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Written testimony:

The philanthropic foundation as we know it did not spring full grown from any one civilization. It gradually emerged in response to social necessity and, like most legal instruments, has since been refined in the crucible of each succeeding culture. The foundation did not appear in primitive societies because it would have served no useful purpose. The welfare of the god, the tribe, the family, the individual were communal undertakings. Private property existed only in *very* personal items; there was none to implement a foundation.

For religious purposes the heads of government initiated the practice of leaving wealth in perpetuity to other than natural heirs. Fourteen hundred years before the Christian era the Pharaohs of Egypt were thus setting aside funds in perpetuity. Inscriptions show contracts wherein the Pharaoh is the donor of specified kinds and amounts of wealth to a college of priests who, for a designated portion of the income, obligated their order to use the remainder to keep the tomb perpetually protected and the religious ceremonies observed. Since there would be no legal machinery to assure the performance of this duty if the dynasty were to change, contracts usually created a second foundation, the income from which went to persons charged with seeing that the priests fulfilled their obligations. The indenture also called down the most terrible maledictions of the gods upon the heads of any unfaithful trustee. The Chaldean civilization had almost identical practices as is shown by a clay tablet, dated 1280 B. C. reciting how King Marouttach bought certain lands from his vassals, built a temple on it, dedicated the whole to the god Marduk, and endowed a college of priests to operate it. These are the earliest known efforts at projecting private will beyond life for general purposes; they constitute the most rudimentary form of the foundation.

A different cultural and governmental pattern in Greece and Rome modified the purpose and the manner of establishing and supervising the perpetuities that we now call philanthropic foundations. As late as the time of Solon and the Law of the Twelve Tables the right of making a will and testament did not exist, nor could a living owner of property alienate it from his heirs. It took 500 years for the ingenuity of these creative peoples to invent a living legal heir as a substitute for a natural heir and then he could receive wealth only from living donors with the consent of natural heirs, if any. It required almost another half millennium to extend to this "unnatural heir" the right to receive bequests and to

translate the concept of a "living legal heir" into the abstraction of "an immutably legal person"-that is, to recognize a foundation or corporation as a person before the law.

The first modification permitted a living donor to create a perpetuity for other than his natural heirs, provided those heirs signified their approval of the indenture by signing it. Foundations so established faced many hazards and often had a tenuous and short-lived existence; the courts were lax in enforcing penalties for discovered malfeasance or misfeasance, beneficiaries had no rights in court, and when a faithful and efficient steward died the court might replace him with a less competent one. The uncertainty of actual perpetuity was so great that often a philanthropic donor preferred to use a bequest to natural heirs, pledging them to carry out his benevolent intentions. Thus Plato in 347 B. C. left to his nephew the academy and a productive endowment of land, stipulating that it be administered for the benefit of his followers; the nephew, using the living legal heir concept, left the foundation to Xenocrates for the benefit of the cult. Following the newer concept, Epicurus gave his gardens to 10 disciples to be administered by them and their successors as a retreat for Epicurean scholars. In time this legal concept was interpreted to apply to the members of a varied list of charitable associations, such as festival groups, colleges of priests or augurs, funeral associations, and the like. As living persons (not as corporations) they were permitted to receive gifts in perpetuity from the living but not through bequest.

About 150 B. C. Roman law modified the legal-heir concept to declare associations were at one and the same time "sentient reasonable beings" and "immutable undying persons." This interpretation gave foundations immutability plus all the advantages of natural heirs save the right to receive bequests. With an improved legal status, foundations increased in number and kind. By 65 B. C, the associations had become a financial and political power; because so many of them aided Catiline's conspiracy Cicero persuaded the Senate to dissolve them as contrary to public policy. Following this first known clash between the state and foundations a general act of the Senate permitted the formation and reorganization of "loyal associations." In Augustus Caesar's reign establishment was restricted to specific authorization, except for the very minor funeral associations.

