 'a charity', for the purposes of the Act, as 'any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities...' (emphasis added). Clearly, Porterhouse and the University of Barchester are 'corporate', being incorporated bodies or corporations, and perform 'charitable purposes', (higher) education in the form of teaching and research. The phrase 'charitable purposes' is further defined as 'purposes which are exclusively charitable according to the law of England and Wales' (s97 (1), CA 1993): hence the favourable taxation and VAT regimes applying to the provision of education generally. The next clause within s97 (1) defines 'charity trustees' as being 'the persons having the general control and management of the administration of a charity' (our Fellows of Porterhouse or the Members of the Council of the University of Barchester IF indeed each is 'a charity').

The use of the word 'IF' will be explained shortly, but, first, note that 'exempt charity', ie a charity exempted from most of the regulatory regime of the Charity Commissioners, is (s96 (2) again) 'a charity comprised in Schedule 2' of the CA 1993. Schedule 2 (Exempt Charities) in clause (b) includes the Oxbridge colleges, while clause (c) takes in 'any university... which Her Majesty declares by Order in Council to be an exempt charity for the purposes of this Act' (as has been done for all English HEIs, whether chartered or statutory). Hill & Hackett (1992/93) explore what this exemption means: it does not mean exemption from all aspects of the supervisory role of the Charity Commissioners, and nor does it mean the burden of trusteeship is lessened or the risk and extent of personal liability reduced: '... the duties and responsibilities of trustees of exempt charities are just as high as for any other charity and the liabilities are just as real if anything goes wrong', p 213 (see also Tudor, 1995, p 15). They are, however, freed of the need to register with the Charity Commissioners or to submit an annual report and accounts to them, and they may commence 'charity proceedings' without the authority of the Charity Commissioners; the latter may not institute an enquiry into them, search their records, or remove a trustee (Fellow, Member of Council), but they can provide advice if requested and can

authorise *ex gratia* payments. There is no exemption from the requirement to keep proper accounts, to supply a copy of the accounts to anybody asking for one, to include a statement concerning being an exempt charity in documents relating to the sale of land, and (perhaps most interestingly) the rules (s72, CA 1993) concerning the disqualification from acting as charity trustees (if bankrupt, convicted of an offence involving dishonesty or deception, etc.). Moreover, 'exempt charities remain, however, fully subject to the jurisdiction of the Court in relation to charities. The common law relating to charities is thus equally applicable to exempt charities.' (p. 213).

But are they 'fully subject to the jurisdiction of the courts'? - back to my 'IF' above... What can be the uncertainty? The CA 1993, Schedule 2, lists, in effect, Porterhouse and Barchester as exempt charities, free of most of the powers of the Charity Commissioners: clearly, Parliament regards them as each 'a charity'. Yet 'a charity', as noted earlier, is 'any institution... subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities...' (s 96 (1), CA 1993). Can there be doubt whether the High Court has such jurisdiction over Porterhouse and Barchester, and, if so, might Hill & Hackett be wrong in saying that exempt charities are 'fully subject to the jurisdiction of the courts' if not of the Charity Commissioners?

The difficulty lies in whether the jurisdiction of the High Court is partly or fully ousted by the fact that other controls (the Privy Council approval of Statutes, the role of the Visitor, specific legislation) apply to the governance of these chartered, charitable, eleemosynary (founded as perpetual), lay corporations, there being nothing then left for the High Court to need to control, supervise, regulate. This is complicated legal territory, with no clear, easy answers - as explored in Palfreyman, 1998a, or in relation to colleges more generally in Hyams, 1993/94 and 1994 (especially p 199), and also by Hambley (1998) in respect of what she calls 'Public Sector Organisations' (NHS Trusts, HEIs, FEIs, etc).

Farrington (1998) picks up the uncertainty: 'The court... can only intervene to regulate or control the activities of a chartered corporation where the governing body has management of the revenues where they are considered to be in the position of trustees and have abused that trust... the courts have otherwise no power to intervene by ordinary process except possibly where the action taken by the corporation

involves mismanagement of charitable funds' (1·45 and 1·47, p 26, emphasis added)... 'in all cases where charitable status is enjoyed, the liabilities of charitable trustees are generally unlimited and there is a potential area of doubt.' (2.110, p174/5, emphasis added).

