

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*<sup>71</sup>, 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*,<sup>1</sup> 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<sup>1a</sup> 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

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.

<sup>71</sup> (1882) 7 A.C. 633.

<sup>1</sup> (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.

<sup>1a</sup> (1955) 3 All E.R. 518.

of the wrongful expulsion. On the question of damages the majority of the court (Sir Raymond Evershed, M.R. and Jenkins, L.J.) held themselves bound by the Court of Appeal's own decision in *Kelly v. National Society of Operative Printers and Assistants*<sup>2</sup> to dismiss the plaintiff's claim, whilst Denning, L.J. in his dissenting judgment held that *Kelly's Case*<sup>3</sup> ought not to be followed and that the plaintiff's claim for damages should succeed.

In *Kelly's Case*<sup>4</sup> the plaintiff had been wrongfully expelled from his union in breach of the union rules by a resolution of a branch committee. He sought against the union a declaration that the resolution was *ultra vires* and void, an injunction and damages. The action was brought in the county court where the plaintiff succeeded in all three claims. The defendants appealed first to the Divisional Court where the appeal was dismissed and then to the Court of Appeal which dismissed the appeal in so far as it related to the declaration and injunction but held that the plaintiff was not entitled to damages. The Court of Appeal held that the claim for damages could only be based on breach by the committee of the contract between the plaintiff and the other members of the union contained in the union rules and that as a trade union is simply a voluntary unincorporated association the action must be an action against all the members of the union in respect of the acts of the committee as their agent. But, it was held, the committee was just as much the agent of the plaintiff as of the other members so that in suing the union for what it had done he was suing himself among others and so his claim must fail. On the other hand, it was further held, if the committee acted without authority and in defiance of the union rules, it was the authorised agent of the members of the union who could not therefore be liable for its acts.

Counsel for the plaintiff in the Court of Appeal submitted that the Court would not be justified in treating *Kelly's Case*<sup>5</sup> as binding in the present case. *Kelly's Case*,<sup>6</sup> it was argued, proceeded on the basis that a trade union is a voluntary unincorporated association of individuals whilst the true position is that, at any rate for the purposes of the present case, a trade union is a separate legal entity, distinct from its members. This argument was rejected by the majority of the court, but found favour with Denning, L.J., who said:<sup>7</sup>

There is only one decision which stands in the way of an award of damages. It is *Kelly v. National Society of Operative Printers and Assistants*.<sup>8</sup> A careful reading of that case shows that it is based on the proposition that a trade union is only an unincorporated association of individuals, without any legal personality of its own apart from its members. But that proposition is, I believe, a false proposition. A trade union is a legal entity with a personality in law comparable to that of a corporation. It is not, perhaps, an entire corporation, but it has many of the attributes of one. In particular, it can make contracts and break them just as a corporation can; it is liable in damages for breach of contract just as a corporation is; save for certain exemptions which Parliament has conferred upon a trade union, none of which avail the Musicians' Union in the present case.

His Lordship went on to express the view<sup>9</sup> that various statutes from 1871 to 1940 have conferred on a registered trade union so many rights and duties, powers and capacities, that it has become a legal entity virtually indistinguishable from a corporation and that the decided cases supported this view.

It was just this question of the legal status of a registered trade union which engaged the exclusive attention of the House of Lords when the widow and administratrix appealed to the House from the Court of Appeal decision

<sup>2</sup> (1915) 113 L.T. 1055.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> (1954) 1 Ch. at 508.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> (1954) 1 Ch. at 507.

<sup>9</sup> (1915) 113 L.T. 1055.

on the question of the member's right to damages. The union did not appeal from the decision upholding the injunction and declaration.

