THE USE OF THE INJUNCTION TO RESTRAIN WRONGFUL EXPULSION FROM VOLUNTARY ASSOCIATIONS

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Because courts in England and Australia have not regarded the aggregation of individuals in voluntary associations as being legally significant or as creating any legal relation sui generis the limited measure of intervention in the affairs of associations indulged in by the courts is for the most part merely an incident of regulation and protection of the interests of individuals.

The courts are reluctant to interfere in the affairs of voluntary associations.[1]

However, the activities of associations impinge upon the affairs of individuals and their impact may impeach some legal rights of an individual. Wrongful expulsion of an individual from an association may be one such activity. In such cases the courts must intervene regardless of the fact that the protection of that individual's interest may involve the exercise of some control over some members of the association.

It might have been expected that in this field the injunction would be the pre-eminent remedy. It would appear to be a remedy more appropriate than an award of damages because in the circumstances it would be less severe. The imposition on individual members of the association or of its committee of the threat of liability to pay damages if they do not act up to the required standard in purporting to expel a member would constitute a severe deterrent upon persons contemplating membership of associations and would thus be contrary to the apparent policy favouring the right of the individual to associate freely with others for lawful ends. This appears to be one type of case in which it would be desirable to ignore the lingering effect of historical development under which equitable remedies are regarded as supplementary to common law remedies. Apart from such theoretical considerations, in practice, the injunction has become the characteristic remedy in cases of wrongful expulsion. This is not the result of any recognition that it is more appropriate; rather, it appears to be the result of the former separation of tribunals administering law and equity. The injunction is available in cases of wrongful expulsion because the Court of Chancery had a general jurisdiction to protect rights of property of individuals and in some cases in which persons were wrongfully expelled from associations an individual right of property was, in its view, in jeopardy.

In England before 1875 a court of common law would not intervene in a case of wrongful expulsion except possibly where there was a conspiracy on the part of those responsible for the expulsion.[2] If before 1875 wrongful expulsion

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1 "The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment": *per* Rich, Dixon, Evatt, and McTiernan, JJ., *Cameron* v. *Hogan* (1934) 51 C.L.R. 358, 378.

Treatments of the present topic are provided by Z. Chafee, "The Internal Affairs of Associations" (1930) 43 *Harv. L.R.* 993, and D. Lloyd, "The Disciplinary Powers of Professional Bodies" (1950) 13 *Mod. L.R.* 281, and "Judicial Review of Expulsion by a Domestic Tribunal" (1952) 15 *Mod. L.R.* 413. Since this article was written a lecture by Lord Justice Morris on "The Courts and Domestic Tribunals" has been printed in (1952) 69 *L.Q.R.* 318.

2 *Wood* v. *Woad* (1873) L.R. 9 Ex. 190.

could have led to an award of damages then it would appear to have been a case of "other injury" within the meaning of the Common Law Procedure Act 1854, s. 79, which enabled a plaintiff in a court of common law to claim an injunction "in all cases of breach of contract or other injury". By the operation of that provision the injunction might have been made available beyond cases in which a right of property in the expelled member was prejudiced. It is only in recent years in England that wrongful expulsion has come to be recognised as a legal wrong because it is a breach of contract.[3] By the Judicature Act 1873 (Eng.)[4] the power given by the Common Law Procedure Act 1854 (Eng.)[5] devolved upon the High Court of Justice[6] so that it might now be possible for an injunction to be given in cases of wrongful expulsion where the expelled member cannot rely upon any right of property but can base his claim upon breach of contract.

Before considering the bases of jurisdiction on which the courts will entertain complaints of wrongful expulsion it is necessary to indicate the degree of interference in the internal affairs of associations in which courts have indulged.

It is trite law that a court will not sit as a tribunal of appeal conducting a re-hearing of the case on its merits as it came before the domestic tribunal which purported to expel. According to the Court of Appeal in *Dawkins* v. *Antrobus*[7] there were three grounds upon which a court could give relief. They were: (1) that the proceedings though within the rules of the association were contrary to natural justice; (2) that the proceedings were not in accordance with the rules; and (3) that the decision to expel was not arrived at in good faith.

The requirement embodied in the first ground that the proceedings should conform to the principle of natural justice has been held to involve the giving of adequate notice to the member concerned of the charges made against him, affording him an opportunity to defend himself[8] and the absence from the tribunal of a person who has formulated the charges or acted as prosecutor or has had any other special interest in the prosecution of them.[9]

The second ground mentioned in *Dawkins* v. *Antrobus*[10], that the expulsion was not in accordance with the rules of the association, requires little explanation.

The recent decision of the Court of Appeal in *Lee* v. *The Showmen's Guild of Great Britain*[11] indicates that the decisions of domestic tribunals may be reviewed by the courts on the ground of misconstruction of the rules of the association. This represents a major intrusion but it would appear to be limited to those domestic tribunals whose decisions prejudice such significant individual interests as that of livelihood.[12] In *Lee's Case*[13] the tribunal had power under the rules of the association to impose fines for breaches of the rules and on default in payment of any fine so imposed, to expel the defaulter. Under the rules no member was to indulge in "unfair competition" with regard to certain matters. The plaintiff was fined for conduct which the tribunal regarded as unfair competition within the rules and following default in payment of the fine he was expelled. Ormerod, J., held that the decisions of the tribunal to fine and

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[3] *Abbott* v. *Sullivan* (1952) 1 K.B. 189; *Lee* v. *The Showmen's Guild of Great Britain* (1952) 2 Q.B. 329; P. Donovan, "Domestic Tribunals—A Wrong Without a Remedy" (1952) 2 *Univ. of Q.L.J.* 22.

[4] 36 & 37 Vict., c. 66.

[5] 17 & 18 Vict., c. 125.

[6] *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1882) 20 Ch. D. 501.

[7] (1881) 17 Ch. D. 615.

[8] *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615.

[9] *Dickason* v. *Edwards* (1910) 10 C.L.R. 243; 16 A.L.R. 149.

[10] (1881) 17 Ch. D. 615.

[11] (1952) 2 Q.B. 329.

[12] *Id.*, at 343, *per* Denning, L.J.

[13] (1952) 2 Q.B. 329.

expel, being based on misconstruction of the rules, were wrong in law and therefore ultra vires. The Court of Appeal unanimously affirmed this decision. Somervell, L.J., based his decision on a principle that a tribunal acts ultra vires if it imposes a penalty where there is no evidence that the offence referred to in the rules has been committed. This involves supervising the tribunal's construction of the words in a rule. Somervell, L.J., does not formulate the principle as one under which an incorrect decision on a point of law by a tribunal will be set aside. However, Denning, L.J.,[14] puts it on the distinction between points of law and points of fact. The tribunal's decision on points of law will be reviewable, while its decision on the facts will be conclusive. Romer, L.J.,[15] also appears to rely on this distinction.

For construction of the rules of the association to be a question of law it would be necessary for those rules to have legal significance. In this case the rules were treated as containing a contract and they were thus legally significant. But in Australia some courts have been reluctant to treat the rules of voluntary associations as giving rise to contractual rights and duties. In Australia, it might be possible to have a case where the court recognises no contract but assumes jurisdiction because the member expelled has a right of property. In such a case the rules would not be legally significant and the construction of them would not be a question of law. Under the formulation of Somervell, L.J., there would be a ground for setting aside the tribunal's decision, while under the principle in the form contemplated by Denning and Romer, L.JJ., it would be arguable that the decision was final.

