THE COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX v PEMSEL

Sir John Mummery[1]

Introduction

'Leading cases' are a vital part of the chaotic-looking case law tradition. They radiate what Professor Brian Simpson described as[2] a 'timeless quality' by coming to stand for an enduring legal idea, principle or doctrine.

Their timeless quality boosts our understanding of how the law works in practice and how it applies in particular cases. That quality is an organising force for a mass of detailed judicial decisions. Leading cases can be called on to illustrate divisions of law, to classify concepts and topics and to draw illuminating distinctions. The special status of a leading case prompts questions about why and how it becomes a leading case and why it was decided in one way rather than in another.

Pemsel[3] is practically self-selecting as the leading case in charity law for at least five reasons.

1. Private law/public law divide and the Rule of Law

Charity law is a branch of private law. It is the part that governs the holding of property for purposes recognised by law as being for the public benefit. Property is held for a public purpose through the legal mechanism of a trust or other body of persons.

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1 Retired Lord Justice of Appeal and President of the Investigatory Powers Tribunal and member of the Court of Ecclesiastical Causes Reserved in the UK.

2 AW Brian Simpson, *Leading Cases in the Common Law* (Clarendon 1996) 74.

3 [1891] AC 531 (HL).

Some charity cases are contests between the competing claims of charity and of family members, as under a will or in relation to the validity of a lifetime gift. Other cases are contests between charity and the tax authorities. Tax legislation and tax gathering are matters of public law. The interpretation of the legislation may, however, require cross-referencing to the private law of charity.

Pemsel is the first case on the serious impact of public law, in the form of tax legislation, on the development of that branch of private law. The dispute was between a group of private individuals, who ran a religious charity, and the Revenue about the scope of a statutory tax break for the income of charity property. The Revenue authorities, as State agents, must act in accordance with the law, just as private individuals must. That principle is a key component of the Rule of Law.

2. Classification of heads of charity

Pemsel authoritatively endorsed a workmanlike taxonomy of charity law, which is striking as a concise statement of its essential elements under four heads: the relief of poverty and the advancement of religion, education and other purposes beneficial to the community. The basic legal principles were stated in simple and lucid terms, which were open-ended enough to accommodate the inevitability of future changes in individual and community values and conditions of life. *Pemsel* set a sound agenda for the future development of the law. That agenda was based on careful legal learning distilled from the practical experience of the courts in evolving a body of case law. It was mainly based on listed instances of charities in the preamble to the 1601 Statute of Elizabeth I.

The concept of charity was (paradoxically) widened by the Court of Chancery when applying the restrictions in the Mortmain Act 1736 to testamentary gifts of land to charity: a generous interpretation of that Act enlarged the scope of charity so that the land in question was more likely to finish up with the family of the testator rather than with charity. See how we stand on the shoulders of our legal ancestors.

3. The philanthropy phenomenon

The principled formulation in *Pemsel* was in the heyday of Victorian philanthropy. It has since served to facilitate and stimulate an expanding range and changing pattern of voluntary initiatives and human aspirations over the last 120 years. It has contributed to changes in the shape of society at a time when the political climate veered towards more centralisation of State control over the daily lives of its citizens.

In their charitable activities, individual citizens are able to organise themselves voluntarily in order to help each other in the community. They get together to work for others, sometimes in more imaginative and productive ways than those pursued by national and local political policies. Charitable initiatives tend to work their way up from below rather than to infiltrate from the top down. Care for others is supported financially by willing giving, not by taxing and taking. The altruistic motivation to get big and small things done for the improvement of the conditions of humanity is present in all sections of the community.

The centralisation of State power in relatively few hands, both locally and nationally, is likely to lead to competition between those who seek power and control over others and confrontation with those who resist it. Charity operates differently: it builds constructively on the spirit of co-operation between individuals, groups and institutions towards a common community objective.

4. Parliament and the courts: their relationship

The respective roles of Parliament and of the courts are clearly staked out in *Pemsel*. It is within the province of Parliament, not of unelected judges, to decide matters of fiscal policy, such as whether or not charities should enjoy tax breaks. It is for the courts to interpret the wording of a statutory exemption from tax and to decide what is meant by 'charitable purposes' when the exemption is invoked by the charity in a particular case.

