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THE INTERNAL AFFAIRS OF ASSOCIATIONS NOT FOR PROFIT

THE bitterness of a dispute is apt to be inversely proportionate to the area of conflict. Family rows are proverbial for their violence. A similar acerbity pervades quarrels in clubs, trade unions, professional associations, secret societies, churches, and educational institutions. Even a decisive defeat within the organization does not always discourage the losers. Their blood is up, and they are almost sure to carry the fight into the courts, hoping for better fortune on a fresh field of battle. What welcome should such suits receive? Corporations, partnerships, joint adventures, joint stock companies, and business trusts are frequently the objects of judicial control, but their business activities naturally cause public concern, and the bodies which we are considering exist for other purposes than making money. How far should the state consent to settle through its courts the internal affairs of these non-profit-making associations? [1]

A typical example of such internal disputes was presented by the expulsion of Colonel Dawkins in 1878 from the Travellers' Club, of which he had been for more than twenty years a member. That case,[2] which led to the judicial statement of several widely

[1] In addition to the citations in this article, see the authorities and references in POUND, CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY (Chafee's ed. 1930) 87 *et seq.* Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 677, discusses some of the problems of this article, and the writer is also indebted to suggestions in his lectures. Professor Frankfurter has kindly supplied citations on administrative law.

[2] Dawkins v. Antrobus, 17 Ch. D. 615 (1881).

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accepted principles of law, may serve as the focus of our problems. The colonel had not confined his militancy to the field, and this was by no means his first controversy. His career in the Coldstream Guards had been enlivened and then abruptly terminated by a succession of altercations, beginning in 1859 with an undeserved reprimand from his superior officer, and ending with two courts martial in which he was the central figure. The second of these retired him in 1865 on half pay, condemning him as an officer but not as a gentleman. But the colonel had just begun to fight. After failing to get his commanding officer, Lord Rokeby, court-martialed, he sued him unsuccessfully for false imprisonment and conspiracy to reduce Dawkins' rank.[3] A year or two later he tried an action of libel against his previous commanding officer, Lord Paulet, for sending a damaging report about Dawkins to the adjutant general.[4] Losing again, he brought an action of libel against Lord Rokeby for his testimony against the colonel at one of the courts martial.[5] After a third series of defeats in every court up to the House of Lords, the colonel sued three members of the final court martial, including Prince Edward of Saxe Weimar, for conspiracy in reporting to the commander in chief that Dawkins was unfit for his military duties.[6] For the fourth time, judgment for the defendants.

Thus was our law of torts enriched through the colonel's pertinacity. Although the public would regard Dawkins as a quarrelsome nuisance, and the psychiatrists would classify him as afflicted by the litigious variety of mental disease,[7] we lawyers should think of him as one of those all too rare benefactors of the law praised by Von Ihering in his *Struggle for Law*,[8] who at the cost of great inconvenience and expense to themselves establish fundamental legal principles by big lawsuits over small claims. Yet so little recognition has been given him that he is absent from the Dictionary of National Biography, and even his first name is unknown.

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[3] Dawkins v. Lord Rokeby, 4 F. & F. 806 (1866).

[4] Dawkins v. Lord Paulet, L. R. 5 Q. B. 94 (1869).

[5] Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255 (1873), *aff'd*, L. R. 7 H. L. 744 (1875).

[6] Dawkins v. Prince Edward of Saxe Weimar, 1 Q. B. D. 499 (1876).

[7] See SOUTHARD AND JARRETT, THE KINGDOM OF EVILS (1922) 413, 563.

[8] Lalor transl. (1879).

The colonel's greatest achievement in law-making was still to come. Two years after his final failure to bring most of the leaders of the British army to strict accountability in the courts, he turned author and produced a pamphlet entitled, *A Farce and a Villainy — Heads I Win, Tails You Lose,* which reflected on the conduct of Lieutenant General Stephenson, a member of the disastrous court martial. Dawkins enclosed this pamphlet in a wrapper marked, "Dishonourable Conduct of Lieutenant General Stephenson," and sent it by mail to the general at the Horse Guards. Now the general was also a member of the Travellers' Club, and the matter was soon brought to the attention of the club committee, which under the rules had power to find "the conduct of any member, either in or out of the club-house, . . . injurious to the character and interests of the club." After Dawkins had first refused to explain and then refused to resign, the committee made such a finding of injurious conduct, and thereupon called a general meeting of the club, which expelled the colonel by a vote of 108 to 36. Dawkins then sued the club trustees and the committee for a declaration that his expulsion was improper, and for an injunction restraining them from interfering with his use of the club's buildings and property. For the last time he lost his case, but he obtained from the Court of Appeal a lucid statement of the law of clubs.[9] And so Colonel Dawkins passed out of legal history.

Any such effort to induce the courts to intervene in the activities of a non-profit-making association raises a series of important problems, which are not wholly solved.

The Member's Cause of Action

What is the nature of the cause of action, for which a court may give specific relief to members of such associations? By "specific relief" is meant any judicial order other than a judgment for damages — for example, an injunction, a declaratory judgment, or, under some circumstances, a writ of mandamus. For instance, on what ground should a club member in Dawkins' situation apply for an injunction?

[9] Dawkins v. Antrobus, 17 Ch. D. 615 (1881).

It is obvious that a member of these associations can not bring his case within the recognized powers of a court of equity over partnerships and business corporations. In distinction from such business organizations, the word "associations" is used in this article somewhat loosely, but conveniently, to include non-profit-making groups generally, whether corporations or not. Clubs and churches sometimes obtain incorporation, and private schools and colleges almost always do so, but for the most part the presence or absence of the corporate form does not seem to affect our problems. Attention will, however, be called to this factor when it appears significant.[10] Whether the title to property is in trustees, or in the members jointly, or in the association itself considered as an entity not created by legislation (if the courts permit this), does not usually appear material to the decision of an internal dispute.

A member of a non-profit-making association can not claim relief as a partner, because these associations differ from partnerships in many important respects.[11] A member has neither a part-

[10] For the purposes of this article it will be assumed that any unincorporated association under discussion is not illegal, and that the property devoted to its objects is validly owned at least for the time being, whatever the precise form of ownership. See Note (1929) 42 HARV. L. REV. 813; SCOTT, CASES ON TRUSTS (1919) 327n.; Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 527, 541, 642.

[11] Cases showing the nature of non-profit-making associations and their differences from partnerships include: Goesele v. Bimeler, 14 How. 589 (U. S. 1852) (socialistic community); Burke v. Roper, 79 Ala. 138 (1885) (church relief society); Lawson v. Hewell, 118 Cal. 613, 621, 50 Pac. 763, 767 (1897) (Masonic lodge); Curtiss v. Hoyt, 19 Conn. 154 (1848) (fire company); Myrick v. Holmes, 151 Ga. 437, 107 S. E. 324 (1921) (lodge); Driscoll v. Hoyt, 11 Gray 404 (Mass. 1858) (consumers' coöperative association); McFadden v. Murphy, 149 Mass. 341, 21 N. E. 868 (1889) (benefit society); Mason v. Finch, 28 Mich. 282 (1873) (Masonic lodge); Brown v. Stoerkel, 74 Mich. 269, 41 N. W. 921 (1889) (trade union); Schiller Commandery v. Jaennichen, 116 Mich. 129, 74 N. W. 458 (1898) (benefit society); Moore v. Hillsdale County Tel. Co., 171 Mich. 388, 137 N. W. 241 (1912) (telephone association); Missouri Bottlers' Ass'n v. Fennerty, 81 Mo. App. 525 (1899) (business association); McMahon v. Rauhr, 47 N. Y. 67, 70 (1871) (boat club); Lafond v. Deems, 81 N. Y. 507 (1880) (benefit society); Powell v. Waldron, 89 N. Y. 328, 331 (1882) (produce exchange); Bolton v. Hatch, 109 N. Y. 593, 17 N. E. 225 (1888) (stock exchange); Burt v. Oneida Community, 137 N. Y. 346, 33 N. E. 307 (1893) (socialistic community); O'Neill v. Delaney, 158 N. Y. Supp. 665 (1909) (trade union); Branagan v. Buckman, 67 Misc. 242, 122 N. Y. Supp. 610 (1910) (farmers' telephone association); Ash v. Guie, 97 Pa. 493 (1881) (Masonic lodge); Local Union v. Barrett, 19 R. I. 663,

ner's right to share in profits as they accrue nor his liability *in solido* for any losses. Indeed, in the absence of some specific agreement, a member is probably not even liable to contribute his proportionate share to make up losses. He can not be held on contracts which he did not actually authorize or ratify. Every partner is an agent of the partnership for the purpose of its business, but a member of an association has as such no power to bind the other members by contracts, and even the officers are not general agents for the association, but must ordinarily look to its property for reimbursement. A member, unless it is specially provided otherwise, has no transmissible interest in the association while it is a going concern, by conveyance *inter vivos* or will or inheritance, and has nothing which can be reached by his creditors. His death does not dissolve the association, and he can not force a dissolution in his lifetime except by unanimous consent or at least a majority vote. In short, his control over affairs and his interest in the common property are much less than those of a partner, and he has little more than a right to use this property together with the other members, and to gain such other advantages as he can from their companionship in the enterprise.

The incorporation of a non-profit-making association does not put its members in a materially different situation. They are not shareholders, and so they must establish some other reasons for equitable relief than the remedies of shareholders with respect to the property and business of the ordinary commercial corporation.

