LEGAL PERSONALITY, TRADE UNIONS, AND DAMAGES FOR UNLAWFUL EXPULSION.

Introduction.

The result of the pronouncement of the House of Lords in *Bonsor v. Musicians' Union*[1] is that whereas in the past the only remedies of a trade union member wrongfully expelled from his union were a declaration as to his rights and an injunction ordering re-instatement to the register of members, it is now possible for him to obtain, in addition, damages for the loss which the expulsion has occasioned him. In upholding the plaintiff's claim for damages in this instance, the House of Lords has overruled the precedent set by the Court of Appeal in *Kelly v. National Society of Operative Printers' Assistants*[2] and followed by the Court of Appeal in *Bonsor's Case*.[3]

The record shows that the expulsion of Bonsor from the Musicians' Union caused him considerable financial loss and certainly great personal distress. In such circumstances the relief accorded by the Court of Appeal was totally inadequate to compensate for the loss; and for many the decision must have occasioned a feeling that adherence to precedent had worked considerable injustice. There is every reason to believe, however, that those judges who found themselves unable to make an order for damages were dissatisfied with the result which *Kelly's Case*[4] dictated, but they were not in a position to hold otherwise without violating the doctrine of *stare decisis*.[5]

The House of Lords was unanimous in rejecting the authority of *Kelly's Case* and in upholding Bonsor's claim for damages. The reasoning of the majority was that a trade union was a legal entity, though not incorporated, and could be sued as such an entity distinct from the members who composed it. The officer responsible for the act of expulsion was the agent of the members; but in suing the union by name (a process permitted by law) the plaintiff was suing all members but himself. Hence he could not be regarded as party to the act of which he complained. The minority view, however, was that a trade union has legal personality and could be sued as a legal person, and hence the breach of contract was a breach committed by the union. On this view it was not necessary to invoke any principle of limited agency.

1 [1955] 3 All E.R. 518.

2 (1915) 84 L.J.K.B. 2236, 113 L.T. Rep. 1055.

3 [1954] Ch. 479, [1954] 1 All E.R. 822.

4 See *per* Evershed M.R. in [1954] Ch. 479, at 506.

5 Young v. Bristol Aeroplane Co. Ltd., [1944] K.B. 718, [1944] 2 All E.R. 293.

The striking diversity in opinion between Lords Morton and Porter on the one hand and Lords MacDermott, Keith, and Somervell on the other, and the conviction with which the opposing views were put forward, calls for a review and analysis of the concept of legal personality and the theories of legal personality which have been formulated both in England and on the Continent. In this way it may be possible to elucidate the theoretical premises implicit in the recent pronouncements and to reach some understanding of the reason why the law lords should have reached the same result but from different starting points.

I.

At no time has English thought about the nature of legal personality assumed the quality of tacit and generally accepted doctrine. Since Maitland's time[6] a vast amount of erudite learning has been applied in theoretical discussion,[7] but the record of judicial pronouncements is almost completely devoid of any analysis of the concept of

[6] MAITLAND, *The Unincorporate Body*, in III COLLECTED PAPERS 271, and *Trust and Corporation, ibid.*, 321, *Moral Personality and Legal Personality, ibid.*, 304; see also his Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, vii-xliii (hereafter quoted as MAITLAND).

[7] See Brown, *The Personality of the Corporation and the State*, (1905) 21 L.Q. REV. 365; Machen, *Corporate Personality*, (1910-11) 24 HARV. L. REV. 253, 347; Geldart, *Legal Personality*, (1911) 27 L.Q. REV. 90; Pollock, *Has the Common Law received the Fiction Theory of Corporations?*, (1911) 27 L.Q. REV. 219; Canfield, *The Scope and Limits of the Corporate Entity Theory*, (1917) 17 COL. L. REV. 128; Vinogradoff, *Juridical Persons*, (1924) 24 COL. L. REV. 594; Dewey, *The Historic Background of Corporate Legal Personality*, (1926) 35 YALE L.J. 655; Dodd, *Dogma and Practice in the Law of Associations*, (1928-29) 42 HARV. L. REV. 977; Chafee, *The Internal Affairs of Associations Not for Profit*, (1929-30) 43 HARV. L. REV. 993; Radin, *The Endless Problem of Corporate Personality*, (1932) 32 COL. L. REV. 643; Kelsen, *The Pure Theory of Law*, (1934) 50 L.Q. REV. 474; Latty, *The Corporate Entity as a Solvent of Legal Problems*, (1936) 34 MICH. L. REV. 597; Wolff, *On the Nature of Legal Persons*, (1938) 54 L.Q. REV. 494; CARR, THE LAW OF CORPORATIONS (1905); SMITH, THE LAW OF ASSOCIATIONS (1914); HALLIS, CORPORATE PERSONALITY (1930); LLOYD, THE LAW OF UNINCORPORATED ASSOCIATIONS (1938); BARKER, Introduction to GIERKE ON NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800 (1934); FREUND, THE LEGAL NATURE OF CORPORATIONS; DUFF, PERSONALITY IN ROMAN LAW (1938); GRAY, THE NATURE AND SOURCES OF THE LAW (1924), 27-64; SALMOND, JURISPRUDENCE (9 ed., 1937), 108-119; KORKUNOV, GENERAL THEORY OF LAW (trans. Hastings 1922), sec. 28; POLLOCK, FIRST BOOK OF JURISPRUDENCE (5 ed., 1923), 111-129; HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923), 194-228; KOCOUREK, JURAL RELATIONS, c.17; HOLLAND, JURISPRUDENCE (13 ed., 1924) c. 8, secs. i, ii; MARKBY, ELEMENTS OF LAW (6 ed., 1905), secs. 131-5; PATON, JURISPRUDENCE (2 ed., 1951), c. xvi; FRIEDMANN, LEGAL THEORY (3 ed., 1953), c.26.

legal personality and of the circumstances in which it will be attributed to any person or group. In the main, theories about legal personality have been derived from continental sources, and it is only after consideration of them that English writers have turned to their own legal materials and reflected upon the theory or theories implicit in English law. Our first task, therefore, must be to examine the leading continental theories and to relate them to the theorising of English lawyers.

Roman Law never had an explicit theory of legal personality[8] but nevertheless Roman sources were drawn upon by mediaeval statesmen, churchmen, and lawyers when they sought authority for what have now become known as the fiction and concession theories of legal personality. Insofar as the concession theory involved acceptance of the fiction theory, it is convenient to regard the two theories as one—the fiction-concessionist theory; taken together they mean that legal personality is a legal fiction and that the granting of legal personality is dependent upon the concession of the sovereign power.[9] This conception of legal personality has undergone successive refinements, but from the time of its formulation by Pope Innocent IV to its systematisation by Savigny in the 19th century it was the prevailing theory in Europe. The first reaction to the theory began with Beseler's criticism of Savigny, but it was not till Gierke had developed his Genossenschafts-theorie[10] that the reaction could be described as significant. Gierke repudiated the notion that legal personality was in any sense a fiction or mental construction and that the attribution of legal personality was dependent upon the fiat of the sovereign. His thesis was that in society there are many groups of individuals which may be regarded as units of the social structure, just as natural persons are. To these groups we may ascribe group personality; and if that is so they should automatically be accorded legal personality. Maitland paraphrases Gierke's hypothesis thus[11]:— " . . . . our German Fellowship is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammptperson,* and its will is a *Gesammtwille;* it is a group-person, and its will is a group-will."

