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EXPULSION FROM PRIVATE ASSOCIATIONS IN NEW ZEALAND

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PART ONE: INTRODUCTION
The associations examined in this study have two common characteristics: they are formed by a group of private individuals, and they have come together for some primary purpose other than profit-making. The classic form of such an association was the Eighteenth Century Club, and for the purpose of this inquiry the genre of voluntary association may be broadly defined in club terms:--

"...a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science or literature, or for any purpose except the acquisition of gain." 1

Commercial trading companies and business partnerships are clearly excluded. Fraternal orders, political parties, church bodies and golf-clubs equally clearly fall within the definition. The place of the trade union is more difficult to determine, but the resemblance of trade unions to social clubs has been acknowledged by New Zealand courts and it is proposed to pay particular attention to trade unions for they most clearly illustrate the broader context in which expulsion must be studied. Expulsion embraces more than mere catalogue and analysis of case-law and statute relating to voluntary associations for the legal problems involved cannot be divorced from their social, political and economic context.

The voluntary association has been described as "an exotic in the field of litigation", the core problem being that such an aggregate of individuals is not recognised traditionally as having any separate legal existence. From this it follows that the association cannot enter into contracts nor sue nor
be sued, and there are difficulties confronting such a group wishing to hold any real property, or, indeed, any form of tangible asset. In short, there exist a number of problems of substance and procedure in actions by and against such a group.

Furthermore, voluntary associations have traditionally been accorded autonomy in internal affairs. The courts have long taken the view that the internal dispute of, say, a debating-society or card club are not justiciable. While most internal affairs of voluntary bodies can be resolved by the rules governing co-ownership and agency, the traditional judicial approach affords little encouragement to the wrongly expelled member. This is so notwithstanding that expulsion "constitutes perhaps the central legal issue as regards associations of a non-commercial nature."

At the narrowest the question to be pursued in this study is: when a member of a voluntary association is improperly expelled, what is the nature of his remedy and against whom is it available? For the member the resolution of this issue raises problems of substance and procedure. For the courts the issue involves two problems: on what basis will the Court assume jurisdiction and, if jurisdiction is assumed, what remedies are available?

At the widest, the theme of this study is a facet of the conflict between group and individual freedoms, which crystal-lise in the problem of expulsion from private associations, and which involve associated jurisprudential difficulties consequent upon rapid social change in a modern welfare state.
Broad consideration of the relation of law to society and of legal theory to social reality will, therefore, intrude throughout.
PART TWO: THE LEGAL STATUS OF PRIVATE ASSOCIATIONS IN NEW ZEALAND
The precise determination of the legal status of a given group is often difficult. It is not always easy, for example, to determine whether a given combination of individuals is, or has ceased to be, a trade union or whether it is instead a commercial company or even a partnership. Indeed some aggregations of individuals defy legal classification. Yet both Parliament and the Courts are increasingly concerned with adjusting the claims of groups in a pluralist society, be they employer organisations, consumer groups, churches, universities, cultural, artistic or athletic associations, trade unions or trading companies. The extraordinary growth of associations within the modern state makes it increasingly necessary to define the rights and duties of such groups. The industrial union with its position clearly spelled out in New Zealand, is an example of social control by and over private associations.

(a) Legal personality:

For the purpose of this study the real interest in this process of definition of group activity lies in the use of the concept of legal personality. Traditionally it was within the competence of the Sovereign alone to grant legal personality to an aggregation of individuals. As far as legal theory is concerned a "person" is any being to whom Parliament attributes legal rights and duties. Any unit which is so endowed is a "person" whether a natural human being or not and any unit which is not so endowed is not a "person" even though it is a natural human being.
The application of these mutually exclusive tests gave rise to the traditional view of English jurists that legal personality was polarised into real human beings and corporations. As the voluntary, unincorporated association fell between these poles it was not a legal person despite the secure place in social reality which many of these associations occupied. Trade Unions existed in fact before Parliament recognised them, at least for some purposes, and many associations shared the same history. Hence we may say that private associations exist in fact and their admission to the legal family of persons is not an act of creation, but of recognition. Before legal personality exists there must be some factual group to cloak with personality. The really interesting question concerns the criteria to be used in determining which factual groupings are to be accorded legal personality.

It is a truism that Parliament may personify whatever it pleases. This means that it is for each State to decide whether it is advisable to endow certain bodies with personality or not. In the Common Law world today it is generally necessary for the achievement of legal personality that certain rituals should be observed and certain conditions fulfilled. The only question of any substance is 'to what extent ought the provision of these facilities be extended to a group of individuals?'. The answer clearly depends on prevailing views of the social benefit to be obtained, and, whether or not the political climate will accept the extension of corporate form for the convenience of administration.
It is obvious that the criteria for according legal personality are independent of the precepts of lawyers law. Professor Geldart understood this for he wrote that the problem of legal personality is "not one on which law and legal conceptions have the only or the final voice." Personification is not the sole prerogative of the lawyer, it is engaged in by poet and philosopher, and legal personification is the outcome of speculative thought married to administrative response to changing social conditions. An example is the response to the changes in the social and financial structure of English society wrought by industrialisation. These changes resulted in legislation according large business partnerships legal personality, though Joint Stock Companies had existed in fact before their belated recognition in law.

This response lends weight to Dicey's argument that the coming together of a number of persons creates a body which is "a natural corporation" by its very existence limiting the freedom of its members and constantly tending to limit the freedom of outsiders. In short, whatever the group, it differs from the individuals of whom it is composed because prior to either statute or judicial decision "the thing itself has been in being".

Dicey is not alone in arguing for the real existence of a group and in light of the very real social, political and economic existence of the groups under discussion it is considered that it is necessary for the ordering of society that these factual groups should stand in some relation to
each other and the state and have a legal status which is capable of description.

Acceptance of the dogma that legal personality is a gift of Parliament has resulted in the legal position of associations being dependent upon statute. Many statutes provide for the association which complies with the provisions required becoming a corporate body, so that compliance with the statutory formalities results in a legal person.

This formalised process of incorporation facilitates administrative and procedural action. It is also an answer to a number of problems posed by the definition of a legal person as something which is the subject of rights and duties. Is any group with the capacity to hold even a single right a "person"? If so, then when in the law of associations do you draw the line between person and non-person? If not, then what is the irreducible legal minimum of rights necessary to constitute a "person"?

Convenience, not logic, must be the determinant of these questions and in constructing the Welfare State it appears that the New Zealand Legislature has accepted the social and factual reality of groups because it is remarkably easy for any group to be cloaked with legal personality in this country.

The facilitation of incorporation has two major advantages to outsiders. Firstly, it rationalises the position of the group within the State thus enabling the State to ascertain the persons against which its power may be exercised. Secondly, incorporation is a practical answer to the
inadequacy of procedural machinery for bringing actions against unincorporated associations. By the same token, of course, incorporation may not necessarily be advantageous to the association itself for, as will emerge below, the absence of corporate form traditionally amounted to civil immunity for the association. But the convenience of treating any large association of individuals as one unit for administration and litigation is obvious and the decision of the legislature in New Zealand to extend the facilities for incorporation to all associations so desiring it should be seen as a procedural device stemming from policy considerations.

Furthermore, the enactment of such legislation is consistent with the traditional view that legal personality is Parliament's gift, an act of creation. From this it follows that when Parliament is silent, legal personality does not exist and that it is not for the judge to usurp the legislature's prerogative and "create" a legal person. Nevertheless the traditional attitude is subjected to strain when legislation is enacted which confers certain rights and duties similar to those possessed by corporations but without expressly incorporating the group.

The modern judicial approach is to seize on evidence of corporate privileges to imply corporate responsibility unless Parliament has expressly decreed otherwise. If the Courts find an institution operating pursuant to a statute, owning property, employing staff, possessing a protected name and being involved in legal actions in its day-to-day operation
then the Courts will imply corporate personality into the Act. It may be that the Courts will seize on slender evidence to treat a group as a legal entity but in the absence of legislation it is unlikely that the Courts will alone create legal personality.

What does seem to be emerging is an acceptance of the mutual interdependence of Legislature and Judiciary in the process of admitting new entities to the legal family. The Courts have been able to assume a more positive role in this process for several reasons. A robust view of the factual, social reality of a group has long characterized the New Zealand Bench and as is often pointed out the Common Law Courts have never wedded themselves to any one or other theory of the concept of legal personality. This, it is submitted, is for the very good reason that academic disputation as to the proper explanation for legal personality is apt to be conducted at far too abstract a level to be of any practical assistance in the resolution of a problem before the Bench. So refined has the academic dialogue become that it may well be that there is little difference between the theories. Each is a concept about a concept and there seems no objection to their being simultaneously valid.

No one theory adequately explains the concept of legal personality. It is not the exclusive province of the lawyer but is "a theme from the borderland where ethical speculation marches with jurisprudence", an area of speculation
where thought from a number of disciplines overlaps. History, political science, law, philosophy each have a contribution to make to the elucidation of this concept and it is important to remember that the enactment of legislation providing corporate personality is for convenience of administration. Such legislation is based not on abstract principle, it is enacted" to achieve results, not to state legal theory".

Nevertheless it is difficult to resist the conclusion that when Parliament concedes legal personality to a group it is recognising that something in fact, though not in law, was in existence upon which corporate personality is to be conferred by legislation.

This is reinforced by the statutes which subject certain bodies to rules without expressly incorporating the group. The result of such legislation is to throw the group into the foreground and relegate the individual member to the background. This enables the Courts to adopt a unitary view of the group, to view "they" as "it" and the association in the vanguard of this development has been the English trade-union, whose legal status is still the subject of academic debate.

(b) **Registered associations:**

The legal status of trade unions is today derived from various statutes. The starting-point is the TRADE UNION ACT 1908, which is modelled on the English TRADE UNION ACT of 1871. The 1908 Act, by Section 8 enabled trade unions to register if they so wished but the Act said nothing pertinent
about the effect of such registration upon the status of a
registered trade union. In other legislation, Parliament had
declared that on registration the association became a separ-
ate legal person. Remembering that, traditionally, legal
personality was within the sole competence of Parliament to
bestow it can be appreciated that the accepted view of a
registered trade union was that it was the same as any other
voluntary, unincorporated body. That is, it was taken that
registration made no difference to the status of a trade
union. This was consistent also with the established divi-
sion of entities known to the Common Law who could sue or be
sued - corporations and individual persons - and it meant that
for procedural as well as substantive reasons trade unions
like other private associations were largely immune from
civil suit.

But in July 1901 the House of Lords decided that a re-
gistered trade union, although not a corporation, was some-
thing new which could be sued in tort in its own name and
against whose property judgment could be obtained. Over
fifty years later their Lordships repeated their finding
that by registration the union acquires some existence apart
from its membership.

Reaction to these decisions still continues. Some
opposition stems from social and political persuasions,
other from a jurisprudential view.

Professor Wedderburn has recently suggested that
authors and contemporaries of the English Act of 1871 would
have been surprised by the Taff Vale decision and astonished by Honson v Musicians Union. But this criticism is a manifestation of the academic abstraction of legal personality. The same approach results in lamentation that there should be "a species of institution which is neither fish, flesh, nor good red herring" and the contemporary jibe that "the registered trade union has become, in the language of genetics, a jurisprudential "sport"."

From a purely jurisprudential viewpoint it is possible to argue that the legal status of a registered trade union or other association, like Mohammed's coffin, is suspended somewhere between Heaven and Earth so that such a body falls outside or cuts across the two traditional categories of organised group activity. But against this it may be argued that the result of decisions on registered associations is that such a body, in particular trade unions, is a legal entity simply because this is what the Courts say.

