THE LEGAL STATUS OF TRADE UNIONS*

E. I. SYKES†

By some the decision of the House of Lords in *Bonsor* v. *Musicians Union*[1] will be regarded merely as supplying a clear practical rule that a member of a registered trade union, expelled in defiance of the rules, may maintain an action for damages against the union, no matter on what theory of the nature of a trade union such rule may be based. Others will no doubt regard it as an instance of the difficulty of applying traditional legal concepts to something which has an undoubted real existence but lacks the artificial criteria through which those concepts operate. When one considers that two law lords (Lords Morton and Porter) thought that a registered trade union, though not a corporation, was a juristic entity distinct from its members, that two law lords (Lords MacDermott and Somervell) considered it a mere aggregation of individuals and that one (Lord Keith) was able to regard it as being an association of individuals and a legal entity at one and the same time and in respect of the one transaction, it would appear that some fundamental obscurity lies at the heart of the English theory of corporate legal existence.

It is proposed in this paper to accept (what is indeed obvious) that the trade union as an association has a real existence, to discuss the actual rules which the law has evolved to deal with it and govern its relations with its own members and with the outside world and then in the light of those rules to endeavour to answer the question of separate legal existence. The first purpose will include a statement of the actual results of certain decided cases, including the *Bonsor* decision; the second will involve an evaluation of the notions of juristic personality or lack of it which pervade the reasoning and results of the decisions.

I

The Unregistered Trade Union

Even in an unregistered condition the trade union possesses some distinctive juridical characteristics which mark it off from other voluntary associations. These however stem partly from the peculiar doctrines of the common law relating to trade unions, partly from the intervention of statute law.

In England the Combination Laws had made any combination of workmen for any purpose relating to their employment a criminal offence. The repeal

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* A paper prepared for the Eleventh Annual Conference of the Australian Universities Law Schools Association in August, 1956.

† B.A., LL.D. (Melbourne), Senior Lecturer in Law, University of Queensland.

[1] (1956) A.C. 104, noted (1956) 2 *Sydney L.R.* 185.

of those laws in 1824 left a situation which can be fairly described as murky. The Act of 1825 (6 Geo. IV c. 129), which is usually taken as ushering in the new era, certainly reveals an assumption on the part of the legislature that, apart from the forms of combination which were expressly thereby legalised, all associations of workmen for purposes connected with their trade, remained criminal associations *by the rules of common law*. Certain judicial decisions later rendered this point of view untenable,[2] but when the clouds cleared somewhat they revealed a position where the objects of a trade union were usually, though not invariably, regarded legally as being in restraint of trade.[3] It followed that, although the act of association was not criminal in itself, yet the rules of the trade union and any trusts set up thereby for the holding of property were void (subject to the special rules applicable to "illegal trusts"). A further consequence was that the whole security of trade union funds was endangered by reason of the fact that it was practically, though not perhaps theoretically, impossible for a prosecution to be maintained for the embezzlement or larceny of such funds by the officials or servants of the union.[4]

It was mainly this latter difficulty that appears to have led to the enactment of the Trade Union Act of 1871. This statute provided, probably unnecessarily, that the purposes of a trade union should not by reason merely of being in restraint of trade be deemed unlawful so as to render a member liable to criminal prosecution. The more important provision however is that which declares that the purposes of a trade union should not by reason merely that they are in restraint of trade, be deemed unlawful so as to render void or voidable any agreement or trust.[5] It is to be noted that these provisions apply independently of any registration requirement. All the Australian States have enacted statutes on this model,[6] but the Western Australian enactment makes the emancipation from the doctrine of restraint of trade apply only to a registered trade union, that is registered under the Trade Union Act of that State.

On the face of it, this statutory provision of the 1871 Act would render the rules of the association enforceable amongst the members thereof on the basis that such rules constituted the contract by which the association was constituted. It was obviously feared however that the relaxation of the old doctrines might have the result of forcing the courts to entertain litigation to enforce agreements for the putting into force of group pressure tactics, for instance agreements to effectuate strike or boycott action. Hence the provisions of s.4 which stated that "nothing in this Act" should enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement between members of a trade union as such concerning the conditions on which any members should or should not (inter alia) transact business, employ or be employed, any agreement for the payment of a penalty or subscription to a trade union, any agreement between one trade union and another and any agreement for the application of the funds of a trade union to certain purposes the most material of which is the provision of "benefits to members". Nothing in the Act however

[2] E.g. *Hornby* v. *Close* (1867) L.R. 2 Q.B. 153, see esp. at 159; *R.* v. *Stainer* (1870) 11 Cox 483.

[3] *Ibid.*; *Hilton* v. *Eckersley* 6 El. & Bl. 47.

[4] See *R.* v. *Dodd* (1868) 18 L.T. 89. It was also held that protection could not be secured by registering under the Friendly Societies Act—*Hornby* v. *Close* (1867) L.R. 2 Q.B. 153, 159.

