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TRADE UNIONS AND THE COMMON LAW IN NEW ZEALAND

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A thesis submitted for the degree of Doctor of Philosophy of the University of Auckland. 

Auckland, February 1973
The topic of this thesis had its origins in suggestions made by Dr J.A. Farmer, a former lecturer in industrial law at Auckland Law School. I should like to record my indebtedness to my supervisor, Professor J.F. Northey, Dean of Auckland Law School, for his considerable assistance to me in the writing of this thesis, and for the willingness with which he gave up so much of his valuable time on my behalf; and also to my wife Margaret for her patience during the long period in limbo. I have attempted to state the law as contained in sources available to me at 1st November 1972.

Rodney Harrison,
Auckland,
February 1973
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defence association (1898) 371.
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Sefton v Tophams Ltd. (1965) 464.
Shanks v Plumbing Trades Union (1967) 162.
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96, 375, 455, 468-9.
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South Wales Miners' Federation v Glamorgan Coal Co. (1905) 375, 465.


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Temperton v Russell (1893) 363, 364, 365, 366, 368, 371, 446.

Tesco Supermarkets Ltd. v Nattrass (1972) 102.


True v Australian Coal Employees' Union (1949) 293.

Tunney v Orchard (1955) 216, 218.

Turner v Allison (1971) 205.

Tuttle v Buck (1909) 527.

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Warner Brothers Pictures v Nelson (1937) 565.
Waterside Workers' Federation v Burgess Brothers Ltd. (1916) 95.
Watson v Smith (1941) 163.
Weinburger v Inglis (1919) 203.
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Wellington Drivers' I.U.W. v Fraser (1908) 137, 147, 186.
Wellington Municipal Officers' Association v Wellington City Corporation (1951) 403.
Wellington Plasterers' I.U.W. v Murray (1936) 147, 188.
Wellington Wharf Labourers' I.U.W. v B.N.Z. (1914) 133, 158, 168, 245.
Wells v Butler (1952) 356.
Westport Coal Co. v Geddes (1920) 530.
Wheatley v Federated Ironworkers' Association (1960) 133, 278, 280, 293-5.
White v Kuzych (1951) 180, 206, 212, 214-5, 216, 217, 218.
White v Riley (1921) 456.
Williams v Aristocratic Restaurants Ltd. (1951) 538, 542.
Williams v Hursey (1959) 13, 20, 95, 267, 278, 296-7, 480, 549.
Williams v Musicians' Union (1912) 254.
Wilson v Herries (1913) 449.
Wiseman v Borneman (1971) 191.
Wishart v Henneberry (1962) 166.
Wishart v Thorp (1961) 221.
Wolstenholme v Amalgamated Musicians' Union (1920) 184.
Wood v Woad (1874) 212, 223.
Woodhouse v Lannan (1957) 20.

Yorkshire Miners' Association v Howden (1905) 92, 118, 119, 172, 266, 310.
Young v Canadian Northern Railway (1931) 254.
Young v Cassella (1914) 383.
Young v Ladies' Imperial Club (1920) 180, 181.
PART ONE

SOME PRELIMINARY MATTERS
Mrs Bertram: That sounds like nonsense, my dear.
Mr Bertram: That may be so, my dear; but it may be very good law for all that.

- Sir Walter Scott

Guy Mannering
CHAPTER I

A GENERAL INTRODUCTION
The purpose of this thesis is to examine and evaluate the present common law relating to trade unions in New Zealand. It is proposed that this examination and evaluation should not be limited to the "black-letter" law, but should take place in the wider social context of how trade union affairs, and industrial relations, are in fact conducted in this country. Where the common law is weighed in this balance and found wanting, it is intended that the possibility of statutory reform be considered.

By far the major feature affecting an analysis of the common law relating to trade unions in this country is the extent of statutory regulation of trade unions and their activities. In particular, the system of compulsory conciliation and arbitration contained in the Industrial Conciliation and Arbitration Act 1954,¹ and similar Acts dating back as far as 1894, has in places wholly abrogated, in places modified, the English common law. A considerable part of this thesis must accordingly be devoted to the relationship between the "pure" common law and this country's statute law.

The common law affects both the internal aspect of trade unions - that is, their relationship with their individual members; and their external aspect - that is, their social role of representing their members' interests. The wide sweep of the common law especially affecting trade unions in New Zealand can be fairly comprehensively covered under three broad headings: trade unions and

¹ Henceforth referred to as "the Act", unless the context requires otherwise.
the law of contract; trade unions and the doctrine of
ultra vires; trade unions and the law of torts. The one
minor omission from this analysis (and from this thesis)
is the common law power of the courts to punish for
contempt of an inferior court, where the contempt
involves the Court of Arbitration.  

In order to deal with these broad headings, this
thesis will be divided into five quite separate and
independent parts: an introductory part; a part
devoted to each of the three previously mentioned
branches of the common law "tree", and a concluding
part. Where necessary for an understanding of the
present law, the historical background to particular
areas will be outlined.

Part One will treat of "Some Preliminary Matters".
Thus chapter II attempts to answer the necessary question,
"what is a trade union?", and in particular examines the
legal status of the various kinds of trade unions.
Consonant with the proposed realistic appraisal of the
role of the common law, chapter III provides some of the
necessary background to the system of industrial
relations in this country. Chapter IV continues this
by examining the important question of the legality of
"direct action" by trade unions and trade unionists in
this country. Finally, in chapter V, the legal
principles governing the responsibility of trade unions

v Butler [1953] N.Z.L.R. 944. Cf. ss.170 and 171 of
the Act, and Cornwell v Temple [1942] G.L.R. 259;
Anderson v Robertson [1948] G.L.R. 230; Butler v
Court of Arbitration may well have inherent power to
punish for contempt of itself; ibid, 1060.
for the acts of their officials and members will be looked at.

In Part Two, we take up the topic of "Trade Unions and the Law of Contract". Of major importance in this area is the contract of union membership, which provides the legal basis for the union/member relationship. Such matters as the content of the contract of union membership, the internal management of the union, and discipline of union members, will be dealt with. In addition, the law relating to trade union contracts made with those outside the union will be reviewed, and the special problem of the "collective agreement" touched upon.

Part Three deals with the limitations imposed by the common law on the legal powers of trade unions. These limitations are customarily referred to as "the doctrine of ultra vires". It is proposed to inquire whether the range of activities legally permissible for trade unions in New Zealand is not unduly restricted, and, indeed, out of touch with what in fact takes place.

In Part Four we turn to "Trade Unions and the Law of Torts". This massive topic mainly involves the liabilities incurred by trade unions engaging in industrial action: namely, the "economic" torts of conspiracy, interference with contractual relations, intimidation, and interference with trade, business or employment by "unlawful means". The relationship between such liabilities and a comprehensive system for the settlement of industrial disputes, as exists in this country, will also be discussed.
Finally, Part Five will attempt briefly to draw together the separate strands of Parts One to Four. Some general statements on the relationship between trade unions and the common law, and the role of the common law in trade union affairs and in industrial relations in this country, will be attempted.

It is important to recognise at the outset that the law relating to trade unions is an area of law with a high political content. This follows inevitably from the matters with which it deals. As a well-known writer in this field has said: 3

"This is not an area of law which anyone can discuss without making apparent his attitudes. It is a place where law, politics, and social assumptions meet in a man; and whoever believes that he is so 'objective' or 'impartial' as to be above policies and prejudices is either arrogantly naive or dishonest with himself and others."

Nevertheless, a great measure of objectivity is possible in respect of the law "as it is", and the writer will attempt to achieve this. With respect to the law "as it ought to be", it should perhaps be acknowledged that the writer subscribes to a broad view of the functions of trade unions, and sees them as a beneficial (although by no means perfect) social force with a wider role than that of merely improving the conditions of employment of their members.

CHAPTER II

WHAT IS A TRADE UNION?
A. THE TRADE UNION IN FACT.

The classic definition of a trade union is that of the Webbs: "a continuous association of wage earners for the purpose of maintaining and improving their working lives". The Industrial Conciliation and Arbitration Act 1954, s.53(2) speaks of societies "lawfully associated for the purpose of protecting or furthering the interests of workers", and the Trade Unions Act 1908, s.2, of a "combination, whether temporary or permanent, for regulating the relations between workers and employers, or between workers and workers". All these definitions correctly stress the industrial purposes of a trade union, but in view of the wider social role now played by trade unions, they cannot be regarded as complete statements.

This wider social role, as envisaged by the unions themselves, clearly extends to an involvement with political and economic issues, and appears to be developing to include an interest in trading and business activities. To a certain extent, this wider concern is entirely logical. Thus it would be fruitless for trade unions to negotiate wage increases for their members, while neglecting the economic issue of the


2 The provision goes on to include an association of employers in the definition of "trade union", but this legal definition does not correspond with accepted usage.

3 See chapter XIII, section G, post.
extent to which these increases should be taxed. Similarly, there is little point in unions striving for a shorter working week, without concerning themselves with the social question of how union members are going to spend their increased leisure time. Past a certain stage, however, trade union involvement in politics becomes controversial, as with the Federation of Labour ban in June and early July 1972 arising out of the French Atom Bomb tests in the Pacific. Approval or disapproval of union action is then determined according to one's political sympathies.

Another modern problem involves the class of people who together constitute a trade union. Trade unions are no longer limited to "workers", in the sense of manual labourers. Many "white-collar" groups, and even salaried professional people, are now represented by trade unions. Even to limit the idea of a trade unionist to those who are under a contract of employment may not be entirely accurate. 4

While these difficulties arise when one attempts to define a trade union, they are perhaps of little practical importance. In fact, it is somewhat of a contradiction to attempt a definition of something so essentially pragmatic and factual in its nature. Trade unions, therefore, are rather like elephants - difficult to define, but easily recognisable when you come across one.

4 See e.g. Ready Mixed Concrete Ltd. v Cox (1971) 10 K.I.R. 273, where union members were in fact working as independent contractors.
B. THE TRADE UNION IN LAW.

Although there are four separate legal categories of trade union in this country, this poses few practical problems. The vast majority of trade unions are registered as industrial unions under the Industrial Conciliation and Arbitration Act 1954. If a trade union is not registered as an industrial union, it may in theory register under the Incorporated Societies Act 1908, or the Trade Unions Act 1908; or it may remain unregistered. Registration under the Incorporated Societies Act 1908 is of some importance, as the various trade unions of state servants, which are not subject to the Industrial Conciliation and Arbitration Act, are registered thereunder, as are all but one of the few trade unions in the private sector which are not registered as industrial unions. No unions are registered - or likely to be registered - under the Trade Unions Act 1908; and there is to the writer's knowledge only one union presently not registered under any Act.

5 In this work, the term "industrial union" will be used to refer to a union registered under the Industrial Conciliation and Arbitration Act 1954, while the term "trade union" will refer to trade unions generally, including industrial unions.

6 E.g., the Public Service Association, the Post Office Association, and the primary, secondary, and university teachers' organisations. Cf. the anomalous position of the Railways unions under s.218 of the Industrial Conciliation and Arbitration Act 1954.

7 The unions are: The Chemical Manure and Fertiliser Workers' Union; The Institute of Marine and Power Engineers; The N.Z. Federation of Wood, Pulp and Paper Products Workers; The Northern Federation of Wood, Pulp and Paper Products Workers.

8 The United Mineworkers of New Zealand.
1. **Industrial Unions.**

The legal status of industrial unions registered under s.53 of the Industrial Conciliation and Arbitration Act 1954 is beyond doubt. Section 56(1) of the Act provides that, on registration, the union becomes "a body corporate by the registered name, having perpetual succession and a common seal". The grant of corporate status means that an industrial union is a separate legal person. It can therefore be party to a contract or a collective agreement, or to a tortious conspiracy. As a corporation, it has power to own property, including land; and to sue and be sued in its registered name. This is confirmed by ss.81 and 82 of the Act. Another important indirect consequence of corporate status is the importation by analogy of principles of corporate and company law. That this has frequently occurred will be seen throughout the course of this work.

Before 1954, when the present Act was passed, the incorporation was expressed to be "solely for the purposes of this Act". The effect of this qualification on the corporate status of industrial unions is still far from

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9 For an analysis of the present effect of the doctrine of restraint of trade on industrial unions, see chapter VII, section B, post.

10 Industrial Conciliation and Arbitration Act 1900, s.7(1); Industrial Conciliation and Arbitration Act 1925, s.7(1).
clear. But with the removal of the qualification in the 1954 Act, it is now certain that an industrial union is "a body corporate ... without restriction as to the purposes for which it is in law a body corporate". However, this is not to say that its powers are unrestricted, as will be seen.

The Act also permits the registration of New Zealand unions, and unions governing two or more industrial districts. These are nevertheless industrial unions, and are in an identical position to that just outlined. In addition, there is provision for "industrial associations" of two or more industrial unions from the same or related industries. Subject to one unimportant proviso, s.87(2) states that all the provisions of the Act relating to unions and their officers shall, "as far as they are applicable and with the necessary modifications", apply to industrial associations. For the purposes of

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13 Sections 60-64 of the Act.

14 Section 65 of the Act.

15 Section 87 of the Act.

16 In N.Z. Clerical Employees' I.A.W. (1961) 61 Bk. Aw. 289, it was held that, despite s.87(2), Part IV of the Act dealing with union elections does not apply to an industrial association of workers. The reasoning of Tyndall J. is not altogether satisfactory.
this thesis, it will be sufficient to talk in terms of industrial unions only, the common law principles to be discussed being, it is submitted, equally applicable to industrial associations.

2. **Trade Unions Registered under the Incorporated Societies Act 1908.**

There is no objection to a trade union registering under the Incorporated Societies Act 1908.\(^{17}\) Registration under this Act results in the acquirement of corporate status, with incidents similar to those already described in the case of an industrial union.

3. **Trade Unions Registered under the Trade Unions Act 1908.**

With two other statutes providing for registration of trade unions in existence, the presence of the Trade Unions Act 1908 on this country's statute-books requires a brief preliminary word of explanation. The Trade Unions Act 1908 was sired by an English statute, the Trade Union Act 1871 (U.K.). This historic piece of legislation was passed in order to overcome the early common law illegality of trade unions.\(^{18}\) It placed all

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17 To be registered, a society must not be associated "for the purpose of pecuniary gain" - Incorporated Societies Act 1908, s.4. Section 5(c) of that Act makes it clear that trade unions do not offend against this requirement.

18 See chapter VI, post.
"trade unions" as defined by the Act in a position similar to that of any other unincorporated private association, such as a club. In addition, it also provided for the voluntary registration of trade unions. New Zealand copied this legislation in 1878, prior to the introduction of the first Industrial Conciliation and Arbitration Act in 1894, and it has remained in force till the present day.

The complete disuse of the Trade Unions Act 1908 in this country, and the recent repeal by the Industrial Relations Act 1971 (U.K.) of the original English Act of 1871, make it unnecessary, for practical purposes, to discuss a question over which much academic and some judicial ink has been split. That question is the problem of the legal status of a trade union registered under the 1871 Act (or our 1908 Act). From an historical viewpoint, however, the judicial treatment received by the registered trade union deserves a brief mention.

It was assumed in 1871 and subsequently that a trade union, on registration, did not change its legal status - that it remained an unincorporated private association of individuals. The 1871 Act itself contained no provision for incorporation. However, in 1901 - the year of another famous trade union case, Quinn v Leathem19 - the House of Lords, much to the astonishment of the trade union movement in England, held in Taff Vale Railway Co. v Amalgamated Society of Railway Servants20 that a

registered trade union could be sued in its registered name, and any damages awarded were recoverable from its funds.

The agitation which followed the Taff Vale case resulted in the passing of the Trade Disputes Act 1906 (U.K.), which was intended to protect trade unions from tortious liability for their industrial activities.\textsuperscript{21}

The uncertainty created by the decision as to the precise legal nature of a registered trade union remained, however. In particular, it was unclear whether or not the registered trade union was an entity separate in law from its individual members. Subsequent decisions failed to settle this question, although there was a clear tendency to treat the registered trade union as something very close to a corporation.\textsuperscript{22}

In Bonsor v Musicians' Union,\textsuperscript{23} the House of Lords had one final tilt at the problem. Of the five judgments delivered, two\textsuperscript{24} concluded that a registered trade union was a legal entity separate from its members, while another two\textsuperscript{25} determined that it was not.\textsuperscript{26}

\begin{itemize}
  \item[21] See Part Four, post.
  \item[23] [1956] A.C. 104.
  \item[24] Those of Lords Morton and Porter.
  \item[25] Those of Lords MacDermott and Somervell.
  \item[26] However, they held that it could still, as a procedural matter, be sued in its registered name.
\end{itemize}
Unfortunately, Lord Keith, who delivered the fifth judgment, cannot be said to have exercised his casting vote on the issue in any decisive manner. Indeed, his Lordship seemed to have neatly summed up his own and future confusion when he stated:27

"[I]n a sense, a registered trade union is a legal entity, but not ... a legal entity distinguishable at any moment of time from the members of which it is at that time composed."

Academic commentators have disagreed on the interpretation of Lord Keith's crucial judgment,28 but it is really no longer of importance to reach any concluded opinion on this matter. Nevertheless, Taff Vale and the subsequent cases represent an interesting piece of judicial legislation, and a significant departure from previously accepted legal theory, which had required an express legislative grant of corporate status before a body could possess any degree of legal personality separate from its members.

4. **Trade Unions not Registered under any Act.**

An unregistered trade union, like any unincorporated private association of individuals, has no legal status separate from its members. This has caused difficulties in England, where a number of trade unions have remained - and still remain - unregistered.29 In New Zealand, there


29 But see now Industrial Relations Act 1971 (U.K.), s.154.
appear to have been few unregistered unions, and the difficulties of proceeding against unregistered unions in breach of the Labour Disputes Investigation Act 1913\(^{30}\) have been overcome by permitting them to be sued "as if" they were industrial unions.\(^{31}\)

The lack of separate legal status means that the contract of union membership is between all the members individually, that union property must be held by trustees, and that the union cannot sue or be sued in its own name. The difficulties involved in successfully suing an unregistered trade union are the most important result of its legal status.\(^{32}\)

Apart from the possibility of a suit against the trustees in a matter concerning property held by them, or against some or all of the members individually, the only other avenue is that of a representative action against the unregistered union under R.79 of the Code of Civil Procedure. The representative action can be used only where "there are numerous persons having the same interest in an action". This creates a number of difficulties when it is applied to unregistered trade unions, which may have large, fluctuating memberships. For, if a single member has a valid defence personal to

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30 See section B of the following chapter.
31 Labour Disputes Investigation Act 1913, ss.8(4), 20.
himself, this vitiates the whole action, as there is then no identity of interest for the purpose of the rule.33 A change in membership of the union, the existence of members who voted against or withdrew from the course of action which damaged the plaintiff, the infancy of one of the members in the case of a contract, may all have this effect.

5. The Legal Status of a Branch of a Trade Union.

In the case of a trade union with a big membership, or one which covers a large geographical area, the rules may provide for the union to be divided into branches. The Industrial Conciliation and Arbitration Act has recognised that industrial unions may have branches, and has provided that certain procedures shall be applicable to branches as well as to the parent unions.34 There is however, no provision made for the legal status of industrial union branches. It would appear that, irrespective of the degree of autonomy accorded the branch under the union's rules, it does not acquire separate legal status, and cannot hold property,


34 See s.73(2A) of the Act (imposition of levies on members of branch); s.78 of the Act (auditing of branch accounts).
sue or be sued, or enter into contracts or industrial agreements.\textsuperscript{35} The secession of a branch from the union can therefore only occur in fact, not in law;\textsuperscript{36} funds and other assets held by the union will continue to be the property of the parent union.\textsuperscript{37}

The present legal position in this country, with four theoretical categories of trade union, is certainly untidy and in need of reform. In the present work, discussion can be limited to industrial unions, in view of their overwhelming importance and their special position under the Industrial Conciliation and Arbitration Act 1954. Unless otherwise stated, it can be assumed that the common law principles discussed apply equally to unions registered under the Incorporated Societies Act 1908.

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\textsuperscript{36} In the absence of express provision for secession in the rule-book, which is extremely unlikely.

\end{flushright}
CHAPTER III

AN INTRODUCTION TO THE SYSTEM OF
INDUSTRIAL RELATIONS IN NEW ZEALAND.
In this chapter it is not intended to do more than give a brief outline of the background of industrial relations in this country, against which the common law doctrines which form the subject-matter of this work may be seen and evaluated in perspective. The historical background to the system, although important for a complete understanding of it, will not be dealt with.

New Zealand's system of industrial relations is predominantly one of compulsory conciliation and arbitration, but as will be seen later in this chapter, this formal system and particularly its sanctions have been ignored of recent years, with the result that reform is overdue. It is, however, beyond the scope of this work to attempt any general criticism of the present system. Our statutory framework has been said to be "peculiar to New Zealand". However, some of the Australian state systems, and particularly the Commonwealth Conciliation and Arbitration Act 1904-1970, do have a

1 For greater detail, see Woods, Report on Industrial Relations Legislation (1968); Szakats, Trade Unions and the Law (1968); Mathieson, Industrial Law in New Zealand (1970).


3 For a criticism and further references, see Szakats, op. cit., 75-86. Cf. Mathieson, op. cit., 239-42.

basically similar approach - one particular difference in the Commonwealth Act being the penalty provisions.  

Although the Australian case-law in this area has been immeasurably complicated by constitutional problems and difficulties with the relationships between the state and Commonwealth systems, which are absent in this country, Australian authorities can frequently be looked to as the most relevant to our own system.

A. THE INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1954.

The Industrial Conciliation and Arbitration Act 1954 is easily the most important single piece of industrial relations legislation in this country. It attempts to establish a self-contained and independent system for the settlement of all industrial disputes. This system is presided over by the Court of Arbitration, a body which exercises both judicial and legislative functions.

1. Registration under the Act.

Registration under the Act is voluntary. "Any society consisting of not less than fifteen persons lawfully associated for the purpose of protecting or

5 See generally, Sykes, Strike Law in Australia (1960); Foenander, Trade Unionism in Australia (1962); Foenander, Recent Developments in Australian Industrial Regulation (1970); Portus, Australian Compulsory Arbitration 1900-1970 (1971); Sykes & Glasbeek, Labour Law in Australia (1972).

6 Cf. the role of the Industrial Advisory Council set up under the Industrial Relations Act 1949, which is charged with making reports and recommendations on ways of improving industrial relations.
furthering the interests of workers engaged in any specified industry or related industry in New Zealand may register. In practice, because the benefits of registration are seen to outweigh the disadvantages, most unions do register. Upon registration, the society becomes an "industrial union of workers", with certain rights and duties under the Act. Corresponding provision is made for the registration of "industrial unions of employers", and of the other organisations referred to in the preceding chapter. Industrial unions are subject to a number of requirements in respect of the content of their rules, and certain matters of internal management. These will be discussed in chapter VII, post.

There is provision for voluntary cancellation by a union of its registration under the Act.

2. The Effect of Registration.

Registration is commonly referred to as a "package deal", conferring on a union some benefits and some

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7 Section 53(2) of the Act. For the meaning of "related industry", see s.110.

8 For a discussion of the legal status of industrial unions, see the preceding chapter.

9 Section 85 of the Act. Note also s.86, and the de-registration provision (s.198), to be discussed shortly.
disadvantages.

The benefits are all directed at ensuring the security and monopoly position of industrial unions. Once an industrial union is registered in a particular industrial district in respect of a particular industry, no rival union can be registered without the consent of the Minister of Labour; nor will an existing industrial union be permitted to change its membership rules so as to encroach on the "territory" of any other industrial union. However, a rival unregistered union is not prevented from competing with an industrial union for its members and territory, as it is not bound by the Act.

Another advantage of registration is that an industrial union will usually have its membership to a great extent assured, by reason of the obligation to join imposed on all those eligible for membership. The obligation to join exists by virtue of the "preference clause" in the union's award or industrial agreement. The preference clause may be "unqualified" or "qualified". An unqualified preference clause requires an employee to join the relevant industrial union within fourteen days of becoming employed by an employer subject to the award or industrial agreement. A qualified preference clause requires the employer of an employee who refuses to join (or ceases to be a member of) the relevant union, to dismiss that employee

10 Section 58 of the Act.
11 Awards and industrial agreements will be discussed shortly.
on request by the union, if there is a union member equally qualified and willing to do the particular work. An industrial union may obtain an unqualified preference clause when the parties to the award or industrial agreement agree to it, or when not less than fifty per cent of the employees to be bound by the award wish to be union members. Unqualified preference is obtained in the vast majority of cases. If an unqualified preference clause is not inserted in an award, the Court of Arbitration must insert a qualified preference clause, unless it sees good reason to the contrary.\(^\text{12}\) There is provision for a right of admission for those desiring (or required) to join an industrial union,\(^\text{13}\) and for exemption from union membership on conscientious grounds.\(^\text{14}\)

Finally, an industrial union is in an advantageous position in its dealings with employers. By registering, the union can in effect compel an employer to recognise and negotiate with it, even if the employer is not registered under the Act and has no wish to be bound by the proceedings. A similar result is achieved by the "blanket clause", by which an award binds not merely those employers who are parties to it, but all employers in the industry and

\[\text{12} \quad \text{Sections 174, 174A-F of the Act.}\]
\[\text{13} \quad \text{Sections 174H of the Act.}\]
\[\text{14} \quad \text{Sections 175, 175A-C of the Act. For an historical and comparative review of this area, see Szakats, "Compulsory Unionism: A Strength or Weakness?" (1972) 10 Alberta Law Rev. 313.}\]
locality to which the award applies.\footnote{15}{Section 154(1) of the Act. The award also binds every employee of an employer who is bound by it: s.153(1).} In addition, an industrial agreement may be extended so as to have similar effect, or may itself be made into an award.\footnote{16}{Sections 107, 108 of the Act.}

The main obligation imposed on an industrial union is that of abiding by the dispute-settling and wage-fixing procedures laid down by the Act. As a corollary, the "right to strike" is surrendered by the union and its members, and penalties are prescribed for breach of this and other related obligations.\footnote{17}{By Part X of the Act. See the following chapter.} Similar duties, including an obligation not to resort to "lockout" action, lie on employers and organisations of employers who are subject to the jurisdiction of the Act. Thus all "industrial disputes"\footnote{18}{As defined by s.2 of the Act.} must be settled either by the voluntary agreement of the parties, or by the processes of conciliation and arbitration. However, as will be seen shortly, these obligations have of recent years been ignored with impunity, particularly by the unions but also by employers.

3. Wage Fixing Procedures.

Only the briefest outline of these processes is possible here.\footnote{19}{For greater detail, see Mathieson, op. cit., 239-342.} The procedures by which wages and other
conditions of employment are determined revolve, as already stated, around the central notion of an "industrial dispute". An industrial dispute is usually brought into existence by an individual union serving a set of claims on an employer or employers' organisation. If the dispute is settled by negotiation between the parties themselves, it can be filed as an industrial agreement binding the parties to it, or it can be forwarded to the Court of Arbitration to be made into an award. If the dispute is not settled by negotiation, then it goes on to conciliation, where an attempt is made, with the assistance of a Conciliation Commissioner, to settle the dispute. If settlement is reached at this stage, the agreement can be filed as an industrial agreement, or go forward to the Court of Arbitration to be made into an award. Where the parties still disagree, the dispute then goes to the Court for arbitration. The decision of the Court is handed down as an award, binding on all parties and subsequent parties.

Awards and industrial agreements remain current for three years or less, as specified. Industrial agreements

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20 Under s.103 of the Act.
21 Under s.108 of the Act. See also s.107.
22 See Part VI of the Act.
23 Section 129 of the Act.
24 Section 130 of the Act.
26 This is the "blanket effect" referred to earlier. The Court may decline to make an award: s.145 of the Act.
may be varied by the parties, and awards may be amended by the Court. Awards and industrial agreements set minimum rates of pay and other conditions, and it is an offence for an employer to pay, and for an employee to receive, less than the rate stipulated. The Court of Arbitration has a special jurisdiction, under the General Wage Orders Act 1969, to increase minimum rates of pay in all awards and industrial agreements simultaneously. It also has jurisdiction to interpret awards and industrial agreements.27


The Act has, on paper, ample procedures for enforcement of the obligations imposed by it. The complex series of provisions forbidding and penalising strike action will be fully examined in the next chapter, as will the further restrictions imposed by awards and industrial agreements. What is important to realise is that these strike penalties have fallen into complete disuse, in spite of a rate of work stoppages which is far from insignificant, and which has in fact showed a dramatic increase in the last few years.28 The Department of Labour has not invoked the

27 Section 33 of the Act.
28 The latest Annual Report of the Department of Labour (for the year ending 31 March 1972) shows a comparatively high figure of 162,563 man-days lost through work stoppages in 1971, while the 277,348 man-days lost in 1970 rates as this country's worst year ever for industrial unrest, 1951 (the year of the protracted and crippling waterfront strike) excepted.
strike penalties since 1955, and employers - who since 1962 have had power to take proceedings themselves - have only done so on two occasions, neither of them recent. The reasons for this lack of enforcement would seem to be the practical difficulties involved in any attempt at enforcement against a number of strikers, and the plain fact that it does nothing positive to restore good industrial relations between the parties. By reason of this non-enforcement of strike penalties by both government and employers, trade unions in this country have achieved a "right to strike", in practice if not in law.

The one effective disciplinary sanction under the Act is the Minister of Labour's power to cancel the registration of an industrial union under s.198 of the Act. The effectiveness of "de-registration", as it is known, is that it allows a better-behaved union to be registered, with the consent of the Minister of Labour, in place of the deregistered one. The deregistered union, having lost the advantages of the Act, will, unless it commands a strong following, be unable to compete with its more moderate rival. De-registration has not been frequently used; but the power was recently invoked

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30 For greater discussion, see ibid, 22-6.
31 Note further, s.197 of the Act, which gives the Court of Arbitration (or the Magistrates Court) power to suspend the registration of a union convicted of certain offences. This power does not appear ever to have been used.
against the Seamen's Union in November 1971.  

In a somewhat different category, provision is made for enforcement of awards and industrial agreements, at the suit of an "Inspector of Awards", or of the parties. Certain types of obligation are habitually enforced, such as those imposing minimum working conditions on an employer. But as already stated, breaches of "no-strike" clauses in awards and industrial agreements are customarily not enforced.

B. THE LABOUR DISPUTES INVESTIGATION ACT 1913.

The Labour Disputes Investigation Act 1913 applies to "societies of workers" which are not bound by any award or industrial agreement under the Industrial Conciliation and Arbitration Act 1954, and to their members, and also to the employers of those members. Thus if a trade union chooses not to register as an industrial union, or cancels its registration, or is de-registered, it will, regardless of whether it is registered or incorporated under any other Act, be subject to the provisions of the Labour Disputes Investigation Act 1913.

This Act requires, as a prerequisite to the legality of any strike action taken, that certain steps be followed when a dispute as to conditions of employment arises between

32 For a list of the previous occasions of its use, see Woods, Report on Industrial Relations Legislation, 29.

33 Part XI of the Act.

34 Labour Disputes Investigation Act 1913, s.3.
parties to whom the Act applies. Notice must be sent to the Minister of Labour, who must then refer the matter to conciliation. If no settlement is reached within fourteen days, a secret ballot of union members involved must be held to decide what course of action is to be taken. If strike action is decided upon, a further seven days must elapse after publication of the result of the ballot, before a legal strike can take place. Corresponding obligations are imposed on employers to whom the Act applies.

In addition, s.8 of the Labour Disputes Investigation Act 1913 permits the registration of any collective agreement between parties subject to the Act, by either party thereto. The agreement is then enforceable as if it were an industrial agreement made under the Industrial Conciliation and Arbitration Act 1954; and strike action during the currency of such an agreement will be unlawful.

The cumbersome procedures and unrealistic time limits of the Labour Disputes Investigation Act 1913 are totally unsuited to modern conditions. It is not surprising,

35 Although the procedures specified in ss.4 and 7 of the Act appear to be voluntary, the wording of s.9(a) makes it clear that strike action will be unlawful unless the procedures are followed. See also Anderson v Georgeson [1935] G.L.R. 238. Quite illogically, although the steps set out in s.4 are limited to disputes over conditions of employment, s.9(a) also makes illegal strikes which do not relate to conditions of employment. However, it has been held that such strikes are only illegal if there is an agreement registered under s.8 of the Labour Disputes Agreement Act 1913 in existence: Dobbin v Davies [1932] N.Z.L.R. 1435.

36 Labour Disputes Investigation Act 1913, s.9(b).

therefore, that its procedures, with the possible exception of s.8, are today seldom invoked, and the strike penalties, like those in the Industrial Conciliation and Arbitration Act 1954, never enforced.

C. COLLECTIVE BARGAINING IN NEW ZEALAND.

Although the formal, legislated industrial relations system of conciliation and arbitration remains of great importance, it no longer gives a complete picture of industrial relations in this country. A recent phenomenon is a substantial increase in "free" collective bargaining outside the formal system. This is a process of bargaining between employer and union in which agreement is reached as to wages and conditions of employment on the basis of the pressure exercised by each party - the threat or existence of strike action by the union, and of lockout or some other action by the employer, being the main sources of this pressure. The conciliation and arbitration system is either completely ignored, or merely used as an enforcement agency for the end product of the bargaining, as when the resulting "collective agreement" is registered as an industrial agreement or is filed under s.8 of the Labour Disputes Investigation Act 1913.

Alternatively, the collective bargaining may take place in respect of matters in excess of those laid down by a

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38 For analysis, see Wilson, "Collective Bargaining in New Zealand outside the Conciliation and Arbitration Act" (1970) 1 (no. 3) A.U.L.R. 37; Woods, Free or Compulsory Collective Bargaining - New Zealand at the Cross-Roads (1971).

39 For the legal position when the collective agreement is not registered, see chapter VIII, section B, post.
current award or industrial agreement, resulting in what are called "ruling rate" or "house" agreements.

The recent considerable increase in free collective bargaining can be explained by the dissatisfaction felt by many unions at the arbitration system's inability to cope with the rapid inflation of recent years. Another important factor is undoubtedly the historic refusal by the Court of Arbitration in 1968 to make a general wage order which was admittedly merited. This latter event, which invoked an angry reaction from the trade union movement, can be seen as something of a turning-point in New Zealand's industrial relations.


This 1970 amendment to the Act was the legislature's response to a realisation that dispute procedures in existing legislation were inadequate for modern industrial conditions, particularly in view of the increase in collective bargaining just referred to. A significant departure from previous practice is that the three new procedures introduced by the amendment apply both to trade unions which are subject to the Industrial Conciliation and Arbitration Act 1954, and to those which are not. 40

The amendment substitutes new sections 177 and 178 in the principal Act, which have the effect of

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40 This is clear from the definition of "workers' union" in s.176. Note also the wide definition of "instrument".
inserting a model disputes clause in every award, industrial agreement, agreement under s.8 of the Labour Disputes Investigation Act 1913, and "collective agreement in the nature of an industrial agreement". The clause includes a "no-strike" clause, but the procedure applies only to disputes between the parties to the award or other instrument concerning its interpretation or other related matters.

The amendment also provides a standard procedure to deal with "personal grievances", that is, claims by an employee of wrongful dismissal or other action by an employer affecting his employment to his disadvantage. However, the remedies open to the employee, which appear to be available only when he has suffered a legally wrongful dismissal, make this a less potent measure than appears at first sight.

Finally, the amendment establishes an "Industrial Mediation Service". The service utilizes mediators who are charged with the duty of maintaining "harmonious industrial relations". The mediators have power to intervene on request or unasked in any actual or potential industrial dispute, and to assist the parties

41 For a discussion of enforcement problems arising with this last category of agreement, see the writer's article in [1971] N.Z.L.J. 180.

42 Under the new s.179 of the principal Act.

43 See s.179(5) of the Act.

44 Under the new s.180 of the principal Act.
to reach a settlement, acting as arbitrator if requested to.

E. SPECIAL PROCEDURES FOR PARTICULAR INDUSTRIES.

A number of separate wage-fixing and industrial relations systems have from time to time been enacted to govern particular industries and classes of employee. The most important of these is the State Services, which are subject to detailed provisions laid down by the State Services Act 1962, and the State Services Remuneration and Conditions of Employment Act 1969. Outside the State Services, there are several enactments governing specific industries. Mention can be made of the Waterfront Industry Act 1953, the Agricultural Workers Act 1962, and the Aircrew Industrial Tribunal Act 1971.

Analysis of these statutes is beyond the scope of this work, but, once again, the common law principles

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45 Cf. the power to call a compulsory conference under s.8 of the Industrial Relations Act 1949. This applies only in respect of matters not specifically provided for in an award or industrial agreement.

46 Reference should also be made to the statutes governing particular industries within the state services, e.g. the Government Railways Act 1949, the Hospitals Act 1957, the Post Office Act 1959, the Education Act 1964.

47 Unions subject to the Waterfront Industry Act and the Aircrew Industrial Tribunal Act are expressly permitted to register under the Industrial Conciliation and Arbitration Act 1954, but do not follow its procedures.
discussed will generally be applicable to trade unions which represent employees subject to those Acts.

F. RECENT LEGISLATION AIMED AT STABILISATION OF THE ECONOMY.

Very recently, the pattern of conciliation and arbitration, on the one hand, and free collective bargaining, on the other, has been significantly altered by the introduction of certain anti-inflationary measures. The Stabilisation of Remuneration Act 1971 attempted, by the setting up of a "Remuneration Authority" to scrutinise and allow or disallow wage increases - said to be a significant cause of inflation - to keep all increases down to as low a level as possible. The system set up by the Stabilisation of Remuneration Act, although ostensibly a temporary measure, has been continued in substance by the Stabilisation of Remuneration Regulations 1972, which are still in force at the present time. The regulations (unlike the Stabilisation of Remuneration Act itself) are balanced to some extent by regulations imposing a price-freeze.

The penal provisions of the Stabilisation Act, and now of the regulations, impose important, but hopefully

48 The Act contained its own expiry date: 30 June 1972.
49 S.R. 1972/59. The regulations are made pursuant to the Economic Stabilisation Act 1948.
50 The Stabilisation of Prices Regulations 1972 (S.R. 1972/60).
temporary, limitations on strike action and wage negotiation by trade unions. These provisions do not, however, greatly affect the common law doctrines which form the subject-matter of this thesis. 51

G. THE ENGLISH SYSTEM OF INDUSTRIAL RELATIONS CONTRASTED.

The vast majority of cases setting out the common law relating to trade unions are, as one would expect, English ones. In order to evaluate the relevance of these decisions as authorities in this country, it is necessary to have some knowledge of the context in which these cases were decided. Legislative solutions adopted in England in respect of problems arising out of the common law may also be looked to in respect of similar problems arising here. The English system of industrial relations has, however, recently undergone a complete change, with the coming into force of the Industrial Relations Act 1971 (U.K.). We are here concerned with the position existing prior to that Act, as this is what shaped the present common law. The Industrial Relations Act itself represents a complete reversal of the previously existing system, introducing much stricter control of trade unions and their activities by means of a comprehensive and separately administered code of "unfair industrial practices." 52

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51 Breach of the penal provisions would presumably be relevant as "unlawful means" in an action in tort. See Part Four, post.

52 See e.g. Campbell, The Industrial Relations Act (1971); Harvey, Industrial Relations (1971); Selwyn, Guide to the Industrial Relations Act 1971 (1971).
The main characteristic of pre-1971 industrial relations in England was undoubtedly a general lack of positive intervention by the law. Apart from legislation of a social welfare or safety nature, industrial relations were almost exclusively conducted by free collective bargaining based on a legal right to strike and to lockout. A general acceptance by unions, employers, and government of this way of conducting industrial relations has meant that legislative activity in this area has been largely limited to removing the common law restrictions on trade union activity which from time to time developed. The Trade Union Act 1871 (U.K.), the Conspiracy and Protection of Property Act 1875 (U.K.), the Trade Disputes Act 1906 (U.K.), the Trade Union Act 1913 (U.K.), and the Trade Disputes Act 1965 (U.K.), all followed this pattern of restoring a previously existing position of non-intervention by the law.

It can be seen, therefore, that the English common law, which the New Zealand courts have accepted and applied virtually without question, has evolved against a background

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54 Note also the Contracts of Employment Act 1963 (U.K.).

55 There have been exceptions to this: see e.g. Wedderburn, op. cit., 197-218.
of industrial relations which could scarcely be more dissimilar to that existing in this country. This is a matter to which we will return at various points in this thesis.
CHAPTER IV

THE LEGALITY OF DIRECT ACTION
Of the kinds of activity described in chapter I as "external" trade union activities, the most significant, both from a legal viewpoint, and from the amount of public attention it attracts, is clearly that of direct action. "Direct action" is a somewhat vague term popularly used to refer to action by trade unions and their members which by-passes any formal or informal procedures which may be available for the settlement of contentious matters. An attempt is made instead to achieve the objective(s) desired by using some form of interference with the normal flow of work (or goods or services) in order to put pressure on the party with whom the dispute exists, who is usually the employer of members of the union involved. In some cases, the pressure may be aimed at some third party - another employer, for example, or perhaps the government. The term "direct action" is, therefore, wider in meaning than strike action, although strike action is of course the most common form which direct action takes.