A New Zealand decision well illustrates this difference between the academic and judicial approach to the problem of organised group activity. In Russell v Amos Northcroft J. rejected the defendant's contention that an unincorporated club could not be sued. Instead the learned judge turned to the Act under which the club was registered and, having found that the statute conferred certain obligations as well as certain privileges, held himself able to apply the decision in Taff Vale. The core of this pre-eminently practical approach is in these words
"I am unable to accept the view that the Ashburton Working Men's Club registered under the Friendly Societies Act so as to obtain all the advantages thereby conferred, is immune from the legal consequences of its normal activities whether at the suit of an outsider or of an individual member."

The result, it is submitted, is that it is not enough for practical purposes to argue that a voluntary association is not an entity separate from its membership simply because it is not formally incorporated. As FUSSELL v AMOS shows even without incorporation associations have attracted special rules. Parliament is habituated to according a privilege or conferring an immunity upon associations which it does not formally incorporate with the result that the legislature seems to be indicating an intention to set-up something which is more than the sum total of its members. There exist legal rules applicable to something and this something is recognised by the Courts as a legal unit. In the words of Professor A.H. Smith "Corporate privileges and corporate responsibilities must always be co-ordinate unless Parliament has decreed the contrary". This epitomizes the approach long adopted by New Zealand Courts and academic criticism of indications of similar judicial activity in England misses the point that the end result of a long line of trade union decisions is that a registered union is an entity because this is what the Courts say it is. The union is a right and duty bearing unit and there seems little merit in debating whether or not it is a "quasi-corporation" in substantive law or merely a procedural group name.
Today such debate seems a storm in a teacup. Practical problems require practical solutions and these the Courts have fashioned from legislative timber.

(c) Incorporated associations:

In New Zealand the question of the legal status of a trade union is secondary to the question of the legal position of the industrial union operating under compulsory arbitration. Parliament's intention to operate a system of arbitration and conciliation in order to obviate industrial conflict, and prevent inflation by wage control, required statutory recognition of industrial trade unions. Thus a New Zealand Chief Justice could state with confidence -

"An industrial union under this Act occupies a different position from a trade union in England. It is a corporation, and unlike the English trade-unions, it does not therefore require trustees in whom its property may be vested. An industrial union can hold land (section 16) in its own name or in the name of trustees. The provisions of the Trade-Unions Act of 1871 (English) were very different, for by section 8 of that statute "all real and personal estate whatsoever belonging to any trade-union registered under this Act shall be vested in the trustees for the time being of the trade-union appointed as provided by that Act".... Our Trade Unions Act has similar provisions."43 and later in the same judgment "An industrial union is a corporation, and has no need of trustees either in holding property or "in enforcing contracts, or in being sued"44

The provisions of arbitration machinery and the effect of registration as an industrial union explains why there was no reaction to the Taffe Vale decision in New Zealand. Immunity in tort would have sat strange beside liability in
crime for the same actions by virtue of the provisions of the Industrial Conciliation and Arbitration Act. Moreover, the tortious liability of trade-unions has not been an important issue in New Zealand, at least in terms of employers who rely upon the arbitration machinery when strikes occur. Similarly, the New Zealand unions did not feel the need to take up cudgels at the news of the English decision for they had secured their position only after considerable industrial conflict, notably the 1890 strike.

Hence the New Zealand unions knew where they stood by the time of Taff Vale. In the emerging welfare state, practising the adversary system of litigation on the premise that litigation is between persons, it is understandable that the State should seek to identify legal persons clearly as these are the objects against which the State may have to use its ultimate powers. The Industrial Conciliation and Arbitration Acts are part of a pattern to which a number of Acts contribute, one result of which is the almost complete elimination of the unincorporated private association from the New Zealand scene. Massive State activity in all aspects of life was early accepted in New Zealand and a consequence was the early development of State supervision of private associations. The significantly named Unclassified Societies Act, 1895, was an early example of this for by virtue of section 5 any association registered under the Act became a body corporate.

Basically this state supervision of private associations
in New Zealand is part of a wider problem involving the relationships between the State and the associations within its territory but it has a narrower significance for this study. English Common Law had no provisions for actions involving unincorporated private associations nor are there general legislative provisions today. Thus, as mentioned above, the availability of corporate form to any group complying with comparatively simple formulae should be seen as a procedural device stemming from policy considerations.

An American writer has suggested that when an unincorporated body elects to incorporate the change "may amount to no more than a mere event in its history" but while this may be so for a partnership becoming a company it is manifestly not so for non-profit associations seeking incorporation under statute in New Zealand. The classic form of private association is the club and incorporation effects a major change as may be illustrated from one small area of club life.

Since the members of an unincorporated association are co-owners of the property when a member orders a drink no contract of sale occurs for the transaction is characterised simply as a release by all other members of their interest in the property. Such associations are not carrying on trade or business when they supply food, drink or services to members. But incorporation alters this and the effect of incorporation upon a club is reflected in the number of licensing offences involving clubs in New Zealand. Whereas
the stock of liquor from which members partake in an unincorporated club is part of the distribution in specie of property in which all members have a common interest, following incorporation members other than the person ordering have no rights in the liquor and the transaction between member and club is a sale.

The assumption of jurisdiction over such a matter is an indication of a major incursion into the internal affairs of a private association and the Courts have been able to assume such jurisdiction by virtue of legislation which incorporates the association. Without doubt the most valuable illustration of the importance of this process is the New Zealand industrial union.

There is in New Zealand a high degree of legislative and judicial intervention in the internal affairs of unions which is in marked contrast to the situation of countries which still operate a collective bargaining method of regulating industrial relations. The English Legislature, for example, seems to desire to discourage judicial intervention in the internal regulation of trade unions, whereas in New Zealand the effect of incorporation is to place the industrial union on the same footing as a trading company, and trends in legislation increasingly to control the practice of business corporations is paralleled in this country by controls over the affairs of industrial unions. This control may be evidenced by several illustrations.

In the first place the State controls the registration
process. Registration is approved only if the union's proposed rules are consonant with the requirements laid down in the Act, especially the provisions of section 66, and if they are not registration may be refused. Furthermore by a 1939 amendment to the Industrial Conciliation and Arbitration Act the Minister of Labour was empowered to de-register unions from under the Act and this has been used in times of political and industrial unrest to discipline recalcitrant unions.

But the most striking indication of control over internal affairs of industrial unions is undoubtedly furnished by the Industrial Conciliation and Arbitration Amendment Act 1957 by virtue of which union elections were to be scrutinized by the Registrar of Industrial Unions and secret ballots were to be enforced. Equally significant are the provisions of section 70 of the 1954 Act which empowers the Registrar of Industrial Unions to refuse to register rules which in his opinion are "unreasonable or oppressive".

Such legislation removes the traditional reluctance of the Court to intervene in internal trade-union affairs. Registration under industrial conciliation legislation results in the union becoming a body corporate which is bound by the rules which it adopts. To produce legal results, these rules must be strictly complied with and the New Zealand Courts have expressed an appreciation of the fact that theirs is a simpler task than their English brethren face when presented with trade union litigation. The
New Zealand Bench approaches industrial unions confidently armed with well-established and understood concepts, notably the doctrine of ultra vires, which have long been developed in dealings with legal persons and many of the rules of law applicable to commercial trading concerns have been applied to industrial unions in New Zealand.

Thus it has been decided that the principles of constructive notice of corporate documents apply to industrial unions in relation to contracts with outsiders, and that the rule in *Foss v Harbottle* also applies. For reasons which shall emerge later this approach to industrial unions may offer little encouragement to the wrongly expelled member. On the other hand, however, possible advantage to the expelled member is indicated by the attitude with which the Courts approach the industrial union's rules. Two tests are applied, namely, whether the rules are in accordance with the Act and, secondly, whether or not the rules have been strictly complied with. Using these tests the Courts have declared void the ballot for office of President of a union and, as recently as 1958, Haslam J. granted an injunction to compel a postal ballot for the position of secretary of a union at the suit of a member whose nomination for the position was refused contrary to the rules. More recently yet the Court of Appeal has ruled ultra vires the use of union funds by way of a contribution to the legal expenses of two union delegates who were unsuccessful defendants in a defamation action.
These decisions emphasise the importance of incorporation upon the internal affairs of private associations. Few unions in New Zealand are not registered under the Industrial Conciliation and Arbitration Act and the number of unincorporated private associations is small because of the legislature's policy of granting corporate form to bodies which registered under a variety of Acts. Nevertheless the private association in its pure form remains still in the form of church bodies, unregistered trade unions, and unincorporated golf-clubs, while the registered trade union has been described as a "quasi-corporation" by a New Zealand judge.

The relevance of these categories of private association emerges when the central question is put in this way - is the member of an incorporated private association better placed to pursue a remedy for wrongful expulsion than the member of, say, an unincorporated golf club?

This can be answered only by (a) examining the substantive and procedural difficulties confronting the aggrieved member of a private association, (b) examining the basis upon which the Courts will assume jurisdiction of internal affairs of such associations and (c) examining the available remedies.
PART THREE: THE LIABILITY PROBLEM
THE LIABILITY PROBLEM

When the improperly expelled member seeks a remedy in the Courts he faces several intertwined problems. The question of procedure, maintaining an action, cannot be disassociated from the question of whose liability is the expulsion and what is the redress. The question of liability for the actions of an unincorporated association or its members is a question of substantive law. In most cases this falls to be decided under the law of agency. Because the Common Law refuses to recognize a private unincorporated association as an entity, the association cannot be sued as such, so that, for example, the members of a committee of such an association are personally liable for goods supplied. For the expelled member the issue is: who is the wrongdoer? Obviously it is not the association. Hence he must bring his action against the members of the Committee, the trustees or other officers, or the individual members. A brief examination is sufficient to reveal that these actions are unlikely to succeed.

(a) Suit against the Committee

The committee or other organ may well in fact be the instrument of expulsion but in so far as the committee is the agent of the association, it is also the agent of the expelled member who could not, therefore, succeed in this action as he would be suing himself.

In the case of the registered association, although
BONSOR v MUSICIANS UNION is silent on the point, there seems no objection in principle to bringing an action against the members of the committee who voted for the improper expulsion, subject only to (a) the difficulty of establishing the implied term which the members have broken and (b) the practical consideration that such persons may be men of straw. They may be impecunious and in any event it may be unfair to hold them responsible. Clearly it is better in every way for the plaintiff to have access to the common fund, but there are problems here too, as will emerge below.

(b) Suit against the trustees

Although it is clearly established in New Zealand that trustees of an association may be sued in respect of property vested in them it has been argued that property means specific property and it would seem that personal actions against the association through the trustees will succeed only in those cases where the tort was related to the wrongful use of the property held by the trustee. In short, there are limitations upon the availability of an action against the trustees, and the propositions apply equally to the member of a registered trade-union, despite the TRADE UNION ACT 1908 SECTION 10 (3).

(c) Suit against the officers of the association

An officer of a private unincorporated association is immune from civil suit, even if the Rules of the body purport to empower an officer to so act. Consequently it has been
held that service of a writ upon a club secretary in an action against a club is bad. Here again the problems stem from the lack of recognition of the association as an entity which gives rise to the difficulty of attributing vicarious liability to the group. Consequently it would seem that the officer's personal liability is the expelled member's only hope for redress, but here it must be shown that a wrong has been committed by that person.

(d) **Suit against the members**

Joinder of individual members may be possible in small associations analogous to partnerships, but not in associations where membership is both large and fluctuating.

Because the voluntary grouping of aggregates of individuals is not viewed traditionally as being legally significant the voluntary association is very nearly immune from civil suit. Such a conclusion clearly holds out little hope for the wrongly expelled member desiring redress in the Court. There are, however, two remaining actions which the member may use (a) the equitable suit of a representative action or (b) an action against the association in the association name where there is an enabling statute.

(e) **The Representative Action**

The Common Law difficulties indicated above amounted to civil immunity for the private association. In part Equity met these difficulties by providing a means of suing an aggregate of persons by means of a class or representative
action. This action came into Common Law procedure in the 13 1870's and is found in New Zealand in Rule 79 of the Code of Civil Procedure in the following words:

"Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court or a Judge to defend, in such an action on behalf of or for the benefit of all persons so interested." 