[5] Trade Union Act, 1871, s.3.

[6] Trade Union Act, 1881-1936 (N.S.W.); Trade Union Act, 1928 (Vic.); Trade Union Act, 1915 (Q'land); Trade Union Act, 1876-1935 (S.A.); Trade Unions Act, 1902 (W.A.) and Trades Unions Act, 1889 (Tas.).

was to render any of the specified agreements unlawful. These provisions are again duplicated in the Trade Union Acts of the Australian States.

Under such provisions, agreements to provide benefits whether by way of sick pay, superannuation benefit or strike pay were held unenforceable.[7] And as an association of employers was also technically a trade union, collective bargaining agreements unless the employer contracting was an individual were rendered unenforceable.[8]

The restrictive provisions of s.4 applied only to trade union rules which derived their legal status from the provisions of s.3 of the Act removing the taint of restraint of trade. Accordingly, in cases where the rules of a trade union would not, even apart from the Act, be in common law restraint of trade, there was no bar to the enforceability of such agreements. Such cases were however rare.[9]

The original attitude of the courts was to refuse to adjudicate in the case of an invalid expulsion as to grant an injunction in such cases was regarded as directly enforcing an agreement to provide benefits.[10] As however trade unions became more powerful and came to be more and more invested with the aura of respectability, there became noticeable a tendency on the part of the courts to narrow considerably the interpretation of s.4. In *Yorkshire Miners Association* v. *Howden*[11] and *Cope* v. *Crossingham*[12] injunctions were granted to restrain applications of trade union funds in breach of the rules. In a line of decisions culminating in *Amalgamated Society of Carpenters* v. *Braithwaite*,[13] the courts held that an expulsion of a member in breach of the rules was enjoinable. This was held not to amount to enforcing an agreement for union benefits, it merely amounting to putting back an expelled member in the position he previously occupied, viz. that of a person with an unenforceable claim to benefits.[14]

Subject then to the somewhat attenuated inhibitions of s.4 of the Act of 1871, the position as to the internal relations of the trade union comes to look very like that applying to the ordinary voluntary association. As regards the matter of expulsion, it is clear that the courts would remedy by injunction not only an expulsion carried out in breach of the express provisions of the rules but also one effected in violation of the principles of natural justice. Whether court intervention in the latter case is based on the theory of contract or that of protection of a property interest does not fall to be considered here;[15] the point is that there is nothing here which is peculiar to the position of the trade union as such.[16]

The position as to liability for damages in contract or in tort shares the obscurity which surrounds the general topic of the applicability of this remedy to voluntary associations, whether the plaintiff is a member or an outsider.

If the action is by a non-member purporting to be against an unregistered

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[7] E.g. *Burke* v. *Amalgamated Society of Dyers* (1906) 2 K.B. 583. Apart from special statute, this is still the rule.

[8] It is not certain that they are enforceable even when made between the union and an individual employer but this has nothing to do with the Trade Union Act.

[9] An instance is *Osborne* v. *Amalgamated Society of Railway Servants* (1911) 1 Ch. 540, but the common law status of the Union was only one of the grounds of decision.

[10] See *Rigby* v. *Connol* (1880) 14 Ch. D. 482.

[11] (1905) A.C. 256.

[12] (1909) 2 Ch. 148.

[13] (1922) 2 A.C. 440.

[14] *Id.* at 465 (*per* Lord Atkinson).

[15] See on the general position *Lee* v. *Showmen's Guild* (1952) 2 Q.B. 329, esp. at 342; *Abbott* v. *Sullivan* (1952) 1 K.B. 189.

[16] This statement is made of course without regard to the special provisions of some of the industrial arbitration statutes in Australia.

union for breach of contract, then it has to be borne in mind that only those who enter into the contract are liable thereunder. Usually however the contract is not made with the members; it is usually made with some official or committee to whom certain powers have been entrusted under the trade union rules. If the contract is entered into by some such official, then in order to render the common fund available his authority to bind the whole of the members must appear, either expressly or from the union rules. Unless the representative procedure under Rules of Court is available, all the members must be sued and great obscurity exists as to the position where there are changes of membership between the date of the contract and the date of action. Assuming that liability is successfully established, it will sometimes be limited to the common fund but it may be that in other cases it will extend to the personal assets of the members. This question will simply depend on the extent of the authority reposed by the members in the agent who enters into the contract, whether such authority is to be deduced from the rules or otherwise.[17] In this aspect of members' liability the position seems to be different from that of a club where personal liability is somewhat exceptional.

In the case of tort, difficulties are multiplied. Those persons actually committing or authorising the tort alone of course can be sued and unless some authority can be supplied from a vote at a meeting or from the rules themselves the difficulties of making the common fund available would be very great. If the tortious act is resolved upon at a meeting of the members the effect of the existence of a dissentient minority is very obscure.

