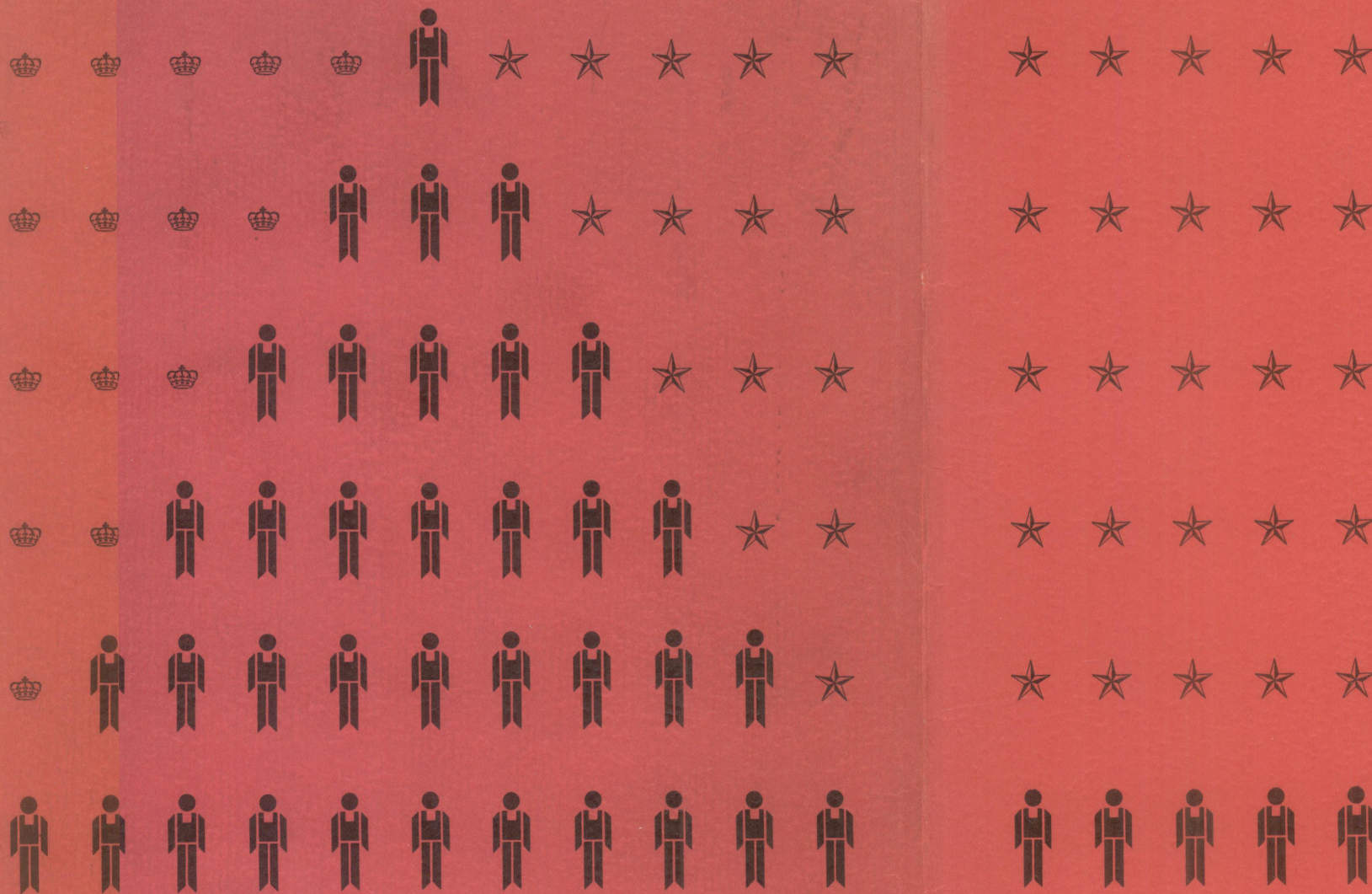


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# UNION GOVERNMENT & THE LAW:

BRITISH AND AMERICAN EXPERIENCES

by Joseph R. Grodin

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*British and American Experiences*

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By Joseph R. Grodin.

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## Foreword

The Institute of Industrial Relations is pleased to offer *Union Government and the Law: British and American Experiences* as the eighth in its Monograph Series.

Labor unions, because of the growth of their economic and political power, have become increasingly subject to legal control over their internal affairs. The state is more inclined than in the past to intervene in disputes between the organization and its members. This trend is evident both in Britain and in America, but there remain at the same time marked differences between the two nations. Both the tendency and the contrasts are the subject of the present volume.

Joseph R. Grodin is particularly fitted to describe and analyze these experiences. He did undergraduate work at the University of California, Berkeley, holds a law degree from the Yale Law School, and received the Ph.D. from the London School of Economics, University of London. He presently practices law in San Francisco.

The Institute of Industrial Relations is grateful to the Trade Union Study of the Center for the Study of Democratic Institutions for a grant to assist in underwriting the publication of this monograph. The author wishes to thank Justice Mathew O. Tobriner for inspiration and encouragement, Professor Otto Kahn-Freund for guidance, and the writer's wife, Janet Grodin, for patience. The Institute reading committee for the manuscript consisted of Charles K. Hackler, Esq., of Los Angeles, Professor Edgar A. Jones, Jr., of the School of Law, University of California, Los Angeles, and the undersigned. Mrs. Anne P. Cook edited the manuscript. The cover was designed by Marvin Rubin.

The viewpoint expressed is that of the author and is not necessarily that of the Institute of Industrial Relations or of the University of California.

BENJAMIN AARON, *Director*  
*Institute of Industrial Relations*  
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## Chapter I

### Introduction

To what extent and in what manner the law ought to intervene in the internal affairs of trade unions is a question which, particularly within the last decade, has commanded increasing attention from legal scholars and the public at large in both Great Britain and the United States.<sup>1</sup> Partly because the union's function in the economic picture of both countries has become relatively institutionalized, and partly because this has itself rendered more acute the problem of power exercised by the union over the individual worker, the focus of labor law has tended to shift from the union-employer relationship to the relationship between unions and the workers they represent. Discussion of internal union democracy, the admission and discipline of members, the duties of a union and its officers toward members and nonmembers, the protection of union funds—these issues and others like them have assumed at least equal importance with the more traditional problems of industrial relations and collective bargaining. Recent passage of legislation in the United States regulating quite extensively the internal affairs of unions in this country bears witness to the practical significance of such discussion.<sup>2</sup>

It is the purpose of this study to compare the statutory and common law of Britain and America bearing upon the union-worker relationship as it affects intra-union government. The problems posed by that relationship are somewhat different in the two countries; and variance in social and legal contexts has determined and will almost certainly in the future determine different answers. But the underlying issue—

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<sup>1</sup> Most of the writings on the British law and practice are cited throughout this study. The volume of American writing is so great that only the more important works can be referred to. A fairly exhaustive bibliography of both legal and nonlegal material is contained in *SELECTED READINGS ON GOVERNMENT REGULATION OF INTERNAL UNION AFFAIRS*, published by the Subcommittee on Labor, U.S. Senate Committee on Labor and Public Welfare (1958).

<sup>2</sup> Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 STAT. 519, hereafter cited as LMRDA. There has been some discussion of "reform" legislation in Britain as well. See *A Giant's Strength: Some Thoughts on the Constitutional and Legal Position of Trade Unions in England*, by The Inns of Court Conservative and Unionist Society, reprinted in 7 J. PUB. L. 223 (1958). Cf. Grunfeld, *Trade Unions and the Individual*, *id.* at 284.

the proper balance between state protection of individual interests vis à vis the union, on the one hand, and preservation of a reasonable degree of autonomy for the union, on the other—is basically the same. And the fact that the issue arises within a similar democratic and common-law background in the two countries renders a comparative approach meaningful.

The comparison undertaken here reveals one basic similarity and one basic difference in the approach of Britain and America toward the problem at hand. The similarity lies in the fact that the law of both countries has gradually moved from a hands-off position toward a greater degree of control over the union-worker relationship; the difference, in the fact that, subject to some exceptions, this movement has been much more pronounced and more rapid in the United States than in Britain. To provide a context for detailed discussion of this comparison in later chapters, it will be helpful to suggest some of the reasons for the common trend and for the relative position of the two countries.

### THE COMMON TREND TOWARD GREATER CONTROL

The courts and legislatures of both Britain and America have traditionally been reluctant to interfere in the internal affairs of unions. Part of this reluctance can be traced to the nineteenth-century view of the union as an illegal or semilegal conspiracy, the objectives of which were regarded as contrary to public policy, at first because they interfered with government control of wages and employment,<sup>3</sup> and later because they interfered with the “free market.”<sup>4</sup> This view, which tended to place unions “outside the law,” was expressed in Britain through the common-law rule that union rules were unenforceable because they were in “restraint of trade.”<sup>5</sup>

In large measure, however, the policy of noninterference in intra-union affairs sprang from a conceptual assimilation of trade unions with other so-called “voluntary” unincorporated associations, such as the social club, the friendly society, and the church, the internal workings of which were traditionally free from judicial intervention. In a classic article on this subject, Professor Zachariah Chafee analyzed the policies, seldom articulate, which lay behind this judicial attitude.<sup>6</sup> He pointed to the “Dismal Swamp” policy, according to which courts felt themselves on unfirm ground in dealing with the frequently esoteric

<sup>3</sup> HEDGES & WINTERBOTTOM, *LEGAL HISTORY OF TRADE UNIONISM* 11–19 (1930).

<sup>4</sup> *Id.* at 52–55.

<sup>5</sup> See chap. 2 *infra*.

<sup>6</sup> *Internal Affairs of Associations Not for Profit*, 43 *HARV. L. REV.* 993 (1930).



affairs of secret societies and religious groups; the "Hot Potato" policy, which constituted a recognition by courts of the serious political problems which interference with some organizations might raise; and the "Living Tree" policy, which emphasized the necessity of autonomy for "voluntary" organizations whose continued growth was desired, and the potential danger to that growth posed by judicial interference.<sup>7</sup> To this list of judicial attitudes compiled by Professor Chafee might be added the "Worthless Weed" policy, according to which courts were reluctant to recognize purely social, nonpecuniary interests as worthy of equitable protection; and the closely related "Shrinking Violet" policy, which emphasized the ineffectiveness of legal intervention in matters not directly involving tangible "property."<sup>8</sup> These various policies received doctrinal expression in a number of forms, including the British Friendly Society<sup>9</sup> and Trade Union Acts,<sup>10</sup> the American requirement of exhaustion of intra-union remedies,<sup>11</sup> an insistence upon "property rights" as a condition to equitable relief,<sup>12</sup> and the procedural and other difficulties which courts found inherent in the status of most nonprofit organizations as unincorporated associations.<sup>13</sup>

The last half-century has witnessed some change in attitude toward the role of the law in intra-association affairs in general. For one thing, the courts of both countries have displayed an increasing willingness to protect interests of no direct pecuniary value, such as interests in reputation.<sup>14</sup> For another, the political atmosphere in both countries has tended to support a greater degree of state responsibility for protection of individuals against institutional power.<sup>15</sup> But while the increased tendency to interfere in the internal affairs of trade unions has been due in part to these general changes, a more significant cause lay in the gradual recognition of the differences between trade unions and most other forms of nonprofit associations.

The modern trade union exercises a power over the lives of individual workers much more pervasive than that exercised by most other

<sup>7</sup> In addition to the policies opposed to judicial intervention, Chafee discussed the argument for judicial control under the heading of the "strangle-hold" policy, i.e., the strangle hold which some associations have upon their members through control of an occupation or property. *Id.* at 1002.

<sup>8</sup> See chap. 4 *infra* (discussion of property rights as basis for legal intervention).

<sup>9</sup> 18 & 19 Vict. c. 63 (1855) and related acts. See chap. 2 *infra*.

<sup>10</sup> 34 & 35 Vict. c. 31 (1871). See chap. 2 *infra*.

<sup>11</sup> See chap. 3 *infra*.

<sup>12</sup> See chap. 4 *infra*.

<sup>13</sup> See chap. 4 *infra*.

<sup>14</sup> See chap. 4 *infra*. For examination of the trend and collection of cases, see Annotation, *Jurisdiction of Equity to Protect Personal Rights*, 175 A.L.R. 438 (1948).

<sup>15</sup> See, e.g., FRIEDMANN, *LAW IN A CHANGING SOCIETY* c. 10 (1959); Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629 (1943).

nonprofit associations over their members.<sup>16</sup> While it performs many of the functions of the social club, the friendly society, and, at least in Britain, the political organization, its control over the industrial environment is almost legislative in nature. Through collective bargaining and the settlement of grievances, the union effectively determines the economic existence of members and nonmembers alike. Moreover, unlike the situation with most clubs and friendly societies, there is often only one union to which a worker in a particular industry or with a particular employer may belong or look to for representation. The union is frequently able to eliminate the element of voluntarism present in most other associations by making union membership a condition of employment. Finally, the power of the union in the economy, and its consequent ability to affect the general public, when coupled with the recognition and legal status granted in both countries to the union as an institution, makes its internal functioning to a considerably greater extent a legitimate matter of public concern.

Public awareness of these differences between unions and other associations, and of the factors in favor of intervention, has increased as the union's relations with employers have become more stabilized. This is true not only because the union's "external" relations may require less attention, but also because the stabilizing process itself accentuates the need for internal control.

It is a common phenomenon within organizations which seek social change that as they grow in size and power and begin to achieve their goals, their internal mechanisms tend to become crusted and their leadership oligarchic. An aura of status surrounds the leaders and provides an incentive for them to maintain themselves in their positions of power. Their ability to do so is enhanced by the typically bureaucratic nature of large-scale organization, and by their near-monopoly of political skills and technical expertise. It is aided also by a growing apathy on the part of the membership, engendered in part by a shift in emphasis from broad, idealistic programs to narrower, more technical adaptations of policy to concrete problems. Robert Michels has called this process the "iron law of oligarchy."<sup>17</sup>

This phenomenon is easily observable in some trade unions. With the achievement of an established bargaining relationship, the leader-

<sup>16</sup> That the nature, extent, and sources of this power are different in the two countries is, of course, an important factor. See pp. 6-11 *infra*, where this matter is discussed in more detail.

<sup>17</sup> MICHELS, *POLITICAL PARTIES* (1919). For examination and qualification of Michels' thesis, see LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* (1956) (suggesting that the iron law may be malleable to the extent that opposition groups flourish within the organization).

ship tends to maintain itself in control, the membership to become apathetic, and the entire program of the organization to be focused on day-to-day relationships.<sup>18</sup> This process is accentuated as collective bargaining becomes more technical and more centralized.<sup>19</sup> Such changes are not only destructive of internal democracy, but tend also to lead to possible misuse of power by union officers.<sup>20</sup> The revelation of such changes within unions has been another factor in spurring the trend toward greater control.

This is not to say that the policies of noninterference developed in the case of other nonprofit associations have no application to the union. Clearly the "Worthless Weed" policy has little application: the interests of the worker in union membership and the incidents thereof are certainly substantial enough to warrant legal protection.<sup>21</sup> But few political subjects represent more of a "Hot Potato" than the regulation of intra-union affairs.<sup>22</sup> More significantly from a public point of view, the internal operations of a union may well be a "Dismal Swamp" to judges and legislators of middle-class background, and to that extent the law should proceed with caution. To the same end, the "Living Tree" policy remains of great importance. Although the unions cannot justifiably claim immunity from legal control, the law should resist the temptation offered by occasional wrongdoing on the part of unions and their officials to intervene in such a fashion as to restrict unions in their external policies or seriously to weaken the union's ultimate responsibility for conducting its own affairs.<sup>23</sup> In striking this balance

<sup>18</sup> For an excellent study of apathy and oligarchy in one large British union, see GOLDSTEIN, *THE GOVERNMENT OF BRITISH TRADE UNIONS* (1952). Statistics relating to membership participation in a number of British unions are collected and analyzed in ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 99 ff. (1955).

Among the American studies on the subject, see LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* (1956); TAFT, *STRUCTURE AND GOVERNMENT OF TRADE UNIONS* (1954); TANNENBAUM & KAHN, *PARTICIPATION IN UNION LOCALS* (1958); Coleman, *The Compulsive Pressures of Democracy in Unionism*, 41 AM. J. SOC. 519 (1956); Seidman, *Democracy in Labor Unions*, 41 J. POL. ECON. 221 (1953); Strauss, *Control by the Membership in Building Trades Unions*, 41 AM. J. SOC. 527 (1956).

The commentators do not agree as to whether membership participation in meetings and elections and political opposition are essential for union democracy. Compare LIPSET, TROW & COLEMAN, *op. cit. supra*, with ALLEN, *POWER IN TRADE UNIONS* (1954).

<sup>19</sup> KERR, *UNIONS AND UNION LEADERS OF THEIR OWN CHOOSING* (The Fund for the Republic, 1958).

<sup>20</sup> See First and Second Interim Reports (Nos. 1417 and 621) of the Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate (1958, 1959).

<sup>21</sup> See chap. 4 *infra*.

<sup>22</sup> Witness, for example, the battle over passage of the LMRDA in the United States.

<sup>23</sup> See Summers, *The Role of Legislation in Internal Union Affairs*, 10 LAB. L.J. 155 (1959). The "Living Tree" policy is more than a matter of concern for unions as institutions. The public may well have a direct interest, for example, in insuring that unions have sufficient control over their own members to prevent costly wildcat strikes.

of interests, moreover, the law must take into consideration its own limitations. While it cannot afford to be a "Shrinking Violet," there are some things it simply cannot do. It probably cannot, for example, do much to cure the apathy and lack of participation on the part of union members which in large measure accounts for the allegations that unions are not "democratic."

It will remain for subsequent chapters to consider how well the scales of justice have balanced. It is a fact, at any rate, that consideration of these cautions has not prevented the courts, and in the United States even the legislatures, from going far beyond the boundaries set by the earlier restraints on legal intervention. The various statutory and common-law doctrines which formerly expressed a policy of noninterference in intra-union affairs have been limited in their application; and both British and American courts have regulated fairly extensively in the fields of union discipline, handling of union funds and property, and union governmental procedure. It is likewise a fact, however, that American courts and legislatures have, with few exceptions, gone much further in that direction; and we turn now to a consideration of the possible reasons for this difference.

#### THE RELATIVE POSITIONS OF GREAT BRITAIN AND AMERICA

The reasons for the comparatively greater intrusion of American law into the internal affairs of unions are undoubtedly complex and various, but several factors stand out as of special interest.

One reason is that the need for intervention appears to be greater in America than in Britain. Perhaps British trade unionism has outgrown its period of scandals;<sup>24</sup> or perhaps the American brand of "business unionism," with its emphasis on day-to-day material betterment, has less built-in protection against wrongdoing.<sup>25</sup> Whatever the reason, Britain has not been plagued, or at least not since the last century, with the sorts of deliberate abuses of union power which have come to the surface from time to time within the American labor movement, and which have been the subject of recent disclosures.<sup>26</sup>

<sup>24</sup> On the period of the "Sheffield outrage," see WEBB, *HISTORY OF TRADE UNIONISM* 259 ff. (rev. ed. 1920).

<sup>25</sup> "... business unionism, as a set of ideas justifying the narrowest definitions of a union's role in society... helps to legitimate one-party oligarchy, for it implies that union leadership is simply the administration of an organization with defined, undebatable goals: the maximization of the member's income and general welfare. The more narrowly an organization defines its functions as fulfilling limited and specific needs, the narrower the range there is for controversy [and therefore the weaker the impetus to involvement]." LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* 406 (1956).

<sup>26</sup> ROBERTS, *UNIONS IN AMERICA: A BRITISH VIEW* (1959).



A second reason is that British law, and particularly judge-made law, generally changes more slowly in response to changing conditions than the American. American judges, steeped in a pragmatic culture, traditionally have less regard for the doctrine of *stare decisis* than do their British counterparts. It is to be expected, therefore, that American judges would be quicker to adapt the law to the changing nature of trade unions.

Closely related to the differences in response to change is the fact that the British put less faith in the efficacy of legal controls than do the Americans. Despite the seemingly greater degree of centralization of governmental power in Britain, the feeling of *laissez faire* is in some ways stronger there than in America.<sup>27</sup> Perhaps because of their comparative homogeneity and established traditions, the British are much more likely to trust to the operation of purely social norms and sanctions where the Americans would turn to the law.<sup>28</sup> As a corollary, the British tend to attach more importance to the "voluntary" nature of associations than do the Americans, and to adhere more strongly to the pluralist position that private associations should, so far as possible, be independent of both state support and state control.<sup>29</sup>

In many ways most important from the standpoint of legal comparison is the fact that the British trade union, though certainly far from a social club, can nevertheless lay greater claim to being a "private" association than its opposite number in America. The American union is subject to considerably more governmental restrictions on its external affairs,<sup>30</sup> and at the same time receives considerably more governmental support. In many ways it may be dependent on the state for its "existence"—not merely because the state permits it to exist, but because the state actively encourages its functions. Consider, for example, a typical American industrial union subject to the Labor Management Relations Act, 1947 (Taft-Hartley Act).<sup>31</sup> In its early stages of organization, it may call upon the National Labor Relations Board to protect it against

<sup>27</sup> For a penetrating study of the place of *laissez faire* in contemporary British society, see LAW AND PUBLIC OPINION IN THE TWENTIETH CENTURY (Ginsberg ed. 1959).

<sup>28</sup> This seems to be the case, for example, in the field of company law. See Gower, *Some Contrasts between British and American Corporation Law*, 69 HARV. L. REV. 1369 (1956).

<sup>29</sup> See, e.g., LASKI, *THE FOUNDATIONS OF SOVEREIGNTY* (1921); MILNE-BAILEY, *TRADE UNIONS AND THE STATE* (1934).

<sup>30</sup> See Teller, *British versus American Labor Law and Practices: A Study in Contrasts*, A.B.A. Section of Labor Relations Law 19 (1957); Kahn-Freund, *English Labor Law and Collective Bargaining*, *id.* at 42. See also supplements by Kahn-Freund in SMITH, *LABOR LAW: CASES AND MATERIALS* (1950). The LMRDA adds still further external limitations.

<sup>31</sup> 61 Stat. 136, 29 U.S.C. § 141. (Title I of the Taft-Hartley Act amends the National Labor Relations Act, hereafter cited as NLRA.) The situation is substantially the same for unions covered by the Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 151.

unfair labor practices on the part of employers which tend to interfere with the rights of employees to join the union and to engage in concerted activities.<sup>32</sup> Later, it may call upon the Board to conduct an election among employees in a unit found by the Board to be appropriate for purposes of collective bargaining. If it wins the election, the union will be certified by the Board as bargaining representative for all employees within the unit.<sup>33</sup> Whether certified or not, if the union has in fact been designated by a majority of employees within an appropriate unit to act as their bargaining representative, the employer is required to bargain in good faith with that union as *exclusive* representative of *all* employees within the unit, whether members of the union or not.<sup>34</sup> The subjects upon which each side must bargain in good faith are to a considerable extent regulated by law.<sup>35</sup> The collective bargaining agreement, when reached, has binding legal effect,<sup>36</sup> and no individual employee can contract out of its terms.<sup>37</sup> With the sanction of federal law (subject to the laws of those states which prohibit union-security agreements<sup>38</sup>) the contract may require union membership as a condition of continued employment,<sup>39</sup> and it most frequently does.<sup>40</sup> During the existence of the agreement, the union typically acts as exclusive representative of all employees with respect to the manner of its administration.<sup>41</sup> The American union thus acts as a sort of industrial legislative body with the active concurrence and support of the state.

In Britain, on the other hand, unions with few exceptions have sought and obtained from the state only independence from legal control.<sup>42</sup>

<sup>32</sup> NLRA, as amended, §§ 7 and 8.

<sup>33</sup> § 9(c).

<sup>34</sup> §§ 8(a)(5) and 9(a). Unions have a corresponding obligation to bargain. § 8(b)(3).

<sup>35</sup> § 8(d).

<sup>36</sup> Taft-Hartley Act, § 301.

<sup>37</sup> *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (individual contract ineffective as bar to collective bargaining); *Order of Railroad Telegraphers v. Railway Express*, 321 U.S. 342 (1944) (individual contract ineffective as waiver of prospective benefits).

<sup>38</sup> See Katz, *Two Decades of State Labor Legislation: 1937-1958*, 25 U. CHI. L. REV. 109 (1957). Such laws are expressly permitted by section 14(b) of the amended NLRA.

<sup>39</sup> NLRA, as amended, § 8(a)(3).

<sup>40</sup> In 1954, two thirds of the 1,716 contracts studied by the U.S. Bureau of Labor Statistics contained union-shop provisions. Theodore, *Union Security Provisions in Agreements*, 78 MONTHLY LAB. REV. 649 (1955).

<sup>41</sup> For discussion of the employer's duty to bargain during the life of an agreement, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958). For discussion of the union's exclusive agency in the handling of grievances, see Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

<sup>42</sup> For an excellent discussion of the "collective laissez-faire" position of British unions and British law during the twentieth century, see Kahn-Freund, *Labour Law*, in *LAW AND PUBLIC OPINION IN THE TWENTIETH CENTURY* (Ginsberg ed. 1959). One of the few instances in which British unions sought affirmative legal enactment in the last century with respect to their own affairs was the Trade Union Act, 1871, and there the unions sought only to remove the stigma and effects of common-law illegality. See chap. 2 *infra*.

True, they have in recent years obtained representation on a variety of advisory committees to governmental agencies,<sup>48</sup> but even that degree of governmental recognition assumes the existence of the union as a going institution, and does not constitute the sort of affirmative assistance which unions have received in the United States; it is, in effect, the institutionalization of autonomy. British unions remain relatively free of legal control over their external affairs. They cannot be sued in tort,<sup>49</sup> and statutory regulation is almost nonexistent.<sup>50</sup> More significantly, except in the case of nationalized industries<sup>51</sup> no law requires a British employer to bargain with a union; and, unless he has a government contract,<sup>52</sup> no law prevents him from discriminating against union activists.<sup>53</sup> No governmental agency determines the right of a union to represent employees, or the unit appropriate for representation.<sup>54</sup> Indeed, a British union seldom seeks to "represent," in the American sense, employees other than its own members, either in negotiating or in presenting grievances.<sup>55</sup> The collective agreement that results from negotiations may in practice prevail throughout an industry,<sup>56</sup> and it has the legal effect of supplying by implication the terms and conditions of employment where not otherwise specified by the individual contract of employment.<sup>57</sup> Moreover, the agreement may acquire indirect legislative effect in a variety of ways. The Minister of Labour, upon recommendation of a tripartite committee, is empowered to issue wage regulation orders in cases where collective bargaining is or may prove to be nonexistent or inadequate,<sup>58</sup> and to that end he may use collective bargaining rates in effect for part of an industry as the basis for a

<sup>48</sup> E.g., the National Insurance Advisory Committee and various local advisory committees under the National Insurance Act, 1946, §§ 41, 42.

<sup>49</sup> Trade Disputes Act, 1906.

<sup>50</sup> See generally Kahn-Freund, *Legal Framework*, in *INDUSTRIAL RELATIONS IN GREAT BRITAIN* 101-127 (Flanders & Clegg eds. 1954).

<sup>51</sup> Public corporations administering nationalized industries are typically required by statute to consult with unions with a view to establishing machinery for collective bargaining. E.g., Transport Act, 1947, § 195.

<sup>52</sup> See the Fair Wages Resolution of the House of Commons, 1946 (427 HANSARD 628), prohibiting the award of government contracts to employers who do not permit their employees to join a union.

<sup>53</sup> Compare parliamentary policy as expressed in ratification of the International Labor Code (1951), arts. 71 *et seq.*, declaring the right of workers to join unions without employer interference.

<sup>54</sup> The closest British law comes to governmental determination of the "appropriate unit" question is the decision by an administrative agency as to the proper unit for application of minimum-wage determinations.

<sup>55</sup> Unions frequently bargain jointly with a single employer. See Flanders, *Collective Bargaining*, in *INDUSTRIAL RELATIONS IN GREAT BRITAIN* (Flanders & Clegg eds. 1954).

<sup>56</sup> For discussion of British practice of industry-wide bargaining, see Flanders, *id.* at 288-291.

<sup>57</sup> Kahn-Freund, *supra* note 45, at 58-60.

<sup>58</sup> Wages Councils Acts of 1945 (8 & 9 Geo. 6, c. 17) and 1948 (11 & 12 Geo. 6, c. 47).

minimum wage covering the industry as a whole.<sup>54</sup> Government contracts are required to contain provision for the payment of rates and conditions established through collective bargaining or arbitration.<sup>55</sup> Under a very recent Act, if an employer refuses to observe "recognized" terms and conditions of employment (whether or not he is a party to an agreement) the matter may go to the Industrial Court for arbitration.<sup>56</sup> But the agreement itself is probably not enforceable in the courts,<sup>57</sup> and individual employers and employees may probably contract out of its terms.<sup>58</sup> Seldom will the collective agreement by its terms require union membership as a condition of employment,<sup>59</sup> and although compulsory unionism may be enforced through informal pressures,<sup>60</sup> it is often membership in *a* union rather than in a particular union which is enforced.<sup>61</sup> Thus, though British unions may be as powerful as the American in their control over the industrial situation, their power is exercised in a far less formal fashion; and to the extent that their power owes anything to the state, it is primarily because the state has refrained from regulating unions rather than because of any affirmative governmental support.

This difference in the institutional framework of the two countries is probably accentuated by differences in their forms of government. If the union were to be regarded by British courts as quasi-governmental bodies, it would not follow conceptually that courts should impose extensive restrictions on their internal affairs. True, to the extent that British courts adopted the analogy of administrative tribunals, they might impose, and indeed have imposed, certain minimal requirements of fair notice and hearing in disciplinary proceedings, and a degree of

<sup>54</sup> See Flanders, *supra* note 50, at 288.

<sup>55</sup> Fair Wages Resolution of the House of Commons, 1946 (427 HANSARD 628). See Kahn-Freund, *supra* note 45, at 75-83.

<sup>56</sup> Terms and Conditions of Employment Act, 1959. The matter must first go before the Minister of Labour. See discussion by Kahn-Freund at 22 MODERN L. REV. 408 (1959).

<sup>57</sup> Kahn-Freund, *supra* note 45, at 56-58. Significantly, there has been no litigation on the question.

<sup>58</sup> *Cf.* Hulland v. Saunders, [1945] K.B. 78. See discussion by Kahn-Freund, *supra* note 56, at 410.

<sup>59</sup> Apparently no reliable estimate of the number of workers covered by union security agreements has been made. ROBERTS, TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN 42 (1955).

<sup>60</sup> See Bell, *Trade Unions*, in INDUSTRIAL RELATIONS IN GREAT BRITAIN 173-174 (Flanders & Clegg eds. 1954). Again, no data as to the number of workers compelled to join by informal pressures are available. ROBERTS, *op. cit. supra* note 59, at 42.

<sup>61</sup> Bell, *supra* note 60, at 171-172. The worker's choice among unions is becoming increasingly limited, however, by interunion cooperation in defining jurisdictional boundaries under the so-called "Bridlington Agreement." See ROBERTS, *op. cit. supra* note 59, at 51 ff.



judicial review of such proceedings.<sup>62</sup> But to the extent that unions engage in legislative functions, British courts, by analogy to the doctrine of parliamentary supremacy, would refrain from invalidation of union rules.<sup>63</sup> In other words, in Britain the notion of sovereignty tends to suggest freedom from judicial limitations.

The United States, on the other hand, has a written constitution which contains specific limitations on governmental power. More important, that constitution creates a separation of powers between administrative, legislative, and judicial branches which grants to the Supreme Court the power to declare legislative acts invalid.<sup>64</sup> Furthermore, the United States constitutes a federal system in which sovereignty is divided. While the states are supreme within certain fields, they are subject to federal control in others; and in particular they are subject to the supervision of the United States Supreme Court with respect to rights guaranteed by the federal constitution.<sup>65</sup> Therefore, it is conceptually easier for an American court to grant to unions a measure of sovereignty and at the same time, recognizing them as quasi-governmental bodies, to apply to them the notions of due process of law and equal protection of the laws established by the constitution. As we shall see in later chapters, the application to unions of constitutional principles by American courts accounts in large measure for the differences between the approach of the two countries toward regulation of internal union affairs.

The next two chapters are devoted to discussion of two major expressions of judicial reluctance to intervene in internal union affairs: the doctrine of the illegality of trade unions in Britain, and the doctrine of exhaustion of intra-union remedies in the United States. Chapter 4 discusses the theoretical bases for judicial intervention in both countries. In chapters 5, 6, and 7 we shall explore the substantive law of intervention relating to union discipline, union finances, and union democracy.

This study is not intended as an exhaustive treatise on the subject of legal regulation of union government. Indeed, the vast amount of American litigation on the subject precludes that possibility. Rather

<sup>62</sup> See chap. 4 *infra*. This analogy is thoroughly explored in ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* c. 4 (3d ed. 1951). But even with respect to notice and hearing, the British administrative analogy does not supply as rigorous safeguards as in America. See De Smith, *The Right to a Hearing in English Administrative Law*, 68 HARV. L. REV. 569 (1955).

<sup>63</sup> DICEY, *THE LAW OF THE CONSTITUTION* 37 ff. (8th ed. 1927).

<sup>64</sup> *Marbury v. Madison*, 1 Cranch. 137 (1803).

<sup>65</sup> In the context of this study, the most significant limitation upon state action is the Fourteenth Amendment's requirement of due process and equal protection of the laws. See chap. 7 *infra*.

it is intended as a comparison of the highlights of the American and British law, sufficient for the purpose of understanding in a general way where the law on this subject has been in the two countries and where it is going.

## Chapter 2

### The Union as an Illegal Association

It is ironic that in the twentieth century unions should be in the position of relying upon their illegality at early common law as a defense to actions brought against them by members, but such is the situation in Britain.<sup>1</sup> Prior to the Trade Union Act of 1871<sup>2</sup> it was generally believed that union rules were unenforceable in the courts because they formed part of a contract in restraint of trade.<sup>3</sup> British unions objected to the restraint-of-trade doctrine for a variety of reasons, and sought its modification.<sup>4</sup> But insofar as that doctrine may have protected them from suits by members based upon union rules, they heartily approved.<sup>5</sup> As to enforcement of union rules against members, unions were quite willing to rely upon internal sanctions, particularly if enforceability in court meant subjection to internal regulation.<sup>6</sup> Those hostile to unions did not wish to see them able to enforce their

<sup>1</sup> On this subject generally see CITRINE, *TRADE UNION LAW* c. 4 (1950); HEDGES & WINTERBOTTOM, *LEGAL HISTORY OF TRADE UNIONISM* (1930); WEBB, *HISTORY OF TRADE UNIONISM* c. 5 (rev. ed. 1920); BARATIER, *L'AUTONOMIE SYNDICALE DEVANT LES COURS ANGLAIS* (1928); and Kahn-Freund, *The Illegality of a Trade Union*, 7 *MODERN L. REV.* 192 (1944).

<sup>2</sup> 34 & 35 Vict. c. 31, hereafter sometimes referred to as the 1871 Act.

<sup>3</sup> See ELEVENTH AND FINAL REPORT OF THE ROYAL COMMISSIONERS APPOINTED TO INQUIRE INTO THE ORGANIZATION AND RULES OF TRADE UNIONS AND OTHER ASSOCIATIONS (1869), hereafter called Commissioners' Report; and Erle, *Memorandum on the Law Relating to Trade Unions*, incorporated in the Commissioners' Report at lxxvi.

<sup>4</sup> See HEDGES & WINTERBOTTOM, *op. cit. supra* note 1, at 55; WEBB, *op. cit. supra* note 1, at 255-257.

<sup>5</sup> Indeed, it was for this reason that the friends of trade unions advised them against seeking complete legalization. WEBB, *op. cit. supra* note 1, at 270-271.

<sup>6</sup> The Minority Report of the Royal Commission on Trade Unions, 1869, drafted by Frederic Harrison, reads in part: "A proposal has recently been put forward to enable the unions to recover at law contributions and fines from their members. It is significant that this suggestion comes not from the competent representatives of the societies, who distinctly disclaim this object, but from others outside their pale. . . . The enforcing of these contracts would require, as a preliminary step, what exists in the case of trading companies and the like, a complex and definite machinery to which the societies must conform, in other words, a complete law regulating the whole life of the union. . . . But the condition upon which alone the public would give the full aid of the law to the unions would be such as few unions would accept." Commissioners' Report, at lx, quoted with approval by the Home Secretary, Mr. Bruce, introducing into Commons the bill which became the 1871 Act. 204 HANSARD 266.

trade rules against members by legal action,<sup>7</sup> and were probably unwilling, because of antipathy toward unions in general, to assist members in suits against their own associations.

Out of this curious confluence of interests opposed to judicial interference came Section 4 of the 1871 Act. While Sections 2 and 3 protected unions against the restraint-of-trade doctrine being used as a theory of criminal conspiracy,<sup>8</sup> or as a means of rendering void or voidable union agreements or trusts in general,<sup>9</sup> Section 4 provided:

Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:

(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

(2) Any agreement for the payment by any person of any subscription or penalty to a trade union:

(3) Any agreement for the application of the funds of a trade union,

(a) To provide benefits to members; or

(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

(c) To discharge any fine imposed upon any person by sentence of a court of justice; or

(4) Any agreement made between one trade union and another; or

(5) Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

Thus, the 1871 Act relegated the legal proceedings designated in Section 4 to the effect of the common law, and there is little doubt that both the members of Parliament and the representatives of trade unions assumed (1) that the designation was broad enough to include most if

<sup>7</sup> Indeed, the Majority Report of the Royal Commission recommended denial of registration to unions with restrictive trade rules. Commissioners' Report, at xxiv. See also Draft Report prepared by Mr. Booth, *id.* at cvi.

<sup>8</sup> Section 2 provides: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

<sup>9</sup> Section 3 provides: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."



not all suits against unions by their members,<sup>10</sup> and (2) that the effects of the common law would be to bar such suits, on the theory that a union's rules were unenforceable because in restraint of trade.<sup>11</sup> Section 4 was hailed by trade unions as a grant of protection against legal interference with their internal affairs.<sup>12</sup>

This optimism on the part of unions was short-lived. Courts soon began to batter at the barrier of Section 4, using as weapons a restrictive interpretation of the types of legal proceedings covered and a liberal view of the enforceability of union rules at common law—both contrary to the assumptions of the Act's supporters. The first weapon has proved to be the most formidable so far; but the second may yet prove effective.

## RESTRICTIVE INTERPRETATION OF SECTION 4

### MISAPPLICATION OF UNION FUNDS

The first assault on Section 4 occurred in what is perhaps its most vulnerable area: actions to restrain misapplication of union funds. The framers of the 1871 Act, which expressly provides that funds of registered unions shall be held in trust, presumably did not intend to leave

<sup>10</sup> It is not entirely clear why Section 4 includes only specified types of agreements, nor why the word "directly" was used to modify the type of enforcement proscribed. It is probable, however, that both limitations were intended to make clear that Section 4 would not interfere with the protection of union property through enforcement of trusts, or with the enforcement of agreements with nonmembers. The Minority Report of the Royal Commission of 1869, upon which the 1871 Act was based (see WEBB, *op. cit. supra* note 1, at 274-279), expressed dissatisfaction with the "indirect" effect of restraint-of-trade doctrine on the protection of union property, and stated that "in all matters but the direct enforcement [of a contract in restraint of trade] and as to all matters incident to or consequential of such a contract, the doctrine should have no place." Commissioners' Report, at lx. Mr. Bruce, in introducing the bill into the House of Commons, stated that one object was to permit unions to protect their funds and to "remove any disabilities so far as regarded contracts entered into by trade unions with third parties." 204 HANSARD 266. The Earl of Morley, in moving the Second Reading in the House of Lords, explained that one effect of the bill was to prevent enforcement of the "primary contracts" between unions and members, but to leave "secondary contracts" enforceable, so that a union's secretary could sue for his salary, or the society could sue its bankers with respect to its funds on deposit, or its landlord with respect to a lease. 205 HANSARD 1911, 1918.

<sup>11</sup> See, e.g., Commissioners' Report, at xix ff. (*per* Majority) and at lii, lvii ff. (*per* Minority); 204 HANSARD 266, *per* Mr. Bruce; 205 HANSARD 1918, *per* Lord Morley; and Sir William Erle's Memorandum, *supra* note 3. Section 23 defined a trade union as "such combination . . . as would, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of one or more of its purposes being in restraint of trade." That definition was altered by the Trade Union (Amendment) Act, 1876, 39 & 40 Vict. c. 22, probably to enable trade associations to take advantage of the Act's provisions. Kahn-Freund, *supra* note 1, at 195.

<sup>12</sup> An article in the *Beehive*, a trade-union journal of the period, stated: "Section 4 prevents any interference on the part of courts of justice with the internal organization and working of unions. If it were not for this section, any member might sue the union, and every union would be constantly harassed by lawsuits." Reprinted in T.U.C. Parliamentary Committee Publication (1871-1875).

unions without a means for preventing misuse of trust funds.<sup>13</sup> On the other hand, judicial control over the application of union money may be a means of exerting far-reaching control over union policy. The legislative history of the Act provides no substantial clue as to where it was intended that the balance should be struck.

Unions argued that Section 4 precluded any action to restrain union funds from being applied contrary to union rules, on the ground that such an action was a "legal proceeding instituted with the object of directly enforcing . . . [an] agreement for application of the funds of a trade union to provide benefits to members" within the meaning of subsection (3)(a). The first English court to consider the question sustained this argument and held Section 4 to bar an action brought by a union's executive council to restrain misapplication of funds by a seceding branch.<sup>14</sup> But in the same year a Scottish court held that Section 4 was not a bar to a similar action brought by trustees of a national union, on the theory that an action for an injunction did not constitute "direct" enforcement of any intra-union agreement, but was "intended merely to preserve the status quo."<sup>15</sup> Conceivably the Scottish case was distinguishable on the ground that Section 9 of the 1871 Act expressly authorized suits by trustees; but two years later an English court relied upon the same narrow interpretation of "directly" to permit suit by a dissenting minority within a union to restrain the majority from applying the union's funds to a proposed amalgamation, allegedly in violation of the union's rules.<sup>16</sup>

This breach in the Section 4 wall was then widened and made permanent by the House of Lords. In *Yorkshire Miners Association v. Howden*<sup>17</sup> a member of the Miners Association sought to restrain payment of strike benefits to members of his branch on the ground that the strike had not been authorized by the Association as its rules required. The Association's position, apart from relying upon Section 4, was that it had subsequently ratified the strike action, and that such ratification was sufficient to support the payments. The Section 4 argu-

<sup>13</sup> Indeed, protection of union funds was one of the principal reasons unions urged adoption. WEBB, *op. cit. supra* note 1, at 261-275.

<sup>14</sup> *Duke v. Littleboy*, (1880) 49 L.J. Ch. 802. The court rejected the plaintiff's argument that his action required only "indirect" enforcement of a benefit rule, and held, following *Rigby v. Connol*, p. 19 *infra*, that the word "directly" was used in Section 4 only to distinguish a suit for damages, also barred by the section.

<sup>15</sup> *McLaren v. Miller*, (1880) 7 R. 867, 17 Sc. L.R. 607.

<sup>16</sup> *Wolfe v. Matthews*, (1882) 21 Ch. D. 194. See also *In re Durham Miners Association*, (1900) 17 T.L.R. 39 (without discussion of Section 4, granting a declaration that payment of strike benefits to members striking without union approval was improper); *Alfin v. Hewlett*, (1902) 18 T.L.R. 664 (restraining misuse of union funds, without discussion of Section 4).

<sup>17</sup> [1905] A.C. 256.

ment was strengthened legally by the fact that the rule relied upon by the plaintiff was itself a rule providing for the payment of benefits, and by the fact that it could also be said to be a rule concerning the conditions on which members would work, within the meaning of subsection (1). Moreover, the judicial relief requested would constitute a considerable intrusion upon autonomy, since it would involve construction of a union rule contrary to that adopted by the union's governing body, and the effect would probably be to halt a strike which that body had approved. Nevertheless, a majority of the Law Lords held the action maintainable and granted the injunction requested, upon the ground that Section 4(3) was designed only to prevent suits to enforce payment of benefits, and had no application to a suit to restrain such payments, even though such a restraint would necessarily increase the likelihood of other payments being made according to the rules. Three of the Law Lords adopted the "direct-indirect" dichotomy to reach this result; a fourth, Lord Macnaghten, expressed doubt as to that distinction, and rested his decision upon the ground that the plaintiff's object in the action was not to enforce a benefit rule, and that "no administration or application of the funds of the union was sought or desired."<sup>18</sup> The potential argument under subsection (1) of Section 4 does not appear to have been made.

The effect of the *Howden* rule has been to vest courts with a large measure of control over union activities.<sup>19</sup> Through injunctions against "misapplication" of funds, unions have been prevented from engaging in political activities;<sup>20</sup> from granting financial assistance to members of another union on strike;<sup>21</sup> from paying the court costs incurred by a union officer in prosecuting a slander suit against a member,<sup>22</sup> or in defending a suit brought against him as a union officer;<sup>23</sup> and from amalgamating with another union.<sup>24</sup>

<sup>18</sup> There seems to be no practical distinction between the two approaches. Lord Macnaghten appears to be saying substantially the same thing as the other Law Lords when he states: "The object of the litigation is to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired." *Id.* at 265.

<sup>19</sup> As to the extent of judicial control over union funds and property in general, see chap. 5 *infra*.

<sup>20</sup> E.g., *Bennett v. Amalgamated Society of Operative House & Ship Painters*, (1915) 31 T.L.R. 203; *Carter v. United Society of Boilermakers*, (1915) 32 T.L.R. 40.

<sup>21</sup> *M'Dowall v. M'Ghee*, [1913] 2 S.L.T. 238.

<sup>22</sup> *Oram v. Hutt*, [1913] 1 Ch. 259.

<sup>23</sup> *Alfin v. Hewlett*, *supra* note 16.

<sup>24</sup> E.g., *Booth v. Amalgamated Marine Workers Union*, [1926] Ch. D. 904.

In addition to an injunction restraining misapplication of union funds, it is fairly clear that Section 4 is no bar to an order requiring the officers responsible to restore funds already misapplied.<sup>25</sup> Nor, on the "direct-indirect" distinction, would that section appear to bar an order directing that funds be applied to a particular purpose prescribed by the union's rules, so long as that purpose was not the payment of benefits to a member. But in *Cope v. Crossingham*<sup>26</sup> the Court of Appeal affirmed a decision of Eve, J. in the Chancery Division of the High Court<sup>27</sup> that though a court has jurisdiction to restrain misapplication of funds by a seceding branch, it may not order the branch to deliver the money to the national trustees. Eve, J. in his judgment stated:

If I were to follow up the declaration . . . with an order directing payment, I should be adopting a course which the House of Lords and in all other cases the Courts have declined to adopt, that is to say, I should be really administering *inter se* the funds of this society.

This reluctance to interfere with administration of union funds *inter se*, regardless of whether the payment of benefits is involved, constitutes in effect a throwback to the original policy of Section 4, that of preserving union autonomy.

#### UNION BENEFITS

No British court has yet devised a means of interpreting Section 4 to permit a suit by a union member for an order to compel payment of benefits due under union rules,<sup>28</sup> but the *Howden* principle comes close. In *Sansom v. London & Provincial Union*,<sup>29</sup> members of a union on strike brought suit claiming that money donated by nonstrikers for the purpose of supplementing regular strike benefits was being diverted to the union's general treasury, and they sought a declaration that

<sup>25</sup> *M'Dowall v. M'Ghee*, *supra* note 21; *Carter v. United Society of Boilermakers*, *supra* note 20; *Bennett v. House & Ship Painters*, *supra* note 20. In the last two cases Section 4 does not appear to have been asserted as a defense.

<sup>26</sup> [1909] 2 Ch. 148.

<sup>27</sup> [1908] 2 Ch. 624.

<sup>28</sup> Section 4 prohibits suits by persons standing in the capacity of the member as well as suits by the member himself. *E.g.*, *Winder v. Guardians of Kingston-upon-Hull*, (1888) 20 Q.B.D. 412 (guardian); *Crocker v. Night*, [1892] 1 Q.B. 702 (nominee for death benefits); *Russell v. Amalgamated Society of Carpenters & Joiners*, [1912] A.C. 421 (personal representative).

It has been held that Section 4 does not affect the right of a member's dependents to sue for benefits due them directly under the union's rules. *Love v. Amalgamated Society of Lithographic Printers*, [1912] S.C. 1078 (suit by dependent for sick benefits while member insane). *But cf.* *McLaren v. National Union of Dock Labourers*, [1918] S.C. 834 (Section 4 held to bar suit by dependent for burial benefit; the *Love* case distinguished). It is questionable in any event whether a dependent has standing to sue. See CITRINE, *op. cit. supra* note 1, at 114.

<sup>29</sup> (1920) 36 T.L.R. 666.

such diversion was wrongful and an injunction restraining its continuance. Despite the fact that the obvious purpose of the suit was to obtain benefits, and that the requested relief would have exactly that effect, the injunction was granted. If this case is good law, it might be possible for any member claiming benefits under the rules to compel payment by obtaining an injunction against use of the money for any other purpose.<sup>30</sup>

Another alternative is to hold that a declaration may be granted even where an affirmative order may not. Though this distinction seems highly unrealistic, it is supported by some dicta in the cases,<sup>31</sup> and by at least one holding.<sup>32</sup> In *Miller v. Amalgamated Engineering Union*,<sup>33</sup> however, Section 4 was held to bar both an order and a declaration in a suit by a union member for benefits.

#### UNION DISCIPLINE

The second judicial assault on union autonomy through restrictive interpretation of Section 4 came on a flank which one would have thought was better protected than the area of union funds and property—that of discipline by unions of their members. Though legislative which held Section 4(3)(a) to bar an action by an expelled member for intent is always in some sense a fiction, it seems very unlikely that the supporters of the 1871 Act thought it would result in permitting suits against unions by members claiming to have been wrongfully disciplined; yet according to the courts it did just that.

Actually, the defense was able to hold out for nearly forty years. In *Rigby v. Connol*,<sup>34</sup> the first expulsion case to be decided under the 1871 Act, Sir George Jessel, Master of the Rolls, held Section 4 to preclude an action brought by a member claiming to have been wrongfully expelled, and seeking an injunction restraining interference with the benefits of membership, on the ground that the object of the action was directly to enforce an agreement to provide benefits, within the meaning of subsection (3)(a).<sup>35</sup> This theory was followed by a Scottish court in *Aitken v. Associated Carpenters and Joiners of Scotland*,<sup>36</sup> damages and a declaration that the expulsion was wrongful and that

<sup>30</sup> The Sansom case is perhaps distinguishable, however, on the ground that technically the plaintiffs were not relying upon any rule of the union, but on a theory of constructive trust.

<sup>31</sup> *E.g.*, *Amalgamated Society of Carpenters & Joiners v. Braithwaite*, [1922] 2 A.C. 440, *per* Lord Buckmaster.

<sup>32</sup> *McCord v. Sproat*, [1931] N.I.R. 119 (Section 4 not discussed).

<sup>33</sup> [1938] Ch. 669.

<sup>34</sup> (1880) 14 Ch. D. 482.

<sup>35</sup> Relief was denied also on the ground that no "property rights" were involved. See chap. 4 *infra*.

<sup>36</sup> (1885) 12 R. (Ct. of Sess.) 1206.

he was entitled to the privileges and benefits of membership. As late as the turn of the century, the Court of Appeal in *Chamberlain's Wharf v. Smith*<sup>87</sup> invoked Section 4 to deny relief to a member of a trade association seeking to restrain action on an allegedly wrongful expulsion resolution, though instead of relying on subsection (3)(a) the court held the action was one for the direct enforcement of an agreement concerning the conditions of carrying on work, within the meaning of subsection (1), since the member was expelled for violation of a trade regulation.<sup>88</sup>

But in 1911 the Section 4 wall was broken down. Osborne, a member of the Amalgamated Society of Railway Servants, who had contended successfully before the House of Lords that a rule requiring members to pay political contributions was *ultra vires*,<sup>89</sup> was found guilty of "attempting to injure the society" and purportedly expelled. He then brought a second suit against the union, this time seeking a declaration that the expulsion resolution was wrongful and an injunction restraining its enforcement. Relying on *Rigby v. Connol* and *Chamberlain's Wharf*, the trial court held Section 4 to be a bar. But the Court of Appeal reversed,<sup>90</sup> partly on the ground that the society was lawful at common law,<sup>91</sup> but also on the ground that the action was not within Section 4. Subsection (1) did not apply because no violation of a trade rule was involved, and on that ground *Chamberlain's Wharf* was distinguished. As to subsection (3)(a) and *Rigby v. Connol*, the learned judges pointed to the fact that the plaintiff in that case expressly claimed the right to benefits; all Osborne desired was to remain a member, which involved much more than benefits, and his right to benefits would continue to be as unenforceable as before.<sup>92</sup> Cozens-Hardy, M.R. went even further and expressed the view that in the light of the "direct-indirect" distinction adopted in the *Howden* case, *Rigby v. Connol* and *Chamberlain's Wharf* were no longer decisive.

The House of Lords ultimately adopted this broader view. In *Amalgamated Society of Carpenters & Joiners v. Braithwaite*<sup>93</sup> the plaintiffs,

<sup>87</sup> [1900] 2 Ch. 605.

<sup>88</sup> This argument could also have been made in *Rigby v. Connol*, where the member was expelled for failure to pay a fine levied against him for allegedly permitting his son to work in a nonunion shop, in violation of a union trade rule.

<sup>89</sup> *Osborne v. Amalgamated Society of Railway Servants*, [1910] A.C. 87.

<sup>90</sup> [1911] 1 Ch. 540.

<sup>91</sup> See p. 26 *infra*.

<sup>92</sup> Buckley, L.J. argued that a member has various rights, including the right to vote, to subscribe to funds, to receive benefits, to a proprietary interest in the union's property, to the advantages of membership, and to a distributive share upon dissolution. Only the right to benefits is made unenforceable by Section 4.

<sup>93</sup> *Supra* note 31.

threatened with expulsion for allegedly "working on a co-partnership system" in violation of their union's rules, sought to restrain the expulsion on the ground that the system they were working under did not fall within the meaning of that phrase. The defendant relied upon both subsections (1) and (3)(a) of Section 4, but the House of Lords unanimously rejected both arguments, on the ground that the action did not involve "direct" enforcement of either a trade rule<sup>45</sup> or a benefit rule. Lord Buckmaster said:

Looking at the words of the section alone, unaided and unembarrassed by previous decisions, I should have thought it plain that an action which in fact asks for nothing but a declaration as to the construction of a rule as to membership and, as an incident thereto, an injunction, was not an attempt to enforce directly any such agreement as that referred to in the statute. . . .

To construe a rule is not directly to enforce any agreement between the members, and I am unable to see any reason why the words of the statute should be so extended as to exclude a trade union itself or any of its members from obtaining the advantage of having obscure words construed by a wholly independent tribunal.

"The advantage of having obscure words construed by a wholly independent tribunal"—how ironic those words seem in the light of the declared intentions of those who supported the 1871 Act!

It is clear, then, that Section 4 is no longer a bar to an action by an expelled member for a declaration that his expulsion was wrongful and an injunction restraining exclusion from membership. Although neither *Rigby v. Connol* nor *Chamberlain's Wharf* were expressly overruled,<sup>46</sup> those decisions could have no effect in the light of *Braithwaite*, except perhaps in the unlikely event a plaintiff stated he was seeking retention of membership only for the purpose of receiving benefits.<sup>46</sup> Two of the Law Lords stressed the fact that the plaintiff was seeking to restrain expulsion rather than to be restored to membership, and that therefore the relief granted merely maintained the status quo; but this is probably a distinction devoid of content, since any expulsion which is unlawful is technically invalid.<sup>47</sup>

<sup>45</sup> Lord Atkinson adopted a novel device for determining whether Section 4(1) was involved. He first "interpreted" the copartnership rule and held it did not apply to the situation in which the plaintiffs were working, and then concluded that no enforcement of an agreement concerning conditions of employment was sought.

<sup>46</sup> Lord Buckmaster stated of *Rigby v. Connol*: "It may be out of great respect for the authority of Sir George Jessel that this decision has never been definitely overruled." And *Chamberlain's Wharf*, he suggested, "... was clearly based on the wider view of *Rigby v. Connol*... and this view cannot, after the decision in [the *Howden* case] be any longer accepted."

<sup>46</sup> *E.g.*, *Smith v. Scottish Typographical Association*, [1919] S.C. 43, where the plaintiff had already been reinstated subject to forfeiture of benefit rights. Lord MacKenzie argued that an action for complete reinstatement was in effect an action for benefits.

<sup>47</sup> *Cf.* *Bonsor v. Musicians Union*, [1954] Ch. 479, where the distinction was ignored, the plaintiff seeking a negative injunction and the court talking about reinstatement.

It is not so clear whether Section 4 is a bar to an action for damages for wrongful expulsion. The "direct-indirect" distinction is not available here, for Section 4 applies specifically to actions brought with the object of recovering damages for breach of the designated agreements. Since an agreement to provide benefits to members is one of those designated, it would appear that loss of union benefits could not be an item of damage. Otherwise, Section 4 does not appear to be an obstacle. Even though the member might have been expelled for violating a trade rule, he would not be seeking damages for breach of that rule any more than, by claiming an injunction, he would be seeking direct enforcement of it. Nevertheless, in *Berry v. Transport and General Workers Union*<sup>48</sup> a Scottish court held that, while it had jurisdiction to declare invalid an expulsion resolution, Section 4 precluded its granting damages.<sup>49</sup>

In contrast to the expulsion cases, Section 4 has so far been held to preclude action by a member to restrain imposition of a fine levied against him,<sup>50</sup> or even a declaration that the fine is invalid.<sup>51</sup> Such an action, courts have held, would constitute direct enforcement of an "agreement for the payment by any person of any subscription or penalty to a trade union." These cases were decided prior to *Braithwaite*, however, and it may be that, by analogy to the reasoning in that case, it will be held that an injunction or declaration would not constitute direct enforcement of the fine agreement, but only maintenance of the status quo.<sup>52</sup>

#### INTERVENTION IN OTHER AREAS

While misapplication of funds, benefits, and union discipline are the primary areas of legal interference affected by Section 4, the effect of that section in other areas is worth noting. Subsection (4) applies to actions instituted with the object of directly enforcing or recovering damages for the breach of "Any agreement made between one trade

<sup>48</sup> [1933] S.N. 110.

<sup>49</sup> *But cf.* *Bonsor v. Musicians Union*, [1956] A.C. 104 (granting damages; Section 4 not argued).

<sup>50</sup> *Mullett v. United French Polishers London Society*, (1904) 91 L.T. 133, 20 T.L.R. 595; *Rae v. Plate Glass Merchants Association*, (1919) 56 S.L.R. 315; *Drennan v. Associated Ironmoulders of Scotland*, [1921] S.C. 151.

<sup>51</sup> In each of the cases cited in the previous footnote, the plaintiffs sought both an injunction and a declaration, and Section 4 was held to bar any relief.