A definite ground for equitable action which exists in some cases is the enforcement of a trust. A trust is usually present if the purposes of the association are charitable, as in the case of churches and schools, but some of the groups which we are considering, like clubs, stock exchanges, and trade unions, are clearly not charitable. The validity of a non-charitable trust for a shifting body of beneficiaries is not easy to sustain.[12] Even if a valid

36 Atl. 5 (1896); Clark v. Brown, 108 S. W. 421, 432 (Tex. Civ. App. 1908) (church); Flemyng v. Hector, 2 M. & W. 172 (1836) (club); *In re* St. James's Club, 2 DeG. M. & G. 383 (1852); Wise v. Perpetual Trustee Co., Ltd., [1903] A. C. 139 (club). See Note (1928) 41 HARV. L. REV. 898; Warren, *Voluntary Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335, 341, 343; STURGES, UNINCORPORATED ASSOCIATIONS AS PARTIES TO ACTIONS (1924) 383, 386; SCOTT, CASES ON TRUSTS 751n; Note, 4 Abb. N. C. 300 (N. Y. 1878).

[12] *Supra* note 10.

trust can be worked out, it is significant that this possible basis for relief is ignored in most of the expulsion cases, such as that of Colonel Dawkins. It is desirable, if possible, to find a more widely present cause of action for wrongful expulsions, which will not depend so closely on the nature and purposes of the group.

When we turn aside from the authorities and consider the actual human interests which suffer from an expulsion, it becomes apparent that in many cases they are chiefly interests of personality. The expelled club member finds his social reputation blasted, and is likely to be blackballed by other desirable clubs. The former trade unionist is ostracized by union members. A student like Shelley who has been excluded from college is branded for years to come, and deprived of intimate associations with places and companions. Excommunication from a church means loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit [13] and perhaps the dread of eternal damnation. In comparison with such emotional deprivations, mere losses of property often appear trivial. It would seem natural that courts of equity should consider the desirability of remedying such injuries to personality, but they are hindered from doing so by the oft-repeated doctrine that equity protects only property rights. Dean Pound [14] and others have shown the unsubstantial basis of this doctrine in the older cases, and its unfortunate effect in restricting the ability of courts to remedy many of the evils of modern life. Injunctions and similar flexible remedies of equity are much better suited than a speculative action for damages to protect interests of personality when the injuries to them are sufficiently serious to warrant the interference of the courts.[15] The trend of the decisions today is toward such protection, even in the courts of last resort, and an examination of unreported cases in the lower courts collected from newspapers indicates that such courts are willing to go

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[13] See the chapter on Lamennais in LASKI, AUTHORITY IN THE MODERN STATE (1919) 189; and the account of the last days of George Tyrrell in 2 BLUNT, MY DIARIES (1921) 254 *et seq.*

[14] See Pound, *supra* note 1; Note (1922) 7 CORN. L. Q. 261.

[15] See Chafee, *Does Equity Follow the Law of Torts?* (1926) 75 U. OF PA. L. REV. 1.

farther than the appellate judges in frankly protecting interests of personality. Such press items are also significant to show the frequency with which citizens are now seeking equitable remedies against this kind of injury. Law in action is breaking away from the property limitation which still receives much sanction from law in books.[16] In spite of these modern tendencies, however, the time has not yet arrived when we can expect courts of equity to look squarely at the interests of personality involved in expulsions from associations, and we are still obliged to seek the basis of relief elsewhere.

Three views as to the member's cause of action have been suggested.

(1) The deprivation of some property interest of the member may be made the basis of his right to relief against an improper expulsion or other wrongful act of an association. This is the orthodox English view, which also finds some support in this country, particularly in church controversies. In expulsions from clubs like that of Colonel Dawkins, the courts have found such an interest in the member's right to share in the property of the club on its dissolution. Dean Pound has pointed out that this alleged property interest is largely a fiction, under the guise of which the courts are really protecting interests of personality,[17] just as in *Gee v. Pritchard*[18] Lord Eldon safeguarded the plaintiff's right of privacy by saying that she had a property right in the personal letters which the defendant was about to publish. Although it is true that on the dissolution of a club any surplus of its property remaining after the payment of debts would be distributed among all the members, it is probable that the instances in which a distribution of surplus has actually occurred are very few. Ordinarily a club keeps alive while it remains prosperous, and most cases of dissolution have taken place because the club was in financial difficulties, and consequently the members received nothing whatever. It is well recognized that until dissolution the member's so-called property interest amounts to very little. Ordinarily he can not sell it or transmit it by inheritance.[19]

[16] See the press items collected in POUND, *op. cit. supra* note 1, at 127 *et seq.*

[17] *Supra* note 1, at 678.

[18] 2 Swans. 402 (1818).

[19] STURGES, *loc. cit. supra* note 11; see cases cited *supra* note 11, especially

This remote and conjectural possibility of sharing in a probably non-existent surplus is a very unsatisfactory basis for the jurisdiction of a court of equity.

Moreover, even this slight property interest is absent in many expulsions from associations which cause serious injury. For example, many leading English clubs are proprietary clubs, whose property is not owned by the club or its members but by a group of proprietors who allow the members to make use of it under an agreement from which they presumably expect to profit. An expulsion from a proprietary club may be just as bad for the social reputation of the member as if the club were of the other type, but in such a case the English courts feel obliged to deny an injunction. The member's best remedy is then an action for damages, as in the recent *Bath Club Case*.[20] The absurdity of this difference in remedies between the two types of clubs is shown by the case of *Baird v. Wells*,[21] involving a wrongful expulsion from a proprietary club. The English court began by denying an injunction on the ground that no property interest was owned by the member, and then went on at considerable length to examine the circumstances of the expulsion and to find that it was improper. This roundabout method served to give some protection to the interests of personality which had been injured. The member's reputation was saved from a permanent smirch, but he did not succeed in regaining the opportunities of enjoying the use of the club, which would have been given him under the same circumstances if it had not been a proprietary club. It seems plain that the club member's interests of personality should be the object of consideration regardless of the nature of the club, and that the real question is whether the injury to these interests is sufficiently serious to warrant judicial interference with the internal affairs of a social organization. The court's willingness to decide this fundamental question ought not to depend on the presence or absence of an insignificant interest in club property.

A further unfortunate consequence of the property theory is that the courts are sometimes so much occupied in declaring their

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Lawson v. Hewell, and Clark v. Brown. For members' rights on dissolution, see (1928) 41 HARV. L. REV. 898; (1918) 27 YALE L. J. 418; (1918) 28 *id.* 201; SMITH, LAW OF ASSOCIATIONS (1914) 91; SCOTT, CASES ON TRUSTS 380n.

[20] *Infra* note 56.

[21] 44 Ch. D. 661 (1890).

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unwillingness to protect anything except property, that they do not take the time to ascertain that an interest of substance is actually present in the particular case before them. An improper expulsion from a trade union would seem clearly remediable on the property theory. The member is entitled to share in the benefit funds of the union. Apart from these funds, his opportunity of gaining a livelihood is likely to be seriously diminished, especially in England, if he is deprived of his union card. This occupational advantage is plainly an interest of substance which ought to be classified as property in the sense that this word is widely used by the courts.[22] Yet one of the earliest cases of expulsion to come before the courts involved a trade union, and relief was actually denied by so able a judge as Sir George Jessel, on the ground that the plaintiff had not been deprived of any property right.[23] Fortunately, a different view as to trade unions has prevailed in this country, and in England the decision has been virtually overruled, although the right of a trade union member to sue for expulsion has been considerably limited by legislation.[24]

The property theory is thus unsatisfactory because it requires the courts to base their decisions on an immaterial factor in the situation, and distracts their attention from the real interests of the member which have been injured and the true reasons which may make it undesirable to grant him relief.

(2) The member's entry into an association is sometimes said to give rise to a contract that the rules of the organization will be followed, and an improper expulsion is considered to be actionable as a breach of this contract. This view has been most fully presented in two American cases,[25] but it finds incidental

[22] Truax v. Raich, 239 U. S. 33 (1915); Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853 (1916), Notes (1916) 30 HARV. L. REV. 75, (1917) 1 MINN. L. REV. 71; Raymer v. Tax Comm'r, 239 Mass. 410, 132 N. E. 190 (1921), Note (1923) 31 YALE L. J. 318; *cf.* American Steel & Wire Co. v. Davis, 261 Fed. 800 (N. D. Ohio 1919). *Contra:* Bonifaci v. Thompson, 252 Fed. 878 (W. D. Wash. 1917), Note (1919) 32 HARV. L. REV. 436.

[23] Rigby v. Connol, 14 Ch. D. 482 (1880).

[24] POUND, *op. cit. supra* note 1, at 88n., 107n.

[25] Krause v. Sander, 66 Misc. 601, 122 N. Y. Supp. 54 (1910); Lawson v. Hewell, 118 Cal. 613, 618, 50 Pac. 763 (1897). The English cases expressing this view are discussed in Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404.

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expression in many other judicial opinions in this country, and even in England. The courts seem to feel that the presence of a contract overcomes the orthodox difficulty of giving relief, when the member would otherwise be held to have only interests of personality.[26] If a court is definitely committed to the view that equity protects only interests of substance, it is hard to understand why the presence of a contract gives any help. The notion seems to be that any contract is an interest of substance. Yet an agreement which affects only personality can hardly be classed as property. A good example of this fallacious reasoning is *Pollard v. Photographic Co.*[27] Since a woman is held not to have any property interest in her face, she can not enjoin the use for advertising purposes of a photograph which has been taken of her without her consent, even if this use is a tort for which damages could be recovered. But if she has employed a photographer to take her picture, this decision allows her to enjoin its unauthorized use on the ground that there is an implied contract that the photograph will be entirely subject to her control. If her face is not property in itself, it does not become property when it is made the subject of a contract, and the contract has no pecuniary value apart from the prints for which she has paid, and which are not here in question. In the same way, when a man joins a bridge club which has no physical assets, he does not acquire any property right which would justify equitable relief against expulsion on the orthodox view merely because the court finds that the members have made a contract to play with each other every Thursday night. In sound logic, the presence of the contract in such a situation affords no basis for relief unless we are ready to abandon the traditional limitation of equity jurisdiction to property rights, as we ought to do. And in that event we gain nothing by treating the expulsion as a breach of contract rather than a tort.