The representative procedure provided for by Rules of Court whereby several of numerous defendants can be appointed to represent themselves and all others having the same interest is not well adapted to claims for damages by reason of the requirement of an identical or at least a common interest. This is especially so in the case of tort. Lord Macnaghten in the *Taff Vale* case[18] was confident that the representative procedure would be available in the case of a tort committed by the authority of an unregistered trade union but these remarks are purely *obiter* and their force is considerably diminished by decisions which have been given since the *Taff Vale* case. The view taken in *Temperton* v. *Russell*[19] that there must be an identical proprietary interest was indeed held to be too narrow in *Duke of Bedford* v. *Ellis*[20] where a "common interest" was held to be enough but later cases have demonstrated just how difficult it is to establish such common interest in a tort case.[21] Not only moreover, is the requirement of a common interest difficult to satisfy in a tort case in view of the possibility of differing defences available to different members, but the overall complexities arising from changes in membership since the date of commission of the alleged tort, the position of dissentients at a meeting where a vote is taken authorising the tortious act and so on have to be faced. Some of these difficulties also apply to the case of contract.[22] Where the representative procedure is used, it seems clear, though it has never been decided in a British or Australian court, that any judgment for debt or damages on the representative basis can be enforced only against the collective

[17] See Lloyd, *Law of Unincorporated Associations* 135.
[18] *Taff Vale Railway Co.* v. *Amalgamated Soc. of Railway Servants* (1901) A.C. 426, 438-39.
[19] (1893) 1 Q.B. 435.
[20] (1901) A.C. 1, 8.
[21] See e.g. *Hardie & Lane Ltd.* v. *Chiltern* (1928) 1 K.B. 663; *Mercantile Marine Service Assn.* v. *Toms* (1916) 2 K.B. 243; *London Assn.* v. *Greenlands* (1916) 2 A.C. 1; *Fearnley* v. *Berry* (1924) Q.S.R. 280.
[22] *Barker* v. *Allanson* (1937) 1 K.B. 463.

fund.[23] It could not very well be otherwise as the individuals represented are not parties and have no right to intervene in the proceedings.[24] It may be mentioned here that certain Canadian decisions[25] have applied the remarks in the *Taff Vale* case to make unregistered trade unions liable in tort through the representative procedure and no particular difficulty seems to have been felt. These decisions also reveal a belief that under such procedure the ordinary member is under no liability.

In the case where proceedings are brought by a member for a breach of the rules, there is the apparent difficulty that where the breach is by an official or committee such official or committee can be regarded as acting for the whole body of the members only on the basis that the whole body also includes the plaintiff. Such difficulty was considered in the case of *Kelly* v. *National Society of Operative Printers*[26] and again in the *Bonsor* decision and will be briefly considered in connection with the discussion of those cases.

The provision of the Trades Disputes Act 1906 in England rendering incompetent an action against a trade union in tort has not been adopted in Australia save in Queensland.

A last consideration is that the Trade Union Act of 1871, as amended by a later Act of 1876, contained a definition of "trade union" which was also adopted in the various Australian statutes. As will be seen, this definition was used by the courts to restrict the activities of registered trade unions and it will be submitted that this doctrine is also applicable to the unregistered trade union—another instance of a special fetter applicable to all bodies which answer the description of trade union.

II

The Registered Trade Union

The Act of 1871 in England, in addition to the provisions just mentioned, introduced a system of registration. This was not made compulsory nor was the freeing of trade unions from the restraint against trade doctrine made contingent on registration. If the trade union is registered the property is vested in trustees and the Act makes the trustees (and any other officer authorised by the rules) capable of bringing and defending any action "touching the property right or claim to property of the trade union".[27] The rules of the trade union must be registered and the Act specifies certain matters which must be included in the rules.

The Trade Union statutes in all the Australian States follow this pattern. However the legislation dealing with compulsory arbitration both in the Commonwealth sphere and in all the States save Victoria and Tasmania, provides for another system of registration with the Registrars of the arbitration tribunals. This registration however is not of trade unions as such but of "industrial unions" or industrial organizations. Save in New South Wales, there is an express provision for incorporation of such bodies (when registered) "for the purposes of this Act". Consideration of the extent of this type of provision is deferred for the moment.

In some of the cases previously noticed wherein injunctions were granted

[23] Lloyd, (1956) 19 *Mod. L. Rev.* 121.

[24] *Ibid.* This does not mean that the court could not or would not on application give leave to one or more of such individuals to intervene in the proceedings. All that is meant is that it could not be claimed that one of such individuals (not being one of the representative defendants) was a party merely because the representative defendants represented the whole class.

[25] *Tunney* v. *Orchard* (1955) 3 D.L.R. 15 (Manitoba); *Metallic Roofing Co.* v. *Local Union No. 30* (1905) 9 O.L.R. 171 (Ontario).

[26] (1915) 84 L.J.K.B. 2236.