During the reign of the five good emperors, 96-180 A. D., foundations were greatly encouraged throughout the Roman Empire. Nerva gave the cities the right to accept foundation funds by bequest, Trajan extended the privilege to the towns, Hadrian included the villages, and Marcus Aurelius permitted the associations (private groups) to receive bequests. In this period, the objectives of foundations began to shift from honoring the gods and the dead, preserving the cult, and perpetuating a feast day to at least a palliative ministering to the needs of underprivileged groups. Nerva, Trajan, Hadrian, Antoninus Pius, and Marcus Aurelius gave generously of their private wealth for establishing in the municipalities foundations for alimentarii, that is, foundations to aid in the feeding, clothing, and educating needy legitimate children.

We know that among many others influenced to follow the example of the emperors Pliny the Younger established an alimentarius in his native city of Como and in one other town. Another was Herodes Atticus, a citizen of Athens and the Rockefeller of his day, who lived during the reign of the Antonines. He built a water-supply system for Troas, endowed a giant stadium at Athens, and restored to its ancient

magnificence the theater of Pericles ; he provided a temple to Neptune and a theater at Corinth, a stadium at Delphi, endowed a bath at Thermopylae, and a system of aqueducts at Canusium in Italy. Inscriptions indicate that the people of Epirus, Thessaly, Euboea, Boeotia, and other cities of Greece and Asia Minor gratefully styled Herodes Atticus their benefactor.

In their struggle to rule, the 30 "barracks emperors" of Rome between 192 and 324 A. D. "borrowed" the foundation funds that had been entrusted to the municipal treasuries. This confiscation caused Constantine to recognize the obligation and the necessity for the state to assist causes formerly aided by these foundations. By edict he reiterated the legal rights of the Christian Church (an association in Roman law), pointing out that its property and revenues could not be alienated by anyone nor used within the church for purposes other than that designated by the donor. Thereafter Constantine used church instead of state machinery for distributing public funds to the underprivileged. Both state and church officials encouraged, philanthropically inclined individuals to give to the poor, aged, orphans, sick, and the other underprivileged persons only through the church.

In time the ecclesiastical foundations became the chief almoners in the Roman Empire and wherever else Christianity was dominant. Through its powerful hold on the dying hours of the faithful the church was able to amass enormous wealth for the exercise of the monopoly on charity given it by the state. By A. D. 453 certain bishops and abbots had so yielded to the temptation to divert to other church purposes the inalienable perpetuities for the underprivileged that the emperor Valentinian cited again the principles of Constantine and issued a "cease and desist" order against such practices. During the next hundred years, under the watchful eye of the state, the church more or less faithfully discharged as a lawful obligation the duties of almoner which it had assumed as a moral obligation in the time of Constantine.

Around A. D. 550 the legal basis of the ecclesiastical foundation was revised in Tribonian's restatement of Roman law that we know as Justinian's Corpus Juris Civilis. The Code, the Digests, and especially the Novels (statutes of Justinian,) brought the laws of Piae Causae into reasonable conformity with the social conditions of the age. While socially an administrative agent to give the wealth of the few to the needs of the many, legally the ecclesiastical foundation was still an association (like an apostolic church) where donors, administrators, and recipients were one and the same body of persons. The local church had also overstepped its legal bounds by having more than one such association ; patriarchs, bishops, abbots each controlled one or more foundations for pious causes, and lesser churchmen managed foundations for orphanages, schools, hospitals, ransoming captives, and the like. The laws specifying the obligations and privileges of those who managed such endowments were contradictory and inadequate for safeguarding the funds from avarice and stupidity.

To bring a semblance of legal order was a formidable undertaking for Tribonian and his associates. The nearest they came to resolving the fundamental problem of the nature of an ecclesiastical foundation was to declare in a statute of Justiniarn that "the founder of an ecclesiastical establishment creates a legal person of an ecclesiastical nature whose personality derives from that of the church but which possesses a legal capacity of its own." In other words, the foundation was now legally independent of the recipients and was the actual responsibility of the administrators chosen by the donor. The

personality of the foundation was at spiritual oneness with the church just as the Trinity of the Godhead was really one. Otherwise the ecclesiastical foundations could not have been considered organic parts of the church universal. The declaration lessened somewhat the control of the church hierarchy over foundations and increased the necessity for secular statutory regulation.