There is a little more clarity at least in relation to how such corporators should behave when handling the investments of the corporation: ie closer to 'the prudent investor' charity trustee (see Dale & Gwinnell, 1995/96, on US law, and note Harries v Church Commissioners for England [1992] 1 WLR 1241 where the Court regarded the 'trustees' of a charitable corporation as being subject to the principles of charity law concerning investment).

The position in relation to a specific trust is straightforward - for example, money bequeathed to Porterhouse by alumnus X only for purposes A, B, C linked to the educational activity of the college will be a separate charitable trust managed by the college as itself the trustee, and will be within the jurisdiction of the High Court in terms of the Court enforcing the trust for charitable purposes. The problem area is in relation to the general property of the corporation, the assets used to support the broad charitable educational activities of the institution. A statutory, 'new' (post-1992) corporation, for example, would normally hold such assets beneficially, not on trust, and hence the jurisdiction of the High Court in relation to charity will not apply: there being no trust to enforce. The governance of the corporation will be constrained and monitored by other mechanisms of the kind referred to earlier.

In the case of eleemosynary chartered corporations (such as Porterhouse and Barchester), however, the academic authorities, Tudor (1995, 162/3 & 371) and Halsbury (Vol. 5 (2) on Charities, para. 228/**230 in the 2001 Reissue**) (and as recognised by Hambley, 1998, para: 347, A38, f84/166/215), argue that they do (as eleemosynary chartered corporations) hold their general corporate property, and not just specific assets donated 'with strings attached', on trust, and hence the jurisdiction of the High Court does indeed apply with respect to protecting those assets and ensuring that they are applied only for charitable purposes X, Y, Z in accordance with the Charter and Statutes/Ordinances/Regulations of the corporation/foundation and with any relevant legislation. The Privy Council and the Visitor may still be involved, but that does not necessarily mean the jurisdiction of the High Court has been ousted

with regard to the charity assets (Tudor, 1995, 371, 374, 381, & 387). In turn, the line in Tudor and Halsbury as the modern authorities stretches back to and is supported by Grant on Corporations (1850, 136 and 531/3), Shelford's Law of Mortmain (1836, 334 and 408/9), and (to a lesser degree) Kyd on Corporations (1793, Vol. 2, 195): all as discussed in Palfreyman, 1998a.

The contrary view to what might be called 'the Tudor line' is, as mentioned before, that a corporation holds its general corporate assets beneficially, subject to their being used only in support of charitable purposes X, Y, Z. Claricoat & Phillips (1996/97), for example, consider the Tudor distinction between eleemosynary and non-eleemosynary (civil or ecclesiastical) corporations, stating: 'No very good reason can be seen for this distinction, except perhaps that the Court of Chancery was seeking to found a jurisdiction which would give it control over these undoubtedly charitable institutions...' (84). Certainly some of the case-law is archaic: Lydiatt v Foach, for example, coins the concept of corporators as 'but trustees for charity', yet dates back to 1700 (2 Vern. 410). (Indeed, one extensive case report (Green v Rutherford, 1750, 1 Ves. Sen. 463-475) is worth considering in detail - see Appendix.) Even so, some (Picarda, 1995) would argue that the Attorney-General, as the *parens patriae* protecting charity, could still seek to protect and enforce the use of such assets in an appropriate charitable way by challenging the corporation in the High Court.

Halsbury (Vol. 5 (2), Reissue, 1993) comments that the court 'exercises jurisdiction with respect to the dealings and conduct of governors who receive and apply the revenues of charity property or manage charity estates', even if an eleemosynary corporation and 'whether or not the corporation is subject to the control of a Visitor' (para. 431/483). Thus, the jurisdiction of the court is never completely ousted, and anyway 'the jurisdiction of a Visitor is limited by the statutes regulating the charity...' (para. 414/466), and 'If the power given to the Visitor is unlimited and universal he has, in respect of the foundation and property moving from the Founder, no rule but his sound discretion. If there are particular statutes they are the rule by which he is bound, and if he acts contrary to or exceeds them he acts without jurisdiction, and consequently his act is a nullity.' (para. 406/458). Thus, para. 222/224 sums up the role of the Court: 'Perhaps the true meaning of the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust is that the court has no jurisdiction to intervene unless there has been placed on the

holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes; for the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to such obligation and against whom the court can act in personam so far as necessary for the purposes of enforcement.'. (See the Appendix for a discussion of the constraints placed upon the New College Visitor by the original Founder's Statutes, and especially by Rubric 48 on the disposal of property: restraints which, arguably, either impose in effect a trust between Founder and Visitor/Warden & Fellows, thereby invoking the jurisdiction of the Court, or else so constrain the Visitor (and, in turn, the Warden & Fellows) that such 'particular statutes' leave scope for the jurisdiction of the Court to be applied by way of judicial review of the Visitor were he to exceed his jurisdiction/powers - or both!)

Others would attempt to get to the same answer by a different route - for example, Pettit (1993, 277) comments, in the context of the Court's jurisdiction: 'Where a corporate body holds property on charitable trusts, there is clearly jurisdiction, but in many cases a corporation with exclusively charitable purposes simply holds property as part of its corporate funds. If jurisdiction depends on the existence of a trust, a problem arises. It may be possible in the case of a charity, incorporated by charter, to evade the difficulty by holding that the corporate charity holds its property on trust for its charitable purposes [the Tudor line] ... it has been held that the court has jurisdiction not only where there is a trust in the strict sense, but also, in the case of a corporate body, where under the terms of its constitution it is legally obliged to apply the assets in question for exclusively charitable purposes [the Picarda line] ... Further, the statutory definition of charity [CA 1993, s 96 (1)] includes a corporate 'institution' which is defined [s97 (1)] to include a trust, and trust is defined in relation to a charity as meaning the provisions [the Statutes?] establishing it as a charity and regulating its purpose and administration whether those provisions take effect by way of trust or not.' (emphasis added).

Claricoat & Phillips (1996/97) also recognise this mechanism for 'lifting the veil of incorporation' and ensuring that 'charity trustees' means real people, as opposed to just the legal persona of the corporate body itself, who can be sent to prison for the

mismanagement of a charity! Farrington (1998) similarly follows the Pettit approach, at least in relation to the Governors of the statutory (new, post-1992) HEIs: 'In practice, it is perhaps more appropriate to consider members of governing bodies as charitable trustees... Section 97 (1) Charities Act 1993 defines 'charity trustees' in terms which include directors of charitable corporations as well as trusts. It is argued with support from the decision in Harries v Commissioners for Church of England [as cited above] that governors of a higher education corporation clearly fall within this definition and in that capacity are subject to the jurisdiction of the courts.' (2.112 and 2.114, p 176). Yet, if anything, the statutory regime surrounding the new HEIs is stronger than for the chartered universities and Oxbridge colleges (although the former do not in addition have the concept of the Visitor), and might be more likely to oust the jurisdiction of the Court.

For Tudor, Picarda and others, much of the debate centres around two key cases, which Hyams (1993/94) discusses (and especially what he terms the 'problematic dicta' within them): Liverpool and District Hospital for Diseases of the Heart v Attorney-General [1981] Ch 193, and Construction Industry Training Board v Attorney-General [1973] Ch 173 (CITB). In essence, if the Tudor line is not acceptable (the general property of an eleemosynary chartered corporation is held on trust and hence within the jurisdiction of the High Court), nor the Picarda line (the corporation anyway has a duty to apply the assets for exclusively charitable purposes and hence the Attorney-General can seek to protect them in the High Court), nor the Pettit approach (whether the assets are held under a trust or not, they still belong to a charity within the jurisdiction of the High Court, even if they are partially exempted from the regime of the Charity Commissioners), Hyams argues that the Court will anyway seek to bring the charitable corporation and its general property within its jurisdiction on the basis that 'it is in a position so analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs...' (quoting from Slade J in the Liverpool Hospital case, at 209 G, Slade J's emphasis). This would be in keeping with the Harris v Church of England Commissioners case referred to earlier. Moreover, in the CITB case, at 185A, Russell L.J. (dissenting) comments: '...I find it difficult to hold that the Minister in the instant case can be said to have less control than a Visitor may have; and, indeed, I think some institutions specifically exempted by the Act have Visitors,

which if the definition was devised to exclude such, should think their exemption superfluous...!

