

# DEVISES AND BEQUESTS TO UNINCORPORATED BODIES

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English and Australian courts have in recent years affirmed and emphasised that in order to be valid a trust must be either in favour of human beneficiaries all of whom are ascertainable or in favour of charity.<sup>1</sup> They have frequently cited the words of Lord Parker in *Bowman v. Secular Society*:<sup>2</sup> 'a trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which the Courts in this country recognise as charitable.' Yet they have also been constrained to recognise the existence of various anomalous exceptions to this general rule, though they have referred to them with considerable disfavour.<sup>3</sup> Among these exceptions was said to be the case of a trust for the benefit of an unincorporated association, though this exception was put forward tentatively and was stated to be 'more doubtful' than those in favour of the maintenance of particular animals or tombs. The judgment of the Privy Council in *Leahy v. Attorney-General for New South Wales*<sup>4</sup> shows that this hesitation was well justified.

It has long been recognised that a testator or settlor who wishes to create a trust in favour of an unincorporated society has some complicated obstacles to surmount if he is to achieve his purpose. First, there is the difficulty that such a society is in law no more than an aggregation of its individual members; for the most part it is not recognised as having any separate existence. Secondly, the gift cannot simply be made to the individual members of the society from time to time, since this would infringe the rules against remoteness of vesting. Thirdly, if there is any restriction upon the society or its members which prevents them from disposing of the capital,

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1. *Re Cain* [1950] V.L.R. 382; *Re Astor's Settlement Trusts* [1952] Ch. 534; *Re Shaw* [1957] 1 W.L.R. 729; *Re Endacott* [1960] Ch. 232 (C.A.).

2. [1917] A.C. 406.

3. In *Re Endacott* [1960] Ch. 232, the Court of Appeal adopted the list put forward in Morris and Leach: *The Rule against Perpetuities* (2nd ed.), 310. It is (1) trusts for the erection of monuments or graves; (2) trusts for the saying of masses, in jurisdictions where such masses are not regarded as charitable; (3) trusts for the maintenance of unincorporated associations; (4) trusts for the benefit of unincorporated associations; (5) miscellaneous cases.

4. [1959] A.C. 457.

the gift is void as 'tending to a perpetuity', which in this context means infringing a rule against inalienability.<sup>5</sup> The courts, however, evolved a system which would surmount all these hazards. The first was countered by the construction of a direct gift to an unincorporated association as a gift to its individual members; this is the same rule as is applied to gifts to members of a partnership in the partnership name.<sup>6</sup> Avoiding the second and third hurdles was more difficult; ultimately the courts determined that even if a gift could not be construed as a gift to the present members individually, it would be valid provided that all the members could combine together to dispose of the gift, or could, if they so chose, dissolve the society and distribute its funds among themselves.<sup>7</sup> On the other hand, if for any reason the members could not combine to dispose of the gift or could not divide it among themselves upon dissolution of the association the gift was void as a perpetuity.<sup>8</sup> It seems that all cases were soluble by the application of one or other of these principles; and since if the gift was upheld any possibility of future members of the society having any rights to it under its terms was necessarily precluded and if it was not there was no cause for further analysis, there has been no case in which a gift to an unincorporated body has been declared void as offending the rule against remoteness of vesting.

As a result of these rules many gifts upon trust to associations, including trusts expressed to be 'for the benefit' of the association, 'for the general purposes' of the association, and even, in one or two extreme cases, where the settlor nominated specific purposes to which he wanted his gift to be applied, were upheld.<sup>9</sup> This result was desirable in that it enabled one of the commonest and most reasonable

5. Nathan's argument that it is a rule limiting the duration of a trust has been well met by Sheridan, (1953) 17 Conv. (N.S.) 46, 57-58. The view of the present writer is that where a gift is to individuals the rule can only be one against inalienability; where it is to purposes the rule looks like one of duration but operates because the property is withdrawn from commerce and rendered inalienable for too long a period. *Contra*, Morris and Leach: *The Rule Against Perpetuities* (2nd ed.), 325-327.
6. *In re Smith* [1914] 1 Ch. 937, 948. And see *Maugham v. Sharpe* (1864) 17 C.B. (N.S.) 443, and *Wray v. Wray* [1905] 2 Ch. 349.
7. *Re Clarke* [1901] 2 Ch. 110; *Re Drummond* [1914] 2 Ch. 90; *Re Prevost* [1930] 2 Ch. 383; *Re Turkington* [1937] 4 All E.R. 501; *Re Taylor* [1940] Ch. 481; *Re Price* [1943] Ch. 423; *Macaulay v. O'Donnell* [1943] Ch. 435n.; *Van Kerkvoorde v. Moroney* (1917) 23 C.L.R. 426; *Re McAuliffe* [1944] St.R.Qd. 167; *Re Cain* [1950] V.L.R. 382.
8. *Carne v. Long* (1860) 2 De G.F. & J. 75; *Re Clark's Trusts* (1875) 1 Ch. D. 497; *Re Dutton* (1878) 4 Ex. D. 54; *Re Amos* [1891] 3 Ch. 159; *Re Swain* (1908) 99 L.T. 604; *Re Clifford* (1912) 81 L.J. Ch. 220; *Re Patten* [1929] 2 Ch. 276; *Re Topham* [1938] 1 All E.R. 181; *Macaulay v. O'Donnell* [1943] Ch. 435n.; *Queensland Trustees v. Woodward* [1912] St.R.Qd. 291; *Gleeson v. Phelan* (1914) 15 S.R. (N.S.W.) 30.
9. *Van Kerkvoorde v. Moroney* (1917) 23 C.L.R. 426; *Re Turkington* [1937] 4 All E.R. 501; *Re Price* [1943] Ch. 423.

of the wishes of testators and settlors to be effectuated; and its achievement has served to bring about the view that the difficulties facing a person who wishes to benefit an unincorporated body may be surmounted by careful draftsmanship in ensuring that there is nothing in the terms of the gift itself to prevent its disposal.<sup>10</sup> It is submitted, however, that the result has only been reached by ignoring a principle now recognised as fundamental to the law of trusts, and that recent decisions, particularly of Australian courts, have brought out this point and made it correspondingly more difficult to devise or bequeath property upon trust to an unincorporated body.