In view of the avowed reluctance of courts to interfere in the internal affairs of voluntary associations, it might have followed that when a member was affected by a decision of a domestic tribunal which was arrived at in violation of the rules, the courts would require the member to exhaust his remedies within the association. In the field of public law a suit for declaratory judgment against the Attorney-General may not succeed if there is some other appeal procedure available.[16] In Australia there are authorities indicating that where the rules of an association provide for an internal appeal, failure to take advantage of that right of appeal will not debar an aggrieved member from bringing an action. In *Carbines* v. *Pittock*[17] the plaintiff was suspended for twelve months from membership of a lodge. The domestic tribunal had clearly failed to observe the rules. The plaintiff sued the officers of the lodge on behalf of all officers and members, claiming a declaration, injunction and damages. Although the rules gave an internal right of appeal and the plaintiff had not taken advantage of it, Hood, J., held the plaintiff entitled to nominal damages.[18] He refused an injunction since at the time of judgment the period of the plaintiff's suspension had expired and there was nothing to restrain.

It may be that if an injunction could have been otherwise granted in this case the normal discretionary character of that remedy might have influenced the court to refuse it on the basis that there was an internal procedure for appeal.

Insofar as the action may have been treated by Hood, J., as an action for breach of contract, his approach would appear correct, for, as Griffith, C.J., put

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[14] *Id.*, at 342-43.
[15] *Id.*, at 348.
[16] *Smeeton* v. *A.G.* (1920) 1 Ch. 85.
[17] (1908) V.L.R. 292; (1908) 14 A.L.R. 248.
[18] In passing, it is not clear upon what basis Hood, J., held the defendants liable in damages. He put it, "But he (the plaintiff) apparently paid a subscription for some benefit, and he has been deprived for twelve months of that benefit, whatever it was, by what I consider is the wrongful act of the defendants." ((1908) V.L.R. at 297.)

it, "it is no answer to a breach of contract to say that the plaintiff might have obtained redress for the breach in some other way, unless there is an express or implied stipulation that failing to obtain redress in that other way shall be a condition precedent to the right to complain of the breach."[19] This is in line with the ordinary principle governing arbitration and is clearly appropriate where jurisdiction is founded on a contract.[20] Whether it is appropriate to any contract constituted by the rules of an association in the face of a policy favouring non-intervention in the affairs of associations would seem to be open to question.

In *Daly* v. *Gallagher*[21], where the executive of a voluntary association by resolution excluded the plaintiff from membership, without giving him any notice of their intention to proceed against him, or giving him any opportunity to show cause, the plaintiff's claim for a declaration and injunction based on his proprietary interest in the association whose property was held in trust for the members was held to be maintainable even though he did not avail himself of a right of appeal given by the association's rules. Although the basis of the court's intervention here was property rather than contract, Shand, J., citing the observations of Griffith, C.J., quoted above, held that the plaintiff was not debarred from bringing his action because he did not take advantage of the right of appeal. The right of appeal in this case was described as "illusory" but the decision that the plaintiff was entitled to proceed in the Court does not appear to owe anything to this special fact. Whilst a party to a contract should in the absence of a *Scott* v. *Avery*[22] clause be entitled to go directly to the courts, it is a little surprising that the courts will intervene in other cases before a member has exhausted his remedies.[23]

The third ground on which a court can set aside a resolution for expulsion is that the proceedings were not free from malice.[24]

Having considered briefly the extent to which the courts will intervene in protecting individual rights it is necessary now to consider the bases for jurisdiction which the courts have recognized.

The first basis is the existence in the individual concerned of some right of property.

The leading English authority on the subject of jurisdiction is *Rigby* v. *Connol*[25] in which Jessel, M.R., stated the principle: "The first question that I will consider is, What is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society. There is no

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[19] *Macqueen* v. *Frackelton* (1909) 8 C.L.R. 673, 695.
[20] *Scott* v. *Avery* (1856) 5 H.L.C. 811.
[21] (1925) Q.S.R. 1.
[22] (1856) 5 H.L.C. 811.
[23] In *White* v. *Kuzych* (1951) 2 All E.R. 435 the Judicial Committee of the Privy Council on appeal from the Court of Appeal for British Columbia held that a person complaining of wrongful expulsion from a trade union could not obtain relief from the courts until all the domestic remedies under the rules of the trade union had been exhausted. But in this case the rules of the union stated that they operated as a contract and the member expressly undertook that he would not become a party to any suit at law or in equity against the union until he had exhausted all remedies allowed to him by the rules. D. Lloyd, in (1952) *Mod. L.R.* 413, cites this case for the general proposition that no recourse to the courts may be had until all the domestic remedies under the rules have been exhausted, but it seems that it is an authority governing only those cases in which the contract contains an express clause analogous to the *Scott* v. *Avery* (1856) H.L.C. 811, clause.
[24] For an Australian illustration of a decision for expulsion being set aside on this ground, see *Huxham* v. *Trustees and Executive Committee Incapacitated etc. Soldiers Association of Queensland* (1947) Q.S.R. 69.
[25] (1880) 14 Ch. D. 482, 487.

such jurisdiction that I am aware of reposed in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property."

In Australia this has been taken to imply that where the association possesses no property the Court has no jurisdiction.[26] Given that the association has property the court will not have jurisdiction unless the member concerned has a right of property by reason of his membership.

What have the courts understood by the term "property" for this purpose?

From dicta of Fletcher Moulton, L.J., in *Osborne* v. *Amalgamated Society of Railway Servants*[27], it appeared as if "property" would be given a wide meaning:

> If by the term 'property' the learned Judge (Jessel, M.R., in *Rigby* v. Connol[28]) intended to mean a beneficial interest in land or chattels, I am of opinion that this dictum goes too far. There are many rights which in such a sense could not be called rights of property which nevertheless the law will protect, as, for instance, if there was an association of men subscribing for a benevolent purpose, say for the endowment of a scientific institution, the whole funds of the association being dedicated to that charitable purpose on the terms that the administration should be under the control of the association. I can see no reason why membership of such an association should not have the same legal protection as would be given in the case of an association where the members had a beneficial interest in the funds.

The property basis for the jurisdiction to restrain wrongful expulsion from an association by injunction was adopted in Australian courts[29] and before the nineteenth century ended at least one court held that mere payment by a member of a subscription did not of itself give him a sufficient proprietary interest. In *Amos* v. *Brunton*[30] the plaintiff alleged that he had been wrongfully expelled from a trade association of flour millers and sellers to which subscriptions were paid by members "to defray expenses". The only property of the association at the date of the suit was £35 being the balance of subscriptions over expenses. Manning, C.J. in Eq., thought it was clear from *Rigby* v. *Connol*[31] that the subscription by the members to a fund for expenses did not give the Court jurisdiction to grant an injunction. Under the rules of the association as they then stood, the balance was held in trust for the expenses of the association. The member did not have any expectation of a share in any balance on hand at the time of the winding-up because such a distribution depended on there being a majority vote in favour of it.

The opportunity for expansion of the scope of the injunction in this field suggested by Lord Justice Fletcher Moulton's dictum was clearly denied to Australian courts by the High Court in *Cameron* v. *Hogan*[32], which has become the leading authority on this topic in this country. The plaintiff, Hogan, was a member of the Australian Labor Party of Victoria, an unincorporated association. As a member of the Legislative Assembly of Victoria he held high office, being leader of the State Parliamentary Labor Party and Premier of Victoria. The defendants were members of the Victorian central executive of the association. Differences over political policy arose between Hogan and the

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[26] *Graham* v. *Sinclair* (1918) 18 S.R. (N.S.W.) 75, 89. Affirmed on appeal to the High Court (1918) 25 C.L.R. 102.

[27] (1911) 1 Ch. 540, 562.

[28] (1880) 14 Ch. D. 482.

[29] E.g., *Macpherson* v. *Sutherland* (1885) 6 N.S.W.L.R. Eq. 46, 146; *Murray* v. *Parnell* (1909) Q.S.R. 65.