The learned Lords, whilst unanimously overruling *Kelly's Case*<sup>10</sup> and upholding the right of a member who has been wrongfully expelled from his registered trade union to sue the union for damages in respect thereof, arrived at this conclusion on different and conflicting grounds. Lord Morton of Henryton<sup>11</sup> and Lord Porter<sup>12</sup> held that for this purpose a registered trade union is an entity recognised by law and distinct from the individual members thereof. Hence when a person joins the union, a contract in terms of the rules comes into existence between the person and the union. For breach of this contract by wrongful expulsion the union is liable in damages. Lord MacDermott<sup>13</sup> and Lord Somervell of Harrow,<sup>14</sup> on the other hand, relying on substantially the same authorities relied on by Lord Morton of Henryton and Lord Porter, came to the conclusion that a registered trade union is not a juridical person. Hence when a person joins such a union he enters into a contract in terms of the rules with the other members of the union, but nevertheless when a breach of this contract occurs by wrongful expulsion the expelled member may sue the other members for damages in the registered name of the union. Lord Somervell<sup>15</sup> added the qualification that the trustees of the property of the union should be added as parties and Lord MacDermott<sup>16</sup> the rider that execution on any judgment could only be levied on the assets of the union and not on the assets of the individual members. Both their Lordships were of the opinion<sup>17</sup> that it is incorrect to hold, as was done in *Kelly's Case*,<sup>18</sup> that when a union committee or official expels a member from the union it is acting as an agent of the expelled member. The inference, they argue, is unreal, because it is absurd to suppose that an official or committee is acting as agent of an expelled member when expelling him. The realistic view, it is said, is that for the purposes of that act the official or committee is acting as agent of the other members only. Lord Keith, it is conceived, is a further supporter of the view held by Lord MacDermott and Lord Somervell. There is, indeed, a tendency in his judgment to straddle verbally the important issues as may be seen from the following extract:

In the result, then, my view is that Mr. Bonsor's contract of membership was a contract between himself and the other members of the union. On the view I have endeavoured to express, it may be regarded also as a contract with the trade union, for the trade union, in its registered capacity, is representative of all the members. So long as this is kept in view, it is convenient to talk of a member's contract of membership as a contract with his trade union.<sup>19</sup>

It is submitted, however, that the above apparent inconsistencies are merely verbal, and that in the result a majority of the House of Lords espouses the view that, at any rate in relation to the matter then before the House, a registered trade union is simply a voluntary unincorporated association and a member's contract of membership is with the other members of the association.

The question of the legal status of a trade union was first discussed in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*<sup>20</sup> where it was held by the House of Lords that a trade union could be sued in its registered name in tort for the wrongful conduct of its servants during a strike. Farwell, J. at first instance whose judgment was expressly approved by the House of Lords, used words which indicate that in his view a trade union was a legal entity apart from its members. He said:<sup>21</sup>

<sup>10</sup> (1915) 113 L.T. 1055.

<sup>11</sup> *Id.* at 526-27.

<sup>12</sup> *Id.* at 543.

<sup>13</sup> (1915) 113 L.T. 1055.

<sup>14</sup> (1901) A.C. 426.

<sup>15</sup> (1955) 3 All E.R. at 524.

<sup>16</sup> *Id.* at 535.

<sup>17</sup> *Id.* at 535-36.

<sup>18</sup> *Id.* at 429.

<sup>19</sup> *Id.* at 543-44.

<sup>20</sup> *Id.* at 538, 543.

<sup>21</sup> (1955) 3 All E.R. at 540-41.

Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of the agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.

In the House of Lords, the Earl of Halsbury L.C. and Lord Brampton seem to have shared this view. The Earl of Halsbury said:<sup>22</sup>

If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.

And Lord Brampton said quite plainly:<sup>23</sup>

I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name.

