JURISDICTION TO REVIEW EXPULSION FROM A POLITICAL PARTY

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[*This article explores the theoretical inadequacies of the High Court decision of* Cameron and Others v. Hogan. *In that case it was held that there was no basis for a court to assume jurisdiction to review expulsion from a political party. However, the author argues that the members of an unincorporated association which is established to promote non-charitable objects are entitled to the protection of equity for wrongful expulsion, as they retain a sufficient proprietary interest in the funds of the association. The article then proposes that the only acceptable legal explanation for the existence of such an association is the presence of a network of contracts and that these bind each member to obey the rules. This network of contracts provides a court with an alternative source of jurisdiction to review expulsion in breach of the rules.*]

Introduction

Do Australian courts have the same jurisdiction to review a decision to expel a member of a political party by a disciplinary tribunal or executive body, in breach of the rules and of the requirements of natural justice, as is readily exercised by English courts?[1] This cannot be dismissed as an abstract question unlikely to arise for decision. In 1986 alone, Mr Hartley was expelled from the Victorian Branch of the Labor Party, a member of the Victorian Division of the Liberal Party was reprimanded for criticizing the party leader, and — according to rumour — threatened with expulsion, Senator George Georges was suspended from membership of the Queensland Branch of the Labor Party, Mr Tuxworth was expelled from the Liberal National Coalition Party of the Northern Territory, and the Australian Democrats suffered a schism amidst rumours of pending expulsions. 1987 opened with the expulsion of Mr Jackson from the N.S.W. Branch of the Labor Party on 8 January, and the continuing power struggles within the conservative parties promise further expulsions. It can only be a matter of time before an aggrieved member seeks the assistance of the courts in defining and protecting his rights. When this occurs, a full examination of the deficiencies of *Cameron and Others v. Hogan*[2] is unavoidable.

In *Cameron v. Hogan*, a case involving an expulsion from the Victorian Branch of the Australian Labor Party, it was held by the High Court that the courts have no jurisdiction to review the expulsion of a member, not only from a political party, but from almost every kind of voluntary association. The decision has commonly been distinguished or ignored by Supreme Courts, and consequently the inadequacy of the reasoning of the High Court in *Cameron v. Hogan* has on the whole escaped searching scrutiny. However, when a case the facts of

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1 *Fountaine v. Chesterton* (1968) 112 *The Solicitors' Journal* 690, *John v. Rees* [1970] Ch. 345, *Lewis v. Heffer* [1978] 1 W.L.R. 1061.

2 (1934) 51 C.L.R. 358. Hereinafter referred to as '*Cameron v. Hogan*'.

which are squarely on all fours with *Cameron v. Hogan* finally arises for decision, there will be the opportunity to establish the whole area of the law relating to the jurisdiction of the courts to intervene in the affairs of unincorporated associations on a sound footing. Presently, it is submitted, the law in this area is in a confused state.[3]

In *Cameron v. Hogan*, decided in 1934, the High Court took the view that no basis for its jurisdiction existed because the expulsion complained of did not affect any legal right belonging to the plaintiff Hogan. The Court considered that Hogan had no proprietary interest in the funds of the party, by virtue of rules purportedly dedicating its funds to its political objectives, and also considered that no contractual nexus existed between the members of the party binding them to observe its rules. Furthermore, the Court stated that these conclusions were applicable to all types of voluntary associations, excluding only those constituted for the purpose of 'private gain and material advantage'.[4]

It is submitted that the Court, in deciding that members of the great bulk of unincorporated associations have no legal rights which would be affected by a wrongful expulsion, did not consider two vital issues: the source of any legally binding force given to rules purporting to dedicate the property of an unincorporated association to non-charitable purposes, and the nature of an unincorporated association as, not an entity, but a relationship between individuals. It is argued here that if the Court had considered these issues it could not have failed to come to the conclusion that the property of an unincorporated association must remain the joint property of its members, for there is no enforceable trust in favour of which the members could divest their interest, and that furthermore only a contract of membership satisfactorily explains the relationship between the members of such an association and resolves the issue of whence the rules derive their binding force.

The case of Cameron v. Hogan

The facts of the case were as follows: Edward John Hogan, Premier of Victoria from the end of 1929 to mid-May 1932, was expelled from the Victorian Branch of the Australian Labor Party by the Central Executive because of his support for the Premiers' Plan, which involved reductions in wages, salaries, pensions and interest as a solution to the severe national financial crisis which developed in 1929. He sought relief by way of damages, declaration and injunction in the Supreme Court of Victoria against the members of the Central Executive. At the trial of the action, *Hogan v. Cameron*,[5] Gavan Duffy J. held that a contract did arise out of membership of the party, and was expressed in the rules. Hogan contended that he had suffered substantial damage by reason of the loss of the leadership of the party in Parliament, but his Honour considered the claim to be untenable, possibly because Hogan retained his seat in Parliament despite his expulsion. Nominal damages of one shilling were awarded, however, following

[3] Baxt, R., 'The Dilemma of the Unincorporated Association' (1973) 47 *Australian Law Journal* 305.

[4] *Infra* n. 10, p. 329.

[5] [1934] V.L.R. 88.

the decision of the Court of Appeal in *Young v. Ladies Imperial Club Ltd.*[6] Gavan Duffy J. refused injunctive relief because he considered that Hogan had no proprietary right or interest in the funds of the party sufficient to attract the protection of equity, and declaratory relief because he thought there was no power to grant such relief unless an injunction was also granted.

On appeal to the High Court, a bench composed of Rich, Dixon, Evatt, McTiernan, and Starke JJ. unanimously held that the Court had no jurisdiction to intervene in the internal affairs of a political party.

Their Honours agreed with Gavan Duffy J. on the issue of whether Hogan had a proprietary interest in the funds of the party. They held that he had no such interest because under the rules of the party the members were to enjoy no personal interest in or benefit from the property of the party. Starke J. pointed out that 'the association has no club-house or meeting hall, or any property of which the members have any personal use or enjoyment',[7] and considered this fact to be of crucial importance. Rich, Dixon, Evatt and McTiernan JJ., in a joint judgment, said,

> whatever view may be taken of the exact and technical situation of the legal and equitable property in the various assets 'belonging' to the Party, it is reasonably clear that membership of the association carries with it no tangible or practical proprietary right . . . . It furnishes its members with no civil right or proprietary interest suitable for protection by injunction.[8]

Starke J. did not speculate as to the precise location of ownership of the assets of the party, but the other members of the Court inclined to the view that the members had been completely divested of any interest in the property of the party by the rule dedicating it to political purposes. They said, 'There is much to be said for the view that payments made by members . . . are final: that they are subscriptions to an object, so that no resulting interest however contingent remains in the member.'[9]

The second ground upon which the High Court refused jurisdiction in *Cameron v. Hogan* — the absence of a contract between the members of the party — depended heavily on their Honours' initial conclusion that Hogan enjoyed no significant proprietary interest in the funds of the party.

The majority did not deny the existence of the contractual jurisdiction but said that as a general rule no actionable breach of contract is committed by an unauthorized resolution expelling a member of a voluntary association or by the failure of executive officers to obey the rules of the association, unless the members enjoy some proprietary right in the property of the association. Their Honours explained this generalization by saying,

> voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature . . . are for the most part bodies of persons who have combined to futher some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private

6 [1920] 2 K.B. 523.
7 (1934) 51 C.L.R. 358, 385.
8 *Ibid.* 378.
9 *Ibid.* 377. *Cf. Hogan v. Cameron* [1934] V.L.R. 88, 95 *per* Gavan Duffy J., 'I have great doubt whether [the property of the Victorian Branch of the Australian Labor Party] is not subject to a trust which would limit its expenditure to the political objects of the association.'

gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract.[10]

Starke J. simply stated that '[t]he rules of a voluntary association organized for political purposes are not agreements enforceable at law, or in other words, contracts',[11] without discussing the issue of intent to enter into legal relations.