[30] (1897) 18 N.S.W.L.R. Eq. 184.

[31] (1880) 14 Ch. D. 482.

[32] (1934) 51 C.L.R. 358.

executive. Under the association's rules the executive had certain powers with respect to nominations for Party selection of candidates for Parliament. Purporting to exercise these powers the executive refused to re-endorse Hogan as a Labor candidate at the parliamentary elections of May 1932. Although unendorsed Hogan stood at the election and was elected. Later the central executive decided that he should be excluded from the association. Hogan claimed in the Supreme Court of Victoria a declaration that his exclusion was wrongful, an injunction restraining the central executive from carrying his exclusion into effect, a declaration that the non-endorsement of his candidature was wrongful, and damages.

He alleged that the association was possessed of considerable assets and that as a member of the association he was entitled jointly with other members to the property and assets of the association.

In the Supreme Court he was successful in the claim for damages, Gavan Duffy, J., holding that the rules did not justify the central executive in either refusing to endorse Hogan as a Labor candidate for election or in purporting to exclude him from the association. There was in his view a breach of contract but Hogan had no such substantial or proprietary interest in the property of the association as to justify either an injunction or a declaration. The members of the central executive appealed to the High Court, arguing that the rules of the association could not be held to constitute a contract, and on this the High Court held for them. Hogan cross-appealed, arguing that he had a sufficient property interest to entitle him to relief by injunction against exclusion.

The revenue of the association was derived from capitation fees paid by affiliated Unions and subscriptions paid by members of Branches. The funds of the association were devoted to the promotion of the political objects of the Party. Under the rules the members obtained no direct personal advantage from the funds. This in the view of all members of the High Court meant that there was no foundation of jurisdiction to grant an injunction and Hogan failed in his cross-appeal. In the words of Starke, J., "But the association has no clubhouse or meeting hall, or any property of which the members had any personal use or enjoyment."[33]

The possibility that the members might resolve to dissolve the association and to divide the association's property among the members represented the nearest approach of an interest of Hogan in the property of the association. Until any such resolution he had no proprietary interest. It is implicit in the joint judgment of Rich, Dixon, Evatt and McTiernan, JJ., and the separate judgment of Starke, J., that mere payment of subscription is not sufficient to justify the grant of an injunction.

In England recently Morris, L.J., in *Abbott* v. *Sullivan*[34] approved Lord Justice Fletcher Moulton's dictum and thought it would give a court jurisdiction to grant an injunction or to make a declaration in a case where the association had no property but where membership of it carried with it the ability to earn a living in a special way. The protection of such interests as the right to pursue a chosen vocation to the best possible advantage would involve giving to the term "property" a very wide meaning, covering many forms of material advantages.

Australian courts have been conservative in interpreting the expression "property" for this purpose. In *Amos* v. *Brunton*[35] the association of flour

[33] *Id.*, at 385.
[34] (1952) 1 K.B. 189, 216-17.
[35] (1897) 18 N.S.W.L.R. Eq. 184.

millers existed "to promote and establish uniformity in commercial usages, and for the exchange of information of advantage to the members". The plaintiff doubtless lost commercial advantages by reason of his expulsion but there was no suggestion that that could constitute a right of property. In *Graham* v. *Sinclair*[36] the plaintiff was a shareholder in a company formed to establish and maintain a club for nurses, and she was a member of the club established by the company. She sued the directors of the company, claiming damages, alleging that the directors in the exercise of supervisory powers over the committee of the club had expelled her from the club wrongfully. Her claim for damages failed because in law the expulsion resolution, if wrongful, was void and her rights of membership were unaffected. The judgment of Ferguson, J., throws some light on the meaning of "property" for this purpose. The plaintiff contended that she had a proprietary interest in the club because it was the practice to list the nurses who were members and when one of the public or a member of the medical profession applied for the services of a nurse, those whose names appeared on the list were sent in rotation. This was apparently an advantage which accrued to members only incidentally from membership: it was not the main purpose of the association to provide that advantage. However, it could conceivably have been regarded as giving the plaintiff's membership of the club a pecuniary value equivalent to a proprietary interest for this purpose.

However, Ferguson, J., thought that the case provided "a good example of the distinction between the case of proprietary rights in which the Courts will interfere, and the case of other benefits arising from the association which are outside the jurisdiction of the Court".[37] Although it did not appear that expulsion from the club would have the effect of preventing the plaintiff obtaining employment as a nurse, if that had been the result of expulsion, the reasoning of Ferguson, J., would have debarred the plaintiff from relief.

In a later case in the Supreme Court of New South Wales, Long Innes, J., was prepared to recognise that the traditional meaning of property was inappropriate in these cases. In *Webster* v. *The Bread Carters' Union of New South Wales*[38], in entertaining a motion for an injunction by five persons expelled from the union, he was prepared to recognize that though the foundation of the action was property, a more important consequence to the plaintiffs was that if the purported expulsion were not declared void they would, in view of the statutory provision in New South Wales for preference to unionists, be actually unable to secure employment in the bread-carting industry. The union concerned was registered under the Industrial Arbitration Acts of New South Wales and it was possibly open to Long Innes, J., to apply the doctrine in *Edgar* v. *Meade*[39] that a member of a registered union is entitled to have a wrongful expulsion set aside without having to show some right of property. But his judgment goes beyond this and appears to recognize that the real role of the courts in these cases is to protect interests of substance of individuals regardless of whether they can properly be described as proprietary interests.

Some suggestion of a limitation on the authority of *Cameron* v. *Hogan*[40] is contained in the judgment of Graham, A.J., in *Atkinson* v. *Lamont*.[41] Since that was a case concerned with expulsion from a trade union registered under the Conciliation and Arbitration Act (Commonwealth) it was not strictly necessary to consider *Cameron* v. *Hogan*[42] because *Edgar* v. *Meade*[43] justified judicial

[36] (1918) 18 S.R. (N.S.W.) 75.
[37] *Id.*, at 89.
[38] (1930) 30 S.R. (N.S.W.) 267.
[39] (1916) 23 C.L.R. 29.
[40] (1934) 51 C.L.R. 358.
[41] (1938) Q.S.R. 33.
[42] (1934) 51 C.L.R. 358.
[43] (1916) 23 C.L.R. 29.

intervention in the absence of a proprietary interest in the member. But Graham, A.J., opined that the voluntary associations intended to be referred to in *Cameron* v. *Hogan*[44] were only those associations which stood apart from private gain and material advantage. If this were the criterion, then a trade association of merchants like that in *Amos* v. *Brunton*[45] would presumably be subject to judicial intervention. However, this limitation would apparently direct attention to the objects of the association, whereas it is conceived that they are irrelevant and the proper question is whether the action of the association, whatever its objects, will prejudice an interest of substance of the expelled member.

The value of property as a basis for jurisdiction is not only reflected upon by the foregoing cases but is also rendered doubtful by lack of certainty in legal theory as to what constitutes a proprietary interest. In the English cases of the last century[46] it was never doubted that where the trustees of a club held buildings and other property upon trust for the personal use of the members so that the members were beneficiaries under a trust, the members had rights of property. From a realistic point of view it was probably right to say they had rights of property. However, the lack of precision in this property basis for jurisdiction was emphasised by cases like *Baker* v. *Archer-Shee*[47] and *Schalit* v. *Joseph Nadler Ltd.*[48] in which the question as to whether a beneficiary under a trust could properly be said to have a proprietary interest at all was debated.[49]

Furthermore, it is open to argument that the members of an association which does not exist for the direct benefit of its members but for the attainment of some impersonal purpose (like that involved in *Cameron* v. *Hogan*[50]) in strict legal theory have proprietary interests in the assets devoted to that purpose.

