THE POWER TO RESTRAIN TRADE UNION EXPULSION

It may be true that in any group of men oligarchical government is bound, in the end, and in some degree, to develop . . . . . But that is not to say that the leaders are shepherds whom the flock is unthinkingly [sic] to follow. It means that safeguards must be erected lest the mass of men become mere units in a sheepfold.[1]

One of the earliest cases involving expulsion from a trade organization was *Booreman's* case.[2] Booreman was a barrister of one of the Temples and was expelled therefrom. He sought a direction to the benchers of the Temple to restore to him his chambers and his membership of the society. It was held that the court would not entertain such a suit.

It is difficult to know whether the decision would have been the same if a modern trade union had been involved. But I submit that it is doubtful. The report of the case says:

> . . . . . but it was denied by the Court, because there is none in the Inns of Court to whom the writ can be directed, because it is no body corporate, but only a voluntary society, and submission to government; and they were angry with him for it, that he had waived the ancient and usual way of redress for any grievance in the Inns of Court, which was by appealing to the Judges, and would have him do so now.

Of that case Lord Mansfield[3] in *R.* v. *Benchers of Gray's Inn,* where he refused a mandamus to compel the defendants to call the prosecutor to the bar, said:

> I do not take the first reason stated in March to be the true one. It is not solid. The second is the true reason. As to the first, the Inns of Court had regulations, they acted and were known as a body, and all the orders which I have mentioned were directed to them. But the true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the Judges.

1. Laski: *Authority in the Modern State,* pp. 108-109.
2. March.N.R. 177 pl. 235.
3. (1780) 1 Dougl. 353, at p. 355.

Lord Thurlow, C., in *Cunningham* v. *Wegg* [4] was also of opinion that the internal affairs of the Inns of Court were no concern of the courts:

> There is no instance of a suit, either relative to the discipline, or the property of Chambers, in an Inn of Court. The defendants say, as far as they have acted, they are liable to the jurisdiction of the Judges. It is a claim among persons having privilege; therefore, this is not the proper jurisdiction.

It is perhaps hard to decide whether an institution of scholars comprises a trade organization. The difficulty is, however, more semantic than real, for, if membership of the institution is a prerequisite of the scholar carrying on his calling, then it is for our present purposes a trade organization.

"One Colmar, a scholar" was expelled from Exeter College "by the rector and fellows for incontinency".[5] By the statutes and constitution of the college, the Bishop of Exeter for the time being was appointed visitor; when the Bishop came to inquire into the expulsion of Colmar, Dr. Bury, the rector, and others refused to attend the visitation. The Bishop then suspended some of the fellows "and afterwards, with the consent of the unsuspended fellows, deprived the rector, Doctor Bury."

The position of the rector in the circumstances was not greatly different from that of a modern carpenter expelled from his union and declared "black". The rector admittedly had been deprived of a position in an institution of learning rather than expelled, but his position was really not much different.

That is not to say, of course, that the questions of law involved are the same. The bodies are differently constituted and the wrong (if wrong there be) to the individual is (technically) different.

Dr. Bury failed in his action to have his position as rector restored to him. Holt C.J. [6] pointed out:

> The head of such a body cannot maintain an assize for his headship, for he hath no sole seisin; the whole body of the college have an interest in the estate, he has not a title to a penny of the revenues in his own right, till by consent they be privately divided and distributed; and then too it is not the rector's money, it is Dr. Bury's money after division.

His Lordship had, however, distinguished between those corporations which were for public government and those which were for private charity, into which latter category the instant case fell. It is submitted that trade organizations (though not corporations) can be described as for public government rather than private charity. They are of a public

4. (1787) 2 Bro.C.C. 241 at p. 243.
5. *Philips* v. *Bury* (1690) 2 T.R. 346.
6. 2 T.R. 346, at p. 355,

nature and belong more to the field of social organization than to that of individualistic mutual assistance.

In *Carrington* v. *Taylor*[7] an action on the case was held maintainable by the owner of an ancient decoy against a person who fired at wild fowl so near to the decoy as to make the birds there take flight.

At first sight, this may not appear relevant to the question in hand. It does, however, illustrate the attitude which the old courts of common law took to the protection of a person's means of livelihood. The decision is based on that of Holt C.J. in *Keeble* v. *Hickeringill* which is appended as a note thereto.[8]

In the latter case, Holt C.J.[9] said:

> As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and *he that hinders another in his trade or livelihood is liable to an action for so hindering him.* Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say to pay his debts, 1 Roll. 60, 1; all the cases there put. *How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment.*

If the right to derive profit from one's employment was worthy of the protection of the Court of King's Bench at the beginning of the eighteenth century, why should not courts administering both law and equity protect that right today?

7. (1809) 11 East. 571.
8. Pollock on *Torts* (14th Edn.) says at p. 268: "It was thought for some time that hindering a man in his occupation or livelihood was a special cause of action. A judgment of Holt C.J. delivered in 1705, and followed (or rather perhaps incautiously extended) by the Court of King's Bench in 1809, but on the whole neglected by text-writers and judges till the later years of the nineteenth century, was the supposed authority for this. Holt certainly said that 'he that hinders another in his trade or livelihood is liable to an action for so hindering him,' whether a franchise is interfered with or 'a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood.' But it seems the better opinion, as the result of recent discussion, that a special right not to be disturbed in one's business is not known to the law."
9. (1705) 11 East. 574 at p. 575. Italics supplied.

It is true that his Lordship continued to make a distinction between interference which was rightful and that which was wrongful: [10]

> Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an antient (sic) school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie). But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7, 8. 21 H. 6, 31. 9 H. 7, 7. 14 Ed. 4, 7. Vide Restal. 662. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.

The distinction drawn is clear. If a man is merely asserting his own rights and injures me in my livelihood, there is no action, but if the injury is the purpose of his action then I have a remedy.[11]

However, if I am today expelled from a trade organization, then no one argues that I should be reinstated if I have been rightfully expelled. If the expulsion has been wrongful, if it is effected not only contrary to the rules but for the very purpose of punishing me and is not related to the union's welfare, Holt C.J., if still alive, would allow my action. He would probably be puzzled to find that, though he had power to grant injunctions, he could not grant an injunction in this particular case because no "property" right was involved. It is unlikely that his Lordship would accept such a view. Rather, I suggest, would he protest that my wrongful expulsion and the consequent difficulties placed on me in

10. *Ibid*. at pp. 575-576.

11. This savours of the answer given in the conspiracy cases, as to which see *Mogul Steamship Company* v. *McGregor Gow & Co.* (1885) L.R. 15 Q.B.D. 476; (1889) L.R. 23 Q.B.D. 598; [1892] A.C. 25; *Allen* v. *Flood* [1898] A.C. 1; *Quinn* v. *Leathem* [1901] A.C. 495; *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435.

earning my livelihood interfered with a "property" of mine, which he could and would protect in the best way possible — by injunction.

Expulsion from a trade organization has, of course, no worse effect on the person expelled than has refusal to admit a new member on the proposed new member. Each can be thereby deprived of his livelihood. It is, however, more difficult to show that a refusal to admit is wrongful than it is to prove that an expulsion is wrongful.

In *R.* v. *Benchers of Lincoln's Inn*, [12] a mandamus was refused to compel the admission of an applicant to the Inn. The comments of the learned judges are of interest. Bayley J. said: [13]

> If it could be shown that every individual had an inchoate right to be admitted a member of these associations, and that there was an obligation in the latter to admit him, and that the party aggrieved had no other remedy, then it would follow that this Court would be bound to grant a mandamus; but there being no such right or obligation in this case, I think there is no ground for granting a mandamus.

Littledale J. [14] concurred:

> When these are said to be voluntary societies submitting to government, that must be understood to import that they submit to a government to be exercised on the members of the society . . . . Now, as far as the admission of members is concerned, these are voluntary societies, not submitting to any government. They may in their discretion admit or not as they please, and this Court has no power to compel them to admit any individual.

A mandamus would have lain, it appears, if the rejected would-be member had had an inchoate right to be admitted. If, then, a member had a right to remain a member, should not he be protected in his right of membership? That would appear to be their Lordships' opinion. As Lord Redesdale [15] put it two years later: "[T]here never should be a wrong without a remedy. Our law will not allow such a defect of justice . . . . . ."

Manisty v. *Kenealy* [16] in 1876 decided that the Inns of Court are voluntary societies, and the decisions of the benches with regard to the disbenching of their members are final and conclusive, subject only to an appeal to the Lord Chancellor and the judges as visitors.

---

12. (1825) 4 B. & C. 855.

13. *Ibid.* at p. 860.

14. *Ibid.* at pp. 860-861.

15. *Attorney-General* v. *Mayor of Dublin* (1827) 1 Bligh N.S. 312, at p. 345.

16. (1876) 24 W.R. 918.

In those days, of course, few barristers would have admitted that they were members of an Inn of Court primarily for the purpose of earning a living. Moreover, we must beware of the instinctive judicial belief that the Inns of Court should be left to manage their own affairs.

