DOMESTIC TRIBUNALS—A WRONG WITHOUT A REMEDY.

Once again, in *Abbott* v. *Sullivan and Others*,[1] Denning L.J. found himself in a minority of one pressing for a more expansive view of the Common Law. Where the plaintiff has suffered a definite economic injury he ought not to be denied a legal remedy because of the difficulty in formulating the precise legal nature of his claim which lay somewhere "in an uncharted area on the borderland of contract and of tort."

The facts of the case were relatively simple. The plaintiff was a member of the corn porters' committee, a body controlling corn porters in the Port of London. Only those accepted and registered by this committee could work as corn porters in the area, and such acceptance involved an agreement to submit to the jurisdiction of the committee and to observe the Corn Porters' Working Rules. The committee was connected with the Transport and General Workers' Union, of which all porters were members. Following certain complaints against the plaintiff by members of his gang, a union officer convened a meeting of the committee which the plaintiff attended, and at which a fine was imposed on him. In the street, shortly after this meeting, the plaintiff struck the union officer, who thereupon convened an emergency meeting of the committee. The plaintiff received notice of the meeting, wrote apologising to the officer concerned, but protested against the committee's assumption of jurisdiction in a matter unconnected with his work as a porter. At the emergency meeting, which the plaintiff did not attend, it was resolved that his name should be removed from the register of members. The Port of London Authority was advised of the decision and in the result the plaintiff ceased to be employed as a corn porter.

He brought action claiming that the committee had not been authorised to pass the resolution removing him from the register and claiming damages for such wrongful removal. (The union officer, the Transport and General Workers' Union and the Port of London Authority had also been joined as defendants, but it is intended here to deal solely with the action against the committee.)

The trial judge found that the resolution of the committee was *ultra vires*, apparently on two grounds: firstly, that by the rules, express or implied, of the organisation they had no jurisdiction to take disciplinary action against a member as a result of a common assault in the street on a trade union official; secondly, that the committee "while purporting to exercise a judicial or quasi-judicial function, had disregarded one of the so-called principles of natural justice in that they failed to give the plaintiff any proper notice of the case which he was being called upon to meet."

1. [1952] 1 K.B. 189.

All three judges in the Court of Appeal agreed with the finding that the resolution in question was *ultra vires*, relying on the absence of jurisdiction (Evershed L.J. referred to the principles of natural justice but preferred to express no concluded view on this aspect of the case).

The point at issue therefore was this. If a domestic tribunal takes disciplinary action against a member in a matter in which it has no jurisdiction and thereby inflicts definite economic injury on the member, will the latter have any legal claim against the members of the tribunal assuming they have acted *bona fide* and without malice, and that no question of conspiracy is involved?

The judgment of Evershed L.J. is in some respects curiously reminiscent of the old pre-1932 " privity of contract " reasoning. The plaintiff's " claim, if claim there be, must rest on a contract, either express or implied, made (as I assume) by every corn porter with each member, severally, of the committee, which was broken by the passing by the committee . . . of the resolution. . . . At no point . . . can I find the slightest hint of any such claim. . . ." After referring to the difficulties of formulating a term of the type visualised, he went on to say that the Court would be reluctant to decline to entertain a claim merely on the basis of a defective pleading. However, no authority had been cited to show " that in the case of a body such as the corn porters' committee there should be imported a contractual term of the character . . . I have stated " (*e.g.* that the committee should not knowingly act beyond their proper or contractual jurisdiction), nor could such a term be inferred from the facts of the present case.

On the " more general aspect of the matter " (presumably a claim in tort) he wished to hear full argument, and was not satisfied that any useful analogy could be drawn from cases dealing with statutory tribunals or proprietary clubs.

Morris L.J. after establishing the jurisdiction of the court to intervene because of the violation of some " property right " of the plaintiff, went on to discuss the case of a judicial tribunal which acted beyond its jurisdiction. He accepted the principle of *Calder* v. *Halket*,[2] which was the basis of Denning L.J.'s judgment, namely, that the member of such a tribunal might be liable if he acted outside his jurisdiction when he had the knowledge or means of knowledge of such jurisdiction. Somewhat puzzlingly, he limits this protection to cases " where there is something from which to protect " by which he seems to mean cases where goods have been seized or defamatory statements made, *i.e.*, cases falling within one of the old specific nominate torts. But in any event, he considered the committee here did not have even so much protection since they were not exercising judicial functions. Therefore " it is, in my judgment, plain that they have no protection if, because they acted beyond their powers, they did some *actionable civil wrong*."[3] There was no conspiracy

2. (1839-40) 3 Moo. P.C. 28.