In *Cameron* v. *Hogan*[51] none of the justices embarked on any exhaustive enquiry as to who was entitled to the property "belonging" to the Australian Labor Party of Victoria. The subject of the legal situation of the property in the funds of associations which do not exist for the benefit of their members is a vexed one.[52] The four members who handed down a joint judgment thought there was "much to be said for the view that payments made by members to the Branch or by the Branch or the Union to the central executive or State electorate council are final; that they are subscriptions to an object, and that no resulting interest, however contingent, remains in the member".[53]

The legal process by which a member divested himself of his interest in favour of an object could not be a gift at common law, for a mere purpose cannot be a donee. The only legal medium whereby the subscription could be devoted to the purpose in such a way that the member divested himself of his interest would be a trust under which trustees specially appointed or all members as co-owners held the legal title. It would be a trust not for any individual but for a purpose. If the purpose of the association were charitable the trustee would have effectively transferred his interest so that he could not be said to retain proprietary rights, even though there would be no ascertainable person who would be beneficiary. But if the purpose of the association were non-charitable it is not easy to explain the legal situation of its property by reference to a trust for its objects. Trusts for non-charitable purposes are generally recognized as

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[44] (1934) 51 C.L.R. 358.
[45] (1897) 18 N.S.W.L.R. Eq. 184.
[46] E.g., *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615.
[47] (1927) A.C. 844.
[48] (1933) 2 K.B. 79.
[49] H. G. Hanbury, *Essays in Equity* (1934) 89-93.
[50] (1934) 51 C.L.R. 358.
[51] *Supra.*
[52] J. C. Gray, *The Rule Against Perpetuities* (4th ed. 1942) 769-770; W. O. Hart, "Some Reflections on *Re Chardon*" (1937) 53 L.Q.R. 47-48.
[53] (1934) 51 C.L.R. at 377.

being invalid because of the absence of a beneficiary who can enforce the trust if the need to do so arises.[54] Some light on the legal situation of the property of associations which do not exist to confer benefits on their members exclusively may be thrown by the cases dealing with the effect of a gift or bequest to an association. Where there is a simple disposition to an unincorporated body without any purpose expressed by the donor, there is a gift to the members and no trust for the association's purpose is thereby created.[55] Where the disposition is expressly made to the association for its purposes it would seem that there is an attempt to set up a purpose trust which would fail if the purposes of the association were not charitable. But English courts have upheld the validity of these dispositions provided the gift is not to be an endowment of the association so as to create a perpetuity.[56] The disposition will be valid if the members of the association are "at liberty in accordance with the terms of the gift to spend both capital and income as they think fit. . . . "[57] It is the power residing in the members to dissolve the association at any time which prevents such dispositions being regarded as creating perpetuities.[58] Until the members resolve upon dissolution, who is the owner of the property? It is conceived that in strict legal theory where the purposes of the association are non-charitable the members are still co-owners of the property, each member being bound by contract with the other members to allow his share to be devoted to the purposes of the association. If the members are not the owners then nobody is the owner, for the law's recognition of a purpose as a quasi-owner is limited to charitable purposes.

In the cases in which courts have considered dispositions to groups not recognized as legal entities it is apparent that the courts have been concerned to prevent the dispositions failing on that account. To this end they have appeared to emphasize that the disposition is one to the members. In the cases of wrongful expulsion the courts, reluctant to intervene in an association's internal affairs, have given "property" a limited connotation.[59]

It will be apparent from the foregoing treatment that the property concept is by reason of its uncertainty alone unsuitable as a basis for jurisdiction. It is not material to the real issue in wrongful expulsion cases. If the matter is approached from the standpoint that courts should not interfere in the internal affairs of voluntary associations because such interference might involve the courts in controversies relating to religion or politics, the property criterion does not serve as a useful limiting factor. If in *Cameron* v. *Hogan*[60] it had been

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[54] *Bowman* v. *Secular Society Ltd.* (1917) A.C. 406, 441, *per* Lord Parker of Waddington; *Re Astor's Settlement Trusts* (1952) Ch. 534; *Re Cain* (1950) V.L.R. 382, 389; (1950) A.L.R. 796, 802.

[55] "Such a gift is a gift to the members, who are bound by agreement *inter se* to apply their common funds to the objects stated in the constitution of the bodies. But no question of trust arises. The members may by agreement dispose of the fund, divide it amongst themselves, divert it to other uses, or dissolve their body on such terms as they think fit." *Per* Dean, J., *Re Cain* (1950) V.L.R. at 389; (1950) A.L.R. at 803.

[56] E.g., *Re Price* (1943) Ch. 422.

[57] *Per* Lord Buckmaster, *Macaulay* v. *O'Donnell* reported in a footnote to *Re Price* (1943) Ch. 422.

[58] W. O. Hart (1937) 53 *L.Q.R.* at 48.

[59] The proprietary interest which the High Court contemplated in *Cameron* v. *Hogan* (1934) 51 C.L.R. 358, as the basis of jurisdiction in wrongful expulsion cases, was far removed from that acted upon by Lord Eldon, L.C., in *Gee* v. *Pritchard* (1818) 2 Swanst. 402, when, avowedly exercising the equitable jurisdiction to protect property, he granted an injunction to restrain the publication of letters by the recipient of them at the suit of the writer of them. But then it seems Lord Eldon was not concerned to protect the plaintiff's property but the plaintiff's feelings and in substance the suit was one to protect a right of privacy or prevent a breach of confidence. Pound, "Equitable Relief against Defamation and Injuries to Personality" (1916) 29 *Harv. L.R.* 640, 643.

[60] (1934) 51 C.L.R. 358.

found that the Australian Labor Party of Victoria, in addition to its other activities, had provided a club-house for its members, the court would have had difficulty in refusing an injunction without appearing to depart from established principle.

The recent decisions in England in *Abbott* v. *Sullivan*[61] and *Lee* v. *The Showmen's Guild of Great Britain*[62] indicate that the courts are recognizing that the problem is one of reconciling the need for courts to abstain from undue interference with the activities of domestic tribunals with the need to protect the interests of substance of individuals against the activities of such tribunals. The range of individual interests of substance which the English courts will now recognize as worthy of protection goes beyond interests which can be called proprietary. In England the inadequacy of the property basis for jurisdiction has been most keenly felt in cases of wrongful expulsion from a trade union where the effect of expulsion would be deprivation of livelihood. To meet these cases either the meaning of property has been expanded almost to bursting point or the property basis has been abandoned and contract has taken its place. In Australia it has been found possible to deal with cases of wrongful expulsion from registered trade unions without requiring the plaintiff to show that he has a right of property. In *Edgar* v. *Meade*[63] Isaacs, J., considered the jurisdiction of the Court to grant an injunction to restrain exclusion of a member from a trade union registered under the Conciliation and Arbitration Act (Commonwealth) in a case where the domestic tribunal had failed to give the plaintiff an opportunity to be heard. He stated that in the case of a purely voluntary association, a court of equity bases its jurisdiction on property and a court of common law before the Judicature Act regarded the invalid expulsion as void and gave no damages so that between the two jurisdictions the plaintiff could rely only on property as the basis of jurisdiction. He then proceeded,

> But here the situation in my opinion calls for another view. This organization is the creature of the Federal Parliament for a special reason, and as incidental to a specific power in the Constitution. The incorporation of employees in such an organization is a matter of public policy, and to effectuate the policy of the Act. For this purpose rules are required to be registered, and in my opinion a member or a group of members forming a branch recognized by the rules have a *locus standi* to assert in a competent Court their legal rights to remain members of the organization, notwithstanding an invalid resolution to expel him or them, and so exclude him or them from the status and benefit which the Act intended them to have. . . . The very object of the legislative provisions in incorporating such associations and facilitating the settlement of industrial disputes might be defeated if members and branches could be excluded by a governing body, contrary to rules, unless property was involved. The organization is therefore not in the same position as a voluntary club.[64]