As the subject-matter of this work is trade unions, it is not proposed to deal with the tactics (or legality) of direct action as adopted by employers.¹ Nor is discussion of this topic particularly necessary, for although employers in New Zealand do resort to direct action, and in particular, the lockout, it is not customarily used as a bargaining weapon. As Grunfeld

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¹ For some of the methods adopted by employers, see Grunfeld, Modern Trade Union Law (1966), 458-9.
has remarked: "It is in the nature of things that organised labour has in general to be the more active, the attacking side in industrial negotiations". This is because the employer, who is usually concerned only to maintain the status quo with regard to conditions of employment, has no need of positive action. Furthermore, any changes in working conditions which he wishes to make can be achieved without his resorting to direct action, as he controls both managers and premises. The unions, on the other hand, can only achieve their objectives by prevailing on the employer to grant them, hence the necessity for them to initiate negotiations and to assume the role of the aggressor generally.

It is sufficient to say, therefore, that most instances of direct action by employers fall within the definition of "lockout" in s.190 of the Act, and that lockout provisions corresponding to those governing strikes are contained in both the Act and in the Labour Disputes Investigation Act 1913.

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2 Ibid, 318.
3 This would be less likely to be the case in any industry which had some degree of worker or trade union control or ownership.
4 Cf. McHardy v Jackson (1913) 16 G.L.R. 96.
5 Sections 191, 192, 193, 195, 196 of the Act.
6 Sections 13, 14, 15 of that Act.
The issue of the legality of direct action by trade unions arises in two independent ways. First, direct action may be (and in New Zealand, usually is) a breach of industrial relations legislation. Secondly, direct action may be a breach of the contract of employment of the individual worker taking part in it. In either case, this is a breach of the law, for which legal sanctions are available, but, as already indicated, are very seldom invoked. More importantly for our purposes, however, direct action involving either breach of industrial relations legislation or breach of the contract of employment will generally amount to "unlawful means" for the purpose of the doctrines of the law of tort discussed in Part Three, post.

A. THE METHODS OF DIRECT ACTION.

In New Zealand most of the recognised methods of direct action are used by unions. The most common kind of direct action adopted is of course the strike - the complete withdrawal of labour by the workers. Variations on this include the "go-slow", in which the workers remain at work, but considerably reduce their output; the rolling strike, in which stoppages of short duration take place at intervals; the part-ban, in which the workers refuse to carry out a particular part of their customary task, e.g. to work overtime or to work a
particular part of their customary task, e.g. to work overtime or to work a particular service at a particular time; the "black ban", in which the workers, although prepared to perform the rest of their tasks, refuse to work on or with a particular thing (or person) which has been "blacked". Two further methods, which are less common in this country, are the "work-to-rule" or "regulation" strike, in which all safety and other regulations governing the job are meticulously observed, and the "stay-in" or "sit-down" strike, in which the workers remain at their place of work but do nothing.\(^8\)

Another method of direct action which is not uncommon in this country is that of picketing - or "watching and besetting", as the law so picturesquely puts it - at the entrance to the premises of the person with whom the dispute exists. The various purposes for which picketing may take place, and the legality of picketing under statute and at common law, will be separately considered in Section A of chapter XXII, post.

Yet another method of direct action is the "boycott", that is, "the endeavour to dissuade members of the public or commercial entrepreneurs from entering into trade relations with the offending employer",\(^9\) for the purpose of crippling his business and in that way forcing him

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8 The terminology used here is neither settled nor of a high degree of precision. Nor is this account intended to be an exhaustive list of the possible methods of direct action.

9 Sykes, op. cit., 27. However, "boycott" is frequently used to mean an embargo or black ban, as in Flett v Northern Transport Drivers' I.U.W. [1970] N.Z.L.R. 1050.
to submit. Picketing of business premises is normally used as the means of dissuading customers, although leaflets and other means of communication can be used. Boycotting is a more indirect and uncertain method of direct action than the others, and it does not seem to be used much in New Zealand, where the industrial union, with automatic recognition by the employer and numerical strength,\textsuperscript{10} has other more effective methods to turn to.

Each of the methods outlined can be used either as a \textit{primary} pressure, that is, directly against the employer (or other party) in dispute, or as a \textit{secondary} pressure, that is, against some person other than the employer in dispute (usually a customer or supplier of his) with the object of thus indirectly forcing submission by the employer.\textsuperscript{11} The indirect course of adopting secondary pressures is particularly useful for a union when it lacks sufficient bargaining strength at the place of the dispute, but in New Zealand, where unions seldom lack numerical strength or recognition, secondary pressures, like boycotting, are usually unnecessary.\textsuperscript{12}

If we turn from the methods of direct action employed by trade unions to the purposes for which these various

\textsuperscript{10} See Section A of the preceding chapter.

\textsuperscript{11} The terminology is that of Sykes, opcit., 26.

\textsuperscript{12} A recent example of secondary pressure successfully applied is Pete's Towing Services v Northern Transport Drivers' I.U.W. [1970] N.Z.L.R. 32, discussed in section C of this chapter.
methods are used, a different terminology applies.

In general terms, the purposes of direct action may be said to be either industrial or non-industrial. Non-industrial purposes would include those springing from personal, social, or political motives. By far the greater part of direct action by trade unions in New Zealand - or anywhere else for that matter - is undoubtedly industrial in its aims. Direct action for industrial purposes is usually to induce compliance with some demand made on the employer by those taking part. It may, however, take the form of a "sympathy strike". The sympathy strike, like the political strike and the "protest strike", shows the strike in its role as a mode of expression. In addition, it can be regarded as a means of implementing broad industrial objects which may transcend the particular originating dispute. In a sympathy strike, the strikers act "merely as a gesture of accord with the strikers in another industry; they themselves have no specific demand to make on their employer". Common usage of this term may,

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13 However, increasing state intervention into spheres traditionally thought of as "industrial", and a wider view by trade unions of their industrial functions, has considerably blurred the distinction between "industrial" and "non-industrial" purposes. There is also the possibility of trade union action taken with mixed industrial and non-industrial motives.


15 Sykes, op.cit., 33.
however, be less exact than this, and would probably include a refusal "on principle" to do another union's work, or to handle goods worked by non-union labour during a strike.

The political strike, which is the most important variety of non-industrial direct action, is also characterised by a lack of any demand made on the affected employer. The intention is instead to put pressure on some outside party, usually the government. The incidence of strike action for political purposes has shown a marked increase of late. The Federation of Labour ban on French goods and services during the recent French nuclear testing in the Pacific has already been referred to. Other instances of political direct action in this country include a one-day stoppage by Seamen in April 1971 protesting New Zealand's involvement in the Vietnam war, and the numerous protest strikes over the passing of the Stabilisation of Remuneration Act 1971. A more unusual political strike was the international twenty-four hour stoppage by airline pilots in June 1972 over aircraft hijackings, in which New Zealand pilots took part. There is also the looming possibility of trade union action against the 1973 Springbok Rugby tour of New Zealand.

A form of direct action which seems to be increasing is the "protest strike". The "protest" may be, and usually is, politically motivated, but it may also be industrial in nature, e.g. a protest against the use by an employer of non-union
subcontractors. Although a protest strike may be pure "protest", with no demand attached, there is usually some demand implicit.

B. THE LEGAL DEFINITION OF "STRIKE".

It is important now to determine which of the various kinds of direct action just analysed come within the legal definition of "strike". This definition is contained in s.189 of the Industrial Conciliation and Arbitration Act 1954, but it applies to all trade unions in this country, as the same definition is adopted by the Labour Disputes Investigation Act 1913. The definition is as follows:

189. Definition of strike - (1) In this Act the term "strike" means the act of any number of workers who are or have been in the employment of the same employer or of different employers -

(a) In discontinuing that employment, whether wholly or partially; or

(b) In breaking their contracts of service; or

(c) In refusing or failing after any such discontinuance to resume or return to their employment; or

(d) In refusing or failing to accept engagement for any work in which they are usually employed; or

(e) In reducing their normal output or their normal rate of work, -

the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers -

(f) With intent to compel or induce any such employer to agree to terms of employment or comply with any demands made by the said or any other workers; or

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(g) With intent to cause loss or inconvenience to any such employer in the conduct of his business; or

(h) With intent to incite, aid, abet, instigate, or procure any other strike; or

(i) With intent to assist workers in the employment of any other employer to compel or induce that employer to agree to terms of employment or comply with any demands made upon him by any workers.

(2) In this Act the expression "to strike" means to become a party to a strike.

The first important thing to notice about this definition is that it is exhaustive. That is, the ordinary meaning of the word "strike" is excluded. Thus if direct action does not come within the express wording of the definition, it will not be caught by either the Industrial Conciliation and Arbitration Act or the Labour Disputes Investigation Act, although it may constitute a breach of an award or industrial agreement, or an agreement registered under s.8 of the latter Act.

For strike action to be caught by s.189, three elements must be established: (i) that the action taken comes within one or more of paragraphs (a) to (e) of the definition; (ii) that the action taken was done in combination; and (iii) that the intentions of the strikers fall within one or more of paragraphs (f) to (i) of the definition. The requirement of combination would not appear to cause any problems.
Most kinds of direct action are caught by paragraphs (a) to (e). The strike simpliciter is clearly within one or all of paragraphs (a), (b), (c) of s.189, as are the "sit-down" strike, and the "rolling" strike. The "go-slow" and the "work-to-rule" are embraced by paragraph (e), "reducing their normal output or their normal rate of work". The "part-ban" and the "black ban", which will normally amount to a breach of contract by the striker, come within paragraph (a) and paragraph (b), and - in the case of a refusal to work overtime - within paragraph (a), paragraph (b), or paragraph (d), depending on the particular circumstances. Picketing and boycotting on their own clearly do not come within the definition.

Greater problems arise when one turns to the various intents required by the definition. It can be seen that primary pressure for industrial purposes is caught by

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19 See also Inspector of Awards v Cheer (1907) 9 G.L.R. 366.

20 Federated Seamen's I.A.W. v Slaughter (1925) 25A Bk. Aw. 1303.

21 Unless, perhaps, the employer accepts in advance that a ban is going to take place and does not require the particular task to be performed at all. Cf. Thomson v Deakin [1952] Ch. 646.


23 If overtime is agreed to be worked, or possibly if it is customarily worked, a refusal in concert to do so will amount to a breach of contract. See Anderson v Georgeson, supra; Camden Exhibition and Display Ltd. v Lynott [1966] 1 Q.B. 555.
paragraph (f), and possibly by paragraph (g), while secondary pressure for industrial purposes is within paragraphs (f) and (i). The "sympathy strike" which takes place purely out of "sympathy" is covered by one or more of paragraphs (f), (h) and (i) of the definition. But the refusal "on principle" to do what is claimed to be another union's work, or what will react to the disadvantage of another striking union, whether it is called a "sympathy strike" or not, poses greater problems. The predominant purpose of such a refusal is usually to avoid any possible inter-union trouble, or accusations that the union's members are strike-breaking (or "scabbing", to give the correct term of opprobrium). If this is what motivates those who refuse to work, it may be difficult to place direct action of this sort into any of the categories of intent required by s.189.

A possible illustration is the recent Pete's Towing Services Ltd. v Northern Transport Drivers' I.U.W., the facts of which will be given in the following section of this chapter. In that case it would appear to have been open to Speight J. to hold that the defendant union had not committed the tort of intimidation, inasmuch as the action threatened did not fall within the definition of "strike" and was therefore not unlawful. Speight J. clearly recognised, by his holding of "justification" for the tort of interference with

24 See Inspector of Awards v Auckland Boilermakers' I.U.W., supra.
26 See chapter XIX, post.
contractual relations, 27 that the union's motive was to keep out of trouble rather than to advance its own or any other union's financial interests.

If we turn to see what non-industrial purposes fall within paragraphs (f) to (i), it appears that at least some will be caught by the definition. A strike to further a personal grudge, or a "protest strike" directed against the strikers' employer, would appear to be covered by paragraph (g). A non-industrial strike involving a demand made on the employer 28 would be within paragraph (f). In the case of a political strike, which does not involve a demand on the employer, the only possibility is paragraph (g), which requires an intention on the part of the strikers to cause "loss or inconvenience" to their employer, "in the conduct of his business". In a political strike, the target of those taking part is not the employer at all, but some third party, usually the government. Any intention to cause loss or inconvenience is very much incidental to this. On a reasonable interpretation of paragraph (g), it would seem that it applies only where the ultimate end of the action is to cause loss or inconvenience. 29

27 See chapter XVIII, section A, post.

28 It should be born in mind that a demand can be inferred from the circumstances - Bailey v Manson (1922) 18 M.C.R. 30.

29 This is the view of Sykes, op. cit., 55, on an examination of similar Australian provisions.
this is correct, then political strike action does not come within paragraph (g), and is therefore outside the definition.

In Dobbin v Davies,30 however, Judge Fraser held that employees who had gone on strike in protest against the use by their employer of non-union subcontractors must, as they had chosen a form of protest which they knew would cause loss to their employer, "be presumed to have intended the natural consequences of their act". As a result, their action was covered by paragraph (g). Although this approach to paragraph (g) has been given further sanctity by a recent Court of Arbitration decision,31 it is open to question whether this is an appropriate use of the so-called "presumption of intention".32 The presumption is in any event rebuttable, and, in the case of a political strike, could, it is assumed, be rebutted without too much difficulty.

Two further factors leading towards the conclusion that political strikes are not within s.189 are that the Industrial Conciliation and Arbitration Act, viewed as a whole, appears to be concerned solely with industrial

31 In re a dispute between the N.Z. Engineering Trades I.U.W. and the Shortland Freezing Co., Court of Arbitration, 17 August 1972 (as yet unreported).
32 In effect, it replaces "with intent to cause loss" in paragraph (g) with the words "with knowledge that their actions would cause loss".
matters, and that s.189, as it has penal consequences, must be restrictively construed in case of ambiguity.\textsuperscript{33} It should also be noted that, if all the other requirements are satisfied, the fact that those going on strike give legal notice to terminate their contracts does not prevent their action from coming within the definition, as the existence of a breach of contract is not required to constitute a strike.\textsuperscript{34} It will presumably be otherwise, however, if workers whose demands have not been met decide \textit{en masse} to give legal notice and leave that employment for another, as in that case they will be motivated predominantly by dissatisfaction at the non-compliance with their demands, so that the intents required by the section will not be present.\textsuperscript{35} It seems that it is possible to have a "one man" strike, if the striker is acting in concert with other workers.\textsuperscript{36}

C. THE LEGALITY OF DIRECT ACTION UNDER THE INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1954.


It has been seen that the legal definition of

\textsuperscript{33} These two lines of reasoning were adopted in the Australian case of Morrison and Colgan \textit{v} Bogue (1951) 53 W.A.L.R. 66 - a case of a political strike, but involving a somewhat different definition.

\textsuperscript{34} Ross \textit{v} Moston [1917] G.L.R. 87.

\textsuperscript{35} Cf. Buchanan \textit{v} Registrar of Friendly Societies (1904) 6 W.A.L.R. 108.

\textsuperscript{36} Inspector of Awards \textit{v} Kelpe (1909) 11 G.L.R. 100.
"strike" in s.189 of the Act covers nearly all variations of strike action, which is the most important method of direct action. The most significant omission from the definition was seen to be strike action for political purposes. The definition does not, however, deal with either picketing or boycotting, and as a result these two methods of direct action fall outside the scope of the Act, and accordingly also of the Labour Disputes Investigation Act 1913. Their legality must, therefore, be determined by the provisions of the general law.37

It is important to note that s.189 merely defines the term "strike"; it in no way answers the question whether action falling within its terms is legal or illegal. To determine the legal effect of a strike falling within the definition in s.189, we must turn to the infelicitously-drafted provisions of Part X of the Act.

Part X contains a number of provisions dealing with strikes (as defined in s.189), and various penalties are imposed on both those taking part, and those inciting, instigating, or assisting them.38

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37 For the legality of picketing, see chapter XXII, section A, post. Liability in tort could be incurred by a trade union boycott, in particular, for "conspiracy to injure" and interference with contractual relations, Cf. Ware & De Freville Ltd. v M.T.A. [1921] 3 K.B. 40; Goldfinch v Rangitikei Sawmillers' Co-operative Assoc. (1914) 33 N.Z.L.R. 666. The possibility of trade union boycotting, in the strict sense, in this country, is too remote to warrant further consideration. Note that the Trade Practices Act 1958, s.39(1) makes it clear that a refusal by trade unionists to provide their services is not caught by that Act.

38 For a careful review of these provisions, see Bretten, "The Right to Strike in New Zealand" (1968) 19 I.C.L.Q. 749.
will be sufficient for our purposes if these provisions are paraphrased, rather than quoted in full.

Under s.192(1), every worker who is a party to a strike and who is at the commencement of the strike bound by an award or industrial agreement is liable to a penalty not exceeding $100. However, there can be no liability under s.191(1) if judgment has been obtained under s.193 against the worker's union or association.39 Under s.193(1), every person40 who incites, instigates, aids or abets a strike by workers who are bound at the commencement of the strike by an award or industrial agreement is liable: i) if a worker or private citizen, to a penalty not exceeding $100; ii) if a union official, to a penalty not exceeding $500; iii) if a union or association, to a penalty not exceeding $1000. Section 193(2) deems any person who makes a gift of money or other valuable thing to or for the benefit of any person on strike, or to or for the benefit of any union, association, or organisation of which the striker is a member, to have aided and abetted the strike within s.193(1), unless he proves that he acted without the intention of aiding or abetting the strike. Subsection three of s.193 states that if a majority of the members of a union or association are parties to a strike, the union or association is deemed to have instigated the strike.

39 Section 192(4) of the Act.

40 "Person" is defined in s.2 to include a body corporate, and thus an industrial union.
The effect of these two sections would appear to be fairly clear. Strike action is completely illegal for industrial unions (and associations) and their members, unless there is no award or industrial agreement binding union members. As Bretten has pointed out, the latter situation is unlikely to occur in practice, as both awards and industrial agreements continue in force notwithstanding the expiry of their currency, until a new award or industrial agreement comes into operation - unless the union's registration is cancelled. Although the absence of any binding award or industrial agreement is a possibility in the period immediately after the registration of an industrial union, when its first award or industrial agreement has yet to come into being, even then - if, as is likely, any industrial dispute involved has been referred to conciliation by either the employer or the union - strike action will be illegal under s.166 of the Act.

Apart from these rather remote possibilities, therefore, strike action by an industrial union or its members would seem to be illegal, as long as the union

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41 In the latter case, the union and its members will then be subject to the provisions of the Labour Disputes Investigation Act 1913.

42 Loc. Cit., 753.

43 Sections 103(5) and 152 of the Act.
continues to be registered under the Act. Unfortunately, this is not the end of the matter. Section 191(1) requires the rules of an industrial union to provide that, when strike action is proposed, the union shall conduct on that issue a secret ballot of the union members concerned, before any strike action takes place. Section 195 reinforces the obligation imposed by s.191. Subsection one of s.195 provides that in the event of a strike taking place the union whose members are involved is deemed to have instigated\(^44\) the strike, unless it is proved that a secret ballot was held, or that every officer of the union either had no means of knowing that the strike was imminent, or took every step possible to ensure the holding of a ballot and to prevent the strike occurring.\(^45\) Subsection two provides a fine not exceeding $200 for every union member taking part in a strike, and a fine not exceeding $1000 for every official of the union involved who cannot prove that he had no means of knowing that the strike was imminent or that he took every step possible to ensure the holding of a ballot and to prevent the strike occurring. It is a defence to a charge under this subsection to prove that a secret ballot was held and that the majority voted in favour of striking.

\(^{44}\) For the purposes of liability under s.193(1), ante; also under ss.196 and 197.

\(^{45}\) Cf. s.193(3), under which the union is deemed to have instigated the strike if a majority of its members are parties to it. s.195(1), by contrast, deals with the circumstances in which a union will deemed to have instigated a strike, even though less than a majority of members are parties to it.
Section 195, therefore, sets out the legal effect of not holding the secret ballot before a strike takes place. Does the holding of the secret ballot legalise the stoppage? Both s.191(8) and s.195(4) make it clear that nothing in either section "shall be deemed to render lawful any strike or lockout which would otherwise be unlawful, or to derogate from the other provisions of this Part of this Act". This means, therefore, that the holding of the secret ballot in no way legalises the stoppage, as a strike after a majority vote in a secret ballot will still be caught by ss.192 and 193 unless it falls within the exceptional circumstances already examined.46 The overall scheme of these provisions is thus merely to create two grades of offence as far as strikes are concerned, the penalties in the case of a strike which takes place without a secret ballot being greater than where a secret ballot has been held.47

Finally, s.196 provides special penalties in respect of strikes in certain important industries if a person employed in any of those industries goes on strike without two weeks prior notice of his intention to strike.48 As with the holding of a secret ballot,

46 Note that s.195 (and s.196) does not seem to have the limitation contained in ss.192 and 193, that the workers involved be bound by an award or industrial agreement - another example of the poor drafting of these provisions.


48 Section 196(5) of the Act.
the giving of notice in no way legalises the stoppage.\textsuperscript{49} Further disciplinary provisions are contained in ss.197 and 198, but these relate to the suspension or cancellation of the registration of the unions involved, and do not affect the question of the legality of strike action.

To sum up: so long as an industrial union continues to be registered under the Act,\textsuperscript{50} it would appear to be illegal for the union, its officials, or members, to engage in, or to incite, instigate, aid or abet a strike within the definition in s.189 - whether or not a secret ballot has been conducted. The one exception to this proposition is the unlikely case where no binding award or industrial agreement exists. In such a case, unless either s.166 or s.196 applies, a strike after a majority secret ballot in favour of striking will be legal, as it is not caught by s.192, s.193, or s.195; although, by way of anomaly, the strike will be illegal if no such ballot has taken place, as it will then come within s.195, which does not seem to require the existence of a binding award or industrial agreement.

\textsuperscript{49} Cf. s.26 of the Police Offences Act 1927. Quaere: are both of these provisions necessary?

\textsuperscript{50} If an industrial union cancels its own registration under s.85 of the Act, this will not relieve it from its obligations under its award or industrial agreement; s.85(3). This would seem to mean that the "no stoppages" clause in the award or industrial agreement (see later in this section) will continue to apply.
2. *Pete's Towing Services Ltd. v Northern Transport Drivers' I.U.W.*

The conclusions just reached as to the legality of strike action under the Act would seem to require no further comment, were it not for the decision of Speight J. in *Pete's Towing Services Ltd. v Northern Transport Drivers' I.U.W.* ⁵¹ The facts of that case were as follows: the plaintiff was a "one-man" company managed by a Mr Jamieson. It operated a tug and barge unit, carrying on a coastal trade in bulk cargo. In order to operate competitively, Jamieson desired to keep costs down to a minimum, and to do this it was in his opinion necessary to avoid using ordinary waterside workers' labour for his loading and unloading. Jamieson planned to use instead the crew and equipment of the unit, and in particular a mobile crane, for these tasks. His method of operation attracted the notice of the Auckland Branch of Waterside Workers' Union, who claimed that the work being performed was "waterside work" within the Waterfront Industry Act 1953, and that under that Act they were entitled to be paid an equivalent amount of wages to what would have been paid to watersiders for doing the same work.

However, Jamieson's attitude to these claims was, in the words of Speight J., "curt and unco-operative". ⁵²

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⁵² Ibid, 36.
He refused to discuss the matter with the union, or with the Auckland Port Conciliation Committee, to which the union had referred the dispute under the terms of the Waterfront Industry Act. After some time, no progress having been made, the Port Conciliation Committee referred the matter to the Waterfront Industry Tribunal in Wellington for its adjudication.

The plaintiff company's operations elsewhere, at Mount Maunganui and Whangarei, had also attracted the attention of the local branches of the Union, but in each case Jamieson in effect refused to enter into negotiations in respect of these matters. The watersiders were not satisfied with this state of affairs, and at their Biennial Conference in November 1968, a resolution was passed declaring the plaintiff company "black" until such time as it should enter into discussions on a proper basis with the Union.

Shortly after this Conference, the events which formed the subject-matter of the litigation occurred at Whangarei. The plaintiff was engaged in supplying sand under contract to Ready Mixed Concrete Ltd., the unloading of the bags being done by means of a hired front-end loader discharging the sand into one of Ready Mixed Concrete's trucks. This mode of operations came to the notice of a Waterside Workers' Union official, who, on the assumption that the two men operating the front-end loader and the truck were members of the defendant Drivers' Union, contacted Arvidson, the local organiser of that union, and informed him of the situation and of the watersiders' claim to do the work which was being
done. Arvidson told both drivers, and also the Manager of Ready Mixed Concrete Ltd., who arrived on the scene, of the "blacking" of the barge by the watersiders, and also of the latters' claim that the work being done was "waterside work". The exact words used by Arvidson were not established, but it was clear that he gave the impression that some form of industrial trouble was likely if the loading proceeded.

Consequently the manager of Ready Mixed Concrete Ltd. formed the opinion that it would be prudent not to accept any more sand deliveries until these matters were resolved. As a result of this incident, and a similar occurrence at Whangarei some months later, little, if any, work was attempted by the plaintiff company with its barge. Subsequently, the plaintiff company issued proceedings against the Drivers' Union, claiming $41,739 damages for loss of prospective profits, and alleging intimidation, interference with contractual relations, and "conspiracy to injure".

It is the holding of Speight J., the trial judge, on the issue of intimidation which is of present interest. His Honour emphasised that no definite or immediate action had been threatened by Arvidson, and that what had been said did not therefore amount to

53 See ibid, 39.
54 The tort of intimidation involves the causing of economic harm to another by means of a threat to do an unlawful act. See chapter XIX, post.
a threat to use unlawful means. Although, as a commentator has pointed out, the evidence in the case would seem to have supported a holding that Arvidson had not "threatened", but merely "warned" Ready Mixed Concrete Ltd., Speight J. preferred to base his decision on the ground that the strike action which had been "threatened" need not necessarily have involved any illegality. His Honour stated:

"As I understand it, with particular reference to Part X of the Industrial Conciliation and Arbitration Act 1954, a strike as such is not illegal and, indeed, there are lawful methods of striking. A fortiori it may be lawful to threaten strike (sic), depending on the type of action contemplated."

In effect, Speight J. is here saying that, inasmuch as there were lawful methods of striking theoretically open to those involved, the court should not, in the absence of something less vague than what was said in this case, treat Arvidson's threats as being threats of illegal action. However, as the analysis of the provisions of Part X has shown, a strike by workers subject

55 [1970] N.Z.L.R. 32, 44. A more important issue not raised in this case - whether a breach of industrial relations legislation should be treated as "unlawful means" for the purposes of liability in tort - is discussed in chapter XVI, section H, post.


to an award (as was the case here) is clearly illegal, whether a secret ballot is taken or not. Earlier New Zealand cases which had been founded on threats to strike as "unlawful means"\(^59\) were distinguished by Speight J. on the basis that what had been threatened in those cases was immediate strike action, without the legal notice required for termination of the workers' contracts. However, it is by no means clear from an examination of the cases that these factors were thought of as being of any importance.

Furthermore, Speight J. was, it seems, of the opinion that the giving by the drivers at Ready Mixed Concrete Ltd. of sufficient notice of termination of their contracts of employment would prevent their action from being illegal. Thus in his view Arvidson had not committed himself or his drivers to acting illegally, as there was no evidence to suggest that they would give less notice than that required by their award.\(^60\) But although it seems to be the law in England that a strike notice of the requisite length will render strike action perfectly lawful,\(^61\) in New Zealand the definition of "strike" in s.189 of the Act makes it clear that the giving of notice and the absence of any breach


\(^60\) [1970] N.Z.L.R. 32, 44.

\(^61\) This is not completely certain; see the final section of this chapter.
of contract are both irrelevant to the issue of the legality of the strike. This was the basis of the decision in **Ross v Moston**.62

The only other alternative for legal strike action is one which Speight J. does not actually deal with, but which needs to be disposed of, as his holding that "there are lawful methods of striking" perhaps implicitly raises it. This is the possibility that before resorting to the threatened strike action, the union will obtain the cancellation of its registration under the Act, so that it can then legally strike (subject presumably to the restrictions of the Labour Disputes Investigation Act 1913).63 There is of course no likelihood whatsoever of this actually happening in the present climate of industrial relations, but this cancellation point might be raised, in order to argue that the union should be given the benefit of the doubt where the evidence was uncertain as to the actual course of action proposed.

An argument of this kind was dealt with in **Blanche v McGinley**64 by Denniston J., who clearly thought, even in 1912, that it was totally unrealistic to say that a threat of strike action should, under normal circumstances,

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63 It will, however, continue to be bound by the obligations of its award or industrial agreement - s.85(3) of the Act.

64 (1912) 31 N.Z.L.R. 807, 815.
be construed as being contingent on the months-long procedure of cancelling the union's registration. It was, furthermore, not merely a question of what those who issued the threat intended by it: "It is not only what is in the minds of the senders, but what would naturally be conveyed to the minds of the recipients: that is the test". It seems probable, therefore, that this, too, does not amount to a "lawful method of striking" for the purpose of the tort of intimidation.

On the basis of the foregoing analysis, it is respectfully submitted that Speight J. in Pete's Towing case was wrong in law when he held that a threat to strike was not, of necessity, a threat to do an unlawful act. This is not to say, however, that Speight J.'s decision was not a correct one from an industrial relations standpoint. Clearly on the merits of the case, it was the "right" decision, but it was unfortunately based on the "wrong" reasons. In the writer's view, therefore, the decision in Pete's Towing Services Ltd. v Northern Transport Drivers' I.U.W. can have no effect on the conclusion already reached, that strike action within the definition in s.189 is, for all practical purposes, illegal.

3. **Strike Action as a Breach of an Award or Industrial Agreement.**

In addition to being illegal under Part X of the

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65 Ibid.

66 For further analysis of and comment on this important case, see Part Three, post.
Act, strike action by an industrial union or its members may also be illegal as a breach of the particular award or industrial agreement governing the union's industry. Penalties are imposed on both workers and unions, with corresponding provision for employers, for breach of awards and industrial agreements. Whether or not strike action amounts to a breach will depend on the wording of the particular award or industrial agreement. In the past, the normal wording of the disputes clause inserted in most awards did not, it seems, make a strike a breach of the award. Since 1970, however, the wording of the standard disputes clause deemed to be inserted in all awards and industrial agreements makes it clear that a stoppage can involve a breach of the award or industrial agreement. Subclause 7(a) of the disputes clause provides: "No worker employed by an employer who is a party to the dispute

67 Section 199 of the Act.


69 See ss.176-178 of the Act, substituted by s.3 of the 1970 amendment to the Act. Note that the disputes clause is deemed to be inserted in certain other instruments including "any other collective agreement in the nature of an industrial agreement". Whether strike action can amount to an illegal breach of subclause 7(a) when it is inserted in such an agreement would seem to depend primarily on whether the agreement itself is legally enforceable. For full discussion, see chapter VIII, section B, post, and also the writer's article in [1971] N.Z.L.J. 180.
shall discontinue work, either totally or partially, because of the dispute". It should be noted, however, that the disputes procedure applies only to disputes between the parties to the award or industrial agreement concerning its interpretation or any collateral matter. Strikes which do not concern such matters will not, therefore, be illegal as a breach of the award or industrial agreement - although they may of course be caught by Part X of the Act.

D. THE LEGALITY OF DIRECT ACTION UNDER THE LABOUR DISPUTES INVESTIGATION ACT 1913.

The restrictions imposed by the Labour Disputes Investigation Act 1913 on direct action by unions not subject to an award or industrial agreement have already been examined in section B of chapter III, ante. These restrictions are only in respect of action coming within the definition of "strike" in s.189 of the Industrial Conciliation and Arbitration Act, which the Labour Disputes Investigation Act adopts. A strike within this definition will be illegal, therefore, if the procedures outlined in chapter III are not obeyed. In addition, as an agreement registered under s.8 of the Labour Disputes Investigation Act is among the class of instruments into which the standard disputes clause created by the Industrial Conciliation and Arbitration Amendment Act 1970 is deemed to be inserted, strike action by a party to an agreement under s.8 could be illegal as a

70 Section 178(1) of the Act.
breach of the disputes clause and thus of the agreement. This would be so only in circumstances similar to those just outlined in respect of awards and industrial agreements.

E. DIRECT ACTION AS A BREACH OF THE INDIVIDUAL CONTRACT OF EMPLOYMENT.

The problem of the effect of strike action on the contract of employment of the individual worker who participates in a strike has always been of great importance for English labour lawyers. This is because the legal obligations springing from this contract have long been the only general restriction on the "right to strike", a right which has traditionally been accepted as being an essential part of the English system of industrial relations. This position has been only slightly modified by the new Industrial Relations Act 1971 (U.K.).

In New Zealand, on the other hand, the problem has attracted little attention. The reasons for this lack of attention are threefold. First, the emphasis of the law has naturally been concentrated on the prohibitions on striking contained in industrial relations legislation, as these involve both criminal sanctions and liability in tort. Secondly, as was seen earlier in this chapter, the definition of "strike" in

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71 For a good general review, see Foster, " Strikes and Employment Contracts" (1971) 34 M.L.R. 275. For the distinction between a contract of employment (or contract of service), and a contract for services, see Mathieson, op. cit., 2-11.
s.189 of the Act does not require the action taken to be in breach of the striker's contracts of employment. 72 Thirdly, as the conciliation and arbitration system itself prohibits strike action, the issue of a legal right to strike has not arisen in this country.

However, the topic of direct action, and strike action in particular, as a breach of the individual contract of employment has now assumed greater relevance in this country. This has occurred as a result of recent English developments and, in particular, the decision in Rookes v Barnard, 73 which established that a breach of the contract of employment can amount to "unlawful means" for the tort of intimidation, and possibly for the other economic torts also. 74 Furthermore, liability for the tort of interference with contractual relations 75 will generally be incurred by the instigator of direct action, if the action results in a breach of the contracts of employment of those involved. Brief consideration will be given, therefore, to some of the issues which arise out of this topic.

1. **Strike Action as a Breach of Contract.**

In theory, strike action may have one of three possible

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74 See chapters XVII-XX, post.
75 See chapter XVII, post.
legal effects: it may be i) a breach by the striker of his contract of employment, or ii) a termination of the contract, or iii) a suspension of some or all of the obligations under the contract. Which of these three categories the strike action falls into, has been treated by the courts as depending on the legal effect attributed to the "strike notice" (if any) given by the strikers or the union on their behalf.

Traditionally, notices of intention to strike have been treated as having either of two possible effects, depending on the length of the notice given. Thus strike notices which are of the length required by the contract for lawful termination of it seem to have been expressed (or at least interpreted by the courts) as notices of termination of the contract. This means, of course, that no possible breach of contract can occur, and thus a strike taking place after the expiry of such a notice is completely lawful from a contractual viewpoint. (The New Zealand position in regard to notices of termination, which differs somewhat from that just outlined, will be considered shortly). Alternatively, the strike notice given may be less than that required for termination of the contract, or there may be a failure

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76 See also Foster, loc. cit., 276.

77 In New Zealand, this period is usually laid down by the relevant award or industrial agreement; alternatively, it may be based on an express term of the contract, or on custom. See Mathieson, op. cit., 42.
to give any notice at all. In such a case, the short notice (if any) is an anticipatory breach of contract; and the strike itself is unlawful, as it is a breach of the employment contracts of those involved. This breach (or anticipatory breach) of contract entitles the employer either to rescind the contract of employment and summarily dismiss the employees involved, or to sue them for breach of contract. On the other hand - and this is what usually happens - the employer is entitled to waive the breach, and take the employees back after the strike as if no breach had occurred.

The traditional approach depends, therefore, on this simple distinction between strikes with sufficient notice (which amount to termination of the contract) and strikes with insufficient or no notice (which are breaches of contract). And although this approach does not solve the problems which arise in those special situations when proper notice of strike action is given, but the action undertaken is only a partial refusal to work, it has provided a workable basis for a contractual right to strike in English law. In Rookes v Barnard, however, the issue of strike notice was given a more sophisticated treatment by Donovan L.J. in the Court of Appeal, and by Lord Devlin in the House of Lords.


79 For a discussion of the measure of damages in such cases, see Grunfeld, op. cit., 325-9.


It was commented by their Lordships that although a strike notice of proper length could be expressed and intended as a notice of termination (and, if so, would take effect as a notice of termination), nevertheless, the normal function of such a notice was not to operate as a notice of termination, but merely to announce an intended breach of contract. This mode of thought was adopted and given clear expression by Lord Denning in *Stratford v Lindley*,\(^ {82}\) who said:\(^ {83}\)

"[A strike notice of proper length] is not to be construed as if it were a week's notice on behalf of the men to terminate their employment; for that is the last thing any of the men would desire. They do not want to lose pension rights and so forth by giving up their jobs. The strike notice is nothing more or less than a notice that the men will not come to work. In short, they will break their contracts."

This approach had the unfortunate result that, except in the few cases where the strike notice is expressed, or at least is construed, as a notice of termination, there is no difference in law between giving full strike notice, short notice, or no notice at all. The strike will in any case be in breach of contract. Such a result was clearly unsatisfactory, not only from the aspect of the theoretical "right to strike" in England, but also because of the possibility that the resulting breach of contract could be utilized by a third party suing for

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\(^{82}\) [1965] A.C. 269.

\(^{83}\) Ibid, 285.
intimidation. In Morgan v Fry this possibility was realised, and the judges were faced with these theoretical difficulties of their own creation.

The plaintiffs in that case were lockmen in the Port of London, who had left the majority Transport and General Workers' Union (T.G.W.U.) and formed a breakaway union. The defendants, officials of the T.G.W.U., had decided to crush the breakaway union, and had informed the employers that, if the plaintiffs refused to rejoin the T.G.W.U., they should be dismissed. The defendants therefore gave notice that at the end of a two week period their men would be instructed not to work with members of the breakaway union - although they would continue to perform their duties as far as possible without them. This was clearly not a notice to terminate the workers' contracts, and thus the plaintiffs, who were dismissed as a result of the threatened action, sued alleging that the defendants had threatened a breach of contract and were therefore liable for intimidation.

The plaintiffs were successful at first instance, but in the Court of Appeal it was held that no unlawful act had been threatened, and as a result their action failed. Unfortunately, the three members of the Court refused to depart from the majority decision.

84 The issue of intimidation was foreclosed in England by the Trade Disputes Act 1965 (U.K.), which provided that threats to break a contract of employment were not actionable in "trade disputes".


86 The Trade Disputes Act 1965 (U.K.) did not apply, as it came into force subsequent to the events complained of.
reached this result by different routes, so that no real solution of the contractual problem emerges from the decision.

Lord Denning M.R., faced with the passage from his judgment in *Stratford v Lindley* 87 which has just been cited, characteristically met the problem head-on: 88

"It is difficult to see the logical flaw in that argument. But there must be something wrong with it: for if that argument were correct, it would do away with the right to strike in this country."

His Lordship proposed, therefore, a new legal basis for the strike notice of proper length. Having emphasised that neither party to the contract normally wished to take the drastic step of terminating the contract if it could be avoided, he concluded that both parties are, therefore, content to accept a strike notice of proper length as lawful. "It is an implication read into the contract by the modern law as to trade disputes." 89 Lord Denning went on to consider the effect of this on the contract of employment: 90

"If a strike takes place, the contract of employment is not terminated. It is suspended during the strike: and revives again when the strike is over."

However, it is clear that the strike notice itself could not operate to suspend the contract, as one party to a contract cannot unilaterally suspend the operation

87 Supra.
89 Ibid, 728.
90 Ibid.
of a contract: the consent of both parties is required.\textsuperscript{91}

Lord Denning must, therefore, be referring to an implied consensual suspension of the contract by both parties—a novel concept, and one for which no authority exists. But even apart from its novelty, there are a number of theoretical problems which Lord Denning's suspension theory leaves unanswered,\textsuperscript{92} and it is difficult to predict whether his well-meaning attempt to find a judicial solution to a problem which he himself helped to create will become accepted as law.

Davies L.J., basing his judgment on somewhat similar reasoning, seemingly accepted Lord Denning's argument, for he stated that he supposed that the strike notice in effect would mean "that the obligations under the contract would be mutually suspended",\textsuperscript{93} with the result that no breach of contract occurred. In addition, he suggested that, on the facts of the case, the strike notice may have amounted to "a termination of the existing contract and an offer to continue on different terms".\textsuperscript{94} This offer had, he thought, been accepted by the employers, so that again no breach of contract took place. Under this approach, the strike notice is treated as a notice of termination, with an implied

\begin{itemize}
\item \textsuperscript{91} See \textit{Bowes & Partners v Press} [1894] 1 Q.B 202.
\item \textsuperscript{92} See \textit{The Donovan Report}, 244-5; Wedderburn, op. cit., 110. Cf. Foster, loc. cit., 281-4.
\item \textsuperscript{93} [1968] 2 Q.B. 710, 733.
\item \textsuperscript{94} Ibid, 731.
\end{itemize}
offer to work on new terms, namely, the granting of the demands which have occasioned the notice.

Russell L.J. adopted a more traditional approach, holding that the strike notice was notice of an intended breach of contract, and not a notice of suspension. He avoided having to find for the plaintiffs, however, by holding that the breach in this case was not to be regarded as "unlawful means" for the tort of intimidation.