3. Italics supplied.

or defamation involved; the conduct did not, in his opinion, amount to any actionable civil wrong. So far as the statement of claim was based on alleged breach of some contract, the learned Lord Justice stated that no case had been cited which held the members of the committee of a members' club liable for wrongful expulsion (though the position might be different in the case of a proprietary club). The claim here must rest on some implied contract and the difficulty of formulating the terms of such a contract " which *must* have been of common acceptance " led him to reject any such claim.

Before dealing with the judgment of Denning L.J. it is proposed to make some general comments on the relation of the courts to these domestic tribunals—or professional or semi-professional bodies which exercise disciplinary powers over their members. There is an excellent article by Mr. Dennis Lloyd in 13 *Modern Law Review* 281. After referring to the vast increase in the number of modern bodies with wide powers of control over members (amounting almost to a return to the medieval guild system) the author traces the history of the courts' attempts to develop some method of resolving conflicts between these professional or quasi-professional bodies and the individual whose means of livelihood they control. Two conceptions provided a theoretical basis for the courts' intervention—" one a doctrine *stricti juris*, that of property, and the other a far vaguer and almost political dogma, viz., natural justice." The latter ground is of course of uncertain and extremely limited application. Provided the member was given notice of the charge and an opportunity to defend himself, then, it seems the court would be satisfied if the body acted in good faith however unreasonable its verdict.[4] But even this theory of natural justice was evolved in relation to partnership cases and statutory tribunals when no real question of the court's jurisdiction arose. In the case of voluntary associations, such as clubs, etc., the traditional reluctance of the courts to interfere in the internal affairs of these bodies is reflected in the narrow ground eventually formulated for such intervention, namely, the infringement of some right of property. The inadequacy and unreality of this approach is seen in subsequent judicial attempts to evade the limitations of such a formula by giving a fictional denotation to the term " property right." See, for example, *Osborne* v. *Amalgamated Society of Railway Servants*,[5] where Fletcher Moulton L.J. said there were many rights which in such a sense could not be called rights of property which, nevertheless, the law would protect, and he instanced the case of an association of members subscribing for a charitable purpose, the whole fund to be used for such purpose. The members would have no beneficial property interest in such a case, yet the court might protect membership of the group. On this basis, Morris L.J. considered the court entitled to intervene in the instant case, though it is perfectly obvious that no

4. See, for example, *White* v. *Kuzych* [1951] A.C. 585, 595-6.
5. [1911] 1 Ch. 540 at 562.

" property " right was involved. As Lloyd says, " Indeed the whole conception of property in the strict sense is bound to lead to utterly unreal distinctions between corporate and unincorporate bodies, proprietary and member's clubs, and bodies which maintain a meeting-place for the members and others which are devoid of property; distinctions irrelevant to the real issue, which is whether there is an unfettered power to deprive a man of his professional livelihood."[6]

Considerations of this nature led the writer to seek a more satisfactory basis for the Court's jurisdiction in contract. " The advantages of such an approach are manifest, for not only does it obviate the artificial distinctions which result from seeking out some interest of a proprietary kind, but it also immensely widens and rationalises the scope of the remedy, and makes it quite immaterial to consider such questions as whether the aggrieved person was or was not an actual member of the society " (*e.g. Russell* v. *Duke of Norfolk*,[7] where the trainer was not a member of the Jockey Club, the governing body.) " For on this footing the court need only pause to inquire whether there was a contract between the parties, and if so what were its terms both express or implied, and whether there has been a breach of those terms."[8] He finds some support for this view in recent cases, though " it must be admitted that the proprietary basis of the jurisdiction has been by no means exorcised by the modern cases."[9]

It is worthwhile noting that while Lloyd urges the adoption of the contract theory as providing a more rational basis for the jurisdiction of the Court, the opinion has been expressed in America, that even this extension is far from being completely satisfactory. In an article on " Legal limitations on Union Discipline," [10] Professor Summers considers the contract theory even more of a legal fabrication than the property theory. " With whom does the member make his contract ? Most courts say that it is with the union—but the union may not be a legal entity." (As the corn porters' committee certainly was not in *Abbott* v. *Sullivan*.) "A few courts have attempted to avoid this difficulty by saying that the contract is with the other members—a contract with a million others who have no knowledge and little concern ! What are the terms of the contract ? The constitutional provisions, particularly those governing discipline, are so notoriously vague that they fall far short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any term at any time. . . . Membership is a special relationship. . . ." In any event, the real question is not whether the contract or property theories accurately describe these

6. *Op. cit.* p. 289.
7. [1949] 1 All E.R. 109.
8. Lloyd, *op. cit.* p. 288.
9. *Ibid.* p. 289.
10. 64 Harvard Law Review 1049, 1055.

special relationships, but whether they assist the courts in arriving at sound results. Both theories he considers critically weak in this respect.