<sup>52</sup> *Cf.* *Brodie v. Bevan*, (1921) 38 T.L.R. 172 (granting a declaration that a ballot introducing a levy was invalid); *Blackall v. National Union of Foundry Workers*, (1923) 39 T.L.R. 431 (holding, on the basis of *Braithwaite*, that action for reinstatement of a member expelled for failure to pay contributions did not constitute "direct" enforcement of an agreement to pay subscriptions).



union and another." In *McLuskey v. Cole*<sup>53</sup> this subsection was held to bar an action against the National Federation of Glass Bottle Workers by its Glasgow District, which sought declaratory and injunctive relief against a resolution expelling the district from membership in the Federation. The district argued that the agreement formed by the Federation's rules was among individuals rather than between each district and the Federation; but the court, relying on the fact that the Federation's rules did not provide for membership by individuals, held that the agreement was between one trade union and another.<sup>54</sup> On the assumption that a branch is a "trade union" within the meaning of the 1871 Act,<sup>55</sup> the *McLuskey* holding suggests that the rules of a national union may be unenforceable by or against a branch, unless the national union is said to be composed of individuals only. This argument does not seem to have been made in the cases dealing with misapplication of funds or secession by branches.<sup>56</sup>

In a number of cases courts have considered claims for, and sometimes granted, relief based on union rules without mentioning Section 4, presumably on the ground that the rules involved did not come within the scope of that section. Included in this category are cases involving suit by union officers protesting against a resolution cutting short their term of office;<sup>57</sup> by a nominee for office seeking to restrain the holding of an election without allowing his nomination;<sup>58</sup> and by a suspended officer seeking to restrain enforcement of a suspension resolution.<sup>59</sup>

Finally, it is clear that insofar as a member claims rights existing independently of the rules, Section 4 is no bar. Thus, a member may sue to enforce rights given him by the 1871 Act to inspect the union's books,<sup>60</sup> or to enforce an arbitration award,<sup>61</sup> or may sue on an account stated.<sup>62</sup>

### "LIBERAL" VIEW OF THE COMMON LAW

Although a restrictive interpretation of Section 4 has been sufficient to allow judicial intervention in most important areas of internal union

<sup>53</sup> [1922] 1 K.B. 534.

<sup>54</sup> *Cf. Holland v. London Society of Compositors*, (1924) 40 T.L.R. 440 (dicta that interunion agreement relating to transfer of members was unenforceable).

<sup>55</sup> Section 5(2) of the Trade Disputes Act, 1906, 6 Edw. 7, c. 47, makes it clear that this is now the case.

<sup>56</sup> *E.g., Cope v. Crossingham*, *supra* note 26.

<sup>57</sup> *Amalgamated Society of Engineers v. Jones*, (1913) 29 T.L.R. 484.

<sup>58</sup> *Watson v. Smith*, [1941] 2 All E.R. 725.

<sup>59</sup> *Burn v. National Amalgamated Labourers Union*, [1920] 2 Ch. 364.

<sup>60</sup> *Norey v. Keep*, [1909] 1 Ch. 561; *Dodd v. Amalgamated Marine Workers Union* [1924] 1 Ch. 116.

<sup>61</sup> *Edinburgh Master Plumbers Association v. Munro*, [1928] S.C. 565 (trade association).

<sup>62</sup> *Evans v. Heathcote*, [1918] 1 K.B. 418 (trade association).

affairs, the courts have developed a second approach which may yet result in permitting members to bring actions clearly covered by that section. This approach consists in holding, contrary to the assumptions that lay behind the 1871 Act, that at least some rules of some unions were enforceable at common law; and that Section 4, which merely limits the legalizing effect of the Act, is therefore no obstacle to their enforcement.<sup>63</sup>

Actually, this approach is tripartite. In theory, a union rule may be enforceable at common law (a) if none of the union's rules "restrain trade"; or (b) if the rules restrain trade, but not "unreasonably"; or (c) if the rule to be enforced is not itself in unreasonable restraint of trade, and is "severable" from the rules that are. The cases which have followed this second approach involve all three of these possibilities.

#### RESTRAINT OF TRADE

The doctrine of restraint of trade as applied to trade unions at common law was somewhat ambiguous. According to the view expressed by Sir William Erle in his Memorandum on the Law Relating to Trade Unions, the function of that doctrine was to render unenforceable agreements among workmen as to the conditions upon which they would work.<sup>64</sup> Such agreements were unenforceable because they restrained the individual wills of workmen, and not because of the possible effects of a strike upon the employer or the public. The doctrine protected the parties to the agreement; it did not, according to this view, make them criminally liable for entering into it.

But there was another view of the "illegality" of trade unions, which sprang from the notion that unions were criminal conspiracies at common law. Prior to the nineteenth century unions were believed to be illegal, not on the *laissez-faire* principle that they prevented the exercise of choice by individual workmen, but because they challenged the power

<sup>63</sup> It may be, however, that this approach would preclude action against a union in its registered name, on the theory that the "right" of a union to sue or be sued in such name derives from the 1871 Act, which must be excluded from consideration in a suit based upon prior common law. CITRINE, *TRADE UNION LAW* 91 (1950).

<sup>64</sup> "As to combinations, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination. Any arrangement for that purpose, whatever may be its purport or form, does not bind as an agreement, but is illegal, though not unlawful, on account of restraint of trade, and therefore void." P. 23 (see note 3 *supra*).

of the state to regulate trade through wage-fixing statutes.<sup>65</sup> Later, unions were regarded as illegal because of the potential harm they could cause an employer.<sup>66</sup> While unions were relatively free from prosecution by the time of the 1871 Act, the doctrine of restraint of trade became infused with these earlier concepts of trade-union illegality. Some judges viewed a union's rules to be in restraint of trade because of their likely effect (via work stoppage) upon employers and the public, rather than upon the freedom of individual workmen to decide the conditions upon which they would work.<sup>67</sup>

This ambiguity in the restraint-of-trade doctrine provided a weak spot through which the shield of illegality could be pierced. It was probably assumed by the framers of the 1871 Act that the second, broader theory of illegality was the law, for in *Farrar v. Close*<sup>68</sup> it had been held, over a vigorous dissent by two judges based on Erle's Memorandum, that a rule providing for payment of strike benefits to members was unlawful as in restraint of trade, even though the rules did not bind the members to strike nor provide penalties for their refusal. The fact that the payment of benefits made a strike more likely was sufficient.<sup>69</sup> But in 1909, in *Gozney v. Bristol Trade & Provident Society*,<sup>70</sup> the Court of Appeal in effect overruled the *Farrar* case by holding that an action by a union member to recover a fine allegedly wrongfully imposed was maintainable at common law, in spite of the existence of a rule providing for strike benefits, on the grounds that (1) the "principal purpose" of the society was to provide friendly benefits rather than to "regulate trade"; and (2) something more than a rule increasing the likelihood of strikes was required for illegality, since strikes themselves were not illegal at common law.<sup>71</sup> Cozens-Hardy, M.R. suggested that a rule providing for "assistance" of strikes by union officers would be sufficient, but Fletcher-Moulton, L.J. indicated that a "provision for making or enforcing agreements to strike" would be required.<sup>72</sup>

<sup>65</sup> HEDGES & WINTERBOTTOM, *LEGAL HISTORY OF TRADE UNIONISM* 11 ff. (1930).

<sup>66</sup> *Id.* c. 4.

<sup>67</sup> *E.g.*, Cockburn, J. in *Hornby v. Close*, (1867) L.R. 2 Q.B. 153, and *Farrar v. Close*, (1869) L.R. 4 Q.B. 602.

<sup>68</sup> *Supra* note 67.

<sup>69</sup> Cockburn, J., writing the controlling opinion for an equally divided court, conceded that "some strikes may be justifiable," but that "others may be to extort unreasonable exactions or enforce tyrannical rules."

<sup>70</sup> [1909] 1 K.B. 901.

<sup>71</sup> The society was an unusual one, in that it was established on a purely local basis, it accepted workers without reference to their trade, and it apparently did not engage in collective bargaining. See Kahn-Freund, *The Illegality of a Trade Union*, 7 *MODERN L. REV.* 192, 200-201 (1944).

<sup>72</sup> While conceding that a strike might be harmful to the employers, Fletcher-Moulton refused to agree that it was necessarily harmful to the community. Such a presumption, he declared, would be based "not on recognized legal principles, but on the opinion of one of the contending schools of political economists."

While the *Gozney* decision left some ambiguity in the restraint-of-trade doctrine, the Court of Appeal adopted the Erle approach completely in its decision in the *Second Osborne* case.<sup>73</sup> That case involved the Amalgamated Society of Railway Servants, the principal purpose of which could hardly be characterized as that of a friendly society. Moreover, one of the rules of the Society provided for "sanction" of strikes by union officers and their use of "every lawful means to assist" strikers. Overlooking the Society's purpose, and following Fletcher-Moulton's suggestion in *Gozney*, the same court held, as an alternative ground for permitting suit by an expelled member, that the union's rules were legal at common law because they did not require the members to strike, but left the decision "voluntary."

Unless the restraint-of-trade doctrine were to be rejected altogether, however, it was apparent that the *Gozney-Osborne* trail must have an end, and that end came with the House of Lords decision in *Russell v. Amalgamated Society of Carpenters & Joiners*,<sup>74</sup> which made it clear that at least a rule which *penalizes* a member for noncompliance with union decisions was in restraint of trade. Since that decision, and perhaps in part as a result of it,<sup>75</sup> there have been few unions whose rules do not "qualify" as rules in restraint of trade under the *Russell* decision.

#### REASONABLENESS

According to traditional restraint-of-trade doctrine, however, an agreement is not illegal merely because it restrains trade; it must do so "unreasonably."<sup>76</sup> If the function of that doctrine is solely or primarily to protect individuals against legal enforcement of an agreement which bargains away their rights to engage in a trade or occupation the way they see fit, then the standard of "reasonableness" adopted should be that of reasonableness among the parties to the agreement. And that is the standard which is generally applied. For example, where an employee agrees with his employer not to compete with him upon leaving the business, the courts are concerned with whether the agreement places too great a restriction upon the employee's ability to earn a

<sup>73</sup> *Supra* note 40. The judges were undoubtedly influenced by the fact that the plaintiff had been expelled for bringing a (successful) suit to restrain misapplication of union funds. See page 20 *supra*; Kahn-Freund, *supra* note 71, at 202.

<sup>74</sup> [1912] A.C. 421.

<sup>75</sup> See Kahn-Freund, *supra* note 71, at 203.

<sup>76</sup> *E.g.*, *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] A.C. 535. Prior cases spoke of "general" restraints which were bad, and "partial" restraints which were legal; *e.g.*, *Rousillon v. Rousillon*, (1880) 14 Ch. D. 351. But this was probably only a difference in terminology. See discussion in SANDERSON, *RESTRAINT OF TRADE* (1926).

living, as compared with the employer's reasonable desire to prevent competition.<sup>77</sup> Even in the case of trade associations, British courts have upheld restrictions on competition deemed "reasonably" necessary to protect the business interests of the members.<sup>78</sup>

But this concern for the interests of the parties to a restraining agreement was not applied to trade unions and their members. Just as the House of Lords once refused to extend to unions the same defense of "justification" for inflicting injury on others that it applied to business combinations,<sup>79</sup> so in the case of enforcement of union rules courts have generally not considered the economic interests of union members as justifying restraints of trade. Just as the courts once looked to the effects of union conduct on others in order to determine whether union rules constituted a "restraint," so they tended to look to such external effects in order to determine whether the restraint was "reasonable."

Thus, the possibility that union rules might only "reasonably" restrain trade does not appear to have been directly considered<sup>80</sup> until the case of *Swaine v. Wilson*<sup>81</sup> in 1890. The union in that case had a number of rules which were clearly designed to control jobs for union members and limit entrance to the trade. For example, members were prohibited from informing nonmembers of the existence of jobs. Applying the standard of reasonableness among the parties to the agreement, the court might have held that the economic interest of members in preserving available jobs for themselves constituted a reasonable basis for the restraint. The court held the restraint was reasonable, and there-

<sup>77</sup> *E.g.*, *Leather Cloth Co. v. Lorsche*, (1869) L.R. 9 Eq. 345. Lord Macnaghten in the *Nordenfeldt* case, *supra* note 76, stated that "the only justification [is that] the restraint is reasonable in reference to the interests of the parties concerned and reasonable in reference to the interest of the public, so framed and guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time is in no way injurious to the public." But in *Attorney General of Australia v. Adelaide Steamship Co.*, [1913] A.C. 781, Lord Parker, for the Privy Council, stated: "Their Lordships are not aware of any case in which a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public." *Cf.* *Wyatt v. Kreglinger*, [1933] 1 K.B. 793.

<sup>78</sup> *E.g.*, *Wickens v. Evans*, (1829) 3 Y. & J. 318 (agreement among boxmakers not to compete in each other's territory); *Collins v. Locke*, (1879) 4 A.C. 674 (agreement among master stevedores to parcel out among themselves the business of a particular port).

<sup>79</sup> *Quinn v. Leathem*, [1901] A.C. 495, which in effect applied a different standard to unions than had been applied to a trade association in *Mogul Steamship Co. v. McGregor Gow & Co.*, [1892] A.C. 25. See CITRINE, *op. cit. supra* note 63, at 58-63.

<sup>80</sup> Compare with the trade-association cases cited in note 78, *supra*, the trade-union case of *Cullen v. Elwin*, (1904) 20 T.L.R. 490 (union rules limiting the work week, prohibiting outdoor work without sanction, and providing for equitable distribution of work among members, held illegal as in restraint of trade). The argument of reasonableness was raised prior to the 1871 Act but rejected. See Hayes, J. in *Farrar v. Close*, *supra* note 67: "It would be an odd way of promoting freedom of trade to prevent individuals from placing themselves in a better position to raise wages."

<sup>81</sup> (1890) 24 Q.B.D. 252.

fore not illegal, but on the rather farfetched ground<sup>82</sup> that the society's principal function was to provide benefits, including unemployment benefits, and that rules insuring employment for union members were reasonably necessary to prevent undue drain on the society's funds. This provided but a slim reed on which judicial intervention could lean. The *Swaine* case was distinguished in several subsequent decisions as involving a society the "principal purpose" of which was to provide benefits;<sup>83</sup> and the reasoning in that case was adopted for the next and last time in the *Gozney* case, as an alternative basis for relief.

The argument that union trade rules ought to be considered "reasonable" restraints on trade because reasonably necessary to the economic protection of union members does not seem to have been seriously presented in these cases.<sup>84</sup> The plaintiff in the *Russell* case<sup>85</sup> made that argument before the Court of Appeal, but that court did not pass upon it directly, and before the House of Lords the plaintiff conceded the illegality of the union's rules. Two of the Law Lords nevertheless commented upon the issue. Lord Macnaghten conceded that only unreasonable restraints were unlawful, but, without saying why, concluded that the rules of the Carpenters union fell into that category.<sup>86</sup> Lord Shaw of Dunfermline was more explicit. He stated:

So far as the individual liberty of the worker is concerned, it is accordingly fairly plain that the trade in respect of him is restrained, but that would not be sufficient to satisfy the conditions of unlawfulness unless they were such as to affect trade in general or the public at large.

These conditions of unlawfulness he found satisfied by a union rule providing for assistance to strikers in other trades and for a levy "in the event of any great struggle between capital and labour in our own or any trade."

Apart from the possible grounds of distinction afforded by the dicta of Lord Shaw, it still remains open for a court to reconsider the assumption that union rules unreasonably restrain trade. In view of the general change in public and judicial attitudes toward trade unions since the *Russell* case, and in particular in view of the House of Lords decision in *Crofter Hand Woven Harris Tweed Co. v. Veitch*,<sup>87</sup> which recognized

<sup>82</sup> See Kahn-Freund, *supra* note 71, at 200-201.

<sup>83</sup> E.g., *Sayer v. Amalgamated Society of Carpenters & Joiners*, (1902) 19 T.L.R. 122; *Cullen v. Elwin*, *supra* note 80; *Burke v. Amalgamated Society of Cleaners & Dyers*, [1906] 2 K.B. 583.

<sup>84</sup> Cf. argument of Hayes, J. in *Farrar v. Close*, *supra* note 80.

<sup>85</sup> *Supra* note 74.

<sup>86</sup> "It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful."

<sup>87</sup> [1942] A.C. 435.

the economic interests of union members as justification for inflicting injury upon employers, such a reconsideration would be quite consistent with the trend of legal development.<sup>88</sup>

#### SEVERANCE

The *Swaine* and *Gozney* cases relied on yet a third ground for holding union benefit rules enforceable by members at common law: the principle that even though certain parts of an agreement may unreasonably restrain trade, they do not necessarily taint all other parts with their illegality; promises not in themselves in restraint may be enforced if they can be "severed."<sup>89</sup> As in the case of the other two grounds, this principle had been applied to two-party agreements in restraint of trade,<sup>90</sup> and in one case to the rules of a trade association,<sup>91</sup> but never to a trade union.<sup>92</sup> It is possible that the failure of courts to invoke the doctrine of severance in the case of trade unions indicated a carry-over of the earlier view that for union rules to be in restraint of trade meant, not merely that the rules were unenforceable because they restrained the free choice of the parties to the agreement, but that they were in some sense illegal because they harbored a threat to employers and the community. On this view, severance might be denied on the ground, never actually expressed in the cases, that the members were *in pari delicto*.

Whatever the reason, in the *Swaine* case the court held, for the first time, that, assuming certain rules of the society to be in unreasonable restraint of trade, their illegality did not affect enforcement of rules providing for benefits, because the "principal purpose" of the organization was that of a friendly society. *Swaine* was followed in *Gozney*, where, because the society in that case kept trade and benefit funds separate, the requirements for severability were even more easily met. But, along with other techniques for escaping common-law illegality, the doctrine of severance was defeated by the House of Lords in the *Russell* case. The House of Lords refused to sever a benefits rule from other rules of the Carpenters union which were held illegal, on the

<sup>88</sup> This does not necessarily mean a reconsideration would be desirable. The trend of legal development with regard to restraint of trade and conspiracy to injure is irrelevant to the policy question of whether union rules should be enforceable in courts. Cf. *Miller v. Amalgamated Engineering Union*, [1938] 1 Ch. 669, where the plaintiff's argument along such lines was waved aside by a finding that the defendant association was a "trade union" within the meaning of the 1871 Act.

<sup>89</sup> See generally on this subject Marsh, *Severance of Illegality in a Contract*, 54 L.Q. REV. 230, 347 (1948).

<sup>90</sup> E.g., *Nordenfeldt v. Maxim Nordenfeldt Co.*, *supra* note 76.

<sup>91</sup> *Collins v. Locke*, *supra* note 78.

<sup>92</sup> In *Hilton v. Eckersley*, (1855) 6 E. & B. 45, the plaintiff's argument for severance was denied.

ground that the principal purpose of the organization was that of a union and not of a friendly society; and on the further ground that trade and benefit funds were mixed, so that the members stood to forfeit their benefits if they violated rules regulating their conditions of employment. This meant that the consideration for the promise to pay benefits was illegal and that therefore the promise could not be enforced.

From the standpoint of present-day policy, this reasoning may be questioned. Although courts have sometimes said that in order for a promise to be enforced no part of its consideration may be illegal,<sup>83</sup> a strict application of that doctrine would mean no severance at all. One writer<sup>84</sup> has suggested that the cases can be explained by reference to two factors: the intent of the parties and public policy. So far as the intent of the parties is concerned, unions clearly do not need to rely upon the courts for enforcement of their trade rules, so that for courts to enforce benefit rules without enforcing trade rules would frustrate no anticipations. And it is difficult to see how a court order requiring payment of benefits in accordance with a union's rules could injure either the union or the public, even though the rules might deny benefits to those who have violated some union policy.

But in terms of the assumptions underlying the 1871 Act, the *Russell* decision is understandable. The *Swaine* and *Gozney* cases involved a deliberate molding of facts and theory to avoid the necessity of refusing relief to a member when the union's sole defense was its own illegality.<sup>85</sup> These, and the other cases we have discussed, reflect a trend away from treating unions as outlaw organizations, and toward regarding them as institutions subject to legal control. The *Russell* decision placed a temporary obstacle to expansion of that trend in a direction clearly contrary to the common-law assumptions of illegality and unenforceability, but it has not succeeded in halting the trend itself.

### COMPARISON WITH AMERICAN DOCTRINE

It is significant that in the United States the restraint-of-trade doctrine never became a serious obstacle to judicial intervention in internal union affairs. One reason, undoubtedly, was that by the time American courts were faced with suits involving intra-union disputes they had

<sup>83</sup> *E.g.*, *Putsman v. Taylor*, [1927] 1 K.B. 637.

<sup>84</sup> Marsh, *supra* note 89.

<sup>85</sup> For example, the cases overlooked the fact that nineteenth-century unions used benefit rules primarily as a means of enforcing trade rules. WEBB, *INDUSTRIAL DEMOCRACY*, pt. 2, c. 1 (2d ed. 1920). For discussion of this and other factual weaknesses in the decisions, see Kahn-Freund, *supra* note 71, at 200-201.



already, for the most part, rejected the doctrine of criminal conspiracy and the theory that unions were illegal *per se*.<sup>96</sup> They did adopt the notion of civil conspiracy, with which the restraint-of-trade doctrine was associated, but this notion was concerned with the legality or illegality of particular objectives of, or means used by, a trade union.<sup>97</sup> Strikes, for example, came generally to be regarded as legal.<sup>98</sup> While in theory that should have had little or no effect upon the question of the enforceability of union rules *inter se*, in practice American courts, like the British, failed to distinguish between illegality, in the sense of criminal or tortious liability, arising out of the effect of union activity upon an employer or the public, and illegality, in the sense of unenforceability, arising out of the restraining effect of an agreement upon the parties thereto.

Many American courts did regard as unlawful, however, attempts by unions to "monopolize" the labor market by agreements or rules which had the effect of requiring union membership as a condition of employment.<sup>99</sup> This judicial position gave rise to the only instances in which unions relied upon their "illegality" as a defense to an action brought by a member.

In *Froelich v. Musicians Mutual Benefit Association*,<sup>100</sup> decided in 1902, a member of a musicians' union was expelled for failing to pay a fine imposed because he rode on a streetcar while transit employees were on strike. The Missouri Appeals Court held the expulsion invalid for several reasons, but declined to grant the member relief on the ground that one of the union's bylaws, which provided that members should not work with nonmembers, was illegal in restraint of trade. The court said:

Such a confederation and combination is a trust pure and simple. . . . The plaintiff is in the attitude of asking the court to keep him where the law says he has no right to be and to remain him in a position where he may support and maintain an illegal association, and where he may continue to support and keep up a monopoly of the services of musicians. Courts have never dealt with monopolies, except to restrain or destroy them, and we decline to depart from this wholesome rule in this case. . . .

<sup>96</sup> Early American decisions did adopt a criminal-conspiracy theory. *E.g.*, Philadelphia Cordwainers Case (1806), reported in 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (1910-1911). But this doctrine was rejected in the landmark case of *Commonwealth v. Hunt*, 4 Metc. 111 (1842), holding unions lawful *per se*, and the Hunt theory was followed by most American courts. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 60 (1940).

<sup>97</sup> *E.g.*, *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900).

<sup>98</sup> See Teller, *op. cit. supra* note 96, c. 7.

<sup>99</sup> *Id.* § 170.

<sup>100</sup> 93 Mo. App. 383 (1902).

The following year, in *O'Brien v. Musical Mutual Protective Union*,<sup>101</sup> a New Jersey court used similar reasoning as one ground for denying relief to members of a musicians' union who claimed their charter had been wrongfully revoked by the parent organization. Citing no authority, but obviously relying upon British precedent, the court said:

If [plaintiffs' claim that nonmembership in the union will mean loss of employment] is well founded, the court, by compelling the continuance of the membership, and enforcing, by injunction or otherwise, the agreement as to exclusive jurisdiction and rights of membership, would, as it seems to me, give a compulsory legal sanction to those rules and regulations of a voluntary association or combination of individual right of contract, and on the conduct of a trade, and to secure within a certain district the monopoly, so far as possible, of a particular kind of labor. While these rules and regulations . . . may not be unlawful, they are certainly altogether voluntary, as between the persons who enter into them . . . and courts will not, either directly or indirectly, compel their performance. To compel, by injunction or otherwise, the continuance of association or of membership in these voluntary trade unions, either local or general, would, in my judgment result in enforcing the performance of their restrictive regulations, and it would, therefore, be an unjustifiable interference with the freedom of contract and of trade.

But *O'Brien* was the last American case to sustain a union's claim of illegality as a defense to an action brought by a member. Two years later, in *Brennan v. United Hatters*,<sup>102</sup> the New Jersey Court of Errors and Appeals held a wrongfully expelled union member entitled to damages against his union. As to the union's claim that the plaintiff's right to employment as a union member was dependent upon his participation in an unlawful monopoly, the court stated, without referring to *O'Brien*:

This argument has an odd sound, proceeding, as it does, from the labor organization itself; for if the purposes of the defendant association as disclosed in the record before us be in truth unlawful, that circumstance does not, in our view, tend to overthrow the judgment under review. The plaintiff's right of action, as we regard it, does not rest upon any assertion of the alleged monopoly, but upon a repudiation of the very course of procedure that was invoked in his case to establish the monopoly. It is well settled that, where a party has entered into an agreement that is void because contrary to public policy, his right to recover upon a ground of action that exists independent of the agreement is not overthrown by the operation of the maxim *in pari delicto*.

Although *Brennan* is perhaps distinguishable from *O'Brien* on the ground that in the latter case the plaintiffs sought to continue membership in an illegal association, that distinction was undercut by a more

<sup>101</sup> 64 N.J. Eq. 525, 54 Atl. 150 (1903).

<sup>102</sup> 73 N.J.L. 729, 65 Atl. 165 (1906).

recent decision of the New Jersey Equity Court in *Harris v. Geier*.<sup>108</sup> In that case, members of a Teamsters local brought a representative suit to restrain the Teamsters Joint Council from interfering with its affairs and placing it under receivership. The defendants relied in part upon the allegedly illegal purpose of the union, but the court said:

Objection to relief is made on the ground that the purpose of the union is to monopolize the supply of labor employed in operating taxicabs and busses in Hudson County, contrary to public policy. I am of the opinion that the objection is not sound. It is by no means clear that such a monopoly is contrary to the policy of the State. . . . But even if I am wrong in this, it does not follow that complainants must be denied relief. They are not suing on a contract with employers giving to the union a labor monopoly, or otherwise suing to enforce their monopoly. They allege rights independent of such a monopoly and which are not tainted by its alleged "illegality," and which therefore cannot be defeated on this ground.

In the same year, in *Walsche v. Sherlock*,<sup>109</sup> a New Jersey court held invalid and restrained the enforcement of union rules requiring that all members obtain jobs only by "clearance" from the union. The union argued that members, having agreed to the rules, should be bound by them; and this time the court turned the "illegality" argument inside out. Relying on the court's statement in *O'Brien* that courts should not enforce restrictive agreements "directly or indirectly," the court said:

If the defense set up is an attempt to enforce the contract between the complainants and the labor union, as I think it is, to sustain the defense would be indirectly to enforce a contract obviously restrictive of the complainants' constitutional right to work, and which tends toward monopoly, and this the court will not do, directly or indirectly.

It thus appears that in New Jersey the illegality, if any, of a trade union's rules or contracts is no longer a defense to an action brought by a member; and in Missouri, the only other state in which the question has been raised, the *Froelich* case has been ignored. Several American courts have recently upheld the right of a union to sue a member for subscriptions or fines due under the rules<sup>106</sup>—a result clearly impossible in Britain unless the *Russell* view of common-law illegality is reversed.

In addition to the fact that American courts rejected the view that unions were illegal per se at common law, two other factors probably help account for the relative absence of illegality as a defense in the

<sup>108</sup> 112 N.J. Eq. 99, 164 Atl. 50 (1932).

<sup>109</sup> 110 N.J. Eq. 223, 159 Atl. 661 (1932).

<sup>106</sup> E.g., *United Auto Workers, Local 756 v. Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958).

United States. One is that American unions had no statutory protection of their legal status so far as external affairs were concerned; they were undoubtedly reluctant to take the position that their rules were illegal with respect to intra-union disputes, for fear of what effect that position might have when they were sued by an employer. The second factor is that American courts developed their own doctrine to protect union autonomy—the requirement of exhaustion of remedies—and to a limited extent that doctrine served the same function as Section 4 of the 1871 Act. We discuss that requirement in the next chapter.

## Chapter 3

### Exhaustion of Remedies

A curious difference between American and British law relating to internal union affairs is the long-standing American rule, until recently absent in Britain,<sup>1</sup> that a member of a union, or for that matter any unincorporated society, must ordinarily exhaust all available remedies by appeal within his association before the courts will assume "jurisdiction" of the controversy.<sup>2</sup>

The difference is curious in two respects: first, because it represents a rare instance of American courts developing a rule with little or no common-law background; and second, because the difference lies in a direction which contradicts the typical tendency toward greater intervention in America than in England.

The American rule appears to have originated with the New York case of *White v. Brownell*.<sup>3</sup> The plaintiff in that case was a member of a stockbrokers' association. Accused of failing to pay money due another member for a stock sale, he refused to attend a meeting of an arbitration committee, which found him guilty and brought his case to the attention of the membership committee, which suspended him. Prior to commencing action, the plaintiff sought to appeal to the executive committee of the association, as permitted, but not expressly required, by the association's constitution. A meeting of the executive committee was called, but no quorum was present. The plaintiff declined to proceed further with his internal appeal and brought suit, claiming that the findings of the arbitration committee were erroneous.

The Court of Common Pleas, in what has become a fairly typical sequence of argument in exhaustion cases,<sup>4</sup> first passed upon the merits of the controversy. It held that the suspension was proper according to the provisions of the association's constitution and bylaws, and that

<sup>1</sup> See p. 49 *infra*.

<sup>2</sup> For general consideration of the exhaustion requirement, see Comment, *Exhaustion of Remedies in Private, Voluntary Associations*, 65 YALE L.J. 369 (1956). As to the requirement in trade unions, see Vorenberg, *Exhaustion of Intra-Union Remedies*, 2 LAB. L.J. 487 (1951), and Annotation, 168 A.L.R. 1462.

<sup>3</sup> 2 Daly 329 (N.Y. Sup. Ct. 1868).

<sup>4</sup> *E.g.*, *Bush v. International Alliance of Theatrical Stage Employees*, 55 Cal. App. 2d 357, 130 P.2d 788 (1942); *Cromwell v. Morrin*, 91 N.Y.S.2d 176 (Sup. Ct. 1949).

the plaintiff had no cause to complain. The court went on to hold, however, that the plaintiff was in any event contractually bound to exhaust his remedies within the association before resorting to legal action. The court stated:

The by-law having provided a mode for reviewing and correcting any error or injustice on the part of the committee or membership in reporting to the president that the plaintiff was in default, he was bound to avail himself of the remedy provided by the constitution and by-laws of the body of which he had become a member before he can ask a court of equity to investigate a proceeding not necessarily final in the body itself, but which was there subject to review, and might be annulled by the action of a committee expressly clothed with authority to investigate it.

The court then cited as authority an early English case holding that a member of a business firm who sought to dissolve a partnership must first seek a vote of his partners,<sup>5</sup> and continued:

He must, in consonance with the rule upon which Lord Eldon acted in the case above cited, resort to the remedy which is provided by the constitution and by-laws of the association itself, before he asks a court of equity to interfere—unless by evasion, intentional delays, or other unjust procedure he is practically deprived of the benefit of that remedy—which in this case is substantially denied by the answer.

The rule in *White v. Brownell* requiring exhaustion of remedies has been followed in all jurisdictions and has been extended to all forms of unincorporated association.<sup>6</sup> Some courts seek to explain this rule by saying that it is an implied term of the “contract” between the association and its members,<sup>7</sup> but most courts apply the rule without attempting to explain its basis.<sup>8</sup> The contract rationale is weak for two reasons. First, it fails adequately to explain what courts actually do. Not only is exhaustion of remedies required, as in *White v. Brownell*, in the absence of an express provision requiring appeal,<sup>9</sup> but exceptions to the rule are applied regardless of the existence of such a provision.<sup>10</sup>

<sup>5</sup> *Carlen v. Drury*, (1812) 1 Ves. & B. 154. This case seems to have had no effect on cases in which members of associations sought judicial relief. See p. 49 *infra*.

<sup>6</sup> Some of the nonunion cases are collected in annotations at 20 A.L.R.2d 344 (clubs); *id.* at 531 (professional associations); *id.* at 563 (churches).

<sup>7</sup> *E.g.*, *Malloy v. Carroll*, 272 Mass. 524, 172 N.E. 790 (1930). See 87 C.J.S. *Trade Unions* § 49; 4 AM. JUR. *Associations and Clubs* § 31 (Supp. 1955).

<sup>8</sup> *E.g.*, *Waldman v. Ladisky*, 101 N.Y.S.2d 87 (Sup. Ct. 1950); *Screwmen's Benevolent Association v. Benson*, 76 Tex. 552, 13 S.W. 379 (1890).

<sup>9</sup> *E.g.*, *Sims v. Cross*, 33 CCH Lab. Cas. ¶ 71,054 (D.D.C. 1957); *Porth v. Local 201, United Brotherhood of Carpenters*, 171 Kan. 177, 231 P.2d 252 (1951); *Knox v. Local 900, United Auto Workers*, 36 CCH Lab. Cas. ¶ 65,725 (Mich. Cir. Ct. 1959). *But cf.* *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 Atl. 102 (1935) (no exhaustion required in absence of express requirement where no “property right” involved); see p. 42 *infra*.

<sup>10</sup> *E.g.*, *Cameron v. Durkin*, 321 Mass. 590, 74 N.E.2d 671 (1947); *Naylor v. Harkins*, 11 N.J. 435, 94 A.2d 825 (1953); *Wilson v. Miller*, 194 Tenn. 390, 250 S.W.2d 575 (1952).

Moreover, some courts require that nonmembers seeking some relief from the union exhaust available intra-union remedies<sup>11</sup>—a result difficult to explain on contract theory. Second, the contract rationale tends to be rigid; it does not allow for flexibility in the application of policy. Strict application of contract principles, for example, might require exhaustion of intra-union remedies when it would be clearly unjust to do so; and, conversely, it might excuse exhaustion when resort to intra-union remedies might be beneficial.

The more realistic view is that the rule constitutes an application of public policy quite apart from any agreement. The policy embedded in the exhaustion rule is similar to that which underlies the rules requiring exhaustion of administrative remedies in governmental agencies.<sup>12</sup> It avoids unnecessary litigation by insuring that extrajudicial remedies have been pursued; and it enables the association to assume responsibility for the acts of subordinate officials and bodies and to administer a uniform policy.<sup>13</sup> The exhaustion policy is thus a matter both of judicial convenience and of association autonomy.

It is consistent with the policy behind the exhaustion rule to admit of certain exceptions when to require exhaustion would be inequitable. The court in *White v. Brownell*, for example, indicated that exhaustion would not be required when the member is deprived of the benefit of appeal by "evasion, intentional delays, or other unjust procedure." Courts in subsequent decisions have adopted these exceptions; but, just as British courts have champed against the bit of Section 4 of the 1871 Act, so American courts have in many cases whittled away the exhaustion requirement by exceptions that have little basis in policy.<sup>14</sup> As a result, the decisions discussing exceptions are often of little predictive value.<sup>15</sup>

<sup>11</sup> *King v. Wynema Council*, 25 Del. 225, 78 Atl. 845 (1911) (suit for benefits by non-member beneficiary); *Davis v. Brotherhood of Railway Carmen*, 272 S.W.2d 147 (Tex. Civ. App. 1954) (suit by nonmember seeking admission); *Porth v. Local 201*, *supra* note 9 (suit by expelled member for reinstatement).

<sup>12</sup> DAVIS, *ADMINISTRATIVE LAW* c. 15 (1951).

<sup>13</sup> The Pennsylvania Supreme Court has recently adopted this explanation, rejecting the contract rationale. *Falsetti v. Local 2026, United Mine Workers*, 400 Pa. 145, 161 A.2d 882 (1960).

<sup>14</sup> It has been suggested that policy supports but a single exception to the exhaustion requirement, i.e., proof that the plaintiff will suffer "irreparable injury" unless relief is granted. Comment, 65 YALE L.J. 369, 383 (1956). The writer is inclined to agree, with the qualification that "injury" be interpreted broadly to include loss of participation rights and injuries to reputation.

<sup>15</sup> Summers reports that in only twenty out of 200 reported New York cases involving judicial intervention in union affairs did the courts refuse to act because internal remedies had not been exhausted, and of these, six were suits to prevent the union from proceeding even before it had held a hearing or made a decision, and thirteen were suits in which exhaustion was used as a "make-weight" to deny relief, after the court had first examined the merits and determined there was no substance to the suit. Summers, *Judicial Settlement of Internal Union Affairs*, 7 BUFFALO L. REV. 405, 410 (1958).

## BASES FOR EXCEPTIONS

## EXCESSIVE DELAY

One exception to the exhaustion requirement accepted by most courts is that a member need not prosecute an appeal from an adverse ruling if the union officials in charge intentionally delay the hearing on appeal,<sup>16</sup> or if the delay is in any event "excessive."<sup>17</sup> But the criteria used for determining when delay is excessive are by no means uniform.<sup>18</sup>

The primary criterion should be, and often is, the degree of harm which the member is likely to suffer while his case is on appeal. For example, if a member, as a result of expulsion or suspension from his union, is prevented from working by the operation of a union-security agreement, courts tend to regard it as unjust to require him to suffer the penalties of discipline during appeal;<sup>19</sup> they are more likely to require exhaustion of remedies if there is no interference with employment,<sup>20</sup> or if "sentence" is in general suspended during appeal.<sup>21</sup>

But length of time is itself a factor, along with degree of harm.<sup>22</sup> Most union constitutions provide for several stages of appeal from a disciplinary action: first to the local membership; second to the international president and/or executive board; and finally to the convention, which is in some cases held annually, but more often at longer intervals.<sup>23</sup> Courts tend to require exhaustion of remedies through the preliminary stages, but to excuse appeal to the national convention on grounds, among others, of excessive delay.<sup>24</sup>

<sup>16</sup> *E.g.*, *Schneider v. Local 6, United Association of Journeymen Plumbers*, 116 La. 270, 40 So. 700 (1905); *Browne v. Hibbets*, 290 N.Y. 459, 49 N.E.2d 713 (1943).

<sup>17</sup> *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y.S. 1003 (Sup. Ct. 1907).

<sup>18</sup> *E.g.*, compare *Local 57 v. Boyd*, 245 Ala. 227, 16 So. 2d 705 (1944) (delay of two and one-half months held excessive), with *Snay v. Lovely*, 276 Mass. 159, 176 N.E. 791 (1931) (delay of over a year held not excessive).

<sup>19</sup> *E.g.*, *Naylor v. Harkins*, *supra* note 10; *Browne v. Hibbets*, *supra* note 16; *Seligman v. Toledo Moving Picture Operators Union*, 88 Ohio App. 137, 98 N.E.2d 54 (1947). Loss of insurance benefits may also be considered. *E.g.*, *Local 57 v. Boyd*, *supra* note 18. But see *Greenwood v. Building Trades Council*, 71 Cal. App. 1959, 233 Pac. 223 (1925) ("The fact that hardship may be suffered during the pendency of the period which such proceedings are being taken and had does not obviate the necessity of their being taken").

<sup>20</sup> *E.g.*, *Way v. Patton*, 195 Ore. 36, 241 P.2d 895 (1952).

<sup>21</sup> *E.g.*, *Cunningham v. Milk Drivers & Dairy Employees*, 144 N.Y.S.2d 790 (Sup. Ct. 1955); *Minch v. Local 370, Operating Engineers*, 44 Wash. 2d 15, 265 P.2d 286 (1953). Cf. *McCauley v. Lancaster Federation of Musicians*, 26 L.R.R.M. 2304 (Pa. C.P. 1950) (requiring exhaustion upon condition that union reduce fine required as a condition of appeal from \$300 to \$100).

<sup>22</sup> Courts are influenced by comparison with judicial delays. See *Dallas Photo-Engravers Union v. Lemmon*, 148 S.W.2d 954 (Tex. Civ. App. 1941) (delay held not unreasonable in comparison with delay on civil calendar).

<sup>23</sup> *Summers, Disciplinary Procedures of Unions*, 4 IND. & LAB. REL. REV. 483 (1950).

<sup>24</sup> *E.g.*, *Local 4 v. Brown*, 258 Ala. 18, 61 So. 2d 93 (1952) (convention not to meet for over a year); *Fritz v. Knaub*, *supra* note 17 (convention not to meet for two years);



## HARDSHIPS IN APPEAL

In addition to excessive delay, courts will take into consideration other hardships connected with appeal, and in particular, where the appellate body meets at some distance from the member, the cost and inconvenience of defending his case.<sup>25</sup> Carried to the extreme, the hardship limitation would in nearly every case excuse exhaustion of remedies beyond the local tribunal. This is so because not only conventions, but also the offices of the national president and executive board, are normally located hundreds or thousands of miles from the great majority of members.

Whether the hardship doctrine ought to be carried to that extent depends, it would seem, not only on the general policy of requiring appeal, but on whether the right to be present at the determination of an appeal is regarded as essential to the fair procedure which courts require of disciplinary proceedings. As we shall see in a later chapter, some American courts hold that if a member is given a fair hearing at his initial trial it is not essential that he be heard at the appellate level.<sup>26</sup> Courts have not faced this issue squarely in the exhaustion cases, and generally rely upon hardship as merely one factor to be taken into consideration.<sup>27</sup>

## LACK OR FUTILITY OF APPEAL

The exhaustion doctrine assumes the existence within the union of an appeal procedure by resort to which a member may reasonably be expected to obtain relief if his case is just. If in fact the constitution of the union does not provide for an appeal,<sup>28</sup> or if it conditions the

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*Heasley v. Operative Plasterers*, 324 Pa. 257, 188 Atl. 206 (1936) (convention supposed to be held on call, but no convention held for eight years and no showing of plans for one). The fact that union conventions all too frequently operate as a "rubber stamp" for decisions of the incumbent officers is perhaps an additional factor for excusing exhaustion in such cases. *Summers*, *supra* note 23. Expense and inconvenience of appeal to the convention may likewise be considered. See *infra*. But cf. *Anderson v. Brotherhood of Painters*, 330 S.W.2d 541 (Tex. Civ. App. 1959).

<sup>25</sup> *Local 57 v. Boyd*, *supra* note 18 (general executive board to meet in a distant city); *Local 4 v. Brown*, *supra* note 24 (member in Alabama; convention in Washington, D.C.); *Beedie v. International Brotherhood of Electrical Workers*, 25 N.J. Super. 269, 96 A.2d 89 (App. Div. 1953) (convention at distant city); *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y.S. 956 (1904) (appellate body to convene at distance of several hundred miles from plaintiff's residence); *Gallagher v. Monaghan*, 58 N.Y.S.2d 618 (Sup. Ct. 1945) (same); *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957).

<sup>26</sup> See chap. 5 *infra*.

<sup>27</sup> Each of the cases cited in note 25, *supra*, involved factors other than cost of travel as an excuse for exhaustion.

<sup>28</sup> *E.g.*, *Simons v. Berry*, 250 N.Y. 463, 148 N.E. 636 (1945) (no appeal provided). In *Armstrong v. Duffy*, 90 Ohio App. 233, 103 N.E.2d 760 (1951), it was held that a member need not exhaust remedies provided after institution of action.

right of appeal upon the discretion of union officers,<sup>29</sup> then no attempt at appeal will be required.

More troublesome, because more subject to discretion, is the rule that exhaustion is not required where it would clearly be futile. Futility sufficient to excuse exhaustion may arise either from the fact that the appellate body does not have the power to grant effective relief, or from the fact that the appellate body is so biased against the member that an adverse ruling is inevitable. These two grounds for finding futility warrant separate discussion.

*Lack of power to grant effective relief.* In discipline cases in which a member seeks reinstatement after wrongful expulsion, exhaustion may be excused if, as is rarely the case, the appellate tribunal has no power to require reinstatement.<sup>30</sup> More frequently, the question of the power of the appellate tribunal to grant effective relief is raised by a member's claim for damages.

The power of a national union president or executive board to order a local union to grant a member damages for a wrong done to him is seldom spelled out in a union's constitution and bylaws; and if the power be said to exist by implication, it is seldom exercised.<sup>31</sup> Usually relying upon the improbability of relief by way of damages through appeal, courts have consistently held that the exhaustion rule does not apply where a member seeks only damages to compensate him for a loss occasioned by wrongful disciplinary action.<sup>32</sup>

Perhaps a distinction ought to be made between completed and continuing harm as a result of wrongful discipline. If a member is currently incurring damage, as where he stands expelled from his union and is unable to find work, it is unfair not to give the union the opportunity to terminate its liability by ordering reinstatement, even though the member does not seek such relief. As one commentator has put it, a member who does not desire to be reinstated should not be able to obtain the "cash value" of his membership by failing to appeal and permit the union to offer him a means of mitigating his damage.<sup>33</sup> An

<sup>29</sup> *Heasley v. Operative Plasterers*, *supra* note 24 (convention subject to call); *contra*, *Mulcany v. Huddell*, 272 Mass. 539, 172 N.E. 796 (1930).

<sup>30</sup> *Brown v. Harris County Medical Society*, 194 S.W. 1179 (Tex. Civ. App. 1917). See also *Browne v. Hibbets*, *supra* note 16, where the court relied upon the fact that the appellate tribunal had no power to remove the "black mark" of a fine imposed by a local union.

<sup>31</sup> See Taft, *Status of Members in Unions During Appeal*, 62 Q.J. ECON. 610 (1948).

<sup>32</sup> *E.g.*, *Grand International Brotherhood of Locomotive Engineers v. Green*, 210 Ala. 496, 98 So. 569 (1923); *Harper v. Gribble*, 46 L.R.R.M. 2860 (Colo. Sup. Ct. 1960); *Mullen v. Seegers*, 220 Mo. App. 847, 294 S.W. 745 (1927); *Pfoh v. Whitney*, 43 Ohio L. Abs. 417, 62 N.E.2d 744 (1945); *St. Louis Southwestern Ry. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908). *But cf.* *Strobel v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (1939) (holding exhaustion required in the absence of bad faith).

<sup>33</sup> *Summers, Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1089 (1951).

alternative approach would be to eliminate exhaustion as a condition precedent to court action in such cases, but to limit an award of damages to those suffered prior to the expiration of a reasonable time for appeal.

Where, however, the damage suffered by the member is at an end by the time he files in court, as where he has been expelled and then reinstated, there is less reason to require exhaustion. A desirable result could be achieved in such cases by placing the burden upon the union to show that the appellate tribunal has the power to and would, in proper cases, award damages to the member. Unless the union can make such a showing, exhaustion should not be required.

A somewhat different situation is presented in those cases in which a member seeks *both* damages and reinstatement. Some courts have insisted upon exhaustion of internal remedies before they will hear *either* claim to relief,<sup>34</sup> though others have assumed jurisdiction over the damage claim only, requiring appeal with respect to reinstatement.<sup>35</sup> For the same reason that exhaustion would be required in the case of a continuing harm, the first course is probably preferable from the standpoint of policy.

*Bias.* Some courts have developed the rule that appeal will not be required if the appellate tribunal is so obviously biased against the member that appeal would be futile.<sup>36</sup> For example, appeal has been excused when a substantial number of the appellate body has participated in the original trial and voted against the member;<sup>37</sup> where the only available appeal for a member accused of slandering the union president was to the president himself;<sup>38</sup> where the appellate body was the instigator of the plaintiff's expulsion;<sup>39</sup> or where a member, ex-

<sup>34</sup> Cf. *Bonham v. Brotherhood of Railroad Trainmen*, 146 Ark. 117, 225 S.W. 562 (1920).

<sup>35</sup> E.g., *Anderson v. Brotherhood of Painters*, *supra* note 24; *Taylor v. United Association of Journeymen Plumbers*, 46 L.R.R.M. 2897 (Tex. Civ. App. 1960).

<sup>36</sup> This is to be distinguished from the rule requiring an unbiased tribunal as part of natural justice. See chap. 5 *infra*.

<sup>37</sup> E.g., *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct. 1942). But cf. *Sims v. Cross*, *supra* note 9 ("The mere fact that the General Executive Board has already voted adversely to the accused, and that therefore it may be difficult to get a sufficient number of members to change their votes so as to reach the opposite result is immaterial. This is true of all petitions for rehearing"); *DeMott v. Amalgamated Meat Cutters*, 157 Cal. App. 2d 13, 320 P.2d 50 (1958) (the fact that three out of twenty-one members of executive board had acted adversely to plaintiff was not sufficient to excuse appeal to that body).

<sup>38</sup> E.g., *Corregan v. Hay*, *supra* note 25. But cf. *Hall v. Morrin*, 293 S.W. 435 (Mo. App. 1927) (member found guilty of slandering national officers required to appeal to national executive board).

<sup>39</sup> *Crossen v. Duffy*, 103 N.E.2d 769 (Ohio App. 1951); *Heasley v. Operative Plasterers*, *supra* note 24.

pelled by action of the president, could appeal only to an executive board found to be controlled by the president.<sup>40</sup>

As the last cited case indicates, the determination of the presence of bias frequently requires considerable discretion on the part of the court. Courts should, and probably do, take into consideration the hardships imposed by appeal in deciding whether to excuse exhaustion on grounds of bias. Unless the bias appears clearly from admitted facts, courts tend to be reluctant to excuse exhaustion in the absence of hardship.

### PROPERTY RIGHTS

The existence of a "property right," according to traditional doctrine, is a condition precedent to the granting of equitable relief in intra-association disputes.<sup>41</sup> As the doctrine has developed, the notion of what constitutes a property right has expanded to the point where the requirement, in that context, is virtually meaningless. But in the area presently under discussion, some courts have confused the property-right requirement and the exhaustion rule by saying that *if* a member is seeking protection of a property right, he need not exhaust his internal remedies prior to seeking judicial relief *unless* exhaustion is expressly required by the union's rules.<sup>42</sup>

Clearly if such a rule were applied literally, it would practically eliminate the exhaustion requirement. If a property right is a condition to equitable relief, then in the absence of an express rule, exhaustion would never be required where equitable relief was otherwise proper; and, as we have seen, most courts excuse exhaustion where the member seeks only damages. But courts do not apply the rule that literally.<sup>43</sup> It is used rather as a makeweight for intervention, and most of the cases which invoke the rule can be explained on the ground either that the statement of the rule was dictum,<sup>44</sup> or that other factors were involved which normally tend to excuse exhaustion of remedies.<sup>45</sup>

<sup>40</sup> *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y.S. 336 (1931). *But cf.* *Fish v. Huddell*, 51 F.2d 319 (D.C. Cir. 1931) (on almost identical facts, refusing to "indulge" in assumption that executive board was dominated by president).

<sup>41</sup> See chap. 4 *infra*.

<sup>42</sup> *E.g.*, *Local 57 v. Boyd*, *supra* note 18; *Bush v. IATSE*, *supra* note 4; *Holmes v. Brown*, 156 Ga. 402, 91 S.E. 408 (1917); *Gardner v. Newbert*, 74 Ind. App. 183, 128 N.E. 704 (1920); *Nissen v. International Brotherhood of Teamsters*, 229 Iowa 1028, 295 N.W. 858 (1941); *Fleming v. Moving Picture Machine Operators*, 124 N.J. Eq. 269, 1 A.2d 386 (1938); *Fritz v. Knaub*, *supra* note 17; *Heasley v. Operative Plasterers*, *supra* note 24.

<sup>43</sup> Indeed, the great number of cases in which exhaustion has been required in the absence of an express rules requirement testify to that fact.

<sup>44</sup> *E.g.*, *Bush v. IATSE*, *supra* note 4 (exhaustion required, distinguishing cases in which member claimed benefits); *Mogelever v. Newark Newspaper Guild*, 124 N.J.

## LACK OF JURISDICTION IN DISCIPLINARY TRIBUNAL

Courts surround union disciplinary action with a variety of limitations. Discipline must be in accord with the union's constitution and bylaws, both with respect to the grounds for imposing discipline and the procedure by which it is imposed. Moreover, regardless of the procedure specified by the union's rules, a member must be granted notice of charges, a fair hearing, and other elements of what courts regard as "due process" or "natural justice."<sup>46</sup>

When a member seeks judicial relief from union-imposed discipline, it is usually on the ground that one or more of these limitations has been ignored. It is indicative of the judicial revolt against restrictions upon their power to interfere in intra-union affairs that some courts look first to the merits of the controversy before them, find that the union has imposed discipline for an improper reason or by improper methods, and then, in complete disregard of the exhaustion policy, hold that exhaustion of remedies is not required because the irregularity has rendered the proceedings "void" and the union tribunal without "jurisdiction."<sup>47</sup> Conversely, some courts hold that a member should have exhausted his intra-union remedies after first deciding against him on the merits.<sup>48</sup>

It is apparent that this cart-before-the-horse logic, like the property-right theory, creates an exception as broad as the rule. The purpose of the exhaustion requirement is to preclude judicial interference until union authorities have had an opportunity to remedy wrongful action

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Eq. 60, 199 Atl. 56 (1938) (exhaustion required on grounds no "property rights" and no loss of employment); *Dragwa v. Federal Labor Union*, 136 N.J. Eq. 172, 41 A.2d 32 (1945) (exhaustion required, on ground member agreed to rules which included a provision for appeal).

<sup>46</sup> *E.g.*, *Local 57 v. Boyd*, *supra* note 18 (appeal futile, and tribunal without jurisdiction); *Nissen v. International Brotherhood of Teamsters*, *supra* note 42 (no assurance that appeals body would be called in session); *Lo Bianco v. Cushing*, *supra* note 9 (tribunal without jurisdiction); *Fritz v. Knaub*, *supra* note 17 (appeal lay to convention not to be held for two years, at great distance, and presided over by officer who had already decided against plaintiff).

<sup>47</sup> See chap. 5 *infra*.

<sup>48</sup> *Improper tribunal*: *Harris v. National Union of Marine Cooks & Stewards*, 98 Cal. App. 733, 221 P.2d 136 (1950); *Jose v. Savage*, 123 Misc. 283, 205 N.Y.S. 6 (1924). *Improper trial*: *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y.S. 1 (Sup. Ct. 1919); *Fales v. Musicians Protective Union*, 40 R.I. 34, 99 Atl. 823 (1917). *Improper grounds*: *Abdon v. Wallace*, 95 Ind. App. 604, 165 N.E. 68 (1929); *Ray v. Brotherhood of Railroad Trainmen*, 182 Wash. 39, 44 P.2d 787 (1935); *Leo v. Local 612, Operating Engineers*, 26 Wash. 2d 498, 174 P.2d 523 (1946). *Improper sanction*: *Local 7, Bricklayers Union v. Bowen*, 278 Fed. 271 (S.D. Tex. 1922).

<sup>49</sup> *E.g.*, *Bush v. IATSE*, *supra* note 4; *Clark v. Morgan*, 271 Mass. 164, 171 N.E. 278 (1930); *Walsh v. International Alliance of Theatrical Stage Employees*, 22 N.J. Misc. 161, 37 A.2d 667, *aff'd*, 136 N.J. Eq. 115, 40 A.2d 623 (1944).

by subordinate bodies or officials. If appeal is to be excused upon a finding that the initial action is wrongful, the doctrine is rendered meaningless. There is virtually no ground for invalidating union disciplinary proceedings which has not also been made a reason for excusing exhaustion of remedies.<sup>49</sup>

In creating the "no-jurisdiction" exception, the courts were probably influenced by the analogy to the notion of a "void judgment," subject to collateral attack.<sup>50</sup> But that notion would extend only to matters of notice, hearing, and the constitution of the tribunal; whereas courts have extended the no-jurisdiction exception to excuse appeal even where the defect related to whether the member had committed an offense for which he could be disciplined.<sup>51</sup>

Perhaps some justification can be found for the no-jurisdiction exception where the defect is either obvious or admitted, so that a court may be reluctant to put the plaintiff to unnecessary steps. On the other hand, where the defect is obvious the decision is more likely to be reversed on appeal within the union; and one purpose of the exhaustion rule is, or should be, to preserve association autonomy by granting the union an opportunity to put its own house in order.

In one of the few cases to consider the issue directly, the Supreme Court of California has in effect rejected the no-jurisdiction exception.<sup>52</sup> In reply to a plaintiff's contention that appeal was not required because discipline had been imposed in violation of the union's rules,<sup>53</sup> the court stated:

If such an exception is construed as broadly as the quoted language would permit, it would make it unnecessary for any party with a justified grievance involving personal and property rights against an organization of which he is a member, including the plaintiff in the present case, to have the matter corrected internally by the machinery provided before resorting to the courts. The exception in such a case would swallow the rule, a result clearly not intended by the cases relied on as authority for the broad interpretation sought by the plaintiff to justify this action.

It is only when the organization violates its rules for appellate review or

<sup>49</sup> See note 47 *supra*.

<sup>50</sup> In *Malmsted v. Minneapolis Aerie*, 111 Minn. 119, 126 N.W. 486 (1910), this argument was made explicit. Some cases indicate that courts regard failure by the union to follow its own rules as a breach of contract which excuses the obligation to exhaust remedies. *E.g.*, *Rueb v. Rehder*, 24 N.M. 534, 174 Pac. 992 (1918).

<sup>51</sup> See note 47 *supra*.

<sup>52</sup> *Holderby v. International Union of Operating Engineers*, 45 Cal. 2d 843, 291 P.2d 763 (1955). See also *Harris v. Detroit Typographical Union*, 144 Mich. 422, 108 N.W. 362 (1906); *McCauley v. Lancaster Federation of Musicians*, 26 L.R.R.M. 2304 (Pa. C.P. 1950).

<sup>53</sup> The plaintiff contended that rules requiring notice and hearing had not been complied with.

upon a showing that it would be futile to invoke them that the further pursuit of internal remedies is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts.

### NONDISCIPLINARY CASES

Most of the decisions invoking the exhaustion requirement have involved discipline of members. While it has occasionally been said that the exhaustion requirement is either inapplicable or less applicable to cases not involving discipline,<sup>54</sup> it is perhaps more accurate to say that courts apply to nondisciplinary cases the same sorts of exceptions created for the disciplinary cases, and that in certain areas of judicial interference these exceptions tend generally to be applicable.

This is the case, for example, in the area of judicial control over union funds and property. Most courts excuse exhaustion of remedies where a member seeks relief against misapplication of union funds,<sup>55</sup> but usually on the bases of specific reasons, such as (1) any delay in remedy may be damaging, since misapplied funds may be difficult to recover;<sup>56</sup> (2) a union appellate tribunal may be unable to grant effective relief, particularly where the member seeks restoration of misapplied funds<sup>57</sup> or where the claimed misapplication is a continuing act;<sup>58</sup> or (3) according to the court's interpretation of the union's rules (usually based in part upon the foregoing reasoning) they do not provide for an appeal in such cases.<sup>59</sup>

Similarly, where a local union has been wrongfully placed under trusteeship it would normally be inequitable to require its members to appeal to the officers of the parent body who imposed it; and appeal

<sup>54</sup> *E.g.*, *Local Lodge 104 v. International Brotherhood of Boilermakers*, 158 Wash. 480, 291 Pac. 328 (1930).