After Cameron v. Hogan*: a medley of cases*

Cameron v. Hogan has not received an enthusiastic reception from either academics[12] or judges. It seems to have been applied with full vigour in only two of the reported cases: *Heale v. Phillips*,[13] and *Pridmore v. Reid*,[14] both of which involved dog fanciers' clubs. In *Green and Others v. Page and Others*,[15] although Burbury C. J. followed *Cameron v. Hogan* in holding that the members of the Tasmanian Lawn Tennis Association possessed neither contractual nor proprietary rights, he was still prepared to find some source of jurisdiction which would allow intervention into the affairs of the Association.[16]

It is submitted that the failure of judges, to whom *Cameron v. Hogan* was apparently not cited, to arrive at the conclusion (treated by the High Court in *Cameron v. Hogan* as virtually self-evident) that a contractual relationship between members of an unincorporated association can be imputed only where the association is devoted to the pursuit of 'private gain and material advantage', is further evidence of the unsoundness of that decision. It is noteworthy that shortly after *Cameron v. Hogan* was decided, Reed A. J. found no difficulty in holding that the rules of a political association amounted to a contract of membership in *Re Unley Democratic Association*.[17] His Honour was asked to determine ownership of a sum of £760 held by the trustees of a defunct association dedicated to the advancement of the cause of democracy. The association had owned a meeting hall, which the trustees rented out to various societies, but his Honour was satisfied that the association was not established in any way for the purpose of pecuniary gain. Possibly the case can be distinguished from *Cameron v. Hogan* on the basis that the association possessed a hall which was available for the use

[10] (1934) 51 C.L.R. 358, 370-1.

[11] *Ibid.* 384.

[12] *E.g.* Baxt, R., 'The Dilemma of the Unincorporated Association' (1973) 47 *Australian Law Journal* 305; Holden, A. C., 'Judicial Control of Voluntary Associations' (1971) 4 *New Zealand Universities Law Review* 343; O'Connor, D., 'Actions Against Voluntary Associations and the Legal System' (1977) *Monash University Law Review* 87; Apel, I. and Landauer, M., 'The Associations Incorporation Act 1981: The Problems Solved and Those Remaining' (1983) 57 *Law Institute Journal* 583. *Cf.* Forbes, J. R. S., *The Law of Domestic or Private Tribunals* (1982) 20-1, who appears to approve of *Cameron v. Hogan*.

[13] [1959] Qd.R. 489.

[14] [1965] Tas. S.R. 177.

[15] [1957] Tas. S.R. 66.

[16] The situation with which his Honour was called upon to deal was rather unusual. The incumbent officers of the association refused to resign to make way for fresh officers elected at the Annual Meeting of the association. Burbury C. J. considered that the situation had produced a deadlock which could not be resolved by the members (at 79) and therefore the case was one where it would be proper to make a declaration (at 80).

[17] [1936] S.A.S.R. 473.

of the members,[18] but it seems to fall squarely within the category of associations set up apart from 'private gain and material advantage' envisaged by the majority in *Cameron v. Hogan.*

Where *Cameron v. Hogan* has been cited, its status as a binding precedent has been generally recognized. The authority of the decision has been openly defied only once: by Wootten J. in *McKinnon v. Grogan.*[19] Many judges have preferred to deal with the problems posed by *Cameron v. Hogan* by quietly ignoring its existence.[20] Many others have found some ground of distinction.[21]

Of course, not all judges have disapproved of *Cameron v. Hogan.* In *Heale v. Phillips*,[22] cited and followed in the very similar case of *Pridmore v. Reid*,[23] the Full Court of the Supreme Court of Queensland rejected any suggestion that *Cameron v. Hogan* should be reconsidered in the light of more recent English decisions, and Townley J. put forward an interesting objection to the existence of a contract of membership. His Honour said, 'To put the matter another way — suppose the plaintiff to be guilty of the conduct which, according to paragraph 5 of the statement of claim, was charged against her. If such conduct were a breach of the constitution or rules, was every other or any other member of the association to have an action against her for that breach?'[24] It is clear that in asking this question his Honour failed to consider the full implications of the contract constituted by the rules. The members undertake to be bound by the rules, including the disciplinary provisions, which usually provide for investigation of breaches of the rules to be carried out by an executive committee with the power to sanction by fine, suspension or expulsion. The proper course of action for an individual who feels that a fellow member should be reprimanded for conduct in breach of the rules is to draw the attention of the disciplinary tribunal to the offending member's conduct. Arguably, for a member to ignore the disciplinary procedure laid down in the rules and to bring an action for damages or injunction against another member would not only be premature but itself a breach of the rules exposing the prosecuting member himself to disciplinary action.[25]

It is submitted that the judges who decided *Heale v. Phillips* and *Pridmore v. Reid* fell into the same error as did the High Court in *Cameron v. Hogan*: treating the rules of an unincorporated association which prescribe the purposes for which

18 *Cf.* the comments of Starke J. in *Cameron v. Hogan*, *supra* n. 7, p. 328.

19 [1974] 1 N.S.W.L.R. 295.

20 In *McKinnon v. Grogan*, Wootten J. was dealing with the North Sydney District Rugby League Football Club. In two other cases involving the affairs of the same organization, *Grogan v. McKinnon and Others* [1973] 2 N.S.W.L.R. 290 and *Malone v. Marr and Others* [1981] 2 N.S.W.L.R. 894, judges of the Supreme Court of N.S.W. simply assumed jurisdiction without any discussion of the difficulties posed by *Cameron v. Hogan.*

21 *E.g. Finlayson v. Carr* [1978] 1 N.S.W.L.R. 657, which has been described as 'tantamount to a refusal to follow *Cameron v. Hogan.*': Sievers, S. and Baxt, R., 'The Rights of Members of an Unincorporated Association . . . to Challenge Decisions of Management' (1984) 2 *Company and Securities Law Journal* 3, 8.

22 [1959] Qd.R. 489.

23 [1965] Tas.S.R. 177.

24 [1959] Qd.R. 489, 499.

25 'A man may lawfully contract not to exercise a legal right; his exercise of that right, notwithstanding his agreement, may nevertheless be lawful; but he breaks his agreement all the same': *Macqueen v. Frackelton* (1909) 8 C.L.R. 673, 710 *per* Isaacs J.

the property of the association may be used as legally binding without identifying any legal basis for the authority of those rules. It will be argued here that rules dedicating association property to non-charitable objects can be given legal significance only by means of a contractual agreement amongst the members of the association as the co-owners of the property.