It is a fair summary of decided cases to say that there is no certainty in law as to the practicability of the representative action, in particular in the case of representative defendants. Even if the expelled member can show as a matter of substantive law that he has a good cause of action it does not follow that the machinery of the representative action will be available as of right for there are a number of difficulties associated with the action. Some of these difficulties were referred to in BONSOR v MUSICIANS UNION.

Membership of most private associations is constantly changing so that persons who were members at the time the cause of action arose may no longer be members, and, by the same token, new members may have joined. The infancy of some members would complicate an action in contract while in tort an equal difficulty would be a finding that some of the members had voted against the action complained of as in these circumstances each defendant would be entitled to claim a separate defence and therefore ought not be represented as a defendant as this would mean an absence of "the same interest" required by the Rule.

These limitations to the representative action are
accentuated when the action is founded in tort, for here separate defences may be more readily available than in other actions, and in fact the authorities differ markedly on whether or not the representative action is available at all in tort. Furthermore there is authority in New Zealand that the representative action is not available when the sole remedy sought is damages and this means that the expelled member who seeks damages rather than reinstatement will find little solace in the representative action. This is a material consideration, for reasons which emerge below.

The essence of the representative action is the requirement of an identity of interest. The exact meaning of this is not clear. In turn the lack of clear judicial guidance on this point has resulted in uncertainty as to whether or not the Courts will allow the representative procedure to recover damages in light of the difficulty of determining the extent of the damage caused by each defendant. Moreover it seems never to have been decided whether judgment is to be executed against the common fund or whether it extends to a personal judgment against the members individually.

All of these problems are technical and are inherent in the Rule. On the theoretical side the action may be objected to on the grounds that legal controversy can only be between legal persons which means corporations or natural persons. But to this it may be argued that the effect of the action is to treat the private association as a legal unit, at least for the purpose of the action and that this procedural device
is a striking reminder of the truth of the adage that "substance law has at first the look of being gradually secreted in the interstices of procedure". In short it may be argued that the representative action is a procedural answer to the jurisprudential problems flowing from the habit of treating unincorporated associations as no more than aggregates of individuals. The use of the action gives the Bench a flexible device to use when considerations of natural justice, public policy and felt social needs press upon the Court. A Canadian Court faced the many problems in the way of allowing an action in tort in the following words:

"The question is simple enough. Can a union or other voluntary unincorporated association which is an entity in fact, be made to answer in the Courts for wrongs, or for breach of contract, or for debts contracted? If it cannot, that ends the matter, but if, as I think it can, it must not escape the accounting because of a want of ability in the Courts to devise a suitable form of judgment. The form of the judgment is but a means to achieve the end of imposing responsibility upon the union and of making it possible for the plaintiff to realise his judgment out of the assets of the union. The form of the judgment is not at all important so long as the intended result is reached." 21

This is a form of judicial creativeness not uncommon in the over-all development of the law of tort and often recently manifested by the present Master of the Rolls in the field of member-association law where new fact-situations require new remedies.

Even so, the representative action is unlikely to adequately protect the expelled member. An action against the association eo nomine is far more likely to satisfy.
(f) **Suit in the Association name**

The decision of their Lordships in *TAFT VALE* that a registered trade union can be sued in its own name opens the door to a form of relief which the cumbersome representative action was ill-suited to achieve. The result of the decision has been that the Courts will allow an action against the name of the association where ever there is an enabling statute. It is for this reason that the administrative policy to allow incorporation to any association desirous of so doing is a procedural reform of the greatest significance to the expelled member, and, with the brief examination of the problems facing the expelled member before us it is possible now to assess the advantages to the aggrieved member in his association being incorporated.

(g) **Incorporation as a procedural device**

Because English law does not contain any general legislative provisions permitting suit against an unincorporated association the legislative provisions for registration and incorporation of private associations in New Zealand have largely removed the procedural obstacles examined above. Thus, for example, the industrial trade union "has no need of trustees either in holding property, or in enforcing contracts or in being sued" and the incorporated voluntary association in New Zealand is a defendant eo nomine. Hence there are no reported instances of the representative action being used in trade union actions and when an unincorporated and un-
registered union was involved in litigation a New Zealand judge indicated an eminently practical solution to the procedural problems by allowing the plaintiff to sue the individuals personally responsible and leaving them to sort out the questions in actions for indemnity. Clearly the expelled member of a private association in New Zealand is more likely to have his action entertained in the Courts than his counterparts elsewhere in the Common Law world. Expulsions from trade-unions proceed on similar facts in England and New Zealand and a comparison of typical fact-situations shows that the New Zealand unionist is more likely to obtain a remedy than his English equivalent. The reasons for this will emerge later but it is worthwhile to mention here that incorporation has three general advantages to the expelled member.

In the first place where the statute confers powers of regulation and discipline upon a tribunal the Courts are readier to review the decisions of the tribunal on the reasoning that such a body must act in a judicial, as well as judicious, manner. Secondly, because the association is incorporated it must act within its powers and ultra vires actions will be struck down by the Courts. Thirdly, because bodies corporate have long been held answerable for acts of a servant or agent of the corporation committed within the scope of his authority or employment incorporation removes the substantive problems associated with attempting to attach vicarious liability to private unincorporated associations.
It is tempting to urge that incorporation should be made compulsory for all private associations in New Zealand. But, as will emerge, incorporation alone is not a complete answer to the difficulties facing those alleging wrongful expulsion. Incorporation may create obstacles to the ostracised member seeking redress, for, by analogy with trading companies, New Zealand courts have held that such matters as the alteration of the Rules of an incorporated private association are a domestic matter for the domestic forum so that "the Court cannot...assume a jurisdiction to set aside, on the ground of irregularity, something that the majority can, and no doubt will, immediately and easily re-establish".

It is now pertinent to ask when, if at all, will the Courts assume jurisdiction of a dispute within a private association?
PART FOUR: THE JURISDICTIONAL PROBLEM
INTRODUCTION

The traditional reluctance of the Courts to intervene in the internal affairs of private associations has already been remarked upon. A similar reluctance is shown in the judicial attitude to partnerships which differ from the associations under discussion mainly because they are primarily concerned with profit-making. The Courts have adopted this laisse-faire attitude on the premise that the relationship between members of a voluntary body was essentially a personal one which could give rise to judicial intervention in only "the most flagrant cases". Furthermore while the Courts may feel confident in construing statutes and by-laws according to well polished canons of construction, the same criteria do not necessarily apply to the rules of an unincorporated religious or political body. Obviously, too, if the Court was too willing to assume jurisdiction of a dispute involving members of a religious or political association it would in effect be arbitrating upon matters of religious or political dogma. For this reason the Courts have long accorded a wide discretion to private associations to manage their own internal affairs. Both in New Zealand and England the Courts have refused to intervene in university disputes while the High Court of Australia has refused to intervene even to save a prominent political figure from expulsion from his party. The New Zealand Courts while noticeably less reluctant to supervise private associations than many other jurisdictions,
have always been particularly hesitant towards disputes within religious associations.

In **Baldwin v Pascoe** the Court was faced with an action which arose out of the refusal of an Anglican clergyman in a Christchurch parish to administer the sacrament of the Lord's Supper to one of his parishioners. Denniston J. did allow that if the refusal was actionable it must sound in either tort or contract. But he held no duty was shown in the statement of claim and that the act complained of was not slander as no special damage was proved. Furthermore no contract was disclosed by the pleadings. Hence the learned judge was able to conclude that the only offence established was ecclesiastical, the remedy for which lay in recourse to the domestic tribunals of the Church of England.

As will be explained later this decision epitomises the problems facing the aggrieved member of a voluntary association. The question of a remedy in tort is still developing, at least for disputes involving private associations other than industrial unions, and it would have been difficult to establish the terms of the contract in **Baldwin v Pascoe**. Furthermore, Denniston J. fashioned a major obstacle to the member when he held that domestic remedies had not been exhausted.

The Court in **Baldwin v Pascoe** was obviously reluctant to entertain an action in a civil court which appeared to be an ecclesiastical issue and Denniston J. was manifestly uneasy to be in the position of having to determine what in reality was an internal religious dispute.
Not unnaturally the unease of the Courts in these matters is matched by the resentment of private associations at having their internal affairs open to scrutiny. The reaction to the *Free Church Case* is evidence enough of this, as was the attempt by New Zealand Federation of Labour leaders to have special legislation conferring privilege upon trade union leaders, a sign of sensitivity which occasioned prickly editorial comment in the *New Zealand Law Journal*. By their very nature groups such as Masonic Orders, religious bodies, political parties and trade unions will be resentful of publicity of their internal affairs, particularly in such a delicate matter as the right to expel.

The value of the autonomy and independence of voluntary associations within a democratic society must be weighed against the need for the association to stand in some defined relationship to other associations and the State. How far the State should infringe upon the association is a question largely to be determined by the political persuasion of the respondent and is a question which has aroused the enthusiasm of those who see the State as just another association and those who see the State as supreme. The "hands-off" attitude of the English Courts is consistent with the Pluralist philosophy but the contrasting massive State supervision of private associations in New Zealand, particularly trade unions, would be opposed by the Pluralists.

It is unlikely that political theory is the correct explanation for the traditional reluctance of English Courts
to intervene in private associations. Rather is it possible for the Courts to justify their reluctance in legal concepts. Thus the Courts may justify their refusal to intervene by denying that the plaintiff has any legal or equitable right on which to found a justiciable claim, or by pointing to an alternative effective remedy, or by asserting that all internal domestic appeals have not been exhausted. But as de Smith points out "at bottom there lies the view that judicial regulation of this area of activity would be contrary to public policy".

The particular body to which de Smith was referring was the university but it is submitted that the Courts reluctance to intervene in educational bodies has nothing peculiar to such bodies. Similarly there is nothing about the Courts reluctance to intervene in expulsions from unions which is peculiar to unions. It is important, however, to remember that although the Courts are reluctant to assume jurisdiction over the internal affairs of private associations this reluctance can be overcome. The control over industrial unions in New Zealand has been noted above and evidence of an erosion of the traditional reluctance will be presently examined.

What is certain is that the Courts hesitation will dissipate in order to review an expulsion when the plaintiff can show some rights in property or contract which are prejudiced by the expulsion. What is less certain is whether or not the Courts will intervene to protect an interest which cannot be characterised as either property or contract.
PART FIVE: PROTECTION OF A PROPERTY RIGHT
PROTECTION OF A PROPERTY RIGHT

Because of the deeper reasons for their reluctance to intervene in domestic affairs of a voluntary association the original basis for intervention was placed on the narrowest possible ground. The Courts will assume jurisdiction to review an expulsion if the expelled member was by this expulsion deprived of some property right or asset in the association which he would otherwise have enjoyed.

The classic exposition is that of JESSEL M.R. in RIGBY v CONNOL

"...what is the jurisdiction of a Court of Equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion.

There is no jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring a service, being the common
relation of master and servant, or whether
they are agreements for the purpose of pleasure,
or for the purpose of scientific pursuits, or
for the purpose of charity or philanthropy -
in such cases no Court of Justice can interfere
so long as there is no property the right to
which is taken away from the person complaining."

This statement is an expression of the Equity view and
the very narrow meaning given to "property" is clear.  
RIGBY v CONNOL was a case of expulsion from a trade union and an in-
junction was refused for two reasons.  Firstly because no
property right was involved, and secondly because the
learned Master of the Rolls thought that to grant an in-
junction would infringe certain legislation.

Given that the association has property the Court will
not have jurisdiction unless the member has a right of pro-
erty by reason of his membership.  It is therefore critical
to an understanding of this issue to determine the meaning
given to the term "property".