Another objection to the contract theory is its artificiality

[26] On similar reasoning, covenants in separation agreements to refrain from molestation have been enforced at the suit of the wife, although they appear to affect only personality. Sanders v. Rodway, 16 Beav. 207 (1852); Hunt v. Hunt, 4 DeG. F. & J. 221 (1862); Swift v. Swift, 34 Beav. 266 (1865); Hamilton v. Hector, L. R. 6 Ch. App. 701 (1871).

[27] 40 Ch. D. 345 (1888); see (1923) 24 A. L. R. 1320n.

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Who are the parties to the contract? If the association is unincorporated and may not be treated as an entity, then each member has a contract with every other member. Thus if there are six hundred persons in a club, we must contemplate $\frac{600 \times 599}{2}$ or 179,700 contracts, and in a fair-sized national trade union the number must run high into the millions. The late Mr. Hohfeld taught us that jural relations were more complex than we had realized, but are they as complicated as that? The philosophical maxim called the Razor of Occam, "*Essentia non sunt multiplicanda praeter necessitatem,*" is sometimes worth applying in law. If possible, we should seek a simpler explanation of the rights of an association member. The fact is that a new member does not think of himself as forming any such vast network of executory transactions with the other members, but as entering into a present relation with the association. True, it is a consensual relation, but it is not usually regarded by him as mainly promissory.[28] It is about the same sort of contract as the *Contrat Social* of Rousseau or the Charter of Dartmouth College.

If a wrongful expulsion is a breach of contract, then all the members who vote for expulsion are liable at law for damages. But, as will be seen later,[29] the authorities for any action at law by the expelled member are meagre. And when such actions have been maintained, they have been directed against the unincorporated association or its officers or committee, not against ordinary members. Under the contract theory, a man of moderate means, who voted for expulsion at a meeting summoned without proper notice, might find himself subject to a judgment for the entire damages suffered by the ousted member. Furthermore, the measure of damages in actions at law by an expelled member appears to be based on a theory of tort rather than of contract.[30] He does not merely recover for the loss of expected

[28] The relation between an educational institution and a student or a teacher is sometimes definitely contractual. Part of the incidents of membership in a trade union or a benefit society usually consists in promises to pay benefits, but these do not necessarily render the whole relationship contractual, any more than a lease is a contract because of the covenants to pay rent.

[29] *Infra* note 48.

[30] In *Expulsion of Member of Club* (1926) 70 SOL. J. 828, it is stated that the expelled member of a proprietary club may recover not only the amount of his dues, and damages for the loss of the opportunity to enjoy the amenities of

benefits, but also recovers for the injury to his reputation, just as in defamation, and may receive punitive damages.[31]

The rigidity of the contract theory gives rise to a final group of objections. Except by a great deal of stretching and straining, it does not afford room for several principles which ought to govern the internal affairs of associations, including the three principles frequently laid down by the courts.[32]

(a) If the constitution and by-laws form a contract by which the member is bound, even if he has not read them, the fact that some of these clauses are "contrary to natural justice" does not prevent them from being operative. Nevertheless, the courts say that such clauses will be disregarded. This result might fit into the contract theory if this partial invalidity of the "contract" were due to its interference with some broad public policy,[33] but in most instances the objection to the particular clause is merely its unfairness to the member. Thus the clause seems to be judged by its effect upon the relation between the member and the association, rather than by the usual doctrines of the law

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the club, including good meals at less than hotel rates, but also damages for the injury to his reputation and the improbability of his election to other desirable clubs. Although the article says that the right of action is founded entirely on contract, it recognizes that the last item of damages savors more of tort. Lahiff v. St. Joseph's Soc., 76 Conn. 648, 57 Atl. 692 (1904) (benefit society; mental suffering included); Connell v. Stalker, 21 Misc. 609, 48 N. Y. Supp. 77 (1897) (union liable for suspended member's loss of wages due to discharge by employer because unionists would not work with him); Lytle v. New Castle Agric. Ass'n, 91 Pa. Super. 152 (1927) (trespass against corporate member of unincorporated association for causing expulsion of another member); Simpson v. Grand Internat. Brotherhood of Locomotive Engineers, 83 W. Va. 355, 365, 98 S. E. 580, 585 (1919) *semble* (suit for wrongs, not breach of contract). The customary addition of damages for injury to the feelings in suits for breach of promise of marriage is explained by the fact that such an action is not genuinely contractual. Liability does not survive. See (1915) 28 HARV. L. REV. 701. Nor does a statute permitting attachment in actions *ex contractu* apply. Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044, 59 L. R. A. 954 (1902).

[31] Grand Internat. Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923). Alabama, like most states, refuses punitive damages for breach of contract. See Western Union Tel. Co. v. Rowell, 153 Ala. 295, 310, 45 So. 73, 81 (1907); St. Louis & S. F. R. R. v. Hunt, 6 Ala. App. 434, 440, 60 So. 530, 533 (1912). The authorities are collected in (1919) 17 C. J. 976, 977.

[32] These are discussed more fully *infra* p. 1014 *et seq.*

[33] This might be said of a rule restricting the member's constitutional right of petition. Spayd v. Ringing Rock Lodge, *infra* note 77. But no general purpose of society suffers when a member is expelled without notice or a hearing.

of contracts, which do not brush aside a promise merely because of its harshness on one party. In other words, the law of associations does not wholly depend upon the consensual elements of the relation between the member and the group, but such elements may be supplemented, modified, or disregarded according to the function of the particular group in the community. For example, requirements for notice and a hearing are imposed by the courts when the rules say nothing about them,[34] so that these requirements can not be considered a part of the contract unless we are going to call them implied clauses.

(b) If a violation of any rule is a breach of contract, then, as Dean Pound has pointed out:

> ". . . the interpretation of the written contract is for the court. Thus a court of equity is to be the final interpreter of the laws and rules of all voluntary associations, clubs, and fraternal orders. This is neither intrinsically desirable nor expedient from the standpoint of dispatch of public business in the courts." [35]

Thus, if the rules make "conduct injurious to the character or interests of the club" a ground for expulsion, and a member is expelled for doing what Dawkins did, the court would, on the contract theory, have to decide whether the rule should be construed to cover his behavior. It would have to set aside the expulsion if, like Sir George Jessel,[36] it thought that the club was not injured by the mailing of printed matter seen only by the postman and the recipient unless he chose to show it to other persons. The courts would become courts of appeal from the tribunals of all associations, obliged to grant a trial *de novo* in each controversy. Yet if anything in the law of associations is clear, it is that no such trial *de novo* in the courts takes place. The "domestic tribunals" of associations are treated rather like administrative bodies,[37] and judicial review of their decisions is

[34] This was done in Dawkins v. Antrobus, 17 Ch. D. 615, 623 (1881).

[35] *Supra* note 1, at 680.

[36] Dawkins v. Antrobus, 17 Ch. D. 615, 623 (1881). The Court of Appeal took the opposite view, but made it plain that their opinion of the colonel's conduct was immaterial to their decision because this was a question for the club to decide, so long as it did not violate the three rules discussed *infra* p. 1014 *et seq.*

[37] See the lucid explanation in ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928) c. iv.

somewhat similarly limited. On the contract theory, we can only explain this established practice by reading into the contract an implied provision that the member agrees to abide by the determination of the association tribunal as to the interpretation of the constitution and rules, so long as that tribunal conforms to the procedure specified in the contract. This view, which was taken in a California case,[38] would allow the courts to construe only procedural rules, which is their usual practice. Few ordinary contracts, however, contain such a clause entrusting to one party the absolute power of interpreting some of its most important provisions, and ousting the courts of jurisdiction.[39] To imply this extraordinary clause when a member says nothing about it is straining contractual principles very far. It is much more satisfactory to say that this requirement of finality is imposed by the law, and not by any contract, as a desirable incident of the relation between the member and the association.

(c) The requirement that the expulsion must not be malicious (in bad faith) even if the rules are followed, is well settled, and yet there is nothing to that effect in the so-called contract. A man who performs his contract does not become liable to suit because of bad motives. Here again we must either read a malice clause into the agreement by implication, or frankly recognize that we are not dealing with a true contract at all.

The contract theory would also necessitate equitable relief in all cases where the three requirements just discussed have been violated, even though the courts ought to keep their hands off and

[38] Lawson v. Hewell, *supra* note 25. See Pound, *supra* note 1, at 681, n.113. In Dawkins v. Antrobus, 17 Ch. D. 615 (1881), it may be argued that the alleged contract expressly made the committee's decision final, because the rule begins, "In case the conduct of any member . . . shall, *in the opinion of the committee*, . . . be injurious. . . ." But this clause merely states a preliminary condition for the consideration of expulsion at a general meeting of the club, which was surely not bound to vote automatically to follow the committee. The unsoundness of such an argument is further shown by the alternative preliminary condition in the rules — a meeting could be called if any twenty members certified in writing that a member's conduct was injurious. Their opinion could not be meant to be final. The power of expulsion was placed in the general meeting, and there is no provision about the finality of its decision.

[39] Compare the conflicting decisions on the validity of by-laws giving the association tribunal final power to decide questions other than expulsion, such as liability for benefits, or business disputes between members of a stock exchange or board of trade. See (1914) 49 L. R. A. 372; (1906) 2 L. R. A. (N.S.) 672.

refuse to exercise jurisdiction for two reasons of policy to be considered later — the difficulty of construing the procedural rules of the association,[40] and the danger of fettering its growth.