The difficult issue of the enforceability of non-charitable purposes was raised — although not in an altogether satisfactory fashion — in *Stevens v. Keogh*,[26] where the High Court was confronted with a plaintiff who asked for an injunction to restrain the alleged misuse of the funds of the N.S.W. Police Association, the rules of which specifically provided that the members had no right to share in property upon a dissolution. The two members of the Court, Latham C. J. and Williams J., who discussed the question of whether the plaintiff had standing to sue apart from that given by the legislation relating to industrial organizations, agreed that the plaintiff had a sufficient interest in the funds of the association to bring the suit.[27] It is unfortunate that their Honours did not take the opportunity to explore the full complexities of the mechanism whereby rules dedicating property to non-charitable purposes (including purposes which benefit members) become of legal significance, rather than blandly declaring that a member of the Police Association enjoyed a proprietary interest in its funds while it existed. It is submitted, however, that their Honours' comments indicate some awareness of the theoretical difficulties raised by *Cameron v. Hogan.*

In other cases of a similar nature to *Stevens v. Keogh* which have arisen since it was decided, judges have also been prepared to hold that the members of an association, the property of which is dedicated to purposes, have a proprietary interest in the property,[28] but have avoided coming to grips with the difficulties of convincingly reconciling their decision with *Cameron v. Hogan.* Indeed, in none of the cases decided subsequent to *Cameron v. Hogan* has any serious attempt been made to deal with the inadequacies of the decision, or to put forward an acceptable analysis of the legal structure of unincorporated associations. All that can really be said is that since no court has to date been faced with a set of facts identical to those of *Cameron v. Hogan* (expulsion from a political party) it has been possible for a court so inclined to find some ground of distinction. It is clear that Supreme Court judges on the whole dislike the restrictions that a strict application of *Cameron v. Hogan* would impose on their jurisdiction, and that the vast majority of those judges who have been asked to intervene in disputes arising out of the affairs of voluntary associations have accepted that the resolution of such disputes is a proper judicial function. They have therefore sought to distinguish *Cameron v. Hogan* in an *ad hoc* fashion on whatever ground seems plausible in the light of the facts of the particular case before them. In some cases, the court has pointed to some pecuniary advantage flowing from membership of the association,[29] and in others, to the fact that the subject-matter

[26] (1946) 72 C.L.R. 1.
[27] *Ibid.* 12, *per* Latham C. J., and 34-5 *per* Williams J.
[28] *E.g. Rendall-Short v. Grier* [1980] Qd.R. 100; *Burton v. Murphy* [1983] 2 Qd.R. 321.
[29] *E.g. Ex Parte Appleton* [1982] Qd.R. 107. *Cf. Heale v. Phillips* [1959] Qd.R. 489.

of the dispute relates, not to disciplinary action taken against a member, but to the due administration of association property.[30] This fragmentary approach has, unfortunately, diverted attention from the underlying theoretical inadequacies of *Cameron v. Hogan*. It is the aim here to probe into these very theoretical inadequacies, to show that *Cameron v. Hogan* is contrary to both authority and principle, and to offer a satisfactory explanation for the legal structure of unincorporated associations.

The proprietary interest of a member

Historically, cases of expulsion from unincorporated associations were dealt with by the courts of equity, whose jurisdiction was founded upon the fact that by virtue of the expulsion the member lost a right of property. Since an unincorporated association has no existence apart from that of its members, it cannot own property and the property which is for the sake of convenience described as 'the property of the association' is in fact the joint property of the members.[31] In the earliest cases involving associations of a political nature, expelled members had no difficulty in relying upon this property jurisdiction because these forerunners to contemporary political parties were essentially social organizations which provided clubhouse facilities for their members.[32] Jurisdiction over the affairs of these political clubs was founded on the fact that it could clearly be seen that the enjoyment of the members of club property was derived from their status as joint owners. Political clubs were treated like any other gentlemen's club.[33]

Political clubs have now been replaced by parties dedicated to the serious pursuit of political aims rather than the provision of social amenities for members. From a legal point of view, the most important change has been the appearance of constitutional rules which purport to dedicate the property of the party to the achievement of its political purposes.[34] In *Cameron v. Hogan* the High Court seized upon the fact that the rules of the Victorian Branch of the Australian Labor Party dedicated its property to its political objects as a justification for holding that the party was, unlike the earlier political clubs, outside the well-established category of voluntary associations constituted by contract between the members, and the property of which is held in trust for the members.

The majority in *Cameron v. Hogan* went so far as to suggest, in reliance upon the rules dedicating the property of the party to its purposes, that the members of

30 *E.g. Burton v. Murphy* [1983] 2 Qd.R. 321.

31 *E.g. Re Producers' Defence Fund* [1954] V.L.R. 246, where Smith J. held that the natural meaning of the expression 'funds of the Association' in relation to the Victorian Rural Producers' Association was 'the funds belonging, subject to the rules, to the members of the Association' (at 252).

32 The objects of the Randolph Churchill Conservative Club are illustrative of the true nature of these political clubs: 'The advancement of the Conservative cause . . . and the promotion of social intercourse.' See *Andrews v. Salmon* (1888) 4 T.L.R. 490, 491.

33 In *Chamberlain v. Boyd* (1883) 11 Q.B.D. 407, involving the Reform Club, the report does not even mention the political nature of the club. See *Hopkins v. Marquis of Exeter* (1867) L.R. 5 Eq. 63, 67 *per* Lord Romilly for a reference to the political objects of the Reform Club.

34 Rules of the Victorian Branch of the Australian Labor Party:
'18.2 The income and property of the Party whensoever derived shall be applied solely towards the promotion of the objects of the Party as set forth in these Rules and no portion thereof shall be paid over or transferred directly or indirectly by way of profit to members of the Party . . .'

the party retained no interest at all in its property. This suggestion, it is submitted, is misguided and illustrates the High Court's inability to come to grips with the issues raised in *Cameron v. Hogan*. In putting forward the view that Hogan retained no proprietary interest however slight in the funds of the party, the High Court was nevertheless not entirely without the benefit of authority. Arguably, however, both the previous cases in which a similar view was adopted were wrongly decided.

In *Rigby v. Connol*,[35] Jessel M. R. held that money applicable to the purpose of regulating the trade of the members of the union of journeymen hatters was money in which they had no proprietary interest because they enjoyed no direct benefit from its application to these 'trade purposes'.[36] Clearly, the Master of the Rolls drew a false dichotomy between purposes which directly benefited the members, and purposes which indirectly benefited them.[37]

In *Amos v. Brunton and Others*,[38] Manning C. J. held, following *Rigby v. Connol*, that a member of the N.S.W. Millers' and Flour Merchants' Association had no property in the funds of the association because it had been established for trade purposes, and its funds were to be used exclusively to cover its expenses. Manning C. J. took the view that since the money could only be used by the executive committee to pay expenses, '[the plaintiff's] subscription does not purchase for him anything of substance which could be sold and returned to him in the form of money upon the breaking-up of the association.'[39] It is submitted that his Honour was mistaken. The plaintiff may have contractually bound himself to allow his share of the common property to be devoted to expenses, but so far as any surplus upon a dissolution was concerned, it must obviously be divided amongst the members in the usual fashion. Furthermore, the rule in question adds nothing to the established law relating to obligations incurred by executive members in the course of carrying out their duties. It is well understood that

Rules of the Victorian Division of the Liberal Party of Australia:
'59. The income and property of the Party whencesoever derived shall be applied solely towards the promotion of the objects of the Party as set forth in this Constitution, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend bonus or otherwise howsoever by way of profit to the members of the Party.' (Rule 5 of the Federal Constitution is in identical terms.)

Rules of the National Constitution of the Australian Democrats:
19.0 Use of party funds:
'The Party is a non-profit organization and accordingly the following provisions shall apply:
19.1 The income and property of the Party howsoever and whencesoever derived or acquired shall be applied solely towards the promotion of the objects and policy objectives of the Party as set forth in this Constitution and no portion thereof shall be paid or transferred directly or indirectly by way of dividend bonus or otherwise to members of the Party . . .'

The rules of the National Party of Australia appear to be more obscure. Rule 2(b) of the Victorian Constitution states that the assets of the Party shall be vested in the General Council as Trustees. Rule 3 lists the objects of Party, but there is no rule specifically stating that the property of the Party is to be applied only to the objects of the Party. It is argued here that the absence of such a rule is of little importance, *infra* n. 19, p. 343.

35 (1880) 14 Ch. D. 482.

36 *Ibid.* 489.