8 *Cf.* DUFF, *op. cit.*

9 MAITLAND, xxx.

10 In POLITICAL THEORIES OF THE MIDDLE AGE.

11 MAITLAND, xxvi.

Both the *fiction-concession* theory and Gierke's *Genossenschaftstheorie* (or *redlist* or *organism* theory) were rationales for different social policies.[12] The former was an instrument by which rival groups might be suppressed or checked by sovereign power, whereas the latter represented the strivings of nascent German states for autonomy. Gierke's theory was a crest in the tide of the Teutonic romantic movement and provided a creed first for nationalism and later syndicalism. First and foremost he was seeking to secure effectiveness in action for "the pulsation of a common purpose which surges, as it were from above, into the mind and behaviour of the members of any group",[13] and this effectiveness in action could only be secured by cloaking the group—national, local, regional or professional—with an aura of legality.

It has often been said that Maitland was an adherent of the realist school[14] but this view is only a half-truth; for although he was critical of English thinking about legal personality, he really did not go beyond the sympathetic exposition of Gierke's theory. He does indeed suggest that group personality may be a reality, but unlike Gierke he does not go so far as to assert that in law it follows, as a necessary consequence, that the group has legal personality. On one occasion for instance, he remarked "that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends."[15] Maitland's criticisms of English thought on legal personality relate in the main to the half-hearted treatment it had received, but he explained this as being due to the refinement of the trust device and to its utilisation in the formation of numerous permanent associations of individuals which either did not want or could not obtain incorporation. His eulogies on the adaptability of the trust device may afford some grounds for saying that Maitland was at heart a realist, but at the same time it should be remembered that the mere fact that one of the incidents of legal personality—perpetual succession—could in practice be secured by continual replacement of trustees does not amount to the attribution of legal personality in the strict sense.

12 See PATON, JURISPRUDENCE, c. xii.

13 BARKER, Introduction to GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800, lxi (hereafter quoted as BARKER).

14 Vinogradoff, *Juridical Persons,* (1924) 24 COL. L. REV. 594; Hart, *Definition and Theory in Jurisprudence,* (1954) 70 L.Q. REV. 37, at 51 n. 17; Mack, *Group Personality: Footnote to Maitland,* (1952) 2 PHILOSOPHICAL QUARTERLY 249.

15 *Trust and Corporation,* in 3 COLLECTED PAPERS at 383.

II.

The *bracket*,[16] *symbolist*,[17] *expansible-symbol, collective* or *non-entity* theory of legal personality finds its political counterpart in the 18th century social contract doctrine which viewed the state as a collective unit composed of individuals bound together by the expression of their own wills. The theory has for its exponents von Jhering,[19] the Marquis de Vareilles-Sommière,[20] Max Radin,[21] Hans Kelsen[22] and Hohfeld,[23] and its essence is that corporate personality is no more than a verbal symbol for the complex of rights, duties, etc., between the constituent members. None of the aforementioned writers have carried their arguments to the extent of denying the phenomenon of group action or of group personality on the moral plane. Each is concerned primarily with the realm of legal discourse. Hohfeld, for instance, concedes that the action of individuals when acting as members of a corporation is different from their action as natural persons but "when all is said and done, a corporation is just an association of natural persons conducting business under legal forms, methods, and procedure that are *sui generis*."[24] All propositions which have corporation as their subject or object are ultimately reducible to singular propositions in terms of the legal relationships between natural persons: " . . . When we say that the so-called legal or juristic person has rights or that it has contracted, we mean nothing more than what must ultimately be explained by describing the capacities, powers, rights, privileges (or liberties), disabilities, duties and liabilities, etc., of the natural persons concerned as of such persons."[25]

III.

Barker's theory of legal personality[26] has been constructed through a synthesis of elements of the fiction, the concession, and the realist

16 So-called by MAITLAND, xxiv.

17 See DUFF, *op. cit.*

18 See Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws,* (1928-29) 42 HARV. L. REV. 516.

19 3 GEIST DES ROM. RECHTS, 343. See MAITLAND, xxiv; and DUFF, *op. cit.*

20 See Wolff, *On the Nature of Legal Persons,* (1938) 54 L.Q. REV. 494.

21 *The Endless Problem of Corporate Personality,* (1932) 32 COL. L. REV. at 643, 658, 665.

22 *The Pure Theory of Law,* (1934) 50 L.Q. REV. 474, at 496-498; PATON, JURISPRUDENCE, c. xii.

23 FUNDAMENTAL LEGAL CONCEPTIONS, 198-204.

24 *Ibid.,* 198.

25 *Ibid.,* 199, n. 14; Machen, *Corporate Personality,* (1910-11) 24 HARV. L. REV. at 347, 366.

26 See his Introduction to GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800.

theories. Legal personality in his analysis is a juristic construction[27] and in that sense something which cannot be expressed in object-language. Legal persons are fictions; they are *created* by members of the group, but *recognition* is afforded by some other agency. "Normally", Barker says,[28] "the regular process will be that of legislation, accompanied and applied by judicial interpretation. But the judge will not necessarily stop at an exact interpretation of the mere letter of existing law. He may recognize legal personality (at any rate when he is dealing with the matter of group-personality) on the ground of analogy, assigning *personae* to bodies which are in an analogous position to those already recognised under existing law." Recognition may be given by virtue of custom or usage.

The subject of legal personality of an association of individuals is the common purpose of the group. It is the common purpose which is the "permanent unity which transcends the collection of individuals who are united in its service." This transcendental approach, so-called "the Purpose Theory", involves the abstraction of reference to natural persons and pins juristic personality upon property, potential or existing, destined for appropriation to a particular purpose.[29]

IV.

Little persuasion will be needed to convince the reader that the theories outlined here have been formulated upon widely divergent premises and conceptions. Many apparent contradictions may, however, be eliminated by recognition of the fact that indifferent terminology has obscured identical reference and has resulted in confused thinking.

Proponents of the fiction and the realist theories frequently clash because of their failure to appreciate that they are often speaking on two levels of discourse. The realists first seek to prove the existence of definable groups in society and the phenomena of group action. The "metaphysical realists" even suggest that these groups have a will and a moral being and that the individuals involved serve the same role in relation to the body as the organs of the human to the whole biological structure. The more radical, including Gierke, maintain that legal personality exists wherever group personality exists and that it does not require sanction by the state. The less radical do not

[27] *Ibid.*, lxxvi.

[28] *Ibid.*, lxxi.

[29] *Ibid.*, lxxx. See also Wolff, *On the Nature of Legal Persons,* (1938) 54 L.Q. Rev. 494; Duff, *op. cit.*

deny that the fiat of the state is required but argue that if a group exists as a fact, then the state *ought* to accord it juristic personality.[30]

Even Hohfeld and Radin do not expressly rule out the suggestion that "group personality" may exist as a fact, but their theories are not phrased in terms of phenomenological description but rather in terms of legal relations. In legal discourse the use of a group name is a convenient label even though the entity it represents is a fact, indeed a fact which the law must recognise. But in law, it is an entity "that in the last analysis consists of nothing more than a name by which a complex can be dealt with in discourse."[31]

The moment we speak of a group as an entity having personality we invoke a metaphor borrowed from the language of individual behaviour and which as such may lead us to attribute inappropriate characteristics to the group. The postulation of the existence of a group-will or group-soul or group-personality to associations of natural persons is undoubtedly the result of such thinking. That we can attribute legal or moral responsibility to a group does not constitute proof that a group has personality, will or soul. It is no more than a resolution to use language in a particular way.