It is to be noted that the decision in *Manisty* v. *Kenealy* is in conflict with the inference which we managed to draw from *R.* v. *Benchers of Lincoln's Inn.*

Pulbrook v. *Richmond Consolidated Mining Company* [17] fell on the other side of the line, for an obvious, though technical, reason. There the learned Master of the Rolls was concerned with an attempt to prevent a director of a corporation, a *non-voluntary* association, who was a shareholder, and therefore a corporator, from continuing to act as director.

His Lordship [18] said:

> In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

The ratio of the decision is, however, hard to discover. His Lordship continued: [19]

> Besides that, he is in the position of a shareholder, of a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his services. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue.

In *Rigby* v. *Connol,*[20] an injunction was refused for two reasons: that no property right was involved, and that the Master of the Rolls considered that to grant an injunction would infringe section 4 of the Trade Union Act, 1871. The latter reason is seldom adverted to and the very fact that the case concerned a trade union is often forgotten. The facts of the case were as follows:

17. (1878) L.R. 9 Ch. D. 610.
18. *Ibid*. at p. 612.
19. *Ibid*. at p. 613.
20. (1880) L.R. 14 Ch. D. 482.

The plaintiff was expelled from a trade union. Its rules provided that any journeyman hatter apprenticing his son in a 'foul shop' (a shop in which non-unionists were employed) should be fined *£5*. The plaintiff, though warned to remove his son from the non-union firm, refused to do this. He also refused to pay the fine, and the committee then expelled him. The committee notified the plaintiff's employers that other union members would no longer work with the plaintiff. Thereupon he was discharged, and thereafter, as he claimed, remained unable to obtain alternative employment. He therefore asked for a declaration and injunction against this 'capricious and wrongful expulsion' which had caused him serious injury. The defendants were content to say that they had acted according to their rules in a *bona fide* manner, that the plaintiff could have appealed against their decision to a general meeting, and that in any case, the court had no jurisdiction.

Sir George Jessel,[21] M.R., said that he could only interfere to protect a property right and that no property right was involved here. His words are, I think, worth quoting:

> I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no 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. . . . if the association has no property, and takes no subscriptions from its members, I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others.

Of that statement Dr. Stoljar[22] observes:

> The court thought the answer to be simple and clear, perhaps too simple and clear .... Despite the previous reference to 'subscriptions', it is clear that 'property' had a very narrow meaning. It included tangible assets like a club's furniture or meeting-rooms, but excluded the purely financial membership of ordinary 'card-holding' members. If this narrow test justifiably withheld legal interference in the affairs of ten or a hundred people playing whist or talking science or what have you, it was also one which did not fit the case of a trade union. However, this was the very test which had been established for the purpose of clubs and long before trade unions became legitimate bodies. From a strict point of view of precedent, therefore, Jessel M.R. was applying the law then available for dealing with the expulsion problem. Still, the test so applied was to cause much difficulty when later a union was distinguished from other voluntary associations.

While I question the accuracy of Dr. Stoljar's assertion that "from a strict viewpoint of precedent" the learned Master of the Rolls "was applying the law then available for dealing with the expulsion problem",

21. *Ibid*. at p. 487.

22. "The Internal Affairs of Associations" in *Legal Personality and Political Pluralism,* pp. 70-71.

I agree that the decision has since caused a great deal of difficulty. The concept of a property right was not always that applied by Jessel M.R. His was an unnecessarily narrow application, especially since it was an application to a body which we now recognize is not always, nor of necessity, voluntary.

I suggest, however, that, so far as his Lordship did advert to the particular nature of the association with which he was dealing, it confirmed him in his refusal to grant the injunction. The Trade Union Act, I submit, gave his Lordship his main ground for refusing, the other reason advanced was not scrutinised over carefully. Even the main reason given, as we shall see later, brought forth subsequent and violent protests.[23]

No one of course can argue that a man has a right to work for a particular person or company. He has (perhaps) a right that third parties shall not act to prevent him so "working", but, even if he has a contract with his employer he can only receive damages for its breach, not an injunction to enforce its performance.

As Cotton L.J.[24] said in *Bainbridge* v. *Smith:*

> I think it right to say that in my opinion, and I believe that my learned Brother agrees with me, if the company says that even if the plaintiff has the qualifications they do not desire him to act as one of their managing directors, we should not grant any injunction, because it would be contrary to the principles on which this Court acts to grant specific performance of this contract by compelling this company to take this gentleman as managing director, although he was qualified so to act, when they do not desire him to act as such.

In *Leeson* v. *General Council of Medical Education and Registration*[25] the Court of Appeal was dealing with a statutory body. The Council acting under the powers conferred by the Medical Act, 1858, held an inquiry at which they adjudged a medical practitioner guilty of infamous conduct in a professional respect and removed his name from the register of medical practitioners. He sought an injunction to restrain his deregistration.

Although the injunction was not granted, it was clear that the court would intervene if the statutory power had been misused or the inquiry had been conducted in a manner contrary to natural justice:

> The only thing which the Courts can investigate when proceedings of the General Medical Council of this character are brought before them is whether

23. See *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* [1922] 2 A.C. 440, *per* Lord Buckmaster at p. 449, *per* Lord Atkinson at p. 460.

24. (1889) L.R. 41 Ch. D. 462, at p. 474.

25. (1889) L.R. 43 Ch. D. 366.

> the domestic forum has acted honestly within its jurisdiction. The jurisdiction is defined by the statute .... the substantial elements of natural justice must be found to have been present at the inquiry.[26]

Of course the tribunal whose actions were in question was a body created by statute. It was not the tribunal of a voluntary association the very existence, and continued existence, of which was dependent upon consensual arrangement between the members. However, is the right to work important enough for an injunction to lie only when its deprivation is under cover of statutory power? If a court will enjoin a statutory body from acting wrongfully so as to achieve a particular effect, should it not also prevent a self-appointed or contractually-created body from doing the same thing?

The problem here is in categorizing the act as wrongful. If the self-appointed body acts to protect its own interests and incidentally prevents, say, non-unionists from working, where is the wrongfulness unless there has been a tort of conspiracy? If I am expelled from a union contrary to the rules, where is the wrong unless the rules constitute a contract?

This problem has created a great deal of difficulty. It seemed impossible for the rules to constitute a contract between all the members, or between the executive and the other members.

If such a contract can be found, if there is a legally binding obligation on the tribunal not to act in a certain way, or if the tribunal's behaviour can be shown to be tortious, then there seems no reason why the court should restrain its actions any less than it does those of statutory bodies.

In *Fisher* v. *Jackson,*[27] North J. restrained the dismissal of a schoolmaster by two instead of, as required by the endowing instrument, three local vicars. Similarly, in *Richardson* v. *Methley School Board,*[28] Kekewich J. granted an injunction restraining a school board from electing a new member in place of a member they had improperly declared disqualified. In both cases the body against whom the injunction was granted was exercising a power conferred by statute, but the fact that the power is statutory should, it is submitted, only enable the action to be more easily classified as wrongful. Probably a more pertinent and less answerable distinction is the fact that the position on the board could possibly be classed as a "patrimonium".

The decisions do not, unfortunately, elaborate at any length on the reasons for assuming jurisdiction. This is, of course, not really surprising since all the authorities point to there being such power with regard to a statutory body.

26. *Ibid.*, *per* Bowen L.J. at p. 383.
27. [1891] 2 Ch. 84.
28. [1893] 3 Ch. 510.

In *Amos* v. *Brunton,*[29] an association formed by millers and sellers of flour "to promote and establish uniformity in commercial usages, and for the exchange of information of advantage to members" was held to be purely voluntary. Hence, although expulsion from membership might mean that no member of the association would deal with the ex-member, and that he might have to do business in a far less economical fashion, or that he might no longer be able to carry on his business at all, the court would not assume jurisdiction to grant an injunction unless there was property "to a share in which the plaintiff is entitled by reason of his membership in the association."

The case is very strong authority for saying that the court will protect membership of a trade organization only if a property right is involved, and quite clearly by this is meant property in the narrow modern sense of the term, not the broader concept envisaged in the eighteenth century and the early nineteenth century nor that of the Court of Appeal in *Lee* v. *Showmen's Guild of Great Britain.*[30]

In 1907 a man who had been excluded from membership of the Institute of Chartered Accountants because of failure to pay his subscription, was refused relief on the ground that his exclusion from the institute was carried out in accordance with the rules of natural justice and was also according to the regulations contained in the charter. The court did not, however, question its ability to exercise jurisdiction in the matter.[31]

Similarly, in *Luby* v. *Warwickshire Miners' Association,*[32] Neville J. restrained the expulsion of a member from a trade union registered under the Trade Union Acts, 1871 and 1876. The fact that the trade union was a registered trade union does not appear to have been relevant to the decision except possibly to assist in rebutting the argument that the association was illegal.

In granting the injunction his Lordship did not even canvass his jurisdiction to do so, except in so far as he could not protect membership of an illegal association. He said that the union was not a legal person but that membership involved no illegality: [33]

> It is true that trade unions have in their own interests not been invested with a legal status, but when it is asserted, as it sometimes is, that trade unions are illegal associations, it is true only in the sense stated. Their existence has been repeatedly recognized by the Legislature and their affairs

29. (1897) 18 N.S.W.L.R. Eq. 184.

30. (1952) 2 Q.B. 329.

31. *James* v. *Institute of Chartered Accountants* (1907) 98 L.T. 225.