37 *Cf. Makin and Others v. Gallagher and Others* [1974] 2 N.S.W.L.R. 559, a case involving the affairs of the Builders Labourers' Federation. Holland J. noted that the funds of the union were used not only to provide strike and lockout pay, legal assistance in defence of members, and assistance in times of distress through sickness, accident or unemployment, but to finance the efforts of the union to obtain better wages, hours and conditions of employment for the members (at 581-2). His Honour drew no distinction between the two different types of objects.

38 (1897) 18 N.S.W.L.R. (Eq.) 184.

39 *Ibid.* 188.

committee members are entitled to an indemnity out of association funds for properly-incurred liabilities.[40]

It is submitted that to deny that the members of a voluntary association, the property of which is dedicated to non-charitable purposes, retain their interest in that property is tantamount to enforcing a trust for non-charitable purposes.[41] It is argued here that the true position is that the members of such an association retain ownership of the property, but have contractually agreed to expend it only upon the specified purposes. This view is supported by the law in relation to bequests to unincorporated associations.

In Re Grant's Will Trusts[42] contains a recent statement of the relevant principles, and is of particular interest as it concerns a bequest to a political party. Vinelott J. stated that gifts to associations will be upheld where they can be construed as gifts to the members of the association even though the property is given as an accretion to the funds of the association, so that it becomes subject to the contract, normally evidenced by the rules of the association, which governs the rights of the members *inter se*.[43] His Honour pointed out that a bequest in that form would be valid because it did not seek to impose an unenforceable non-charitable purposes trust.[44] Of course, the only assurance that the testator has that the subject-matter of the gift will be devoted to the desired purpose is that the members of the association (the recipients of the gift) have contractually bound themselves to apply their common property to that purpose.

It can be seen that the property and contractual jurisdictions, rather than being distinct, are in fact the two faces of one coin. Unless dedicated to a valid charitable trust, the property of an unincorporated association must remain the property of the members and the source of any legal authority of rules, specifying upon what objects the funds of the association may be applied, must spring from their status as the terms of a contract, not the terms of a trust. Rejection of the proposition that the members of an unincorporated association retain co-ownership of its property despite the presence of rules dedicating its property to objects entails acceptance of the proposition that the property has no owner and therefore must go to the Crown as *bona vacantia*, for the law's recognition of a purpose as a quasi-owner is limited to charitable purposes. It seems highly unlikely, however, that a court would be prepared to accept the proposition that the funds of every association established to achieve objects rather than the provision of amenities for members should be regarded as settled upon an invalid purposes trust and therefore *bona vacantia*.

In *Re Producers' Defence Fund*,[45] Smith J. had to consider these issues in deciding who were the persons, if any, entitled to the property of an association dedicated to non-charitable objects upon its dissolution. His Honour held that the

[40] Fletcher, K. L., *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) 124-30.
[41] Ford, *op. cit.* 193.
[42] [1980] 1 W.L.R. 360.
[43] *Ibid.* 365-6.
[44] *Ibid.* 367.
[45] [1954] V.L.R. 246.

funds of the association remained the property of the members, and that the rules dedicating the funds to the objects of the association derived their force from an agreement between the members expressed in the contract of membership. This view is clearly in accordance with that put forward here.

It is submitted that the suggestion made by the majority in *Cameron v. Hogan* that the members of the Victorian Branch of the Australian Labor Party were completely divested of all interest in the funds of the party by the presence of rules dedicating those funds to political purposes is completely untenable. The subscriptions paid by members of a political party are undoubtedly for an object, but as the object is non-charitable, they cannot completely divest themselves of their interest in favour of the object. They must therefore retain a beneficial interest in the funds of their party, and it follows that if a member is wrongfully expelled he loses this beneficial interest, and with it any chance of ultimately sharing in the funds upon a dissolution. The only alternative to finding that the members of a political party are the co-owners of the property of the party is to hold that the party is not an unincorporated association.[46]

It should be noted that the rules of some political parties[47] provide that upon a dissolution, the funds are not to be shared amongst the members, but transferred to a body having similar objects. It is submitted that the position of members expelled from these parties would not be affected by the presence of these rules. It is uncertain whether the power to dissolve an association and distribute its property contrary to its rules resides in all its members or in the majority of members.[48] However, it seems clear that there is a residual power in at least all

[46] This was the approach taken by Vinelott J. in *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)* [1980] 3 All E.R. 42. His Honour held that the funds collected by the central office of the Conservative Party were not the property of the persons who made up the membership of the party, saying, 'It is simply not the case that the legal owner of property must always hold the property on some effective trust or be the beneficial owner of it. An executor in the course of administering a will is not a trustee of his testator's property; equally, he is not the beneficial owner . . . a situation in which the beneficial ownership of property which is not held by trustees on some effective trust is left in suspense can also be produced by contract and may possibly arise in other circumstances' (at 61). Intriguing though his Honour's reasoning may be, it is unlikely to be applied in Australia. Central to Vinelott J.'s conclusion that the members of the Conservative Party were not the co-owners of its property was his decision that the party, due to its extremely fragmented organization, was not an unincorporated association. No such suggestion has ever been made about an Australian political party, and in *Cameron v. Hogan* (1934) 51 C.L.R. 358 and *Burton v. Murphy* [1983] 2 Qd.R. 321 the Australian Labor Party was treated as an unincorporated association. The other parties have a similar scheme of organization, being also composed of a number of state bodies and a federal body. They would presumably also be viewed as unincorporated associations.

[47] Rules of the Victorian Division of the Liberal Party: '60. If upon the winding-up or dissolution of the Party, there remains after satisfaction of all its debts and liabilities any property whatsoever the same shall not be paid or distributed amongst the members of the Party, but shall be given or transferred to some company association society or other body having objects similar to the objects of the Party . . .' (Rule 6 of the Federal Constitution is in identical terms.)

Rules of the National Constitution of the Democrats:
Use of party funds:
'19.2 If upon the winding-up or dissolution of the Party there remains after the satisfaction of all its debts and liabilities any property whatsoever the same shall be paid to or given or transferred to some other institution or institutions having objects and objectives similar to the policy objectives of the Party . . .'

[48] *Master Grocers' Association of Victoria v. Northern Districts Grocers' Co-operative Ltd* [1983] 1 V.L.R. 195, 202-3 *per* Brooking J., for a recent discussion of the issue.

the members to share the property of the association amongst themselves whatever directions may be found in the rules with regard to the disposal of the property upon dissolution.[49]

The right to share upon dissolution

It is argued here that the essence of the proprietary right possessed by a member of an unincorporated association, the property of which is dedicated to political purposes, is the right to share upon a dissolution. The High Court in *Cameron v. Hogan* considered the possibility that Hogan might have the right to share in the property of the party upon a dissolution, but their Honours took the view that it was not a right of sufficient substance to attract the protection of equity. It is submitted that their Honours were in error in holding that Hogan had no proprietary interest worthy of protection simply because there was no common property available for the use of the members of the party. The courts of equity have always considered that the principal right of a member of a voluntary association is the right to share in the assets upon a dissolution. In one of the oldest of the club cases, *In Re St James' Club*,[50] St Leonards L. C. said:

> What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and if the club was broken up while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club; but he had no transmissible interest, he had not an interest, in the ordinary sense of the term capital in partnership transactions; it was a simple right of admission to, and enjoyment of, the club while it continued.[51]

Of the two rights described by St Leonards L. C. — the right to share in the property upon a dissolution and the right to use the common property — the right of user would appear to be of less importance because it is derived from the right to share upon dissolution.