Could, however, the High Court's jurisdiction still be partially ousted by the argument that, for Porterhouse and Barchester at least as corporate charities, there is already in place an alternative regime for controlling the administration of the corporate property, including (if necessary) the power to change the constitution of the corporation and to appoint or remove its corporators as the *de facto* (quasi-trustees (the s72, CA 1993, powers referred to above): this last component perhaps being the justification to oust completely the jurisdiction of the Court? Consider the alternative controls applying to Porterhouse and Barchester...

There are the Charter and Statutes as approved by the Privy Council; there is the Visitor; there is some legislation. The Privy Council 'office' presumably does not have the resources of the Attorney-General or the Charity Commissioners to 'police' such exempt charities, and hence the Attorney-General : High Court route is the only viable one. Moreover, unless the Crown has clearly reserved powers when granting the Charter, not even the Privy Council has power to alter the Charter, to add or remove corporators/members, or control the administration of the corporation (Tudor, 1995, 371) - short of the Privy Council revoking (*scire facias*) a Charter as is theoretically possible, but that topic is an article in itself! The Visitor similarly has few resources and, these days, is largely a passive, appeal-based entity, not a Visitor in the active sense of coming to inspect, and anyway, while the Visitor may have exclusive jurisdiction on the interpretation and application of the Statutes, he/she does not necessarily have jurisdiction over the charity general property IF it is indeed held on trust OR because the Founder did not intend to provide the Visitor with discretion concerning the disposal of capital as opposed to revenue/yield arising on that capital (see the Appendix) and, even if he/she did so, the Visitor does not have the powers, for example, to trace assets and recover charity property, or punish corporator (quasi-) trustees (other than depriving them of office and, possibly, awarding damages in favour of the corporation against them). The Statutes themselves typically are not minutely detailed, they assume the application of broad swathes of the common law

(eg concerning the holding of meetings) or, arguably, the application of both common law and at least attention to the 'good practice' contemplated in relevant legislation (eg the concepts of 'fair-dealing' and 'self-dealing' in relation to the fiduciary duties of the corporators to the corporation and its property, the concept of the prudent man of business investing assets on behalf of another or balancing income today against capital growth/income growth for tomorrow, the Trustee Act 1961 and the CA 1993 itself). Finally, the specific legislation (eg the Further and Higher Education Act 1992) relates only to the case of public funds flowing into and within Barchester, not its corporate property; while the Universities and College Estates Acts 1925/64 constrain Porterhouse only in relation to the disposal of its permanent endowment capital *corpus*, not in its use of income. (Hyams (1998, para. 14.006) even speculates that 'the blatant misuse of public [i.e. charity] funds even by the trustees of a charitable trust [including a chartered 'private' university or college]' might be subject to public law and not just charity/trust law, and hence the HEI might be liable to judicial review, as well as being accountable to the Charity Commissioners and/or the High Court/Visitor.)

Any alternative regime of control, therefore, while it might be enough to justify exemption from most of the requirements of the CA 1993, hardly seems to replace fully the jurisdiction of the High Court either in theory or in practice - theory which is confirmed in the interpretation given by Tudor and Halsbury (and followed by Hambley), and practice which is acknowledged in the cases where the Court has considered the governance and the administration, including the management of the corporate property, of corporations as being within its jurisdiction (e.g. the C18 and C19 cases noted in Tudor (1995, 369-388) or Picarda (1995, ch 41), or briefly summarised in Williams, 1910; and, more recently, Baldry v Feintuck [1972] 1 WLR 552, re the property of the Students' Union at the University of Sussex).

So, to conclude... Firstly, since 'the control of the High Court in the exercise of the court's jurisdiction with respect to charities' (s 96 (1), CA 1993) is not ousted, either completely or even substantially, by there being realistically and practically implementable and effective alternative regulatory regimes in place, Porterhouse (or

Barchester) is indeed really 'a charity' in the terms of the CA 1993; and, secondly, hence its (corporator -) Fellows (Members of Council at Barchester) are 'charity trustees' under s 97 (1) of that Act. Although, thirdly, there is exemption from many of the terms of the Act, that exemption is not total; and anyway, fourthly, Porterhouse is within the jurisdiction of the High Court with reference to its general corporate property, as well as any specific trust property, at the relation of the Attorney-General (or even the relation of its Visitor or any of its corporator - Fellows as charity (quasi) - trustees wishing to commence 'charity proceedings') or (perhaps more likely) as a result of the laying of an 'information' before the Attorney-General.