The diversity of judicial opinion at all levels in *Pemsel* on the interpretation and application of the law is not surprising: it reflects differences of opinion that exist within the community about tax breaks and who should have them, and about what is for the public benefit and what is not.

All the judges, who were in serious disagreement with one another in *Pemsel*, had something of interest to say. *Pemsel* is almost contemporary in the serious divergence of judicial views forcefully expressed. It is also a fine example of the difference that one sensible, clear thinking and imaginative judge, who knows what he is talking about, can make to the orderly development of case law. Like some other great cases, *Pemsel* was a majority decision that is almost entirely remembered to this day for a sentence or two in the opinion of just one of the 11 judges - Lord Macnaghten. (Lord Atkin in *Donoghue v Stevenson*[4] is another instance.)

4 [1932] AC 562, [1932] UKHL 100.

5. Religion: its place as a head of charity

Pemsel settled authoritatively, so far as the courts are concerned, the controversy whether, in the fiscal context, the advancement of religion is, in itself, a head of charity distinct from the activities of religious bodies that are for the public benefit in associated fields of education and social welfare. The advancement of religion by mission is recognised as a distinct head of charity, even though it is not mentioned as such in the Preamble to the Statute of Elizabeth, which refers to the building of churches but not much else directly related to religion. As a matter of history the charitable activities of religious institutions preceded those of secular charities and the abuses in their administration that led to the Statute of 1601.

In earlier times religion was regarded as self-evidently for the public benefit. The charitable character of the religious beliefs and activities of faith institutions was not questioned in or by courts of law. Times have changed. There are advocates for a re-think on whether the advancement of religion is either a 'public' purpose or a 'beneficial' one.

Reading a Case

I first read *Pemsel* 50 years ago. It made an immediate impact, far more than most other cases discussed in trust law lectures and classes.

I was introduced to law by reading reported cases. I was taught that some cases are greater than others, that the great cases are worth reading more than once and that it is a waste of time to read lots of lesser cases. It is not just the *ratio* of the case that matters: it is also what you can find out in and about the case by travelling back in time down the old ways. It is a kind of exploration connecting us with a vanished world. The leading case is a trace of what has shaped our world. How and why did the case go to court? Who were the people involved in the case? What were the ideas behind the debate? How was the case decided? What is its overall place in the development of the law?

It was not until the preparation of this article that I read in full the judgments of all 11 judges in the Law Reports. All that was needed to write an essay or to answer an exam problem, or to write an opinion, or to argue a case in court was a short passage in Lord Macnaghten's opinion. As has been frequently pointed out, even that was not original: it was reminiscent of Sir Samuel Romilly's submissions to Lord Eldon almost a century earlier in *Morice v Bishop of Durham*.[5] (If that is plagiarism, judges do it all the time when cases are well argued. A good advocate

5 (1805) 10 Ves 522; (1804) 9 Ves 399.

collaborates with the court and contributes more directly than might be thought to the writing of the key parts of the judgment.)

I have now read every single judgment in *Pemsel*. The exercise made me realise that I was never actually taught how to read a leading case: in practice I learned how to plunder it.

A leading case like *Pemsel* benefits from being read in full at least three times in the manner recommended by the historian of the Victorian period, Mr GM Young:[6] first, to see what it is about; secondly, to see how it is done; and thirdly, to argue with it.

It is similar process to the advice of Lord Clark of Saltwood[7] on how to look at pictures. A picture can be interrogated and explored with pleasure and profit by first engaging with its overall impact, then proceeding to take possession of it and to scrutinise the detail, to identify the dominating theme, and to make it yield up information and meaning in a dialogue. The detailed parts should then be related to the whole by piecing the fragments together and standing back for reflection on what you have seen and what you have discovered.

The Contemporary Landscape

Victorian philanthropy

One historian, John Stevenson,[8] summed up the role of philanthropy in Victorian England thus: 'Private philanthropy had played a major part both in the provision and evolution of social policy in the 19th century'. Large benefactions by wealthy donors were only part of the story. Widespread charitable giving and collective voluntary effort addressed the numerous social problems that went with rapid industrialisation, urbanisation and population growth. The efforts of many were aimed at improving the conditions of society and alleviating the social problems surrounding poverty, crime, prisons, the neglect and abandonment of children, slum housing, disease, drink, the lack of hospitals and medical facilities, ignorance, the lack of schools and educational facilities and so on. By the beginning of the 20th century charity had extended into other areas, such as conservation, the environment and heritage: the National Trust was registered as a charity on 12 January 1895, not long after *Pemsel*.

