THE DISSOLUTION OF NON-PROFIT ASSOCIATIONS

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The dissolution of voluntary, non-profit associations, whether unincorporated or incorporated pursuant to an *Associations Incorporation Act*, has until recently received comparatively little attention from the courts. It was not until the decision of Megarry J. (as he then was) in *Re Sick and Funeral Society of St John's Sunday School, Golcar*[1] (hereinafter referred to as *Re Sick and Funeral Society*) and the more recent judgment of Walton J. in *Re Bucks Constabulary Widows' and Orphans' Fund (No. 2)*[2] (hereinafter referred to as *Re Bucks (No. 2)*) that the basic legal principles which are applicable to the dissolution and subsequent disposition of property of non-profit associations were clearly established. These principles have been developed further by Vinelott J. in *Re Grant's Will Trusts*[3] and *Conservative and Unionist Central Office* v. *Burrell*[4] (hereinafter referred to as the *Conservative Party* case). These decisions have emphasized the importance of the fundamental questions of (i) whether or not an association exists, (ii) if so, the manner in which its property is held, and (iii) the way in which these matters are intertwined with the specific issues which arise when an association is dissolved.[5]

A number of these basic principles are also relevant to some aspects of the dissolution of non-profit associations which have been incorporated pursuant to an *Associations Incorporation Act* or other similar statute. This may be done in South Australia, Western Australia, Tasmania, the Australian Capital Territory, the Northern Territory and New Zealand.[6] The majority of these statutes do not include provisions which adequately regulate the winding up of an incorporated association or the disposition

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1 [1973] 1 Ch. 51.
2 [1979] 1 All E.R. 623.
3 [1979] 3 All E.R. 359.
4 [1980] 3 All E.R. 42.
5 See S. Stoljar, *Groups and Entities* (2nd ed., Canberra, Australian National University Press, 1975) p. 38; *Re Bucks (No. 2)* 629 per Walton J.; *Conservative Party* case 58 per Vinelott J. See also *Hall* v. *Job* [1952] A.L.R. 935, 939; *Re Caledonian Employees Benevolent Society* [1928] Sc.L.T. 412 and *Hancock* v. *Scattergood* [1955] S.A.S.R. 1, 17-8.
6 *Associations Incorporation Act* 1956-1965 (S.A.); *Associations Incorporation Act* 1895-1962 (W.A.); *Associations Incorporation Act* 1964 (Tas.); *Associations Incorporation Ordinance* 1953 (A.C.T.); *Associations Incorporation Ordinance* 1963-1969 (N.T.); *Incorporated Societies Act* 1908-1976 (N.Z.).

of any surplus assets which remain after the association has been dissolved. It is only in recent years that the importance of these issues has been recognized.[7]

Although at the present time there is not an *Associations Incorporation Act* in Victoria, the Victorian Cabinet has recently accepted a report of the Chief Justice's Law Reform Committee which recommends the introduction of such a statute.[8] It is hoped that this legislation will be introduced in the near future.

The Draft Bill annexed to the report of the Chief Justice's Law Reform Committee includes specific provisions dealing with the winding up of incorporated associations and the subsequent disposition of any surplus property. These provisions were drafted after consideration of the decisions mentioned above and after consultation with those responsible for the administration of similar statutes in other jurisdictions.

In the first part of this article I will examine the rules applying to the dissolution of unincorporated associations which have been enunciated in the cases, and then discuss briefly the present position of incorporated associations in different jurisdictions and the various statutory reforms which have been proposed as a solution to the problems which have arisen in the past.

UNINCORPORATED ASSOCIATIONS

(1) The Property of an Unincorporated Association

Once it is clear that an independent unincorporated association does exist, it is then necessary to establish the basis upon which its property is held. In many cases the only persons with any interest in the property of an unincorporated association are the current members of the association. This general principle applies whether the association under consideration is a social club or an association formed for a sporting, literary or any other purpose, whether or not that purpose is altruistic. If such an association is dissolved, the current members are the only persons amongst whom its property could be distributed unless those members agreed otherwise.[9]

This position will be altered if the association's property, or any part of it, is held on a charitable or other valid trust.[10] Before looking at the various possibilities it should be noted that the source from which an association's

[7] Queensland Draft Associations Incorporation Act and Working Paper (1978) 18-20; N.S.W. Law Reform Commission, *Associations—Outline Scheme for Incorporation by Registration* (1979) 41-5; Victoria, *Chief Justice's Law Reform Committee Report on Unincorporated Associations* 1980 18-20; W.A. Law Reform Committee Working Paper on *Associations Incorporation Act* 1895-1969 June 1971 para. 15-20; W.A. Law Reform Committee Report, 14 March 1972 4-6.

[8] Victoria, *Chief Justice's Law Reform Committee Report on Unincorporated Associations* 1980 18-20.

[9] Per Walton J. in *Re Bucks (No. 2)* [1979] 1 All E.R. 623, 626.

[10] Ibid.

property has been derived may affect its ultimate disposition on the dissolution of the association. In many cases all the property will have come from subscriptions or other contributions from the members; however, it may also have been subscribed by non-members who may or may not be identifiable. Cases such as *Re Gillingham Bus Disaster Fund*[11] (hereinafter referred to as *Re Gillingham*) and *Re West Sussex Constabulary's Widows, Children and Benevolent Fund Trusts*[12] (hereinafter referred to as *Re West Sussex*) illustrate the problems which may arise. As has been shown in these decisions, it may be necessary, when an association is dissolved, to decide: (i) whether its property was derived from the members or from third parties; (ii) on what basis it had been subscribed by each of them; and (iii) whether it should be returned to the contributors, divided amongst the members, applied *cy-près* or passed to the Crown as *bona vacantia*.[13]

(a) *Property Held on Trust for Charitable Purposes*

If the property of an unincorporated association is held by the association's trustees on trust for a charitable purpose it must be applied *cy-près* if the association is dissolved.[14] In a number of early cases dealing with the dissolution of friendly societies it was held that the societies had been formed for charitable purposes and therefore their property could in no circumstances be divided among the members on the dissolution of the society.[15] However, in the later decisions concerning friendly societies it was held that they were, in most instances, not formed for charitable purposes.[16]

Another example of an association formed for a charitable purpose may be seen in *Smith* v. *Kerr*[17] where the Court of Appeal held that Clifford's Inn had been constituted pursuant to a trust for charitable purposes and that on its dissolution its property must be applied *cy-près*.

An interesting decision was reached by the Court of Appeal in *Gibson* v. *South American Stores*[18] in which the court held that a fund set up by a company for the benefit of its employees was a valid charitable trust for

[11] [1958] 1 All E.R. 37.
[12] [1970] 1 All E.R. 544.
[13] See the very detailed discussion of these issues in two articles by C. E. F. Rickett, "Unincorporated Associations and their Dissolution" [1980] C.L.J. 88, 118-22 and "Purpose Gifts and Unincorporated Associations" [1981] N.Z.L.J. 44. See also B. Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 M.L.R. 626 and *Re Edis's Trusts, Campbell-Smith* v. *Danis* [1972] 2 All E.R. 769, 773-4 discussing the property of an unincorporated territorial army unit.
[14] See, for instance, Rickett, op. cit. 93-4; D. H. McMullen, S. Maurice and D. B. Parker, *Tudor on Charities* (6th ed., London, Sweet and Maxwell, 1967) pp. 273-9; G. W. Keeton and L. A. Sheridan, *The Modern Law of Charities* (2nd ed., Belfast, W. & S. Magonan, 1971) Ch. XIV.
[15] *Re Buck* [1896] 2 Ch. 727; *Spiller* v. *Maude* (1886) 32 Ch.D. 158.
[16] See *Tierney* v. *Tough* [1914] 1 I.R. 142; *Braithwaite* v. *Attorney-General* [1909] 1 Ch. 510.
[17] [1902] 1 Ch. 774.
[18] [1950] 1 Ch. 177.

the relief of poverty, but as no general charitable intent had been expressed by the company, a power of revocation in the trust deed was valid, enabling the return of the surplus funds to the company by way of a resulting trust on the dissolution of the fund. This would appear to be the only type of case in which property held on a charitable trust would not have to pass *cy-près* on the dissolution of the association concerned.

