tioners interested in large estates, contains possibilities of endless expense and litigation, in two directons.

The first lies in the refusal of the High Court to place the onus on the Commissioner to justify his issue of a further assessment.

This means that the only way in which further assessments may be reviewed is by the rather circuitous and expensive procedure of having all the facts which could possibly be relevant to the amount of the assessment put before the Supreme Court for its determination, after lengthy and costly inquiries.

The second lies in the refusal of the Court to lay down any rule as to the kind of evidence on which the Commissioner may base his decision that the first assessment was too low.

The possible scope left to the Commissioner was encompassed by Williams, J.,[21] who considered that, on the argument accepted by the majority, "the Commissioner has a complete power of revision from time to time of the value he had placed on every asset in the estate. Even if his primary estimate was challenged upon an appeal under s. 124 and the court on an issue of fact decided the value, nevertheless the Commissioner, on finding that the asset had subsequently realised more than the value fixed by the Court, could issue a further assessment under s. 128 and no *res judicata* could operate to stop him from doing so because s. 128 provides that the Commissioner has power to make a further assessment of the duty unpaid and to recover the same in the same manner as if no previous assessment or payment had been made and he would therefore be exercising an independent power".

As no time limit is placed on the exercise of his powers by the Commissioner under this section, it may be possible for him to claim, even after an estate has been completely distributed, that some later but comparable sale enabled him to impose further duty, thus necessitating a further adjustment between beneficiaries.

Such an interpretation is in sharp contrast with the general policy of the law to put an end to litigation: *interest reipublicae ut sit finis litium*. Apart from considerations of convenience, then, this decision of the High Court would appear to be out of accord with British and Australian legal traditions.

JANET SUMMERS, Case Editor — Fourth Year Student.

CHARITABLE TRUSTS

INLAND REVENUE COMMISSIONERS v. *BADDELEY AND OTHERS*

The recent[1] *dictum* of Viscount Simonds on the law of charities in *Inland Revenue Commissioners* v. *Baddeley and Others*[2] will cause considerable concern to those lawyers who prefer versatile if rather confused principles of law to definite but rigid ones.

For many years the courts have accepted the classification of trusts laid down by Lord Macnaghten in *Pemsel's Case*.[3] The relevant passage reads as follows:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any one of the preceding heads.

This well-turned and easy to understand sentence has occasioned a great deal of litigation the results of which have been deplored by more than one writer.[4] However, despite the multiplicity of decisions on the law of charities the case

[21] *Id.* at 395.

[1] 17th February, 1955.

[2] (1955) 2 W.L.R. 552.

[3] (1891) A.C. 531.

[4] See N. Bentwich, "The Wilderness of Legal Charity" (1933) 49 *L.Q.R.* 520; J. Stone, *The Province and Function of Law* (1946) 446.

under review shows that one aspect at least of the law relating to charities has yet to be fully explored.

The facts of the case are as follows:— Land on which was erected a mission church, lecture room and store and other land laid out as playing fields was transferred by two conveyances to trustees to be held on trust to be "used by the leaders for the time being of Stratford Newtown Methodist Mission for the promotion of religious, social and physical well-being of persons resident in the County Boroughs of West Ham and Leyton . . . who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church."[5]

On construction of the documents it was held by Viscount Simonds,[6] Lord Porter,[7] Lord Tucker,[8] and Lord Somervell of Harrow,[9] with Lord Reid dissenting,[10] that since they were expressed in language so vague as to permit the property to be used for purposes which the law did not regard as charitable and which did not satisfy the necessary element of public benefit,[11] the documents did not fall within the fourth head of charities set out in *Income Tax Special Purposes Commissioners* v. *Pemsel*,[12] that is, "other purposes beneficial to the community".