Morris Cohen likens the stretching of the term "personality" beyond its ordinary denotation to the mathematical process of stretching the term "number" by applying it to surds or "real numbers" which are not numbers at all.[32] The use of the word "personality" in relation to groups involves, first of all, analogy with the behaviour of individuals, but there are limits to which the analogy can be pressed and ultimately we are forced to admit that expressions relating to individuals are so different that the meaning of personality in the two instances is different.[33] But even if we do regard the use of personality in connection with groups as non-metaphorical and simply a case of the application of a verbal symbol to a new referent, it must be remembered that "intellectual resolutions cannot rob words of their old flavours or of the penumbra of meanings which they carry along

30 Jethro Brown, *The Personality of the Corporation and the State,* (1905) 21 L.Q. Rev. at 365, 370; Geldart, *Legal Personality,* (1911) 27 L.Q. Rev. 90, at 94-95; Laski, *The Personality of Associations,* (1915-16) 29 Harv. L. Rev. 404, at 424.

31 Radin, *The Endless Problem of Corporate Personality,* (1932) 32 Col. L. Rev. at 643, 667.

32 Cohen, *Communal Ghosts and Other Perils in Social Philosophy,* (1919) 16 Jol. of Philosophy 673, at 681.

33 Hart, *Definition and Theory in Jurisprudence,* (1954) 70 L.Q. Rev. 37, at 58, 59.

with them in ordinary intercourse."[34] Thus the mere adoption of the same word may lead to confusion of referents and eventually false reasoning.

V.

The fiction theory concedes that the application of personality to groups involves an analogy but it fails to see that it also involves a shift of meaning. In its earliest formulation by Pope Innocent IV the process of analogy was not carried far; a corporation was held to be capable of proprietary rights but since it was "incapable of knowing, intending, willing, acting", it could not be held responsible for crimes or torts.[35] The fiction by which modern corporations have been held liable in crime and tort is not that of ascribing a will to the corporation but the resolution that in certain circumstances a corporation will be regarded as legally responsible in the same way as an individual.[36]

It is unfortunate that the word "fiction" should ever have been applied to the analogical process just described. Despite its derivation from the Latin *fingere*—to make or construct—the sense in which it has been used in language imports an element of make-believe.[37] The earlier fictionists categorically denied even the fact of group entities, but later members of this school have left that question open. Personality is a mental construction and, as such, a fiction. Wolff, for instance, thought that it was not necessary for lawyers to investigate the nature of group action, for that was a question for sociology rather than law. "The fiction theory merely says that it is for the law to decide whether and under what conditions an entity not a human being has legal personality; whether it can obtain personality on the basis of free association, or by complying with certain fixed rules, or, finally, as the result of a particular act of State in each individual case."[38]

VI.

Professor Hart has recently attempted to force the analysis of legal personality into the light of modern logic.[39] He regards the question, "What is a corporation?", as meaningless or nonsensical. The only

34 Cohen, *loc. cit.*, 681.

35 MAITLAND, xx.

36 DUFF, *op. cit.*, 212.

37 Radin, *The Endless Problem of Corporate Personality*, (1932) 32 COL. L. REV. at 643-644.

38 Wolff, *On the Nature of Legal Persons*, (1938) 54 L.Q. REV. 494, at 509.

39 Hart, *loc. cit.*

kind of question we can answer is: "How, and under what conditions, the names of corporate bodies are used in practice?" The truth of such a proposition as "A. & Co. owes B. £10" is a function of the rules relating to corporations, these rules in turn being a species developed from rules applying to individuals.

The analysis of corporate personality resolves itself into an examination and specification of the conditions under which propositions about corporations are true and the manner in which they are used. The Hohfeldian approach of breaking down propositions about corporations to individual propositions about the members is not only crude but incorrect. Traditional theories reveal no improvements because each has made the fundamental error of assuming that expressions for corporate bodies *stand* for something.

The finding of true conditions for propositions about corporations means only this: That the proposition must be compatible with legal rules concerning corporations. However, we can carry the analysis even further than this and ask the question: In what manner do we determine what rules are valid and what rules are invalid? This involves a reference to some superior norm. In English law it would involve a reference either to statute or common law, and for the rules to have meaning and to be capable of application it would be necessary for statute law or common law to define what person, persons or groups should be treated as corporations. The question therefore of what is a corporation is not nonsensical, but rather one which may be answered by reference to a superior norm.

VII.

The search for a superior norm which prescribes the conditions and circumstances in which legal personality will be attributed to groups is nothing more than a search for a theory of legal personality. Opinions have varied as to what theory or theories of legal personality have been adopted in English law,[40] but on the whole the evidence

40 Pollock held that English law had no place for the fiction theory and himself leans towards the realist theory. Hallis, Dodd, and Machen on the other hand thought that the fiction theory was pre-eminent. Both Dicey and Geldart and to a certain extent Jethro Brown and Laski were realists. Duff found that Lord Lindley's judgment in Salomon v. Salomon & Co., [1897] A.C. 22, was expressed in realist language, but that the arguments he advanced were not carried to their logical conclusion (see DUFF, *op. cit.*, 215, and cf. GRAVESON, STATUS IN THE COMMON LAW, 77).

supports the view that the concession theory has held sway.[41] However, we are well cautioned "to be wary of assuming that our law of corporate personality has remained constant from the Year Books through Coke to Blackstone to our own day, merely because we find judges repeating the time-honoured phrases."

Holdsworth[42] maintains that the fiction theory of Innocent IV became part of the theoretical basis of English corporate theory during the 13th or 14th century and was first received into the Canon Law. Later the theory was applied to institutions with no religious connections, for example, boroughs, guilds, universities, and colleges. However, the canonist rule that legal personality could only be conferred by the sovereign was not altogether new in England, for from a quite early date it had been the rule that cities and boroughs could not take franchises unless they were already possessed of royal charters. What could be achieved by royal charter could also be achieved by Act of Parliament, and by the reigns of Edward III and Edward IV this was a recognised mode not only of creating corporations but also of correcting royal charters.[43]

There is reason to believe that before the fiction-concession theory became pre-eminent various associations had been admitted to the status of legal persons without so much as a royal charter or Act of Parliament. This was made possible by the principle of corporate capacity by prescription, by the doctrine of implied grant, and by the recognition of quasi-corporations for certain purposes.[44]

Blackstone[45] expressly acknowledges his debt to the canonists but he also states that English law went even further than the civil law. He speaks of corporations as "artificial persons" for whose creation the king's consent was absolutely necessary. This consent could be express or implied; express by royal charter or Act of Parliament, or implied at common law by virtue of the doctrine of presumed loss of royal charter. This latter doctrine contains germs of the realist notions, but nevertheless it required the declaration of a court of law before implied incorporation could be affirmatively established.

41 See HOLDSWORTH, 3 HISTORY OF ENGLISH LAW, 469 et seq., 9 H.E.L. 45 et seq. Maitland (*op. cit.* xiv) thought that England received the Italian theory of corporate personality at the time of the reception on the Continent. Civilian doctrine was explicitly acknowledged by Blackstone (4 ed., I. 467) but English law had progressed even further.