Moreover, and fifthly, all this matters because, possibly at Porterhouse and probably at Barchester, the (quasi -?) trustee role of the Fellows/Members of Council may not be sufficiently emphasised in guidance given on 'good practice' in decision-making, and similarly and very probably the personal liability (even if remote) risk of charity trusteeship is not sufficiently appreciated, while the potential role of the Attorney-General (and even of the Charity Commissioners via those post-exemption residual sections of the CA 1993 still applicable) within the jurisdiction of the High Court in relation to charity matters is likely to be little understood. (See Palfreyman, 1998b, on issues of governance within HEIs.) Indeed, Members of the Council of the University of Barchester are probably amongst the two-thirds of those in control of a charity who do not think of themselves as 'charity trustees'; the Fellows of Porterhouse may have a more instinctive, or at least better 'folk-memory', understanding of this aspect of becoming a corporator, not least by swearing a Latin oath of allegiance on being admitted to a Fellowship (see research on charity trustees and their appreciation of the obligations of trusteeship as discussed in Dollimore, 1993/4). In this last respect at least there is recent progress thanks to the admirable clarity of the legal research study produced by the Treasury Solicitor for the Neill (née Nolan) Committee on Standards in Public Life (Hambley, 1998). Perhaps if this concept of charity (quasi -) trusteeship were better instilled, especially within the statutory HEIs (and, indeed, FEIs), the recent scandals of mismanagement, and even alleged corruption, would have been fewer?

(NB *This Appendix D appeared as an article in the Charity Law & Practice Review 6 (2) 151-166; see Palfreyman, 1999.*)

APPENDIX: Green v Rutherford (1750) 1 Ves. Sen. 463

This case clearly confirms that the Visitor has no jurisdiction when the eleemosynary corporation (St John's College, Cambridge) holds assets on a specific trust established subsequent to the Foundation, but, moreover, it does not support the Tudor/Halsbury line that the general corporate assets are held on trust and hence also fall within the jurisdiction of the Court: it leaves them within the exclusive jurisdiction of the Visitor, the jurisdiction of the Court is completely ousted by the existence of the Visitor. So declare the Master of the Rolls, Sir John Strange, and the Lord Chancellor, Lord Hardwicke: '... and though they are a collegiate body, whose Founder has given a Visitor to superintend his own foundation and bounty, yet as between one claiming under a separate benefactor and those trustees, for special purposes, the court will look on them as being given on special trust, the visitor has no jurisdiction' (MR); '... whether the plea is sufficient in law and equity to oust this court of all manner of jurisdiction of the cause... for in case of a private, particular, limited jurisdiction, and of courts proceeding by rules different from the general law of the land, no appearance, answering or pleading of the party, will give a jurisdiction to the court... the original and nature of visitorial power must be considered. The original of all such power is the property of the donor, and the power every one has to dispose, direct, and regulate his own property... the law allows the Founder or his heirs, or the person especially appointed by him to be Visitor, to determine concerning his own creature... The Founder may give a general power; or may limit and bind by particular statutes and laws... If the power to the Visitor is unlimited and universal, he has in respect of the foundation and property moving from the Founder no rule but his sound discretion. If there are particular statutes, they are his rule, and he is bound by them: and if he acts contrary to or exceeds them, acts without jurisdiction... his act is a nullity...' (LC, concurring with MR that a 'special trust... puts an end to the Visitor's power' over the trust property, emphasis added).