(b) *Property held subject to a Resulting Trust for the Contributors if the Association is Dissolved*

As mentioned above, the association's property, or part of it, may not be held upon a charitable trust, but may have been given to the association for a particular purpose, so that upon the completion or failure of that purpose or of the association, it must be returned to the donor. In *Re Trusts of the Abbott Fund*,[19] a fund had been set up to support two elderly ladies. The balance remaining after the death of the survivor had to be returned to the donors and could not be divided between the members of the fund.[20]

(c) *Property which is Beneficially Owned by the Members of the Association Subject to their Rights and Duties Inter Se*

Since decisions such as *Neville Estates* v. *Madden*,[21] *Re Recher's Will Trusts*[22] and *Re Lipinski's Will Trusts*,[23] it has been clearly established that property may be given to, and held by, the members of an unincorporated association as an accretion to the general funds of the association. The members are the beneficial owners of the property, subject to their rights and duties *inter se* as expressed in the rules or constitution of the association. This position is not changed by the purposes for which the association may have been formed. In *Re Grant's Will Trusts*,[24] the facts of which concerned a bequest to a particular branch of the Labour Party which no longer existed, Vinelott J. emphasized that it did not matter whether an association was a members' club, a sporting club or had been formed for any other purpose, which might or might not have been altruistic.[25] Vinelott J. also stressed that in these cases the members were able to agree (in the manner prescribed by the rules, or else unanimously) to change the association's rules so that the funds, or part of them, should be applied for some new purpose, or even distributed amongst the members for their own benefit.[26]

19 [1900] 2 Ch. 326.
20 See *Re British Red Cross Balkan Fund* [1914] 2 Ch. 419; *Re Gillingham* [1958] 1 All E.R. 37; *Re West Sussex* [1970] 1 All E.R. 544.
21 [1962] 1 Ch. 832.
22 [1972] Ch. 526.
23 [1976] Ch. 235.
24 [1979] 3 All E.R. 359.
25 Ibid. 365.
26 Ibid. 366.

The individual interest of members in the property of an existing association cannot be severed. A member who resigns or the estate of a member who has died has no further interest in the property of the association.[27] When an association is dissolved it is only the members at that date who are entitled to a share in any distribution which is made. Past members are not entitled to share in any such distribution of property.[28]

(d) *Property Given to an Association Subject to an Implied Contractual Term*

In both *Re Grant's Will Trusts* and the *Conservative Party* case Vinelott J. seemed to decide that there could be an intermediate position between property held on trust for the members of an association subject to the association's rules (as discussed above) and property which was held on trust for a purpose which would usually be invalid.[29] He referred to the judgment of Brightman J. in *Re Recher's Will Trusts* and agreed that a testamentary gift to an unincorporated association must be void unless it can be construed as a gift to the members of the association. Vinelott J. nevertheless felt that this principle need not necessarily apply to a subscription paid *inter vivos*. In this latter situation there is room to imply a contractual term that if the subscription was not used for the purpose for which it had been paid it should be returned to the subscriber. By relying on an implied contractual term rather than a trust, the problems of purpose trusts were avoided.[30] It is interesting that in neither case did Vinelott J. refer to *Re Lipinski's Will Trusts* or the Victorian case of *Re Goodson*.[31] In both of these decisions the principles expressed by Brightman J. in *Re Recher's Will Trusts* were carried further, and testamentary gifts for the purposes of an unincorporated association upheld. In each of these cases the judge emphasized that whenever possible a gift to an unincorporated association should be construed as an absolute gift to the association in augmentation of its funds and not as a purpose trust.[32]

(e) *Joint Tenants*

The members of an unincorporated association may also hold the association's property as joint tenants who are able to sever their individual interests at any time. As Vinelott J. noted in *Re Grant's Will Trusts*,[33] these cases are relatively uncommon.[34]

[27] See *Watson* v. *Johnson* (1936) 55 C.L.R. 63 and *Re Bucks (No. 2)* [1979] 1 All E.R. 623, 629.
[28] See fns. 88-92 infra.
[29] See Rickett, op. cit. 96, 109-11.
[30] See *Re Grant's Will Trusts* [1979] 3 All E.R. 359, 372; *Conservative Party* case [1980] 3 All E.R. 42, 63-4.
[31] [1971] V.R. 801.
[32] Per Oliver J. in *Lipinski's Will Trusts* [1976] Ch. 235, 247; per Adam J. in *Re Goodson* [1971] V.R. 801, 813.
[33] [1979] 3 All E.R. 359, 364.
[34] See the American case of *Rehder* v. *Rankin* 91 N.W. (2nd) 379 (1958).

(2) The Dissolution of an Unincorporated Association

As an unincorporated association is at law no more than the aggregate of its members, prima facie the members may agree unanimously to dissolve the association and distribute its property whenever and however they wish (subject to any restriction contained in the rules of the association). In theory, when an association has fulfilled its purpose or object it would be wound up by its members and any surplus property would be disposed of either among the members or in accordance with their wishes to a similar association, or otherwise as the members direct. In practice, it appears that this course is seldom taken and many associations just fade away with a dwindling membership until the association finally becomes defunct.

The dissolution of some kinds of unincorporated associations and the distribution of any surplus assets may be affected by various statutory provisions.[35] If there are no relevant statutes, the dissolution and distribution of any assets should be provided for in the rules of the association, but in many cases the rules do not deal with these matters at all. The possible situations which may occur are discussed below:

(a) In many instances the rules of an association will include detailed provisions setting out the procedure to be followed if the association is dissolved and the manner in which any surplus property is to be distributed. Well-drawn rules will also prescribe a method by which the rules may be amended by the members, and it would then be possible to provide for any special circumstances which had not been considered when the rules were drafted. In this situation it would be unlikely that any real problems would arise when an association was dissolved. Even if problems did occur, a court would probably refuse to intervene on the ground that the members of the association were able to alter the rules themselves to deal with the situation.[36]

(b) The rules of an association may include a procedure to be followed if the association is dissolved but omit any means by which the rules may be amended by the members. If this is so, prima facie the rules may only be altered by the unanimous agreement of all members of the association, not just those members present and voting at a meeting.[37]

(c) Conversely, the rules of an association may prescribe a method by which they may be amended but omit any provisions dealing with the dissolution of the association. This deficiency may be remedied by the members amending the rules in the prescribed manner, provided that this

35 See cases such as *Cunnack* v. *Edwards* [1895] 1 Ch. 489 and *Re Bristol Athaneum* (1890) 43 Ch.D. 236.

36 As in, for example, the *Leven Penny* case [1948] S.C. 147 (see fn. 59 infra).

37 But see the decisions discussed infra which suggest that it may be possible to alter the rules of an association by a majority vote and the later acquiescence of the remaining members.

action is taken before the association is dissolved.[38] In *Re West Sussex*, Goff J. was dealing with the disposal of surplus assets of a police benevolent fund which no longer existed due to the amalgamation of a number of local police forces. The rules of the fund included a procedure for amendments to be made, but Goff J. held that after the date of the amalgamation no members of the fund existed who could hold a meeting, amend the rules, or wind up the fund. As he said, "they had the power but they did not exercise it, and now it is too late".[39]

(d) If the rules of an association do not include either a method by which the association may be dissolved or a procedure by which they may be amended, or in the possible but unlikely situation of an association which has no rules at all,[40] the question then arises of the manner in which such an association may be dissolved.