32. [1912] 2 Ch. 371.

33. *Ibid*, at p. 380.

> regulated by Acts of Parliament. Numerous decisions of the Courts have been come to with regard to them, and it has never until the present case, I think, been suggested that the membership of trade unions involved a criminal act.

Apart from this question, however, his sole concern was as to the validity of the expulsion.[34]

> In my opinion the association was without power to expel a member. There was no rule purporting to give them such power, and, even had they possessed it, the attempt to expel the plaintiff without giving him any opportunity of obtaining a hearing would in my opinion have been illegal. Having regard to the circumstances of the case and the absence of any record of such a resolution in the minute-book, and the naturally indifferent recollection of the witness, I am not satisfied that any resolution purporting to expel the plaintiff was ever passed.

The same attitude was adopted in *Meyers* v. *Casey.*[35] That case did not involve membership of a trade union, nor membership of an employers' organization in the normal sense of the term. It involved, *(inter alia)* the expulsion of the plaintiff racehorse owner from the Victoria Racing Club, membership of which was of importance to him not merely as conferring social status but also as enabling him to earn an income (though presumably not his chief source of income).

There is no evidence that the plaintiff depended for a living on the proceeds of his betting or on the winnings of his horses. However, the High Court of Australia did not seem concerned to canvass whether or not it had jurisdiction to protect by injunction membership of what might to the plaintiff be a mere social club, and perhaps a trade organization only in a broad sense of the term (for there is no reason to suppose horse racing was not the plaintiff's hobby rather than his trade or means of gaining a livelihood). It is true the injunction sought to restrain the expulsion was refused, but it was refused on grounds other than lack of jurisdiction.

Nor did the same Court in *The Amalgamated Society of Engineers* v. *Smith,*[36] express any doubt as to its jurisdiction to restrain expulsion from a trade union, provided the organization was not illegal. In that case, however, the court was concerned with an association registered under the Commonwealth Conciliation and Arbitration Act. The rules as to jurisdiction with regard to the affairs of such associations may well differ from those relating to trade organizations not so registered.[37]

34. *Ibid*. at p. 379.

35. (1913) 17 C.L.R. 90.

36. (1913) 16 C.L.R. 537.

37. See *Edgar* v. *Meade* (1916) 23 C.L.R. 29.

In the same year, Neville J. in *Parr* v. *Lancashire and Cheshire Miners' Federation*[38] granted an injunction restraining expulsion and said:

> With regard to the question of expulsion, I find no power of expulsion to exist; but, if it did exist, it is quite clear that the circumstances under which it was purported to be exercised in the present case deprive the action of the union of all validity. The expelled member had no opportunity of being heard in his defence, the resolution for expulsion was passed behind his back, and, however complete the power of expulsion might have been, there is no pretence here of its having been properly exercised. In this connection some arguments on behalf of the defendant branch union did not at all meet with either my sympathy or approval. It is suggested that the Court would be doing wrong by granting an injunction restraining the members of the association from expelling the plaintiff because of the impropriety of his conduct and the just abhorrence in which it is suggested he must be held by all the other members of the association. I confess I do not in the least follow such an argument.

Once again the court did not advert to the possibility that it might not have jurisdiction to grant the injunction sought.

In *Kelly* v. *National Society of Operative Printers' Assistants,*[39] the plaintiff who had been expelled by the committee of the defendant trade union was granted an injunction and declaration but was refused damages for breach of the contract contained in the rules, since the committee who were responsible for breaking the contract were acting as agents for the plaintiff equally with his fellow members.[40]

In effect, the Court of Appeal treated the rules of the association as constituting a contract; expulsion contrary to the rules would be ineffective and an injunction would be granted to restrain a member so expelled from being treated as expelled. Moreover, before the court will refuse an injunction to restrain an expulsion, it must be shown not only that the power to expel has been exercised properly, but also that the rules expressly confer the power to expel:

> A power to expel will not be implied; it must be found in the rules, and in plain and unambiguous language. Indeed, there is no inherent power in any club or society to alter its rules so as to introduce such a power.[41]

> A power of expulsion, as the learned County Court Judge said, is not inherent in a voluntary association. It must be conferred by the rules and must be exercised in conformity with the rules.[42]

38. [1913] 1 Ch. 366, at p. 373.
39. (1915) 84 L.J.K.B. 2236; 113 L.T. 1055.
40. *Bonsor* v. *Musicians' Union* ([1956] A.C. 104) has now disapproved this idea that the expelling committee are acting as the agents of their victim. In this way *Bonsor's Case* has also thrown some doubt on *Cameron* v. *Hogan* which relied heavily on *Kelly's Case.*
41. (1915) 113 L.T. 1055, *per* Swifen Eady L.J. at p. 1057.
42. *Ibid.*, *per* Phillimore L.J. at p. 1059.

In *Edgar* v. *Meade,*[43] Isaacs J. granted an injunction restraining the expulsion of a member from an organization registered under the Commonwealth Conciliation and Arbitration Act. He found that no "property" was necessary to give him jurisdiction in such a case, for an *association so registered* was not a "purely voluntary" association. The distinction however was between associations registered under the Act and other voluntary associations. It was not a distinction in favour of trade organizations as such; his Honour considered that the purpose of the legislation would be defeated if he did not possess such jurisdiction.

It is difficult, therefore, to draw from *Edgar* v. *Meade* any but the flimsiest support for the theory that no "property right" is necessary to give the court jurisdiction to protect by injunction the membership of a trade organization.

Cossel v. *Inglis,*[44] also decided in 1916, did not really involve the question of expulsion. It was rather a failure to re-elect to membership which brought about the action.

A member of the Stock Exchange, which is constituted in the same way as a proprietary club, is elected for one year only and comes up annually for re-election. Normally such re-election is automatic. In this case there was a refusal to re-elect brought about by the fact that the plaintiff, who was of German origin, came up for re-election during World War I.

As a result of his not being re-elected, the plaintiff could be obliged to part with the shares which he held as one of the proprietors of the Stock Exchange. However, not only was it held that the failure to re-elect was not wrongful but it was also said that by the failure to re-elect the plaintiff had not been deprived of any "property right". Astbury J. said:[45]

> Assuming, as I will for the moment, that the plaintiff has, within the meaning of the judgment of Jessel M.R. in *Rigby* v. *Connol,* a right of property in the Stock Exchange undertaking of which he has been deprived, and which alone can give a Court of Justice jurisdiction to entertain this action.....

His Lordship continued :[46]

> .....but under the constitution of the Stock Exchange there is much to be said to the contrary. The plaintiff's proprietorship, as it existed when he sent in his application for re-election, has not been interfered with, but if he fails to secure re-election a second time — that is, in March 1917 — he

43. (1916) 23 C.L.R. 29.

44. [1916] 2 Ch. 211.

45. *Ibid*. at p. 224.

46. *Ibid*. at p. 232.

> will have to part with his shareholding as a proprietor and will then receive the then value of his shares, the holding of which in itself gives him no right to membership.

It is true that the case was not concerned with expulsion, but the dicta are still relevant. They are perhaps the merest of dicta, since the failure to re-elect was not wrongful and for that reason alone the action would have failed. They, nonetheless, reflect the temper of judicial opinion, albeit in time of war.

In *Pratt* v. *British Medical Association*[47] also there are statements of the law relating not to expulsion but rather to the allied and sometimes interwoven subject of wrongful interference with another's trade or business:

> The basic right of every citizen has been well stated by Sir William Erle in his famous work on Trade Unions, at p. 12, as follows: 'Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will.' But that right is subject to the rights of others, and the limitations have been clearly stated not only in the continuation of the above passage in Sir William Erle's treatise, but also in the cogent judgment of Lord Lindley in *Quinn* v. *Leathem*. He there says: 'As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances.' So far as I am aware this passage is fully consistent with all the authorities both before and after *Quinn* v. *Leathem*.[48]

McCardie J., continued, concerned at the all-pervading and arbitrary power of the British Medical Association: [49]

47. [1919] 1 K.B. 244.
48. *Per* McCardie J., *ibid*. at pp. 256-257.
49. *Ibid*. at pp. 270-271.

> But the British Medical Association has taken to itself a jurisdiction more far-reaching, and perhaps more potent, than that of the General Medical Council. It entrusts to a large extent the standard of 'the honour and interests' of the medical profession to a number of scattered bodies throughout the country, which vary in numbers, inclination, views and self-interest. A branch or division may make a rule to suit its own local pecuniary interest. If that rule be broken by a medical man, be he a member of the defendant Association or not, then he becomes subject to a declaration that he has acted against the honour and interests of the medical profession. Upon this declaration there follows a local condemnation, and upon this local condemnation there may result a merciless boycott and resultant ruin of the person against whom it is directed.

Should not the arbitrary power of the "voluntary" association to remove the livelihood of its unwanted or disobedient members be equally a subject of judicial indignation? The effect is the same in either case. Expulsion is followed by boycott perhaps not against the individual as such, but at least against him as a non-member. Yet the courts have been heard to say, "We cannot prevent such expulsion by injunction, we can only grant damages."

Are damages an adequate remedy? Is there logically, historically or realistically any reason why an injunction will not lie? Is the shadow of *Rigby* v. *Connol* still with us?