Thus in Australia judicial protection of individual members of registered organization is not the result of recognition by the courts that the member has an interest worthy of legal protection even though it be non-proprietary but is the incidental result of registered trade unions being treated as part of the machinery for the prevention and settlement of industrial disputes by conciliation and arbitration and thus being subject to the supervision of the courts in the course of their application of Commonwealth law.[65] It may be that this approach

[61] (1952) 1 K.B. 189.
[62] (1952) 2 Q.B. 329.
[63] (1916) 23 C.L.R. 29.
[64] *Id.* at 43.
[65] *Edgar* v. *Meade* (1916) 23 C.L.R. 29, was cited in *Cameron* v. *Hogan* (1934) 51 C.L.R.

to the problem of wrongful exclusion from registered trade unions has meant that the inadequacy of the property basis for jurisdiction has not been disclosed in Australia to the same extent as in other jurisdictions.

Since the equitable jurisdiction to protect property has failed to prove a satisfactory basis for jurisdiction for granting an injunction, it has been urged that the jurisdiction may be founded more suitably on contract.[66]

In *Cameron* v. *Hogan*[67], Rich, Dixon, Evatt and McTiernan, JJ., reject the idea that the rules of any large association can ordinarly have the result that "those undertaking office thereby enter into a contract with each and every member that they will execute the office in strict conformity with the rules."[68] But there would appear to be no theoretical difficulty in supposing that when a member joins an association each of the other members undertakes that if and when he becomes a member of the relevant tribunal, he will, in considering proposals for determination of a person's membership, act in accordance with the standards prescribed in *Dawkins* v. *Antrobus*.[69] The reluctance of the High Court to recognize a contractual duty on the part of each member of the tribunal is probably explained by the undoubted fact that persons joining associations which are not partnerships do not contemplate the assumption of a potential personal liability to pay damages, the primary remedy for breach of contract. But if an injunction could become the appropriate remedy, to the exclusion of damages, in cases of wrongful expulsion there would seem to be no difficulty in subjecting each member to the contractual duties described. In the cases where the member can point to a table and chair of the association and can say that he has a right of property, the courts are not tenderly disposed towards the members of the tribunal who improperly resolved on expulsion. In jurisdictions where provisions similar to those by which the Common Law Procedure Act 1854 (Eng.) gave the courts of common law power to grant injunctions have been operative it might still be possible to elevate the injunction to the position of primary remedy for breach of this kind of contract.

In *Cameron* v. *Hogan*[70] it was said that even if it were found that an enforceable contract of membership was contemplated by the members it would be necessary to see whether a breach of contract had been committed. The four justices who delivered a joint judgment adopted the views of Isaacs, J., in *Edgar* v. *Meade*[71] that a court of common law before the Judicature Act regarded the invalid expulsion as void and they added that if the resolution for expulsion was not authorized by the rules it would be simply a void act leaving the expelled

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at 372, without dissent. It was followed by the Supreme Court of Queensland in *Atkinson* v. *Lamont* (1938) Q.S.R. 33.

Since *Edgar* v. *Meade* (*supra*) was decided the Commonwealth Court of Conciliation and Arbitration has been given the power upon complaint by any member of a registered organization to make an order giving directions for the performance or observance of any of the rules of an organization (Conciliation and Arbitration Act (1904-1952) (Cwlth.) s. 81, No. 13, 1904 - No. 34, 1952). The empowering provision was held to be constitutionally valid in *The King* v. *Commonwealth Court of Conciliation and Arbitration ex p. Barrett* (1945) 70 C.L.R. 141. It has been held that the Court of Conciliation can exercise this power to order that the appropriate persons in a registered union shall perform the rules by recognising that persons wrongfully expelled are still members of the union. The jurisdiction is not limited to protection of rights of property: *Australian Workers' Union* v. *Bowen* (*No. 2*) (1948) 77 C.L.R. 601.

Semble: The existence of this power in the Court of Conciliation and Arbitration does not oust the jurisdiction of another court acting on the authority of *Edgar* v. *Meade* (1916) 23 C.L.R. 29, or exercising the powers of a court of equity to protect rights of property: *Webster* v. *The Bread Carters' Union of N.S.W.* (1930) 30 S.R. (N.S.W.) 267.

[66] D. Lloyd in (1950) 13 *Mod. L.R.* at 290. [67] (1934) 51 C.L.R. 358.

[68] *Id.* at 373.

[69] (1881) 17 Ch. D. 615.

[70] (1934) 51 C.L.R. at 372 *per* Rich, Dixon, Evatt and McTiernan, JJ.

[71] (1916) 23 C.L.R. at 43.

person's membership unaffected, and there would be no breach of contract.

It is submitted with respect that if the duty is one to decide according to certain minimum standards, there would be a breach of contract even though the resolution for expulsion may be void in law. There is the difficulty that a contract of this kind is personal and that might prevent a court granting an injunction to force association at least where there is no express negative stipulation. But in the property cases this difficulty is not apparent and it would disappear if it comes to be recognised, as apparently it has in England, that the dangers of forcing personal relationships are outweighed by the need for prevention of injury to individual interests of substance by improper exercise of jurisdiction.[72] If it is felt that only contract can supply the peg on which to hang the action, the contractual duty could be formulated as one not to determine membership improperly where any attempt to do so would be likely to prejudice the member's interest of substance, like property or ability to obtain employment.

Abbott v. *Sullivan*[73] indicates that English courts may be prepared to intervene on the basis of breach of contract. The plaintiff had been employed as a cornporter. The interests of cornporters had been safeguarded for many years by the Overside Cornporters' Committee who exercised disciplinary control over cornporters and enforced the observance of the cornporters' working rules. The plaintiff had been fined by the committee for what was apparently a breach of the working rules. At the hearing of that matter a divisional officer of the Transport and General Workers Union was present to advise in the committee's deliberations although the committee was not a committee of that Union. On leaving the committee after the hearing the plaintiff, annoyed with the result of the hearing, struck the divisional officer while in the street. An emergency meeting of the committee was convened to consider this assault. The plaintiff was summoned but he refused to attend on the ground that the matter was not within the committee's jurisdiction. The committee proceeded in his absence and resolved that he should be removed from the register of overside cornporters. The plaintiff sued two members of the committee, claiming damages on the ground that the committee had exceeded their jurisdiction. He also sued the union and the divisional officer, claiming damages for procuring breach of contract by the first two defendants. The trial judge decided against the plaintiff on the claim for damages, but he declared that the resolution was not within the committee's jurisdiction. On appeal all members of the Court of Appeal (Evershed, M.R., Denning and Morris, L.JJ.) held that the resolution was *ultra vires*, but although Denning, L.J., decided that the resolution constituted a breach of contract for which an action for damages would lie against those members of the committee who voted in favour of it, the other two members of the court decided that there had been no breach of contract.

There was no written constitution containing the rules of and organization of the committee. Their jurisdiction was to be regarded as established by custom and a person who applied for admission as a cornporter and who was accepted was to be taken to have agreed to that jurisdiction.

The judgments of each member of the Court contained consideration of the matter as one arising out of an implied contract between the members of the committee and the plaintiff, but there was a difference of opinion as to the nature of the implied term binding the members of the committee in the exercise of their jurisdiction.