In short, the member's "contract," like his "property interest," is often a legal fiction which prevents the courts from considering attentively the genuine reasons for and against relief.

(3) The member's relation to the association is the true subject matter of protection in most cases where relief is given against wrongful expulsions. The wrong is a tort, not a breach of contract, and the tort consists in the destruction of the relation rather than in a deprivation of the remote and conjectural right to receive property. Although this theory of a relation as the basis of relief receives practically no support in judicial opinions,[41] the reasons outlined in the preceding discussion indicate that it is the correct explanation of the decisions. Dean Pound's exposition of the influence of feudalism on Anglo-American law shows that the central idea of our law is relation.[42] We speak of the law of principal and agent, master and servant, landlord and tenant, vendor and purchaser, banker and customer, and domestic relations. Such relations are usually consensual. They may grow out of a contract. The contract or the otherwise expressed intent of the parties determines some of the incidents of the relation, but not all. Other incidents, often of great importance, arise from the nature of the relation and its function in the community, and are fixed by usage, judicial decisions, and legislation, without any express provision by the parties, and even in disregard of a part of their actual agreement. To use Professor Wambaugh's happy phrase, the law embroiders a great texture of rights and duties upon the slight expression of their intentions. For example, a man opening a checking account at a bank gives and receives practically no promises. The courts go outside whatever contract exists to determine such important questions as the bank's proper method of forwarding checks for collection, and the depositor's duty to examine his vouchers for the discovery of forgeries.

In similar fashion, the relation of the member to the associa-

[40] See Pound, *supra* note 1, at 680, n.112.

[41] The mandamus cases are the best authority for this view. See notes 60, 62, *infra*.

[42] THE SPIRIT OF THE COMMON LAW (1921) 21 *et seq.*

tion is partly shaped by the terms of the constitution and by-laws as they exist when he joins or as they are afterwards altered in accordance with provisions for their amendment, but these writings do not constitute a contract in the ordinary sense, and should not finally or rigidly determine the rights of the member and the powers of the association. Other incidents of the relation are found in the judicial requirements for a valid expulsion,[43] and in the actual living purpose of the association over and above the exact wording of its documents. On this view, the closest analogy to the position of the member of an association is to be found in the relation between a stockholder and a corporation, or between a partner and the partnership. Such relations are much more than contracts. The law of associations not for profit thus takes its natural place beside the law of business corporations and partnerships.

A violation of the relation does not automatically give rise to judicial relief. Judicial consideration must be given to the seriousness of the injury, on the one hand, and, on the other, to the policies which make interference with the particular association undesirable. Sometimes the relation, unlike membership in business corporations and partnerships, may involve only interests of personality, but the courts should still consider whether justice and policy require them to protect it. For a time, under the influence of the traditional limitation of equitable jurisdiction to interests of substance, the courts are likely to continue to insist on finding some property element in the relation before they will prevent its destruction, but this tradition will probably die out soon. Then the presence or absence of an interest of substance will not determine any jurisdictional question, but will merely be one factor affecting the court's decision whether its jurisdiction over these relations will be exercised; that is, whether the member in the particular instance has enough at stake — whether substance or personality — to warrant judicial action.

One important objection remains to be considered. The statement that the basis of relief against expulsions is the member's relation to the *association* assumes that the latter may be regarded by the courts as a legal entity, even though not incorpo-

[43] See *infra* p. 1014 *et seq.*

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rated or otherwise recognized by statute as a unit.[44] But the policies which have been thought to require legislative authorization for business associations do not necessarily apply to the non-profit-making groups which we are considering. Their failure to incorporate involves no serious loss of taxes to the state, since they pay only a nominal incorporation fee, and the voluntary creation of such associations involves none of the dangers to the community which may arise from commercial enterprises conducted by methods which are not authorized by the legislature or surrounded by the safeguards imposed by statute on business corporations.[45] It is an undoubted fact that clubs, trade unions, churches, and other social organizations are frequently created without the formalities of incorporation. Such groups do exist as facts, and their members customarily think of them as units. It is not apparent that anything substantial will be gained by the community if the courts insist on closing their eyes to these facts, which everyone else clearly recognizes. The Church of England, the Inner Temple, and the United Mine Workers, are entities just as truly as a bowling club with twelve members which takes the trouble to obtain a charter. The recognition of these unincorporated groups as capable of entering into a legal relation with their members does not necessarily confer on them large powers. For example, if it be thought undesirable that they should be sued without legislative authorization, the expelled member can file his bill for an injunction against the officers of the association as individuals. Indeed this is a usual practice. It finds an analogy in the provision of the Negotiable Instruments Law which allows an instrument to be payable to "the holder of an office for the

[44] I thus run counter to the powerful arguments of Edward H. Warren and others as to the necessity of legislative authorization before groups can possess legal rights, powers, and duties. See WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929). It is not necessary to recapitulate here the opposing arguments, which received their first able presentation in English from Maitland, and which have been fully presented in this REVIEW by Professor H. J. Laski and Professor E. M. Dodd, Jr. See Maitland, *Introduction* to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (1900); *The Unincorporate Body* in 3 MAITLAND, COLLECTED PAPERS (1911) 271; *Moral Personality and Legal Personality* in 3 *id.* 304; *Trust and Corporation* in 3 *id.* 321; Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404, reprinted in his FOUNDATIONS OF SOVEREIGNTY (1921) 139; Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977.

[45] See Note (1929) 42 HARV. L. REV. 813, 815, n.21.

time being" [46] and thus gives some recognition to the independent continuous existence of an unincorporated group, but at the same time makes the officer rather than the group the proper party in litigation.[47] In short, the conception that the basis of the member's cause of action for expulsion is his relation with the group does not involve any conflicts with important principles of public policy, and it has the definite advantage of making legal theory conform to the layman's view of the facts. Of course, it would be possible to mold the relation theory of the association cases to conform to the aggregate conception of an unincorporated group. The member would then sue to protect his relation with all the other members. This, however, involves all the complexity which has already been urged as an objection to the contract theory; it is much more satisfactory to treat the association as a unit regardless of its incorporation, especially since that fact does not appear to have much effect on the actual result of decisions on expulsion.

The Nature of the Remedies

When equity relieves against expulsion from an association, is it following the law? If equity can not act against a tort in the absence of an action for damages, it is by no means certain that it can enjoin expulsions. Damages have been recovered against an association, or the members who actively participated in an expulsion, in only a few cases in a few jurisdictions.[48] An action

[46] Negotiable Instruments Law § 8(6).

[47] But see a different explanation in Warren, *op. cit. supra* note 44, at 344, n.31.

[48] *Relief granted:* The Bath Club Case, *infra* note 56; Grand Internat. Brotherhood of Locomotive Engineers v. Green, *supra* note 31 (union, under a statute superseding the prior decision at common law cited *infra*), Notes (1924) 24 Col. L. Rev. 551, (1924) 20 Mich. L. Rev. 245, (1924) 33 Yale L. J. 784; Lahiff v. St. Joseph's Soc., *supra* note 30; Swafford v. Keaton, 23 Ga. App. 238, 98 S. E. 122 (1919) (church); Connell v. Stalker, *supra* note 30 (union); Lytle v. New Castle Agric. Ass'n, 91 Pa. Super. 152 (1927) (racing association); Thompson v. Grand Internat. Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834 (1905) (union); Simpson v. Grand Internat. Brotherhood of Locomotive Engineers, *supra* note 30, *certiorari* denied, 250 U. S. 644 (1919) *semble* (union), Note (1919) 33 Harv. L. Rev. 298.

Relief denied: Kelly v. National Soc. of Printers' Ass'ts, 84 L. J. K. B. (N.S.) 2236 (1915) (union); Grand Internat. Brotherhood of Locomotive Engineers v.

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at law against an unincorporated association, which has not acquired by statute the capacity of being sued as an entity, raises serious procedural objections. A representative suit may be brought in equity against some of the members without joining the others, but there is little authority for such class suits at law in the absence of legislation.[49] There is also the difficulty that, unless the association is regarded as an entity, the member is recovering damages from himself among the other members, and their agents are his agents.[50] More practical objections have also been urged. The damages can not be accurately calculated, and consequently to allow such a suit permits conjecture and possibly vindictiveness on the part of the jury. Although the assessment of compensation for injuries to reputation is well established in defamation cases, it is doubtful whether this practice may advantageously be extended to a new kind of litigation. Furthermore, any damages paid by the association will be shared by the members who voted against the wrongful expulsion and are thus not to blame.[51] The argument that the funds of the association ought not to be diverted from the purpose of the enterprise, especially if charitable, to the payment of a judgment, is less satisfactory, but has influenced at least one court in denying recovery.[52] Some of these objections do not apply to a suit at law against the officers or other members who actually participated in the wrongful expulsion. Still, it is harsh to make them pay money out of their own pockets if they were acting in good faith and were merely mistaken in their interpretation of the procedural rules of the association. This harshness is especially apparent when

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Green, 296 Ala. 196, 89 So. 435 (1921); Dodd v. Armstrong, 18 Phila. 399 (1886) (fraternal society); Lavalle v. Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467 (1892). See also the cases for and against relief cited in Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486 (1910), and in SAYRE, CASES ON LABOR LAW (1922) *passim*.

[49] See the suits against the Brotherhood of Locomotive Engineers, and the law review comments, *supra* note 48; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383, 387; WARREN, *op. cit. supra* note 44, at 1008, *sub* Representative parties.

[50] Kelly v. National Soc. of Printers' Ass'ts, *supra* note 48.