Clearly, therefore, in the analysis by the LC much will depend on just what powers over his foundation property a Founder devolves to the Visitor - absolute freedom, or circumscribed by Statutes set by the Founder? The Porterhouse and Barchester Statutes are not to hand, but those for New College, Oxford, are: the original William of Wykeham Statutes given by him as the Founder in 1379 stress that New College is an

'everlasting college of poor and needy scholars clerks' for which the Founder hereby wishes 'to make establish and also ordain certain things which now occur to us which we think necessary and useful for our said college at Oxford for the scholars clerks and other persons and the possessions and goods of the same college and their healthful regulation...' (Preamble, emphasis added). Rubric 1 enjoins the Warden, Scholars and Fellows (the corporators) 'to preserve, protect and manfully defend the goods and chattels, lands, revenues and other possessions spiritual and temporal' so that the College may 'peacefully and strongly persist and for ever endure in the beauty of peace' (emphasis added). Rubrics 47-51 (see detail below on Rubric 48) and 53-58 concern the management of property, and the original Statutes end with what Leach (1911, 373) calls 'a somewhat pathetic attempt to secure permanence, by the most stringent oaths and penalties on any one altering them'.

Thus, William of Wykeham, then Bishop of Winchester, appoints as the Visitor to his 'everlasting college' all his successors as Bishop of Winchester, but he binds them with very 'particular statutes' (to use the phrase of Hardwicke LC, as quoted above) - indeed, more detailed statutes than usually found in an Oxbridge college. Moreover, within those Statutes he implies the permanence of the property of the College (a permanent endowment *corpus*), and expressly states that the corporation may spend revenues but not mentioning capital. If the Fellows were free to spend capital, how could the College be secure as 'everlasting' in its objective of distributing the bounty (yield/revenues/income?) of the Founder? Hence, there is no express power given to the Visitor to approve proposals to spend capital. This links to the regime for the disposal of land or 'capital monies' in the 1925/64 Universities and College Estates Act. So, not only does the Visitor appear not to have such open jurisdiction as to permit the spending of capital, but it seems not unreasonable to say that it is as if William of Wykeham was putting his capital assets (then, of course, mainly land) with the Visitor for the benefit of the College, entrusting them to future Bishops of Winchester: perhaps, therefore, one can see why Tudor and Halsbury refer to the general property of an eleemosynary chartered corporation being held on trust. Hence, the Court might retain jurisdiction not only because of this arguable point about the existence of a trust, but also because it would need to intervene if the Visitor acted beyond his jurisdiction, as it were *ultra vires* the Founder's Statutes, in relation to the

disposal of capital/permanent endowment: there are limited grounds on which the Visitor is subject to judicial review (Palfreyman & Warner, 1998, 350/351). It may be thought that in this way William of Wykeham, as also a one-time Lord Chancellor himself, would ensure that, in order to best protect and preserve his 'everlasting college', these matters would be as firmly settled as it was possible to get them six hundred years ago. He might be alarmed to hear talk in 1990s Oxford of the possibility of colleges being free to spend capital or use capital to fund recurrent deficits!

Incidentally, the CA 1993 defines 'permanent endowment' in s 97 (General interpretation) as to be construed in accordance with s 96 (3), which in turn reads: 'A charity shall be deemed for the purposes of this Act to have a permanent endowment when all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act 'permanent endowment' means, in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity.'. Given that the Statutes for the Oxford colleges typically refer only to the spending of the revenues (the annual income stream arising on the investment of the capital) on the particular and exclusively charitable purposes envisaged within the Statutes, there is a distinction between the expenditure of the capital and income, and hence there is permanent endowment held by these corporations - which, since they are eleemosynary, and eleemosynary means the perpetual distribution of the Founder's bounty, is not surprising: the endowment *corpus* has to be preserved over the centuries so as to generate the revenues needed to fulfil the charitable objectives (see the reference below to New College's original Founder's Statutes and especially Rubric 48).

The 1870 revision of the New College Statutes, as also for the 1923 revision, continue the express mention of revenues being available for use and, by their silence on the issue, the implication that capital is not to be expended, thereby echoing the relevant Rubrics from the Founder's original Statutes. Indeed, in the event of there being insufficient College income 'to provide for the charges created by these Statutes and to defray the rest of its expenditure', the Visitor may approve what we would now

inelegantly call a 'downsizing' 'scheme to be submitted to him by the Warden and Fellows': no mention of dipping into capital to finance recurrent deficits on the annual operating account! (Statute XVIII, The Visitor, clause 4). The same clause is to be found in all sets of college statutes (Statutes, 1927). Similarly, the 1870 Statutes for New College refer to the maintenance of the Chapel, the Hall, 'and the several other buildings of the College'; as 'the first charge on the revenues of the College' (Statute 21): no suggestion there of spending capital on repairs! The 1923 Statutes allow the Governing Body to 'set apart out of the general revenues of the College' a sum each year 'to form a fund for the improvement or completion of the fabric of the College': no suggestion here of freedom to be readily raiding endowment capital to build a new building or to fund major repairs!