[27] S. 9.

against expulsion or against mis-application of funds, the injunction was granted against the union in its registered name as well as against certain officials.[28] However the question of use of the registered name in an action against a trade union was not discussed in any detail until the famous *Taff Vale* case.[29] This was not initially a specific claim for damages though damages were later awarded and the reasoning was wide enough to cover such a claim. It was held that a claim in tort by a stranger would lie against a trade union in its registered name. The *ratio* is extremely difficult to discover. Lord Brampton was the only member of the House of Lords, and indeed the only judge in the three tribunals involved, to hold expressly that the registered trade union was a legal entity apart from its members. Lord Macnaghten expressly said that the registered name was only a convenient symbol for the aggregation of individuals composing the trade union. He at least, it seems clear, regarded the action against even a registered trade union as one against a number of individuals but akin to a representative action in that the common fund could be successfully reached.[30] Lord Lindley, though less clearly, seems to espouse the same view. In the light of the fact that the majority of the law lords accepted the reasoning of Farwell, J. in the court below it seems that the *ratio* of the decision can fairly be expressed in his words "it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents".[31]

In *Kelly* v. *N.S.O.P.A.*,[32] previously mentioned, the Court of Appeal came to grips with a claim for damages for wrongful expulsion brought by a trade union member against the union in its registered name. The court, allowing the claim for an injunction, nevertheless rejected the claim for damages. It first rejected the view that the union was in some sort a legal entity and distinguished the *Taff Vale* case as being limited to a claim by a third person. Passing then to the notion of the action being merely a claim for breach of contract made with a number of individuals, it held that damages could not be recovered since the committee who actually broke the contract were acting as agents for the plaintiff equally with his fellow members.

In 1946 the case of *National Union of General and Municipal Workers* v. *Gillian*[33] decided that a registered trade union could possess a character capable of being defamed and could maintain an action for damages in its registered name. This case is the high-water mark of judicial approval of the concept of juristic entity. Birkett, J. expressed the view that the Act of 1871 had designedly created a new entity in law, a new *persona*.[34] Scott, L. J. in the Court of Appeal referred to a "co-operative personality" being given the status of a "*persona juridica*" and said forthrightly that "In my view, the true interpretation of the Acts is that a trade union is given all powers of a *persona juridica* except (a) those solely characteristic of a natural person and (b) those which are expressly excepted by the creating statute".[35] Uthwatt, J. said that the *Taff Vale* decision "involves, to my mind, that a registered trade

[28] E.g. *Yorkshire Miners Assn.* v. *Howden* (1905) A.C. 256.
[29] (1901) A.C. 426.
[30] *Id.* at 440.
[31] *Id.* at 429.
[32] (1915) 84 L.J.K.B. 2236.
[33] (1946) K.B. 81.
[34] See (1945) 2 All E.R. 593, 594.
[35] (1946) K.B. 81, 86.

union is recognised by the law as a body distinct from the individuals who from time to time compose it."[36] He said it was not a corporation but the presence of the corporate fiction was not necessary to secure its individuality. It might be called a "near-corporation".

Before briefly discussing the *Bonsor* case, it is desirable to mention the House of Lords decision in *Amalgamated Society of Railway Servants* v. *Osborne*[37] which is suggestive of many things. There it was held that a rule of a trade union permitting the levying of contributions for the purpose of securing Parliamentary representation and paying the expenses of members pledged to support the Labour party was "illegal". With the exception of two law lords who proceeded on the ground that such a rule was against public policy on the score that it would fetter the free exercise of Parliamentary functions, the principle adopted was that the enumeration of objects mentioned in the definition of "trade union" was exhaustive and that the exercise of such powers for other purposes, such as political ones, was void. This looks like an application of the doctrine of *ultra vires* to the registered trade union, a view which seems to derive support from the reference made to the position of trading companies. However it is at least arguable from a perusal of the judgments of those that rely on this ground that all they were saying was that trade unions were proscribed combinations at common law, at least civilly, and that the legislature in legalising them, was not to be taken as extending such legalisation beyond the purposes and objects set out in the definitions in the Acts.[38] The reasoning in fact seems to extend to the unregistered as much as to the registered union.[39]

The *Osborne* decision led to the passage of the Trade Union Act of 1913 which rendered it enough that the principal objects of a trade union were "statutory objects" as therein defined. It provided that the fact that the combination had objects other than the statutory objects did not prevent it from being a trade union within the meaning of the Trade Union Acts and further provided that a trade union should have power to apply its funds for any lawful object for the time being authorised under its constitution. At the same time the Act provided safeguards in respect of the application of funds for political purposes. The rules had to provide for such application to be made out of a separate fund, for the giving of notice by any member that he objects to so contribute and had to provide that any person so objecting should not be excluded from union benefits or otherwise discriminated against. So far as the Australian States are concerned, New South Wales has substantially adopted the provisions of the English Act of 1913[40] whilst Queensland has legislated to give unrestricted freedom to raise and apply trade union funds for political purposes. In the absence of legislation in the other States, the *Osborne* principle seems to apply.[41]