[51] Lavalle v. Société St. Jean Baptiste, *supra* note 48; Golden Star Lodge v. Watterson, 158 Mich. 696, 702, 123 N. W. 610, 613 (1909) *semble*.

[52] Lavalle v. Société St. Jean Baptiste, *supra* note 48. This argument resembles the refusal to make charitable corporations liable for torts to outsiders.

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the officers conformed to all the provisions of the constitution and by-laws, but the expulsion is upset by the courts because a rule is thought contrary to natural justice. The officers can hardly be expected to know at their peril what natural justice requires. On the whole, it would be preferable not to allow the recovery of damages by the expelled member either from the association or its officers except when there has been a definite pecuniary wrong, such as the refusal to pay sick benefits and death benefits,[53] or when the expulsion is accompanied by an independent actionable tort like defamation.[54] Reinstatement of the member or a declaration that he has been wrongfully expelled,[55] seems ordinarily a sufficient and more satisfactory remedy.

An interesting example of the recovery of damages is furnished by the famous *Bath Club Case*.[56] Captain Peter Wright, a member of the club, had published a book of recollections, which stated that the late William Ewart Gladstone was fond of the company of prostitutes. The son of Mr. Gladstone, being unable to sue Captain Wright for defamation of the dead, had succeeded in getting the controversy before the courts by the ingenious method of making such damaging statements about Captain Wright that he himself sued for libel. This suit became for practical purposes a trial as to the truth of the captain's attack on the former Prime Minister, and was decided against Captain Wright. As an outgrowth of this litigation, the captain was expelled from the Bath Club without a proper notice and an op-

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[53] See 59 Am. St. Rep. 200 (1897), and cases cited; Connell v. Stalker, *supra* note 30. Benefits were recovered in equity in Harman v. Raub, 25 Pa. Co. Ct. 97 (1901); and in mandamus in Washington Beneficial Soc. v. Bacher, 20 Pa. St. 425 (1853); *cf.* State *ex rel.* Koppstein v. Lipa, 28 Ohio St. 665 (1876).

[54] This was the situation in Swafford v. Keaton, *supra* note 48. Similarly, even though the court will not enjoin an expulsion, it may enjoin a boycott of the expelled member, which is an independent tort. Pratt v. British Medical Ass'n, [1919] 1 K. B. 244.

[55] A declaratory judgment was given against a proprietary club in Young v. Ladies' Imperial Club Ltd., [1920] 2 K. B. 523, *rev'g* [1920] 1 K. B. 81, which relied on Baird v. Wells, 44 Ch. D. 661 (1890). But see Watt v. MacLaughlin, [1923] 1 Ir. R. 112.

[56] See (1926) 70 Sol. J. 828; (1926) 90 J. P. 436; (1926) 162 L. T. 69; 1 Birkenhead, Law, Life, and Letters (1927) 7; *cf.* Kelly v. National Soc. of Printers' Ass'ts, *supra* note 48, involving a trade union.

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portunity to be heard in his own defense. Since the club was a proprietary club, no property interest of his was involved, and consequently the English courts would not give an injunction. He was, however, allowed to sue for damages, and recovered £25 for the injury to his reputation caused by the expulsion, and £100 for the loss of the amenities of the club. A declaratory judgment would seem a preferable remedy, and adequate under the circumstances.[57]

Denial of a remedy at law to the expelled member should not prevent him from obtaining equitable relief. The objections to a recovery of damages do not apply to an injunction or a declaratory judgment. Those remedies involve no guesswork on the part of a jury as to the extent of the injury, and they do not penalize members of the association who were innocent or merely mistaken. As in other situations, equity should not follow the law in denying relief against torts for which the flexible methods of chancery furnish a much more suitable remedy than the action for damages.[58]

Reinstatement may sometimes be obtained also through the writ of mandamus. When the expelling body is a state university, or a public educational body, or a medical board possessing statutory powers, the writ enforces a public duty,[59] and the fact that a private association such as a college is incorporated may be held enough to permit the use of mandamus to compel the performance of its corporate duties, even though they would not ordinarily be considered public in nature.[60] The remedy has been

[57] See note 55, *supra*.

[58] See Chafee, *supra* note 15, at 25, 26.

[59] See Note (1925) 39 A. L. R. 1019 (state school or university).

[60] State *ex rel.* Undertaking Co. v. New Orleans Funeral Directors' Ass'n, 161 La. 81, 108 So. 132 (1926); Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904) (law school); State *ex rel.* Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294 (1908); People *ex rel.* Bartlett v. Medical Soc., 32 N. Y. 187 (1865) (admission compelled); People *ex rel.* Cecil v. Bellevue Hospital Medical College, 60 Hun 107 (N. Y. 1891), *aff'd*, 128 N. Y. 621, 28 N. E. 253 (1891); *In re* Haebler v. New York Produce Exchange, 149 N. Y. 414, 44 N. E. 87 (1896); Barry v. The Players, 147 App. Div. 704, 132 N. Y. Supp. 59 (1911), *aff'g* 73 Misc. 10, 130 N. Y. Supp. 701 (1911); Commonwealth *ex rel.* Burt v. Union League, 135 Pa. 301, 19 Atl. 1030 (1890); see Notes (1897) 59 Am. St. Rep. 200; (1890) 8 L. R. A. 195; Merrill, *Some Disputed Questions in Mandamus* (1890) 30 CENT. L. J. 459.

The writ is sometimes denied against educational institutions on the ground that the relator is not a member of the corporation and is trying to enforce a contract.

used in some cases even against unincorporated associations.[61] Whether the possibility of mandamus[62] prevents reinstatement by injunction, and *vice versa*, is not entirely clear.[63] It would be preferable to regard the two mandatory remedies as coördinate. The principle that adequacy of the remedy at law is a defense to equitable relief need not include the extraordinary remedies. At all events, the judicial attitude toward an expulsion does not appear to be affected by any difference between mandamus and an injunction. The same tests of the wrongfulness of the expulsion and the same discretionary reasons against relief apply to both remedies.

The Three Tests of a Lawful Expulsion

After a court has decided to take jurisdiction of a member's suit for relief against an association or its officers, it will proceed to ascertain whether his expulsion was wrongful. For this purpose it will usually apply three tests which were set forth by the Court of Appeal in *Dawkins v. Antrobus*,[64] although in that case the colonel failed to establish any violation of these requirements. As already indicated, they are: (1) the rules and proceedings must not be contrary to natural justice; (2) the expulsion must have been in accordance with the rules; (3) the proceedings must have been free from malice (bad faith).

Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589 (1909); Barker v. Bryn Mawr College, 1 Pa. D. & C. 383 (1922), *aff'd*, 278 Pa. 121, 122 Atl. 220 (1923); State *ex rel.* Burg v. Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116 (1906); see Pennypacker, *Mandamus to Restore Academic Privileges* (1926) 12 Va. L. Rev. 645.

[61] Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 Pac. 217 (1888); Stahl v. Roumanian Young Men's Ass'n, 77 N. J. L. 380, 71 Atl. 1114 (1909); *In re* Miller v. Builders' League, 29 App. Div. 630 (1898). The cases are usually *contra*. See (1910) 16 Ann. Cas. 1246; Ann. Cas. 1914B, 90.

[62] Mandamus is said not to be a remedy for mere breaches of contract. See 2 Spelling, Extraordinary Relief (1893) § 1379; and see the cases in note 60, *supra*, denying relief. Hence its use by expelled members is some indication that they are enforcing not a contract but a duty growing out of the relation, and thus gives support to the relation theory of associations.

[63] See Baltimore Univ. v. Colton, *supra* note 60; Hardcastle v. Maryland & Del. R. R., 32 Md. 32, 35 (1869); Bourke v. Olcott, 84 Vt. 121, 78 Atl. 715 (1910); Moundsville v. Ohio R. R., 37 W. Va. 92, 16 S. E. 514 (1892); Northern Pac. Ry. v. Van Dusen, 245 Fed. 454 (C. C. A. 8th, 1917); Pennypacker, *supra* note 60; (1908) 21 Harv. L. Rev. 542.

[64] *Supra* note 2.

(1) *Natural justice.* This means, in the first place, that any gaps in the rules as to the procedure of the association or its tribunal should be filled by the adoption of fair methods, with a reasonable regard to the generally accepted main principles of parliamentary law.[65] Thus in Dawkins' case the club committee notified him of the charges against him and gave him an opportunity to defend himself in writing,[66] although there was nothing in the rules to that effect.

There should also be due notice of the investigation to the persons who compose the tribunal. In *Young v. Ladies' Imperial Club*,[67] a duchess had agreed to remain on the executive committee if she did not have to be troubled with going to any meetings. Accordingly notices were never sent to her. When the committee met to consider an expulsion everybody was notified but the duchess. The plaintiff's expulsion was consequently held invalid, although it did not appear that the duchess would have come if notified, or would have opposed the expulsion. The court said that notice would be excused only by reasons which would make her attendance impossible, such as remote absence or serious illness. One may guess that the duchess was told of the next meeting and stayed away, and that Mrs. Young was promptly re-expelled.

Another principle which would probably be implied is that nobody should be a judge in his own cause. A person who is really prosecuting the member under investigation should not sit on the tribunal and vote for his expulsion.[68]

Besides filling gaps in the rules, the courts will apply natural justice to upset an express rule which is contrary thereto. The principle is thus a sort of unwritten "due process" clause which invalidates the statute of the association. Its meaning is equally

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[65] On filling the gaps from parliamentary law, see Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919 (1900) (association for erecting soldiers' monument).

[66] The court's approval of this procedure would indicate that the usual requirement of a hearing may not mean the right to appear in "open court" and argue orally. It is also interesting that no objection was made to the fact that Dawkins had no opportunity to defend himself before the general meeting of the club, which did the actual expelling. A hearing before the responsible body, which made a preliminary inquiry and reported to the meeting, was probably sufficient.