Eve J. in *Law* v. Ch*artered Institute of Patent Agents*[50] granted an injunction restraining the plaintiff's exclusion from membership of the institute on the ground that his expulsion had been carried out contrary to natural justice. He did not even consider the possibility that he might not have jurisdiction. But, of course, he was dealing with expulsion from a chartered body.

In *Braithwaite* v. *Amalgamated Society of Carpenters and Joiners,*[51] the Court of Appeal enjoined a threatened expulsion from the defendant union. Their Lordships were there really concerned with the operation of the Trade Union Acts; they were not concerned to discuss whether or not the absence of a property right would deny them jurisdiction. However, their Lordships gave vent to some very strong statements which can be used to support the proposition that membership of a trade organization should always be protected.

> I am of opinion, therefore, independently of authority, that the Court has jurisdiction to entertain the proceedings, and that the judgment of Eve J., which was confined to this point, was incorrect. I may venture to express the opinion that, if the law were otherwise it would be disastrous to members of trade unions as it would leave them and their capacity to earn a livelihood at their trade entirely at the mercy of the dominating section for

50. [1919] 2 Ch. 276.

51. [1921] 2 Ch. 399.

> the time being, without any possibility of relief at the hands of the Court against an expulsion which might be clearly unjustifiable by any rule.[52]
>
> It is hardly too much to say that such men as the plaintiffs, expulsion from their union is little less than a sentence of industrial death. [53]

The latter statement is very reminiscent of the phrasing on which Denning L.J. (as he then was) was to base his decisions in *Abbott* v. *Sullivan* and *Lee* v. *Showmen's Guild of Great Britain.*

On appeal to the House of Lords a year later, [54] under the name of *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite,* the decision of the Court of Appeal was upheld, but a right of property was found to exist: [55]

> The plaintiffs' case is that they, being members of an association in which they had rights of property, have suffered from an alleged expulsion from membership on grounds which are not to be found in the contract of membership as grounds of expulsion. They seek, and seek only, to establish that their membership is unimpaired. They do not seek in any way to enforce their rights as members.

The criticism which their Lordships levelled at the decision in *Rigby* v. *Connol* even though directed at the interpretation it gave to section 4 of the Trade Union Act, 1871, is interesting:

> It is, however, impossible not to see that the learned judge might, if he had thought fit, have moulded the injunction so that it merely followed a declaration as to membership, and I cannot resist the impression that he thought such a claim was also barred. It may be out of respect to the great authority of Sir George Jessel that this decision has never been definitely overruled. Technically, it is true that the judgment may be supported, but in substance it cannot.[56]
>
> Well might Lord Halsbury say of this judgment, as he did say of it in *Yorkshire Miners' Association* v. *Howden:* 'I am bound, however, to say if that decision ever came up for review I think it would have to be considered whether it does not strike the word "direct" out of the statute.'[57]

The views expressed by the House of Lords in this case contain also some authority for treating the rules of a trade union as a contract.[58]

> Of course when a workman becomes a member of a trades union he contracts to be bound by the rules of that union, and the contracts which he enters into with the union or with each of his fellow-workmen are to be found, if found at all, in those rules.

52. *Ibid.*, *per* Warrington L.J. at p. 422.
53. *Ibid.*, *per* Younger L.J. at p. 426.
54. [1922] 2 A.C. 440.
55. *Ibid.*, *per* Lord Wrenbury at p. 470.
56. *Ibid.*, *per* Lord Buckmaster at p. 449.
57. *Ibid.*, *per* Lord Atkinson at p. 460.
58. *Ibid.*, *per* Lord Atkinson at p. 455.

In the previous year, in a case[59] which turned upon the interpretation of section 56 of the County Court Act, 1888, Scrutton L.J. had made a rather pertinent point with regard to the decision in *Kelly* v. *National Society of Operative Printers' Assistants:*

> I am glad it is unnecessary for us in this case to go into the question of the exact relation of *Kelly's Case* and *Osborne's Case.* I do not understand them. In *Kelly's Case* the Court decided that a person in the position of the present plaintiff could not recover damages against a society of which he was a member, because he himself was member of that unincorporated body, and you cannot, on a contract between yourself and yourself, recover damages against yourself. But the Court in *Kelly's Case* did grant a declaration and injunction to the plaintiff against himself, without apparently seeing that there was any inconsistency. If they had considered this point we should have been bound by their decision, whatever the result of it was; but I cannot find any trace in the judgment that it occurred to anybody to consider the effect of that action having come from a county court, and the effect of the limited jurisdiction of the county court upon that point. In *Osborne's Case* a declaration and injunction in the High Court were granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case the point taken in *Kelly's Case* about damages was considered by the Court, that is whether a man can get damages or any other relief against himself or against a body by its trade name which includes himself. It may be that in some future stage of trade union litigation, which is likely to occupy the Court for many years to come, that that important point may come up for consideration; and I only desire at present to guard myself from expressing any opinion one way or the other about it, except by saying that I do not at present understand the relation of *Kelly's Case* and *Osborne's Case* to each other.

In 1929 Lawrence L.J. indicated[60] that a member of a trade union registered under the Trade Union Act, 1871 is not, by expulsion, deprived of any property right. His Lordship, however, refrained from any statement as to what the position would be if the union were not registered under the Act, because "such a case would depend upon an investigation of the rules of the union concerned."

In the same year in *Craddock* v. *Davidson*[61] there was a wrongful refusal by the committee of management of a trade union to accept the nomination of the plaintiff for the presidency of the trade union in question.

The election was declared null and void, and an injunction was granted restraining the wrongfully elected president from continuing in that capacity. The statements of Douglas J.[62] as to the property right on which he based his decision are extremely relevant:

59. *The King* v. *Cheshire County Court Judge and United* Society *of Boilermakers* [1921] 2 K.B. 694 at pp. 709-710.

60. *Cotter* v. *National Union of Seamen* [1929] *Ch.* 58 at pp. 108-109.

61. [1929] St. R. Qld. 328.

62. *Ibid.* at pp. 337-338.

> But it has been contended that in this case the Court will not make any order, because it is alleged that the plaintiff has not been deprived of any right of property, inasmuch as he has not been excluded from the union, and is entitled to all the rights and privileges appertaining thereto, including the benefits of the award of the Board of Trade and Arbitration of 9th November, 1927. He has, however, been excluded from the right to vote for the office of president, and from the possibility of holding office as president, for which, if elected, he would, as one of the committee of management, be entitled to the sum of 2s. 6d. per night of meeting. See rule 27A. My attention was not drawn to this rule during the argument, but I think it gives sufficient pecuniary interest to the plaintiff to entitle him to the decision of the Court. The possession of a particular status, meaning by that the capacity to perform certain functions or *to hold certain offices,* is a thing which the law will recognize as patrimonial interest, and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy. *Forbes* v. *Eden; Macqueen* v. *Frackelton.* It has also been definitely decided in *Osborne* v. *Amalgamated Society of Railway Servants,* applying *Pender* v. *Lushington,* that a right to vote constitutes property, *per* Cozens Hardy M.R., at 554, and Buckley L.J., at 567. The decision of Barton J. in *Amalgamated Society of Engineers* v. *Smith* is to the same effect. These were cases of the expulsion of a member by a trade union, in which the member was held to be entitled to sue. But the question whether a right of property had been interfered with may arise notwithstanding the absence of expulsion. The exclusion of one member as well as of the other members from the right to vote may be, and in this case has been, effected without expulsion. It is, I think, an invasion of a right of property, and the Court is not precluded from giving appropriate relief. The cases of *Rigby* v. *Connol, Baird* v. *Wells,* and *Murray* v. *Parnell* do not apply to the facts of this case.

If his Honour is correct in his statements as to what constitutes a property right, then everyone expelled from a trade union or trade organization of any kind is deprived of a property right. An expelled member is no less deprived of "the right to hold certain offices" nor of "the right to vote for the office of president" than is the member whose nomination is refused; nor is the expelled member less excluded "from the possibility of holding office as president."

It is submitted with all respect that if one is deprived of a property right, then so is the other. There is, however, little judicial authority to support the proposition that a wrongfully expelled trade unionist is always entitled to an injunction for this reason.

However, in *Webster* v. *Bread Carters' Union of N.S.W.*[63] the New South Wales Court of Equity held that it had inherent jurisdiction to restrain by injunction an act *ultra vires* of a trade union, and restrained by injunction the expulsion of the plaintiffs from the union. Long Innes J.[64] said:

> Although, as was pointed out by Sir Edmund Barton A.C.J. in *The Amalgamated Society of Engineers* v. *Smith* (16 C.L.R. 537, at 553), and by Lord

63. (1930) 30 S.R.N.S.W. 267.

64. *Ibid*. at pp. 270-271.