We now come to the *Bonsor* case. This was a case of a claim for damages

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[36] *Id.* at 87-88.
[37] (1910) A.C. 87.
[38] *Id.* at 93.
[39] The view of Lloyd, *Law of Unincorporated Associations* 148 is in favour of the application of the *Osborne* decision to unregistered trade unions. This view, it is suggested is correct. The contrary view is asserted by Halsbury, *Laws of England* (2 ed.) vol. 32, 467, Note (d).
[40] Industrial Arbitration Act, 1940, s.107. The exact point was in fact decided in Western Australia in *True* v. *Australian Coal and Shale Employees Federation* (1949) 51 W.A.L.R. 73. The attitude of the Commonwealth Court of Conciliation and Arbitration to the inclusion in trade union rules of provisions authorising payments for political objects (see Foenander, 10 *Uni. of Toronto L.J.* 73) cannot be regarded as in any way conclusive of this matter.
[41] See *Allen* v. *Gorton* (1918) 18 S.R. (N.S.W.) 202.

for an expulsion in breach of the rules. The only difference from the facts in *Kelly's* case lay in the fact, quite immaterial, that the expulsion was the work of the union secretary instead of a committee. The trial judge granted a declaration and injunction in respect of the expulsion but decided that he could not grant the damages which were claimed by reason of the long period during which Bonsor had been obliged to take less remunerative employment. In this he was upheld by the Court of Appeal over the vigorous dissent of Denning, L. J. The majority considered themselves bound by *Kelly's* case but it cannot be said that they in any way disapproved of its reasoning. In fact it is obvious that they would have been prepared to discard the theory of juristic personality even without the buttress of *Kelly's* case. They put on one side not only the *Taff Vale* case but also the case of *Gillian* v. *National Union* on the score that different considerations apply when the action brought is by or against a stranger. On the footing that the union is merely an agglomeration of individuals, they approved of *Kelly's* case, elaborating its reasoning in some respects and distinguishing the case where an injunction is claimed from that of a claim for damages.

In the House of Lords this decision was reversed. As in the instance of the *Taff Vale* decision, it is somewhat difficult to state the ratio. Lords Morton and Porter held the union was liable for damages on the basis that by virtue of the registration it was a legal entity capable of entering into contractual relations and that the contract of membership was between Bonsor on the one hand and the trade union on the other. Both agreed that the union was not a corporation but both said that nevertheless it had legal existence. Lord Porter referred to it as "a thing . . . an entity, a body, a near-corporation".[42] Lords MacDermott and Somervell represent the opposite school of thought on this question. Lord MacDermott made a careful analysis of the Act of 1871 from which, in reliance on such facts, for instance, as that the legislature had deliberately refrained from incorporating trade unions when it could easily have done so, that it had instead of giving a trade union power directly to hold property provided for the vesting of such property in trustees, and that the trade union might have its registration cancelled upon its own request, he deduced that it was not a corporation and not a juristic person.[43] He pointed out that in the *Taff Vale* case Lord Brampton was the only one to pronounce clearly in favour of juristic personality, that the remarks of the other law lords could not at the most be taken further than that the legislature had conferred upon registered trade unions some of the characteristics of a juridical person, had endowed it with powers in such a way as to show that it was also intended to saddle it with certain responsibilities. In his view what was decided in the *Taff Vale* case was only procedural in character. The action against the union in its registered name is still an action only against a number of persons bound together in an association but the plaintiff "does not need to marshal the membership on any basis of individual liability as, for example by excluding those who are infants or who have joined since his cause of action arose or who, as a minority, have voted in his favour; nor (if a member) has he, in my opinion, even to make it clear on the face of the record that he excludes himself".[44] He also expressed the opinion that if the union was sued to judgment in its registered name, execution must be confined

[42] (1956) A. C. 104, 131.
[43] He appeared to conclude that it could not be a juristic person or entity if it was not a body corporate.
[44] (1956) A.C. 104, 145.

to the property of the union and could not be levied on the private assets of members. With these views Lord Somervell was in substantial concurrence.