Although no doubt satisfactory to the defendants in that case, Morgan v Fry leaves the contractual position of strikes and strike notices in considerable confusion. As was seen at the commencement of this section, there are in theory three possible results of strike action - namely, breach, termination, and suspension - and, between them, the three judgments in this case attribute to the same notice all of these possible effects. However, it is unlikely that this common law tangle will ever be resolved, for in England, a statutory solution has been introduced, leaving New Zealand and other Commonwealth lawyers to battle with the problem if and when it arises in their jurisdictions.

How applicable, then, are the various approaches adopted in Morgan v Fry to the New Zealand context? The first matter worthy of note is that the different legal background in this country, and in particular,

95 Ibid, 734.
97 Industrial Relations Act 1971 (U.K.), s.147.
the strike provisions of the Act, may make the adoption of Lord Denning's suspension theory impossible. Dr Farmer notes that this theory is based on a term of the contract of employment, which is implied on the basis of the English employer's acceptance in modern times of the "right to strike". 98 He concludes that, in view of the totally different industrial background, "the sociological assumption in New Zealand is quite the reverse". 99 This approach is open to the counter-argument that the recent growth of collective bargaining in this country, 100 and resultant rejection by many unions and employers of the prohibitions on direct action contained in industrial relations legislation, may even now, or at any rate at some time in the future, give rise to a new "sociological assumption" similar to the English one - at least in those industries where free collective bargaining is being carried on. On the whole, however, Dr Farmer's view is more likely to be the correct one at the present time. The current trend towards collective bargaining would probably not, in the eyes of the judiciary, have established itself sufficiently to permit the implication, in the face of legislative prohibitions, of a positive "right to strike" into employment contracts in New Zealand.

99 Ibid.
100 See chapter III, section C, ante.
Indeed, if the "sociological assumption" approach is pushed to its logical conclusion, there may even be an implied term in most, if not all, contracts of employment in New Zealand that no strike action will be undertaken. Support for a somewhat similar proposition to that just put forward can be drawn from Anderson v Georgeson, where Judge Frazer held that, as a disputes and "no-strike" clause in an unregistered (and expired) collective agreement was impliedly incorporated into the defendants' contracts of employment, they were in breach of contract in resorting to direct action. As a result, their action came within the definition of "strike" in the Labour Disputes Investigation Act 1913. As the terms of the relevant award, industrial agreement, or, semblé, agreement registered under s.8 of the Labour Disputes Investigation Act 1913 are, at least in the absence of express agreement, similarly incorporated in the contracts of those employees subject to them, it would seem to follow from Anderson v Georgeson that the disputes and "no-strike" clauses in those instruments also form part of the individual contracts of employment. Thus

103 Supra.
104 Now in the standard form laid down by s.3 of the 1970 amendment to the Act.
a strike in breach of the terms of the disputes clause\textsuperscript{106} will, it is submitted, be a breach of the contracts of employment of those concerned. To this extent, at least, it can be said that most contracts of employment in New Zealand contain an implied term not to strike.

As a consequence, it can safely be said that in general in this country, a strike cannot operate to suspend the contract of employment. It must, therefore, amount either to a breach or to a termination of the contract. It remains to consider these two possibilities in respect of the various categories of strike notice.

With respect to strikes with short notice, or no notice at all, it is well-established law that these are a breach of the contract of employment, and there can be no doubt that this obtains in New Zealand also. A strike after proper notice, if it is not expressed (or is not interpreted by the court) as a notice of termination, will also be a breach of contract. This is simply because, being neither a termination nor, as we have just seen, a suspension of the contract, such a strike cannot be other than a breach of contract.

What, then, of a strike which follows the giving of a clearly expressed notice of termination of proper length? At first sight, this would appear not to be a breach of contract, as the period of notice required for legal termination of the contract has been complied with. However, it

\textsuperscript{106} It will be remembered that the disputes clause only applies to disputes concerning the interpretation of the instruments, and matters incidental thereto - s.178(1) of the Act.
has been seen that it is open to argument that, in this country, most employment contracts contain as an implied term the standard form disputes clause set out in s.178 of the Act. Assuming that this argument is legally correct, does the giving of proper notice of termination prevent strike action which would otherwise be caught by the implied "no-strike" term in the employment contract, from being a breach of contract? It is submitted that by far the most likely interpretation of this term is that it establishes an obligation to refrain, when a dispute arises, from all strike action, including the termination of the employment relationship by a concerted resignation. Thus in Rookes v Barnard, the breach of the "no-strike" clause incorporated in the employees' contracts of employment was preceded by a strike notice which was only a few days short of that required for termination. It seems likely, from the importance attached to the breach of the "no-strike" clause in that case, that a notice of termination of the proper length would not have regularised the defendants' position. In Morgan v Fry, Russell L.J. discussed this very possibility and concluded that "even if that which was threatened had been concerted termination of contracts on a full seven days notice, such termination would have been a breach of the "no-strike" clause". 109

If the foregoing analysis is correct, then it can be seen that in New Zealand even a notice of termination of proper length will not, in those cases where the implied "no-strike" clause applies, prevent strike action from being a breach of the contract of employment.\textsuperscript{110}

To sum up: strike action in New Zealand will, it is submitted, be a breach of the contracts of employment of the strikers in all cases where no proper notice of termination is given, and also - unlike in England - in many cases where proper notice of termination is given. This is, of course, apart from any other liabilities, either criminal or tortious, which the same action may theoretically incur.

2. \textbf{Picketing as a Breach of Contract.}

The possibility is indeed remote of picketing (or boycotting) by employees taking place without the occurrence of simultaneous strike action, so as to raise as an independent issue the question of their individual effect on the contract of employment. However, it is possible that shift workers in dispute with their employer might picket his premises during their time off, while still turning up for work. An employee owes a contractual duty of "good faith and fidelity" to his employer;\textsuperscript{111} and in a Canadian case which involved

\textsuperscript{110} Cf. Ross \textit{v} Moston [1917] G.L.R. 87; also Pete's Towing Services case [1970] N.Z.L.R. 32, 44, where Speight J. seems to suggest that a strike after a proper notice of termination would not be in any way illegal.

\textsuperscript{111} Robb \textit{v} Green [1895] 2 Q.B. 315.
employees acting in the manner just described, it was decided, with no apparent qualms, that the employees were in breach of this duty.\textsuperscript{112}

It can be seen, therefore, that the contractual limitations on strike action in New Zealand are much stricter than the corresponding English position. This is clearly an indirect result of the prohibitions on striking in our industrial relations legislation. It must be stressed, however, that the importance of these contractual limitations does not lie in the contractual remedies available. For employers in this country, as in England, seldom utilize these remedies against the individual employees involved. It lies rather in their relevance as "unlawful means" in actions in tort, for these can often be directed against the employees' trade union or its officials, with greater effect than an action against the employees themselves. The appropriateness of this use of breaches of contract as "unlawful means" will be further discussed in Part Three, post.

\textsuperscript{112} \textit{Nipissing Hotel Co. v Hotel & Restaurant Employees' Union} (1963) 38 D.L.R. (2d) 675.
CHAPTER V

VICARIOUS AND CORPORATE RESPONSIBILITY OF TRADE UNIONS
Like any other body lacking a physical entity, a trade union, by its very nature, cannot act or think for itself. These and other similar functions must be carried out by natural persons acting on the union's behalf. Physical criteria, therefore, will be of no assistance in deciding whether the law should attribute to a trade union responsibility for particular acts, decisions, or motives, as these of necessity emanate from officials, members, or other persons in some relationship to the union. Instead, a legal test is necessary; and at common law two separate but overlapping theories of responsibility have evolved. These are the theories of vicarious liability, and of corporate liability. Vicarious liability, which is perhaps the wider of the two, is a means of attributing responsibility in law to a legal person (whether a natural person or not) for the acts, omissions, and state of mind of his (or its) agents or employees.\(^1\) Corporate liability, on the other hand, is limited, as the name suggests, to those legal persons which are bodies corporate, and is a means by which legal responsibility is attributed directly to a corporation for the acts, omissions, and state of mind of those persons who are, for practical purposes, the corporation.\(^2\) In addition, there are special provisions in the Act which govern the criminal

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1 Or independent contractors - see Atiyah, Vicarious Liability in the Law of Torts (1967). In the trade union context, discussion can be limited to responsibility for agents and employees.

2 The liability of trade unions for contracts entered into by its agents or officials is separately considered, in chapter VIII, post.
liability of industrial unions for strikes. These provisions, which override to some extent both vicarious and corporate liability, will be considered at the end of this chapter.

A. VICARIOUS LIABILITY.

It has been settled law since the Taff Vale case\(^3\) that trade unions are subject to the doctrine of vicarious liability.\(^4\) Thus a union will be liable for the acts, omissions, and motives of its agents and employees, when they are acting on behalf of the union and within the scope of the authority conferred upon them. The central problem in every case is, therefore, to determine whether particular union members or officials are acting within the scope of the authority conferred on them. This whole area has very recently come under review by the House of Lords, in Heatons Transport Ltd. v Transport and General Workers' Union.\(^5\)

That case, which was the first real test of the British Government's controversial new Industrial


\(^4\) For a general treatment of this complex topic, see Atiyah, op. cit.

Relations Act, arose out of the "blacking" by shop stewards of the defendant union of certain transport firms. The shop stewards, who represented the union's dock worker members, took this action in support of a claim that they were entitled to load and unload containers handled by those firms. The National Industrial Relations Court, on the application of the trucking firms, declared the blacking to be an "unfair industrial practice" and ordered the union to desist. The blacking continued, and fines totalling £55,000 were imposed on the union for contempt of court. The union appealed to the Court of Appeal, which held that the shop stewards, in taking direct action, were not acting with the authority, express or implied, of the union. The union was therefore not responsible for their actions. The House of Lords reversed this decision, and restored the fines.6

The reasoning of Lord Wilberforce, delivering their Lordships' unanimous decision, requires careful study. The Court of Appeal, stressing that the shop stewards were agents and not employees of the union, had held that they had no authority under the rules of the union to instigate direct action and, furthermore, that no authority had been delegated to them in this particular case. Lord Wilberforce thought that the fact that the shop stewards were agents and not employees were not significant. The test was the same in either

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6 This unanimous reversal by the House of Lords of a Court of Appeal decision in favour of a union is the latest example of a pattern which had previously been remarked upon: see O'Higgins & Patington, "Industrial Conflict" Judicial Attitudes" (1969) 32 M.L.R. 52.
case: "was the servant or agent acting on behalf, and within the scope of the authority conferred by, the master or principal?". More importantly, his Lordship discounted the idea that the terms of the contract between union members, which is the ultimate source of shop stewards' (and other officials') authority, are exhaustively set out in a union's rule-book. Custom and practice were also relevant. Thus the failure of a union's rules to specify the powers of its shop stewards did not necessarily enable it to escape responsibility:  

"If authority to take a particular type of action is not excluded by the rules, and if such authority is reasonably to be implied from custom and practice, such authority will continue to exist until unequivocably withdrawn."

Lord Wilberforce also discounted the necessity for any delegation of authority by the governing body of the union:  

"[Q]uestions of delegation from 'the top' ... do not arise if authority to take industrial action has either expressly or implicitly been conferred directly on shop stewards from 'the bottom', i.e. the membership of the union."

The action by the shop stewards was in accordance with the union's policy on the container issue, and overall his Lordship was satisfied that the evidence established "a general implied authority for the shop stewards to protect their men's wages and jobs by blacking". The

8 Ibid, 111.
9 Ibid, 112.
10 Ibid, 113.
union's "advice" to the shop stewards to discontinue the blacking was not an "unequivocal withdrawal" of this authority, so that it was to be held responsible for the actions of its shop stewards throughout.

This judgment contains several points worthy of comment. The idea that the rule-book is not the sole repository of the terms of the contract of union membership (in spite of the rule that one cannot usually go beyond the written terms of a contract which has been reduced to writing) is certainly a novel one. Although this judicial excursion into the sociology of group behaviour displays a certain robust realism, it is to be noticed that this doctrine has not hitherto operated in favour of trade unions, which have been strictly confined in their activities to the terms of their rule-books. As will be seen later,11 the courts have required union rules to contain an express power to expel or otherwise discipline a union member; and it could scarcely be seriously argued that the acquiescence of the membership in activity ultra vires the rules of a union would result in the implication of a new term in the contract of membership. Indeed, implication into the rules of terms favourable to the union would seem on the authorities to be well-nigh impossible.12

Even in the field of vicarious liability itself, the written rules have been treated, in the absence of

11 See chapter VII, section D, post.
12 See the cases cited in footnote 36, chapter VII, post.
facts establishing a delegation of specific authority, as determining the existence and extent of the authority of union officials. This clearly emerges from the House of Lords decision of Denaby and Cadeby Main Collieries Ltd. v Yorkshire Miners' Association,\(^{13}\) which was not greatly different in its essential facts from the Transport and General Workers' Union case. There the defendant union had under its rules a structure which consisted of a central governing body and officials, with the actual membership being divided into a number of branches, each with its own locally elected officials. The rules stated that no striking branch members could receive strike pay without the approval of the governing body, although this did not mean that a branch could not decide for itself to undertake strike action. A strike was called at the plaintiff's colliery by officials of a branch, without obtaining the approval of the governing body of the union. Later, after the plaintiff had dismissed the strikers, the defendant union had started to pay strike money to those on strike, under the impression - which it transpired was mistaken\(^ {14}\) - that it could lawfully do so under its rules. The strike having terminated, the plaintiff sued to recover financial losses caused by it, claiming that the defendant was responsible for the actions of the branch officials in calling the strike.

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\(^{13}\) [1906] A.C. 384.

\(^{14}\) See Yorkshire Miners' Association v Howden [1905] A.C. 256.
The House of Lords held that although it was contemplated that branch officials could call a strike, they were not in so doing acting as the agents of the union. There was, stated Lord James, "nothing to be found in the rules that makes the officers of the branches the agents of the central body".\(^\text{15}\) As the evidence did not disclose the existence of any specific delegated authority, the union was not liable.

To return to the \textit{Transport and General Workers' Union} case: even if the court is entitled in principle to go beyond the terms of the rule-book to determine questions of agency, the factual foundation for the alleged agreement of members, upon which the delegation of authority "from the bottom" was based, was, with respect, extremely shaky. At common law, unless a power to do so is expressly provided in the rules, a trade union cannot amend its rules,\(^\text{16}\) nor dissolve itself nor merge with another union,\(^\text{17}\) without the unanimous concurrence of all its members. In the instant case it is not clear whether their Lordships were of the opinion that, by way of exception to the common law rule, a unanimous delegation was not

15 \cite{free-church-of-scotland-v-overtoun}[1904] A.C. 515; \cite{harington-v-sendall}[1903] 1 Ch. 921; \cite{ree-tobacco-trade-association}[1958] 3 All E.R. 353. Cf. \cite{abbatt-v-treasury-solicitor}[1969] 3 All E.R. 1175.

16 \cite{ree-tobacco-trade-association}[1958] 3 All E.R. 353.

necessary in order to bind the union, or whether they thought that the evidence established the concurrence, without dissent, of all of the union's 700,000 members, some of whom were ranged in opposition to the dock workers on the container issue.

*Heatons Transport Ltd. v Transport and General Workers' Union*, although decided under the shadow of the Industrial Relations Act 1971 (U.K.), purports to apply general principles of law. It is of importance, therefore, to ascertain whether the approach adopted by that case is applicable to New Zealand. It is submitted that it is unlikely in the case of an industrial union that the New Zealand courts can go beyond the registered rules in determining the terms of the contract of union membership. Under s.66(b) of the Act, the rules of an industrial union must provide for the "powers and duties of the committee and of the president and secretary and of any other officers". Rules made in compliance with this and the other requirements of s.66 as a condition of registration as an industrial union must surely be treated as contractual terms which are exhaustive of their subject-matter.

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18 It appears not. Lord Wilberforce stated ([1972] 3 All E.R. 101, 112): "There is ... no a priori reason why members of the union should not agree that shop stewards should be authorised by all the members to take action".

19 See especially ibid, 110.

20 Except perhaps where an absurdity would result. Note also s.57 of the Act, the wording of which suggests a contract on the basis of the registered rules.
point of distinction lies in the corporate status of the industrial union. Where, as in the case of the Transport and General Workers' Union, a union has no separate legal personality, it may be possible to envisage the individual members as together having a residual power or authority by which a delegation "from the bottom" might be effected. But in the case of a body corporate, it is submitted that all power and authority must pass to the legal person which exists independently of the individual members. The only delegation of authority possible will be "from the top", in accordance with the rules.

It is submitted, therefore, that the Transport and General Workers' Union case is distinguishable in principle in this country, as it may well be on its particular facts, also. The traditional approach laid down in the Yorkshire Miners' case 21 will continue to apply. An industrial union will therefore be liable i) where its agents or employees act within their express or implied authority under the rules, and ii) where specific authority is given to a particular official or member (or even to a non-member). 22 As the Yorkshire Miners' case shows, the same principles are applicable when the responsibility of a union for the action of one of its branches is in issue. 23

23 See also Smithies v National Association of Operative Plasterers [1905] 1 K.B. 310; Waterside Workers' Federation v Burgess Brothers Ltd. (1916) 21 C.L.R. 129; Williams v Hursey (1959) 103 C.L.R. 30.
Even where an official or other agent has exceeded his authority, the union may be held to have ratified the official's acts if it expressly or impliedly adopts what has been done. In the *Yorkshire Miners* case, as was seen earlier, the union had paid strike money to those on strike. An argument was rejected that the payment of strike pay after the men had been dismissed amounted to a ratification of the branch officials' earlier tortious acts. In *Smithies v National Association of Operative Plasterers*, on the other hand, it was held that the defendant union, although originally ignorant that strike action by a branch was inducing a breach of contract, had, by giving strike pay after it had been informed of this, ratified the wrongful acts of the branch so as to render itself liable to the plaintiff.

In this country, the statutory background of the conciliation and arbitration system has resulted, in this area as in many other areas of trade union law, in an important gloss being placed on the general principles just outlined. This gloss governs the most common situation in which the issue of vicarious liability arises, namely where an official of an industrial union instigates or threatens strike action, and it is proposed to make the union accountable for his actions. The principle has emerged that, insofar as it is prima facie not one of the duties of an official of an industrial union to instigate or threaten strike action, the union will not, in the absence of express or implied

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24 Supra.
authority on its part, be responsible for an official who does indulge in such conduct. Thus in Gohns v Auckland Waterside I.U.W., it was sought to hold the union criminally liable for a strike which the union secretary had assisted in. Sim J. observed that:

"So long as an industrial union is registered under the Industrial Conciliation and Arbitration Acts, and its members are working under an award or industrial agreement, the promotion of strikes cannot be regarded as part of the business of the union.... In the absence of any express or implied authority from the union, [the union secretary's] acts must be treated ... as being outside the sphere of his duties as secretary, and cannot impose any responsibility on the union."

The union was accordingly acquitted on a charge of aiding and abetting the strike under what is now s.193 of the Act.

This approach to the responsibility of an industrial union for its agents and employees considerably narrows the width of the principle of vicarious liability, as applied in the English decisions already discussed. The idea of "the business of the union" restricts the class of activities which will usually come within the authority of a trade union official, excluding strike action as inconsistent with registration under the Act. This bears a close analogy to cases such


26 (1912) 14 G.L.R. 566, 567.
as Poulton v London and South Western Railway Co., in which the employee of a trading company without authorisation involves the company in an ultra vires activity, in the course of which he commits a tort. In these cases it has been held that, even though the acts were done for the company's benefit, it cannot be vicariously liable. This is because the employee has exceeded his authority, having, on the facts, no express authority, nor (since the activity is ultra vires) any implied authority.

The principle in Gohrs' case, although developed in cases dealing with criminal liability, applies to "civil" vicarious liability as well. In Auckland Abattoir Assistant' I.U.W. v Farrell, Smith J. accepted this, holding that the act of an industrial union delegate who had procured the plaintiff's dismissal by threat of

27 (1867) L.R. 2 Q.B. 534. See also Shaw, Savill & Albion Co. v Timaru Harbour Board (1890) 15 App. Cas. 429.

28 Strike action is in fact ultra vires an industrial union; see chapter XIII, section A, post.

29 This is not to say that a union (or any other corporation) will under no circumstances be liable for its agents' or employees' acts when it is acting ultra vires. Where the ultra vires activity has been authorised by the union itself (that is, its "brains" - see the following section of this chapter), the union will be liable for its agents' or employees' tortious or criminal acts committed in the course of that activity. See Blunden v Inhabitants of the Oxford Road District (1901) 20 N.Z.L.R. 593; Northern Publishing Co. v White [1940] N.Z.L.R. 75. Cf. Goodhart, "Corporate Liability in Tort and the Doctrine of Ultra Vires" (1926) 2 C.L.J. 350; Atiyah, op. cit., 383-7. However, this is not so in the case of contracts entered into ultra vires the union - see chapter IX, post.

strike action was (there being no express or implied authority from the union) outside the delegate's course of business, and thus did not impose vicarious liability on the defendant union.

The approach in these cases can be contrasted with that in Auckland Branch of the Australasian Federated Seamen's I.U.W. v Auckland Seamen and Firemen's I.U.W., 31 an action for penalty for breach of an industrial agreement. In that case a union secretary, authorised to receive applications for admittance into the defendant union - but only so that they could be submitted to the wishes of the union's general meeting - had purported to exclude an applicant of his own initiative. It was held by Stringer J. that, as the secretary had been authorised only to receive applications for admission and not to accept or refuse them, he had acted without authority, and his union was not therefore liable to any penalty. It is clear that the admittance of new members to an industrial union is not an ultra vires act (or, alternatively, is "part of the business of the union"), so that this case cannot be regarded as an application of the principle in Gohns' case, although this may well have been what Stringer J. had in mind. It is submitted, therefore, that there was no basis for treating the secretary as having exceeded his authority. The secretary's act in refusing the application for admittance was, to use Salmond's test, 32 an improper mode of doing an authorised act (namely, dealing with applications for admittance) rather

31 (1915) 17 G.L.R. 487.
than the doing of a class of acts which he was not
authorised to do. It should accordingly have rendered
the union vicariously liable.

It can be seen that the principle in Gohns' case
considerably narrows the vicarious liability of an
industrial union for strikes - although it does not affect
the vicarious liability of the union for other acts,
unless these, too, are ultra vires or "not part of the
business of the union". The availability of the
principle as a defence to tort actions based on the
strike provisions of the Act as "unlawful means"\(^{33}\) seems
to have been overlooked in some cases. In *Pete's Towing
Services* case,\(^ {34}\) for example, it could have been argued
that the so-called "threat to strike" made by Arvidson,
the defendant union's delegate, was - like that of the
delegate in *Auckland Abattoir Assistants' I.U.W. v Farrell*\(^ {35}\)-
in excess of his authority, so that it did not bind the
union. On the other hand, the reason for the failure to
plead this defence may be a practical one. There would
seem to be no advantage to a defendant union for it to
put up a successful defence to an action for damages,
if this will still leave its officials obliged, as the
unsuccessful defendants, to pay the whole of the damages.
Moreover, there is a possibility that with the increased
use of strike action by unions in this country, judges
would nowadays be more ready to find an implied
authority for agents to instigate strike action. The

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33 See chapter XVI, section H, post.
34 [1970] N.Z.L.R. 32. For the facts of this case, see section C of the preceding chapter.
present importance of the principle in Gohns’ case must also be considered in the light of the wide special provisions in the Act dealt with later in this chapter.

B. CORPORATE LIABILITY.

The basis of the doctrine of corporate liability is the treating of certain superior officers or some internal body (such as, in the case of a trading company, the managing director, or the board of directors) as being not merely the agents or employees of the corporation, but, for some purposes, the corporation itself. It has been held, therefore, that that person (or persons) who is "the directing mind and will of the corporation, the very ego and centre of the personality of the corporation"36 - in a word, the "brains" of the corporation, as distinct from its "hands"37 - will render the corporation liable for his acts and state of mind, not on the basis of vicarious liability, but on the basis that his acts and state of mind are in law the acts and state of mind of

36 Lennard’s Carrying Co. v Asiatic Petroleum Co. [1915] A.C. 705, 713, per Lord Haldane (the locus classicus).

37 The metaphor is that of Lord Denning, in H.L. Bolton Ltd. v T.J. Graham & Sons Ltd. [1957] 1 Q.B. 159, 172.
the corporation itself.38

There seems to be no reason why this doctrine should not apply to industrial unions, and also to unions registered under the Incorporated Societies Act 1908, where appropriate.39 Indeed, this approach can be seen to have been implicitly adopted already - judges and academics talk for example of the need for an agent to have "the express or implied authority of the union", when what they really mean is authority from the person or persons who constitute its "brains".

Who, then, is (or are) the "brains" of a union, for these purposes? This will depend once again on the rules and the organisation of the particular union, just as, in the case of a trading company, it depends on the memorandum and articles of the company.40 Most union rules entrust the management of the union to a committee - the "executive" of the union. On the other hand, the union secretary quite frequently has control of the

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38 For a recent affirmation of this approach by the House of Lords, see Tesco Supermarkets Ltd. v Nattrass [1972] A.C. 153. One exception, in a conceptual sense, to the doctrine of corporate liability would seem to be the rule invalidating contracts which are found to be inconsistent with the registered documents of a trading company, or the rules of an industrial union. This may operate to prevent someone who would normally be thought of as the "brains" of the company or union from binding it. See chapter VIII, section A, post.

39 See also Heatons Transport Ltd. v T.G.W.U. [1972] 2 All E.R. 1214, 1247.

day-to-day running of the union, while the ultimate power of decision-making - on major issues at least - may reside in the general meeting of members. Larger unions may well have a more complex hierarchy. It is submitted that it is theoretically possible that, in any one union, there may be more than one person or group who can qualify, not necessarily simultaneously, as the "brains". Thus although the union executive may normally be the "brains" of the union, a decision reached by a general meeting of the members may also be a decision of the "brains" of the union, at least if the executive are obliged to follow it. It is difficult to say whether the post of union secretary, in practice a most important position in many unions, would generally be accounted to be the "brains" of the union, either instead of, or as well as, the union executive. In Progress Advertising (N.Z.) Ltd. v Auckland Licensed Victuallers' I.U.E., Shorland J. thought the office of secretary of an industrial union of employers was analogous to that of a company manager, but this may not help much in particular cases. If it is held that a union secretary generally is the "brains" of a union, this may override the vicarious liability approach hitherto adopted under the principle in Gohns' case.

The principles of corporate liability have developed mainly out of criminal cases, the doctrine of vicarious liability not being of general application in the criminal law. In civil law, on the other hand, the doctrine of

42 (1912) 14 G.L.R. 566.
vicarious liability is usually sufficient to impute liability, and, as a result, the possibility of corporate liability has assumed much less practical significance\textsuperscript{43} - although it may be of importance if the union is sued as party to a tortious conspiracy with some of its officials. Apart from this, the doctrine of corporate liability, together with that of vicarious liability, does provide a basis on which expressions like "the union's intention", "the union's decision", "the union's act" - expressions commonly used in this work, and in the case-law - can be used in a legally accurate sense.

\section*{C. SPECIAL PROVISIONS IN THE INDUSTRIAL CONCILIATION \newline AND ARBITRATION ACT GOVERNING LIABILITY FOR STRIKES.}

It has been seen throughout this chapter that by far the most recurrent issue is that of the legal responsibility of a trade union for strikes by its members. During the previous discussion, and the treatment of the principle in \textit{Gohns'} case in relation to industrial union responsibility for strikes in particular, no mention was made of those provisions of the Act which expressly make an industrial union liable for strike action engaged in by its members. The two provisions, which were outlined in the previous chapter, are s.193(3) and s.195(1) of the Act. Under s.193(3), it will be remembered, a union is deemed to have instigated a strike\textsuperscript{44} if a majority of

\begin{flushright}
\textsuperscript{43} See Atiyah, op. cit., 382-3.
\textsuperscript{44} Within s.193(1) of the Act.
\end{flushright}
its members are parties to it. Under s.195(1), a union is deemed to have instigated a strike if any (that is, less than a majority) of its members are parties to it, unless it can prove that a secret ballot was held, or that every officer of the union either had no means of knowing that the strike was imminent or took every step possible to ensure the holding of a ballot and to prevent the strike occurring.

For practical purposes, these provisions supersede the principles of corporate and vicarious liability, so far as the criminal liability of an industrial union for strikes is concerned. Thus where a majority of union members are on strike, or where any union members at all are on strike and (as would be the case in many current strikes) the requirements of s.195(1) cannot be met, it will be irrelevant to the criminal liability of the union under these provisions that the union officials exceeded their authority as in Gohns' case, or that the "brains" of the union were opposed to the strike. Indeed, Gohns' case itself - which one must assume to have involved less than a majority of the union's members, so as to have avoided liability under the 1908 equivalent of s.193(3) - would presumably now be decided differently under s.195(1), which was added to the Act subsequent to that decision, by an amendment in 1951.

Do these statutory provisions have any effect on the civil responsibility of an industrial union for

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45 Section 191 of the Act.

46 Usually in relation to some cause of action in tort.
strike action by its members? Clearly, in principle, the imposition by statute of an "absolute" criminal responsibility for a particular state of affairs should have no effect on existing common law principles governing civil responsibility for the same state of affairs. On this basis, the civil responsibility of an industrial union for strikes should continue to be determined solely by the common law principles of vicarious liability and corporate liability - and, in particular, the principle in Gohns' case.

On the other hand, we have the phenomenon already noted, and discussed in greater detail in section H of chapter XVI, post, of the use of the strike provisions of the Act as "unlawful means" for the purpose of imputing liability in tort. Does this mean that the provisions of s.193(3) and s.195(1) are relevant to civil responsibility for strikes? The cases on "unlawful means" have never embarked upon any detailed analysis of the provisions relied on, so that no direct assistance can be drawn from the case-law. It could be argued, however, that, breach of Part X of the Act having been without qualification held to constitute "unlawful means", a technical contravention of either s.193(3) or s.195(1) will, irrespective of the union's common law responsibility, be a breach of Part X and, therefore, "unlawful means". This would result in a very wide tortious liability for strikes being imposed on

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47 Except perhaps insofar as it is permitted to form the basis of an action in tort for breach of statutory duty, or to determine the standard of care in an action for negligence.

48 See chapter XVI, section H, post.
industrial unions. This could lie irrespective of the absence of any fault on the union's part — clearly a most unjust result. Arguments to rebut this conclusion could be based on the general irrelevance of stricter criminal standards of responsibility in civil cases, and the importance of retaining fault as the basis of liability in this area of the law of torts. However, the argument earlier advanced has the merit of logic, if nothing else, and it is hard to predict which of these opposing arguments would be accepted in a court of law.

In cases where it is not sought to use ss.193(3) and 195(1) as "unlawful means", it is submitted that there are no arguments in favour of using these provisions in determining the civil responsibility of an industrial union for strike action by its members. The tortious or other liabilities of the union in such cases can only be decided by recourse to the common law principles of vicarious and corporate liability.

As the large amount of theoretical discussion in this chapter has shown, much of this area of trade union law is uncharted territory, only sparsely dotted with the beacon of an occasional case. The relationship between, and comparative importance of, vicarious liability and corporate liability as applied to trade unions cannot be said to have ascertained; and the further relationship between these common law principles and the all-pervading background of
the conciliation and arbitration system is yet to be fully explored by either counsel or judges. It can only be hoped that, in the selection of the various alternatives still open in this area, a common-sense and not unduly legalistic approach will prevail.
PART TWO

TRADE UNIONS AND THE LAW OF CONTRACT
'tis not in the bond

The Merchant of Venice
CHAPTER VI

INTRODUCTION
A. GENERAL.

The law of contract affects trade unions in two distinct ways: "internally", and "externally". The internal contractual aspect of trade unions is, both practically and theoretically speaking, the more important of the two. It focuses upon the contract of union membership, the conceptual rock upon which is constructed the complex framework of rights and duties owed to and by the union and its individual members. The external aspect, on the other hand, involves the trade union's contractual relations with "outsiders" - that is, persons who are not party to the contract of union membership.

These two topics, although at first sight unrelated, are in fact linked together in historical perspective. The early illegal status of trade unions, which resulted from the primarily contractual doctrine of restraint of trade, prevented them from entering into valid contracts with outsiders, as well as from enforcing their membership contracts. This historical background is crucial to an understanding of the present law, and can, therefore, be usefully examined at this stage.

B. TRADE UNIONS AND CONTRACT - AN HISTORICAL OUTLINE.

For much of the nineteenth century, trade unions in England were treated as illegal associations, both at common law, and under a succession of statutes of
varying degrees of severity, beginning with the Combination Act 1800.¹ Illegality at common law was the direct result of the application of the doctrine of restraint of trade to invalidate the contract which trade unionists entered into upon joining the union and agreeing to be bound by its rules. The doctrine of restraint of trade, as the name suggests, is a doctrine of public policy which operates to invalidate agreements which unduly restrain trade or competition. Under the influence of the prevailing twin philosophies of individualism and economic "laissez-faire",² the judiciary had no hesitation in holding trade unions to be in unlawful restraint of trade. The reason given was that unionists, by binding themselves to support one another, and not to work, if the majority so decided, were imposing a restraint on the individual's "free discretion" to carry on his trade when he wanted to.³ This meant that the agreements and trusts of trade unions received no protection from the law, with the result that a trade union official who had embezzled union funds went completely unpunished.⁴

¹ For detailed treatment, see Citrine's Trade Union Law (3rd ed. 1967), 3-9.
² See Dicey, Law and Opinion in England in the Nineteenth Century (2nd ed. 1926), 146-58, 191-201 especially. See also the discussion of judicial attitudes in chapters XVI and XXIV, post.
³ Hornby v Close (1867) L.R. 2 Q.B. 153, followed in Farrer v Close (1869) L.R. 4 Q.B. 602. See also the dicta in Hilton v Eckersley (1855) 6 E. & B. 47.
⁴ Hornby v Close, supra; Farrer v Close, supra.
This was obviously an unsatisfactory position. But so, too, was the opposite extreme of having the whole of a union's rules fully enforceable in a court of law. The eventual solution was the passing, with the full approval of the trade union movement in England, of the Trade Union Act 1871. Reference has already been made in chapter II, ante, to the registration provisions of this Act, and the problems which arose as to the legal status of unions registered thereunder. Sections 3 and 4, which attempted to solve the problem of restraint of trade, applied, however, to all trade unions, whether registered or not. Under s.3, the agreements and trusts of trade unions were no longer invalidated by being in restraint of trade. This was subject to the qualifications introduced by s.4, which must be quoted in full:

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

5 A counterpart to this Act was passed in New Zealand in 1878, and now stands as the Trade Unions Act 1908.

6 Trade Unions Act 1908, s.4.

7 S.5 of the Trade Unions Act 1808 is in almost identical terms.
2. Any agreement for the payment by any person of any subscription or penalty to a trade union:

3. Any agreement for the application of the funds of a trade union, -
   
   (a) To provide benefits to members; or
   
   (b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade unions; or
   
   (c) To discharge any fine imposed upon any person by sentence of a court of justice; or

4. Any agreement made between one trade union and another; or

5. Any bond to secure the performance of any of the abovementioned agreements.

But nothing in this section shall be deemed to constitute any of the abovementioned agreements unlawful."

The cumulative effect of ss.3 and 4 was that a trade union in restraint of trade at common law was no longer subject to the disadvantages which had hitherto resulted from its illegal status, yet was not in the (to the union) equally undesirable position of having its rules and agreements fully enforceable at law. This comparatively privileged position of trade unions in respect of their internal activities (by contrast with the severe limitations which continued to apply to their external activities)\(^8\) was not to be fully enjoyed for long, however. The limitations of the apparently broad protection conferred by s.4 were revealed by two separate developments.

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\(^8\) See chapter XVI, sections A and B, post.
The first of these was based on the logical converse of ss.3 and 4: any trade union not in unlawful restraint of trade, and thus not owing its legality to s.3, could not claim the protection of s.4, which merely said that nothing in the Act would render the named agreements directly enforceable. Clearly, if the agreement was valid at common law, it remained unaffected by s.4. No doubt such an interpretation was correct, but its application could hardly have been envisaged by those who framed the Act of 1871. The state of the law at that time would have made it inconceivable that any trade union could be held not to be in unlawful restraint of trade.

Subsequently, however, it became apparent that the irony of trade unions sheltering behind a doctrine which had previously operated to their detriment did not appeal to a still largely unsympathetic judiciary. The upshot was a major change of attitude to the issue of trade unions and restraint of trade. From the 1899 case of Swaine v Wilson, the Courts showed themselves prepared to accept that not all trade unions were necessarily in restraint of trade, and that in any event provisions which were in restraint of trade could

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9 (1889) 24 Q.B.D. 252. See also Gozney v Bristol Trade & Provident Society [1909] 1 K.B. 901; Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch. 540. For detailed discussion of this line of cases, see Kahn-Freund, "The Illegality of a Trade Union", (1944) 7 M.L.R. 192.
be "severed" from those that were not. This judicial 
volute-face clearly opened up potential vistas of 
control over the internal affairs of trade unions.

However, no sooner had the way been opened than 
it was narrowed, and, for practical purposes in England, 
almost closed. In Russell v Amalgamated Society of 
Carpenters,\textsuperscript{10} the House of Lords, while accepting that 
not every union was necessarily in restraint of trade, 
held that union rules which provided penalties, 
including expulsion, for the enforcement of trade 
rules and strikes were clearly in restraint of trade 
at common law. Furthermore, such rules could not 
be severed from the union's benevolent purposes so as 
to permit separate enforcement of the latter. This 
decision, which indicated a return to the older, 
 stricter, view demonstrated in the authorities prior 
to Swaine v Wilson\textsuperscript{11} - together with the deliberate 
inclusion of provisions in restraint of trade in the 
rules of many unions\textsuperscript{12} - has resulted in a general 
acceptance in England of the usual trade union rules 
as constituting an unreasonable restraint of trade,\textsuperscript{13}

\textsuperscript{10} [1912] A.C. 429.
\textsuperscript{11} Supra.
\textsuperscript{12} Kahn-Freund, loc. cit., 203-4.
\textsuperscript{13} For a recent Scottish case demonstrating that 
this position still obtains, see Bernard v National 
Union of Mineworkers 1971 S.L.T. 177.
with the result that ss.3 and 4 have inevitably applied.

The second major development which occurred was a progressive narrowing of s.4, by a process of strict interpretation of its provisions. As Grunfeld has so clearly demonstrated, this process of interpretation took two separate but related paths.

First, attention was focused on the meaning of the crucial wording of s.4, which prevented actions for the purpose of "directly enforcing", or recovering damages for breach of, the named agreements. Although several early cases had taken a broad view of this wording, the trend was halted by the leading case of *Yorkshire Miners' Association v Howden*. In that case, a union member sued for an injunction to restrain the payment of strike pay in violation of union rules. The House of Lords, in granting the injunction, held that s.4 was not a bar to the action. While a suit for specific performance of one of the named agreements could not be entertained, an action to restrain breach of a union rule, without specifically enforcing it, was not a "direct enforcement" within s.4. The distinction was shortly stated by Lord Lindley: "The object of the action is not to apply the funds..."
[of the union], but to preserve them for future application". This somewhat fine distinction between "direct" and "indirect" enforcement of s.4 agreements brought important areas of union government within the jurisdiction of the Courts.

Secondly, certain categories of union rules were established as being fully enforceable, on the grounds that they were not among the agreements named in s.4. In *Amalgamated Society of Carpenters v Braithwaite*, the House of Lords made it clear that the Courts could order the reinstatement of a member expelled in breach of the union's expulsion rule, as this did not involve any of the s.4 agreements. It was also held, applying the *Yorkshire Miners* case, that the plaintiff's action did not directly enforce the union's benefit rules, as reinstatement to membership gave him no enforceable rights to any benefit. Nor, on this reasoning, did it enforce the union rule as to members' conditions of employment on the basis of which the plaintiff had been (wrongly) expelled. The most important consequence of the approach


18 *Rideout, The Right to Membership of a Trade Union* (1963), criticises the distinction (at pp.190-7), and concludes that it "makes nonsense of the statutory provision".

adopted in Braithwaite's case, which is no doubt correct on the strict wording of s.4, was that union disciplinary measures were clearly subject to the supervision of the Courts. By implication, so too, were all other rules not expressly mentioned in s.4 (such as rules governing union elections and meetings).

After some initial confusion, therefore, it was clearly established: i) that the rules of practically all English trade unions were dependent on s.3 of the Trade Union Act 1871 for their legal validity, and ii) that the immunity conferred on trade union contracts by s.4 of that Act was subject to a number of important limitations. This legal position continued in England right up until the passing of the Industrial Relations Act 1971 (U.K.).

With this historical background in mind, we can now turn to consider the contractual position of trade unions in New Zealand, first with respect to the contract of union membership; and secondly, with respect to contracts with outsiders.

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20 The 1971 Act has re-enacted s.3 of the 1871 Act (Industrial Relations Act, s.135), but has repealed s.4.
CHAPTER VII

THE CONTRACT OF UNION MEMBERSHIP
A. INTRODUCTION.