> Buckmaster in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* ([1922] 2 A.C. 440, at 448), the foundation of such an action as the present is property, a more important consequence to the plaintiffs is that, as alleged in the statement of claim, unless the purported expulsion of the plaintiffs is declared null and void, they and each of them during the period of expulsion will not only be deprived of the reasonable expectation, mentioned by Cozens Hardy M.R., in *Osborne* v. *Amalgamated Society of Railway Servants* ([1911] 1 Ch. 540, 554), of enjoying certain benefits for which they have subscribed, but will be actually unable to secure employment in the industry of breadcarting by reason of the existing legislation in this State which provides, by section 4 of the Industrial Arbitration (Amendment) Act, 1927, that, as between members of any industrial union or unions of employees specified in an industrial award and other persons offering or desiring service or employment at the same time, preference shall be given to such members other things being equal. Even in England, where the doctrine of preference to unionists is not enforced by legislative enactment, it was said by Younger L.J., as he then was, in *Braithwaite* v. *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* ([1921] 2 Ch. 399, at 426): 'It is hardly too much to say that to men such as the plaintiffs' expulsion from their union is little less than a sentence of industrial death.' In this State, having regard to the legislation above-mentioned, the result of the action of the Union now complained of, unless remediable, or unless the plaintiffs are able and fitted to become members of some other union of employees, must be that during the period of suspension they will be practically unemployable, and must either be supported by the State, or forced to go to some other State or country where their expulsion from the defendant Union will not render them unemployable. It is consequently of vital importance to the plaintiffs that their expulsion from the defendant Union, if invalid, should be so declared with the utmost possible promptitude.

When we look at statements such as this, it is amazing to think that the decision in *Lee* v. *Showmen's Guild of Great Britain* could have caused the amount of comment that it did twenty years later.

The decision could hardly be more explicit authority for saying that membership of a trade union, at least where that membership is a *legal* prerequisite of carrying on one's occupation, will be protected by injunction. In one sense, it is a very small step to saying that such membership will be protected where it is a *practical* necessity for carrying out one's calling.

In dealing with the statutory power of the General Medical Council, Lord Wright said in *General Medical Council* v. *Spackman*:[65]

> Such tremendous powers, which may close a man's professional career and ruin him financially and socially, have been vested in the council by Parliament from a faith both in the members' expertness in regard to that grave issue and in their moral gravity and trustworthiness. Such is the eminence of the council and so completely representative is it of a great profession, the honour and integrity of which are of the highest importance as matters of public policy.

65. [1943] A.C. 627, at pp. 639-640.

These powers when given to a statutory body are "tremendous", and the giving of these powers to the statutory body is indicative of the "eminence" of the body in question. Yet if the body is guilty of "a departure from 'natural justice'",[66] certiorari will lie against the body.

How can we argue that a self-appointed body may do the same thing, "may close a man's professional career and ruin him financially and socially", and the courts have no power to restrain the body's actions; that the courts can merely stand by and allow such bodies to ravage a man's career and then award the inadequate remedy of damages?

Over 200 years ago it appears to have been accepted that the "property" which Courts of Equity would protect could include intangibles, for in *Tonson* v. *Collins*[67] Blackstone (for the plaintiff) argued :

> The one essential requisite of every subject of property is, that it must be a thing of value. Its value consists in its capacity of being exchanged for other valuable things; and if I can exchange it, it must be mine previous to the exchange: for, *nemo dat quod non habet.* Whatever therefore hath a value is the subject of property. For it would be absurd and unjust in any system of law, not to secure the enjoyment of that, by which (when lawfully acquired) a man may make a profit or advantage.

Admittedly, Yates[68] (for the defendant) was not prepared to go quite so far:

> All property implies possession. Bynkershoch says, it begins and ends with manual possession. It is the *jus utendi, et fruendi.* And though actual possession is not always necessary, yet potential possession is. There must be *potentis possidendi.* The subject of property must be something susceptible of possession. Puffendorf (book 4) lays it down as essential to property, that it must be, 1. Useful; 2. Under the power of man, so as to fasten on it.

In the same year, Sir Thomas Clarke, M.R., had said:[69]

> As to the first question, it is not necessary to determine whether authors had a property in their works before the Statute of Queen Anne. (See in *Macklin* v. *Richardson, post,* 695.) If they had not, it was a reproach to the law. Nor is it material to determine, whether they have a property after the determination of fourteen years. That question is now depending before the Court of the King's Bench, and seems to be the same with the former.

Although his Lordship refrained from answering the question in so many words, it seems clear that he considered that a "property right" did exist sufficient to justify the protection of a Court of Equity.

66. *Ibid*., *per* Lord Wright at p. 640.

67. 1 Black W. 321, at p. 322.

68. *Ibid*. at p. 333.

69. *Dodsley* v. *Kinnersley* (1761) Amb. at p. 404.

In *Millar* v. *Taylor*[70] eight years later, Aston J. speaking of property said:

> From this great theory of property; it is to be collected — *That a man may have property in his body, life, fame, labours, and the like; and, in short, in any thing that can be called his.* (Italics supplied). That it is incompatible with the peace and happiness of mankind, to violate or disturb, by force or fraud, his possession, use or disposal of those rights; as well as it is against the principles of reason, justice and truth.

His Lordship continued: [71]

> The rules attending property must keep pace with its increase and improvement, and must be adapted to every case. A distinguishable existence in the thing claimed as property; an actual value in that thing to the true owner; are its essentials; and not less evident in the present case, than in the immediate object of those definitions.

As recently as 1949, however, in *Russell* v. *Duke of Norfolk*[72] the Court of Appeal found for the defendants in the following circumstances :

By rule 102 of the Rules of Racing of the Jockey Club:

> (i) Every trainer of a horse running under these rules must obtain an annual licence from the stewards of the Jockey Club and pay a yearly subscription of one sovereign to the Bentinck Benevolent Fund. (ii) A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person.

Rule 17 empowered the stewards *(inter alia)* to grant and withdraw licences at their discretion, to inquire into and deal with any matter relating to racing, to warn off Newmarket Heath and to authorise publication of their decisions in the Racing Calendar. A trainer paid £1 and was granted a licence to act as a trainer during 1947. A condition of the licence was: "A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the Racing Calendar, for any reason which may seem proper to them, and they shall not be bound to state their reasons". Following an inquiry into the circumstances in which one of the horses trained by him won a race, the stewards of the Jockey Club withdrew the trainer's licence and published the fact of the withdrawal in the Racing Calendar. In an action against the stewards of the Jockey Club and the secretary of the Club, who also published the Racing Calendar, for a declaration that the decision to withdraw the licence was void as contrary to natural justice, for a declaration that the trainer's name was wrongfully placed on the list of disqualified trainers,

70. (1769) 4 Burr. 2303 at p. 2338.

71. *Ibid*. at p. 2340.

72. [1949] 1 All E.R. 109.

for an order to delete it, and also for damages for breach of contract and for libel.

The Court held that, since no inquiry was necessary, there could not be implied a term that if an inquiry was held it should be held in accordance with natural justice, and that in any case, there was no evidence that any principle of natural justice had been violated.

"This penalty of disqualification", said Denning L.J.,[73] (who dissented as to the first part of the decision):

> is the most severe penalty that the stewards can inflict. It is the same penalty as that which is imposed on persons guilty of corrupt practices. It disqualifies the trainer from taking part in racing and thus takes away his livelihood. . . . . It is very different from a mere dismissal of a servant or withdrawal of a licence or even expulsion from a club, which Maugham J. had in mind in *McLean* v. *Workers' Union* ([1919] A.C. 623). The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding responsibilities.

It is hard to see any reason why the same arguments should not apply in the case of a trade organization. Such organizations should, for the reasons expressed by his Lordship, be distinguished from a mere club, and membership of such bodies should be protected by the only effective method, the injunction.

The conclusions which Dr. Stoljar[74] draws from this decision, are interesting:

> Although the decision went against the trainer (as there was no evidence that natural justice had been violated), the case indicates possible lines of future development. For it shows the growing apprehension of those domestic tribunals which control trades or professions. All this may eventually lead towards a new and more uniform branch of law covering all domestic tribunals. In other words, the tendency may be to throw together the Jockey Club with trade unions, the social club with the medical association. Again, the tendency may be to abandon the previous theories of property or contract in favour of an administrative approach where quasi-judicial bodies are required to apply 'natural justice' and whether the origin of these bodies be statutory or customary or voluntary.

I would suggest that a more realistic, more logical and historically more tenable development would be for the Courts to insist that any body whose actions are capable of interfering with a right which the law considers of real value, must act in accordance with natural justice. Phrased in this way the test may appear vague, but what I am attempting to express was expressed much better nearly two centuries ago. What I mean to say is:

73. *Ibid.* at p. 119.

74. "The Internal Affairs of Associations" in *Legal Personality and Political Pluralism,* p. 91.

(1) Property should be protected by injunction.

(2) A man should not be deprived of property in a way that is contrary to any contractual arrangement, the law, or natural justice.

(3) "A man may have property in his body, life, fame, labours and the like; and, in short, in any thing that can be called his." [75]

(4) "The rules attending property must keep pace with its increase and improvement, and must be adapted to every case." [76]

It was in 1952 that the Court of Appeal did give voice to what was at last a definitive acceptance of the fact that membership of a trade organization should be protected. However, it is respectfully submitted that this desirable result was based on dogmatism rather than authority, and was achieved by pruning what I call the late-19th-century-property-doctrine rather than by eradicating it.

In *Abbott* v. *Sullivan* [77] no injunction was sought, the plaintiff merely sought damages for his expulsion by the Cornporters' Committee. He failed because the majority of the Court could find no contract express or implied between the Committee and the expelled member. Only Evershed M.R., however, would have been unprepared to equate the right to work, of which the plaintiff had been deprived by his expulsion, with that "property right" which the courts will protect by injunction.