The first case to point to the difficulty was *Re Cain*,<sup>11</sup> where Dean J. drew the distinction between a trust to the society *simpliciter* and a trust for the purposes of the society. The former could be treated as a gift to the individual members and therefore valid; but the latter would fail as a trust without a beneficiary unless the purposes of the association were charitable. Consideration of this distinction led him to the conclusion that many of the cases which had held trusts to unincorporated associations void as tending to a perpetuity could equally well have been decided purely on the ground that they sought to establish trusts for non-charitable purposes. He took as an illustration the decision in *Macaulay v. O'Donnell*,<sup>12</sup> in which the House of Lords held that upon proper construction a gift to 'The Folkestone Lodge of the Theosophical Society . . . absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone' was void as a perpetuity. His analysis of the gift was that if its final words did not import a binding obligation the gift was valid, but that if they did it was void independently of any question of perpetuity. This analysis was accepted by Dixon C.J. and McTiernan and Kitto JJ. in *Attorney-General for New South Wales v. Donnelly*.<sup>13</sup> Kitto J. tried to explain the difficulty to which it gives rise — the reason for the House of Lords taking the trouble to decide that the gift in *Macaulay v. O'Donnell* created a perpetuity if the very fact that it was a trust for purposes necessarily involved the consequence that it was void — by saying that it is essential to consider whether a perpetual endowment is intended in the case where the gift is for the benefit of particular individuals. This is hard to follow. The rule against inalienability originated in a case in which there was no question of a gift to individuals being intended;<sup>14</sup> and the chief

10. See Fricke and Strauss: *The Law of Trusts in Victoria*, 208-209, and Andrews: 'Gifts to Purposes and Institutions' (1965) 29 Conv. (N.S.) 165.

11. [1950] V.L.R. 382.

12. [1943] Ch. 435n.

13. (1958) 32 A.L.J.R. 44.

14. *Thomson v. Shakespear* (1860) 1 De C.F. & J. 399.

cases which have established the rule in cases concerning gifts to unincorporated bodies are those in which it has been specifically found that the gift is not one to the present members.<sup>15</sup> The notion of a perpetual endowment in favour of a particular individual or individuals is one which it is difficult to comprehend. If a gift to individuals is one of capital, the gift is absolute; if one of income only the rule that a gift of income in perpetuity to an individual should be construed as a gift of the capital will come into effect.<sup>16</sup> (It is because a gift of income alone to an unincorporated body of itself displaces the presumption that the gift is one to the present individual members that it is held invalid.)<sup>17</sup> If, on the other hand, the particular individuals concerned are the present and future members of the association then the rule against remoteness of vesting rather than any rule against inalienability is in issue, and the trust will, in any event, fail for uncertainty of objects.

It is more probable that the House of Lords presupposed that a trust for purposes might in some cases be valid and held that such a trust would be valid provided that it did not render the trust fund inalienable for a period longer than that allowed by the rules against remoteness of vesting. The earlier cases on the validity of gifts to unincorporated associations stem from a period when the courts were far from rigorous in their application of the principle that trusts must have a human beneficiary; and only those which held expressly that only those gifts which can be construed as gifts to the present individual members may be upheld can be considered as adverting even indirectly to it. The present judicial attitude is, however, firmly against the idea of the non-charitable purpose trust, and despite the uncertain scope of the judgments of Sir William Grant M.R. and Lord Eldon, *Morice v. Bishop of Durham*<sup>18</sup> is used as the basis of the authority against it. Since the hardening of judicial feeling first became apparent in *Re Cain* and *Re Astor*,<sup>19</sup> it has won support in the High Court, the Privy Council and the Court of Appeal, and the application of the principle embodied in Lord Parker's dichotomy now emerges as the chief obstacle in the path of the testator who wishes to benefit an unincorporate body.

The most authoritative treatment of the validity of a testamentary gift to an unincorporated body is now that given by the Privy Council

15. *Re Drummond* [1914] 2 Ch. 90; *Re Price* [1943] Ch. 423; *Macaulay v. O'Donnell* [1943] Ch. 435n.

16. *Jarman on Wills* (8th ed.) ii, 1172, 1173.

17. *Re Swain* (1908) 99 L.T. 604; *Re Levy* [1960] Ch. 346 (C.A.).

18. (1804) 9 Ves. 399; (1805) 10 Ves. 522.

19. [1952] Ch. 534.

in *Leahy v. Attorney-General for New South Wales*<sup>20</sup> where all the difficulties which beset the validity of such a gift were examined and discussed at length. The discussion arose from clause 3 in the will of the testator, which provided: 'as to my property known as "Elmslea" situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon upon trust for such orders of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select and I again direct that the selection of the order of nuns or Brothers as the case may be to benefit under this clause of my will shall be in the sole and absolute discretion of my said executors and trustees.' In the result the Privy Council held that the gift was good insofar as it could be confined to charitable purposes and the field of selection limited to Orders of nuns of an active as distinct from a contemplative nature.<sup>21</sup> But it rejected an argument put forward on behalf of the trustees who were anxious to have as wide an area of choice as possible, that the gift was valid as it stood without recourse to charity or to statutory assistance.

The gift was to any of a number of unincorporated bodies; it had been upheld by Myers J. in the Supreme Court of New South Wales and by a majority of the High Court (Dixon C.J. and McTiernan J. dissenting) without recourse to the saving provisions of the New South Wales Conveyancing Act. In dealing with the question of its validity the Privy Council started from the fundamental proposition that in law a gift to an unincorporated society *simpliciter* (that is, where neither the circumstances of the gift nor the directions of the gift nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. And as a gift to individuals, each individual is entitled to his distributive share (unless he previously bound himself by the rules of the society that it shall be devoted to some other purpose). But if the members are themselves intended to take as trustees then the question of the identity of the beneficiaries would arise. If they take as trustees for them-

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20. [1959] A.C. 457. It is difficult to paraphrase the judgment so as to do it justice; hence apart from the one obvious alteration in arrangement (going direct to the answer at the end of the judgment and discussing the principles upon which the Board purported to reach it separately) the language and sequence of argument used in the judgment have as far as possible been retained.

21. A trust for the purposes of a contemplative Order is not a charitable trust as the public cannot be shown to derive a benefit from the work of the community: *Cocks v. Manners* (1871) L.R. 12 Eq. 574; *Gilmour v. Coats* [1949] A.C. 426. The saving statute was the Conveyancing Act 1919-1954, s. 37D (N.S.W.). Cf. Property Law Act 1958, s. 131 (Vic.); Trustees Act 1962, s. 102 (W.A.); Charitable Trusts Amendment Act 1963, s. 4 (N.Z.). There is no equivalent legislation in South Australia.

selves the trust is pointless; but if some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void as being uncertain and beyond doubt tending to a perpetuity. After these preliminary observations, their Lordships then stated that the question raised by clause 3 was whether, even if the gift to a selected Order of nuns is *prima facie* a gift to the individual members of that Order, there were other considerations arising out of the terms of the will, or the nature of the society, its organisation and rules, or the subject-matter of the gift which should lead the court to conclude that, though *prima facie* the gift was an absolute one (absolute both in quality of estate and freedom from restriction) to individual nuns, yet it was invalid because it was in the nature of an endowment and tended to a perpetuity or for any other reason. After an examination of cases, principles and the facts the answer to this question was given as being that 'the dominant and sufficiently expressed intention of the testator is . . . ( . . . in the words of Lord Buckmaster) that "the gift is to be an endowment of the society to be held as an endowment" and that "as the society is according to its form perpetual" the gift must, if it is to a non-charitable body, fail.'