In the original Wykeham Statutes Rubric 48, 'That the manors, possessions, advowsons and ecclesiastical patronage must not be disposed of' (as set out below, and as kindly translated by the New College Archivist, Mrs Caroline Dalton, from the medieval Latin of the original Wykeham Statutes) seems as close to a trust (Wykeham to the Warden & Fellows as the corporators) as a Court may need to find in order to impose its ultimate jurisdiction over the corporate property of New College, and hence is surely supportive of the Tudor/Halsbury/Hambley line. Moreover, it also seems to support the argument that the Founder, in this area at least, had curtailed the jurisdiction of the Visitor: the Bishop of Winchester supervises the Warden and Fellows in spending revenues arising from this corporate property, yet has no power to dispose of such property as capital (the permanent endowment *corpus*). As explored in Palfreyman (1997/98), it was because future generations in some such corporations abused this 'trust' that the Elizabethan 'disabling' legislation was passed which severely circumscribed the ability of colleges and other eleemosynary corporations to dispose of such property; legislation which was to some degree eventually freed up by the mid-Victorian 1858 'enabling' forerunner of the 1925 Universities and College Estates Act. (As an aside, note in Rubric 48 the commercial common-sense of William of Wykeham's stricture that new commitments in terms of corporate expenditure must be covered by additional 'permanent possessions' yielding twice the cost to recurrent annual revenue of the proposed additional activity: he well

recognised that, then as now, organisations underestimate expenditure and overestimate income!)

RUBRIC 48... 'That the manors, possessions, advowsons and ecclesiastical patronage must not be disposed of'

Item we decree, ordain and wish that the manors, advowsons and ecclesiastical patronage, lands, tenements, rents, services, serfs or free tenants, ground and soil, woods and land where trees grow, meadows, grazing lands, commons and pasture and other immoveable goods of the college, whether they derive from spiritual or from secular sources and any rights whatever or wherever they may be, must never be granted or sold as a fief or for the term of a life. Nor must advowsons or ecclesiastical patronage, vicarages, chaplaincies, or chantries be granted to anyone as a fief or for the term of a life or of years, or for any other period of time: manors may only be put to farm for a term of twenty years and appropriated churches for a term of ten years, and not for any other term. Nevertheless we permit that the lands, tenements, messuages and tenures in all places with their appurtenances, which were customarily let out to tenants, both in town and in villages, on manors and in appropriated churches in all places without exception belonging and appurtenant to the college, which fall into the hands of the said Warden and Fellows through escheat or through failure of heirs or by any other method may be granted and put to farm for a term of years in the court rolls according to the customs anciently practised in those places: or else they may be let by indentures between the Warden and Scholars on the one hand and the recipient or recipients on the other hand, the college documents being sealed with the communal seal. All this is on the understanding that no transaction of this kind exceeds the term of fifty or sixty years and that the tenants of the said lands, tenements, messuages, and holdings or of any part of them do not give away, or grant any interest in them to other people or pass them on in any way without the special permission and agreement of the said Warden and Scholars. Furthermore we decree that the Warden, Fellows and Scholars of our said college must on no account grant annual pensions or perpetual chantries or corrodies, nor must they commit the college to any other spiritual or temporal obligations in perpetuity or for a term of more than forty years, unless they have received for their part in sustaining the obligation and for their interest and protection in so doing as permanent possessions either in kind or in

rents for the convenience and sustenance of our aforesaid college twice as much as the cost of sustaining the obligation.

LIST OF CASES CITED (See Appendix C for discussion of key cases and Appendix D for discussion of Green v Rutherford.)

AG v Governors of the Foundling Hospital (1793) 2 Ves. Jun. 42.

AG v Governors of the Sherborne Grammar School (1854) 18 Beav. 256.

AG v Leeds Corporation [1929] 2 Ch 291.