There are, however, *dicta* in the other speeches in the House which tend to support the contrary view. For example, Lord Macnaghten said:<sup>24</sup> "I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons, who, from their position, may be taken fairly to represent the body." And later:<sup>25</sup> "The registered name is nothing more than a collective name for all the members." And Lord Shand and Lord Lindley seem to have been of the same opinion. The division of opinion in the *Taff Vale Case*<sup>26</sup> is perpetuated in the instant case. Lord Morton and Lord Porter, naturally enough, are to be found emphasising the *dicta* of Lord Halsbury and Lord Brampton,<sup>27</sup> while Lord MacDermott, Lord Keith and Lord Somervell<sup>28</sup> emphasise the judgments of Lord Macnaghten, Lord Shand and Lord Lindley.

In *Amalgamated Society of Railway Servants v. Osborne*<sup>29</sup> where it was held by the House of Lords that a registered trade union did not have power to levy a political contribution from members, the doctrine of *ultra vires* was applied to a trade union in the same manner in which it is applied to a corporation. In that case the Earl of Halsbury, referring to the Trade Union Act of 1871 (Eng.),<sup>30</sup> said<sup>31</sup> "the Act is, as it were, the charter of incorporation", and Lord Atkinson said<sup>32</sup> of trade unions that they "are when registered, quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of individuals merely bound together by contract or agreement, express or implied". Lord Morton<sup>33</sup> relied on this proposition in the instant case; Lord Porter<sup>34</sup> refrained from doing so on the ground that the earlier case might be distinguishable and Lord MacDermott<sup>34a</sup> and Lord Keith<sup>34b</sup> did distinguish it.

The question of the legal status of a trade union next arose directly in

<sup>22</sup> *Id.* at 436.

<sup>23</sup> *Id.* at 442.

<sup>24</sup> (1901) A.C. 426.

<sup>25</sup> *Id.* at 535, 539, 542.

<sup>26</sup> (1910) A.C. 87; see also (1911) 1 Ch. 540.

<sup>27</sup> 34 and 35 Vict. c. 31.

<sup>28</sup> (1955) 3 All E.R. 523-24.

<sup>29</sup> *Id.* at 527.

<sup>30</sup> *Id.* at 438.

<sup>31</sup> (1955) 3 All E.R. at 521-23, 526-27.

<sup>32</sup> (1910) A.C. at 92.

<sup>33a</sup> *Id.* at 534.

<sup>33</sup> *Id.* at 439-440.

<sup>34</sup> *Id.* at 102.

<sup>34b</sup> *Id.* at 540.

*Kelly's Case*<sup>35</sup> itself where the Court of Appeal was clearly of the opinion that a trade union was simply an unincorporated association of individuals. Swinfen Eady, L.J., referred<sup>36</sup> to the union as "a voluntary unincorporated association"; Phillimore, L.J. said<sup>37</sup> "the trade union . . . is merely an unincorporated society of individuals" while Bankes, L.J. was of the opinion<sup>38</sup> an action against a trade union "may be regarded as in its nature a representative action in which all the members are sued in their collective name". As already stated, although this case is now overruled by the House of Lords, the above *dicta* are supported by three of the five law lords.

In *Braithwaite's Case*<sup>39</sup> it was held by the House of Lords that a member of a union who has been wrongfully expelled from membership can sue the union in contract for a declaration as to his rights under the contract and also an injunction to prevent the union expelling him in breach of the contract. From this case Denning, L.J. in the Court of Appeal in the present case drew the implication that an action against a trade union cannot be a representative action against all the members but must be an action against a separate legal person, otherwise in *Braithwaite's Case*<sup>40</sup> the plaintiff would have been suing himself, which is not possible.<sup>41</sup> Lord Morton<sup>41a</sup> in the present case in effect puts the same view of *Braithwaite's Case*<sup>41b</sup>, though Lord Porter<sup>41c</sup> is less confident in attaching weight to it. Lord Somervell<sup>41d</sup> distinguishes it as a case dealing with injunctions.