On this ground alone the gift would fail as a charitable gift. However, Viscount Simonds saw fit to find the attempted charitable gift bad, not only on the above ground, but also on the ground that the members of the Methodist Church resident in the County Borough of West Ham and Leyton, future converts as well as present adherents, did not constitute a sufficient class to be recognised as "public"[13] within the fourth category in *Pemsel's Case*.[14] This *dictum*, if it is followed in the lower courts of England and other common law countries, will institute a radical change in the law of charities and cause many gifts upheld as charitable in previous cases to satisfy no longer the condition of being beneficial to the community (as required in the fourth category). The following are the precise words of Viscount Simonds:[15]

> I should in the present case conclude that a trust cannot qualify as a charity in the fourth class of *Income Tax Special Purposes Commissioners* v. *Pemsel*[16] if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed.

In other words, a gift to trustees for purposes of religion alone under the third head in *Pemsel's Case*,[17] *viz.* "advancement of religion" is a good charitable trust even though it be confined to a particular religion;[18] but once "other" purposes[19] as well as religious are included as objects of the gift, which is thereby brought under the fourth head in *Pemsel's Case*,[20] the gift is no longer a charitable gift according to Viscount Simonds as it no longer satisfies the necessity of a public element. To refine this view even further the learned Law Lord is saying in effect that the class to be benefited by the gift must be more extensive, and thus wider public benefits must be conferred under the fourth category than under the first three categories.

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[5] For a fuller exposition of contents of documents see Viscount Simonds, *Inland Revenue Commissioners* v. *Baddeley* (1955) 2 W.L.R. 552, 555.

[6] *Id.* at 554.

[7] *Id.* at 563.

[8] *Id.* at 580.

[9] *Id.* at 582.

[10] *Id.* at 563.

[11] Note the different use of the word "public". In the *ratio decidendi* the vagueness of the class, due to the words "the promotion of the social well-being" (*per* Tucker, L.J. (*id.* at 580)) in the document prevents the gift being recognised as having the necessary "public" element. Viscount Simonds is here saying that even though the class is sufficiently certain, it is still not "public".

[12] (1891) A.C. 531.

[13] See *supra* n. 11.

[14] (1891) A.C. 531.

[15] (1955) 2 W.L.R. 552, 562.

[16] (1891) A.C. 531.

[17] *Ibid.*

[18] For examples of liberality of decisions of courts on the third category, see H. G. Hanbury, *Modern Equity* (6 ed. 1952) 226.

[19] In the sense satisfying the requirement of the nature of the charitable trust under the fourth head.

[20] (1891) A.C. 531.

It is submitted in this note that there is no justification in law for holding that a class which satisfies the requirements of a charitable trust under the first three headings[21] may not satisfy the requirements of a charitable trust under the fourth heading. As to the instant case, though Lord Somervell of Harrow in a bald statement supports[22] Viscount Simonds, Lord Porter[23] and Lord Tucker[24] expressly reserve their opinion on this matter, while Lord Reid[25] in a well-argued judgment vigorously disagrees with Viscount Simonds.

The main case in point is *Verge* v. *Somerville*,[26] where a gift for benefit of New South Wales returned soldiers was upheld as charitable, Lord Wrenbury saying that to qualify as a charity a trust must be for "the benefit of the community or an appreciably important class of the community. Inhabitants of a parish or a town, or any particular class of such inhabitants may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot." Viscount Simonds cites this passage,[27] adding that he feels great difficulty in giving a precise quantitative or qualitative meaning to the word "class". In order to use this passage to support his own viewpoint, his Lordship links the word "class" with the word "returned soldiers" and differentiates between "a form of relief extending to the whole community yet by its very nature advantageous only to the few and a form of relief accorded to a selected few out of a large number equally willing and able to take advantage of it."[28] And he maintains that "returned soldiers" belong to the former type and thus the word "class" means exactly that.