It will be seen that the question and answer were put in the traditional form of endowment and perpetuity; and that where in the High Court Dixon C.J. and McTiernan J. found that there was a trust for the purposes of the Orders and, these purposes being non-charitable, the gift failed, the Privy Council apparently accepted the earlier law. Were this so, *Leahy's* case would be important principally as a case in which their Lordships explained more clearly than usual some of the factors which influenced them in holding that the testator had intended to create an endowment or perpetuity. But this acceptance was more apparent than real. Between question and answer there is a protracted examination of principle and authority which produced conclusions more in accord with those of the dissenting judges of the High Court. The Board emphasised repeatedly that it is only because a gift can be upheld as a gift to the individual members that it can be upheld at all. Any other view of the gift makes it automatically bad. If the members of the association take as trustees for present and future members not ascertainable within the period allowed by the rule against perpetuities, the trust must fail. If, on the other hand, there is a trust not for persons, but for a non-charitable purpose, no-one can enforce the trust and the provision will amount to a delegation of testamentary power; the subject-matter of the gift will be undisposed of or fall into residue. (Although the Privy Council here arrived at their conclusion by applying the rule that there cannot be a delegation of testamentary power, it is submitted that they also had in mind the wider principle expounded

by Lord Parker; it went on to say that '*Morice v. Bishop of Durham* continues to supply the guiding principle' and, although that was a case of a trust created by will its 'guiding principle'—whatever it may be—relates to all trusts, however created, and is nothing to do with a delegation of testamentary power.) Even the alternative ground which had won the favour of Lord Buckmaster in *Macaulay v. O'Donnell* was disapproved. In accordance with a long line of authorities in lower courts Lord Buckmaster had said: 'There is no perpetuity if the gift is for the individual members for their own benefit, but that, I think, is clearly not the meaning of this gift. . . . Nor again is there a perpetuity if the society is at liberty in accordance with the terms of the gift to spend both capital as they think fit.' Their Lordships thought that the second ground of validity did not present a true alternative; it is only because the individuals constituting the society are the beneficiaries that they can dispose of the gift. Immediately after this analysis, but before they made any further reference to 'endowments' or 'perpetuities', they found that the intention of the testator was to create a trust, not merely for the benefit of the existing members of the selected Order, but for its benefit as a continuing society and for the furtherance of its work. Applying the principles they had just expounded such a trust was bound to be void, regardless of whether it created a perpetuity or not.

The major point which emerges from this reasoning is that the only way in which a gift to an unincorporated body can be upheld is as a gift to the members as individuals, either as joint tenants or as tenants in common; and that in consequence each individual member is entitled to his distributive share. If the members have entered into contracts among themselves that they will not sever their shares those contracts may take effect; but that is a matter which, in the absence of any express trust or direction in the will, is no concern of the executors.<sup>22</sup> So under the will the members take as individuals; once they have obtained the gift in that capacity they may do with it as they please. They may spend it on the purposes of the association; but if they do so this will be either because they feel under a formal obligation to spend it in that way or because they are under a contractual obligation to do so.<sup>23</sup> In either case, there is nothing that the testator can do to ensure that the money is spent according to his wishes. This is the first disadvantage of the law as explained in *Leahy's* case. The second disadvantage is that of the necessity of finding the contracts (if any) which create the

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22. See *In re Smith* [1914] 1 Ch. 937.

23. The Privy Council seemed to favour some kind of contractual obligation; Kitto J. in the High Court thought that only a moral obligation was imposed.

obligation of each member not to sever his share of the gift. The third disadvantage is that if in construing the will the court finds any indication that the testator did not intend the members to take individual shares as joint tenants or tenants in common, and if, in particular, there is any provision inconsistent with the ability of each member to sever his share, then there is evidence that they were intended to take the gift only as trustees for some other persons or purposes, with the inevitable consequence that the gift will fail.<sup>24</sup>

If the law must start from the premise that under the will the property must be given to the individual members if the gift is to be valid, it seems committed to seeking contracts outside the will in order to effectuate the true wishes of the testator and to prevent that severance which is a condition of its validity. If the rules of the society contain some specific provision as to what is to be done with property which is given to those persons who happen to be members of the society when the testator dies, then there are express contracts and all is well. But the rules of most unincorporated societies have nothing to say on this point, so that any contracts would have to be implied. Implying the contract at the date of the gift is surely out of the question; if any member wants to sever his share there can be no justification for implying his consent to a contract not to do so and it must be wrong to impose an obligation on an individual in respect of a piece of his own property which he wishes to use for his own purposes and which he has probably never even considered the possibility of receiving, let alone giving away. The alternative to this would be to imply such a contract at the date of his joining the club; this is more plausible but again restricting a man's use of his own property against his will and then telling him that he has contracted to restrict it seems an abuse of the conception of contract.

The difficulty in finding the contracts between the members may lead to the result that, regardless of the real intention of the testator, the individual members may accept his bounty for themselves. But if the canons of construction adopted by the Privy Council are applied generally, then it may only be in rare cases that the gift will have even that limited effect. The Board began by saying that there was a *prima facie* presumption that a gift to an unincorporated body

24. A further disadvantage may be that the Privy Council has lent further weight to the orthodox view that the interest of a member in the funds of the society is a normal joint tenancy or tenancy in common subject to contractual obligations. This view leads to insuperable difficulties, the best analysis of these being perhaps still that of Maitland in 'Trust and Corporation': *Collected Papers*, iii, 321, 377, 378. A more recent analysis appears in Ford, *Unincorporated Non-profit Associations*, 5, 6. The advantages of his view that there is a special equitable form of co-ownership for members of an association are considerable.