The principal weakness of the contract theory is the illusory nature of the standard for intervention that it is supposed to afford the judge. The rules of associations such as Trade Unions are often extremely vague or else completely silent on the various offences for which a member may be punished. So also, as to the procedure to be followed. There may be little real protection for the individual. " If the constitution permits expulsion for criticizing union officers, a court, blindly following the contract theory, may grant the officers complete freedom to liquidate all opposition. While most courts have attempted to reinforce these weak spots in the theory by requiring that constitutional provisions be not ' against public policy,' and that disciplinè procedures ' conform to natural justice,' these vague limitations also may provide no workable standards for the courts and little protection for the individual member." The force of this criticism is revealed in a case such as *Abbott* v. *Sullivan*, where there were no constitutional provisions at all to cover the actions of the Committee, and the consequent difficulty (perhaps impossibility) the Court felt in introducing some implied term to cover the case. Then, too, there is the point discussed in *Russell* v. *Duke of Norfolk*, namely, whether an express rule in the constitution or contract could dispense with the need for complying with " natural justice." Lord Goddard C.J. and Tucker L.J. considered that such an agreement would be valid, while Denning L.J. thought it might be invalid as contrary to public policy. The danger is obvious that the individual member might be deprived of even the poor protection afforded by " natural justice." It is no answer to say the individual need not accept such conditions. The controlling body has a complete monopoly in the chosen field of activity which may be the individual's only profession or trade. " Such arguments," says Lloyd, " have the same ring of reality as those of the opponents of the early factory legislation, who insisted that a child was not compelled to work fourteen hours a day, since he was not bound to seek that class of employment."[11] It is clear then that " Both . . . [sc. the property and contract theories] have potentially dangerous weaknesses when used by judges who fail to see that they are devices for explaining results rather than premises for determining results."[12]

Yet, even if the Court is able to decide, by use of either of the theories discussed, that it has jurisdiction to intervene, *Abbott* v. *Sullivan* illustrates that the problem has been by no means solved. For the Court may consider itself compelled to deny a remedy since the injury suffered by the plaintiff cannot be fitted within any of the traditional categories. It is the present submission that there is a pressing need for some broader and more flexible approach, such as that set out by Denning L.J. (It is interesting to notice that in *Russell* v. *Duke of*

11. *Op. cit.* p. 283.

12. Summers, *op. cit.* p. 1058.

Norfolk he had used a similar method in approaching the question of jurisdiction for he based this not " on the narrow foundation of property or even of contract, but rather on the broad basis recognised by some of the law lords in *Weinberger* v. *Inglis*.")

He takes first the case of statutory tribunals. There is no question that it is an actionable wrong for them to act outside their jurisdiction. " The remedy in such cases is, as a rule, one of the recognised actions of tort . . . [*e.g.*] false imprisonment . . . trespass to goods or trover. But it sometimes is not an action of tort, but an action for restitution . . . for money had and received. These cases all show that an invalid usurpation of jurisdiction which causes damage is itself a wrong. The form of action depends on the nature of the damage. But suppose the damage takes a different form from the old forms of fine or imprisonment. Suppose it takes the form of depriving a man of his livelihood . . . does that mean he has no remedy? It would be strange if the law could not adapt its remedies to such a situation where the wrong is the same but only the damage is different." Similar considerations apply, he continues, to domestic tribunals and proprietary clubs. And finally, " there is no reason why the same principle should not apply to voluntary associations." Hence his statement of the proposition: " If the members of a tribunal take it on themselves to punish a man for real or supposed wrongdoing when they know or have the means of knowing that they have no jurisdiction in that behalf, then they are liable to him for any damage so caused even though they were not actuated by malice."

Where, as in this case, jurisdiction could only be gained as the result of a contract between the parties, then there must be implied in the contract a term to the effect that the tribunal will not knowingly exceed its jurisdiction.