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6 See e.g. GM Young, *Early Victorian England, 1830-1865* (OUP 1934).

7 See K Clarke, *Looking at Pictures* (Murray 1960).

8 John Stevenson, *British Society 1914-45* (Penguin 1984) 317.

As David Edwards, the Church historian, has written,[9] England had also become one of the most religious societies that the developed world has ever known. Religious belief was dynamic and inventive. Religious activity of every kind was fervent. The culture of the Evangelical Revival and the powerful traditions of dissenting religious groups re-defined religious belief and practice. They placed emphasis on conduct and on personal salvation by good works. The church, the chapel and the family were centres of charitable activity in the locality. They embraced a range of non-State social welfare activities organised and inspired by religious faith and teaching. Much was done outside the world of work, especially by middle class women who did not go out to work and had help in the home.

Many in the middle class subscribed to the puritan work ethic: 'Gain all you can. Save all you can. Give all you can'; 'By giving we receive'; 'Masters of ourselves, servants of others'. It has been described as[10] 'The Rise of the Respectable Society' based on ideas of self-respect, self-help and helping others, out of a sense of duty, to help themselves. Saving others, as well as oneself, fulfilled a personal moral need in many middle class Victorians. It was not just a path to heaven. In general, altruism was to be preferred to egoism, though they were not mutually exclusive. There are famous names: Wilberforce, Shaftsbury, Nightingale and William Booth, to recall just a few associated with good works and service to others at the national level.

But there was a dark side to philanthropy. It was manifested in the hypocritical and self-righteous aspects of the Age. Perhaps Charles Dickens, more than anyone, brought out both the positive aspects and the negative aspects of Victorian philanthropy. Dickens was himself directly involved in a wide spectrum of charitable activities, such as ragged schools and social housing, but he had mixed feelings about institutional and organised charity. In some cases he thought that the only effective solution was in State action, in particular in coping with the problems of poverty and education. 'Do-gooding' for the well being of fellow human beings had its limits. It could itself be an obstacle to social reform and social justice. In some aspects it could be ostentatious, complacent, self-congratulatory, patronising, condescending, snobbish, committee-ridden with professional social-climbing philanthropists, intrusive, even done out of fear as a form of social or class control, rather than with genuine personal sympathy, warmth, affection and benevolence. Charity could be misguided, ineffectual and self-serving. In *Bleak House* Dickens ridiculed the charitable efforts of Mrs Jellyby who lavished more attention on African settlements on the left bank of the

9 See eg David Lawrence Edwards, *A concise history of English Christianity: from Roman Britain to the present day* (Fount 1998).

10 Professor Francis Michael Longstreth Thompson, *The rise of respectable society: a social history of Victorian Britain, 1830-1900* (Fontana Paperbacks 1988).

Niger rather than on caring for the needs of her own children around her. In *The Mystery of Edwin Drood* we meet Mr Honeythunder, the bullying professional philanthropist from the 'Haven of Philanthropy'.

In his book *The Victorians*,[11] AN Wilson describes the period as one of the 'most radical transformations ever seen by the world, in the improvements they made and in the problems they created'. As he wrote, 'The Victorians are still with us. The world they created is still with us, though changed'.

Charity law

Changes in charity law were in the air from 1853 onwards when the Charitable Trusts Act set up the Charity Commissioners to register and monitor charities.

By the Charitable Uses Act 1888 there was a partial repeal of the Mortmain Act 1736. Repeals were continued in the Mortmain Charitable Uses Act 1891, introduced by Lord Herschell who sat on *Pemsel*, and were completed in the Charities Act 1960.

Tax law

Exemption from income tax existed from the time when it was introduced in the Income Tax Act 1799. It was repeated in the 1842 Act when income tax was reintroduced. The thinking behind the exemption was that there was no point in depleting the income of funds that were given for public use and benefit.