[67] [1920] 2 K. B. 523, Note (1920) 36 L. Q. Rev. 328.

[68] Leeson v. General Council of Medical Education, 43 Ch. D. 366, 379 (1889).

vague. We can be certain that it usually involves the right of the accused member to a notice and a hearing,[69] but little else is settled. Rules in restraint of trade have been declared void,[70] and sometimes provisions ousting the courts of jurisdiction over pecuniary disputes between members.[71] An appeal to a reviewing tribunal within the association has been held essential to natural justice.[72] On the other hand, the common law rules as to the admissibility of evidence need not be followed, which is natural enough, since the tribunal lacks the powers of compelling testimony like a court.[73] The member has no right to a formal bill of particulars or to counsel, and need not be notified of every consultation held on his case.[74] Moreover, double jeopardy may be inflicted upon him. An acquittal before the tribunal of the association,[75] or even in a criminal court,[76] does not prevent a second inquiry, resulting in his expulsion. Thus natural justice in an association does not confer upon the accused member all the rights of a prisoner in our criminal law.

The most interesting cases are those which pass on the validity of a rule of the association which is alleged to interfere with the constitutional right of a member. For instance, in *Spayd v. Ringing Rock Lodge*,[77] a by-law of a trade union provided that any member using his influence against the legislative representative of the union should be expelled. A member signed a petition

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[69] See POUND, *op. cit. supra* note 1, at 95n.; (1900) 49 L. R. A. 363; (1923) 27 A. L. R. 1512.

[70] Huston v. Reutlinger, 91 Ky. 333, 15 S. W. 867 (1891) (underwriters' board).

[71] *Supra* note 39.

[72] Universal Lodge v. Valentine, 134 Md. 505, 107 Atl. 531 (1919) (Masons); Bachman v. Harrington, 52 Misc. 26, 102 N. Y. Supp. 406 (1906) (trade unions).

[73] See Dawkins v. Antrobus, 17 Ch. D. 615, 623 (1881); Leeson v. General Council of Medical Education, 43 Ch. D. 366 (1889); *cf.* King v. King, 25 Wyo. 275, 168 Pac. 730 (1917), Note (1918) 31 HARV. L. REV. 1030.

[74] Austin v. Dutcher, 56 App. Div. 393, 67 N. Y. Supp. (1900); Green v. Board of Trade, 174 Ill. 585, 51 N. E. 599 (1898). See also note 66, *supra*.

[75] Rueb v. Rehder, 24 N. M. 534, 174 Pac. 992, 1 A. L. R. 431 (1918) (trade union); Simpson v. Grand Internat. Brotherhood of Locomotive Engineers, *supra* note 48; *cf.* Kepner v. United States, 195 U. S. 100 (1904); State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918).

[76] Miller v. Hennepin County Medical Soc., 124 Minn. 314, 144 N. W. 1091, 50 L. R. A. (N.S.) 579 (1914).

[77] 270 Pa. 67, 113 Atl. 70, 14 A. L. R. 1446 (1921), Note (1922) 35 HARV. L. REV. 332, (1922) 6 MINN. L. REV. 241. *Accord:* Schneider v. Local Union, 116 La. 270, 40 So. 700 (1905) (controlling union members on public board).

to the state legislature asking a reconsideration of the Full Crew law, which was supported by the union's representative. His expulsion was set aside by the courts on the ground that the rule violated his constitutional right of petition. Other rights which have been protected against associations are the right to testify in court against the interests of a union,[78] and to sue the union.[79] On the other hand, the courts refused to enjoin a vote of censure by the American Legion against a member who had opposed the bonus to veterans, although the constitutional right of petition appeared to be involved.[80]

An extreme instance of abridgment of a constitutional right by an association recently arose in Rhode Island. Members of a Roman Catholic church of French Canadians had unsuccessfully sued the bishop to enjoin his use of parish funds for diocesan purposes,[81] and were excommunicated by the bishop for their conduct in haling him before the court. The Rhode Island constitution provides:

> "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws." [82]

No effort was made to enjoin the excommunication, which was subsequently withdrawn, and it is by no means probable that the constitutional right of suit would have been so protected by the courts.

The situation just described throws doubt on the wisdom of the policy which the courts have adopted in other cases, of insisting that a person must be allowed to remain a member of an association although he has resorted to the courts or legislature in opposition to its cherished measures. May it not be that

[78] Thompson v. Grand Internat. Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834 (1905).

[79] Osborne v. Amalgamated Soc., [1911] 1 Ch. 540; Sweetman v. Barrows, 263 Mass. 349, 161 N. E. 272 (1928).

[80] Choate v. Logan, 240 Mass. 131, 133 N. E. 582 (1921). No property interest was injured in this case.

[81] The Church Suits, 49 R. I. 269, 141 Atl. 703 (1928).

[82] Art. I, § 5.

the member waives some constitutional rights by joining the association, and can only resume them by severing his connection with it? The privilege of voting or running for office would seem an important constitutional right. Would it be illegal for a Republican club to expel a member who had become a candidate on the Democratic ticket? [83] It would be better not to have any hard and fast rule in these situations. The courts should consider, on the one hand, the seriousness of the injury caused by expulsion and the importance of the constitutional right; and, on the other hand, the desirability of giving full autonomy to the association and of permitting it to maintain the unimpaired loyalty of its members to the purposes for which it is obviously organized.

These considerations throw some doubt on the universal application of the doctrine of natural justice. If the rules of an association deny notice or a hearing before expulsion, it may sometimes be unfair to deprive the member of these usual privileges because he does not examine the rules with minuteness when he joins, or because the purposes of the organization are not worth preserving at the expense of ordinary principles of a fair trial. Consequently the argument already considered,[84] that the unjust rule is a part of a contract between the member and the association, will have no effect on the courts. However, the nature of some associations is such that the person who joins them is clearly aware of the autocratic control which they possess over the continuance of his relation. For example, when a prophet like Dowie establishes a religious community, his absolute power is an integral feature of the enterprise, and any person who joins it knows exactly what he is in for. As will subsequently appear,[85] the attitude of the courts toward such centralized power will vary greatly with different kinds of associations, and it is clear that in some instances the ordinary standards of natural justice will not be applied to the procedure of expulsion.

(2) *Violation of rules.*[86] This requirement is simple, so long

[83] See Hopkinson v. Marquis of Exeter, L. R. 5 Eq. 63 (1867).

[84] See *supra* p. 1004.

[85] *Infra* p. 1026. See also State *ex rel.* Poulson v. Odd Fellows' Grand Lodge, 8 Mo. App. 148 (1879).

[86] See POUND, *op. cit. supra* note 1, at 87n., 95n., 96n.

as the procedural rules, to which judicial review is ordinarily confined,[87] do not present unusual difficulties of construction. In that event, however, the courts may refuse to go into the merits, for reasons to be considered under the next heading.

One point is worth notice here. Even if the rules are of the sort that the courts are willing to construe, they will not usually do so until after the plaintiff has exhausted his remedies within the association.[88] He must abide the investigation before the association tribunal; and if he can appeal from its adverse decision to an appellate body within the association, then he must not resort to the courts until his appeal has failed. As long as possible, outside interference should be avoided. The resemblance between administrative law and association law has already been mentioned, and this doctrine as to exhaustion of remedies finds a parallel in the cases refusing judicial review of administrative rullngs so long as an appeal is still open to some higher official or board.[89]

An appeal within the association may not be required if it would be an inadequate remedy for the member.[90] Thus if the appellate body meets very infrequently, the delay amounts to a denial of justice. And when the association is acting wholly outside its powers, its appellate body is as incompetent to pass on

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[87] See *supra* p. 1006.

[88] See POUND, *op. cit. supra* note 1, at 96n.; (1914) 52 L. R. A. (N.S.) 817, 823. Even the disappearance of appellate bodies within the association does not justify a resort to the courts before a trial in the lowest tribunal of the association. Lafond v. Deems, 81 N. Y. 507 (1880) (benefit association). As to the denial of any appeal, see *supra* note 72.

[89] Thus the validity of a deportation order by an immigration inspector will not be reviewed on *habeas corpus* until after appeal to the Secretary of Labor. United States v. Sing Tuck, 194 U. S. 161 (1904). See also Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908) (state rate-making); Gorham Mfg. Co. v. State Tax Comm., 266 U. S. 265 (1924). A similar policy led the Supreme Court to dismiss the federal injunction in the recent Interborough Case because the railroad had not first contested in the New York state courts the validity of the five-cent-fare ruling of the state Public Service Commission. Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929); see Lilienthal, *The Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379, 392.

[90] Fritz v. Knaub, 103 N. Y. Supp. 1003 (1907), *aff'd*, 124 App. Div. 915 (1908); Gardner v. East Rock Lodge, 96 Conn. 198, 113 Atl. 308 (1921), Note (1922) 31 YALE L. J. 328; Edrington v. Hall, 168 Ga. 484, 491, 148 S. E. 403, 407 (1929); Mulroy v. Knights of Honor, 28 Mo. App. 463 (1888); Rueb v. Rehder, *supra* note 75; Fales v. Musicians' Union, 40 R. I. 34, 99 Atl. 823 (1917).

the case as the tribunal of first instance, and the courts may as well take charge at once. The same result may follow if an adverse decision of the appellate body is a foregone conclusion. And some cases have held that exhaustion of internal remedies is unnecessary if the expelled member seeks only damages and not a reinstatement,[91] for being no longer in the association he is not bound to use its tribunals. Still, the dispute arose while he was a member, and should be settled by the association if possible, rather than in the courts; consequently these cases do not establish a sound general practice. It may be preferable to give the appellate body a chance to correct the errors of the inferior tribunal, and thus avoid any liability for damages.