was a gift to the members at the date the will took effect,<sup>25</sup> but that this presumption could be rebutted by other considerations arising out of the terms of the will, or the nature of the society, its organisation and rules, or the subject-matter of the gift. These factors were then applied to the gift of 'Elmslea' with the result that the presumption was held rebutted. The first feature of the gift noticed by the Board was that it was in terms upon trust for a selected Order; this is termed 'not altogether irrelevant'. The reason for so holding is that although the gift can be construed as to each and every member of the Order, the form of the gift is not to its members, and 'it may be questioned whether the testator knew the niceties of the law'. The force of this argument is evident: the very use of the name of the group is evidence that the intention of the testator is to benefit the group rather than the individuals who compose it. Indeed, in *Re Amos*,<sup>26</sup> North J., when asked to construe a devise to 'the Boiler Makers and Iron Ship Builders Society' as a gift to the individual members, refused to do so on the ground that such a construction would be entirely contrary to the testator's intention because 'instead of the property being administered by the executive body of the Boiler Maker's Society for the purposes of the society, it would belong to a number of individuals as their common property, so that any one of them might at anytime commence an action for partition or sale'. Yet if the *prima facie* conclusion to be drawn from the gift is that it was made to the individual members, little weight can be given to this point; certainly it now seems that North J. went too far, for if he was correct this factor would of itself rebut the *prima facie* conclusion, which could then have no existence. The point here seems to be that the courts decided to construe a gift to an unincorporated body as a gift to its members because the society has no separate existence in law and so cannot receive the gift; yet presumably the testator intended to benefit somebody, and the members of the society are the only other possible beneficiaries. Provided that these are the only possible constructions of the gift the rule of construction always takes effect. But if there is anything in the terms of the gift or the surrounding circumstances which indicates that the testator had in mind a gift to present and future members or to the purposes of the association there is no room for the rule to operate. The only importance that can legitimately be attached to the fact that the gift is in form one to the society rather than one to its members directly is that the court might be more astute in its scrutiny of the rest of the will to find such an alternative construction. The rule of construction is used as part of a salvage operation and

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25. This approach seems to derive from *Re Ogden* [1933] Ch. 678.

26. [1891] 3 Ch. 159.

is designed to save a gift that looks bad at first sight; normally it can only operate at the expense of the true intention of the testator, so that any attempt to find that intention from the mere form of the gift will inevitably result in the rule being displaced and the gift held bad.

The second reason given for holding the *prima facie* presumption to be rebutted was that the members of the selected Order might be very numerous and spread all over the world. It was not easy to believe that the testator intended an immediate beneficial legacy to such a body of beneficiaries. This point might be significant in one of two ways. The court might be less ready to construe a gift to a society as a gift to its members with the reference to the society being simply a method of identifying the beneficiaries if the members are unknown to the testator. In *Perpetual Trustee Co. v. Wittscheibe*<sup>27</sup> a testator left part of his property to his sister for her life and on her death to 'the Reverend, the Commissary for the time being of the Franciscan Fathers, Waverley, for the benefit of the order of Franciscan Fathers, Waverley'. Williams J. found himself unable to construe the gift as one to the individual Friars at the death of the life tenant. He conceded that if the gift had been immediate he might have held that the Friars were intended to take personally, as the testator probably knew them personally; but he did not think that the testator could have intended to confer such benefits upon the Friars who were there at this future and uncertain date. If, therefore, the membership of the club which a testator wishes to benefit is large and it can be shown that he did not know some of the members, it would seem that there is some evidence against his having intended to benefit all the members as individuals; and if this evidence is given the effect which was given to it by Williams J. the gift would be invalidated. Similarly, if this part of the reasoning of Williams J. is accepted, then no deferred gift to an unincorporated body could be held valid.

This consideration may not have concerned the Privy Council, for its judgment concentrates on the features that the beneficiaries might be very numerous and scattered without saying why these factors militated against the gift being one to the present members as individuals. But it seems fair to suppose that it may have had some bearing on its decision. It is hard to see in what other way the fact that the members of the Order might be scattered could influence the issue. It might perhaps lead to the difference between a trust which is difficult to administer and one which might be easy (if it were valid); but courts do not usually attach much importance to

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27. (1940) 40 S.R. (N.S.W.) 501.

difficulties in the administration of a trust when considering its validity.<sup>28</sup> The argument that the beneficiaries might be too numerous perhaps rests on the notion that if the property were sold their capital share would be very small and if it were not their share of the income tiny. This would be very persuasive; it may be sensible to devote a particular capital sum to purposes, since as a fund the amount may be significant and its income, if devoted to a particular purpose, worthwhile, whereas if these sums were to be divided those sums might become futile. But there is little authority for such an argument. It is not usual for evidence to be given of the number of members in relation to the value of the gift – no precise evidence of either was given in *Leahy's* case; but in *Re Clarke*,<sup>29</sup> a case to which the Privy Council gave grudging approval on the basis that it was an extreme case of a gift to members as joint tenants, the number of potential beneficiaries was over two thousand and the value of the gift not recorded; while in *Re Ogden*,<sup>30</sup> which was cited in *Leahy's* case without any kind of disapproval, the gift upheld was to 'such political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as [Sir Herbert Samuel] shall in his absolute discretion select'. No enquiry was made as to the potential number of beneficiaries who might have to take as joint tenants in relation to the value of the gift. Apart from lack of authority, this argument – inevitably enough, since it is inferred from the use of the word 'numerous' – again seems to indicate that a large membership may serve to rebut the presumption that the gift is to the individual members as joint tenants, and it seems natural that nobody had previously thought that the validity of a gift to a society could in any way be dependent on the state of the membership at the date the testator died.

The third feature which helped to rebut the presumption that the gift was to the individual members was the subject-matter of the gift. 'Elmslea' was a grazing property of about 730 acres, with a furnished homestead containing twenty rooms and a number of outbuildings. Their Lordships did not find it possible to regard all the individual members of an Order as intended to become the beneficial owners of such a property. That this type of consideration may sometimes be conclusive against the gift is demonstrated by *Re Wilson*.<sup>31</sup> In that case Hudson J., faced with a gift of land to trustees 'for and

28. Cf. the attitude adopted by Wynn-Parry J. in *Re Eden* [1957] 1 W.L.R. 788, even as modified by Cross J. in *Re Saxone Shoe Co.* [1962] 1 W.L.R. 943.

29. [1901] 2 Ch. 110.

30. [1933] Ch. 678.

31. [1960] V.R. 514.

on behalf of the Girls' Friendly Society at Ballarat', held that if due regard were paid to the nature of the society and its constitution, organisation and membership, it was obvious that the grantor did not intend that all the individual members of the Society in the Diocese of Ballarat should become the beneficial owners of the property: membership of that society was open to female members of the Church of England over the age of twelve, with a junior section for girls over seven, and its main object was 'to unite girls and women in a fellowship of prayer, service and purity of life for the glory of God'. Yet this criterion is among the least satisfactory of those suggested. The alternative constructions of the gift are that it is to the present members of a society as individuals; to present and future members of the society; or for the purposes of the society. Since any argument which demonstrates that a gift is inappropriate for the present members by virtue of the nature of the gift is equally valid when trying to construe the gift as intended for present and future members, the only remaining construction is that the gift was intended for the purposes of the association. But the Privy Council in *Leahy's* case did not try to discover whether the gift of a grazing property was suitable for the purposes of any Order or nuns or of the Christian Brothers, except as a saleable commodity, nor did Hudson J. in *Re Wilson* ask whether the gift was suitable for the purposes of the Girls' Friendly Society. And even though the nature of the property in the gift may be unusual it may be sold, or pending sale its income may be devoted to the beneficiaries. It was this latter point which swayed O'Bryan J. into upholding the gift in *Re Goode*,<sup>32</sup> though the gift was one of the testator's business to the Robinvale sub-branch of the Returned Servicemen's League for the use and benefit of the sub-branch.