A strict interpretation of the exposition by Sir George
Jessel excludes purely financial membership of an ordinary
subscribing member.  The importance of this to the card-
holding member of a trade union or political party is obvious.
If the payment of a subscription does not of itself give the
member a sufficient proprietary interest to justify the grant
of an injunction, then an improperly expelled member will
have difficulty in persuading the Court to entertain his
action.  In New Zealand where most unions are small and
scattered a union may not have property in the narrow sense.
Even if it did it is difficult to find for the individual
member any legal property rights in the tangible assets of the union. Property is not held in trust by the union or by the incorporated club and a member cannot dispose of his property interest in the New Zealand Labour Party by testamentary bequests. Any rights which a member might have in these associations are non-existent until the association is dissolved. Although it is good law that on dissolution there shall be a distribution among members it is doubtful if there are many instances in which such a distribution has occurred. In any event an association continues only so long as it prospers and almost by definition a dissolution of a private association offers little hope of surplus assets.

It would be a naive trade-unionist who would look forward to his property interest in the event of a dissolution of his union.

Furthermore even this theoretical interest is absent in many associations from which expulsion may cause injury. The New Zealand equivalent of the English proprietary club is an example. Even more vexed is the legal situation of the assets of an association such as a political party which does not exist for the direct benefit of the members but for the attainment of some impersonal purpose.

Moreover it may be argued that the use of the property test is not a valid reason for limiting jurisdiction if the Courts are merely reluctant to become involved in religious or political controversies, and many decisions go to establish that the property test is at best a fiction. Property in
the context of private associations is not restricted to land and injunctions will lie to protect interests for which the traditional meaning of "property" is no longer an appropriate description. New Zealand Courts have seized upon very frail property rights to found jurisdiction and to grant relief and by doing so, it is submitted, have exposed the artificiality of the criterion.

Thus in *Watford v Miller* a right to use a storeroom in a club for storing liquor in lockers was held to be a property right and "to take it away arbitrarily would be just as much an expulsion of the member whose right was affected as it would be to deny to him the right to use the billiard-room or the dining-room of the club-house, or of both of those rooms". Another judge saw the members of the incorporated club as having "a potential right of property" and this view seems more akin to the traditional view of property right as being a right to share in the assets on a distribution.

On the other hand in *Millar v Smith* North J. gave a very clear indication that property rights are to be read in the widest possible sense. The headnote accurately summarises the holding as follows:

"The jurisdiction of the Court to interfere at the instance of a member of a voluntary association to prevent his being improperly expelled therefrom is not limited to cases where the property of which the member is, as a result, being unjustly deprived, consists of a beneficial interest in land or chattels, as there are many rights which in such a sense cannot be called rights of property, which, nevertheless the law will protect."
In this case an unlawful suspension from a golf-club entitled the plaintiff to a declaration and an injunction. The Court assumed jurisdiction on the basis that the interference with the plaintiff's rights to play in club fixtures was an interference "with the enjoyment of rights she possesses that are sufficiently related to her property rights to justify the Courts intervening to protect her interests."

In arriving at this decision North J. asserted that the then Master of the Rolls in RIGBY v CONNOL purported to lay down too rigid a rule to cover the rights of property which the Courts will protect. North J. found three leading English cases to support his contention that there are today many rights which cannot in a narrow sense be called rights of property but which nevertheless the law will protect.

Among these other rights which the law will protect under the guise of "property" is the right to vote and jurisdiction has been assumed in trade union disputes both in Australia and in New Zealand on the basis that wrongful deprivation of the right to vote gave jurisdiction. In the New Zealand decision Haslam J. found that the office of secretary-treasurer had a "proprietary aspect" because, inter alia, it carried the right to speak and vote at all meetings. It followed that any wrongful interference with this right gave the Court jurisdiction.

Clearly the concept of "property" as a criterion for jurisdiction has been stretched to bursting point. It has not been restricted in a technical sense but instead has
become a catch-all phrase. The foregoing decisions call into question the value of "property" as a basis for jurisdiction unless it is seen as a term so flexible that, in addition to the intangibles which it already embraces, it can be used in the widest sense to cover any legally recognised right. This, it has been strongly argued, is the original meaning of "property right" and therefore "whether that right exists by virtue of contract, or arises from the very protection which the law extends as socially desirable to certain relationships, the Court can protect that right by injunction when it is interfered with wrongfully i.e. tortiously or in breach of contract."

Such an approach amounts to an assertion that talk of property-rights is irrelevant since the real subject of protection is the plaintiff's status as a member. As will be explained below this is material to the New Zealand legal system for in this country membership of a union or an incorporated club is seen as conferring a status which the law will protect. In short if membership in an association is itself a property right then, it is submitted, the property doctrine is irrelevant today as a criterion of jurisdiction.
PART SIX: PROTECTION OF A CONTRACTUAL RIGHT
PROTECTION OF A CONTRACTUAL RIGHT

A second theory about the member's rights in an association is the contract theory which appears to be the most widely accepted basis for intervention in the Anglo-American legal world. It is argued that the member's rights in the association are subject to the association's constitution which is a contractual agreement. This being so the Courts can assume jurisdiction on behalf of a member if the association has acted illegally. The principles governing jurisdiction under this head were propounded in DAWKINS v ANTROBUS and well summarised in the headnote:

"The Court will not interfere against the decision of the members of the club professing to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been mala fides or malice in arriving at the decision." 3

At first glance this may well seem a more attractive ground for reviewing an expulsion than the property theory but the contract theory also bristles with difficulties. Here again the root cause of the problems is the traditional view of the private association as no more than an aggregate of individuals. If, therefore, we are to talk in terms of contract, violation of which is actionable, we must answer this question: with whom has the member contracted? For the member of an incorporated association the answer is that the contract is between the member and the association though whether the constitution is also a contract between members inter se is still a difficulty.
There is authority for the proposition that when a number of people voluntarily join together to form an association under rules to which they agree, each member enters into a contract with every other and future members join on the same terms. This has unfortunate implications for the wrongfully expelled member for logically he must recover against each other member of the association. Yet as Chafee points out in a club of 600 members there are 179,700 contracts. To this it may be objected that the theoretical number of contracts does not prove the concept to be false. Nevertheless the procedural difficulties which flow from the premise that the association is merely an aggregate of individuals are a considerable barrier to the expelled member and add emphasis to the submission that incorporation has removed most procedural problems by accepting that the contract in question is between the member and the corporate body.

Even the recognition that the registered union is something more than the sum of its membership has not removed other difficulties inherent in the contract theory of membership. These problems are well illustrated in recent English decisions.

In ABEOTT v SULLIVAN a corn-porter's name was removed from the register of members after he had struck a trade union official. The "committee" which purported to expel the plaintiff had no basis in the constitution, it had no rules, but it consisted of men elected by the cornporters. In the absence of any contract on which jurisdiction could be said to rest
the Court of Appeal held the resolution invalid and ultra vires. But an action for damages against those who had voted for expulsion was refused, Denning L.J. dissenting. The majority were not prepared to look beyond contract, thus reflecting the traditional basis for jurisdiction.

The result was that the plaintiff who had been wrongfully excluded from his livelihood for some years, was unable to obtain damages. At first instance the trial judge, Croom-Johnson J., felt unable to grant damages in the absence of a legal peg on which to hang an award, a view in which the majority of the Court of Appeal agreed. Denning L.J., on the other hand, expressed a strong regret that the absence of a legal peg should deprive the plaintiff of a remedy. In his view there might be good reason for a general tortious liability for intentional infliction of unjustifiable injury, along the lines of the well-known dictum of Bowen L.J., but conceded regretfully that such a wide proposition was not yet accepted into English Law.

For reasons explained below this regret is shared for such a flexible proposition would cover expulsion cases without the need to resort to implied terms in contract or the tenuous property interests previously noted. The proposition would be even more effective if the English courts were to recognize that rights in membership may exist above contract for the difficulties inherent in the contract theory go deeper than those already indicated.

Two matters in particular merit special attention.
(a) **Exhaustion of internal appeal machinery**

An important consequence of the contract theory as a basis for jurisdiction is that it is open for the Court to refuse to assume jurisdiction until the plaintiff has exhausted the appeal machinery provided within the association. Although the rules may not purport to oust the jurisdiction of the Courts on questions of law, the rules may require the members to exhaust their domestic remedies before having recourse to the Courts. Where the rules expressly state that they operate as a contract and the member explicitly undertakes not to become a party to litigation against the association until he has exhausted all remedies allowed him by the rules, then the Courts have shown a liking for the literal interpretation of the contract and have denied a remedy.

But in the absence of such an express term is the complaining member bound by an implied term in the contract of membership to exhaust first his internal remedies? It is submitted that he is not. In **Ronsor v Musicians Union** no objection was taken in the House of Lords to the failure to exhaust internal remedies, and there is Australian authority to the effect that a duty to exhaust internal remedies will be found against the expelled member only on the clearest evidence.

Furthermore **White v Kuzich** has been distinguished by a Canadian Court and in a recent decision Lord Denning, in refusing to find a duty to exhaust, distinguished
on the basis that in that case there existed "special circumstances" which, it is submitted, were the express undertakings to exhaust internal remedies.

These decisions it is contended are conclusive on the absence of an implied duty to exhaust. There is, however, a recent first instance English decision to the contrary—but this is better explained on the grounds of absence of natural justice and is clearly against the weight of authority. The strongest academic support for an implied duty to exhaust internal appeals comes from Rideout but he appears to beg the question by positing his duty on "an adequate system of appeals". Moreover it is submitted he is on no firmer ground when he argues that the member is under a moral obligation to exhaust internal remedies nor when he asserts that the implication to exhaust would settle disputes in an orderly, speedy way.

As will emerge it is no longer tenable to claim that an intending unionist is free to bargain when, by economic necessity, he is forced to join a union and his alleged moral obligation to the union seems flimsy ground for refusing legal redress. Furthermore the establishment of an implied duty to exhaust could well work hardship where the expulsion is immediately effective with some delay before the domestic tribunal determines the matter. This is a particularly grave objection for the plaintiff in the position of the corn-porter in ABBOTT v SULLIVAN, or the member of any association the immediate expulsion from which results
in harm to livelihood. Even where livelihood as such is not prejudiced by expulsion it is not certain that domestic tribunals will be either speedy or orderly. The final domestic appellate tribunal of a political party is usually the Annual Conference. Hence a member expelled after one Conference must wait 12 months and in the nature of such bodies, is hardly likely to have his appeal determined in a placid, orderly manner.

It is submitted that judicial statements against any such implied duty to exhaust internal remedies should be welcomed. Statements to the contrary represent a return to the traditional reluctance to intervene in internal affairs of private associations and New Zealand Courts have too long abandoned this reluctance to return to it now by way of an "implied term". Indeed in this context the Courts have utilized the implied duty the other way by holding that the duty to exhaust internal appeals does not operate against the member whose expulsion is inoperative in law because of a failure to observe the Rules governing expulsion or a violation of the principles of natural justice. Likewise, the member who avails himself of the appellate machinery within the association is not thereby estopped from resorting to the Courts if the domestic tribunal is not properly constituted or departs from the procedure which the rules intend should be followed in cases of expulsion.

Here the Courts are showing a readiness to find an implied term to enable them to protect the interest of the
member against the collective interest of the association. Any attempt to find an implied duty to exhaust internal remedies is unlikely to marshall judicial support in this country.

(b) **Natural Justice**

The second question is whether or not the domestic tribunal in exercising its disciplinary powers is required to comply with the principles of natural justice. It is submitted that the domestic tribunal is so required, but that this is not necessarily of any comfort to the complaining member.

The meaning of natural justice cannot be determined helpfully from any one decision. Nevertheless there is recognized to be an irreducible minimum of matters which must be observed by domestic tribunals of private associations. These were explained in an early New Zealand decision by Herdman J.

