which their Lordships were prepared to understand those words. Nor could it be said that the employer had "delegated" any duty to him. However, their Lordships indicated that their decision would have been the same even if the employer had purchased the drift direct from the manufacturer. In such a case there would, at least, have been a contractual relationship, but it seems to follow from their Lordships' reasoning, that no liability would exist because there would still in their view be no delegation of any duty to such a manufacturer. But if their Lordships were prepared to admit that the employer could be liable for the negligent acts of "agents" and "independent contractors" to whom he has "delegated" performance, it would be hard to understand their rejection of liability for the negligence of the manufacturer-supplier. Lord Morton of Henryton said simply that there was no liability in such a case because purchase directly from the manufacturer was not a "delegation" of the master's duty to take reasonable care.[13] It is submitted with respect that the rejection of liability in such a case is not such an easy conclusion as the Lords seemed to think it was. Perhaps an artificial line may be drawn between such a manufacturer and the agent or independent contractor to whom a duty has been delegated, but no sensible line can be drawn when the position is judged in terms of any intelligible policy.

Once it is assumed that the master's liability extends beyond his own negligence and that of his servants in the strict sense, it may be that it is impossible to formulate any principle of liability for the acts of others which can show any justification in policy. The employer who simply purchases a drift direct from a manufacturer who has some already in stock is not liable for that manufacturer's negligence, but if he orders a drift from a manufacturer who is temporarily out of stock and who agrees to run his production specially to meet the order, it may well be that the employer *will* be liable.

In *Davie's Case* the House of Lords has missed a valuable opportunity to state a principle which would express the liability of the employer to his employee for the negligence of persons other than his servants in the strict sense. Certainly their Lordships had no desire to extend the employer's liability in this field any further, and they had no hesitation in refusing to make the respondents liable in the present case. To have done so would, in their view, have meant the imposition of an absolute liability. They have however, left the formulation of any principle for another day. The significance of the case is that the House has set its authority against any prevailing trend towards absolute liability in this field, although it cannot be said that the case involves any real reversal of this trend, because there was too little in existing authority to support the appellant. However, Viscount Simonds refused to draw any inferences from the suggestion by counsel for the appellant that the House should have taken into consideration the fact that probably the employer would, but the employee would not, be covered by liability insurance. His Lordship said:[14] "It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him."

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CHARITABLE TRUSTS

LEAHY & ORS. v. ATTORNEY-GENERAL OF NEW SOUTH WALES & ORS.

The notoriety of the law of charities for its obscurities and complexities

[13] *Id.* at 345.
[14] *Id.* at 343.

is probably justified.[1] *Leahy's Case*[2] must be regarded as a significant decision in this field, since, first, it clarifies the scope of the "charitable-trust-validation" section, s.37D of the Conveyancing Act, 1919-54 (N.S.W.); and, second, it is concerned with the line of demarcation between, on the one hand, absolute and immediate gifts to unincorporated non-charitable associations which escape difficulties as to certainty and perpetuity, and, on the other, gifts to such bodies constituting trusts, which do not. Section 37D provides as follows:[3]

(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

Section 37D was enacted in New South Wales in 1930, following suggestions repeated many times by Long Innes, C.J. in Eq., and was modelled upon s.2 of the Victorian Charitable Trusts Act, 1914, which was passed in Victoria after a public outcry at the decision of Madden, C.J., in *In the Will of Forrest*,[4] the facts of which illustrated strikingly how the then law of charities could defeat the beneficient intentions of testators.

In that case the court had held that certain large philanthropic trusts failed for uncertainty because they were expressed to be partly for charitable purposes and partly for indefinite non-charitable purposes, and the trustee had a discretion to apply the whole trust fund for any of these purposes. No apportionment could be directed between the valid charitable and invalid indefinite purposes. In deciding the case Madden, C.J., was merely applying, as he was bound to do, the principle of law illustrated by such cases as *Morice* v. *The Bishop of Durham*,[5] where it was held that a purported legacy to the Bishop of Durham to be disposed of to such objects of "benevolence and liberality" as the Bishop in his own discretion should most approve, could not be said to be given for solely charitable purposes. As the intention was too indefinite to create a trust, the legacy failed.

There are implicit in s.37D two distinct questions: (1) What is the nature of the trust which will invoke the operation of the section (subs. (1))? and (2) What effect will its application produce (subs. (2))? By reason of its simplicity, subs. (2) has never posed any difficulties; but it is otherwise with subs. (1). Certain aspects[6] of its interpretation could fairly be regarded as settled law before *Leahy's Case*. What was not settled was whether the scope of the section comprehended not only cases where it was possible to effect a constructional severance of the charitable from the non-charitable trusts (i.e. where valid charitable purposes and non-charitable purposes were designated by separate descriptions, *e.g.* where the gift is for "charitable or benevolent objects", but also cases where charitable purposes and non-charitable and invalid purposes were designated by a composite description, *e.g.* for "patriotic

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[1] See e.g. N. Bentwich, "The Wilderness of Legal Charity" (1933) 49 *L.Q.R.* 520.