(i) By unanimous agreement of the members

The members of the association at the date in question may agree to dissolve it and all agree upon a procedure to be followed. This was done in the case of *Re Producers' Defence Fund*[41] where, as Smith J. stated in his judgment, "all the persons who were members of the Association at the date of the passing of the resolutions [to dissolve the association] subsequently consented and agreed to the Association being dissolved, and its funds applied in accordance with the resolutions".[42]

A preliminary problem of fact may arise when it is necessary to establish the members of the association at the relevant date. Megarry J. had to decide this point in *Re Sick and Funeral Society* where there were a number of claimants who had let their membership subscriptions lapse for a number of years and who then sought to pay the arrears and share in the distribution of assets on the dissolution of the society. Megarry J. held that a member of an association may resign either by writing a letter of resignation or in some other way, either by words or conduct "sufficiently manifesting his intention to be a member no more".[43] He emphasized that the facts in the particular situation must be considered, and that although it could not be said that a failure to pay a weekly subscription for a few months would necessarily cause a membership to lapse, failure to pay for some years was a different matter and a "moribund membership ought not to be capable of resurrection".[44]

[38] See *Tierney* v. *Tough* [1913] I.R. 142, 154 and *Re Unley Democratic Association* [1936] S.A.S.R. 473, 482, and *Blair* v. *McKinnon* [1981] Sc.L.T. 40 where the court approved of the addition to its rules of provisions regulating the dissolution of a club.
[39] [1970] 1 All E.R. 544, 546-7.
[40] *Conservative Party* case [1980] 3 All E.R. 42, 58.
[41] [1954] V.L.R. 246.
[42] Ibid. 249.
[43] [1973] 1 Ch. 51, 62.
[44] Ibid. See also J. F. Josling, "End of a Club Centenarian" (1973) 117 *Sol. J.* 101, 102-3.

In cases where an association has been inactive for some years it may be difficult to determine whether or not an association has been dissolved or is merely dormant for a period, especially when no subscriptions have been paid or benefits received during that period. In *Re William Denby Sick and Benevolent Fund*,[45] a fund had been inactive for a number of years without actually being wound up. Brightman J. decided that although the members could be taken to have acquiesced in the non-payment of benefits and contributions for a period, it could not also be assumed that they had acquiesced in the distribution of the assets of the fund without their unanimous agreement. The judge discussed the various situations in which it could be said that such an association had terminated, and in particular the facts which would be needed to establish that the "substratum" of a society had disappeared so that it could no longer be treated as an existing association.[46] At common law the unanimous agreement of all members was needed to dissolve an association (as it was to alter the rules of an existing association unless a different procedure was prescribed by those rules,[47] as discussed above). As was shown by the result in *Free Church of Scotland* v. *Overtoun*,[48] the majority of members could not take any such action against the will of the minority, however small.

(ii) Agreement by a majority of members

There are a number of reported cases which suggest that it may be possible to alter the rules of an association by a majority vote and the later acquiescence of the remaining members. In *Re Conveyances . . . Abbatt* v. *Treasury Solicitor*,[49] both Lord Denning M.R. and Cross L.J. held that the members who had voted against a change in the rules of a club in 1954, but who had later acquiesced in that change, could not, some years later, object to the effect of that change and obtain the intervention of the court on their behalf. A similar decision was reached by Brightman J. in *Re William Denby Sick and Benevolent Fund*. It should be noted that in this latter case the judge stated that he felt that it was unlikely that the members of an association could ever be taken to have acquiesced in the dissolution of an association, as opposed to a decision to change its rules or to allow it to be inactive for a period.[50]

In *Re Sick and Funeral Society*, which was decided more recently than the two cases mentioned above, Megarry J. stated that, in his opinion, any defects which might have existed at the date of the resolution to wind up the society had been cured by the passage of time since that date. He dealt only with a case in which the resolution was not challenged "until long after

[45] [1971] 1 W.L.R. 973.
[46] Ibid. 979-81; see also *Sellor's* v. *Woodruff* [1925] 4 D.L.R. 646, 649.
[47] See *Murray* v. *Johnstone* (1896) 33 Sc.L.R. 714.
[48] [1904] A.C. 515.
[49] [1969] 3 All E.R. 1175, discussed by B. Green, op. cit. 632-3.
[50] [1971] 1 W.L.R. 973, 981-2.

the event", leaving aside a situation where a challenge may have been made promptly.[51]

In the early New South Wales case of *Amos* v. *Brunton*[52] there is a dictum by Manning C.J. that a majority of the members of an association could bind the minority, validly dissolve the association and distribute its assets among themselves. This decision pre-dates the *Free Church of Scotland* decision and the other later cases which have been decided on that basis, and may be of doubtful validity.[53]

(iii) Inherent jurisdiction of the court to intervene

It is clear from the earliest reported cases that the courts considered that they had an inherent jurisdiction which enabled them to intervene in the dissolution of an unincorporated association, at least if the association was an unregistered friendly society, as in *Re Lead Company's Workmen's Fund Society*.[54]

In *Keys* v. *Boulter*,[55] Megarry J. followed the decision in the *Lead Company* case when dealing with the dissolution of a trade union. He stated:

> "It seems to me that it is possible to infer from what he said that there is a principle conferring jurisdiction which is applicable not merely to unregistered friendly societies, but also to any body of any kind for which no appropriate machinery exists for securing its winding up. Certainly I consider that the inherent jurisdiction of the court ought to extend this far; and I think it does."[56]

Cross J. reached a similar decision in *Re Blue Albion Cattle Society*[57] while dealing with the dissolution of a cattle breeders' society. Although the court may have jurisdiction to intervene, it is clear that whenever possible the general rule of non-interference in the affairs of a voluntary association will be followed, and the courts will act only when the members of a voluntary association are not able to do so, as in *Blake* v. *Smither*[58] where Kekewich J. stated: "There was no provision in the rules for winding up the society, and unless the members could agree there could be no dissolution, except by an order of the Court".[59]

51 *Conservative Party* case [1980] 3 All E.R. 42, 58. See also the remarks by W. R. Atkin in "Unincorporated Associations—Distribution of Surplus Assets on Dissolution" (1979) 8 N.Z.U.L.R. 217, 220 where he notes that in the unreported case of *Re Kaiapoi Woollen Mills Employees' Welfare Society, Gray* v. *Kaiapoi* (unreported 1976) Somers J. held that the principle of acquiescence could not be relied upon because the time between the majority resolution in favour of dissolving the society and the closure of the mill was too short.

52 (1897) 14 W.N. (N.S.W.) 69.

53 Atkin, op. cit. 219.

54 [1904] 2 Ch. 196. See also cases such as *Blake* v. *Smither* (1906) 22 T.L.R. 698.

55 [1972] 1 W.L.R. 642.