In the same year, the Court of Appeal made the principles expounded by Denning L.J. in *Abbott* v. *Sullivan* the basis for their decision in *Lee* v. *Showmen's Guild of Great Britain.*[78] There the plaintiff obtained an injunction restraining the defendant union of travelling showmen from expelling him.

Denning L.J.[79] said:

> The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.

75. *Millar* v. *Taylor* (1769) 4 Burr 2303, *per* Aston J., at p. 2338.

76. *Ibid.*, *per* Aston J., at p. 2340.

77. [1952] 1 K.B. 189.

78. [1952] 2 Q.B. 329.

79. *Ibid.* at pp. 341-342.

> It was once said by Sir George Jessel M.R. that the courts only intervened in these cases to protect rights of property: see *Rigby* v. *Connol;* and other judges have often said the same thing: see, for instance, *Cookson* v. *Harewood.* But Fletcher Moulton L.J. denied that there was any such limitation on the power of the courts: see *Osborne* v. *Amalgamated Society of Railway Servants;* and it has now become clear that he was right: see the comporters' case, *Abbott* v. *Sullivan.* That case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is *ultra vires.* It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood: see *Amalgamated Society of Carpenters, etc.* v. *Braithwaite;* but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced: see *Baird* v. *Wells.* That is, I think, the only relevance of rights of property in this connexion. It goes to the form of remedy, not to the right.

The right to enter a social club is "too personal to be specifically enforced." Is not the right to belong to any body or organization just as personal, if the distinction is to be between personal and proprietary rights? If, however, we differentiate between what Aston J., would have called property and those claims which he would not have so designated, the distinction becomes both logically and historically more acceptable.

His Lordship continues: [80]

> In the case of social clubs, the rules empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules; but they will not otherwise interfere: see *Labouchere* v. *Earl of Wharncliffe* and *Dawkins* v. *Antrobus.*
>
> It is very different with domestic tribunals which sit in judgment on the 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 their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In 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. A man's right to work is just as important to him as, if not more important than,

80. *Ibid.* at p. 343.

> his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.

In effect, his Lordship says that membership of a trade organization is not voluntary and that wrongful expulsion from such an organization will be restrained by injunction because the right to work is a legal right, by contrast with social rights which are not really rights at all, or, perhaps more accurately, are mere moral as opposed to legal rights.

So far as his Lordship's statement relates to social clubs, it is clear that his Lordship intended to convey that the court would supervise expulsions from such bodies only where the expulsion infringed or interfered with some legally recognized right. The courts have never, of course, taken cognizance of social rights or social obligations. When the courts first said that the jurisdiction to grant an injunction was based on property that, I submit, is all that was meant, that the courts would not take cognizance of purely social obligations. A legally recognized right must be involved. Denning L.J. (and with him the other members of the Court of Appeal) says that the right to work is such a right. I submit that it is not necessary for him to go further.

His Lordship, with all respect, is correct to equate the right to work with a property right, but so far as such an equation implies that in this way it differs from any other legal right, I suggest that his Lordship is modifying rather than recanting, the heresy which began (perhaps) with *Rigby* v. *Connol.*[81]

He is still saying that the court can protect rights of contract and rights of property, not that the injunction can be used to protect all legal rights, which, I submit, is what his predecessors of the 18th century were prepared to do. There is still no true recantation.

Romer L.J.[82] also states unequivocally that the membership of such an association is a legal right which the courts will protect.

In *Bonsor* v. *Musicians' Union,*[83] the Court of Appeal (Denning L.J. dissenting) held that an expelled member of a union could not obtain damages for his wrongful expulsion, because the union was not a legal entity and the plaintiff would be claiming against all the members including himself, which he could not do.

81. (1880) L.R. 14 Ch. D. 482.

82. "In general, this right to continued membership of a trade union is of vital importance to men who join it, and expulsion from the union may well result in the loss to a man of his only known means of livelihood. It is a right which the courts recognize and will not hesitate, in proper circumstances, to protect." [1952] 2 Q.B. 329 at p. 347.

83. [1954] 1 Ch. 479; reversed by the House of Lords [1956] A.C. 104.

However, Denning L.J.,[84] in his dissenting judgment, said:

> In conclusion I would say that Parliament has legalized trade unions and given them large immunities from the ordinary process of the law. It has exempted them from any liability for tort, and also from liability for certain contracts; but it has never exempted them from liability for wrongful exclusion of a member. Nowadays exclusion from membership means exclusion from his livelihood. No one in this country should be in law fully excluded from his livelihood without having redress for the damage thereby done to him.

This is, in effect, the same argument as his Lordship used in *Abbott* v. *Sullivan* and *Lee* v. *Showmen's Guild of Great Britain.*

In *Davis* v. *Carew-Pole,*[85] Pilcher J. decided on similar grounds that he had jurisdiction to grant an injunction in the circumstances of that case.

The plaintiff, who was a livery stable keeper, had been required to attend before the Stewards of the National Hunt Committee on the hearing of a charge that a horse trained by him, an unlicensed trainer, had been entered to run in a steeplechase contrary to the National Hunt Rules. The plaintiff submitted to the jurisdiction of the stewards and was declared a disqualified person. This disqualification could have had a serious effect on the plaintiff's business, and could have greatly limited him in the exercise of that business. It was found that the Committee had misconstrued the National Hunt Rules.

Counsel for the defendants argued that the stewards had committed no tort, and since there was no contractual relationship, the disqualification could not be categorized as wrongful, however unjust it might be and no matter how serious its effect. This argument "did not appeal to" Pilcher J.,[86] though he admitted that "it is, no doubt, true to say that, where no tort is alleged and no contract express or implied is made out, no claim for damages can succeed in cases of this type. In this connection I refer to the decision of the Court of Appeal in *Abbott* v. *Sullivan."*

His Lordship went on to distinguish *Abbott* v. *Sullivan* on the basis that, in the instant case, a contract could be implied and he granted the injunction restraining the defendants from treating the plaintiff as a disqualified person:[87]

> A glance at the statement of claim in this case will show how the learned pleader has done his best to link the plaintiff and the defendants by contract. While admiring his ingenuity, I am not prepared to hold that any

84. *Ibid.* at p. 514.

85. [1956] 2 All E.R. 524.

86. *Ibid.* at p. 528.

87. *Ibid.* at p. 530.

> implied contract could properly be inferred, at any rate until the plaintiff received the summons to attend the inquiry and submitted himself to the jurisdiction of the stewards. In *Abbott* v. *Sullivan* it will be remembered that the plaintiff had refused to attend the tribunal, saying that they had no jurisdiction. In the present case the plaintiff has submitted to the jurisdiction of the Stewards of the National Hunt Committee, and, at least from the moment when he did so, impliedly agreed to abide by their finding, subject to any legal right which he might have to impugn it. From that moment it seems to me that he was in contractual relation with the Stewards of the National Hunt Committee. In those circumstances, if counsel for the plaintiff had not decided (and, I think, he decided wisely) to waive his claim for damages, he might have been entitled to recover damages. If it be necessary that the parties should be in contractual relationship (and I think that it follows from *Abbott* v. *Sullivan* that, where no damages are claimed, it is not necessary), then it seems to me that there is a great deal to be said for the proposition that, once the plaintiff had submitted to the jurisdiction of the Stewards of the National Hunt Committee, they were impliedly linked by contract, and linked in such a fashion that it would certainly be inequitable, and, I think, wrong, that the defendants should be entitled to say that the plaintiff had no cause of action against them. I accordingly grant the plaintiff the declaration, the order, and the injunction which he seeks, and order that he have the costs of the action.

The result, and the method by which it was achieved, it is submitted with all respect, leave little to be desired. The injunction was granted to protect the plaintiff from the actions of a self-appointed "trade organization". It was granted, not to protect any "property", but to protect a right arising from an implied contract. The wrongfulness of the purported disqualification also arose from this implied contract.

Semantically, we may not have got back to the simple and logical position of our forefathers who would allow an injunction to protect a "property", that term being synonymous with right, but in effect that is the position which his Lordship reached.

In speaking of the findings of a statutory body, Devlin J., in *Hughes* v. *Architects' Registration Council of the United Kingdom,*[88] spoke of the right to work not as any particular type of right but as a "right" pure and simple, a right which the law would recognize:

> It is said that this is an important case. So it is. But there is something more important than the standing of a profession about which the council is naturally and properly concerned. There is the right of every man to earn his living in whatever way he chooses unless by the law or by his own voluntary submission his way is taken from him; and in the exercise of that right he must not be punished by a professional majority under the pretext— for that is all it is, though I am sure it was not consciously adopted as such — that non-conformity is of itself disgraceful.

That any such broader view of *Lee* v. *Showmen's Guild of Great Britain* is not generally accepted is apparent. In *Bimson* v. *Johnston,*[89] for example, Thompson J. said:

88. [1957] 2 All E.R. 436 at p. 443.
89. (1957) 10 D.L.R. 11, at p. 22.