As was remarked at the beginning of the preceding chapter, the contract of union membership is the conceptual basis upon which is founded the many-faceted legal relationship between the union, its officials, and its members. The legal enforceability of the union rule-book flows from this source, also. Indeed, for all practical purposes, the rule-book is the contract. 

Although the concept of contract occupies such a central position, nevertheless any idea that the rules of a union are simply contractual terms arrived at as the result of a voluntary agreement between union members is clearly unreal. The incoming member has no power to stipulate his terms of entry. He must accept the rules as they stand if he wishes to join. Furthermore, unless he is prepared to become a

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1 Many union officials will also be union members, and thus directly bound by the rules. In addition, vis-a-vis the union, the paid union official may be bound by the rules as part of his contract of employment. It would appear that in allowing actions against union officials for breach of the rule-book contract, whether sued on their own or as co-defendants with the union, the courts have invariably treated officials as bound by the rules without inquiry into their contractual position. (See, e.g. McGregor v Young [1920] N.Z.L.R. 766; Gourlay v Cornish [1946] N.Z.L.R. 210; Armstrong v Kane [1964] N.Z.L.R. 369).


3 Lord Denning M.R. has stressed this point on several occasions. See e.g. Lee v Showmen's Guild [1952] 2 Q.B. 329, 343; Bonsor v Musicians' Union [1954] Ch. 479, 485.
"conscientious objector", he is legally obliged to join the relevant industrial union, if he wishes to work at his chosen occupation at all. Conversely, the industrial union's side of the arrangement has similarly lost any claim to being voluntary, in view of the obligation imposed by s.174H of the Act, to admit to membership (subject only to prescribed membership levels) all applicants who are "not of general bad character". Nor are the rules of an industrial union permitted to take whatever form the members as a whole decide upon, as will be seen shortly.

There is, therefore, a certain artificiality in treating an aggrieved union member as having "consented" to a particular rule of which he later complains. For this reason, an attempt has been made by some judges to treat union rules as more than a simple contract between the parties which the courts cannot edit, but can only interpret. The nature of this attempt - and its effect on the law - will be dealt with in the following section.

Problems of content of union rules aside, however, it can safely be asserted that the contractual basis of the courts' jurisdiction over the internal affairs of trade unions is at present unchallenged. In this respect at least, contract forms the only intelligible basis for analysis of the union/member relationship.

4 See chapter III, section A, ante.
5 The membership contract is, however, supplemented at points by alternative statutory remedies, as will be seen.
The position was not always so clearcut, however. In 1880, Jessel M.R. had laid down the apparently broad principle that the courts would only intervene in the affairs of trade unions and other voluntary associations, in order to protect the "rights of property" of a member.6 If the union did not possess any "property", the courts had no jurisdiction. Subsequent analysis has demonstrated the fallacy of this approach, and established that, at the most, the relevance of property rights goes only to the form of remedy to be granted.7 Even prior to this, the meaning of the crucial phrase, "rights of property" had been substantially widened so as to cover almost any legally enforceable right, including those arising under contract.8 This made the existence of a right of property virtually inevitable in all trade union cases, and rendered the concept of property rights meaningless as a separate basis for jurisdiction. Today, the concept of property rights is virtually ignored in trade union cases, and it would appear to be universally accepted that the contract of union membership is a

6 Rigby v Connol (1880) 14 Ch. D. 482, 487.
7 See per Denning L.J. in Lee v Showmen's Guild, supra, 341-2; Rideout, op. cit., 166-74.
8 Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch. 540 can be said to have started this trend. See also Millar v Smith [1953] N.Z.L.R. 1049; Woodford v Smith [1970] 1 W.L.R. 806.
sufficient basis for all forms of intervention by the courts. In New Zealand, the property rights doctrine has never been applied to industrial unions. Furthermore, there is Australian authority that the doctrine is inapplicable to unions registered under the corresponding Commonwealth legislation.

Reference has already been made to "the parties" to the contract of union membership. It is important to ascertain precisely who these parties are. On joining the union, the individual union member could be thought of as entering into contractual relations with the industrial union itself, or with each of the other individual members, both of whom have the capacity to make such a contract. In fact, it would appear that the contract of union membership is a contract both between each member and the union itself, and between the members inter se. A similar legal position obtains

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11 Edgar v Meade (1916) 23 C.L.R. 29. There may be some difficulties where an injunction is sought against a trade union registered under the Incorporated Societies Act 1908, particularly in view of s.14 of that Act. In Bouzaid v Horowhenua Indoor Bowls Centre [1964] N.Z.L.R. 187, Haslam J. took a narrow view of property rights and refused an injunction. However, his Honour's reasoning would appear to be inapplicable to expulsions from trade unions; and it is in any event inconsistent with the modern tendency to accept a contractual nexus as sufficient basis for intervention.
in the case of the memorandum and articles of a company, which apparently constitute a contract between the company and the individual shareholder, and between each individual shareholder as well. 12

The existence of a contract between the individual member and the union would appear to be established by a number of cases in which a member has successfully sued the union to enforce the rule-book contract. 13 The existence of a contract between the members inter se, on the other hand, is somewhat less certain, but such a contract appears to have been recognised as existing on at least three occasions 14 - although these cases are further complicated by being actions against union officials. 15 Its existence is given some support by s.57 of the Act, which states that members "shall be bound by the rules of the union during the continuance of their membership". 16

The remaining sections of this chapter deal in greater detail with the relationships between these various parties. In section B, the problem of the

12 Companies Act 1955, s.34; Hickman v Kent or Romney Marsh Sheep Breeders' Association [1915] 1 Ch. 881; Rayfield v Hands [1960] Ch. 1.


15 See footnote 1, ante.

16 Cf. Companies Act 1955, s.34.
content of the contract of union membership will be looked at, while in sections C and D, we will examine the two main aspects of the enforcement of this contract, namely, internal management of the union, and disciplinary action against members. Finally, in the concluding section E, a general assessment of the role of the law of contract in this area will be attempted.

B. THE CONTENT OF THE RULE-BOOK CONTRACT.

1. Compulsory Statutory Content.

One important facet of the Industrial Conciliation and Arbitration system is the considerable regulation which it imposes over the rules and internal affairs of industrial unions, in exchange for the privileges obtained by registration.17 This statutory supervision of the union rule-book is achieved primarily by s.66 of the Act, which lists no less than thirteen matters which must be provided for in the rules of an industrial union. Also important is s.70, which empowers the Registrar of Industrial Unions to refuse to record any rule or amendment which is in his opinion "in any way unreasonable or oppressive", an appeal lying from his

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17 See chapter III, section A, ante.
refusal to the Court of Arbitration.18

This statutory control of the content of the rules of industrial unions is of importance in the context of possible judicial control of content at common law, as it may be asked whether there is room, either in principle or in practice, for judicial censoring of a union rule-book which has already passed through the hands of a statutory censor. This will be discussed after the common law in this area has been examined.

2. The Present Effect of the Doctrine of Restraint of Trade on Trade Union Rules.

It was seen in chapter VI, ante, that at common law, trade unions in England have been generally held to be bodies in unreasonable restraint of trade. Since the passing of the Trade Union Act 1871 (U.K.), this illegal common law status has no longer adversely

See also s.174H (discussed later in this section) which invalidates rules inconsistent with the principle it lays down. Other provisions governing the content of the rules of an industrial union are: s.58(2), which limits alterations of union rules so as to enlarge the jurisdiction of the union; s.67, which empowers the Registrar to order a union to amend its rules to bring them into conformity with s.66; and s.73, which imposes limits on the amount of levies and subscriptions payable by union members. The ultra vires the statute doctrine, which limits the activities (and rules) of industrial unions to objects falling within the definition in s.53(2) of the Act, also imposes considerable restrictions on the content of union rules - see Part Three, post.
affected trade unions in that country. As already stated, New Zealand has, in the Trade Unions Act 1908, a close equivalent to the 1871 English enactment. It is of some importance, therefore, in view of the restrictions imposed by s.5\textsuperscript{19} of the 1908 Act, to consider the extent to which the doctrine of restraint of trade applies, in a modern context, to unions registered under the Industrial Conciliation and Arbitration Act 1954.\textsuperscript{20}

The modern doctrine of restraint of trade was laid down by the House of Lords in \textit{Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co.}\textsuperscript{21} In that case Lord Macnaughten stated in a well-known passage:\textsuperscript{22}

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade in themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public...".

\textsuperscript{19} Corresponding to s.4 of the 1871 English Act, which was discussed in detail in the preceding chapter.

\textsuperscript{20} There appears to be nothing to prevent an industrial union from falling within the definition of "trade union" in s.2 of the Trade Unions Act 1908. It could, therefore, be subject to s.5 of that Act - but only if its rules constitute an unreasonable restraint of trade.

\textsuperscript{21} [1894] A.C. 535.

\textsuperscript{22} Ibid, 565.
The test is, therefore, a two-part one: the rules of a union will not offend against the doctrine, first if they do not impose a restraint upon trade; and secondly if - although imposing some restraint - the restraint is reasonable i) as between the parties, and ii) as regards the public interest. Let us apply this test to the industrial union. First, the actual rules can be examined to see if they offend against the doctrine. Secondly, the "reasonableness" or public policy issue can be considered in the light of the special position occupied by the industrial union in New Zealand society.

If one looks at the rules of an industrial union, and compares them with those of a typical English trade union, an important difference emerges. It is true that the rules of industrial unions vary widely in a number of respects. However, in view of the basic postulates of the conciliation and arbitration system, and the power of censorship exercised by the Registrar of Industrial Unions, it can be safely stated that certain provisions would not occur in the rules of an industrial union. Thus there will be no power in the rules of an industrial union to call a strike, to pay strike pay, or to discipline members for failing to go on strike - precisely because strike action is expressly forbidden by the Act. There will usually be no imposition by the rules of restrictive conditions as to the nature of the work to be performed by union members, or the price to be

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23 For the modern emphasis given to this test, see Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd. [1968] A.C. 269.
charged for it, as these conditions are imposed by the governing award or industrial agreement. Similarly, the "closed shop" or compulsory unionism aspect of industrial unions - thought to be clearly in unreasonable restraint of trade by Lords Hodson and Pearce in Paramus v Film Artistes' Association\(^{24}\) - is in this country imposed not by the union's rules, but by the governing award or industrial agreement, under statutory authority.\(^{25}\)

By contrast, the rules of the typical English trade union do make provision for these matters, which are the very factors that the courts have seized upon in holding the rules of English unions to be generally in unreasonable restraint of trade.\(^{26}\)

In view of this, it is strongly arguable that the rules of industrial unions do not normally impose a restraint of trade. Support for this conclusion can be drawn from the small minority of English decisions where trade union rules were found not to be in restraint of trade. Perhaps the most compelling authority is the Court of Appeal decision in Osborne v Amalgamated Society


\(^{25}\) See chapter III, section A, ante.

\(^{26}\) See the discussion in the preceding chapter, and the leading case of Russell v Amalgamated Society of Carpenters [1912] A.C. 421.
of Railway Servants. There, the rules of the union empowered the Executive to "sanction" strike action as a last resort, after a ballot of union members concerned. It was held that, since the rules merely gave power to sanction a strike, as distinct from ordering one, they were not in restraint of trade. Fletcher Moulton L.J. was "struck by the absence of all the familiar provisions relating to strikes and the power of the society to direct whether men shall or shall not work under particular circumstances which are so frequently to be found in the rules of trade unions". In Gozney v Bristol Trade and Provident Society, also, a union whose objects included the payment of strike pay to members was held to be not in restraint of trade, as the rule was not (it was said) for the purpose of encouraging or procuring strikes, but merely to insure members against the financial consequences of a strike.

Even if the rules of an industrial union were conceivably capable of being interpreted as imposing a restraint of trade, a court should, if possible, adopt a construction which results in their validity.

27 [1911] 1 Ch. 540.
28 Ibid, 564.
29 [1909] 1 K.B. 901.
31 Osborne v Amalgamated Society of Railway Servants, supra, 553; Amalgamated Society of Engineers v Smith (1913) 15 C.L.R. 537, 556, 566-7, 570.
It is submitted, therefore, that the rules of the typical industrial union do not, either in principle or on the authorities, impose a restraint of trade. A broader view of the matter, and a consideration of the public policy foundations of the doctrine, reinforce this conclusion. The introduction in this country of a statutory system of registration for trade unions, under which their industrial objectives are strictly channelled, and their membership assured, would seem to imply a legislative "blessing" of registered unions, which would make the application of the doctrine of restraint of trade wholly inappropriate. In terms of the modern test of restraint of trade, this is tantamount to saying that, even if some restraint is imposed, it must, in the full context of the Conciliation and Arbitration system, be treated as being a reasonable restraint, and therefore a valid one.

The conclusion reached, that the contract of membership of an industrial union is not in unreasonable restraint of trade, has the result that none of the difficulties encountered in England over invalidity and unenforceability of union rules would appear to exist in the case of industrial unions in this country. In

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32 See also Wheatley v Federated Ironworkers' Association (1960) 60 S.R. (N.S.W.) 161, 178-9. Speaking of the comparable Commonwealth Arbitration Acts, Walsh J. there remarked that inasmuch as it was "an essential part of the system which the Act introduces, that freedom of employees to contract as they please without any interference in relation to the terms upon which they would work, should be restricted ..., [t]he basis of public policy upon which rested the application of the restraint of trade doctrine would [not exist in the case of a registered trade union]" (ibid, 178-9).
particular, the theoretical bar presented by s.5 of the Trade Unions Act 1908 to the enforcement of certain types of agreement can be seen to have no application.33

3. Judicial Control of Content.

(i) At Common Law.

Reference was made at the beginning of the chapter to the "take-it-or-leave-it" nature of the contract of trade union membership, which results in the individual worker who joins a union having virtually no say as to the terms of his membership. The effect of this lack of freedom of contract has been, in England at least, to put the individual member in rather a vulnerable position with regard to his continued membership. Because of this, some judges - most notably, the present Master of the Rolls, Lord Denning - have sought by various means to exercise a supervisory jurisdiction over the rule-book contract.

It is clear that the somewhat nebulous doctrine of "public policy" does place limitations on the contents of the rule-book contract. Public policy has, for example, operated to invalidate (at common law) union rules in

33 Even if the reasoning just advanced is incorrect, it is still not clear that s.5 of the Trade Unions Act 1908 would be applicable. A difficult question would then arise as to the relationship between that Act and s.8 of the Illegal Contracts Act 1970, which permits relief to be given "where any provision of any contract constitutes an unreasonable restraint of trade".
unreasonable restraint of trade, as we have just seen. It would also, it appears, invalidate any rule which purported to oust the general jurisdiction of the courts to interpret the rule-book contract; or which declared a union's rules to be "binding in honour only".

Beyond this, the extent of permissible judicial supervision of union rules has been subject to a great deal of uncertainty. Lord Denning M.R. has consistently claimed a supervisory jurisdiction over unjust or unreasonable union rules. In Bonsor v Musicians' Union, in the Court of Appeal, he said of union rules:


35 Grunfeld, op. cit., 58. Such a rule would in this country almost certainly be rejected by the Registrar under s.70 of the Act.

36 As the rule-book is part of a contract, there is the possibility of implied terms. The courts appear to have been reluctant to imply additional terms into union rule-books - see Spring v N.A.S.D.S. [1956] 2 All E.R. 221; McKay v Oliver (1967) 15 F.L.R. 39; Leigh v National Union of Railwaymen [1970] Ch. 326. Cf. Stanley v Amalgamated Society of Railway Servants' I.U.W. [1926] G.L.R. 230 (implied power to conduct ballot of members). In view of the code-like nature of industrial union rules under s.66 of the Act, there would appear to be little room for "implied rules" for New Zealand.

37 [1954] 1 Ch. 479.

"They are more like by-laws than a contract. In these circumstances the rules are to be construed not only against the makers of them, but, further, if it should be found that any of those rules are contrary to natural justice, or what comes to the same thing, contrary to what is fair and reasonable, the court would hold them to be invalid."

This enterprising attempt to analogise union rules to municipal by-laws was, however, soundly rebuffed in *Faramus v Film Artistes' Association*. 39

There the defendant union had a membership rule which declared that no person convicted of a criminal offence (other than minor motoring offences) could be eligible for membership. The plaintiff, who had incurred two short prison sentences in his youth, joined the union and worked as a film artiste. After he had been accepted as a member for eight years, his previous convictions were discovered, and he was thereupon excluded from membership. Faramus sued to prevent this exclusion. The House of Lords held that, being clearly ineligible in terms of the membership rule, Faramus was not, and never had been, a member of the union.

The membership rule itself was accepted as completely valid, and an attempt to have it struck down on the grounds that it was unreasonable and/or contrary to natural justice was denied. Lord Denning's dictum in *Bonsor v Musicians' Union* 40 and his by-law analogy were rejected by Upjohn L.J. and Diplock L.J.

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40 Supra.
in the Court of Appeal,\footnote{41} and this rejection was confirmed in the House of Lords.\footnote{42} A further submission that the rule was invalid as an unreasonable restraint of trade was also rejected, on the grounds that, although void at common law, the membership rule was, along with the rest of the union's rules, validated by s.3 of the Trade Union Act 1871 (U.K.).\footnote{43}

The \textit{Faramus} case, therefore, would appear to exclude the possibility of judicial control of content of union rules, either by a criterion of reasonableness or fairness, or by use of the doctrine of restraint of trade to invalidate particular union rules. The case does leave open, however, the possibility of a requirement of "natural justice" in cases dealing with expulsion, as distinct from initial refusal of membership.\footnote{44} This topic will be dealt with shortly.

In spite of this apparent obstacle, a right of judicial censorship was reasserted in the recent case of \textit{Edwards v Society of Graphical and Allied Trades}.\footnote{45}

\footnotesize

\begin{footnotes}
\footnote{44} Ibid, 941, 947.
\footnote{45} [1971] Ch. 354.
\end{footnotes}
There the plaintiff, who had been admitted as a "temporary member" of the defendant union, was excluded from the union under a rule which provided for the automatic termination of temporary membership in the event of the member becoming over six weeks in arrears, but this was owing to an administrative blunder on the part of the union. In spite of this, the union refused to readmit the plaintiff. After being out of work for some time, the plaintiff sued. At the trial, the union admitted that the plaintiff was still a member; and computation of his damages became the sole issue. In the Court of Appeal, however, Lord Denning felt bound to discuss the rules as to termination of temporary membership. In his opinion, the rules were wholly invalid, by reason of their arbitrary nature. His Lordship said:

"I do not think ... any ... trade union can give itself by its rules an unfettered discretion to expel a man or to withdraw his membership. The reason lies in the man's right to work.... A trade union exists to protect the right of each one of its members to earn his living and to take advantage of all that goes with it. It is the very purpose of its being. If the union should assume to make a rule which destroys that right or puts it in jeopardy - or is a gratuitous and oppressive interference with it - then the union exceeds its powers. The rule is ultra vires and invalid."

This reliance by Lord Denning on the "right to work" (pace Hohfeld), and its assumed link with the "essential purpose" of a trade union - characterised by Wedderburn as a "conceptual bludgeon" - would appear

46 Ibid, 376.

to have as little chance of becoming accepted law as had his Lordship's earlier attempt to establish a standard of "reasonableness". The union rule upheld in the Faramus case was clearly an interference with Faramus' "right to work", yet it seems hardly likely that the House of Lords would have held it to be invalid on that ground. Although that case involved a rule governing initial exclusion from membership, by contrast with Edwards' case, which dealt with termination of existing membership, it is difficult to see what logical distinction can be drawn between the two classes of rule, once appeal to the "right to work" is made.

Lord Denning's latest endeavour would not, therefore, appear to have surmounted the obstacle presented by the Faramus case. 48

Edwards v Society of Graphical and Allied Trades 49 is also noteworthy for the somewhat different approach of Sachs L.J. 50 Sachs L.J. thought the union's rules as to termination of temporary membership were "plainly in restraint of trade"; and as it could not be said

48 See, too, the earlier case of Nagle v Fielden [1966] 2 Q.B. 633, where the Court of Appeal suggested that the "right to work" would provide a remedy to a plaintiff who had been arbitrarily refused a licence to train race-horses, purely on account of her sex. Some of the dicta in this case are wide enough to apply to unreasonable trade union admission rules, but it is once again difficult to reconcile such an approach with Faramus v Film Artistes' Association, supra. The Nagle v Fielden approach has been adopted, however, in the Industrial Relations Act 1971 (U.K.), s.65(2).

49 Supra.

50 Megaw L.J., the third member of the Court, preferred not to deal with this aspect of the case.
"that a rule that enabled such capricious and despotic action [was] proper to the 'purposes' of this or any other trade union", 51 it was, he held, not protected by s.3 of the Trade Union Act 1871 (U.K.). The Faramus case, which, it will be remembered, had rejected an argument on the very same lines, was distinguished by saying that it dealt with eligibility as distinct from expulsion. 52

It is clear from a reading of that case, however, that the restraint of trade argument was rejected on the proper construction of s.3 itself, and not on the basis of the type of rule involved. 53 The approach of Sachs L.J. in the Edwards case would appear to put quite a different construction on the section from that laid down by the Faramus case.

There remains one further avenue of judicial control over union rules, to which brief reference has already been made. Do the "principles of natural justice" 54 set a minimum standard of fairness, by which a union's rules must be judged? In Edwards v Society of Graphical and Allied Trades, 55 both

51 [1971] Ch. 354, 382.
52 Ibid.
54 For the content of these principles, see section D of this chapter, post.
55 [1971] Ch. 354, 376, 382. See also Lord Denning in Bonsor v Musicians' Union [1954] 1 Ch. 479, 485-6 (quoted earlier); and in Enderby Town Football Club Ltd. v F.A. Ltd. [1971] Ch. 591, 606.
Lord Denning and Sachs L.J. were of the opinion that the relevant rules were, as well as being invalid on the other grounds already discussed, void as contrary to natural justice. There are, however, a number of difficulties with this approach.

First, there is the vexed question of exactly when the principles of natural justice will be held to apply. This issue will be dealt with in greater detail when we come to discuss disciplinary action against union members, but the major points can be briefly outlined at this stage. In the Faramus case, as already seen, a distinction was drawn between trade union rules governing admission, and those dealing with expulsion (and other disciplinary action). The former, it was held, were not required to comply with natural justice, so it is clear that their content cannot be regulated on this ground. Even with respect to expulsion rules, the law as to the applicability of natural justice is somewhat uncertain. Where a union's rules postulate the making of a decision whether or not some punishable offence has been committed, it seems well settled that, at least in the absence of express exclusion, the process of decision will be subject to the principles of natural justice. But an expulsion rule may be framed in terms of an apparently absolute discretion to withdraw membership.

56 Section D of this chapter, post.

57 Maclean v Workers' Union [1929] 1 Ch. 602; Lawlor v Union of Post Office Workers [1965] Ch. 712, 728-9 (Ungoed - Thomas J. leaving open the possibility of a wider principle).
or in terms of automatic termination of membership on the happening of a stated event, such as a certain time in arrears of subscriptions. Lord Denning and Sachs L.J. were of the opinion in Edwards' case that rules of this type were invalid because they contravened the principles of natural justice. However, the more usual approach is to hold that the concept of natural justice, which (it has been said) "is limited to acts done in relation to methods adopted in resolving a dispute", simply does not apply to such rules, as they do not involve any "dispute". In other words, expulsion rules have traditionally been interpreted either as subject to natural justice (in the majority of cases), or as falling outside its sphere of application - but not as being void for contravention of it.

A second and related problem involves a fundamental issue: can union rules expressly, or perhaps even by

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58 Faramus v Film Artistes' Association [1963] 2 Q.B. 527, 555, per Diplock L.J.


60 See per Megarry J. in Gaiman v National Association for Mental Health, supra, 332.
implication, exclude the principles of natural justice? Characteristically, Lord Denning's view is that "public policy" prevents the parties from contractually excluding natural justice,\(^6^1\) but there are also a number of strong authorities the other way.\(^6^2\)

The conflict in effect turns on whether natural justice is to be classified as an overriding principle of public policy, or as a mere implied contractual term ultimately capable of exclusion. This can only be arbitrarily decided - although the weak position of the individual member may lead to the conclusion that as a matter of pure policy, the rules of a union should not be able to override natural justice. However, the

\(^{6^1}\) Russell v Duke of Norfolk, supra, 119; Abbott v Sullivan [1952] 1 Q.B. 189, 198; Lee v Showmen's Guild, supra, 342; Bonsor v Musicians' Union [1954] Ch. 479, 485-6. See also Dawkins v Antrobus (1881) 17 Ch. D. 615, 630; Seaton v Gould (1889) 5 T.L.R. 309, 311; Faramus v Film Artists' Association [1964] A.C. 925, 941, 947; and of course Edwards v S.O.G.A.T. itself. Cf. John v Rees, supra, 400 and Gaiman v National Association for Mental Health, supra, 338, where Megarry J. expressed the opinion that before any question of the validity of an express exclusion arose, it had to be decided whether natural justice in fact applied. However, this approach, which would seem necessarily to involve an examination of the relevant rule, is likely to lead to circular reasoning. Lord Denning's view appears to have been adopted in Canada: Kennedy v Gillis (1961) 30 D.L.R. (2d) 82; Hughes v Seafarers' Union (1961) 31 D.L.R. (2d) 441. Cf. Posluns v Toronto Stock Exchange (1964) 46 D.L.R. (2d) 210, 313, on the question of exclusion by implication.

\(^{6^2}\) Maclean v Workers' Union, supra, 623-4; Russell v Duke of Norfolk, supra; Law v Wellington Working Men's Club (1911) 30 N.Z.L.R. 1198, 1203; Perry v Fielding Club (1929) N.Z.L.R. 529, 533. The Australian cases are strongly in favour of this view. See Dickason v Edwards (1910) 10 C.L.R. 243, 251, 255; Australian Workers' Union v Bowen (1948) 77 C.L.R. 601, 617, 631, 638; MacSween v Fraser (1956) 1 F.L.R. 10, 15; McKay v Oliver (1967) 16 F.L.R. 39, 44. For detailed review of the authorities, see Rideout, op. cit., 101-9.
possibility that natural justice cannot be contractually excluded provides a further obstacle to using this concept to control the content of trade union rules.

It has been seen that considerable attempts have been made in England to control the content of union rules dealing with membership. The success of these attempts, and the present extent of control at common law, remain uncertain; but the reasons for this judicial activity - which is of fairly recent origin - are perfectly clear. The motive has obviously been to ensure a minimum of protection for the individual in the face of the powers of economic life and death wielded by the modern trade union.63 Such a motivation can no doubt be favourably contrasted with the more questionable judicial intervention of the last century, based as it was on the political and philosophical beliefs of the individual judges.64 Moreover, the discrepancy between the powers of control laid claim to, and the amount of intervention which has in fact taken place, may suggest that the fears which have been expressed in this regard65 are unlikely to be realized.66

64 See chapter VI, ante (doctrine of restraint of trade); chapter XVI, post (criminal and tortious liability for industrial activity).
65 See Wedderburn, op. cit., 459-61.
66 The issue has been to a great extent foreclosed in England by the introduction of statutory safeguards; Industrial Relations Act 1971, s.65(2), (7), (8), (9), s.75, and the 4th Schedule to that Act.
(ii) In the New Zealand Context.

It is now necessary to consider the extent to which the common law principles just outlined are applicable to industrial unions in this country. It is submitted that these principles (whatever they are ultimately held to be) apply in this country, except insofar as they are excluded, in principle or in practice, by the statutory provisions discussed at the beginning of this section. As will be seen, however, the amount of statutory regulation may not leave much scope at all for their operation.

The problem of unfair or restrictive admission rules, as raised by the Paramus case,\(^67\) can be said to be completely resolved by s.174H of the Act. Looked upon as something of a logical corollary to the present de facto compulsory unionism,\(^68\) s.174H provides a statutory right of admission\(^69\) for all prospective union members who are "not of general bad character", and renders null and void any industrial union rule inconsistent with this right. There is clearly no room, or need, for common law control of union rules in this area.

The position with regard to union rules governing termination of membership is somewhat more complicated. On the one hand, it has been held that s.174H (just discussed) confers only a right of entry, not a right to

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67 \([1964]\) A.C. 925.
68 See chapter III, section A, ante.
remain in the union, with the result that a suitably-worded expulsion rule does not offend against that section. On the other hand, it is clear that a rule providing for automatic termination of membership after a member has been for a certain time in arrears can be valid as a "purging" rule under s.66(i) of the Act.

Apart from this, the scope for operation of common law principles is less certain. As will be seen, there is generally nothing to prevent the implication of the principles of natural justice in respect of expulsion or other disciplinary rules. Furthermore, any rule providing for expulsion or other penalties which on its face was unreasonable or offended against the principles of natural justice would be rejected by the Registrar of Industrial Unions as "unreasonable or oppressive" under s.70 of the Act. But what is the position if an unjust rule slips through the net provided by s.70? In Australia, there is a further power in the Industrial Court, under s.140(1) of the Commonwealth Conciliation and Arbitration Act 1904-1970, to strike out unreasonable or oppressive rules after their registration, so that complete control over content at all stages is achieved.

71 According to Edwards v S.O.G.A.T. [1971] Ch. 354, such a rule would be invalid at common law.
72 Section D of this chapter, post.
73 See Sykes & Glasbeek, op. cit., 733-4; Mathieson, op. cit., 160-5.
In this country, it appears settled that the approval and recording of a rule by the Registrar is not conclusive of its validity. It could therefore be argued that, even in the absence of an express statutory power, the courts still have an inherent power to supervise union rules, and to ensure that they comply with common law principles such as the requirements of public policy and of natural justice. Alternatively, it could be argued that the common law principles apply by reason of s.66(n) of the Act, which gives industrial unions power to make rules on "any other matter not contrary to law". This would seem to mean that a rule which is "contrary to law" by being contrary to natural justice, or contrary to public policy, must be ultra vires and invalid.

Overall, however, it is apparent that the possibilities of judicial censorship of the rule-book contract are severely limited with respect to unions registered under the Industrial Conciliation and Arbitration system. In view of the considerable


statutory control of content exercised before the rules can come into being, this narrow scope is scarcely a matter for surprise. Nor, perhaps, in view of the vagueness and uncertainty of the common law in this area, is it to be thought of as a matter for regret.

C. THE INTERNAL MANAGEMENT OF THE UNION.

In dealing with the topic of internal management, it is proposed first to outline the area for discussion, secondly to discuss a major limitation on the power of the courts to intervene in disputes involving internal management, thirdly to consider briefly particular areas where problems have arisen, and finally to outline the legal remedies available to the individual union member.

1. Internal Management Defined.

The "internal management" of a trade union can be rather loosely defined as consisting of a number of different but related procedures, by which the day-to-day (and year-to-year) running of the union is achieved. A fundamental distinction must be drawn between the union's procedures of internal management, and its substantive powers (or "objects", or "purposes"), which govern not the day-to-day running of the union, but rather the overall limits within which the day-to-day running must take place. Although the legal principles governing the substantive powers of a trade union (often
collectively referred to as the doctrine of ultra vires) are to a certain extent based on the contract of union membership, \(^7^6\) it will be seen that there are other equally, if not more important, aspects to the problem, which is for this reason given separate treatment in Part Three of this work. A further distinction must be drawn between internal management, and discipline of individual union members. The uniquely important consequences of expulsion from membership in particular have resulted in the formulation of special principles of law, which can best be dealt with separately.

At this stage it need scarcely be said that the internal management of a trade union is in general prescribed, and given legal backing, by the contract contained in the union's rules. In addition, there are a number of specific areas where statutory obligations over and above those contained in the union rules have been imposed on industrial unions. These statutory obligations will be briefly outlined shortly, and their relationship with the corresponding common law principles discussed.

2. The Rule as to "Excusable Irregularities".

There exists one important limitation on intervention by the courts in the internal management of a trade union. This is the rule as to excusable

\(^7^6\) In particular, the individual member's right to sue to restrain ultra vires acts must be regarded as contractual in origin.
irregularities -- or "the rule in Foss v Harbottle", as it is better known in company law, where it originated. The rule imposes an apparently broad limitation on the bringing of actions by individual union members to prevent or rectify irregularities in the management of a trade union. This is subject, however, to a number of important exceptions.

Briefly put, the rule in Foss v Harbottle is based on the initial proposition that the proper plaintiff in an action to redress a wrong done to a corporate body, such as a union or company, is the corporate body itself. From this it is said to follow that if an individual union member wishes to remedy an alleged wrong which could be ratified by a simple majority of the union's members, he must gain the support of a majority of the members and file suit in the union's name. If he cannot do this, then it is clear that no wrong has been done to the union, as a majority of members must be in favour of what has been done. Thus whether the individual member succeeds or fails in winning over a majority of the members, in neither case is he in a position to sue in his own name. 78

The underlying purpose of this rule is, on the one hand, to prevent the union (and the courts) from being harassed by individual members complaining of matters of insignificance, and, on the other hand, to

77 (1843) 2 Hare 461.
78 See the statement of the rule by Jenkins L.J. in the leading case of Edwards v Halliwell [1950] 2 All E.R. 1064, 1066.
prevent the futility of litigating matters which can ultimately be overruled by the wishes of the majority.\textsuperscript{79} Although it may be thought that such a principle ignores the basic human fact of the apathy of majorities, nearly all chance of individual injustice being worked is removed by the existence of the exceptions to the rule.

The most complete statement of these exceptions occurs in the judgment of Jenkins L.J. in Edwards v Halliwell,\textsuperscript{80} where he outlines five distinct situations in which the individual member can sue in his own name:

i) Where the act complained of is ultra vires the union;\textsuperscript{81}

ii) Where what has been done amounts to "a fraud on the minority";\textsuperscript{82}

iii) Where the act complained of is one which could validly be done or sanctioned, not by a simple majority of members, but only by some special majority required by the union's rules;\textsuperscript{83}

iv) Where the personal rights of the complainant member have been invaded (e.g., by some form of


\textsuperscript{80} [1950] 2 All E.R. 1064, 1067.

\textsuperscript{81} As to which, see Part Three, post. See also Wellington Amalgamated Watersiders' I.U.W. v Wall [1952] N.Z.L.R. 772.

\textsuperscript{82} For what amounts to a "fraud on the minority" in a company law context, see Gower, op. cit., 564-80. There may not be much room for this category in trade union affairs, however, unless it extends (as argued by Gower) to a possible general principle that the majority must exercise their powers bona fide for the benefit of the company (or union) as a whole.
disciplinary action, or by an unauthorized in-
increase in union dues);\(^{83}\)

v) Where the interests of justice require the relaxation of the rule.\(^{84}\) There is some doubt as to both the existence and the scope of this exception. However, in a recent trade union case\(^ {85}\) it was said that the interests of justice would operate to permit an action by individual members where the urgency of the matter -- and the inability of the union's constitutional machinery to operate in time to be of practical effect -- would otherwise irredeemably deprive the majority of an opportunity of expressing their will.\(^{86}\)

If the rule as stated is laid alongside the exceptions to it just outlined, it can be seen that the apparently broad initial principle is to a great extent swallowed up by the subsequent qualifications upon it. Thus, in practice, the rule in Foss v Harbottle is much narrower in its scope -- and by its very vagueness, more flexible -- than might at first appear.

It has long been settled that the rule, with its exceptions, applies to trade unions registered

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83 As in Edwards v Halliwell, supra.


85 Hodgson v N.A.L.G.O., supra.

under the English Trade Union Act 1871. In *Humphries v Auckland Tailoresses' I.U.W.*, the principle was applied to an industrial union. There the plaintiff sought to invalidate a set of new rules adopted by the defendant union. The process by which the rules had been passed, although admittedly irregular, had had the support of a large majority of union members. Finlay J., having held that the changes made were not ultra vires the union, and had not inflicted any "private injustice" on any individual, applied the rule in *Foss v Harbottle* and refused the remedies sought.

In so holding, Finlay J. stressed the existence of a clear majority of members in favour of what had been done. Indeed, in his view, the authorities established that "there must be no doubt that the purpose sought to be achieved has the support of a majority of members who might be interested". With respect, however, it is doubtful that this requirement, which would virtually limit the successful invocation of the rule to irregularities arising out of general meetings of union members,

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87 *Steele v South Wales Miners' Federation* [1909] 1 K.B. 361; *Cotter v National Union of Seamen* [1929] 2 Ch. 58; *Edwards v Halliwell*, supra. Although the fact is perhaps of historical interest only, it has recently been held that the rule in *Foss v Harbottle* can not apply to an unregistered trade union — *Hodgson v N.A.L.G.O.*, supra.

88 Supra. The rule was also applied in a recent unreported decision of Speight J., *Farnside v N.Z. Engineering Trades I.U.W.*, Supreme Court, Auckland, 12 May 1970.

89 [1950] *N.Z.L.R.* 380, 386. See also *Steele v South Wales Miners' Federation*, supra, 370.
does emerge from the cases relied on. The rule has been applied in company law cases where the majority will is not accurately known, *Foss v Harbottle* itself being such a case.  

There would appear to be no reason why trade unions should be subject to a more stringent test, with consequently greater limitations on majority rule, than is the case with trading companies.

Although the content of the rule in *Foss v Harbottle*, and its application to industrial unions, would appear to be fairly well settled, this area of law is complicated by another principle which appears to be superimposed on the *Foss v Harbottle* rule. This is the distinction sometimes drawn between "mandatory" and "directory" union rules. As the terms suggest, a mandatory rule is one which must be strictly complied with according to its letter, while "substantial" compliance with a directory rule will be accepted as sufficient where the case requires.  

Thus in *Gourlay v*

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90 Cf., however, the more pragmatic approach shown recently in *Hogg v Cramhorn Ltd* [1967] Ch. 254, and *Bamford v Bamford* [1970] Ch. 212, where proceedings were adjourned to allow a meeting of shareholders to be called.

91 An industrial union rule may be mandatory in a different sense, if it is one required by s. 66 of the Act. However, it does not follow that such a rule requires mandatory compliance with its terms. This point, which is implicit in many of the New Zealand cases, is expressly made in *Friend v Barnes* (1969) 15 F.L.R. 184; cf. the confusion apparent in *Auckland Ceramic Concrete Builders' I.U.W. v N.Z. Labourers' I.A.W.* [1954] N.Z.L.R. 1103, 1107.
Cornish, the rules of an industrial union required the election of its officers to be carried out in February each year. A meeting called at the proper time was closed by the chairman against the wishes of the majority, and it was later claimed that, February having passed, no elections could be held until the following year. Kennedy J. granted a mandamus to compel the holding of a special general meeting for the elections. He was satisfied that the rule was directory only: "Any other interpretation would impose an inconvenience or injustice on members . . . without promoting the real aim and object of the rule". Although a test along the lines suggested in this passage is of some general assistance, the classification into mandatory or directory remains largely a matter of individual impression.

The mandatory/directory distinction has been adopted (not always expressly) in a number of other cases in this country, as the basis for denying or permitting relief to union members alleging breach of union rules. This approach has been applied in particular to union rules governing the imposition of levies. These rules (which of course affect the "rights of members" in terms of the rule in Foss v Harbottle)

94 See also the test laid down in Friend v Barnes, supra, 190.
have inevitably been construed as mandatory.\textsuperscript{95} So, too, have the requirements of union disciplinary rules,\textsuperscript{96} which similarly affect members' rights.

It is submitted, therefore, that the mandatory/directory distinction can, and does, perform much the same function as the rule in \textit{Foss v Harbottle}, in that a suit to enforce directory provisions is likely to be caught by the initial rule, whereas a suit to enforce a mandatory rule is likely to be permitted under one of the five exceptions. It would appear, too, that whether a judge chooses to rely on the one or the other principle appears to a great extent a matter of chance. The two principles can be distinguished one from the other by saying that the rule in \textit{Foss v Harbottle} governs the individual member's title to sue, while the mandatory/directory distinction governs his (and other parties')\textsuperscript{97} rights under the rules when suing. But this should not be permitted to obscure the hitherto apparently unrecognised fact that both principles, in separating irregularities of internal management which

\begin{itemize}
\item \textsuperscript{96} See section D of this chapter, post.
\item \textsuperscript{97} As in the Auckland Ceramic Union case, supra.
\end{itemize}
are "excusable" from those which are not, perform a largely similar function. This is a role which they are able to fill because of their considerable vagueness and flexibility.

Within their somewhat narrow limits, therefore, both the rule in Foss v Harbottle and the mandatory/directory distinction serve a valuable purpose. On the one hand, as full a play as possible is given to the principle of majority rule, this being the canon by which trade union affairs have traditionally been conducted— even to the point of neglecting the rules themselves. On the other hand, individual injustice is satisfactorily prevented in all cases where matters of importance are at stake. Overall, the common law appears for once to have achieved a satisfactory blend of realism and justice.

3. Specific Areas of Internal Management.

A number of problem areas occur within the overall sphere of industrial union management. In some of them, the standards imposed by the common law have been considerably modified by statute. The following specific areas are not intended to be exhaustive of the whole field.

(i) Union Officials.