42 3 HISTORY OF ENGLISH LAW 478.

43 *Ibid.*, 476.

44 *Ibid.*, 477.

45 I COMM. 469, 472.

As soon as it became imperative in the interests of the central government to control freedom of association it became necessary to exert some control upon the formation of corporations, and hence we find a marked decline in the significance of the doctrine of incorporation by implication. The tone and lines of general policy were set by the measures taken by the legislature following the South Sea Bubble. Thereafter incorporation was made more difficult to achieve and it would have been a radical judiciary that would have allowed associations to assume the cloak of incorporation simply upon proof of group action similar to that of groups incorporated by charter. The general attitude is exemplified in the words of the Attorney-General, Sir Robert Sawyer, in a 1682 case involving *quo warranto* proceedings against the City of London. If proceedings of this nature could not be taken against corporations, "it were to set up independent commonwealths within the kingdom and (this) . . . would certainly tend to the utter overthrow of the common law, and the crown too, in which all sovereign power to do right both to itself and the subjects, is only lodged by the common law of this realm."[46]

The policy of control of the activity of organised groups in England was helped along by the insistence that the category of juristic persons was closed. Coke for instance speaks of the dichotomy of "persons natural created by God", and "persons incorporate or politique created by the policy of man . . . , either sole, or aggregate of many."[47] The only "artificial persons" which Blackstone includes in his classification are corporations. The necessary flexibility to the system was provided by the extensive use of the trust device, but the advantages of incorporation were consistently restricted to those groups who took the step of obtaining incorporation. The trust device never constituted any great threat to the interests of central government because, as Holdsworth points out,[48] "the capacity for action of a group of men, who depend for their life upon a body of trustees acting under a trust deed which defines and stereotypes their powers, is far more limited, both for good and evil, than the capacity for action of an incorporate person."

With the passing of the Companies Acts during the 19th century incorporation became a formal process. The necessary controls over corporations were effected not only by this general legislation but also by legislation relating to particular activities.

46 9 HISTORY OF ENGLISH LAW 46.

47 CO. LITT. 2a.

48 9 HISTORY OF ENGLISH LAW 48.

The social history of England during the latter part of the 18th century and during the first half of the 19th century reveals that trade unions were an ascendent form of organisation but one whose activities were not freely tolerated by the body politic. Union pressure and a general realisation that unions had become an integral part of the social structure eventually secured legal recognition of these associations, but it was a recognition that was circumscribed by special statutory provisions. The concessions granted were minimal, and the legislature never went to the extent of expressly conferring legal personality of any of the hitherto known descriptions. The *Taff Vale Case*[49] established that unions might be sued in their registered names, and though the practical result was negatived by the Trade Disputes Act 1906, the principle established still stands.

The effect of the Trade Unions Acts has been to give trade unions many of the rights, duties, etc., that are appendant to corporations. The questions those Acts raise are whether as a matter of statutory construction Parliament has implicitly authorised the creation of a new kind of legal personality, or whether, if they have not gone so far as that, they have created a situation in which the recognition of registered trade unions as legal persons has become a social imperative; have they, in other words, created a situation in which the difference between registered trade unions and corporations is only the absence of the corporate label?[50]

It would seem that since at least the 18th century the attribution of legal personality is dependent upon declaration by statute (or by an administrative authority vested with power to declare) that a specific person or body of persons has legal personality. The courts have no such power except insofar as they have power to construe statutes.

VIII.

Having considered the various theories of legal personality and the approach of English jurists to the problem we must now return to the analysis of *Kelly's Case* and *Bonsor's Case.*

The plaintiff, Kelly, had been suspended and later expelled by a branch committee of the National Society of Operative Printers' Assistants. Thereafter he found it difficult to obtain work as most

49 Taff Vale Rly. Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426.

50 Laski (*loc. cit. supra,* n. 30, at 407) advances the opinion that the distinction between corporated and unincorporated bodies is only formal.

printing offices employed only union labour. After about a year, he sought a declaration by the court that the act of expulsion was *ultra vires* and that therefore he was still a member of the society; in addition he claimed an injunction against the union officers and damages for unlawful expulsion.

Relief was granted in all respects but damages. The Court of Appeal, consisting of Swinfen Eady, Phillimore, and Bankes L.JJ., was unanimous in holding that the officers of the society were the agents of all the members, including the plaintiff, and by suing the union the plaintiff was also suing himself. The premise implicit in all the reasons for judgment is that a registered trade union does not have legal personality, for it is only on that assumption that it can be said that the officers of the society were the agents of all the members. No limitation was sought to be placed on the relationship of agency, and in view of the holding that the act of expulsion was *ultra vires,* it would seem that the agency was deemed to extend even to illegal acts.

Bankes L.J. alone referred to the *Taff Vale Case* but only to Lord Macnaghten's statement that the registered name of a trade union is no more than a collective name for all the members, and to the observation of Farwell J. that the issue was not between members of the society but between the members of the society and third persons. Farwell J., however, did not lay great stress upon this feature of the case, and the general tenor of his judgment is that trade unions are legal entities which have been given legal personality by the legislature. This view finds further support in the judgments of the Earl of Halsbury L.C. and Lord Brampton in the House of Lords. Lord Shand, Lord Lindley and Lord Macnaghten, on the other hand, expressly negatived the suggestion that a trade union was a legal entity. Since the *Taff Vale Case* there have been several cases in which the juridical nature of trade unions has been discussed but in none has the issue been of vital importance and in none do we find any unanimity of opinion. In *Amalgamated Society of Railway Servants v. Osborne*[51] the House of Lords did not hesitate to treat the doctrine of *ultra vires* as applicable to trade unions; but that in itself cannot be regarded as a conclusive affirmation that trade unions do have legal personality. The Earl of Halsbury and Lord Atkinson both regarded trade unions as quasi-corporations, but it is not clear whether they meant "quasi-corporation" as a term of art or simply as an expression which referred to the fact that many of the rights and duties of registered trade unions were similar to those of corporations.

51 [1910] A.C. 87.

Superficially the decision of the Court of Appeal in *National Union of General and Municipal Workers v. Gillian*[52] appears to fly in the face of *Kelly's Case*. There the court held that a union might sue for a libel on itself. Affirming the decision of Birkett J. at first instance, Scott L.J. and Uthwatt J. both treated the union as a recognized entity, and neither seems to have suggested that this legal personality existed only for the purpose of action by and against third parties. When this case was considered by the Court of Appeal in *Bonsor's Case* and by Lord MacDermott and Lord Keith in the House of Lords, the reasoning was subject to several criticisms and was explained either as *dicta* or as applicable only where the action concerned third parties.

In view of the fact that none of the cases, with the exception of *Kelly's Case,* directly involved issues as between the union and its members, the opinions that had been expressed since the *Taff Vale Case* could not be regarded as having established beyond all doubt the true juridical status of trade unions. Hence when *Bonsor's Case* came before the House of Lords there was no authority which tied its hands one way or the other.

IX.

The facts of *Bonsor's Case* were, briefly, as follows:—The plaintiff, Bonsor, commenced action against the Musicians' Union in 1952 in respect of what he alleged was wrongful dismissal from membership of the Union. The relief he sought was: (1) a declaration as to his rights, (2) an injunction, (3) damages. As a result of the expulsion, Bonsor had been unable to secure employment as a musician and was forced to work for lower wages in other occupations. Upjohn J.[53] found the act of expulsion by an officer of the union to be wrongful and therefore null and void. On this basis he granted an injunction whereby the plaintiff was to be restored to the register of members but on the authority of *Kelly's Case* he declined to make an order for damages.