In *Lyttelton v. Blackburne*[52] and *Baird v. Wells*[53] it was held that the mere right of user enjoyed by members of a proprietary club (which differs from a members' club in that the property is owned by a proprietor, with whom all the members contract individually) was insufficient to justify an injunction. In *Lyttelton v. Blackburne*, followed in *Baird v. Wells*, Bacon V.C. considered himself to be deprived of jurisdiction because the committee of the club held no property in trust for the members.[54] It is submitted that the right which attracts the protection of equity must therefore be the right of ownership — the right as a co-owner to share upon dissolution. The presence or absence of rights to enjoy the property during the existence of the association is unimportant.

The counter argument to this submission was succinctly stated by Burbury

49 Fletcher, *op. cit.* 171-5.
50 (1854) 2 De G.M. & G. 383; 42 E.R. 920.
51 42 E.R. 920, 922.
52 (1875) 45 L.J. Ch. 219.
53 (1890) 44 Ch.D. 661.
54 'Even, however, if the plaintiff had proved his case it would be exceedingly doubtful whether this court had any jurisdiction to interfere, because, from the constitution of the club there is no property of which the Committee are trustees for the members': (1875) 45 L.J. Ch. 219, 223.

C. J. in *Green and Others v. Page and Others*,[55] a case decided after *Cameron v. Hogan*. His Honour said, in relation to the Tasmanian Lawn Tennis Association:

> The Association has no assets other than a fluctuating sum at the credit of its bank account in the order of £600 to £700. Any ultimate interest that a member may have in the Association's funds in the event of a dissolution of the Association is too unsubstantial (*sic*) and remote an interest to constitute the kind of proprietary interest which the courts have required before granting an injunction or awarding damages at the instance of a member of a voluntary association who has been expelled from membership.[56]

It must be conceded that so far as the average voluntary association is concerned, the right to share upon dissolution is of negligible pecuniary value. However, there is no suggestion in any case prior to *Cameron v. Hogan* that the value of the property right must be significant before it attracts the protection of equity. Once satisfied that the association in question possessed some property, the courts appear to have considered that they had the power to grant an injunction to protect a member's interest in that property without engaging in the exercise of determining the probability of a dissolution occurring, or amongst how many members the property would have to be shared upon a dissolution. Courts have in fact granted injunctive relief where the member's property interest was very slight, for example in *Lamberton v. Thorpe*,[57] where Luxmoore J. intervened to protect the plaintiff's membership of the Rotary Club, a dining club which owned no premises and only some property of trivial value.[58]

The property right of a member of an unincorporated association has long been recognized by academics as nebulous and impossible to quantify in money terms.[59] The courts have, however, always been ready to intervene to protect that abstract right and there is not a scrap of authority to support the view taken by the High Court in *Cameron v. Hogan* that Hogan's right to share upon dissolution was not 'a civil right of a proprietary nature proper to be protected',[60] or 'too insubstantial to warrant interference by any Court by way of injunction.'[61] Furthermore, as Starke J. pointed out in the later case of *Watson v. J. & A. G. Johnson Ltd*,[62] in the case of a members' association, '[u]ntil the joint affairs are settled, the club dissolved, the liabilities discharged, and the mutual rights of the members adjusted, it is impossible to ascertain the value of the interests of the members in the common property or assets, whether considered individually or as a whole.'[63] Consequently, it must be the right itself, and without any qualification as to value, that courts of equitable jurisdiction have historically been accustomed to protect.

55 [1957] Tas.S.R. 66.
56 *Ibid.* 76.
57 (1929) 45 T.L.R. 420.
58 Luxmoore J. did, however, note that counsel for the defendant committee members did not dispute the existence of jurisdiction (at 421).
59 See, *e.g.* Holden, A. C., 'Judicial Control of Voluntary Associations' (1971) 4 *New Zealand Universities Law Review* 343, 350.
60 (1934) 51 C.L.R. 358, 377 *per* Rich, Dixon, Evatt and McTiernan JJ.
61 *Ibid.* 385, *per* Starke J.
62 (1936) 55 C.L.R. 63.
63 *Ibid.* 69.

It follows that a member wrongfully expelled from a political party, although he does not lose any right to enjoy the property of the party, nevertheless loses something which equity recognizes as a property right. He is therefore entitled to an injunction restraining executive members from interfering with him in the enjoyment of his rights as a member.

The jurisdiction in contract

The courts of common law also historically possessed jurisdiction over the affairs of unincorporated associations by virtue of the contract of membership contained in the rules of the association. Plaintiffs, however, rarely sought to make use of this jurisdiction because of the lack of effective remedies. The jurisdiction in contract is now blossoming,[64] and the explanation is that modern courts seem unconcerned by either the personal nature of the contract of membership (once considered a bar to the grant of an injunctive order) or by the notion that an invalid explulsion is simply a void act incapable of affecting a member's rights. The transition in emphasis from property to contract has in fact taken place with remarkably little discussion of the barriers which were once considered to prevent the award of effective relief for expulsion in breach of contract.

It is important to realize that, prior to *Cameron v. Hogan*, the courts had never experienced any difficulty in recognizing the existence of the contract of membership. Of course, it was recognized that where people gather together casually for purely social purposes, there may well be no legal basis to their association. Informal agreements amongst friends to meet, for example, to play cards or tennis, lack the intention to be legally bound that is an essential requirement for a contract. Such a loose group would not be regarded as an 'association'.[65] However, an association established to promote the same activities which has a name, and a body of rules, and which collects subscriptions, must be considered to fall into a different category. This was clearly accepted by Sir George Jessel M. R. in *Rigby v. Connol*,[66] a judgment described by Ford as 'the locus classicus on jurisdiction'.[67]

The explanation for the fact that the jurisdiction in contract did not develop until relatively recently is not that it was difficult to establish the contract of membership, but that no remedies were available for breach of that contract. This is a point which the High Court in *Cameron v. Hogan* apparently failed to appreciate.

Stirling J.'s comments in *Baird v. Wells*, a case involving expulsion from a proprietary club, provide insight into the way in which the courts approached

64 Holden has gone so far as to say, 'The earliest basis of jurisdiction, the protection of a property interest, has almost fallen into disuse.' *op. cit.* 350.

65 *E.g. Re Thackrah, Thackrah v. Wilson* [1939] 2 All E.R. 4, where a testamentary gift to the Oxford Group failed because the evidence did not establish the existence of an association of individuals banded together under the name of 'the Oxford Group'. At p. 6, Bennett J. observed, 'Before one can find an association there must be some rules, either written or oral, by which those who are supposed to be members of it are tied together. I think that they would probably be written rules. There must be some constitution.'

66 (1880) 14 Ch.D. 482, 487.

67 Ford, *op. cit.* 200.

their contractual jurisdiction over expulsions from voluntary associations in early cases. His Honour said,

> The position appears to me to be this: each member is entitled by contract with the Defendant *Wells* to have the personal use and enjoyment of the club, in common with the other members, so long as he pays his subscription and is not excluded from the club under Rule 17. That right is, as it seems to me, of a personal nature such as, if infringed, may give rise to a claim for damages, but not such as the Court will enforce by way of specific performance or injunction.[68]

His Honour likened the contract to one for the provision of board and lodging.