Under s.66(a) of the Act, the rules of an industrial union must provide for the election (or, in some circumstances, the appointment) of a committee of management (the "union executive"), a president, a secretary, and any other necessary "officers". "Officer"
is defined by s. 2 of the Act as meaning the president, vice-president, treasurer, or secretary. In addition, the rules of a union may, and frequently do, make provision for certain other positions within the union, such as an assistant secretary, organisers, and job delegates. The holders of all these various positions can be conveniently referred to as the "officials" of the union.

The powers and duties of union officials are wholly dependent on the union rule-book, which must specify what those powers and duties are.\(^98\) If a union official, including the union executive, acts in excess of his powers, it is open to an individual member to sue (subject to the rule as to excusable irregularities) to compel compliance with the rules,\(^99\) and to recover damages if he has suffered loss in his personal capacity.\(^100\)

The rules of a union may entrust an official, or some internal body, with administrative powers which are discretionary. The principles governing the exercise of purely discretionary administrative powers\(^101\) were

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\(^98\) Section 66(b) of the Act. See Wellington Wharf Labourers' I.U.W. v B.N.Z. (1914) 33 N.Z.L.R. 842.


\(^100\) As in McGregor v Young [1920] N.Z.L.R. 766.

\(^101\) That is, powers which do not require to be exercised in accordance with natural justice -- see section D of this chapter, post.
discussed in the recent important case of \textit{Breen v Amalgamated Engineering Union},\textsuperscript{102} where the Court of Appeal held that the principles developed as to the exercise of discretions by statutory bodies\textsuperscript{103} applied to non-statutory bodies also, and to trade unions in particular. The discretionary powers of trade union officials must, it appears, be exercised "fairly", and without bias, malice or bad faith; their exercise must not have been influenced by an irrelevant or extraneous considerations.\textsuperscript{104} The duty to act fairly may even include a duty to hear members affected before deciding, at any rate if there are adverse factors which the official or domestic body intends to take into account against them.\textsuperscript{105} However, this is practically to require the observance of the principles of natural justice, in an area where they have traditionally been held inapplicable.\textsuperscript{106}


\textsuperscript{103} In such cases as \textit{Re H.K. (an infant)} [1967] 2 Q.B. 617; \textit{Padfield v Minister of Agriculture, Fisheries & Food} [1968] A.C. 997.

\textsuperscript{104} [1971] 2 Q.B. 175, 190, per Lord Denning M.R. See also \textit{ibid}, 195, 200. For detailed treatment of these principles, see \textit{De Smith, Judicial Review of Administrative Action} (2nd ed. 1968), 281-339.


\textsuperscript{106} See the discussion of natural justice in section D of this chapter, post.
A problem which has received very little consideration is that of discipline, and particularly dismissal, of union officials. Is a paid union official merely an employee, dismissable, like any other employee, at his employer's discretion? Or does he have a right to a hearing, in accordance with the principles of natural justice, like the union member who is threatened with expulsion? Section 66 (a) of the Act requires the rules of an industrial union to provide for the removal of its "officers" by a secret postal ballot of financial members, or by some other "sufficiently democratic" procedure approved by the Registrar. Section 66 (a) does not, however, make it clear whether or not natural justice must be observed for the removal of all union officials, including "officers". The particular union rules may themselves lay down a detailed procedure for removal, and may in addition set out certain grounds on which the removal is to be based. Breach of the rules governing his removal will no doubt entitle a dismissed union official to redress. The question remains, however, whether the principles of natural justice are applicable to the removal of union officials generally.

Where the action to be taken against an official affects him not only as an official, but also in his capacity as a union member (e.g., by requiring not only

107 That is, summarily, for misconduct; or with proper notice, for any or no reason.

108 As in Leary v National Union of Vehicle Builders [1971] Ch. 34.
his dismissal, but also his exclusion from holding future office in the union), the principles of natural justice must be observed.\(^{109}\) However, where the only action taken is dismissal of the union official from his post, this reasoning is clearly inapplicable. In a recent Australian case,\(^ {110}\) a distinction was drawn between dismissal of an elected official, and dismissal of one who has merely been appointed.\(^ {111}\) It was held that an elected official of a union registered under the Commonwealth Conciliation and Arbitration Act was an "office-holder" (as distinct from a mere employee) within the classification made by Lord Reid in Ridge \textit{v} Baldwin,\(^ {112}\) and as such could, as a general rule, only be dismissed in accordance with the principles of natural justice.\(^ {113}\) In special circumstances, however, a rule governing dismissal of an elected official can by necessary

\(^{109}\) Burn \textit{v} National Amalgamated Labourers' Union [1920] Ch. 364; Lynch \textit{v} McLachlan (1962) 3 F.L.R. 59; Taylor \textit{v} National Union of Seamen [1967] 1 All E.R. 767. In Leary's case, supra, it was conceded that natural justice was applicable.

\(^{110}\) \textit{Barnes v Oliver} (1970) 16 F.L.R. 366.

\(^{111}\) It is submitted that the logical distinction is not between "managerial" elected officials, on the one hand, and officials employed under a contract of service, on the other (as Citrine, op. cit., 295-6 states it: see also \textit{Roper v Collingridge} [1935] St. R. Qd. 1, 18-9), but, quite simply, between elected officials and those who are not elected. Cf. the discussion of the term "official" in \textit{Barnes v Oliver}, supra, 371-2.


implication exclude natural justice.\textsuperscript{114} An appointed official, on the other hand, can be dismissed like any other employee—subject to the proviso that, if the rules as to dismissal treat appointed officials on the same footing as elected officials, this may lead to the conclusion that appointed officials are also entitled to receive natural justice.\textsuperscript{115}

The distinction between elected and appointed officials also affects the remedies available to the wrongfully dismissed union official. The appointed official, being merely an employee, is not entitled to reinstatement, or to a declaration that his dismissal is a nullity,\textsuperscript{116} but must be left to his remedy in damages.\textsuperscript{117} The elected union official may obtain, in addition to damages, reinstatement to his position in the union\textsuperscript{118}—although, in view of the embarrassment this may cause within the union, the courts may not always be willing to grant this remedy, particularly in interlocutory proceedings.\textsuperscript{119}

\textsuperscript{114} (1970) 16 F.L.R. 366, 373, 391. See also McKay v Duncan (1968) 12 F.L.R. 216. This follows from the Australian view that union rules can exclude natural justice—see footnote 62, ante.

\textsuperscript{115} McKay v Oliver, supra, 56; Barnes v Oliver, supra, 372-5.

\textsuperscript{116} Which would have the effect of ordering specific performance of a contract for personal services.

\textsuperscript{117} Taylor v National Union of Seamen, supra.

\textsuperscript{118} Shanks v Plumbing Trades Union (unreported), discussed in Leary v National Union of Vehicle Builders, supra, 56-7. See also the discussion in Taylor's case, supra, 777. Cf. Citrine, op. cit., 295-6.

\textsuperscript{119} Leary's case, supra, 57-8.
(ii) Elections.

The crucial importance of elections as a means of ensuring democratic government of trade unions has been statutorily recognised in Part IV of the Industrial Conciliation and Arbitration Act, which contains a number of provisions aimed at guarding against, and if necessary correcting, malpractice in industrial union elections. These wide statutory powers provide a more effective and less formal means of supervising union elections than can an action at common law. Nevertheless, the common law remedies still have some part to play, particularly when an individual candidate for office is affected by some breach of the rules governing elections.120 Thus in Prior v Wellington United Warehouse I.U.W.,121 Prior had his nomination for secretary-treasurer of the defendant union refused by the union executive, the only other nominee being declared elected by default. It was held that the executive, in purporting to refuse his nomination, had assumed a jurisdiction which it did not possess under the relevant rules.122 Accordingly, an injunction was granted against the union to compel it to hold a proper election.

120 Because at least ten financial members must lodge a complaint before an inquiry can take place under s. 90 of the Act, the statutory remedies are of no assistance when only one or two members feel aggrieved.


Under s.66 (a) of the Act, the rules of an industrial union must provide for the election, removal, and filling of vacancies of union officers, the usual method required being a secret postal ballot of financial members. Because of their central place in union government, these rules will normally be construed as mandatory, and failure to comply strictly with them will result in an invalid election. Non-compliance with rules requiring a secret postal ballot, and the posting out of ballot papers so as not to allow voters the full period prescribed for their return, have both been held to have this result. It is clear, too, that a denial to a properly qualified union member of his voting rights under the rules would, as an infringement of his "personal rights", entitle him to a remedy at common law.

Overall, however, the common law remedies based on breach of the rule-book contract provide, by comparison with the flexible and informal statutory procedures, a much more limited and mechanical approach to this important area of union management. Although it retains

123 Gourlay v Cornish [1946] N.Z.L.R. 210, discussed earlier in this section, provides an example of an election rule which was held to be merely directory.


126 Pender v Lushington (1877) 6 Ch. D. 70; Cf. the Clews case, supra. If the member's vote would not have affected the result of the election, he will still be entitled to a declaration that his vote was wrongly denied, and, possibly, nominal damages. For a case on eligibility to vote, see Cook v Stanley (1914) 17 G.L.R. 202.
some importance as a means of correcting breaches of union election rules - particularly when only a few individuals are affected - the common law in this area has for practical purposes been supplanted by more effective statutory provisions.

(iii) Meetings

There are a number of aspects to the proper conduct of union meetings. The manner of calling the meeting, its composition, its powers, and its procedures, including voting, must under s.66(c) of the Act, be stated in the rules of an industrial union. As a result, failure to comply with any of the rules setting out these requirements will invalidate both the meeting and its end product - unless this failure amounts to an "excusable irregularity".

Thus a complete omission to hold a meeting as required by the rules has been held, not surprisingly, to invalidate subsequent proceedings. So, too has a failure to give proper notice of the business to be transacted at the meeting - although some irregularities occurring under this type of rule may be excused depending on the nature of the business transacted,


whether it affects members' rights and so on. A similarly flexible rule would appear to apply to irregularities in the composition or conduct of a union meeting. As has just been seen, denial of voting rights at a meeting would give an aggrieved union member a right of action.

Questions of the effect of particular union rules aside, three further points can be made about union meetings. First, where the rules are silent on some procedural matter, it would appear that the established common law principles governing meetings are applicable. Secondly, if the purpose of the meeting is contrary to the rules of the union or otherwise unlawful, then the business transacted thereat will be invalid, even if the meeting is in other respects procedurally correct. Finally, if the meeting is one to which the principles of natural justice are applicable, it must be conducted in conformity with those principles.

The way union meetings are in fact conducted in

129 Humphries v Auckland Tailoresses' I.U.W. [1950] N.Z.L.R. 380; Cotter v National Union of Seamen [1929] 2 Ch. 58. A strict approach will always be taken in cases dealing with expulsion - see the cases cited in footnotes 175, 176, post.


131 Gourlay v Cornish, supra. See also Wishart v Henneberry (1962) 3 F.L.R. 171.

132 Denniston Coal Miners' I.U.W. v Armitage, supra.

133 For the applicability of natural justice, see the following section of this chapter.
this country is from time to time a topic of public discussion, the nature of which is perhaps unavoidably ill-informed and undocumented. Allegations of a lack of democracy at trade union meetings are of course both difficult to prove, and to disprove; and it is not proposed to attempt to do either in this work. However, any undemocratic practices which do exist are, in the writer's opinion, unlikely to be remedied by stricter enforcement of union rules, or by any other direct legal measures. Solution of this problem, if it exists, can only be achieved by overcoming membership apathy - an acknowledged condition in many of this country's trade unions. This in turn will be brought about not by cocooning union members in more protective rules, but by streamlining and revitalising the trade union movement as a whole. The way in which this formidable task is to be accomplished falls well outside the scope of this thesis - although an obvious first step is to reduce the number of small, weak industrial unions by encouraging amalgamations.

134 The attempt has been made, however, with the "tightening up" in February 1972 of the rules of the de-registered New Zealand Seamen's Union, which was required by the Minister of Labour as a condition of re-registration. It is doubtful that the stricter rules will themselves achieve anything in this direction, although changed attitudes on the part of the mass of union members, as a result of the de-registration, may do so.

(iv) Financial Administration.

As one would expect, the financial administration of an industrial union is governed by its rules—with one large exception. Under s.66(f) of the Act, the union's rules must provide for the control of the property, the investment of the funds, and an annual or more frequent audit of the accounts. As in other areas of management, breach of a union rule on one of these topics may, unless an "excusable irregularity" exists, be remedied at the suit of an individual member.

Here, more than in other areas of internal management, the possibility also exists that action will be taken in the union's name.

The "large exception" referred to earlier occurs as a result of s.78 of the Act, which specifies detailed procedures for the keeping and auditing of union accounts, under the watchful eye of the Registrar of Industrial Unions. These procedures, which need not be set out here, are backed by criminal sanctions. It is safe to say that s.78, has, for all practical purposes, superceded the common law in this area.

136 As to which, see Wellington Wharf Labourers' I.U.W. v Bank of New Zealand (1914) 33 N.Z.L.R. 842.
137 For the kinds of investment an industrial union is legally competent to make, see chapter XIII, section G, post.
139 Or by criminal proceedings.
140 Note the unusually wide definition of "union" in s.78(19).
(v) Entrance Fees, Subscriptions and Levies.

For a union to impose either entrance fees, subscriptions or levies on its members, provision must be made in its rules. If the rules fail to make proper provision (for example, for the striking of levies on members), then there is no obligation on union members to make any payments demanded of them — although there is no objection to the instigation of a voluntary levy.141 At common law, entrance fees and subscriptions cannot be raised, and levies cannot be imposed, without strict compliance with the relevant rules, and in particular without proper notice of the action proposed.142 An irregularity in the raising of subscriptions, or in the striking of a levy, will not be an "excusable irregularity" within the rule in Foss v Harbottle.143 In addition, the purpose for which a levy is imposed must be lawful; a compulsory levy to replenish union coffers depleted by ultra vires spending is not a lawful purpose.144

However, the common law is now modified by statute in a number of important respects. The amount of entrance fees and contributions payable by an industrial

141 As to the administration of such a levy, see Sansom v L.P.U.L.V.H. (1920) 36 T.L.R. 666.
144 Denniston Coal Miners' I.U.W. v Armitage, supra. See also Hikurangi Coalminers' I.U.W. v Mee (1925) 20 M.C.R. 13.
union member\textsuperscript{145} is subject to a ceiling set by s.73(1) and (3) of the Act, as amended in 1970. The manner of imposition of levies is prescribed by s.73(2) and (2A). For levies for political purposes,\textsuperscript{146} or levies which bring the total of levies individually payable in any one year to more than six dollars, a secret ballot procedure is laid down. For all other levies, the statutory procedure follows the common law standards already set out. There are criminal penalties for breach of these obligations; and in addition, sums wrongly paid by a union member can be recovered as a debt due from the union, either by the member or by an Inspector of Awards on his behalf.\textsuperscript{147}

It can be seen that statute has once again intervened in this country to impose standards in some respects stricter than the common law - particularly in the case of levies. Statutory remedies and penalties have been provided, which also have the effect of diminishing the importance of the rule-book contract. However, outside the area covered by s.73, the particular union rules continue to govern; and, indeed, within that area, the aggrieved union member may well be able

\textsuperscript{145} Or by a member of a union subject to a Labour Disputes Investigation Act registered agreement.

\textsuperscript{146} As to the power to impose levies for political purposes, and exemption from such levies, see the Political Disabilities Removal Act 1960.

\textsuperscript{147} Section 73(5) and (6) of the Act.
to point to both breach of s.73 and breach of the relevant rule as a ground of invalidity. Furthermore, the contract of union membership will remain the basis of the courts' jurisdiction in those cases where a union member sues, not to recover sums paid by him, but to have a levy or increase in subscriptions declared invalid, or to contest an expulsion imposed by way of penalty for nonpayment of the levy or increased subscription. (vi) Services to Members.

The extent of industrial union power to provide services to members has long been severely curtailed in this country, and has only recently been given any noticeable scope, by s.66A of the Act, introduced in 1964. The reasons for this restricted scope, and the extent of the change introduced by s.66A, will be thoroughly dealt with in Part Three, but it is proposed at this point to discuss briefly the management of the services provided.

No special problems arise with the financial administration of an industrial union's services to its members. This will be governed by the general

148 As in Edwards v Halliwell, supra.
149 As in Gould v Wellington Waterside Workers' I.U.W., supra.
principles of financial administration already dealt with, subject to certain machinery provisions of s.66A which need not concern us here.

The financial administration of union services aside, the possibility of control by individual members of the management of these services is diminished by the fact that union rules providing for benefits or services will usually be drafted in terms of discretionary power. In such cases, it will be impossible to enforce performance by the union of a particular service to which the individual member feels he is entitled\(^{150}\) - although the exercise of the discretion may be attacked if it does not comply with the principles already outlined as to the exercise of discretions generally.\(^{151}\) Subject to this, however, the member will be able to enforce compliance with the relevant rules, where the breach is not an "excusable irregularity".\(^{152}\)

Where the provision of the particular service is not subject to any discretion, or where the discretion

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152 As in Swaine v Wilson (1889) 24 Q.B.D. 252, where the relevant rule allowed no discretion. In England, s.4 of the Trade Union Act 1871, discussed in the preceding chapter, has usually prevented actions of this kind (as in Russell v Amalgamated Society of Carpenters and Joiners [1912] A.C. 421), although permitting "indirect enforcement" - Yorkshire Miners' Association v Howden [1905] A.C. 256. In this country, as already demonstrated, the equivalent s.5 of the Trade Unions Act 1908 does not apply to industrial unions.
is exercised in favour of providing the service, further problems may arise as to the quality of the service provided. The clearest instance of this type of problem occurs with legal aid services. (The provision of legal aid and advice to members is a not uncommon function of industrial unions in this country.)

A recent English decision has shown that a trade union which provides legal aid or advice is under a duty to obtain for the member legal advice from a barrister or solicitor of reasonable skill and experience. If the rules allow some union official a discretion to decide whether the member's claim is worth pursuing further, then he must act reasonably and take appropriate care in determining that question. If legal assistance in pursuing a case is refused, there is no duty on the union to warn the union member that unless he takes prompt action his claim will become statute-barred. However, if the union does undertake conduct of the member's case, and itself allows the

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153 See chapter XIII, section C, post.

154 Cross v B.I.S.K.T.A. [1968] 1 All E.R. 250. In this and Buckley's case, supra, it is somewhat surprising that no mention was made of s.4(3)(a) of the Trade Union Act 1871 (U.K.) as a bar to the action. By comparison, recent Scottish litigation on the same topic has been fought out entirely on this issue - see McGahie v U.S.D.A.W. 1966 S.L.T. 74; Bernard v National Union of Mineworkers 1971 S.L.T. 177.

155 Buckley v N.U.G.M.W., supra.

action to become statute-barred,\textsuperscript{157} then the union will be liable to the member.\textsuperscript{158}

4. Remedies for Breach of Internal Management Rules.

All the usual remedies are available to union members, where appropriate, to correct breaches of trade union management rules. An injunction may be sought against the union and/or the officials responsible, to compel compliance with the particular rule which has been broken.\textsuperscript{159} A declaration may be issued where a member's rights, or the validity of some proceeding, are in issue. Damages, also, may be claimed where maladministration has resulted in a member suffering personal loss; and where financial loss has been suffered by the union, the union officials responsible may be required to make good the loss. It may be that an order of mandamus is also available against an industrial union to enforce compliance with its obligations under the rules,\textsuperscript{160} but discussion of this problem can be postponed until the following section, when remedies for wrongful disciplinary action will be dealt with.

\textsuperscript{157} As in \textit{Bernard v National Union of Mineworkers}, supra.

\textsuperscript{158} For the relationship between the right to recover damages and the plaintiff's prospects of success in his original action, see \textit{Buckley v N.U.G.M.W.}, supra, 773-4.

\textsuperscript{159} As to the issue of injunctions against unions registered under the Incorporated Societies Act 1908, see footnote 11, ante.

D. DISCIPLINARY ACTION AGAINST UNION MEMBERS.

Disciplinary action by trade unions may take a number of different forms. The most likely punishments in this country are expulsion, suspension, and fining. Other possibilities include exclusion from holding union office, exclusion from union benefits, and being subject to a resolution of "censure". In addition, there is loss of membership by "purging the register", which can be considered as a form of disciplinary action. The key issue, however, is that of expulsion from membership. Expulsion has long been recognised in this country as involving not only direct loss of the privileges of union membership, but more importantly, a serious consequential interference with the expelled member's security of employment, by reason of the preferential treatment which the Industrial Conciliation and Arbitration system gives to unionists. As it is the central problem in this area, discussion can for the most part be carried on in terms of expulsion alone. The principles which govern expulsion are

161 See s.66(i) of the Act, and the discussion later in this section.

equally applicable to other forms of disciplinary action.  

The case-law dealing with the topic of expulsion from private associations generally is of tremendous volume and some complexity. Called upon to deal with the domestic disputes of bodies ranging from stock exchanges to bridge clubs, the courts have quite understandably tended to be reluctant to intervene.  

In respect of trade unions, however, an increasing judicial awareness of the factors referred to in the preceding paragraph has resulted in a clearly discernable trend in favour of intervention. This trend has received little judicial acknowledgement -

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165 And other bodies exercising control over individual livelihood.

166 In Lawlor v Union of Post Office Workers [1965] Ch. 712, Ungood-Thomson J. was prepared to grant relief against expulsion even though the plaintiffs did not need to be members of the union to retain their jobs. Loss of standing as union members, although unaccompanied by financial loss, was a sufficient basis for intervention (ibid, 734-5). Cf. Gaiman v National Association for Mental Health [1971] Ch. 317, 336-7.
with the not altogether surprising exception of Lord Denning167 - and it may even foreshadow a fundamental change of attitude by the courts to the issue of intervention in the domestic disputes of private associations generally. Be that as it may, the basic principles of law applicable to expulsions from trade unions are, except for some grey areas, fairly well settled - although their development is no doubt far from at an end.168

There are, it will be seen, two major grounds upon which an expelled trade union member can challenge the validity of his expulsion. It may be either i) contrary to the rules of the union involved, or ii) in violation of the principles of natural justice. Where the rules of the union provide for some internal appeal procedure, further issues arise as to whether the aggrieved member is bound either to pursue these internal remedies, or (having pursued them) to abide by the decision which results therefrom. Finally, there is the problem - one of great practical importance - of the legal remedies available to the member who has been wrongfully expelled. It is now proposed to deal with each of these topics in turn.

167 Lee v Showmen's Guild, supra, 343.
1. **Disciplinary Action under the Rules.**

(i) **General Principles.**

A trade union has no inherent or implicit power to expel or otherwise discipline its members. In other words, the rules must contain an explicit power to penalize the particular conduct disapproved of.\(^{169}\) The foregoing principle is equally applicable when a different penalty is imposed from that which ought to have been.\(^{170}\) This is so, it appears, even when the penalty actually visited is less severe than that which ought to have been imposed\(^{171}\) - a rather strange doctrine which effectively discourages clemency in trade union discipline.

As the above discussion clearly indicates, trade union disciplinary rules are treated as penal in nature.

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171 [Burn v National Amalgamated Labourers' Union](https://www.legislation.gov.uk/ukcase/1920/section/1) [1920] 2 Ch. 364; [McGregor v Young, supra](https://www.legislation.gov.uk/ukcase/1920/section/1), 777, 778, 780.
and subject to strict interpretation. An outstanding example of how strict a compliance the courts are prepared to require is Bonsor v Musicians' Union. Bonsor had become 52 weeks in arrears with his membership subscriptions, and the secretary of his branch had erased his name from the union's register of members, under a rule which permitted expulsion of any member having 26 weeks' subscription in arrears. The rule in question did not specify who was to perform the expulsion, but the House of Lords construed it as requiring implementation by the branch committee, not by the branch secretary. It was held that this purely technical slip amounted to an actionable breach of Bonsor's contract of membership, for which he could recover damages.

This strict approach applies both to rules governing procedural matters, and to rules setting out substantive offences and penalties. Bonsor's case is one example of a procedural invalidity, and illustrates that disciplinary powers can only be exercised by the official or body given them by the rules. The case also shows that disciplinary powers cannot be delegated, at least in the absence of an express power of delegation.

172 Burn's case, supra, 373; Amalgamated Society of Carpenters v Braithwaite [1922] A.C. 440, 466; Blackall v National Union of Foundry Workers (1923) 39 T.L.R. 431, 433; Bonsor v Musicians' Union [1954] Ch. 479, 485; McGregor v Young, supra, 782.


Other procedural requirements are that the body exercising the disciplinary power, and its individual members, be properly appointed in accordance with the rules; that the requisite quorum, if any, be present; and that the meeting at which the disciplinary powers are to be exercised be properly convened - that is, with due notice and an explanation of the business to be transacted having been given to all those entitled to attend. Furthermore, if the union rules specify any particular procedure to be followed at the meeting itself, then this must be followed - although it has been said that the court must not insist on a too minute observance of merely formal matters.

(ii) Judicial Review of the Decision to Expel.

As well as ensuring the procedural correctness of the expulsion, the courts can to some extent supervise the application of the substantive expulsion

175 Maclean v Workers' Union [1929] 1 Ch. 602, 619; White v Kuzych [1951] A.C. 585, 599; Leary v National Union of Vehicle Builders [1971] Ch. 34; Ethel v Whalan [1971] 1 N.S.W.L.R. 416, and the Australian authorities there cited. However, the mere presence, without participation, of a non-member will not invalidate the tribunal's deliberations and decision; Leary's case, supra, 53-4.


rule to the particular case. It has been often said that the courts will not act as Courts of Appeal, on the merits, from the decisions of non-statutory disciplinary bodies, or "domestic tribunals", as they are also called. But it may well be that this principle, which has its origins in the traditional reluctance of the courts to interfere in the internal affairs of clubs and similar voluntary associations, does not accurately represent current judicial attitudes to trade union expulsions at least.

In the first place, the court can examine the facts of the particular case, to ascertain whether there was some evidence for the factual conclusions reached by the disciplinary body. If no evidence exists, it will intervene. However, the evidence adduced need not comply with the formal rules of evidence applicable in a court of law — although it must of course be presented so as to comply with the principles of natural justice.


179 Kelly v NATSOPA, supra, 581, 585; McGregor v Young [1920] N.Z.L.R. 766, 772, 776, 779, 781; Lee v Showmen's Guild, supra, 340. Cf. Lord Denning (ibid, 345) who interprets the test as meaning that the facts must be "reasonably capable of supporting" the decision reached.

180 Maclean v Workers' Union [1929] 1 Ch. 602, 621; Perry v Fielding Club [1929] N.Z.L.R. 529, 542; Australian Workers' Union v Bowen, supra, 628, 637; Holmes v O'Toole (1957) 1 F.L.R. 212.
An alternative way of expressing this principle is to say that the courts will inquire whether the disciplinary body could honestly have reached the conclusion that it did. There would seem to be little, if any, difference between the two tests in this context. In addition, both clearly overlap with the requirement of natural justice that the decision be reached honestly and in good faith.

In the second place, it is now settled that the courts retain jurisdiction to interpret the particular rules relied on and to ensure that they are complied with. The disciplinary body cannot, in other words, give itself jurisdiction by a wrong (albeit bona fide) construction of the rules.

A distinction is often drawn in this context between disciplinary rules which permit the disciplinary body to make a purely subjective determination of the offence, and rules which set out a factually-based or

181 Maclean's case, supra, 621-3, where Maugham J. discusses both approaches; Australian Workers' Union v Bowen, supra, 614-5, 628-9, where the court may have been influenced by the subjective wording of the particular expulsion rule.


183 Discussed later in this section.

184 This point can be said to have been finally settled by Lee v Showmen's Guild, supra, although it is clearly born out by a number of earlier cases (e.g. Kelly v NATSOPA, supra; McGregor v Young, supra; Braithwaite v Amalgamated Society of Carpenters [1922] 2 A.C. 440).
"objective" offence. The former kind of rule is indicated by the presence of the phrase "in the opinion of", or some similar form of words, e.g. a rule permitting the expulsion of a member "who in the opinion of the executive council is not a fit and proper person for membership". The latter range from the specific, e.g. "interfering with an official of the union in the execution of his duty", to the more general, e.g. a rule making punishable "conduct likely to injure or bring discredit on the union, or to cause dissention therein". This distinction has not always been observed. In a few cases, expulsion rules not expressly allowing an "opinion" have been read as allowing a subjective determination by the disciplinary body, but this can no longer be accepted as correct law.

185 Kelly v NATSOPA, supra, 585; Lee v Showmen's Guild, supra, 341, 350.

186 As in Lawlor v Union of Post Office Workers [1965] Ch. 712. See also Australian Workers' Union v Bowen (1948) 77 C.L.R. 601.


As to the power of the courts to interpret either subjectively or objectively formulated rules, it is obvious that the more general the language employed in the particular rule, the less likely it will be that it will require interpretation. Subject to this practical limitation, it is submitted that the courts will interpret an expulsion rule if it is capable of interpretation, irrespective of the width of its drafting. Thus the courts have felt free to construe not only rules embodying specific offences such as "unfair competition", but even a rule as vague as "bringing the union into discredit".

As the preceding discussion has shown, the courts have a clear power to review a decision to expel i) if the facts reveal "no evidence" to support the decision; and ii) if the relevant rule has been wrongly interpreted. In between these two extremes lies a commonly-occurring third possibility. For, as Romer L.J. pointed out in Lee v Showmen's Guild:

190 As in Lee v Showmen's Guild, supra. See also the analysis of specific offences in terms of actus reus and mens rea in O'Neill v Printing Industry Employees' Union (1965) 6 F.L.R. 488.

191 As in Wolstenholme v Amalgamated Musicians' Union [1920] 2 Ch. 388. Eve J. interpreted "union" as including union branches, and "discredit" as meaning discredit both within the union and outside it. See also O'Connor v Palmer (1959) 1 F.L.R. 397, where the term "misconduct" was held to involve "something more than mere negligence, error of judgment, or innocent mistake".

"The question ... may be purely factual, or may be one partly of fact and partly of law, or may be one purely of construction of the rule, in which case it is wholly a question of law". This somewhat marshy middle ground of mixed law and fact requires the simultaneous application of both the factual and the legal tests. Lord Denning outlined the process in _Lee's case:_

"The construction of the rules [may be] so bound up with the application of the rules to the facts that no one can tell one from the other. When that happens, the question whether the committee has acted within its jurisdiction depends, in my opinion, on whether the facts adduced before them were reasonably capable of being held to be a breach of the rules. If they were, then the proper inference is that the committee correctly construed the rules and have acted within their jurisdiction. If, however, the facts were not reasonably capable of being held to be a breach, then the only inference is that the committee have misconstrued the rules and exceeded their jurisdiction. The proposition is sometimes stated in the form that the court can interfere if there was no evidence to support the finding of the committee; but that only means that the facts were not reasonably capable of supporting the finding."

_Lee v Showmen's Guild_ itself provides a clear illustration of this approach. Lee operated a fairground roundabout at the annual Bradford Summer Fair, where he occupied a particular site granted him by the Bradford Corporation. A fellow-member of the Guild, who had previously occupied the same site, applied to the Guild for a ruling that he was the one entitled to occupy the site. His application was successful, and an appeal by Lee was dismissed. In defiance of this ruling, Lee the following year applied to the Corporation for, and was granted, permission to occupy the disputed site. As

193 Ibid, 345.
a result, Lee was fined under a rule which prohibited "unfair competition with regard to the renting, taking or letting of ground or position". He did not pay the fine, and was expelled as a consequence. Lee sued the Guild for a declaration and injunction to invalidate the fine, and to ensure that he remained a member.

The Court of Appeal held that, on the above facts, Lee could not be properly found guilty of "unfair competition". The rule, looked at as a whole, prohibited only "competition between members by means of undercutting or bribery or acts analogous thereto". So construed, it was incapable of being applied to Lee's conduct. He therefore obtained the remedies sought.

The principles outlined are, it is submitted, applicable as a basis of review for all types of expulsion rule. Judicial review of a decision based on a specific, factually-based rule therefore differs from that of a general, subjectively-framed expulsion only in the practical application of those principles. The specific, factually-based rule encompasses only a narrow range of facts, which renders its exercise liable to be attacked on the grounds of lack of evidence. Furthermore, the necessarily precise definition of such a rule makes problems of interpretation more likely to

194 Ibid, 353.
arise. It follows that this type of rule is subject to the greatest degree of judicial review, as Lee's case demonstrates. At the other end of the scale lies the general, subjectively-framed expulsion rule. This type of rule will, by reason of its very generality, give much less scope for review on questions of construction and even less again on questions of fact. This considerable variation in the scope of judicial review in practice is clearly inherent in the widely varied drafting of union expulsion rules.

As the scope of review depends so much on the particular facts and form of rule in each case, there is little advantage in examining further decisions. However, one other aspect deserves mention. A power to punish for disobedience of union decisions or directions is limited to lawful decisions or directions. If the decision or direction is in breach of union rules, or otherwise unlawful, the courts will intervene to protect the union member involved.\(^{196}\) Prior knowledge of the decision or direction on the part of the particular union member is also necessary.\(^{197}\)

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197 Holmes v Federal Clerks Union (1956) 1 F.L.R. 1. The case also holds that the decision will not be "lawful" if it does not permit an excuse of impossibility of performance on the part of the affected member.
(iii) Purging the Register.

A form of disciplinary action with special characteristics is "purging of the register". All industrial unions are required by s.66(i) of the Act to have a rule providing for purging their membership register of the names of members who remain a specified period in arrears with any fee, subscription, fine or levy. The specified period must be not less than 3 nor more than 12 months. It has been held that, on a proper construction of s.66(i), the union must purge members properly in arrears, and indeed, that "the Act itself results in an automatic exclusion from membership of such persons". But while the words "shall provide" in s.66(i) undoubtedly makes the existence of a purging rule mandatory, it by no means follows that this renders the purging itself either mandatory or automatic - two quite different things in any event. Such a conclusion would render nugatory any union rule permitting relaxation of a purging rule on grounds of sickness, injury, et cetera. However, it must be admitted that in practice many rule-books themselves provide for mandatory purging, "from time to time".

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199 See footnote 91, ante. Cf. s.79(1) of the Act.

In *James v New Zealand Waterside Workers' I.U.W.* 201 Finlay J. held that the removal of a member's name under a purging rule does not amount in law to an expulsion, with the result that the principles of natural justice, and particularly the requirements of notice and a hearing, are not applicable. 202 In reviewing such proceeding, the court is therefore only concerned to see that, on a proper construction of the purging rule, "the facts warrant and justify the action taken". 203 This includes ascertaining whether the member is entitled to the protection of any excusatory provision which the rules may contain. 204 The facts will not "warrant and justify the action taken" if the full period of arrears stated in the rules has not elapsed, 205 if the alleged arrears arise out of an invalid fine or levy, 206 or if

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201 Supra.

202 Although the decision is undoubtedly a correct one, the test applied by Finlay J. is, with respect, clearly wrong. The concept of natural justice has been held to be applicable to a wide range of proceedings other than expulsions, so that to inquire whether purging is "in law an expulsion" (whatever that means), is of no real assistance.


204 See James' case, supra, where Finlay J. held that a plaintiff whose recovery to health was uncertain was not entitled to protection on the grounds of "sickness", as the rule only envisaged "disablement for a somewhat temporary period".


the arrears have been created by the unjustifiable refusal of union officials to accept contributions proferred by the member. 207

2. The Principles of Natural Justice.

(i) General.

It is almost de rigueur for any consideration of the principles of natural justice to be prefaced by a general discussion of the precise nature of the concept. 208 Such discussions tend, however, to degenerate into mere assessments of terminology, and are for that reason of little utility. The essential thing to grasp is that the principles are "essentially procedural in nature; ... natural justice [can be regarded] as a distillate of due process of law". 209 Admittedly, a practical problem of recent origin is how to distinguish the duty to act "fairly" from the principles of natural justice. Some judicial confusion is apparent here. A logical, albeit somewhat simplistic, approach might be to say that the distinction is between a "quasi-judicial" function, which requires the observance of the principles of natural justice, and an "administrative" or


208 See e.g. De Smith, op. cit., 135-7; Rideout. op.cit., 93-8.

209 Per Megarry J. in John v Rees [1970] Ch. 345, 399, quoting from his judgment in Fountaine v Chesterton (unreported).
purely discretionary function, which only imports the lesser and more flexible duty to act fairly.\footnote{210} Why this should be so is less easy to explain, however. On the other hand, the duty to act fairly has frequently been treated, somewhat confusingly, as merely part of the principles of natural justice.\footnote{211}

In any event, it is not necessary to pursue these questions in the context of expulsion by trade unions. As will be seen shortly, both the applicability of the principles of natural justice, and their main features, are relatively well settled in this area — although it should be born in mind that (as pointed out on innumerable occasions)\footnote{212} these principles are not rigid rules: they take their colour from the circumstances of the particular case. However, for present purposes, the content of natural justice was adequately summarized by Harman J. in Byrne v Kinematograph Renters Society.\footnote{213}

\footnote{210} See Re H.K. (an infant) [1967] 2 Q.B. 617; Breen v Amalgamated Engineering Union [1971] 2 Q.B. 175; Re Pergamon Press Ltd [1971] Ch. 388. For the possible content of the duty to act fairly, see the discussion of Breen's case in section C of this chapter, ante.


\footnote{212} See e.g. Russell v Duke of Norfolk [1949] 1 All E.R. 109, 118 (the locus classicus); Wiseman v Borneman, supra, 308, 309, 311, 314.

"First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith."

Provided that "good faith" is understood as including the important ground of bias,214 this can be taken as an accurate statement of the general position.

It is proposed, therefore, to deal with the topic under the following headings: i) the applicability of the principles of natural justice; ii) the right to notice; iii) the right to a hearing; iv) bias; v) "residual" good faith; and vi) the consequences of a breach of natural justice.

(ii) The Applicability of the Principles of Natural Justice.

In the field of public law, one of the most difficult problems encountered is whether a person or body exercising a statutory power is under an obligation to observe the principles of natural justice. Various tests have from time to time been put forward as a basis for deciding this issue. These include: whether the function of the person or body is "quasi-judicial" or administrative; whether there is a lis (or contest) between competing claims; whether the "rights" or "property" of some individual are in

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jeopardy; whether, as a matter of statutory interpretation, natural justice was intended to apply.

In the case of expulsion from trade unions, however, these difficulties are almost wholly absent—as has been judicially acknowledged. Where union rules permit expulsion or other disciplinary action for some stated cause—as they do in the vast majority of cases—they have invariably been treated as requiring compliance with natural justice. This is so even "on the most restricted view" of the problem, and it therefore does not really matter whether natural justice is treated as applying by reason of the "quasi-judicial" nature of the power; the fact that the member's reputation is at stake; the fact that his contract rights, or property rights, or livelihood are in jeopardy; or all of these. Subject only to the difficult question of whether natural justice can be expressly (or impliedly) excluded, the applicability of the principles of natural justice to the normal type of expulsion "for cause", is beyond

215 Durayappah v Fernando [1967] 2 A.C. 337, 349 (referring to expulsion from clubs, but a fortiori in the case of trade unions).

216 Lawlor v Union of Post Office Workers [1965] Ch. 712, 729, per Unggoed-Thomas J. See also Burn v National Amalgamated Labourers' Union [1920] 2 Ch. 364, 374; Maclean v Workers' Union [1929] 1 Ch. 602, 624-5.

217 See the discussion in section B of this chapter, and the conflicting authorities cited in footnotes 61 and 62, ante.
dispute.\textsuperscript{218} It makes no difference in this context that the rule is widely-worded so as to permit a subjective opinion on the part of the disciplinary body, rather than being based on a specific, factual situation.\textsuperscript{219}

The only uncertain area is, therefore, that of the apparently unfettered discretionary power of expulsion. As was seen earlier, there is some authority that the courts will hold such a rule to be void,\textsuperscript{220} but, equally, there appears to be a valid distinction between expulsion "for cause" (which imports natural justice), and expulsion under an unfettered discretion (which does not).\textsuperscript{221} In any event, a prior question exists whether the discretion is in fact "unfettered", on the construction of the relevant rule. In this regard, there is authority that plain words will be needed, where loss of membership is involved, to exclude natural justice—if indeed it can be excluded at all—and that this cannot be achieved by describing what is in fact an

\begin{footnotesize}
\begin{enumerate}
\item This position has been given statutory force in England by s. 65 (8) of the Industrial Relations Act 1971 (U.K.); see also s. 65 (9).
\item \textbf{Lawlor v Union of Post Office Workers}, supra, 730,732.
\item See the discussion of Edwards v S.O.G.A.T. [1971] Ch. 354 in section D of this chapter, ante.
\item Gaiman v National Association for Mental Health [1971] Ch. 317, 337. And see the cases cited in footnote 59, ante. Cf. Leary v National Union of Vehicle Builders [1971] Ch. 34, where it was conceded that an apparently absolute discretion was subject to natural justice.
\end{enumerate}
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expulsion as something else.²²² Even if an absolute discretion is held to exist, it may be that where the discretion is exercised on some stated ground which in fact impeaches the character or conduct of the member and is intended as a penalty for it, the principles of natural justice will apply in any event.²²³ Alternatively, it may be that the requirement of "fairness" will be held to apply to the exercise of the discretion.²²⁴ In either case, little will remain of the so-called "unfettered discretion". Moreover, it is highly likely in this country that an unfettered discretion to expel would be rejected by the Registrar of Industrial Unions as unreasonable or oppressive under s. 70 of the Act, or possibly struck out by the courts as "contrary to law".²²⁵

²²² See the judgment of Megarry J. in John v Rees [1970] Ch. 345, 397, 400; but cf. the approach adopted by the same judge in Gaiman's case, supra, 335–6, where he held in the case of a company limited by guarantee, by contrast with an unincorporated body such as a club or (English) trade union, the powers of expulsion were to be exercised primarily for the benefit of the company as a corporate entity. On this basis, he was prepared to accept that the rules of natural justice were inapplicable. Assuming the case to have been correctly decided, it is nevertheless doubtful that this corporate analogy could be applied to unions possessing corporate status in this country, except in the unlikely event of a clearly-worded absolute discretion, as there will be more at stake than the mere loss of membership involved in Gaiman's case.