On appeal,[54] the decision of Upjohn J. was upheld and affirmed in all respects. The Court of Appeal (Denning L.J. dissenting) maintained that in view of *Kelly's Case* they were bound to hold that since the union was not a body distinct from its individual members, any

[52] [1946] K.B. 81.
[53] See [1954] Ch. 479.
[54] *Ibid.*

action for breach of contract against that union must be treated as an action for breach of contract between members. The union official responsible for the breach was an agent for all the members, including the plaintiff; so, in effect, the plaintiff was suing himself as well as the other members of the union. Apart from the fact that in *Kelly's Case* the expulsion was effected by a committee and not by one official, *Bonsor's Case* was "on all fours" with the circumstances involved in the previous case.

The primary consideration for Denning L.J. seems to have been to give relief according to the dictates of justice.[55] To leave the plaintiff without remedy would be "a grievous thing"; his right to work was just as important, if not more so, as his right of property, and as such deserving of protection. *Kelly's Case* did not stand in the way since it was an erroneous decision founded on false assumptions.[56] These were four in number, namely:

(1) "A trade union is not a legal entity." This statement, according to Denning L.J., was completely false, for both in fact and in law a trade union has personality comparable with that of a corporation. The Trades Unions Act 1871-1940 had conferred upon unions so many rights and duties and such ample powers and capacities as to make them, certainly not corporations, but at least legal entities.

(2) "An action against a trade union is in its nature a representative action." If this was true, then it would follow that every member of the union would be responsible for the wrongs of its officials, which is untrue.

(3) "An action by a member against the union is an action against himself." This was inconsistent with those cases in which declarations and injuctions in favour of expelled unionists have been granted.

(4) "The expelling committee is the agent of the expelled member." Denning L.J. firmly resisted the suggestion that in expelling a member the officer responsible could in any sense be regarded as Bonsor"s agent.

Although the House of Lords overruled the Court of Appeal on the question of damages it did not follow the reasons advanced by Denning L.J. without qualification.

On the issue of whether a trade union could have legal personality Lords MacDermott, Keith, and Somervell agreed that no union

[55] *Ibid.*, at 506-507.

[56] *Ibid.*, at 512-513.

could become a juristic person by the mere act of registration under the Trades Unions Acts, whereas Lords Morton and Porter stated that the effect of those Acts was to confer upon trade unions a legal personality which, though still short of corporate personality, was definitely that of a legal entity. The latter based their characterisation primarily upon the judgment of Farwell J. in the *Taff Vale Case* and rejected the view taken by Lord Macnaghten and Lord Lindley in the House of Lords that an action against a union was an action against all the members. To Lord Morton this latter opinion had "never been more than a minority view, inconsistent with the relevant authorities from the *Taff Vale Case* onwards, with the solitary exception of *Kelly's Case*,"[57] but to Lord Porter it ranked as nothing more than *obiter dictum*.[58] One further ground gave cogency to the attribution of legal personality to trade unions, namely, the practical difficulty that if actions must be brought against the individual members, then they must be brought against those who were members at the time when the writ was issued. Yet some of these persons may not have been members when the wrongful act was committed.[59]

In perhaps what is the most erudite judgment of all, Lord MacDermott treats the question of whether a trade union has legal personality as one of statutory interpretation.[60] He expressly refutes the argument of Denning L.J. that because in the world of fact a trade union may be regarded as an entity the law should follow suit and accord legal personality to it. The provisions of the Trades Unions Acts, most indicative of Parliament's intention not to confer legal personality, were the following:—

(a) Sec. 4 of the Act of 1871, which renders certain types of agreement unenforceable, speaks only of agreements between members of the union and not of agreements between the union and its members.[61]

(b) The sections dealing with the registration of trade unions contain no provision for incorporation; it is significant that sec. 5 of the 1871 Act expressly excludes the operation of the Companies Act.[62] Registration and its consequences are of far less import than might have been expected if it had been intended that upon

57 [1955] 3 All E.R. 518, at 523.
58 *Ibid.*, at 526.
59 *Ibid.*
60 *Ibid.*, at 527 et seq.
61 *Ibid.*, at 530.
62 *Ibid.*, at 530.

registration a new juridical person should be created. Most important is the fact that Parliament has made no effort to incorporate the registered trade union.[63]

(c) Leases to unions must be taken in the name of trustees (sec. 7) and all personal estate is to be vested in trustees (sec. 8).

(d) A trustee or officer of the union may bring or defend an action.

(e) A union may withdraw or cancel its certificate of registration simply upon request (sec. 8 of the 1876 Act)—the comparative ease with which a union may register or de-register makes it difficult to conceive that Parliament intended the legal status to change upon registration.[64]

The overall picture presented upon examination of the Trades Unions Acts was "that the legislature, though minded to bestow on registered unions some of the gifts and attributes of legal personality, had no intention of doing more and was, indeed, averse to the idea of going the whole length and making these unions new creatures, distinct in law from their membership, and fundamentally different from the "combination" of persons which the definition requires all trade unions to be."[65]

Lord MacDermott concedes that some judicial opinion is contrary to the view he takes, but the very conflict of opinion gave the present House of Lords "a clean slate." Unlike Lord Morton and Lord Porter he did not find in the judgment of Farwell J. in the *Taff Vale Case* any unequivocal authority for the proposition that a trade union has legal personality. On the contrary, Farwell J. recognized the absence of legal personality. The practical difficulty which had troubled Lords Morton and Porter[66] was dismissed peremptorily. It had been overcome by the provision whereby the union might be sued in its registered name and judgment enforced against union property. In the result, Lord MacDermott refused to admit the possibility that without Act of Parliament a new kind of legal personality which is neither that of a natural person nor that of a corporation may be recognized. Even without the sanction of Parliament it seems he would go so far as to say that the categories of legal personality are closed. Lords Morton and Porter, on the other hand, did not deny that a registered trade union was not a corporation, but they chose to characterize it as at least "a legal entity." It is interesting to notice that Sir Raymond

63 *Ibid.*, at 535 et seq.
64 *Ibid.*, at 531, 535.
65 *Ibid.*, at 535.
66 *Ibid.*, at 532 et seq.

Evershed M.R., in the Court of Appeal, thought that so far as relations between the union and third parties were concerned, a union might be regarded as having some of the attributes of a true corporation, indeed as being a "near-corporation."[67] It may well be that Parliament did not intend that corporate status should be accorded to a trade union, but in permitting it to act and be acted upon as a right-duty-bearing unit for many purposes it must have intended to accord it some kind of legal personality.

Like Lord MacDermott, Lord Keith seems to have been of the opinion that English law entertains only two kinds of legal personality, that of natural persons and that of corporations. His reasoning, however, reveals a number of inconsistencies, for while he admits that a trade union is a legal entity, he qualifies the statement by saying that it is not a legal entity "distinguishable at any moment from the members of which it is at that time composed."[68] Furthermore, although the membership was constantly changing, a registered trade union "has a permanent identity and represents its members at any moment of time." When he speaks of "a legal entity", Lord Keith is probably not using the term in the same sense as Lords Morton and Porter, i.e., in the sense of "a legal person." Possibly he is only referring to the relation of trade unions to third parties. The idea of a "permanent identity" representative of the members is certainly inconsistent with the notion of a permanent identity distinct from the members, but it nevertheless imports something which cannot be *identified with* the members. But apart from these few questionable points, there is little doubt that Lord Keith sided with Lords MacDermott and Somervell.