It is submitted that the nature of the property given should not be a conclusive factor in the construction of the gift. If the choice is between construction as a gift to the individual members or as a gift to a non-existent body, then there is a presumption in favour of the former construction and the nature of the property is strictly irrelevant to the reasoning which lies behind it. But when the courts have to decide between the alternative construction of a gift to the present members, to present and future members or to purposes the test will frequently prove neutral as it will be as appropriate for one as for the other. In any event, there is always the over-riding consideration that the property might be sold. And a careful draftsman could certainly circumvent this particular hazard by leaving the property on trust for sale with or without a power to postpone any sale.

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32. [1960] V.R. 117.

Lastly, although no evidence as to the constitutions and rules of the various Orders mentioned in the will was given, their Lordships thought it 'at least permissible to doubt whether it is a common feature of them that all their members regard themselves or can be regarded as having the capacity of (say) the Corps of Commissionaires<sup>33</sup> to put an end to their organisation and distribute its assets.' In the absence of any evidence as to the rules of the Orders it is inconceivable that the Privy Council attached any weight to this point; but it does indicate that they considered the rules of the Orders as relevant in determining whether or not the initial presumption was rebutted. This is characteristic of the general approach of the courts in determining the validity of the gift, and has been so since in *Carne v. Long*<sup>34</sup> Lord Campbell L.C., in construing a devise for the 'use, benefit and support of the Penzance Public Library', held that it created a perpetuity as the rules of the library at the death of the testator prevented division of the property of the library as long as ten members remained. Lord Campbell said that 'the testator must be presumed to know what these regulations were' and imported them on to the terms of the gift, so that any interest in the gift other than the present enjoyment of the property comprised in it was prevented from passing to those who were members of the library at the death of the testator. Though the practice of looking at the rules has been commonly adopted, it has always been puzzling, for if the testator has himself done nothing to include them in the terms of the gift their effect outside it should not be relevant to its validity.<sup>35</sup> Yet before *Leahy's* case the practice was comparatively harmless; only if the rules prevented the property from being alienated or the association from being dissolved did they invalidate the gift.

Since *Leahy's* case the practice has become even more bewildering. The pattern of events envisaged by the Privy Council at the beginning of its judgment is that under the will the members take individual severable shares; what happens by way of contract after that is irrelevant to the validity of the gift. This should render the very existence of such contracts an irrelevant matter when considering the gift, and if their existence should not be taken into account then neither should their terms. If, however, one adopts the *Carne v.*

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33. See *In re Clarke* [1901] 2 Ch. 110.

34. (1860) 2 De G.F. & J. 75.

35. It is very hard to see what justification there can be for going outside the terms of the will in order to find the intention of the testator. Extrinsic evidence is admissible to rebut a presumption, but the only presumptions to which this has been applied are the substantive doctrines such as election, satisfaction and the presumption of a resulting trust. Whether it is correct to call a *prima facie* construction a presumption in this sense is doubtful.

*Long* approach and imports the rules of the society on to the terms of the gift, it follows that whenever they contain any agreement (whether express or implied) between the members that they will not sever their shares but devote them to association purposes, then the gift will not be construed as one to the present members as joint tenants or tenants in common and must fail. The effect of *Carne v. Long* was that in a case where according to the rules of the association the property would become inalienable the testator was held to have intended it to become so; the effect of the Privy Council adopting the same approach is that where according to the rules individual members may not take their individual shares in the property the testator must be held to have intended them to be unable to do so, so that the gift cannot be construed as an immediate gift to the individual members. The reasoning moves from the existence of the rule to the intention of the testator without any obvious justification (unless one accepts the unsatisfactory *dictum* of Lord Campbell in *Carne v. Long* that 'the testator must be presumed to have known what the regulations were'; this still leaves an unexplained shift from knowledge to intention) and is clearly open to criticism on this score. More to the point, however, is that it renders the whole idea of the contractual obligations between the members nugatory; for if such obligations exist at the date the gift takes effect the gift must fail so that they can never take effect. The Privy Council, in adopting the approach advocated in *Carne v. Long*, seems to have contradicted its own concept of the machinery whereby the association rather than the individual members may ultimately benefit from the gift.

There is one further point which arises from the wording of the judgment. The Privy Council doubted whether members of the Orders involved regarded themselves as having the capacity to put an end to the organisation and distribute its assets. In that the members of at least some of the Orders would have taken vows of poverty so that they would immediately renounce any personal interest in the gift and thereafter not regard themselves as competent to deal with it, this would most certainly be so. The same would be true of the members of most of the contemplative Orders. The Privy Council approved comparatively few cases in *Leahy's* case, but among those that it did were *Cocks v. Manners*,<sup>36</sup> where the gift was to Dominican sisters, and *In re Smith*,<sup>37</sup> where it was to Franciscan friars. In these cases, as in several others, the considerations which presented themselves to the Board would have militated against the validity of the gift, for Franciscans and Dominicans take vows of

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36. (1871) L.R. 12 Eq. 374.

37. [1914] 1 Ch. 937.

poverty. This point did not disturb the judges who decided those cases, since they assumed that any contracts taking effect outside the will could not affect the validity of a bequest in it.

The conclusion to be derived from consideration of the factors which influenced the Privy Council is that the canons of careful draftsmanship previously considered adequate may not now suffice to ensure the validity of the gift. The standard form of gift is one to the association for the benefit of the association or to the association for its general purposes. The only reason such gifts can be upheld is that the phrase 'for the benefit' or 'for the purposes' of the association is ignored. But even if such a phrase is omitted to be more certain of success the gift may fail. It should be noticed that the gift in *Leahy's* case was one to selected Orders; it made no reference to 'benefit' or 'purposes'. Yet it was held invalid, not because there was anything in the terms of the gift which rendered it void (it had been competently drawn by a professional draftsman), but because of the nature of the property and the possible number and location of the beneficiaries. Add the obstacle of reading the rules of the association into the gift and the difficulties become acute. All the draftsman can do is to make the gift one expressly to the members at the date of the gift and then rely on each individual member not to sever his share. For if he has to guard against the effect of extrinsic circumstances as well as the terms of the instrument his only safe course must be to abandon the technique of drafting the gift in favour of the association direct altogether and recognise that if his client wants to benefit the 'continuing group enterprise' this intention cannot be fulfilled by imposing any legal obligation on those who are members at his death but only by relying on an exceptionally doubtful contractual agreement among the members or by relying on their sense of moral obligation.