The first official challenge to the exemption came not in the courts, but in Parliament and from Gladstone as Chancellor of the Exchequer. In 1863 he spoke at length in a debate in the House of Commons criticising the exemption as subsidising institutions of doubtful value, which were not subject to adequate scrutiny, supervision or control. He questioned the motives of those who gave to charity, such as those who wished to immortalise themselves. Gladstone suffered that fate in the Memorial Foundation that houses his vast library in Hawarden, with a statue of himself for good measure. The unique residential library, with chapel, for the pursuit of learning is a registered charity. Mr & Mrs Gladstone gave generously to charity throughout their lives.

Gladstone's biographer, Lord Jenkins, who had also been Chancellor of the Exchequer, described Gladstone's proposal as[12] a 'bewildering political excursion'

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11 Andrew Norman Wilson, *The Victorians* (Hutchinson 2002).

12 Roy Jenkins, *Gladstone* (Macmillan 1995) 241.

and a 'Don Quixote attack' which he attributed to a rash aspect of his unstable personality and his ability to persuade himself of the rightness of any view he chose to hold. There was 'a brand of tramlines logic which could sometimes take over his mind'. He convinced himself that taxing charities was a 'moral imperative, not just a fiscal convenience'. As Lord Jenkins notes,[13] 'If ever a man deliberately poked a stick in a wasps' nest, it was he'.

Disraeli opposed the removal of the exemption in principle, describing it, with an optimistic touch, as a 'right', not just a 'privilege'. As his biographer, Lord Blake, has written:[14]

> On one important financial matter Disraeli secured a triumph for which posterity can be grateful. Gladstone, with that financial pedantry, which sometimes marred his judgment, pressed vehemently for the extension of income tax to charities. Disraeli successfully led the attack on this iniquitous proposal, and Gladstone had to drop it.

The proposed measure was withdrawn, but in due course there was a change in Crown practice. The Tax Commissioners began to examine more closely applications for refunds by charities of tax that had been paid. In *Pemsel* the Crown refused the refund that had been previously allowed for many years. The charities fought back, both on the political front and in the courts.

Pemsel Particulars

The parties

Mr JF Pemsel was the Treasurer of the United Brethren (or the Moravians, described as a Protestant Episcopal Church). The Moravians originated with the Bohemian Brethren. They were based on a community in Saxony near Dresden and originally were close to the Lutheran Church. They were particularly active in missionary work with an emphasis on service and fellowship.

The first Moravian Church in England was established in Fetter Lane, just off Fleet Street, by Peter Boehler who had considerable influence on the Wesley brothers.

The Moravians survive today as a group totalling about 600,000, mainly in Tanzania and Greenland and around Philadelphia.

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13 ibid 242.

14 Robert Blake, *Disraeli* (Eyre & Spottiswoode 1966) 429.

The other parties were the Tax Commissioners. They departed from established practice by refusing Mr Pemsel's application for a rebate of tax paid on the trust income in the form of rents and profits of land on which income tax had been paid.

The trusts

Under trusts established in 1813 by Elizabeth Bates the income of property was divided into 4 parts to be held upon trust for 3 purposes: ½ of the income was held for mission purposes (the maintenance of missionary establishments 'among heathen nations'), ¼ for schools for the education of the children of ministers and ¼ for the maintenance of 'choir houses' for single women engaged in education and had become incapacitated, widows and single men employed in education.

The mission purposes were the main cause of disagreement in the final stages of the case.

The proceedings

Mr Pemsel's application in 1886 for refund of tax of tax paid in accordance with the long standing practice of the Commissioners was refused. He then applied for mandamus compelling them to grant allowances regarding the rents and profits on which tax had been paid.

The tax law

From the time that income tax was first introduced in 1799 there had been a charity exemption. Income tax was abolished in 1816.

The exemption was repeated in section 61 the Income Tax Act 1842 which re-introduced income tax. Schedule A No VI contained allowances for duties on rents and profits of land vested in trustees for charitable purposes in so far as the same were applied for 'charitable purposes'. What were 'charitable purposes'?

The decision

Pemsel settled the law on two main points:

1. The narrow point: all the tax paid by the charity in this case should be refunded to the charity.
2. The wider point: the legal basis for the ruling on what is a charity for fiscal purposes. That ruling had enormous ramifications for the law of charity. The tax exemption issue required the courts to define the scope of charities that enjoyed tax breaks. They were not confined to charities

established for the relief of poverty. In the tax context the scope of charity was the same as in the general law of trusts and institutions. That scope was derived from the descriptive list of charities in the preamble to the Statute of Elizabeth I and was re-ordered under four heads of charity.