Although Stirling J. mentioned the possibility of obtaining an award of damages for wrongful expulsion in breach of contract, at the time the courts took the view that an invalid expulsion was completely void and incapable of affecting a member's rights. Damages for expulsion were therefore not awarded. *Wood v. Woad and Others*[69] exemplifies the difficulties faced by expelled members seeking to rely on the contractual jurisdiction. The plaintiff had been expelled from a mutual insurance association and he claimed at law for damages sustained by reason of the expulsion. The Court of Exchequer was prepared to entertain his claim because 'he was a member of the association and had paid his money for the benefits belonging to that membership . . .',[70] but made a declaration that the plaintiff had no cause of action even though the expulsion was invalid. Amphlett B. said of the plaintiff: 'He has not ceased to be a member of the society; he has not lost the rights of a member. He is to recover damages for what? For an attempt to expel.'[71]

In numerous cases prior to *Cameron v. Hogan*, many of which have already been referred to, the existence of a contract of membership was recognized.[72] No suggestion is to be found either in these cases or in academic writings from this period that it is only the right to use and enjoy association property that justifies the implication that the members must have intended to enter into contractual relations. The simple fact of membership was treated as sufficient to give rise to the contract. Cyprian Williams, writing in 1903, considered the full legal explanation for the existence of an unincorporated association to be a combination of property and contract law,[73] but the contribution made by contract long tended to be overlooked because the jurisdiction to make orders restoring a wrongfully expelled member to the privileges of membership was firmly based on the existence of property.

It is clear from an analysis of the earlier cases that the obstacle to the development of the jurisdiction in contract was the lack of effective remedies, not the unwillingness of the courts to recognize the contract of membership. *Forbes v.*

68 (1890) 44 Ch.D. 661, 676.
69 (1874) L.R. 9 Exch. 190.
70 *Ibid.* 201, *per* Pollock B.
71 *Ibid.* 204.
72 *E.g. Hopkinson v. Marquis of Exeter* (1867) L.R. 5 Eq. 63, a case involving the Conservative Club, where Lord Romilly M.R. said, 'In order to secure the principal object of the club, the members generally enter into a written contract in the form of rules.' (at 67). See also *Dawkins v. Antrobus* (1881) 17 Ch.D. 615, where Sir George Jessel M.R. described a club as a body founded upon a written contract expressing the terms on which the members associate (at 620); and *Harington v. Sendall* [1903] 1 Ch. 921, where Joyce J. applied very similar reasoning (at 926).
73 Williams, T.C., 'Club Trustees' Right to Indemnity: A Criticism of *Wise v. Perpetual Trustee Co. Ltd*' (1903) 19 *Law Quarterly Review* 386, especially 390-1.

Eden,[74] heavily relied upon by the majority in *Cameron v. Hogan*, was itself a case in which the House of Lords recognized that the canons of a church — a body clearly apart from 'private gain and material advantage' — amounted to a contract of membership. Relief was refused because the plaintiff's claim rested upon a speculative possibility of injury: he feared that he might be removed from his position as a minister of the church because of his opposition to executive actions allegedly in breach of the rules.

Prior to *Cameron v. Hogan*, it was also the case in Australia that the existence of the contract of membership, whatever the nature of the association, was readily recognized, but effective remedies were not yet available for the actions of executive members in breach of that contract unless the plaintiff member suffered some pecuniary loss. The leading case is *Macqueen and Others v. Frackelton*,[75] where the High Court upheld the decision of the Supreme Court of Queensland to grant a declaration that a resolution of the General Assembly of the Presbyterian Church of Queensland was made in breach of the contract between the members and consequently void, and to grant liberty to apply for injunctive relief. The plaintiff was the minister of the Ann Street Church in Brisbane, and as a result of the resolution he had been suspended for six months and deprived of his ministerial emoluments. It is not clear precisely what was the position with respect to the property of the church, but it seems that it was held on religious trusts for the purposes of the church rather than for the benefit of the members.[76] Nevertheless, the Court felt no difficulty in treating the consensual compact between the members of the church as a contract. Isaacs J. said:

> [I]n the ascertainment and enforcement of rights and liabilities among its members, a Church is regarded by the law in precisely the same light as any other society of men who have entered into association for lawful purposes. Whether the objects be sacred or secular, whether for friendly, literary, scientific, or religious purposes the social compact is at once the source and the measure of the rights of those who compose the body. It is a pure question of contract . . . .[77]

The theoretical basis of the jurisdiction in contract

The contract of membership has been well accepted since the earliest days of unincorporated associations. However, it is necessary to confront the question of whether there is a sufficient theoretical basis for the implication of a contract of membership. Such issues as who are the parties to the contract, and the mechanism of offer and acceptance which brings them into the contractual relationship, require some exploration.

In *Cameron v. Hogan*, the majority sought a further justification for their refusal to recognize a contract between the members of the Victorian Branch of the Australian Labor Party in the procedural difficulties involved in bringing an action against a large number of persons. Their Honours said,

> In the next place, the difficulty of framing an action by one member of a large body of persons for damages for breach of a contract constituted by his admission to membership has always been very great. Such a contract apparently is considered joint, and in (*sic*) common law in strictness it would have been necessary for the plaintiff to join all the members as defendants.[78]

74 (1867) L.R. 1 Sc. & Div. 568.
75 (1909) 8 C.L.R. 673.
76 *Frackelton v. Macqueen and Others* [1909] St.R.Qld 89, 95 *per* Cooper C.J.
77 (1909) 8 C.L.R. 673, 704.
78 (1934) 51 C.L.R. 358, 371.

It is submitted that these remarks spring from a fundamentally mistaken view of the nature of the contract of membership. There is no contract between each member and all the other members as a body: each member contracts with each other member individually to be bound by the rules of the association. The contract between each two members binds them to observe the rules. Hence, a member expelled in breach of the rules should be able to sue the executive members responsible for breach of their individual contracts. This theory provides an answer to the question asked by Starke J. in *Cameron v. Hogan*: 'how can any contract be inferred between Hogan and the members of the central executive, whom he sues, binding them not to exert jurisdiction, or expel him except in accordance with the rules?',[79] and also obviates the need to sue the body of the membership, for they have committed no breach of contract.

This fundamental misapprehension as to the nature of the contract of membership explains why their Honours did not raise what appears to be the principal theoretical objection to the proposition that the rules of an unincorporated association constitute a contract of membership: multiplicity of contracts. By this it is meant the enormous number of separate contracts which must be considered to exist if each and every member of an association of reasonable size is considered to have contracted individually with each and every other member. The mathematical formulae for calculating the number of different ways of combining two items from a group containing n items is:

$$\frac{n!}{(n-2)! \times 2}$$

(note: n! means $n \times (n-1) \times (n-2) \times \ldots \times 1$).

Assuming a club of 600 members, the total number of contracts between each two members would be:

$$\frac{600 \times 599 \times \ldots \times 1}{598 \times 597 \times \ldots \times 2}$$

i.e. 179,700[80]

The vast number of contracts required by this theory led Chafee to regard it as artificial,[81] and the number of contracts involved in a political party with thousands of members is admittedly staggering. Nevertheless, it is submitted that the theory is workable. When an association is first formed, the members contract together directly at the inaugural meeting. Thereafter, an executive is appointed by the members to act as their agents in accepting new members. Prospective members make to this executive an offer to adhere to the rules and pay a subscription in return for the privileges of membership, and their offers are accepted by the executive as the agents of all the other members individually.

[79] *Ibid.* 384.

[80] Chafee obtains the same result. Chafee, Z., Jr., 'The Internal Affairs of Associations Not For Profit' (1930) 43 *Harvard Law Review* 993, 1003.

[81] *Ibid.*

Consideration is provided by both parties. This point was addressed by Gavan Duffy J. in *Hogan v. Cameron*,[82] where his Honour said,

> [e]ach member here, amongst other things, parts with his money by payment of a subscription. He gets in return, amongst other things, a right to a voice in the disposition of the fund thus created, or in the election of those who dispose of it, though such disposition may be limited by the objects of the association.[83]

The sheer number of contracts in itself does not pose a problem, because the terms of each contract, contained in the rules, are identical.