"The rules of natural justice appear to mean, for this purpose, that a man is not removed from office or membership, or otherwise dealt with to his disadvantage without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of Justice will not interfere, not even if it thinks that the decision was in fact wrong."

It is clear from this that the Courts will intervene if bad faith is established or if the domestic tribunal
has not acted in a formally careful manner, and the narrow meaning thus given to natural justice in this context means that expulsions which are procedurally correct will not be impeached. This submission is reinforced by the knowledge that the Courts state that, while in a court of Law not only must justice be done but must manifestly be seen to be done, "in the case of a domestic tribunal...the standard is not nearly so exacting" and that for bias to be effective in domestic tribunals it must be "invincible".

The adoption of such vague and minimal standards of natural justice makes the task of the expelled member extraordinarily difficult. Of necessity domestic tribunals of private associations frequently include persons whose interests are adverse to the members with whom they are dealing, or who must act as both prosecutors and judge.

The latter situation is well illustrated from the Constitution of the New Zealand Labour Party which empowers the National Executive "on its own motion" to expel a member after giving notice and a hearing. Appeal is to the same National Executive or to the Annual Conference of the Party. The latter body by its very nature is unlikely to be able to go into the issues either fully or fairly, and the former body is unlikely to rescind its earlier decision for obvious reasons. Partisanship, political expediency and policy will always be relevant to expulsions from political parties and trade unions and this reality seems to be accepted by the Courts which will not find bias in
the face of correct observance of procedure.

Similarly the observance of correct procedure goes a long way to establishing good faith and though in isolated cases a vendetta can be proved the plaintiff is generally in the position of having to build bricks without straw. Acceptance of the contract theory of membership means that if the rules are followed the Courts will not intervene. Natural justice is thereby reduced to a procedural matter. A further limitation upon the effectiveness of the natural justice plea is the judicial acceptance of a power to exclude the operation of natural justice by privative clauses, though the existence of such a power "is the subject of much confusing and conflicting authority".

The most serious limitation of all, however flows from the emphasis on the observance of procedure. If the expulsion is procedurally correct and within the Rules then the Court will not assume jurisdiction to review the merits of an expulsion by way of retrying disputed issues of fact or reviewing the substance of the expulsion. The Courts have gone so far as to say that it is "impossible" for them to act as appellate Courts from the decisions of domestic tribunals.

There are, of course, considerable barriers to the Court's power to act as an appellate body from domestic tribunals of private associations. On a broad front two factors have to be balanced; the importance of membership to an individual, particularly in "closed-shop" unions, on
the one side and on the other the importance of autonomy to the association, particularly in the control of membership. This latter consideration is of most relevance to a trade union for whose ultimate efficiency unity is the only strength and for the protection of which strength expulsion is the ultimate sanction. Striking a balance between these two interests is extremely difficult and accounts in part for the judicial reluctance to intervene in social clubs and other voluntary associations by way of reviewing the merits of an expulsion.

But while at first glance such reluctance holds out little comfort to the expelled the Courts in reality have kept open the door to review, by reserving to themselves, almost by definition, the sole right to render final decisions on questions of Law. It is thus open to the Courts to review an expulsion by arguing that from the contract theory of membership it follows that there can be no expulsion unless there is a rule covering the alleged offence. Assistance will be given to a member whose association attempts to punish him for something not a breach of the rules. Thus in Gould v Wellington Waterside Workers Union a refusal to pay an improper levy was held not to be good ground for an expulsion, and in Dodwell v The Bishop of Wellington the Court made clear its readiness to rule upon the proper construction of the Constitution and Rules of a church in determining whether or not a licence to preach had been properly revoked. In the latter case the Court
emphasised that its jurisdiction would enable it to "restore to the plaintiff any temporal advantages of which he might appear to have been unjustly deprived" by virtue of the Bishop of Wellington over-reaching his jurisdiction.

It follows that final and binding decisions on questions of law cannot be within the competence of a domestic tribunal and the Courts will be swift to nullify privative clauses which seek to oust the jurisdiction of the Court in this manner. The strongest recent illustration of this is the English Court of appeal decision in LEE v SHOWMENS GUILD OF GREAT BRITAIN in which Denning L.J. limited the jurisdiction of domestic tribunals in two ways; firstly by resorting to the omnibus authority of public policy which he said restricts parties from making whatever contract they wish and secondly by extending this rationalisation to cover specifically the point that the parties cannot by contract oust the jurisdiction without recourse to the Courts in case of error of law.

The importance of LEE v SHOWMENS GUILD OF GREAT BRITAIN is its affirmation that decisions of domestic tribunals may be reviewed by the Courts on the grounds that the domestic tribunal has misconstrued the rules. On the broader front this represents a major intrusion into the arena of voluntary bodies as it amounts to a restriction on the parties theoretical freedom of contract. It is not surprising that the decision has been followed in New Zealand for not only had it been anticipated in part but also the New Zealand experience is that supervision of
voluntary associations is more pronounced than in most Commonwealth countries. Thus the principle in *Lee's Case* 39 has been applied to Racing Conference decisions and the deliberations of the executive organs of industrial unions. 40

But attractive though this approach may be it is submitted that its effectiveness for the expelled member is limited by three considerations.

The first is the indication by Denning L.J. in *Lee v Showmen's Guild* that this ground for review may be confined to those domestic tribunals whose decisions prejudice such significant individual interests as that of livelihood. 41 For the member of a union in New Zealand this makes no difference for Courts in this country have long recognised that as a man's right to seek employment is directly affected by any action which the executive of the union may take under the rules providing for expulsion then the executive when dealing with a member under those rules must act strictly within the limits of the powers conferred upon it. 42 But where livelihood is not affected the member may be unable to avail himself of this ground for review notwithstanding that the harm to his reputation may be considerable.

Secondly the approach adopted in *Lee's Case* will be ineffective if the Court chooses not to treat the rules of a given association as creating contractual rights and duties. If the rules are not so characterized they can have no legal significance and their construction will not
be a question of Law. Such a view might well be taken of the relationship of members of a political party and in such circumstances the Court would be able to assume jurisdiction only on the basis of the infringement of a property right. The artificiality of this has been indicated.

The third limitation may also be conveniently illustrated from the rules of a political party. The jurisdiction and power to expel from the New Zealand Labour Party are found in Clause 7(i) of the Constitution which reads as follows -

"Upon the application of any Branch or any L.R.C. or by its own motion, the National Executive may, for reasons determined sufficient by it, expel any persons from membership of the Party, provided, however, that such persons shall be notified of such reasons and be given opportunity to state his case before the National Executive and, if expelled, has the right of appeal to Annual Conference."

This generally worded rule is so nebulous as to cover any circumstance and it allows the Labour Party's Executive to expel whomever it chooses without specifying any offence. Furthermore the rule is so widely framed that it is difficult to see how a question of law can arise as it is impossible for the disciplinary body to exceed the authority which the rules give it. Rules of golf clubs and industrial unions are typically framed in this broad manner with the question of whether or not a given member's conduct merits expulsion being purely a question of opinion for the disciplinary organ. In this way the basis for review adopted in Lee v Shommens Guild and followed in Prior is removed.
provided the expelling organ observes the procedural rules by giving notice and a hearing. The expulsion provisions typified by those in the New Zealand Labour Party Constitution are not so drafted as to give the National Executive the power to render a final decision on a question of law so that the rule cannot be held void as contrary to public policy. For this and other reasons given above a person expelled even maliciously from the Labour Party is unlikely to have his grievance entertained in a Court of Law.

The traditional contractual and property bases for assuming jurisdiction are thus shown to be artificial in the context of political parties and church bodies. The contract theory is equally artificial when applied to trade unions in contemporary New Zealand. The most unrealistic aspect of the theory lies in the assumption that the member has consented to the contract. While in theory the member has consented to the wide powers given the disciplinary body in reality he has no choice in the face of "closed-shop" practices. The union imposes the rules and if the member wishes to obtain employment he has no option but to accept the rules as they stand.

There is evidence that the basic assumption of the contract theory is being eroded as both Courts and Legislature come to grips with the reality of union membership. In *Lee v Showmens Guild* Denning L.J. recognised the artificiality of treating the Unionist as having consented to the rules. This lack of consent has been recognized.
by the New Zealand Legislature which restricts the power of the industrial union to impose whatever rules it thinks fit. Furthermore once the Courts read into the alleged contract implied terms, say to observe natural justice, then it may be argued that this also is a recognition of the social reality that where one party is virtually compelled to accept the rules if he is to work then there is no point in talking of freedom of contract or agreement between the parties.

Obviously the modern voluntary associations, in particular the industrial unions, are confronting the Courts with tasks for which traditional concepts of property and contract are inadequate, and for which new concepts are needed.
PART SEVEN: THE TORT THEORY
THE TORT THEORY

A third criterion for assuming jurisdiction in internal affairs of associations is the tort theory. Under this theory a members relationship with his association is seen as something more than contractual and more than a property right. The members rights in the association are characterised as status, the wrongful interference with which is actionable.

This view has widespread academic acceptance in North America, indeed it is said to have originated in an article by an American scholar, Zachariah Chafee, but the extent of judicial acceptance is less certain.

Before examining the New Zealand case law it is important to remember always that it was not for every violation of a members relationship with his association that Chafee urged redress. In his view the Courts would assist only where some interest of substance or personality was at stake.

The main objection which Chafee saw was that to allow any such action would be to depart from the traditional concept of the voluntary association as a non-entity, incapable of suing and largely immune from civil suit. This objection has been supported by academics. Professor Ford wrote that, for this reason, "it is doubtful whether English and Australian Courts would at present accede to the suggestion" and another writer has repeated himself that wrongful expulsion is not as such a tort and that the immunity accorded English trade unions in tort means that "as yet
there is no tort and no tortfeasor". In both 

RONSOR v MUSICIANS UNION and ABROTT v SULLIVAN a claim in tort was rejected, the cause of action being recognized to be on the basis of breach of contract only.

Commenting on the latter decision, Professor Lloyd expressed the opinion that an action in tort is unlikely to be granted for the reason that, before it can, there must be a right to membership established at law which has been infringed. If such a right exists it does so by virtue of contract and Common Law will not allow an action framed in tort to recover for what is a breach of contract. In short, there are statutory and judicial objections to bringing an action in tort against an English domestic tribunal which has wrongly expelled a member.

There are, however, limitations upon the applicability of the English decisions to New Zealand. To begin with there is no New Zealand legislation prohibiting actions in tort against trade unions. The outcry in England against the TAFF VALE decision did not find an echo in New Zealand largely because of the different position of trade unions under arbitration legislation. This legislation confers corporate personality upon industrial unions which register under the Act and this device avoids the criticism that, even if there is a tort of expulsion, there is no tortfeasor. Even when faced with non-registered unions the New Zealand Courts have taken a robust view of the reality of the existence of the union and it is noteworthy that KELLYS CASE,
which was initially a stumbling-block in Bonsor v Musicians Union has been ignored in this country.

The most significant development in New Zealand limiting the application of English decisions, however, is the recognition both by Parliament and the Courts that membership of a union carries rights and duties which are different from either contract or property.

The clearest expression of the recognition of interests growing out of contract is found in the judgment of Hosking J. in Gould v Wellington Waterside Workers Industrial Union of Workers.

"So far as the acts of the defendants consisted in preventing the plaintiffs from obtaining employment, I think the defendant's conduct amounted to a tort. It was something beyond a breach of the rules. The plaintiff possessed a status with regard to the right of preferential employment, not dependent upon the rules but upon the industrial agreement, and created not merely by the consent of the Union but by the correlative consent on the part of the employers to restrict their area of choice of employees. This consideration, I think, will serve to distinguish these cases from what I may term the club cases."

The facts in this case were not dissimilar to those in Abbott v Sullivan as in both the members name had been wrongfully removed from the register. But while the English decision indicates that for this there is no remedy, the New Zealand shows that such an interference is a tort.