The more important of Justinian's comprehensive list of laws to safeguard foundation funds and keep them socially useful provided for the selection of a similar cause when the original had lost its social utility; and also provided that the endowment revert to the donor or his heirs if his will was not made effective in 1 to 3 years, depending on the nature of the perpetuity. In a national emergency the emperor could alienate to the government any perpetual fund of church or secular foundation. The church could not permanently alienate property given it and only the bishop or abbot could exchange it for other property; for buying foundation property otherwise, one was fined and the property and the payment reverted to the church. Managers of endowment property could put it on long-time lease but the lease became inoperative if the rent was 2 years in arrears. Such property could be pledged to raise money to ransom Christians from the Saracens or to pay debts; the creditor could not foreclose but could hold the property only until the revenue repaid the loan. Foundation funds could not be loaned to heretics or infidels. The state gave charitable funds investment preference and protection similar to that which we accord funds held in trust for minors.

The Emperor gave the bishop or abbot the right to designate the actual manager of a charitable endowment. A manager could not make a "gift" in return for his appointment (a common practice of the day) but he might give the foundation the equivalent of a year's salary. Managers were authorized by the Emperor to act as guardians or to appoint and supervise guardians for all legally incompetent persons under their care, such as orphans and the insane. These powerful prerogatives were exercised by the church to its financial advantage throughout the medieval age; as masters in chancery in the England of Henry VIII and Queen Elizabeth these churchmen were still exercising a dominant control over property and person.

The Saxon kings in England, following the Roman practice, recognized the ecclesiastical foundation as a spiritual trust and therefore chiefly the concern of the bishop, abbot, or similar church official. After 1066 the Norman kings rejected this idea and declared the foundation a temporal trust subject to secular supervision under the usual laws of chancery. In challenging the dominance of the church in temporal affairs a decree of Henry II (reigned 1154-1189) declared: "The bishops and abbots shall hold their possessions of the King and answer for the same to the King's justice." From this time on the common law of England recognized the Crown as guardian of the revenues of vacant bishoprics and the patron of all charitable funds and hence their legal founder. These declarations were the first skirmishes in a 400-year struggle of the state to control foundation wealth estimated at one-third to one-half that of all England. On the surface the Kings opposed the princes of the church for alleged abuses of obligations to both donors and recipients; in essence, however, it was a battle for the economic and political control of the nation.

The economic power of the church was lessened by Henry's successors and was finally broken by the acts of Henry VIII and Edward VI in dissolving most of the ecclesiastical foundations and confiscating their wealth 'to the Crown.

In theory this wealth was rededicated to the causes it had been serving but actually it created many of the landed estates of England and diverted the revenue from the poor to the aristocratic friends of the King. This paper has space for only one instance. In 1947 John Kempe, an Archbishop of Canterbury, at the end of his career founded and endowed a school in his native town, Wye, less than a century late. Henry VIII confiscated it to the Crown and gave the whole to Walter Bucler, who had been secretary to one of Henry's wives. The royal grant kept up the fiction that the charitable purpose of the foundation was to be continued by stipulating that Bucler should at all times provide a schoolmaster to teach without fee and that Bucler must pay him from the revenues of the foundation an annual salary of £13 6s. 8d. Bucler did nothing of the kind and in the reign of James I the Crown resumed the property and regranted it to Robert Maxwell, a Scotch gentleman, increasing to £16 the salary of the mythical school teacher. The property then passed through the hands of a number of individuals who ignored any philanthropic obligation and at last to the possession of Sir George Wheler, who in 1724 gave it back to educational purposes.

The English Kings did not follow the example of Constantine and cause the state to assume some responsibility for supporting the charitable and educational causes that had been deprived of philanthropic revenue. For the Tudors the state did not exist for the benefit of its subjects. With the changed economic situation of Elizabeth's reign the condition of the poor became so intolerable as to appeal powerfully to the humanitarian qualities of the rising middle class. Interest in the welfare of the recipient became more important than the effects of a gift on the soul of the donor. A new philanthropic motive had become dominant.