The proposition that the executive members have been appointed to act as the agents of the members for the purpose of accepting new members does not conflict with the observations of O'Bryan J. in *Freeman v. McManus*.[84] His Honour had to decide whether one unincorporated body (the Victorian Branch of the Australian Labor Party) had entered into a tenancy agreement with another unincorporated body (the Melbourne Trades Hall Council). He rejected the idea that 'the Federal executive or the central executive [of the Branch] has any authority to bring the members into contractual relations with third parties.'[85] It is not suggested that the agency of the executive members extends beyond the authority to admit new members; to maintain that it stretched to such commercial dealings as the lease of land would be absurd.[86]

The most powerful argument in favour of the existence of contractual relations between the members of unincorporated associations is not, however, the neatness of the theory but the fact that it is necessary to explain many well accepted features of the law governing such associations. For example, even the true nature of the proprietary interest of a member in a gentlemen's social club cannot be understood without reference to the contract of membership. To quote Lee,[87] the bare trust upon which the trustees of such a club hold its property 'is the product of a special agreement made between the members: it is subject to that agreement and does not govern it . . . .'[88]

Forbes does not agree. He takes the view that,

> [g]enerally it is most difficult to persuade a court that the rules of an unincorporated voluntary association are intended to create legal relations among the members . . . [c]ases can certainly be found in which reasons for judgment, perhaps per incuriam, move from the language of mere consensus to that of enforceable contract, but upon close examination of such cases it will often be found that the property test was satisfied.[89]

He concludes by describing references to the existence of a contract between the members in decided cases as 'otiose'.[90]

It is submitted that Forbes is incorrect. References to the fact that a contract exists between the members of an unincorporated association, which are to be

82 [1934] V.L.R. 88.
83 *Ibid.* 94.
84 [1958] V.R. 15.
85 *Ibid.* 24.
86 See also *Banfield v. Wells-Eicke* [1970] V.R. 481, *Carlton Cricket and Football Social Club v. Joseph* [1970] V.R. 487.
87 Lee, W. A., 'Trusts and Trust-like Obligations with Respect to Unincorporated Associations', in Finn, P. D. (ed.), *Essays in Equity* (1985) 1979-95.
88 *Ibid.* 180.
89 *The Law of Domestic or Private Tribunals* (1982) 20.
90 *Ibid.* 21.

found scattered amongst the reports, are not irrelevant or unnecessary but represent an acknowledgment of the complex interaction of property and contract which explains the existence of the legal relationship known as the unincorporated association. It must be borne in mind that an unincorporated association, like a trust, has no existence as an entity in its own right, and, just as a trust is correctly described as an obligation placed on the trustee, an unincorporated association is correctly described as a relationship between the members. It is argued here that this relationship must be contractual in nature.

It has always been assumed that executive members are bound by the objects of the association and cannot expend the funds of the association for any purposes outside those objects, regardless of the presence or absence of a rule explicitly dedicating the funds to association objects.[91] It is submitted that the same would apply even if the rules of an association, *e.g.* a social club, contained no objects. The executive members could not spend the money as they pleased — perhaps on themselves — but would be bound to expend it on the provision of amenities for the members. The source of this legal obligation cannot be a trust, for the law does not recognize non-charitable purpose trusts. It is this which gives rise to Lee's claim that the terms upon which the property of a members' club is held by the trustees are the product of the agreement of the members.[92] It follows that the differences between a simple members' social club and a political party are negligible. Both are founded upon an agreement to expend the common property upon certain objects, specified either explicitly or implicitly.

Additional evidence supporting the contract theory of association existence is provided by the fact that while the power to make the injunctive orders which provided effective relief to an expelled member historically depended upon the existence of a proprietary right, the exercise of that power has always been closely linked to the terms of the contract of membership. Where a purported expulsion was in breach of the rules and therefore of the contract of membership, the element of wrongfulness was introduced that enabled a plaintiff to successfully argue that he was entitled to the protection of equity to prevent him being unlawfully deprived of a property right. A member who had been expelled in accordance with the prior agreement made between himself and the other members, embodied in the rules, could not complain that he had been wrongfully deprived of his share in the association property. Examples of cases in which the connexion between the property jurisdiction and the contract of membership was explicitly stressed, are *Dawkins v. Antrobus*,[93] and, more recently, *Maclean v. The Workers' Union*,[94] where it was held that the source of both the power to expel[95] and of the procedure to be followed in an expulsion[96] must be found in the rules expressing the agreement of the parties.

[91] *E.g. Thellusson v. Viscount Valentia* [1906] 1 Ch. 480, 489 *per* Joyce J.; *Baker v. Jones and Others* [1954] 1 W.L.R. 1005.
[92] Lee, *op. cit.*
[93] (1881) 17 Ch.D. 615.
[94] [1929] 1 Ch. 602.
[95] (1881) 17 Ch.D. 615, 620.
[96] [1929] 1 Ch. 602, 623-4.

Finally, the fundamental rule governing associations — the rule that no member is liable for debts incurred by executive members beyond the amount of his or her subscription — must also be founded upon contract. The members, as *cestuis que trust*, have excluded the liability to indemnify their trustees which would otherwise exist under the rule in *Hardoon v. Belilios*[97] by contractual agreement. This was the approach taken by the Judicial Committee of the Privy Council in *Wise v. Perpetual Trustee Co. Ltd*,[98] where the contract of membership was treated as containing an implied term excluding the right to indemnity. Their Lordships said,

> [c]lubs are associations of a peculiar nature . . . and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed.[99]

Despite Cyprian Williams' criticisms on the ground that the authorities cited by their Lordships do not support their conclusion that there is an implied condition that a member of a club shall have no liability beyond his entrance fee and subscription,[1] this principle has become a cornerstone of association law. It cannot be seriously argued that while members of an unincorporated association, upon joining the association, intend to enter into a contract relieving them of liability to indemnify the trustees of the association, they do not intend to enter into a contract in terms of the rules of the association, securing their rights of membership.

It is submitted that there is no viable alternative to recognizing that the basis of the existence of all unincorporated associations, whether their property be dedicated to objects or not, is contract. To reject this proposition is to raise several unanswerable questions, not least of which is from where do the rules gain their binding force, if not from a contract between the members? Furthermore, there are no objections of any substance to the contract theory. As explained, although the number of individual contracts may be large, this poses no problem as their terms are identical. Consideration is provided by the payment of a subscription by a new member, and admission to membership by the existing members, and a mechanism for offer and acceptance exists by means of the agency of the executive members for the limited purpose of accepting new members.

Remedies for expulsion in breach of contract

The issue of remedies is one that deserves some discussion in its own right, for historically there were no remedies for expulsion in breach of contract. This was a view to which the High Court clung in *Cameron v. Hogan*, despite the progress being made by other courts in developing remedies.[2] Unanimously, their

97 [1901] A.C. 118.
98 [1903] A.C. 139.
99 *Ibid.* 149.
1 Williams, *op. cit.* 394-5.
2 *Gray v. Allison and Others* (1909) 25 T.L.R. 531 is the first case in which a court appears to have been willing to treat an invalid expulsion as a wrong actionable in damages. See also *Young v. Ladies' Imperial Club Ltd* [1920] 2 K.B. 523, *Murphy v. Synnotty and Others* [1925] N.I. 14, and *Savill v. The Committee of the South Australian Jockey Club* (1880) 14 S.A.S.R. 22, where an injunction was granted even though the plaintiff also asked for damages at law.