Lord Keith performed the extraordinarily dexterous feat of being able to adopt something of both views. He was of the view that "in a sense" a registered trade union is a legal entity, but it was not a legal entity distinguishable at any moment of time from the members of which it is composed. It remained a voluntary association of individuals but it had important attributes which distinguished it from other voluntary associations. "It would not, I think, be wrong to call it a legal entity".[45] It is somewhat difficult to know what Lord Keith means. Apparently the entity to which he refers is not something which stands apart from the entities which are the individual members; it is merely the representative of all these entities. Such a view apparently permits him to regard Bonsor's contract of membership as a contract between himself and the other members of the union and at the same time a contract with the trade union as representative of all its members.[46]

The views expressed by Lords MacDermott, Keith and Somervell on this question did not alter their agreement with the other two law lords that the trade union was liable. They disagreed with the view taken in *Kelly's* case that, purely on the atomistic view of the trade union, the plaintiff must fail in an expulsion case on the score that the expelling agents were as much his agents as those of the general body of members so that in suing the trade union he was suing himself. This view is dealt with in the clearest way by Lord Keith. Obviously the union officials could not be regarded as the plaintiff's agents in the matter. The trade union here had adopted the act of the union and the position was no different in substance from what it would have been had he been expelled by a majority at a meeting. The same consideration met another point which had been made by Bankes, L.J.[47] that the claim for an injunction was essentially different from that for damages. In the case of the former you succeeded because you proved the officials had acted in defiance of the rules; you could not contend that they were at the same time the authorised agents of all the members to do the acts complained of as being breaches. The answer to this was that the union had adopted the act of expulsion. The members of the House of Lords in general did not think that there was any essential difference between the granting of an injunction against the union and the awarding of damages. However there is no need to pursue this aspect of the case any further. It is nevertheless interesting to note that Tritschler, J. in the Canadian case of *Tunney* v. *Orchard*[48] regarded the case of wrongful expulsion in breach of the rules as a case not of breach of contract at all but one of tort, the tort consisting of interference with the status of the member. There is a great body of support for this view in the United States.

Whilst there had been all this activity in Britain, there were but few cases of interest in Australia. The general tendency was to follow the decision in the *Taff Vale* case without much searching inquiry into the implications of that decision. In one respect the decision was relied upon for more than it actually established. Thus in *Egan* v. *Barrier Branch of Amalgamated Miners Association*[49] a trade union was held capable of conspiring with one of its members and a similar result was arrived at in *Brisbane Shipwrights Union* v. *Heggie*.[50] In the latter case the attention of the High Court was mainly directed to the

[45] *Id.* at 150.
[46] *Id.* at 152.
[47] (1915) 84 L.J.K.B. 2236, 2239.
[48] (1955) 3 D.L.R. 15.
[49] (1917) 17 S.R. (N.S.W.) 243.
[50] (1906) 3 C.L.R. 686.

essentials of the tort of conspiracy but at the end of the judgment of Griffith, C. J., who delivered the judgment of the court, he briefly refers to the objection that the defendant trade union could not lawfully be deemed guilty of a conspiracy and counters it shortly by stating that the court was bound to follow the decision of the House of Lords in *Taff Vale*.[51] A decision that a trade union could be guilty of the tort of conspiracy where the allegation is that it conspired with some outside person is not in any way worthy of comment as it merely falls under a general principle of suability in tort which is equally consistent with juristic personality or the lack of it. However the promulgation of a general principle that a conspiracy can take place between one member and the trade union and not merely between the one member and *the other members* seems to involve acceptance of a more decided theory of juristic personality than can be extracted from *Taff Vale*.[52] The nearest English case on this point appears to be *Giblan* v. *National Amalgamated Labourers Union*,[53] but this seems to be merely a case where A and B, members of a union, conspire together and the tort committed by them is imputed by the law to the union for which they act on the normal principles of vicarious liability.

One aspect which may not be entirely irrelevant to the question of legal personality and which, as we are investigating not merely the question of personality but also the general place of the trade union under the law, should here be mentioned in any event, is the question of actions against the trustees. The real and personal property of the registered trade union is vested in the trustees and the Act provides that they can sue and are suable in all actions touching and concerning the union property or the right or claim to trade union property. It was at one time supposed that it was enough that the action touched and concerned the union property in the sense that the outcome thereof would either add to or diminish the union's general assets so that in a case of tort, where it was sought to fasten liability on the trade union as such, it was competent to sue the trustees though personally they had nothing to do with the commission of the tort and the tort did not involve the use or application of any of the specific property of the union; however in the case where this view was expressed,[54] such opinion was entirely unnecessary to the decision as it was a case of a defamation in a publication which was owned by trustees on behalf of the trade union. Later when the Trades Disputes Act of 1906 had rendered it legally impossible to sue a trade union in tort this view held that it was still possible to sue the trade union trustees. Such a view must however be regarded as unsound at least so far as tort claims are concerned and appears to have been rejected.[55] It has been said that "property" means *specific property* so that not only claims for personal torts would be excluded but also claims in contract where the subject matter was not in some way specific property owned by the trade union.[56] The trustees could be sued in relation to torts which arise from wrongful uses of property, for instance nuisance or a use of landed property which would invoke the principle of *Rylands* v. *Fletcher*.[57] The fact that certain actions may be brought against the trustees has not interfered in any way with the concept of the liability of the registered trade