[2] *Leahy and Ors.* v. *A.-G. for N.S.W. and Ors.* (1959) 2 All E.R. 300 (P.C.); *A.-G. for N.S.W.* v. *Donnelly and Ors.*; *Leahy and Ors.* v. *Donnelly and Ors.* (1958) 98 C.L.R. 538. The S.C. decision was not reported.

[3] There is also s.37D(3) which provides: "This section shall not apply to any trust declared before or to the will of any testator dying before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1930."

[4] (1913) V.L.R. 425. The Victorian provision is now Property Law Act, 1958, No. 6344, s.131.

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

[6] As to which, see *infra*.

objects".[7] *A priori*, and apart from authority, it might be thought that, in strict logic, the legislation would be equally susceptible of a "wide" or "narrow" interpretation.

This doubtful question of statutory interpretation has now been resolved in *Leahy's Case*, where both the High Court and the Privy Council affirmatively ruled that s.37D applies not only where valid charitable purposes and invalid non-charitable purposes are designated by separate descriptions but also where, in certain circumstances, charitable purposes and non-charitable and invalid purposes are designated by a composite description.

In *Leahy's Case* a testator, who died in 1955, by a will dated 1954 disposed *inter alia* of his property as follows: "Clause 3. As to my property known as 'Elmslea' . . . upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select . . .". Clause 5 provided:

> As to all the rest and residue of my estate both real and personal . . . upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such convents as my said executors and trustees shall select either by way of building a new convent . . . or the alteration of or addition to existing buildings occupied as a convent or in the provision of furnishings in any such convent or convents . . . the receipt of the Reverend Mother . . . of that particular order of nuns or convent shall be a sufficient discharge . . . for any payment under this clause.

The questions for determination were the validity of the disposition made by Clauses 3 and 5.[8]

In relation to Clause 3 the Privy Council, and Dixon, C.J. and McTiernan, J., in the High Court, held this disposition to constitute a continuing trust which would be bad under the general law as tending to a perpetuity. Dixon, C. J., and McTiernan, J., stressed the inappropriateness of the property for the services or benefit of the order chosen; also the membership of any order chosen would be indeterminate and the trust was intended to apply to those

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[7] The earlier case-law relevant to this question may be briefly summarised: In *In re Hollole* (1945) V.L.R. 295, O'Bryan, J. refused to apply the Victorian section where the gift was "to my trustee and executor to be disposed of by him as he may deem best". His Honour said that the section contemplated a severable trust, one which was partly charitable and partly non-charitable and not a trust which was entirely undefined and uncertain as to subject-matter. In *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust* (1946) 46 S.R. (N.S.W.) 298, the N.S.W. Supreme Court attached to the section a wide operation, ruling that the section applied not only where charitable and non-charitable objects were expressly enumerated but also where they were comprised in one expression; but that the section did not apply to a trust directing the application of a fund for a single purpose in which the charitable and non-charitable elements could not be distinguished.

The broader view of the section (as applying also to a compendious expression) was adopted by the Full Supreme Court of N.Z. in *In re Ashton* (1955) N.Z.L.R. 192. The N.Z. section is in the same words as the Victorian. Turner, J. said that in the case of a composite expression, "the test may be whether the words of the trust can be demonstrated to have a substantial charitable content". However, in the Victorian case of *In re Belcher* (1950) V.L.R. 11, Fullagar, J. expressed the opinion that the criterion for the application of s.131 was the possibility of a constructional severance of the charitable from the non-charitable trusts. It applied only where the testator had expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty. The section did not operate in the case of a compendious expression.

[8] It must be borne in mind at the outset that a trust for the benefit of orders of nuns generally (as here) embraces both convents engaging in external works and those devoted to personal sanctification and contemplation only. Such a trust as this was expressed in a composite form comprehending both charitable and non-charitable purposes. There being a discretion to apply the trust property wholly to non-charitable purposes and no apportionment directed, under the general law, such a trust is void for uncertainty. Also, the dispositions in clauses 3 and 5 were capable of being construed as being trusts of indefinite duration. Unless by aid of statutory provision they could be read down to being deemed "charitable" trusts in the strict sense, the dispositions might be invalid as infringing the rule against perpetuities.

who should become members at any time. The Privy Council thought that the court should have regard to such matters as the fact that the gift was formally couched in the terms of a trust, the numbers and dispersion of the order and the size of the subject property. Their Lordships concluded 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. The question, in their opinion, was basically one of construction, namely whether the donees were intended to take beneficially themselves or as trustees.