The donor can therefore himself do little towards the achievement of his true objective, and if the gift to be good must be one to the members at his death he might as well make the gift expressly to them rather than risk a hazardous process of construction, and forget his true wishes. The principles expressed in *Leahy's* case automatically operate to frustrate the wishes of the testator. Adapting Ames' criticism<sup>38</sup> of *Morice v. Bishop of Durham* it may be said that only an imperative rule of law, based on sound reasons of policy, can justify such a result, particularly when the wish which is defeated is one as common, and often as beneficial to the community, as one to benefit an unincorporated association. It appears from *Leahy's* case that

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38. Ames: 'The Failure of the Tilden Trust' (1892) 5 Harv. L.R. 389.

two such rules are relevant in reaching this result: the one, the rule against trusts of indefinite duration, the other the rule that a trust must have a human beneficiary.

It is submitted that although the policy behind the rule against trusts of indefinite duration is sound, the rule has little application in the context of gifts to unincorporated bodies. The reason is that the rule is intended to prevent property from becoming inalienable or from being tied up for too long a period; it is a rule against inalienability rather than a rule directed specifically against trusts of a potentially excessive duration. The only constructions of the gift which can bring this into effect are that of a gift to the present members with a restriction on their power of alienation and a gift to purposes lasting beyond the relevant period. If the former construction is adopted the proper course is to strike down the restriction and make the gift absolute; if the latter, there is no room for the rule to operate at all, since the gift is already void for want of a beneficiary.

The only imperative rule which then may operate to invalidate the gift is that which demands that every trust should have a beneficiary. The rule originally stood on the ground that there must be someone with sufficient *locus standi* to be able to enforce the trust; hence charitable trusts were not regarded as exceptions to the rule. But if this were the true rule a trust for the purposes of an unincorporated society would not be invalidated by it, for, as Ford has pointed out,<sup>39</sup> any individual member of the society can compel the committee of the society (who would normally be the trustees) to devote association property to the purposes of the association. The formulation of the rule has, however, changed so as to say a trust must have a human beneficiary or have a charitable object,<sup>40</sup> and though there has been no examination of the foundation of this new rule, it seems to preclude any further argument based on the ability of the members to enforce the purpose trust. The question then arises as to what should be the true effect of this rule on a gift which is expressed to be simply upon trust for an unincorporated body.

An alternative approach to that adopted in *Leahy's* case has been suggested by Cross J. in *Neville Estates v. Madden*.<sup>41</sup> It will be appreciated that he must have found the rationalisation of *Macaulay v.*

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39. *Unincorporated Non-profit Associations*, 23-25.

40. See *Re Astor's Settlement Trust* [1952] Ch. 534; *Re Endacott* [1960] Ch. 232 (C.A.).

41. [1962] Ch. 832.

*O'Donnell* propounded by the Privy Council difficult to accept without qualification; when the House of Lords has said that a gift to a voluntary society may be good even if it is not a gift for the individual members for their own benefit it is hard to accept that they did not mean that at all, particularly when the statement is in full accord with numerous prior authorities. After a bare reference to *Leahy's* case, he held that a gift to or in trust for an unincorporated body might take effect in one of three ways. Firstly, it might, on its true construction, be a gift to the members of the association as joint tenants, so that any member can sever his share and claim it whether or not he continues to be a member of the association. Secondly, it might be a gift to the existing members, not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precluded the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity. Thirdly, the terms or circumstances of the gift may show that the property is not to be at the disposal of the members for the time being, but is to be held in trust for or applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail unless the association is a charitable body.

The first and third of these propositions are in accord with *Leahy's* case and quite straightforward. The second, however, presents difficulties. It clearly contemplates that there may be a valid gift under the will with the rights and obligations of the members *inter se* included in its terms. Hence the rules of the association would not take effect outside the terms of the gift but would be incorporated in the trusts created by the will. The proposition is thus inconsistent with the view taken in *Leahy's* case that if there is any rule which prevents severance of individual shares this is incorporated on to the terms of the gift and immediately invalidates it by rebutting the presumption that the gift was to the present members as individuals. It is, however, more in accord with the view that the gift may be valid so long as there is nothing to prevent the members from combining to dispose of it as they wish, and the authority in favour of that view is formidable. Apart from this, it is by no means inconsistent with the principle that the beneficial interest under a trust

must vest in individuals. As the Privy Council pointed out, the reason why the members of a society can dispose of funds held on trust for the society is because they are the beneficiaries of the trust. But it does not necessarily follow that the interest of each member must be a joint tenant or tenant in common of the fund so that the form of co-ownership involved is one which is at all points in accord with the classical common law models.

It is perfectly clear that the rights and obligations of a member of an unincorporated association in the funds of the association are not those of a joint tenant in the ordinary meaning of the term. They are similar in that each individual possesses one undivided share in property which accrues to other persons automatically on the occurrence of particular events, but there the similarity ends. The main incidents of the interest which an individual member of a club or other unincorporated body holds have been well defined.<sup>42</sup> In general, until realisation of the assets of the association upon its dissolution, the right of the individual member is merely to enjoy the use of the club premises, if any, and to enjoy any other privileges in accordance with the rules of the society.<sup>43</sup> His interest is neither severable nor transmissible<sup>44</sup> except to other members of the club upon his resignation, expulsion or death, when the transfer is automatic. While the association exists he can bring an action against the committee to prevent say *ultra vires* expenditure of funds.<sup>45</sup> If he is expelled according to the rules of the association he has no remedy.<sup>46</sup> If he is expelled invalidly then in England he is entitled to a declaration that he is still a member,<sup>47</sup> and if the association has any property, to an injunction to restrain the other members from preventing him from enjoying the association property.<sup>48</sup> In Australia this topic is more complicated following the decision in *Cameron v. Hogan*,<sup>49</sup> where in denying the plaintiff an injunction to restrain his exclusion from the Australian Labor Party, the majority of the High Court held that he had no interest capable of enjoyment in the funds of the Party other than a share in them should it decide according to its rules to dissolve itself and distribute its assets. This did not amount

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42. See generally, Ford: *Unincorporated Non-profit Associations*, 5, 6.

43. *Halsbury's Laws of England* (3rd ed.) v, 253, 254.

44. *Re St. James's Club* (1852) 2 De G.M. & G. 383.

45. *Stevens v. Keough* (1946) 72 C.L.R. 1.

46. *Hopkinson v. Marquis of Exeter* (1867) L.R. 5 Eq. 63; *Rigby v. Connel* (1880) 14 Ch. D. 482; *Cameron v. Hogan* (1934) 51 C.L.R. 358.

47. *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 (C.A.), 341-342 per Denning L.J.

48. *Gray v. Allison* (1909) 25 T.L.R. 531.