<sup>55</sup> *E.g.*, *DeMonbrun v. Sheet Metal Workers*, 140 Cal. App. 2d 456, 295 P.2d 881 (1956); *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); *Bell v. Sullivan*, 49 N.Y.S.2d 388 (Sup. Ct. 1944); *O'Neill v. United Association of Journeymen Plumbers*, 348 Pa. 532, 36 A.2d 325 (1944); *Wilson v. Miller*, *supra* note 10. *But cf.* *Martin v. Favell*, 73 N.W.2d 856 (Mich. Sup. Ct. 1955); *Way v. Patton*, *supra* note 20.

<sup>56</sup> *DeMonbrun v. Sheet Metal Workers*, *supra* note 55.

<sup>57</sup> *E.g.*, *Bell v. Sullivan*, *supra* note 55 ("... nowhere... is there jurisdiction vesting in any of the association tribunals power to compel an accounting and for the award of judgment thereon, or any process or means provided to compel obedience and payment other than punitive impositions"). *Cf.* *Alden v. Cook*, 360 Mo. 252, 227 S.W.2d 729 (1950) ("... we cannot assume as a matter of law that if the shortage were discovered restitution would not be made without a lawsuit").

<sup>58</sup> *E.g.*, *DeMonbrun v. Sheet Metal Workers*, *supra* note 55 ("These things, diversion and misapplication of funds and other property, go on from day to day... If it be said that an appeal lies therefrom, a practical problem arises as to how often must an appeal be taken and does it hold any likelihood of success").

<sup>59</sup> *E.g.*, *Polin v. Kaplan*, *supra* note 55 (misapplication of funds held not to be a "decision" within meaning of rule requiring appeal from "decisions" of union and its officers).

to the national convention would often be a meaningless remedy. On these grounds<sup>60</sup> and others,<sup>61</sup> courts have usually excused exhaustion in such situations, as they have where a local union's charter has been revoked or suspended by its parent body,<sup>62</sup> or where the parent body attempts to interfere with local elections.<sup>63</sup>

In election cases, application of the exhaustion requirement varies. Exhaustion is generally not required where a member seeks to compel union officers to hold an election after their refusal to do so,<sup>64</sup> but it is often insisted upon in cases where members complain that they were improperly disqualified from standing for union office,<sup>65</sup> or that a union election was conducted improperly.<sup>66</sup> It seems that imposition of the requirement in such cases is often more a device for avoiding jurisdiction than for insuring use of an effective means of appeal.<sup>67</sup> Suits involving discipline or removal of officers are subject to the same exhaustion requirements as in discipline cases generally.<sup>68</sup>

<sup>60</sup> *E.g.*, *Harris v. Geier*, 112 N.J. Eq. 99, 164 Atl. 50 (1932); *Spitzer v. Ernst*, 190 Misc. 47, 72 N.Y.S.2d 570 (Sup. Ct. 1947); *Underwood v. Maloney*, 32 L.R.R.M. 2234 (E.D. Pa. 1953); *O'Neill v. Journeymen Plumbers*, *supra* note 55; *Washington Local Lodge 104 v. International Brotherhood of Boilermakers*, 203 P.2d 1019 (Wash. Sup. Ct. 1949).

<sup>61</sup> *O'Brien v. Matual*, 14 Ill. App. 2d 173, 144 N.E.2d 446 (1957) (lack of hearing rendered imposition void, so no decision to appeal from); *Hickman v. Kline*, 71 Nev. 55, 279 P.2d 662 (1955) (partial appeal unsuccessful); *Canfield v. Moreschi*, 40 N.Y.S.2d 757 (Sup. Ct. 1943) (national union "exceeded its jurisdiction"). *Cf.* *Garcia v. Ernst*, 101 N.Y.S.2d 693 (Sup. Ct. 1951) (statement that exhaustion excused on grounds of bias in the appellate tribunal, but temporary injunction denied on the ground, among others, that a hearing had been granted); *Zipkin v. Kaplan*, 2 App. Div. 2d 407 (N.Y. 1956) (exhaustion required where sole ground for objection is that trustee was not a union member).

<sup>62</sup> *E.g.*, *Ellis v. American Federation of Labor*, 48 Cal. App. 2d 440, 120 P.2d 79 (1941) (violation of due process); *Gardner v. Newbert*, *supra* note 42 (similar); *Heasley v. Operative Plasterers*, *supra* note 24 (national appellate body biased, and no certainty that convention will be held); *Local 7, Bricklayers Union v. Bowen*, *supra* note 47 (interpreting rules not to provide appeal in event of charter suspension).

<sup>63</sup> *Webster v. Rankins*, 50 S.W.2d 746 (Mo. App. 1932); *Maineculf v. Robinson*, 41 L.R.R.M. 2493 (N.Y. Sup. Ct. 1958); *Wilson v. Miller*, 194 Tenn. 390, 250 S.W.2d 575 (1952).

<sup>64</sup> *E.g.*, *Harris v. Geier*, *supra* note 60; *O'Neill v. Journeymen Plumbers*, *supra* note 55. See chap. 7 *infra*.

<sup>65</sup> *E.g.*, *Harrison v. O'Neill*, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950); *Clarke v. Corr*, 145 N.Y.S.2d 125 (Sup. Ct. 1955). *Cf.* *Di Bucci v. Uhrich*, 37 CCH Lab. Cas. ¶ 65,457 (N.Y. Sup. Ct. 1959) (restraining holding of election without allowing plaintiff's name on ballot).

<sup>66</sup> *E.g.*, *Leahigh v. Beyer*, 67 Ohio L. Abs. 79, 116 N.E.2d 458 (1953). *Cf.* *Siblia v. Western Electric Employees Association*, 142 N.J. Eq. 77, 59 A.2d 251 (1948). See chap. 7 *infra*.

<sup>67</sup> See chap. 7 *infra*.

<sup>68</sup> *E.g.*, *DeMott v. Amalgamated Meat Cutters*, *supra* note 37.



## EFFECT OF THE LMRDA

The new Labor-Management Reporting and Disclosure Act, which contains restrictions on both the procedure<sup>69</sup> and the grounds for union disciplinary action,<sup>70</sup> and provides for enforcement through action in the federal courts,<sup>71</sup> does not expressly require exhaustion of intra-union remedies as a condition to such action. But Section 101(a)(4), which prohibits unions from limiting the right of members to sue or testify,<sup>72</sup> contains a proviso to the effect that "any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof." Though the context and legislative history<sup>73</sup> would indicate that the proviso has effect only in the situation where a union seeks to discipline a member for going to the courts, it has been interpreted to create a substantive federal exhaustion doctrine, enabling the courts to require exhaustion of internal remedies up to but not exceeding four months. On this view, it appears that the proviso permits federal courts to develop their own principles regarding the time when a union's action is ripe for judicial intervention, and that principles developed by the state courts will not be binding.<sup>74</sup>

In the case of misapplication of union funds, the Act gives members the right to bring suit if they have requested that the "labor organization or its governing board or officers" seek appropriate relief and the latter "refuse or fail" to do so within a "reasonable time."<sup>75</sup> Since the term "labor organization" is defined in the Act to include local unions,<sup>76</sup>

<sup>69</sup> See p. 117 *infra*.

<sup>70</sup> P. 136 *infra*.

<sup>71</sup> P. 138 *infra*.

<sup>72</sup> P. 137 *infra*.

<sup>73</sup> Senator Kennedy, in explaining the conference bill on the Senate floor, stated in part: "So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the 'right to sue' provision is fulfilled, and any requirements which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute." 105 CONG. REC. 16414 (1959).

<sup>74</sup> *Detroy v. American Guild of Variety Artists*, 47 L.R.R.M. 2452 (2d Cir. 1961) (holding exhaustion not required "where the internal union remedy is uncertain and has not been specifically brought to the attention of the disciplined party, the violation of federal law clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award"). See also *Johnson v. Local 58, International Brotherhood of Electrical Workers*, 45 L.R.R.M. 2685 (E.D. Mich. 1960) (holding IBEW appellate procedure "unreasonable"). *But cf. Smith v. Local 467, General Truck Drivers*, 181 F. Supp. 14 (S.D. Cal. 1960) (holding the exhaustion requirement to be absolute, without exception for futile appeals).

<sup>75</sup> § 501(b). See p. 164 *infra*.

<sup>76</sup> § 3(i).

it is apparent that no exhaustion by appeal to the parent body or the convention is required. Except for the requirement of demand, which in some states may be novel,<sup>77</sup> this is in accord with existing law. Similarly, no exhaustion is required in the case of suits to remedy the improper imposition or maintenance of a trusteeship over a local union, or in the case of complaints to the Secretary of Labor relating to such matters.<sup>78</sup>

By contrast, the Act expressly requires that before a member may file a complaint with the Secretary of Labor challenging an election on the ground that it was not conducted in accordance with the union's rules or with the provisions of the Act, he must either (1) have exhausted available remedies under the constitution and bylaws of his union and any parent body, or (2) have invoked such available remedies "without obtaining a final decision within three calendar months after their invocation."<sup>79</sup> This exhaustion provision differs from the common law in two respects. First, it establishes a fixed limit to the exhaustion period. Second, it appears to require exhaustion under circumstances in which exhaustion might not be required at common law. As noted above, courts frequently require exhaustion in the case of challenges to an election, but not invariably. The customary exceptions to the exhaustion requirement are usually considered.<sup>80</sup> Further, exhaustion is not ordinarily required where a member seeks to compel the holding of an election under circumstances in which local or national officials refuse to conduct an election at the time prescribed by the union's rules.<sup>81</sup> The new Act's requirement that "available remedies" be exhausted seems to preclude consideration of many of the traditional exceptions to the exhaustion doctrine.

Apart from specific provisions relating to exhaustion of remedies, it is possible that the Act's extensive regulation of internal affairs may affect the exhaustion rule as applied in the state courts. The Supreme Court of Pennsylvania, for example, in an opinion which based the exhaustion doctrine on policy rather than contractual grounds, and which defined relatively limited exceptions to the requirement, announced:

It is with a view toward the recent steps taken legislatively to safeguard the rights of individual members against organizational excesses that we today

<sup>77</sup> See p. 89 *infra*.

<sup>78</sup> § 304(a). See p. 195 *infra*.

<sup>79</sup> § 402(a). See p. 182 *infra*.

<sup>80</sup> See p. 46 *supra*.

<sup>81</sup> P. 46 *supra*.

elevate the rule of exhaustion to such a prominent position in our jurisdictional scheme.<sup>82</sup>

### COMPARISON WITH BRITISH DOCTRINE

It is interesting to compare the history of the exhaustion requirement in the United States with the history of limitations on judicial interference in Britain imposed by the restraint-of-trade doctrine and Section 4 of the Trade Union Act of 1871. There are some obvious differences between the two: for example, one was exclusively the creation of the judiciary, whereas the other was in large measure a result of legislative policy. And perhaps the exhaustion requirement is more justifiable in relation to the policies involved in the conflict between judicial interference and union autonomy than is the British rule. Yet their histories are similar in that they both once imposed a substantial restraint on judicial action in the field of internal union affairs (though this is more true of the 1871 Act than of exhaustion) and the effect of both of them has been greatly diminished by exceptions and qualifications for the most part unrelated to the notion of autonomy. The history in both cases is illustrative of the trend toward greater control.

Perhaps the existence of the restraint-of-trade obstacle accounts in part for the absence of exhaustion doctrine in British law.<sup>83</sup> The statutory requirement that disputes within registered friendly societies be finally determined in accordance with the rules of the society may also have weakened the pressure for an exhaustion requirement.<sup>84</sup> In any event, the principle implied by the early partnership case of *Carlen v. Drury*,<sup>85</sup> relied upon by the New York court in *White v. Brownell*,<sup>86</sup> was never extended to nonprofit associations. The rule in *Foss v. Harbottle*, held in Britain to be applicable to trade unions,<sup>87</sup> implies

<sup>82</sup> *Falsetti v. Local 2026, United Mine Workers*, 400 Pa. 145, 161 A.2d 882 (1960). See also *Wax v. International Mailers Union*, 400 Pa. 173, 161 A.2d 603 (1960) (requiring that complaint state specific steps taken to exhaust internal remedies).

<sup>83</sup> In *McKernan v. United Operative Masons Association*, [1873] 1 S.C. (4th) 453, the defendant union argued that the plaintiff's action for disablement benefits was "premature" because he had not taken advantage of the opportunity, afforded by the union's rules, to appeal to other branches. The court did not find it necessary to pass upon that contention, since the plaintiff's suit was barred by Section 4 of the Trade Union Act, 1871.

<sup>84</sup> Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, § 68(1). Prior Acts contained similar provisions. *E.g.*, Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, § 22 (repealed). But, as with Section 4 of the Trade Union Act, 1871, the provisions limiting court jurisdiction have been strictly interpreted. *E.g.*, *Sinden v. Banks*, (1861) 3 E. & E. 623 (suit for misappropriation of funds not barred); *Prentice v. London*, (1875) L.R. 10 C.P. 679 (suit for reinstatement not barred).

<sup>85</sup> (1812) 1 Ves. & B. 154.

<sup>86</sup> 2 Daly 329 (N.Y. Sup. Ct. 1868).

<sup>87</sup> *Cotter v. National Union of Seamen*, (1929) 45 T.L.R. 352, 2 Ch. 58. See chap. 4 *infra*.

somewhat the same policies as the exhaustion doctrine in its insistence that a member may not sue if the action complained of is one which could be effectively remedied by a vote of a simple majority at a general meeting.<sup>88</sup> Both rules are to some extent designed to avoid suits in court over matters which might be corrected internally.<sup>89</sup> The rule in *Foss v. Harbottle*, however, is of very limited application. It does not prevent suit to restrain *ultra vires* application of funds;<sup>90</sup> nor does it prevent suit to correct a personal wrong, such as wrongful disciplinary action.<sup>91</sup>

Recently, however, the Judicial Committee of the Privy Council applied the exhaustion requirement to the extent of upholding an express agreement to exhaust intra-union remedies. In *White v. Kuzych*,<sup>92</sup> a Canadian case, a union member had been charged with violating various provisions of the union constitution by his actions in publicly denouncing a closed-shop agreement negotiated by his union and the officers who enforced it.<sup>93</sup> Pursuant to the provisions of the union constitution, the member was called before a trial committee which, after hearing, found the member guilty as charged. The matter then went before the membership meeting of the union, which adopted the trial committee's report and voted for the member's expulsion. The union's constitution permitted an appeal within sixty days from a "decision" of the membership meeting to the Shipyard General Workers Federation, the governing body of the union. The oath of obligation taken by each member expressly bound him to exhaust available intra-union remedies before resorting to the courts. The plaintiff, instead of appealing within the union, brought action for a declaration that the expulsion was invalid and for damages on the grounds that (1) the trial committee was not constituted in accordance with the union's constitution, and (2) the members of the trial committee and of the union who voted for his expulsion were guilty of bias.

The Canadian Court of Appeal, affirming a judgment of the trial court in the plaintiff's favor,<sup>94</sup> sustained the plaintiff's position on both these grounds, and then relied upon the same grounds as reasons for

<sup>88</sup> GOWER, *COMPANY LAW* 528 ff. (2d ed. 1957).

<sup>89</sup> *Id.* at 527.

<sup>90</sup> *E.g.*, *Yorkshire Miners Association v. Howden*, [1905] A.C. 256.

<sup>91</sup> *Cf.* *Amalgamated Society of Carpenters & Joiners v. Braithwaite*, [1922] 2 A.C. 440; *Edwards v. Halliwell*, [1950] 2 All E.R. 1064.

<sup>92</sup> [1951] 2 All E.R. 435; see Whitmore, *Judicial Control of Union Discipline: The Kuzych Case*, 30 CAN. B. REV. 1 (1952).

<sup>93</sup> Specifically, he was charged with (1) holding unauthorized public meetings to discuss internal union affairs, (2) conduct unbecoming a member, and (3) slander against the president of the union.

<sup>94</sup> [1949] 2 W.W.R. 558.

excusing exhaustion of remedies. The court held (3 to 2) that the fact that the trial committee was improperly constituted rendered the proceedings void *ab initio*; and that in any event the bias against the plaintiff meant that the determination of the membership meeting to expel him was invalid, and therefore not a "decision" within the meaning of the rules for appeal.<sup>96</sup> In terms of the American decisions, this constituted an application of the no-jurisdiction exception to the exhaustion requirement.

The Privy Council reversed the Court of Appeal on both points. Apparently accepting that court's assumption that exhaustion would not be required if the trial committee was improperly constituted,<sup>96</sup> it held (with little discussion in the opinion) that such was not the case. And it interpreted the word "decision" in the union's appeal rules to apply to any "conclusion" reached by the membership meeting, whether or not the conclusion was valid.<sup>97</sup> The plaintiff argued further that an appeal to the Federation would be futile, because that body was certain to decide against him; but the Judicial Committee rejected that argument on the ground that there was "no reason why the Federation, if called on to deal with the appeal, should be assumed to be incapable of giving its honest attention . . ."; and on the further ground that "At any rate this is the appeal which the respondent was bound by his contract to pursue before he could issue the writ." In the process of reaching this conclusion the Judicial Committee reviewed the charges of bias against the union and remarked that "severe condemnation of the methods followed in the proceedings under review is fully justified."

An American court would probably have reached the same conclusion as the Privy Council, but probably not on the basis of the same reasoning. An important factor which was not mentioned in the opinion but which would have been of primary significance to an American court was that the rule providing for appeals expressly stated that if an appeal is taken from an expulsion order, the order is stayed until a decision by the appellate tribunal. The requirement of exhaustion would, therefore, have imposed little hardship on the plaintiff. Further, as we have seen, some American courts would differ with the Privy Council as

<sup>96</sup> [1950] 2 W.W.R. 193.

<sup>96</sup> "If this is proved to be so, any proceedings for hearing and deciding on the charges were a nullity . . . and there would be no basis for an appeal to the Federation." Cf. *Orchard v. Tunney*, [1957] S.C.R. 436 (member not required to appeal from expulsion vote of executive board, since board's action had to be confirmed by the membership as a condition to its becoming effective).

<sup>97</sup> This interpretation, Lord Simon felt, avoided the question: "... is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice appealable, or on the contrary, is it simply void and thus not subject to appeal at all."

to the significance of the allegation that the trial committee was improperly constituted; a California court, at least, would have rejected that as an argument for excusing exhaustion. Finally, an American court would not be likely to attach the same importance to the terms of the "contract" as a reason for rejecting the plaintiff's argument that exhaustion would have been futile.

It is this last factor which gives rise to the greatest doubt as to the effect of the *White v. Kuzych* decision. Given the Privy Council's emphasis upon the contractual nature of the exhaustion requirement, there is a serious danger that a British court, faced with an express rule requiring exhaustion of remedies, would decline jurisdiction even though the plaintiff might suffer considerable hardship if required to appeal.<sup>98</sup> Conversely, the decision raises the question whether British courts will require exhaustion of remedies in proper cases where the union's rules permit, but do not expressly require, intra-union appeal. As to the latter question, it would seem that the decline of Section 4 of the 1871 Act as a bar to judicial intervention, and a general trend toward exercising greater control over internal union affairs, should make British courts willing to adopt the exhaustion requirement, either by implying it as a condition in the union "contract" or by imposing it as a separate consideration of policy, for the purpose of achieving a desirable balance between judicial control and union autonomy.

<sup>98</sup> See, however, the remark of Denning, L.J. in *Lee v. Showmen's Guild*, [1952] 2 Q.B. 329, 1 All E.R. 1175 ("If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void"). While this remark relates to the possibility of a rule depriving the court of jurisdiction entirely, rather than to one requiring exhaustion of intra-union remedies before appealing to the courts, it nevertheless indicates willingness to invalidate union rules as contrary to public policy.

## *Chapter 4*

# Theories and Patterns of Control

The two previous chapters dealt with specific doctrines, restraint of trade and exhaustion of remedies, limiting the extent of judicial control over intra-union affairs. In subsequent chapters we shall examine the substantive rules which the courts and legislatures have evolved. This chapter represents a sort of transition. It discusses in general terms the various common-law theories and concepts upon which courts base their power to intervene, viewing those theories and concepts both in their positive aspect, as affirmative vehicles for judicial control, and in their negative aspect, as conceptual limitations upon the extent of that control. It is intended primarily to provide a background against which the substantive rules can be examined, and is subject to the caveat that the full significance of a legal theory can be understood only in terms of decisions.

We are concerned here basically with the legal nature of the union-worker relationship. What is the source of the obligation, if any, which a union owes to an individual worker? What interests, if any, of the worker will the courts protect, and on what basis? Traditionally the courts have not been very concerned with these theoretical questions; typically they have proceeded on a case-to-case basis without discussing legal doctrine. In some instances what courts have said about these questions does not adequately explain what they do; but enough can be inferred from what courts have said and done to support the following generalizations.

Traditionally, courts in both Britain and the United States have regarded unions as akin to other unincorporated associations for purposes of internal regulation, and have applied to them rules developed in cases dealing with clubs and friendly societies. This meant that at first courts were inclined to view the union-member relationship as a static one, and to grant relief on the basis of protecting pecuniary "property rights." Gradually, courts began to emphasize the contractual nature of the relationship, and to base intervention upon the union's rules as a "contract" among members or between each member and the

organization. This is the prevailing basis for common-law judicial intervention in both Britain and the United States.

More recently the trend in both countries, though more pronounced in the United States, has been for courts to de-emphasize the voluntary aspect of union membership, to stress the differences between unions and other unincorporated associations, and to regard the union-worker relationship as being more in the nature of a legally created status than a status created by agreement. Within contract doctrine, this trend takes the form of courts assuming greater responsibility for interpreting union rules and, particularly in the United States, for imposing policy limits on the intra-union agreement. In addition to contract doctrine, the trend involves the application to unions of status principles developed in related fields. In cases dealing with discipline and exclusion from membership, some American courts have invoked tort doctrine to explain the basis for judicial interference. In cases dealing with the handling of union funds and property, British courts apply directly, and American courts by analogy, principles derived from the law of trusts. Courts of both countries frequently rely upon an analogy between unions and corporations. Finally, and most significantly, American courts tend to view the union-worker relationship as analogous to the relationship between public utility and consumer, or government and citizen. Even in Britain, the governmental analogy, though seldom explicit, provides the most adequate explanation for certain doctrines. We shall explore these generalizations in the following pages, concluding with a brief examination of the theories and patterns of control inherent in the LMRDA.

### PROPERTY DOCTRINE

The significance of property doctrine for the law relating to internal union affairs stems from the early case of *Rigby v. Connol*,<sup>1</sup> in which Jessel, M.R. denied equitable relief to an expelled union member on the ground, among others,<sup>2</sup> that the member had failed to allege the existence of any "property rights" with which the union's action interfered. Following the dictum of Lord Eldon in *Gee v. Pritchard*<sup>3</sup> to the

<sup>1</sup> (1880) L.R. 14 Ch. D. 482. In *Lyttleton v. Blackburne*, (1875) 45 L.J. Ch. 219, Bacon, V.C. expressed doubt whether a court would have jurisdiction to interfere in a case of expulsion from a club in which "there is no property of which the committee are trustees for the members."

<sup>2</sup> The primary basis for denial of relief was Section 4 of the 1871 Act. See p. 19 *supra*.

<sup>3</sup> (1818) 2 Swanst. 402. On the basis of protecting a "property right" in personal letters, Lord Eldon actually protected a claim to privacy by restraining their publication.



effect that equitable jurisdiction is founded upon protection of property, the Master of the Rolls said:

The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of a society and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice would interfere with such an association if some of the members declined to associate with some of the others. . . .

The property-right doctrine as thus formulated has received considerable criticism from legal writers,<sup>4</sup> and deservedly so. While a court of equity might understandably be reluctant to order persons to associate with one another, an equitable decree, even in the extreme examples cited by the Master of the Rolls, need not take that form. So far as equitable relief is concerned, the question should be, not whether a member possesses "property rights" which are interfered with, but whether he has interests at stake which are worthy and capable of equitable protection. Clearly a union member's inchoate interest in union property upon dissolution, which apparently would have satisfied Jessel, M.R.,<sup>5</sup> is the least significant of his interests in union membership.<sup>6</sup> Apart from his interests in benefits (which the Master of the Rolls

<sup>4</sup> E.g., Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); Lloyd, *Disciplinary Powers of Professional Bodies*, 13 MODERN L. REV. 281 (1950); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

<sup>5</sup> Indeed, from the language of the opinion, it would seem sufficient that the society collect subscriptions, even though it has no permanent property. See dicta to that effect in *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, *per* Fletcher-Moulton, L.J., impliedly followed in *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523, and in *Donaldson v. Institute of Botano-Therapy*, (1937) 184 L.T. 384. *But cf.* *Cookson v. Harewood*, [1932] 2 K.B. 478; *Millican v. Sullivan*, (1888) 4 T.L.R. 203. These cases are analyzed in Lloyd, *supra* note 4.

<sup>6</sup> *Life* magazine reported in 1948 (May 31, p. 80) that if all the assets of the thirty-two largest and wealthiest American unions were to be divided among the members, the average share would be about \$22.00. Cited in Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1052 (1951).

may have felt obliged not to consider, in view of the Section 4 argument), he has interests in reputation, in participating in union decisions, and, at least today, in employment.

Moreover, the property doctrine has at all times failed to explain what courts actually do. Even in the early club cases, it was apparent that the courts and litigants were interested primarily in the effects of expulsion upon the member's reputation rather than upon his pecuniary rights. In several cases decided prior to *Rigby v. Connol* the courts, finding an expulsion to be wrongful, restrained interference with all membership "rights, privileges and benefits";<sup>7</sup> and in one case Jessel, J. himself granted equitable relief to a club member expelled without notice or hearing, saying: "They ought not . . . to blast a man's reputation forever . . . perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct."<sup>8</sup>

As a condition precedent to the granting of equitable relief, the property requirement has given little trouble in England to plaintiffs in trade-union expulsion cases.<sup>9</sup> In the *Second Osborne* case,<sup>10</sup> which was the first union expulsion case that did not hold Section 4 of the 1871 Act to bar relief, Fletcher-Moulton, L.J., referring to *Rigby v. Connol*, said:

The learned judge also lays down that the jurisdiction of the Court to prevent a member of a voluntary association from being improperly expelled is based on the right of property vested in the member of which he is unjustly deprived by such unlawful expulsion, and that no Court of Justice can interfere so long as there is no property the right to which is taken away from the person complaining. If by the term "property" the learned judge intended to mean a beneficial interest in land or chattels, I am of opinion that this dictum goes too far. . . .

But I do not think it at all necessary to examine this part of the judgment, because in the case of a trade union such as the present there is undoubted interest in property, even in the narrow sense of the word. The funds of the union belong to the members, and are by reason of agreements and trusts which

<sup>7</sup> *E.g.*, *Labouchere v. Earl of Wharnccliffe*, (1879) 13 Ch. D. 346; *Fisher v. Keane*, (1879) 11 Ch. D. 353 (both decided by Jessel, J.).

<sup>8</sup> *Fisher v. Keane*, *supra* note 7. The same inconsistency occurred in the case of trade unions. While courts held that "property rights" must be present, and found such rights to exist, for example, in the member's right to receive benefits, nevertheless they went beyond protection of the proprietary interest by ordering reinstatement to membership. *E.g.*, the *Second Osborne* case, *infra*.

<sup>9</sup> The *Rigby v. Connol* dictum has been relied upon to deny relief to an expelled member of a proprietary club, on the ground that he had no interest in club property, *Baird v. Wells*, (1890) L.R. 44 Ch. D. 661; to a horse trainer whose license was revoked by the Pony Club, on the ground that he was not a member of the club and had no proprietary interest therein, *Cookson v. Harewood*, *supra* note 5; and to a surgeon who was suspended as honorary surgeon from a voluntary hospital, on the ground that he had no interest in the assets of the hospital, *Millican v. Sullivan*, *supra* note 5.

<sup>10</sup> *Supra* note 5.

are valid in law appropriated to the purposes of the trade union, and more especially to giving benefits to members. Should the trade union be dissolved these funds would be divided amongst its members. While it is in existence these members are eligible, and are the only persons who are eligible, to receive the benefits which by its rules follow from membership. They have the right to come to the Courts to prevent the misapplication of those funds. It is true that they cannot enforce the application of the funds to the granting of those benefits, but that is a defect in their remedies and not in their rights. Accordingly it is not necessary to discuss the limits of the jurisdiction of a Court in this respect.<sup>11</sup>

Nevertheless, Jessel, M.R.'s opinion that "the foundation of the jurisdiction is the right of property" remained to obscure somewhat the basis for relief in expulsion cases. Courts in several expulsion cases enforced the union's rules as a "contract,"<sup>12</sup> but if the rules were enforceable as a "contract" what was the relevance of property rights? Why were the contract rights themselves not sufficient to support jurisdiction? Clearly some confusion existed between (1) the theory upon which relief was granted, i.e., the legal doctrine which measured whether the plaintiff had been "wronged," and (2) the nature of the relief to which the plaintiff was entitled.

This matter has been considerably clarified by the opinion of Denning, L.J. in the case of *Lee v. Showmen's Guild*.<sup>13</sup> Considering a claim by a member of an association of carnival showmen that he had been wrongfully expelled, the Lord Justice stated:

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

<sup>11</sup> Buckley, L.J. indicated that in his opinion the member's right to vote, as well as his pecuniary interest in union assets and benefits, was a "property right." In the *Braithwaite case*, [1922] 2 A.C. 440, the union conceded the existence of property rights in union assets and benefits, and based its argument solely on Section 4 of the 1871 Act. See p. 20 *supra*.

<sup>12</sup> *E.g.*, the *Second Osborne case*, *supra* note 5, and the *Braithwaite case*, *supra* note 11.

<sup>13</sup> [1952] 2 Q.B. 329, 1 All E.R. 1175.

only relevance of rights of property in this connexion. It goes to the form of remedy, not to the right.

The situation in the United States with respect to union expulsion cases is substantially the same as in Britain. Most American courts verbally imported the property-right doctrine of *Rigby v. Connol*,<sup>14</sup> but they have had no difficulty in finding property rights to exist in the member's share of union assets,<sup>15</sup> in his right to benefits,<sup>16</sup> right to vote,<sup>17</sup> or right to employment.<sup>18</sup> In many cases relief has been granted without reference to property.<sup>19</sup> Research has disclosed only one case in which a member was denied injunctive relief for wrongful expulsion because of the nonexistence of property rights, and in that case the property-right doctrine was confused with the doctrine of exhaustion of remedies.<sup>20</sup> The trend of American opinions is to go further than Denning, L.J. in the *Lee* case and to reject the property doctrine completely. Thus, one court has said:

The doctrine that equity jurisdiction is limited to the protection of property rights conflicts with the familiar principle that equity may give preventive relief, when the legal remedy of money damage, if available at all, is inadequate to redress a wrong. Obviously money has little in common with such personal rights or interests as reputation, domestic relations, or membership in non-profit organizations. . . . A plaintiff expelled from a corporation or association not organized for profit need not show that he has even a nominal property interest to protect.<sup>21</sup>

<sup>14</sup> *E.g.*, *Grand Lodge v. Waldeck Lodge*, 61 Ill. App. 558 (1895); *Froelich v. Musicians Mutual Benefit Association*, 93 Mo. App. 383 (1902). The acceptance was not universal, however. *Cf. Loubat v. Le Roy*, 15 Abbott N.C. 1 (1884): "This is the first case in this State [New York] in which a court of equity has been called upon to determine the principles or methods of governing, or to be employed by a purely social club in conducting investigations as to the conduct of a member leading to his expulsion. The jurisdiction of the court is not disputed. Membership in the club in question is regarded as a valuable social privilege, and an unjust expulsion as a stigma upon the character to be redressed in a court of equity."

<sup>15</sup> *E.g.*, *T. Angrisani v. Stearn*, 167 Misc. 728, 3 N.Y.S.2d 698 (Sup. Ct. 1938).

<sup>16</sup> *E.g.*, *Otto v. Journeymen Tailors Protective Union*, 75 Cal. 308, 17 Pac. 217 (1888); *Froelich v. Musicians Mutual Benefit Association*, *supra* note 14.

<sup>17</sup> *E.g.*, *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941).

<sup>18</sup> *E.g.*, *Local 57 v. Boyd*, 245 Ala. 227, 16 So. 2d 705 (1944); *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 Atl. 102 (1935).

<sup>19</sup> *E.g.*, *Klein v. Morring*, 248 App. Div. 153, 288 N.Y.S. 1105, *aff'd*, 273 N.Y. 553, 7 N.E.2d 689 (1937). Some courts merely refer to "membership" itself as a property right. *E.g.*, *Fleming v. Moving Picture Machine Operators*, 124 N.J. Eq. 269, 1 A.2d 386 (1938).

<sup>20</sup> *Crutcher v. Eastern Division No. 321*, 151 Mo. App. 622, 132 S.W. 307 (1910). According to the court, the plaintiff's sole reason for seeking judicial relief was to protect his rights in a union insurance policy. Since the union's rules protected those rights pending appeal, the court held that (1) the plaintiff should exhaust his internal remedies, and (2) there were no "property rights" to be protected until appeal was taken.

<sup>21</sup> *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. Cir. 1947).

In cases not involving expulsion, however, both British and American courts have at times invoked property doctrine as a basis for denial of relief. These cases may conveniently be discussed under two headings: first, disciplinary cases involving a sanction other than expulsion, and second, nondisciplinary cases.

#### DISCIPLINARY CASES NOT INVOLVING EXPULSION

Short of expelling a member found to have violated some union rule, a union may impose a fine, or it may suspend the member from some or all the benefits of membership for a temporary period.

In the event a fine is imposed and the member fails to pay, he will ordinarily be expelled or threatened with expulsion, and in that event, as we have seen, the property doctrine will not be a bar to declaratory or injunctive relief.<sup>22</sup> But in some instances members have sought equitable relief on the basis of a *threatened* imposition of a fine, and in such cases courts have on occasion denied relief on the ground that the member has no property rights which are threatened. Thus, a Scottish court in *Drennan v. Associated Ironmoulders of Scotland*<sup>23</sup> held that a lack of property rights, in addition to Section 4 of the 1871 Act, prevented the court from taking jurisdiction over a suit to restrain imposition of a fine. Similarly, the New York Court of Appeals in *Thomas v. Musical Mutual Protective Union* invoked the property doctrine to deny relief to a union member who had been served with an order to show cause why he should not be fined for violating a union rule.<sup>24</sup>

Property doctrine is not necessary to the decision in such cases, however. Denial of relief can be explained more adequately, and properly, on the ground that the member cannot show the sort of irreparable injury which makes equitable relief appropriate; and on the further ground, at least in the United States, that the member has not exhausted his intra-union remedies. Thus, the New York court in the *Thomas* case stressed that (1) the member was not threatened with expulsion, (2) there was no process by which the fine could be collected, and (3) it was not at all certain that a fine would even be imposed. Such

<sup>22</sup> In addition, an American union member may sue to recover a fine paid under protest. *Fuerst v. Musical Mutual Protective Union*, 95 N.Y.S. 155 (Sup. Ct. 1905). It may be that Section 4 of the 1871 Act would prevent such an action in Britain. See p. 22 *supra*.

<sup>23</sup> (1921) 58 Sc. L.R. 146. In *Mullett v. United French Polishers London Society*, (1904) 91 L.T. 133, holding Section 4 of the 1871 Act to bar an action for a declaration and an injunction to restrain the levying of a fine, the property doctrine was not argued.

<sup>24</sup> 121 N.Y. 45, 24 N.E. 24 (1890). Cf. *Sullivan v. McFetridge*, 183 Misc. 106, 50 N.Y.S.2d 385 (1944) (granting temporary injunction against *trial* of plaintiff, on ground that the trial body lacked "jurisdiction").

a holding, it would seem, is proper even on a purely contractual view of the union-member relationship. Where, however, a fine has been imposed and the member has exhausted internal remedies, it would seem that his interests in reputation would be sufficient to support a declaration that the fine is improper.

More questionable are the American cases which deny relief to a suspended member on the ground that no property rights are at stake. If the suspension results in the loss, even temporarily, of such recognized property rights as benefits or employment, there is no problem.<sup>25</sup> But some unions will suspend a member only from attendance at meetings, without interfering in any way with his employment or right to benefits; and in such circumstances some American courts have denied relief. For example, in *Blek v. Kirkman*<sup>26</sup> a member suspended from meetings for ninety days without notice or hearing sought a declaration that the suspension was invalid as a denial of fair procedure. A New York court refused to grant the plaintiff's motion for a judgment on the pleadings, on the sole ground that he had not alleged the suspension affected any property right or resulted in irreparable injury. More recently, in *Bires v. Barney*<sup>27</sup> the Supreme Court of Oregon denied equitable relief on the same ground to officers of a local union who had been suspended from membership by the president of their national union. The court said:

In the case before us it is the contention of the defendants, and, therefore, the position of the defendants in interpreting the powers of the president of the Grand Lodge, that in suspending the plaintiffs . . . the only punishment or restriction placed upon the parties is that it "does not sever membership from the order, but deprives the member of rights to visit lodges. A member under suspension for cause may be admitted for the purpose of paying dues and assessments, or giving evidence on a case, or to answer questions, but no other business shall be transacted while the suspended member is in the lodge room." . . . All other rights and benefits of membership of the suspended members are still retained fully by them.

The defendants having placed this construction upon the action of the general president of the Grand Lodge, they cannot recede therefrom. Therefore, no property rights of these plaintiffs are in anywise jeopardized and a court of equity will not interfere.

Cases like *Bires v. Barney* recall the illustrations invoked by Jessel, M.R. in *Rigby v. Connol* as arguments for denying equitable relief. But whatever the situation may be with whist clubs and scientific societies,

<sup>25</sup> E.g., *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y.S. 336 (1931). While the "right to work" may not be regarded as a property right in England, interference with employment would, on the basis of Denning, L.J.'s decision in the *Lee* case, *supra* note 13, be grounds for equitable relief.

<sup>26</sup> 148 Misc. 522, 266 N.Y.S. 91 (Sup. Ct. 1933).

<sup>27</sup> 203 Ore. 107, 277 P.2d 751 (1954).

surely a member's interest in attending and participating in union meetings is of sufficient importance to warrant equitable protection against wrongful interference,<sup>28</sup> and protection of such an interest goes far beyond merely ordering persons to associate with one another. Such cases are difficult to reconcile with others which grant equitable relief to persons wrongfully suspended from office, even though the office be unpaid;<sup>29</sup> or with still others which, in different contexts, regard members' interests in participation as important rights, worthy and capable of equitable protection.<sup>30</sup>

British courts have not had occasion to pass upon the suspension of participation rights, but they have granted equitable relief to persons wrongfully suspended from unpaid union office.<sup>31</sup> The fact that at least two judges have expressed the view that a member's right to vote within his union is a "property right,"<sup>32</sup> together with Denning, L.J.'s restrictive view of the property doctrine in the *Lee* case, suggests that British courts may also protect the member wrongfully suspended from attendance at or participation in union meetings.

#### NONDISCIPLINARY CASES

In certain areas of judicial control over intra-union affairs it is clear that property rights exist, even in the narrow pecuniary sense. The property doctrine has never been an obstacle, for example, in cases involving misapplication of union funds or suits to obtain benefits provided by the rules. But in other areas American courts have sometimes invoked the doctrine as a basis for denying relief, though these decisions are in a small minority.

Where, for example, a national union revoked the charter of a branch and the members of the branch brought a representative action for injunctive relief, a New Jersey court in *O'Brien v. Musical Mutual Protective Union*<sup>33</sup> held it had no jurisdiction of the action on the ground, among others, that no property rights were involved. An English court followed the same theory in *Wing v. Burn*,<sup>34</sup> in which the officers of an

<sup>28</sup> See p. 174 *infra*.

<sup>29</sup> *E.g.*, *Bianco v. Eisen*, 75 N.Y.S.2d 914 (Sup. Ct. 1944).

<sup>30</sup> *E.g.*, *Dusing v. Nuzzo*, *supra* note 17.

<sup>31</sup> *O'Neill v. Transport & General Workers Union*, [1934] I.R. 634. *Cf.* *Burn v. National Amalgamated Labourers Union*, [1920] 2 Ch. 364 (not clear whether office paid or not).

<sup>32</sup> *Second Osborne case*, *supra* note 5, *per* Cozens-Hardy, M.R. and *per* Buckley, L.J., the latter relying upon the company-law case of *Pender v. Lushington*, (1887) 6 Ch. D. 771.

<sup>33</sup> 64 N.J. Eq. 525, 54 Atl. 150 (1903). *Cf.* *Thomas v. Musical Mutual Protective Union*, *supra* note 24.

<sup>34</sup> (1928) 44 T.L.R. 258.

affiliate of the National Amateur Wrestling Association sought a declaration and injunction against a cancellation of their charter. In the United States the *O'Brien* case has been superseded by a great number of cases granting relief to local unions against improper suspension or revocation of their charters by their parent bodies;<sup>85</sup> and the comments of Denning, L.J. in the *Lee* case raise doubt as to whether *Wing v. Burn* is still good law in England.

Similarly, one American court has held that it has no jurisdiction to order an election of officers as required by a union's rules, on the ground that no property rights are involved.<sup>86</sup> But other courts have granted relief under such circumstances, either without discussing the nature of the interests involved,<sup>87</sup> or by holding that the right to participate in union affairs is a property right.<sup>88</sup> The latter view has been best expressed by a New York court in *Dusing v. Nuzzo*:

It is argued that a court of equity will intervene only to protect property rights, and since it has been held that the elections of officers of fraternal societies are not property rights of members, the argument advances to the point that union members stand in the same position of equitable disability in the right to an election of their officers.

But a labor union is not a social club. It is an economic instrumentality conceived in the necessities of making a living under the expansive influence of modern industrial concepts. The individual workman is impotent to deal with a great industrial organization. Aggregates of capital can only be met on equal terms by labor in the aggregate of union organization. The success of the result is dependent upon the responsiveness and the ability of the leader of the union. He is not the arbiter of social pleasure; he is the dispenser of bread and it is not difficult to hold that the union member has an enforceable interest in union elections of which the court of equity will be cognizant. It is as real and as needful of equitable protection, surely, as money or chattels.

The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral.

British courts have not been presented with the question, but again, either on the view that voting rights are property rights or on the basis

<sup>85</sup> *E.g.*, *Local 7, Bricklayers Union v. Bowen*, 278 Fed. 271 (S.D. Tex. 1922); *Ellis v. American Federation of Labor*, 48 Cal. App. 2d 440, 120 P.2d 79 (1941); *Gardner v. Newbert*, 74 Ind. App. 183, 128 N.W. 704 (1920).

<sup>86</sup> *State ex rel. Givens v. Superior Court*, 65 Ind. App. 471, 117 N.E.2d 553 (1954).

<sup>87</sup> *E.g.*, *Tobacco Workers International Union v. Weyler*, 280 Ky. 355, 132 S.W.2d 754 (1939).

<sup>88</sup> *E.g.*, *Dusing v. Nuzzo*, *supra* note 17; *Bianco v. Eisen*, *supra* note 29.



of contract, it would seem that their position would be the same as that of the New York court.

Finally, one American court relied upon property doctrine to deny relief to persons claiming to be the duly elected officers of a union;<sup>39</sup> but that decision is contrary to the overwhelming weight of authority which holds that the right to hold office in a union is protectible against improper denial of the right to stand for election,<sup>40</sup> improper conduct of the election,<sup>41</sup> or improper suspension or removal,<sup>42</sup> even where the office is an honorary one and the officer is unpaid. Said the New York court in *Bianco v. Eisen*:

The executive board of a labor union is vested with authority and discretion to consider and make decisions affecting, among other things, the economic interests of its members. That members of such a body may serve without compensation is of no moment. It is the nature of the office rather than its perquisites which give it substance. One elected to membership on such a board may be said to have been entrusted with a post of great confidence and responsibility. The unimpeded exercise of the functions of elective office, such as membership on the executive board of a labor union, is a right so fundamental as to be deemed the equivalent of a property right.

British courts have likewise protected the right to hold union office against improper denial of nomination<sup>43</sup> and improper suspension,<sup>44</sup> and in such cases property doctrine does not seem to have been argued.

From the New York court's position in *Dusing v. Nuzzo* that a member's right to participate in his union's affairs is a property right, and in *Bianco v. Eisen* that the right to hold office is "so fundamental as to be deemed the equivalent of a property right," it is but a short step to the proposition that the notion of "property right" in this context is virtually meaningless; and that step was taken by a New York court in the recent case of *Caliendo v. McFarland*.<sup>45</sup> Holding that union shop stewards had the right to an injunction restraining the improper selection of new stewards, the court said:

<sup>39</sup> *Booth v. Baker*, 268 Ill. App. 474 (1932). Cf. *Leahigh v. Beyer*, 67 Ohio L. Abs. 79, 116 N.E.2d 458 (1953) (candidates for union office, claiming election was improperly conducted, were required to exhaust internal remedies on the ground, among others, that they had no property rights at stake).

<sup>40</sup> *E.g.*, *Clarke v. Corr*, 145 N.Y.S.2d 125 (Sup. Ct. 1955).

<sup>41</sup> *E.g.*, *Sibilia v. Western Electric Employees Association*, 142 N.J. Eq. 77, 59 A.2d 251 (1948); *Fisher v. Kempter*, 25 L.R.R.M. 2189 (N.Y. Sup. Ct. 1949).

<sup>42</sup> *E.g.*, *Talton v. Behncke*, 199 F.2d 471 (7th Cir. 1952); *Bianco v. Eisen*, *supra* note 29.

<sup>43</sup> *Watson v. Smith*, [1941] 2 All E.R. 725.

<sup>44</sup> *Burn v. National Amalgamated Labourers Union*, *supra* note 31; *O'Neill v. Transport & General Workers Union*, *supra* note 31. Cf. *Amalgamated Society of Engineers v. Jones*, (1913) 29 T.L.R. 484 (upholding amendment to rule cutting short plaintiff's term of office, without discussion of plaintiff's right to obtain equitable relief).

<sup>45</sup> 13 Misc. 2d 183, 175 N.Y.S.2d 869 (1958).

Defendants urge that the plaintiffs have no property right or interest in maintaining the status quo, and in any event can show no irreparable damages. This contention is without merit. Plaintiffs have a recognized, legally enforceable right to the specific performance of the provisions of the contract between the Union and its members. The nature of this right is such that money damages for an infringement thereof, either cannot be estimated, or do not afford adequate or complete remedy. In such a case, equity's mission to enforce the legal right is clear, namely intervention before the threatened commission of the wrong—this, rather than subject the suppliant to an inadequate legal remedy available only subsequent to the injury. . . . Consequently, *given a substantial, and not merely nominal or technical right, equity will zealously protect it against invasion, and the absence of material injury to the one seeking to enforce such a right, or the amount of inconvenience or monetary loss to the other party will have little weight in the settlement of the issue.* (Emphasis added.)

Despite the apparent contrast between the position of Denning, L.J. in the *Lee* case that an injunction will be granted in expulsion cases only where a "proprietary" right or the right to earn a livelihood is involved, and the position of the New York court in *Caliendo* that an injunction is appropriate even in the absence of pecuniary interests, so long as the right is "substantial" and "not merely nominal or technical," there is probably no difference in substance. Courts of both countries are in general agreement that (1) a member has a legal right to insist upon observance of the union's constitution and bylaws as a contract, and (2) the nature of the member's interest at stake in a contract violation is normally both worthy and capable of equitable protection.

### CONTRACT DOCTRINE

The prevailing theory in both Britain and America is that the common-law rights of union members *inter se*, as with members of other associations, are determined primarily, if not solely, by the provisions of the union's constitution and rules, viewed as a contract among members, or between each member and the union.<sup>46</sup> Thus, a union's rules constitute a limitation on the grounds for which a member may be disciplined,<sup>47</sup> on the disciplinary procedure,<sup>48</sup> and on the sanction imposed.<sup>49</sup> They provide a basis for claims by members for benefits<sup>50</sup> and a

<sup>46</sup> *E.g.*, *Bonsor v. Musicians Union*, [1956] A.C. 104; *Gonzales v. International Association of Machinists*, 356 U.S. 617 (1958).

<sup>47</sup> *E.g.*, *Amalgamated Society of Carpenters & Joiners v. Braithwaite*, *supra* note 11; *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931).

<sup>48</sup> *E.g.*, *Bonsor v. Musicians Union*, *supra* note 46; *Cason v. Glass Bottle Blowers Association*, 37 Cal. 2d 134, 231 P.2d 6 (1951).

<sup>49</sup> *E.g.*, *Burn v. National Amalgamated Labourers Union*, *supra* note 31; *Dachyolous v. Ernst*, 118 N.Y.S.2d 455 (Sup. Ct. 1952).

<sup>50</sup> *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala. 565, 108 So. 456 (1926); *cf. Swaine v. Wilson*, (1890) 24 Q.B.D. 252.

restriction on the use of union funds.<sup>51</sup> They determine the procedure by which a union is governed, including the manner of selecting officers<sup>52</sup> and the conduct of union affairs.<sup>53</sup>

But such a statement of the law is of little value, either as a predictive or analytical tool for the legal observer or as a standard for those who must decide cases, for it fails to take into account the vital role of the courts in interpreting or (in America) invalidating union rules. Interpretation and invalidation are, of course, problems which may arise in the case of any contract, but they are particularly acute in the case of the intra-union agreement for two reasons: First, union rules, like the rules of most associations, are frequently very general in terms and incomplete in coverage, so that a great deal may be left to interpretation and implication. Second, and most important, viewing union rules as a contract raises significant questions of public policy.

Union rules are in no real sense the product of bargaining or negotiation. A member either joins a union and accepts its rules or he does not. Although he has, at least in theory, some control over the rules once he becomes a member, the effectiveness of that control is limited both by the principle of majority rule and by whatever restrictions may exist on the effectuation of the majority will: the member may find himself in either an outvoted minority or an ineffective majority. While this is characteristic of associations in general, the unilateral nature of union rules is reinforced by elements of necessity (job rights and participation rights) which render the alternative of foregoing membership much less realistic than in most other organizations. If union rules are to be regarded as a contract, they are more in the nature of a *contrat social* than a bargaining relationship with which contract doctrine was designed to deal. Modern courts recognize this characteristic of unions' rules. For example, Denning, L.J. in *Bonsor v. Musicians Union*<sup>54</sup> remarked:

... these rules are a contract in theory rather than in fact. A true contract requires the agreement of parties freely made with full knowledge and without any feeling of restraint. . . . In order that a person should be allowed to work at his trade he had no option but to sign a document agreeing to the rules. . . . Rules applied to a man in that state of mind are less a contract, as we used to understand a contract, than a legislative code laid down by some, to be imposed on all, members of the union. They are more like by-laws than a contract.

<sup>51</sup> *E.g.*, *Yorkshire Miners Association v. Howden*, [1905] A.C. 256; *Local 720 v. Dednasek*, 119 Colo. 586, 205 P.2d 796 (1949).

<sup>52</sup> *E.g.*, *Watson v. Smith*, *supra* note 43; *Sibilia v. Western Electric Employees Association*, *supra* note 41.

<sup>53</sup> *E.g.*, *Edwards v. Halliwell*, [1950] 2 All E.R. 1064; *Rowan v. Possehl*, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

<sup>54</sup> [1954] Ch. 479.

Union rules are not unique in this respect. Indeed, it might be difficult for many modern agreements to meet Denning, L.J.'s criteria for a "true contract." The intra-union agreement is an example of what has been called a "contract of adhesion"<sup>55</sup>—an agreement prepared by an economic institution which wields considerable power and adhered to by individuals whose only practical alternative is to forego the goods or services proffered. Like such "contracts" as baggage slips, railway tickets, or insurance policies, it represents the tendency of a highly organized society from contract to status, or, more accurately, the tendency to impose status in the guise of contract.<sup>56</sup>

The institutional agreement places somewhat of a strain on contract doctrine. Faced with such contracts, courts, in recent years at least, tend to utilize their powers of fact-finding and interpretation, not so much to enforce expressed intent (for that would mean the intent of the stronger party) as to protect the weaker party against contractual provisions which the courts may regard as unreasonable. These traditional tools of contract law become, in this context, a means of expressing public policy, or of imposing upon the parties a judicially created status in lieu of the status attempted by the agreement. Even though courts may express what they are doing in terms of contract doctrine, that doctrine becomes an inadequate explanation for what is done. It is also necessary to know what principles of public policy, what notions of status, courts are, intentionally or unintentionally, applying.

But in addition to the problems common to all contracts of adhesion, the function of the courts in fact-finding and interpretation is further complicated in the case of unions by the existence of tribunals inside the organization which have the stated or implicit power of performing those functions themselves. The members, it can be argued, have agreed to be bound, not only by the union's rules, but also by the interpretation and application of them by the union's own judicial or administrative officers. That argument, as well as the generally accepted policy of affording to unions some measure of internal autonomy, conflicts with the policy of protecting the weaker party to the bargaining relationship.

This conflict has been resolved somewhat differently for fact-finding and for interpretation. In the case of fact-finding, at least in disciplinary cases, courts of both countries have in general abdicated their functions

<sup>55</sup> KESSLER & SHARP, *CONTRACTS: CASES AND MATERIALS* (1953) (introduction includes excellent bibliography); Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629 (1943).

<sup>56</sup> See, in addition to the works cited in note 55 *supra*, FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1959); GRAVESON, *STATUS IN THE COMMON LAW* (1953); Grunfeld, *Passenger Charges Schemes 1952-3 and the Voice of the Consumer*, 17 MODERN L. REV. 119 (1954); Patterson, *Compulsory Contract*, 43 COLUM. L. REV. 731 (1945); Pound, *The New Feudalism*, 15 A.B.A.J. 553 (1929).

to the intra-union tribunal, stating that they will decline to review factual determinations unless there is "no evidence" or no "substantial evidence" upon which the determination could have been based.<sup>57</sup>

In the case of interpretation, on the other hand, British and American courts tend to resolve the conflict in favor of their own jurisdiction. There is this difference, however: American courts are reluctant to overturn the interpretation of a union tribunal or officer unless that interpretation is "unreasonable" or "contrary to public policy";<sup>58</sup> they use the technique of interpretation frankly as a policy tool. British courts regard themselves in no way restricted by domestic interpretation; they tend to apply a literal construction to the union's rules, and probably to interpret them, where ambiguous, against the union and in favor of the complaining member.<sup>59</sup>

Courts have not attempted to explain this distinction between fact-finding and interpretation on the basis of contract doctrine, and it would be difficult to do so. Viewed separately, the reluctance of courts to review questions of fact could be laid to the argument that members have agreed to be bound by the factual determinations of union tribunals; and the willingness of courts, particularly in Britain, to review questions of interpretation could be explained by the principle that the parties to a contract may not, in the absence of a valid arbitration provision, oust the courts from "jurisdiction" to interpret the agreement. But why the former argument should not apply to interpretation, or the latter to fact-finding, defies explanation on contract theory alone. It is quite apparent that what courts are doing here is to apply by analogy principles pertaining to the scope of review over administrative agencies or inferior courts.<sup>60</sup>

Apart from questions of interpretation and fact-finding, contract doctrine raises conceptual obstacles to the protection of members against unambiguous union rules which are contrary to generally accepted notions of public policy. This is particularly true in Britain, where invalidation of contract terms is less frequent than in America. British courts have not so far resorted to invalidation of any union rules,

<sup>57</sup> *E.g.*, *Lee v. Showmen's Guild*, *supra* note 13 (dicta); *Nissen v. International Brotherhood of Teamsters*, 229 Iowa 1028, 295 N.W. 858 (1941). American courts display some tendency to review factual questions relating to policy; see discussion in chap. 5 *infra*.

<sup>58</sup> *E.g.*, *De Mille v. American Federation of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947); *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S.E. 580 (1919).

<sup>59</sup> *E.g.*, *Amalgamated Society of Carpenters & Joiners v. Braithwaite*, *supra* note 11. For a more complete discussion of this question, see chap. 5 *infra*.

<sup>60</sup> See ROBSON, *ADMINISTRATIVE LAW* c. 7 (3d ed. 1951), in which this parallel is discussed at length.

though recent dicta would indicate that they may do so in the case of rules which purport to dispense with "natural justice"<sup>61</sup> or to oust the courts from their "jurisdiction" to interpret.<sup>62</sup> American courts have gone much further in invalidating union rules, particularly in discipline cases. In addition to striking down rules which purport to dispense with fair disciplinary procedure,<sup>63</sup> they have, with increasing frequency, protected members against discipline for reasons which the courts (often in reliance upon statutory policy) regard as improper, such as for criticism of union officers or policies.<sup>64</sup> Nevertheless, there have been instances in which American courts, relying blindly upon the notion of agreement, have permitted discipline for conduct which should be protected.<sup>65</sup>

Finally, there are many instances of judicial interference in internal union affairs which cannot reasonably be explained by contract doctrine at all. The requirement of "natural justice" even in the face of a rule purporting to exclude it is one example. If expulsion of a member without notice or hearing gives rise to a cause of action, despite the existence of a union rule expressly authorizing such a procedure, that cause of action could be said to be based upon contract only on the rather farfetched dogma that the rule dispensing with notice and hearing is "invalidated" and a rule to the exact opposite is "implied" in its place. Surely the requirement is more easily explained by frankly recognizing it is as judicially created, by analogy to administrative and judicial proceedings, and imposed upon the parties because of their general relationship to each other, regardless of any agreement on the subject.<sup>66</sup>

Contract doctrine poses similar difficulties where the plaintiff is unable to point to any express agreement, either because he is not a member of the defendant organization or because the latter has no express rules. Contract doctrine cannot easily explain, for example, the rule of some American jurisdictions that a union may not lawfully exclude persons from membership for reasons which are arbitrary, at least where nonmembership means no work.<sup>67</sup> In Britain, contract theory has proved a stumbling block to plaintiffs in such situations. A

<sup>61</sup> *Per* Denning, L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Lee v. Showmen's Guild*, *supra* note 13; *Bonsor v. Musicians Union*, *supra* note 54.

<sup>62</sup> *Lee v. Showmen's Guild*, *supra* note 13, *per* Denning, L.J. and *per* Romer, L.J.

<sup>63</sup> See pp. 103 ff. *infra*.

<sup>64</sup> See pp. 133 ff. *infra*.

<sup>65</sup> *Ibid.*

<sup>66</sup> There is some basis even in the earlier British cases for a noncontractual approach to natural justice. See Lloyd, *Disciplinary Powers of Professional Bodies*, 13 MODERN L. REV. 281 (1950).