(3) *Bad faith.* The cases on this requirement are comparatively few,[92] probably because when it occurs it is apt to be accompanied by a violation of the rules or by unjust proceedings. The member is entitled to an honest inquiry into his case. The tribunal must be attempting to find the facts and not just be out to get him. The real reason for his expulsion must not be something different from the charges on which he is tried. The unreasonableness of the findings of the tribunal does not *ipso facto* constitute bad faith, but is evidence thereof, as in malicious prosecution.[93]

Policies Affecting Exercise of Jurisdiction

Even though a court has jurisdiction to settle a dispute within an association, and the plaintiff's statement makes out a *prima facie* case of injury, the court should still feel free to refuse to go into the merits of the controversy. Its decision on this question of exercise of jurisdiction should be affected by various considerations of policy, which have not received much articulate expression in judicial opinions, partly because the judges were busily engaged in deciding whether they had jurisdiction or not, and in determining the existence of some fictitious property right or contract. On the other hand, the relation theory settles the

[91] Simpson v. Grand Internat. Brotherhood of Locomotive Engineers; Thompson v. Grand Internat. Brotherhood of Locomotive Engineers, both *supra* note 48.

[92] See Pound, *op. cit. supra* note 1, at 96n.

[93] See Dawkins v. Antrobus, 17 Ch. D. 615, 630 (1881).

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jurisdictional issue automatically in the affirmative, and leaves the court free to proceed at once to the more substantial question — should the relation receive judicial protection in view of the various policies which are applicable? Attention to this problem soon shows that the policies vary greatly according to the nature of the association and the state's attitude toward it. The relations of a person to a club, a trade union, a church, and a state university, are very different from each other. This fact is so obvious that it may seem absurd to mention it, but it deserves emphasis because it has received so little elaboration in the cases. The courts have tended to imply that the only decisive difference was the presence or absence of a property right, and that when this existed the requirements for granting relief were the same for all kinds of associations.

The four policies which are to be discussed for their effect upon judicial interference with the different types of associations may be called, for the sake of vividness, the Strangle-hold Policy, the Dismal Swamp Policy, the Hot Potato Policy, and the Living Tree Policy. The first favors relief; the last three oppose relief.

(1) The seriousness of the consequences of an expulsion or other injury varies greatly in different kinds of associations. The former club member may suffer in reputation and have difficulty in joining other clubs, but he is able to find companionship and comfortable surroundings elsewhere. Expulsion from a secret society, or the refusal of the grand lodge to give its password to the delegate of a subordinate lodge,[94] or the revocation of the charter of a college sorority,[95] leave no permanent wounds. The minority of a church who resent the new doctrines or ritual introduced by the majority can worship elsewhere with those who share their beliefs, and their faith will be strengthened by the sense of persecution. But the skilled workman who is thrown out of his trade union, the physician expelled from the medical association, or the broker expelled by the stock ex-

[94] Wellenvoss v. Grand Lodge, 103 Ky. 415, 45 S. W. 360 (1898) (injunction denied).

[95] Heaton v. Richmond, 42 Am. L. Rev. 178 (Mass. 1900) (injunction denied). *Contra:* Heaton v. Hull, 51 App. Div. 126, 64 N. Y. Supp. 279 (1900), *aff'g* 28 Misc. 97, 59 N. Y. Supp. 281 (1899).

change, will often find it very hard to earn a livelihood. Expulsion from a benefit society forfeits the insurance which has been purchased by years of saving. The pecuniary consequences of dismissal from a private school or college are less severe than those of dismissal from a public school or state university.

These varying degrees of injury may not be decisive for or against relief, but they are likely to have some effect. Some associations have a strangle-hold upon their members through their control of an occupation or of property which can ill be spared. In such there is operative a policy in favor of relief against wrongful treatment.

Admission to an occupational association may be almost as necessary to a workman or professional man or broker as reinstatement after expulsion. Some trade unions drive skilled workmen out of an industry by narrow limitations of membership and high entrance fees. Medical associations refuse to take in doctors with heretical views, and greatly hamper their practice. When admission is unfairly refused to such associations, the courts might sometimes advantageously give relief if they would enjoin wrongful expulsions. They have done so, however, in very few cases, notably in suits against public schools and state universities.[96] The usual doctrine is that an association must be completely free to choose its own members.[97] The most extreme instance of this doctrine is found in two suits against the London Stock Exchange.[98] Under its rules, members are elected for only a year, and must be reëlected annually. During the war a patriotic organization started a campaign against brokers of German birth, and two of these who had long been members and had been in no way offensive were not reëlected. The rules provided for no charges of misconduct, and none were given. The English

[96] People v. Medical Soc., 32 N. Y. 187 (1865) (mandamus); Creyhon v. Board of Education, 99 Kan. 824, 163 Pac. 145 (1917) (admission of graduate of parochial school to high school; mandamus). See Note (1925) 39 A. L. R. 1019, on admission to public schools and state universities.

[97] King v. Bishop of London, 15 East 117 (1812); Mayer v. Journeymen Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492 (1890) (union); White v. Brownell, 2 Daly 329 (N. Y. 1868); see ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928) 165; SAYRE, CASES ON LABOR LAW (1922) 689n.

[98] Cassel v. Inglis, [1916] 2 Ch. 211; Weinberger v. Inglis, [1919] A. C. 606, *aff'g* [1918] 1 Ch. 517.

courts, including the House of Lords, held that none was necessary. The requirements for a valid expulsion did not apply to the rules of admission, and technically this was an election to membership, although it had all the consequences of expulsion under the practice of the New York Stock Exchange.

When an association has a strangle-hold upon an industry or occupation, internal decisions upon other questions besides expulsion and admission may be of much public concern. Thus when a trade union is contemplating a large strike, the public is definitely interested that the strike vote shall be regularly taken. However, the courts have usually refused to interfere in such internal questions,[99] and perhaps public opinion is a better method for obtaining fair proceedings.

(2) When the procedural rules of an association have the same general nature as the by-laws of a business corporation, the courts will be performing an accustomed task in construing these rules. The situation is far different, however, if the association is a secret society or a church. In that event, unless the courts feel compelled by the contract theory to construe the "agreement," however difficult, they must face the question whether they should refuse to master a new terminology and run the risk that the expulsion against which they are denying relief may, in fact, have been a violation of the rules. The injury to the member may be outweighed by the enormous amount of time and effort required for the decision of the case. For example, some courts have refused to act in controversies within secret societies because of the difficulty of learning the ritual.[100]

Unfortunately the same judicial reluctance has not been displayed in church controversies. In very many instances the courts have interfered in these, and consequently have been obliged to write very long opinions on questions which they could

[99] State v. New Orleans Funeral Directors' Ass'n, 161 La. 81, 108 So. 132 (1926) (by-law); Long v. Baltimore & Ohio R. R., 155 Md. 265, 141 Atl. 504 (1928) (administration of collective bargaining with employer); International Hod Carriers Local v. International Hod Carriers Union, 101 N. J. Eq. 474, 138 Atl. 532 (1927). *Contra:* International Union of Steam Engineers v. Owens, 119 Ohio St. 74, 162 N. E. 386 (1928) (issue of transfer card); Williams v. District Executive Board, 1 Pa. D. & C. 31 (1921), Note (1922) 7 CORN. L. Q. 261; see POUND, *op. cit. supra* note 1, at 1001.

[100] See *supra* notes 94, 95; POUND, *op. cit. supra* note 1, at 1001.

not well understand. The result has often been that the judicial review of the highest tribunal of the church is really an appeal from a learned body to an unlearned body. Even if the interpretation of a trust is concerned, the settlor might well have preferred to abide by a final decision from the theologians of his church rather than from a court which would very likely include members of entirely different faiths or no faith at all. The courts would have done well to take to heart the warning of Mr. Justice Miller in *Watson v. Jones*,[101] against engaging in the intricacies of theological disputes. Instead, they have eagerly rushed into what may be called the Dismal Swamp of obscure rules and doctrines.[102] Thus the attempted union in 1906 of the Presbyterian Church and the Cumberland Church, which was less Calvinistic and more inclined to revivals, gave rise to at least twenty-three reported decisions,[103] which fill over 250 double-column pages in the unofficial reporters. The House of Lords, in *Free Church of Scotland v. Overtoun*,[104] spent 112 pages, with arguments by counsel of 97 pages and appendices of documents occupying 41 pages, to reach a decision which was so unsatisfactory that it had to be overridden by an Act of Parliament.[105] In the course of the argument Haldane charged one of the law lords with anthropomorphism in his interpretation of predestination, and the Lord Chancellor in his opinion felt obliged to quote two passages of original Greek from the Councils of Constantinople and the Synod of Jerusalem in order to show the attitude of the Arminians. It is important to remember that if American courts follow this decision and upset the action of a church tribunal through strict construction of a religious trust, our constitutional doctrines make it impossible for legislation to correct the mistakes of the judges.

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[101] 13 Wall. 679, 733 (U. S. 1871).

[102] References are collected in POUND, *op. cit. supra* note 1, at 102n.

[103] Most of these are cited by Patton, *The Cumberland Church Cases* (1915) 64 U. OF PA. L. REV. 66. Others are Sherard v. Walton, 206 Fed. 562 (W. D. Tenn. 1913); Fussell v. Hail, 233 Ill. 73, 84 N. E. 42 (1908), *aff'g* 134 Ill. App. 620 (1907); Pleasant Grove Congregation v. Riley, 248 Ill. 604, 94 N. E. 30 (1911); Clark v. Brown, 108 S. W. 421 (Tex. Civ. App., 1908).