Two considerations of a general nature emerge from the case. Firstly, the traditional reluctance of the courts to intervene in the affairs of voluntary associations stems from the fact that the question arose originally in the case of private clubs, etc., and in such cases their reluctance is understandable since the disputes were in essence a domestic or family affair (what Lloyd calls " The *damnosa hereditas* of the old club cases "). But with the modern growth in number and power of professional and trade associations, vastly different social and economic problems arise. " The right of a man to work is just as important to him as, if not more important than, his rights to property. We see in our day many powerful associations which exercise great powers over the rights of their members to work. They have a monopoly in important fields of human activity. A wrongful dismissal by them of a member from his livelihood is just as damaging, indeed more damaging, than a wrongful dismissal by an employer."[13] The Courts have shown a

13. *Abbott* v. *Sullivan*, *supra*, pp. 204-5 *per* Denning L.J.

recognition of this development in their increasing readiness to intervene, without always pausing to specify the exact basis on which they are exercising jurisdiction. It may be, as Lloyd urges, that the category of contract, with its elastic conception of implied terms, will provide a rational and general basis.

But this leads to the second consideration, that the implied term conception may not be so elastic if the Court does not realise exactly what is the real gist of the action, and there is a danger that in subsequent cases too much attention will be paid to what has been said rather than what has been done. In other words, having a suitable basis for jurisdiction is of no use if there is no appropriate or adequate remedy.

In *Abbott* v. *Sullivan* there was an additional special feature which may have influenced the Court, particularly Evershed L.J., namely, that as the result of negotiations between the Union and the committee the plaintiff had been reinstated to membership. Now, in the normal case of an expulsion, although contract may provide a satisfactory basis for intervention, the damages claimable for a breach of the contract may not be the real gist of the complaint. Rather will the plaintiff be seeking one of the more effective, but discretionary, remedies of Equity, *e.g.*, injunction or declaration of right. And Equity has been very sparing of these remedies in such cases; " the tendency was to treat the relation of a member to his club as essentially personal," so that an injunction would generally not be available to restrain breach of such a contract. It is on the availability of these remedies that the real efficacy of the right of a member depends. It is submitted that there is room for a more liberal use of the Court's discretion. Writing before *Abbott* v. *Sullivan*, Lloyd considered there was " some evidence of a strong tendency on the part of the courts to regard membership of a professional body as more than a mere personal relationship, but rather as something capable of giving rise to a contractual nexus a breach of which, for example by wrongful expulsion, entitles the aggrieved member to both a declaration and an injunction."[14]

Finally, one might be permitted to share the regret of Denning L.J. that the general principle of Bowen L.J., namely, that it is an actionable wrong for any man wilfully and intentionally to injure another without just cause or excuse, has not yet been accepted into our law. For such a principle would cover the case entirely, without any need to resort to such fictional devices as " property " and " contract."[15] [16]

P. DONOVAN*

14. *Op. cit.* p. 292.
15. For a more realistic approach, by a differently constituted Court of Appeal (Somervell, Denning, Romer, L.JJ.) see the recent case of *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 T.L.R. 1115. Admittedly the case turned on the interpretation of the rule of the Trade Union concerned, but the case is noteworthy for four points:
   (*a*) A clear distinction is drawn between the old club cases and those such as the present, where expulsion from the association means loss of livelihood.

(*b*) The old idea of " property right " as the basis of intervention seems finally exploded. It is accepted that jurisdiction is assumed to protect contract rights (Rights of Property are only relevant to the question of remedy).

(*c*) Although as Denning L.J. says of such domestic tribunals: " In theory their powers are based on contract," he realises the artificiality of this point of view. What in fact is being protected by the Court is a clear economic right—the right to work. The Court will intervene if the tribunal has assumed jurisdiction by an incorrect interpretation of the rules (even though their decision is said to be final and binding on members).

(*d*) Finally, both Denning and Romer L.JJ. express the view that an attempt to oust the jurisdiction of the Courts on such " points of law " by a rule to that effect would be contrary to public policy (see above page 26).

16. The difficulties that faced the court in *Abbott* v. *Sullivan* would be less likely to arise in connection with Australian Trade Unions because of the provisions for registration of all rules or amendments thereof under the Conciliation and Arbitration Act. See, for example, *Ryan* v. *Federated Clerks Union* [1951] S.A.S.R. 249.

*LL.B. (Queensland), B.A., B.C.L. (Oxford); Reader in Law in the University of Adelaide; Professor-elect of Commercial Law in the University of Melbourne.