²²⁴ See footnote 210, ante. The discretion must at any rate be exercised in good faith - Hopkinson v Exeter (1867) L.R. 5 Eq. 63.

²²⁵ See section B of this chapter, ante.
In practice, therefore, it is submitted that there will seldom, if ever, be any exceptions to the applicability of natural justice to expulsions and other disciplinary action by trade unions—apart, that is, from "purging the register" of unfinancial members, which as previously stated has been held not to require the observance of natural justice.

(iii) The Right to Notice.

The right to notice, together with the right to a hearing, make up what is often referred to as the audi alteram partem rule. Failure to give proper notice constitutes by itself a breach of natural justice, although in many cases it will necessarily have the further result that the right to a hearing is denied.226

The notice given to the accused member must be "fair, adequate, and sufficient".227 By this it is meant that the notice must be sufficiently specific to enable him to appreciate the substance and gravity of the charges against him,228 it must give him adequate time to


227 Per Jessel M.R. in Fisher v Keane (1878) 11 Ch. D. 353, 362. As to proof of receipt of notice, see Holmes v O'Toole (1957) 1 F.L.R. 212, 224.

228 See e.g., Innes v Wylie (1844) 1 Car. & K. 257, 263; Andrews v Salmon (1888) 4 T.L.R. 490; Gray v Allison (1909) 25 T.L.R. 531.
prepare his defence, and it must of course indicate the time and place appointed for the hearing. In practice, a notice will be sufficiently specific if it sets out, or at least names, the particular rule (or rules) relied on, and gives particulars of the matters of complaint against the member. It appears that notice may be either oral or in writing, although the latter is to be preferred. If notice is given of one specific charge, the disciplinary body cannot without fresh notice condemn the member on other charges.

It has from time to time been said that if an accused has received insufficient formal notice, but had actual notice of the substance of the charges against him, with the result that no prejudice to his case has occurred, this will not amount to a breach of natural justice.

232 Labouchere v Wharncliffe (1879) 13 Ch. D. 346, 352; Montgomery v Lee Steere (1926) 29 W.A.L.R. 70, 75. Cf. Andrews v Mitchell [1905] A.C. 78, where written notice was required by the rules of the society. For the position where the accused fails through his own fault to receive a written notice, see James v Institute of Chartered Accountants (1907) 24 T.L.R. 27.
However, there are dicta to the contrary, and in addition a number of broad statements which suggest that the merits and effect of a denial of natural justice are irrelevant to the issue of liability.

(iv) The Right to a Hearing.

It has long been established as one of the requirements of natural justice that a union member accused of offences against union rules must be afforded a fair opportunity of meeting the charge and of contradicting or correcting any statement prejudicial to his interests. This does not mean, however, that the accused must in fact receive a hearing: if he is given a reasonable opportunity of stating his case, and fails to take advantage of it, this will not amount to a breach of natural justice. But there will be a denial of natural justice if, when the accused fails to turn up at the hearing, the disciplinary body proceeds (as in Annamunthodo v Oilfields Workers' Union) to "convict" him of some other, more serious, offence than that with which he was originally charged.

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237 See the cases cited in footnote 291, post.

238 Pett v Greyhound Racing Association [1969] 1 Q.B. 125, 131, per Lord Denning M.R.


240 Supra.
The weight of authority - what little there is - would appear to require an oral hearing rather than written submissions. However, what the particular union rules say may well affect this issue.

While the vast majority of cases, where there has been a complete denial of any hearing, pose no problems, there is some uncertainty as to what will constitute an adequate hearing in each particular case. Indeed, it has often been stated that a disciplinary body has some discretion in this respect, and is not required to follow any particular procedure. However, it is submitted that, as a general rule, an accused union member will, in addition to being able to make submissions personally, have the right to present evidence and to call witnesses for that purpose. It would appear, however, that he cannot insist on cross-examining witnesses called in


support of the case against him, whether cross-examination should be allowed will depend on the circumstances. Nor, it seems, is an accused member entitled to be present throughout the hearing for the purpose of listening to witnesses who testify against him. However, the practical effect of this rule is qualified by the principle that a disciplinary body cannot receive or rely on testimony unfavourable to the accused without giving him the opportunity to contradict it. Thus in Taylor v National Union of Seamen, the introduction of matters prejudicial to an accused union member after he had withdrawn from the hearing was held to be a breach of natural justice.

A further problem involves the entitlement of an accused union member to legal representation. The law on this can be safely stated to be in a state of utter confusion and uncertainty. The older authorities tend to negative any entitlement to legal representation.


245 Fielding Club v Perry, supra, 544, 546-7; Bailey v Ahearn, supra, 213-4.

246 Fielding Club v Perry, supra; Ross v Electrical Trades Union (1937) 31 Sol. Jo. 650.


248 In re Macqueen (1861) 9 C.B. (N.S.) 793; Maclean v Workers' Union, supra, 621; cf. Ex parte Death (1852) 18 Q.B. 647. Contra: Edgar v Meade (1916) 23 C.L.R. 29, 43.
but in *Pett v Greyhound Racing Association*, the Court of Appeal were of the opinion that where a serious matter such as livelihood was involved, natural justice required that a person accused of misconduct be permitted legal representation, if he so desired. However, in *Pett v Greyhound Racing Association (No. 2)* — the trial of the action — Lyell J. somewhat surprisingly distinguished the remarks of the Court of Appeal as "obiter," and held that the plaintiff was not entitled, as a matter of natural justice, to legal representation. Most recently, in *Enderby Town Football Club Ltd v Football Association Ltd*, Lord Denning, although criticising Lyell J.'s decision, conceded that where the rules were silent on the matter there was no absolute right to legal representation. If the disciplinary body, in the proper exercise of its discretion, declined to allow legal representation, then the courts would not interfere — although they would do so if the discretion was "fettered" by the laying down of a rigid rule, as occurred in Pett's case.

The *Enderby* case itself involved a rule expressly excluding legal representation, which the majority of the Court upheld as valid and binding on the plaintiff.
All the members of the Court were clearly of the opinion that the interests of justice were not necessarily always served by allowing legal representation. Cairns L.J. remarked that "the employment of lawyers is likely to lengthen proceedings and certainly greatly to increase the expense of them without any certainty of bringing about a fairer decision". \[254\]

To this kaleidoscope of decisions and dicta can be added a Scottish decision, \[255\] purporting to follow the first Pett case, \[256\] where a refusal to allow legal representation was held to be a breach of natural justice. Where all this leaves the right to legal representation in the absence of any express provision is, to say the least, somewhat uncertain. One can perhaps have some sympathy with Fenton Atkinson L.J. when he observes somewhat pointedly that natural justice appears to have been satisfactorily dispensed for years past without any suggestion of a requirement of legal representation. \[257\]

The final problem in this area is whether the accused is entitled to be heard not only on the charge itself, but also, in the event of the charge being established, "in mitigation" on the severity of the punishment to be imposed. \[258\] While there is one clear

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254 Ibid, 609. See also ibid, 605, 608.
257 Enderby Town Football Club Ltd v F.A. Ltd, supra, 609.
258 If the disciplinary body has any discretion in the matter.
statement to the contrary, \textsuperscript{259} the weight of authority is in favour of such a right. \textsuperscript{260}

Although there is merit in a concept like natural justice having a certain flexibility, it is submitted that the present uncertainty surrounding the conduct of the hearing and such fundamental issues as the need to allow an oral hearing, cross-examination of witnesses, and legal representation, is undesirable. The layman can scarcely be expected to comply with the requirements of natural justice when there is substantial disagreement among lawyers as to what these requirements are. As things stand at present, no trade union disciplinary body could, in expulsion cases at least, safely reject a claim of entitlement in respect of any of these contentious matters. This is particularly so in view of the modern trend towards imposing higher standards of natural justice in proceedings affecting individual livelihood. There would appear to be a need for a definitive judicial statement on this topic, or for the adoption of a statutory code of conduct making clear what is required.

(V) Bias.

The concept of bias as applied to trade unions is radically different both from that applicable in the case of courts and of statutory tribunals, and from the popular meaning of "bias". Both the composition of the

\textsuperscript{259} Weinburger \textit{v} Inglis [1919] A.C. 606, 632.

domestic tribunal and the frequently inquisitorial nature of the proceedings make it impossible to apply strictly the traditional notions of bias. Moreover, as has been judicially stressed, the state of affairs is usually one contemplated, or even required, by the union rules themselves.

This "built-in" bias is clearly apparent when one considers the prohibition against tribunal members having any pecuniary interest in the decision. This requirement has been rigorously enforced in cases involving judicial bodies and statutory tribunals, but of necessity it cannot be said that the pecuniary interest which each member has in the funds of the union will prevent him from taking part in an expulsion decision.

The lower standards to be required of trade union proceedings are also recognised in the case of bias by reason of the personal attitudes or conduct of some of all of those participating in the decision. In cases involving statutory tribunals or courts, the test is a fairly strict one: there need not exist actual bias; it is sufficient if "a real likelihood of bias" is

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261 Maclean v Workers' Union [1929] 1 Ch. 602, 624, 626-7; Australian Workers' Union v Bowen (1948) 77 C.L.R. 601, 616-7, 618-9, 630.

established. By contrast, the test to be applied to trade union disciplinary bodies is, according to the leading New Zealand case of Armstrong v Kane, "not nearly so exacting".

"[T] heir decisions will not be vitiated for bias unless it has manifested itself in a manner prejudicial to the member whose rights are in jeopardy, or the bias is 'invincible' . . . or there is something in the nature of a lis between a member of the tribunal and the member appearing before it . . ."

The problem of personal attitudes towards the accused union member is a real one in trade unions. The incident or series of incidents which lead to the charge against the member will almost certainly have provoked strong feelings among the members of the domestic tribunal. Some of them may even have had personal contact with the member over the matters complained of. Short of trade unions being encouraged or even required - to use an independent arbitrator to deal with disciplinary matters, difficulties with personal attitudes would appear to be inevitable.

Realistically, the courts have tended to recognise and make allowance for this. Thus it has been held

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265 Ibid, 374, per Wilson J.
that a member of a disciplinary body is not guilty of bias by reason only of his having taken part in the incident leading to the charge, nor necessarily because he demonstrated prior to the hearing opposition to the accused member's actions, nor even because there existed between him and the accused member strong feelings of antagonism arising out of prior conflicts. Nor does a prior hearing of the same issue for a different purpose authorised by the rules necessarily constitute operative bias against the accused. The rationale behind these authorities can be expressed by saying that the personal attitudes under discussion, although throwing doubt on the person or persons concerned, do not without more negative that "will to reach an honest conclusion after hearing what was urged on either side, and . . . resolve not to make up their minds beforehand on [the accused's] personal guilt", which Viscount Simon in White v Kuzch270 regarded as a prerequisite to an unbiased decision.

On the other hand, a demonstrated prejudgment of the issue to be decided by the tribunal will amount to

266 Taylor v National Union of Seamen [1967] 1 All E.R. 767, 775; Australian Workers' Union v Bowen, supra, 630.
267 Taylor's case, supra; Maclean v Workers' Union, supra, 627; Australian Workers' Union v Bowen, supra, 617.
269 Australian Workers' Union v Bowen, supra, 615, 630, 638; Taylor's case, supra, 775.
invalidating bias, as will the existence of a list, or personal contest, between the accused and a tribunal member. So, too, may strong feelings of personal antagonism arising out of the conflict which gave rise to the proceedings. These matters are thought to be inconsistent with the necessary 'will to reach an honest conclusion'.

A member of a disciplinary body may disqualify himself not only by his personal attitudes, but also by his actions. While such clearly irregular practices as intimidation of witnesses will take place very rarely, a not uncommon occurrence is the assumption by a tribunal member of the additional role of prosecutor. The general rule is that a man may not act as both prosecutor and judge, but this is subject to the qualification that some degree of initiative can be taken by the disciplinary body, if the rules envisage it. Otherwise, there may be no one at all to put the case against the accused. But it will be different

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271 Kuzych v White, supra, 189, 194, 198.
272 Dickason v Edwards (1910) 10 C.L.R. 243; Craddock v Davison [1929] St. R. Qd. 328; Maclean v Workers' Union, supra, 625.
273 Huxham v Incapacitated Sailors' and Soldiers' Association [1947] St. R. Qd. 69; Australian Workers' Union v Bowen, supra, 631; Kuzych v White, supra, 189.
274 As in Kuzych v White, supra.
275 Maclean v Workers' Union [1929] 1 Ch. 602, 626; Australian Workers' Union v Bowen (1948) 77 C.L.R. 601, 616-7, 630, 639-40.
if one of the members of the body puts himself in a special position by assuming sole charge of the prosecution. Thus in Taylor v National Union of Seamen, the General Secretary of the union had forcefully presented the case against the plaintiff, at a meeting which he not only chaired but also voted at. It was held that as the rules did not require him to retain membership or chairmanship of the meeting, his assumption of the additional role of accuser (a role "which he most amply filled") amounted to a breach of natural justice. On the other hand, natural justice is not infringed when a potentially biased person takes a leading part in the hearing, but absents himself from the subsequent deliberations and decision of the tribunal, nor even when one who has acted as accuser remains present, without participating, while the decision is being reached.

Although in this area each case must ultimately depend on its particular combination of facts, the decided cases do illustrate how difficult it is to establish invalidating bias. As has been seen, the

276 [1967] 1 All E.R. 767. See also Dickason v Edwards, supra; Australian Workers' Union v Bowen, supra.
278 Holmes v O'Toole (1957) 1 F.L.R. 212; Byrne v Kinematograph Renters' Society [1958] 2 All E.R. 579.
general approach of the courts has been to accept that union rules may contemplate a certain amount of "built-in" bias. For the future, it is not easy to say what effect, if any, the recent tendency to declare void rules which infringe natural justice will have in this area.

(vi) "Residual Good Faith.

It is well established that disciplinary powers must be exercised in good faith. However, much of what might ordinarily be regarded as establishing absence of good faith on the part of a disciplinary body falls within the more specific ground of bias. Bad faith independent of bias is most likely to occur, therefore, when the tribunal, although not strictly biased against the accused, acts from an improper motive. That is, it reaches its decision, not "in the interests, real or supposed, of the body it represents, [but] for an ulterior or extraneous motive".

Thus bad faith will be established by a fraudulent or capricious motive; by the tribunal's failure to

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279 See section B of this chapter, ante.

280 Dawkins v Antrobus (1881) 17 Ch. D. 615, 622, 629, 630, 634; Baird v Wells (1890) 44 Ch. D. 661, 670; Byrne v Kinematograph Renters' Society, supra, 599.

281 Australian Workers' Union v Bowen, supra, 628, per Dixon J.

282 Hopkinson v Exeter (1867) L.R. 5 Eq. 63, 68; Dawkins v Antrobus, supra, 629, 634.
consider the real issue, namely, whether the accused's conduct fell within the relevant rules; by its expelling a member for reasons other than those disclosed in the offence charged; and by its reaching a decision which has no evidence to support it. Other factors, such as the utilization of improper procedures, or an unreasonable decision, or the existence of malice towards the accused member, will furnish some evidence of bad faith.

Overall, cases of bad faith which do not involve other specific breaches of union rules or of natural justice will be rare. The courts appear to require fairly strong proof of bad faith, and allegations of it have seldom succeeded.

(vii) The Consequences of a Breach of Natural Justice.

It has been seen that natural justice imposes purely procedural standards on disciplinary hearings. The concept does not, except very indirectly through the


284 Tantussi v Molli (1886) 2 T.L.R. 731; Cameron v Davis (1950) 1 F.L.R. 413; Evaskow v International Brotherhood of Boilermakers (1969) 9 D.L.R. (3d) 715.

285 Cameron v Davis, supra.


288 Dawkins v Antrobus, supra, 634; Huxham's case, supra 74.

requirement of good faith, canvass the merits of the particular decision. But what is the position when, although these standards have not been observed, the result reached would have been the same in any event? There are, as we have seen, cases in which the courts have declined to intervene, on the grounds that the plaintiff has not been prejudiced, nor the result affected, by a technical breach of natural justice. In a sense, this realistic approach is attractive, for a breach of natural justice (especially if minor) does not necessarily produce an unjust final result. On the other hand, there is high authority that the fact that "the case was as plain as a pikestaff is [not] an answer to the demand for natural justice", and, indeed, this attitude may be thought to be implicit in many of the decisions in this area. Moreover, it is debatable whether the courts are in a proper position to assess either the real effects of a breach of natural justice, or, by inference, the merits of the plaintiff's case - this latter issue being one that they have in other respects traditionally steered clear of.

290 Byrne v Kinematograph Renters' Society, supra is perhaps the high-water mark of these decisions. See also the cases cited in footnote 235, ante, and Lamond v Barnett [1964] N.Z.L.R. 195, 203-4 (refusal of prerogative writs where breach of natural justice has occurred).

In cases where natural justice has been denied, and
the court does intervene, a further difficulty arises.
This is whether the decision reached by the disciplinary
body is to be treated as being void and of no legal
effect, or merely voidable at the election of the expelled
member. The question is not entirely an academic one.
It affects the form of the remedies sought (whether the
expelled unionist is to be declared to be still a member,
and the union restrained from interfering with this status;
or the expulsion is to be declared wrongful, and his
reinstatement ordered). As will be seen shortly, it
also affects the member's obligation to resort to any
appeal procedures specified by the rules, and the position
where an appeal is in fact pursued but is dismissed.

No clear answer to this problem can be given. Until
recently, the cases appear to have unquestioningly adopted
the view that a breach of natural justice by a domestic
tribunal rendered its decision void, or a nullity —
the terms apparently being used synonymously. However,
in *White v Kuzych*, doubt was expressed as to whether

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292 See e.g. *Innes v Nylie* (1844) 1 Car. & Kir. 257; *Wood v Woad* (1874) 9 Ex. 190; *Lapointe v Association*, etc. de Montreal [1906] A.C. 535; *Law v Wellington Working Men's Club* (1911) 30 N.Z.L.R. 1198; *Edgar v Meade* (1916) 23 C.L.R. 29, 45. The expressions used in such cases as *McGregor v Young* [1920] N.Z.L.R. 766, and *Australian Workers' Union v Bowen* (1948) 77 C.L.R. 601 (e.g. "bad", "vitiating", "invalid") are inexact, but may be intended as
equivalent to void.

the decision was void or merely voidable; and in Ridge v Baldwin, Lord Evershed went further and, after lengthy analysis, concluded (Lord Devlin concurring) that a decision given in contravention of natural justice by a body acting within its jurisdiction was merely voidable. On the other hand, Lords Reid, Rodson and, apparently, Lord Morris in Ridge v Baldwin were of the opinion that such a decision was void. In Durayappah v Fernando, the Privy Council preferred the term "nullity", but seemed to accept that a decision contrary to natural justice was "void ab initio", at least when challenged by the person against whom it was given.

When we examine recent cases dealing specifically with domestic tribunals, the courts — and most importantly the Privy Council in Annamunthodo v Oilfields Workers' Union — appear to have accepted that a denial of natural justice renders the tribunal's decision void, not voidable.

Certainly, in strict legal theory, as de Smith concedes: "Neither view is demonstrably right or wrong". But on the present state of the authorities, old and new, it

295 Ibid, 86-94.
298 Ibid, 353-5. See also Denton v Auckland City, supra.
would appear settled that at least so far as non-statutory domestic tribunals are concerned, and trade unions in particular, the decision reached contrary to natural justice will be void ab initio.

3. Internal Appeals

The rules of a union may, in addition to prescribing offences and penalties, provide persons found guilty of an offence with a right of appeal within the union. The rules of at least some industrial unions have provisions of this nature. When such rules exist, questions arise as to i) the need for an expelled member to pursue these appeal rights before resorting to the ordinary courts; and ii) the necessity of his having to abide by the decision reached, if he does exercise his appeal rights.

(i) The Duty to Exhaust Internal Remedies.

In this area, as in many others, the common law has evolved by a process of restrictive interpretation from an initial position established by a leading case, to what is for practical purposes the opposite conclusion. The ill-starred initial decision is the Privy Council case of White v Kuzych. There the plaintiff had, on joining the defendant union, sworn an oath not to bring an action against the union until he had exhausted all

302 Less usually, the rules may provide internal appeals for disputes over other than disciplinary matters, as in Cook v Stanley (1914) 17 G.L.R. 202. See also Leigh v National Union of Railwaymen [1970] Ch. 326.

remedies available to him under the Union Constitution. Expelled as a result of bitter differences between him and the union executive, he forthwith sued the union, and succeeded at first instance and on appeal on the grounds of bias. The union's appeal from these decisions to the Privy Council was upheld, it being decided that the plaintiff was contractually bound to exhaust the internal remedies provided before bringing the dispute before the courts. In answer to the plaintiff's argument that the expulsion decision, being void as contrary to natural justice, could not be appealed from, the Privy Council held that the expulsion decision, whatever its legal status, was a "decision" within the meaning and intendment of the union rules relating to appeals. The "lawyer's refinement" which treated a defective decision as no decision at all, and therefore not subject to appeal, could not be attributed to either the draftsman of the union rules, or those who adopted them.

This quite strong authority in favour of internal settlement (initially at least) of union/member disputes has been distinguished in two ways. First, it has been held that the obligation to exhaust internal remedies exists only when the member has expressly bound himself to do so (as in White v Kuzych). In other words, the

304 Ibid, 600.
mere provision in the rules of a right of appeal does not result in any implied duty to appeal. Second, and more importantly, it has been held that, whether or not there is an express exhaustion clause, there is no duty to exhaust remedies in respect of a decision which is void for breach either of the rules or of natural justice, as there is in law no decision at all from which to appeal. This is the "lawyer's refinement" which was rejected in White v Kuzych, but as the point turns solely on the construction of the relevant union rules, that case has been without difficulty distinguished.

A further ground put forward as excusing non-compliance with an express exhaustion rule is that the right of appeal given is inadequate or impractical. Exhaustion of internal remedies has therefore been excused because unreasonable delay is likely to result, because the place stipulated for the appeal was not reasonably accessible to the plaintiff, and because the right to appeal is itself unfairly circumscribed. There may,

308 Supra.
309 Bimson v Johnston, supra, 33-5; Gee v Freeman (1958) 16 D.L.R. (2d) 65, 69; Leigh v National Union of Railwaymen, supra, 335.
311 Fisher v Keane (1879) 11 Ch. D. 353, 360; Daly v Gallagher [1925] St. R. Qd. 1, 13.
indeed, be a general ground of exemption where an appeal, if pursued, would be likely to have little effect,\textsuperscript{312} but on the other hand, this consideration was treated by the Privy Council in White v Kuzych\textsuperscript{313} as being of no relevance.

The present position with regard to the exhaustion of internal remedies would appear to be as follows. The contract of union membership may impose an express obligation to exhaust on union members. As is evident from the cases cited, this seems to be the practice in a number of Canadian unions. This obligation will not be treated as binding if the initial decision is void, or if the appeal procedures are inadequate or impractical. This appears to be what Goff J. meant when he said recently in Leigh's case that where there is an express exhaustion rule, "the court is not absolutely bound ... but the plaintiff will have to show cause why it should interfere with the contractual position".\textsuperscript{314} If the appeal rule does not expressly lay down a duty to exhaust internal remedies, then the courts will not construe it as imposing one, but may in their discretion withhold relief until the internal appeals have been pursued.\textsuperscript{315} Factors influencing the exercise of this discretion include the nature of the issues raised.

\textsuperscript{312} Leigh v National Union of Railwaymen, supra, 335, where there was, however, no express duty to exhaust.

\textsuperscript{313} [1951] A.C. 585, 601.

\textsuperscript{314} [1970] Ch. 326, 334.

\textsuperscript{315} Lawlor v Union of Post Office Workers, supra, 733; Leigh's case, supra, 334.
(whether or not they are of a legal nature), the presence or absence of a provision suspending the imposition of penalties pending appeal, the legal effect of the decision to be appealed from, and the adequacy of the appeal rights provided.

It is perhaps a matter for some regret that the courts have retreated so far from White v Kuzych. That case, although it overlooked the unreality of treating a member as voluntarily binding himself by an express exhaustion rule, was at least prepared to countenance the possibility that a system of internal appeals could provide effective settlement of domestic disputes. The imposition by the courts of an implied duty to exhaust "reasonable" appeal rules (those which granted a stay of sentence during the appeal and provided an adequate remedy) before resorting to court action, would have been a positive step. It would, moreover, have provided both the unions and the courts with a beneficial solution, while imposing little, if any, hardship on the individual union member.

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316 Lawlor's case, supra, 733-4; Leigh's case, supra, 335.

317 Lawlor's case, supra, 734; Hiles v Amalgamated Society of Woodworkers, supra, 454. This is a not uncommon provision in industrial union rule-books.

318 If the decision is void, then the appeal cannot validate it, as will be seen shortly. See also Hiles' case, supra, 453.

319 Leigh's case, supra, 335.

320 Supra.

(ii) The Effect of Exercise of Appeal Rights by a Union Member.

If an expelled union member has been obliged to exercise his internal rights of appeal, or voluntarily exercises them, without success, a question arises as to the effect of this on the legality of his expulsion. It seems settled that the member does not, by appealing, waive his right to challenge the expulsion in court later on. Nor is he estopped from alleging procedural defects or a breach of natural justice by his failure to raise these points in his appeal. In other words, the appeal is not to be treated as affirming the expulsion, but as a disaffirmance of it. A related issue is whether an initial decision in violation of the principles of natural justice can be "cured" by compliance with natural justice on appeal. It has been held that the original decision,

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323 A breach of union rules cannot of course be cured by an appeal, as the holding of the appeal will not result in compliance with the rules governing the first instance decision.
being a nullity, cannot be so cured.\textsuperscript{324} The only way a failure of natural justice can be remedied, therefore, is by a complete rehearing by the trial body in accordance with natural justice.\textsuperscript{325}

The doctrine that an appeal tribunal cannot cure a denial of natural justice, nor generally speaking a breach of the rules, is no doubt a logical one. But it does make the provision of appeal rights in such cases a somewhat meaningless exercise from the union's point of view. Union appellate tribunals are effectively limited to determining appeals brought on the merits only.

Three final points should be made concerning internal appeals. If union rules bestow a right of appeal, then a failure by the union to provide the appeal or to follow the procedure laid down for it will invalidate a prior expulsion.\textsuperscript{326} For the "prosecution" to be permitted an appeal against an acquittal of an accused union member, the rules must give it an express right of appeal, in which case the member will be entitled to natural justice before the appeal tribunal.\textsuperscript{327} On the other hand, natural justice does not require that the

\begin{footnotes}
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person laying the charge be heard on appeal by the accused member.


(i) Waiver.

A preliminary point which arises is whether a union member who submits to a disciplinary jurisdiction with knowledge that some breach of procedural rules or of natural justice exists, can be held to have waived his right to complain of that irregularity in subsequent proceedings. Although there are dicta which suggest such a waiver (or estoppel) can occur, judges have generally taken a realistic view and rejected allegations of waiver. It would appear that the courts have recognised that a mechanical application of the doctrine would almost certainly lead to injustice. Allegations of waiver are therefore unlikely to succeed in the absence of strict proof of the accused member's knowledge of the irregularity, and his intention to waive it.


329 Dickason v Edwards (1910) 10 C.L.R. 243, 261; Australian Workers' Union v Bowen (1948) 77 C.L.R. 601, 618. See also Rideout, op. cit., 159-64.

330 Baird v Wells (1890) 44 Ch. D. 661, 673; Gould v Wellington Waterside Workers' I.U.W. (1924) N.Z.L.R. 1025, 1032; Barnes v Oliver (1970) 16 F.L.R. 366, 396. This is consistent with the courts' attitude to the issue of waiver by appeal - see the cases cited in footnote 322, ante.
(ii) Remedies for Breach of Contract.

An expulsion of a union member which contravenes the rules or violates the principles of natural justice is a breach of the contract of union membership, for which the usual remedies for breach of contract are available. Thus an injunction, a declaration, and damages where appropriate, may be claimed either separately or in conjunction.

The remedy of injunction is frequently granted to restrain a trade union or its officials from implementing a wrongful expulsion. 331 An interlocutory, or temporary, injunction may be issued to safeguard the plaintiff's position until trial of the action. Recently some plaintiffs appear to have utilized the interlocutory procedure not as an interim measure, but as a means of determining the issues at stake. 332 This parallels a similar trend in the field of actions to restrain tortious industrial activity by trade unions. 333 Where a trade union disciplinary body is proposing to act in breach of the rules or of natural justice, an injunction quia timet may be granted to restrain it from so proceeding. 334 An injunction is of course a discretionary remedy. As was seen earlier, one of the factors which may influence the exercise of this discretion is the existence of an unexercised right of internal appeal.

331 As to the issue of injunctions against unions registered under the Incorporated Societies Act 1908, see footnote 11, ante.


333 See chapter XXIII, section B, post.

Declaration, like the injunction, is a discretionary remedy. It is used to declare wrongful expulsions void and of no effect, frequently coupled with an injunction to restrain the union from acting on the invalid expulsion. A declaration can issue even in the absence of a contractual relationship, so that a non-member affected by the proceedings or rules of a trade union may be entitled to a declaration of his rights. 335

Where an expelled union member suffers loss as the result of a breach of the rule-book contract, damages can be claimed against the union. 336 Actual damage must be proved, 337 and it must be shown that the breach of contract caused the loss suffered. 338 If the expulsion causes the member to lose his employment he may recover damages both for his loss of earnings up to the time of the trial, and for his future losses, if any. 339 His past loss will be determined by calculating the net income he would have earned had he continued in his employment, less any wages from

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other employment, or unemployment benefit, received during the period.\(^\text{340}\) He must attempt to mitigate his loss by finding reasonable alternative employment;\(^\text{341}\) but need not move to another locality in an effort to find work, nor (if previously employed as a skilled tradesman) accept unskilled work or attempt to change his trade.\(^\text{342}\) His future loss will be "the difference between what he would have earned if there had been no breach of contract and what he will earn on the assumption that he uses all proper diligence to mitigate his loss".\(^\text{343}\) This should be assessed "on a broad basis", taking all the circumstances into account.\(^\text{344}\) Exemplary (or punitive) damages would appear not to be available.\(^\text{345}\) The principles outlined are equally applicable where damages are claimed for a wrongful refusal to admit to union membership.\(^\text{346}\)


343 Ibid, 387, per Megaw L.J.

344 Ibid, 385, per Sachs L.J. See also ibid, 378, 387. The Court of Appeal rejected an argument that, by analogy with cases dealing with wrongful dismissal, any difficulties suffered by the plaintiff in obtaining fresh employment should not be compensated (see Baker v Denkara Ashanti Mining Corporation (1903) 20 T.L.R. 37; Cutler v Didmore (1913) 16 G.L.R. 130; Cowles v Prudential Assurance Co. [1957] N.Z.L.R. 124). Thus a trade union's wrongful interference with the employment of a worker gives rise to a greater measure of damages than does wrongful interference by an employer.


346 Hardgreave's case, supra, 1220.
It would appear that a member can only recover damages in contract from the individual members of the tribunal if they have acted maliciously or unreasonably. This will not usually result in any disadvantage to the expelled member, as in most expulsions the union is the obvious defendant. However, in rare cases the tribunal may exceed its authority so as not to bind the union.

Injunction, declaration, and damages are essentially private law remedies. In addition, an order of mandamus - traditionally used to secure the performance of public duties - has on occasions been issued to restore a wrongly expelled union member to membership. The question arises as to the appropriateness of issuing this remedy against an industrial union. It appears that, for mandamus to be granted, the plaintiff must have a legal right to the performance of a duty of a public (and not merely private) nature. In cases involving industrial unions, these requirements have for the most part been glossed over. In addition to serving as a remedy for wrongful expulsions, mandamus has been granted, without question, to compel the admission of an applicant who had wrongfully been

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348 As in Orchard v Tunney (1957) 8 D.L.R. (2d) 273.


refused entry to an industrial union, and to compel the holding of an election in accordance with the rules. The availability, in principle, of this remedy against an industrial union has been the subject of discussion on only two occasions.

In Wellington Waterside Workers' I.U.W. v Hargreaves, where the plaintiff sought to be admitted to the defendant union, Myers C.J. stressed the need for a plaintiff to show a legal right to the performance of a legal duty by the union - not a common law duty, but one "imposed expressly or by necessary implication by ... the Industrial Conciliation and Arbitration Act". This appears to be a recognition of the necessity for a "public" (or at least statutory) duty. His Honour was unable to find such a duty in the Act.

In Armstrong v Kane, the court was asked to grant a mandamus to reinstate a suspended union member to full membership. It was held that the remedy was not available. Stressing the need for a public duty, Wilson J. pointed out that the duty to reinstate the member was a duty owed to him personally and to no one else. His Honour did not refer to any of the earlier decisions where mandamus had been granted.

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355 Ibid, 811.
356 There is now: s.174H of the Act.
358 Ibid, 370.
In strict principle, therefore, it would seem that mandamus is not an appropriate remedy for a wrongful expulsion, which is merely a breach of the contract of union membership and not a violation of the Act.\(^{359}\) Furthermore, as pointed out in *Armstrong v Kane*,\(^{360}\) the fact that there is an equally effective remedy available - namely, injunction\(^{361}\) - is another reason why mandamus cannot lie. Where breach of management rules is involved, too, the same objections will generally apply. The mandamus issued to compel the election in *Gourley v Cornish*\(^{362}\) could, and should, have been a mandatory injunction.\(^{363}\) On the other hand, the duty to admit to membership of an industrial union has since 1936 been a statutory one, and it would appear that mandamus is the only means of enforcing the duties at present imposed by s.174H of the Act.

It is obvious that the demonstrated willingness to issue mandamus against industrial unions is in fact a judicial recognition of the public nature of their functions under the Industrial Conciliation and Arbitration system, and the unreality of treating them as simply private associations. While this spirit of realism is no doubt praiseworthy, it is perhaps wasted upon fashioning mandamus into a remedy for wrongful expulsions, in view of the ready availability of the injunction.

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361 In a mandatory form, if necessary.
362 Supra.
(iii) Tortious Remedies,

It is clear that acts done subsequent to an expulsion in order to prevent an expelled member from continuing in his employment may give rise to liability in tort. But does the act of expulsion from an industrial union itself constitute a tort? Of the heads of tortious liability discussed in Part Four of this work, few are at all relevant. An action for intimidation would be inappropriate. Those directly responsible for the expulsion cannot usually be sued for interference with the member's contract of union membership, as they will in the normal case be acting as agents of the union. In a rare case, where the entire proceeding has been tainted by bad faith, the expelled member may succeed in an action for "conspiracy to injure". Although it has been held that a breach of contract may be "unlawful means" for the purpose of liability in tort, it is unlikely that a union member expelled in breach of contract will be permitted to sue for unlawful interference with his trade or employment by alleging the union's breach of contract as "unlawful means". In certain fact situations, the torts of defamation and malicious falsehood may be applicable, but this need not be pursued further.

364 See chapter XXIV, section A, post.
365 Henderson v Kane [1924] N.Z.L.R. 1073. However, the tort would be available in the Orchard v Tunney (1957) 8 D.L.R. (2d) 273 situation.
367 Rooke v Barnard [1964] A.C. 1129. See the discussion of this case in chapter XIX, section B, post.
Established heads of liability apart, is there a tort of wrongful expulsion? It can be argued that in this country membership of an industrial union confers a "status" involving more than the rights and duties which flow from the contract of union membership. A wrongful interference with that status, with its consequential interference with employment opportunities, is therefore not merely a breach of contract; it is a tort. This was the reasoning of Hosking J. in Gould v Wellington Waterside Workers' I.U.W., and there is some support for such a view in Flowers v Wellington Wharf Labourers' I.U.W. In England, on the other hand, it appears to be settled that wrongful expulsion can only be a breach of contract, not a tort - although it may well have been the statutory immunity accorded trade unions in tort, rather than any real abstention on the part of the common law, which produced this result.

In Orchard v Tunney, the Supreme Court of Canada rejected the idea that union membership conferred a status, and affirmed the essentially contractual nature of the relationship. However, the majority of the Court were

371 Trade Disputes Act 1906 (U.K.), s.4(1).
prepared to hold that the defendant union officials had interfered with the plaintiff's *contractual* rights of membership, including that of working within the union's closed shop. Such an intentional infringement of his rights gave rise to an action in tort for damages on the principle of *Ashby v White*.\(^{373}\) *Orchard v Tunney* involved somewhat special facts. The defendants, union officials who had purported to expel the plaintiff, had totally exceeded their powers, and their acts were not ratified by the membership. As a result, there was no breach of the plaintiff's contract with the majority of members (or "the union").\(^{374}\) The case therefore provides a tortious remedy where the union cannot be made liable in contract\(^ {375}\) - although it would appear to have been possible to sue those defendants who were union members for their own personal breaches of contract. In the normal case, where the expulsion does result in a breach of contract with the union, it is arguable that the *Orchard v Tunney* cause of action is not appropriate, as the primary source of liability can only be contractual.

\(^{373}\) (1703) 2 *Ld. Raym.* 938.

\(^{374}\) The union involved was not a legal entity.

\(^{375}\) The tort established closely resembles the tort of interference with contractual relations, which was presumably thought inapplicable because there was no breach of contract between the plaintiff and "the union". However, it is arguable that the defendants' actions did amount to an actionable interference with contract, in spite of the absence of any breach of contract. See chapter XVIII, section B, post.
The rejection of the status concept in Orchard v Tunney, and the English authorities referred to, can no doubt be distinguished in this country on the basis of the quite different legislation involved. But it, and particularly Rand J.'s warning that "[t]here are few, if any, more ill-defined ideas in law than that of status", 376 may prompt the question whether a concept of status is really necessary in this sphere. Simply to call a primarily contractual relationship a "status" adds nothing; and the fact that its content and performance are in some respects regulated by statute makes the contract of union membership no different from many modern contracts. 377 It is obvious that any tort based on wrongful interference with the so-called status of union membership could not lie where the member has been validly expelled from the union. In other words, the sole criterion of "wrongfulness" for this tort is breach of the contract of union membership. Thus what is initially a breach of contract, actionable as such, is converted into a tort merely by attaching to it the label of "status".

The significant difference between the cause of action in tort and that in contract lies in the measure of damages available. Damages in tort are usually greater, as the plaintiff's inconvenience and distress can be taken into account, even though punitive damages may not be available. 378 However, although this appears

376 (1957) 8 D.L.R. (2d) 273, 280.
377 E.g. apprenticeship contracts, moneymakers' contracts, share-milking agreements, to name but a few.
378 See chapter XXIII, section A, post.
to be an advantage - at least to the expelled member - in this context there may not be a great deal of difference in the majority of cases, for even the contractual damages for wrongful expulsion and consequent loss of employment are assessed "on a broad basis". All in all, therefore, it is open to question whether it is either necessary or correct in principle to elevate a breach of contract to the status of a tort of wrongful interference with union membership, simply by describing it as such.

E. CONCLUSIONS.

An attempt has been made in this chapter to examine the various aspects of the contractual framework of industrial union membership. Perhaps the most striking feature has been the detailed provision which the Act makes in respect of the content of the rules and certain matters of internal management, by comparison with the absence of statutory regulation with regard to discipline of union members - an absence which is total except insofar as control may possibly be exercised over "unreasonable or oppressive" rules under s.70 of the Act. In a country where statutory regulation of trade unions and industrial relations is the rule rather than the exception, this absence of provision in respect of union discipline is noteworthy, especially in view of the measures which other common law jurisdictions have

found necessary.\textsuperscript{380}

The explanation for this phenomenon may well lie in the highly pragmatic way in which much of the Act has been built up. Controls have been introduced only when public concern has demonstrated the need for them. This was true of both election and accounting procedures, the two most highly regulated areas of industrial union management.\textsuperscript{381} Expulsion from industrial unions, on the other hand, seems to have remained a non-issue. Not only have the strong feelings and factionism which are the source of so many expulsions generally been absent from trade union politics in this country,\textsuperscript{382} but it appears from an examination of a selection of industrial union rule-books that the majority of unions have not even taken a power of expulsion under their rules. Certainly many possess a power to fine for various offences, but the maximum amount of the fine is usually low. Fines, too, are less likely to give rise to litigation than the more severe forms of punishment, unless the member refuses to pay and is subsequently expelled for being in arrears. This is not to say, however, that expulsions are entirely absent from the present industrial scene. A recent

\textsuperscript{380} E.g., America (Labor-Management Reporting and Disclosure Act 1959, as to which see (1969) 82 Harvard L.R. 727); England (Industrial Relations Act 1971, s.65 and Schedule 4); Australia (Conciliation and Arbitration Act 1904-1970 (Commonwealth), ss. 140, 141).