The judgements

The case, which was argued at three different levels, resulted in 11 judgments. There was judicial disagreement at each level. In the end there was a majority of 4:2 in the House of Lords in favour of the trustees on all the purposes of the charity, including the missionary purposes. It was only in the House of Lords that the Crown finally accepted that the trusts for the non-missionary purposes were charitable. The contest there was about the mission purposes.

The Queen's Bench Division[15]

The first hearing resulted in an embarrassing draw: there was an equal division of judicial opinion between the two judges who heard the application. The result was a victory for the Commissioners, as no decision could be reached in favour of granting the application for mandamus.

Lord Coleridge, the Lord Chief Justice, decided for the Crown and held that the rule for a mandamus should be discharged. He construed the exemption as applying only to trusts where the purposes were connected with the relief of the poor and not to all trusts held by the Court of Chancery to be charitable within the spirit and intendment of the preamble to the Statute of Elizabeth I. He followed the decision of the Scottish Court on appeal in *Baird's Trustees v Lord Advocate*.[16] He opted for what was described in the case as the 'popular' ordinary meaning of charitable purposes as relieving poverty, as distinct from its 'technical' legal meaning applied in the Court of Chancery, which embraced wider purposes of general utility.

The other member of the court, Grantham J, disagreed. He said that the Scottish Court in *Baird's Trustees* took too narrow a view and that he would not follow it. He pointed out that the exemption mentioned schools and hospitals, which were not necessarily for the relief of poverty.

As the court was evenly divided, he followed the then practice of 'withdrawing' his judgment.

15 (1888) 22 QBD 296 (HC).

16 (1888) 15 Sess Cas 4th Series 682.

The Court of Appeal[17]

Although the appeal by the Moravian Trustees was allowed and mandamus was ordered against the Commissioners, there was significant disagreement in the Court of Appeal about the basis on which the mission trust income was entitled to the exemption.

The majority, Lord Esher MR and Lopes LJ, held that 'charitable purposes' meant the ordinary and popular sense of those words, not the 'technical' meaning attached by the Court of Chancery. They disagreed with Lord Coleridge about how that meaning applied to the trusts in this case, which they held to be charitable, as they were for the relief of want: that relief was not confined to physical wants or necessities, and could cover educational and religious want, so that the popular meaning covered all the income in this case.

Fry LJ, the only Chancery judge on the appeal, disagreed with the majority on the meaning of 'charitable purposes' in the tax legislation. He traced the history of charity from 'the pious and godly uses' of pre-Reformation times when the Church was the main provider of charity in the form of education and care for the sick and the poor and the old and at a time when the feudal state had a limited role in those areas. He explained how the dissolution of the monasteries placed property in the hands of the Crown and how legislation established educational and eleemosynary institutions under the later Tudors. He concentrated on the preamble to the Statute of 1601[18] describing what in law was regarded as charitable and was left open for judicial decision as what was a charity in the particular case.

The decisions of the Court of Chancery settled a well ascertained meaning in English Law. That 'technical' sense should be applied in the construction of the legislation. He was in the minority in holding that the expression 'charitable purposes' in the 1842 Act was used in the primary sense in English law in the Court of Chancery, which was ascertained in the preamble stating and declaring what was charitable and was ascertained in the cases based on it directly and by analogy. He did not agree with *Baird's Trustees*.

The House of Lords[19]

The case was argued on 20, 21 and 24 March 1890. Judgment was not given until 20 July 1891. By a majority of 4 to 2 the House of Lords dismissed the appeal.

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17 (1888) 22 QBD 305 (CA).

18 43 Eliz c4.

19 *Pemsel* (n 3).

In the House of Lords the Crown accepted the charity's claim for allowance on all the income except that of the mission trust.

The Committee of the House included the Lord Chancellor, Lord Halsbury, and a retired Lord Justice, Lord Bramwell, who had received a peerage. They were both in favour of allowing the appeal against the order granting mandamus on the ground that *Baird* was correct and that 'charitable purposes' was used in its popular sense and not in the technical sense used by the Court of Chancery. They both made the point that every exemption from tax increased the tax burden on the rest of the community. They held that the mission trust was not charitable in the popular sense.