49. (1934) 51 C.L.R. 358.

to a tangible or practical proprietary right on which the court could base any jurisdiction to grant an injunction. It should be noticed, however, that the party existed to further purposes rather than for the benefit of its members, so that this reasoning would not be applicable to a club which existed solely for the benefit of its members.<sup>50</sup>

Upon dissolution of a voluntary society according to its rules or by a decision of all the members, it appears that the members are at liberty to decide what share in the association property each is to take;<sup>51</sup> certainly if they resolve to take in equal shares the resolution is valid.<sup>52</sup> If they make no resolution the position is less certain. In *Re Printers' and Transferrers' Society*<sup>53</sup> Byrne J. held that the correct principle to apply is that there is a resulting trust in favour of those who have contributed to the funds, though he also held that the members of the society at the date of its dissolution were the only persons entitled to lay claim to the fund. He therefore decided that the existing members of the club at the date of its dissolution should take in accordance with the amounts that each had contributed. He considered that there was a resulting trust in favour of these members; he reached this result easily because there was no surplus remaining after each member had taken what he had contributed. Had there been a surplus the position would have been more difficult and the surplus might have gone to the Crown as *bona vacantia*.<sup>54</sup> Similar principles apply when a fund is collected for a non-charitable purpose.<sup>55</sup>

While the association remains in existence it may be difficult to localise the equitable membership of the association funds, particularly where the principle of *Cameron v. Hogan* applies so as to prevent the individual member from claiming a proprietary interest sufficient to warrant the grant of an injunction to him. But the very fact that the members can combine to dispose of their funds as they please suggests that they hold, in effect, as joint tenants upon an inseverable tenancy, and this impression is reinforced by the fact that unless the rules of the association make specific provision for it, the majority of members cannot dispose of the property against the wishes of the minority. The property of the association thus belongs to the members. It has been said that the nature of the interest of a member of an unincorporated body in its fund may be explained

50. See the distinction drawn by Dean J. in *Re Cain* [1950] V.L.R. 382.

51. Assumed in *In re Clarke* [1901] 2 Ch. 110; *Re Drummond* [1914] 2 Ch. 90; *Macaulay v. O'Donnell* [1943] Ch. 435n.

52. *Brown v. Dale* (1878) 9 Ch. D. 78.

53. [1899] 2 Ch. 184.

54. See *Attorney-General v. Braithwaite* [1909] 1 Ch. 510.

55. *Re Producers' Defence Fund* [1954] V.L.R. 246.

either as an orthodox joint tenancy subject to contractual modifications or as a specially developed equitable form of co-ownership.<sup>56</sup> Which it is is irrelevant to the problem of whether it is possible for the members to hold as individuals without being straightforward joint tenants or tenants in common; for upon either analysis they may do so. And whichever it is, it seems that the view of Cross J. that the gift may be made subject to the right and obligation of the members *inter se* is not inconsistent with the principle that there must be ascertainable human beneficiaries of a trust.

If, then, a gift to the members subject to their contractual or equitable rights and obligations *inter se* is a gift to individuals, the only problem remaining is whether the importation of those obligations into the terms of the gift prevent it from being construed as a gift to the present members and brings the rule against remoteness of vesting into play. Those obligations involve the proposition that whenever a new member joins the association, he will take a share in all the property of the association at the time he joins; and it is clearly possible that he may not join until well after the perpetuity period has expired. The questions which arise are therefore whether he takes a share in the property the subject of the gift as soon as he joins, and, if he does so, whether he takes under the will or as a result of further contractual arrangements with the members of the club who took the gift when it was made. It is submitted that the latter is the true position; the testator has disposed of the whole of the beneficial interest to the present members, who together may do with it as they please. If, having an absolute interest in the property at their disposal, they elect to allow other people to join the association and thereby become entitled to a share in the fund, that is a separate disposition of the property by them and nothing forced upon them by the terms of the gift.

There seems no objection in principle, therefore, to the views of Cross J. that there may be a valid gift made to the present members of an association which is subject to the rights and obligations imposed by membership. Such a gift remains a gift to individuals, and so within the principles relating to the objects of a trust, and it does

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56. Ford: *Unincorporated Non-profit Associations*, 5-7; Morris and Leach, *The Rule Against Perpetuities* (2nd ed.), 314-315, agree with Ford that the preferable analysis is that of a different kind of equitable co-ownership but think that if this is so then there should be a transfer of that interest in writing so as to comply with such provisions as the Law of Property Act 1925, s. 53 (1) (c) (Eng.), and the Law of Property Act 1936-1960, s. 29 (1) (c) (South Australia). This seems to be the wrong point; such a transfer may come about by operation of law and may not count as a 'disposition' of an equitable interest. But if the preferred analysis is correct, then whenever a new member joins a club, there should be a written transfer of property.

not offend the rule against remoteness of vesting. This construction then becomes possible in a case where the gift is made to the association in its own name. The importance of this is twofold. Firstly, if this construction is adopted the courts will have gone some part of the way towards fulfilling the true intention of the testator. There is still the risk that all or a majority of the members will combine to divide the gift, but that is less than the risk that any individual member might sever his share. And, secondly, the rigorous canons of construction adopted in *Leahy's* case may be relaxed so that the court can adopt a less Draconian attitude towards the gift.

The two major factors which rebutted the presumption that the gift in *Leahy's* case was to the individual members were the type of property given and the potential number of the beneficiaries. If it is a permissible construction of the gift that the members are to hold it subject to the rules of the association considerations such as those which depend for their force on the necessity for each individual to be able to sever his share become much less important. The other factors remain as a bar to this interpretation of the gift. This construction necessarily engrafts the rules of the association on to the gift, and if there is anything in them which is inconsistent with the premise that the present members are to have the whole of the beneficial interest and can so combine to dispose of the gift,<sup>57</sup> then the only possible construction is that there is a purpose trust. Apart from the rules, if the nature of the association is such that it appears to the court that the members cannot combine to dispose of the gift, then the construction adopted will again be that a purpose trust was intended. The Privy Council made this point in *Leahy's* case, and it was one of the two grounds on which Cross J. held that a fund collected *inter vivos* by members of a synagogue was not held by the committee on trust for those members, but for purposes.<sup>58</sup> Even admitting the possibility of the construction to the members subject to their obligations *inter se* this does not entirely eliminate the risk of extrinsic factors leading the court to conclude that what was

57. Per Cross J. in *Neville Estates v. Madden* [1962] Ch. 832, 849.

58. In the case of a devise or bequest to a voluntary society this would simply lead to the gift being held bad. But in *Neville Estates v. Madden, supra*, n. 57, the fund subject to litigation had been collected *inter vivos*, and if Cross J. was right in his view that the nature of the society and the spirit of its rules were such as to lead to the conclusion that the donors had divested themselves of the whole of their interest in their money, the fund (had it not been charitable) would presumably have belonged to the Crown as *bona vacantia*. This raises a much larger question—how can an unincorporated contemplative Order hold funds at all? In *Leahy's* case the Privy Council considered that the individual members could not have any interest in their funds, again owing to the nature of the society. And if they are not the objects of the trust, and the purpose trust is void, being non-charitable, might not this mean that the funds of all such bodies should be regarded as *bona vacantia*?

intended was a gift on trust for the purposes of the association (or, as Cross J. put it, a gift to the association as a quasi-corporate entity).