However, Lord Reid[29] quotes these identical words of Lord Wrenbury to support his point of view, and to indicate the logical flaw of Viscount Simonds' judgment. His Lordship says: 'I repeat the crucial words: "the inhabitants of a parish or town *or any particular class of such inhabitants* may for instance be the objects of such a gift" ',[30] and then goes on to state the facts in *Verge* v. *Somerville*[31] and points out correctly, as it appears to the present Writer, that

> accordingly the *ratio decidendi* was that without poverty being a qualification there was a valid charitable trust within Lord Macnaghten's fourth division in favour of a class of the community defined otherwise than by reference to all the inhabitants of any particular area.[32]

In other words, Lord Reid is pointing out that returned soldiers and Methodists are equally sections of the community *qua* a class under the fourth head for the purposes of Lord Wrenbury's test in *Verge* v. *Somerville*.[33]

Thus, when Viscount Simonds argues that "a gift of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area may well be supported as a valid charity . . ." but reserves his opinion in the case "in which the beneficiaries are a class determined, for instance, by adherence to a particular religion or by employment in a particular industry or by particular employers",[34] he is, in effect, maintaining that only the whole of the community within a given geographical area may benefit as a legal charity under the fourth class in *Pemsel's Case*,[35] and hence comes into con-

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[21] There are, it is to be noted, anomalies within the first head, i.e. Trusts for the Relief of Poverty. These are the so-called "poor relations" cases which were distinguished as being an exception in *Oppenheim* v. *Tobacco Securities Trust Co.* (1951) A.C. 297, 305, 308, in which it was decided not to extend the "poor relations" type of case to an educational trust for benefit of employees. An educational trust for relatives was held non-charitable in *Re Compton* (1945) Ch. 123. It is to be noted that the Ontario Court of Appeal, in *Re Cox* (1951) 20 L.R. 326, refused to extend the "poor relatives" cases within the "poverty" category itself, so that a poverty trust, the beneficiaries of which were bound by a nexus of common employment, was held to be non-charitable in law.

[22] (1955) 2 W.L.R. 552, 582.
[23] *Id.* at 563.
[24] *Id.* at 581.
[25] *Id.* at 563.
[26] (1924) A.C. 496.
[27] (1955) 2 W.L.R. 552, 561.
[28] *Id.* at 562.
[29] *Id.* at 576-77.
[30] *Id.* at 576.
[31] (1924) A.C. 496.
[32] (1955) 2 W.L.R. 552, 557.
[33] (1924) A.C. 496.
[34] *Id.* at 559.
[35] (1891) A.C. 531.

flict with the plain meaning of Lord Wrenbury's words and the decision on the facts of the case of *Verge* v. *Somerville*.[36] No matter how Viscount Simonds defines the public element under the fourth class, it is clear that returned soldiers would always be a class within New South Wales in exactly the same way as the Methodist Church is a class within the smaller geographical area of the parish. This may be illustrated by Viscount Simonds' own words in a passage which follows closely the one quoted above:[37]

> Somewhat different considerations[38] arise if the form which the purporting charity takes is something of general utility which is, nevertheless, made available not to the whole public, but only to a selected body of the public — an important class of the public it may be. For example, a bridge which is available to all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons however numerous and important; it is then clearly not a charity. It is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve.

How, if this is Viscount Simonds' view, can he hold that returned soldiers are "a selected body of the public": that they are a class of the community? In fact, it may be replied to Viscount Simonds[39], adopting the words of the Master of the Rolls[40], "who has ever heard of a bridge to be crossed only by impecunious Returned Soldiers?". If, by his words above cited[41], Viscount Simonds means that the beneficiaries of the gift in *Verge* v. *Somerville*[42] are all the persons of a class within a court's jurisdiction (in this case, the New South Wales Supreme Court), he must be taken to mean by his subsequent words[43] that not only would Returned Servicemen within a parish be unable to benefit under a charity but that even a general purpose charity for a parish would also fail, as the people of a parish are a selected few out of a large number in New South Wales equally willing and able to take advantage of it. Such a development of the law is suggested by *Tudor on Charities*,[44] but would appear not to be the opinion of Viscount Simonds earlier in his judgment.[45] It would thus appear that the main support of Viscount Simonds' theory does not support him at all.