[51] *Id.* at 703.
[52] In fact in *Egan's* case there was a strong assertion of quasi-corporate personality.
[53] (1903) 2 K.B. 600.
[54] *Linaker* v. *Pilcher* (1901) 70 L.J.K.B. 396.
[55] See *Taff Vale* case (1901) A.C. 426, 431; *Vacher & Sons* v. *London Society of Compositors* (1912) 3 K.B. 547, 560-61, (1913) A.C. 115; *Osborne* v. *Amalgamated Society of Railway Servants* (1909) 1 Ch. 163, 193; *Longdon-Griffiths* v. *Smith* (1951) 1 K.B. 295.
[56] But see *McPherson* v. *Hilberg* (1912) 14 W.A.L.R. 48.
[57] *Vacher & Sons Ltd.* v. *London Society of Compositors* (1912) 3 K.B. 547, 560-61.

union under its registered name and it seems that even in cases where the trustees could be sued, such as in the case of a contract which has as its subject matter specific union property, there exists an alternative right of suit by using the registered name. It does seem however that as the members or the union itself (if it is a juristic entity) would be merely the *cestuis que trust* or *cestui que trust* under the trusts by virtue of which the property is held, in an action against the trade union in its registered name the trustees should be joined in order to allow legal execution against the property.[58] Without such joinder equitable execution of course would be possible.[59]

It has not been suggested that the fact of registration of a trade union either expands or contracts the normal principles on which the courts will take jurisdiction in matters involving the internal affairs of trade unions. It has been commented previously that the trade union is treated just like any voluntary association. It should however be mentioned that in Australia the compulsory arbitration statutes, notably in the Commonwealth sphere and in some of the States such as New South Wales and Western Australia, do confer large powers of supervision and enforcement over trade union rules and regulations on the arbitration tribunals. However the condition of application of this jurisdiction is usually registration of the union as an industrial union or as an organization under the arbitration statutes. The position of New South Wales however is here peculiar in that these supervisory powers apply to trade unions registered under the Trade Union Act.

III

The General Position and Conclusions

It is germane to our main purpose to state first the practical position. The *unregistered* trade union is akin to the general voluntary association, the only differences being that firstly, certain contracts between members or between trade unions themselves are, by reason of statute unenforceable and secondly, save in the two States previously indicated, the trade union cannot indulge in activities such as the application of funds for political purposes which are not comprehended within the statutory objects set out in the definitions contained in the Trade Union Acts. The liability of a trade union in contract or in tort exists subject to the same difficulties and obscurities as in the case of other voluntary societies but in Queensland the trade union cannot be sued in tort, at least by the representative procedure.

The *registered* trade union can sue and be sued in its registered name; where this happens and judgment is given, such judgment goes against the common property irrespective of possible changes in membership and execution thereunder is limited to union property and does not extend to the private property of the members. Liability exists both in contract and in tort and both to members and outside persons but a trade union cannot be sued in Queensland in its registered name for a tort. The trustees may sue and be sued where the trade union's specific property is involved but in Queensland when a tortious use or application of property is involved the trustees cannot be sued if the tortious act was committed in contemplation or furtherance of an industrial dispute as defined by the industrial arbitration statute. The trade union can sue in its registered name even in a case such as defamation which involves the notion of the possession of some sort of reputation as an entity. The powers of the registered trade union are confined to purposes which are within the definition section of the statutes and this in the case of the registered

[58] *Taff Vale* case (1901) A.C. 426, 443.
[59] *Tunney* v. *Orchard* (1955) 3 D.L.R. 15 (Manitoba).

union is at least capable of being viewed as an application of the doctrine of *ultra vires*. The registered trade union is capable of owning property but only through trustees. The legislature has clearly refrained from express incorporation of trade unions.

Some of these facts point to the existence of a separate juristic entity; some tend away from it. Much of the discussion over this question seems to be a mere matter of words. The use of such words as "quasi-corporation", "near-corporation", "juristic person" confuse rather than clarify the matter. Even the word "corporate" becomes, if it be contemplated too intensely, a word without precise significance. Nothing could be more barren here than a mere exercise in semantics. Everybody seems to agree that the trade union is not a "corporate" body. To Lord MacDermott that would conclude the argument in favour of the trade union being a mere association of individuals; to him the dichotomy is simply that of corporations and natural persons. Yet surely there may be intermediate degrees of legal existence. To admit this is not to embrace the realist theory of corporations. Associations may have reality in fact but they do not have reality in law as distinct entities until the law gives them some sort of recognition. The most obvious recognition is the conferring of express corporate status; the use of the words "shall be a corporation" is a special formula which brings in its wake automatically things like a common seal, perpetual succession, suability, power to contract and commit torts, the doctrine of *ultra vires* and so on. It is a key that unlocks a room where the furniture is very familiar to us. Yet there are other keys and other rooms. To drop the metaphor, the legislature by making other sorts of provisions and devices may indicate an intention to set up something which is more than the sum total of its members.