The reason for the difference lies in the fact that membership of an industrial union in New Zealand is characterised as status. Once this is accepted then it is open to the Courts to hold that any wrongful interference with,
or deprivation of, this status is an actionable wrong.

Early acceptance of the status of member of a union may be found in New Zealand decisions with the Courts accepting the concept with an initial reluctance. Speaking of the Industrial Conciliation and Arbitration Act 1894, Stout C.J. observed wryly that it

"in effect abolishes 'contract' and restores 'status'. The only way the Act can be rendered inoperative is by workmen not associating or not joining the union. No doubt the statute, by abolishing "contract" and restoring "status" may be a reversal to a state of things that existed before our industrial era, as Maine and other jurists have pointed out. The power of the Legislature is sufficient to cause a reversion to this prior state, 'though jurists may say that from "status" to "contract" marks the path of progress." 17

Status is a nebulous term and it is unlikely that any inquiry into its meaning can be fruitful for its meaning varies with its context. Thus to a lawyer the status of marriage means something different from the status of adoption which in turn differs from the status of legitimacy. The very slipperiness of the term has been seized on by one writer as a sound reason why it should not be extended so as to include membership of a union, yet the very elasticity of the term may be its great advantage in this context.

In the course of what is probably the best known study of the term, C-K. Allen defined status as

"the condition of belonging to a particular class of persons to whom the law assigns certain legal capacities or incapacities or both." 19
Later in the same article the learned author interpreted a "class" of persons contemplated by law as meaning:

"a class of such a kind that, by an established rule of law, legal consequences result to the members from the mere fact of belonging to it." 20

It is in this sense that the New Zealand Legislature and Bench use the terms status and class.

The New Zealand Courts have never been in any doubt that "unionism...affects the status of workers" nor that the Industrial Conciliation and Arbitration legislation has a special nature in that it affects status and even if status and class have no precise jurisprudential meaning Connolly J. was confident that it was not "in any way straining the meaning of the two words "status" and "class" to apply them so as to distinguish unionists from non-unionists". 23

It is important to notice however that the Courts were protecting established membership in a union, so that an applicant for membership of a union, merely by complying with the rules of an industrial union, did not thereby acquire as against the union any enforceable right to admission. Once a man became a member then the Courts would issue writs to compel the union to recognise this and to enter the plaintiff's name on the register. But because of the analogy with voluntary associations generally the New Zealand Courts refused to recognise a right to admission and a duty to admit. 24 25

The Courts took the view that membership could properly be restricted to persons complying with the Rules and such
Rules could be as harsh or as vague as the Union wished. Hence to challenge any exclusion the rejected applicant had to show mala fides in the consideration of his case. That this was no easy matter is shown by Batt v Napier Waterside
Workers Industrial Union of Workers.

The plaintiff sought mandamus to admit him to the Union. His claim was based on the contention that in applying for membership he complied with the Rules and thus inso facto was entitled to membership. The Rules of the Union restricted membership to persons of good character and sober habits. Although conceding that "the refusal to admit the plaintiff does not proceed from any paramount desire to keep the union pure and unsullied" the trial judge, Reed J., refused relief. Unanimously the Court of Appeal upheld this decision notwithstanding evidence of a letter apparently indicating bias and notwithstanding judicial expressions of sympathy with the plaintiff. The reasons which weighed with the Executive of the Union were never revealed and the breadth of the exclusion rule was such that one is left wondering whether a plaintiff in Batt's situation could ever succeed in establishing bad faith for he is in the unenviable position of having to build bricks without straw.

But, the merits of the issue aside, the decision is of some interest as an illustration of the reluctance of the Courts to intervene in private associations. With few exceptions the New Zealand judiciary failed to appreciate that the new industrial unions were not merely voluntary
associations analogous to social clubs. The outstanding exception was Ostler J. who in a number of judgments, several of them dissents, made clear his recognition of the new unions as something more than social clubs. At the same time the Courts recognized that as there was no common law right to membership of a voluntary association then any right to admission could be secured only by virtue of legislation. Furthermore any hint of compulsion was anathema to the Courts because "Compulsion is the antithesis of unionism. Unionism imports voluntary action". The unspoken assumption of this epigrammatic observation is that unions were private bodies to whom autonomy was the essence. On the other hand there was an emerging realisation in Parliament that the unions were a novel form of association and that membership of these bodies was a matter of public interest. The result was that in 1936 Parliament enacted the Industrial Conciliation and Arbitration (Amendment) Act which conferred power upon the Arbitration Court to order compulsory unionism and, more important, gave every applicant a reasonable right to admission. When re-enacted as Section 174 of the Industrial Conciliation and Arbitration Act, 1954, the Statute empowered the Registrar to scrutinize the union rules to ensure that they permitted a reasonable right of admission.

The real interest in the existence in this country of a legal right to admission lies in the fact that Parliament has recognized a right to work and legislation has
secured this right. A New Zealand worker has a right against the Union that it not interfere with his employment by an unreasonable denial to him of admission to the union. New Zealand Courts have long recognized the existence of a right to work with one judge at first instance going so far as to describe the right as "the natural right of every human being". A judicial statement on similar lines was felt to be too extreme when uttered by a Canadian judge many years later and it is certain that the New Zealand Bench never went so far as to find that the right to work was a natural right.

But even without going as far as Reed J., the Bench in this country has used the concept of a right to work to afford protection to the member of a union whose status as member is maliciously or wrongfully interfered with. Thus, although reluctant to mandamus a union to admit, the Courts have issued mandamus where a member's name was improperly removed from the Registrar of Members and have granted mandamus requiring the union to recognize as a member someone who was improperly expelled. More recently the right to work was even used as grounds for allowing a right of being heard in proceedings for certiorari when, as a result of the determination of the dispute, members of the union were likely to be deprived of their opportunities of obtaining employment.

There are good reasons why both Courts and Parliament recognize the right to work. "Closed-shop" unions are the
rule in this country, despite the abolition of compulsory unionism in 1961, with the result that "the mere wrongful exclusion of a member from the union is sufficient to ensure that he gets no employment. The expulsion excludes him from the opportunity of getting work". This gives the union very great powers over a dissatisfied member who is unable to enter into a new contract with the union and whose initial "consent" is now accepted judicially as unreal. In any event Parliament in New Zealand cut the ground from under the contract theory of membership by ensuring that entry to a union was a statutory right, so that it cannot be maintained that any bargain is struck in this country as a pre-condition to entry to a union.

When this legislation is superimposed upon a considerable body of case law what clearly emerges is a recognition that a member of an industrial union has a status, a wrongful deprivation of which is an actionable wrong. The effect of the decisions is to create a "right" to work in the sense that there must be no wrongful interference with the capacity with which the individual has to work or with his relations with a particular employer.

The existence of such a right is of considerable advantage to the improperly expelled member of an industrial union in New Zealand for unjustifiable interference with the right is redressible by other means that recourse to protection of alleged property or contractual rights and the New Zealand Courts are therefore able to grant a remedy
where traditional heads would not recognize a redressible grievance.

Thus in MILLER'S CASE the plaintiff member offered to pay his dues on numerous occasions. These offers were rejected over a course of time sufficient to make the plaintiff non-financial and unable to obtain work. Ostler J. held that the refusal to accept the dues was an actionable wrong, for which damages were recoverable, because the plaintiff was "deprived of an opportunity of obtaining work".

This approach opens up grounds for relief for members in the situation of the plaintiff in BONSOR v MUSICIANS UNION and the advantage to the New Zealand unionist whose name has been erased from the register is shown by contrasting ABBOTT v SULLIVAN and GOULD v WELLINGTON WATERSIDERS. Moreover the right to work is wide enough to subsume the tortious heads often relied upon. The advantage of the right to work is shown in HUGHES v NORTHERN COALMINE WORKERS where, although the action was brought in conspiracy and intimidation, it is clear that the reason why relief was given was that no regard was paid "to the grave interference resulting to his right to earn a living at his usual occupation and near his own home".

In avoiding the difficulties attendant upon established heads such as conspiracy, the New Zealand Courts have developed a new tort interest whose emergence long precedes recent similar developments in Canada and England and whose recognition has been strenuously urged by writers in other jurisdictions.
But the New Zealand Courts could not secure this interest completely, and enjoyment of the right to work could not be achieved without some control being exercised over membership requirements of unions. That the Legislature took this step is a recognition that union membership has become an indispensable condition to securing employment and, more important, that what was seen formerly as a matter for private agreement among union members has become a matter of public interest. Thus in New Zealand the right to work is to be equated with the right to join a trade union and the member of a union has a relational interest which the Courts will protect. The Courts in this country have long anticipated the decision in *Nagle v Fielden* to the effect that an association exercising a virtual monopoly in an important field of human activity cannot exercise its discretion capriciously so as to deprive a person of the right to work.

But because union membership is seen as a status there has developed a confusion between the status and its incidents so that it often appears that the Courts are treating an interference with the right to work as an interference with status and vice versa. Fair J. was once moved to afford relief to a unionist because no regard was paid "to his right to become a member of the Union, or to the grave interference resulting to his right to earn a living" but it is not clear whether it was status or the incidents thereof which was the basis of protection.
For status to have any meaning in a legal context its incidents and consequences must be explored. It may be that the outcome of this exploration in the field of incorporated private associations in New Zealand points the way to the expression, and open recognition, of a new concept of the relationship of a member and his association. A lead has been given by the distinction in industrial union cases between the effect of a breach of the rules, which gives rise to an action in contract, and the loss of employment opportunities by interference with a right to work, for which damages are awarded. What these decisions have done is to openly recognize that interference with the status of a member of a union is an actionable wrong.

There are good reasons why this approach to membership of any association should be applauded. To begin with recognition of the status interest, wrongful interference with which is actionable, enables the Court to avoid the doubtful exercise of trying to justify relief in terms of some existing remedy, whether contract or not. Use of the status concept allows the Court to supplement or modify, or even ignore, the Constitution of the association without having to resort to implied terms, and it allows the expelled member to commence an action without first having to exhaust domestic remedies. Furthermore the relational approach allows damages to be awarded in addition to declaration and injunction and damages may well be more attractive to the expelled member than other remedies. Clearly it is not difficult to equate
the measure of damages for deprivation of status with the measure of damages for an interference with existing personal interests such as reputation. Indeed expulsion is closely akin to defamation as Roscoe Pound has observed.

The status concept aids the member who is in an association possessing no property or where there is an absence of contractual rules. A share-holding member of a profit-making association, whether incorporated or not, is protected in his interests and it is difficult to see why shares in, say, a trading company, are any more worthy of protection than membership in a private non-profit association. The only effective protection in the latter situation, it is submitted, lies in the extension of the status concept of membership. This will be facilitated with the growing recognition that the element of personal negotiation and agreement has largely disappeared from this area just as it has from many areas of what have been traditionally thought of as contractual relationships.
PART EIGHT: REMEDIES
REMEDIES

Once the Court has determined that it has a basis for assuming jurisdiction the next question concerns the availability and adequacy of the remedies, for merely having a suitable basis for jurisdiction is little comfort to the aggrieved member if there is no appropriate remedy. As most Courts think in terms of contract law when cases of expulsion arise it follows that wrongful expulsion is understood in procedural terms and therefore consists in expulsion not in accordance with either the rules or the principles of natural justice.

Accordingly the remedies traditionally available are a declaration that the purported expulsion is a nullity and an injunction to restrain the defendants to act upon the purported expulsion. Because most private associations in New Zealand are incorporated a plaintiff in this country has a choice as to defendant so that the declaration and injunction will lie against both the association and such members as ordered the expulsion. Even where the association is unincorporated an action may still lie against the association if there is an enabling statute. But where the association lacks any statutory recognition several problems arise.