Lord Macnaghten, a Lord of Appeal in Ordinary, delivered an opinion for dismissing the appeal. He was supported by Lord Herschell, a former Lord Chancellor, Lord Watson, a former Lord Advocate, and Lord Morris, a former Lord Chief Justice of Ireland. They agreed that that the expression 'charitable purposes' in the statutory words of exemption in the 1842 Act was used in the same sense as in the English Court of Chancery.

Lord Macnaghten's opinion in *Pemsel*, as in most of the cases on which he sat, was the most influential in defining and developing the main principles and in bringing order to the exposition and future development of charity law.

He described the Commissioners' view as being based on a superficial and narrow reading of the legislation and said that the question of interpretation presented no special difficulty. The Crown now accepted that the view of Lord Coleridge was too narrow. He reviewed the law pointing out that a purpose was charitable, even though it incidentally benefited the better off and that 'with the policy of taxing charities' he had nothing to do, meaning that that was a matter of policy for Parliament.[20] He added the comment that he found it 'rather startling' to see an established practice of many years 'set aside by an administrative department of its own motion' after something like an assurance given to Parliament that 'no change would be made without the interposition of the Legislature'. Those were the words of a judge who had spent 30 or more years at the Chancery Bar and 7 of them in the House of Commons. He was well aware of the role that the fiscal consequences of interpretation had when in deciding what is and what is not a charitable purpose.

20 ibid 591.

As for the meaning of the expression 'charitable purposes', that was a legal term for the courts to construe and it comprised four principal divisions. The evergreen passage reads:[21]

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

He concluded that the Moravian Mission trust fell under the head for the advancement of religion.

On that point Lord Herschell said:[22]

> Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less as a charitable purpose than the ministering to physical needs … .

Discussion

The judges

It is easy to exaggerate the influence of the background, character and ideas of the individual judge on his judicial decisions. In most cases they play no significant part.

However, in cases where the point is as general as charitable status turning on notions of public benefit, and there is a sharp division of opinion, the case might well have gone the other way with a different constitution of judges. In those cases it is difficult to resist the urge to know more about the individual judges.

Some were Conservatives, some were Liberals and all had been in public life. Some were Equity lawyers, others were Common Lawyers. All of them were, in their different ways, men of faith and were well acquainted with the problem of balancing out competing aspects of the private interest and the public interest, as well as with the impulse to help others who are not so well off.

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21 ibid 583.

22 ibid 572.

Lord Macnaghten (1830-1913)

He was an Ulsterman.

His judicial stature is almost without rival. Sir Frederick Pollock, Editor of the Law Reports amongst other things, described his judgements, which were written with a quill pen if his formal photo shows his typical desk top, as[23] 'genius beyond the reach of art'. Sir Rufus Isaacs said on his death that he was[24] 'one of the greatest judicial figures' and a great exponent of Equity.

He was a Lord of Appeal for 26 years until he died at the age of 83. Some of his judgments are amongst the finest in the Law Reports and are great cases for the same reason that *Pemsel* is. In case after case he laid down the law in clear and simple terms of principle that are good law to this day: *Nordenfeldt*[25] on restraint of trade, *Salomon*[26] on corporate personality, *Winans*[27] on domicile and *Free Church of Scotland case*[28] are a few examples.

His judicial skills were of a high order: he knew the proper limits of the judicial role, he understood from long experience at the Bar what he was talking about and he crafted judgments in vivid compact prose conveying the maximum amount of information in the minimum number of words and with a subtle wit and sense of humour that he kept under control. He had an ability to summarise and relate the facts so as to make them interesting and in a sentence of two he expounded principles with a sense of vision and imagination. Like all the best judges he listened to the arguments with patience and decided final appeals without doubt.