\textsuperscript{381} For the historical background to the reform of these two areas, see Woods, Industrial Conciliation and Arbitration in New Zealand, 177-8, 191.

\textsuperscript{382} The Australian cases on union discipline provide a striking contrast in this respect, as a glance through that country's Federal Law Reports will reveal.
example was the February 1972 dispute over the presence of pool tables in Auckland hotel bars, which provides a perfect illustration of how not to carry out an expulsion. In that case some forty barmen who had refused to go on strike were excluded from a Hotel Workers' Union meeting, which then proceeded to expel them in their absence. Called upon to justify this, the union could not even produce a rule-book at first, and then was unable to find a rule on which to base its actions. It was wisely decided to treat the expulsions as ineffective.\textsuperscript{383}

Whatever the explanation for the present blend of statute and common law, it is clear that the imposition of statutory standards in respect of the content of industrial union rules has eliminated many, if not most, of the problems which sprang from the inadequacy of the common law in the face of harsh or unreasonable rules. In the field of internal management of industrial unions, too, a fairly satisfactory overall balance has been achieved by the doctrine of "excusable irregularities". This has been supplemented by statutory regulation of certain important areas, and apart from the general objections which will be made shortly, there appear to be no substantial problems here.

All is not well, however, with the law governing disciplinary action by trade unions, where the common law has been left entirely to its own devices. Although it is arguable that in some cases the courts exercise an effectively wider jurisdiction, in theory they are, as has

\textsuperscript{383} See \textit{The Auckland Star}, 21 to 23 February 1972.
been seen, limited to procedural matters, and to matters of construction. Their powers of review of the facts are accordingly very limited. It follows that the merits of an expulsion decision are not subject to investigation by the courts. Lord Lloyd has criticised the abstention of the common law from this field. In his view: "If a man can go to the courts on a claim to recover a debt of five shillings and have it fully investigated, why should he not be entitled to the same consideration when a sentence of economic death has been inflicted upon him?"384 But while the courts can be validly criticised in this way for refraining from deciding the real issues raised by expulsion cases, it is debatable whether they are really capable of carrying out such a task, if only by reason of the attitudes imbued by their long tradition of protecting the interests of the individual in preference to those of the group. These difficulties will be greatly increased in cases involving "ethical" offences. Of course, as Lord Lloyd has pointed out,385 the unions equally disqualify themselves by reason of their inevitable leaning in favour of the group. In fact, neither the court nor the unions are ideally suited to making a final determination of the merits of an expulsion decision, and some alternative solution would appear to be preferable.

385 Ibid.
A number of lesser criticisms can also be made of the present law governing expulsions. The judge-made concept of natural justice, with all its emerging uncertainties, is too vague to provide a satisfactory guide for the laymen who have to conduct disciplinary proceedings. The strictness with which the courts have treated purely technical irregularities in expulsions represents a draconian approach which does not always accord with the justice of the case - *Bonsor v Musicians' Union*\(^\text{386}\) being the outstanding example in this respect. In addition, the present law dealing with the exercise of internal appeals by union members appears to be designed to make the provision and pursuit of appeal rights a legally meaningless exercise, for the union at least. Again, from the individual member's point of view - and this applies to disputes over internal management as well as over disciplinary matters - the remedies which the common law gives him may well be too inaccessible and too expensive to be of much practical use.

These criticisms do not, it is submitted, necessarily result in the rejection of the contract of union membership as the basis of the union/member relationship. As a peg on which to hang the legal framework of union membership, it has been shown to be more appropriate than such alternative concepts as property, status, and tort. Overall, contract has in the writer's opinion proved satisfactory, if only because in the case of industrial

\(\text{386} \ [1956] \text{A.C. 104.}\)
unions it has been reinforced by statute at its weakest points. But although the contractual framework remains conceptually satisfactory, there is a need for more clearly defined, but informal, disciplinary procedures, and for more practical and flexible remedies.

Disciplinary procedures could quite simply be clarified and improved by requiring union rules to contain a codified and simplified form of natural justice. The provision of satisfactory alternative remedies is a more difficult matter. Obviously the person or body to whom recourse would be had must be capable of taking a realistic approach to internal union disputes. There must be the realisation that, in the words of an Australian judge, "the game as played ... in this specialized field is somewhat more robust than one would associate, for instance, with that played in the Ladies Softball Association". 387

In Australia, s.141 of the Conciliation and Arbitration Act 1904-1970 empowers the Industrial Court, upon complaint by a union member, to make an order giving directions for the observance of any of the rules of a registered union by any person who is under an obligation to observe those rules. The person against whom the order is sought must be given an opportunity to be heard, and failure to comply with

387 Per Dunphy J. in Cameron v Davis (1960) 1 F.L.R. 413, 431.
an order made under the section is a criminal offence punishable by a fine. \(^{388}\) This cuts across the rule in *Foss v Harbottle* and allows an individual member to sue in respect of matters under the control of the majority, \(^{389}\) although, being discretionary, it will no doubt be refused when only technical irregularities are involved. The section applies equally to disciplinary action against union members, but it has not been interpreted as permitting the Court to deal with the merits of the action taken. \(^{390}\) Damages cannot be awarded under s.141, but the common law right of action remains.

This provision, in conjunction with the Industrial Court's power to disallow oppressive or unreasonable rules under s.140 of the Conciliation and Arbitration Act, seems to have worked reasonably well in Australia, and the vast majority of cases have been brought under it rather in the ordinary courts. There is an obvious advantage in having these matters handled by a body which is accustomed to dealing with trade union affairs and industrial matters generally. The reposal of a similar jurisdiction in the Court of Arbitration would fit in well with the scheme of things in this country and,

\(^{388}\) For detailed discussion, see Foenander, op. cit., ch.8; Portus, op. cit., 191-4.

\(^{389}\) See *Barrett v Opitz* (1945) 70 C.L.R. 141, 165.

\(^{390}\) See *Australian Workers' Union v Bowen* (1948) 77 C.L.R. 601, 634 especially.
although there is no demonstrated need for more than occasional intervention in the affairs of industrial unions, would provide an additional safeguard for the membership rights of individual unionists.

A more radical alternative which would represent a complete departure from the concept of supervision by court proceedings would be the creation of a kind of "union ombudsman", with power to investigate informally allegations of breach of union rules (including the merits of individual cases) and to recommend (not order) action where necessary. Union members would be required to complain to this official before taking other legal action, and an appeal could lie from his decision to the Court of Arbitration. The Registrar of Industrial Unions would be the obvious person to carry out these functions.

Any moves along these lines would almost certainly be opposed by the trade unions, which are likely to resent any measure which might appear to reduce their autonomy. Today, however, trade unions must be treated - and, indeed, are in fact treated - as having emerged from the chrysalis of private association with which the common law originally enveloped them, to stand as social organisms of considerable importance, in the democratic running of which the public, as well as the individual members, have an interest.
CHAPTER VIII

TRADE UNIONS AND EXTERNAL CONTRACT
By comparison with the contract of union membership, few problems arise with the external contractual relations of trade unions. It is proposed first to outline the general principles applicable where a union contracts with an "outsider". The writer will then briefly discuss the legal status of the "collective agreement", which raises contractual problems of a special nature.  

1 Another special problem formerly of some importance involves the contractual aspects of a trade union's relationship with applicants for membership. The courts have waivered between treating trade unions as simply private associations which have power to exclude applicants as they wish (see Wellington Waterside Workers' I.U.W. v Hargreaves [1934] N.Z.L.R. 795), and manipulating contractual principles so as to provide the applicant with some safeguards against arbitrary refusal of admission. The device of spelling out a contract from the application for membership itself was rejected as an unnecessary fiction in Nagle v Fielden [1966] 2 Q.B. 633. A more robust approach in this country was to hold that an applicant in person who complies with the rules as to admission thereby becomes a member in spite of his rejection by the union (see Flowers v Wellington Wharf Labourers' I.U.W. (1911) 13 G.L.R. 453; Gillard v McFarlane [1930] N.Z.L.R. 258. For a similar English decision, see Woodford v Smith [1970] 1 W.L.R. 806. Cf. Hargreave's case, supra; Batt v Napier Waterside Workers' I.U.W. [1934] N.Z.L.R. 993, where the particular admission rules were not complied with). However, this approach does considerable violence to the basic contractual principles of offer and acceptance. More recently, in Nagle v Fielden, supra, an attempt was made to avoid the pitfalls of basing the court's jurisdiction in contract, by propounding a "right to work". In any event, this once live issue has now been defused by the provision of statutory rights to admission - in this country, by s.174H of the Act, and in England, by s.65(2) of the Industrial Relations Act 1971.
A. GENERAL PRINCIPLES.

Subject to i) the provisions of the Act,\(^2\) ii) the limitations imposed by the doctrine of ultra vires,\(^3\) and iii) any special provisions in the union rule-book,\(^4\) an industrial union has as a body corporate full capacity to enter into binding contracts. The difficulties of enforcement which resulted from the application to trade unions in England of the doctrine of restraint of trade and s.4 of the Trade Union Act 1871 (U.K.)\(^5\) have been shown not to exist in the case of industrial unions in this country.\(^6\)

Whether contracts entered into by industrial unions must be in any particular form is, somewhat surprisingly, less certain. By s.66(d) of the Act, the rules of an industrial union must provide for the mode in which industrial agreements and "any other instruments" shall be executed on its behalf. "Instrument" is not defined in the Act, but s.83 would seem to indicate that it refers to formal, written documents, such as deeds. Are industrial union contracts which do not involve

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2 E.g., s.81, which limits the amount of land which an industrial union may purchase or take on lease to five acres.
3 For the principles governing contracts which are entered into ultra vires the union, see chapter IX, post.
5 Quoted in chapter VI, ante.
6 See chapter VII, section B, ante.
"instruments" required to be in any particular form? By contrast with the legislation governing incorporated societies and trading companies, the Act contains no provision as to the formalities of contracts entered into with industrial unions. This omission is important, since at common law the contracts of bodies corporate must be made under seal - subject to certain exceptions, in particular contracts involving day-to-day matters. This would appear to leave many industrial union contracts in an uncertain and anomalous position, unless it can be argued that (as Shorland J. seems to have assumed in Progress Advertising (N.Z.) Ltd. v Auckland Licensed Victuallers' I.U.E.) a rule entrusting the management of the union to its executive or its secretary is of itself sufficient to empower them to make contracts without seal.

By reason of the fact that a union can only contract through agents - its officials - it is necessary, for a contract to be valid, that it be concluded with someone having authority to bind the union. A union official will bind the union if he enters into a contract while

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7 Incorporated Societies Act 1908, s.15.
8 Companies Act 1955, s.42.
11 One might also argue that s.83 of the Act, which permits "deeds and instruments" to be executed under the seal of the union, is an "expressio unius" which excludes the need for a seal with other types of contract.
12 For detailed discussion of the parallel problem in company law, see Gower, op. cit., 150-69.
acting within his **actual** authority, express or implied, under the rules. He will also bind the union even when he exceeds his actual authority, if he is acting within his **apparent** (or ostensible) authority. This latter proposition requires some elaboration. In general, an agent will be acting within his apparent authority i) if he is permitted to act in a certain capacity (e.g. trade union secretary) and does an act which is within the scope of the authority usually possessed by persons acting in that capacity; and ii) if he is "held out" by his principal as having a particular authority. In both cases the agent will bind his principal, despite the fact that he has no actual authority, unless the other party knew of the absence of authority or the circumstances were such as to put him on inquiry. This basic rule is however, subject to a special qualification in the case of companies. Persons dealing with a company are deemed to have notice of the company's registered documents. If these show that the agent has no actual authority, he will not bind the company even when he acts within his apparent authority.

These propositions are illustrated by Progress Advertising (N.Z.) Ltd. v Auckland Licensed Victuallers' I.U.E.,¹³ where the company law principle of constructive notice was extended to the rules of an industrial union, on the grounds that they, too, are registered and available to the public. The plaintiff company had entered into a

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¹³ Supra.
contract with the defendant union of employers, through the union's President. The President had no actual authority to make such a contract, and the union repudiated it. The plaintiff's suit for breach of contract failed. Shorland J. held that the plaintiff could not rely on any apparent authority possessed by the President, for it was fixed with constructive knowledge of the defendant's rules and thus of the President's lack of authority. Furthermore, the concluding of contracts was (his Honour held) not a function usually performed by a union president,\(^{14}\) nor had the union held out its President as having authority in this particular case, so that no apparent authority existed in any event. In addition, as its managing-director knew that negotiation of the contract had previously been entrusted to the President and the Secretary jointly, this ought to have put the plaintiff on inquiry.

The rule that a union official can have no apparent or actual authority when this would be inconsistent with the registered rules has its converse. Where there is no inconsistency with the registered rules, the normal rule of agency applies, and the party dealing with the union can rely on the apparent authority of the person with whom he deals. In addition, under the company law rule in *Turquand's case*,\(^{15}\) the other party is entitled

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\(^{14}\) It was more likely, his Honour thought, to be one of the functions of a union secretary. See also Wellington Wharf Labourers' I.U.W. v B.N.Z. (1914) 33 N.Z.L.R. 842, 844.

\(^{15}\) *Royal British Bank v Turquand* (1856) 6 El. & Bl. 327.
to assume that matters of internal management authorised by the union's rules have been complied with. He need not therefore inquire whether an authority which could have been given has in fact been given. However, he cannot rely on this principle unless he had actual as distinct from constructive knowledge of the rules in question,¹⁶ and was not put on inquiry as to the actual authority of the person with whom he dealt.

A contract entered into in excess of the authority of the person making it (but intra vires the union) is merely voidable, and can be ratified by the union.¹⁷

B. COLLECTIVE AGREEMENTS.

A collective agreement can be loosely defined as an agreement between a trade union (or unions) and one or more employers, regulating conditions of employment. The term "collective agreement" is here used in contradistinction to awards and industrial agreements, which have enforceability and a special legal status under the Industrial Conciliation and Arbitration Act.¹⁸ While the collective agreement has

¹⁶ Rama Corporation Ltd. v Proved Tin & General Investments Ltd. [1952] 2 Q.B. 147.
¹⁷ Progress Advertising (N.Z.) Ltd. v Auckland Licensed Victuallers' I.U.E., supra, 1210.
¹⁸ In the same category are agreements registered under s.8 of the Labour Disputes Investigation Act 1913.
long been the traditional method of regulating industrial relations in Britain, it is only recently that it has assumed real importance in this country. In New Zealand, collective agreements may result from the parties resorting to "free" collective bargaining independently of the conciliation and arbitration system. They may also occur when the parties agree to special conditions over and above those contained in their award or industrial agreement - what are often called "ruling rate" or "house" agreements. In addition to these relatively formal kinds of agreements, it is clear that there takes place in this country a certain amount of "fractional" or "workplace" bargaining of the kind described in the Donovan Report, although undoubtedly of a less widespread nature than in England. This type of informal agreement tends to merge imperceptibly into custom and practice, and proof of its terms may well raise difficulties.

It is of some importance, therefore, to ascertain whether these various kinds of collective agreements are legally enforceable. In the first place, it is clear

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19 See e.g. The Donovan Report, chapters III, IV, V. The Industrial Relations Act 1971 (U.K.) has changed this emphasis completely.

20 See chapter III, section C, ante.

21 They can do this because awards and industrial agreements set minimum and not maximum conditions of employment.

22 The Donovan Report, 18-9, 36-7.

that the statutory enforcement provisions are not available in respect of unregistered collective agreements. The possibility remains that a collective agreement may amount to a binding contract between the parties.

It is essential to distinguish the contractual effect of collective agreements from what Kahn-Freund has called their "normative" aspect; that is, their possible operation as express or implied terms in the contract of employment of the individual worker. The former problem hinges upon one crucial issue: whether the parties intend to enter into binding contractual relations. In England, the vast weight of academic opinion states that at common law collective agreements are usually not intended by the parties to be legally binding, and are therefore


27 In England, the position was formerly complicated by the now repealed s.4(4) of the Trade Union Act 1871 (U.K.), which rendered unenforceable agreements between a trade union and a "trade union" of employers. As seen in chapter VII, section B, ante, the equivalent section of the Trade Unions Act 1908 does not apply to industrial unions. The collective agreement itself also must not offend against the doctrine of restraint of trade. It is submitted that it is most unlikely, under modern conditions, that a collective agreement would be held to be an unreasonable restraint upon trade.
not contracts. \textsuperscript{28} So far as it is possible to generalize, these contentions have been born out by a recent case, \textit{Ford Motor Co. v Amalgamated Union of Engineering and Foundry Workers.} \textsuperscript{29}

In that case, the Ford Company, the plaintiff, had entered at different times into three collective agreements with the unions representing their employees. Trouble had arisen with some of the unions over the terms of the most recent of the agreements, and an official strike had been proclaimed. The company had obtained an \textit{ex parte} injunction requiring the striking unions to obey the agreements, and to stop the strike. In these proceedings the company was applying for continuance of the interim injunction pending trial of the action. It was argued for the company that the agreements were commercial contracts, relating as they did to wages and conditions of employment, and therefore binding. The unions contended that the agreements were intended to be binding "in honour only". They pointed to a background of industrial opinion adverse to the plaintiff's claim, and also to the "vague aspirational wording" of many of the clauses, as showing that neither party intended to be bound.

The judge, Geoffrey Lane J., first distinguished between two categories of case - commercial contracts, which are obviously intended to be legally binding, and

\begin{itemize}
\item \textsuperscript{28} See e.g. Professor Kahn-Freund in Flanders & Clegg (eds.) \textit{The System of Industrial Relations in Great Britain} (1954), 56-8; Grunfeld, op. cit., 136; \textit{The Donovan Report}, 125-7; Wedderburn, op. cit., 171-80. Cf. Cronin & Grime, op. cit., 315-63. For the present English position, see footnote 43, post.
\item \textsuperscript{29} [1969] 2 Q.B. 303.
\end{itemize}
social or domestic arrangements, which are not. He concluded that the present case did not come directly within either category. His Lordship then reviewed the small amount of case-law on this question, but found the conflicting dicta did not provide a great deal of assistance. There being no express provision in the agreements, nor any other direct evidence, to show the intentions of the parties, his Lordship turned to an examination of the surrounding circumstances; in particular, the subject-matter of the agreements, their wording, the type of people who negotiated them, and the "general state of opinion" contained in sources available to these people, which might "shape their opinions, and, more importantly, shape their intentions when making these agreements". He concluded from an examination of all these circumstances that:

"...[t]he fact the agreements prima facie deal with commercial relationships is outweighed by the other considerations, by the wording of the agreements, by the nature of the agreements, and by the climate of opinion voiced and evidenced by the extra-judicial authorities. Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement, and reached against a background of opinion adverse to enforceability, are in my judgment, not contracts in the legal sense and are not enforceable at law."

31 Ibid, 324.
34 Ibid, 330-1.
As a result, the relief sought was refused.

This reasoning has been criticised as a misapplication of the "intention to contract" test, which is, or should be, an objective test.\textsuperscript{35} The same critics have also pointed out that the "sources of opinion" published subsequent to 1955 (when the first agreement was concluded), which formed the majority of those considered by Geoffrey Lane J., must in strict law be irrelevant to the issue of the intentions of the parties, at least in regard to the 1955 agreement. (Intention must of course be ascertained as at the time the agreement was entered into.) In spite of a judicial disclaimer,\textsuperscript{36} the \textit{Ford Motor Co.} decision must be considered as ultimately a policy decision, not expressed as such (for that would never do), but reached by the indirect method of permitting the industrial relations aspects of the problem to determine the intentions of the parties. This is an eminently sensible and realistic approach in a contentious area, whatever the academics may say.

Insofar as the \textit{Ford Motor Co.} case shows that the paramount question is the intention of the parties in each case, and that the court can utilize what limited material it has at its disposal in order to reach a conclusion on this issue, it is submitted that it demonstrates the approach to the problem which must be adopted at common law in this country. What conclusions, if any, can be reached on this issue in New Zealand's fundamentally different climate of industrial relations?

\textsuperscript{35} Selwyn, loc. cit.; Cronin & Grime, op. cit., 357-63.

\textsuperscript{36} [1969] 2 Q.B. 303, 321.
The few New Zealand authorities which exist are far from conclusive. In none of them has the question of the intention of the parties to make an enforceable contract, as distinct from an agreement binding in honour only, been squarely raised. In *Beattie, Coster & Co. v Duncan*\(^37\) an unregistered miners' union entered into a collective agreement with certain mine owners. The plaintiff, a member of the union, sued his employer, one of the mine-owners, to recover additional wages at the retroactively higher rate stipulated in the agreement, claiming that this was implied into his contract of employment.

Hosking J., however, decided the case on the ground that the agreement itself was legally binding, and that the plaintiff could sue as one of the parties to it. Extrinsic evidence was admissible to show that the union name in the agreement was intended to designate the individual members of the union, and that the plaintiff was a member. The intention of the parties to avert a serious stoppage by means of the agreement was apparently equated with an intention to make a binding contract.\(^38\)

The case raises the interesting question: who are the parties to a collective agreement? Up till this point it has been assumed that a trade union acts as principal, and not as agent for its members. The little

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\(^{37}\) [1922] *N.Z.L.R.* 1220. For somewhat similar cases, see *Griffiths v Dominion Compressed Yeast Co.* (1922) 17 *M.C.R.* 84; *Edwards v Skyways Ltd.* [1964] 1 *All E.R.* 494.

\(^{38}\) See [1922] *N.Z.L.R.* 1220, 1226.
case-law that exists tends to confirm this.\(^{39}\) It has been said that "any other view would lead to insoluble difficulties" in respect of members who voted against the agreement, or who joined the union after the agreement had been concluded.\(^{40}\) In this country, where unions almost invariably have corporate status, it seems highly likely that a union, in entering into a collective agreement, generally acts as principal - as is the case with the concluding of awards and industrial agreements. This approach is, however, more difficult where the union has no separate legal personality, and for this reason the decision in \textit{Beattie, Coster & Co. v Duncan}, which adopts the agency approach, cannot be treated as authority applicable to industrial unions.

The only other authority in favour of a binding contract is \textit{Miller v Collett},\(^{41}\) where Edwards J. treated an unregistered agreement between a union and several employers as unquestionably being a binding contract. But, once again, the contrary does not seem to have been argued. Nor was the status of the agreement necessary for the decision in that case.


\(^{41}\) (1913) 32 N.Z.L.R. 994, 1000, 1012.
On the few occasions on which the question has arisen before it, the Court of Arbitration appears to have taken the attitude that "at common law an agreement entered into by a trade union, relating to conditions of employment, is unenforceable." However, if the expression "at common law" is intended to refer to the operation of the doctrine of restraint of trade, this reasoning cannot be upheld, in view of the inapplicability of the doctrine to industrial unions. The dicta in the Court of Arbitration are unsupported by other reasons, in particular by any reference to the intentions of the parties.

The case-law in this country cannot therefore be said to be of any great assistance. In the absence of direct evidence of the parties' intentions, it might be argued that the fact that the parties to a collective agreement chose not to use the statutory enforcement provisions shows that they did not intend their agreement to be legally binding. But it could equally be urged in rebuttal that the agreement was left unregistered for some other reason, e.g., because it was a "ruling rate" variation of a current award or industrial agreement, but was nevertheless intended to be binding.

If we follow the approach taken by the Ford Motor Co. case, and examine the "sources of opinion" available to the parties,

42 Pukemiro Collieries Ltd. v Pukemiro Miners' Union [1928] N.Z.L.R. 385, 390, per Judge Frazer. See also Anderson v Georgeson [1935] G.L.R. 238, 241; In re N.Z. Fire Brigades Officers' I.U.W. Award (1965) 65 Bk. Aw. 1496. For the sake of completeness, Williamson v Musicians' Union (1912) 15 C.L.R. 636 (in favour of a contract); Australian Agricultural Co. v Federated Engine Drivers' Union (1913) 17 C.L.R. 261; and Young v Canadian Northern Railway [1931] A.C. 83, 89 (both arguably against a binding contract) should be mentioned.
there seem to be none in this country of the weight of those considered in that case. The Court of Arbitration's view that collective agreements are not legally binding may well be the only direct "source of opinion" which could have affected the parties. On the other hand, a general background of acceptance of the use of the law in industrial relations could be pointed to in support of the existence of a contract.

It can be seen that there are no strong indications either for or against collective agreements being binding contracts in this country. It is moreover, impossible to generalise, inasmuch as the issue depends in principle on the intentions of the parties in each particular case. As a matter of policy, however, it is submitted that enforcement of collective agreements by action for breach of contract will in most cases be inappropriate, and a task for which the ordinary courts are ill-equipped. It may be thought necessary, therefore, to settle the question of their enforceability by some statutory provision.43

There have been too few cases in this area for any attempt to be made to assess the part played by the common law. It is obvious, however, that as with the law of tort,44 the law of contract can play no positive role in industrial relations or the solving of industrial disputes. The

43 The Industrial Relations Act 1971 (U.K.), s.34 provides that collective agreements, in writing, are conclusively presumed to be intended as enforceable contracts, in the absence of express provision therein to the contrary. This presumption is, however, backed by new methods of enforcing these agreements (s.36), which oust the jurisdiction of the ordinary courts (see s.129).

44 See chapter XXIV, section A, post.
decision in the Ford Motor Co. case to abstain from interfering was therefore, at best, a negative achievement of the common law.
PART THREE

TRADE UNIONS AND THE DOCTRINE OF ULTRA VIRES
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.

- Dylan Thomas

*In My Craft or Sullen Art*
CHAPTER IX

INTRODUCTION
By a process of development which will be traced in the succeeding chapters, it appears now to be settled that the legal powers of trade unions are subject to certain fundamental limitations over and above those which the law imposes on all persons generally. These limitations on the legal capacity of trade unions and certain other bodies—commonly known as the doctrine of ultra vires—were evolved in the nineteenth century in respect of two sorts of body corporate: the statutory corporation, and the trading company. The statutory corporation was held to be limited to the purposes set down in the statute which brought it into being; and the trading company was held to be restricted to pursuing the objects specified in the memorandum of association required as a part of its registration under the successive English and New Zealand Companies Acts.

Historically, therefore, there are two separate strands of the ultra vires doctrine, the one applying to statutory corporations, and the other to registered trading companies. However, in the case of trade unions registered under the Trade Union Act 1871 (U.K.) and, later, under our Industrial Conciliation and

1 For a history of the doctrine, see Brice on Ultra Vires (2nd ed. 1877), passim.


3 Ashbury Railway Carriage & Iron Co. v Riche (1875) L.R. 7 H.L. 653.
Arbitration Acts, the courts, faced with these two distinct strands, chose to apply not one, but both - in effect giving trade unions the worst of both worlds. In fact, it is open to serious question whether it was appropriate to extend either aspect of the doctrine of ultra vires to limit the powers of trade unions. The trade union powers which the ultra vires doctrine as applied to statutory corporations sought to limit were - unlike the case of the statutory corporation itself - not powers specifically granted to trade unions upon registration under statute, but powers which they had traditionally exercised independently of registration. Furthermore, the original rationale of the doctrine of ultra vires as applied to trading companies, which was the protection of the possibly large sums of money which shareholders and creditors of the company had risked on the understanding that it would be applied only for certain named purposes, did not hold true for the trade union. Trade unions do not engage in commercial activity to any significant extent; and the motivation - historically at least - for a worker's joining a trade union was surely not approval of a short list of specified objects (as might be said of an investor in a trading company), but rather a desire to advance his and his fellow workers' living standards in a general and unspecified way.

4 See Gower, op. cit., 83-5.
Despite these theoretical objections, both facets of the doctrine of ultra vires have been applied to trade unions in their full rigour. The actions of a trade union can therefore be either "ultra vires the statute" (corresponding to the doctrine as applied to statutory corporations), or "ultra vires the rules" (by analogy with the doctrine as applied to trading companies). The ultra vires the rules doctrine, which gives rise to few problems of a legal nature, will be dealt with in the following chapter. Chapter XI contains a necessarily detailed analysis of the ultra vires the statute doctrine, and its application to industrial unions in particular. The remedies available when a trade union acts ultra vires are discussed in chapter XII. In chapter XIII, an attempt is made to outline the effect of the ultra vires the statute doctrine on certain common activities of industrial unions, while chapter XIV contains some concluding remarks and suggestions for reform.

The application of the doctrine of ultra vires to trade unions has the result that, by company law analogy, all transactions, and particularly contracts, entered into ultra vires a union are legally nullities. They cannot create rights and duties, nor can they be

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5 Cf. the quite distinct principles of the law of agency discussed in chapter VIII, section A, ante, which in conjunction with the rules determine the powers and authority not of the union, but of union officials. The term ultra vires is sometimes used, perhaps inappropriately, in this connection also.
ratified, even by a unanimous vote of all union members.  A contract entered into ultra vires a trade union will therefore be void and unenforceable against it, whether the person dealing with the union was aware of its lack of power or not.  This principle operates not only to invalidate contracts with outsiders which are entered into ultra vires, but it can also apply to contracts of union membership. Thus the admission of an applicant for union membership to a class of membership which is not provided for in the union's rules (such as "temporary membership"), or the admission to membership of one who is not eligible to become a member, will, it appears, amount to an ultra vires contract which will be invalid irrespective

6 Ashbury Railway & Iron Co. v Riche, supra. For the application of the doctrine of ultra vires to torts committed by trade unions, see chapter V, footnote 29 ante.

7 The contract is probably also unenforceable by the union against the other party to it. See the discussion and authorities cited in Gower, op. cit., 96.

8 Martin v S.T.G.W.U. [1952] 1 All E.R. 691.

9 Bielski v Oliver (1958) 1 F.L.R. 258.
of any apparent waiver or estoppel on the part of the union. The legal remedies open when a contract or other transaction is found to have been entered into ultra vires will no doubt be similar to those available to and against a trading company.

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10 This approach is open to criticism on the grounds of the obvious injustice it is liable to cause, especially when the invalid membership has been acted upon for some time (as in Martin's case, supra). Cases of this nature are unlikely to arise frequently, however, as this reasoning does not, it is submitted, apply to mere procedural irregularities in the admission of properly qualified applicants to full membership, since the rules in question will generally be directory only. See Flowers v Wellington Wharf Labourers' I.U.W. (1911) 13 G.L.R. 453; Federated Seamen's Union v Belfast Steam Navigation Co. (1918) 24 C.L.R. 462; Auckland Local Bodies Labourers' I.U.W. v Kronast (1924) 19 M.C.R. 81; Dominion Mercantile Agency v Webber (1928) 23 M.C.R. 144; Auckland Milkroundsmen's I.U.W. v Rutledge (1948) 43 M.C.R. 97. Cf. United Grocers' Union v Linaker (1916) 22 C.L.R. 176.

CHAPTER X

ULTRA VIRES THE RULES
The rules of trade unions almost invariably set out - as those of industrial unions are required to do under s.66 of the Act - a number of objects or purposes for which the union is formed. This list of objects forms part of the contract of union membership, and it has been settled at least since Yorkshire Miners' Association v Howden,¹ where the House of Lords restrained the defendant union from paying strike pay to members in contravention of its rules, that unions are required to keep within the limits of their named objects.

Whether or not a proposed course of action (or expenditure) which is not expressly permitted by the rules is ultra vires a trade union has been said to depend on whether it is reasonably or fairly incidental to the objects of the union.² However, in the leading New Zealand case of Wellington Amalgamated Watersiders' I.U.W. v Wall,³ the narrow limits of this approach were emphasised by North J., who said, delivering the judgment of the Court of Appeal:⁴

1 [1905]A.C. 256. For similar cases, see In re Durham Miners' Association; Watson v Cann (1900) 17 T.L.R. 39; Astley v Electrical Trades Union (1951) 95 Sol. Jo. 744.


4 Ibid, 782.
"[I]t requires to be made quite clear that the whole stream of authority shows that the word 'incidental' used in this connection means no more than that an expenditure may lawfully be incurred if it can be justified as a reasonable implication from the language of the constating instrument."

It was, however, accepted that the objects rule should receive a liberal rather than a restrictive construction.  

It is obvious that the more general the language used in framing the objects and powers of the union, the less likely it is that the particular activity or expenditure will fall outside its scope. As a result, union objects are usually framed in general terms. Wellington Amalgamated Watersiders' I.U.W. v Wall is one case where the objects of the union were held to be insufficiently wide to cover the action undertaken. There Wall, a union member, sued for an order directing repayment of money paid by the union to two of its members for the purpose of meeting part of the damages awarded against them in a libel suit. The two members, the union's representatives on the Wellington Trades Council, had

5 Ibid. See also Stevens v Keogh (1946) 72 C.L.R. 1, 22.
6 Care must be taken, of course, to ensure that the ultra vires the statute doctrine is not thereby infringed.
7 See, for example, the objects rule in Wellington Waterside Workers' I.U.W. v Hargreaves [1934] N.Z.L.R. 795, 820.
8 Supra. Cf. Williams v Hursey (1959) 103 C.L.R. 30; also Stevens v Keogh, supra; Hill v Archbold, supra.
along with other members of that council issued a report defamatory of one Neary, who successfully sued them in respect of it. A majority of union members had voted to assist them in paying the damages.

The union relied on paragraph (b) of its objects rule as justifying the expenditure. Paragraph (b) empowered it to "protect and further in any lawful way the interests of members (and of other workers in the industry) in relation to conditions of employment in the industry". However, the Court of Appeal held that the union, in assuming responsibility for a tort committed by its delegates on another body, could not possibly be said to be protecting or furthering members' interests in relation to conditions of employment. It was not, said North J., "sufficient for the appellants to show that in some remote or indirect way the union, in the course of time, may possibly derive some benefit from making the payment". 9 The payments were therefore ultra vires; and the plaintiff was, the Court held, entitled to an order that recipients repay the money to the union.

The ultra vires the rules doctrine, although it cuts across the trade union principle of "majority rule", probably provides a reasonable solution to the problem of balancing majority and minority members' interests. The restrictions on trade union activity which flow from the doctrine are far from unimportant, but as they depend entirely on the wording of the

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particular objects rule (and any other relevant rules), little more can usefully be said about them. Moreover, they are restrictions which are in a sense self-imposed, in that the union members as a whole have the remedy - amendment of the offending rule - in their own hands. The extent of the amendment will, however, be subject to the more serious, because permanent and irremovable, restrictions of the ultra vires the statute doctrine, to which we now turn.
CHAPTER XI

ULTRA VIRES THE STATUTE
An Act of Parliament may make provision for the voluntary registration of a particular kind of association of individuals, thereby imposing duties and conferring privileges on those associations which choose to register. When it does this, the Act will in most cases make some (but not necessarily complete) provision in respect of the activities, powers and rules of associations registered under it.

When such an association desires to undertake a particular activity, and there is in the Act under which it is registered express provision on that subject, then the legal position is quite clear. The activity, if it is not completely forbidden, can only be carried out according to the terms of the statute. If these terms are contravened, or if the activity is totally proscribed, then the association cannot undertake the activity, or pass a rule to that effect, without exceeding its powers.

When, on the other hand, the particular Act makes no express provision for or against the proposed activity, there would seem to be two broad ways of approaching the problem of whether the law should permit the association to indulge in the activity. First, it may be said that the association should only be permitted to do what the particular Act actually provides for, nothing more. This assumes that the Act was intended to be exhaustive in its treatment of the particular kind of association; and possibly that, for one reason or other, it is socially desirable that these associations should in fact be kept within these limits. Secondly, it may be said that the association should be permitted to do whatever its rules
allow it to do; that is, both what the particular Act makes provision for, and what it does not. This proposition should perhaps be subject to the proviso that the association should not thereby be permitted to change itself into something fundamentally different from the particular kind of association which the statute makes provision for. To put it another way, the association's predominant objects should remain those contemplated by the statute under which it has registered. This makes more or less the opposite assumptions to the first approach.

It can be seen from this theoretical analysis that there are two aspects to the doctrine of statutory limitation of powers, or ultra vires the statute doctrine, as it is usually called. One aspect arises where the regulating statute makes express provision for the proposed action, and the other involves the situation where it makes no such provision. It is now proposed to apply this analysis to trade unions, and to industrial unions in particular.

A. ACTIVITIES EXPRESSLY PROVIDED FOR IN THE GOVERNING STATUTE.

This aspect of the ultra vires the statute doctrine is fairly straightforward, in that the questions it raises are purely of statutory interpretation. As it imposes particular rather than general limitations on the scope of union activities, it is, as will be seen, of considerably less importance than the other, more far-reaching aspect of the doctrine.
Although other provisions of the Industrial Conciliation Act impose express limitations on industrial unions, problems of this nature have mainly arisen under s.66 of the Act, which, as was seen in chapter VII, ante, requires certain matters to be provided for in the rules of an industrial union. Wellington Waterside Workers' I.U.W. v Hargreaves illustrates the sort of problem which can arise under s.66. In that case, the Court of Appeal had to decide whether, in view of what is now paragraph (h) of s.66, an industrial union was entitled to limit its membership by a rule providing that admission should be subject to the consent of the union executive. Paragraph (h) states that an industrial union shall provide in its rules for "a register of members, and the mode in which and the terms on which persons shall become or cease to be members". The Court held, Ostler J. dissenting, that the particular rule was not ultra vires the power given, in that it neither contravened the terms of paragraph (h), nor was

1 E.g., s.81 of the Act, which limits the amount of land which an industrial union may purchase or take on lease to five acres, and of course the penalty provisions of the Act, which will be further discussed in section A of chapter XIII, post. See also Att-Gen v Smith [1950] N.Z.L.R. 680, reversed on appeal on different grounds [1951] N.Z.L.R. 1072; Monaghan v N.Z. Merchant Service Guild I.U.W. [1951] N.Z.L.R. 797.

inconsistent with the intentions of the Act when viewed as a whole. The invalidation of an industrial union rule as going beyond the rule-making power given was, stated Johnston J., "only justified ... if fairly inferred from the language granting the power, or if [the rule was] so foreign to the nature of the association given the power that it would render it impotent in the performance of its objects". 3

B. ACTIVITIES NOT EXPRESSLY PROVIDED FOR IN THE GOVERNING STATUTE.

It was suggested at the beginning of this chapter that where a statute which provides for registration is silent on its face concerning a particular activity, there exist in theory the two possible approaches to the problem which were outlined. Faced with this choice, how then has the law treated trade unions which register under statutes providing for their regulation? In England, with the help of amending legislation to reverse court decisions to the opposite effect, the second and less restrictive alternative governs. In Australia, although the position is complicated by varying State legislation and decisions, the courts have themselves chosen the less confining solution; at least in respect of the Australian equivalent of an industrial union. In

3 [1934] N.Z.L.R. 795, 823. This approach would appear to be equally applicable to the second aspect of the ultra vires the statute doctrine, which has, as will be seen, received a very restrictive treatment indeed. Note, however, the unfavourable application of a similar test by Lord Macnaghten in A.S.R.S. v Osborne [1910] A.C. 87, 96-7.
New Zealand alone, the restrictive first approach, laid down by court decisions at the beginning of this century and left unchanged to the present day, apart from a few patchwork amendments, holds sway. In order to discover how this came about, we must now turn from theory to history; and history, so far as this aspect of the ultra vires the statute doctrine is concerned, begins with the case of Amalgamated Society of Railway Servants v Osborne.⁴

1. Amalgamated Society of Railway Servants v Osborne.

In Amalgamated Society of Railway Servants v Osborne, Osborne, a union member, sued the appellant, a trade union registered under the now repealed Trade Union Act 1871 (U.K.), claiming a declaration that one of its rules was ultra vires and void. The rule impugned was one which provided for parliamentary representation on the union's behalf, and for compulsory levies on all union members for the financial support of such representatives. The House of Lords held that the rule was invalid, so that Osborne was entitled to his remedy.

Of the Law Lords, one, Lord Shaw of Dunfermline, held that the rule was invalid on constitutional grounds which need not concern us here; while another, Lord James of Hereford, held that the fact that the parliamentary

⁴ [1910] A.C. 87. This decision is cogently criticised on legal, historical, and social grounds by the Webbs, op. cit, 606-31.
representative was compelled to "forgo his own judgment", and "to answer the whip of the Labour Party" on all matters, meant that the payments to him could not be within the powers of the union. As he expressly disagreed with the construction of the Trade Union Act 1871 adopted by the majority, and also refrained from deciding "the constitutional question", the reasons for this holding are not completely clear.

The remaining three Law Lords all reached their decisions on the basis of the 1871 Act. They relied principally on the definition of "trade union" in that Act, as amended in 1876. The relevant part of the definition is as follows:

"The term 'trade union' means any combination, whether temporary or permanent, for regulating relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business ..."