<sup>67</sup> See chap. 7 *infra*.

horse trainer whose license is withdrawn by the Jockey Club may be able to rely upon the license as a "contract" for the purpose of "implying" a provision that he must be granted a fair hearing;<sup>68</sup> but if the plaintiff is an unlicensed livery stable keeper, his disqualification by the stewards of the National Hunt Committee without a fair trial cannot be held a breach of "contract"; and, while he may be entitled to an injunction or declaration (according to one court) he may not recover for damages!<sup>69</sup> In *Abbott v. Sullivan*<sup>70</sup> a committee of cornporters, having no written rules, but exercising *de facto* control over the employment of cornporters on the London docks, removed the plaintiff from the "register" of cornporters (and consequently from employment) apparently because he had struck an officer of a trade union with which the committee was informally associated. In a suit for declaration that the removal resolution was invalid and for an injunction against its effectuation, the plaintiff was denied relief by the Court of Appeal because he had not adequately pleaded the terms of a "contract" upon which relief could be based. Lord Justice Denning, who would have granted relief on the basis of an "implied" agreement,<sup>71</sup> wisely referred to the problem as lying in an "uncharted area on the borderland of contract and tort."

### TORT DOCTRINE

Some American writers have suggested that judicial intervention in union disciplinary matters can be explained more easily, and with greater foundation in policy, by invoking principles of tort law rather than contract law.<sup>72</sup> According to this view, the union-member relationship is in the nature of a status, protected by law, and carrying with it certain rights and duties irrespective of consensual agreement. Interference with that status, in the absence of "justification," constitutes a tort. Although the provisions of a union's constitution and bylaws may supply the necessary justification, they are subject to the

<sup>68</sup> *Russell v. Duke of Norfolk*, *supra* note 61. See pp. 103 ff. *infra*.

<sup>69</sup> *Davis v. Carew-Pole*, [1956] 1 W.L.R. 833.

<sup>70</sup> [1952] 1 K.B. 189, 1 All E.R. 226, discussed in Lloyd, *Judicial Review of Expulsion by Domestic Tribunals*, 15 MODERN L. REV. 413 (1952).

<sup>71</sup> See also *Weinberger v. Inglis*, [1919] A.C. 606 (dicta that committee of the Stock Exchange was obliged to exercise in a fair manner its discretion whether to re-elect persons to membership). Cf. *Byrne v. Kinematograph Renters Society*, [1958] 2 All E.R. 579 (contract implied from invitation to attend inquiry); *Davis v. Carew-Pole*, *supra* note 69. See discussion of this whole question in Lloyd, *supra* note 70; Lloyd, *The Right to Work*, (1957) CURRENT LEGAL PROBLEMS 36; Note, 21 MODERN L. REV. 661 (1958).

<sup>72</sup> E.g., Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951). For a British view, see Lloyd, *Expulsion from a Trade Union as a Tort*, 36 CAN. B. REV. 83 (1958).

obligations which courts (and legislatures) may impose as a matter of public policy.

This theory has the merit of overcoming the conceptual problems raised by contract doctrine. It can explain, for example, the nature of a member's action for damages or reinstatement when he has been expelled without notice or hearing in cases where the union's rules either do not provide for "natural justice" or purport to dispense with it. In addition, tort doctrine frees courts from the limitations of viewing the union's constitution and bylaws as a contract, and permits them to take into consideration the unequal nature of the union-member "bargain." Adoption of tort doctrine would thus be consistent with the trend from contract to status brought about by "contracts of adhesion."

Tort theory finds considerable support in American decisions involving claims by expelled union members for damages for lost wages. Indeed, in some of the earlier cases, courts did not invoke contract doctrine, but instead viewed the member's action as one in tort for "civil conspiracy" or "malicious interference with employment"; they asked (1) whether the defendant union or the named defendants had interfered with the plaintiff's employment, and (2) if so, whether their interference was justified.<sup>73</sup> This form of action continues to be used in several states.<sup>74</sup> Normally, the union's constitution and bylaws are held to constitute sufficient justification, and relief is granted only where those rules are violated.<sup>75</sup> But occasionally courts have found the expulsion to be wrongful because maliciously motivated,<sup>76</sup> or the interference with employment not justified because not necessary for protection of the union's interests.<sup>77</sup> Where the wrongdoing is found to be intentional, courts have, consistent with tort doctrine, awarded punitive damages.<sup>78</sup>

<sup>73</sup> *E.g.*, *Brennan v. United Hatters*, 73 N.J.L. 729, 65 Atl. 165 (1906); *Blanchard v. Newark Joint District Council*, 78 N.J.L. 737, 76 Atl. 1087 (1910); *St. Louis Southwestern Ry. v. Thompson*, 192 S.W. 1095 (Tex. Civ. App. 1908).

<sup>74</sup> *E.g.*, *Perko v. Bridge, Structural & Ornamental Iron Workers*, 168 Ohio St. 161, 151 N.E.2d 742 (1959); *Savard v. Industrial Trades Union*, 76 R.I. 496, 72 A.2d 660 (1950); *Minch v. Local 370, Operating Engineers*, 44 Wash. 2d 15, 265 P.2d 286 (1953).

<sup>75</sup> *E.g.*, *Brown v. Lehman*, 141 Pa. 647, 15 A.2d 513 (1940).

<sup>76</sup> *E.g.*, *Walker v. Grand International Brotherhood of Locomotive Engineers*, 186 Ga. 811, 199 S.E. 146 (1938). In some cases union members or officials have been held liable for interference with employment in the absence of any disciplinary action. *E.g.*, *Sullivan v. Barrows*, 303 Mass. 197, 21 N.E.2d 275 (1939); *Kinane v. Fay*, 111 N.J.L. 553, 168 Atl. 724 (1933).

<sup>77</sup> *E.g.*, *Barile v. Fisher*, 94 N.Y.S.2d 346 (Sup. Ct. 1949) (union not only brought about plaintiff's discharge under closed-shop contracts but enlisted the aid of other unions in "boycotting" him); *Shinsky v. Tracey*, 226 Mass. 21, 114 N.E. 957 (1917) (similar).

<sup>78</sup> *E.g.*, *Kinane v. Fay*, *supra* note 76; *Walker v. Brotherhood of Locomotive Engineers*, *supra* note 76.



These cases do not, however, necessarily constitute acceptance of the theory of tort described above, for they focus upon interference with the employment relationship, rather than the union-member relationship, as the basis for relief. This distinction was made by the California Supreme Court in *Cason v. Glass Bottle Blowers Association*,<sup>79</sup> where the question was whether a one-year tort statute of limitations or a two-year contract statute was applicable to a suit for reinstatement and damages by a union member claiming to have been wrongfully expelled. The court held that the plaintiff had two years in which to bring his suit, saying:

The record shows that there was a closed shop contract between the national union and plaintiff's employer, and plaintiff was entitled to sue in tort if the union wrongfully expelled him and at the same time refused to let him work because he was not a union member. . . . Plaintiff likewise had contract rights by reason of his membership in the union, and he was entitled to bring an action for breach of that contract if he was wrongfully expelled. . . . Thus *the trial court correctly determined that the action partook of the nature of both tort and contract*. The final decision of the union, denying reinstatement, occurred when the national convention approved the grievance committee's report on August 5, 1946, and the complaint was filed on December 17, 1947, which was more than one year but less than two years thereafter. It follows, therefore, that plaintiff's action is not barred insofar as it is based on contract because it was brought within the two-year period prescribed by Section 399. (Citations omitted; emphasis added.)

Nevertheless, there are indications that American courts will view wrongful expulsion from a trade union as a tort in itself. Even in the *Cason* case, which purported to rest upon contract theory, the court affirmed a judgment awarding the expelled member damages, not only for lost wages, but also for shame and humiliation suffered as a result of his expulsion—relief not usually granted for breach of contract.<sup>80</sup> A federal court of appeals has held that an act of wrongful expulsion constitutes a tort for the purpose of applying the statute of limitations.<sup>81</sup> More significantly, the general trend of American cases toward imposing extracontractual limitations on the union's power to discipline members,<sup>82</sup> and in particular toward protecting the right of members to participate in union affairs,<sup>83</sup> suggests that membership itself, apart from interference with employment, will be protected against unjustified interference, even in the absence of "contract" violation.

This probable trend toward utilizing tort doctrine to protect the

<sup>79</sup> *Supra* note 48.

<sup>80</sup> See *Taylor v. Marine Cooks & Stewards*, 117 Cal. App. 2d 556, 256 P.2d 595 (1953).

<sup>81</sup> *Lowry v. International Brotherhood of Boilermakers*, 220 F.2d 546 (5th Cir. 1955).

<sup>82</sup> See chap. 5 *infra*.

<sup>83</sup> See chap. 7 *infra*.

union-member relationship is displayed also in cases involving *exclusion* from union membership. Some American courts, relying in part upon statutory policy, have held that a union may not arbitrarily exclude persons from membership and at the same time interfere with their employment because they are not union members; and interference with employment in such cases is held to be a tort.<sup>84</sup> Ordinarily the relief granted, apart from damages, is an alternative writ of mandate, directing the union *either* to cease interference with the plaintiff's employment *or* to admit him to membership. Recently, however, the Supreme Court of California upheld a decree ordering a union to admit the plaintiff to membership, upon a showing of arbitrary exclusion, without granting the alternative of noninterference.<sup>85</sup> If such an order is to be supported upon some common-law theory of relief (the court did not discuss that question), it would seem that the court's action could be explained only on the basis of tort doctrine.

In Britain, tort doctrine cannot be used in suits against unions involving internal union affairs, since Section 4 of the Trade Disputes Act, 1906, precludes suits in tort against a union or against its officials or members in a representative capacity.<sup>86</sup> Moreover, by effect of Section 3 of that Act, officers or members cannot be held individually liable in tort for inducing a breach of the employment contract or for wrongful interference with employment if their acts are "in contemplation of furtherance of a trade dispute." But tort doctrine is available to the limited extent of permitting a suit against union officers or members for civil conspiracy resulting in interference with employment where it can be shown that the defendants' purpose was purely personal rather than in the interests of the trade. In *Huntley v. Thornton*<sup>87</sup> a member of the Amalgamated Engineering Union was allowed to recover damages against the members of the Hartlepool District Committee, whose actions in boycotting the plaintiff resulted in his being unable to find employment,<sup>88</sup> on the theory that the committee was acting to protect, not the union's interests, but its own. On three occasions, the committee had recommended to the union's executive council that the plaintiff

<sup>84</sup> *Ibid.*

<sup>85</sup> *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958).

<sup>86</sup> *Cf. Parr v. Lancashire Miners Federation*, [1913] 1 Ch. 366, where the defense of Section 4 of the 1906 Act to a wrongful expulsion action was rejected on the ground that the action was in contract rather than in tort.

<sup>87</sup> [1957] 1 All E.R. 234, discussed by Grunfeld in 20 MODERN L. REV. 495 (1957).

<sup>88</sup> The committee asked all stewards within the district, and the secretary of the neighboring district, to blacklist the plaintiff. Officials of the neighboring district were also named as defendants, but the action against them was dismissed on the ground that they, ignorant of the personal feud taking place, were sincerely acting for what they thought were trade interests.

be expelled for his refusal to participate in a one-day strike and for his "arrogant attitude" toward the committee in its investigation of the refusal, but each time the committee's recommendation was turned down. The committee's subsequent actions in seeking to bar the plaintiff from employment, the court held, were solely to vindicate its own authority and had no relation to the interests of the trade. For that reason, no "trade dispute" was involved within the meaning of Section 3, and for the same reason the committee, lacking justification for the harm it had caused, was liable to the plaintiff for civil conspiracy.<sup>89</sup>

### TRUST DOCTRINE

Section 8 of the Trade Union Act of 1871 expressly requires that all real and personal property of a registered trade union be vested in trustees.<sup>90</sup> Apart from that requirement, it is probably the case that all British trade unions and branches, registered or not, hold title to property through the medium of trustees. That being so, in England trust doctrine is directly applicable to cases involving alleged misuse of funds. The application of that doctrine is discussed in chapter 6.

In the United States, many states by statute permit unions to hold title to property in the name of the union itself,<sup>91</sup> and there are many unions which do not expressly provide in their constitutions for trustees of union property. Nevertheless, American courts have held that the funds of a union are held in constructive trust and that the union officers who handle or determine the application of union funds are responsible as trustees.<sup>92</sup> The law of trusts is, therefore, as applicable in America as in Britain to matters involving the use of union funds and property.

<sup>89</sup> Cf. *Orchard v. Tunney*, [1957] S.C.R. 436, reviewed by Lloyd at 36 CAN. B. REV. 83 (1958) and by Crawford & Stone, *id.* at 97. Tort doctrine has not been applied in England in nonunion expulsion cases. It was invoked by the plaintiff in *Wood v. Woad*, (1874) L.R. 9 Ex. 190, involving claimed wrongful expulsion from a friendly society, but relief was denied on the rather specious ground that if the plaintiff's expulsion was wrongful, he had suffered no damage. In *Abbott v. Sullivan*, *supra* note 70, all three Lord Justices were of the opinion that wrongful expulsion did not of itself constitute a tort, in the absence of allegation and proof of conspiracy to injure. See Lloyd, *supra* note 66, at 299, and *supra* note 70, at 415-417.

<sup>90</sup> Section 8 provides in part: "All real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of a trade union appointed as provided by this Act for the use and benefit of such trade union and the members thereof. . . ."

<sup>91</sup> For example, Section 21200 of the California Corporations Code provides in part: "... any labor organization may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge or encumber, by deed of trust or otherwise, manage and sell all such real estate and other property as may be necessary for the business purposes and objects of the . . . labor organization."

<sup>92</sup> *E.g.*, *Collins v. International Alliance of Theatrical Stage Employees*, 119 N.J. Eq. 230, 182 Atl. 37 (1935). See chap. 7 *infra*.

### THE UNION AS A CORPORATION

All British trade unions, and most American,<sup>93</sup> are unincorporated associations, in the sense that they have never gone through the process of "incorporation" as that term is used technically in the law. In the past their status as unincorporated associations has been relevant to the development of legal control over internal union affairs in two respects. First, it has been relevant because some courts have suggested that the degree of judicial interference ought to be less in the case of unincorporated associations than in the case of corporate bodies;<sup>94</sup> and, second, because the Anglo-American theory that only incorporated bodies possess "legal personality" has created certain procedural problems in connection with judicial interference. As we shall see, both these notions have declined in importance, and both British and American courts have tended and are tending to treat unions for most purposes as if they were corporate bodies.

#### RELEVANCE OF INCORPORATION TO DEGREE OF INTERFERENCE

Those courts which have stated that judicial interference in the internal affairs of unincorporated associations should be minimal have seldom indicated why a lack of incorporation should lead to that conclusion. Some courts have linked the word "voluntary" to the phrase "unincorporated association," but if that word is taken to refer to the degree of compulsion exercised to force a person to become or remain a member, it is apparent that an association is no more voluntary because it happens to be unincorporated. Indeed, in that sense, many unincorporated associations, and particularly unions, are less voluntary than corporate bodies.

One factor undoubtedly involved in the reluctance of courts to intervene in the internal affairs of unincorporated associations is the relative absence of direct pecuniary interest on the part of their members, as compared with the importance of the shareholder's direct interest in corporate assets.<sup>95</sup> But this factor, enshrined in the property doctrine already discussed, stems from the nonprofit nature of most unincorporated associations, rather than from their lack of incorporation. In any event, as we have seen, membership in an unincorporated association, particularly a trade union, may be far more important economically than corporate membership in a profit organization.

<sup>93</sup> The laws of most states permit unions to incorporate, and some unions have done so. See, e.g., *Beesley v. Chicago Journeymen Plumbers Association*, 44 Ill. App. 278 (1892); *Meurer v. Detroit Musicians Benevolent & Protective Association*, 54 Mich. 954 (Sup. Ct. 1893).

<sup>94</sup> See Chafee, *supra* note 72.

<sup>95</sup> See pp. 54-64 *supra*.

More directly related to the fact of incorporation is the notion that corporate bodies are in some sense creatures of the state, as opposed to unincorporated bodies, which are the product of "voluntary agreement." From this notion it can be argued that a corporate shareholder's "franchise" ought to be protected by the state to a greater degree than membership in an unincorporated group;<sup>96</sup> that the governing rules of an incorporated body are entitled to more weight than those of a "private" association, since they are statutory in nature;<sup>97</sup> and, most significantly, that a corporation owes its "existence" to the state and therefore ought to be subject to greater regulation.<sup>98</sup>

But the notion, of course, is completely unrealistic. Although corporate bodies might have been meaningfully regarded as creatures of the state when they were created by Royal Charter, or by private or special act of Parliament, under general incorporation laws their creation is as much the product of voluntary agreement as is the formation of an unincorporated body.<sup>99</sup> Nor can it be meaningfully said that corporate bodies derive "privileges" from the state which justify a greater degree of intervention in their internal affairs. Again, such a statement might have had significance at a time when organizations not sanctioned by the state were viewed with hostility; thus, a trade union's supposed illegality at common law was one reason for judicial reluctance to intervene in its internal affairs. But this situation was changed in the case of trade unions by the Trade Union Act of 1871, and the older hostility toward "unrecognized" associations in general no longer exists.<sup>100</sup>

The acquisition of "legal personality" through incorporation might to a limited extent be regarded as a "privilege" justifying regulation.<sup>101</sup> But those aspects of legal personality which could reasonably be said to be beneficial to an organization (i.e., leaving out the "ability" to be sued) have long been possessed to a substantial degree by unincorporated associations as well. Through the trust device, an association may hold title to, transfer, and sue to protect association property, and may enter into contracts with third parties.<sup>102</sup> Even the privilege of limited liability is in large measure secured by the fact that in a suit

<sup>96</sup> *Cf.* *State ex rel. Waring v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408 (1869).

<sup>97</sup> *Cf.* *People ex rel. Gray v. Medical Society*, 24 Barbour 570 (N.Y. Sup. Ct. 1857).

<sup>98</sup> See discussion of history behind the Trade Union Act, 1871, in chap. 2 *supra*. *Cf.* *Medical & Surgical Society v. Weatherby*, 75 Ala. 248 (1883).

<sup>99</sup> See GOWER, *COMPANY LAW* c. 3 (2d ed. 1957).

<sup>100</sup> See chap. 2 *supra*.

<sup>101</sup> *Cf.* WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* (1929).

<sup>102</sup> 3 MAITLAND, *COLLECTED PAPERS* 271, 304 (1911).

against the "association" through representative defendants, or against the association in its own name, where such suit is allowed, the plaintiff, in England and in many American jurisdictions, may probably reach only the associated assets, and not the individual assets of the members.<sup>108</sup>

Moreover, if acquisition of privileges from the state be regarded as an exchange for submission to internal regulation, unincorporated associations, and unions in particular, possess many such privileges more valuable than the attributes of legal entity. Tax exemption, British trade-union immunity from tort liability, and American trade-union rights under federal legislation, to name just a few, justify a measure of state control at least as readily as the traditional privileges accorded to corporations.

These considerations suggest that there is no substantive policy which would support greater internal intervention in the case of a corporation than in the case of an unincorporated association; and an examination of the decisions (in the United States, where direct comparison is possible) reveals that, in spite of language to the contrary, such a distinction is not made in practice. Clubs, for example, are often incorporated in the United States; yet the decisions show that the fact of incorporation does not affect the principles which courts apply in matters involving internal disputes.<sup>104</sup> Similarly, some trade unions in the United States are incorporated, and American courts have displayed no greater tendency to interfere in their internal affairs than in the affairs of their unincorporated counterparts.<sup>105</sup> The factor of incorporation does not of itself appear to affect the degree of control exercised by courts over the actions of union tribunals and officers.

#### PROCEDURAL QUESTIONS ASSOCIATED WITH LEGAL PERSONALITY

While the presence or absence of technical incorporation does not provide a basis for differences in degree of internal regulation as a matter of policy, it does pose certain questions of procedure which are related to the notion of "legal personality." We shall discuss here two of the most important questions of this sort: (a) whether and by what

<sup>103</sup> See pp. 78 ff. *infra*.

<sup>104</sup> *E.g.*, *United States ex rel. De Yurbitide v. Metropolitan Club*, 11 App. D.C. 180 (1897); *Elwell v. Manhattan Chess Club*, 23 Misc. 500, 52 N.Y.S. 726 (1898); *Stein v. Marks*, 44 Misc. 140, 89 N.Y.S. 921 (1904); *Commonwealth ex rel. Burt v. Union League*, 135 Pa. 301, 19 Atl. 1030 (1890).

<sup>105</sup> *E.g.*, *Beesley v. Chicago Journeymen Plumbers Association*, *supra* note 93; *Meurer v. Detroit Musicians Benevolent & Protective Association*, *supra* note 93; *Doyle v. N.Y. Benevolent Society*, 3 Hun. 361 (N.Y. Sup. Ct. 1875); *Weiss v. Musical Mutual Protective Union*, 189 Pa. 446, 42 Atl. 118 (1899); *Cotton Jammers & Longshoremen's Association v. Taylor*, 56 S.W. 553 (Tex. Civ. App. 1890); *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 91 S.W. 834 (Tex. Civ. App. 1905).

procedure a union member may recover damages against union funds for breach of union rules; and (b) whether and to what extent the rule in *Foss v. Harbottle*, relating to the procedure of bringing "corporate" causes of action, is applicable to suits by union members.

*Damage suits by union members.*<sup>106</sup> It has long been clear in England, as a result of the House of Lords decision in *Taff Vale*,<sup>107</sup> that a registered union possesses sufficient "legal personality" to support a suit against it in its registered name; and, as a result of the House of Lords decision in the *Osborne* case,<sup>108</sup> that a union member might, in such a suit, obtain a declaration and injunction against a breach of union rules. But, prior to the recent House of Lords decision in *Bonsor v. Musicians Union*,<sup>109</sup> it had been held that the union's lack of "entity" precluded recovery of damages by a member injured as a result of a rules violation.

The basis for this position, as stated by the Court of Appeal in the *Kelly* case<sup>110</sup> and the *Bonsor* case,<sup>111</sup> was somewhat as follows: A union, as an unincorporated association, is governed by the rules of agency. A union's funds, which are really but the joint property of all members for the time being, cannot be reached by a plaintiff complaining of wrongful conduct on the part of the union representatives unless that conduct was authorized or ratified by all the members (or at least all the members except the plaintiff). In the absence of actual participation on the part of all members in the wrongful act, such authorization can be shown only by the apparent authority established by the union's rules. But on that basis the plaintiff himself has authorized the wrongful act since he, too, is a party to the union's rules; and therefore he cannot recover.

There are a number of difficulties with such reasoning. For one, assuming that the liability of union funds is governed by the law of agency to the extent that the union or its members are not liable for

<sup>106</sup> Among the numerous articles on the subject are the following:

On the general subject of suits by and against unincorporated associations: Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929); Lloyd, *Actions Instituted By or Against Unincorporated Bodies*, 12 MODERN L. REV. 409 (1949); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1923).

On the subject of suits by or against labor organizations: Forkosch, *The Legal Status and Suability of Labor Organizations*, 28 TEMP. L.Q. 1 (1954); Magill, *Suability of Trade Unions*, 1 N.C.L. REV. 81 (1922); Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40 (1941).

On the subject of suits for damages by union members in particular: Lloyd, *Damages for Wrongful Expulsion from a Trade Union*, 19 MODERN L. REV. 121 (1956).

<sup>107</sup> *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

<sup>108</sup> *Osborne v. Amalgamated Society of Railway Servants*, [1910] A.C. 87.

<sup>109</sup> [1956] A.C. 104.

<sup>110</sup> *Kelly v. National Society of Operative Printers*, (1915) 31 T.L.R. 632.

<sup>111</sup> [1954] Ch. 479.

torts committed by or contracts entered into by persons whose acts the members have not authorized or ratified,<sup>112</sup> the law of agency has, in theory, nothing to do with whether a contract, admittedly entered into, has been breached. What constitutes a breach of contract depends upon the terms of the contract, not upon the rules of agency. If, for example, a union officer purportedly expels a member in a manner which violates the union's rules, and if as a result of such purported expulsion the member suffers damages, whether he can recover such damages by legal action does not depend upon a finding that the officer's conduct was "authorized" by the membership, but upon whether the members, through their intra-union "contract" agreed, expressly or impliedly, to hold the common funds liable for wrongful acts of union officers; or, in the alternative, upon whether they agreed, and have violated their agreement, to act collectively in order to avoid or minimize the results of possible rules violations.

But a more basic difficulty with the self-authorization reasoning (apart, of course, from its elevation of form above substance) is that it assumes that individual responsibility of all members, on agency principles, is essential to a judgment against their common fund. This is presumably the case in a representative proceeding, where the suit against representative defendants is said to be but a shorthand method of suing those represented.<sup>113</sup> But it is a reasonable inference from the House of Lords decision in *Taff Vale* that where a registered union is sued by its registered name, it is not necessary to show that all persons who are members of the union at the time of the suit authorized or ratified the wrongful act complained of (indeed, that would be impossible, in view of the fluctuating nature of union membership, unless membership itself were deemed ratification); but only that the person who committed the wrongful act was at that time acting as a representative of "the union." Thus, at least four of the five Law Lords expressed agreement with the opinion of the trial judge that unions should be liable for the acts of agents "to the same extent that they would be if they were a corporation"; and damages were actually awarded, for tortious acts of union officers, despite the fluctuating nature of union membership and the lack of proof of knowledge of the wrongful acts on the part of the membership. As a corollary, recovery in such a suit would be limited to the common funds and would not extend to the assets of individual members. In short, the House of Lords in *Taff Vale*

<sup>112</sup> For a general discussion of agency principles applicable to unincorporated associations, see LLOYD, *UNINCORPORATED ASSOCIATIONS* (1938).

<sup>113</sup> E.g., *Hardie & Lane, Ltd. v. Chiltern*, [1928] 1 K.B. 663; *Barker v. Allanson*, [1937] 1 K.B. 463.



regarded the union as an entity for substantive, and not merely procedural, purposes, and applied to it much the same notions of collective responsibility and corporate immunity as are applied to incorporated groups.<sup>114</sup>

This principle of collective responsibility and limited liability inherent in suits against registered unions provided the basis for at least a minority of the Law Lords who reversed the Court of Appeal in the *Bonsor* case and upheld the standing of a wrongfully expelled member of a registered union to sue for damages. Lords Morton and Porter declared flatly, on the basis of the *Taff Vale* decision, that a registered union is an entity for the purposes of suit against it in its common name. Lord Keith was of the opinion that a registered union is not a "legal entity distinguishable from members at any moment of time," but that nevertheless it is an entity, different from other unincorporated associations, in that when it is sued in its registered name its funds are bound by "collective responsibility," and recovery is limited to those funds. Lord MacDermott, with whom Lord Somervell apparently agreed, argued, on the other hand, that a registered union is not a legal entity; that suit against the union in its common name, and the collective responsibility imposed in such a suit, is merely a procedural device, removing some of the obstacles to suits against large associations with fluctuating memberships; and that the only reason individual assets cannot be reached in such a suit is that there is "no procedure" available for levying execution against them. The decision of the Court of Appeal was wrong, in their opinion, because it represented an "unwarranted extension of the agency."

Despite the various means of expressing the conclusion, it is now clear in England that there is no practical difference between suing a registered union and suing a corporation, whether the plaintiff be a member or not. Since the *Taff Vale* decision was based upon the effects of registration under the 1871 Act,<sup>115</sup> however, the situation with respect to unregistered unions is different. Presumably their common funds can be reached, if at all, only by a suit against representative defendants.<sup>116</sup> If it be assumed that such a representative suit is in reality a

<sup>114</sup> It is debatable whether the Law Lords thought this was the result of their decision. On one hand, they expressed concurrence with the opinion of Farwell, J. in the trial court, who clearly regarded the union as a quasi-corporation for purposes of suit against it in its registered name; on the other hand, their own opinions indicate that they felt their decision had merely procedural consequences. See discussion of this point in Lloyd, *Damages for Wrongful Expulsion from a Trade Union*, 19 MODERN L. REV. 121, 129 (1956). All we are saying here is that the actual holding was inconsistent with any but a substantive interpretation.

<sup>115</sup> Cf. *Russell v. Amalgamated Society of Carpenters & Joiners*, [1912] A.C. 421, *per* Lord Atkinson.

<sup>116</sup> Representative actions are authorized in Britain by R.S.C. Order 16, Rule 9:

suit against all members of the union individually, and that the judgment would of necessity bind their individual assets,<sup>117</sup> then individual liability on the part of all members would have to be shown—a requirement which would render recovery of damages almost impossible, whether the plaintiff be a member or nonmember. The membership of the union at the time of suit may be different from the membership at the time of the wrong;<sup>118</sup> and different members may have participated in the wrong to different degrees or not at all, and thus have different defenses available.<sup>119</sup> But if, on the other hand, it is deemed possible to reach the union's common assets in such a suit without necessarily rendering each member personally liable (and it would seem that, in contract actions at least, such might be the case),<sup>120</sup> then a plaintiff should be permitted to do so without proving individual authorization or ratification, on the basis of collective responsibility. Lords MacDermott and Somervell leave open this possibility, while Lords Morton, Porter, and Keith, by insisting upon the 1871 Act as the source of the collective-responsibility principle, appear to foreclose it.

In the United States, a considerable variety of statutes and common-law rules renders difficult any generalizations concerning the substantive and conceptual problems raised by the *Bonsor* case. The United States and nearly half the states<sup>121</sup> now have statutes which either expressly authorize<sup>122</sup> or are interpreted to authorize<sup>123</sup> suits against labor

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"Where there are numerous persons having the same interest in one cause or matter, one or more such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

<sup>117</sup> See cases cited in note 105 *supra*.

<sup>118</sup> *Cf. Barker v. Allanson*, *supra* note 113.

<sup>119</sup> *Cf. London Association for Protection of Trade v. Greenlands*, [1916] 2 A.C. 15. R.S.C. Order 16, Rule 9 requires that the entire class represented have the "same interest." See CITRINE, *TRADE UNION LAW* 146-150 (1950); Lloyd, *Actions Instituted By or Against Unincorporated Bodies*, 12 *MODERN L. REV.* 409 (1949).

<sup>120</sup> *Cf. Wise v. Perpetual Trustees Co.*, [1903] A.C. 139 (trustees of unincorporated club, found liable under lease, held not entitled to indemnity from individual members in absence of rule making them personally liable for club debts). Persons contracting with the union could be held charged with knowledge that individual assets could not be reached. This reasoning could not, however, be used in actions in tort.

<sup>121</sup> For citation of statutes relating to suits by or against labor organizations, see Forkosch, *supra* note 106.

<sup>122</sup> *E.g.*, KAN. GEN. STAT. §44-811: "An action or suit may be maintained by or against any unincorporated labor organization in its commonly used name. . . ." Some statutes authorize suit against any unincorporated association. *E.g.*, COLO. RULES CIV. PROC., Rule 17(b): "An unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right."

<sup>123</sup> Several states have so-called "common name" statutes. *E.g.*, CAL. CODE CIV. PROC. § 388: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name. . . ." Such statutes have generally been held to apply to labor organizations. *E.g.*, *Armstrong v. Superior Court*, 173 Cal. 341, 159 Pac. 1176 (1925).

organizations in their common names. Some of these statutes provide that judgment in such suits can be executed only against union assets,<sup>124</sup> others that judgment may be executed against individual members,<sup>125</sup> at least after association assets are exhausted,<sup>126</sup> and others are either silent<sup>127</sup> or ambiguous<sup>128</sup> on the question. Despite these differences, it is fairly clear that in practice courts treat a union sued in its common name as an entity in the sense that union assets can be reached upon a lesser showing of authorization, ratification, or participation on the part of members than would ordinarily be required to hold the members individually liable.<sup>129</sup>

In the absence of a statute authorizing suit against unions in their common name, most American courts adhere to the common-law rule that an unincorporated association is not a legal entity for purposes of suing or being sued.<sup>130</sup> The effect of this rule, however, is substantially obviated by the device of the class or representative suit. Although courts often give lip service to the notion that the representative suit is but a shorthand means of suing the represented defendants, most courts here, as in the case of suits against unions in their common name, recognize the union as an entity to the extent of permitting the plaintiff

<sup>124</sup> *E.g.*, KAN. GEN. STAT. § 44-811: "Judgment in such action may be in force against the common property only, of such labor organization."

<sup>125</sup> *E.g.*, S.C. STAT. § 10-1516: "Any property of the association, and the individual property of any member thereof, found in the State, is liable to judgment and execution for satisfaction of any such judgment."

<sup>126</sup> *E.g.*, TEX. STAT. tit. 105, c. 2, art. 6133 (1949).

<sup>127</sup> *E.g.*, OKLA. STAT. tit. 12, c. 6, § 182 (1951).

<sup>128</sup> *E.g.*, IDAHO CODE ANN. tit. 5, c. 3, § 5-323 (1947) (providing that the judgment binds the joint property of the associates as if all were named as defendants). Several of the "common name" statutes, *e.g.*, CAL. CODE CIV. PROC. § 388, provide that "the judgment in the action shall bind the joint property of all the associates, *and the individual property of the party or parties served with process*, in the same manner as if all had been named defendants and had been sued upon their joint liability." (Emphasis added.) A California court has suggested that such a statute would permit a plaintiff, successful in a suit against a union but unable to collect from union assets, to bring suit for accounting against union members. *Deeney v. Hotel & Office Employees Union*, 57 Cal. App. 2d Supp. 1023 (1943).

<sup>129</sup> For example, in South Carolina, where judgment obtained in a suit against a union can, according to statute, be executed against the individual assets of union members (see note 125 *supra*), the Supreme Court affirmed such a judgment for damages arising out of physical assaults by union officers and certain members, on the grounds that union officials arranged for payment of their fines and that the pickets responsible for violence were retained by the union. *Hall v. Walters*, 226 S.C. 450, 85 S.E.2d 729 (1955). For detailed discussion of the application of entity theory to suits against unions, see Note, *Responsibility of Union for Acts of Members*, 38 COLUM. L. REV. 454 (1938).

<sup>130</sup> *E.g.*, District 21, *United Mine Workers v. Bourland*, 169 Ark. 796, 277 S.W. 546 (1925). See Annotation, 149 A.L.R. 508. *Cf.* *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922) (holding union suable in its own name at least with respect to actions arising out of federal statutes). See Magill, *supra* note 106, and Sturges, *supra* note 106. Some states have followed the Coronado rule, *e.g.*, *Williams v. United Mine Workers*, 294 Ky. 520, 172 S.W.2d 202 (1943).

to reach union assets without a showing of liability, on agency principles, on the part of all members.<sup>131</sup>

A notable exception to this generalization in the past has been the state of New York. Until recently, the courts of that state had held that in order for a plaintiff to obtain judgment which could be executed against union funds through class action he must first establish individual liability on the part of all members, through authorization, ratification, or participation in the wrongful act.<sup>132</sup> The requirement of individual liability was based on an interpretation of the New York statute governing representative suits in association cases, which provides that an action may be maintained against the treasurer or president of an association to recover any property, or upon any cause of action "for or upon which the plaintiff may maintain such an action or special proceeding against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally."<sup>133</sup> Judgment in such a suit may be executed only against association property.<sup>134</sup> If those assets are exhausted, the plaintiff may sue the individual members, but liability must be proved anew.<sup>135</sup>

Recently, however, the New York Court of Appeals indicated a substantial change of position. In *Madden v. Atkins* several union members, claiming to have been expelled for conduct not violative of their union's constitution, brought suit against union officers in their representative capacity for reinstatement and damages. The trial court found the expulsion wrongful and granted both forms of relief,<sup>136</sup> but the intermediate appellate court reversed as to damages<sup>137</sup> on the basis of the prior cases which appeared to insist upon proof of individual liability on the part of all members. Both sides then appealed to the Court of Appeals, which sustained the holding that the expulsion was wrongful and held, in addition, that the plaintiffs were entitled to recover damages from the union's treasury.<sup>138</sup>

<sup>131</sup> *E.g.*, *Jackson v. International Union of Operating Engineers*, 307 Ky. 485, 211 S.W.2d 138 (1948). For an excellent discussion of this subject, with citation of authorities, see Witmer, *supra* note 106.

<sup>132</sup> *E.g.*, *Glauber v. Patof*, 294 N.Y. 583, 63 N.E.2d 181 (1945); *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951). There was another line of cases, mostly older and seemingly indistinguishable, which had granted damages without discussion of that requirement. *E.g.*, *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Blek v. Wilson*, 262 N.Y. 353, 186 N.E. 692 (1933).

<sup>133</sup> General Associations Law § 13.

<sup>134</sup> § 15.

<sup>135</sup> § 16.

<sup>136</sup> 1 Misc. 2d 7, 147 N.Y.S.2d 19 (1955).

<sup>137</sup> 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957).

<sup>138</sup> 4 N.Y.2d 283, 151 N.E.2d 73 (1958).

The Court of Appeals attempted to distinguish the opposing precedent on the ground that the plaintiffs in those cases had not made a sufficient showing of "union responsibility." Relying on cases decided prior to the development of the individual-responsibility rule,<sup>130</sup> the court declared the following rule:

In short, the principle to be deduced from the decisions involving wrongful expulsion is this: where it is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, *the act of expulsion will be regarded as the act of the union, for which damages may be recovered from union funds.* Where, however, proof of union responsibility is lacking, the claim for damages against the organization must fall. (Emphasis added.)

Pointing to the fact that the plaintiffs had been expelled at a membership meeting, upon recommendation of a trial committee, the court argued that "each and every member of Local 88, by reason of the provisions of its constitution, has specifically delegated the power of expulsion to a trial committee and a regular meeting of the membership." From this the court concluded: "For the wrongs complained of in the case before us, the *requisite participation of the membership was sufficiently shown to justify liability against the organization, even though not against the individual members.*" (Emphasis added.)

By holding that the union funds may be reached upon a showing of "union responsibility" under circumstances where individual members would not be personally liable, the New York court in effect extended the *Bonsor* principle of collective responsibility and limited liability to representative suits. There is one important point, however, on which the two decisions appear to differ. The New York court stressed the fact that the expulsion was brought about by action of a membership meeting to which the members, through their intra-union contract, had expressly delegated the power to expel; whereas the House of Lords in the *Bonsor* case sustained the plaintiff's right to recover damages where the expulsion was held wrongful precisely because the branch secretary who purportedly expelled the plaintiff did not have the power to do so under the union's rules. On this point it would seem that the position of the House of Lords is preferable. The members of the union in *Bonsor* were responsible, through their union rules, for placing the branch secretary in a position where he could bring about all the normal consequences of a proper expulsion through his authority as a union officer. It seems unjust not to extend the principle of collective responsibility to permit recovery under such circumstances.

<sup>130</sup> *Supra* note 132.

When we turn, in the American cases, from questions of substantive liability to the conceptual riddle of common agency posed in the *Bonsor* appeal, we are faced with a curious situation. American courts have quite frequently invoked the common-agency principle to deny recovery to union members in a suit against their union, but primarily in cases in which the member seeks to hold his union liable for alleged negligence or wrongful act in handling his grievance concerning seniority. For example, in *Marchitto v. Central R.R. of New Jersey*,<sup>140</sup> the New Jersey Supreme Court held that a union member was not entitled to damages for his union's alleged negligence in handling a seniority claim, on the following ground:

In legal effect the plaintiff and every other member of the brotherhood are co-principals joined together in a joint enterprise to accomplish a common purpose with their relationships to each other and to the group governed by the association's constitution and the by-laws or rules adopted thereto, and by the common law. As a member of the group the plaintiff is jointly responsible with all other members for the actions of the group itself, and accordingly as a principal he has no cause of action against his co-principals for the wrongful act of their common agents.

Other courts have ruled to the same effect.<sup>141</sup> In only one other intra-union situation has a court relied upon the common-agency theory to deny relief, and that concerned an alleged wrongful removal from office.<sup>142</sup>

In cases involving claims for damages as a result of wrongful expulsion from a union, not once has an American court denied recovery on the common-agency theory. Typically the courts have considered the claim, and often granted relief, without discussing that theory at all. Indeed, we have been able to discover only three expulsion cases in which the common agency was discussed. In one, *Howland v. Local 306, United Auto Workers*,<sup>143</sup> the Supreme Court of Michigan rejected on two grounds the union's contention that the plaintiff should be barred by common agency: first, since the union argued that the plaintiff was no longer a member, it could not at the same time argue that, as a

<sup>140</sup> 9 N.J. 456, 88 A.2d 851 (1952).

<sup>141</sup> E.g., *McClees v. Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 18 N.E.2d 812 (1938); *Brotherhood of Railroad Trainmen v. Allen*, 230 S.W.2d 325 (Tex. Civ. App. 1950), *cert. denied*, 340 U.S. 934 (1951); *Atkinson v. Thompson*, 311 S.W.2d 250 (Tex. Civ. App. 1958). See also *Hromek v. Gemeinde*, 238 Wis. 204, 298 N.W. 587 (1941) (suit by member for injuries sustained by alleged negligence of union representatives); Annotation, 14 A.L.R.2d 473. *Contra*, *Glover v. Brotherhood of Railway & Steamship Clerks*, 108 S.E.2d 79 (N.C. Sup. Ct. 1959).

<sup>142</sup> *Goins v. Missouri Pacific System Federation of Maintenance of Way Employees*, 272 F.2d 458 (8th Cir. 1959) (damages only).

<sup>143</sup> 323 Mich. 305, 35 N.W.2d 166 (1948).

member, he was barred by common agency;<sup>144</sup> and second, the plaintiff's suit was against the union as an entity.<sup>145</sup> In another, *Taxicab Drivers Local 889 v. Pittman*,<sup>146</sup> the Supreme Court of Oklahoma sought to distinguish the seniority cases by saying:

We note, however, that in each of those cases the conduct of the agent was in the performance of his duty on behalf of the association in some project from which the plaintiff could reasonably expect to benefit just as much as any other member, at the inception of the project. Here we have quite a different situation.

Then, after quoting from Lord MacDermott's decision in the *Bonsor* case,<sup>147</sup> the court stated:

We agree. Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agent for that purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy.

In the third case, the Texas Supreme Court, following the *Pittman* rationale, held the common-agency theory no bar to an action by a member of one local union for damages against a sister local which had intentionally refused to accept his "clearance card" or to refer him to work. If the denial of work had resulted only from "negligence, inadvertence, or mistake," the court ruled, then no damages would be recoverable. But the "intentional wrong" made the undertaking "strictly adverse" to the plaintiff's interests, allowing him to sue.<sup>148</sup>

The reasons asserted in these expulsion cases for rejection of the common-agency argument provide no adequate distinction of the seniority cases in which the argument is accepted. Whether or not the plaintiff is a member of the union at the time he files suit, which the court in *Howland* regarded as controlling, is clearly irrelevant to the theory of common agency, which is based upon membership at the time of the alleged wrong. And if suit brought by an expelled member is against the union as an entity, so must be a suit brought by a member seeking protection against interference with his seniority. The *Pittman*

<sup>144</sup> This argument has likewise been relied upon by courts in seniority cases as a means for distinguishing the expulsion cases. *E.g.*, *Atkinson v. Thompson*, *supra* note 141.

<sup>145</sup> This position was also taken by a California court in *Deeney v. Hotel & Office Employees Union*, *supra* note 128, where the nature of the action is not disclosed in the reported opinion.

<sup>146</sup> 322 P.2d 159 (Okla. Sup. Ct. 1957).

<sup>147</sup> *Supra* note 109 ("To say that this is done on behalf of the person expelled seems to me an unwarranted extension of the agency and quite out of keeping with reality").

<sup>148</sup> *United States v. Borden*, 45 L.R.R.M. 2352 (1959).

decision's distinction, based upon the factor of initial benefit to the plaintiff, is likewise inadequate, since it fails to account for those cases in which the plaintiff contends the union failed to take some action which it should have taken, and ignores the fact that a principal-agent relationship is not dependent upon a finding of benefit to the principal. Probably the true explanation of the expulsion-seniority distinction is that courts are unwilling to review union decisions on seniority matters, which call for the exercise of considerable discretion.<sup>149</sup>

*The rule in Foss v. Harbottle.* A corporation is the proper party, and the only proper party, to sue for breach of a duty owed the corporation by one of its directors or officers—this was the original principle derived from the English case of *Foss v. Harbottle*.<sup>150</sup> But what has come to be known as “the rule in *Foss v. Harbottle*” goes somewhat beyond this application of the principle of corporate entity, and holds that (possibly subject to certain exceptions) a shareholder may not sue to complain of some irregularity in corporate proceedings unless the irregularity is such that it could not be cured by simple majority vote of the shareholders. Professor Gower suggests that this extension of the *Foss v. Harbottle* principle, while contrary to the original reason for the rule, is nevertheless justified (1) because it avoids the possibility of a multiplicity of suits brought by different shareholders, and (2) because it avoids litigation over matters which may be academic in view of the power of the majority to ratify the irregular act.<sup>151</sup>

Consistent with the practice of British courts to treat registered unions for most purposes as if they were corporations, the English Court of Appeal, in *Cotter v. National Union of Seamen*,<sup>152</sup> held that such unions are “entities” to which the rule in *Foss v. Harbottle* applies. The plaintiffs in that case were five members of a union, who purported to sue on behalf of themselves and all other members except the defendant officers. Their complaint was that certain resolutions passed at a “special conference” of the union called by the executive council (one of them authorizing an interest-free loan to the Miners Non-Political Movement; the other approving the suspension of one of the plaintiffs from union office) were invalid, on the grounds that the conference was improperly called, the business transacted at the conference went beyond its original purpose, and the conference itself was improperly constituted. The plaintiffs sought a declaration that the resolutions were invalid and an injunction restraining their enforcement. In deny-

<sup>149</sup> See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

<sup>150</sup> (1843) 2 Hare 461.

<sup>151</sup> See discussion in GOWER, COMPANY LAW 527 (2d ed. 1957).

<sup>152</sup> (1929) 45 T.L.R. 352, 2 Ch. 58.



ing the relief on the basis of the rule in *Foss v. Harbottle* the court noted that the resolutions themselves were not *ultra vires* and that the plaintiffs were clearly in a minority; the resolutions, if improperly passed, could, and probably would, be ratified by majority action; therefore, the plaintiffs should not be permitted to complain.

It is not clear from the opinion whether the *Foss v. Harbottle* principle was ruled applicable to trade unions by analogy only, or upon the theory that a registered union is a "legal entity." If the latter, then the conflict as to that point among the Law Lords in the *Bonsor* case perhaps creates some doubt as to whether the principle continues to be applicable. But assuming it does, its application is likely to be very limited indeed. To begin with, the *Foss v. Harbottle* principle does not apply where the defect complained of is one that could not be ratified by a simple majority of the members,<sup>153</sup> and this exception includes acts which are *ultra vires* the union's constitution.<sup>154</sup> Thus, in the earlier case of *Yorkshire Miners Association v. Howden*,<sup>155</sup> the House of Lords, impliedly accepting the general applicability of the rule in *Foss v. Harbottle* to registered unions, held that the rule did not prevent individual members from suing to restrain application of union funds for purposes not authorized by the union's constitution. The member's cause of action in such a case may be said to be both individual (in the sense of protecting his personal interest in the union's assets) and derivative (in the sense that he is enforcing a corporate right of action).<sup>156</sup> Multiplicity of actions can be avoided by requiring the plaintiffs to sue as representatives of all members. Insofar as the action is derivative, it may be necessary to show, however, either that the plaintiffs have requested the union's trustees to sue, or that it would be futile to do so.<sup>157</sup>

The rule that individual members may sue to protest against an action which cannot be ratified by a simple majority extends to cases where the plaintiffs are not, strictly speaking, suing in a derivative capacity at all. For example, in *Edwards v. Halliwell*<sup>158</sup> the Court of Appeal, relying on that rule among others, held that *Foss v. Harbottle* was no bar to a suit by union members protesting that a resolution to increase union contributions was not passed by the two-thirds majority required by the union's rules.

<sup>153</sup> *MacDougall v. Gardiner*, [1876] 1 Ch. D. 13.

<sup>154</sup> *Simpson v. Westminster Palace Hotel Co.*, (1860) 8 H.L.C. 712.

<sup>155</sup> [1905] A.C. 256.

<sup>156</sup> GOWER, *op. cit.* *supra* note 151, at 536.

<sup>157</sup> *Cf.* decision of Court of Appeal in *Yorkshire Miners Association v. Howden*, [1903] 1 K.B. 308.

<sup>158</sup> [1950] 2 All E.R. 1064.

That the plaintiffs in *Edwards v. Halliwell* were suing to protect individual interests rather than on a corporate cause of action was an alternative basis for the court's decision that the rule in *Foss v. Harbottle* did not apply.<sup>150</sup> To the extent that the rule of that case has been broadened to include the policies of avoiding multiplicity of suits and futile litigation, the fact that the plaintiffs are suing to protect individual interests should, perhaps, not be controlling; and Professor Gower has suggested that the suit to protest against a nonratifiable act is the only exception to the *Foss v. Harbottle* principle.<sup>150</sup> But it would seem that the policies themselves are of questionable application in cases where the plaintiffs have personal interests at stake. Multiplicity of suits can be avoided by the simple expedient of requiring the plaintiffs to sue as representatives of all other members, as is required in the case of company law where individual shareholders sue to protest against a fraud on the minority.<sup>151</sup> And the fact that the action complained of is *intra vires*, in the sense that it *might* have been taken by a majority of the membership if the proper procedure had been followed, should not, it would seem, prevent individuals from complaining that it was *not* so taken, at least in the absence of clear evidence that the action was supported by the overwhelming majority of the membership, and that the defect was of such a minor, or technical, nature that the proper procedure would not have affected the outcome.<sup>152</sup> Even in the case of strictly unincorporated associations, and quite apart from the rule in *Foss v. Harbottle*, courts have considered whether relief should be denied where the action complained of involved a "mere irregularity" of little consequence.<sup>153</sup> But a strict application of the rule in *Foss v. Harbottle* would lead to the conclusion, for example,

<sup>150</sup> *E.g.*, *per* Asquith, L.J.: "When in circumstances such as I have described a remedy is sought by an individual, complaining of a particular act in breach of his rights and indicting particular damage on him, it seems to me the principle of *Foss v. Harbottle*... does not apply either by way of barring the remedy or supporting the objection that the action is wrongfully constituted because the union is not a plaintiff."

<sup>150</sup> *Op. cit. supra* note 151, at 530.

<sup>151</sup> *Id.* at 535.

<sup>152</sup> *Cf.* *Brodie v. Bevan*, (1921) 38 T.L.R. 172 (ballot held improper on ground that procedure violated rules in such a way as to make vote unfair). See *Humphries v. Auckland Tailoress' Union*, [1950] N.Z.L.R. 380. The New Zealand court, reviewing the English *Foss v. Harbottle* cases, concluded in part that it is a condition to the application of that rule that "there must be no doubt that the purpose sought to be achieved has the support of the majority of members who might be present."

<sup>153</sup> In *Edwards v. Halliwell*, *supra* note 158, the defendants' argument that the defect complained of was a "mere irregularity" was considered separately from the *Foss v. Harbottle* argument by Jenkins, L.J. See *Amalgamated Society of Engineers v. Jones*, (1913) 29 T.L.R. 484 (relief denied because of minor nature of irregularity), distinguished by Jenkins, L.J. as not involving a wrong "as a matter of substance."

that a union member expelled by a procedure which violated his union's rules could not complain if the rules gave the majority at a membership meeting the power to expel—a conclusion contrary to the decided cases.

One of the opinions in *Edwards v. Halliwell* contains dicta to the effect that the rule in *Foss v. Harbottle* is “not inflexible,” and will be relaxed when the “interests of justice” require it.<sup>164</sup> But a more satisfactory approach, which is supported by the opinions in that case, is to confine the *Foss v. Harbottle* rule to cases involving purely corporate rights of action, and to permit individual members to sue on matters affecting their interests, subject only to the qualifications that particular types of actions may require the joinder, through representation, of other members in order to avoid multiplicity of suits, and that courts will not interfere with irregularities which will clearly not affect and have not affected the relationships between the parties.

Contemporary American corporation law does not include *Foss v. Harbottle* in precisely the same form as in England.<sup>165</sup> Suits by shareholders to enforce a corporate right of action—the derivative action—are permitted with greater frequency. Shareholders are, however, typically required first to make a “demand” upon the directors, and sometimes upon the other shareholders, that they bring the suit.<sup>166</sup> The requirement of “demand” has not, until recently, been applied to trade unions. In the only case to raise the question directly, a Delaware court held that the requirement was inapplicable because a union is an unincorporated association and not a legal entity.<sup>167</sup> In the LMRDA, however, the right of a member to sue for violation of fiduciary responsibility by union officers<sup>168</sup> is expressly conditioned upon his having requested the union or its governing board or officers to take appropriate action and their having refused or failed to do so “within a reasonable time.”<sup>169</sup>

Apart from application of the American version of *Foss v. Harbottle*, American courts are concerned over the policies suggested by that rule. In the interest of avoiding multiplicity of suits they will insist

<sup>164</sup> *Per* Jenkins, L.J.

<sup>165</sup> See Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1385 (1956).

<sup>166</sup> See BALLANTINE, *CORPORATIONS* c. 11 (1946).

<sup>167</sup> *Roberts v. Kennedy*, 12 Del. Ch. 133, 116 Atl. 255 (1922). *Cf.* *Robinson v. Nick*, 136 S.W.2d 374 (Mo. App. 1940) (minority's lack of “authorization” to bring lawsuit held no defense). See Perkins, *Protection of Labor Union Funds by Members' Representative Suits: Massachusetts Practice*, 27 B.U.L. REV. 1 (1947).

<sup>168</sup> See chap. 6 *infra*.

<sup>169</sup> § 501(b).

that plaintiffs suing on a cause of action which affects other members sue in a representative capacity.<sup>170</sup> Like the British courts, they will deny relief where the departure from rule is minor in nature and the action complained of is clearly supported by the majority.<sup>171</sup>

Apart from the relevance of incorporation to the degree of judicial interference and to procedural problems in interference, courts of both countries draw upon the law of companies (or, in America, of "corporations") for assistance in formulating the pattern of intervention. For example, the principle of *ultra vires* acts and applications of funds is applied by analogy; the fiduciary standard of directors (along with that of trustees) helps define the content of the responsibility owed by union officers; and company-law cases are often cited in decisions concerning union elections and the conduct of its internal affairs. These matters are discussed in later chapters.

### THE UNION AS A PUBLIC UTILITY OR GOVERNMENT

The probable future of the law relating to internal union affairs is reflected in the tendency of American courts to view the union as in the nature of a public utility or governmental body, existing for the socially desirable purpose of representing employees in their relations with employers, and burdened with certain legal obligations corresponding to its social function.

The public-utility analogy<sup>172</sup> arises primarily from American statutes regulating labor relations. Under the National Labor Relations Act, as amended, any union designated by a majority of employees as their representative in a unit found by the National Labor Relations Board to be "appropriate" for purposes of collective bargaining becomes the *exclusive* bargaining representative of *all* the employees in that unit.<sup>173</sup> It has the right, enforceable through unfair labor practice proceedings, to compel the employer to bargain with it in good faith for the terms and conditions of employment of all such persons.<sup>174</sup> It has the further right, unless restricted by state law,<sup>175</sup> to require, through agreement with the employer, that all such persons become members of the union as a condition to continued employment after thirty days.<sup>176</sup> The policy

<sup>170</sup> *E.g.*, *Roberts v. Kennedy*, *supra* note 167.

<sup>171</sup> *Cf. Rowan v. Possehl*, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

<sup>172</sup> *Tobriner, The Labor Union: Public Utility of Labor Relations*, 43 A.B.A.J. 805 (1957).

<sup>173</sup> § 9(a).

<sup>174</sup> § 8(a)(5).

<sup>175</sup> Section 14(b) permits states to enact more restrictive legislation concerning union security. To date, eighteen states have outlawed the union shop through so-called right-to-work laws.

<sup>176</sup> § 8(a)(3).

implied by this legislation is that it is desirable that there be one and only one labor organization representing employees in a bargaining unit at any given time. The situation under the Railway Labor Act is similar. A statutorily designated union thus acquires, in effect, a monopoly in representation in much the same way, and for much the same reasons, as a public utility is granted a monopoly in the rendering of a particular service.

That being the case, it is but a simple step to the proposition that a union having a statutory monopoly to the right to represent employees in a particular bargaining unit must exercise that monopoly in the best interests of those represented, just as a public utility is required to render services to its consumers. From this proposition three conclusions follow. First, the union, like a public utility, must render services without discrimination as to factors which are irrelevant to its statutory obligation. Just as a public utility must offer services to all persons within its assigned district who are willing to pay for them, so a union must represent equally all persons in the bargaining unit who are willing to pay reasonable and uniform initiation fees and dues, regardless of their race, creed, color, or any other factors unrelated to the union's function as collective bargaining representative.<sup>177</sup> As a corollary, some courts have held that a union exercising job control through union-security arrangements must not only represent but also admit to membership all persons who are willing to become members upon reasonable terms and conditions; it cannot utilize its monopoly to exclude persons from employment for arbitrary reasons. The California Supreme Court, so holding in one case,<sup>178</sup> stated:

Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.

The second conclusion to be drawn from the public-utility analogy is that, in addition to its duty not to discriminate unreasonably, the union has an affirmative obligation to render services that are reasonably adequate. Carried to the extreme, this obligation might mean that courts would review all union actions, to make sure that the union obtained the best possible contract for its members and enforced it to

<sup>177</sup> *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). See chap. 7 *infra*.

<sup>178</sup> *James v. Marinship Corp.*, 25 Cal. 2d 71, 155 P.2d 329 (1945). See chap. 7 *infra*.

the best advantage. No one has suggested that judicial intervention should extend that far, but American courts are beginning to invoke the principle of the duty of fair representation to the extent of inquiring whether union officers are guilty of bad faith or gross negligence in the performance of their duties.<sup>170</sup>

Finally, the public-utility theory leads logically to the conclusion that a union cannot exercise the powers inherent in its statutory monopoly for purposes not reasonably related to its statutory function. This is, in some ways, the most controversial conclusion of all. In the area of union-management relations it suggests limitations on union economic action for the protection of the public, unless the "public" served by the union as a utility is deemed to be limited to the employees it represents in collective bargaining. In the area we are concerned with here—that of union-employee relations—the conclusion suggests limitations, akin to the corporate notion of statutory *ultra vires*, upon the scope of activities in which the union may engage. The implications of this reasoning are discussed more fully in later chapters.

While the public-utility analogy helps explain many of the American decisions relating to intra-union affairs, the concept of the union as a government-like body is of broader application and probably more helpful.<sup>180</sup> The union is like a government in a variety of ways. Membership in and the rendering of financial assistance to a union are quite often as compulsory as citizenship in and payment of taxes to a government; the available alternatives (quitting the industrial community in one case, quitting the country in the other) are almost equally unrealistic. The union's internal structure—government through elected officials and disciplinary tribunals—is similar to that of a modern state. More significantly, the union exercises government-like powers over its members, not only through internal legislation and discipline, but through the treaty-like device of collective bargaining; and in many cases this power is exercised with the sanction of, and through procedures established by, the government of the state.

This latter factor—the statutory framework in which the American union operates—has led some courts to suggest that because of its statutory position a union is not only *like* a government, it is a government in the constitutional sense, that is to say, union action is government action to which constitutional limitations are directly ap-

<sup>170</sup> See chap. 7 *infra*.