Although the case of *Goodman* v. *Mayor of Saltash*[46] has been explained as an anomaly[47], the actual decision of the House of Lords in this case is still binding on the House, and since in that case it was held that there was a valid charitable trust where the particular class of person benefited were the inhabitants of ancient messuages within the borough of Saltash, the *ratio decidendi* was that there might be a valid charitable trust where beneficiaries were not by any means all the inhabitants of a particular area. The same conflict as exists in the case being reviewed between Lord Reid and Viscount Simonds, can be seen in the judgments of Lord Blackburn[48] and Lord Fitzgerald.[49] Lord Blackburn dissented on the ground that the public element was lacking, while Lord Fitzgerald adopting the same viewpoint as Lord Reid maintained they

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[36] (1924) A.C. 496.
[37] Quoted *supra.*
[38] (1955) 2 W.L.R. 552, 562.
[39] *Ibid.*
[40] Evershed, M.R., referring to a question asked by Counsel in *Baddeley and Ors. (Trustees of the Newtown Trust)* v. *Inland Revenue Commissioners* (1953) 3 W.L.R. 135, asks "Who has ever heard of a bridge to be crossed only by impecunious Methodists?" (*id.* at 144).
[41] (1955) 2 W.L.R. 552, 562. "The distinction between a form of relief extending to the whole of the community yet by its very nature advantageous to the few."
[42] (1924) A.C. 496.
[43] " . . . and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it". ((1955) 2 W.L.R. 552, 562.)
[44] (5 ed. 1929) 45.
[45] (1955) 2 W.L.R. 552, 559.
[46] (1882) 7 A.C. 633.
[47] *Tudor on Charities* (5 ed. 1929) 45; Viscount Simonds, *William's Trust* v. *I.R.C.* (1947) 1 All E.R. 513, 521.
[48] (1882) 7 A.C. 633, 654.
[49] *Id.* at 608.

were a class within the borough, supporting the Lord Chancellor[50] who said the custom was "confined to a particular class of persons, *viz.*, the inhabitants of ancient messuages within the borough".

Also in *Re Christchurch Inclosure Act*[51] Lindley, L.J. in holding that a trust for certain cottages within a parish could be the subject of a valid charitable trust, said:

> Moreover the trust is not for the inhabitants of a parish or district, but only for some of such persons . . . a gift subject to a condition or trust for the benefit of the inhabitants of a parish or town or of any particular class of such inhabitants is (as I understand the law) a charitable trust.[52]

The only judge who holds views similar to Viscount Simonds is Babington, L.J. in *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners*[53], where he states:

> The Presbyterian Church is not a section of the public . . . . Considerable confusion has, I think, arisen from a failure to distinguish between the public element in cases under the first three of Lord Macnaghten's categories and the fourth. Under the first three the charitable intention must be established, i.e., for the relief of poverty, the advancement of religion or the advancement of education. The objects must be of a public nature, as Fitzgibbon, L.J. says, but it is immaterial under these categories how the class is delineated provided it is adequate in numbers and importance. In cases falling within category four, however, there can be no charity until it is shown that the gift is to or for the benefit of the public or a section of the public . . . . If this trust had been for the advancement of religion the class would clearly be sufficient in numbers and importance to sustain it as a good charitable trust though it only benefits a particular faith the numbers of which do not constitute a section of the public.[54]

However, this argument was rejected by the other two judges, Lord MacDermott and Andrews, C.J.

It is very interesting to compare the views of the judges who heard the case under discussion at first instance in Chancery[55] and later on appeal.[56] One and all they reject the view of Babington, L.J. (which subsequently proved to be that of Viscount Simonds). Evershed, M.R., said, *inter alia*:

> The essential quality or characteristic of the intended beneficiaries in the present case remains that of being inhabitants of West Ham or Leyton albeit they are but a class of such inhabitants; and they fall accordingly within the language of Lord Wrenbury in *Verge* v. *Somerville*.[57] The inhabitants may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.[58]

This may be termed the logical reply to Viscount Simonds' argument and the following extract from Jenkins, L.J.'s judgment may be termed the legal reply.