Denning, L.J., held that if the committee of a voluntary association only

[72] *Lee* v. *Showmen's Guild of Great Britain* (1952) 2 Q.B. 329.
[73] (1952) 1 K.B. 289.

gain jurisdiction by reason of a contract, express or implied, there must be implied a contract that they will not take away a member's property or deprive him of his livelihood when they know, or have the means of knowing, that they have no jurisdiction in that behalf.[74] If they break that contract they are liable to pay damages. He thought it would be going too far to say that the members of a domestic tribunal promise absolutely that they will not exceed their jurisdiction. Presumably it would also be going too far in a case where the rules do not embody the principle of natural justice to say that the members of the tribunal promise absolutely that they will act in conformity with that principle. But it is conceived that what prevents the implication of those more extensive undertakings is the thought that if the members break the undertaking they will be held liable in damages. If an injunction were the remedy instead of damages the result of implying wider undertakings would not be so serious for the individual members of the committee. The injunction would be merely performing the same function as that performed by prohibition and certiorari in relation to statutory tribunals.

Morris, L.J., thought that, if in the absence of an express contract some implied contract had to be extracted, he could not think that the cornporters who became members of the committee promised that they would not do anything which was beyond their jurisdiction or that they promised not to make mistakes. He thought the only term which could be implied was that they had undertaken to apply their minds honestly and conscientiously to any problem that arose.[75] On the facts there was no breach of that contract.

The reluctance of Morris, L.J., to impose any more onerous contractual duty binding the members of the tribunal is illuminated by his opinion that if the members of "a committee who act conscientiously and honestly but who make mistakes are to be liable in damages, new perils will be added to certain forms of public service."[76] Sir Raymond Evershed, M.R., was not satisfied that a term in the form stated by Denning, L.J., could properly be implied into the contract from which the jurisdiction of the tribunal sprang.

Abbott v. *Sullivan*[77] was a case in which the jurisdiction of the tribunal was not based upon detailed written rules but upon custom and before any relief based upon contract could be given the Court was faced with the difficulty of finding the terms by implication. What if the rules of an association expressly show that a tribunal is to follow, say, the rules of natural justice? Can there be a claim for damages if the rules, treated as imposing contractual duties on the members of the committee, are not observed? The High Court of Australia has dealt with such a case.

In 1909 the High Court in *Macqueen* v. *Frackelton*[78] treated the consensual compact regulating the relations of members of the Presbyterian Church of Queensland *inter se* as a contract although it was in the eye of the law a voluntary association. The plaintiff, a minister of the Church, had had charge of a church which carried with it under the rules the right to receive a stipend.

The rules provided for administration of the affairs of the Presbyterian Church of Queensland by a hierarchy of Courts: in ascending order they were Church Sessions, Presbyteries, a State General Assembly, and a Federal General Assembly. Under the Rules of Discipline each of these courts had a duty to exercise discipline over members of the church who committed offences. The

[74] (1952) 1 K.B. at 203.
[75] *Id.* at 219.
[76] *Id.* at 215-16.
[77] (1952) 1 K.B. 189.
[78] (1909) 8 C.L.R. 673.

rules governing the mode of exercise of that jurisdiction provided an elaborate form of procedure to ensure a fair trial to persons accused of offences. Disputes arose between the plaintiff and the congregation of his church and these were investigated by a Commission appointed by the appropriate Presbytery. The Commission's report censured the plaintiff and after its adoption by the Presbytery steps were taken to bring the matter before the State General Assembly with a recommendation that the pastoral tie between the plaintiff and his congregation be dissolved. Before the General Assembly met, the plaintiff issued a writ in the Supreme Court of Queensland against all members of the Presbytery except himself, claiming an injunction to restrain them from removing him from his office as minister of a church until proceedings had been taken in accordance with the Rules of Discipline. The issue of the writ was reported by the Presbytery to the General Assembly which resolved that the plaintiff should be cited to appear before it on the following day. Two days later the General Assembly resolved that the plaintiff in invoking the aid of the Supreme Court had been guilty of an offence, that he should be suspended for six months from his position as a minister of the Church and his church was declared vacant, thus depriving him of his right to receive a stipend. The plaintiff then brought another action in the Supreme Court against the members of the General Assembly and of the Presbytery for a declaration that the sentence passed was void and for a mandamus to restore him to office. The two actions were consolidated and the trial judge gave judgment for the plaintiff in both actions. On appeal to the Full Court judgment in the first action was set aside and leave to appeal from that decision was refused by the High Court on the ground that up to the issue of the writ in that action no civil right of the plaintiff had been infringed. No civil right was infringed because the plaintiff, not having been suspended from office at that stage, had not sustained any loss of money or property.

In the appeal to the Full Court in the second action, the defendants were unsuccessful and they appealed to the High Court. All three members of the Court (Griffith, C.J., O'Connor and Isaacs, JJ.) held that the consensual compact between the members of the Church constituted a contract. The General Assembly in proceeding summarily in disregard of the express terms of the contract designed to protect accused persons had acted in excess of its authority and in breach of contract. Since there was a breach of contract it might be expected that a civil action would have been available for even nominal damages, even if the plaintiff could not have proved actual pecuniary loss.

But all members of the Court based the civil jurisdiction to interfere in this case on the ground that a "civil right" of the plaintiff had been infringed. In the view of Griffith, C.J., prejudice to "civil right" involved loss of money or property. Since the plaintiff had not only lost his right to stipend as minister of the church to which he had been appointed but was also prevented from acting as a minister elsewhere in Queensland, he had been deprived of a civil right.[79] O'Connor, J., agreed with the Full Court of Queensland that loss of stipend was a loss of "civil right".[80] Isaacs, J., stated the proposition that no court of law will take any cognizance of a breach of contract of this kind except to protect a right of property[81] and in his view there was sufficient authority for holding that status and the consequent opportunity to obtain emoluments or to secure the moral certainty of obtaining them was a sufficient interest in property to satisfy that proposition.[82]

[79] *Id.* at 693.
[80] *Id.* at 703-4.
[81] *Id.* at 713.
[82] *Id.* at 724.

The plaintiff did not claim damages but it appears clearly from the judgment of Griffith, C.J., that he would have held the members of the General Assembly liable in damages.[83] Neither O'Connor, J., nor Isaacs, J., expresses any view on the form of civil redress which the plaintiff could have obtained in addition to a declaration.

It is noteworthy that in this case the plaintiff's right to civil relief was not complete until some "civil right" of his was prejudiced. It is also of interest that Denning, L.J., in *Abbott* v. *Sullivan*[84] limited the implied undertaking binding the members of the cornporters' committee to one not to take away a member's property or deprive him of his livelihood when they knew, or had the means of knowing, that they had no jurisdiction in that behalf. The limitation stated by Denning, L.J., stems from a recognition that the extent of the interference in the affairs of internal associations must be defined by evaluating the individual interests which the Courts will protect, despite their normal reluctance to engage in such interference. But the limitation of interference to protection of civil right appears to have been imported into *Macqueen* v. *Frackelton*[85] from cases dealing not with legal relief for breach of contract but with equitable protection of property. This is borne out by the fact that Isaacs, J. (who was the only judge to offer any explanation of the limitation) relied (inter alia) on the statement of Lord Cranworth in *Forbes* v. *Eden*[86] that "Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs". Isaacs, J., also relied on *Rigby* v. *Connol*[87], the *locus classicus* on jurisdiction, to grant an injunction on equitable principles in the club cases. However, the judgments in *Macqueen* v. *Frackelton*[88] do give a wide connotation to the term "civil right" which goes beyond property in the strict sense, with the result that if *Abbott* v. *Sullivan*[89] (assuming there had been rules expressly regulating the mode of exercise of the committee's jurisdiction) had arisen in Australia, a result not dissimilar from that for which Denning, L.J., decided, might have been reached. However, as a result of equating the basis of the jurisdiction to deal with the matter as a breach of contract with the basis of the jurisdiction in cases like *Rigby* v. *Connol*[90] so that each is based on protection of property, there is the danger that the weight of accumulated authority may deter an Australian court from regarding property as an elastic term for this purpose. This danger has not been lessened by the judgments in *Cameron* v. *Hogan*[91], where Rich, Dixon, Evatt and McTiernan, JJ., stated that the above quoted dictum of Lord Cranworth should not be understood as relating only to the jurisdiction of courts of equity.[92] *Macqueen* v. *Frackelton*[93], though not referred to in the judgments in *Cameron* v. *Hogan*[94] (it was mentioned in argument only), supports that statement but it is authority for giving "property" a wide meaning.