<sup>180</sup> See, e.g., Kovner, *Legal Protection of Civil Liberties Within Unions*, (1948) WIS. L. REV. 18; Malick, *The Confusion in Union Status: A Proposal*, 2 LAB. L.J. 830 (1951); Witmer, *Civil Liberties and the Trade Union*, 50 YALE L.J. 321 (1941).

plicable.<sup>181</sup> It is not necessary to go that far, however, and most courts have been content with saying, to the same practical effect, that constitutional principles are applicable to unions by analogy.<sup>182</sup> Thus, the rule that a statutory bargaining representative may not arbitrarily discriminate against persons in the bargaining unit, though explainable on the public-utility analogy, was actually first developed by analogy to the equal protection clause of the federal constitution, the Supreme Court stating in the *Steele* case:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Although the duty of nondiscrimination was based partly on statutory implication, other principles of constitutional law have been applied to unions independently of any statutory provision. Thus, the right of a member to speak freely within his union and to criticize union officers and policies has been protected by some American courts against disciplinary actions by unions, on the theory that a union member has the same rights of free speech within his union as a citizen within the state.<sup>183</sup> Other substantive limitations which American courts impose upon union disciplinary power are likewise explainable by the governmental analogy. The common-law principle of "natural justice," requiring fair procedure in union disciplinary matters, is called in America "due process of law," and courts apply to unions substantially the same principles of due process as the constitution requires of governmental bodies.<sup>184</sup> On a similar theory, courts have protected the union member's right to vote<sup>185</sup> and to hold office,<sup>186</sup> and union meetings and elections are governed to a considerable extent by principles derived from constitutional law.<sup>187</sup>

In Britain, the public-utility analogy is less forceful than in America, since British unions do not operate as statutory bargaining representatives in the same sense as American unions do. Nevertheless, to the

<sup>181</sup> *E.g.*, *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946). Most courts have rejected that theory, however, on the ground that no state action is involved. See *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 355 U.S. 893 (1959).

<sup>182</sup> *E.g.*, *Steele v. Louisville & Nashville R.R.*, *supra* note 177.

<sup>183</sup> *E.g.*, *Crossen v. Duffy*, 90 Ohio App. 252, 103 N.E.2d 769 (1951). See discussion at pp. 133 ff. *infra*.

<sup>184</sup> Pp. 103 ff. *infra*.

<sup>185</sup> Pp. 174 ff. *infra*.

<sup>186</sup> Pp. 181 ff. *infra*.

<sup>187</sup> Pp. 195 ff. *infra*.

extent that they participate in advisory tribunals for the purpose of representing worker interests, they might be said to be vested with the same sort of public responsibility. So far British courts have not relied upon that factor as grounds for legal intervention.

The governmental analogy, however, is nearly as appropriate in Britain as in America. True, British unions are less dependent upon governmental support, in the sense that they do not operate in a general statutory framework, and they do not rely upon legal sanctions for enforcement of their agreements.<sup>188</sup> And to some extent membership in a union, or at least in a particular union, may be more voluntary. But British unions possess the same sorts of governmental characteristics in their relationship to their own members as do American unions, and they legislate as effectively regarding their members' industrial existence.

The difference between the governmental analogy in the two countries, as pointed out in the introductory chapter, is that it does not necessarily lead to the same conclusions. The existence of a written constitution, of a federal system, and of the concept of judicial supremacy invests the analogy with more impetus for intervention in the United States. Still, the governmental analogy provides the most adequate explanation of a number of British rules relating to internal union affairs. The requirement of "natural justice" in disciplinary matters clearly implies the concept of a judicial tribunal (or of an administrative tribunal exercising judicial powers). The position of British courts with respect to reviewing decisions of disciplinary tribunals on matters of fact and questions of law is patterned after the scope of review which courts exercise over decisions of lower courts or administrative bodies. Their tendency to view union rules as in the nature of a statute for purposes of interpretation underlines the legislature nature of union power.<sup>189</sup> Although the British courts may never go so far as the American in their application of constitutional and administrative principles to unions, they are certainly going in the same direction.

### THEORIES AND PATTERNS UNDER THE LMRDA

Under the LMRDA, property doctrine is irrelevant. The Act provides remedies against wrongful discipline without regard to the existence of property rights;<sup>190</sup> and it recognizes as worthy of protection such mem-

<sup>188</sup> See chap. 1 *supra*.

<sup>189</sup> See pp. 124 ff. *infra*.

<sup>190</sup> §§ 102, 609. See chap. 5 *infra*.



bership interests, ignored by courts at common law, as the right to attend meetings and to participate in deliberations.<sup>191</sup>

With respect to contract doctrine, the Act recognizes the principle that a union is bound by the provisions of its own constitution and bylaws, and does not interfere with enforcement of such provisions at common law.<sup>192</sup> Indeed, in the area of election and removal of officers, the Act provides an alternative administrative remedy for violation of union rules.<sup>193</sup> Nevertheless, the Act imposes obligations upon the union-member relationship in no way dependent upon contract, and makes it quite clear that such obligations are paramount; any union rule inconsistent therewith is invalid and without effect.<sup>194</sup>

The principles established by the Act, like those of the common law, are derived in part from trust and corporation rules. Thus, for example, the Act's provisions relating to fiduciary responsibility of union officers<sup>195</sup> are based upon the rules relating to responsibility of trustees and corporate directors. It is apparent, however, that the main theme of the Act relies upon the governmental analogy. The Bill of Rights contained in Title I, for example, draws directly from constitutional principles of free speech, assembly, equal protection, and due process; and the provisions of Title IV, relating to union elections, are based upon the assumption that a union should be governed by democratically selected representatives. These parallels will be discussed more fully in later chapters.

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<sup>191</sup> § 101(a)(1). See *Nelson v. Brotherhood of Painters*, 47 L.R.R.M. 2441 (D. Minn. 1961) (granting injunction against wrongful suspension from union meetings).

<sup>192</sup> § 603(a). See chap. 7 *infra*.

<sup>193</sup> § 402. See chap. 7 *infra*.

<sup>194</sup> *E.g.*, § 401(b). See chap. 5 *infra*.

<sup>195</sup> § 501. See chap. 6 *infra*.

## Chapter 5

# Union Discipline

This and succeeding chapters deal with the substantive law of judicial intervention in three important areas of internal union affairs: discipline, union financial affairs, and the problem of majority rule and minority rights. The area of union discipline, though logically ancillary to the subject matter of the later chapters, is considered first because it is the area in which courts first began to intervene and in which the greatest degree of intervention has taken place.

There are three grounds upon which a court may invalidate union disciplinary proceedings: first, the procedure followed was contrary to that prescribed by the union's rules, or by "natural justice"; second, the member's conduct was not a "punishable offense" under the union rules, or under the law; and third, the sanction imposed was improper. As a practical matter, these three grounds often fuse with one another, particularly in the United States. For example, a court disturbed about the grounds for which discipline was imposed may go "out of its way" to find a procedural defect.<sup>1</sup> We shall, however, discuss them separately so far as possible, and conclude with a consideration of the remedies available to a wrongfully disciplined member.<sup>2</sup>

### PROCEDURAL ASPECTS OF UNION DISCIPLINE

Legal limitations upon union disciplinary procedures are of two sorts: (1) those derived from the express provisions of the union's constitution and rules, and (2) those derived from what is called in Britain "natural justice" and in the United States "due process of law."

<sup>1</sup> See Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

<sup>2</sup> For discussion of union disciplinary practices and procedures in America, see Summers, *Disciplinary Procedures of Unions*, 4 IND. & LAB. REL. REV. 15 (1950), and *Disciplinary Powers of Unions*, *id.* at 483; in Britain, see ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 20 ff. (1955). Summers has written exhaustively on the legal aspects of union discipline; see, in addition to the articles cited above, *Union Democracy and Union Discipline*, N.Y.U. 5th ANN. CONF. ON LABOR 443 (1952); *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958). On British law, see Lloyd, *Disciplinary Powers of Professional Bodies*, 13 MODERN L. REV. 281 (1950), and *Judicial Review of Expulsion by Domestic Tribunals*, 15 *id.* 413 (1952); Whitmore, *Judicial Control of Union Discipline*, 20 CAN. B. REV. 1 (1952).

## UNION CONSTITUTION AND RULES

In accordance with the view that a union's rules constitute a contract among members or (on the entity theory) between each member and the union, both British and American courts insist that a union follow its own constitution and rules relating to disciplinary procedure. Thus American courts will ordinarily grant relief if a member has been disciplined by an officer or tribunal which, under the union's rules, has no disciplinary power with regard to the offense charged,<sup>3</sup> or which is improperly constituted under the union's rules,<sup>4</sup> or which does not follow the prescribed procedure for reaching its decision;<sup>5</sup> and they will likewise grant relief where a member has been disciplined without the type of charge,<sup>6</sup> notice,<sup>7</sup> or hearing<sup>8</sup> prescribed by the union's rules. British courts, though they have not been faced with as many cases of this type, have granted relief under similar circumstances.<sup>9</sup>

While British and American courts thus agree in principle as to the binding effect of procedural rules requirements, there does appear to be this difference in approach: American courts seem willing to tolerate minor departures from prescribed procedure, and to allow union tribunals some leeway in interpreting their own rules, so long as what the courts regard as basic notions of fair play are not violated. British

<sup>3</sup> *E.g.*, *Walsh v. Reardon*, 274 Mass. 530, 174 N.E. 912 (1931) (discipline by parent body rather than by local union); *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 Atl. 102, *aff'd per curiam*, 119 N.J. Eq. 377, 182 Atl. 874 (1935) (discipline by local union rather than by parent body); *Barnhart v. United Auto Workers*, 12 N.J. Super. 147, 79 A.2d 88 (1951); *Kunze v. Weber*, 197 App. Div. 319, 188 N.Y.S. 644 (1921) (expulsion by president rather than by executive committee).

<sup>4</sup> *E.g.*, *Harris v. National Union of Marine Cooks & Stewards*, 98 Cal. App. 2d 733, 221 P.2d 136 (1950) (trial committee not elected by membership as rules required); *Malloy v. Carroll*, 272 Mass. 524, 172 N.E. 790 (1930) (executive board improperly constituted because president improperly selected); *Jose v. Savage*, 123 Misc. 283, 205 N.Y.S. 6 (1924) (trial committee contained persons improperly elected).

<sup>5</sup> *E.g.*, *International Printing Pressmen & Assistants Union v. Smith*, 145 Tex. 399, 198 S.W.2d 729 (1946) (union membership failed to ratify recommendation of trial committee).

<sup>6</sup> *E.g.*, *Lo Bianco v. Cushing*, *supra* note 3 (no charge served); *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364, *aff'd without opinion*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1944) (charges not signed by charging party).

<sup>7</sup> *E.g.*, *Weiss v. Musical Mutual Protective Union*, 189 Pa. 446, 42 Atl. 118 (1899) (notice without copy of charge); *International Printing Pressmen & Assistants Union v. Smith*, *supra* note 5 (notice not given in sufficient time).

<sup>8</sup> *E.g.*, *Johnson v. United Brotherhood of Carpenters & Joiners*, 52 Nev. 400, 288 Pac. 170 (1930) (denial of hearing); *Gallagher v. Monaghan*, 58 N.Y.S.2d 618 (Sup. Ct. 1945) (improper delegation of hearing function).

<sup>9</sup> *Bonsor v. Musicians Union*, [1954] Ch. 479, *rev'd*, [1956] A.C. 104 (expulsion by branch secretary rather than by branch committee). See the following nonunion cases: *Andrews v. Mitchell*, [1905] A.C. 78 (friendly society: discipline improper since no written notice of charge as required by rules); *Fisher v. Keane*, (1879) 11 Ch. D. 353 (club: discipline improper where trial committee not specially convened); *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523 (similar).

courts, on the other hand, at least judging from the few cases so far decided in this area, seem more inclined to insist upon strict compliance with rules requirements, and to give little weight to the interpretative opinions of the association's own tribunals. Whether this divergence in attitude is attributable to the generally more legalistic outlook of British courts or to other factors,<sup>10</sup> it is, as we shall see, typical of the approach taken by the two countries throughout the area of intra-union affairs.

The American approach is exemplified by two qualifications which American courts have grafted upon the general principle that discipline is invalid if imposed by a procedure contrary to the union's rules. The first is that a member may waive his right to insist that union rules be followed by conduct that shows an intentional abandonment of such rights, or by conduct constituting estoppel. Intentional abandonment may be shown by express acquiescence, as where a member agrees to be tried by a tribunal which is not constituted in accordance with the union's constitution;<sup>11</sup> or it may be inferred from conduct, as where a member appears generally and participates in a hearing of which he did not receive proper notice.<sup>12</sup> Waiver on an estoppel principle may be found where a member fails to appear at a trial after proper notice,<sup>13</sup> or, in some circumstances, where he fails to make timely objections.<sup>14</sup> The waiver defense has been rejected, however, where the member's appearance at a union meeting was without knowledge that her expulsion was being considered;<sup>15</sup> and where the plaintiff was a man of limited intelligence who could not be expected to be aware of the technicalities of union rules.<sup>16</sup> Further, courts may be reluctant to find

<sup>10</sup> Another factor, undoubtedly, is that American courts seem less wedded to the contractual concept of intra-union relationships and more willing to establish requirements on the basis of public policy.

<sup>11</sup> *E.g.*, *Monroe v. Colored Screwmen's Benevolent Association*, 135 La. 893, 66 So. 260 (1914); *Gleeson v. Conrad*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949).

<sup>12</sup> *E.g.*, *Bush v. International Alliance of Theatrical Stage Employees*, 55 Cal. App. 2d 357, 130 P.2d 788 (1942). The member may, by such conduct, also waive the right to receive charges before the trial, *McConville v. Milk Wagon Drivers Union*, 106 Cal. App. 696, 289 Pac. 852 (1930); or the right to receive charges in writing, *Clark v. Morgan*, 271 Mass. 164, 171 N.E. 278 (1930).

<sup>13</sup> *Miller v. International Union of Operating Engineers*, 118 Cal. App. 2d 66, 257 P.2d 85 (1953); *Whitney v. King*, 210 App. Div. 312, 206 N.Y.S. 194 (1924); *Trainer v. International Alliance of Theatrical Stage Employees*, 353 Pa. 487, 46 A.2d 463 (1946).

<sup>14</sup> *Mogelever v. Newark Newspaper Guild*, 122 N.J. Eq. 316, 194 Atl. 6 (1937), *aff'd on other grounds*, 124 N.J. Eq. 60, 199 Atl. 56 (1938) (bias); *People ex rel. Schults v. Love*, 199 App. Div. 815, 192 N.Y.S. 354 (1922) (irregularities in composition of tribunal).

<sup>15</sup> *Brennan v. United Hatters*, 73 N.J.L. 729, 65 Atl. 165 (1906); *Savard v. Industrial Trades Union*, 76 R.I. 496, 72 A.2d 660 (1950).

<sup>16</sup> *Hopson v. National Union of Marine Cooks & Stewards*, 116 Cal. App. 2d 320, 253 P.2d 733 (1953).

waiver where the sanction is expulsion with consequent loss of job,<sup>17</sup> or where the basis for discipline is repugnant to the court's sense of justice.<sup>18</sup>

Closely related to the doctrine of waiver is the second qualification imposed by American courts: since union trials are conducted by laymen and not lawyers, technical compliance with procedural requirements is not always necessary; substantial compliance, so long as the deviation does not seriously prejudice the member, is usually sufficient. For example, courts have declined to overturn union disciplinary action where the charges against the member did not comply in all respects with rules requirements but the member in fact knew of the nature of the charges;<sup>19</sup> or where, at a meeting at which a member's expulsion was voted upon, some of the members present should have been disqualified from voting, but the total vote in favor of expulsion was so great that their disqualification would not have altered the result.<sup>20</sup> In this connection, courts have been somewhat more lenient with departures from notice requirements than with departures from requirements relating to the composition of disciplinary tribunals;<sup>21</sup> but in most cases the decision appears to turn more on the way the court reacts generally to the discipline involved than on any such distinction.

The more literal approach of the British courts is illustrated by the friendly society case of *Andrews v. Mitchell*,<sup>22</sup> in which the House of Lords held disciplinary proceedings invalid because, though the plaintiff member had actual notice of the charges against him, he did not receive written notice as the rules required. Similarly, in *Young v. Ladies' Imperial Club*<sup>23</sup> the Court of Appeal held expulsion of the

<sup>17</sup> *E.g.*, *Schmidt v. Rosenberg*, *supra* note 6.

<sup>18</sup> *E.g.*, *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y.S. 785 (1935); *Weiss v. Musical Mutual Protective Union*, *supra* note 7.

<sup>19</sup> *E.g.*, *Davis v. International Alliance of Theatrical Stage Employees*, 60 Cal. App. 2d 713, 141 P.2d 486 (1943).

<sup>20</sup> *Mogelever v. Newark Newspaper Guild*, *supra* note 14.

<sup>21</sup> See *Summers*, *supra* note 1.

<sup>22</sup> *Supra* note 9.

<sup>23</sup> *Supra* note 9. For other club cases to the same effect, see *Fisher v. Keane*, *supra* note 9 (discipline held invalid on ground, among others, that the committee which expelled plaintiff had not been "specially summoned" as the rules provided); *Labouchere v. Earl of Wharnccliffe*, (1879) 13 Ch. D. 346 (discipline held invalid on the ground, among others, that notice of a meeting posted before 3 a.m. on the morning of November 1 is not sufficient to give a "fortnight's notice" of a general meeting to be held on November 14, as the rules required); *Baird v. Wells*, (1890) L.R. 44 Ch. D. 661 (discipline held invalid on the ground, among others, that the expelling committee was improperly constituted; but relief denied for absence of property rights). Cf. *per* Evershed, M.R. in *Abbott v. Sullivan* [1952] 1 K.B. 189, 1 All E.R. 226 (plaintiff could not complain of lack of formal notice of charges when he was "in fact well aware of the nature of the charges").

plaintiff by the club's executive committee improper because one member of the committee (who, according to the club, was an inactive, titular member only) was not sent notice of the meeting as the rules required, and because the notice that was sent merely identified the nature of the controversy between the plaintiff and a fellow member who charged her with using insulting language, without expressly stating that expulsion was to be considered. In both cases the plaintiff member appeared and participated in the proceedings. It is very likely that an American court, under similar circumstances, would have held either that the member had waived the defect alleged, or that the defect was so inconsequential as not to invalidate the entire proceedings.

British courts have likewise been more strict than American courts in their interpretation of union procedural rules. American courts have expressed reluctance to interfere with the interpretation of a union tribunal,<sup>24</sup> unless that interpretation is unreasonable or contrary to public policy.<sup>25</sup> Although they will overturn a union's interpretation where the resulting procedure would be unfair,<sup>26</sup> and are inclined to do so where the sanction is severe,<sup>27</sup> or the member's conduct wins the court's sympathy,<sup>28</sup> they will usually uphold the union's interpretation when it is not outweighed by such policy factors.<sup>29</sup> British courts, on the other hand, seem to give little or no weight to domestic interpretation,<sup>30</sup> and at least one judge has expressed the opinion that, applying contract rationale, union rules will be construed strictly against the union.<sup>31</sup> Courts of the two countries are in agreement in one respect, however: where an ambiguity in union rules creates a choice between alternatives, one of which is contrary to judicial notions of fair procedure, a union interpretation adopting that alternative will be overturned. Discussion of this principle involves the notion of natural justice, or due process of law. It is to this notion that we now turn.

<sup>24</sup> *E.g.*, *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S.E. 580 (1919); *Callahan v. Order of Railway Conductors*, 169 Wis. 43, 171 N.W. 653 (1919).

<sup>25</sup> *E.g.*, *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947); *Savard v. Industrial Trades Union*, *supra* note 15.

<sup>26</sup> *E.g.*, *Hatch v. Grand Lodge*, 233 Ill. App. 495 (1924); *Blek v. Wilson*, 145 Misc. 373, 259 N.Y.S. 443 (Sup. Ct. 1932), *rev'd on other grounds*, 262 N.Y. 353, 186 N.E. 692 (1933).

<sup>27</sup> *E.g.*, *Steinert v. United Brotherhood of Carpenters & Joiners*, 9 Minn. 189, 97 N.W. 668 (1903); *Shadley v. Grand Lodge*, 212 Mo. App. 653, 254 S.W. 363 (1923).

<sup>28</sup> *E.g.*, *Johnson v. Brotherhood of Carpenters*, *supra* note 8; *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct. 1945).

<sup>29</sup> *E.g.*, *Bush v. IATSE*, *supra* note 12; *Clark v. Morgan*, *supra* note 12.

<sup>30</sup> *E.g.*, *Labouchere v. Earl of Wharnccliffe*, *supra* note 23, where Jessel, J. rejected the club's interpretation of a rule requiring "fortnight's notice"; *Bonsor v. Musicians Union*, *supra* note 9.

<sup>31</sup> *Per Denning, L.J.* in *Bonsor v. Musicians Union*, [1954] Ch. 479.

## FAIR PROCEDURE

The judicially imposed requirement that associations observe "natural justice" or "due process of law" in disciplining their members provides an interesting example of the interplay between the governmental and contractual approaches to regulation of intra-association affairs. It is now clearly established in the United States, and a reasonable probability in Great Britain, that, in the case of trade unions at least, the requirement of fair procedure is one imposed by law, irrespective of contractual agreement. This position was not reached, however, without considerable wavering and uncertainty on the part of courts in both countries.

One of the first English cases to consider the question was *Innes v. Wylie*,<sup>32</sup> in which Lord Denman, C.J. held a member's expulsion from the Caledonian Club invalid for lack of notice or hearing. The Chief Justice, in reaching this conclusion, mentioned neither the rules of the club nor the probable intention of the parties. Rather he derived the requirement of notice and hearing from the similarity of the disciplinary process to a judicial proceeding: "No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called upon to answer the charge, and is warned of the consequence of refusing to do so." On rehearing of the same case, however, the club apparently argued that the relationship of the parties should be determined solely by reference to the club's rules. To this argument the Chief Justice replied:

Any society may undoubtedly make any rules by which the admission and expulsion of its members are to be regulated; and the members must conform to, and cannot question them. But where there are no directions on the subject contained in the rules, a party expelled may lawfully complain that his expulsion has been effected contrary to the general principles of law.

This, then, was a partly governmental, partly contractual view of the fair-procedure requirement. The requirement was imposed by law, by analogy to judicial proceedings, in the sense that it was applicable in the absence of contrary contractual provisions; but at the same time it could be dispensed with by mutual agreement. In subsequent cases the requirement was extended to professional societies,<sup>33</sup> friendly societies,<sup>34</sup> and trade unions;<sup>35</sup> and it was broadened, at least by dicta, to include

<sup>32</sup> (1844) 1 Car. & K. 257.

<sup>33</sup> *Leeson v. General Council of Medical Education*, (1889) 43 Ch. D. 366 (dicta).

<sup>34</sup> *Blue v. Pollock*, (1866) 4 Macph. 1042; *Wood v. Woad*, (1874) L.R. 9 Ex. 190.

<sup>35</sup> *Luby v. Warwickshire Miners Association*, [1912] 2 Ch. 371 (dicta); *Burn v. National Amalgamated Labourers Union*, [1920] 2 Ch. 364 (dicta).

not only the right to notice and hearing, but also the right to an unbiased tribunal acting in "good faith."<sup>36</sup> With the exception of one decision by Jessel, M.R., "implying" the requirement of notice and hearing from a rule postulating an "inquiry,"<sup>37</sup> no attention was paid in these cases to the basis of the fair-procedure requirement until the decision of Maugham, J. in *Maclean v. Workers Union*.<sup>38</sup>

Maugham, J. took a purely contractual view of the requirement. Denying a member's claim that his expulsion was wrongful because of bias on the part of the disciplinary tribunal, he stated:

In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association known as a trade union, it seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules. . . . If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the courts would interfere on the grounds of public policy. . . . The phrase "the principles of Natural Justice" can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused shall be given his chance of defense and explanation.

There are, however, a number of decisions which make it doubtful whether Maugham, J.'s dictum is good law. Even before the *Maclean* case several members of the House of Lords indicated *in dicta* in *Weinberger v. Inglis*<sup>39</sup> that the committee of the Stock Exchange, having the power under Exchange rules to re-elect each year such members as they "think proper," owed applicants for readmission the duty of acting honestly and in good faith. It would have been awkward to base the committee's obligation on contract, unless each member were said to have a contractual right to re-election; and even if contract theory were used, no rule of the Exchange postulated an "inquiry," so that the requirement of good faith could not be "implied" on that ground. In any event, none of the Law Lords discussed contract doctrine. Insofar as they mentioned the basis of the obligation to decide honestly and in good faith, they invoked the "quasi-judicial" or "fiduciary" character of the committee's capacity. In short, they hinted at status, rather than contract, as the foundation of the natural-justice requirement.

<sup>36</sup> *E.g.*, *Hopkinson v. Marquis of Exeter*, (1867) L.R. 5 Eq. 63; *Tantussi v. Molli*, (1885) 2 T.L.R. 731.

<sup>37</sup> *Fisher v. Keane*, *supra* note 9.

<sup>38</sup> [1929] 1 Ch. 602.

<sup>39</sup> [1919] A.C. 606. See analysis in Lloyd, *Disciplinary Powers of Professional Bodies*, 13 MODERN L. REV. 281 (1950).



More recently, in *Russell v. Duke of Norfolk*,<sup>40</sup> a majority of the Court of Appeal held that the stewards of the Jockey Club must follow the principles of "natural justice" in withdrawing the license of a horse trainer for misconduct, thereby disqualifying him from practicing his trade. The club argued that the rules not only failed to require any particular procedure for disqualification, but neither expressly required nor implied that an "inquiry" be held, so that, following the opinion of Maughan, J. in *Maclean*, there was no contractual basis for importing the requirements of natural justice. Tucker, L.J. adopted this view, but the other two Lord Justices did not. Asquith, L.J. felt that, "reading the rules as a whole," an inquiry was contemplated in the case of withdrawal of licenses for misconduct. Denning, L.J. went further and expressed the opinion that the rules could not validly dispense with a hearing in such a case—that the requirement of natural justice was imposed independently of the rules.<sup>41</sup> All three Lord Justices agreed, however, that the plaintiff had been granted a fair hearing.

In more recent cases Denning, L.J. has reiterated his position that natural justice is required independently of and regardless of any provisions in a union's rule book. Thus, in *Bonsor v. Musicians Union*,<sup>42</sup> he stated:

The Union was a "closed shop." In order that a person should be allowed to work at his trade he had no option but to sign a document agreeing to the rules. . . . In these circumstances the rules are to be construed not only against the makers of them, but furthermore, any rule found to be contrary to natural justice, or what comes to the same thing, to what is fair and reasonable, will be held to be invalid.

While this statement was dictum only, and there have been no recent cases which put it to the test,<sup>43</sup> it is possible that Denning's view represents the weight of judicial opinion in Britain today.

The attitude of American judges toward the fair-procedure requirement is substantially in accord with that of Denning, L.J. American courts, aided by the governmental analogy and a written constitution, quite clearly regard the requirement as something independent of a union's rules, and insist upon due process of law (a term derived from

<sup>40</sup> [1949] 1 All E.R. 109. See Lloyd, *supra* note 39.

<sup>41</sup> The Lord Justice based his opinion primarily on the job control which the committee exercised. Asquith, L.J. expressed no opinion on this point. The view of Tucker, L.J. was impliedly *contra*.

<sup>42</sup> *Supra* note 31. See, to the same effect, in *Lee v. Showmen's Guild*, [1952] 2 Q.B. 329, 1 All E.R. 1175; *Abbott v. Sullivan*, *supra* note 23.

<sup>43</sup> *Cf. Byrne v. Kinematograph Renters Society*, [1958] 2 All E.R. 579 (dicta that in absence of contractual relationship plaintiff not entitled to relief for violation of natural justice), discussed by Lloyd in 21 MODERN L. REV. 661 (1958).

the Constitution) not only where a union's rules are silent on the subject,<sup>44</sup> but also where the rules purport to dispense with the requirement.<sup>45</sup> As early as 1920, a New York court stated:

Not only does the entire scheme of these articles indicate, but both good conscience and the law demand, that no member shall be deprived of his rights and privileges until he has had notice of the charges against him and been given opportunity to meet them. Labor organizations have become an integral part of our business life, and wield a powerful influence upon the everyday affairs of multitudes of our people. In return for the benefits which, when rightly managed, they insure, their members surrender to them all individual trade freedom, and must rely upon their honest, fair, and efficient management for opportunity to support themselves and their families. These members constitute a goodly percentage of our citizenship, and the state is vitally interested in their welfare.

The requirements of good government will not permit them to be arbitrarily, or without fair opportunity to defend themselves, deprived by their leaders of their opportunity to work and earn. Therefore, in the absence of precise stipulation for notice of and hearing of complaints against them, public policy demands that the law intervene to supply such omission. . . . So necessary is this rule to our public needs that a provision in the constitution of such an organization like the last paragraph of section 4 in article 17, which provides for removal or suspension without notice, of a local or individual member, must be held void as against public policy and utterly unenforceable.<sup>46</sup>

While the theoretical basis of the natural-justice requirement is of great interest, it must be recognized that a union's rules seldom conflict with judicial notions of fair disciplinary procedure, and that therefore the contents of the requirement, rather than its basis, are of primary practical importance. We shall now discuss those contents under the headings of (a) right to a hearing, (b) right to notice, (c) time and place of hearing, (d) conduct of hearing, (e) good faith and bias, and (f) protection against double jeopardy.

*Right to a hearing.* Courts in both Britain and America will generally hold union disciplinary proceedings invalid unless the accused member has been afforded an opportunity for a fair hearing.<sup>47</sup> Some American courts have created an exception to this rule where a union's bylaws

<sup>44</sup> *Cason v. Glass Bottle Blowers Association*, 37 Cal. 2d 134, 231 P.2d 6 (1951); *Mogelever v. Newark Newspaper Guild*, *supra* note 14; *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y.S. 336 (1931). *Contra*, *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W.2d 349 (1947) (hearing not required in absence of rule requirement).

<sup>45</sup> *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y.S. 1 (Sup. Ct. 1919); *Bricklayers Union v. Bowen*, 183 N.Y.S. 885, *aff'd without opinion*, 198 App. Div. 967, 189 N.Y.S. 938 (1920); *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941). *Cf.* *People ex rel. Schults v. Love*, *supra* note 14 (dicta that union may provide for expulsion of member without formal trial).

<sup>46</sup> *Bricklayers Union v. Bowen*, *supra* note 45.

<sup>47</sup> *E.g.*, *Burn v. National Amalgamated Labourers Union*, *supra* note 35; *Cason v. Glass Bottle Blowers Association*, *supra* note 44.

provide for automatic suspension of a member who has failed to pay dues or assessments. They have held in such cases that rules may dispense with a hearing where there can be no reasonable doubt as to the facts, and where the sanction is clearly specified by the union's rules.<sup>48</sup> Where, however, the facts are in dispute, or where mitigating circumstances might reasonably be expected to affect the degree of "punishment" imposed, a hearing must be held.<sup>49</sup> British courts have not thus far had an opportunity to pass upon the automatic suspension question, but it seems likely their position would be the same.

*Right to notice.* In cases where a hearing is required to be held, it is essential that the accused member be given timely notice both of the nature of the charges against him<sup>50</sup> and of the time and place of hearing.<sup>51</sup> In addition to the controlling union rules on the subject, the standard by which the form and manner of giving notice is judged is whether the accused is given ample opportunity to prepare his defense. Thus, American courts have held a notice of charges to be insufficient where the member is merely informed that charges have been brought;<sup>52</sup> or that he has violated specified provisions of his union's constitution, without specifying the acts alleged to be in violation;<sup>53</sup> or that he has used "defamatory language" without specifying the language used.<sup>54</sup> Similarly, British courts have held defective a notice which simply asked a club member to come to a meeting and attend to important business, without informing him that his expulsion was being considered;<sup>55</sup> or which informed a member of a professional society that charges had been made against him, without giving him particulars of the charges;<sup>56</sup> or which informed the accused that he was an "offending member."<sup>57</sup> Courts of both countries appear in agreement that a member may not be found guilty of conduct differing from that with which he was charged, if the variance was such as to prejudice him in his defense.<sup>58</sup>

<sup>48</sup> *E.g.*, *De Mille v. American Federation of Radio Artists*, *supra* note 25; *Champion v. Hannahan*, 138 Ill. App. 387 (1908); *United Auto Workers, Local 756 v. Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958).

<sup>49</sup> *Cason v. Glass Bottle Blowers Association*, *supra* note 44 (*dicta*).

<sup>50</sup> *E.g.*, *Fisher v. Keane*, *supra* note 9; *Cason v. Glass Bottle Blowers Association*, *supra* note 44.

<sup>51</sup> *E.g.*, *Fales v. Musicians Protective Union*, 40 R.I. 34, 99 Atl. 823 (1917).

<sup>52</sup> *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y.S. 956 (1904).

<sup>53</sup> *Walsh v. International Alliance of Theatrical Stage Employees*, 22 N.J. Misc. 161, 37 A.2d 667, *aff'd on other grounds*, 136 N.J. Eq. 115, 40 A.2d 623 (1944).

<sup>54</sup> *Johnson v. Brotherhood of Carpenters*, *supra* note 8.

<sup>55</sup> *Gray v. Allison*, (1909) 25 T.L.R. 531. *Cf.* *Weinberger v. Inglis*, [1919] A.C. 606; *Abbott v. Sullivan*, *supra* note 23.

<sup>56</sup> *Donaldson v. Institute of Botano-Therapy*, (1937) 184 L.T. 384.

<sup>57</sup> *Andrews v. Salmon*, (1888) 4 T.L.R. 490 (social club).

<sup>58</sup> *Andrews v. Mitchell*, *supra* note 9 (friendly society); *D'Arcy v. Adamson*, (1913) 29 T.L.R. 367 (club); *Burke v. Monumental Division*, No. 52, *Brotherhood of Loco-*

*Time and place of hearing.* American courts have ruled that the hearing must be held at a time and place which will give the accused a reasonable opportunity of attending. A hearing at a place distant from the accused's place of residence,<sup>59</sup> or held at a time when the accused was required to be in court,<sup>60</sup> has been held to violate principles of due process. British courts have not passed on the question, but it is likely they would take the same position.

*Conduct of hearing.* In the United States, a union disciplinary hearing must afford most of the procedural safeguards provided in a civil trial. Although the member probably need not be permitted representation by counsel,<sup>61</sup> unless required by union rule,<sup>62</sup> he must be granted the right to be confronted by the evidence against him,<sup>63</sup> to cross-examine adverse witnesses,<sup>64</sup> and to present evidence on his own behalf, including the testimony of witnesses.<sup>65</sup> Though legal rules as to admissibility of evidence need not be strictly followed,<sup>66</sup> their gross violation may amount to denial of due process.<sup>67</sup>

It is not clear to what extent these rules are applicable in Britain.

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motive Engineers, 273 Fed. 707 (D. Md. 1919). *Cf.* Bachman v. Harrington, 52 Misc. 26, 102 N.Y.S. 406 (1906) (variance held not prejudicial error, where member not surprised and evidence the same on both charges).

<sup>59</sup> *E.g.*, Gallagher v. Monaghan, 58 N.Y.S.2d 618 (Sup. Ct. 1945). *Cf.* Miller v. Operating Engineers, *supra* note 13 (*contra* where union offered to pay expenses).

<sup>60</sup> Fales v. Musicians Protective Union, *supra* note 51 (failure to grant continuance held fatal error). *Cf.* Schmidt v. Rosenberg, 49 N.Y.S.2d 364 (1944) (failure to grant continuance when member was ill). *But cf.* Walsh v. IATSE, *supra* note 53 (refusal to continue hearing until similar issues pending before grand jury were resolved held not to violate due process).

<sup>61</sup> Smith v. Local 467, General Truck Drivers, 181 F. Supp. 14 (S.D. Cal. 1960); Local 2 v. Reinlib, 133 N.J. Eq. 572, 33 A.2d 710 (1943).

<sup>62</sup> Savard v. Industrial Trades Union, *supra* note 15.

<sup>63</sup> *E.g.*, Cason v. Glass Bottle Blowers Association, *supra* note 44 (accused not permitted to hear testimony of only witness against him); Brooks v. Engar, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed without opinion*, 284 N.Y. 767, 31 N.E.2d 514 (1940) (similar). The accused has the right, not only to confront witnesses, but also to examine documentary evidence considered against him. Cason v. Glass Bottle Blowers Association, *supra*. *Contra*, where evidence not prejudicial, Becker v. Calnan, 313 Mass. 625, 48 N.E.2d 668 (1943). The right to confront evidence may be waived by failure to appear. Fales v. Musicians Protective Union, *supra* note 51.

<sup>64</sup> Cason v. Glass Bottle Blowers Association, *supra* note 44; Brooks v. Engar, *supra* note 63; Harmon v. Matthews, *supra* note 45; Ames v. Dubinsky, 70 N.Y.S.2d 706 (Sup. Ct. 1947); Sloan v. Braun, 191 N.Y.S.2d 213 (Sup. Ct. 1959).

<sup>65</sup> *E.g.*, Lo Bianco v. Cushing, 117 N.J. Eq. 593, 177 Atl. 102, *aff'd per curiam*, 119 N.J. Eq. 377, 182 Atl. 874 (1935); Rueb v. Rehder, 24 N.M. 534, 174 Pac. 992 (1918); Koukly v. Weber, 154 Misc. 659, 277 N.Y.S. 39 (1935); Savard v. Industrial Trades Union, *supra* note 15.

<sup>66</sup> *E.g.*, Bush v. IATSE, 55 Cal. App. 2d 357, 130 P.2d 788 (1942) (upholding union rule authorizing use of affidavits).

<sup>67</sup> Walsh v. IATSE, *supra* note 53 (court disregarded *ex parte* affidavit in concluding that conviction was supported by substantial evidence); Harmon v. Matthews, *supra* note 45 (conviction overturned where based only on affidavit of accuser). See pp. 118 ff. *infra*.

The decisions state that an accused member must be granted an adequate opportunity of defending himself,<sup>68</sup> and this probably includes the opportunity to be present at an oral hearing and produce evidence.<sup>69</sup> The only explicit statements as to the nature of the hearing, however, appear in *Maclean v. Workers Union*,<sup>70</sup> in which Maugham, J. said:

Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to courts of justice and those applicable to domestic tribunals. In the former, the accused is entitled to be tried by the judge according to the evidence legally adduced and has a right to be represented by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of the witnesses and the summing-up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges. Before such a tribunal counsel have no right of audience and there are no effective means of testing by cross-examination the truth of the statements that may be made. . . .

In other cases, British courts have stated that the contents of the natural-justice requirement vary with the circumstances of each case,<sup>71</sup> and that a plaintiff cannot complain of a violation of natural justice if he was not prejudiced thereby.<sup>72</sup> An American court might agree with both those statements, but it is not likely that it would agree with the decision of Harman, J. in *Byrne v. Kinematograph Renters Society*<sup>73</sup> to the effect that the principles of natural justice were not violated when an accused was denied the opportunity to see a report used in evidence against him and was prevented from having his wife testify in his behalf. It appears that American courts may insist upon higher standards in domestic disciplinary hearings than do the British.

*Good faith and bias.* In some ways the most important aspect of the natural-justice requirement, because of its potentiality for bringing about far-reaching changes in union disciplinary procedures, is the principle that an accused is entitled to be tried by an unbiased tribunal acting in good faith and without malice. The political framework of

<sup>68</sup> *E.g.*, *Fisher v. Keane*, (1879) 11 Ch. D. 353; *Burn v. National Amalgamated Labourers Union*, *supra* note 35.

<sup>69</sup> *Per* Lord Simon, L.C. in *General Medical Council v. Spackman*, [1943] 2 All E.R. 337.

<sup>70</sup> [1929] 1 Ch. 602.

<sup>71</sup> *Russell v. Duke of Norfolk*, *supra* note 40.

<sup>72</sup> *Davis v. Carew-Pole*, [1956] 1 W.L.R. 833.

<sup>73</sup> [1958] 2 All E.R. 579.

most unions makes it unreasonable to expect the objectivity one expects of administrative and judicial tribunals.<sup>74</sup> Unless courts are willing to invalidate a union's disciplinary procedure, they must, in many cases, confine themselves to a narrow application of the rules of bias and good faith. This has been the position of both British and American courts; but the tendency, at least in America, is to apply higher standards even if that means invalidating discipline which is proper under the union's rules.

In England, the rule against bad faith, malice, and bias exists principally in dicta. The early club cases, which dealt with rules authorizing discipline for conduct detrimental to the club's interests in the opinion of some club committee, contain statements to the effect that the courts would intervene if the committee's action was not "bona fide,"<sup>75</sup> or was arrived at from "fraud, personal hostility, or bias,"<sup>76</sup> or "capriciously,"<sup>77</sup> or not in "good faith,"<sup>78</sup> or out of "malice."<sup>79</sup> But in only one case<sup>80</sup> did a member actually obtain relief on that ground, and in that case the question of good faith was put to a jury.

British courts had occasion to deal more extensively, though negatively, with the claim of bias in two cases brought by disciplined physicians against the General Council of Medical Education and Registration, a semiprivate body empowered by statute to enforce certain rules of conduct against members of the medical profession. In both cases, the aggrieved physicians complained that certain members of the General Council had close connection with the Medical Defence Union—a separate organization which brought the accusations against them—and for that reason were presumptively biased. In the *Leeson* case<sup>81</sup> the connection was that certain members of the Council were also members of the Defence Union; but a majority of the court, while recognizing the principle that "no man can be an accuser or complainant and also sit in judgment of the accused," ruled that membership in the accusing organization, without membership on its governing body, did not render the Council members "accusers." In the *Allinson* case<sup>82</sup> one of the members of the Council was actually an officer of the Defence Union, and a member ex officio of its governing

<sup>74</sup> See Summers, *Disciplinary Procedures of Unions*, 4 IND. & LAB. REL. REV. 15 (1950).

<sup>75</sup> *Tantussi v. Molli*, *supra* note 36; *Hopkinson v. Marquis of Exeter*, *supra* note 36.

<sup>76</sup> *Richardson-Gardner v. Fremantle*, (1871) 24 L.T. (n.s.) 81.

<sup>77</sup> *Lyttleton v. Blackburne*, (1875) 45 L.J. Ch. 219.

<sup>78</sup> *Dawkins v. Antrobus*, (1881) 17 Ch. D. 615.

<sup>79</sup> *Lambert v. Addison*, (1882) 46 L.T. (n.s.) 20.

<sup>80</sup> *Tantussi v. Molli*, *supra* note 36. See also *Baird v. Wells*, (1890) L.R. 44 Ch. D. 661 (denying relief because no "property rights" at stake).

<sup>81</sup> *Leeson v. General Council of Medical Education*, *supra* note 33.

<sup>82</sup> *Allinson v. General Council of Medical Education*, [1894] 1 Q.B. 751.

body, at the time the charges were brought. However, he had never attended any meetings of the Defence Union's governing body; nor did he know, while he was an officer, that charges had been filed against Allinson; and he resigned from the Union before the General Council heard the charges. Lord Esher restated the *Leeson* holding to the effect that a judge would be disqualified if he had "any pecuniary interest, no matter how small," or if "in substance and in fact" he was also an accuser and could "reasonably be suspected of being biased"; but he held, with both other judges concurring, that no reasonable basis for suspicion existed on the facts before the court.

It is quite evident from the decisions in both the club cases and the professional society cases that the courts were influenced by the reputation and social standing of the gentlemen accused of bias.<sup>83</sup> One might have predicted that judges would more easily find bias on the part of members of a trade-union tribunal, but in *Maclean v. Workers Union*<sup>84</sup> it was held that members of a union executive board were not disqualified, by reason of "natural justice," from passing judgment on a member accused of failing to abide by their order censoring certain portions of his election address for union office, even though the censored portions were critical of the board and even though the board had previously been forced to rescind invalid disciplinary proceedings against the same member when he threatened suit. While conceding that the members of the board "might fairly be suspected of bias in a popular sense" and were "in effect taking upon themselves the duties of acting as prosecutors in relation to the charge of having committed the breach in question," the court held that such a situation must have been contemplated by the union's rules and was therefore permissible.

The *Maclean* decision, however, does not rule out the claim of bias in union disciplinary tribunals. It merely recognizes the fact that strong feelings are inevitable within union organization, and accepts the alternative of applying a rather narrow concept of bias rather than disqualifying the entire board established by the union's rules as a disciplinary tribunal. Thus, Maugham, J. remarked that "in many cases the tribunal is necessarily entrusted with the duty of appearing

<sup>83</sup> *Per* Jessel, M.R. in *Dawkins v. Antrobus*, *supra* note 78: "... one might expect at the hands of English gentlemen, who are always lovers of fair play, that which would certainly entitle him to and secure for him the support of all those who were impartial if they had thought it really was a case in which he was the aggrieved party and not the aggressor." *Per* North, J. in the *Leeson* case, speaking of the persons accused of bias as men "whose names are sufficient to guarantee for their perfect good faith and honor in the matter."

<sup>84</sup> *Supra* note 38.

to act as prosecutors as well as that of judges; for there is no one else to prosecute." Put differently, if the executive board were disqualified from judging Maclean there was, under the union's rules, no other body which could judge him. Maugham, J. expressed disagreement with the dicta in *Leeson* and *Allinson* to the effect that pecuniary interest alone would be a ground for disqualification, since, he reasoned, all members of an unincorporated association have a pecuniary interest in association property. He indicated that, in his view, a judge would be disqualified only if he went out of his way to put himself in a special position as prosecutor, or if he had a "lis" with one of the parties.

The most recent British decision relating to bias in intra-union tribunals confirms this restricted view of the grounds for disqualification. *White v. Kuzych*<sup>88</sup> involved a member of a Canadian union who had made himself unpopular with his fellow members by publicly declaring his opposition to unions in general and to the closed shop in particular. Charges were filed against him, based upon that and other conduct; he was "tried" by a committee which found him guilty and recommended his expulsion; and he was expelled by the overwhelming vote of the union membership. On the basis of the widespread feeling against the member, the trial court declared the expulsion invalid on grounds of prejudice and bias, and the Court of Appeals for British Columbia affirmed by a three-to-two decision. The Privy Council, however, reversing the decision on the ground that the plaintiff had failed to exhaust internal remedies, remarked as to the question of bias:

If the so-called "trial" and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants—that "icy impartiality of Rhadamanthus" which Bowen, L.J. in *Jackson v. Barry Railway Co.* thought could not be expected of the engineer-arbitrator—or to regard as disqualified from acting any member who had held and expressed the view that the "closed shop" principle was essential to the policy and purpose of the union. What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.

In a number of cases American courts have relied upon bias or bad

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<sup>88</sup> [1951] 2 All E.R. 435.



faith as a ground for overturning union disciplinary action under circumstances in which a British court, judging by the dicta in the cases discussed above, might well have reached the same conclusion. For example, Maugham, J. would probably have agreed with a New York court that a union disciplinary tribunal should not include the chief witness against the accused,<sup>86</sup> or the brother of the complainant and chief witness against the accused.<sup>87</sup> Similarly, the members of the Privy Council who decided *White v. Kuzych* would presumably have concurred in the decision of a federal district court that disciplinary action should be overturned where the tribunal is found to have entered upon the inquiry "in a spirit of reprisal rather than one of judicial fairness."<sup>88</sup> These incidents meet even the narrow tests for disqualification established by the British courts.

Conversely, some American courts, in refusing to invalidate union disciplinary proceedings for alleged bias, have based their decisions on reasons with which their British colleagues would probably agree. For example, it has been held no violation of due process for members of and complainants before an executive committee, which recommended disciplinary action against the plaintiff, to vote in favor of the committee's recommendation at a union membership meeting.<sup>89</sup> ("This was not improper. A judge who sits at nisi prius may sit en banc in review of his own rulings.") And where bias does exist, the court will not invalidate the proceedings unless the bias was prejudicial to the accused member.<sup>90</sup> Most significantly, some American courts, in accordance with the policy hinted at in the *Maclean* case and *White v. Kuzych*, have declined to apply rules of disqualification for bias where their application would result in the disqualification of all judges with authority to act under the union's rules.<sup>91</sup> For example, in *Hall v. Morrin* the plaintiff, accused of slandering the members of the union's

<sup>86</sup> *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct. 1945) (one of the bases for decision).

<sup>87</sup> *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y.S. 28 (1935) (one of the bases for decision).

<sup>88</sup> *Local 7, Bricklayers Union v. Bowen*, 278 Fed. 271 (S.D. Tex. 1922) (where one of the judges wrote a letter to the accused stating that it was the intention of the executive board "to deal out the letter of the law to these men, who are introducing disruptive things within our institution, and that there will be no let-up on our part until this has been fully accomplished, in so far as their membership and their association with us is concerned").

<sup>89</sup> *Mogelever v. Newark Newspaper Guild*, 122 N.J. Eq. 316, 194 Atl. 6 (1937), *aff'd on other grounds*, 124 N.J. Eq. 60, 199 Atl. 56 (1938).

<sup>90</sup> *Ibid.* (even if persons who complained against plaintiff before executive board should have been disqualified from voting at membership meeting, the error was not prejudicial, since their vote would not have affected the outcome); *Ames v. Dubinsky*, *supra* note 64.

<sup>91</sup> *Hall v. Morrin*, 293 S.W.2d 435 (Mo. App. 1927); *Mogelever v. Newark Newspaper Guild*, *supra* note 89.

executive board, was tried and found guilty by that board itself. Rejecting the plaintiff's contention that the disciplinary action was invalid for bias, a Missouri court stated:

If the general executive board was incompetent to try plaintiff, then it is manifest that he could not have been tried at all, and he might, as suggested by defendants, have committed any offense with impunity, no matter how derogatory to the interests of the association, so long as he was careful at the same time to include therein some slander against the members of the general executive board. . . . We conclude, therefore, that inasmuch as the manner of plaintiff's trial was governed by the contract existing between him and the International Association, and inasmuch as the hearing appears to have been conducted in substantial conformity with the laws and rules of practice provided in the constitution by which he had agreed to be bound, his objections to the validity of his trial and conviction are not well taken.

What is most significant in this context, however, is not the area of agreement between British and American courts, but the area of disagreement—specifically, the tendency on the part of some American courts to apply more rigid standards of objectivity to union tribunals, even though their application may result in the disqualification of all judges competent to act under the union's rules. For example, in *Cohen v. Rosenberg*<sup>92</sup> a member of the Musicians Union was disciplined for alleging that a union election had been conducted in a fraudulent and dishonest fashion. His trial board was composed entirely of persons who held office as a result of the election alleged to be fraudulent. The Appellate Division of the New York Supreme Court held the expulsion invalid, on the ground that the members of the trial board were "disqualified by a direct interest in the subject matter of the controversy," though there was no other body qualified under the union's rules to try the plaintiff.

More recently, in *Madden v. Atkins*<sup>93</sup> the plaintiffs had been accused and found guilty by a union trial committee of participating in the formation of a rival union and of carrying on certain allegedly improper activities in its behalf, including the defamation of local officers. Pursuant to the union's rules, the plaintiffs appealed to the union's executive board, which affirmed the disciplinary action. Before the court, the plaintiffs contended that the trial committee was improperly selected, in that it contained one witness against the plaintiffs and three paid employees of the union, all appointed by the executive board;

<sup>92</sup> 262 App. Div. 274, 27 N.Y.S.2d 834, *aff'd without opinion*, 287 N.Y. 800, 40 N.E.2d 1018 (1941). To the same effect, see *Maltz v. Rosenberg*, 265 App. Div. 927, 21 N.Y.S.2d 940 (1942).

<sup>93</sup> 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), *aff'd with modifications on other grounds*, 4 N.Y.2d 283, 151 N.E.2d 73 (1958).

and that the executive board should be disqualified for bias because its members were the subject of the alleged defamation. The Appellate Division held the plaintiffs' discipline improper on both these grounds, among others, stating:

The common requirement that all parties are entitled to a trial by impartial judges must be enforced with particular zeal in a case such as this where the court's power to review is so circumscribed that it may be compared to its function in reviewing an award in arbitration proceedings.

The court, going beyond prior precedent, held that the plaintiffs "were entitled to have, not only their trials, but also their appeals, held and determined by impartial judges." In holding the executive board disqualified from acting as an appellate tribunal, the court concluded:

The fact that there were no members of the board who could qualify as disinterested judges is irrelevant. If there was a problem as to how to provide an impartial appellate tribunal for these cases the burden of its solution was [the union's].

The question of bias is in many ways at the core of the problem of legal intervention in union disciplinary proceedings. The issue of the scope of judicial review of the factual and interpretative decisions of union tribunals, for example, is, or should be, dependent to some extent upon the degree to which such tribunals can be counted upon to exercise relative independence and objectivity of judgment. It may be that the effect of such decisions as *Madden v. Atkins* will be to encourage unions to establish tribunals composed of truly disinterested parties.

Two American unions—the United Auto Workers and the Upholsterers—have already taken such a step.<sup>94</sup> The Upholsterers Appeal Board was established by constitutional amendment in 1953.<sup>95</sup> It consists of an unspecified number (presently nine) of disinterested "persons of good repute" selected by the convention periodically. The members of the board act in three-man panels. It has the power "to hear and determine" disciplinary matters on appeal from the General Executive Board, but its decision must be "based solely on the facts and the provisions of these General Laws."<sup>96</sup> In its only decision to date, however, the Appeal Board, while upholding the union's position, stated that its task was also "to see . . . that the trial was conducted and the decision was rendered without unfairness to the accused."<sup>97</sup> It remains to be seen

<sup>94</sup> For extensive analysis of the two boards, see Comment, 11 STAN. L. REV. 497 (1959).

<sup>95</sup> UPHOLSTERERS INTERNATIONAL UNION, GEN. LAWS, art. XXVI, § 6(b).

<sup>96</sup> § 6(b)(iii).

<sup>97</sup> Appeal of Raucher, UIU App. Bd. Case No. 1 (Jan. 16, 1957).

whether the board will assert jurisdiction to overturn "unfair" proceedings which conform to the union's constitution.

The UAW Public Review Board, though established more recently, in 1957, has received a good deal more publicity and has handled many more cases. The board consists of seven persons, selected by the international president, subject to the approval of the executive board and convention. Like the Upholsterers Appeal Board, it operates through three-man panels; but unlike the former, the UAW board is authorized to hear, not only disciplinary cases, but all cases decided by the International Executive Board<sup>98</sup> and all charges against officers for violation of the AFL-CIO Codes of Ethical Practices.<sup>99</sup> Though its jurisdiction is not limited to enforcement of the union's constitution and bylaws, the board has not gone beyond those rules in the cases so far decided.

The UAW board has so far decided twenty-four appeals. The first eleven of these were nonadversary proceedings in which the board confirmed the "clearance" of certain union officers who had invoked constitutional privileges in refusing to answer questions asked by a Senate investigating committee.<sup>100</sup> But in other cases the board has (1) ordered the payment of back wages to a member who lost work as a result of charges made against her, on the ground that she did not receive a proper trial;<sup>101</sup> (2) upheld (by a four-to-one decision) the executive board's removal from office and suspension of local officers, as against the latter's contention that it was improper for the executive board members to vote by proxy in such a proceeding;<sup>102</sup> (3) reversed the decision of an appeal committee of the executive board which set aside local elections for irregularities, on the ground that the committee consisted of only two members, rather than the three required by the constitution;<sup>103</sup> (4) held, contrary to the position of the union's president

<sup>98</sup> UNITED AUTO WORKERS, CONST., art. 32, pp. 8, 11.

<sup>99</sup> Art. 31, pp. 3, 4. The Ethical Practices Codes were adopted by the AFL-CIO in 1957 "to protect the labor movement from any and all corrupt influences." The codes cover (1) local union charters, (2) health and welfare funds, (3) racketeers, crooks, communists, and fascists, (4) investments and business interests of union officials, (5) financial practices and proprietary activities of unions, and (6) union democratic processes.

<sup>100</sup> In the Matter of Simmons, Pub. Rev. Bd. Cases Nos. 1-5; In the Matter of Burns, Pub. Rev. Bd. Cases Nos. 6-10; In the Matter of Trachtenberg, Pub. Rev. Bd. Case No. 11. These cases were decided under the Ethical Practices Codes.

<sup>101</sup> Appeal of Local 469, Pub. Rev. Bd. Case No. 13 (May 23, 1958) (no trial, no notice, no opportunity to confront accusers, as required by constitution).

<sup>102</sup> Appeal of Turner, Pub. Rev. Bd. Case No. 12 (July 23, 1958). Imposition of trusteeship required vote of two thirds of the executive board. A majority of the Review Board, member McCree dissenting, held that absentees could vote by proxy and that summary suspension of local officers without a hearing was warranted under the constitution. The majority expressed hesitation on both points, but regarded themselves as bound by the constitution.

<sup>103</sup> Appeal of Smith, Pub. Rev. Bd. Case No. 20 (Sept. 30, 1958); Appeal of Smith, Pub. Rev. Bd. Case No. 17 (Sept. 30, 1958).

and executive board, that a member who resigned as president of a local upon being appointed as State Labor Commissioner could not return to office when his appointment failed of legislative confirmation;<sup>104</sup> (5) reversed the executive board's suspension of a member for suing a local officer without first exhausting internal remedies;<sup>105</sup> and (6) affirmed the executive board's dismissal of charges of election irregularities, on the ground that the irregularities proven were too insubstantial to warrant setting aside the election.<sup>106</sup>

The writer believes that the voluntary establishment of independent tribunals such as these provides by far the best answer, not only to the problem of intra-union bias, but to many other problems relating to intra-union affairs as well.<sup>107</sup> While courts appear more and more willing to interfere with the determinations of union tribunals composed of interested parties, it is believed that they would be reluctant, and properly so, to overturn the decisions of a tribunal such as the UAW Public Review Board.<sup>108</sup> Thus union members could be assured of a reasonably fair consideration of their cases, and unions themselves could avoid intervention by judges who may be ignorant of and unsympathetic with the basic purposes and policies of trade unionism. It is doubtful, however, that other unions will follow the example of the Upholsterers and the UAW in the absence of judicial or congressional encouragement.

*Protection against double jeopardy.* An interesting application of the governmental analogy appears in the position of some American courts that, just as a person accused of crime cannot be tried twice for the same offense,<sup>109</sup> so a union member should not be subject to successive trials for violation of union rules. In *Lafferty v. Fremd*<sup>110</sup> the plaintiff was tried by a union judicial board on charges of advocating rival unionism and was found not guilty. The board, apparently under pressure from the union president, then decided that in interpreting

<sup>104</sup> See Comment, 11 STAN. L. REV. 497 (1959).

<sup>105</sup> Appeal of Szymczak, Pub. Rev. Bd. Case No. 14 (Apr. 30, 1958). The Review Board held that a union constitutional provision prohibiting appeal to courts without exhaustion of internal remedies applied only to intra-union proceedings from which judicial review could be sought.

<sup>106</sup> Appeal of Cunningham, Pub. Rev. Bd. Case No. 23 (Mar. 11, 1959) (claim that ballot stations had been left unattended and ballot boxes stuffed; but claimants had lost by large majorities).

<sup>107</sup> See AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN LABOR UNIONS: A STATEMENT OF POLICY (1952).