AG v Leicester Corporation [1943] 1 Ch 86.

AG v Magdalen College, Oxford [1847] 10 Beav 402.

AG v Manchester Corporation [1906] 1 Ch 643.

AG v St Cross Hospital (1853) 17 Beav. 435.

AG v St John's Hospital, Bedford (1864) 2 De G.J. & S 621.

AG v Whorwood (1750) 1 Ves. 537.

AG v Wyggeston's Hospital (1852) 12 Beav. 113.

Baldry v Feintuck [1972] 1 WLR 552.

Charitable Corporation v Sutton (1742) 2 Atk 400.

Construction Industry Training Board v Attorney-General [1973] Ch 173.

Corporation of Mercer University v Smith, 371 SE 2d 858 (Ga 1988).

Cowan v Scargill [1984] 2 All ER 750.

Ex p. Berkhamstead Free School (1813) 2 V & B 134.

Great Eastern Railway Co. v Turner (1872/73) 8 Ch Appeal Cases 149.

Green v Rutherford (1750) 1 Ves. Sen. 462.

Harries v Church Commissioners for England [1992] 1 WLR 1241.

Howden and others v Incorporation of Goldsmiths (1840) 2 D 996.

Hume v Lopes [1892] AC 112.

In re Forest of Dean Coal Mining Company (1878/79) 10 Ch 450.

In re Lands Allotment Company [1894] 1 Ch 616.

In re Whitworth Art Gallery Trusts [1958] Ch 461.

Liverpool and District Hospital for Diseases of the Heart v Attorney-General [1981] Ch. 193.

Lydiatt v Foach (1700) 2 Vern. 410.

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Re Vernon's Will Trusts [1972] Ch 300.

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R v Mayor of London [1679] 1 Show 274, and 89 ER 573.

Soldiers', Sailors' and Airmen's Family Association v Attorney-General [1968] 1 WLR 313.

Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F. Supp. 1003 (DDC 1974), *aka* the Sibley Hospital case.

Sutton (1742): see Charitable Corporation...above.

Sutton's Hospital Case (1612) 10 Co Rep 1a.

The Abbey, Malvern v Ministry of Town and Country Planning [1951] 2 All ER 154.

Thetford School Case (1610) 8 Co. Rep. 130b, 131a.

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INDEX (paragraph numbers, not pages unless referring to Appendix D)

Adler 33
Austin 79
Bursar Robinson of New College Appendix A, para. n
Brice 34, 36
Butcher 47
Carr 33, 34
'Charity' & 'Charity Trustees' 39, 59, 60, 64, 69, 77, Appendix D
Dale & Gwinnell 13, 62
Claricoat & Phillips 39, Appendix D
Disabling Acts 33, 50, 55, Appendix A
Eleemosynary Corporations: corporate assets held on trust (permanent endowment) 10, 19, 20, 23, 26, 27, 28, 29, 30, 31, 33, 35, 36, 39, 52, 57, 58, 76, Appendix C
Eleemosynary Corporations: corporate assets not held on trust (not permanent endowment) 10, 13, 14, 23, 25, 28, 33, 35, 51, 52, 55
Farrington 32, 42, 43, 56
Finn 79
Gower 46, 47
Green v Rutherford, Appendix D
Halsbury 29, 40, 75, Appendix D
Hambley 7, 30, 45, 46, 48
Hill & Hackett, Appendix D
Hyams 6, 21, 44, Appendix D
Insolvency 45
Luxton 28
MPT 13, 62
Permanent endowment, Appendix D
Perpetuity of a Corporation 34
Pettit 35, 39, Appendix D
Picarda 22, 28
Quasi-trustee 7, 10, 32, 45, 69, 77 (re Fiduciary Duties, 79), Appendix D
Radcliffe 1947 Opinion 17
Rubric 48 of Wykeham's Statutes, Appendix D
s61 (and s 727, plus s145) 45, 64
Scott 9-11
Sibley Hospital case 8, 12
Stebbing 49-53
Street 36, 54, 67
'Traditional View' 5, 6, 18-48, 75
Trustee Act 2000 62
US Law 8-13
Visitor, ousts jurisdiction of Court? 24, 25, 30, 31, 36, 51, 52, 74, Appendix D