Finally, the question was directly raised once again in *National Union of General and Municipal Workers v. Gillian*<sup>44</sup> where it was held by the Court of Appeal that a trade union may sue in its registered name for a libel on the union as a body. As Denning, L.J. pointed out in his judgment in the present case<sup>45</sup>: "A libel is, of course, in its very nature, a wrong to the person, not a wrong to property, and it is apparent that it is only by attributing legal personality to a trade union that it can be permitted to sue for a libel on itself". In that case Birkett, J. at first instance said<sup>46</sup>: "I think the 1871 Act did in fact create a new legal entity, namely, a registered trade union", and later<sup>47</sup>: "The 1871 Act in my opinion, designedly created registered trade unions for the first time, and designedly created a new entity in law, a new persona, and I think it must follow that that new entity is in the same position as any other creature of the legislature". Scott, L.J. in the Court of Appeal said he agreed completely with the judgment of Birkett, J.<sup>48</sup> and went on to say<sup>49</sup> that Parliament is able

to create a *persona juridica* not previously known to the law, if it so chooses, or to clothe an existing association of natural persons with what may be called co-operative personality so as to give it the status of a *persona juridica*. In my view that is just what it did in 1871. It expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality that I find any other inference of the intention of Parliament impossible.

Uthwatt, J. said<sup>50</sup> referring to *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*<sup>51</sup>:

That decision involves to my mind, that a registered trade union is

<sup>35</sup> (1915) 113 L.T. 1055.

<sup>36</sup> *Id.* at 1058.

<sup>37</sup> *Id.* at 1060.

<sup>38</sup> *Id.* at 1062.

<sup>39</sup> (1922) 2 A.C. 440.

<sup>40</sup> *Ibid.*

<sup>41</sup> (1954) 1 Ch. at 509-510.

<sup>41a</sup> (1955) 3 All E.R. at 524.

<sup>41c</sup> (1955) 3 All E.R. at 527.

<sup>44</sup> (1946) K.B. 81 (in which *Kelly's Case* (1915) 113 L.T. 1055 was not cited).

<sup>45</sup> (1954) 1 Ch. at 510.

<sup>47</sup> *Id.* at 602.

<sup>49</sup> *Id.* at 85.

<sup>51</sup> (1901) A.C. 426.

<sup>41b</sup> (1922) 2 A.C. 440.

<sup>41d</sup> *Id.* at 543.

<sup>46</sup> (1945) 2 All E.R. 593, 600.

<sup>48</sup> (1946) K.B. at 84.

<sup>50</sup> *Id.* at 87-88.

recognised by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation; but it is very much like one. The association is not merely the aggregate of the persons who compose it, and the presence of the corporate fiction is not necessary to secure its individuality. In an age of neologism it might be called a "near-corporation".

In the instant case Lord Morton<sup>52</sup> and Lord Porter<sup>53</sup> associated themselves with the opinion expressed by Uthwatt, J., Lord MacDermott<sup>54</sup> did not regard the case as necessarily soundly based, while Lord Keith<sup>55</sup> thought that at any rate the *dicta* in it went too far.

It is submitted that the decision of the House of Lords in the present case is hardly more satisfactory and perhaps less satisfactory than the decision of the Court of Appeal. The situation left by the Court of Appeal decision was anomalous — it meant that a registered trade union was a legal entity so far as the rights and duties of *non-members* of a union in relation to the union were concerned, as in *Gillian's Case*<sup>56</sup>, whilst it was a voluntary unincorporated association so far as the rights and duties of *members* in relation to union were concerned. This rule, though anomalous, was at least clear. But, as the matter is left by the House of Lords, the basis of rights and duties of members in relation to the union is once more thrown into dispute. The Master of the Rolls, in concluding his judgment in the present case, expressed<sup>57</sup> the opinion that the law could not be regarded as satisfactorily settled and the hope that the House of Lords would settle it. The fulfilment of this hope appears to have been deferred by the present outcome.