<sup>108</sup> Apparently a Public Review Board decision would not preclude appeal to the courts, however. *Knox v. Local 900, United Auto Workers*, 36 CCH LAB. CAS. ¶ 65,725 (Mich. Cir. Ct. 1959).

<sup>109</sup> U.S. CONST., amend. V ("... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

<sup>110</sup> 36 L.R.R.M. 2674 (N.Y. Sup. Ct. 1955).

the union's constitution it was usurping the function of the union executive committee, and that it should return the matter to that body. The executive committee then appointed a new judicial board to try the plaintiff on the same charges. In a suit to restrain the second trial, the New York Supreme Court granted the requested injunction, stating:

The constitutional provisions against a person being put twice in jeopardy for the same offense . . . apply only to criminal proceedings and hence are not here applicable and do not of themselves operate to make it illegal to try plaintiff a second time. . . .

Neither do I think that the mere fact that there is no specific provision affirmatively authorizing a second trial is of itself conclusive against the propriety of a second trial, as was apparently held in *Rueb v. Rehder*, 24 N.M. 534, 544.<sup>111</sup>

But the constitutional provisions against a person being put twice in jeopardy for the same offense embody and express a principle of justice and sound public policy which reasonably can and should be applied even in cases in which the provisions themselves are not actually operative; and the analogous principle of *res judicata*—the rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction—is here directly applicable. . . .

Therefore, not because of any constitutional prohibition of double jeopardy, nor because of the mere absence of any express affirmative authority for a second trial, but because it is generally unjust to require a duly acquitted man to defend himself a second time, and generally contrary to sound public policy to permit the reopening of matters once judicially determined, the rule applicable to cases of this sort seems to me to be that a second trial of the same charges is improper unless there be some special circumstances making a second trial both necessary and just.

Other courts have permitted a retrial for the same offense, however, not only where the original decision was reversed by the courts on procedural grounds,<sup>112</sup> or was in the process of being tested in the courts on such grounds,<sup>113</sup> but also where the original decision was overturned by a higher union official for no apparent reason other than that he was dissatisfied with it.<sup>114</sup> It is difficult to tell whether the *Lafferty* case represents a trend toward protection against double jeopardy. British courts have not so far been faced with the question.

<sup>111</sup> *Supra* note 65 (holding improper the discipline of a member, without charges or hearing, for an offense of which he had just been acquitted by the same trial body).

<sup>112</sup> *Cason v. Glass Bottle Blowers Association*, 37 Cal. 2d 134, 231 P.2d 6 (1951); *Roberts v. Schifferdecker*, 170 App. Div. 918, 154 N.Y.S. 1142 (1915); *Cohen v. Rosenberg*, *supra* note 92.

<sup>113</sup> *Reubel v. Lewis*, 47 N.Y.S.2d 147, *aff'd without opinion*, 268 App. Div. 764, 50 N.Y.S.2d 164, *appeal dismissed without opinion*, 293 N.Y. 762, 57 N.E.2d 840 (1944).

<sup>114</sup> *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S.E. 580 (1919); *Callahan v. Order of Railway Conductors*, 169 Wis. 43, 171 N.W. 653 (1919). See also *Peabody v. Kaufman*, 270 App. Div. 1019, 62 N.Y.S.2d 368, *aff'd without opinion*, 296 N.Y. 796, 71 N.E.2d 770 (1946) (reversing holding that such trial constituted double jeopardy).

### EFFECT OF THE LMRDA

Section 101(a)(5) of the LMRDA provides:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.<sup>115</sup>

To a considerable extent this section is merely declarative of the common law prevailing in most jurisdictions. Under it, there can no longer be any doubt that the requirements of due process take precedence over contrary union rules. The exception for nonpayment of dues was probably intended to incorporate the common-law rule that members may be automatically disciplined for failure to pay dues where there is no reasonable doubt as to the facts or as to the sanction to be applied<sup>116</sup>—though whether these qualifications to the exception will be applicable under the Act remains to be seen. The requirement of “written specific charges” does appear to change the common-law rule, which did not insist upon charges in writing so long as the member was reasonably apprised of the accusations against him.<sup>117</sup> Under the literal language of the Act, a member may have discipline invalidated for failure to serve written charges even though he appeared and defended against known charges. It may be, however, that the common-law rules of waiver and estoppel will be read into the section by implication. The requirements of reasonable time for preparation of defense and of full and fair hearing do not on their face suggest any change in existing law, and presumably the common-law decisions will be used to interpret the statutory language.

### GROUND FOR UNION DISCIPLINE

Generally, a union may discipline a member only for conduct which is proscribed by the union's rules.<sup>118</sup> Although some American courts have intimated that a union has the “inherent power” to discipline members whose conduct is incompatible with the basic principles of

<sup>115</sup> Disciplinary procedure which violates the procedural requirements of Section 101(a)(5) is remediable by suit in federal district court. § 102. However, Section 103 of the Act provides that the provisions of Title I do not limit the “rights and remedies” of a member under state or federal law, or before any court or other tribunal, or under the constitution and bylaws of any labor organization. Presumably, therefore, a member complaining of procedure violative of “due process” may sue in either federal or state court.

<sup>116</sup> See p. 104 *supra*.

<sup>117</sup> See p. 105 *supra*.

<sup>118</sup> See section on Judicial Review, *infra*.

the organization,<sup>119</sup> the actual holdings to that effect exist principally in older cases dealing with unions which had incorporated.<sup>120</sup> British courts have denied the existence of any such inherent power.<sup>121</sup> The pertinent issues for judicial intervention, therefore, are (1) whether and to what extent a court will review the determination of a union tribunal that a member had engaged in conduct violating a union rule; and (2) whether and to what extent a court will hold invalid a union rule authorizing discipline for the conduct in question.

### JUDICIAL REVIEW

As noted in the preceding chapter, treatment of union rules as a contract poses problems of fact-finding and interpretation which do not normally arise in connection with other contracts. Normally, in determining whether a breach of contract has taken place, a court will undertake an independent investigation of the facts relative to the alleged breach, and will exercise independent judgment as to the meaning of any language that may be in dispute. The government-like characteristics of unions and other associations, however, raise the question whether one element of the intra-organization contract is not an agreement by members to be bound, at least to some extent, by the findings of fact and interpretations of rules made by some intra-association tribunal. This in turn raises the further question, if such an agreement be found to exist, either expressly or impliedly in the association's rules, whether and to what extent the court will give effect to it, as opposed to holding it invalid as an attempt to oust the courts from jurisdiction.

These questions can be asked in connection with many issues of intra-union disputes, but they arise most acutely, and have been the subject of most litigation, in the present context of union disciplinary proceedings. As we have seen, the general answer of both British and American courts is to follow the judicial or administrative analogy (ignoring the fact that the analogy breaks down over the typical lack of impartiality on the part of union tribunals) and to hold, without discussion of contract theory, that the scope of judicial review over questions of interpretation ("law") is quite broad, while that over

<sup>119</sup> *E.g.*, *Otto v. Journeymen Tailors Protective Union*, 75 Cal. 308, 17 Pac. 217 (1888); *Brennan v. United Hatters*, 73 N.J.L. 729, 65 Atl. 165 (1906).

<sup>120</sup> *E.g.*, *Beesley v. Chicago Journeymen Plumbers Association*, 44 Ill. App. 278 (1892). Modern cases have refused to "imply" offenses. *E.g.*, *Sullivan v. Barrows*, 303 Mass. 197, 21 N.E.2d 275 (1939); *McGinley v. Milk & Ice Cream Salesmen*, 351 Pa. 47, 40 A.2d 16 (1944).

<sup>121</sup> *E.g.*, *Luby v. Warwickshire Miners Association*, [1912] 2 Ch. 371; *Kelly v. National Society of Operative Printers*, (1915) 31 T.L.R. 632.



questions of fact is quite limited. In the following pages we shall discuss this generalization, together with certain differences in approach between British and American courts.

In no field is the distinction between "law" and "fact" capable of precise definition, but in the field under consideration judicial statements have been unusually confusing. Seldom, in the reported cases, has there been any serious disagreement as to what the disciplined member has said or done; the question is, typically, whether what he has said or done constitutes a violation of some union rule. In some cases, that question may involve a rather clear-cut factual issue. For example, if a union rule prohibiting the "slander" of union officers is interpreted as not applying to truthful statements, then the truth or falsity of a member's statement is a factual question relevant to the decision. In many more cases, however, the factual issue, if any, is merged with an issue of interpretation. For example, in order to determine whether a member has violated a rule prohibiting conduct that is "detrimental" to his association, it is necessary to decide both (1) the probable effect of the member's conduct, and (2) whether that effect is "detrimental" within the meaning of the rule. Finally, in most of the reported cases issues of meaning are predominant, and factual issues are relevant only insofar as facts are always relevant to determine meaning. In view of the variety of possibilities, it is not surprising that some courts have referred to issues as "factual" which others might have regarded as issues of "interpretation." Awareness of such differences in language is essential to a clear picture of the comparative attitudes of British and American courts toward judicial review.

The British rules relating to the scope of judicial review over domestic disciplinary proceedings were first developed in the social club cases decided in the nineteenth century. In one of the earlier cases, *Hopkinson v. Marquis of Exeter*,<sup>122</sup> the plaintiff had been expelled from the Conservative Club because he pledged to vote Liberal at the next election. The club's rules provided that in case any circumstances should occur "likely to endanger the welfare and good order of the club," its executive committee was to call a general meeting, at which a member could be expelled by a two-thirds vote. Rejecting the plaintiff's argument that his conduct was not such as to "endanger the welfare and good order of the club," Romilly, J. held that by becoming a member the plaintiff impliedly agreed to abide by the decisions of the committee and the membership so long as they were "bona fide" and not "capricious": "... none but the members of a club can know the

<sup>122</sup> (1867) L.R. 5 Eq. 63.

little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere."

The rules involved in succeeding club cases served to strengthen this judicial reluctance to intervene, for they expressly granted the club's executive committee authority to take disciplinary action when, *in its opinion*, the member's conduct was "injurious" or "detrimental" to the club's interests. On the basis of such rules, courts upheld the discipline of club members in cases which typically involved mixed questions of fact and interpretation. For example, discipline was sustained where the member's conduct consisted of making an allegedly false accusation against a fellow member;<sup>123</sup> sending an allegedly "discourteous and improper" letter to the club committee, criticizing certain of its actions;<sup>124</sup> using allegedly "insulting" language to the guest of a fellow member;<sup>125</sup> and making allegedly "improper" criticism of a fellow member's conduct.<sup>126</sup> In each of these cases, the court, apparently referring to both questions of fact and questions of interpretation, stated by way of dictum that it could interfere only if the committee's decision was not reached in "good faith." In one, *Dawkins v. Antrobus*, Jessel, M.R. held that the tribunal's decision must be based upon "reasonable and probable cause," but the Court of Appeal disagreed on the point, holding that the absence of reasonable and probable cause would merely be considered as some evidence of bad faith.

English courts displayed a similar reluctance to interfere with the decisions of the statutory tribunals involved in the *Leeson*<sup>127</sup> and *Allinson*<sup>128</sup> cases, already considered in relation to the problem of bias. In both cases the plaintiff was a medical practitioner who had been removed from the "register" of qualified practitioners by the General Council of Medical Education and Registration, which had statutory authorization under the Medical Act<sup>129</sup> to remove the names of practitioners judged by the Council, after "due inquiry," to have been "guilty of infamous misconduct in any professional respect." In neither case does it appear that there was any dispute as to what the plaintiff did: Leeson assisted an unregistered "medical electrician" to carry on a medical practice; and Allinson paid for newspaper advertisements

<sup>123</sup> *Richardson-Gardner v. Fremantle*, *supra* note 76; *Labouchere v. Earl of Wharmcliffe*, (1879) 13 Ch. D. 346.

<sup>124</sup> *Lyttleton v. Blackburne*, *supra* note 77; see also *Lambert v. Addison*, *supra* note 79 (insulting executive committee).

<sup>125</sup> *Fisher v. Keane*, (1879) 11 Ch. D. 353.

<sup>126</sup> *Dawkins v. Antrobus*, *supra* note 78.

<sup>127</sup> *Leeson v. General Council of Medical Education*, (1889) 43 Ch. D. 366.

<sup>128</sup> *Allinson v. General Council of Medical Education*, *supra* note 82.

<sup>129</sup> 21 & 22 Vict. c. 90.

which were highly critical of the practice and procedure of all doctors other than himself. The principal claim of both plaintiffs, in addition to bias, was that the conduct they were charged with did not constitute "infamous conduct in any professional respect." Both courts, however, treated the question as if it were primarily factual. In *Leeson* all three Lord Justices expressed the opinion that they could not review the Council's decision except for the purpose of deciding whether the Council had acted honestly and in good faith—substantially the same test set forth by the Court of Appeal in *Dawkins v. Antrobus*. In *Allinson* three different Lord Justices expressed a somewhat broader view: that they could not review the decision of the Council except for the purpose of deciding whether there was evidence upon which the Council might "reasonably" have reached its conclusion. This, it will be noted, is substantially the view of Jessel, M.R. in the *Dawkins* case. Both courts agreed, however, that the conduct before them was properly held "infamous" within the meaning of the statute.

Considered against the background of these club and medical society cases, the decisions of British courts in reviewing trade-union disciplinary action provide an interesting contrast. Although not once, in the former class of cases, did a court overturn the decision of a domestic tribunal on nonprocedural grounds, in cases involving union discipline judicial reversal on substantive grounds of interpretation (though not of fact) has been quite frequent. In large measure this difference can be accounted for by differences in the types of disciplinary rules involved. None of the union rules before the court have expressly conditioned disciplinary action upon the "opinion" of some committee or person, as in the club cases following *Hopkinson*; and, for the most part, they have described the prohibited conduct in more objective terms than the language involved in *Hopkinson* and the medical society cases.<sup>130</sup>

There have, however, been four union cases involving rules which in general terms prohibited conduct "injurious" or "damaging" to the union. While the courts sustained union disciplinary action in two of these,<sup>131</sup> in the two others they held the discipline wrongful. In *M'Dowall*

<sup>130</sup> Many British unions describe prohibited conduct in very general terms, however. See ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 30 ff. (1955). This is true in America as well. Summers, *Disciplinary Powers of Unions*, 4 *IND. & LAB. REL. REV.* 483 (1950).

<sup>131</sup> *Wolstenholme v. Amalgamated Musicians Union*, [1920] 2 Ch. 388 (writing letter to head office charging misconduct on the part of local union officers, held sufficient evidence of conduct which has "brought the union into discredit"); *Evans v. National Union of Printing Workers*, [1938] 4 All E.R. 51 (refusal by members in receipt of out-of-work benefits to obey instructions of union executive committee to accept particular work, held to constitute "knowingly acting to the detriment of the union's interest").

*v. M'Ghee*<sup>132</sup> a Scottish court held that a union could not properly rely upon a rule authorizing expulsion for "conduct calculated to injure or bring discredit upon the union" in order to sustain expulsion of a member for bringing suit to correct misapplication of union funds. In *Kelly v. National Society of Operative Printers*<sup>133</sup> expulsion of a member for taking extra work outside regular hours, contrary to union policy, was reversed on the ground, among others, that there was "no evidence" to show that his conduct was "calculated to damage the character and reputation of the society." While the *M'Dowall* decision is perhaps distinguishable on grounds of policy, it is difficult to reconcile the *Kelly* decision with *Hopkinson*.

In cases involving union rules which describe prohibited conduct in more objective terms, British courts have exercised their powers of interpretation quite strictly, allowing little or no weight to interpretation by domestic tribunals. A striking example is the House of Lords decision in *Amalgamated Society of Carpenters & Joiners v. Braithwaite*,<sup>134</sup> which concerned a rule prohibiting members from "working on a co-partnership system when such system makes provision for the operatives holding only a minority of shares in the concern." The plaintiffs were members who, in return for meritorious services for their employer, received "partnership certificates" entitling them to share in profits in addition to wages, and who were permitted to purchase additional shares with the profits so received. The scheme was called a "co-partnership" by the employer; it was concededly unlikely that any number of employees would ever hold a majority of the shares; and it was quite clear that the scheme was within the objects against which the rule was made. Nevertheless, the Law Lords held that the scheme was not within the rule, on the various grounds that the plaintiffs were not "working on" the scheme because they still had the protection of their employment contracts, that the scheme was not "legally" a "co-partnership" because employees shared only in profits and not in losses,<sup>135</sup> and that the scheme did not expressly prevent employees from obtaining a majority of the shares.

<sup>132</sup> [1913] 2 S.L.T. 238 (suit for misapplication of funds, in which union alleged plaintiff had been expelled from membership and therefore had no standing to sue).

<sup>133</sup> (1915) 31 T.L.R. 632. See also *Drennan v. Associated Ironmoulders of Scotland*, [1921] S.C. 151.

<sup>134</sup> [1922] 2 A.C. 440.

<sup>135</sup> *Per* Lord Sumner, who thought that the rule in question, as a "penal rule," should be strictly construed. This same notion that union disciplinary rules should be strictly construed because penal in nature was applied in *Blackall v. National Union of Foundry Workers*, (1923) 39 T.L.R. 431, holding that a rule which provided for expulsion of members who failed to pay dues or fines for "twenty weeks" meant, contrary to the union's interpretation, twenty weeks from the time the previous dues period expired, rather than twenty weeks from the date of the last dues payment.

More recently the Court of Appeal in *Lee v. Showmen's Guild*<sup>186</sup> set about declaring with greater particularity the principles that govern judicial review of domestic interpretation and fact-finding. The defendant was a guild of fairground showmen, registered as a trade union. It was customary for the guild to allot fairground positions among its members. Despite the fact that the guild had allotted a particular fairground site to another member, the plaintiff made application to local authorities for permission to occupy that site, received permission, and insisted upon occupying it. Complaint was then brought against the plaintiff under a guild rule prohibiting "unfair competition." The plaintiff was found guilty, fined, and, for refusal to pay the fine, expelled. He then brought suit, claiming that his conduct did not constitute "unfair competition" within the meaning of that rule. Rejecting the guild's argument that its decision must be sustained if it was made in "good faith," the Court of Appeal agreed with the plaintiff. Each of the Lord Justices, however, based his decision on somewhat different grounds.

Denning, L.J. was of the opinion that, while courts in cases involving social clubs were limited to determining whether the disciplinary action was in "good faith," the rule was different for trade unions and statutory tribunals. Because of the economic compulsion which forces a person to submit to the jurisdiction of such bodies, a member must be held to have consented to the exercise of that jurisdiction only "according to the true interpretation of the rules." Therefore, while questions of fact were "essentially" for the domestic tribunal, questions of interpretation were for the courts. Since the issue in hand involved a "mixed question of law and fact," the correct test was "whether the facts adduced were reasonably capable of being held to be a breach of the rules." He held they were not.

Romer, L.J. took a different view. He distinguished both the club and the medical society cases—the former on the ground that the court's jurisdiction was limited by express rules making discipline dependent on the judgment of a club committee; the latter on the ground that the court's jurisdiction was limited by statute; and both on the ground that they involved questions of "personal conduct." In the type of association before him, questions of interpretation were for the courts; and, unlike his colleagues, he held that the issue posed was purely one of interpretation and that no factual issues were involved.

Somervell, L.J. likewise distinguished both the club and medical society cases on much the same grounds as Romer, L.J., emphasizing

<sup>186</sup> [1952] 2 Q.B. 329, 1 All E.R. 1175.

that the case before him, unlike those cases, dealt with the "legal construction of words in a rule." But even on the basis of the principle derived from those cases—which he took to be the "reasonable basis" test of the *Leeson* case—he concluded that the union's decision was erroneous.

Though all three Lord Justices were in agreement that questions of interpretation were for the courts and questions of fact primarily for the union tribunal, they left three questions not wholly answered. The first is what standard will be used to distinguish between "fact" and "interpretation." It is difficult to understand Denning, L.J.'s position that the issue before him was a mixed question of law and fact, except in the sense that factual issues are theoretically relevant to any legal determination; but in that sense the court could never be confronted with a "pure" question of interpretation. On this point the position of the two other Lord Justices seems preferable.

The second question is what standard will be used in interpreting union rules. The *Braithwaite* and *Blackall*<sup>137</sup> decisions suggest that union rules will be regarded as in the nature of criminal statutes and interpreted strictly against the union. The fact that all three Lord Justices in the *Lee* case equated "questions of interpretation" with "questions of law" implies the same conclusion. In the more recent case of *Bonsor v. Musicians Union*,<sup>138</sup> Denning, L.J. stated that union rules are "less a contract . . . than a legislative code" and "are to be construed . . . against the makers of them." The same result could be reached, of course, by identifying union rules with other standard form contracts, which are traditionally interpreted against the stronger party. It should not be overlooked, however, that the *Lee* case involved (implicitly) a question of policy—whether a union should be permitted to discipline a member who obtained a position through regular legal channels—and therefore leaves open the question whether as strict a position will be taken in cases not involving policy issues.

The third question left by the *Lee* decision is whether a union can avoid judicial interpretation by expressly contracting out of it. Both Denning and Romer, L.JJ. expressed the opinion that a flat rule purporting to "oust" the courts from their jurisdiction to interpret the rules would be invalid as contrary to public policy. As a matter of policy, this same position should be applicable to attempts by unions to achieve the same results by making the validity of discipline dependent upon the "opinion" of a committee, as in the early club cases.

<sup>137</sup> *Supra* note 135.

<sup>138</sup> [1954] Ch. 479.

American courts, like the British, state that they will review the evidence presented before a union tribunal only for the purpose of determining whether there was "any evidence"<sup>138</sup> or, in some cases, any "substantial evidence"<sup>140</sup> to support the tribunal's conclusion. There is, however, this difference: while British courts have not so far reversed the determination of a union tribunal with respect to any question which might reasonably be called factual, American courts have done so on a number of occasions. Because of the peculiarities of each case it is difficult to judge whether this difference represents an actual divergence in approach, or only a difference between the types of cases which the courts of the two countries have been called upon to consider, but the latter interpretation is the more likely. The American cases in which courts have overturned union tribunals on factual questions fall generally into three categories: The first is where no evidence was presented against the member at all,<sup>141</sup> and here British courts would certainly agree. The second is where the only evidence against the accused consists of *ex parte* affidavits and the member is not confronted by his accuser.<sup>142</sup> Here British courts might agree, either on the ground that such affidavits are not "substantial" evidence or on the ground that nonconfrontation constitutes a denial of natural justice.<sup>143</sup> The third category is where the court considers evidence relating to factual questions which it deems relevant, because of its interpretation of the union's rules, but which the union tribunal apparently did not deem relevant: for example, whether a member, accused of conduct "detrimental to the union" for having criticized union officers, did so in good faith and with reasonable cause to believe the truth of his allegations;<sup>144</sup> or whether a strike, which the plaintiff was charged with

<sup>138</sup> *E.g.*, *Bush v. IATSE*, 55 Cal. App. 2d. 357, 130 P.2d 788 (1942); *Walsh v. IATSE*, 22 N.J. Misc. 161, 37 A.2d 667, *aff'd*, 136 N.J. Eq. 115, 40 A.2d 623 (1944); *Dachoylous v. Ernst*, 118 N.Y.S.2d 455 (Sup. Ct. 1952); *McGinley v. Milk & Ice Cream Salesmen*, *supra* note 120; *Leo v. Local 612, Operating Engineers*, 26 Wash. 2d 498, 174 P.2d 523 (1946).

<sup>140</sup> *E.g.*, *Nissen v. International Brotherhood of Teamsters*, 229 Iowa 1028, 295 N.W. 858 (1941); *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941).

<sup>141</sup> *E.g.*, *Walsh v. IATSE*, *supra* note 139; *Blek v. Wilson*, 145 Misc. 373, 259 N.Y.S. 443 (Sup. Ct. 1932) (mixed question of law and fact); *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y.S. 785 (1935).

<sup>142</sup> *E.g.*, *Harmon v. Matthews*, *supra* note 140. *Cf.* *Allen v. Los Angeles District Council of Carpenters*, 51 Cal. 2d 805, 337 P.2d 457 (1959).

<sup>143</sup> *But cf.* *Maclean v. Workers Union*, [1929] 1 Ch. 602.

<sup>144</sup> *Crossen v. Duffy*, 90 Ohio App. 252, 103 N.E.2d 769 (1951); see also *Shapiro v. Gehlman*, *supra* note 141 (plaintiff found guilty of "slander" on basis of charges against a union officer which another union trial body had found true; plaintiff's trial body apparently did not regard the truth of the charges as relevant). *But see* *Ames v. Dubinsky*, 70 N.Y.S.2d 706 (Sup. Ct. 1947) (question of fair comment in good faith with reasonable cause is for domestic tribunal).

not supporting, was properly called;<sup>145</sup> or whether advisory ballots, which the plaintiff was accused of forging, were the "property" of the union within the meaning of a union rule prohibiting misuse of union property.<sup>146</sup> Here again the British courts might well agree, either on the ground that the factual questions were not passed upon by the union tribunal or on the ground that the issues posed were ones of mixed law and fact. It would seem, however, that American courts tend to use fact-finding, as they use interpretation, for the purpose of policy implementation, particularly in those situations (such as slander charges) where the union tribunal can least be counted upon to be impartial.<sup>147</sup> To that extent, American courts probably do exercise broader review powers over evidentiary questions than do the British.

When it comes to questions of interpretation, American and British courts declare different rules with respect to the scope of judicial review. While British courts indicate they will lean backward to protect the member by interpreting disciplinary rules strictly against the union, American courts say they will not interfere with the interpretation given by a domestic tribunal unless it is "unreasonable" or "contrary to public policy."<sup>148</sup> For example, in *Harrison v. Brotherhood of Railway & Steamship Clerks*<sup>149</sup> an officer of the union wrote a letter to several congressmen, which stated in part:

As a district chairman of the Brotherhood of Railway Clerks . . . I am appealing to you gentlemen to vote and exert your influence against H.R. 7789, which would amend the Railway Labor Act to permit negotiations for a union shop on the railroads.

This appeal was contrary to the declared policy of the union in favor

<sup>145</sup> *Nissen v. Brotherhood of Teamsters*, *supra* note 140.

<sup>146</sup> *McGinley v. Milk & Ice Cream Salesmen*, *supra* note 120. Judge Stern, dissenting, objected: "A basic error in the court below, which to some extent seems to me to be perpetuated in the majority opinion, is that the Chancellor heard the entire case *de novo* and received evidence bearing on the question of the actual guilt or innocence of the plaintiff. Hundreds of pages of testimony were thus taken which were wholly irrelevant. The only proper inquiry was as to the regularity of the proceedings before the tribunal provided by the union. . . ." See also *Fritz v. Knaub*, 103 N.Y.S. 1003 (Sup. Ct. 1907) (holding that promise by union member, given to superintendent of employer, that he would encourage support for a change the company wished to make in work assignments did not constitute "offering advice and service" to the company where there was "no evidence" that the member "volunteered" the promise!); *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y.S. 28 (1935) (calling of special meeting in defiance of parent body was not "substantial evidence" of detrimental conduct).

<sup>147</sup> See *Fittipaldi v. Legassie*, 7 App. Div. 2d 521 (N.Y. 1959).

<sup>148</sup> *E.g.*, *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947) ("The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing body is binding on the membership and will be recognized by the courts"); *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950). One court has even suggested that interpretative decisions of union tribunals might be made conclusive. *Way v. Patton*, 195 Ore. 36, 241 P.2d 895 (1952).

<sup>149</sup> 271 S.W.2d 852 (Ky. Sup. Ct. 1954).



of union-shop contracts, and the officer was charged and found guilty of violating a union constitutional provision which read as follows:

When such policy has been declared, no member of the Brotherhood shall appear before any legislative committee, Legislature, State, Provincial or Federal executive in opposition to such program or policy in any capacity except that of a private citizen.

The officer brought suit to compel reinstatement, claiming, *inter alia*, that (1) writing a letter did not constitute an "appearance," and (2) individual congressmen did not constitute a "legislative committee." The court rejected both these arguments and upheld the discipline. As to the first point, it said: "We believe that the word 'appear' . . . must be given its ordinarily understood meaning of presenting one's position." As to the second, the court conceded that "strictly speaking" the plaintiff was correct, but it continued:

On the other hand, it is apparent on the face of Section 9 that its whole design and purpose was to prevent members of the Brotherhood from using their office to influence legislative or executive action contrary to the policies of the Brotherhood. Under the wording of this particular Section, it seems to us that the word "legislature" may fairly be construed to include members of the legislature when the appearance is for the purpose of inducing legislative action. Apparently this was the construction adopted by the appellee's authorized officers, and . . . the courts should hesitate to upset a labor organization's interpretation of its own Constitution and by-laws.

This difference in language used by British and American courts probably does represent a divergence in approach, but the divergence is not as great as the language would suggest. American courts have quite frequently reversed union disciplinary tribunals on matters of interpretation, but usually only where it is fairly clear to the court that the member's conduct does not fall within the purposes of the rule in question, or where the union's interpretation would result in disciplining a member for conduct which the court feels should be protected against discipline. In other words, American courts appear to have a more pragmatic and overtly policy-oriented outlook than the British courts, which, on the surface at least, appear more literal in their approach to interpretation.

The case of *Smetherham v. Laundry Workers Union*<sup>100</sup> is an example of the way in which American courts consider the function of a union rule in context. In that case, the plaintiff and another employee had come to blows during working hours over a personal matter. The plaintiff was disciplined under a rule which provided: "No member

<sup>100</sup> 44 Cal. App. 2d 131, 111 P.2d 948 (1941).

shall injure the interests of another member by undermining him or her in wages or in any other wilful manner by which the interests of the other may be placed in jeopardy." The California District Court of Appeal, holding the discipline wrongful, incorporated in part the opinion of the trial court:

The question depends upon what is meant by the word "interests" of a member. Any uncertainty which exists must be considered in the light of the intention of the parties and that intention must be determined from a consideration of the language employed and the subject-matter of the by-laws. Obviously, the words relate to employment and working conditions. The objectionable conduct to come within this provision must be directed to the injury of the member *as an employee*. Any physical or mental injury which is not intended or calculated to harm a member in his employment cannot be considered a violation of this section. To hold otherwise one must read into the contract something beyond the reasonable and proper construction thereof. . . . Indeed, it must be presumed that the parties intended the contract to be reasonably construed.<sup>151</sup>

Most of the cases in which American courts have reversed union tribunals on questions of interpretation, however, have been cases in which the member engaged in conduct which the court felt should have been protected against discipline. Thus, American courts have protected the member's right to criticize officers in good faith by holding that such conduct does not fall within a union rule prohibiting "conduct detrimental to the union,"<sup>152</sup> or advocacy of a "dual party system,"<sup>153</sup> or "scurrilous and defamatory remarks."<sup>154</sup> Similarly, bringing suit against the union has been held not to constitute "interference with a grievance,"<sup>155</sup> or the carrying-on of union business outside a meeting,<sup>156</sup>

<sup>151</sup> Cf. *Curatella v. Heide*, 20 L.R.R.M. (N.Y. Sup. Ct. 1947) (provision for automatic suspension of persons "in arrears in the payment of dues, assessments, or other payments required to be paid" held not applicable to failure to repay loan from union); *McGinley v. Milk & Ice Cream Salesmen*, *supra* note 120 (forging other members' names on advisory ballots in union advisory election held not to justify expulsion for "taking of union property," on ground ballots were not "union property" within meaning of rule).

<sup>152</sup> *Crossen v. Duffy*, *supra* note 144.

<sup>153</sup> *Madden v. Atkins*, 4 N.Y.2d 283, 151 N.E.2d 73 (1958).

<sup>154</sup> *Mahoney v. Sailors' Union of the Pacific*, 43 Wash. 2d 874, 264 P.2d 1095 (1953), *aff'd on rehearing*, 45 Wash. 2d 453, 275 P.2d 440 (1954). Cf. *Miller v. International Union of Operating Engineers*, 118 Cal. App. 2d 66, 257 P.2d 85 (1953) (making false accusations against union officers held to constitute "slander" or "creation of dissension" within meaning of union rule); *Gaestel v. Painters Union*, 120 N.J. Eq. 358, 185 Atl. 36 (1936) (members who charged leaders with "racketeering" were properly expelled for creating "dissension within the union"); *Ames v. Dubinsky*, *supra* note 144 (false accusations against union leaders held to constitute "defamation and libel" within meaning of union rule).

<sup>155</sup> *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 273 Fed. 707 (D. Md. 1919) (but finding that member conspired with employer to bring action held to support discipline for "violation of obligation of membership").

<sup>156</sup> *T. Angrisani v. Stearn*, 167 Misc. 728, 3 N.Y.S.2d 698 (Sup. Ct. 1938). Cf. *Strobel*

or violation of a union's appellate rules.<sup>157</sup> Failing to participate in an illegal strike has been held not to be a violation of union rules prohibiting working while a strike was in progress.<sup>158</sup>

It may be that the British courts, in the few cases in which they have reversed union interpretative decisions, were likewise influenced by policy considerations, even though they did not say so. *Lee*, for example, might be explained on the ground that a union should not be allowed to displace public authorities in assignment of business locations; and *Braithwaite* on the ground that a union should not interfere with the desires of members to advance themselves above the status of wage-earners by becoming "partners." But while an American court might have come to the same conclusion as the Court of Appeal in *Lee*, it is difficult to reconcile the attitude taken by the House of Lords in *Braithwaite* with American decisions such as *Harrison*. Though the paucity of British cases renders generalization difficult, the most plausible hypothesis is that there exists a real difference between British and American courts in their approach to interpretation: British courts tend to interpret rules strictly against the union, and American courts allow unions considerable discretion in interpreting their own rules, subject to the limitations of public policy.

#### INVALIDATION AND PUBLIC POLICY

Just as American courts are more overt than the British in using the techniques of fact-finding and interpretation of union rules to effectuate their notions of public policy, so they are more inclined to rely upon invalidation to the same end, not only with respect to procedural rules, but also with respect to substantive rules prescribing grounds for discipline. Even before passage of the LMRDA there was beginning to emerge a pattern of restrictions upon the grounds for discipline, which appeared to be based upon the two-edged concept of the union as a government within a government.

That the union is a government implies that it must have the power to discipline its own members on matters within the scope of its "sovereignty" or "jurisdiction." Thus, a union may properly insist that its members meet their regular financial obligations to the union,<sup>159</sup> obey

v. Irving, 171 Misc. 965, 14 N.Y.S.2d 864 (1939) (under similar rule, member held to have waived right to protest expulsion by pleading guilty at union trial).

<sup>157</sup> Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931).

<sup>158</sup> Nissen v. Brotherhood of Teamsters, *supra* note 140; Havens v. King, 221 App. Div. 475, 224 N.Y.S. 193 (1927) (dicta).

<sup>159</sup> E.g., Tauber v. Brotherhood of Painters, 122 N.Y.S. 527 (App. Div. 1910).

lawful union trade rules,<sup>160</sup> refrain from participating in unauthorized strikes,<sup>161</sup> and refrain from working while a properly called and lawful strike is in progress.<sup>162</sup>

But that the union is a government within a government implies that its sovereignty is limited: it cannot command the total allegiance of its members, to the exclusion of their obligations and interests as citizens of the state. Intra-union "legislation" must be reasonably related to the union's institutionalized functions, and at the same time not unduly restrictive of the member's "outside" interests. If the trade policy behind union discipline conflicts with the law of the state, as where a union seeks to discipline a member for failing to participate in an unlawful strike,<sup>163</sup> the union policy must give way.

Political activity may also constitute a legitimate union function, and a union which supports a particular political program or candidate may properly insist that its members and officers *qua* members and officers not support conflicting programs or candidates. For example, it has been held that a union might discipline a member who circulated letters advocating a Republican candidate for President of the United States and signed his name as a past president of the union;<sup>164</sup> or who, writing as a union officer, urged congressmen to defeat union-shop legislation which the union supported.<sup>165</sup>

Moreover, it seems that in the United States a union may require affirmative financial support from members for political objects which are closely related to the union's function. In *De Mille v. American Federation of Radio Artists*<sup>166</sup> the California Supreme Court considered the discipline of a member for failure to pay an assessment levied for the purpose of defeating an initiative measure which would have outlawed union-security contracts in California. After concluding that defeat of the measure could properly be regarded by the union as within

<sup>160</sup> *E.g.*, *Meurer v. Detroit Musicians Benevolent & Protective Association*, 54 Mich. 954 (Sup. Ct. 1893) (working with nonmembers); *Drazen v. Curry*, 158 N.Y.S. 507 (App. Div. 1916) (working for less than union scale).

<sup>161</sup> *E.g.*, *Sanders v. Bridge, Structural & Ornamental Iron Workers*, 130 F. Supp. 253 (W.D. Ky. 1955), *modified*, 235 F.2d 271 (6th Cir. 1956).

<sup>162</sup> *E.g.*, *Otto v. Journeymen Tailors Protective Union*, 75 Cal. 308, 17 Pac. 217 (1888); *Havens v. King*, *supra* note 158. *Contra*, where strike improper under union's rules, *Mullen v. Seegers*, 220 Mo. App. 847, 294 S.W. 745 (1927). As to unlawful strike, see note 163 *infra*.

<sup>163</sup> *E.g.*, *Nissen v. Brotherhood of Teamsters*, *supra* note 140; *Havens v. King*, *supra* note 158. *Cf.* *Local 118 v. Utility Workers Union*, 162 N.E.2d 524 (Ohio App. 1958) (strike in breach of contract).

<sup>164</sup> *Pfoh v. Whitney*, 43 Ohio L. Abs. 417, 62 N.E.2d 744 (1945).

<sup>165</sup> *Harrison v. Brotherhood of Railway & Steamship Clerks*, 271 S.W.2d 852 (Ky. Sup. Ct. 1954).

<sup>166</sup> *Supra* note 148. This holding is not affected by the Taft-Hartley Act, which applies only to support of candidates for federal office. See pp. 146 ff. *infra*.

its purposes, the court held that the assessment did not unduly interfere with the plaintiff's political rights, since it did not instruct him how to vote or prevent him from expressing his personal opinion in favor of the proposition. The court stated:

The member and the association are distinct. The union represents the common or group interests of the members, as distinguished from the personal, or private interest. Structurally and functionally a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. . . .

. . . In a government based on democratic principles the benefit as perceived by the majority prevails. And the individual citizen could raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views. A member of a voluntary association should not be permitted successfully to seek a similar avoidance.

But, as the *De Mille* case suggests, a union may not interfere with the exercise of political rights of members as private citizens. For example, a union may not discipline a member for signing a petition to the state legislature in opposition to a law which his union supported;<sup>167</sup> or for testifying before a legislative committee that a certain railroad headlight, favored by his union, had particular disadvantages;<sup>168</sup> or for failing to obey his union's instructions to vote, as a member of a municipal Board of Plumbing Examiners, for a particular person as plumbing inspector;<sup>169</sup> or for campaigning for Republican candidates contrary to the union's position in support of Democrats.<sup>170</sup>

It is difficult to reconcile with this principle the holding of American courts that unions may make membership in the Communist Party a ground for expulsion or ineligibility for union office.<sup>171</sup> The expressed rationale is that since the United States Congress has recognized a threat to the public in Communist control of unions by requiring non-Communist affidavits from union officers as a condition to their unions' utilization of National Labor Relations Board services, it is not unreasonable for unions themselves to impose the same standards both on the holding of office and on union membership.<sup>172</sup> Although that

<sup>167</sup> *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 Atl. 70 (1921).

<sup>168</sup> *Abdon v. Wallace*, 95 Ind. App. 604, 165 N.E. 68 (1929).

<sup>169</sup> *Schneider v. Local 6, United Association of Journeymen Plumbers*, 116 La. 270, 40 So. 700 (1905).

<sup>170</sup> *Cf. Morgan v. Local 1150*, 16 L.R.R.M. 720 (Ill. Super. Ct. 1945), *rev'd on other grounds*, 331 Ill. App. 21, 72 N.E.2d 59 (1946).

<sup>171</sup> *International Association of Machinists v. Friedman*, 252 F.2d 846 (D.C. Cir. 1958); *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950). *Cf. Allen v. Office Employees Union*, 152 Wash. Dec. 750, 329 P.2d 205 (1958) (discipline for invoking Fifth Amendment perhaps invalid).

<sup>172</sup> *E.g., Allen v. Los Angeles District Council of Carpenters*, *supra* note 142.

position may have merit in the case of office-holding, it seems unduly harsh in the case of membership.

The concept of the union as a government within a government suggests also that union members must be free to utilize the legal processes of the state, and the courts have so held. A union member may not be disciplined for bringing suit against his union,<sup>173</sup> at least where he has exhausted available internal remedies,<sup>174</sup> nor for consulting an attorney with respect to such a suit,<sup>175</sup> nor for testifying in a suit against the declared interests of the union.<sup>176</sup>

Even with respect to the conduct of its members *qua* members, that is, with respect to their activities within the institutional framework of the union itself, the union's power to discipline is not unlimited. For in a society committed to the principles of democracy, to say that a union is like a government is to suggest that there are certain types of intra-union conduct which are protected as "civil rights": the right to engage, as an individual, in intra-union political activity and to join with others in political opposition. It has been argued<sup>177</sup> that at this point the governmental analogy breaks down, for the union is a single-purpose organization whose affairs call primarily for the exercise of expertise gained through training and experience rather than for the formulation of policy in the political market place. It is, moreover, engaged in industrial warfare, and can tolerate internal division no more than an army in battle. In part, presumably, for these reasons, but sometimes perhaps for the more personal reasons of officers who wish to maintain themselves in office, American unions<sup>178</sup> (and British

<sup>173</sup> *E.g.*, *Collins v. International Alliance of Theatrical Stage Employees*, 119 N.J. Eq. 230, 182 Atl. 37 (1935); *Polin v. Kaplan*, *supra* note 157; *T. Angrisani v. Stearn*, *supra* note 156; *Dusing v. Nuzzo*, 26 N.Y.S.2d 345 (Sup. Ct. 1941); *Armstrong v. Duffy*, 90 Ohio App. 233, 103 N.E.2d 760 (1951). *Cf.* *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 286 Fed. 949 (D. Md. 1922), *aff'd per curiam*, 298 Fed. 1019 (4th Cir. 1924) (discipline for conspiring with employer to sue upheld); *Strobel v. Irving*, *supra* note 156 (discipline upheld for aiding another to sue); *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 91 S.W. 834 (Tex. Civ. App. 1905) (similar).

<sup>174</sup> *Cf.* *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 273 Fed. 707 (D. Md. 1919) (discipline invalid where only intra-union appeal was to convention fourteen months away); *Armstrong v. Duffy*, *supra* note 173 (dicta that discipline would be proper).

<sup>175</sup> *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 Atl. 102 (1935).

<sup>176</sup> *A. Angrisani v. Stearn*, 167 Misc. 731, 3 N.Y.S.2d 701 (1938), *aff'd*, 255 App. Div. 975, 8 N.Y.S.2d 997 (1939); *St. Louis Southwestern Ry. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908).

<sup>177</sup> *E.g.*, ALLEN, *POWER IN TRADE UNIONS* (1954).

<sup>178</sup> See Summers, *Union Democracy and Union Discipline*, N.Y.U. 5th ANN. CONF. ON LABOR 443 (1952), and *Disciplinary Powers of Unions*, 4 IND. & LAB. REL. REV. 483, 498 (1950) (political action more frequently the subject of union discipline than any other type of conduct).

unions as well<sup>179</sup>) have frequently displayed little tolerance of individuals or groups who oppose incumbent leaders or their policies.

On the other hand, some unions have permitted institutionalized internal opposition and have operated quite effectively.<sup>180</sup> It has been suggested that just as pluralism through pressure groups is a desirable antidote to oligarchy within the state, so it is within the pressure groups themselves.<sup>181</sup> At any rate, it would seem that any loss in efficiency from membership participation is more than counterbalanced by the value of the participation itself, and that participation within a union, as within any large organization, must often be on a group basis to be effective.

For many years American courts have indirectly protected the right to engage in political opposition against union discipline through the exercise of powers of interpretation and fact-finding, and on the basis of procedural defects.<sup>182</sup> In recent years, however, judicial policy in favor of the right to criticize union officers or policies in good faith, and to form opposition political groups, has reached the level of direct expression. Two cases will illustrate the blossoming judicial attitude in this field.

In *Crossen v. Duffy*<sup>183</sup> the plaintiffs, campaigning as an opposition slate to incumbent union officers, had distributed among the members a handbill, which read in part as follows:

We believe the present administration should be changed . . . because of its . . .

1. Reluctance to Accept Laws and Courts of U.S.A.
2. Illegal Salary Increases.
3. Arbitrary Disregard of Wishes and Opinions of Locals and Members.
4. Unfair Election Tactics.
5. Use of Potters Herald for Personal Propaganda Agency and to Impugn Motives and Attack Members.
6. Inefficiency in Office.

<sup>179</sup> See ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 243 (1955) ("Trade unions . . . abhor the conduct of elections on party lines and commonly refuse to concede to their members the right to take certain steps to organize a collective opposition").

<sup>180</sup> See the excellent study of the International Typographical Union in LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* (1956). Summers suggests that economic security does not justify restrictions on intra-union political action, and that the reported cases indicate that "unions in which political discipline is most common are the very ones which are most secure." *Union Democracy and Union Discipline*, *supra* note 178, at 458.

<sup>181</sup> LIPSET, TROW & COLEMAN, *op. cit. supra* note 180, at 15.

<sup>182</sup> Summers reports that of 87 cases in which union members sought protection of political rights, the courts, by use of one or more of the methods mentioned in the text, granted protection in 70. *The Political Liberties of Labor Union Members*, 33 TEX. L. REV. 603, 609 (1955).

<sup>183</sup> *Supra* note 144.

7. Denial of Help to W. Va. Federation of Labor in Efforts to Increase Silicosis Benefits.

8. Duffy's Open Shop Attitude.

For this conduct the plaintiffs were fined by the union's convention, apparently under color of a prior convention resolution covering "conduct in violation of their obligation or anything in any manner detrimental to the N.B.O.P. and its members." The Ohio Court of Appeals, affirming a trial court decision, granted an injunction restraining the discipline imposed. The court first held that "...the charges complained of fall within the scope of free, if not fair, criticism and the free speech guaranteed by the United States Constitution and the Constitution of Ohio." In reaching this conclusion, it relied upon the fact that the incumbent leadership was using the union newspaper to criticize the plaintiffs. The court then posed the question for decision as "whether a rule adopted by a mutual benefit association of the character of a labor union may infringe upon and take away fundamental liberties otherwise granted by the Constitution of the United States and the Ohio Constitution." Emphasizing the fact that "membership has become a frequent condition of employment," the court answered the question in the negative, saying: "Viewing the important role of labor unions in this era, a court may well determine in a particular case that protection of their democratic processes is essential to the maintenance of our democratic government." The court concluded by "interpreting" the convention resolution not to deprive the plaintiffs of their "constitutional" rights.<sup>184</sup>

The right to advocate and maintain an organized opposition within a union is an important one, but the exercise of that right is often curtailed by the traditional union fear of separatist movements. In *Madden v. Atkins*<sup>185</sup> a group of defeated candidates for union election formed an opposition party. They distributed leaflets reading, in part: "In America we have a two party system—Republican and Democrat—and our country prospers and freedom is protected. Is not such a system desirable and possible in Local 88?" The group members were charged and found guilty of "dual unionism," for advocating the opposition party and holding "unauthorized meetings." They were also charged

<sup>184</sup> See, to the same effect, *Schrank v. Brown*, 80 N.Y.S.2d 452 (Sup. Ct. 1948); *Leo v. Local 612*, *supra* note 139; *Mahoney v. Sailors' Union of the Pacific*, *supra* note 154. But cf. *Hopson v. National Union of Marine Cooks & Stewards*, 116 Cal. App. 2d 320, 253 P.2d 733 (1953); *Werner v. International Association of Machinists*, 11 Ill. App. 2d 258, 137 N.E.2d 100 (1956); *Hall v. Morrin*, 293 S.W. 435 (Mo. App. 1927); *Ames v. Dubinsky*, *supra* note 144; *Taxicab Drivers Local 889 v. Pittman*, 322 P.2d 159 (Okla. Sup. Ct. 1957).

<sup>185</sup> *Supra* note 153.



with distributing a "smear sheet" in connection with the election campaign, which described the union leader as one who had risen from the role of "body guard" and "goon squad leader" to president; who had "taken" the organization financially; who had been a Communist Party member; who used his union office for selfish and dishonest purposes; and who resorted to fraud in elections. One of the plaintiffs was also charged with distributing a sheet which contained the following statement: "Many members at present are advocating mass withdrawal from the local, dues strike, dual unionism and boycott of our patrolman unless the situation within our local is corrected."

The New York trial court declined to overturn the discipline, on the ground, among others, that there was "some evidence" to support the charges; but the appellate division reversed, and the Court of Appeals affirmed the reversal. With respect to the charge of dual unionism, it stated: "There is not the slightest support for such an accusation." The plaintiffs, it held, were not advocating a rival union, but a party system within the union. With respect to the "smear sheets," the court stated: "It is enough merely to say that they are nothing more than ardent and hard-hitting campaign literature by the 'outs' matched, indeed, in substance and content, by articles published and distributed by the incumbents in control." Finally, with respect to the sheet referring to "mass withdrawal," the court said: "There is little evidence to connect Polachek with this paper, but, even assuming that he did author it or send it out, that is a far cry from disloyalty to the union." The court concluded the substantive portion of its decision with the following statement of policy:

If there be any public policy touching the government of labor unions, and there can be no doubt that there is, it is that traditionally democratic means of improving their unions may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union leadership and, within the union, to oppose such leadership and its policies. . . . In short, the price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus display.

But the right to free expression within a trade union, as within the state generally, undoubtedly has its limits. For one, deliberately false and defamatory statements may probably be made a basis for disciplinary action.<sup>186</sup> For another, just as a union may not demand loyalty from

<sup>186</sup> *E.g.*, *Taxicab Drivers Local 889 v. Pittman*, *supra* note 184.

its members outside its own institutional framework, so members may to some extent be required to work within that framework in matters having to do with union affairs. It has been held, for example, that a union may properly discipline a member who unnecessarily carries on his campaign against union officers and policies outside the union itself.<sup>187</sup> And probably a union may discipline members who advocate support of rival organizations,<sup>188</sup> though on this proposition there is some doubt.<sup>189</sup>

#### EFFECT OF THE LMRDA

It is difficult to assess the degree, if any, to which these common-law rules have been altered by the LMRDA. With respect to the grounds for discipline, Section 609 of the Act makes it unlawful to discipline a member for "exercising any right to which he is entitled under the provisions of this Act." The primary grant of rights is contained in Title I ("Bill of Rights of Members of Labor Organizations"), though there are other provisions of the Act which might be construed as granting "rights" within the meaning of Section 609.<sup>190</sup> Within Title I, the "rights" of principal significance are the right to free speech and assembly and the right to sue, testify, and petition before judicial, administrative, and legislative bodies.

The right to free speech and assembly is protected by Section 101(a)(2), which provides:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

This section incorporates both the *Crossen v. Duffy* protection of criti-

<sup>187</sup> *Elfer v. Marine Engineers Beneficial Association*, 179 La. 383, 154 So. 32 (1934).

<sup>188</sup> *E.g.*, *Miller v. Operating Engineers*, *supra* note 154; *Local 2 v. Reinlib*, 133 N.J. Eq. 572, 33 A.2d 710 (1943); *Margolis v. Burke*, 53 N.Y.S.2d 187 (Sup. Ct. 1945).

<sup>189</sup> *Cf.* *Leo v. Local 612*, *supra* note 139 (solicitation of members for rival union held no violation of constitutional provision against creation of "dissension"); and *cf.* dissent by Finley, J. in *Mahoney v. Sailors' Union of the Pacific*, *supra* note 154. See discussion in Wollett & Lampman, *The Law of Union Factionalism*, 4 STAN. L. REV. 177 (1951). Expulsion for voting for a rival union in a representation election is invalid. *Ray v. Brotherhood of Railroad Trainmen*, 182 Wash. 39, 44 P.2d 787 (1935).

<sup>190</sup> *E.g.*, the right to distribute campaign literature. See p. 188 *infra*.

cism of union officers and policies, and the *Madden v. Atkins* protection of intra-union pressure groups. At the same time, it gives the union power to adopt "reasonable rules as to the responsibility of every member toward the organization as an institution," which means, probably, the power to discipline for advocacy of dual unionism. Moreover, the right to free speech at union meetings is limited to the expression of views on candidates and business properly before the meeting, and by "reasonable rules" pertaining to the conduct of meetings. In the more progressive jurisdictions, this section will make no significant change in existing law, except, perhaps, that it makes clear the right to caucus away from union meetings, contrary to the present provisions of the constitutions of several unions. In those jurisdictions where protection of the right of free speech and assembly within the union is not expressly recognized, the section is an important advance.

The right to sue, testify, and petition is protected by Section 101(a)(4), which provides:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Just as Section 101(a)(2) incorporates the governmental analogy of the common law with respect to internal union procedures, so Section 101(a)(4) incorporates the notion of the union as a government within a government, having only limited sovereignty. That a union member may, without fear of discipline, bring suit in court, including suit against his union, appear as a witness, and petition and communicate with legislators is already quite well established.<sup>191</sup> That the union might limit his right to sue by insisting upon reasonable exhaustion of internal union remedies was also fairly clear, though of course the common law did not fix an arbitrary four-month period of exhaustion. The question is likely to occur under the Act whether a member may be disciplined for failing to exhaust intra-union appeals where their "rea-

<sup>191</sup> See p. 132 *supra*.

sonableness" is open to good-faith dispute.<sup>192</sup> The second proviso, permitting, in effect, the discipline of a member for conspiring with an employer to bring suit against the union, is similarly declarative of existing law.<sup>193</sup>

A member disciplined for exercise of his statutory rights may bring suit in a federal district court for "such relief (including injunctions) as may be appropriate."<sup>194</sup> Section 103 of Title I provides:

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

It is difficult to believe that Congress intended this section to be taken literally. For example, surely a state could not invalidate a union disciplinary rule prohibiting resort to courts without four months' exhaustion of intra-union remedies, in view of the express language of Section 101(a)(4). The provisions of Title I must be given some pre-emptive effect with respect to the subject matter covered. At the same time, it would be farfetched to hold that Congress intended to pre-empt the entire field of regulation of the grounds for discipline, to the exclusion of state statutory and common-law rules relating to subjects not expressly covered by the Act—for example, the right of members to engage in independent political activity without fear of discipline. The question of federal-state jurisdiction is likely to give rise to considerable litigation.

Except for Section 3(3) of the Trade Union Act, 1913, which protects persons who contract out of the obligation to contribute to a union's political fund,<sup>195</sup> British law contains no statutory limitations upon the grounds for which union members may be disciplined.<sup>196</sup> Nor is it clear whether there are any limits imposed as a matter of public policy. Courts in several cases have displayed opposition to discipline of members for bringing suits against their unions,<sup>197</sup> and it is probable that a

<sup>192</sup> Cf. *Flaherty v. United Steelworkers of America*, 46 L.R.R.M. 2483 (S.D. Cal. 1960).

<sup>193</sup> See p. 132 *supra*.

<sup>194</sup> § 210. See *Moschetta v. Cross*, 46 L.R.R.M. 2810 (D.D.C. 1960) (restraining national union from disciplining officers and members for rival political activity and for bringing suit for accounting); *Alvino v. Bakery Workers Union*, 46 L.R.R.M. 2812 (D.D.C. 1960) (requiring restoration of status quo after removal and suspension of individuals for similar activities).

<sup>195</sup> See p. 145 *infra*.

<sup>196</sup> Section 2 of the Trade Disputes and Trade Unions Act (Northern Ireland) 1927, 17 & 18 Geo. 5, c. 20, protected against discipline persons who refused to take part in illegal strikes; but the relevant portions of that Act were repealed in 1958. 7 Eliz. 2, c. 30.

<sup>197</sup> E.g., *M'Dowall v. M'Ghee*, [1913] 2 S.L.T. 238; *Parr v. Lancashire Miners Feder-*

rule prohibiting such suits would be invalidated as an attempt to "oust" the courts from jurisdiction.<sup>198</sup> On the other hand, expulsion for conduct which an American court might regard as being in the realm of free speech was upheld in *Wolstenholme v. Amalgamated Musicians Union*<sup>199</sup> (complaints to head office of misconduct on the part of local officials), and again in *Maclean v. Workers Union*<sup>200</sup> (election speeches and circulars critical of incumbent officers). On the basis of the present cases, therefore, it would appear that British courts will not interfere with the terms of the "contract" established by a union's rules, at least insofar as it does not purport to dispense with "natural justice" or to eliminate the jurisdiction of the courts.

### LEGAL LIMITATIONS UPON THE SANCTION IMPOSED

For union discipline to be valid, it is not sufficient that the member's conduct be "punishable"; the sanction imposed must be one authorized by the union's rules for the conduct in question. As in the case of rules postulating grounds for discipline, British courts tend to interpret sanction rules rather literally and restrictively. For example, in *Burn v. National Amalgamated Labourers Union*<sup>201</sup> it was held that a rule authorizing "suspension" of a member for a particular offense did not justify suspending a member only from acting as an officer or a delegate; either he was to be suspended entirely or not at all. Also as in the cases dealing with punishable offenses, American courts are more inclined to use their interpretative powers to express policy determinations—in this case a general antipathy toward expulsion which results in loss of employment.<sup>202</sup>

This policy of limiting interference with a worker's employment as a result of expulsion is reflected both in the so-called right-to-work laws of some states, which prohibit contracts that make union membership a condition of employment,<sup>203</sup> and, more directly, in the Taft-Hartley Act. That Act places no direct limitations upon the grounds for union

ation, [1913] 1 Ch. 366. Cf. *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540.

<sup>198</sup> See p. 67 *supra*.

<sup>199</sup> [1920] 2 Ch. 388. It appears, however, that the plaintiff failed to substantiate his charges when requested to do so, and an American court might have upheld the discipline on that ground. See p. 135 *supra*.

<sup>200</sup> [1929] 1 Ch. 602.

<sup>201</sup> [1920] 2 Ch. 364.

<sup>202</sup> *E.g.*, *Dachylous v. Ernst*, 118 N.Y.S.2d 455 (Sup. Ct. 1952), *aff'd per curiam*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953). Cf. *Sanders v. Bridge, Structural & Ornamental Iron Workers*, *supra* note 161; *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y.S. 28 (1935).

<sup>203</sup> *Katz, Two Decades of State Labor Legislation: 1937-1958*, 25 U. CHI. L. REV. 109 (1957).

discipline or upon expulsion as a sanction, but it does provide that a union may not interfere with the employment of an expelled member, even pursuant to a valid union-security contract, unless the expulsion was for failure to tender "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."<sup>204</sup> The same restriction is made with respect to persons who are denied admission to a union. Indirectly, the Act does affect union disciplinary practices and admission policies, since many unions will hesitate to expel or exclude a person from membership on grounds other than the failure to tender dues, if they must allow the person to continue to work in a shop where members are employed.