In the case of the trade union it seems that this has been done. Lord MacDermott himself really admits this. If in an action against a trade union you can proceed even though the persons composing it change after the contract has been made or the tort has been committed as the case may be and if execution on a judgment cannot issue against the members personally, the conclusion is unavoidable that you come into contact with something which has a life at law independent of that of its members. Once then this is admitted, it seems that one is also bound to admit, in spite of Lord Keith, that the contract of membership is with the "something" and not just with the other members. If the only legal reality is that of the other members why, if you sue in the registered name, can you not get execution against the personal property of the members?[60]

In fact if one gives full consideration to what is admitted by Lords MacDermott, Somervell and Keith, the atomistic theory does imply that there is something over and above the component individuals. To say then that something is not separate from the individuals surely involves a contradiction. What Lord MacDermott described as the procedural consequences of the *Taff Vale* decision seem to go to substance and to upset the thesis which forms the basis of the earlier part of his judgment.

The supporters of both theories in the House of Lords would agree that a trade union can be sued and the common funds can be reached both in contract and in tort. It seems to the writer that this means the existence of some sort of legal entity. If however the matter is not so simple and the learned may debate whether it is the one or the many that is or are being sued or in

[60] This last consideration may well prove too much as it seems that this is also a characteristic of the judgment obtained through the representative procedure.

a case where the plaintiff is complaining of an expulsion, where there is a contract with an artificial entity or a number of natural ones, then it seems that such controversy is devoid of practical relevance. Given that a trade union is suable and its property may be reached, the issues that might compel a direct decision on "entity" or "non-entity" seem to be very few. That the trade union goes into the world armed with the same aspects of corporateness as are possessed by the limited liability company cannot be asserted and is not asserted. It for instance does not own property directly but only through the intervention of trustees; its dissolution occurs in a different way and with very different consequences. It has however been submitted previously that artificial legal personality may take many forms. None of the characteristics which familiarly result from the formal act of incorporation in English law are necessarily and inevitably in the nature of a *sine qua non* of juristic existence. For instance in most Continental countries the doctrine of *ultra vires* does not apply to bodies which are admittedly corporate in nature.

A word should, it is thought, be added on the kind of incorporation applicable to the bodies which are registrable as industrial unions or industrial organizations under the Australian compulsory arbitration statutes. Where this is provided for, the status of corporateness in the traditional sense is obviously conferred. Though this is not expressly enacted in the Commonwealth, the mention of "common seal" and "perpetual succession" show unmistakably what is meant. But what is meant by the limitation of incorporation to "for the purposes of this Act"? It is obvious from what decisions there have been that this does not merely confer corporate status for the purpose of proceedings in the compulsory arbitration tribunals themselves. In *Waterside Workers' Federation* v. *Stewart*[61] it was held that action could be brought against a union as an organization in the corporate name in the ordinary courts to enforce payment of a bond given by an industrial union to the Commonwealth Industrial Registrar conditioned on the non-occurrence of strikes by members of the union. In other cases a union has been held entitled to sue in the registered name (that is, as a corporation) in respect of contracts to advertise in journals conducted by it as an organization.[62]

It is submitted that the full corporate status can be relied on only where the litigation concerns something which is linked up with the conciliation and arbitration objects of the statute and the part played by the union in relation to such objects and as a participant in the statutory scheme. So far as the Commonwealth Act is concerned, constitutional limitations would appear to render such an interpretation necessary.[63] Difficulty here is certainly caused by the case of *Waterside Workers' Federation* v. *Burke*[64] which was an ordinary action for tort arising out of familiar pressure tactics employed by organised labour in industrial disputes and which was brought against the union in its registered name as an "organization" under the Commonwealth *Conciliation and Arbitration Act.* No point seems to have been taken as to whether the union was so suable and the action failed on other grounds but the High Court did refer to the Federation as a "corporation".[65]

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[61] (1919) 27 C.L.R. 119.

[62] *Australian Workers' Union* v. *Coles* (1917) V.L.R. 332; *Australian Tramway Employees Assn.* v. *Batten* (1930) V.L.R. 130.

[63] See *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Assn.* (1908) 6 C.L.R. 309.

[64] (1916) 21 C.L.R. 129.

[65] *Id.* at 133.

It would certainly be difficult to argue that a union registered under this legislation would not possess corporate status for the purpose of all actions relating to property held by it.

It is thought however that the corporate status which purports to be conferred by the arbitration statutes could not very well be applicable in the case where it was endeavoured to hold a union liable for a wrongful act unconnected with its property where its liability fell to be determined by the general principles of law, for instance, in the case of a tort committed as an incident of what is often called industrial warfare, such as an action for conspiracy or inducement of breach of contract. If however the deductions made in this paper from the trend of decisions in England is justifiable, then, so far as "suability" is concerned, little effect would follow from a decision that such full corporate status did not exist provided that the union was registered under a State Trade Unions Act. It is only in the case where the arbitration registration is the only one that the trade union could not be sued.