On the view of Dixon, C.J., and McTiernan, J. and the Privy Council, the trust was validated by s.37D, being modified so as to exclude from the choice of possible beneficiaries the contemplative orders. Dixon, C.J. and McTiernan, J., were of the opinion that s.37D did apply to the case of composite expression (as was the present) and went on:

> What must be found in order to justify an application of the provision (to a composite expression) is a distinct or sufficient indication of an intention to authorise the application of . . . the fund . . . to what is clearly a charitable purpose even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity. But it is perhaps unsafe to generalize. . . . The conclusion of O'Bryan, J., *In re Hollole*[8a] was right on the ground that the general words 'to be disposed of by him as he may deem best' did not seem necessarily to advert to any charitable object and were so vague as to be quite indeterminate and only embraced anything that lies within the legal conception of charity because of their indeterminacy. But in the present case . . . the reference is *prima facie* charitable in the sense that it is known that most convents would be the object of legal charity. The words are distributive and it is plain that by restricting their application they may be restrained to charitable objects.[8b]

The Privy Council ruled affirmatively that s.37D, first, applies alike to invalidity due to uncertainty or to perpetuity and, second, embraces the case of a composite expression. The Privy Council's judgment in this context added little of susbstance to the reasoning of the High Court—as they said: ". . . Thus whether the gift be to Orders of Nuns, an object so predominantly charitable that a charitable intention on the part of the testator can fairly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable purposes, the section will apply." *In re Belcher*[8c] was overruled and *In re Hollole* was approved.

On the other hand, Myers, J. in the Supreme Court of New South Wales, and Williams, Webb and Kitto, JJ. in the High Court, were of the opinion that the provision in Clause 3 amounted to an absolute and immediate gift of the whole beneficial interest to the body chosen for its purpose, independently of any charitable character it might possess. The construction of s.37D was on this view not relevant. Kitto, J., for example, thought that the selected body would take "immediately and absolutely" and could expend immediately the whole of what it received. On this view, there was no attempt to create a perpetual endowment.

Turning now to Clause 5, it was apparent that this trust was bad under general law either as being "uncertain", or as violating the rule against perpetuities. The High Court (unanimously), and the Privy Council, ruled that s.37D applied so as to support this trust in part, so that its operation would be confined to convent institutions exclusively devoted to charitable purposes.

Myers, J. in the New South Wales Supreme Court had thought that the

[8a] *Supra* n. 7.
[8b] (1958-59) 42 A.L.J.R. at 49.
[8c] (1950) V.L.R. 11.

section only applied where a charitable intention appeared from the trust itself; and he thought that a trust for (e.g.) "benevolent" purposes did not necessarily disclose such an intention. Therefore the residuary trust could not be saved by s.37D. But granted the long-standing controversy as to the scope of "benevolent", the Privy Council's view seems unanswerable that ". . . in the chequered history of this branch of the law, the misuse of the words 'benevolent' and 'philanthropic' has, more than any other, disappointed the charitable intention of benevolent testators and . . . the section is clearly designed to save such gifts."[8d]

Both the Privy Council and the High Court have thus held that s.37D does not discriminate between, on the one hand, cases where charitable purposes and non-charitable and invalid purposes are designated by separate descriptions and, on the other hand, cases where they are designated by a composite description. Also, the connotation of the word "invalid" in the dichotomy "non-charitable and invalid" in subs. (1) should not be restricted to mean invalidity arising by reason of uncertainty only, but extended to invalidity arising in any form, as for example, from the rule against perpetuities. The more detailed conclusions from this case may, finally, be summarised.

1. *As to the Nature of Gifts to Unincorporated Associations.* A gift to an unincorporated non-charitable association may obey or violate the perpetuity rule according to whether it is construed as an absolute and immediate gift to the present ascertained or ascertainable present members of the association, or whether these hold not beneficially but on a trust for all future members as well. The Privy Council in *Leahy's Case* held that an absolute gift to its members is presumed, but that this presumption is rebuttable by reference to all material circumstances including (in this case) the form of the gift, the aptness of the property to benefit the actual members, and their numbers and positions. Divergence of judicial opinion in this connection may thus be expected to arise from varying appreciation of these facts.