### REMEDIES

The judicial remedies available to a wrongfully disciplined union member are substantially the same in both countries. Generally, he may obtain, in a suit brought against the proper parties, (1) a declaration that his discipline was wrongful; (2) an order maintaining or restoring, so far as possible, the status quo; and (3) an award for damages suffered, if any. There are, however, certain differences between the two countries which require discussion.

First, an American union member must have exhausted all available intra-union remedies, or have shown some legal reason why he should not be required to do so, before resorting to the courts. It is not clear whether the same requirement is imposed in Britain in the absence of a union rule to that effect.<sup>205</sup>

Second, there is some technical difference between the types of order available to a wrongfully expelled union member in Britain and America. In Britain, the appropriate remedial order is an injunction restraining interference with the plaintiff's membership rights.<sup>206</sup> This is likewise the position of some American courts,<sup>207</sup> but many others hold that the proper relief is by way of writ of mandamus, ordering the union to reinstate the improperly expelled member.<sup>208</sup> Ordinarily, in the United States, mandamus is available as a remedy only against governmental officials and corporations—the latter on the theory that the corporation is the recipient of a franchise from the state and is

<sup>204</sup> NLRA § 8(a)(3), as amended by the Taft-Hartley Act.

<sup>205</sup> See chap. 2 *supra*.

<sup>206</sup> *E.g.*, *Amalgamated Society of Carpenters & Joiners v. Braithwaite*, [1922] 2 A.C. 440.

<sup>207</sup> *E.g.*, *People ex rel. Schults v. Love*, 199 App. Div. 815, 192 N.Y.S. 354 (1922).

<sup>208</sup> *E.g.*, *Smetherham v. Laundry Workers Union*, 44 Cal. App. 2d 131, 111 P.2d 948 (1941); *Nissen v. International Brotherhood of Teamsters*, 229 Iowa 1028, 295 N.W. 858 (1941).

subject to its visitatorial power.<sup>209</sup> Mandamus has on occasion been used against other kinds of unincorporated associations, but only where it involves the performance of a duty that is public or quasi-public in nature.<sup>210</sup> Its use in the case of labor organizations reflects a judicial view of the public nature of such a body. In *Nissen v. International Brotherhood of Teamsters*,<sup>211</sup> one of the leading cases on the subject, the Supreme Court of Iowa stated:

The action of mandamus is one brought to command "the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." . . . The Union and its officers in their capacity as stated in the statute [i.e., as holders of an "office, trust, or station"] owed a duty to the plaintiffs to right the wrong committed against them by reinstating them to membership in the organization. Appellants argue that mandamus does not lie to undo a wrong already committed. The statute requires the issuance of the writ whether the duty be violated by a wrongful act or wrongful failure to act. Had the Union, when the men applied for membership, accepted their entrance fee and taken them in, but refused to issue them their cards, mandamus would have been available to compel. As it is, the cards were issued but were wrongfully taken up. Why should not mandamus lie to compel the re-issuance of the cards, and the reinstatement of the men? The trial court answered the question correctly.

Finally, there is, or may be, a difference in the items of damages available to a wrongfully expelled union member in the two countries. As noted in the preceding chapter, union members in both countries may normally obtain a judgment for damages against the union's treasury—in Britain by a suit against the union in its registered name, and in the United States by either a common-name or representative action. The only item of damages recovered so far by a British member in such a suit has been lost wages for interference with employment.<sup>212</sup> American members, however, have been awarded not only lost wages, but also damages for "humiliation" and injury to reputation and "punitive" damages, where the union's act was in bad faith.<sup>213</sup>

This distinction between recovery for loss of pay and for other damage may be significant for application of the doctrine of federal pre-emption. The Supreme Court has ruled that where claim for both types of damage is made, the fact that the National Labor Relations Board may grant back pay for job interference does not deprive state courts of

<sup>209</sup> 55 C.J.S. *Mandamus* § 238.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Supra* note 208.

<sup>212</sup> *But cf.* *Huntley v. Thornton*, [1957] 1 All E.R. 234, an action for civil conspiracy against individual defendants, in which Harman, J. stated that, while lost wages was the principal item of damages, the precise material loss was not to be weighed on "golden scales."

<sup>213</sup> See p. 71 *supra*.

jurisdiction over the subject matter.<sup>214</sup> But where the member seeks reinstatement and damages only on the basis of job interference, and not on account of injury to the union-member relationship, one state court has held that judicial relief is barred.<sup>215</sup>

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<sup>214</sup> *Gonzales v. International Association of Machinists*, 356 U.S. 617 (1958).

<sup>215</sup> *Wax v. International Mailers Union*, 400 Pa. 173, 161 A.2d 603 (1960).



## Chapter 6

# Judicial Control over Union Financial Affairs

Recent disclosures of financial wrongdoing on the part of some American union officers have propelled the issue of judicial control over union financial affairs into the forefront of intra-union legal problems in this country.<sup>1</sup> The spectacle of union leaders using their positions to further their own financial interests through secret profits, loans without interest, padded expense accounts, and the like, has shocked the public conscience.<sup>2</sup> True, such wrongdoing is probably confined to a relatively minor proportion of trade-union leaders. Moreover, such behavior is not unique to unions; in many ways it is but a reflection of similar behavior in American business and public life in general. This fact helps provide an explanation; it may suggest the futility of dealing with the problem on a purely legal level; and it certainly implies that judicial control over unions without similar control over other institutions, both private and public, would be inequitable. But neither the comparatively minor incidence of financial wrongdoing in unions nor the presence of wrongdoing in other institutions should deter the law from doing everything it can, consistent with the policy of avoiding undue encroachment on legitimate union activities, to remedy the situation.

Fortunately, the problem of intra-union corruption is not nearly so acute in Britain.<sup>3</sup> Perhaps British unions have had more time in which to mature (for certainly financial wrongdoing was not unknown there in the last century<sup>4</sup>); or perhaps the standard of integrity within public and business life generally is higher in Britain than in America.<sup>5</sup> For whatever reason, while American courts have been faced primarily with conduct which might be described generally as breach of fiduciary obligation—the attempt to obtain personal advantage through control

<sup>1</sup> See, e.g., Summers, *The Role of Legislation in Internal Union Affairs*, 10 LAB. L.J. 155 (1959); Williams, *Statutory and Fiduciary Standards and the Administration of Property*, 8 LAB. L.J. 860 (1957); Note, 67 YALE L.J. 732 (1958).

<sup>2</sup> See reports of the U.S. Senate Select Committee on Improper Activities in the Labor or Management Field.

<sup>3</sup> See ROBERTS, *UNIONS IN AMERICA: A BRITISH VIEW* (1959).

<sup>4</sup> See WEBB, *HISTORY OF TRADE UNIONISM* 259 ff. (rev. ed. 1920).

<sup>5</sup> ROBERTS, *op. cit. supra* note 3.

over union financial policy—the British litigation in the field of internal fiscal matters has arisen mainly from claims that union officers (generally in good faith) have applied union funds *ultra vires*, that is, for purposes not authorized by the union's constitution and rules. Although these factual differences make comparison between the two countries difficult in this area, there are three points of similarity which make it meaningful. First, as a matter of legal doctrine the two typical fact situations overlap: breach of fiduciary obligation may involve an expenditure not authorized by the union constitution and rules, and the making of an *ultra vires* expenditure may be regarded as a breach of fiduciary duty. Second, the remedies available to a member claiming breach of fiduciary obligation are similar in most respects to the remedies for *ultra vires* expenditure. Third, both countries have statutes designed to make available to members and others information necessary for the determination of the propriety of the handling of union funds. We shall discuss these three points separately.

### SUBSTANTIVE LEGAL DOCTRINE

Apart from specific statutory restrictions, the controlling legal basis for intervention in the field of union financial affairs, as in other areas of intra-union affairs, is, in theory, the provisions of the union's constitution and rules. In the Trade Union Act of 1913,<sup>6</sup> Parliament expressly overruled the doctrine of statutory *ultra vires* as applied to unions in the *Osborne* decision,<sup>7</sup> which held that the purposes for which a union's funds could be used were limited by the definition of a "Trade Union" appearing in the Trade Union Acts of 1871 and 1876. The 1913 Act provides, in part, that except for express limitations on political objects "any . . . trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution."<sup>8</sup> In America, likewise, *ultra vires* in the case of unions means only *ultra vires* a union's constitution and rules.

Whether a questioned expenditure is authorized by a particular rule, or requires an express rule for authorization, involves, of course, somewhat the same problems of interpretation and implication that arise elsewhere in the field of internal union affairs. Union rules relating to purposes, however, are typically even more general in terms and sketchy in coverage than other types of rules, and consequently there

<sup>6</sup> 2 & 3 Geo. 5, c. 30.

<sup>7</sup> *Osborne v. Amalgamated Society of Railway Servants*, [1910] A.C. 87.

<sup>8</sup> § 1(1).

is even greater scope for judicial discretion and indirect policy-making.<sup>9</sup> It will be helpful, therefore, to consider the question of *ultra vires* in terms of particular types of expenditures.

#### POLITICAL EXPENDITURES

In Britain, the validity of expenditures for political purposes is governed by the Trade Union Act of 1913.<sup>10</sup> That Act prohibits the use of trade-union funds<sup>11</sup> for specified political objects (payment of expenses for,<sup>12</sup> maintenance of,<sup>13</sup> or support through meetings or literature of,<sup>14</sup> a political candidate; registration of electors or selection of political candidates;<sup>15</sup> and the holding of political meetings or the distribution of political literature<sup>16</sup>) unless certain conditions are met. These conditions are that the political objects must be approved by ballot vote of the membership conducted pursuant to rules approved by the Registrar of Friendly Societies;<sup>17</sup> and that the union must adopt political-fund rules providing that expenditures for such political objects will be paid out of a separate fund, and that any member may, without loss of any union privileges or benefits,<sup>18</sup> contract out of the obligation to contribute toward the political fund.<sup>19</sup> Members aggrieved by a breach of rules adopted pursuant to these provisions may obtain relief through the Registrar,<sup>20</sup> and perhaps only through the Registrar.<sup>21</sup>

<sup>9</sup> This is more the case, perhaps, in the United States than in Britain, where registered unions are required to list the objects for which funds can be used. See p. 166 *infra*.

<sup>10</sup> 2 & 3 Geo. 5, c. 30. For a more complete discussion of the 1913 Act than attempted here, see CITRINE, *TRADE UNION LAW* c. 6 (1950).

<sup>11</sup> The Act applies to the use of union funds "either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly." § 3(1).

<sup>12</sup> § 3(3)(a): "... the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election to Parliament or to any public office, before, during, or after the election in connexion with his candidature or election."

<sup>13</sup> § 3(3)(c): "... the maintenance of any person who is a member of Parliament or who holds a public office."

<sup>14</sup> § 3(3)(b).

<sup>15</sup> § 3(3)(d).

<sup>16</sup> "... unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act." § 3(3)(e).

<sup>17</sup> § 3(1).

<sup>18</sup> "except in relation to the control or management of the political fund." § 3(1)(b).

<sup>19</sup> § 3(1)(a).

<sup>20</sup> § 3(2). Upon complaint of an aggrieved member, the Registrar is authorized to hold a hearing and, if he considers that a breach has been committed, to "make such order for remedying the breach as he thinks just under the circumstances," which order is binding on the parties without appeal.

<sup>21</sup> *Cf. Forster v. National Amalgamated Union of Shop Assistants*, [1927] 1 Ch. 539, discussed in CITRINE, *op. cit. supra* note 10, at 329.

Members who claim that a union's political rules do not comply with the Act may, however, bring action in the courts.<sup>22</sup>

The Act does not apply to all political expenditures,<sup>23</sup> and expenditures not within its coverage may presumably be made from the union's general treasury so long as they are deemed authorized by the union's constitution and rules.<sup>24</sup> It appears, however, that many unions have framed their rules in such a way as to limit their political objects to those stated in the 1913 Act,<sup>25</sup> and that courts will not condone expenditures for other political purposes in the absence of express language.<sup>26</sup>

Political expenditures by American unions are likewise regulated by statute. The Labor Management Relations Act of 1947 amended the Federal Corrupt Practices Act of 1925 so as to prohibit not only corporations but also labor organizations from making:

... a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . .<sup>27</sup>

Violation of the Act is made a crime, punishable by fine, imprisonment, or both.<sup>28</sup> It is not clear whether violation could also be made the subject of civil action.

In its application to unions the Act has been quite narrowly construed. In *United States v. Congress of Industrial Organizations*<sup>29</sup> a majority of the Supreme Court held that the statute did not forbid a union to expend funds for the publication of the union's political views in the regular course of publishing and distributing a union newspaper, the distribution of which was limited substantially to union members. The majority reached this conclusion, despite legislative history to the contrary,<sup>30</sup> on the ground that a different interpretation

<sup>22</sup> *Birch v. National Union of Railwaymen*, [1950] 2 All E.R. 253 (approval of rule by Registrar did not preclude action by members for declaration and injunction in court).

<sup>23</sup> The limits are discussed in the *Forster* case (decision of Registrar, July 22, 1925, Report 1925), and in *CITRINE*, *op. cit. supra* note 10, at 322 ff.

<sup>24</sup> *Forster v. National Amalgamated Union of Shop Assistants*, *supra* note 21.

<sup>25</sup> *CITRINE*, *op. cit. supra* note 10, at 321, n.25.

<sup>26</sup> *Bennett v. Amalgamated Society of Operative House & Ship Painters*, (1915) 31 T.L.R. 203; *Carter v. United Society of Boilermakers*, (1915) 32 T.L.R. 40 (both holding that expenditure to purchase shares in Labour Party newspaper was *ultra vires*).

<sup>27</sup> LMRA § 304.

<sup>28</sup> The labor organization itself is subject to fine up to \$5,000, and every officer who "consents" to an unlawful expenditure is subject to fine up to \$1,000 or imprisonment for one year, or both.

<sup>29</sup> 335 U.S. 106 (1948).

<sup>30</sup> *E.g.*, 93 *Cong. Rec.* 6436 (1947):

Mr. Pepper: "... I wish to ask the Senator. . . . Would the newspaper called Rail-

would raise the "gravest doubt" as to the Act's constitutional validity. Four justices, concurring, would have held the Government's interpretation proper but the Act unconstitutional, as a denial of free speech.<sup>81</sup>

More recently, in *United States v. United Auto Workers*<sup>82</sup> the Supreme Court, by suggesting a narrow interpretation of the Act, once again declined to pass upon its constitutionality. In that case it was charged that the Auto Workers had paid specific amounts from its general treasury to defray the costs of television broadcasts which endorsed certain candidates for federal office, and that the fund used was derived from union dues and was neither obtained by voluntary political contributions nor paid for by advertising or sales. Holding that it was error to dismiss the indictment, the Court found that the constitutional question was premature<sup>83</sup> and indicated that the following questions of fact would be relevant:

For example, was the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large, or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election?

On remand to the trial court, the union conceded that the funds used were derived from union dues, but argued that approval of the expenditures by delegates to the union's convention made them "voluntary." The jury, instructed to make findings on the questions posed by the Supreme Court, found the union not guilty.<sup>84</sup>

Thus the Corrupt Practices Act, in actual application, is less restrictive of union political activities than the Trade Union Act of 1913. An American union can probably lawfully engage in any of the activities listed in the 1913 Act, so long as the funds used are kept separate and derived from voluntary contributions. But beyond that, an American

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way Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman . . . ?"

Mr. Taft: "If it were supported by union funds contributed by union members as union dues, it would be a violation of the law, yes."

<sup>81</sup> Justices Rutledge, Black, Douglas, and Murphy.

<sup>82</sup> 352 U.S. 567 (1957).

<sup>83</sup> Justices Black and Douglas, dissenting, would have held the Act unconstitutional.

<sup>84</sup> Reported at 41 L.R.R.M. 52 (1958). Cf. *United States v. Painters Union, Local 481*, 172 F.2d 854 (2d Cir. 1949) (Act held not to prohibit small contributions for newspaper advertisements and radio broadcasts in favor of particular candidates, where duly authorized by the membership). And see *United States v. Construction and General Laborers Local 264*, 101 F. Supp. 869 (W.D. Mo. 1951) (Act held not to prohibit payment of salary to regular union officers who spent portion of their time campaigning for union member who was a candidate for office, and a portion of their time recruiting persons to register to vote).

union may probably lawfully sponsor, from its general funds, the holding of meetings or the publication of literature of a purely political nature, at least so long as the meetings or literature are directed only (or perhaps primarily) at the union membership. In any event, the American statute is limited to expenditures in aid of candidates for federal office, whereas the British statute encompasses all offices, incumbents as well as candidates, and party politics as well as individuals.

The validity of political expenditures not proscribed by statute<sup>35</sup> is, as in Britain, governed by the union constitution and rules. In one of the surprisingly few decisions in the area, *De Mille v. American Federation of Radio Artists*,<sup>36</sup> it has been held proper for a union to spend funds for opposing legislation which would have abolished the union shop in California, under authority of a rule stating it to be one of the purposes of the society "to secure proper legislation upon matters affecting their [i.e., the members'] professions."

#### ASSISTANCE TO OTHER ORGANIZATIONS

British courts have had the opportunity in several cases to pass upon the validity of expenditure of union funds in assistance to other organizations. In *Bennett v. Amalgamated Society of Operative House and Ship Painters* and *Carter v. United Society of Boilermakers*<sup>37</sup> it was held that a union could not purchase shares in a Labour Party newspaper in the absence of a union rule expressly authorizing such use of funds. The unions in both cases argued that the purchase was an "investment," but that argument was rejected by the court on the ground that the purchase was not intended as a business venture but as assistance to the Labour Party.<sup>38</sup>

On the other hand, in *Wilson v. National Union of Seamen*<sup>39</sup> and *Cotter v. National Union of Seamen*<sup>40</sup> it was held that a union rule stating it to be a purpose of the union "to promote and provide funds

<sup>35</sup> A few states have local statutes regulating political expenditures. An Indiana statute makes it unlawful for any corporation or labor union to make any contribution or give aid or assistance to any political party or candidate. IND. STAT. §§ 29-5712, 5965 (Burns 1933). A similar statute exists in New Hampshire (N.H. REV. LAWS c. 70, § 2), Pennsylvania (PA. STAT. ANN. tit. 25, § 3225(b) (Purdon)), Texas (TEX. REV. CIV. STAT. art. 5154a, § 4(b)), and Wisconsin (WIS. STAT. § 346.12(1), as amended by c. 135, L. 1955).

<sup>36</sup> 31 Cal. 2d 139, 187 P.2d 769 (1947). See also *Knox v. Local 900, United Auto Workers*, 36 CCH Lab. Cas. ¶ 65,725 (Mich. Cir. Ct. 1959) (political contributions upheld).

<sup>37</sup> Both *supra* note 26.

<sup>38</sup> See also *M'Dowall v. M'Ghee*, [1913] 2 S.L.T. 238 (strike benefits paid to members of another union, as part of amalgamation scheme, held improper); *Wolfe v. Matthews*, (1882) 21 Ch. D. 194 (injunction granted against wrongful amalgamation).

<sup>39</sup> [1929] 1 Ch. 216.

<sup>40</sup> (1929) 45 T.L.R. 352, 2 Ch. 58.

to extend the adoption of trade union principles" was sufficient to authorize a loan by the union to the Miners' Non-Political Movement of £10,000, interest-free. In so holding, the courts rejected the argument of the plaintiffs that the purpose of the loan was to further the cause of abstinence from politics, rather than to extend the adoption of trade-union principles. It is difficult to tell to what extent the difference between the two sets of cases represents a difference in union rules and to what extent it represents a bias on the part of courts against union political activity.<sup>41</sup>

#### PAYMENT OF BENEFITS

In several cases British courts have been faced with claims by union members that union funds were being used to pay benefits *ultra vires* the rules. The leading case is *Yorkshire Miners Association v. Howden*,<sup>42</sup> decided by the House of Lords. The rules of the Miners Association prohibited branches from calling a strike unless it was first sanctioned by two thirds of the branch membership; and they provided for strike benefits payable by the Association where the strike was called after attempts at peaceful settlement and with the sanction of the Association's council. The strike in question was called after approval by the branch membership, but without notice to the employer and without council sanction. For that reason, the Association refused to pay strike benefits to striking branch members. Later, however, the employer announced that he would not permit the men to return to work unless they agreed to certain conditions. The branch, upon advice of the council, refused to submit to those conditions, and the council then voted to award strike benefits commencing with the date of refusal. In a suit brought by a member of the striking branch, it was held that payment of benefits was *ultra vires* because the strike was not properly authorized *ab initio*; subsequent authorization by the council did not render the payments proper.<sup>43</sup>

In other cases British courts have held *ultra vires* the payment of benefits to striking members of another union;<sup>44</sup> the payment of bene-

<sup>41</sup> Cf. *Sanders v. Bridge, Structural & Ornamental Iron Workers*, 130 F. Supp. 253 (W.D. Ky. 1955), *aff'd as to relevant holding*, 235 F.2d 271 (6th Cir. 1956) (transfer to rival union held invalid).

<sup>42</sup> [1903] 1 K.B. 308, [1905] A.C. 256.

<sup>43</sup> See also *In re Durham Miners Association*, (1900) 17 T.L.R. 39 (holding payment of strike benefits *ultra vires* under almost identical circumstances, the court stating that it was "bound to construe the union's rules as they stood," despite contrary interpretation by the union and its members).

<sup>44</sup> *M'Dowall v. M'Ghee*, *supra* note 38 (the benefits were paid as part of a proposed amalgamation with the other union).

fits to members after withdrawal from the national union;<sup>46</sup> and the use of contributions collected for the purpose of supplementing strike benefits to pay the strike benefits themselves, without supplementation.<sup>46</sup> The last case differed from the others in that the plaintiffs' immediate objective was to obtain payment of additional benefits to them, rather than to prevent others from obtaining the benefits. The court held that the action was maintainable, though ordinarily a suit to compel the payment of benefits directly would be barred by Section 4 of the 1871 Act.<sup>47</sup>

Compared with the British, American courts are much less restrictive in their approach. In a recent case, for example, a federal district court ruled that payment of unemployment benefits to members was proper under a constitutional provision stating it was one of the union's objectives "to safeguard the rights, individually and collectively, of the members."<sup>48</sup> On the basis of this and related cases,<sup>49</sup> it is fairly clear that an American court would be more inclined than the British to permit a union's interpretation of a benefit rule to stand unless it is clearly unreasonable or contrary to public policy.

#### SECESSION CASES

Litigation concerning application of union funds frequently arises, particularly in the United States, from attempts by branches to withdraw from their parent organizations. Although other legal questions may be involved,<sup>50</sup> the question of control over the property and funds held by the seceding branch may be determinative of the feasibility of secession, and is therefore a powerful factor in intra-union relationships.

In Britain the question, here as in other cases, is resolved by reference to the union's constitution and rules as a contract. The leading case is *Cope v. Crossingham*,<sup>51</sup> in which the union's rules provided that cer-

<sup>46</sup> *McLaren v. Miller*, (1880) 7 R. 867, 17 Sc. L.R. 607 (suit by national trustees against branch trustees, who proposed to pay benefits to members contrary to union's rules, after first withdrawing from the union).

<sup>46</sup> *Sansom v. London & Provincial Union*, (1920) 36 T.L.R. 666.

<sup>47</sup> See p. 18 *supra*.

<sup>48</sup> *Eads v. Sayen*, 45 L.R.R.M. 2553 (N.D. Ill. 1959).

<sup>49</sup> For cases dealing with union funds on secession see the following section; see also pp. 126 ff. *supra*.

<sup>50</sup> One of the most perplexing problems in the United States is the effect of secession upon National Labor Relations Board certification and upon the existing labor contract. See *Hershey Chocolate Corp.*, 121 N.L.R.B. 901 (1958), discussed in Note, 45 VA. L. REV. 211 (1959).

<sup>51</sup> [1909] 2 Ch. 148. See also *Duke v. Littleboy*, (1880) 49 L.J. Ch. 802 (executive council of national union awarded injunction restraining branch trustees from diverting funds pursuant to secession resolution); *McLaren v. Miller*, *supra* note 45. Similar problems are posed when members of a union object to proposed amalgamation with



tain of the funds collected by each branch should be turned over to the national union, and the remainder used to pay local expenses and sick benefits. When a branch voted to secede from the union and to divide the funds among its members, the national trustees brought suit seeking, among other forms of relief, an injunction preventing use of the branch funds for any purpose other than those specified in the rules. The Court of Appeal held that such an injunction should issue, Buckley, L.J. stating:

The outcome of these provisions, I think, is that the branch does not exist as a separate trade union; that the provisions as to branches, branch officers, and branch trustees and the aggregation of the branches and the districts are all matter of the division of the estates of the body; and that, although a branch has under the rules separate trustees, it has not separate funds in the sense of being entitled, as regards such sums as under the rules are from time to time left in its hands, to a right to its funds in the branch as distinguished from a right to them in the society.

In the United States, also, the fundamental basis for judicial action in secession cases is theoretically contractual.<sup>52</sup> In a number of cases American courts have applied union constitutional provisions prohibiting secession so long as a specified number of members remain loyal, or specifying that local funds revert to the national union upon secession, in such a way as to prevent a secessionist majority from controlling local funds as against a loyal minority,<sup>53</sup> or as against the national union.<sup>54</sup> But it is an interesting example of the manner in which American courts mold the law to conform to their notions of policy that they have devised a number of techniques for protecting secessionist groups when such protection appears to them to be more appropriate.

One group of techniques is based upon "interpretation" of the terms of the contract. A number of courts, for example, have distinguished between "local funds," collected for the purpose of providing benefits

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another. See *Wolfe v. Matthews*, *supra* note 38 (injunction granted); *M'Dowall v. M'Ghee*, *supra* note 38 (injunction granted); *Booth v. Amalgamated Marine Workers Union*, [1926] Ch. 904.

<sup>52</sup> For discussion of legal aspects of secession see Cohn, *The International and the Local Union*, N.Y.U. 11th ANN. CONF. ON LABOR 7 (1958); Summers, *Union Schisms in Perspective*, 45 VA. L. REV. 261 (1959); Annotation, 23 A.L.R.2d 1209.

<sup>53</sup> *E.g.*, *Low v. Harris*, 90 F.2d 783 (7th Cir. 1937); *Liggett v. Koivunen*, 227 Minn. 114, 34 N.W.2d 345 (1948); *Brownfield v. Simon*, 94 Misc. 720, 158 N.Y.S. 187, *aff'd without opinion*, 174 App. Div. 872, 159 N.Y.S. 1102, *aff'd without opinion*, 225 N.Y. 643, 121 N.E. 853 (1916); *Harris ex rel. Carpenters Union 2573 v. Backman*, 160 Ore. 520, 86 P.2d 456 (1939).

<sup>54</sup> *Brown v. Hook*, 79 Cal. App. 2d 781, 180 P.2d 982 (1947); *Tiffany v. Mooney*, 263 Mass. 264, 160 N.E. 808 (1928); *Duffy v. Kelly*, 42 L.R.R.M. 2721 (Mich. Sup. Ct. 1958); *Harker v. McKissock*, 1 N.J. Super. 510, 62 A.2d 405 (1948), *aff'd as modified*, 7 N.J. 323, 81 A.2d 480 (1951).

locally, and "general funds," designed to be turned over to the national union as per capita assessments for the purpose of providing benefits nationally. "Local funds," these courts have held, are not governed by the branch-national "contract," and may therefore be retained as against the national union even in the face of a forfeiture clause.<sup>55</sup> As between the secessionist group and a loyal minority, the courts appear to award the "local funds" to whichever party can best apply them to the purposes for which they were designed.<sup>56</sup>

Another, closely related, "interpretative" technique is to find, contrary to the theory of *Cope v. Crossingham*,<sup>57</sup> that certain local unions are "independent" of their parent body, in the sense that their "existence" is not dependent upon the national organization but upon the support of individual members of the local, and to hold that such "independent" locals may withdraw on the vote of a majority of their members and retain "their" property, at least in the absence of a valid provision for forfeiture.<sup>58</sup> In determining whether a local meets the "independent" test, courts consider such factors as whether it was first chartered by the parent or whether it existed previously;<sup>59</sup> and whether it was "autonomous" or simply a dues-collecting agency for the parent.<sup>60</sup> One court found a local to be "autonomous" from the facts that it held meetings, elected officers, and had its own bylaws.<sup>61</sup>

More significant than the "interpretative" techniques, however, is the doctrine of "implied condition," which arose from the expulsion of several allegedly Communist-dominated unions from the CIO in 1949.<sup>62</sup> A number of locals of such unions, through majority action,

<sup>55</sup> *E.g.*, *Scott v. Donahue*, 93 Cal. App. 126, 269 Pac. 455 (1928) (fraternal benefit society); *Donovan v. Danielson*, 271 Mass. 267, 171 N.E. 823 (1923); *State Council, JOUAM v. Emery*, 219 Pa. 461, 68 Atl. 1023 (1908) (fraternal benefit society); *Shipwrights Association v. Mitchell*, 60 Wash. 529, 111 Pac. 780 (1910).

<sup>56</sup> *E.g.*, compare *Donovan v. Danielson* and *Shipwrights Association v. Mitchell*, both *supra* note 55, with *Schubert Lodge v. Schubert Verein*, 56 N.J. 78, 38 Atl. 247 (Ch. 1899).

<sup>57</sup> This difference in theory probably has factual foundation: American locals are probably more autonomous than British branches.

<sup>58</sup> *E.g.*, *International Union of United Brewery Workers v. Becherer*, 142 N.J. Eq. 561, 61 A.2d 16, *aff'd*, 4 N.J. Super. 456, 67 A.2d 900, *cert. denied*, 3 N.J. 374, 70 A.2d 537 (1948). The Brewery Workers were suspended from the AFL in 1941. In 1946 they decided to affiliate with the CIO. One local, unhappy with the affiliation, voted almost unanimously to withdraw. The court held that the local could keep its funds, on the theory that they were collected for the benefit of local members, independently of the parent body, and that the local was an independent organization. See also *Vilella v. McGrath*, 136 Conn. 645, 74 A.2d 187 (1950); *Huntsman v. McGovern*, 91 N.E.2d 717 (Ohio C.P. 1949).

<sup>59</sup> *United Brewery Workers v. Becherer*, *supra* note 58.

<sup>60</sup> *E.g.*, *Huntsman v. McGovern*, *supra* note 58.

<sup>61</sup> *Crawford v. Newman*, 175 N.Y.S.2d 903 (Sup. Ct. 1958) (alternative ground). *Cf. Fitzgerald v. Abramson*, 89 F. Supp. 504 (S.D.N.Y. 1950).

<sup>62</sup> These included the United Electrical, Radio & Machine Workers of America

elected to disaffiliate from their parent organizations and, in many cases, to affiliate with rival organizations chartered by the CIO.<sup>88</sup> A rash of litigation followed, in which the parent organization and/or a loyal minority sought to recover the property and funds held by the seceding majority. The courts, almost uniformly hostile to the expelled unions, found a way out in the following argument: Often the affiliation of a national union with a particular national federation (AFL or CIO) is a primary factor in inducing a previously independent local to affiliate with that national union, or in inducing individual workers to become or remain members of a local so affiliated. When that is the case, continued affiliation of the national union with the federation becomes an "implied condition" to the continued existence of the "contract of affiliation" represented by the national constitution and rules. (Courts were somewhat vague as to whether the "contract affiliation" was between the national union and its locals, or between the national union and individual members, or among all members of the national union as individuals.) When that condition ceases to exist because the national union is expelled from the federation, the "contract of affiliation" is at an end, and its terms are not binding upon members of a local who wish to secede.

For example, in *Duris v. Iozzi*,<sup>89</sup> one of the first cases to expound the "implied condition" theory, the membership of a local of the United Electrical Workers, then recently expelled from the CIO for alleged Communist domination, elected by a vote of 800 to 30 to disaffiliate from that organization and to affiliate with the newly formed International Union of Electrical Workers. The UE immediately brought suit to restrain the threatened secession and to restrain the local's officers (who continued to act as such) from expending any of the local's funds, from using its name, and from receiving any dues checked off by employers pursuant to existing contracts with the union. The plaintiffs relied upon portions of the UE constitution, which provided in part that "Any disbandment, dissolution, secession or disaffiliation of any local shall be invalid and null and void if seven or more members indicate their desire to retain the local charter," and that "If a local disbands, the local secretary and trustees shall send all funds and property belonging to the local to the General Secretary-Treasurer."

(UE), the Mine, Mill & Smelter Workers, and the United Farm Equipment and Metal Workers. See Scanlan, *The Communist Dominated Union Problem*, 28 NOTRE DAME LAW. 458 (1952).

<sup>88</sup> Most of the litigation has involved attempts by locals to secede from the expelled electrical workers' union (UE) and affiliate with the CIO-sponsored rival (IUE).

<sup>89</sup> 6 N.J. Super. 530, 70 A.2d 793 (1949).

The court, however, pointed to the following facts: the employees represented by the local in question had been members of an independent union prior to the chartering of the local in 1940; the UE organized the employees on the basis of the argument, among others, that it was advantageous to be affiliated with the CIO; in a representation election conducted by the National Labor Relations Board the national union appeared on the ballot with the designation "CIO" after its name; and a similar designation appeared on membership application cards distributed to the employees, in the constitution of the UE, on the flag of the local, and upon all stationery. From these facts the court concluded that affiliation of the UE with the CIO lay "at the root of each individual's decision to join," and held:

When membership is sought by a labor union on the basis of an existing affiliation between itself and either of these two central organizations, that basis becomes and endures as a continuing condition of the membership it attracts. This condition need not be explicitly expressed; it is implicit in the circumstances under which members are sought and their association induced. To hold that members, so invited and enrolled, cannot emancipate themselves when the basic and inducing affiliation is destroyed, is not alone to do violence to a fundamental and controlling condition of membership, but to impose a form of serfdom degrading to the individual and harmful to the public. *Such evil results must be avoided, and there is nothing in the law of contracts that bars the way.* Where the continuing existence of a state of facts (here an affiliation) is an implied condition going to the essence of the contract, the destruction of that state of facts puts an end to the contract itself. The obligation is no stronger or more enduring than the foundation upon which it rests and will not survive the latter's collapse. (Emphasis added.)

The "implied condition" theory has been applied extensively by American courts, both in the case of the "Communist" unions<sup>65</sup> and in the more recent cases involving expulsion of unions from the AFL-CIO for alleged corruption,<sup>66</sup> frequently on the basis of facts less extensive than those involved in *Duris v. Iozzi*. Indeed, in only a small minority of such cases have the courts failed to apply that theory for the protection of seceding members.<sup>67</sup> Some courts have ruled that corruption

<sup>65</sup> *E.g.*, *Local 1140 v. United Electrical Workers*, 232 Minn. 217, 45 N.W.2d 408 (1953); *Clark v. Fitzgerald*, 197 Misc. 355, 93 N.Y.S.2d 768 (1949); *Bozeman v. Fitzmaurice*, 107 N.E.2d 267 (Ohio App. 1950).

<sup>66</sup> *E.g.*, *King v. American Bakery Workers*, 34 CCH LAB. CAS. ¶ 71,369 (Cal. Super. Ct. 1958); *Stott v. Zellman*, 34 CCH LAB. CAS. ¶ 71,530 (Ill. Cir. Ct. 1958); *Crawford v. Newman*, *supra* note 61. In the *Crawford* case the court suggested that the fact of corruption itself constituted breach of an implied condition. See, to the same effect, *Alvino v. Carraccio*, 43 L.R.R.M. 2184 (Pa. C.P. 1958), 46 L.R.R.M. 2541 (1960). In some cases, wrongdoing on the part of the national union has been held to bar relief on the theory of "unclean hands." *E.g.*, *Bozeman v. Fitzmaurice*, *supra* note 65.

<sup>67</sup> *E.g.*, *Overton-Bey v. Jacobs*, 131 N.Y.S.2d 131 (Sup. Ct. 1954) (theory recognized but distinguished on facts); *Edwards v. Leopoldi*, 20 N.J. Super. 43, 89 A.2d 264 (1952) (similar).

alone, apart from expulsion, excuses local disaffiliation with retention of assets.<sup>68</sup> When it is considered that the "implied condition" theory is relatively novel in American contract law, and that the factual assumptions involved are far from convincing, the extent of judicial creativeness in this area appears remarkable indeed.<sup>69</sup>

#### EXPENDITURES FOR THE BENEFIT OF UNION OFFICERS

Expenditure of union funds for the benefit of union officers may be in good faith and nevertheless be invalid as *ultra vires*. That was the situation in the only two British cases within this category. In *Alfin v. Hewlett*<sup>70</sup> a rule of the Railway Union provided that its executive committee might "institute legal proceedings it may deem to be in the interests of members." When the union and one of its officers, James Holmes, were both named as defendants in the *Taff Vale* case, the executive committee was advised by counsel that Holmes should be separately represented, since one of the arguments for the union would be that Holmes' conduct, if tortious, was not authorized by the union. On the basis of that advice, the committee voted that Holmes should obtain separate counsel, but that his costs would be borne from the union treasury. In an action brought by several members to restrain the application of union funds for that purpose, it was held that the proposed expenditure was *ultra vires*, on the ground that there was no evidence that the executive committee had "deemed" Holmes' defense to be in the best interests of the members. Similarly, in *Oram v. Hutt*<sup>71</sup> it was held *ultra vires* for a union to pay the legal fees incurred by a union officer who had (successfully) maintained a libel suit against the plaintiff, though the libel related to the officer's official actions on behalf of the union, on the ground that the union's lack of direct interest in the litigation rendered its assistance invalid as "maintenance."

The status of this question at common law in the United States is not clear. In one case the Supreme Court of Michigan has upheld the expenditure of union funds in payment of costs in defending union officers in a civil suit brought against them for an accounting of their finances as directors of the union's building corporation;<sup>72</sup> but in an-

<sup>68</sup> *E.g.*, *Bradley v. O'Hare*, 11 App. Div. 2d 15 (N.Y. 1960).

<sup>69</sup> Summers, in criticism of the theory, states: "... continuing along the line toward plausibility, the court might find implied conditions not to rig international conventions, not to impose oppressive receiverships, or not to neglect the local unions. Thus, by creating implied conditions the courts can escape the binding terms of the union's organic law, and substitute their own rules of union government." *Supra* note 52, at 265.

<sup>70</sup> (1902) 18 T.L.R. 664.

<sup>71</sup> [1913] 1 Ch. 259, *aff'd*, [1914] 1 Ch. 98.

<sup>72</sup> *Duffy v. Kelly*, *supra* note 54.

other, a New York court held invalid the expenditure of union funds for defense of union officers indicted for extortion.<sup>73</sup> More recently, a federal district court has ruled (though partly on the basis of the policy implied in the LMRDA) that a union could not spend funds to defend officers against civil and criminal charges of fiscal wrongdoing, even though a majority of the membership voted for a resolution authorizing the expenditure. Citing *Alfin v. Hewlett* and *Oram v. Hutt*, the court held that, in the absence of a provision in the union's constitution to which the expenditures could be related, their relationship to the union's declared purposes was too tenuous.<sup>74</sup>

The few American cases in this area are concerned primarily with what might be regarded as questions of breach of fiduciary obligation rather than *ultra vires* expenditures, though quite clearly the two problems overlap. Where union funds are vested in trustees, as is typical in Britain and frequent in the United States, the trustees themselves are, almost by definition, fiduciaries.<sup>75</sup> That union officers and others who control union funds and occupy positions of responsibility for union affairs similarly have a fiduciary obligation to union members is also reasonably well established in both Britain<sup>76</sup> and America.<sup>77</sup>

A principal aspect of the fiduciary relationship is the obligation not to make a personal profit from the position of trust without full disclosure to and approval by the persons to whom the fiduciary duty is owed.<sup>78</sup> For example, in one older case the Supreme Court of Michigan held that a member of a committee appointed to buy land for a building to house the activities of a workers' association violated his obligation to the membership by arranging for the purchase of land at \$32,000, telling his fellow committee members that it would cost \$36,000, and splitting the \$4,000 profit with a real estate agent. The court ordered the officer to account for the secret profit.<sup>79</sup>

Further, it would seem that disclosure of an otherwise secret profit

<sup>73</sup> *O'Connor v. Harrington*, 136 N.Y.S.2d 881 (Sup. Ct. 1954), *modified*, 285 App. Div. 900, 138 N.Y.S.2d 1 (1955).

<sup>74</sup> *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 45 L.R.R.M. 3050 (E.D. Pa. 1960), *aff'd per curiam*, 284 F.2d 162 (3d Cir. 1960).

<sup>75</sup> See CITRINE, *TRADE UNION LAW* 155 (1950).

<sup>76</sup> *Cf. Tate v. Williamson*, (1866) L.R. 2 Ch. App. 55.

<sup>77</sup> *E.g.*, *Local 720 v. Dednasek*, 119 Colo. 586, 205 P.2d 796 (1949); *Collins v. International Alliance of Theatrical Stage Employees*, 119 N.J. Eq. 230, 182 Atl. 37 (1935); *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941); *Steinmiller v. McKeon*, 21 N.Y.S.2d 621, *aff'd*, 261 App. Div. 899, 26 N.Y.S.2d 491, *aff'd*, 288 N.Y. 508, 41 N.E.2d 425 (1940).

<sup>78</sup> *Cf. Tate v. Williamson*, *supra* note 76; *Ferguson v. Crawford*, 151 Ark. 503, 236 S.W. 837 (1922).

<sup>79</sup> *Auto Workers Temple Association v. Janson*, 227 Mich. 430, 198 N.W. 922 (1924). See *Keech v. Sandford*, (1726) Cha. Ca. 61; *Docker v. Somes*, (1834) 2 My. & K. 655; SNELL, *PRINCIPLES OF EQUITY* 159 (24th ed. 1885).

or adverse interest does not absolve the fiduciary of responsibility if the disclosure is made to a body which he effectively dominates and controls. For example, in *Local 720 v. Dednasek*<sup>80</sup> two local union officers each drew a check for over \$1,000 on union funds to his own order. Thereafter, they called a meeting of the local executive board, which was composed of the two officers in question, one other officer found to be substantially controlled by them, and two rank-and-file members. The board as so constituted then approved the withdrawals as "advances" on salary and expenses, allegedly made necessary by threats of the parent organization to take over the local's affairs. In an action brought in the name of the local, the Supreme Court of Colorado held the officers were liable to return the entire amounts "advanced," even though no attempt at concealment was involved. The court stated:

The attempt of defendants to ratify their own illegal action was void. They are in a position of trust with the union and as administrative officers they were called upon to act fairly and honestly, and not to take advantage of their position of trust to vote unto themselves funds which might not otherwise be granted them according to by-laws and the usual practice of the union in payments for services.<sup>81</sup>

Where there has been full disclosure to and ratification by the membership, an expenditure for the benefit of union officers can probably be attacked only on the grounds of *ultra vires*. That American courts, like the British,<sup>82</sup> may be willing to use that doctrine liberally where union officers appear to be taking advantage of their position is indicated by the decision of the New York Court of Appeals in *Schimmel v. Messing*.<sup>83</sup> Two union business agents, upon their return from a trip overseas, were given a profit-making testimonial dinner and permitted to keep the proceeds. A member of the union, alleging that the dinner was union-sponsored, sought an accounting of all profits. The trial court rendered judgment for defendants on the two grounds that (1) the dinner was not sponsored by the union, and (2) in any event the union's constitution did not prevent it from sponsoring such an event.<sup>84</sup> The Court of Appeals affirmed the judgment, but solely on the basis that it felt itself bound by the findings of the trial court as to the first ground. As to the second ground, the court stated:

... without such findings, which are binding on us, *we would not regard the*

<sup>80</sup> *Supra* note 77.

<sup>81</sup> See also *Steinmiller v. McKeon*, *supra* note 77 (approval of withdrawal by executive board held no defense).

<sup>82</sup> See *Alfin v. Hewlett*, *supra* note 70, and *Oram v. Hutt*, *supra* note 71.

<sup>83</sup> 306 N.Y. 841, 118 N.E.2d 904 (1954).

<sup>84</sup> 117 N.Y.S.2d 423, *aff'd*, 282 App. Div. 777, 122 N.Y.S.2d 916 (1953).

*failure of the union constitution and by-laws to forbid such activities as tantamount to authority for the union to permit the use of its name for the purpose of benefitting the personal financial affairs of these officers.*<sup>85</sup>

The doctrine of *ultra vires* may also be used to check expenditures which cannot clearly be shown to benefit a union officer, but which may not be accounted for on any proper basis. For example, in *Collins v. IATSE* an American court ordered an accounting by union officers on the ground, among others, that they had made questionable contributions to the campaign for local political offices.<sup>86</sup>

This background of precedents provides an interesting basis for speculation as to the legal status of the types of conduct investigated by the Select Committee on Improper Activities in the Labor or Management Field. Though the precedents are meager indeed, it seems reasonably clear that nearly all of the financial wrongdoings "found"<sup>87</sup> by the committee would constitute breach of fiduciary obligation under existing law. For example, in the case of Dave Beck, president of the Teamsters from 1952 to 1957, the committee made the following findings, among others:<sup>88</sup>

First, that Beck took (rather than borrowed, as he claimed) more than \$370,000 in union funds, which he used for the purchase of a house for himself and four associates. This finding, if true, would constitute outright theft.

Second, that Beck placed mortgages of the union through a company in which he had an undisclosed financial interest, and received kick-backs for doing so. This would constitute a secret profit, in breach of fiduciary obligation.

Third, that Beck used his position as international president to "browbeat" local affiliates into purchasing toy trucks from a corporation in which Beck's son had a one-third financial interest. This, likewise, would be a clear violation of fiduciary obligation.

<sup>85</sup> Emphasis added. See also *Highway Truck Drivers v. Cohen*, *supra* note 74.

<sup>86</sup> *Supra* note 77. The court also found, as a basis for the accounting order, that union officers had received large and (on the surface) unwarranted expense allowances and gifts, and that the books did not reflect the reason for a \$5,000 attorney's fee. But see *Russell v. IATSE*, 66 Cal. App. 2d 691, 152 P.2d 737 (1944) (payment of \$10,000 per year to tax consultant for services to union officers and employees held not *ultra vires*).

<sup>87</sup> The value of the committee's "findings" is considerably weakened by the fact that the hearings were conducted in a highly political atmosphere; the union officers involved were not permitted to cross-examine witnesses against them or to produce evidence on their own behalf; and the committee's report is written in a far from objective fashion. Nevertheless, many of the findings are so obviously supported by the evidence that they cannot reasonably be disputed.

<sup>88</sup> See Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. REP. No. 1417, 85th Cong., 2d Sess. 60 ff. (1958).



Fourth, that Beck arranged to have the union pay a friend \$12,500 "commission" for the purchase of land under the "most flagrantly false pretenses," and received an \$8,000 kickback.

Fifth, that Beck received another \$24,000 kickback from profits which the same friend earned from selling furniture to the union and arranging for the installation of a bookkeeping system.

Sixth, that Beck placed his relatives on the payroll of the union, and that they received salaries and expenses for which they did "virtually no work."

Seventh, that Beck used union accountants and attorneys to operate his own personal businesses over an extended period of time.

Eighth, that Beck took advantage of his position to obtain personal favors from employers with whom his union engaged in bargaining. For example, the committee found that Beck procured a union loan of \$1,500,000 to the Fruehauf Trailer Co. to use in a proxy fight, and in return received a number of personal favors, including a loan of \$200,000 to himself.

Though some of the conduct disclosed by the committee was somewhat more subtle in nature, there is little doubt that in nearly every case a court would agree that conduct found by the committee to be "improper" was also a violation of the union officer's fiduciary obligation. So far as substance, as distinguished from remedy, is concerned, it appears that existing common law is probably adequate.

#### EFFECT OF THE LMRDA

The LMRDA contains two substantive provisions relating to the fiduciary responsibility of union officers and the use of union funds. Section 501(a) codifies the principle of fiduciary responsibility:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to

relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Quite clearly this section was not intended to place any limits upon the purposes for which unions may expend their funds.<sup>89</sup> In theory, at least, it probably makes no change in existing law, though the direct expression of the fiduciary principle by legislation may have an effect upon the attitude of the courts.<sup>90</sup>

Section 503 does, however, limit the purposes for which union funds may be used. Subsection (a) provides that no union shall, directly or indirectly, make any loan to any officer or employee which results in a total indebtedness on the part of the officer or employee to the union in excess of \$2,000; and subsection (b) provides that no union (or employer) shall, directly or indirectly, pay the fine of any officer or employee convicted of any willful violation of the Act. Willful violation of the section is made a crime, punishable by fine or imprisonment, or both.

### REMEDIES

Both British and American law provide reasonably adequate remedies against misuse of union funds or of control over union funds. These include (1) an injunction against misapplication, (2) reimbursement of misappropriated funds and secret profits, (3) receivership (in the United States), and (4) criminal penalties.

### INJUNCTION

Either union trustees<sup>91</sup> or individual union members, suing as representatives of a class,<sup>92</sup> may obtain an injunction restraining *ultra vires* applications of union funds. In neither country is the rule in *Foss v. Harbottle* held to be a bar.<sup>93</sup> In Britain, Section 4 of the 1871 Act, precluding direct enforcement of rules providing for the application of union funds, does not apply.<sup>94</sup> In the United States, where a plaintiff member must ordinarily exhaust intra-union remedies before taking legal action, exhaustion is generally excused, on the ground either that

<sup>89</sup> See, e.g., statement of Senator Kennedy to that effect at 105 *Cong. Rec.* 16415 (1959).

<sup>90</sup> Cf. *Highway Truck Drivers v. Cohen*, *supra* note 74.

<sup>91</sup> In Britain, Section 9 of the 1871 Act expressly permits trustees of a union to sue concerning union property. In the United States, the general law would permit the same remedy.

<sup>92</sup> E.g., *Yorkshire Miners Association v. Howden*, [1905] A.C. 256; *Roberts v. Kennedy*, 12 Del. Ch. 133, 116 Atl. 255 (1922).

<sup>93</sup> See pp. 86 ff. *supra*.

<sup>94</sup> See pp. 15 ff. *supra*.

provisions for appeal within the union are not applicable or that they are inadequate.<sup>95</sup>

### RESTORATION

An American union member, upon showing of good cause, may obtain a court order directing union officers to "account" for misapplied funds or secret profits earned from breach of fiduciary obligation. In a suit for accounting, the court orders, in effect, that the defendant reimburse the union for any funds or profits he cannot properly account for.<sup>96</sup>

Substantially the same remedy is probably available in Britain. Although the Court of Appeal in *Cope v. Crossingham*<sup>97</sup> held that Section 4 of the 1871 Act precluded an order requiring trustees of a branch to deliver branch funds to the national union in accordance with its rules, a Scottish court in *M'Dowall v. M'Ghee*<sup>98</sup> held that Section 4 was no bar to an action to compel restoration of union funds alleged to have been applied *ultra vires* the rules, and in several other cases British courts have ordered restoration. In two cases union officers were directed to replace funds wrongfully invested in a Labour Party newspaper,<sup>99</sup> and in *Oram v. Hutt*<sup>100</sup> a court ordered a union's general secretary to repay funds held to have been wrongfully applied to pay his costs in a libel action, stating: "Having this money of the association in his hands, he applied it in payment of costs, which was *ultra vires*, and he is consequently liable to replace it." Section 12 of the 1871 Act expressly provides that any person on behalf of a trade union, or the Registrar of Friendly Societies, may bring complaint in a court of summary jurisdiction alleging that an officer or member of a registered trade union has obtained union property "by false representation or imposition" or has "wilfully" withheld or "fraudulently" misapplied union property, or has "wilfully" applied union property *ultra vires*; and that the court may summarily order the officer or member to "deliver up" property in his possession "or to repay the amount of money applied improperly."

<sup>95</sup> See p. 45 *supra*.

<sup>96</sup> *E.g.*, *Malone v. Superior Court*, 254 P.2d 517 (Cal. App. 1952); *Local 720 v. Dednasek*, *supra* note 77; *Roberts v. Kennedy*, *supra* note 92; *Collins v. IATSE*, *supra* note 77; *Dusing v. Nuzzo*, *supra* note 77; *Steinmiller v. McKeon*, *supra* note 77; *Duke v. Franklin*, 177 Ore. 297, 162 P.2d 141 (1945); *Wilson v. Miller*, 194 Tenn. 390, 250 S.W.2d 575 (1952).

<sup>97</sup> *Supra* note 51.

<sup>98</sup> [1913] 2 S.L.T. 238.

<sup>99</sup> *Bennett v. Amalgamated Society of Operative House & Ship Painters*, (1915) 31 T.L.R. 203; *Carter v. United Society of Boilermakers*, (1915) 32 T.L.R. 40.

<sup>100</sup> *Supra* note 71. Section 4 does not appear to have been argued in the case.

## RECEIVERSHIP

In addition to an order restraining further misapplication of funds and requiring accounting and reimbursement, American courts have on occasion resorted to the more extreme remedy of appointing a receiver to conduct the union's financial affairs.<sup>101</sup> Usually this remedy is invoked only where it is found that the defendant officers exercise a despotic control over the union's affairs, and have maintained themselves in office by blocking the normal election procedure. For example, in *Robinson v. Nick*<sup>102</sup> a representative of a national union took over the affairs of a branch, suspended elections, threatened opponents with expulsion, restricted discussion of union business, and accepted bribes from employers. The court removed the agent from office and appointed a receiver to preserve the assets pending an election, saying:

There is ample authority for the proposition that in accordance with general rules, and in a proper case, a receiver may be appointed to conserve the property of an association. . . .

A labor union, being concededly but a voluntary unincorporated association, falls squarely within such category, and there are cases to be found involving labor unions wherein receivers have been appointed in aid of pending suits in which the matters to be determined were not unlike those in issue in the case at bar. . . .

This is not to say that the receiver in such a case shall be expected to bring pressure to bear upon an employer for a closed shop, or to call a strike, or to take his place in the picket line, for none of such things pertaining to the policies of the union and the personal activities of its members are any part of his function as a receiver. To the contrary, his function as an officer of the court by which he is appointed, and from which he derives whatever power he possesses, is only to receive, manage, protect, and preserve the property committed to his possession, holding it during the pendency of the suit for the benefit of all parties concerned.

The Board-of-Monitors device used in the recent Teamsters case and described in the next chapter is a variation on the receivership remedy.<sup>103</sup> That remedy has not been used by British courts; and, indeed, it has been held in *Sansom v. London & Provincial Union*<sup>104</sup> that the appointment of a receiver for union funds would contravene Section 4 of the 1871 Act.

In a suit for injunction, accounting, or receivership, a successful American plaintiff may obtain reimbursement for reasonable attorney's

<sup>101</sup> *E.g.*, *Fagan v. Clark*, 148 N.E.2d 407 (Ind. App. 1958); *Robinson v. Nick*, 235 Mo. App. 461, 136 S.W.2d 374 (1940); *Collins v. IATSE*, *supra* note 77. See Comment, *Appointment of Receivers in Labor Unions*, 42 YALE L.J. 1244 (1933).

<sup>102</sup> *Supra* note 101.

<sup>103</sup> See p. 187 *infra*.

<sup>104</sup> (1920) 36 T.L.R. 666.

fees from the union treasury.<sup>105</sup> In Britain, of course, attorney's fees are generally awarded as part of costs to the successful litigant,<sup>106</sup> but in the United States the general rule is contrary, and recovery of attorney's fees in union misapplication suits represents an exception in favor of class suits to preserve a common fund.<sup>107</sup> According to one decision, a successful plaintiff in a suit for accounting may recover attorney's fees from the union treasury even though the officer-defendant did not comply with the court's order to repay misappropriated funds.<sup>108</sup>

### CRIMINAL PENALTIES

In the United States, criminal penalties are available under the general law for prosecution of outright theft or embezzlement of union property. The same is true in Britain, but in addition Section 12 of the 1871 Act provides special criminal remedies for offenses against union property.

Apart from misuse of union funds, the taking of bribes by, or the giving of bribes to, union officials has also been subject to criminal penalties in the United States.<sup>109</sup> The federal Hobbs (Antiracketeering) Act,<sup>110</sup> which makes it a crime to obstruct, delay, or affect commerce "by robbery or extortion," has been applied to such acts as extortion of money by threat of strike<sup>111</sup> or of losing a union contract.<sup>112</sup> Section 302 of the Taft-Hartley Act prohibits any employer payments to union officials, with specified exceptions.<sup>113</sup> Several states have made bribery of union officials a crime,<sup>114</sup> though so far there has been only one reported conviction.<sup>115</sup>

### AFL-CIO SANCTIONS

In addition to legal remedies, notice should be taken of formal sanctions provided by the American labor movement itself. The AFL-CIO

<sup>105</sup> *O'Connor v. Harrington*, *supra* note 73 (attorney's fees reduced from \$5,000 to \$3,500), *appeal denied*, 139 N.Y.S.2d 919; *Schliefer v. Sherman*, 1-A L.R.R.M. 714 (N.Y. Sup. Ct. 1937); *Vaccaro v. Gentile*, 138 N.Y.S.2d 872 (Sup. Ct. 1955).

<sup>106</sup> 31 HALSBURY, SOLICITORS 182 ff. (2d ed.).

<sup>107</sup> 20 C.J.S. *Costs* § 218.

<sup>108</sup> *Schliefer v. Sherman*, *supra* note 105 (the fact that the officer responsible for misappropriation resigned was considered sufficient benefit to the class).

<sup>109</sup> See Note, 67 YALE L.J. 732 (1958); 32 N.Y.U.L. REV. 965 (1957).

<sup>110</sup> 18 U.S.C. § 1951 (1952).

<sup>111</sup> *United States v. Postma*, 242 F.2d 489 (2d Cir. 1957), *cert. denied*, 354 U.S. 922 (1957).

<sup>112</sup> *United States v. Masiello*, 235 F.2d 279 (2d Cir. 1956), *cert. denied*, 352 U.S. 882 (1956).

<sup>113</sup> "In operation, Section 302 has neither reduced bribery and extortion nor eliminated corrupt or inefficient welfare funds." Note, 67 YALE L.J. 732 (1958).

<sup>114</sup> E.g., N.Y. PENAL LAW § 380. Other general antibribery statutes might apply, but so far have not been invoked. See Note, 58 COLUM. L. REV. 78, 91-92 (1958).