The position in Australia is affected not only by the Trade Union Acts of the various States<sup>60</sup>, but also by the Commonwealth Conciliation and Arbitration Act 1904-1955 (Cwlth.)<sup>61</sup> and by the industrial arbitration Acts of New South Wales<sup>62</sup>, Queensland<sup>63</sup>, South Australia<sup>64</sup> and Western Australia<sup>65</sup>. Detailed discussion of the provisions of these Acts is outside the scope of this note, but brief mention may be made of some of the relevant sections of the Commonwealth Act and the Industrial Arbitration Act, 1940 (N.S.W.).

The Commonwealth Act provides<sup>66</sup> for the registration as "organisations" of certain associations (defined by the Act to include trade unions<sup>67</sup>) of employees and every registered organisation is created a corporation for the purposes of the Act.<sup>68</sup> Further, any such organisation may sue or be sued for the purpose of the Act in its registered or other name.<sup>69</sup> The Act also provides<sup>70</sup> that every dispute between an organisation and any of its members is to be decided in the manner directed by the rules of the organisation and gives<sup>71</sup> the

<sup>52</sup> (1955) 3 All E.R. at 524.

<sup>53</sup> *Id.* at 526-27.

<sup>54</sup> *Id.* at 534-35.

<sup>55</sup> *Id.* at 540.

<sup>56</sup> (1946) K.B. 81.

<sup>57</sup> (1954) 1 Ch. at 506.

<sup>60</sup> These Acts, with the exception of that of Queensland, are based upon the Trade Union Acts of 1871 and 1876 (Eng.). The Queensland Trade Union Act of 1915 also incorporated a number of the provisions of the Trade Disputes Act, 1906 (Eng.).

<sup>61</sup> No. 13 1904—No. 54, 1955.

<sup>62</sup> Industrial Arbitration Act, 1940 (N.S.W.), Act No. 2, 1940—Act No. 11, 1955.

<sup>63</sup> The Industrial Conciliation and Arbitration Act, 1932-1952 (Q'land) 23 Geo V, No. 36—1 Eliz. II, No. 33.

<sup>64</sup> Industrial Code, 1920-1951 (S. Aust.), No. 1453, 1920—No. 27, 1951.

<sup>65</sup> Industrial Arbitration Act, 1912-1952 (W. Aust.), No. 57, 1912—No. 5, 1952.

There is no corresponding legislation in either Victoria or Tasmania, wages boards systems being employed in these States.

<sup>66</sup> Section 70.

<sup>67</sup> Section 4.

<sup>68</sup> Section 75, and see *per* Griffith, C.J., *Jumbunna Coal Mine (No Liability) v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309, 336. See also *Australian Workers' Union v. Coles* (1917) V.L.R. 332; *Australian Tramway Employees' Assn. v. Batten* (1930) V.L.R. 130. Similar provision is made in the industrial arbitration Acts of Queensland, South Australia, and Western Australia as regards unions or associations registering under those Acts.

<sup>69</sup> Section 85.

<sup>70</sup> Section 88.

<sup>71</sup> Section 81.

Commonwealth Court of Conciliation and Arbitration constituted by the Act power, upon complaint by any member of an organisation and after giving any person against whom an order is sought an opportunity of being heard, to make orders directing the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules. In *Williamson v. Federated Marine Stewards and Pantrymen's Association*<sup>72</sup> it was held that the discretionary jurisdiction of the Court under the section conferring this power is appropriately exercisable at the instance of a member who complains that he has been expelled otherwise than in conformity with the rules of the organisation but that if the member fails to take action under the section for a period of twelve months after the occurrence of the action which he considers contrary to the rules, then the Court should not exercise the discretion given to it by the section in the member's favour; in the same case it was held by Dunphy, J.<sup>73</sup> that the Court's discretionary power under the section should not be invoked, and if invoked should not be exercised unless the applicant has used every avenue of relief made available to him by the rules of the organisation. The Act also gives<sup>74</sup> to the Commonwealth Court of Conciliation and Arbitration power, on the application of any registered organisation, to order that any member of an organisation shall cease to be a member thereof from a date and for a period to be named in the order and this provision has been construed<sup>75</sup> as amplifying in possible cases of necessity, the power to determine membership, and not as limiting the power of expulsion which is inherent in an organisation. The Act does not appear to confer on the Court power to award damages for wrongful expulsion or otherwise<sup>76</sup> and it has been held<sup>77</sup> that the Court has no power to enforce the general legal or equitable principles enforceable in ordinary Courts of Law or Equity which may be applicable in particular cases of expulsion.