2. *As to the Meaning of s.37D.* (a) The section will not be applied to permit the transformation of an invalid trust which the donor intended into something entirely different, which the donor did not intend.[9] (b) It will not give relief in the case of a gift too vague to manifest any specific charitable component.[10] (c) The section grants relief where the gift contains objects separately described so that by excising those which are non-charitable, definite charitable objects are left.[11] (d) The section will relieve against invalidity springing either from uncertainty or from infringement of the rule against perpetuities. (e) The section grants relief where a composite expression embraces both charitable and non-charitable purposes, assuming that the trust discloses sufficiently the charitable intention of the donor.

It is indeed difficult to resist, on logical or other grounds, the powerful arguments, first, that the phrase "or could be deemed to be included" (subs. 1) is particularly appropriate to the case of a compendious expression; and, second, that in any event a compendious expression (e.g. "for such Orders of Nuns as my trustee may select") may generally be split into its charitable and non-charitable components (e.g. "for such Orders of Nuns whether active or contemplative, as my trustee may select"). It has never been doubted that

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[8d] (1959) 3 All E.R. 300, at 317.

[9] In *Roman Catholic Archbishop of Melbourne* v. *Lawlor* (1934) 51 C.L.R. 1, the trust was merely to establish "a Catholic daily newspaper." The trust was held non-charitable, but it was not legitimate to apply s.37D in the circumstances so as to alter the whole character of the newspaper intended by the testator, by converting the trust into one to establish a Catholic "religious" newspaper.

[10] (1945) V.L.R. 295.

[11] *In re Bond* (1929) V.L.R. 333. There a legacy "for the blind and their children" was construed as two independent gifts in undefined proportions and the section was applied to exclude the invalid gift "and their children", the whole legacy then being applied "for the blind".

the section extends to this latter form of trust.

3. *"Sufficient" Indication of Charitable Intention.* In dealing with what is a "sufficient" indication of charitable intention the Privy Council thought that this might arise from a "predominantly charitable" or from a "significant" indication of charitable intent. In the High Court, Dixon, C.J., and McTiernan, J. referred to a "distributable" class which is "predominantly" charitable in character; to a "distinct" indication of a charitable intention, to what is "*prima facie*" charitable. These explanations take us little beyond the holding that s.37D will extend to a composite expression provided there is an indication which the Court finds "clear" that a charitable intention on the part of the donor is embraced within it.

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REDUCTION OF SHARE CAPITAL

AUSTRALASIAN OIL EXPLORATION v. *LACHBERG*

For a company to distribute to its shareholders, in cash or in kind, any of its subscribed capital, is to offend against ". . . the fundamental principle of company law that the whole of the subscribed capital of a company with limited liability, unless diminished by expenditure upon the company's objects or . . . by means sanctioned by statute shall remain available for the discharge of its liabilities."[1] While the recent much discussed High Court decision in the *A.O.E. Case*[2] turns on a particularly complicated agreement between two companies, it does provide a clear application of the above principle,[3] with some interesting reflections on distribution of casual profit made on the sale of single assets otherwise than in the course of ordinary business activities.

By an agreement dated February 17, 1958, Australasian Oil Exploration Ltd. (here called A.O.E.) sold to Mary Kathleen Investments Ltd. (here called "M.K.I.") 994,900 shares held by the vendor company in another company, Mary Kathleen Uranium Ltd. (here called "M.K.U.") a holding which carried the right to appoint two directors. The purchase price was £346,720 and the Investments Company undertook within 60 days to offer to the Exploration Company shareholders fifteen Investment Company shares at 5/- each, for every 100 Exploration Company shares held, and to offer to exchange ten Investment Company shares for every 100 Exploration Company shares held. There was a provision directed at preserving the Exploration Company's right to appoint directors of the Uranium Company. The 994,900 shares formed the Exploration Company's principle asset and were valued in the last balance sheet at £248,725, although they were in some of the Company's documents declared to be of a value of £2,000,000. When the agreement was made the company's paid up capital amounted to £2,782,348. However, according to a balance sheet published on 30th April, 1957, it had sustained a loss to its share capital amounting to £1,716,513 leaving total shareholders' funds at £1,065,835. The assets consisted of the M.K.U. shares valued in the balance sheet at £248,725, and fixed assets and other items representing pre-paid expenses, loans and stores in hand, which were all valued extremely highly. Evidence was given, and accepted by the lower court, that the M.K.U. shares were worth greatly in excess of the balance sheet figure of £248,725, and also in excess of the sale price figure of £346,720. This appeal was brought by A.O.E. against the respondent shareholder in *A.O.E.* (*Lachberg*) from the decision of Wolff, J., in the

[1] *Davis Investments Pty. Ltd.* v. *Commissioner of Stamp Duties* (1958) A.L.R. 561 at 568, *per* Kitto, J.
[2] (1959) Argus L.R. 65 (H.C.).
[3] See *supra* n. 1.