It may be difficult to believe in today's world that a man of so many achievements was almost entirely devoid of professional ambition. He was elected a Fellow of Trinity College, Cambridge having been the Senior Classic and rowed twice in the University Boat Race. He practised in Lincoln's Inn as a junior barrister for 23 years before silk was conferred on him in 1880 without application and he declined several offers of judicial office, as he preferred being a barrister. In 1880 he was elected Conservative MP for County Antrim, but never held political office before his appointment in 1887 to succeed Lord Blackburn. He turned down a package

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23 Sir Malcolm Macnaghten (ed), *A Selection of Lord Macnaghten's Judgements 1887-1912* (Butterworth & Co 1951) (for private circulation only).

24 Hansard HC (Series 5) Vol 53, cols 109-14 (1913).

25 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 (HL).

26 *Salomon v A Salomon* & Co Ltd [1897] AC 22 (HL).

27 *Winans v AG* [1904] AC 287 (HL).

28 *Free Church of Scotland v Lord Overtoun: Macalister v Young* [1904] AC 505 (HL)

deal to be Home Secretary and then Lord Chancellor. He was Lord of Appeal until his death in 1913. He was Chairman of the Council of Legal Education.

Such long service in the highest court is a thing of the past. Nowadays no-one stays in any one place long enough to make a significant and enduring contribution to case law. The prevailing style of judgments has been transformed by the compulsion to write lectures, or to produce detailed verbatim reports of the hearing, or to rival critical academic articles or even chapters in some unpublished book. Lord Macnaghten's judgment style was to set out in clear terms what the facts were, to state shortly what the law was and then to apply the law to the facts. It was a perfect recipe for leading cases.

Sir Edward Fry (1827-1918)

He was a member of the famous Quaker family with chocolate interests involving the employment of 5,000 people in Bristol and noted for their philanthropic works in that City. In his Memoirs he devoted a whole chapter to his religious beliefs, his inner spiritual being, his conscience, his consciousness and his impulse to prayer. He was a person with a strong sense of duty and high moral standards.

He was an outstanding Chancery Judge and Lord Justice whose best judgments concentrated on first principles. He was not a person who sought place or position, having turned down two offers of a peerage after retiring from the Bench after 15 years from 1877 to 1892.

He was active in education, in particular the affairs of London University.

Lord Herschell (1837-1899)

He was Lord Chancellor (1886, 1892-1895), a freemason, son of a non-conformist minister of Polish-Jewish descent, himself a High Church Anglican, Chancellor of London University in 1891 and active supporter of the NSPCC.

Lord Halsbury (1823-1921)

He was Lord Chancellor (1885, 1886-1892 and again from 1895-1905) and Anglican High Church. It was said that Equity was not a subject on which he spoke with authority, but that did not stop him speaking on Equity. It is said that he was responsible for the delay in the decision in *Pemsel* for more than a year, having found himself in the minority.

Lord Bramwell (1808-1892)

He was not a Lord of Appeal. Soon after retirement from the Court of Appeal in 1881 at the age of 73 he received a peerage. He died in 1892. It was said that he was better as a first instance judge than as an appeal judge and that he was concerned that the law should be decided his way. He disliked going to church.

Lord Watson (1827-1899)

He was a former Lord Advocate and Scottish Judge of high reputation, which is of interest as he and the rest of the majority agreed that the Scottish Court of Session decision in *Baird* was wrong. He was not a silent judge.

Lord Morris (1826-1901)

He was a former Lord Chief Justice of Ireland and took an interest in Irish education.

Lord Coleridge (1820-1894)

He once wrote to Halsbury a letter of condolence in which he referred to his 'conviction of the ineffable goodness and wisdom of our incomprehensible and inscrutable God'.

Mr Justice Grantham 1835 –1911

He was a Conservative MP whose appointment to the Bench by Lord Halsbury was regarded as not entirely free of political input. He was a good judge of horseflesh and was the last judge to ride to the RCJ on horseback, being a countryman of the old school, but was rather too talkative on the Bench. He later received from Asquith the severest rebuke of a judge by a minister for alleged bias in an election petition case.

The impact

One of Lord Macnaghten's sons, Sir Malcolm Macnaghten, was a High Court Judge. He edited a selection of his father's judgments for private circulation. *Pemsel* is described in an index entry as[29] 'the exemption of charities from the payment of income tax'. That is a strictly correct, though understated, summary of the decision.

29 Sir Malcolm Macnaghten (ed), *A Selection of Lord Macnaghten's Judgements 1887-1912* (Butterworth & Co 1951) (for private circulation only).