X.

In the light of the earlier discussion of the various theories of legal personality it is now possible to re-assess the judgments delivered in the House of Lords in *Bonsor's Case*. None of the law lords can be regarded as having unequivocally subscribed to any of the theories of legal personality mentioned, but each seems, in some measure, to have adopted lines of reasoning that we recognize as the familiar modes of analysis in one or other of the traditional schools. Lords MacDermott, Keith, and Somervell are all pre-eminently concessionists. They implicitly maintain that there is only one type of juristic personality known to English law, i.e., corporate personality. Parliament has not

67 [1954] Ch. 479, at 504-505.
68 [1955] 3 All E.R. at 538.

chosen to give registered unions that status and hence in law a registered union still remains nothing more than an association of individuals bound together by a contractual nexus. Lords Morton and Porter admit that English law is still capable of entertaining new categories of legal personality. Parliament has chosen to create a new kind of legal entity, the trade union. Here too we find the elements of concessionist theory, but at the same time there are germs of a realist bias in both judgments. Both suggest that although Parliament has not explicitly added a new species, the courts are at liberty to afford legal recognition to certain unincorporated groups which manifest the attributes of incorporated groups. It would of course be possible to conceal the true nature of the courts' function by saying that they are only construing a statute, but the myth of Parliament's intention is one that has bemused the legal fraternity for too long.

We may well ask: "Is there much purpose in debating the issue of whether trade unions have legal personality?" The practical result of *Bonsor's Case* was that the plaintiff did receive damages for his unlawful expulsion, and at least three judges based that conclusion upon a ground which was independent of the question of whether the union had a legal personality. But from the point of view of precedent value, the views expressed by Lords Morton and Porter cannot be ignored. They are not, strictly speaking, dissenting views, but only minority opinions and hence they may conceivably be preferred by subsequent tribunals. Their particular value resides in the support they lend to the propositions that (a) the categories of legal personality are not closed, and (b) legal personality may be recognized by courts of law without reference to any clear and unequivocal statutory provision.

A number of objections may be made to this "blank cheque" formula. What qualifications, for instance, must a group have to be accorded legal personality? How are we to know what rules of law apply to new kinds of legal persons? Should the courts revert back to the old common law doctrine of incorporation by implication or should they admit new forms of legal personality only as a matter of statutory interpretation? And finally, what policy considerations should influence the courts in deciding what groups should be accorded legal personality? As to this, Chafee has suggested[69] that the policy considerations upon which the dogma of the concession theory is founded do not apply to non-profit associations. "Their failure to incorporate

[69] Chafee, *The Internal Affairs of Associations Not for Profit,* (1929-30) 43 HARV. L. REV. 993.

involves no serious loss of taxes to the state, since they pay only a nominal incorporation fee, and the voluntary creation of such associations involves none of the dangers to the community which may arise from commercial enterprises conducted by methods which are not authorised by the legislature or surrounded by the safeguards imposed by statute on business corporations."[70] Thus with regard to such associations the absence of a concession from the State should not debar recognition of legal personality.

If the courts have the power to say what groups have legal personality and which have not, not only are they usurping what has hitherto been regarded as the sole province of Parliament, but they are also tending to produce a much greater degree of uncertainty as to the legal status of groups than before.[71] The task of deciding which groups should be accorded legal personality is not really a judicial problem, and it would be impossible to lay down any workable yardstick for decision. Many writers have preferred certain criteria; for example, Geldart[72] would admit all "permanent associations"; Radin,[73] all groups which have come to be known by a group name; Barker,[74] "every organising idea, every common purpose, which permanently unites a number of individuals as the common content of their minds and the common intention of their wills, provided that such idea and purpose are compatible, or to the extent that they are compatible, with the free action and development of all members of the State." In the interests of certainty alone, it would be desirable to ignore the implications of the two "minority" judgments in *Bonsor's Case* or at least read them as applications of the more restricted doctrine of legal personality acquired by implication.

XI.

The law relating to the legal status of trade unions in the United States of America reveals a close similarity to that of England. In *United Mine Workers of America v. Coronado Coal Co.*[75] the United States Supreme Court was urged to accord legal personality to the defendant trade union, but in the result it only decided that as a matter of procedure the unions were suable by their names and that

70 *Ibid.*, at 1009.

71 WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION.

72 *Legal Personality,* (1911) 27 L.Q. REV. 90, at 95.

73 *The Endless Problem of Corporate Personality,* (1932) 32 COL. L. REV. 643.

74 At lxxiii.

75 (1921) 259 U.S. 344, 66 L. ed. 975.

damages were payable out of union funds. But "as a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury (are) liable to suit and recovery . . . "[76]

This conclusion, and more particularly the permitting of unions to be sued by name, was regarded by the court as having been pressed upon them by the nature of modern conditions. "It would be unfortunate," said Taft C.J., "if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund would be to leave them remediless."[77]

The practical effect of allowing a union to be sued by name and damages to be recovered from union funds produces much the same result as does formal incorporation. For quite some time now English law has, as far as actions brought by non-unionists are concerned, allowed action to be brought against the union, and there can be no doubt that actions by members can be brought in the same way. All the law lords in *Bonsor's Case* were unanimous on the point. It was true that there was no express statutory provision providing that execution should be levied against union funds, but neither had it provided machinery for extending "a registered name judgment so as to make it enforceable against members as such." The logical consequence of allowing a union to be sued in its registered name was that execution should be confined to the property of the union. Lord Somervell added a rider that in claims for damages the trustees should be joined with the union as defendants.

XII.

In Australia, trade unions registered under the Conciliation and Arbitration Act 1904-56 have for the purposes of the Act "perpetual succession and a common seal, and may purchase take on lease hold sell lease mortgage exchange and otherwise own possess and deal with any real or personal property."[78] The provision has the effect of permitting unions to achieve corporate status upon compliance with the

[76] Per Taft C.J. at 390.
[77] At 388-389.
[78] Sec. 75.

prescribed conditions as to registration;[79] its validity has been affirmed by the High Court in *Jumbunna Coal Mine (No Liability) v. Victorian Coal Miners' Association.*[80] Union members unlawfully expelled from a trade union can therefore sue the union as a legal entity distinct from its members, without involving the doctrine of agency to secure an order for damages. It is interesting to notice that the Commonwealth Court of Conciliation and Arbitration has power to regulate the rules of registered unions by disallowing rules which, in its opinion, violate any of the standards laid down in sec. 80. Rules vesting in a union executive and regulating the power of expulsion have, however, been held not to offend against the provision relating to tyrannical or oppressive rules.[81]

Isaacs J.[82] has described the incorporation of organisations of employees under the Commonwealth Act as "a matter of policy" designed "to effectuate the object of the Act." Members unlawfully excluded from the union have a *locus standi* to assert in a competent Court their legal rights to remain members of the organisation. This *locus standi* does not depend upon the existence of any proprietary right but rather upon the nature and object of the legislative provisions. Damages were not claimed by the plaintiff in the case in question, but a declaration was made that the resolution purporting to expel him was invalid and that he had not ceased to be a member of the union; an injunction was also granted restraining the defendants (the Union and its executive members) "from enforcing or giving effect to that resolution, or denying to the plaintiff in consequence thereof the right of membership of the organisation."