To begin with the adequacy of the prerogative writs and equitable remedies are open to question. As both declaration and injunction are discretionary they will not automatically lie. Moreover it has been held that certiorari
and prohibition are available only in respect of bodies which draw their power from statute and the traditional view that domestic tribunals owe their existence to contract limits the availability of these remedies. But the most serious objection to the adequacy of the prerogative and equitable remedies is that if a man is wrongfully or maliciously expelled from a social club or political group then the injury to his reputation in the community may not be recompensed by declaration or injunction. Indeed it is unlikely that enforced reinstatement will have any compensatory effect for the members of an association cannot be compelled to associate with a man if they have no wish to do so and persist in refusing to do so. As the Courts see a change of rules as within the sole competence of the association then it is open to the association to circumvent the order by altering the standing rules of the association in accordance with the prescribed formalities. An extreme illustration of the ultimate inadequacy of the writs in the face of persistent refusal of members to associate with an expelled fellow is given by Roscoe Pound who cites a club which was ordered to restore an expelled member. This the club did. It then disbanded and formed a new club from which the recalcitrant member was excluded.

It is of course open to the expelled member to bring his action within one of the established categories of tort or contract. Here the nature of the remedy is dependent upon the characterization of his "interest" in the association
If the interest is contractual then declaration may lie on the justification that an implied term has been broken. Further, the English trade unionist may obtain damages for improper expulsion but the action sounds in contract only. It must be remembered that in England an action against the union alone is barred by statute yet it seems strange that the plaintiff in Bonsor v Musicians Union did not bring an action against the secretary for interference with contract. It seems from the English trade union decisions that the Common Law remedies are inadequate and that "the law relating to possible actions brought by a member against his trade union is in a most unsatisfactory state".

The New Zealand unionist, on the other hand, has a number of Common Law remedies available. The tort of conspiracy has been successfully invoked in New Zealand litigation involving unionists despite the difficulty of establishing that intention to injure rather than protection of the union was the object of the expulsion. Another obvious action is the tort of intimidation which has long been successfully invoked in New Zealand and has been recently rescussitated in England. A further remedy may be found in the tort of interference with contract.

There is nothing novel about these traditional remedies most of which are available to members of private associations anywhere in the Common Law world, subject always to problems of procedure. Where the New Zealand member of a private association has the advantage over his counterparts...
elsewhere is in the availability to him of an action in damages for wrongful interference with his rights as member. These rights are characterised as status and it is the provision of a remedy for the interference with this civil right which distinguishes the law relating to wrongful expulsion in this country from the law elsewhere in the Anglo-American world.
CONCLUSION
CONCLUSION

A decade ago Lord Devlin concluded that because of the receding influence of the Common Law a private citizen in most instances could not expect to obtain legal redress when he was in conflict with the Executive. The same depressing conclusion has been drawn of the position of the aggrieved member of a voluntary association in Common Law jurisdictions. But such a conclusion is not completely true of New Zealand where there is a high degree of legal intervention in the internal affairs of private associations. The New Zealand experience is that the traditional reluctance to intervene in private associations has greatly broken down and for this there are several reasons.

The Legislature regulates the conduct of most associations whether they are insurance companies or golf-clubs and the result is that the private association has ceased to be private. Both Parliament and the Courts have recognized that society at large has an interest in the resolution of conflicts inside associations. It is particularly when this conflict affects livelihood that the New Zealand Courts have long thought in terms of protecting the member against the group, even to the extent of indicating willingness to enter disputes in church bodies.

This protection accorded livelihood is a recognition of the dissimilarity of modern trade unions and traditional forms of private associations. The administrative decision to allow incorporation for private associations is a
recognition that society is affected by the strength of aggregates of individuals. The reconsideration of the relationship between association and State was made necessary by the New Zealand social and political experiment in fashioning a Welfare State. In turn these new sociological considerations have had a profound effect upon the attitude of New Zealand Courts to aggregates of individuals for, unlike other Common Law jurisdictions, in this country the grouping of persons into private associations is regarded as being legally significant in that it creates legal relationships *sui generis*.

Membership of these groups is something more than contractual and the interest in the association which the Courts protect can only loosely be characterized as a property interest. So tenuous were the property rights which ostensibly were the basis of protection and relief in cases such as *Millar v Smith* and *Prior* that they can only be described as fictions, behind which the Courts tackle the real issue - the member's status.

Thus both the Legislature and the Judiciary in New Zealand view as socially desirable the extension of legal protection to interests which stem not from contract or property but which are intrinsic in the relationship itself. In short, membership in private associations in New Zealand is seen as conferring civil rights susceptible of private enjoyment and legal protection. Hence there has developed in New Zealand a novel conception of the legal relationship
arising out of membership of a private association, whether incorporated or not, and the Courts treat any unjustifiable interference with this relationship as a substantive wrong.
Footnotes - Introduction

1 Halsbury, Laws of England (3rd ed.) Vol. 5 p. 252; see also Cameron v Hogan (1934) 51 C.L.R. 356, 370-71.

2 For example Wellington Waterside Workers Industrial Union of Workers v Hargreaves (1934) N.Z.L.R. 795, 826 per Johnston J.

3 This is particularly true of unions operating under compulsory arbitration in New Zealand for "A man's means of earning a livelihood may, under the industrial conditions which obtain in New Zealand, depend upon his being able to continue in a union". McGregor v Young (1920) N.Z.L.R. 766, 782 per Herdman J.

4 For a full treatment see Ford, H.A.J., Unincorporated Non-Profit Associations (1959), a comparative Anglo-American survey.


Footnotes - Part Two

1. See generally, Hickling, M.A., TRADE UNIONS IN DISGUISE (1964) 27 MLR 625.

2. "A (Maori) tribe is not an entity known to the general law...", NICHOLSON v KOHAI (1909) 28 N.Z.L.R. 552, 555 per Chapman J.

3. ". . . trade unions are chiefly pressure groups, free to bargain with governments of any political colour." Oliver, W.H. THE STORY OF NEW ZEALAND (1960) p. 175. For a fuller treatment of the social and political position of unions see Sawer, G., LAW IN SOCIETY (1965) Chpt. VIII.

4. To avoid an inquiry which at the best would be peripheral to this study it is proposed to equate Sovereign with Parliament in the discussion which follows.


6. The different approach to partnerships in England, France and Scotland is an illustration. In Scotland the firm is "a separate legal personality," Gloag and Henderson, INTRODUCTION TO THE LAW OF SCOTLAND (6th ed.) p. 254. See also Gibb, A PREFACE TO SCOTS LAW (1944) p. 57.

7. (1911) 27 L.Q.R. 90, 94.

8. The Joint Stock Companies Act, 1856; The Companies Act, 1862.

9. The same may be said for trade unions before 1871.


13. Corporate form may be obtained by private associations under the following Acts (the list is not exhaustive):-
   FRIENDLY SOCIETIES ACT 1909; INCORPORATED SOCIETIES ACT 1908; INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1954; INDUSTRIAL SOCIETIES ACT 1908.
See Knight & Sharle v Dove [1964] 2 QB 631, c.f. Sturgess (1924) 33 Yale L.J. 383, esp. 398, where it is argued that statutory authority is not material to the question of whether or not unions are legal entities.

Miller v Collett (1913) 32 N.Z.L.R. 994; 15 GLR 577.


Dodds (1929) 42 Harv. L.R., 977, 1006. For an illustration of the truth of this observation see the definition of "person" in the Acts Interpretation Act 1924 s. 2 (N.Z.).

See above footnote 13.


The Taff Vale decision was "...perhaps the most curious perversion of justice in recent English legal history." Mabbott State and Citizen (1947) p. 115.

Taff Vale was "...a piece of pure judge-made law for which no historical justification or legal precedent can be found," Robson J. (1935) 51 L.Q.R. 195, 204, c.f. Foot's claim that Taff Vale "maintained the dignity of the law by a certain relaxation of its logic," English Law and Its Background (1932) p. 202.

(1957) 20 M.L.R. 105.


TAFT v. VALLE, I 901 A.C. 426; BONSOR v. MUSICIANS UNION I 956 I A.C. 104; ABOtt v. SULLIVAN I 952 I I &B 189.

I 936 I N.Z.L.R. 254.

Friendly Societies Act, 1909.

I 901 I A.C. 426.

I 936 I N.Z.L.R. 254, 263 per Northcroft J.

Supra.

See Trade Union Act, 1908; Friendly Societies Act, 1909.

TRADE DISPUTE ACT, 1906, SECTION 4 (U.K.).


WELLINGTON WHARF LABOURERS UNION v. B.N.Z. (1914) 33 N.Z.L.R. 842, 844 per Stout C.J.


THE WELLINGTON WHARF LABOURERS' INDUSTRIAL UNION OF WORKERS v B.N.Z. (1914) 33 N.Z.L.R. 842, 843 per Stout C.J.

ibid, p. 844.


Industrial Conciliation and Arbitration Act 1954, Part X.

See Ford H.A.J. UNINCORPORATED NON-PROFIT ASSOCIATIONS (1959) Chpt. IX.

1894 - 1954.

See above footnote 13.
50 FORSYTHE v THE WELLINGTON CENTRAL MISSION (REG.) (1905) 24 N.Z.L.R. 780.

51 This is the Pluralist - Nonist debate: See for example Figgis CHURCHES IN THE MODERN STATE (2nd ed.) (1914); LASKI THE PERSONALITY OF ASSOCIATIONS (1916) 29 Harv. L.R. 404; Maggid ENGLISH POLITICAL PLURALISM (1941); C.F. Chafee, (1930) 43 Harv. L.R. 993.


53 GRAFF v EVANS (1881-2) 8 Q.B.D. 373.

54 IN RE JUNIOR CARELTON CLUB (1922) I.K.B. 166.

55 OPIS v PETERSEN (1943) N.Z.L.R. 246.

56 TRADE UNION ACT 1871 SECTION 4.


58 The Carpenters Union was de-registered in 1949 for striking over the question of fringe benefits and on 28th February 1951 the N.Z. Waterside Workers Union was de-registered - see Bassett, M.E.R. 'THE 1951 WATERFRONT DISPUTE', unpublished M.A. thesis, University of Auckland.

59 McDougall v WELLINGTON TYPOGRAPHICAL UNION (1914) 16 G.L.R. 309, 311 per Chapman J.

60 PROGRESS ADVERTISING LTD. v AUCKLAND LICENSED VICTUALERS INDUSTRIAL UNION OF EMPLOYERS (1957) N.Z.L.R. 1207.

61 (1843) 2 Hare 461; 67 E.R. 159.


63 ALLEN v AUCKLAND AND SUBURBAN LOCAL BODIES LABOURERS UNION (1938) G.L.R. 66.

64 PRIOR v WELLINGTON UNITED WAREHOUSE AND BULK STORE EMPLOYEES INDUSTRIAL UNION OF WORKERS (1958) N.Z.L.R. 97.
Some still register under the FRIENDLY SOCIETIES ACT 1909. Occasionally unions voluntarily de-register from the I.C. & A. Act 1954. This occurred on a small scale in 1962-1963.

Above footnote 13.

Baldwin v Pascoe (1889) 7 N.Z.L.R. 759.


WELLINGTON WHARF LABOURERS UNION v Bank N.Z. (1914) 33 N.Z.L.R. 842, 844 per Stout C.J.
Footnotes - Part Three

1. **Garry v Shaw** (1913) 32 N.Z.L.R. 726.


4. See **Abbott v Sullivan** [1952] I.K.B. 189 (see below.).


7. **Cunle v Lester** (1893) 9 T.L.R. 480 (contract).

8. **Evans v Hooper** (1875) 1 Q.B.D. 45.

9. see cases in **Dalys Club Law** (5th ed.) at p. 44.


11. See **Williams, Joint Torts** (1951).


14A Representative proceedings are also available in the Magistrates Court, see Magistrates Courts Rules, 1948, Rules 45 and 115.