56 Ibid. 644. See also D. Lloyd, *The Law Relating to Unincorporated Associations* (London, Sweet and Maxwell, 1938) pp. 210-11, and comments by B. Green, op. cit. 635-7.

57 [1966] C.L.Y. 1274 (otherwise unreported).

58 (1906) 22 T.L.R. 698.

59 Ibid. 699; see also the *Leven Penny* case [1948] S.C. 147 and J. N. Martin (ed.) *Daly's Club Law* (7th ed., London, Butterworths, 1979) p. 208.

In Australia the courts have, in most cases, refused to interfere in the affairs of a voluntary association, although this general rule does have exceptions. In *Rendall-Short* v. *Grier*,[60] a very recent decision of the Supreme Court of Queensland, Lucas J. held that the members of an unincorporated association had standing to object to the transfer of the association's assets to an incorporated body. Lucas J. quoted a passage from the early Scottish case of *Forbes* v. *Eden*,[61] which had been cited by the High Court in *Cameron* v. *Hogan*,[62] and in which Lord Cranworth said,

> "Save for the due disposal and administration of property, there is no authority in the courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs."

As members of the association, the plaintiffs in this case were able to bring an action to safeguard the proper application of the association's property in accordance with its constitution. Here the requirements of the constitution had not been complied with, whether the transfer of assets was seen as a transfer from an unincorporated to an incorporated body, or, alternatively, as a dissolution of the association.[63]

(iv) Winding up an association as an unregistered company pursuant to Part X Division 5 of the *Uniform Companies Act* 1961

The definition of an unregistered company in s. 314(1) of the *Uniform Companies Act* is:

> "For the purposes of this Division 'unregistered company' includes . . . any partnership association or company consisting of more than five members but does not include a company incorporated under this Act or under any corresponding previous enactment."[64]

"Company" is defined in s. 5(1) of the *Uniform Companies Act*, but "partnership" and "association" are not.[65]

Although the words "any partnership association or company" appear wide enough to include all unincorporated associations which have more than five members, the early decisions established that limits would be placed on the application of the section. In *Re St. James' Club*,[66] Lord St. Leonards refused to apply the equivalent section of what were then the

[60] [1980] Qd.R. 100.
[61] (1867) L.R. 1 Sc. & Div. (H.L.) 568.
[62] (1934) 51 C.L.R. 358.
[63] [1980] Qd.R. 100, 112.
[64] A similar section was included in earlier *Companies Acts*.
[65] See s. 14(3) of the *Uniform Companies Act* and *Smith* v. *Anderson* (1880) 15 Ch.D. 268 discussing the meaning of "association".
[66] (1852) 2 De G.M. & G. 383. See also Lloyd, op. cit. 209 where he notes that Lord St. Leonards did not state the kinds of associations which came within the scope of the section, only that clubs would not be treated as being within it. See also G. Wallace and J. Young, *Australian Company Law and Practice* (Sydney, Law Book Co., 1965) p. 859; R. R. Pennington, *Company Law* (4th ed., London, Butterworths, 1979) pp. 850-1; H. B. B. Wrenbury, *Buckley on the Companies Acts* (13th ed., London, Butterworths, 1957) p. 733.

Winding Up Acts to a members' club. Similarly, it was held in *Re Bristol Athaneum*[67] that a literary society could not be wound up as an unregistered company under the Acts. In this case Kay J. held that, as the section dealing with winding up (now s. 315) referred to the place of business of an association, its operation must be limited to trading associations. On the other hand, the section has been applied by the courts in a number of cases dealing with the winding up of registered or unregistered friendly societies.[68]

It is not clear whether a court today would allow these provisions of the *Uniform Companies Act* to be used in the winding up of an unincorporated association. It appears from the authorities that, except in the case of a members' social club, this is still an open question, in particular if the members of the association could be said to be bound *inter se* by a contract which would be enforced by the courts. In view of recent decisions such as *Buckley* v. *Tutty*,[69] and especially the judgment of Wootten J. in *McKinnon* v. *Grogan*,[70] it appears that the members of many types of associations would now be regarded as being bound *inter se* by a legally enforceable contract. There seems no good reason why the provisions of the *Uniform Companies Act* dealing with unregistered companies should not be used, at least by these kinds of associations.[71]

(3) Distribution of the Property of an Unincorporated Association on its Dissolution

Once the procedure for dissolving an unincorporated association has been settled, either by reference to the association's rules or otherwise, the proper disposition of its property must be considered.

(a) *Payment of Debts and Liabilities*

The association's property must first be used to pay any debts and other liabilities which had been validly incurred in the association's name, or on its behalf, before it was dissolved.

(b) *Disposition of any Surplus Property*

In many instances the rules of the association will include specific provisions dealing with the distribution of any surplus property remaining after the debts of the association and other expenses incurred in the dissolution have been paid. Unless this property, or any part of it, is held

[67] (1890) 43 Ch.D. 236.
[68] *Re The Alfreton District Friendly and Provident Society* (1863) 7 L.T. (N.S.) 817; *Re Victoria Society, Knottingley* [1913] 1 Ch. 167; *Re Irish Mercantile Loan Society* [1907] 1 I.R. 98 and other similar cases. See B. Green, op. cit. 637-8.
[69] (1971) 125 C.L.R. 353.
[70] [1974] 1 N.S.W.L.R. 295.
[71] See Lloyd, op. cit. 209-10; F. Callaway, *Winding Up on the Just and Equitable Ground* (Sydney, Law Book Co., 1978) pp. 69, 127; J. F. Josling, *Law of Clubs* (2nd ed., London, Oyez Publishing, 1975).

on a valid trust or is subject to a resulting trust for the donors, it will be distributed as provided by the rules of the association.

It is also possible that, as mentioned earlier, the distribution of surplus property may be affected by statute. The decisions in *Cunnack* v. *Edwards*[72] and other early cases dealing with friendly societies were influenced by the *Friendly Societies Act* 1829 (Eng.) in force at that time, which forbade the distribution of any surplus property to the society's members if it was dissolved. Similarly, the *Literary and Scientific Institutions Act* 1854 (Eng.), with some exceptions, forbade the distribution of the property of an association to its members on dissolution if that association came within the scope of the statute.[73]

In the absence of any rules, relevant trusts, statutory provisions, or if the members of an association have not agreed upon a method of distributing any surplus assets before the dissolution of the association concerned, there are a number of ways which may be used to dispose of those assets.

(i) Bona vacantia

Although a number of early cases dealing with the disposition of the surplus property of an association decided that the property should pass to the Crown as *bona vacantia*, these decisions are mostly of doubtful validity today, and if decisions based on similar facts were made now they would be made differently. Cases such as *Cunnack* v. *Edwards*, where the Court of Appeal held that the assets of a friendly society must pass as *bona vacantia* on the death of the last surviving member, were influenced by the *Friendly Societies Act* referred to above. It must also be remembered that at that time a very different attitude was taken to the manner in which the property of unincorporated associations was held, and, except in the case of clubs, the theory that an association's property could be beneficially owned by the members had not been developed. *Cunnack* v. *Edwards* was first distinguished in *Tierney* v. *Tough*[74] and it has been distinguished in most later cases, including *Re Bucks (No. 2)*.[75]

There is no longer any statutory restriction on the distribution of the property of a friendly society, and, as the position of the members of an association as the beneficial owners of the association's property except in unusual circumstances is now established, a claim by the Crown to the assets as *bona vacantia* will rarely be successful.

