given were to allow the person creating the improvement to re-enter the land for the purpose of retaking the benefit (provided that he left the land in its original condition). In these days of compulsory acquisition of land, enforced zoning and master plans it may be that land has become somewhat less sacred so that the relaxing of both the law relating to trespass and the rule *'quicquid plantatur solo, solo cedit'* would be justifiable in harsh cases such as the present.

J. A. GRIFFIN

FREEMAN v. McMANUS[1]

Landlord and tenant—Unincorporated association—Cannot be lessee

In the considerable dispute which followed the breach within the Australian Labour Party in 1954, attempts were made by both factions to have themselves accepted as the legitimate body. Involved in this was the retention of the suite of offices, known as Room 2 in the Trades Hall, Melbourne, which had been for many years the headquarters of the party. Eventually in 1957 the new A.L.P. executive, in order to obtain possession, purported to surrender the 'lease' of the room to the Trades Hall Council, the alleged lessor, and the agent for the latter body then sought to obtain an order for the ejectment of the occupiers under the provisions of Part V of the Landlord and Tenant Act 1928.

A complaint was laid before a stipendary magistrate and he proceeded to hear the matter, but Mr P. D. Phillips Q.C., appearing for the defendants, preferred to argue at the outset that there could be no case to answer as there was no relationship of landlord and tenant present upon which such an order could operate. After rejecting this submission, the magistrate received evidence as to the relationship until Mr Phillips again requested that the complaint be dismissed, on the ground that there cannot be a lease to an unincorporated association, or that the hearing be otherwise adjourned. This would enable the ruling to be tested by way of an order to review. Mr Gillard Q.C., for the complainants, protested against this somewhat dubious procedure—'dubious' because it is a matter of doubt whether such a ruling is the subject-matter for an order within section 150 of the Justices Act 1928,[2] but the magistrate acceded to the defendants' request. An order *nisi* was obtained shortly afterwards, and a summons was taken out by the complainants to have it set aside as being premature. This issue did not arise before O'Bryan J.

[1] [1958] V.R. 15. Supreme Court of Victoria; O'Bryan J.

[2] The interpretation question here has been considered in relation to adjournments which are distinguished from other rulings in a series of cases, the most important of which are referred to in *Commissioners of the State Savings Bank of Victoria v. Rogers Bros. Motor Cycle Agency Pty Ltd* [1954] V.L.R. 149.

as there had later been agreement between the parties that there were certain questions of law which they wished to have considered. The issues then came to be:

1. Was there a relationship of landlord and tenant created as evidenced in the minutes of the Trades Hall Council?
2. Was that relationship brought to an end by the surrender in 1957, if further evidence were adduced by the complainant that such surrender was considered by the Federal and central executives as beneficial to the Australian Labour Party?
3. On the evidence produced before the magistrate, was a relationship of landlord and tenant proved which was brought to an end by the surrender?

Only the first of these was considered by the court at any length as the answer given to it foreclosed any issue from arising under the other two. It was held that there cannot be a lease to an unincorporated association and so the complaint was dismissed.

The decision of the learned judge was based upon a series of discussions beginning with an English case, *Jarrott v. Ackerley*[3], followed by two cases in Canada, *Henderson v. Toronto General Trusts Corporation*,[4] and *Canada Morning News v. Thompson*.[5] There were also statements cited from *Halsbury's Laws of England*,[6] Hill and Redman,[7] and Foa,[8] but still it would be hard to find a more unsatisfactory series of decisions in our law. They illustrate the difficulties, uncertainties, and fictions which form the bulk of the law relating to unincorporated associations. The basic authority is *Jarrott v. Ackerley*[9], where Eve J. said,

> I thought it would be contended that the under-lease was to the members of the society from time to time; but a lease to a fluctuating body of persons is bad, and it is admitted that no such lease could be created. It is now argued that it was an under-lease to the members at the time when it was granted, but the action was not brought on behalf of such members.

The rest of the short judgment dealt with this latter point and the case is far more concerned with the availability of a 'representative action' than with the capacity of an association to hold property as lessees. There is clearly an assumption that a body such as this cannot so hold, though no authority is cited and there is very little to suggest the reason underlying this assumption. It could be that the learned judge regarded the fluctuating nature of the body as the important factor, or it may be based upon a principle of non-

[3] (1915) 85 L.J. Ch. 135.
[4] [1928] 3 D.L.R. 411.
[5] [1930] 3 D.L.R. 833.
[6] (2nd ed.) xx, 35.
[7] *Law of Landlord and Tenant* (12th ed.) 81.
[8] *The General Law of Landlord and Tenant* (7th ed.) 48.
[9] (1915) 85 L.J. Ch. 135, 136.

recognition of unincorporated bodies as legal entities or on some other ground. As an authoritative decision on the point in issue here, the case is hardly conclusive; yet it was so regarded by the courts in the Canadian cases and cited for the proposition in two of the texts referred to. Foa[10] states that such a lease is apparently invalid as a lease to an indeterminate class and in a footnote refers to *Jarrott v. Ackerley*, where, he says, the point appeared to have been conceded.