[104] [1904] A. C. 515. See the observations by Lord Haldane, who was counsel for the Free Church, in HALDANE, AN AUTOBIOGRAPHY (1929) 70 *et seq.*

[105] 5 EDW. VII, c. 12 (1905).

There is one church, however, with which the American courts long ago learned not to interfere. In the middle of the last century an occasional judge interpreted natural justice to mean the rule of the majority of a church congregation in its affairs, and tried to impose this congregational polity with which he was familiar upon the newly established Roman Catholic churches. Such an attitude did not long persist. The courts, often with legislative sanction, leave controversies within the Roman Catholic Church to be settled by its tribunals in accordance with canon law. This is one of the situations where the nature of the association dispenses with legal standards of natural justice. Members of this church, especially those who enter its priesthood, are fully aware of the wide control which a bishop exercises over property and churches in his diocese, and almost all of them would regard any judicial restraint upon his powers as entirely inconsistent with the underlying principles of their religion. Even the right of an excommunicated parishioner or a priest who is removed from his church to notice and a hearing must be determined by the Church itself. This judicial non-interference is not only fair to the individuals concerned, but is supported by strong reasons of policy. Dean Pound, sitting as commissioner in *Bonacum v. Harrington*,[106] said:

"The laws and decrees of the church in evidence presuppose a considerable knowledge of the canon law, and their interpretation by a court, which has no knowledge and cannot take judicial notice of that system, must necessarily be very unsatisfactory. . . . Such an endeavor, indeed, would amount to nothing less than making law for the church. . . . However much we may think that open and public proceedings and hearings upon due notice ought to be had in every investigation of every sort of charge or issue, we must remember that it is not our province to impose our views as to such matters upon religious denominations. We must not forget that ideas and methods which may seem strange to us are often older than those which, from familiarity, we are prone to think part of the order of nature, and that large bodies of men have been governed by them, and are still governed

[106] 65 Neb. 831, 91 N. W. 886 (1902). *Accord:* Bonacum v. Murphy, 71 Neb. 483, 98 N. W. 1030 (1904); Tuigg v. Sheehan, 101 Pa. 363 (1882); Furmanski v. Iwanowski, 265 Pa. 1, 108 Atl. 27 (1919). But *cf.* Church of St. Francis v. Martin, 4 Rob. 62 (1843); Church of St. Louis v. Blanc, 8 Rob. 51 (1844); O'Hara v. Stack, 90 Pa. 477 (1879); Stack v. O'Hara, 98 Pa. 213 (1881).

by them, in the internal affairs of the Roman church, without questioning their entire propriety." [107]

(3) An additional reason against any attempt at judicial control of internal affairs of a powerful body like the Roman Catholic Church, which commands the devoted adherence of its members, is the resentment such action would cause, and the small likelihood of success. The same policy has caused trade unions to be left freer in England than in this country. The English courts discovered that they had picked up a Hot Potato.

The futility and friction of state interference with an association will vary greatly with its nature and the attitude of the community toward its purposes. Some associations, like clubs, are loosely organized, and expect to operate in substantial conformity with the ordinary transactions of men in civil affairs. Judicial control is then entirely natural. Others, such as large religious groups and trade unions, are planned like an army, where implicit obedience to the decisions of a few men is essential to its purposes, and outside control becomes definitely objectionable to the members.

Private schools and colleges sometimes desire to take on such a military form, and exert autocratic powers over their students and teachers, including the right of summary dismissal. It is doubtful whether the students, parents, and teachers contemplate such authority as inherent in the nature of an educational institution. Consequently the ordinary principles of natural justice might well be applied even if the rules of the organization are expressly contrary. However, the Pennsylvania courts have declared that a college may dismiss a student suspected of theft without preferring charges and holding a trial,[108] and the New York courts have refused to set aside a dismissal of a college student without cause when this was expressly permitted by the rules.[109] Similar summary proceedings have sometimes been

[107] Bonacum v. Harrington, *supra* note 106, at 834, 91 N. W. at 887.

[108] Barker v. Bryn Mawr College, 1 Pa. D. & C. 382 (1921), *aff'd*, 278 Pa. 121, 122 Atl. 220 (1923).

[109] Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N. Y. Supp. 435 (1928), Note (1928) 62 AM. L. REV. 438, (1927) 7 B. U. L. REV. 295, (1928) 41 HARV. L. REV. 395, (1928) 26 MICH. L. REV. 931. The opinion below contains an interesting discussion of the existence of a relationship between the student and the university over and above the contract.

adopted in practice in the dismissal of teachers, whose contracts with the institution are usually very informal. It is easy to understand how educational authorities believe that they will secure efficiency and desired standards through the possession of absolute powers. However, an institution which professes to prepare youth for life in a democracy might wisely give them an example of fair play when it is conducting its own affairs.

Even if an association desires to operate like an army, the state may not sanction this wish, especially if the association exhibits the natural propensity of armies to invade the territory of others. The state's decision for or against interference with a rigid internal control will depend on the value which the community sets on the purposes of the association and the frequency of its conflicts with the different purpose of other groups or of the state itself. Furthermore, the state, like the association, may have enlarged conceptions of its own functions, and the result may be disastrous. The efforts of the English government to run the trade unions ended in their creating the Labor party and taking over the government. Conflicts between the state and powerful organizations are bound to arise, and it may be wiser to demarcate their respective functions by treaty negotiations than by litigation, in which the state necessarily acts as judge in its own cause.

(4) The value of autonomy is a final reason which may incline the courts to leave associations alone. The health of society will usually be promoted if the groups within it which serve the industrial, mental, and spiritual needs of citizens are genuinely alive. Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. A due regard for the corresponding interests of others is desirable, but must be somewhat enforced by public opinion. Legal supervision must often be withheld for fear that it may do more harm than good. This principle of freedom and growth is easily overlooked by judges. They are apt to regard the documents with which the association starts its existence with the same strictness as if they were private contracts or trusts. Doctrines appropriate to such short-lived transactions are wholly unsuited to the enduring church or university. The consequence of this judicial interference is, that if these origi-

nal documents lack workable provisions for their own alteration, then the association is denied the power to adapt itself to inevitable changes in its environment. Phrases are held more important than purpose. No matter how undesirable the antique provisions have become with the lapse of many years, they must be strictly observed until their total impossibility permits a *cy près* interpretation.[110] Thus a club which neglected to insert any clause for amendment in its original by-laws was prevented under the contract theory from raising its dues long afterwards, except by unanimous consent.[111] When the Free Church of Scotland appealed for funds in 1843, the words then used were held by the House of Lords in 1904 to constitute an unchangeable trust, under which all its vast funds were awarded to a handful of clergymen who had resisted the decision of the great majority of the Kirk to wipe out petty denominational divisions. In opposition to such a decision is the argument of Haldane:

"... so long as it retained its identity as a Church, the fundamental principle of which was the Headship of Christ, it could adopt or modify or change its doctrines. ... The test of personal identity of the Free Church lies not in doctrine, but in its life — in the continuity of its life." [112]

The same principle was eloquently declared by Lord Macnaghten:

"Was the Free Church by the very condition of her existence forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?" [113]

The same freedom is desirable for schools and colleges. Even if they are owned and supported by the state, it would do well to treat them as partially independent bodies, with much the same control over their educational purposes as that enjoyed by private educational institutions. The courts, like the legislatures.

[110] Scott, *supra* note 10, at 653; Scott, *Education and the Dead Hand* (1920) 34 HARV. L. REV. 1.

[111] Harington v. Sendall, [1903] 1 Ch. 921.

[112] Free Church of Scotland v. Overtoun, [1904] A. C. 515, 609.

[113] *Ibid.* at 631.

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[115] Zimmern, *Politica*
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can hardly profess to be better qualified to decide how teaching shall be carried on than are the teachers and their administrative associates. At this point administrative law obviously overlaps the law of associations, and the scope of judicial review of the acts of educational officials becomes a doubly complex problem,[114] with the additional difficulty that teachers and students may by wise usage acquire privileges which are respected within the institution although they have no legal sanction.

Such are the four policies which may influence the exercise of jurisdiction over associations. The weight which should be given to each policy will vary greatly with the opinion of the place and time and the attitude of a particular judge. At bottom the problem of the relation between member and association is only one form of the much broader issue of the relation between the state and the associations in its territory.

Thus the petty altercations of Colonel Dawkins have brought us eventually face to face with one of the few fundamental problems of political science. Our reaction toward any particular dispute in a club or trade union or church or college is almost sure to be influenced by our inclination toward one side or the other in this undying controversy. We shall be a bit more favorable to judicial intervention if we believe that the state is the sole ruler of all that goes on within its borders, and is the necessary safeguard of the individual against the closely pressed tyranny of associations.[115] We shall be more doubtful of the probable wisdom of state participation in the affairs of such a group if we are accustomed to think of the state itself as just one more kind of association, which, like the others, should keep to its own functions, and which must be judged according to the value and efficiency of the services it renders us in return for rather high annual dues.

Zechariah Chafee, Jr.

HARVARD LAW SCHOOL.

[114] See POUND, *op. cit. supra*, note 1, at 108n., 109n. Especially interesting problems are presented by Note (1926) 11 CORN. L. Q. 266, as to the powers of educational authorities to discipline a student for acts performed outside school hours and school property; and see Nutt v. Board of Education, 278 Pac. 1065 (Kan. 1929), with dissent, granting mandamus to a girl excluded by administrative action from high school because she had married and become a mother.

[115] Zimmern, *Political Thought*, in LIVINGSTONE, THE LEGACY OF GREECE (1922) 348. See also *On Corporate Bodies*, in HAZLITT, TABLE TALK (1822).