This development may be traced through the cases from *Braithwaite* v. *Attorney-General*[76] (in which the surplus funds of a friendly society passed

[72] [1895] 1 Ch. 489.
[73] See *Re Bristol Athaneum* (1890) 43 Ch.D. 236; *Re Jones* [1898] 2 Ch. 83 and *Re Russell Institution* [1898] 2 Ch. 72.
[74] [1914] 1 I.R. 142, 153-4.
[75] [1979] 1 All E.R. 623, 639-41. See discussion of *Cunnack* v. *Edwards* by B. Green, op. cit. 643-4.
[76] [1909] 1 Ch. 510.

bona vacantia) and *Tierney* v. *Tough* (where the claim by the Crown was disallowed) to *Re Customs and Excise Officers' Mutual Guarantee Fund*,[77] *Feeney and Shannon* v. *McManus*[78] and *Re Gillingham Bus Disaster Fund*[79] (all of which rejected any claim by the Crown). Similar arguments rejecting the claims by the Crown were upheld whether the case in point dealt with a friendly society, a members' club or a fund to raise money for the victims of a disaster.

There are still situations in which *bona vacantia* may be the only possible destination for the funds of an association. In *Re Producers' Defence Fund*,[80] an association which was wound up by its members attempted to transfer its funds to trustees upon trust for a non-charitable purpose which was held to be invalid. Smith J. held that, as the members of the association had acted to dissolve it and to immediately transfer all its funds to trustees, it was not possible to say that on the failure of the purpose trust the funds should be divided among those who had previously been members. As Smith J. noted,

> "The resolutions provided for the immediate dissolution of the Association, and it seems clear that what was contemplated was that, when the trust referred to in the resolutions became operative, there would be no Association in existence and therefore no members of the Association."[81]

Similar conclusions were reached in the unreported English cases of *Re Brighton Cycling and Angling Club Trust*[82] and *Re Stamford Working-Men's Club*.[83] In both these cases the original decision was that the funds of a club, which had ceased to exist and no members of which could be found, should pass to the Crown as *bona vacantia*. In the latter case, evidence was later adduced that there were still some members in existence, and an appeal against the earlier decision was allowed.

The decision in *Re Gillingham Bus Disaster Fund* also raises the matter of the proper destination of money given anonymously to a fund which is not needed for the purposes for which it was given. The judge in this case refused to allow the claim by the Crown to succeed on the ground that it would be difficult, or perhaps impossible, to ascertain all the original donors.[84]

[77] [1917] 2 Ch. 18.
[78] [1937] I.R. 23.
[79] [1958] 1 All E.R. 37.
[80] [1954] V.L.R. 246.
[81] Ibid. 254.
[82] Noted in *The Times* March 6th and 7th 1956 and in *Halsbury's Laws of England* (3rd ed., London, Butterworths, 1952-1963) Vol. 5 p. 290. See also M. Hickling, "The Destination of the Funds of Defunct Voluntary Associations" (1966) 30 *Convey (N.S.)* 117.
[83] Noted in *The Times* April 29th 1953. See also Halsbury, op. cit. 290 and Hickling, op. cit.
[84] [1958] 1 All E.R. 37, 43. See also the suggestion by Rickett, op. cit. 120, that a special category should be created to provide that surplus money resulting from anonymous gifts to a fund should pass *bona vacantia*.

The case of *Re West Sussex*[85] also decided that the surplus property of a pension fund which had become unnecessary should pass to the Crown as *bona vacantia*. It is difficult to understand the reasoning in this decision, especially when it is considered with cases such as *Neville Estates* v. *Madden*[86] and others which established that the property of an association may be held by the members beneficially, subject to the rules of the association.[87] In *Re Bucks (No. 2)*, Walton J. criticized the decision of Goff J. in *Re West Sussex* and held that where members of an association were in existence they were able to control the disposition of its assets on dissolution to the exclusion of any claim by the Crown that those assets should pass *bona vacantia*.[88]

If the reasoning of Walton J. is followed, it would appear that in future a claim by the Crown would only be likely to succeed in circumstances such as those found in *Re Producers' Defence Fund*,[89] and possibly also where anonymous gifts had been made to a fund.[90]

(ii) Distribution to the members of the association

It has always been accepted that the analogy with the members of a club applies to associations generally, and a member who dies, resigns, is expelled or in some other way gives up his membership of an association has no further interest in its property.[91]

If the association in question has a declining membership and is, for practical purposes, inactive or possibly even defunct, there may be considerable factual problems involved in deciding the exact date when it was dissolved (if it was ever deliberately dissolved and did not just fade away) and the basis upon which any distribution is to be made.

As was referred to earlier, it may also be difficult to ascertain whether or not persons who call themselves members of the association have allowed their memberships to lapse because of non-payment of subscriptions. In *Re Blue Albion Cattle Society*,[92] Cross J. held that the members who were on the roll of the society at the date of the dissolution order should take a share in the distribution of assets, whether or not their subscriptions

85 [1970] 1 All E.R. 544.
86 [1962] 1 Ch. 832.
87 See criticism of the decision in the *West Sussex* case in M. Albery, "Note—Trust, Contract and Perpetuity" (1971) 87 L.Q.R. 464; also see Rickett, op. cit. 118-20.
88 [1979] 1 All E.R. 623, 636.
89 [1954] V.L.R. 246.
90 An interesting question would arise if the Crown made no claim to the property in question and the court found that there was no other appropriate way to dispose of it. (See Rickett, op. cit. 111-13.). See the detailed discussion of these cases in B. Green, op. cit. 643-8.
91 *Re St. James' Club* (1852) 2 De G.M. & G. 383; *Doust* v. *Attorney-General* (1904) 4 N.S.W.S.R. 577; *Re Customs and Excise Mutual Guarantee Fund* [1917] 2 Ch. 18; *Strick* v. *Swansea Tin-Plate Co.* (1887) 36 Ch.D. 558; *Re Unley Democratic Association* [1936] S.A.S.R. 473.
92 [1966] C.L.Y. 1274.

had been paid. Any unpaid subscriptions were to be set off against their entitlement.

In *Re Unley Democratic Association*,[93] the rules of the association required a quorum of five members. As there were only four members it was not possible to hold a valid meeting at which the association could be wound up. The court held that the association was dissolved by operation of law when the number of members fell below the minimum required by the rules, and the members at the date of the court order should share in the distribution of surplus assets.[94]

As was also referred to earlier, Megarry J. considered this problem in *Re Sick and Funeral Society* and emphasized that whether or not a member had tacitly resigned must be decided in the light of the facts of the particular case in question.[95]

If it is established that there is only one surviving member of the association (as was the case in *Cunnack* v. *Edwards*) it has to be decided whether or not the association is to be treated as a tontine association which had been formed with the express purpose of paying annuities to the members with the benefit of survivorship so that, as the members die, the survivors receive an increasing amount until there is only one left who is entitled to the total.[96] This concept has been rejected in several cases,[97] and in *Re Bucks (No. 2)* Walton J. stated,

> "Unless expressly so provided by the rules, unincorporated societies are not really tontine societies, intended to provide benefits for the longest liver of the members. Therefore, although it is difficult to say in any given case precisely when a society becomes moribund, it is quite clear that if a society is reduced to a single member neither he, still less his personal representatives on his behalf, can say he is or was the society and therefore entitled solely to its fund. It may be that it will be sufficient for the society's continued existence if there are two members, but if there is only one the society as such must cease to exist. There is no association, since one can hardly associate with oneself or enjoy one's own society. And so indeed the assets have become ownerless."[98]

This passage in the judgment of Walton J. is also relevant if there is a possibility that the property of an association should pass to the Crown as *bona vacantia*. It would seem to establish once and for all the position of an association which has become defunct.