Trade unions registered under State laws,[83] with the exception of unions registered under the Industrial Arbitration Act of Western Australia, do not enjoy the benefit of corporate personality and for the most part their activities are governed by statutes modelled on the English Trades Unions Acts. In *Egan v. Barrier Branch of the*

79 Sec. 70.

80 (1908) 6 Commonwealth L.R. 309.

81 *O'Sullivan v. Australian Workers' Union,* (1939) 39 Commonwealth Arbitration R. 323; *Hay v. Australian Workers' Union,* (1944) 53 Commonwealth Arbitration R. 674; *Bowden v. Australian Workers' Union,* 10th May, 1946, unreported.

82 Edgar and Walker v. Meade, (1916) 23 Commonwealth L.R. 29, at 44.

83 See the Trade Union Acts of the States which, with the exception of Queensland, are based upon the English Acts of 1871 and 1876. The Queensland Act of 1915, unlike the other State Acts, embodies some provisions of the (English) Trade Disputes Act 1906. For the Western Australian provision see sec. 13 of the Industrial Arbitration Act 1912-1952.

Amalgamated Miners' Association,[84] however, it was affirmatively stated that registered unions did have legal personality and that a conspiracy could exist between such a union and its members. The *Taff Vale Case* had shown "that the effect of the registration of trade unions under the Act is to give them at least a quasi-corporate status, which, distinguishes between the entity known as a trade union and the individuals who may chance to be its members just as completely, for the present purpose, as in the case of the difference between a fully incorporated company under the Companies Act and the individuals who are its members."[85] This same construction of the *Taff Vale Case* seems to have been implicit in the High Court's decision in *Brisbane Shipwrights' Provident Union v. Heggie,*[86] for no doubt was entertained that the Union could be guilty of conspiracy.[87] *Heggie's Case* was regarded by the Full Court of New South Wales as supporting not only the conclusion that a trade union could be liable for conspiracy but also the conclusion that "a trade union has some kind of corporate entity distinct from the members that compose it."[88]

There is no reported instance, however, of damages being awarded against a trade union, registered under State Acts, for unlawful expulsion. In *Higgins v. Australian Government Workers' Association,*[89] the claim for damages was abandoned at the commencement of the trial on the authority of *Kelly's Case,* and the plaintiff contented himself with his claim for a declaration and an injunction.[90] In *O'Malley v. Dawbarn,*[91] *Kelly's Case* was held inapplicable and a horse owner and trainer was awarded damages for wrongful disqualification. The plaintiff was not however suing as a member of the Rockhampton Jockey Club, but was suing in respect of "rights arising out of the contract made when he became, and was accepted

84 (1917) 17 State R. (N.S.W.) 243.

85 *Ibid.,* at 257.

86 (1906) 3 Commonwealth L.R. 686.

87 *Ibid.,* at 703.

88 (1917) 17 State R. (N.S.W.) 243, at 263. It is interesting that no mention was made of the dictum of Isaacs J. in Amalgamated Society of Engineers v. Smith, (1913) 16 Commonwealth L.R. 537, where it was stated (at 560) on the authority of Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87, that a registered trade union is different from the members composing it and has a personality "on almost the same plane with that of an ordinary statutory corporation." Isaacs J. later refers to the registered trade union as a "quasi-corporation" (at 561).

89 [1921] South Australian State R. 378.

90 *Ibid.,* at 391.

91 [1919] Queensland State R. 128.

as, a registered trainer by the Central Queensland Racing Association."[92] The order for damages was not made against the Club but against the stewards who had been responsible for the disqualification. The reason given was that when they committed the wrongful act they could not at the same time be deemed to be the authorised agents of the other members. The limitation of agency to authorised acts is affirmed by Rich, Dixon, Evatt, and McTiernan JJ. in *Cameron v. Hogan:*[93] "If . . . it were determined that the committee or the officers of a voluntary association in attempting to exclude the member complaining, or in some other respect, had committed a breach of contract, the remaining members of the association would not be responsible. The committee or officers may be agents for the members of the association. But if so, they are agents for all the members. If in the case of a member complaining they have violated the rules, they have exceeded their authority. Upon no doctrine of agency can one of the joint principals hold the other responsible. (See *Kelly v. National Society of Operative Printers*)."

One need only press this reasoning one stage further to hold that the expelling committee or officers is not the agent of the expelled members and yet *Kelly's Case* expressly lays down the contrary.

As far as unions registered under the Commonwealth Act are concerned, members who have been unlawfully expelled may bring action in a competent court of law for damages against the union. Such members do not have to show any proprietary interest, and it is probable that they are not even required to show a contractual relationship. It is submitted that the only matters of which it is incumbent upon the plaintiff to give affirmative proof are the formal record of registration as a member and breach of the rules relating to expulsion from membership.

Where a union is registered only under State law, one would think that the position of expelled members would be exactly the same as that in England, but it seems that Australian authority has pursued an independent line of development, and has gone further than the majority in *Bonsor's Case* by conceding legal personality to trade unions. The authority of decisions of the House of Lords is, of course, greater than that of either State courts or the High Court, but it will be interesting to observe whether in the future the pronouncements of the majority in *Bonsor's Case* will be preferred to those of the minority.

92 *Ibid.*, at 144.

93 (1934) 51 Commonwealth L.R. 358, at 373.

XIII.

The question of whether a trade union member unlawfully expelled from his union can obtain damages has now been settled beyond all doubt, but as far as Australian courts are concerned it is still an open question whether the wrong is a tort or a breach of contract. The order for damages in *Bonsor's Case* was based, in the case of the "majority" ruling, on a breach of contract as between the plaintiff and all the other members of the union, and in the case of the "minority" ruling, upon a breach of contract as between the plaintiff and the union. The declaration obtained in the court below was that the act of expulsion was void. If this act was unauthorised by the rules the plaintiff's membership would surely have remained unaffected and the contractual nexus between him and the union would not be destroyed. It could be argued that as between the union (or the rest of the members) and the plaintiff there was no breach of contractual obligation insofar as the unauthorised acts of executive officers did not bind the union. This argument was not considered by the House of Lords but was firmly rejected by Denning L.J. in the Court of Appeal.[94] It is quite plain, however, that the House of Lords took the view that the executive committee was the agent of the union or the rest of the members even with respect to unauthorised acts. On the other hand it could be argued that the contracts between the members contained covenants between the members and the officers that the latter should observe the rules. Infringement of the rules by an unlawful act of expulsion would then constitute a breach of contract as between the member affected and the officers.

There was never any suggestion that the plaintiff's remedy should be based upon tort rather than upon breach of contract, but this is explicable by the fact that the Trade Disputes Act 1906 has expressly provided that actions in tort against unions will not be entertained by courts of law.[95] In *Tunney v. Orchard*[96] the Manitoba Court of Appeal achieved a result similar to that achieved in *Bonsor's Case* but upon the basis that a tort had been committed. The relief claimed

94 See [1954] Ch. at 513: "The exclusion may have been a nullity in law, but it was far from being a nullity in fact. The plaintiff could not ignore it; nor could anyone else in the musical profession ignore it, neither employers nor workmen. It deprived him of his livelihood and caused him great damage. The trade union is liable for this damage done by the secretary, just as any corporation is liable for the breaches of its servants. It is no answer for them to say that the secretary was not authorised to commit the breach. They have put him in his place to do acts of this class, and they must be answerable for the way he conducts himself therein."