17. **Takekere Kere v Cameron** [1920] N.Z.L.R. 302; 1920 G.L.R. 153. See to same effect **Markt v Knight Steamship Co.** [1901] 2 K.B. 1021. "If this is correct law than the strange result follows that it would be possible to have an action for equitable relief and one for damages based on the same facts with the latter failing and the former succeeding."
See generally Lloyd (1953) 16 M.L.R. 359.

See generally Lloyd (1956) 19 M.L.R. 121. If the association has a trust fund a possible procedure is to join the trustees to represent the members in defending the fund: TIDAL FILMS v RICHARDS (1927) 1 K.B. 374.


TUNNERY v ORCHARD (1953) 15 W.W.R. 49, 87 (Man. C.A.). See (1952) 30 Can. Bar Rev. 70, 81 fn. 70. Cf. Citrine, TRADE UNION LAW (2nd ed.) p. 481. "It is extremely doubtful whether a representative action in tort could ever be brought against a trade union even for the purpose of obtaining an injunction."

A recent example is NAGLE v FIELDEN (1966) 2 Q.B. 635.

TAFF VALE RAIL. CO. v AMALGAMATED SOCIETY OF RAILWAY SERVANTS (1901) A.C. 426.

FUSSELL v AMOS (1936) N.Z.L.R. 254 (a registered club).

WELLINGTON WAREHOUSE LABOURERS UNION v BANK OF NEW ZEALAND (1914) 33 N.Z.L.R. 842, 844 per Stout C.J.


Compare ABROTT v SULLIVAN (1952) 1 K.B. 189 with McGREGOR v YOUNG (1920) N.Z.L.R. 766, G.L.R. 544 (see below): EONOR v MUSICIANS UNION (1956) A.C. 104 with COULD v WELLINGTON WATERSIDE WORKERS UNION (1924) N.Z.L.R. 1025 (see below).


HUMPHRIES v AUCKLAND TAILLORESSES AND OTHER FEMALE CLOTHING AND RELATED TRADE EMPLOYEES' (1950) N.Z.L.R. 380, 389 per Finlay J. The implications for the member seeking re-instatement are obvious.
Footnotes - Part Four

1. See above.


4. GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND v OVERTOUN (1904) A.C. 515. Here the Court had to determine whether property left in trust for church purposes was being used according to the tenets of the Church for which it was given.


7. CAMERON v HOGAN (1934) 51 C.L.R. 358.

8. (1889) 7 N.Z.L.R. 759.


10. (1904) A.C. 515.


12. See above.

Footnotes - Part Five

1 (1880) 14 Ch. D. 482.
2 ibid, p. 487.
3 (1880) 14 Ch. D. 482, 488.
4 TRADE UNION ACT (U.K) 1871 S. 4.
5 (1880) 14 Ch.D. 482, 487-88.
6 The plaintiff in RIGBY v CONNOL (supra) was himself a financial member of a trade-union - "The Journey-men Hatters' Fair Trade Union - from which he claimed he was improperly expelled.
8 "In the case of a proprietary club...the premises and property of the club belong not to the members in common, but to the individual proprietor of the club. The relation between him and the members is exclusively one of contract." HENDERSON v KANE AND PIONEER CLUB [1924] N.Z.L.R. 1073, 1075 per Salmond J.
10 ibid, 857 per Edwards J.
11 ibid, 865 per Sim J.
13 ibid, 1049.
14 ibid, 1054 per North J.
15 (1880) 14 Ch.D. 482.
17 CHADDOCK v DAVIDSON (1929) St. R. Qld 328.
19  *ibid*, 99.
20  Nash P.G., (1962) 4 Malaya L.R. 266
21  *ibid*, p. 300.
22  *Federated Seamen's Union v Sandford Ltd.* [(1930)] N.Z.L.R. 460; G.L.R. 250.
23  *Henderson v Kane and the Pioneer Club* [(1924)] N.Z.L.R. 1073; G.L.R. 640.
Footnotes – Part Six

2 (1881) 17 Ch. D. 615.
3 ibid 615.
5 See THE COMPANIES ACT 1955 SECTION 34. Are the Articles of a Company a contract between the members? The precise effect of 3.34 cannot yet be said to have been finally determined by the Courts"; Northey, INTRODUCTION TO COMPANY LAW IN NEW ZEALAND (5th ed.) p. 59
7 (1930) 43 Har. L.R. 993, 1003-1007.
8 An early trade union case, decided expressly on the point that the contract was between the plaintiff and the union, can be explained as a policy answer to procedural problems: MACLEAN v WORKERS UNION [1929] 1 Ch. 602.
10 [1952] 1 K.B. 189.
13 WHITE v KUZYCH [1951] A.C. 585, P.C.
15 MACQUEEN v TRACKLETON (1909) 8 C.L.R. 673, 695.
16 [1951] A.C. 585, P.C.
17 MACRAE v LOCAL NO. 1720 (1951) 3 D.L.R. 263.
ANNA MINTHODO v MILFIELDS WORKERS TRADE UNION [1961]
3 All E.R. 621, 625.


Rideout, RIGHT TO MEMBERSHIP OF A TRADE UNION (1963) pp. 70-72.


LAW v THE WELLINGTON WORKING MEN'S CLUB AND LITERARY INSTITUTE (1911) 30 N.Z.L.R. 1198.


adopts POLLOCK ON TORTS (12th ed.) p. 126.


ibid, p. 374.

See, for example, MACLEAN v THE WORKERS UNION [1929] 1 Ch. 602; ARMSTRONG v KANE [1964] N.Z.L.R. 369; two cases which show that "bias is the most difficult part of natural justice to apply to the tribunals of voluntary associations,"Rideout, RIGHT TO MEMBERSHIP OF A TRADE UNION (1963) p. 141.


Hickling (1967) U.B.C.L. Rev. 243, 247 (where some of the conflicting authorities are listed).

33 See the facts of **LEE v AMALGAMATED SOCIETY OF RAILWAY SERVANTS** 1919 G.L.R. 489.


35 (1924) N.Z.L.R. 1025.

36 (1887) 5 N.Z.L.R. 263.

37 [1952] 2 Q.B. 329.

38 *supra*.


41 [1952] 2 Q.B. 329, 343.


43 **DODWELL v THE BISHOP OF WELLINGTON** (1887) 5 N.Z.L.R. 263.

44 [1952] 2 Q.B. 329.


46 See above footnote 23.

47 [1952] 2 Q.B. 329.

48 *ibid* p. 343.

49 **INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1954**

**SECTION 6** sets out the matters which must be provided for in the rules. **SECTION 70** empowers the Registrar to refuse to register rules which in his opinion are "unreasonable or oppressive".

50 Expulsion from a trade union does not result in an ordinary contract claim but "is a claim in an unchartered area on the borderland of contract and tort", **ABBOTT v SULLIVAN** [1952] 1 K.B. 189, 205 per Denning L.J.
Footnotes - Part Seven

1 (1930) 43 Har. L.R. 999, esp 1007.
5 [1952] 1 K.B. 189.
6 And it is only since BONSON that the possibility of suing the union for damages has been recognized in England.
7 (1950) 13 M.L.R. 281, esp. 299-300.
9 INDUSTRIAL CONCILIATION AND ARBITRATION ACTS 1894-1954.
10 The same is true of the incorporated club in New Zealand for membership of such is characterised as status: HENDERSON v KANE [1924] N.Z.L.R. 1073, 1074 per Salmond J.
12 KELLY v N.S.O.P.A. (1915) 84 L.J.K.B. 2236.
15 ibid 1042.
TAYLOR v OAKLEY AND MR. JUSTICE EDWARDS (1900) 18 N.Z.L.R. 876; 884-85. Even in the absence of statute a New Zealand judge has held that membership in a voluntary unincorporated association (a church body) is a status growing out of contract: BALDWIN v FASCOE (1889) 7 N.Z.L.R. 759, 770 per Edwards J. Membership of an incorporated club is seen as conferring status: HENDERSON v KANE (1924) N.Z.L.R. 1073. See Hughes, JURISPRUDENCE (1955) pp. 103-107 arguing that contemporary society is characterised by a reversion to status conceptions. In the context of employment see Kahn-Freund, STATUS AND CONTRACT IN BRITISH LABOUR LAW (1967) 30 M.L.R. 635.


STATUS AND CAPACITY (1930) 46 L.Q.R. 277, 288.

ibid p. 289.

FEDERATED SEAMENS UNION v SANDFORD LTD. (1930) N.Z.L.R. 460, 471; 1930 G.L.R. 250, 254 per Smith J.

WELLINGTON FOREMEN etc. v TYNDALL [1944] N.Z.L.R. 52, 56 per Myers C.J.

TAYLOR v OAKLEY AND MR. JUSTICE EDWARDS (1900) 18 N.Z.L.R. 876, 890.

GILLARD v MCFARLANE 1930 G.L.R. 111.


OSBORNE v GREYMOUTH WHARF LABOURERS' INDUSTRIAL UNION (1911) 30 N.Z.L.R. 634.


ibid p. 995.

For the position under collective bargaining today see Hickling, THE RIGHT TO MEMBERSHIP OF A TRADE UNION (1967) U.B.C.L. Rev. 243.

WELLINGTON WATERSIDE WORKERS v HARGREAVES [1934] N.Z.L.R. 795, 799 per Reed J.

O'Halloran J.A. in KUYZCH v WHITE (1950) 2 W.W.R. 193, 198. Criticized by Whitmore E.F., (1952) 30 Can. B.R. 617, 622. It is interesting to note that the Report of the National Resources and Planning Board submitted to Congress by President Roosevelt on January 14th 1942 recited 9 freedoms mentioning first "the right to work, usefully and creatively through the productive years". Similarly the Universal Declaration of Human Rights, by Article 23, seeks to secure the right to work.


FLOWERS v WELLINGTON WHARF LABOURERS (1911) 13 G.L.R. 453.


INDUSTRIAL CONCILIATION AND ARBITRATION AMENDMENT ACT, 1961, SECTION 2.

Mckay v NEW PLYMOUTH WATERSIDE WORKERS 1936 G.L.R. 545, per Ostler J. See also HARGREAVES v WELLINGTON WATERSIDE WORKERS 1932I N.Z.L.R. 1211.

LEE v SHAWMEN'S GUILD OF GREAT BRITAIN (1952) 2 Q.B. 329.

The same is true of membership of an incorporated club in New Zealand.


43 Ibid p. 361.


47 See Remedies, below.


49 Ibid p. 515 per Fair J.


53 C.f. Fridman (1956) 30 A.L.J. 183, who argues that public interest in union membership is negligible and uses this to deny that union membership is a status.


58 Selected Essays, ed. Re, p. 398. And see Baldwin v Pascoe (1889) 7 N.Z.L.R. 759 where expulsion was sued, inter alia, in slander.


60 Hughes, JURISPRUDENCE (1955) pp. 103-107.
Footnotes - Part Eight

4 This is the effect of the TAFF VALE CASE [1901] A.C. 426. But it is unlikely that the principle in this decision will apply in the absence of an enabling statute. See Portus, DEVELOPMENT OF AUSTRALIAN TRADE UNION LAW (1956) p. 236.
5 R v NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS (DISPUTES COMMITTEE), ex parte NEATE [1953] 1 Q.B. 704.
7 DAWKING v ANTRORUS (1881) 17 Ch.D. 615.
8 SOCIAL CONTROL THROUGH THE LAW (1942) pp. 73-74.
11 TRADE DISPUTES ACT, 1906, SECTION 4 (U.K.).
16 HUNTLEY v THORNTON [1957] 1 All E.R. 234.
Footnotes - Conclusion

1 (1956) 9 Current Legal Problems, p. 11.


3 DODWELL v THE BISHOP OF WELLINGTON (1887) 5 N.Z.L.R. 263.


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