This definition, their Lordships held, was exhaustive, and only objects within its scope were permissible. As the object of obtaining parliamentary representation was not within the definition, nor were the powers to be used in furtherance of that object "either expressly conferred or derived by reasonable implication from the provisions of

5 Ibid, 99.
7 Obviously, his decision was based on "public policy" in some form or other, but this comes very close to being part of the constitutional grounds relied on by Lord Shaw.
8 Lords Halsbury, Macnaghten, and Atkinson.
9 The definition in s.2 of our Trade Unions Act 1908 is identical, except that the more moderns terms "workers" and "employers" are used.
the Act", the rule in question was ultra vires and illegal.

Lord Macnaghten and Lord Atkinson clearly regarded the registration of a trade union as putting it in a similar position to corporations created by statute for special purposes, so that it, too, was limited to the named purposes. The Earl of Halsbury did not confine his remarks to registered trade unions. His judgment can be read as proceeding on the somewhat different grounds that the 1871 Act, which "legalized" trade unions, did so only within the limits of that Act, and in particular of the definition, so that objects outside these limits were not within the legal powers of trade unions. But although this approach would seem to mean that a trade union which had objects not within the definition would to that extent fail to be "legalized" by the 1871 Act, the legality of those other objects would, one would think, still have to be determined at common law. If the particular object was itself not in restraint of trade or otherwise unenforceable, it would surely have been valid independently of the 1871 Act. This would seem to have been the case with the political rule in question in the Osborne case (leaving aside the special constitutional problems which the rule raised). Lord Halsbury's failure to recognise this suggests that he attributed a greater effect to the 1871 Act than

10 [1910] A.C. 87, 96, per Lord Macnaghten.
merely making lawful unlawful restraints of trade.\(^{11}\) His Lordship does not, however, explain why this should be so.

It can be seen, therefore, that the real ground of decision in the Osborne case is not completely clear.\(^{12}\) The crux of the majority decision, however, was the treatment of the 1871 Act as an exhaustive, and restrictive, definition of the purposes of, at least, a registered trade union. Their Lordships' assumption - unwarranted, it may be thought - was clearly that the general law and the union's own rules were not a sufficient restraint upon the general scope of the activities of a trade union: "[t]here must be some limit";\(^{13}\) "it can hardly be suggested that [the 1871 Act] legalizes a combination for anything".\(^{14}\) However, it is at least arguable that the English Parliament, in passing the Trade Union Act 1871, intended the definition of "trade union" to be no more than a general description of a type of association,

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11 This was the view of Walsh J. in Wheatley v Federated Ironworkers' Association (1960) 60 S.R. (N.S.W.) 161, 173-4.

12 Most commentators accept that the decision extended to registered trade unions at least, the ultra vires doctrine in the form applied to statutory corporations. A different view is taken by both Menzies J. in Williams v Hursey (1959) 103 C.L.R. 30, 116, and Sykes in (1960) 33 A.L.J. 419, 421. They are of the opinion that the case decides no more than the "legalizing" point attributed to Lord Halsbury, but this is open to the objections already outlined. Lords Macnaghten and Atkinson do use the phrase "ultra vires" at several points.


14 Ibid, 83, per Lord Halsbury.
already in existence, to which it intended to grant certain privileges - in particular, freedom from the restraint of trade doctrine. Lord Shaw, although he did not join Lord James in formal dissent on this issue, put the matter this way:15

"Long before the statutes of 1871 and 1876 were enacted trade unions were things in being, the general features of which were familiar to the public mind. They were associations of men bound together by common interests for common ends. Statute did not set them up, and, speaking for myself, I have some hesitation in so construing language of statutory recognition as a definition imposing such hard and fast restrictive limits as would cramp the development and energies and destroy the natural movements of the living organism. ... I fully recognise that the introduction of matter either foreign to or subversive of the society's objects is not permissible; but I am not clear that [the obtaining of parliamentary representation] is such foreign or subversive matter."

This passage not only supports the writer's view that Osborne's case was, arguably, a wrong decision, and that the choice of a less restrictive approach than that taken was in fact open to the majority judges. It also underlines the crucial point that before the Osborne decision can properly apply to other types of associations registered under other statutes, there must exist:  

1) some form of definition contained in the particular Act, of the general type of association to be registered; and  
2) an indication, from the Act or the previous history of that class of association, that the definition is intended to be exhaustive and therefore restrictive of

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the lawful objects of such an association. It will be argued that New Zealand decisions applying the Osborne decision to industrial unions have paid insufficient regard to these two conditions.

The Osborne decision, coming unexpectedly after many years of political and other non-industrial activity by trade unions, caused in Britain an outcry as great as that which had accompanied the Taff Vale judgment, similarly followed by legislative remedial action. This was the Trade Union Act 1913 (U.K.), which permits both registered and unregistered trade unions to pursue any lawful objects authorized by their rules, provided that their principal objects remain the "statutory objects", that is, those mentioned in the statutory definition. This freedom of action is subject to provisions contained in the Act which govern expenditure on certain political objects. In England, therefore, the ultra vires the statute doctrine in its restrictive form, as laid down in Osborne's case, long ago ceased to apply to trade unions.

16 See also Wheatley v Federated Ironworkers' Association (1960) 60 S.R. (N.S.W.) 161, 177-8.

17 [1901] A.C. 426. See the discussion of this case in chapter II, section B, ante.

18 For detailed consideration of this Act, see Citrine, op. cit., 377-452. Note also the consequential amendments made by the Industrial Relations Act 1971 (U.K.), schedule 8.
2. **Amalgamated Society of Railway Servants v Osborne in New Zealand.**

In New Zealand, no equivalent to the Trade Union Act 1913 was passed; and it was not long before the courts applied the Osborne decision to industrial unions registered under the Industrial Conciliation and Arbitration Act 1908, as it then was. However, before our minds become cluttered with too much case-law, it will be convenient to examine in principle the possibility of applying Osborne’s case to industrial unions, bearing in mind the two preconditions on which that decision was seen to be based: 1) the existence in the particular statute of a definition of the general class of associations with which it deals; and 2) some indication that the definition is an exhaustive description of such associations. The starting-point in our search for these conditions is obviously the Act itself. As the parts material to this inquiry have changed little since 1913, when Osborne’s case was first extended to industrial unions, it will be more convenient to cite the relevant provisions of the present Act.

Taking possible choices in the order in which they appear in the Act, there is first the long title of the statute, which refers to "the settlement of industrial disputes by conciliation and arbitration". But this is, of course, a reference to the purposes of the Act itself, not of the industrial union; and while it may be inferred that industrial unions are to play a leading role in this process, it would be strange to assume that the legislature dealt exhaustively with the subject of industrial unions.
in the long title alone. Turning to the interpretation section, s.2, we find that "industrial union" means "an industrial union registered under this Act", which clearly does not advance matters - indeed, it may even be thought that this bespeaks a legislative intention not to define industrial union. "Industrial dispute" and "industrial matters" are also defined in s.2. But although these expressions are of crucial importance to the question of what an award or industrial agreement may contain, they do not attribute any special characteristics to an industrial union.

It is only when we come to s.53, which provides for the registration of industrial unions, that we find any distinctive qualities attributed to the industrial union. Section 53(2) enacts that:

"Subject to the provisions of this Act, any society consisting of not less than fifteen persons lawfully associated for the purpose of protecting or furthering the interests of workers engaged in any specified industry or related industries in New Zealand may be registered as an industrial union of workers under this Act."

Does this, then, satisfy the two conditions for the application of Osborne's case? It is arguable that s.53(2) does not purport to define an industrial union at all, and that it merely lists certain attributes which a society must have before it can register and by registering become an industrial union. Even if this is tantamount to saying that s.53(2) "defines" an industrial union, there is no indication

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19 See chapter III, section A, ante.
in the Act that it is intended to do so exhaustively. To put it another way, s.53(2) lists the minimum attributes which a society must have before it can register. It does not state either that a society which registers can, or that it can not, go beyond its terms. Some support for this contention can be found in s.66 of the Act, which requires the rules of every industrial union to specify the purposes for which it is formed, and also to provide for certain other matters contained in paragraphs (a) to (m). For if the only purposes which an industrial union can have are those contained in s.53(2), these purposes are both self-evident, and of necessity present in any industrial union which succeeds in obtaining registration, so that there is no real need for the industrial union's purposes to be listed, as s.66 requires.

Further illumination may be gleaned from historical fact. Thus it seems that there were trade union representatives in Parliament even prior to 1890, but when the industrial activities of many trade unions were crushed by their defeat in the maritime strike of that year, they turned to the former method of redress to an even greater degree.20 Other forms of political activity, such as lobbying for legislative reform, had been used by the unions as early as 1879.21 Furthermore, the trade unions had been one of the main forces behind the passing in 1894 of the first Industrial Conciliation

21 Clark, The Labour Movement in Australasia (1907), 59.
and Arbitration statute.\textsuperscript{22} In view of this history of political activity prior to the passing of the Industrial Conciliation and Arbitration Acts, one might have concluded that trade unions, once registered thereunder, should have been permitted to continue with their political and other activities, there being nothing to the contrary in the Act itself. In fact, of course, the opposite conclusion was reached, and it is perhaps ironical that the passing of legislation which the trade unions had by their political activity helped to bring about, should have had the result that those same political powers were taken away from them.

It is submitted, therefore, that history, as well as an examination of the statute, leads to the conclusion that the definition in s.53(2) - if a definition at all - was not intended to be restrictive of the range of activities of an industrial union. By a series of Supreme Court decisions between 1913 and 1951, however, the contrary has been held to be the case.

In the first of these, McDougall \textit{v} Wellington Typographical I.U.W.,\textsuperscript{23} the defendant union had among its objects the giving of assistance to other bodies and to co-workers. A majority of its members had decided to give part of the funds in aid of the families of striking workers who were engaged in an industry totally different from that of the union itself. The plaintiff sued to

\textsuperscript{22} Woods, \textit{Industrial Conciliation and Arbitration in New Zealand}, 37-40.

\textsuperscript{23} (1913) 16 G.L.R. 309.
restrain the proposed action. It was held that, because of s.5(1) of the Industrial Conciliation and Arbitration Act 1908 (now s.53(2)), an industrial union did not have power to assist workers outside its own industry. Stout C.J. accepted without question that s.5(1) was a restrictive definition, and applied Osborne's case. As the statute did not either expressly or impliedly give a power to assist co-workers, the power therefore did not exist. Chapman J. claimed not to be concerned at all with the Osborne decision. He thought that it was purely a question of the effect of s.5(1), but gave no reasons why this was so. Clearly, however, he did in effect adopt a restrictive approach identical to that of Osborne's case, in spite of his disclaimer. Neither judge actually paused to consider whether it was in fact appropriate to apply such an approach to industrial unions, in view of the differences already outlined.

The next, and perhaps the leading case in this area, Ohinemuri Mines and Batteries Employees' I.U.W. v Registrar of Industrial Unions, was an appeal from a refusal by the Registrar of Industrial Unions to record an amendment to the rules of the union. The amendment would have given the union power to use its funds for the payment of benefits to injured members or to the dependants of deceased members. Chapman J. held that

24 Ibid, 311.
the Registrar was justified in his refusal, as the rules dealt with matters beyond the scope of an industrial union. His Honour was of the opinion that Osborne's case applied without exception whenever there was a statutory incorporation of a non-trading body, and therefore to industrial unions. Thus once again there was no threshold examination of the application of the doctrine. Having examined the relevant sections of the Act to find a source for the proposed power, his Honour was forced to conclude that:

"There is certainly not a word in the definitions which appears to extend the scope of a union's operations beyond matters of interest to wage-earners as such, and especially in relation to their employers. Wages, conditions, and hours really embrace the whole objects of the existence of industrial unions."

The use by Chapman J. of the words "wages, conditions, and hours" is in fact an echo of the definition of "industrial matters" in s.2 of the Act. The relevant part of this definition is as follows:

"'Industrial matters' means all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence; and includes all matters affecting the privileges, rights, and duties of unions or associations or the officers of any union or association...."


27 The portion omitted, which relates to preferential employment of union members, is a recent addition to the definition, and is not really relevant at this stage.
Chapman J. clearly accepted that this definition described the complete range of the activities of an industrial union. This is borne out by his subsequent statement that an industrial union "has for its existence the care and cognizance of the interest of workers in industrial matters as defined by s.2". However, it has already been pointed out that this definition contains no indication that it is in any way descriptive of an industrial union, but merely lays down what matters may form the subject-matter of an industrial agreement or an industrial dispute.

Counsel for the union contended that, because the Trade Unions Act 1908 clearly contemplated the inclusion of benefit provisions in the rules of trade unions registered under that Act, this meant that such unions, if they became industrial unions as well, could retain their benefit rules. If so, he claimed that it followed that industrial unions which were not registered under the Trade Unions Act 1908 were entitled to have benefit rules. Chapman J. refused to accept this argument, as he thought that the possession of non-industrial objects would render "the whole machinery of [the] Act ... available for the enforcement of the objects of a trade union". This holding had the result that industrial unions were even more restricted than registered and unregistered trade unions, for the Trade Unions Act 1908 did at least permit


29 Ibid. In fact, with the exception of Part IV of the Act, which deals with disputed elections in industrial unions, there is (and was) no machinery in the Act for positive enforcement of industrial union rules; cf. s.57. As was seen in chapter VII, ante, legal enforcement of the rules of an industrial union is purely a matter of contract.
the latter to have benefit provisions, as Osborne's case itself recognised.

Chapman J. also rejected a submission that the rule in question was authorized under what is now s.66(n) of the Act, which permits the inclusion in an industrial union's rules of "any matter not contrary to law". The paragraph was, he said, "part of a group of what may be termed machinery clauses relating exclusively to rules of procedure", and as a result "any other matter" had to be construed eiusdem generis with these clauses. As a result, it could not be relied on as a source of substantive power.

The prohibition on welfare activities by industrial unions imposed by the Ohinemuri case was eventually removed in 1964, but that case can be said to have firmly established, at least at Supreme Court level, that the ultra vires the statute doctrine applied to industrial unions in the form enunciated in Osborne's case.

Gould v Wellington Waterside Workers' I.U.W. was the next case in which the problem arose. The union had imposed a levy for a strike fund - euphemistically termed an "industrial defence fund" - and it was argued that this action was both ultra vires the union's rules and ultra


32 See s.66A of the Act, and chapter XIII, section C, post.

vires the statute. Hosking J., however, decided that the levy was invalid on separate grounds, leaving the question of ultra vires completely open.34

The final decision in this line of authority is the Auckland Freezing Workers' Union case,35 where the Court was concerned not with the powers of an industrial union, but with those of an industrial association of workers. The association had resigned from its membership of the Federation of Labour and affiliated itself to the short-lived New Zealand Trade Union Congress. The Auckland union, a member of the Association, sued for an injunction to restrain this affiliation on the grounds that it was ultra vires the Association. The Congress had objects embracing all workers in all industries, and also purely political objects. It was accepted that the Political Disabilities Removal Act 1936, which was then in force, could not cover the affiliation, as it applied to industrial unions, not industrial associations.

Following Osborne's case and the New Zealand authorities already examined, Northcroft J. had "no difficulty in holding" that the affiliation was ultra vires. Nor could the power to affiliate be said to exist "by reasonable implication". This, His Honour stated, was because the Act "limits the functions of unions and

34 Ibid, 1033-4, 1040.
associations of workers to industrial matters in their own particular industries, [so that] there cannot be implied an extension to other industries such as is involved in this affiliation, still less can it be extended to political matters which may have no relation whatever to any industry". 36

This decision - like others in this area - had a considerable impact on industrial relations in this country, in that it invalidated existing affiliations by industrial associations and, possibly, by industrial unions, not only to the Congress, but also to the Federation of Labour and the Employers' Federation. In this case, legislative intervention was prompt, 37 but it was not the same in other areas where the ultra vires the statute doctrine applied. Limited political activity by all trade unions was finally permitted in 1936, 38 twenty-six years after the Osborne decision; and, as already stated, some welfare activities became legal for industrial unions in 1964, a mere forty-seven years after the Ohinemuri decision. Apart from these changes, however, the ultra vires the statute doctrine remains unrepealed and still applies with full force to limit the activities of trade unions in New Zealand.

36 Ibid, 350.
37 The present s.88 of the Act, which allows such affiliations, was inserted by an amendment in 1951.
38 By the Political Disabilities Removal Act 1936, now the Political Disabilities Removal Act 1960. This Act is discussed in chapter XIII, section B, post.
At this stage it may be asked: on an examination of the cases just discussed, what exactly is the statutory "definition", as required by Osborne's case, to be used when applying this aspect of the ultra vires the statute doctrine to industrial unions? In McDougall v Wellington Typographical I.U.W., 39 what is now s.53(2) was stressed as the key "definition". On the other hand, in the Ohinemuri case, 40 emphasis was placed on the definition of "industrial matters". In the Auckland Freezing Workers' Union case, 41 which contains the most recent judicial utterances on this topic, Northcroft J. seems to regard both provisions as important. This can be seen from the passage from his judgment which has just been cited.

The proper test, therefore, would seem to be a combination of the two elements. This results in a narrower limitation on activity than does either of the two elements taken on its own. The point has been stressed that s.53(2) is the only provision which remotely resembles a statutory definition of "industrial union", as required by Osborne's case. It may be, therefore, that a future court could reject the further restriction to "industrial matters" as not being part of the true "definition" of industrial union, for the reasons advanced earlier. In the vast majority of cases where the question of infringement of the ultra vires the statute doctrine arises, the extra

39 (1913) 16 G.L.R. 309.
restriction to "industrial matters" will not affect the result. But it may do so in cases where industrial activity is clearly for the purpose of protecting or furthering the interests of workers in their industry, yet does not come within the definition of "industrial matters". 42

If the test outlined above does not directly cover a proposed activity, it seems that there remains the possibility that it may be permitted by "reasonable implication" from the terms of the definition. This is the test laid down in Osborne's case, and adopted in the Auckland Freezing Workers' Union case. 43 However, it seems clear from the decisions in these two cases that implication of powers in this way is possible only in a very narrow area, for the purpose of supplementing what is adjudged to be the legislative intention behind the definition. In particular, it would not seem to be possible outside the area of truly "industrial" activities.

3. Amalgamated Society of Railway Servants v Osborne in Australia.

The treatment of Amalgamated Society of Railway Servants v Osborne in the Australian case-law, dealing as it for the most part does with a system of compulsory conciliation and arbitration basically similar to our own, provides a striking contrast with the New Zealand decisions, both in the level of analysis of the issues involved and in the actual conclusions reached.

42 See chapter XIII, section A, post.
43 Supra.
In Australia, the Osborne decision was quite soon applied to limit political activities by trade unions registered under the various state Trade Unions Acts.\(^{44}\) On the other hand, a 'Beckett J., in Australian Workers' Union v Coles,\(^ {45}\) refused to apply the Osborne case to a union registered under the Commonwealth Conciliation and Arbitration Act.\(^ {46}\) The learned judge was of the opinion that the Act was not exhaustive — "generally speaking, the Act does not care what an organisation may do, nor is it concerned with its powers as between the members themselves".\(^ {47}\) That being so, "the mere absence of specific authority to do things should not be considered as amounting to a prohibition unless the thing done in itself or in its nature contravenes the express provisions of the Act or frustrates the policy of the Act in some way".\(^ {48}\) As a result, the newspaper run by the plaintiff union was held to be intra vires, and the union could therefore recover money owing to it under contract in connection with the newspaper.

A similar result was reached in respect of the pursuit of political objects, in Wheatley v Federated

44 Allen v Gorton (1918) 18 S.R. (N.S.W.) 202; True v Australian Coal Employees' Union (1949) 51 W.A.L.R. 73.
46 That is, the Australian equivalent of an industrial union.
48 Ibid, 336.
Ironworkers' Association. In a very careful and interesting judgment, Walsh J., after disposing of several preliminary matters, and holding that the defendant union's affiliation and payments to the Australian Labour Party were intra vires its rules, held Osborne's case to be inapplicable to trade unions registered under the Commonwealth Conciliation and Arbitration Act on two grounds.

First, on a consideration of the relevant provisions of the Commonwealth Act, he held that there could not be found any "exhaustive and restrictive definition of the nature and scope of [registered] trade unions", so that the approach adopted in Osborne's case could have no application. As there was nothing in the Act to limit the union, it was free to undertake the proposed activity, "the source of power [being] found in the agreement of the members".

Secondly, Walsh J. considered the matter on the basis that a trade union might be per se in unlawful restraint of trade, with the result that it could only be "legalized"

49 (1960) 60 S.R. (N.S.W.) 161.
50 These provisions are basically similar to the New Zealand Act, although wording and emphasis naturally differs in places.
51 (1960) 60 S.R. (N.S.W.) 161, 177.
52 Ibid.
if all its objects came within the "legalizing" statute. This, it will be remembered, was the approach adopted by Lord Halsbury in Osborne's case. Walsh J. held that, although there were no provisions in the Commonwealth Act expressly negating the application of the doctrine of restraint of trade, as there were in the Trade Union Act 1871 (U.K.), it seemed clear that the former Act impliedly negated the application of the doctrine to a union registered under it. The result was that the union's industrial objects were lawful, so that they could no longer affect the lawfulness or unlawfulness of any of its other purposes. The latter could therefore be pursued, "not because the Act confers the power to pursue them, but because being lawful themselves they are no longer tainted by their association with other unlawful objects". This second ground involves, as does the first, a rejection of the basic approach of Osborne's case, for both clearly depend on the view that the statute is not intended to be exhaustive.

The judgment of Walsh J. provides perhaps the best analysis of the issues we have been examining, and it underlines the important point that the decision whether or not the Act in question is intended to be exhaustive - whether in its defining or in its "legalizing" - is crucial to the question whether or not a restrictive approach will be taken. Any remaining doubts concerning the inapplicability of the Osborne approach to unions registered under the Commonwealth Act were dispelled by the decision of the High

53 Ibid, 179.
Court of Australia in Williams v Hursey. This case was concerned with, among other things, the validity of a political levy imposed by the Waterside Workers' Federation, which the plaintiffs had refused to pay. The Court held that such a levy was both authorized by the union's rules and within its lawful objects.

Fullagar J., with whom Dixon C.J. and Kitto J. concurred, delivered the majority judgment. Fullagar J. had no difficulty in holding that the Commonwealth Act was not to be restrictively construed. He further held that, as that Act expressly permitted the union's rules to provide for "any matter not contrary to law", the power to make political levies could therefore be regarded as derived from the Act itself. The only limitation on this power, he thought, was that "nothing is permissible which would tend to frustrate the policy and main purpose of the Act". Taylor J. took a somewhat different approach, examining the law as it stood at the time of registration of the defendant union, which was before Osborne's case, and concluding that the power to make political levies was permissible as a matter "not contrary to law". Menzies J. did not even discuss the possibility of Osborne's case applying. He thought it

54 (1959) 103 C.L.R. 30.
55 Ibid, 64.
56 Ibid, 68.
"well established that a registered organisation can have powers beyond those necessary for its participation in the processes of conciliation and arbitration". The object of supporting a political party by means of a levy was "not ... in itself foreign to the purposes of" such an organisation.\(^{57}\)

This case is complicated by several points which could not arise in New Zealand, in particular the constitutional problem of the conflict between State law and Commonwealth law. What is relevant to New Zealand, however, is the thread running through the judgments, limiting political activity to that which can reasonably be thought to serve the **industrial** interests of the union's members.\(^{58}\) It seems fairly clear that this limitation sprang from the judges' interpretation of the general expression in the union's objects rule, "to foster the best interests of members". This was interpreted as meaning "industrial" interests only. It was not considered what the position would be if the rules made express provision for a matter in no way related to industrial interests, for example, general charitable objects. Although in Australia certain constitutional problems might arise with this,\(^{59}\) it is submitted that in New Zealand, if the non-restrictive approach to the powers of industrial unions were to be adopted, express words granting non-industrial powers could not be limited in this way.

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57 Ibid, 114.

58 See especially ibid, 57, 100. See also Ford, "Trade Union Law and Aid to Political Parties" (1960) 2 Jo. Ind. Rel. 20.

C. CONCLUSION.

It has been seen, therefore, that the ultra vires the statute doctrine operates to restrict industrial unions: 60

i) from acting contrary to what is expressly provided for in the Act; and, more significantly, ii) from undertaking any activities not contained expressly or by reasonable implication in the statutory "definition" of industrial union. This second, highly restrictive aspect of the ultra vires the statute doctrine is of by far the greater importance as a limitation on the powers of industrial unions, as the analysis in chapter XIII, post, will indicate. However, as the question of the applicability of the Osborne approach to industrial unions has up till the present not been discussed beyond Supreme Court level, it is submitted that it is open to New Zealand judges, at least in the Court of Appeal, to re-examine this whole problem, and possibly, lay down a less restrictive test.

The length of time for which the existing authorities have stood, and the apparent legislative acceptance of them, are no doubt favourable to any reconsideration,

60 The approach in Osborne's case clearly does not apply to trade unions registered under the Incorporated Societies Act 1908, in view of s.6(2) of that Act. However, the powers of such unions are naturally restricted in respect of matters for which that Act makes express provision, the most important of these being the prohibition against association "for pecuniary gain". This may prevent a trade union registered under the Incorporated Societies Act from providing monetary benefits to its members. For the application of the Osborne case to trade unions not registered under any Act, see Citrine, op. cit., 379.
but the Australian authorities already discussed would be highly persuasive authority for a less restrictive approach, if a judicial reappraisal of this area were to take place. 61

61 It may be, however, that the wider interpretation in the Australian cases of the provision in the Commonwealth Act permitting union rules on "any matter not contrary to law" could not be followed. The setting-out of the corresponding s.66(n) of our Act differs, and leads quite strongly to the eiusdem generis construction of it which the New Zealand cases have adopted. However, this will not prevent a proposed activity being provided for in the list of objects required by s.66 of the Act.
CHAPTER XII

REMEDIES FOR ULTRA VIRES ACTIVITY
The remedies available in respect of ultra vires action by trade unions have a curious dual nature. A trade union member has a contractual right to sue, and it is possible, in addition, that certain non-members may be able to bring actions, in spite of the absence of any contractual relationship between them and the union.

A. SUITS BY TRADE UNION MEMBERS.

The member's action against a union to enjoin ultra vires acts is established beyond question. As the two preceding chapters have shown, a union member may sue to restrain acts which are ultra vires the rules, and acts which are ultra vires the statute. Any one member may sue, as the rule as to excusable irregularities does not operate where the acts complained of are ultra vires the union.\(^1\)

As the member's action is in essence for breach of the contract of union membership, the remedies discussed in chapter VII, ante, will be available - although damages will only be claimable where the individual member has suffered personal loss.\(^2\) In addition, where ultra vires expenditure or alienation of property has occurred, an order may be made requiring the union officials responsible (if any) to make good

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1 See chapter VII, section C, ante.
2 As in the case of ultra vires disciplinary action.
the loss, or any ascertainable recipients of the funds involved, to repay the money or return the property.3

B. SUITS BY NON-MEMBERS.

There is no direct authority for or against a non-member's action to restrain ultra vires activity by trade unions.4 There may, however, be an analogy with certain remedies available against statutory corporations. These remedies are available to i) the Attorney-General as _parens patriae_, and ii) certain affected members of the public.

1. The Attorney-General's Right of Action.

The non-member who possesses the most extensive right to sue to restrain ultra vires acts by statutory corporations is the Attorney-General. It is settled law that if a public body is exceeding its statutory powers, the Attorney-General can sue to protect the


4 Note that in special circumstances one who is strictly a non-member may be treated as having sufficient interest to restrain ultra vires activity in the same way as a member. See Cope v Crossingham [1909] 2 Ch. 148, and also at first instance [1908] 2 Ch. 624.
public interest. The Attorney-General can sue of his own motion; or if he accedes to the request of a private citizen and agrees to proceed against a public body, the suit will be brought "at the relation of" the private citizen. This "relator action" is generally conducted by the private citizen, who is responsible for costs. The Attorney-General (or his relator) can sue to protect the public interest without having to prove damage either to any individual or to the public generally.

This much is settled law, but the difficult question is whether these principles apply to ultra vires acts done by trade unions, and, in particular, by industrial unions. The Attorney-General's power to sue has been exercised not only against public authorities, such as local bodies, but also against statutory trading companies which have exceeded their powers. Thus railway companies set up by Act of Parliament have been restrained at the suit of the Attorney-General from running a bus service, and from carrying on the business of coal


6 He has an absolute discretion to refuse to lend his name to the action; London County Council v Att-Gen [1902] A.C. 165; Collins v Lower Hutt Corporation [1961] N.Z.L.R. 250.


8 Att-Gen v Birkenhead Borough, supra.

9 Att-Gen v Mersey Railway Co., supra.
merchants. On the other hand, the principle appears never to have been applied to non-statutory trading companies - although actions have lain against such companies to restrain breaches by them of public welfare statutes.

It is arguable that, in the historical and social context of the Industrial Conciliation and Arbitration system, the courts are likely to treat industrial unions at least as performing sufficiently "public" functions for the public to have an interest in seeing that they do not exceed their powers. In addition, inasmuch as the ultra vires the statute doctrine requires industrial unions to keep within the bounds of their governing statute, there is a direct analogy with the statutory trading company cases already referred to. This may be applicable even if the public interest element is held to be absent.

As the following chapter will show, strike action is ultra vires an industrial union, as is a wide range

10 Att-Gen v Great Northern Railway Co., supra.

11 E.g., Att-Gen v Wimbledon House Estate Co. Ltd. [1904] 2 Ch. 34.

12 The judicial willingness to issue mandamus against industrial unions may be a recognition of their public nature. See chapter VII, section D, ante. See also Boulting v A.C.T.A.T. [1963] 2 Q.B. 606, 642-3.

13 Note also Machine Shearers' Union v Australian Workers' Union (1902) 2 S.R. (N.S.W.) (Eq.) 220, 224, 231, where it is suggested (obiter) that the Attorney-General could sue, even where the union is merely acting ultra vires its own rules.
of related activities. Thus if an action by the Attorney-General does lie - and there is some possibility of this, at least where acts ultra vires the statute are involved - it is clear that there exists in this country, at least on paper, a common law "labour injunction", which could be put to potent use. However, such political use of the Attorney-General's powers is at present unlikely - although there remains the possibility of a relator action being permitted.

2. Actions by Members of the Public.

The circumstances in which an individual member of the public can sue to restrain ultra vires activity were laid down by Buckley J. in Boyce v Paddington Borough Council: 14

"A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with a public right is such as that some private right of his is at the same time interfered with ...; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right suffers special damage peculiar to himself from the interference with the public right."

The precise nature of the terms "private right", "special damage" remains unsettled. It appears from a series of cases in which business firms have unsuccessfully sued to restrain corporations from undertaking ultra vires business activities in competition with them, 15 that the

14 [1903] 1 Ch. 109, 114. See also Collins v Lower Hutt City Corporation [1961] N.Z.L.R. 250; Att-Gen v Birkenhead Borough, supra.

mere fact of financial loss or personal inconvenience is not sufficient "special damage" to allow an individual member of the public to sue. As with the Attorney-General's action, the ultra vires activity for which a member of the public is most likely to want to sue a union is strike action. While it can be confidently asserted that the ordinary citizen would have no locus standi, it is possible that an employer adversely affected by strike action could be able to sue. Although there will usually be no "private rights" interfered with in that situation, it is open to argument that the employer will suffer "special damage" as a result of the strike. The cases involving business rivals just referred to tend against this conclusion. But on the other hand, the concept of "special damage" has recently been given a quite liberal interpretation, and it may be argued that the damage caused by strike action is more direct and substantial than that resulting from ultra vires trading activities.

16 Cf. Collins v Lower Hutt City Corporation, supra; Cowan v Canadian Broadcasting Corporation (1966) 56 D.L.R. (2d) 578.

17 Putting to one side the possibility that the strike action involves some distinct tort, as this will be actionable per se.

18 See Att-Gen v Birkenhead Borough, supra; Phillips v N.S.W. Fish Authority [1968] 3 N.S.W.R. 784, affirmed on different grounds [1970] 1 N.S.W.R. 725.
That the possibility of such an action being brought in this country is not as remote as might appear at first sight, is shown by the recent case of Flett v Northern Transport Drivers' I.U.W. 19 In that case the defendant union had engaged in activity which was aimed at, and successful in, preventing supplies of beer being delivered to the plaintiff, who was an hotel proprietor. The plaintiff, along with some other hotel proprietors, had made what the union and many members of the public felt was an unjustifiable increase in the price of the beer he sold. The union's action was taken with the object of persuading the plaintiff to lower his prices. The plaintiff sued for an interlocutory injunction, alleging various causes of action. In particular, it was claimed 20 that the union's action in concerning itself with beer prices - not an "industrial matter" - was ultra vires, and that the plaintiff, having suffered special damage as a result of it, was entitled to an injunction. Unfortunately, Speight J. granted an injunction on other grounds, preferring to leave the ultra vires question open. 21

The individual's right of action, like that of the Attorney-General, depends on the question already discussed, namely whether trade unions are sufficiently involved with the public interest for these principles to apply. Some support for a right of action can be drawn from the New South Wales Court of Appeal decision of *Machine Shearers' Union v Australian Workers' Union*. In that case both the plaintiff union and the defendant union were registered under an arbitration statute. Both unions had members doing the same class of work in the same locality. The defendant union had applied to the New South Wales Industrial Arbitration Court for the cancellation of the plaintiff union's registration, as it had the right to do. That tribunal had refused to cancel the registration, on the grounds that it considered some of the defendant union's rules to be objectionable. The defendant union then purported to amend its rules so as to remove the objectionable ones, and prepared to re-apply for the cancellation of the plaintiff union's registration. The plaintiff union sued for an injunction to restrain the application, alleging that the amendments made by the defendant union were ultra vires and in breach of the defendant's rules.

The Court was unanimous in holding that the plaintiff union had sufficient interest to complain of the ultra vires amendment; in that it was an important part of a transaction.

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22 (1902) 2 S.R. (N.S.W.) (Eq.) 220.
which was intended to achieve the extinction of the plaintiff as an industrial union. It declined to act in this particular case, however, on the grounds that the whole matter was one which could more properly be dealt with by the Industrial Arbitration Court itself.

The important holding for our purposes is the decision that the plaintiff union had "sufficient interest" to intervene. No authority was cited in the judgments, but it is clear that the case was decided on the basis of the principles presently under discussion. In applying these principles to a trade union, the court did not seem aware that any extension of existing law was being made.

The analysis in the Machine Shearers' case can be rejected as too superficial, and it is clearly open to a court to refuse to apply the public interest cases to an industrial union. If this position is taken, the individual member of the public must establish an independent cause of action. In other words, in the absence of any public interest, acting ultra vires is not a wrong actionable at the suit of a non-member. Support for this proposition

23 See ibid, 224, 231.


25 A further possibility is that acting ultra vires, although it does not give rise to an independent cause of action, may amount to some other nominate tort on the part of a union. This is considered in chapter XXII, section B, post.
can be drawn from **Denaby and Cadeby Main Collieries Ltd. v Yorkshire Miners' Association**\(^{26}\) to which reference has already been made in chapter V, section A, ante.

In that case, the plaintiff colliery owners sued to recover financial loss which they sustained as the result of a strike by their employees, who were members of the defendant union. The union had been supporting these members by payment of strike pay which was subsequently held to have been ultra vires.\(^{27}\) Their Lordships were unanimous in rejecting an argument that this was a ground for recovering damages.\(^{28}\) Lord Robertson shortly stated that he could not see "how the fact that the payment of this strike pay was held to be a violation of the internal constitution of the association turns it into an invasion of any right of third parties like the appellants".\(^{29}\)

Although this much appears settled, the main issue - whether a trade union, and in particular an industrial union, can be restrained from acting ultra vires at the suit of the Attorney-General or some affected member of the public - remains an open question. It is moreover, one which may need to be answered in the not too distant future.

\(^{26}\) [1906] A.C. 384.

\(^{27}\) See **Yorkshire Miners' Association v Howden** [1905] A.C. 256.

\(^{28}\) The case involved an action for damages, and does not decide the point discussed earlier, namely whether the cases where injunctions have been issued against public bodies acting ultra vires are applicable to trade unions.

\(^{29}\) [1906] A.C. 384, 407-8. Cf. such cases as Brownlow v Metropolitan Board of Works (1864) 16 C.B. (N.S.) 546; Cator v Lewisham Board of Works (1864) 34 L.J.Q.B. 74, where corporations acting ultra vires were held liable in tort - but on the basis that independent torts, such as negligence, had been committed.
This thesis is an attempt to examine and evaluate the common law relating to trade unions in New Zealand, in the context of the realities of trade union affairs and industrial relations in this country. Of particular importance, therefore, is the relationship between the common (or "judge-made") law and the statutory system of industrial conciliation and arbitration. There are three main areas of common law especially affecting trade unions: the law of contract; the doctrine of "ultra vires"; the law of torts. All three have been considerably influenced by the early illegal status of trade unions, both under statute and at common law.

The most important aspect of contract law applicable to trade unions is the "contract of union membership", upon which is founded both the many-faceted legal relationship between the trade union, its officials, and its members, and the legal enforceability of the union rule-book. Insofar as the content of this contract is concerned, the uncertain and imprecise standards imposed by the common law have for practical purposes been supplanted by the statutory controls contained in the Industrial Conciliation and Arbitration Act 1954. The same is generally true of the contractual principles governing the management of internal union affairs. The important areas of union elections, fees, and financial administration all have detailed statutory provision made in respect of them. By contrast, the field of trade union discipline, and expulsion from membership in particular, is entirely governed by the common law of contract. This limits the courts' powers of review to purely procedural matters (the "rules of natural justice"), and to seeing that union rules are complied with. The real issue - the merits of the union's action - cannot be examined.
Overall, the common law relating to the contract of union membership has failed to provide union members with the flexible and easily accessible remedies which the realities of the case demand. It is therefore urged that jurisdiction over the enforcement of union rules be removed from the ordinary courts and given either to the Court of Arbitration, or to a "union ombudsman" with power to investigate informally allegations of breach of union rules.

The "doctrine of ultra vires" restricts the powers and legal capacity of trade unions in two ways. On the one hand, the objects which a trade union may pursue are limited - as indeed one would expect - to those objects specified in the union's rule-book. On the other hand, the courts have held that a trade union registered under the Industrial Conciliation and Arbitration Act 1954 is limited to pursuing the purely industrial objects enumerated in the Act. This restrictive second aspect of the doctrine of ultra vires - arguably an incorrect application of English authorities - has been reversed by statute in some respects. But it continues, in strict legal theory if not in fact, to prevent trade unions in this country from engaging in certain forms of political activity; from trading; from providing legal aid and various other benefits to members; and, arguably, from publishing their own union newspapers. This restrictive common law doctrine should be reversed by statute so as to bring New Zealand law into line with other Commonwealth countries, and with what in fact takes place in this country.

It is little realised in this country to what extent strike action by a trade union renders the union, its officials, and the strikers themselves open to a civil action for damages at the suit of persons suffering financial loss as a result of the strike. The "economic torts" - the picturesquely-named civil actions for "conspiracy", "intimidation", "interference with contractual relations", and "unlawful interference with
trade, business, or employment" — encompass both threatening, and indulging in, almost all forms of strike action. It is commonly accepted that the economic torts were the product of the unfavourable judicial attitudes to trade unions which existed last century and early this century. In England, legislation has long existed to shield trade unions from the harshness of the common law. No corresponding provision has been made in this country, and although trade unions have from time to time been held liable in damages to individual workers injured by trade union action, the existence of these common law liabilities has not hitherto caused problems. In the last few years, however, law suits based on the economic torts have been brought by employers against trade unions in this country on no less than four occasions. The explanation for this would appear to lie in the greater pressures placed on employers by the breakdown in the system of industrial conciliation and arbitration, and corresponding increase in strike action by some unions.

There are, however, a number of objections to the bringing of such actions by employers in this country. In the first place, it can be argued that the existence, in the shape of the conciliation and arbitration system, of a comprehensive procedure for settling industrial disputes, with its own legal sanctions, requires the exclusion of other legal remedies such as the law of torts. Secondly, it can be said that, as British experience has shown, the existence of tortious remedies available only to the employer is incompatible with the "free" collective bargaining based on a tacitly-accepted right to strike and to lock out, which goes on in this country. A further objection to the use of the economic torts in industrial disputes lies in the fact that they canvass only narrow, and often absurdly technical, legal issues. The moral or industrial blameworthiness of the respective parties is not, indeed may not, be examined. Thus
a trade union which has only been partly at fault may be liable to pay extremely heavy damages (equal to the employer's business losses as a result of the union's action).

The damage that this type of proceeding is likely to do to harmonious industrial relations is considerably, and no doubt explains why the tort actions are not brought nearly as often as they might be. Nevertheless, the recent trend towards the bringing of these actions shows that reform of the common law in this area is still most necessary. The use of the law in industrial disputes should be excluded by statutory provisions similar to those presently in force in England.

The common law relating to trade unions in New Zealand is therefore defective in several respects. The abstention of the common law from deciding the merits of competing cases, although understandable in view of the highly political nature of the issues involved, largely prevents it from playing any positive role in settling either internal or external union disputes. It also means that the intervention of the courts, when it does take place, is often based on technical issues, which are quite irrelevant to the realities of the conflict which has arisen. Certainly, the previous failure of legislators to think through the interaction between the statutory system of conciliation and arbitration and the various common law principles has had the result that there is now a considerable need for reform in this area.