95 Sec. 4 (2).

96 [1955] 3 Dominion L.R. 15.

was exactly the same as that in *Bonsor's Case*—indeed, the only material difference was that the action had been brought against the expelling committee rather than against the union. The tort committed was that of the destruction or impairment of the plaintiff's status as a member of the union.

Tritschler J. was the only judge who delivered a closely reasoned judgment but the arguments and conclusion he advanced had the implicit approval of the four other members of the appellate Court. *Kelly's Case* was firmly rejected; it was "not authority for the proposition that members of an expelling committee cannot be sued for damages."[97] In basing liability on tortious interference with status, Tritschler J. rejected the premise explicit in *Kelly's Case* that unlawful expulsion or suspension was a breach of contract. The relationship between the member and the union started in contract but it resulted in status.[98] It seems fairly clear that the notion that the contract category was inadequate or inappropriate had its roots in comments made by Denis Lloyd and Trevor C. Thomas.[99] The step of introducing the category of tort, moreover, was taken with a clear realisation that it was a marked departure from previous authority.

To those accustomed to the stereotyped and "traditioned" manner of judicial reasoning in English and Australian jurisdictions, the manifesto of Tritschler J. on the nature of the judicial function borders on heresy. "If the law," he says,[100] "is too rigid who makes it so? Who can keep it flexible? The judges found it possible to move from property to contract to meet the exigencies of the time. The step from contract to *status* is not more revolutionary." Quoting from Professor Lon. L. Fuller, he continues, "The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad men in check, but is in fact helping to create a body of common morality which will define the good man. When he sees his office in this light, the judge will realize, I think, how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude towards the 'existing law'."[101]

97 *Ibid.*, at 39.

98 *Ibid.*

99 Lloyd, *Judicial Review of Expulsion by a Domestic Tribunal,* (1952) 15 MOD. L. REV. 413, at 424; Thomas, *Expulsion from Trade Unions,* in LAW IN ACTION, (1954) 43.

100 [1955] 3 Dominion L.R., at 41.

101 FULLER, THE LAW IN QUEST OF ITSELF (1940), 137-8.

Since with the exception of Queensland there is no provision in State legislation relating to trade unions corresponding to the Trade Disputes Act 1906 it is necessary to consider whether the remedy of damages for unlawful expulsion is better treated as a tort or as a breach of contract. In some cases the measure of damages for tort might be greater than that obtainable for breach of contract, but if the claim can be stated in the alternative, then according to the authorities the contract measure must apply. Admittedly the notion of a contractual relationship between a member and the union or between all the members of the union offends against some philosophical notions of contract, which regard contract as the meeting of minds of free-willing individuals. The terms of the union contract are standardized and adhesive and in many instances membership is imperative for an employee if he wishes to obtain employment and enjoy the benefits accorded to other unionists.

The suggestion that a member's remedy for unlawful expulsion is tortious interference with status is indeed a novel one to English lawyers, although it is apparently not so new to their American brethren.[102] Whether the characterization of the relationship between a trade union and members of the union may properly be described as status takes us beyond the scope of this paper, but it is a problem which is well worthy of closer study.

XIV.

Finally, we may ask: "Is the order of damages against a trade union or its individual members justifiable as a matter of social policy?" The interests involved are those of the expelled member who, in the case of "closed-shop" unions, is deprived of his right to work in his customary mode of employment and as a result loses possible wage returns, and those of the body of union members who may suffer from the diminution of union funds consequent upon the misconduct of the executive members.

Both in *Bonsor's Case* and *Tunney's Case* the evidence showed that the harm sustained by the expelled member was extensive. The plaintiff, Bonsor, for instance, "was reduced at one time to accepting employment to remove rust from a Brighton pier. At the time of the trial he was getting £6 a week in an engineering works, whereas, previously earning his livelihood as a musician, he was earning well

102 Whitmore, *Judicial Control of Union Discipline,* (1952) 30 CAN. BAR REV. 1; see also Chafee, *The Internal Affairs of Associations Not for Profit,* (1929-30) 43 HARV. L. REV. 993, at 1010.

over £10 a week." The exclusion had lasted over four years and undoubtedly occasioned no small measure of distress and worry.

H. A. J. Ford[103] seems to have been content with the practical result of *Kelly's Case* for he regards the remedy of injunction as sufficient remedy for unlawful expulsion. His view is that: "The imposition on individual members of the association or of its committee of the threat of liability to pay damages if they do not act up to the required standard in purporting to expel a member would constitute a severe deterrent upon persons contemplating membership of associations and would thus be contrary to the apparent policy favouring the right of the individual to associate freely with others for lawful ends." As a casual observation it appears to the writer that this assumption would not be borne out by the facts. In so many cases, union membership is hardly optional and hence the threat of diminution of union funds is not likely to act as a strong deterrent. In any event, few potential members would, when contemplating joining a union, consider the possibility of litigation against the union, or if they did consider it would regard it as a vital factor in their decision to enlist in the union. As union members they have the privilege of electing their own officers and the threat of potential litigation can only operate as an inducement to nominate and elect for executive office the most trustworthy and scrupulous of their number.

Penalisation of executive officers guilty of malicious as distinct from ill-considered expulsion at the expense of union funds is overcome, in Tasmania at least, by the provision that officers of the union must be joined with the union and may be ordered to pay damages from their private funds if found liable in any individual capacity.[104] It would seem therefore that the interests of individual members in union funds are adequately safeguarded. The risk that union funds may be applied in payment of damages in respect of the unlawful but bona fide actions of executive officers is only a small burden in comparison with the benefits which union membership confers, and in any event, is it not better that the individual member wronged should be accorded a remedy in damages, than that the body of members should be preserved against a relatively small diminution in the value of general union funds?

103 Ford, *The Use of the Injunction to Restrain Wrongful Expulsion from Voluntary Associations,* (1954-55) 1 Syd. L. Rev. 186.

104 R.S.C. O.53, rr. 17, 29, 30, 31.

Framed in terms of the conflict of individual interests the issue becomes one of determining which interests are to be accorded pre-eminence by the law. If we adopted Pound's mode of analysis the question would be answered by reference to several jural postulates representing the preponderance of claims pressing for recognition. It is not proposed here that a detailed examination should be made of the types of individual interests involved in such an issue as that in *Bonsor's Case*. Several of these interests have been mentioned already, namely that of a trade union member in being able to work in the occupation of his choice, and that of a trade union member in general union funds. In addition we should note the member's interest in being able to associate freely with other people in the industry or profession, his interest in the performance of contractual obligations, and the securing of advantages by virtue of those contractual obligations.

Even without reference to the jural postulates which are applicable to the present time it is submitted that the resolution of the conflict of interests in these circumstances in favour of the expelled member is in accord not only with the basic values implicit in the British legal system but also in accord with the standards of justice and fair dealing held by the mass of men in the kind of society with which we are familiar.

ENID CAMPBELL.*

*LL.B., B.Ec., (Tas.); Lecturer in Law, University of Tasmania, 1956—.