[93] [1936] S.A.S.R. 473.
[94] Note that the *Uniform Companies Act* provides for a limited company to be wound up by the Court if the number of members falls below the legal minimum (s. 222).
[95] [1973] 1 Ch. 51, 61-3; see also J. F. Josling, "End of a Club Centenarian" (1973) 117 *Sol. J.* 101.
[96] See *Halsbury's Laws of England* (3rd ed., London, Butterworths, 1952-1963) Vol. 18 p. 4; W. A. J. Jowitt (ed.) *Dictionary of English Law* (London, Sweet and Maxwell, 1959) p. 1761.
[97] *Mitchell* v. *Burness* (1878) 41 Sc.L.R. 640, 739 and *Re Osmondthorpe Hall Freehold Garden and Building Allotment Society* [1913] W.N. (U.K.) 243.
[98] [1979] 1 All E.R. 623, 629.

Once it is clear that there were in fact members of an association at the time that it was dissolved, and their identity has been established, the basis upon which the surplus assets are to be distributed among them must be considered. Here again there are considerable differences between the earlier decisions and those of more recent years.

In *Cunnack* v. *Edwards*, at first instance, Chitty J. decided that the surplus assets should be divided among the members on the basis of a resulting trust in proportion to their contributions. He did not limit this trust to living members. The Court of Appeal reversed this decision and held that the funds should be treated as *bona vacantia*. The concept of a resulting trust was also relied upon in *Re Printers and Transferrers Amalgamated Trades Protection Society*[99] (hereinafter referred to as *Re Printers*). In that case Byrne J. held that the assets should be distributed by way of a resulting trust to the members of the association at the time it was dissolved in proportion to their contributions. Past members were excluded. This decision was followed in other cases, such as *Young* v. *Curran*,[100] *Re Lead Company's Workmen's Fund Society*[101] and *Re Customs and Excise Officers' Mutual Guarantee Fund*.[102]

It is clear that at this stage there was considerable confusion both about the basis upon which the property of an unincorporated association was held, and also between the cases concerning friendly and benefit societies on the one hand, and those concerning clubs and other similar associations on the other.

There did appear to be agreement that it was not necessary for benefits received from the association to be taken into account when its funds were distributed.[103] However, it was decided in *Re Trusts of Hobourn Components*[104] that sums received from a fund should be taken into account when the fund was wound up and the entitlement of members in the final distribution of property was determined.

Few problems appear to have arisen when the association under consideration was a club or some similar body. In *Brown* v. *Dale*,[105] a guild, which was a non-profit corporate body, was dissolved after existing for some centuries. There were no rules dealing with the disposition of its property and Jessel M.R. held that the property belonged to the members at the time that it was resolved to dissolve the guild, and that it should be divided equally among them. In the absence of any contrary stipulation in the rules of a particular club, all the cases appear to have been decided on

99 [1899] 2 Ch. 184.
100 (1909) 9 N.S.W.S.R. 452.
101 [1904] 2 Ch. 196.
102 [1917] 2 Ch. 18.
103 See *Cunnack* v. *Edwards* [1895] 1 Ch. 489, 498.
104 [1945] 2 All E.R. 711; see also *Auckland Car Club (Inc.)* v. *New Zealand Midget Racing Car Federation (Inc.)* (S.Crt. Auckland 1958). Note in [1958] N.Z.L.J. 199.
105 (1878) 9 Ch.D. 78.

the basis that any surplus property should be distributed equally among the members when the club was dissolved. This principle is not clearly expressed in the earlier cases such as *Feeney* v. *McManus*,[106] in which an equal distribution was upheld because in the circumstances of the case it was not possible to discover what contributions had been made by individual members. In *Re St. Andrew's Allotment Trusts*,[107] Ungoed-Thomas J. discussed the cases mentioned above and concluded that

> "prima facie the assets are distributable between members at the relevant date per capita. It is conceivable that a basis for distinguishing the friendly and mutual benefit society cases may be that whereas the club cases contemplate enjoyment ab initio and equality, the friendly society cases contemplate advantages related to contributions."[108]

It was not until the decision of Megarry J. in *Re Sick and Funeral Society* that the principle of equal distribution, which had first been proposed by O'Connor M.R. in *Tierney* v. *Tough*,[109] was clearly established. In *Tierney* v. *Tough*, O'Connor M.R. was dealing with an unregistered friendly society. The judge refused to agree either that the Crown had any claim to the assets of the society or that they should be distributed to the members on the basis of a resulting trust as in *Re Printers*. He pinpointed the fallacy in the reasoning in *Re Printers*, that, if the surplus was to be distributed pursuant to a resulting trust, this would have to extend to past members and to the estates of members who had died (as was held by Chitty J. in *Cunnack* v. *Edwards*). O'Connor M.R. established that the fund belonged to the existing members of the association and had been given to the association absolutely, leaving no room for the application of the doctrine of a resulting trust. The members were the only persons with a right to the assets and they should be divided amongst them. At this point the reasoning of the judge differed from that which was developed in later cases, as he decided that the distribution should be made in proportion to the contributions of the members rather than equally among them all.[110]

This decision has been referred to in many later cases and can be regarded as the starting point from which the modern law has developed.[111] In *Re Bucks (No. 2)*, Walton J. said,

> "There is no doubt that as the result of modern cases springing basically from the decision of O'Connor M.R. in *Tierney* v. *Tough*, judicial opinion has been hardening and is now firmly set along the lines that the interests . . . of persons who are members of any type of unincorporated association are governed exclusively by contract."[112]

106 [1937] I.R. 23.
107 [1969] 1 All E.R. 147.
108 Ibid. 154.
109 [1914] I.R. 142.
110 Ibid. 157.
111 Per Megarry J. in *Re Sick and Funeral Society* [1973] 1 Ch. 51, 59.
112 [1979] 1 All E.R. 623, 636-7.

The acceptance of this "contract" doctrine removes any possible grounds for a distinction between friendly or benefit societies and other associations such as clubs. Whatever the kind of association, the source of the rights of the members is their mutual contract *inter se*. It follows from the acceptance of this concept that in the absence of some contrary indication in that contract, each member has an equal right to share in any surplus assets on dissolution.

In *Re Sick and Funeral Society*, Megarry J. considered the earlier decisions and concluded that the problems in some of those decisions resulted from the confusion between property (which involved the concept of resulting trusts) and contract as the basis of membership of an association. Once it was clear that contract was the true basis, it followed that only the current members could share in the property on dissolution.[113]

It also followed that the length of time that a member had belonged to the association was irrelevant in determining his share of the property on the dissolution of the association. Although he may have paid a subscription for longer, he had also had the benefit of being a member for a longer period.[114]

In *Re Sick and Funeral Society*, there were two classes of members, full members and child members who paid half the full subscription. Megarry J. held that the facts showed that a distinction should be made between the classes when the funds were distributed. He noted that it would not always be easy to establish whether or not such a distinction should be made.[115] The distribution was to be made equally among the members of each class, and full members were to receive twice as much as child members.