Another rather conservative description in a book on Scots Law might describe *Pemsel* as holding that, for tax purposes, the English Law of Charities is part of the Law of Scotland.

The long term impact of *Pemsel* was of far more than just a decision in a tax case. In his *Elegy on England*[30] Professor Scruton has written of the English law of charity as a home grown manifestation of the spirit of peaceful co-existence and of nationwide non-State unofficial power out of private initiative and with many outlets to be found in three centuries of case law.

In legal terms the chart or index of charities provided by the Preamble was given a concise form by Lord Macnaghten's classification into four divisions. He sensibly did not attempt a cut and dried definition, or specify watertight categories, or compile an exhaustive list. Instead, he supplied a short, convenient description that was definite enough to be a guide and flexible enough to allow for changing social values.

The *Pemsel* classification has been broadly adopted in Commonwealth countries with local variations. The same meaning is given in fiscal cases as given in cases involving technical rules of law and the exemption of charity from rules, such as the beneficiary principle, the certainty principle and the perpetuity rule. The common aim of all the exemptions is to facilitate and encourage gifts for the public use and benefit.

Religious charities

What is the position under the 2006 Act about advancement of religion and the requirement of public benefit? Is supporting religion through tax breaks justified as being for the public benefit in the case of activities to convert people to the same religious point of view? Political lobbying and canvassing are not charitable.

So why should religious lobbying enjoy charitable status?

The answer depends on what view is taken on the role of religion in society and in the lives of its citizens. *Pemsel* had (and still has) important financial implications for the activities of religious bodies. What if it had been decided the other way? They would have had to separate out their welfare and educational activities from purely religious activities in order to get the benefit of the tax break. There is likely to be powerful opposition against any move to change the ruling in *Pemsel* that mission activities are charitable.

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30 Roger Scruton, *England: An Elegy* (Pimlico 2001).

I add three general comments:

1. The core legal classification in *Pemsel* is basically the same 120 years later: the list in the 2006 Act is longer, but not an improvement. The longer list is still based on the sound and simple foundations laid in *Pemsel*. There is no exhaustive definition of the conditions in which the law recognises that private money may be permanently given to public purposes for the benefit of the community. This is not surprising, as the very notions of 'public' and 'benefit' are not capable of precise legal definition and classification, nor are they matters of proof by legal evidence. That does not deprive the notions of their practical significance. Their application has to be worked out in practice in a sensible and responsible way and in the light of the experience of the ever-changing conditions of human life.

2. The debate about tax breaks and charity law has continued since *Pemsel* and will continue. In 'The Charity Mess' in the London Review of Books[31] Viscount Runciman raised the question:

> What is the public benefit in donations made for the advancement of religion? ... donors to religious causes typically give to their own church, chapel, synagogue or mosque, not to other people's. If what some of them do is directed – as it undoubtedly is - to the relief of need, isn't that the heading under which donations explicitly directed to that aim should qualify for tax relief?

3. Religious belief, practice and sentiment, which for centuries were spurs to charitable activity, has declined since *Pemsel*, but not the human concern and altruistic instinct of doing good to and for others by non-State assistance and means. The market economy is based on competition and self-interest rather than co-operation, but even it has not extinguished the urge to help other human beings, who are less well off under that system.

Conclusion

Finally I apply to *Pemsel* the idea of reading a leading case three times:

1. *What is it about?* It is about nothing less than laying the foundation of the modern law of charities.

2. *How is it done?* Lord Macnaghten shows us how to do it.

3. *How do I argue with it?* I do not argue with the outcome or how it was achieved. The pity is that there were 11 judgments rather than one.

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31 Runciman, 'The Charity Mess' London Review of Books, 19 July 2012, 34 (14) 20.

In the end Joseph Conrad in *Nostromo*[32] says it all - about life, law and charity: to be fulfilled they must all '... contain the care of the past and of the future in every passing moment of the present'.

That is a message to all charities if they are to continue and to grow, and to the law of charity, if it is to supply effective support.

In a truly great case, like *Pemsel,* the past lives on. The solid and enduring qualities that made it the leading case have ensured its survival to the present and will do so into the future.

32 Joseph Conrad, *Nostromo. A Tale of the Seaboard (*OUP 2007) 273.