The Industrial Arbitration Act, 1940 (N.S.W.) provides<sup>78</sup> for the registration under the Act of trade unions (defined<sup>79</sup> by the Act to mean trade unions registered under the Trade Union Act, 1881 (N.S.W.)<sup>80</sup> and to include branches so registered) of employees and on such registration the trade union becomes an "industrial union" until the registration is cancelled. The Industrial Arbitration Act, 1901 (N.S.W.)<sup>81</sup> which made similar provision for registration of trade unions provided<sup>82</sup> for the incorporation for the purposes of the Act of trade unions so registered but this provision was repealed and has not been re-enacted. Notwithstanding this, however, the Industrial Commission of New South Wales constituted by the present Act has awarded damages at the suit of members against a union as such for breach of the union rules.<sup>83</sup> The Act gives<sup>84</sup> the Commission jurisdiction to entertain and adjudicate upon any legal proceedings instituted for the purpose of directly enforcing or recovering damages for a breach of the agreement contained in the constitution or rules of a trade union<sup>85</sup>, and gives<sup>86</sup> the Commission when exercising jurisdiction under this

<sup>72</sup> (1949) 65 C. Arb. R. 418.

<sup>73</sup> *Id.* at 423.

<sup>74</sup> Section 89.

<sup>75</sup> *Conlon v. Amalgamated Society of Carpenters and Joiners of Australia* (1937) 37 C. Arb. R. 475, 477-78.

<sup>76</sup> In *Stuart v. Heavey and Ors., re Professional Radio Employees' Institute of A'sia* (1935) 35 C. Arb. R. 331, it was held that the Commonwealth Court of Conciliation and Arbitration is not a Court of Common Law, or even of Equity—in the ordinary sense of "Equity".

<sup>77</sup> *O'Carroll v. Australian Journalists' Assn.* (1938) 39 C. Arb. R. 319, 320.

<sup>78</sup> Section 8.

<sup>79</sup> Section 5.

<sup>80</sup> Act No. 12, 1881—Act No. 23, 1936.

<sup>81</sup> Act No. 59, 1901.

<sup>82</sup> Section 7.

<sup>83</sup> See e.g. *Couper and Ors. v. Undertakers' Assistants and Cemetery Employees' Union of New South Wales* (1938) A.R. (N.S.W.) 461.

<sup>84</sup> Section 111.

<sup>85</sup> Provided that the constitution or rules are in writing and copies thereof verified as prescribed have been filed with the Commission.

<sup>86</sup> Section 112.

provision all the powers of the Supreme Court of New South Wales. In *Tinning v. Simpson*<sup>87</sup> it was held that when the Commission's jurisdiction under this section is invoked it has a statutory duty to enforce directly the agreement expressed in the rules of a trade union and that a member affected by a breach of the rules is not bound to have recourse to and await the result of other remedies provided by the rules but is entitled to have the Executive Committee proceed in accordance with the agreement with himself expressed in the rules and to make application to the Commission under this section to this end. The Commission under this section has jurisdiction to declare that a purported expulsion of a member of a trade union from the union is void and of no effect.<sup>88</sup> A recent amendment inserted in the present Act a section<sup>89</sup> providing that where a trade union which is registered as an industrial union proposes to expel any person from membership of the union twenty-eight days notice of the proposed expulsion must be given to the member who is given power within that time to apply to the Commission for an order restraining the union from continuing the expulsion; pending the decision of the Commission no further steps are to be taken by the union in connection with the expulsion. If the Commission is satisfied that the circumstances justify the expulsion it may grant leave to the union to proceed accordingly; if the Commission is not so satisfied it may make an order restraining the union from taking any further steps in connection with the expulsion.<sup>90</sup>