If there is anything in the terms of the gift which is inconsistent with the right of the members to combine to dispose of it, it is clear that this prevents any construction favourable to the gift from being adopted. It may be useful to recapitulate some of the features of gifts to societies which have commonly had this effect. First, if the gift is simply one of income, it will fail.<sup>59</sup> The usual construction that an unlimited gift of income should be sufficient evidence of the intention of the testator to bequeath capital does not apply where there are circumstances which are inconsistent with that having been his true intention, and the fact that the association is a continuing enterprise prevents such a construction from being adopted. Secondly, an indication that the property is not to be sold will avoid the gift,<sup>60</sup> since even though the condition would be void if the gift were to an individual, it points to the intention of the testator as having been to devote his money to the purposes of the association. Thirdly, if there is a devise of realty, any indication that the maintenance of the society is the object of the gift will be fatal to it.<sup>61</sup> In *Macaulay v. O'Donnell* a gift for the 'maintenance of the Folkestone Lodge of the Theosophical Society' was held bad; and it is probable that the devise in *Carne v. Long* for the 'use, benefit and support' of the Penzance Public Library could have been held bad without reference to the rules of the library at all. Lastly, looking again to extrinsic matters, where there is a statutory restriction on the powers of the members to divide the property, the trust will be found to be for the purposes of the association.

Even on the more liberal principles which held sway before *Leahy's* case and which the view adopted in the *Neville Estates* case supports, it is submitted that the form of gift used in several earlier cases would now result in the gift being held invalid. In *Re Turkington*<sup>62</sup> the gift was to 'the Staffordshire Masonic Lodge No. 726 as a fund to build a suitable temple in Stafford'; Luxmoore J. held that the last words imposed no trust so that the gift was valid. He cited *In re Clarke* in support, but in that case the testator gave the Corps of Commissionaires a discretion as to how his gift was to be spent after

59. *Re Clark's Trust* (1875) 1 Ch. D. 497; *Re Swain* (1908) 99 L.T. 604; *Re Clifford* (1912) 81 L.J. Ch. 220; *Re Patten* [1929] 2 Ch. 276; *Re Wilkinson* [1941] N.Z.L.R. 1065; *Re Levy* [1960] Ch. 346 (C.A.), 363; *Re Davis* [1965] W.A.R. 25.

60. *Queensland Trustees v. Woodward* [1912] St. R. Qd. 291; *Gleeson v. Phelan* (1914) 15 S.R. (N.S.W.) 30.

61. See also *Leahy's* case, and the discussion of clause 5 of the will.

62. [1937] 4 All E.R. 501.

he had expressed a preference that they should spend it on their barracks. An even more extreme case is *Re Price*,<sup>63</sup> where the gift to the Anthroposophical Society for 'carrying on the teachings of . . . Dr. Rudolf Steiner' was held valid although Cohen J. specifically found that the testatrix clearly intended to limit the purposes to which her benefaction could be put to carrying out those teachings. This decision can only be explained on the ground that it was made before the rejection of the notion of the non-charitable purpose trust. It is also hard to see how the decision in *Van Kerkvoorde v. Moroney*<sup>64</sup> could now be supported: the gift was to the executive committee of the Socialist Labour Party of Australia 'for such purposes and objects as the said executive may think fit in the objects of the said Party', but in the event of the party changing its objects to objects substantially different from those in existence at the date of his death, there was a gift over to the Socialist Labour Party of America. Despite clear evidence from the terms of the will that his intention was to further purposes alone, the High Court upheld the gift.

Although it seems probable that English courts can follow the way indicated by Cross J., it is unlikely that Australian courts will hold themselves free to do so. The judgment in *Leahy's* case purports in its form to do no more than apply the principles of *Macaulay v. O'Donnell* and to hold the gift bad because it tended to a perpetuity. But the reasoning goes much further. The emphasis on the point that the gift can only be valid if it can be construed as a gift to individuals in severable shares, coupled with the use of guides to construction which only have significance in the light of that proposition, the assertion that a gift to an association *eo nomine* is only *prima facie* valid, and the ready ways in which the presumption that a gift in these terms is a gift to the individual members in their private capacity may be rebutted even though there is nothing in the terms of the will to imperil it, all belong to the ratio of the case and all seem to prevent the adoption of the law explained in *Neville Estates v. Madden*. A bold court might try to reach that result by taking the view that the Privy Council was only explaining the effect of the purpose trusts rule on the situation and hold that in the light of the nature of the interest that a member holds in association property, the construction suggested in that case offends neither any rule against inalienability nor any possible interpretation of the judgments in *Morice v. Bishop of Durham*; but this would involve either ignoring authority if that interest is based on contract or the court first accept-

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63. [1943] Ch. 421. Though see *Leahy's* case [1959] A.C. 457, 485.

64. (1917) 23 C.L.R. 426.

ing the theory of a special equitable form of co-ownership, and there is no judicial support for that theory as yet. The result is, it is submitted, undesirable, partly for the reasons given earlier, and partly because the implications of the decision in *Leahy's* case do not seem to have been realised. The standard form of testamentary gift to an association is one to the association *eo nomine*, to the association for its benefit or to the association for its purposes. On the law expounded in *Leahy's* case the validity of a gift phrased in these terms must always be at hazard.

That the law is in immediate need of some reform at this point seems reasonably clear. There is no reason in policy why a gift to an association should not be valid, provided always that the committee is at liberty to dispose of the capital as it pleases within the perpetuity period. This result may be achieved in England by way of the doctrines of *Neville Estates v. Madden*, though the result reached in that case shows that there are dangers even in those, but can probably now only be achieved in Australia through statutory reform. It is suggested that a short statute which would allow a voluntary society to be treated as a corporate body for the purpose of receiving testamentary gifts would produce a satisfactory result; the law would then allow the testator to go most of the way towards fulfilling his intention of benefiting the quasi-corporate entity and the draftsman could be sure of achieving his objects. There would be no danger of offending the rule against inalienability, for the only way in which that could be done would be by the testator expressly creating a purpose trust; and if he does that, the gift must fail in any event. But until such a statute exists, the best advice that a solicitor can give his client, who wishes to leave property to a voluntary society, is to tell him to persuade the society to incorporate.<sup>65</sup>

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65. Another method might be an adaptation of that used in *Re Gestetner Settlement* [1953] Ch. 672; a trust should be created having nominated beneficiaries who are to take in twenty-one years' time, with power given to the committee of the club to appoint sums out of capital and income to the purposes of the association. Although it is commonly assumed that there may be a power to appoint to purposes there seems to be no specific authority on the point and the decision of Romer J., in *In re Clarke* [1923] Ch. 407, is against the validity of such a power.