The first case in Canada was *Henderson v. Toronto General Trusts Corporation.*[11] There, though the Ottawa Curling Club was defeated in its claim for the premises in question, one of the judges did not deny that there could be a tenancy in such circumstances. Kelly J. states,

> At most, as the defendant has pleaded, the club's interest was as a yearly tenant or a tenant from year to year. By reason of the understanding between the parties as stated by counsel and Henderson during the trial, it is unnecessary to determine whether its occupancy was or is as tenant from year to year or at will.[12]

Middleton J.A. states that the lease alleged by the club was similar in many respects to an absolute conveyance of the land which requires a definite owner of the fee and it would be a departure from this principle if this lease were treated differently. Substantially he agreed with Masten J.A., whose judgment is accepted by the other two members of the court.[13]

> It is plain law that a lease cannot be made to an unincorporated body by that name. [He cites as authority for this *Jarrott v. Ackerley*]. . . . In the present case, I think the evidence in fact establishes only an agreement for a licence to occupy, to the curling club and its members.

This is the first decision directly on the point but even here it need not have been considered upon this basis and it may be possible to argue that this statement of principle is only a *dictum* on the ground that the decision was given upon the terms of the agreement. But the interesting thing to note is that the decision does not seem to be based on the refusal of the law to regard the club as a legal entity. Apparently it is capable of entering into contractual relations, or at least of receiving benefits under a contract executed on its behalf. The judgments of Kelly J. and Masten J.A. strongly suggest this. Though its capacities may be limited, the club seems to possess that element of unity which makes it a cognizable entity within the legal system.

Yet we find in the next case that Anglin C.J.C. in delivering the judgment of the court states,

[10] *Op. cit.*, 48.
[11] [1928] 3 D.L.R. 411.
[12] *Ibid.*, 415.
[13] *Ibid.*, 416.

> These decisions [*Henderson v. Toronto General Trusts Corporation* and *Jarrott v. Ackerley*] rest upon the incapacity of an unincorporated and unregistered association to assert any position which is maintainable in law only by a legal entity. In principle, therefore, they are equally applicable whether the position so asserted be that of landlord or tenant.[14]

It is hoped that the consideration of the previous cases has demonstrated that no clear single basis such as this can be found. Indeed, what inferences there are to be drawn from the cases tend against this view. The avoidance of consideration of this matter of 'legal personality' would make it possible to decide such cases upon the legal requirements of tenancy and convenience to the law in permitting or rejecting such leases. It has been shown[15] that unincorporated associations are entities recognized by the law for limited purposes at least and a large part of the activities of such bodies presupposes that this is so. In most instances unincorporated associations hold property by means of trustees, which is a comparatively simple device, and so this issue appears very seldom in this form. But the case does illustrate an area of the law, the fundamental assumptions of which are obscured and developed to further obscurity in a considerable number of cases, and which viewed generally is rather frightening. It is probably a correct decision in view of existing authority, but it seems that the time is long past when the law could afford to ignore to this extent such a large and important sphere of group activity. Societies can manage to operate by means of a few rather strained devices, through which they play a game of 'let's pretend', and few could regard this as satisfactory.

F. VINCENT

McGINNES v. McGINNES[1]

Foreign recognition of decrees pronounced under Parts III and IIIA Matrimonial Causes Act (Cth.) 1945-1955—Full faith and credit—Armitage v. Attorney-General—Fenton v. Fenton

A wife who was resident in South Australia instituted proceedings, pursuant to Part III, Commonwealth Matrimonial Causes Act 1945, for a decree of judicial separation on the ground of cruelty, consonant with the laws of her domicile—Victoria. Two months later, and three days after the husband (who, at all material times, was domiciled and resident in Victoria) entered an appearance in the South Australian suit, the husband instituted divorce proceedings

[14] *Canada Morning News Co. v. Thompson* [1930] 3 D.L.R. 833, 836.
[15] Dr H. A. J. Ford: 'Dispositional of property to unincorporated non-profit associations' (1957), 55 *Michigan Law Review* 67.
[1] [1958] V.R. 104. Supreme Court of Victoria; Sholl J.