In the ordinary courts, it would appear that trade unions registered as "organisations" under the Commonwealth Conciliation and Arbitration Act, 1904-1955 (Cwlth.) are in a different position from trade unions registered only under the Trade Union Acts of the various States. The latter for most purposes seem to be regarded simply as voluntary unincorporated associations<sup>91</sup> although in holding that such a union may be civilly liable at the suit of a non-member for a conspiracy with its own officers or members the Full Court of the High Court<sup>92</sup> and the Full Court of the Supreme Court of New South Wales<sup>93</sup> have held that such a union is a legal entity distinct from its members, at any rate for this particular purpose.<sup>94</sup> On the other hand, the position of trade unions registered under the Commonwealth Act was distinguished from that of voluntary associations in *Edgar and Walker v. Meade*<sup>95</sup> by Isaacs, J. who appeared to be of the opinion that in an appropriate case damages could be recovered by a member against a union so registered; and the learned judge did in fact in that case award against such a union in favour of the plaintiffs who were members of the union. *Edgar and Walker v. Meade*<sup>96</sup> was referred to with approval by the Full Court of the Supreme Court of Queensland in *Atkinson v. Lamont and Ors.*<sup>97</sup> where Henchman, J. and Graham A.J. seem also to have been of the opinion that damages could be recovered in an appropriate case by a member against a union

<sup>87</sup> (1941) A.R. (N.S.W.) 41.

<sup>88</sup> See *Williams v. Australian Federated Union of Locomotive Engineers, New South Wales Division* (1947) A.R. (N.S.W.) 361 at 362.

<sup>89</sup> Section 129B.

<sup>90</sup> For completeness it may be added that the industrial arbitration Acts of Queensland, South Australia and Western Australia contain no counterpart of the fairly extensive provisions in the Commonwealth and New South Wales Act empowering the Commonwealth Court of Conciliation and Arbitration and the Industrial Commission respectively to exercise control over the internal affairs of the union.

<sup>91</sup> See e.g. *Cameron v. Hogan* (1934) 51 C.L.R. 358, esp. at 371-73. In this case *Kelly's Case* (1915) 113 L.T. 1055, was cited in the joint judgment of Rich, Dixon, Evatt and McTiernan, J.J. without dissent.

<sup>92</sup> In *Brisbane Shipwrights' Provident Union and Ors. v. Heggie* (1906) 3 C.L.R. 686.  
<sup>93</sup> In *Egan v. Barrier Branch of the Amalgamated Miners' Ass. and Ors.* (1917) 17 S.R. (N.S.W.) 243.

<sup>94</sup> As mentioned above, the Industrial Arbitration Act, 1940 (N.S.W.) does not make any provision for the statutory incorporation of "industrial unions" registered under that Act. Presumably, in the ordinary courts, they stand in the same position as unions registered only under the State Trade Union Acts.

<sup>95</sup> (1916) 23 C.L.R. 29.

<sup>97</sup> (1938) Q.S.R. 33.

<sup>96</sup> *Ibid.*



registered under the Commonwealth Act.

In view of the decision in *Bonsor's Case*<sup>98</sup> it may no longer be necessary for this purpose to have regard to the distinction between trade unions registered under the State Trade Union Acts and trade unions registered under the Commonwealth Act. For on either of the views as to the legal status of a registered trade union expressed in the House of Lords, damages are recoverable in the ordinary courts against a union registered under a State Trade Union Act by a member who has been wrongfully expelled.

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<sup>98</sup> (1955) 3 All E.R. 518.