> The enhanced gravity of the civil consequences involved in cases of wrongful expulsion apparently gave rise to the adoption by the courts of the contract theory to provide relief against oppression and injustice. That theory is premised upon the proposition that a contract is made by a member when he joins the Union, the terms and conditions of which are provided by the Union's constitution and by-laws; and that in the case of a dismissal contrary to the constitution and by-laws, a breach arises, which will justify intervention to protect contractual rights. . . . . The contract is not a contract with the Union or the association as such, which is devoid of the power for contract, but rather the contractual rights of a member are with all the other members thereof.

His Honour did not attempt to draw any conclusion from the cases even as broad and general as that which Pilcher J. expressed in *Davis* v. *Carew-Pole*. He merely took the cases to say that the courts can interfere to protect a property or contract right. His Honour made no attempt to generalize. Certainly, so far as he was concerned, the court's interference was still limited within very strict confines. If he adverted to it at all, he dismissed without mention any possibility that the wheel had come full circle. He saw no sign that we had finally escaped, almost accidentally, from the prison which the 19th century decisions had uncomprehendingly built on the open space deliberately left untrammelled by the judges of a previous era.

In 1958, however, Harman J.,[90] though he spoke in terms of "implied contract", held that a body which could ruin a man in his trade as a cinema operator, by preventing him from receiving a supply of films, could not do so without acting in accordance with natural justice.

> The contract here, if there be one, must it seems to me come into existence when the plaintiff is invited to attend the inquiry by the J.I.C., and agrees to do so. The contract would then be that the inquiry should be fairly conducted, and, in my judgment, it would be right in a case of this sort to imply such a contract . . . .
>
> It seems to me that bodies like K.R.S., who exercise monopolistic powers and may ruin a man by their recommendations, ought not to act in an arbitrary manner or at least that if they do, as this body did, set up an investigation committee which is a quasi-judicial, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair. Indeed, in the present case, the plaintiff was expressly told that he would get a fair hearing.

Naturally, if there is no breach of contract and no tort, then the action cannot be wrongful. There seems no reason why the categories of tort should not be extended just as easily as a contract is implied.

As was pointed out in *Donoghue* v. *Stevenson*[91] the categories of tort are not closed. It is also worth noting Lord Macmillan's[92] statement in that case:

90. *Byrne* v. *Kinematograph Renters' Society Ltd.* [1958] 1 W.L.R. 762, at pp. 783-784.
91. [1932] A.C. 562.
92. *Ibid*. at pp. 609-610. Italics supplied.

> On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence — and here I use the term negligence, of course, in its technical legal sense, *implying a duty owed and neglected.*

There is no reason why such a duty can arise only from an implied contract. If I throw a bomb into the street and injure a passer-by, no one argues that there was an implied contract that I should not throw the bomb. Rather is it said that I should have contemplated that it might injure him, and, therefore, threw it at the risk of being liable for any injury which he suffered.

Similarly, if a tribunal sits in judgment on a man, and condemns him, with the effect that he is ruined in his profession, trade or occupation, must not the members of the tribunal show, at least, that they acted as would any reasonable man in the circumstances? To show that a reasonable man would act in accordance with natural justice is perhaps more difficult, but he would no doubt act in a "fair" way. "Fair" it would appear from the statements of Harman J., in *Byrne* v. *Kinematograph Renters Society Ltd.*[93] can be equated with "according to natural justice" or at least means something very much akin to it. There seems no reason, therefore, why the courts should be so preoccupied with the concept of "implied contract", once we accept the fact that the right to engage in employment without interference from third parties is a legally recognized right. If it is,[94] then all we have to say is "the courts will prevent by injunction the wrongful infringement of any legally-recognized right."

This is the conclusion the courts had reached nearly 200 years ago. There seems no reason why it is less valid today. As Professor Potter[95] points out:

> While it is customary to classify torts according to the nature of the 'wrong', there has been a tendency to overlook that, even historically, much of the law of torts has sprung from pre-existing legally recognised rights.

93. [1958] 1 W.L.R. 762.

94. *Abbott* v. *Sullivan* ([1952] 1 K.B. 189); *Lee* v. *Showmen's Guild of Great Britain,* ([1952] 2 Q.B. 329); *Davis* v. *Carew-Pole* ([1956] 2 All E.R. 524); *Byrne* v. *Kinematograph Renters' Society Ltd.* ([1958] 1 W.L.R. 762) are only some of the cases which support such a view.

95. *Principles of Liability in Tort* (Reprinted from Clerk and Lindsell on *The Law of Torts,* 10th Edn.), p. 9.

He goes on further to say: [96]

> Where the plaintiff can establish that he has a right already recognised at Common Law or by statute, which avails against persons generally, any violation of that legal right gives rise to an action for damages in tort. It is submitted that it is not necessary to show that there is any existing ground of liability in tort which will cover the particular invasion of the plaintiff's right nor to show that the plaintiff has suffered material damage. The burden of proof lies on the defendant to show that he had lawful justification and excuse.

Professor Potter[97] suggests, moreover, that novelty should not necessarily be a defence in tort and that the law of torts must adapt itself to the development of new fields in which the interests of individuals clash:

> Where, therefore, a person has an established legal right to do an act, it is no doubt true that the fact that it causes harm, and even that it was intended to cause such harm, may be immaterial; action will not lie and it may properly fall within the category of *'damnum absque injuria'*. It is probably also true that *a violation of an established right recognised by the Common Law is a tort* (Italics supplied). But between these two causes of action there is a tremendous range of human activity.....The advances of science and social and economic changes present an ever-increasing opportunity for new rights or new duties to be declared.

The development of theories of tort law is outside the sphere of our present discussion. I merely wish to emphasise that the use of limited categories of "contract rights" and "property rights" is self-limiting, historically inaccurate, awkward and unnecessary.

In *Prior* v. *Wellington United Warehouse and Bulk Store Employees Industrial Union of Workers* [98] a member of a union whose nomination for the position of secretary of the union was refused contrary to the rules was granted an injunction to compel a postal ballot for the position. However, Haslam J.[99] based his decision on the old closed-but-expanding categories of interest which the court could protect by injunction:

> The office of secretary-treasurer carries a salary of £1,000 per annum, a seat on the executive, and the right to speak and vote at all meetings. The appointment, therefore, has a proprietary aspect and confers considerable power and prestige on the holder for the time being. He is more than a mere employee on the staff of an organization.....
>
> The plaintiff rests his claim to relief on the terms of the rules affecting all members in their mutual relationships. Whether or not the executive had a duty to hear the plaintiff before even debating his nomination, in my opinion, it assumed a jurisdiction which it did not possess and acted in a

96. *Ibid*. at p. 10.

97. *Ibid*. at p. 13.

98. [1958] N.Z.L.R. 97.

99. *Ibid*. at p. 99.

> *bona fide* but mistaken view of the extent of its powers, under the rules. The court can intervene to protect the contractual rights of members under their rules: *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 341, *per* Denning L.J. It can grant an injunction against an executive which, on a misconstruction of a Union rule, has refused to let the plaintiff's nomination go forward to election for office: *Watson* v. *Smith* [1941] 2 All E.R. 725, or against the Union itself, where a member has been expelled contrary to a fair and reasonable interpretation of the rules, *e.g. Bonsor* v. *Musicians' Union* [1954] Ch. 822; [1954] 1 All E.R. 822 (rev., but on another point [1956] A.C. 105; [1956] 3 All E.R. 318); see also the address of Morris L.J. reported in 63 *Law Quarterly Rev.* 318, 330, under the title "The Courts and Domestic Tribunals". The Courts have over a long period not hesitated to interfere where a proprietary right of a member in the broadest sense has been infringed: *Abbott* v. *Sullivan* [1952] 1 K.B. 189, 216; and even a right to vote has been denied: *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540, 567; and *Craddock* v. *Davidson* [1929] St.R.Qd. 328, 338. The essential facts in the last-named decision bear a close resemblance to the present case.

It is respectfully submitted that the difficulties, which his Honour overcame to arrive at his decision, disappear if we remove the blinkers which a 19th century semantic change created, and handle the problem not only with the language but also with the meaning of the 18th century.

The current trend of authority in the United Kingdom was followed by McLelland J. in *Hawick* v. *Flegg*. [100] In that case, his Honour held that, where a resolution of the committee of an unincorporated body disqualifying a member is not justified by the rules and the member is dependent on his membership for a considerable portion of his livelihood and the disqualification is of sufficient substance and a sufficient interference with such livelihood, then, if an action for damages would not afford an adequate remedy and it appears from the rules that there is a contractual connection between the members with one another, the member is entitled to equitable relief restoring him to membership. He granted an injunction, therefore, to restrain the wrongful suspension for one season of a professional Rugby League player. His Honour, in the course of his judgment,[101] commented on the effect of the recent English decisions in this field:

> Very naturally, on behalf of the League a good deal of reliance was placed on what was said by the High Court of Australia in *Cameron* v. *Hogan.* This case, I think, must be regarded as subject to some review having regard to the decision of the House of Lords in *Bonsor* v. *Musicians' Union,* and by implication having regard to the decisions of the Court of Appeal in *Abbott* v. *Sullivan* and *Lee* v. *The Showmen's Guild.* However, Counsel for the League is correct, I think, in his submission that if I should be of opinion that upon the true construction of the constitutions it was not contemplated that any enforceable contract would result, then the plaintiff would fail.....