> If the members of a particular religious sect or denomination resident in a particular area are a section of the public for the purposes of religious or educational charities, I fail to see why they should not also be such for the purposes of any other form of charity . . .[59]

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[50] *Id.* at 646, *per* Lord Selborne.
[51] (1887) 35 Ch. D. 355.
[52] *Id.* at 530, 531. It is fair to point out that both Lindley, L.J. and Mr. Justice Stirling did not feel happy about this decision, but felt constrained by the previous decisions of the House of Lords in *Goodman* v. *Mayor of Saltash* (1882) A.C. 633. This is, of course, an example of the "slippery slope" referred to by Viscount Simonds in *Inland Revenue Commissioners* v. *Baddeley* (1955) 2 W.L.R. 552, 561.
[53] (1946) N.I. 178.
[54] *Id.* at 197-99.
[55] Jarman, J.
[56] Evershed, M.R., Jenkins, L.J., Hodson, L.J.
[57] (1924) A.C. 496.
[58] (1953) 3 W.L.R. 135, 145.
[59] *Id.* at 162.

Law and logic seem weighted against Viscount Simonds, the law because only Babington, L.J. appears to support him, and logic because no matter how "class", as used by Lord Wrenbury is defined, it must always include a religious class.

The fundamental aim of Viscount Simonds is to avoid what he refers to as "the slippery slope"[60] — what his Lordship fears most is that although in this case the area is comparatively large and populous and the members of the church numerous, the principle once established that a "class within a class" (as he calls it) can be the subject of a good charitable gift, may mean that although the area and numbers grow smaller, the same principle would apply, and thus a particular street could be the subject of a valid charitable gift.[61] This view has been expressed by J. Brunyate.[62] To bring order from chaos he submits that no section of the community should be treated within the fourth class as having a sufficient public element. He says[63]:

> The rich, the working classes, miners, the legal profession, trades unionists, Conservatives, Jews, Roman Catholics, and so forth are all important sections of the community, and if one be admitted it is impossible to define a principle for excluding the others, yet if all be admitted the boundaries of charity extend to include gifts in support of all sorts of sectional interests — under existing decisions it is hard to say what the present law on this point is, but it is submitted that geographical sections, with perhaps a very few others, should alone be admitted.

Viscount Simonds' view seems to be similar to Mr. Brunyate's; and if not similar, then with the same result: the exclusion of all spurious cases, the prevention of analogy building on analogy until all becomes an unwieldy mess. What he fears most is the situation that arose in *Re Christchurch Inclosure Act*,[64] where a charity may be held to exist where the object of the gift is only one street.

However, it is maintained in this Note that although such reform is desirable, the means suggested by Viscount Simonds would not achieve the result which he desires — a certain yet adaptable law. To define "section of the community" as meaning a class from the whole of a given law-area would be to exclude a large number of charities, the area of whose benefits is smaller than a given law-area. It would be true to say that the vast majority of trusts are set up to benefit only a small section of the community, and rare are such cases as *In re Smith*[65], where a testator gave his residuary estate "unto my country England to and for her own use and benefit absolutely".[66] However, it seems that the weight of authority is against Viscount Simonds' view, that there is greater necessity for public benefit in the fourth category of *Pemsel's Case*[67] than in the other three and the result of his *dictum* would be to add another refinement[68] to the law of charities.

Viscount Simonds' own formulation in *Oppenheim's Case*[69] appears to be sufficient to meet any contingency. The second requirement effectively excludes any attempt to include such trusts as those in *Oppenheim's Case* and *Re Cox* as being within the ambit of legal charities.[70] The first head, which is here of

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[60] (1955) 2 W.L.R. 552, 561.
[61] *Ibid.*
[62] "The Legal Definition of Charity" (1945) 61 *L.Q.R.* 268.
[63] *Id.* at 282.
[64] (1887) 35 Ch. D. 355.
[65] (1932) 1 Ch. 153.
[66] For a local action which would have failed if the gift had fallen under the fourth class instead of the first class if Viscount Simonds' formulation prevailed, see *Perpetual Trustee Co.* v. *Ferguson* (1951) S.R. (N.S.W.) 256, when there was a valid poverty trust for benefit of boys leaving the Masonic Baulkham Hills School for Boys.
[67] (1891) A.C. 531.
[68] He maintains he is discouraging refinement (1955) 2 W.L.R. 552, 554.
[69] (1951) A.C. 297, 306, where Viscount Simonds states: "These words 'section of the community' have no special sanctity, but they conveniently indicate (i) that the possible... beneficiaries must not be numerically negligible and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on this relationship to a particular individual".
[70] It was recently held in the United States in the case of *Re Tarrant* (28 An. L. Rep.