Since that decision, the principle that the distribution of any surplus property of an association should prima facie be made equally among all its members has been reinforced by the decision of Walton J. in *Re Bucks (No. 2)*. Walton J. applied the reasoning of Megarry J. to the dissolution of a friendly society and held that the principle of equal distribution was equally applicable to the dissolution of a club or a friendly society. He clearly rejected the arguments in favour of proportional distribution. His judgment concluded,

> "It is a matter, so far as the members are concerned of pure contract, and, being a matter of pure contract, it is in my judgment, as far as distribution is concerned, completely divorced from all questions of equitable doctrines. It is a matter of simple entitlement, and that entitlement, in my judgment, at this time of day must be, and can only be, in equal shares."[116]

113 [1973] 1 Ch. 51, 59-60.
114 See also the rejection of the "first in first out" rule in *Clayton's Case* in *Re British Red Cross Balkan Fund* [1914] 2 Ch. 419 and comments by Atkin, op. cit. 220-1.
115 [1973] 1 Ch. 51, 61.
116 [1979] 1 All E.R. 623, 637. See criticism of the principle of equal distribution in B. Green, op. cit. 640-3.

Since this decision it is unlikely that, in the absence of any clear contrary intention in the rules of an association, any basis other than equality would be considered for the distribution of its surplus assets on dissolution.

INCORPORATED ASSOCIATIONS

At the present time in Victoria, an unincorporated, non-profit association may only become incorporated as a company limited by guarantee pursuant to the *Uniform Companies Act*, unless it happens to fall within the ambit of a more specialized statute such as the *Co-Operation Act* 1958 (Vic.) or the *Hospitals and Charities Act* 1958 (Vic.).[117] If incorporated as a company limited by guarantee, the relevant provisions of the *Uniform Companies Act* regulate the winding up and disposition of any surplus assets of such an association.[118]

However, in South Australia, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory (and also New Zealand) a non-profit association may use the simple and inexpensive procedure prescribed by the *Associations Incorporation Act* (the *Incorporated Societies Act* 1908-1976 in New Zealand) in force in each one of those jurisdictions to become incorporated by registration as an incorporated association.

These statutes do not include detailed provisions regulating the winding up and subsequent disposition of any surplus assets of an incorporated association, and, in fact, the Western Australian Act has no provisions at all dealing with the dissolution of incorporated associations.

In recent years the importance of adequately regulating these matters has been recognized. The amendments made to the New Zealand Act in 1976, those which were proposed, but never enacted, to the South Australian Act in 1978, and the recommendations made in the 1972 Report of the Western Australian Law Reform Committee are all evidence of the increasing concern about these issues.[119]

Similarly, the draft statutes prepared by the Law Reform Commissions of New South Wales and Queensland and by the Victorian Chief Justice's Law Reform Committee attempt to provide adequately for the winding up of incorporated associations and the disposition of their property.[120]

[117] See the definitions in Part I of the *Co-Operation Act* and ss. 3(1) and 64 of the *Hospital and Charities Act* which specify the societies and associations which may apply for registration under those Acts.

[118] See the notes prepared by the Attorney-General for the guidance of persons seeking the licence of the Attorney-General to omit "limited" from the name of a company limited by guarantee, (1971) 45 L.I.J. 33, 36.

[119] *Incorporated Societies Amendment Act* 1976 (N.Z.) which amended s. 27 of the principal Act. Bill 87 1978 (S.A.) to amend the *Associations Incorporation Act*. Report and Working Paper of the W.A. Law Reform Committee, Project 21: the *Associations Incorporation Act*.

[120] Qld. Draft Associations Incorporation Act and Working Paper (1978) 18-20.

(1) Winding up an Incorporated Association

(a) *Western Australia*

The *Associations Incorporation Act* 1895-1962 (W.A.) does not contain any provision regulating the winding up or the subsequent disposition of the property of an incorporated association. The 1972 Report of the Law Reform Committee recommended that the Act should be amended to provide for both the voluntary and the compulsory winding up of an incorporated association, and for the proper disposition of any assets remaining after its dissolution.[121] As yet, no action has been taken to implement these recommendations.

As the Act does not deal with these matters, an incorporated association may only be wound up voluntarily if its rules so provide. If there is nothing in its rules it would appear that, failing a timely amendment to the rules,[122] the only means of winding up such an association is a compulsory winding up as an unregistered company pursuant to Part X Division 5 of the *Uniform Companies Act*.[123]

The application of this Division has been discussed earlier in relation to unincorporated associations. On the face of it, the definition of "unregistered company" in s. 314 would include all incorporated associations which have more than five members. However, as was seen earlier, the section has been restricted to associations which could be said to have a "place of business", and non-trading associations, whether or not they are incorporated, have been excluded. The decisions appear to turn on the point of whether or not the association is of a commercial nature rather than on the question of incorporation. The reports of these early cases tend to be very brief and it is difficult to establish the reasons for the decisions made by the judges.[124]

In *Re St. Kilda and Brighton Railway Co.; Ex parte Plevins*,[125] the Full Court of the Supreme Court of Victoria held that a railway company incorporated by a special Act of the Legislative Council could not be wound up as an unregistered company. Both the Chief Justice (Stawell C.J.) and Barry J. refused to allow the company to be wound up under the *Winding-Up Acts* because its activities involved the interests of the public

121 W.A. Law Reform Committee Report, 14 March 1972, 4-6.

122 See fn. 38 supra.

123 See fn. 63 supra; W. E. Paterson and E. H. Ednie, *Australian Company Law* (2nd ed., Sydney, Butterworths, 1971) Vol. 3 pp. 3097-8; W.A. Law Reform Committee Working Paper, para. 17; H. A. J. Ford, *Principles of Company Law* (2nd ed., Sydney, Butterworths, 1978) para. 105; F. B. Palmer, *Palmer's Company Law* (21st ed., London, Stevens, 1968) p. 737 (referring to the corresponding section of the English Act). It appears from these references that there are few decided cases which are of any guidance on this point, and even fewer of those cases have been decided in recent years.

124 See cases such as *Re The Alfreton District Friendly and Provident Society* (1863) 7 L.T. (N.S.) 817.

125 (1863) 2 W. & W. (I.E. & M.) 69. See Paterson and Ednie, op. cit. 3097.

as well as those of the shareholders and creditors of the company. As Barry J. stated, "The *Winding-Up Acts* in my opinion were intended to apply to commercial companies, formed for the purpose of commercial ventures, pure and simple."[126] This is one of the very few early decisions in which the report includes any basis for the decision of the judges concerned.

It would appear to still be uncertain in Western Australia whether or not an incorporated association, such as a social club the activities of which did not involve any type of trading, would be considered to be an unregistered company which could be wound up pursuant to Part X Division 5. In the case of a football or other sporting club which was an incorporated (or an unincorporated) association, it would seem clear that the *Uniform Companies Act* would apply and it could be wound up because of the element of trading in its activities.

(b) *South Australia*

Section 24 of the *Associations Incorporation Act* 1956-1965 (S.A.) deems an incorporated association to be an unregistered company for the purposes of Part X Division 5 and states that if it is unable to pay its debts, within the meaning of that phrase in s. 315(2) of the *Uniform Companies Act*, it may be wound up as an unregistered company.

It would appear that this is the only ground upon which an incorporated association can be wound up compulsorily in South Australia. Unless the rules of the association provide for its voluntary winding up, the only other method of terminating its existence would be for the Registrar to cancel the certificate of incorporation pursuant to s. 25 of the *Associations Incorporation Act*.[127]

(c) *Tasmania, the Australian Capital Territory and the Northern Territory*

The *Associations Incorporation Acts* in these jurisdictions go further than the South Australian statute and provide that the provisions of the *Uniform Companies Act* dealing with the winding up of unregistered companies shall apply to the winding up of incorporated associations.[128] An incorporated association may be wound up compulsorily not only on the ground that it is unable to pay its debts, but also if the association has dissolved or has ceased to exist, or if the Court considers that it is just and equitable that it should be wound up.[129]

Once again an association may only be wound up voluntarily if its rules contain the necessary provisions.