100. [1958] W.N. N.S.W. 255.

101. *Ibid*. at pp. 258-259.

> The people who play Rugby League no doubt do so because they enjoy the sport, take pleasure in it, and desire to foster it; but they also play the game in order to earn money, and in the ease of players like the plaintiff they earn a considerable amount of their livelihood by playing the game of Rugby League.

Once again the question of closed categories of rights which the court can protect rears its head. Yet, it is submitted, this complexity is unnecessary and of doubtful origin. However, one thing is clear, a source of income is a source of right. At least in certain circumstances, the courts will protect any venture from which one may derive income.

So far as the decision in *Cameron* v. *Hogan*[102] relied on *Kelly's Case,*[103] it must be considered suspect. So far as it conflicts with the implied contract doctrines of *Abbott* v. *Sullivan*[104] and *Lee* v. *Showmen's Guild*[105] it may be that the High Court will in time modify the law which it there laid down. The dicta and decision in *Cameron* v. *Hogan* are of neither the old nor the new faith. They belong rather in the semantic obscurity of the 19th century.

The courts of the United States also have been involved in the same conflict between reality and self-imposed artificial limitations.

As early as 1929, however, the Circuit Court of Appeal in *Texas & N.O.R. Co.* v. *Brotherhood of Railway and Steamship Clerks*[106] held that "the term 'property right' was broad enough to include the right to make contracts for the acquisition of property, by the rendition of services, or otherwise, and the right of employees to money or other property exchanged, or to be exchanged, for his services." In other words it held that an employee has a property right in his employment. Once again, as in the Commonwealth decisions, we find that the word "property" serves to obscure the clarity of legal reasoning.

In a note of the case[107] the suggestion is made:

> It is submitted that the courts would have less trouble in getting over the property bump if they would call every right having commercial value "property", or instead of using "property", would use "interest of substance", or better yet, say that equity protects the pocketbook. The holding of the principal case would fall in with such views of property very nicely and in fact goes a long way in making them more plausible.

102. (1934) 51 C.L.R. 358.

103. *Kelly* v. *National Society of Operative Printers' Assistants* (1915) 84 L.J.K.B. 2236.

104. (1952) 1 K.B. 189.

105. [1952] 2 Q.B. 329

106. 33F (2d) 13. (As quoted in (1929) 28 *Mich.L.R.* 621). Affirmed by the Supreme Court 50 Sup. Ct. 667.

107. (1929) 28 *Mich.L.R.* 621.

The author is right in blaming "property" for the confusion, but his suggested remedy ignores the original meaning of the term. It is in that original meaning that the only true remedy can be found.[108]

This view is echoed by Joseph R. Long[109] who says that the injunction should be used to protect all legal rights where there is no adequate remedy at law. He bases his claim, however, not on the historical validity of such an approach, but on the current necessity for it.

The social necessity for control over the economic coercion which can be exercised by any trade organization over its members — and equally over non-members if the association is strong enough — cannot be ignored. However, we are then faced with the question, when is economic coercion unlawful? Most types of economic coercion can only with utmost difficulty be called unlawful. However, the expulsion of a member from a trade association contrary to the rules or contrary to natural justice has been categorized as wrongful. Should we refrain from restraining this type of coercion because a technical requirement, a requirement which, I submit, owes its very existence to a misunderstanding, is absent? Should we not control economic coercion so far as we can without perverting the law for that purpose?

The relative helplessness of the individual member, particularly of an employees' trade union, must also be taken into account when considering social desirability:

> The right management of union affairs is of great public importance..... Upon the wisdom and honesty of the leadership of our trade unions depend in large measure the prosperity of New Jersey. The proper management of the unions is of even greater moment to their members. A stockholder of a corporation, if dissatisfied with its management, can sell his stock and invest elsewhere; a *member of a union can resign and starve* (Italics supplied)..... The court is loath, in such cases, to let any obstacle interfere with granting equitable relief.[110]

108. The existence of the *Clayton Act* in the United States, does, of course, confuse the issue further in that country.

109. (1923) 33 *Yale L.J.* 115 at p. 132.

110. *Harris* v. *Geier,* (1932) 112 N.J. Eq. 99, 106, 164 Atl. 50. (As quoted in 20 *Minn.L.R.* at p. 658.) "This phase of trade union law is an offspring of the law of voluntary non-profit associations. One characteristic inherited from its parent is the concept that these organizations are self-governing autonomies, whose private affairs are not subject to review by the civil courts. Exception is made to this rule, however, when property rights are involved. The courts then take jurisdiction. Although lip service is paid to the necessity that property rights be violated before relief will be granted, the tendency has been toward a liberal and often evasive construction of this requirement. Then, too, some courts recognize and protect a nebulous substitute, the civil right. A few courts work out a kind of property or civil right on the basis of a fictitious contract." Note in 20 *Minn.L.R.* at pp. 658-659.

It is interesting to note that as early, or should I say as late, as 1947 in England, there was at least one text-writer who thought that the term "property" had a wide meaning which embraced such things as the right to work, and was not used in any strictly technical sense. [111] However, there seems little in the current judicial trend to render this attractive simplification acceptable. The English Courts now protect the right to work, and the why and the how of that protection are complicated — unnecessarily so.

Professor Lloyd's [112] comment on *Lee* v. *Showmen's Guild* deserves notice:

> It is submitted that this important decision, although it undoubtedly strikes new ground, in no way involves a reversal of the previous trend of decisions and, indeed, is fully in line with the more recent developments in this branch of law. As previously pointed out, the current trend has been to move away from the older view that jurisdiction in these matters is to be based on the right of property, and to found the jurisdiction squarely on the breach of a contractual duty owed to the member. Since the contract of the member with his fellow members or with the association itself is normally embodied in the rules of the association there seems no reason in principle why these rules should not be the subject of scrutiny by the ordinary courts just as in the case of any other contract.

It is submitted, however, that this comment is only accurate so far as it goes. The property theory if properly understood solves all problems in this respect. There are fields, perhaps, where it may create its own difficulties but, to my mind, this is not one. Neither in contract, express or implied, nor in the mistaken "property" theory is a simple answer to be found.

> This policy of non-intervention which the courts developed in cases involving churches and lodges was early applied with equal strictness to labor unions. Although the modern labor union, both in structure and function, bears little resemblance to these other voluntary associations, a traditional reluctance to interfere still remains an underlying attitude in the minds of the judges ....
>
> To justify intervention, courts have adopted two established legal principles as rationales for relief. First, they have said that membership in a labor union is a property right and must be protected against any unlawful interference. Second, they have reasoned that membership in a union creates a contract. Any improper discipline is a breach of that contract for which the law will give relief.[113]

111. "In this connection, one may add, the term 'property' is used apparently in a wide sense, and must be taken to include, for example, the right to practise an occupation." Robson: *Justice and Administrative Law,* 2nd Edn. (1947), p. 227.

112. "Judicial Review of Expulsion by a Domestic Tribunal" (1952) 15 *M.L.R.* 413 at 422.

113. Clyde W. Summers: "Legal Limitations on Union Discipline" 64 *H.L.R.* at p. 1051.

> They thereby reveal that membership itself is the interest to be protected and the finding of a property right is not a reason but an excuse for the decision. . . . .
>
> The contract theory is, in some measure, a substitute for the property theory. Courts frequently find a breach of contract and grant relief without bothering to discover an interference with property rights. However, most courts have lumped the two theories into a single conglomerate theory. The property rights in membership are said to be created and defined by the contract. . . . .
>
> The contract of membership is even more of a legal fabrication than the property rights in membership.[114]

Property, however, (outside the United States at least) was used only to give the Court jurisdiction, the contract, derived from the rules of the association, or from implied obligations of the expelling body, served only to determine whether the expulsion was wrongful. In effect, both contract and property must exist. As Dr. Stoljar[115] so clearly explains:

> To begin with, 'property' and 'contract' are not simple alternatives, because, as we have seen, property presupposes contract. Thus in the club cases, the very home of the property test, the idea of contract was never absent: the law, through the injunction, specifically enforced a member's property interest within the framework of the rules or the members' mutual agreement. Indeed, the relevance of property was not the right, but the form of the remedy.

If "property" is accepted as meaning, as it originally meant, a legally recognized right, then, whether that right exists by virtue of contract or arises from the very protection which the law extends as socially desirable to certain relationships, the courts can protect that right by injunction when it is interfered with wrongfully, *i.e.,* tortiously or in breach of contract.

There is no need for complexity in the law on this point. Certain conduct is treated as wrongful by the courts because it is socially undesirable. Economic coercion by trade organizations can be despotic and can deprive a man of his ability to earn a livelihood; for these reasons, it is submitted, it is socially undesirable and should be controlled.

Membership of a trade organization is not a mere "social" relation; it gives rise to obligations intended to bind in more than a mere moral sense. The "property" in that membership can be protected consistently with both authority and logic.

P. G. NASH. *

114. *Ibid*. at pp. 1054-1055.

115. "The Internal Affairs of Associations" in *Legal Personality and Political Pluralism* at pp. 85-86.

* Senior Lecturer in Commercial Law, University of Melbourne.