Honours held that Hogan would have been entitled to no relief even if the rules of the party had amounted to a contract, although on different grounds. Starke J. interpreted the rules to mean that there would have been as yet no breach of the contract of membership, because Hogan had not exhausted all avenues of appeal under the rules.[3] The majority favoured the view advanced in *Wood v. Woad and Others*,[4] and said that as a general principle a resolution improperly expelling a member in contravention of the rules was void and left the rights arising out of his membership unaffected.[5]

It is unlikely that a High Court which is prepared to overrule *Cameron v. Hogan* and recognize the existence of contractual relations between the members of a political party would baulk at following the body of English authority, noteably *Young v. Ladies' Imperial Club Ltd*,[6] treating an invalid expulsion from a voluntary association as a breach of contract justifying the award of at least nominal damages. It is submitted that there is no reason in principle for not applying the general rule that nominal damages are available for any breach of contract[7] to the contract of membership in an unincorporated association.

An injunction to restrain executive members from acting upon an invalid resolution to expel should also be available, despite the personal flavour of the contract of membership. The English courts have correctly recognized that while in one sense the contract of membership in a political party is personal, it is not personal in the same fashion that an agreement to meet together informally for social purposes is personal. The personal aspect of the contract of membership has not been perceived as an obstacle to the grant of injunctions to protect membership in political parties.[8] It is submitted that the High Court should follow their example.

Alternatively, careful framing of the order may avoid the principle that a personal contract will not be specifically enforced. In *Macqueen v. Frackelton*[9] Griffith C.J. suggested that an order restraining defendant executive members from interfering with the rights of a plaintiff as determined by the court would not amount to specific performance of the contract of membership.[10] A similar suggestion was made by Jacobs J. in *Baker v. Gough and Others*,[11] where his Honour granted an injunction in support of a declaration that a resolution of the council of the King's School dismissing the plaintiff from his position as school chaplain was void for failure to accord natural justice, even though the contract in question was one of personal service. The injunction restrained the council

3 (1934) 51 C.L.R. 358, 384.
4 (1874) L.R. 9 Exch. 190.
5 (1934) 51 C.L.R. 358, 372.
6 [1920] 2 K.B. 523.
7 'The general rule of law is that an action will lie for any breach of contract, if only for nominal damages': *Macqueen and Others v. Frackelton* (1909) 8 C.L.R. 673, 694 *per* Griffith C.J.
8 In *Fountaine v. Chesterton and Others* (1968) 112 *The Solicitors' Journal* 690 Megarry J. granted an interlocutory injunction restraining executive members from expelling a member of a political party. In *Lewis v. Heffer and Others* [1978] 1 W.L.R. 1061 the Court of Appeal did not doubt that it had the power to grant injunctions restraining suspension of members of the British Labor Party, although it declined to do so on the balance of convenience.
9 (1909) 8 C.L.R. 673.
10 *Ibid.* 695. Connor J. appeared to agree with these remarks of the Chief Justice (at 704).
11 (1962) 80 W.N. (N.S.W.) 1263.

from acting upon the invalid resolution. His Honour justified the grant of an injunction by saying,

> I do not think that the effect of an injunction restraining the school council from acting upon an invalid resolution of dismissal does in fact have the result of decreeing specific performance of a contract of personal service. The contract is one of personal service but the aspect with which the Court is asked to deal is a limited one. The only effect is that the Council cannot act on the particular purported resolution. It is left free to act otherwise in accordance with the law as it may think fit.[12]

His Honour presumably had in mind a valid resolution to dismiss.

It is submitted that there can be no objection to the making of an order in the terms suggested by Griffith C.J. and Jacobs J. Such an order does not oblige an executive committee to refrain from expelling a member, whose conduct may in fact have been objectionable. It simply restrains them from acting to expel the member wrongfully in breach of the rules.

Conclusion

It seems clear, as Gavan Duffy J. in *Hogan v. Cameron*[13] thought, that the members of political parties desire and intend that their rights as members should be protected by law, by means of a contract of membership. It is not insignificant that many parties insist that new members acknowledge the binding force of the rules in their application for membership.[14] If the other requirements of a contract (offer, acceptance and consideration) are present, there is no reason, either in policy or principle, for the court to refuse to interpret and enforce the contract of membership in the same fashion as any other contract.

It is submitted that the best explanation for the refusual of the High Court in *Cameron v. Hogan* to assume responsibility for deciding disputes arising out of membership of unincorporated associations is that given by O'Connor:

> A so-called 'proper' desire to avoid the identification of the judiciary with partisan politics coupled with a reluctance to say so, was resolved by characterising the Australian Labor Party as an informal meeting of friends, and refusing to adjudicate the case on, ostensibly, legal conceptual grounds.[15]

Very similar views were expressed by Wootten J. in *McKinnon v. Grogan*.[16]

It seems to be overwhelmingly the case that, if the principles that an unincorporated association has no identity apart from that of its individual members, and that the courts will not recognize a non-charitable purposes trust, are to be respected, there must be a contract between the members whereby they, as co-owners of its property, pledge themselves to devote it to specified objects. It is

[12] *Ibid.* 1277.

[13] [1934] V.L.R. 88, 94: 'in view of the extreme importance to members of the preservation of the rights given them by the rules, rights the loss of which may be far more grievous and hurtful than expulsion from a social club, and the fact that elaborate provisions are to be found in the rules to state and safeguard those rights, I can see no reason for concluding that the parties intended that their rights should not be dealt with in a Court of justice.'

[14] Prospective members of the Australian Labor Party must pledge themselves to faithfully uphold to the best of their ability its constitution and platform. Prospective members of the Liberal Party of Australia must agree to be subject to the constitution and rules of the party. Prospective members of the Australian Democrats must agree to abide by the terms of the National Constitution.

[15] O'Connor, D., 'Actions Against Voluntary Associations and the Legal System' (1977) 4 *Monash University Law Review* 87, 111-2.

[16] [1974] 1 N.S.W.L.R. 295, 297.

this contract of membership which is the real substance of an unincorporated association, just as the equitable obligation of the trustee is the substance of a trust. It follows that a wrongfully expelled member should have available both the injunction historically granted to protect a member from the deprivation of his property right in the funds of the association, and the full range of remedies granted for breach of contract.

However, it seems that unless and until *Cameron v. Hogan* is overruled, an Australian court has no jurisdiction to intervene on behalf of a member of a political party, even if expelled by a flagrant breach of the rules. Fletcher has suggested that the remedy of declaration might now be available to assist such a member,[17] but in the most recent case involving expulsion from an unincorporated association, *Plenty v. Seventh-Day Adventist Church of Port Pirie*,[18] Bollen J. held himself bound by *Cameron v. Hogan* to refuse a declaration.[19] On appeal, however, the Full Court felt able to distinguish *Cameron v. Hogan* on a variety of grounds.[20]

The High Court has had only limited opportunities to review *Cameron v. Hogan*, but in the most recent cases in which the Court has been called upon to consider the relationship between the members of an unincorporated association, *Attorney-General for the State of New South Wales v. Grant and Others*[21] and *Forbes v. New South Wales Trotting Club Ltd*,[22] *Cameron v. Hogan* was not cited. Hopefully, this is some indication of a growing recognition that *Cameron v. Hogan* places inappropriate constraints upon the jurisdiction of the courts, and is not soundly based upon principle. There is every reason to believe that, given the chance, the High Court would prefer to discard *Cameron v. Hogan* and thus legitimize the expansion in the scope of judicial review of the actions of executive members of voluntary associations which has taken place *de facto*, rather than to cling to a decision which is clearly wrong.

17 Fletcher, *op. cit.* 90.
18 (1986) 40 S.A.S.R. 443.
19 *Ibid.* 456.
20 *Plenty v. Seventh-Day Adventist Church of Port Pirie* (1986) 43 S.A.S.R. 121.
21 (1976) 135 C.L.R. 587; 10 A.L.R. 1.
22 (1979) 143 C.L.R. 242.