importance, is wide enough to allow the court discretion in the manner in which it is applied. Merely by saying that the numbers are numerically negligible the court can prevent such decisions as that in *Goodman* v. *Saltash Corporation*[71], whilst allowing it in the case of returned soldiers. This empirical solution as previously suggested by Viscount Simonds would appear more satisfactory than the rigid formulation suggested in the present case.

In summary, any move to make this branch of the law more certain would fail to do anything but make the law rigid. It is essential that the law of charities be left in general terms and principles so that a just case may not pass unremedied.

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LEGAL STATUS OF TRADE UNION

BONSOR v. *MUSICIANS' UNION*

Sir Raymond Evershed, M.R., delivering his judgment in the Court of Appeal in *Bonsor* v. *Musicians' Union*,[1] referred to a registered trade union in the following words:

> Parliament has . . . chosen in its wisdom to bring into being a creature hitherto unknown to the law, a "near corporation", having not all but some, and unspecified, attributes and characteristics of a corporation, and as a result anomalies and difficulties appear to be inevitable, and the qualities and habits of this statutory, and amorphous, being must be discerned as it is given body and clothing by judicial decisions, which may sensibly decide that it presents (legally) a different aspect in its dealings with outside persons from that displayed to its members in relation to its internal affairs.

But the body and clothing given to this creature by Sir Raymond Evershed himself as one of the majority of the Court of Appeal have now proved unsatisfactory to the House of Lords. The House reversed the decision on appeal[1a] and wrote a new chapter in the history of the transmigration of the trade union.

The facts of the case were that the plaintiff, a musician, was a member of the defendant union. In June 1949 the plaintiff was fifty-two weeks in arrears with his weekly subscriptions and in July 1949 a branch secretary, purporting to act under the rules of the union, struck the plaintiff's name off the register of members. As a result the plaintiff was unable to obtain employment as a musician. The plaintiff brought an action against the union claiming, *inter alia*, a declaration that his expulsion from membership of the union was wrongful, an injunction restraining the union and its officers from acting on the assumption that he was not a member, and damages. It was unanimously held by the Court of Appeal that the expulsion of the plaintiff by the branch secretary was *ultra vires* the union rules and that accordingly the plaintiff was entitled to the declaration and injunction claimed but that nevertheless (Denning, L.J. dissenting) no damages could be recovered from the union in respect

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2d. 424), in the case of an "industry" trust that, though the employees be a body of private individuals, that does not prevent it being an object of charity as the scope of charity must be enlarged as the necessities of men change—this suggests a more dynamic approach. Perhaps the Englishman's regard for tradition keeps him "parish" conscious, or perhaps the English Exchequer has a smaller revenue than its American counterpart. However, it would appear from the decision in *Baker* v. *National Trust Co. Ltd.* (1955) 3 W.L.R. 42 that the principle in *Oppenheim's Case* is now settled law.

[71] (1882) 7 A.C. 633.

[1] (1954) 1 Ch. 479, 504-505. For other literature on this case, see D. Lloyd, "Damages for Wrongful Expulsion from a Trade Union" (1954) 17 *Mod. L.R.* 360; R. B. Cooke, "Damages for Wrongful Expulsion from a Trade Union—a Further Comment" (1954) 17 *Mod. L.R.* 574; (1954) 70 *L.Q.R.* 322; R. B. Cooke, "Trade Union—Members' Remedy for Wrongful Expulsion" (1954) *Camb. L.J.* 162; Trevor C. Thomas, "Expulsion from Trade Unions" in *The Law in Action* (1954) 45.

[1a] (1955) 3 All E.R. 518.