The Statute of Charitable Uses (43 Elizabeth) may conservatively be called the Magna Charta of English and American philanthropic foundations. It recognized the social conditions prevailing and gave legal sanction and royal encouragement to the efforts of private wealth to alleviate the distress. The act was intended to safeguard gifts and bequests to foundations sanctioned by the Crown. The variety of social services Elizabeth left to private philanthropy is enumerated in the statute:

> "For the relief of aged, impotent, and poor people, for the maintenance of sick and maimed soldiers and mariners ; for schools of learning, free schools, and scholars in universities ; for the repair of bridges, ports, havens, causeways, seabanks, and highways ; for or towards relief, education and preferment of orphans, for the marriages of poor maids; for houses of correction; to aid young tradesmen and handicraftsmen; for the relief or redemption of prisoners or captives, and for the aid of the poor in paying taxes."

Gradually English-speaking states have underwritten the palliative work of these early philanthropies, and private wealth has been freed to undertake the preventive and constructive programs usual in the modern foundation.

Act 43 Elizabeth provided a legal procedure for establishing a foundation without the special permission of the Crown if the income was less than £200 per year. The act made it easy to get the special permission for the Crown for larger foundations. It formally established the principle that founding is a joint public and private enterprise. It used the term fundatio incipiens to indicate that the state is the legal initiator and guardian of all foundation activities; fundatio perficiens to describe the act of the individual in giving wealth to implement the legal incorporation. The statute provided for the appointment of special commissions to investigate any alleged abuse in the use of a perpetuity or its revenue. During the first year of the act 45 such investigating committees were appointed by the courts; before 1700 more than a thousand such investigations had been made.

Aside from royal grants sixteenth and seventeenth century England had few large endowments from one person. The outstanding exception is Guy's Hospital, established in London in 1724 by the bequest of Sir Thomas Guy who had made his fortune speculating in South Sea stock. This and his insistence that the foundation carry his name raised for the first time the "tainted" money and egoism issues in modern philanthropy, issues that are still alive but waning among the critics of American foundations.

Because of the greater age and number of her philanthropic perpetuities, England, more than America, has squarely faced the necessity for Government supervision to assure the continued social utility of these trusts. In 1837 the Royal Commission of Inquiry reported 28,840 foundations in existence, many of them devoted in perpetuity to causes no longer in existence. For example, there was a foundation to support a lectureship on coal gas as the cause of malaria fever and one to ransom Englishmen captured by Barbary pirates. Only in extreme cases was the legal doctrine of cy pres (as near as) invoked by the courts to bring back to social usefulness a will or trust agreement that a changing society bad outmoded. The courts made such a timid use of cy pres to remove mortmain or deadhand control from foundation funds that, after 14 years of investigation by a special commission, a series of parliamentary enactments gave larger and more immediate discretion to a regulatory commission.

"Who have the duty of superintendence and control of all property devoted to charitable uses, with an accounting and power to summon all parties concerned in management, to appoint and remove trusts, and to take care that no sale, mortgage, or exchange of charity property be effected without concurrence, and that all funds applicable be invested upon real or Government security ; to preserve all documents, give acquittance of all payments where no competent party can be found, to audit accounts, to sanction salaries paid, retirement allowances, and to authorize such other arrangements as shall appear calculated to promote the object of the founder."

Thus England established a vigorous legal substitute for the expensive, circuitous, cumbersome cy pres device and in the same acts provided the legal machinery to establish and enforce standards for judging the efficiency of philanthropic agencies in attaining the high purposes of the founders.

In social as well as legal design early American foundations followed the English pattern, were palliative rather than preventive in outlook, and were devoted to causes that soon lost their social utility. The doctrine of cy pres has been reluctantly and timidly invoked by American courts to remedy the most fantastic and unreasonable of such indentures, but we still have hundreds of charitable trusts that serve

nonexistent or perfunctory purposes and that might be made to render greater service if we had some such public supervision as is given in England by the Royal Commission.