It appears then that before *Cameron* v. *Hogan*[95] it might have been possible in Australia to base a claim for damages for wrongful expulsion on breach of contract, but since the remedy was available only in circumstances where an

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[83] *Id.* at 694.
[84] (1952) 1 K.B. 189.
[85] (1909) 8 C.L.R. 673.
[86] (1867) L.R. 1 H.L., Sc. 568, 581.
[87] (1880) 14 Ch. D. 482.
[88] (1909) 8 C.L.R. 673.
[89] (1952) 1 K.B. 189.
[90] (1880) 14 Ch. D. 482.
[91] (1934) 51 C.L.R. 358.
[92] (1934) 51 C.L.R. at 370.
[93] (1909) 8 C.L.R. 673.
[94] (1934) 51 C.L.R. 358.
[95] *Supra.*

injunction would be available independently of contract, with one possible exception, no good purpose would be served by asking for an injunction on the basis of breach of contract.[96]

If contract remains at all relevant in claims in relation to wrongful expulsion, one more matter deserves attention, namely, whether the rules of natural justice can be excluded by an express term. The formulation in *Dawkins* v. *Antrobus*[97] of the requirement that the proceedings of a tribunal of a club should not be contrary to the principles of natural justice was so wide that a court should not only, in effect, incorporate that principle into the rules of the association to fill gaps but should also give relief on this ground in the face of rules expressly excluding the principle of natural justice. But in England in recent years it has not been clear whether the principle of natural justice can be excluded by consent. In *Russell* v. *Duke of Norfolk*[98] Lord Goddard, C.J., at first instance agreeing with dicta of Maugham, J., in *MacLean* v. *Workers' Union*[99] thought it could be excluded by an express rule. In the Court of Appeal, Tucker, L.J.,[100] agreed with that view, Asquith, L.J., offered no opinion, while Denning, L.J., [101] doubted the validity of any excluding rule. It is significant that he thought such a stipulation would be contrary to public policy. This appeared to imply that there are certain minimum standards to which domestic tribunals must conform. However, not every domestic tribunal in a voluntary association would be subject to that requirement. It appeared that the criterion in Lord Justice Denning's view was the severity of the impact of the improper decision upon interests of substance of the person affected. The Jockey Club had a monopoloy in its sphere of activity; its decision to withdraw a trainer's licence had the effect of taking away his livelihood. That being so, the case was different from (inter alia) expulsion from a club.

In the later case of *Abbott* v. *Sullivan*[102] Denning, L.J., stated without any qualification that a stipulation excluding the principle of natural justice would be invalid.

In *Lee* v. *The Showmen's Guild of Great Britain*[103] he appears to impose the requirement of conformity with natural justice upon every domestic tribunal. "Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid." Amongst other authorities for this proposition he cites *Dawkins* v. *Antrobus*[104], a case of expulsion from a social club, where no interest so substantial as the right to pursue a chosen vocation was at stake.

In Australia the first ground mentioned in *Dawkins* v. *Antrobus*[105] appears to have been narrowed so as to require the expulsion proceedings to be in accordance with the principle of natural justice unless that principle is excluded expressly or by necessary implication by the rules. In *Macqueen* v. *Frackelton*[106]

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[96] One possible reason why it might have been more advantageous to claim an injunction on the basis of breach of contract would stem from the principle derived from *Doherty* v. *Allmann* (1878) 3 A.C. 709, 721; Ashburner, *Principles of Equity* (2nd ed.) 384-5, that the remedy of injunction is not a discretionary one in cases of breach of contract. But if *Cameron* v. *Hogan* ((1934) 51 C.L.R. 358) bars claims in contract, this possible advantage is not available.

[97] (1881) 17 Ch. D. 615.
[98] (1948) 1 All E.R. 488 at 491.
[99] (1929) 1 Ch. 602.
[100] (1949) 1 All E.R. 109 at 115.
[101] *Id.* at 119.
[102] (1952) 1 K.B. at 198.
[103] (1952) 2 Q.B. 329, 342.
[104] (1881) 17 Ch. D. 615.
[105] *Supra.*
[106] (1909) 8 C.L.R. 673.

it is implicit in the judgments of O'Connor[107] and Isaacs, J.J.,[108] that the rules of a voluntary association can exclude the principle of natural justice.

In the later case of *Dickason* v. *Edwards*[109] all members of the Court (Griffiths, C.J., O'Connor and Isaacs, J.J.) were agreed that the rules of an association may empower a domestic tribunal to decide in violation of all the rules of natural justice. But the rules would not exclude any part of the principle of natural justice except by clear words or necessary implication. *Dickason* v. *Edwards*[110] concerned the rules of a Friendly Society which were treated by the Court as a contract.

As Courts in Australia may be reluctant to regard the rules of an association as a contract following *Cameron* v. *Hogan*[111] it might have been arguable that where the rules are not treated as a contract but a member is nevertheless entitled to an injunction because he has proprietary rights, the tribunal's decision to expel him will be set aside on the ground of disregard of the principle of natural justice, even though the rules expressly exclude some aspect of that principle. However, later formulations of principle derived from *Dickason* v. *Edwards*[112] are wide enough to suggest that the rules of any voluntary association may exclude the principle of natural justice.[113]

That a member joining an association may submit his future to a domestic tribunal so as to deny himself all but a minimum opportunity to ask relief from a Court of law was shown in *Macqueen* v. *Frackelton*[114] by O'Connor, J. He observed:

> A voluntary association might certainly bind its members by a contract stipulating that the interpretation of the terms and conditions of association should be exclusively in the hands of a judicial body empowered to decide without question the limits of its own jurisdiction. It might further provide that the penalty of questioning the decisions of that tribunal should be expulsion from the association or a temporary loss of its benefits. Men may thus, if they think fit, submit themselves absolutely to the will and pleasure of the association which they have voluntary" (sic) "created. If they do so they have no right to complain of any exercise of power so long as it is not malicious.[115]

It is of interest to contrast this statement with observations of Denning, L.J., in *Lee* v. *The Showmen's Guild of Great Britain.*[116] After setting on one side the tribunals in social clubs, where the contract constituted by the rules could make expulsion dependent upon an opinion of the committee unreviewable as to its merits in a Court of law although subject to review on the three grounds mentioned in *Dawkins* v. *Antrobus*, he said:

> It is very different with domestic tribunals which sit in judgment on members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the Courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of the rules which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In

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[107] (1909) 8 C.L.R. at 700-701. [108] *Id.* at 708.
[109] (1910) 10 C.L.R. 343.
[110] *Supra.* [111] (1934) 51 C.L.R. 358. [112] (1910) 10 C.L.R. 243.
[113] "The provisions of a statute . . . , or the rules of a voluntary association may exclude that application of the principle that a person who prepares and formulates charges and takes part in the prosecution of them is thereby precluded from taking part in the consideration and determination of them". Latham, C.J., *Australian Workers' Union* v. *Bowen, No. 2* (1948) 77 C.L.R. at 616.
[114] (1909) 8 C.L.R. 673. [115] *Id.* at 700-701.
[116] (1952) 2 Q.B. 329.

> theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no.[117]

The plaintiff in *Macqueen* v. *Frackelton*[118] lost his employment as a result of the action of the General Assembly. If the rules had expressly made the rights of a member measurable according to the opinion of the General Assembly in such a way that under the view of O'Connor, J., that opinion would not have been reviewable, the plaintiff would have obtained no relief from a Court of law. In these circumstances would the plaintiff obtain relief from Denning, L.J., on the basis that he had been deprived of his livelihood notwithstanding that he had by joining the association assented to rules giving the tribunal wide power to cause that deprivation? The application of Lord Justice Denning's views in cases where clerics are expelled from churches would involve an intervention in the affairs of churches which could only lead to embarrassment. Possibly his views would not apply in such a case, for the particular vocation involved owes its existence to the association concerned. Since the association provides the vocation, the member can hardly complain if the association by ending his membership deprives him of that vocation. But in the case of secular trades, the trade union does not provide the trade. The trade owes its existence to the needs of another and wider association, the community. Is it the interest of the community in obtaining the best possible satisfaction of its needs — an interest apparent in the restraint of trade cases — which justifies the intervention of the courts in the face of express rules in cases where a member's livelihood is in jeopardy as in *Lee's* case? It may be doubted whether the community has a sufficient interest in the effect of decisions of tribunals of social clubs to justify the imposition of the rules of natural justice in the face of rules to the contrary. But Denning, L.J., would apparently hold that such rules would be invalid as contrary to public policy. This appears to suggest that the public policy is not based on material needs of the community but upon the premise that the public has an interest in just procedure for its own sake which overrides individual renunciation of the benefits of that procedure.

The decisions concerning the procedure to be followed by statutory authorities render doubtful the existence of any general principle of public policy that the rules of natural justice should be observed. It is only where the Legislature has imposed a duty on the authority to act judicially that these rules are enforced against statutory authorities.[119] The necessity for an affirmative direction by the legislature that the statutory authority should conduct a hearing argues against the existence of a principle of public policy so far-reaching as that suggested by Denning, L.J.

If there is no rule of public policy that statutory authorities deciding questions affecting the interests of substance of individuals should conform to the principle of natural justice, there can hardly be a rule imposing that requirement on domestic tribunals. The public has a definite interest in the manner of exercise of statutory powers, but as it is the policy of the law to abstain from interference in the affairs of voluntary associations as far as possible, it is difficult to see why the public should have a greater interest in the proceedings of domestic tribunals than it has in the work of statutory authorities.

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[117] *Id.* at 343.
[118] (1909) 8 C.L.R. 673.
[119] *Nakkuda Ali* v. *Jayaratne* (1951) A.C. 66. H. W. R. Wade, "The Twilight of Natural Justice" (1951) 67 *L.Q.R.* 103.

Although jurisdiction in recent English cases like *Abbott* v. *Sullivan*[120] and *Lee* v. *The Showmen's Guild of Great Britain*[121] has been based on contract, the difficulties of the contract theory which deterred the High Court in *Cameron* v. *Hogan*[122] were not considered in these cases. The contract theory has been condemned as unrealistic and it may be that the Court of Appeal has in effect resorted to a fiction. Chafee points out[123] that since the association is unincorporated and cannot be treated as an entity each member has a contract with every other member, with the result that in the club of six hundred persons there are 179,700 contracts. He is also impressed by the difficulty that persons joining associations do not contemplate assuming liability in damages, but this difficulty may be removed if the special nature of the contract is recognized and injunction becomes the primary remedy.

He also opined that if the rules form a contract and any violation of a rule is a breach of a contract, then the interpretation of that contract is for the court. It is undesirable, in his view, that courts should be the final interpreters of the rules of all voluntary associations. Chafee states that by a thorough-going application of the contract theory the courts would become Courts of Appeal from the tribunals of all associations and would be obliged to grant a re-hearing on the merits. Thus, if the rules made "conduct injurious to the character or interests of the club" a ground for expulsion, the court would have to consider whether the rule covered the particular member's conduct which was treated as an offence against the rules by the tribunal. In England, as has been shown, this difficulty has been met by recognizing that the test of expulsion may be whether "in the opinion of" the domestic tribunal the conduct of the member warranted it and any opinion of the tribunal will be unreviewable. It is only where as in *Lee's* case the rules create specific offences, like "unfair competition", the commission of which will justify expulsion, that the courts are called upon to construe the rule and determine whether the member's conduct amounted to the offence specified. If the assumption by the courts of the position of final interpreter is undesirable because voluntary associations are presumed to wish to conduct their own affairs, it is open to the association to frame its rules in such a way that rights and duties under the rules-contract are measurable according to the opinion of a domestic tribunal and in that way limit the court's intervention to something short of examination of the merits of any case. If an association is prepared to allow the courts to review findings of its domestic tribunal by the medium of construing a contract, is there any reason why the courts should refuse to do so?

In place of the contract theory Chafee would treat the relation of the member to the association as an interest worthy of protection in itself by the law of tort. Not every violation of that relation would call for judicial relief. The courts would assist only where some interest of substance (property or livelihood) or personality (reputation) was at stake. The main objection to this suggestion, which Chafee recognizes, is that it would involve departure from the view that a mere association cannot be regarded as a legal entity even though the community and its members may look upon it as a unit and accord it de facto personality. For this reason, it is doubtful whether English and Australian courts would at present accede to the suggestion.

Conclusion.

It may be granted that the property basis of jurisdiction is too narrow and

[120] (1952) 1 K.B. 189. [121] (1952) 2 Q.B. 329. [122] (1934) 51 C.L.R. 358.
[123] "The Internal Affairs of Associations" (1930) 43 *Harv. L.R.* 993, 1003-1007. See also C. W. Summers, "Legal Limitation on Union Discipline" (1951) 64 *Harv. L.R.* 1049.

that the contract basis of jurisdiction in these cases is unrealistic, but under cover of both, the English courts appear to have developed a clear principle. Cases like *Abbott* v. *Sullivan*[124] and *Lee* v. *The Showmen's Guild of Great Britain*[125] establish that though an individual submits himself to the power of a domestic tribunal, that submission can never be unqualified. It is qualified to the extent that any decision by that tribunal which would deprive him of an interest of substance must be arrived at in accordance with certain minimum standards. Australian authorities appear to allow the exclusion of the principle of natural justice by the terms of the member's submission and thus the standards to be observed may be fewer. But given that there is such a principle of law, courts should have jurisdiction to enforce it without regard to property or contract. Adherence to property and contract as bases of jurisdiction can serve only to obscure the real problems, which are the evaluation of the interests of substance which call for judicial protection viewed in the light of the ordinary policy against judicial intervention, the definition of the standards to which domestic tribunals must conform, and the form which judicial relief should take.

Adherence to property as a basis carries with it the risk that the range of individual interests of substance to be protected will be narrow. Reliance on orthodox contract theory is undesirable because the traditional remedy in contract is an award of damages. Courts impressed with the effect of liability in damages on the individual members of domestic tribunals may be led into formulating the duties owed by such members in terms too lenient to ensure the maximum protection for individual interests. An additional defect of the contract theory is that although courts are reluctant to assume jurisdiction over the internal affairs of associations, principles developed in relation to less artificial contracts influence the courts to intervene in cases of wrongful expulsion even though the plaintiff has not exhausted all the domestic remedies.

However, the property and contract concepts appear from recent English decisions to be fictions behind which the courts have tackled the real problems.

[124] (1952) 1 K.B. 189. [125] (1952) 2 Q.B. 329.