[126] (1863) 2 W. & W. (I.E. & M.) 69, 79.
[127] See 163 infra.
[128] Tas. s. 32; A.C.T. s. 17; N.T. s. 20.
[129] *Uniform Companies Act* s. 315(1).

(d) *New Zealand*

It is important to consider the provisions of the *Incorporated Societies Act* 1908-1976 (N.Z.) because, unlike the Australian statutes, it provides also for the voluntary winding up of an incorporated society as well as for a compulsory winding up by the Court.

Section 24 provides that a general meeting of the members of an incorporated society may resolve to wind the society up voluntarily. Only an ordinary resolution is required, but this must be confirmed at a later general meeting called at least one month afterwards for the purpose of confirming the resolution.[130] The rules of the *Companies Act* dealing with voluntary winding up are incorporated by reference.[131]

Sections 25 and 26 deal with the compulsory winding up of an incorporated society. As in the Australian statutes, the relevant rules of the *Companies Act* are incorporated by reference. However, the statute sets out clearly both the grounds upon which an incorporated society may be wound up, and who has the right to apply to the Court for this to be done. The grounds upon which a society may be wound up by the Court under s. 25 are

"(a) If the society suspends its operations for the space of a whole year; or
(b) If the members of the society are reduced in number to less than fifteen; or
(c) If the society is unable to pay its debts; or
(d) If the society carries on any operation whereby any member thereof makes any pecuniary gain contrary to the provisions of this Act; or
(e) If the Supreme Court or a Judge thereof is of opinion that it is just and equitable that the society should be wound up."

The society itself, a member or a creditor thereof, or the Registrar may apply for it to be wound up by the Court.

The recommendations of different Australian law reform agencies, both for the reform of existing legislation and for the introduction of *Associations Incorporation Acts* into Victoria, Queensland and New South Wales, have all preferred the approach taken in the New Zealand statute to the use of the provisions of Part X Division 5 of the *Uniform Companies Act*.[132]

(2) Cancellation of the Certificate of Incorporation of an Incorporated Association

Apart from the Western Australian statute, which has no provision

[130] See *Incorporated Societies Amendment Act* 1971 (N.Z.) inserting s. 24(1A) which makes it clear that only a majority of those members present and voting at the meeting is needed. See also unpublished LL.M. thesis by D. J. White *The Law Relating to Associations Registered under the Incorporation Societies Act* (1972) Ch. VIII.

[131] S. 24(2).

[132] See fns. 115 and 116 supra.

dealing with this,[133] the *Associations Incorporation Acts* of other Australian jurisdictions all include a section allowing the Registrar to cancel the certificate of incorporation of an association on the ground that he "has reasonable cause to believe that an incorporated association has ceased to exist or that the transactions of an incorporated association are such that it is not or has ceased to be an association within the meaning of" the non-profit requirements of the Act in question.[134] This power of cancellation appears to be intended to allow the Registrar to remove defunct associations from the register and also to give him some control over the operations of an existing association. As the statute does not also set out the powers of the Registrar in regard to the assets of an association the certificate of which has been cancelled, these provisions have proved to be of little practical use.[135] The New Zealand statute has recently been amended to give the Registrar clear powers to deal with these assets,[136] and similar powers were included in ss. 23B-23G of the 1969 amendments to the *Associations Incorporation Ordinance* 1963-1969 (N.T.).

(3) Disposition of the Surplus Assets of an Incorporated Association after its Dissolution

Similar considerations apply to the question of the disposition of the assets of an incorporated association as to an unincorporated association. After payment of debts and expenses it must first be determined whether or not any of the association's property was held on a valid trust for charitable or other purposes, so that it should be applied *cy-près* or returned to the donors by way of a resulting trust, as was the case in *Auckland Car Club (Inc.)* v. *New Zealand Midget Racing Car Federation (Inc.)*[137] where it was held that there was a resulting trust in favour of the contributors to the original fund. If the property was not held on trust the rules of the association will in many cases provide that any surplus property should be transferred to an organization with similar objects, as the members decide by special resolution, or among the members of the association.

In the case of a non-profit association which is incorporated as a company limited by guarantee and has a licence from the Minister to omit "limited" from its name, there are strict requirements that the memorandum of the company include a mandatory provision that all surplus property should

[133] See W.A. Law Reform Committee Working Paper, June 1971 para. 15-16; W.A. Law Reform Committee Report, 14 March 1972, 4-6.
[134] S.A. s. 25; see also Tas. s. 34; A.C.T. s. 25(a); N.T. s. 23A (added in 1969) and N.Z. s. 28. (The latter two statutes speak of dissolution rather than of cancellation of the certificate of incorporation).
[135] Information received from the Assistant Commissioner for Corporate Affairs in S.A. and from the Assistant Registrar of Companies (N.Z.) in 1980. Also J. Hambrook, Report on the *Associations Incorporation Act* (unpublished) para. 69.
[136] *Incorporated Societies Amendment Act* 1976.
[137] [1958] N.Z.L.J. 199.

be distributed to a body with similar objects on the dissolution of the company.[138]

The Tasmanian, Australian Capital Territory and Northern Territory statutes include a provision requiring a court order to implement any special resolution of the members relating to the distribution of assets and also giving the Court an overriding discretion to refuse to make such an order if it was not felt to be just, and to substitute a different distribution.[139]

This supervisory power is not included in the New Zealand Act, which states that all surplus assets should be distributed according to the rules of the society and, failing that, as the Registrar directs.[140]

Another possible method is that proposed in the Victorian and Queensland draft statutes, that the assets should be disposed of according to a special resolution of the association and, failing that, be divided among the members in equal shares.[141]

Whichever course is preferred by a particular statute, the important point is that an adequate and fair procedure should be provided by which any surplus assets may be disposed of when a non-profit association has been wound up or has become defunct.

The legal principles governing the disposition of the surplus property of a non-profit association after its dissolution appear now to be clearly established since the decisions in cases such as *Re Bucks (No. 2)* and *Re Grant's Will Trusts*. There still remain many problems concerning the procedure by which an unincorporated or an incorporated non-profit association may be effectively dissolved and its assets disposed of, especially in instances where the association is for all practical purposes defunct.

In jurisdictions where an *Associations Incorporation Act* or some similar statute already exists, these problems may be remedied by amending the existing legislation, at least in so far as they concern incorporated associations. It also appears to follow that, where this legislation does exist, a majority of non-profit associations choose to make use of it and become incorporated, so that few problems involving unincorporated associations occur. In other jurisdictions the introduction of legislation facilitating the incorporation of non-profit associations and regulating their dissolution would lead to the same result.

138 See fn. 118 supra.

139 Tas. s. 33; A.C.T. s. 19; N.T. s. 22; see also N.S.W. Law Reform Commission, *Associations—Outline Scheme for Incorporation by Registration* (1979) para. 69 and supplementary paper in December 1979.

140 S. 27.

141 Qld. draft s. 38; Vic. draft model rule 45. Note that the Qld. draft contemplates the vesting of the assets in the Public Curator if no special resolution is passed. See also *Brown* v. *Dale* (1878) 9 Ch.D. 78.