<sup>115</sup> *People v. Chester*, 4 Misc. 2d 949, 158 N.Y.S.2d 829 (1956).

constitution contains provisions for discipline of unions found to be "dominated, controlled or substantially influenced" by totalitarian or corrupt forces. In order to effectuate these broad provisions, the AFL-CIO 1957 convention adopted six Codes of Ethical Practices, which set forth standards of ethical conduct for unions relating to the issuance of local-union charters, conflict of interests, proper accounting procedures, criminals serving as union officers, control over union funds, and union democracy. Since its formation in 1955, the AFL-CIO has disciplined six unions for corrupt practices. Three were placed under probation, with an AFL-CIO-appointed monitor to oversee their affairs; and three were expelled. While AFL-CIO discipline has not proved an effective deterrent in the case of such large unions as the Teamsters and Bakery Workers, in the case of smaller unions, more dependent upon AFL-CIO support, it has worked reasonably well.<sup>116</sup>

#### EFFECT OF THE LMRDA

The LMRDA in effect confirms the common-law right of union members to bring civil suit to remedy misapplication of union funds by providing in Section 501(b) that in the event of violation of Section 501(a), which declares the fiduciary responsibility of union officers,<sup>117</sup> a member may bring suit in either federal or state court "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." Two conditions are attached to such an action, however, neither of which are present at common law. One is that the member must have requested the union itself (or its governing board or officers) to obtain relief, without success "within a reasonable time." The other is that leave of the court must first be obtained "upon verified application and for good cause shown." The application may, however, be made *ex parte*. As is the case with common-law suits, the trial judge is empowered to award expenses and attorney's fees to the plaintiff, but only from the sums recovered in such action.<sup>118</sup>

In addition to civil remedies, the Act makes theft or embezzlement of union funds or assets by officers or employees a federal crime, punishable by fine up to \$10,000, imprisonment for five years, or both;<sup>119</sup> and Section 302 of the Taft-Hartley Act is revised to make it clear that bribery of, or receipt of bribes by, union officials is likewise a criminal act.<sup>120</sup>

<sup>116</sup> See Hutchinson, *The Constitution and Government of the AFL-CIO*, 76 CALIF. L. REV. 739 (1958).

<sup>117</sup> See p. 159 *supra*.

<sup>118</sup> Cf. *Schliefer v. Sherman*, *supra* note 105.

<sup>119</sup> § 501(c).

<sup>120</sup> § 505. Violators are subject to a fine of up to \$10,000, or one year in jail, or both.

The Act contains two unique requirements for the holding of union office or employment. One is that all officers and employees must be bonded for the faithful discharge of their duties to the extent that they handle union funds or property.<sup>121</sup> The other is that no person who has been a member of the Communist Party or who has been convicted of certain specified felonies<sup>122</sup> may serve as a union officer or employee (except in a custodial or clerical capacity) for a period of five years after termination of party membership or after conviction (or the end of imprisonment therefor).<sup>123</sup> Apart from the questionable relationship of such a provision to the safeguarding of union funds, it is doubtful whether more than a handful of labor leaders will be affected.

### DISCLOSURE

If, as we have seen to be the case, there exist reasonably adequate common-law remedies against the types of financial wrongdoing disclosed by the United States Senate's investigating committee, how is it that the wrongdoing occurred, and continued to occur, over a long period of time? No simple answer is possible. Assuredly one reason was fear—fear by union members that, in spite of the existence of legal rules forbidding discipline for instituting lawsuits,<sup>124</sup> they might be discriminated against by those in power.<sup>125</sup> Another, perhaps the most important, was apathy—lack of concern on the part of some members about anything their leaders did, so long as they received reasonable improvements in wages and conditions over the bargaining table. Indeed, it is possible that some members of unions whose officers were alleged to be guilty of high living at the expense of union funds were actually proud of the fact that their leaders ranked with those of industry in standard of living and ability to milk “the organization” of funds through padded expense accounts.<sup>126</sup> But undoubtedly a most significant reason for the lack of legal action to correct intra-union financial abuse was

<sup>121</sup> § 502. Officers and employees of trusts in which a union is interested must also be bonded. The amount of the bond must be not less than 10 per cent of the funds handled. Bonds may not be placed through agents or brokers or with a surety company in which any union or any union officer has any direct or indirect interest.

<sup>122</sup> The offenses are robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, violation of Titles II or III of the Act, or conspiracy to commit any such crimes. § 504(a).

<sup>123</sup> In the case of a person convicted or imprisoned, the prohibition may be lifted before the end of the five-year period if his citizenship rights were revoked and have been fully restored, or if the Board of Parole of the Department of Justice determines that the bar should be lifted. Willful violation is made a crime, punishable by fine up to \$10,000, one year's imprisonment, or both. § 504(b).

<sup>124</sup> See p. 132 *supra*.

<sup>125</sup> Cf. Dusing v. Nuzzo, *supra* note 77.

<sup>126</sup> See ROBERTS, UNIONS IN AMERICA: A BRITISH VIEW (1959).

ignorance—ignorance not only of the legal remedies available, but of the abuse itself. One of the glaring features of the Senate disclosures was the genuine surprise they evoked even among persons close to the labor movement. While in some cases wrongdoing was fairly suspected, even before the investigation commenced, in others it came as a shock to nearly everyone but the principals involved. This fact suggests the importance of disclosure as an integral element of the law relating to control over union funds and property.

#### DISCLOSURE IN BRITAIN: THE TRADE UNION ACT OF 1871

For nearly a century disclosure has formed the keystone in the British pattern of legal control over intra-union affairs. The Trade Union Act of 1871 contains a variety of provisions designed to make available to members of registered unions the details of their unions' financial affairs.

The Act requires every registered union, upon registration<sup>127</sup> and annually thereafter,<sup>128</sup> to transmit to the Registrar of Friendly Societies a general statement of assets and liabilities, and of receipts and expenditures for the preceding year. The union must also file with the Registrar rules and amendments to rules specifying the purposes for which union funds may be used, and the financial statement must list expenditures separately under the heading of the applicable rule. The general statement is required to be in a form and with the particulars specified by the Registrar. Unions are required to furnish copies of the statement to any member who asks for one, without charge. Penalties are provided for failure to comply with these requirements, or for making false entries or omissions.<sup>129</sup>

The Act also requires that every treasurer or other officer of a registered union render periodic accounts to the trustees or the members at a union meeting, and that the accounts be audited by some "fit and proper" person or persons selected by the trustees.<sup>130</sup> The union rules must also provide for the inspection of the books by "every person having an interest in the funds of the trade union."<sup>131</sup>

#### DISCLOSURE IN THE UNITED STATES

American law contained no provisions for disclosure of financial records by unions until 1947, when the Taft-Hartley law was enacted.

<sup>127</sup> § 13(4).

<sup>128</sup> § 16.

<sup>129</sup> *Ibid.*

<sup>130</sup> § 11.

<sup>131</sup> Sched. 1, § 6.



In substance and effect, Sections 9(f), (g), and (h) added to the NLRA by that law were practically identical with the provisions of the Trade Union Act of 1871 discussed above. Like the 1871 Act, Taft-Hartley did not require financial reporting by all unions, but only by those unions that wished to obtain certain other benefits—in this case, the services of the National Labor Relations Board.<sup>132</sup> In order to obtain those services, a union was required initially and annually to file with the Secretary of Labor a financial report showing: “(a) its receipts of any kind and the sources of such receipts; (b) its total assets and liabilities at the end of its last fiscal year; and (c) the disbursements made by it during such fiscal year, including the purposes for which made.” The Secretary of Labor was authorized to prescribe the form and details of the financial report. Prior to 1957 the reporting form in use by the Secretary was in some ways not so detailed as that required by the Registrar of Friendly Societies, but the form was changed in that year to require considerably greater detail than before, presumably in response to disclosures made by the Senate investigating committee. As in Britain, copies of the financial report were to be made available to the union membership.<sup>133</sup>

There were, however, certain differences between the two statutes. Unlike the 1871 Act, Taft-Hartley made no provision for accounts by union officers in addition to the annual report, although it did require that a union’s rules contain provision for an audit of union financial transactions.<sup>134</sup> Taft-Hartley did not require that members be allowed to examine union financial records, though that right is undoubtedly granted by common law.<sup>135</sup> More significantly, perhaps, the Taft-Hartley Act did not require that union rules specify the purposes for which union funds may be used.

Why did these provisions not serve to prevent the financial abuses disclosed by the Senate investigating committee? Again, there are a number of reasons. Some of them (apathy, fear) we have already discussed; but there are others. For one, many of the instances of wrongdoing pointed to in the committee’s report consisted of breach of fiduciary obligation by making secret profits or maintaining adverse financial interests. These matters would not be disclosed in the financial report

<sup>132</sup> Initial registration was a condition to NLRB investigation of any representation election petition or of any unfair labor practice charge filed by a union. § 9(f). The filing of annual reports was a condition to certification and the investigation of an unfair labor practice charge. § 9(g).

<sup>133</sup> The NLRB provides for three methods of distribution: publication in a paper or bulletin distributed to all members, mail to all members, or posting on a bulletin board, together with an announcement that copies are available.

<sup>134</sup> § 9(f)(6).

<sup>135</sup> *E.g.*, *Mooney v. Bartenders Union*, 313 P.2d 857 (Cal. Sup. Ct. 1957).

of the union.<sup>136</sup> For another, some of the instances of wrongdoing involved funds for which no reports were filed. This was true, for example, of various intermediate organizations, such as joint councils and regional conferences of local unions, which did not directly use the services of the National Labor Relations Board, and which, indeed, may not have been "labor organizations" as defined in the Act.<sup>137</sup> This was also true of union welfare or pension funds which were administered outside the union, through joint employer-union boards of trustees. Finally, in those cases in which reports were filed, improper expenditures were sometimes concealed under general categories where they could not be easily discovered.<sup>138</sup>

A number of states have enacted union financial disclosure laws which correct at least one defect in the Taft-Hartley Act: they require disclosure unconditionally, irrespective of benefits. Wisconsin<sup>139</sup> and Hawaii<sup>140</sup> require only that union officials prepare an annual financial report and make it available to the membership, but several states require the filing of financial reports with specified state officials.<sup>141</sup> Alabama requires the most elaborate type of report: unions must list all disbursements "with the names of recipients and the purposes therefor."<sup>142</sup> Oregon requires only that labor organizations maintain accurate and detailed financial records, and that they be open for inspection by members at any time.<sup>143</sup>

The omission of jointly administered welfare and pension plans from filing requirements has been corrected by the Federal Welfare and Pension Plans Disclosure Act, which became effective on January 1, 1959,<sup>144</sup> and by other state statutes to the same effect.<sup>145</sup> The Taft-Hartley Act provided, in effect, that if a collective bargaining agreement called

<sup>136</sup> See Interim Report, *supra* note 88, at 4 ff.

<sup>137</sup> A "labor organization" was defined by Section 2(5) as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

<sup>138</sup> See Interim Report, *supra* note 88, at 61.

<sup>139</sup> WISCONSIN EMPLOYMENT PEACE ACT c. 57, §§ 111.01-111.19.

<sup>140</sup> HAWAII EMPLOYMENT RELATIONS ACT § 90.11.

<sup>141</sup> *E.g.*, KANSAS LABOR RELATIONS ACT § 44-806.

<sup>142</sup> ALA. STAT. § 17.1105 (Supp. 1952). This law requires the reports to show "the salary paid to each officer" and "the total of all expenditures for the preceding year and generally the purposes for which the expenditures were made." A similar statute in Texas was held unconstitutional in *American Federation of Labor v. Mann*, 188 S.W.2d 276 (Tex. Civ. App. 1945).

<sup>143</sup> ORE. STAT. § 66.040.

<sup>144</sup> 72 STAT. 997, 29 U.S.C.A. §§301-309 (Supp. 1958). See Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L.J. 827 (1958).

<sup>145</sup> Six states now have welfare and pension plan disclosure laws: California, Connecticut, Massachusetts, New York, Washington, and Wisconsin.

for moneys to be paid by employers toward medical, retirement, and other similar benefits, such moneys could not be administered by the union directly, but had to be administered by a joint board of trustees, composed of an equal number of employer and union representatives with provision for arbitration in the event of deadlock.<sup>146</sup> It also required that the detailed basis on which benefits would be paid must be contained in a written union-employer agreement. It was thought that joint administration pursuant to a written plan would correct abuses which had been found to exist in plans unilaterally administered by unions.<sup>147</sup> The Senate's investigating committee hearings indicated that this assumption was not correct,<sup>148</sup> and the committee's findings and recommendations led to the Disclosure Act.

Under the Welfare and Pension Plans Disclosure Act, every covered pension or welfare plan (which includes plans unilaterally established by employers as well as those established by or with unions) must file a description of the plan and an annual financial report with the Secretary of Labor. Copies of the plan description and report (which is quite detailed and lengthy) must be available for inspection by any beneficiary; and, upon request, the plan administrator must mail a copy of the plan description and a summary of the financial report to any beneficiary. Willful failure to comply with the Act is made a misdemeanor; and, of greater practical significance, if an administrator fails to supply a beneficiary with a copy of the plan description and report summary upon request, the beneficiary may recover in a civil action the sum of \$50 per day for each day of failure, plus attorney's fees and court costs at the discretion of the judge.

#### EFFECT OF THE LMRDA

The LMRDA, which replaces the Taft-Hartley reporting provisions, requires reports not only from unions but also from their officers and employees, certain employers, and certain labor relations consultants. These reports are to be filed with the Secretary of Labor, as public information. The Secretary is required to make reasonable provision for inspection and examination by any person, and for the furnishing

<sup>146</sup> § 302. This section is continued, with some modifications, under the LMRDA.

<sup>147</sup> See discussion in Note, 67 YALE L.J. 732 (1958).

<sup>148</sup> See *Final Report on Welfare and Pension Plan Investigations*, Subcommittee on Welfare and Pension Funds, Senate Committee on Labor and Public Welfare, S. REP. NO. 1734, 84th Cong., 2d Sess. 23 ff. (1956). The committee found that union operating and welfare funds were being commingled in some instances; that the funds were sometimes used for *ultra vires* purposes; that favoritism existed in the payment of claims; and that union officials sometimes received kickbacks from insurance companies.

of copies of reports or documents filed upon payment of costs.<sup>149</sup> He is authorized to promulgate regulations prescribing the form and publication of reports, and preventing the circumvention or evasion of the reporting requirements. This authority includes the power to prescribe simplified reports for smaller unions and employers, and, after notice and hearing, to revoke permission to use the simplified report in the case of particular unions or employers, when he determines that the purposes of the Act would be served thereby.<sup>150</sup> Persons required to make reports to the Secretary must maintain records on the matters required to be reported, and to preserve such records for a period of five years.<sup>151</sup> Willful violation of the reporting and disclosure requirements is punishable by fine and imprisonment,<sup>152</sup> and the Secretary of Labor is authorized to seek civil remedies as well in the event of violation.<sup>153</sup>

The reports required of labor organizations under the LMRDA are somewhat more detailed versions of those which most unions filed under Taft-Hartley, though the former leaves no option: reports must be filed whether or not the union desires to use the services of the National Labor Relations Board. As under Taft-Hartley, the reports include (1) an initial filing of a copy of the union's constitution and bylaws, together with certain information as to the union's constitutional provisions and internal procedures; and (2) an annual financial report, together with a statement of revisions in the union's constitution, bylaws, and procedures.<sup>154</sup> The Act still does not require that the union's constitution or bylaws contain a statement of the purposes for which union funds may be used. But the financial information is required to be filed "in such categories as the Secretary may prescribe"; and salaries, allowances, and other disbursements, including reimbursed expenses paid to each officer and employee who received more than \$10,000 during the fiscal year, must be separately listed, so that the reports may be more enlightening than before. In addition, the Act defines a "labor organization" as including all intermediate bodies between the local and the national union,<sup>155</sup> so that organizations such as regional conferences will no longer be immune. Finally, in addition to requiring that each union make its organizational and financial reports "available" to its members, the Act gives each member the right,

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<sup>149</sup> § 205.

<sup>150</sup> § 208.

<sup>151</sup> § 206.

<sup>152</sup> § 209.

<sup>153</sup> § 210.

<sup>154</sup> § 201.

<sup>155</sup> § 3(i).

enforceable by suit in federal court, for just cause to examine the union's books, records, and accounts necessary to verify the reports. The court is given the discretion of allowing reasonable attorney's fees and costs in such an action.<sup>156</sup>

The requirement of reports from officers and employees is new. Such persons (other than clerical or custodial employees) must file with the Secretary an annual report on certain types of "conflict of interest" holdings or transactions possessed or engaged in by himself, his spouse, or minor child during the preceding fiscal year.<sup>157</sup> For example, with respect to an employer whose employees the union represents or is actively seeking to represent, the report must show (a) any stock, bond, security, or other interest in the employer's business (excluding securities listed on a registered stock exchange and shares in certain registered investment companies and public utilities); (b) any transactions involving such interests, or involving loans to or from the employer; (c) any income or other benefit with monetary value received directly or indirectly from the employer (including reimbursed expenses, but excluding payments and other benefits received as a bona fide employee of the employer); and (d) any "direct or indirect business transaction or arrangement" with the employer, except in the regular course of an employer-employee or seller-buyer relationship. Subject to similar qualification, the report must likewise show holdings in and income from "any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing" with such an employer, and "any business any part of which consists of buying from or selling or leasing directly or indirectly to, or otherwise dealing with" the union itself. Finally, the report must show "any payment of money or other thing of value" from "any employer or any person who acts as a labor consultant to an employer," with specified exceptions, such as wages, check-off of dues, and similar routine transactions. Except for the last item, the listing of holdings and transactions required to be reported closely parallels those declared improper by the AFL-CIO Codes of Ethical Practices.<sup>158</sup> But, it will be noted, the Act does not expressly outlaw such holdings or transactions, nor state that they will be considered a violation of the fiduciary responsibility declared in Section 501(a). Nor could it reasonably do so, since the Act, interpreted literally, would require a union official to file a report if an employer takes him to lunch in the course of negotiations. It remains to be seen how far the reporting provisions will be read into the substantive provisions of the Act.

<sup>156</sup> § 201(c).

<sup>157</sup> § 202(a).

<sup>158</sup> Code IV.

## Chapter 7

# Union Democracy: Majority Rule and Minority Rights

Democracy within trade unions has been the subject of much discussion in recent years, particularly in the United States.<sup>1</sup> Its popularity as a topic in this country stems mainly from its presumed relationship to the subject of union corruption. It has been widely assumed that if unions were more "democratic" (the term is seldom defined), financial and other wrongdoing on the part of union officers would be minimized. Unless the word "democratic" is taken in an extreme (and wholly impractical) sense to mean a state of affairs in which members in fact exercise complete and direct control over all actions of their officers, it is plain that this assumption is open to serious qualification. For the mere provision of democratic forms and procedures will not assure their use; the problem of apathy may yet remain.<sup>2</sup>

Moreover, it should not be assumed that "democracy," in the sense of more immediate and direct rank-and-file control over union decisions, is an unmitigated social good. A union, like any organization, must have leaders; and those leaders must be granted authority to make decisions on the basis of knowledge and experience which they acquire through their positions of leadership. Direct democracy is as impractical in a union as it is in any form of government—indeed, more so, since a union, like a corporation or an army, has, in comparison to a state, a rather limited function. Its goals are fairly well defined, and the decisions it must make are more in the realm of tactics than of policy, more related to means than to ends. In a field so complex as industrial relations, they are decisions which often call for the exercise of experienced

<sup>1</sup> Among the numerous books and articles on the subject, some of the best are: LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* (1956); Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959); Kovner, *The Legal Protection of Civil Liberties Within Unions*, 1948 WIS. L. REV. 18; Summers, *The Usefulness of Law in Achieving Union Democracy*, 48 AM. ECON. REV. 44 (Supp. 1958), *The Public Interest in Union Democracy*, 53 NW. U.L. REV. 610 (1958), and *Democracy in Trade Unions*, NEW LEADER, Feb. 10, 1959, p. 7; Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

<sup>2</sup> See GOLDSTEIN, *THE GOVERNMENT OF BRITISH TRADE UNIONS* (1952); Seidman, *Requirements for Union Democracy*, 81 MONTHLY LAB. REV. 255 (1958).

judgment. Lack of sufficient authority in union officers may lead to decisions which are detrimental, not only to the long-range welfare of the union, but to the public as well.<sup>3</sup>

A similar qualification is applicable to the expression of minority views and the formation of rival groups within unions. At times a union is engaged in industrial warfare, and at such times it has, perhaps, the same justification for restricting opposition that may threaten its very existence as does a government, or more particularly an army, during time of war. To borrow a phrase from American constitutional law, it may be that the existence of a "clear and present danger" should constitute a limitation upon the right to free speech and organized opposition within a union as it does within a state.<sup>4</sup>

But despite these qualifications, union democracy, in the sense of majority rule through elected representatives and the protection of minority rights, is of great importance, not only because it may have a desirable effect upon union "corruption," where that exists, but for reasons far more basic. In the United States, where unions are granted utility-like powers of representation and the right, widely exercised, to make union membership a condition of employment, the right to participate in union government and to be protected against arbitrary and discriminatory actions seems, in contemporary western society, to be a compelling correlate.<sup>5</sup> But even in Britain, where the public-utility analogy is not so clearly applicable, general democratic principles, taken with the facts of modern industrial life, lead to the same conclusion. Industrial democracy and worker control—long tenets of British trade unionism—have meaning only in terms of membership participation.<sup>6</sup> In this era of organizational activity, occasional delays and mis-

<sup>3</sup> The early experience of British unions with direct democracy is chronicled in WEBB, *INDUSTRIAL DEMOCRACY*, pt. 1, c. 1 (2d ed. 1920). For a modern statement of the importance of leadership control see, on the British side, ALLEN, *POWER IN TRADE UNIONS* (1954), and, on the American side (with particular reference to the public's interest in intra-union stability), Dunlop, *The Public Interest in Internal Affairs of Unions*, 1957 A.B.A. SECTION OF LABOR RELATIONS LAW 10; Jacobs, *Union Democracy and the Public Good*, COMMENTARY, Jan. 1958, p. 68.

<sup>4</sup> See discussion at pp. 132-136 *supra*.

<sup>5</sup> Summers lists six reasons for fostering democracy within unions: (a) the desirability that collective bargaining give meaning to democracy within industry; (b) the legislative character of collective bargaining; (c) the possibility that the public will insist upon limitations of union power unless unions are democratic; (d) the desirability that unions, insofar as they engage in politics, should represent their members' viewpoints; (e) the relationship between democracy and control of corruption; and (f) "the need to maintain and foster favorable conditions for political democracy." *The Public Interest in Union Democracy*, *supra* note 1.

<sup>6</sup> "A union which lends itself . . . to the domination of one man or even a small group of men is failing to achieve one of the single most important functions of trade unionism—the training of the rank and file in the art of self-government." LASKI, *TRADE UNIONS IN THE NEW SOCIETY* 170 (1949).

takes seem a small price to pay for the opportunity of individuals to play a meaningful role in the organizations of which they are a part.

Majority rule, in the context of union democracy, implies, first, that adequate procedures exist for the expression of majority will, through election and removal of officers, and second, that all those employees directly affected by union action (in American terms, all those within the bargaining unit represented by the union) be permitted to participate in those procedures. The relevant minority rights include the right to express dissenting opinions, the right to fair procedure in disciplinary cases, and protection against arbitrary or unreasonable discrimination by the majority.<sup>7</sup> In the chapter on union discipline we have discussed the right to express dissenting opinions and the right to fair disciplinary procedure. Here we shall discuss (1) the right to participate, (2) the election and removal of union officers, (3) direct membership control, (4) the special problem of trusteeships, and (5) protection against arbitrary or discriminatory acts, or what is referred to in the United States as the union's "duty of fair representation."

### THE RIGHT TO PARTICIPATE

Given the fact that unions limit participation in union meetings and elections to their own members, the first essential to participation is union membership. As we have seen in a previous chapter, both British and American courts indirectly protect the right to participate by enforcing contractual and other limitations upon suspension or expulsion of union members; but admission is a different matter. With the exception of Section 3(1)(b) of the Trade Union Act, 1913, which provides that contribution to a union's political fund may not be made a condition for admission,<sup>8</sup> there is, in Britain, probably no limitation upon a union's right to exclude persons from membership. Though British courts have not been squarely faced with the question, it is likely that they would apply to unions the common-law rule which holds that "voluntary" unincorporated associations are free to adopt whatever admission policies they like, without judicial interference.<sup>9</sup>

<sup>7</sup> For another formulation, see Summers' article in the *New Leader*, *supra* note 1: "Union democracy means, first, full freedom of dissent, of criticism, and of opposition. Union democracy requires, second, that decisions shall be made and executed on the basis of the members' expressed desires—the right to choose, even unwisely. Self-government is self-fulfillment. Third, recognition of personal worth requires recognition of the equality of men—the right to fair and equal treatment. Minorities must not be trampled on by assertive majorities. Finally, every person is entitled to be judged only after full and fair hearings before tribunals that have no personal or institutional stake other than the search for justice."

<sup>8</sup> It is questionable whether a person excluded from membership on that ground would have any effective remedy, since the statute does not confer any right to be admitted to a union, but merely invalidates one reason for exclusion.

<sup>9</sup> Cf. *Innes v. Wylie*, (1844) 1 Car. & K. 257.



In the United States, however, while many courts adhere to the hands-off policy of the common law,<sup>10</sup> there is a growing body of statutory and judicial restrictions upon the union's power to exclude.<sup>11</sup> In view of the factual and legal background in which American unions operate, it is not surprising that this should be the case. Legal restrictions upon union admission policies may be based upon one or both of two theories: protection of the "right to work," where union membership is a condition of employment, and protection of the "right to participate," where the union's policies directly affect all workers of a particular class without regard to union membership.<sup>12</sup> On both scores, the case for legal interference is stronger in America than in Britain. The requirement of union membership as a condition of employment is more formalized in the United States, more widespread, and, of most significance, has received statutory sanction.<sup>13</sup> With respect to the "right to participate," though the actions of British unions affect, both economically and legally, the working conditions of nonmembers, such effect is quite indirect and informal compared to the status of the American union as statutory bargaining representative for a unit of employees. Finally, even if the theoretical justifications for judicial control over union admission policies were equivalent in the two countries, a greater exercise of control could be expected in the United States because instances of arbitrary restrictions upon admission are more common in this country than in Britain. Restrictions based upon race, for example, surely the least defensible, are largely absent in Britain, whose population has been relatively homogeneous, but they are quite common among some American unions.<sup>14</sup>

Until recently, American federal labor legislation has contained no direct protection of the right to participate, either by regulating union admission policies or otherwise. Under the Railway Labor Act the National Mediation Board protects that right to the extent of refusing to establish bargaining units on the basis of race or color alone,<sup>15</sup> on

<sup>10</sup> *E.g.*, *Walter v. McCarvel*, 309 Mass. 260, 34 N.E.2d 677 (1941); *Mayer v. Journey-men Stonecutters Association*, 47 N.J. Eq. 519, 20 A.2d 492 (1890); *Miller v. Ruehl*, 166 Misc. 479, 2 N.Y.S.2d 394 (1939); *Pollock v. Theatrical Protective Union*, 45 L.R.R.M. 3072 (N.Y. Sup. Ct. 1960).

<sup>11</sup> For discussion of the cases see, *e.g.*, Newman, *The Closed Shop Union and the Right to Work*, 43 COLUM. L. REV. 45 (1943); Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947).

<sup>12</sup> See Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805 (1951).

<sup>13</sup> See p. 8 *supra*.

<sup>14</sup> See NATIONAL INDUSTRIAL CONFERENCE BOARD, *HANDBOOK ON UNION GOVERNMENT, STRUCTURE, AND PROCEDURES* (1955); Summers, *Admission Policies of Labor Unions*, 61 Q.J. ECON. 66 (1946).

<sup>15</sup> In the Matter of Representation of Employees of Atlanta Terminal, Case No. R-75 (1936); In the Matter of Representation of Employees of Central of Georgia Railway, Case No. R-234 (1936).

the ground that all employees of a craft or class should have the right to vote for the representative of the whole craft or class;<sup>16</sup> but that policy does not protect the right to participate in the government of the union which is selected.<sup>17</sup> Under the National Labor Relations Act, the NLRB has similarly declared its opposition to bargaining units based upon racial discrimination.<sup>18</sup> It has also repeatedly announced an intention to refuse certification to unions which have discriminatory admission or participation policies,<sup>19</sup> but it has never done so.<sup>20</sup> The Board has, however, found employers to be guilty of unfair labor practices by discharging workers pursuant to a union-security contract when the employees had been discriminatorily excluded from union membership.<sup>21</sup>

The Taft-Hartley amendments to the National Labor Relations Act indirectly protect the right to participate by protecting job rights. The Act provides in effect that a union-shop contract, though otherwise lawful, may not be enforced so as to interfere with the employment of any worker to whom union membership was not available "on the same terms and conditions generally applicable to other members," or who has been denied membership "for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."<sup>22</sup> Also, a union having a union-security contract may not charge "excessive or discriminatory" initiation fees.<sup>23</sup> Theoretically these provisions do not prevent a union from adopting whatever discrimination in admission it likes, so long as it does not interfere with the employment of workers covered by union-security contracts; and the Act expressly provides that it does not affect the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership

<sup>16</sup> NATIONAL MEDIATION BOARD, *THE RAILWAY LABOR ACT AND THE NATIONAL MEDIATION BOARD* 17 (1940).

<sup>17</sup> See Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 430 (1949).

<sup>18</sup> *E.g.*, U.S. Bedding Co., 52 N.L.R.B. 382, 388 (1943).

<sup>19</sup> *E.g.*, Carter Manufacturing Co., 59 N.L.R.B. 804 (1944); Atlanta Oak Flooring Co., 62 N.L.R.B. 973 (1945).

<sup>20</sup> See criticism of the Board's inaction in Aaron & Komaroff, *supra* note 17, at 438-446.

<sup>21</sup> *Monsieur Henri Wines, Ltd.*, 44 N.L.R.B. 1310 (1942) (union fraudulently promised employees union membership if they would vote for union in representation election, and then, after winning election, demanded that they be discharged and replaced with union members); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944) (union excluded members of another union which lost NLRB election). The Board has held, however, that it has no authority under the Act to require statutory representatives to admit to membership all employees within the bargaining unit. *Larus & Brother Co.*, 62 N.L.R.B. 1075 (1945).

<sup>22</sup> § 8(a)(3).

<sup>23</sup> § 8(b)(5).

therein.”<sup>24</sup> As a practical matter, however, many unions may prefer to accept employees into membership rather than have them continue to work as nonmembers.

Several states have statutes similar in theory to the Taft-Hartley limitations upon union security;<sup>25</sup> and about one third of the states have Fair Employment Practices laws which more directly protect the right to participate by seeking to eliminate union restrictions upon admission or participation based upon race, creed, color, or national origin.<sup>26</sup> But until recent passage of the LMRDA, the most interesting developments in protection of participation rights came through the state courts rather than through the legislatures. The leading case is *James v. Marinship Corp.*<sup>27</sup> The plaintiffs in that case were Negro shipyard workers. They complained that contracts between the shipyards and the Brotherhood of Boilermakers required them to become members of that union as a condition of employment, but that at the same time the union excluded them from full membership and required them to become members of an “auxiliary” local, with no vote or voice in the affairs of the “white” local, even though it was the white local’s officers who negotiated their contracts, handled their grievances, and dispatched them to employment. The California Supreme Court upheld an injunction restraining both the union and the employer from enforcing the closed-shop agreement against the plaintiffs unless the latter were admitted to membership under the same terms and conditions applicable to non-Negroes.

The basis of the decision was twofold. First, the court ruled that, at least where a union controls a “monopoly” of jobs through closed-shop contracts, it occupies a “quasi-public position similar to that of a public service business and it has certain corresponding obligations”; and that among these is the obligation not to exclude persons from membership for reasons which are arbitrary or unreasonable, that is, not related

<sup>24</sup> § 8(b)(1).

<sup>25</sup> Pennsylvania requires that the union admit all employees except those employed in violation of prior agreements. Colorado, Hawaii, and Wisconsin permit the state labor board to declare union-security agreements terminated if the union has “unreasonably refused to receive as a member” any employee of the employer. In Massachusetts, the labor board is empowered to order unions to admit to membership persons covered by union-security agreements who have been “unfairly” denied admission. See Aaron & Komaroff, *supra* note 17, at 455.

<sup>26</sup> For citation and discussion of most of the FEP statutes, see Note, 68 HARV. L. REV. 685 (1955). The statutes apply to employers and employment agencies as well as to unions. Most of them establish a commission for investigation, hearing, and enforcement. In only a few states does the commission have authority to order admission or reinstatement. Some statutes provide for cease-and-desist orders, and others for fines.

<sup>27</sup> 25 Cal. 2d 721, 155 P.2d 329 (1944).

to the union's function in collective bargaining.<sup>28</sup> Second, and for present purposes even more important, it ruled that exclusion from participation was equivalent to exclusion from membership:

If the union imposes unreasonable and discriminatory restrictions upon Negroes not placed upon members of Local No. 6, and if the auxiliary does not afford its members privileges and protections substantially similar to that afforded to members of Local No. 6, then to compel the Negroes to join the auxiliary, upon penalty of discharge, is the equivalent of a complete denial of union membership.<sup>29</sup>

In subsequent decisions, the California Supreme Court broadened the *Marinship* rule to include instances of exclusion and discrimination for reasons other than race;<sup>30</sup> and at the same time it held that the rule was applicable not only where the union maintained a "monopoly" control of jobs, but in any case where a plaintiff had been denied a job because of nonmembership in a union which arbitrarily excluded him from membership or full participation.<sup>31</sup> Still, it was the "right to work" which received protection, and not exclusively the "right to participate"; job interference was the keystone of the right of action, and the injunction, if granted, gave the union the option of admitting the plaintiff to full membership *or* of refraining from interference with his job rights.

Recently, however, the California Supreme Court, perhaps for the first time in the United States, upheld an order flatly directing a union to admit to membership a person found to have been arbitrarily excluded. In *Thorman v. IATSE*<sup>32</sup> the plaintiff was a member of an "aux-

<sup>28</sup> In reaching this holding, the court relied upon a number of cases from other jurisdictions condemning the closed-shop-closed-union combination, among them *Wilson v. Newspaper & Mail Deliverers Union*, 123 N.J. Eq. 347, 197 Atl. 720 (1938); *Carroll v. Local 269*, 133 N.J. Eq. 144, 31 A.2d 223 (1943); *Dorrington v. Manning*, 135 Pa. Super. 194, 4 A.2d 886 (1939). The court also relied in part upon the policy of the National Labor Relations Act. See p. 179 *infra*.

<sup>29</sup> The court cited as authority for this proposition the New Jersey case of *Cameron v. International Alliance of Theatrical Stage Employees*, 118 N.J. Eq. 11, 176 Atl. 692 (1935), which held that arbitrary classification of union members was contrary to public policy. The court also held that the discriminatory practices involved were contrary to the public policy of the United States and of California, as declared in their respective constitutional provisions prohibiting discrimination, and as expressed in the common-law rule that public-service businesses, such as innkeepers and common carriers, are required to furnish services to all persons in the absence of some reasonable ground for refusal.

<sup>30</sup> *Bautista v. Jones*, 25 Cal. 2d 746, 155 P.2d 343 (1944) (independent peddlers); *Riviello v. Journeymen Barbers Union*, 88 Cal. App. 2d 499, 199 P.2d 400 (1948) (self-employed barber); *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958) (failure to win membership approval). Cf. *Dotson v. IATSE*, 34 Cal. 2d 362, 210 P.2d 5 (1949) (denying relief on ground that plaintiffs failed to show they had met reasonable requirements for union membership).

<sup>31</sup> *E.g.*, *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 629, 165 P.2d 903 (1946).

<sup>32</sup> *Supra* note 30.

iliary" local of motion picture projectionists. As such, he did not possess the security of employment and seniority of members of the "main" local, nor did he have a voice in its organization or negotiations. The plaintiff applied for membership in the main local and, according to the court, met all the "lawful and reasonable" qualifications therefor, but he was denied admission on the ground that he failed to receive a favorable two-thirds vote of the membership, as required by the union's constitution. After rejection of the plaintiff's application, the main local dispatched a newly admitted journeyman to "bump" him from his job, in accordance with the provisions of the collective bargaining agreement which gave members of that local "bumping" seniority. Apparently on the ground that the requirement of a two-thirds vote was an "arbitrary" restriction upon admission, the trial court granted a writ of mandamus directing the union to admit the plaintiff to membership. Although counsel for the union argued before the California Supreme Court that the remedy went beyond the precedent and theory of prior cases, the court sustained the writ without comment as to that point.

It is difficult to explain such an order except on the theory that an individual within a bargaining unit represented by a union has a right, quite apart from his right to work, to participate in that union's affairs. Indeed, in the case of a union operating as statutory bargaining representative, under state or federal legislation, that theory would seem to follow from the position of the United States Supreme Court that such a union has a statutory, if not constitutional, obligation to represent fairly all employees within the bargaining unit.<sup>33</sup> As the California court said in *Marinship*, "It is difficult to see how a union can fairly represent all the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in determining union policy." In *Betts v. Easley*<sup>34</sup> the Supreme Court of Kansas so ruled, holding that the maintenance, by a union certified to represent employees under the Railway Labor Act, of a subordinate nonparticipating lodge for Negroes, constituted a violation of the due process clause of the federal constitution. The actions of the union, the court held, were governmental rather than private in nature because the union was "acting as an agency created and functioning under provisions of Federal law." Certainly, the court said, "the denial to a workman, because of race, of an equal voice in determining issues so vital to his economic welfare,

<sup>33</sup> *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). See p. 196 *infra*.

<sup>34</sup> 161 Kan. 459, 169 P.2d 831 (1946).

under the Railway Labor Act, is an infringement of liberty if indeed it may not also be said to be a deprivation of property rights."

More recently, however, in *Oliphant v. Brotherhood of Locomotive Firemen*<sup>35</sup> a federal circuit court of appeals ruled that neither the provisions of the Railway Labor Act nor the federal constitution required a railway brotherhood to admit Negroes to membership, in the absence of any claim of discrimination in representation. The only participation guaranteed by the Act, the court ruled, was the initial right to vote for a bargaining representative, and the provisions of the constitution were inapplicable because no governmental action was involved.<sup>36</sup> The United States Supreme Court denied certiorari with the cryptic comment that the denial was "in view of the abstract context in which questions sought to be raised are presented by this record." It may be that Supreme Court action would be forthcoming if, as in the school segregation cases,<sup>37</sup> evidence were introduced showing the effect of segregation upon representation.

#### EFFECT OF THE LMRDA

The LMRDA does not affect union admission policies directly, but it does codify the Marinship-Betts no-discrimination rule in general language. Section 101(a)(1) of the Act provides:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, *subject to reasonable rules and regulations in such organization's constitution and bylaws.* (Emphasis added.)

While the italicized language suggests that a union might, by "reasonable rules and regulations," qualify the right to vote, it is provided elsewhere in the Act that union officers shall be elected by secret ballot "among the members in good standing";<sup>38</sup> that "every member in good standing . . . shall have the right to vote for or otherwise support the candidate or candidates of his choice";<sup>39</sup> and that "Each member in good standing shall be entitled to one vote" in election of officers.<sup>40</sup> Further, the terms "member" and "member in good standing" are defined in the Act<sup>41</sup> to include

<sup>35</sup> 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 355 U.S. 893 (1959).

<sup>36</sup> To the same effect, see *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).

<sup>37</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>38</sup> § 401(a).

<sup>39</sup> § 401(e).

<sup>40</sup> *Ibid.*

<sup>41</sup> § 3(o).

...any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

It is arguable under the Act, therefore, that a person excluded from membership is nevertheless entitled to participate if his exclusion was for reasons other than his failure to meet the union's requirements for membership.<sup>42</sup>

### THE ELECTION AND REMOVAL OF UNION OFFICERS

Judged by the governmental analogy, most unions in both countries provide reasonably adequate procedures for election and (though this is not quite so clear) removal of union officers.<sup>43</sup> Consequently, enforcement of union rules as a contract probably tends to a just result in this area more than in any other. Nevertheless, the Congress of the United States has now supplemented contract theory with statute. We shall discuss both the common law and the LMRDA under four headings: (a) the holding of union elections, (b) eligibility for office, (c) the conduct of elections, and (d) removal from office.

### THE HOLDING OF UNION ELECTIONS

British courts have not so far been faced with a claim by a union member that his union refuses to hold an election at the time or interval specified by its constitution or rules. In the United States several such cases have reached the courts. In one recent case, the Supreme Court of Indiana held that a trial court had no "jurisdiction" to order an election because no "civil or property rights" were involved;<sup>44</sup> but other American courts have granted relief by directing that an election be held,<sup>45</sup> and, in some cases, where mishandling of union funds was

<sup>42</sup> Cf. *Hughes v. Local 11, Bridge, Structural & Ornamental Iron Workers*, 47 L.R.R.M. 2734 (3d Cir. 1961) (complaint alleging that plaintiff, a member of one local, had fulfilled all requirements of union's constitution and bylaws for transfer to second local, but had been denied Title I rights in that local, held to state a cause of action).

<sup>43</sup> For discussion of election procedures in British unions, see ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* (1955); in American unions, see TAFT, *STRUCTURE AND GOVERNMENT OF LABOR UNIONS* (1954).

<sup>44</sup> *State ex rel. Givens v. Superior Court*, 65 Ind. App. 471, 117 N.E.2d 553 (1954). Cf. *Fagan v. Clark*, 148 N.E.2d 407 (Ind. App. 1958).

<sup>45</sup> E.g., *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (1941), discussed at p. 62 *supra*; *Chambers v. International Hodcarriers Union*, 52 F. Supp. 76 (D.D.C. 1943); *Tobacco Workers International Union v. Weyler*, 280 Ky. 355, 132 S.W.2d 754 (1939); *Webster v. Rankins*, 50 S.W.2d 746 (Mo. App. 1932); *Harris v. Geier*, 112 N.J. Eq. 99, 164 Atl. 50 (1932); *O'Neill v. United Association of Journeymen Plumbers*, 348 Pa. 532, 36 A.2d 325 (1944).

alleged, by appointing a receiver for the purpose of both protecting the funds and supervising the election.<sup>46</sup>

*Effect of the LMRDA.* The LMRDA contains provisions which affect both the holding of elections and the remedies available for failure to hold them. All "officers" of national unions must be elected not less often than once every five years;<sup>47</sup> "officers" of local unions every three years;<sup>48</sup> and "officers" of intermediate bodies such as general committees, system boards, joint boards, or joint councils, every four years.<sup>49</sup> The term "officer" is defined in the Act as:

any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.<sup>50</sup>

These provisions will require many unions to change their governing rules with respect to both the frequency of elections and the officers to be elected.

If a union fails to hold an election within the time prescribed by its constitution and bylaws or by the Act, any member, after having exhausted available intra-union remedies (or having failed to obtain a final decision after three months of invoking them), may file a complaint with the Secretary of Labor;<sup>51</sup> and the Secretary, if he finds reasonable cause to believe that a violation of the Act or of the union's constitution or bylaws has occurred and has not been remedied, must within sixty days bring civil action against the union in a federal district court;<sup>52</sup> and the court, if it finds upon a preponderance of the evidence that there has been a violation, must direct an election under supervision of the Secretary and, "so far as lawful and practicable," in conformity with the union's own rules. The Secretary is then required to certify to the court the names of the persons elected, and the court is to enter a decree declaring such persons to be the union's officers.<sup>53</sup>

In some ways, these remedies are likely to be more effective than the common-law remedies presently available. For one, they make it clear

<sup>46</sup> *E.g.*, *Fagan v. Clark*, *supra* note 44; *Dusing v. Nuzzo*, *supra* note 45; *Local 11 v. McKee*, 114 N.J. Eq. 555, 169 Atl. 351 (1935). In *Kegg v. Bianco*, 89 Pitt. L.J. 447 (Pa. C.P. 1941), the court held nominations for office in the courtroom. See Note, 51 YALE L.J. 1372 (1942).

<sup>47</sup> § 401(a).

<sup>48</sup> § 401(b).

<sup>49</sup> § 401(d).

<sup>50</sup> § 3(n).

<sup>51</sup> § 402(a).

<sup>52</sup> § 402(b). This section also gives the court power to "take such action as it deems proper to preserve the assets of the labor organization."

<sup>53</sup> § 402(c).



that a claim of "no property rights" is not a defense; for another, they remove expense as a deterrent to legal action. In other ways they may be less effective: the added step of the Secretary may occasion more delay, and it is possible that exhaustion of remedies will be required under the Act where it would not be required at common law.<sup>64</sup> However, the Act expressly provides that existing rights and remedies to enforce a union's constitution and bylaws with respect to elections (prior to the conduct thereof) shall not be affected,<sup>65</sup> so that a selective plaintiff may obtain the speediest remedy under the circumstances.

#### ELIGIBILITY FOR OFFICE

What requirements a person must meet before he is eligible for nomination and election for union office is likewise, in the absence of statute, a matter for the union's constitution and bylaws; and before passage of the LMRDA there were no statutory requirements in either England or America.

In the only British case on the subject, *Watson v. Smith*,<sup>66</sup> the court granted relief to a member who claimed that his name was improperly left off the ballot in a coming union election. The applicable rule required as a condition for nomination that the member have "worked at the industry, or signed a vacant book [that is, an unemployment register] and resided for the twelve months immediately preceding nomination" in a particular locality. The plaintiff had resided in the specified locality for the appropriate twelve-month period, but for eight months of that period he was off work because of illness. The court held that on a "true construction" of the rule, plaintiff was eligible, and granted an injunction restraining the union's executive council from holding an election without allowing his nomination.

American courts seem more hesitant to intervene in such situations, particularly where intervention would mean upsetting an election already held or (though the hesitancy is less) postponing a scheduled election.<sup>67</sup> This hesitancy is typically expressed indirectly, either by

<sup>64</sup> Exhaustion of remedies was not required in the cases cited above in which elections were directed. See *Rarick v. United Steelworkers of America*, 47 L.R.R.M. 2343 (W.D. Pa. 1960) (denying temporary order restraining election on grounds, *inter alia*, of nonexhaustion).

<sup>65</sup> § 403. See *Beiso v. Robilotto*, 47 L.R.R.M. 2590 (N.Y. Sup. Ct. 1960) (holding state court has jurisdiction over action to have plaintiffs' names placed on ballot).

<sup>66</sup> [1941] 2 All E.R. 725.

<sup>67</sup> See *Local 2 v. National Organization of Masters, Mates & Pilots*, 11 D. & C.2d 75, 34 CCH LAB. CAS. ¶ 71,357 (Pa. C.P. 1955), where the court frankly recognized the necessity, in election cases, "to meet the practicality of the situation" by interpreting union rules so as to avoid overturning an election! No such reluctance is apparent where the relief sought is to prevent interference by the parent organization with a scheduled election. *E.g.*, *Daley v. Stickel*, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958); *Maineculf v. Robinson*, 41 L.R.R.M. 2493 (N.Y. Sup. Ct. 1958).

insisting upon exhaustion of intra-union remedies (which would appear to be futile in most election situations) or by interpreting the eligibility rules strictly against the complaining member, or both.

For example, in *Clarke v. Corr*,<sup>58</sup> where the plaintiff sought to set aside a union election on the ground that his name was improperly omitted from the ballot, the court denied relief on the ground that the plaintiff's membership in the union from November 7 of one year to November 6 of the next (the date of his nomination for office) did not meet the union's eligibility rule requiring "one year or more continuous membership," and on the further ground that the plaintiff had failed to exhaust available remedies. But in *Harrison v. O'Neill*,<sup>59</sup> where the plaintiff sought to set aside an election on the ground, among others, that the candidates who were elected should have been declared ineligible, the court, in addition to holding that the plaintiff should be required to exhaust intra-union remedies, declared that the candidate in question met the requirements of an eligibility rule that he be "in good standing and has been a member for one year," despite the fact that he was "suspended" for nonpayment of dues for a portion of the year, on the ground that the rule required good standing only as of the date of nomination.

It may be that the American courts are more willing to restrain an election than to set one aside,<sup>60</sup> but even in that type of case they appear hesitant, perhaps because of the delay involved. Thus, in *Harris v. Local 544*,<sup>61</sup> where the plaintiff sought to enjoin the holding of an election without his name on the ballot, the court denied relief on the ground that, although the plaintiff had been a member of the union for eight years, he had not been "in good standing for a period of two years prior to nomination," as required by the union's constitution, since he had never made payment of one month's dues in advance, as required of members subject to dues checkoff by their employers.<sup>62</sup>

*Effect of the LMRDA.* Against this background of nonintervention, the provisions of the LMRDA may have far-reaching effects, both sub-

<sup>58</sup> 145 N.Y.S.2d 125 (Sup. Ct. 1955). See also *Maloney v. District 1, United Mine Workers*, 308 Pa. 251, 162 Atl. 225 (1932).

<sup>59</sup> 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950). See also *O'Connell v. O'Leary*, 167 Misc. 324, 3 N.Y.S.2d 833 (1938).

<sup>60</sup> Cf. *McGrave v. Severino*, 249 App. Div. 112, 291 N.Y.S. 303 (1936) (restraining election on ground defendant ineligible for office under union rules); *Litwin v. Novak*, 193 N.Y.S.2d 310 (App. Div. 1959) (restraining parent union from conducting second election in local union).

<sup>61</sup> 36 CCH LAB. CAS. ¶ 65,225 (Minn. Dist. Ct. 1958). See also *Stephenson v. Stone-man*, 306 P.2d 1000 (Cal. App. 1957).

<sup>62</sup> Cf. *Strano v. Local 609, United Association of Journeymen Plumbers*, 298 Pa. 97, 156 A.2d 522 (1959) (denying injunction against scheduled election for lack of exhaustion of internal remedies).

stantively and procedurally. Substantively, the Act contains prohibitions against certain persons holding union office. Section 504 provides that, with certain exceptions, no person "who is or has been a member of the Communist Party" or who has been convicted of certain specified crimes may hold union office for five years after termination of his membership in the Communist Party or for five years after conviction (or end of imprisonment).<sup>63</sup> Subject to that section, and to "reasonable qualifications uniformly imposed," Section 401 of the Act provides that "every member in good standing shall be eligible to be a candidate and to hold office."

Procedurally, the Act makes available to persons improperly disqualified as candidates the same administrative remedies it affords in the case of violation of other election provisions.<sup>64</sup> The member, after appropriate attempts at exhaustion of intra-union remedies, may file a complaint with the Secretary of Labor, who, if he finds reasonable cause to believe that a violation of Section 401 or of the union's constitution and bylaws has been committed, brings an action in federal court. If the court finds that a violation has occurred and that it "may have affected the outcome of an election," it must declare the election to be void, and direct a new election under supervision of the Secretary and "so far as lawful and practicable in conformity with the constitution and bylaws of the labor organization." Pending final decision upon the outcome, the challenged election is presumed valid.<sup>65</sup> These remedies for challenging an election already conducted are made exclusive.<sup>66</sup>

It is significant that the Act does not give the Secretary the power to seek, or the courts the power to grant, any injunctive relief against an election about to be held. Although Section 403 provides that the remedial provisions of the Act do not affect "existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof," a member who complains that the provisions of his union's constitution and bylaws relating to eligibility for office are not "reasonable" within the meaning of Section 401 must presumably wait until the election is held before he can seek relief.<sup>67</sup> Further, the apparent unwillingness of courts to

<sup>63</sup> See p. 165 *supra*.

<sup>64</sup> See p. 182 *supra*.

<sup>65</sup> § 402(a).

<sup>66</sup> § 403. See *Myers v. International Union of Operating Engineers*, 45 L.R.R.M. 3045 (E.D. Mich. 1960).

<sup>67</sup> *Byrd v. Archer*, 45 L.R.R.M. 2289 (S.D. Cal. 1959); *Johnson v. San Diego Waiters & Bartenders Union*, 47 L.R.R.M. 2450 (1961); *Rarick v. United Steelworkers*, *supra* note 54.

interfere in questions of eligibility makes it doubtful whether effective relief at the pre-election stage is available. The Act does not specify whether a member who is unsuccessful in an attempt to block an election in a state court on the ground that his name has been omitted from the ballot contrary to the union's constitution or bylaws may utilize the Act's remedies after the election has been conducted.

#### THE CONDUCT OF AN ELECTION

British courts have not had occasion to pass upon questions relating to the manner in which an election of union officers is conducted. As in the case of questions relating to eligibility for union office, American courts seem reluctant to intervene, at least where it is not clear that the departure from union rules requirements affected the outcome of the election, and this reluctance is similarly expressed by holding either that the member must exhaust intra-union remedies<sup>68</sup> or that there was no substantial violation of the union's rules.<sup>69</sup> Although the rule in *Foss v. Harbottle* is technically inapplicable, since personal rights are involved,<sup>70</sup> it is possible that this reluctance is based upon the policy of that rule not to interfere with majority decisions on matters which do not require more than a majority vote. On that basis, it may be that British courts, also, would decline to interfere in such cases.<sup>71</sup>

Where, however, the impropriety of the election procedure raises a substantial doubt as to whether the results will express or have properly expressed the desires of the membership, as where the members received inadequate notice that the election would be held,<sup>72</sup> or where those conducting the election were guilty of fraud,<sup>73</sup> American courts

<sup>68</sup> *E.g.*, *Gray v. Atkins*, 122 N.Y.S.2d 36 (Sup. Ct. 1953); *Leahigh v. Beyer*, 67 Ohio L. Abs. 79, 116 N.E.2d 458 (1953). See discussion in Summers, *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958).

<sup>69</sup> *E.g.*, *Carey v. International Brotherhood of Paper Makers*, 123 Misc. 680, 206 N.Y.S. 73 (1923) (defect did not affect outcome of election); *Kennedy v. Doyle*, 140 N.Y.S.2d 899 (Sup. Ct. 1955) (fact that nomination meeting was held two months earlier than time specified in union rules did not warrant holding election invalid where two thirds of membership were present and no one protested); *Zacharias v. Siegal*, 40 L.R.R.M. 2300 (N.Y. Sup. Ct. 1957) (where candidate died just before election, action of executive board in appointing replacement was not invalid, where such procedure not expressly prohibited by bylaws and ratified by general membership); *La Monte v. Smith*, 45 L.R.R.M. 2007 (N.Y. Sup. Ct. 1959) (requiring showing that irregularities would have affected outcome). *Cf.* *Ford v. Curran*, 133 N.Y.L.J., April 10, 1955, 28 CCH LAB. CAS. ¶ 69,221 (N.Y. Sup. Ct. 1955) (incumbent officers violated constitution by using union newspaper in election campaign, but relief denied on ground that plaintiffs were guilty of laches for failing to seek relief prior to the election). *Accord*, *Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748 (1950).

<sup>70</sup> See pp. 86 ff. *supra*.

<sup>71</sup> See pp. 190 ff. *infra*.

<sup>72</sup> *Fisher v. Kempter*, 25 L.R.R.M. 2189 (N.Y. Sup. Ct. 1949).

<sup>73</sup> *E.g.*, *Lacey v. O'Rourke*, 147 F. Supp. 922 (S.D.N.Y. 1956); *Siblia v. Western Electric Employees Association*, 142 N.J. Eq. 77, 59 A.2d 251 (1948); *Longo v. Reilly*, 35

have granted relief. The forms of relief granted in such cases have been rather ingenious. In one case, a court granted a temporary injunction restraining the installation of elected officers, on the ground that there was "grave doubt" whether reasonable notice of the election had been given to members as required by the union's constitution.<sup>74</sup> In another, where the plaintiff members sought to restrain the defendant incumbents from tampering with or destroying the ballots cast, the court not only granted the injunction requested, but appointed a receiver to count the ballots and insure installation of the duly appointed officers.<sup>75</sup> In a third, the court awarded damages to a member deprived of office through fraudulent conduct of an election, on the theory that interference with his "title and emoluments of office" constituted a tort.<sup>76</sup>

The most dramatic instance of judicial intervention in union election procedure is the Teamster monitorship device. That device grew out of a suit by members of the International Brotherhood of Teamsters to restrain the holding of a national convention, on the grounds, among others, that delegates had not been properly selected and that the incumbent officers had conspired to "rig" the election by securing the votes of improperly elected delegates. The trial court granted the requested injunction,<sup>77</sup> but the Court of Appeals reversed on the ground that it was not necessary in order to prevent irreparable injury.<sup>78</sup> After the election, at which the incumbent slate was returned to office, the plaintiffs on similar grounds sought and obtained an order restraining those elected from taking office.<sup>79</sup> The plaintiffs and defendant officers then agreed to a decree which established a three-man monitoring committee composed of one person nominated by the plaintiffs, one by the union, and one chosen by the other two. This Board of Monitors was granted broad powers to "insure the enforcement and protection of all rights of the individual members and the subordinate bodies of the [union] as guaranteed by the provisions of the International Constitution." In particular, they were granted power to make recommendations to the national executive committee on appeals, to draft a model code of local-union bylaws, and to review and establish adequate financial accounting procedures. The monitorship was to last for one year and thereafter until a convention was called by the executive com-

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N.J. Super. 405, 114 A.2d 302 (1955); *Allis-Chalmers Local 248 v. Wisconsin Employment Relations Board*, 8 L.R.R.M. 1148 (Wis. Cir. Ct. 1948).

<sup>74</sup> *Fisher v. Kempter*, *supra* note 72.

<sup>75</sup> *Siblia v. Western Electric Employees Association*, *supra* note 73.

<sup>76</sup> *Longo v. Reilly*, *supra* note 73.

<sup>77</sup> *Cunningham v. English*, 40 L.R.R.M. 2650 (D.D.C. 1957).

<sup>78</sup> 40 L.R.R.M. 2653 (D.C. Cir. 1957).

<sup>79</sup> 40 L.R.R.M. 2693 (D.D.C. 1957), *preliminary injunction granted*, 41 L.R.R.M. 2022 (D.D.C. 1957), *modified*, 41 L.R.R.M. 2044 (D.C. Cir. 1957).

mittee.<sup>80</sup> But in late 1958, when the committee issued a call for convention, the monitors opposed on the ground that the union had not cooperated with their attempts to "clean house"; and, despite the fact that the monitorship decree was by consent, the monitors were successful in having it modified so as to prohibit a convention being held without their approval.<sup>81</sup> The Board of Monitors remains as a unique means of judicial regulation over internal union affairs.

*Effect of the LMRDA.* Even more dramatic, however, are the provisions of the LMRDA relating to the conduct of an election. These provisions, which are enforceable by the same procedures available in the case of provisions relating to eligibility of candidates,<sup>82</sup> require that:

1) All union elections for officers must be by secret ballot among the membership,<sup>83</sup> except that national officers and officers of intermediate bodies may be elected by delegates chosen by secret ballot.<sup>84</sup>

2) The union must comply with "all reasonable requests" of candidates to distribute campaign literature at their own expense to all members in good standing, and must refrain from discriminating among candidates with respect to use of membership lists or with respect to authorization or expense of campaign literature.<sup>85</sup> This duty is enforceable in civil court at the suit of any bona fide candidate. In addition, candidates must be given the opportunity, at least once during the thirty-day period prior to an election, to inspect a list of all members who are subject to a collective bargaining agreement requiring membership as a condition of employment.<sup>86</sup>

3) "Reasonable opportunity" must be given for the nomination of candidates.<sup>87</sup>

<sup>80</sup> See 43 L.R.R.M. 2217 (D.D.C. 1958).

<sup>81</sup> *Ibid.*; *aff'd*, 265 F.2d 379 (D.C. Cir. 1959).

<sup>82</sup> See p. 185 *supra*.

<sup>83</sup> § 401(b).

<sup>84</sup> §§ 401(a) and (d).

<sup>85</sup> § 401(c). The section provides that every union "shall be under a duty, enforceable at the suit of any bona fide candidate for office . . ." to comply with such requests and refrain from such discrimination. The section goes on to require that candidates be given the right to inspect membership lists and that adequate safeguards to insure a fair election be provided. It is not clear whether the provision for enforcement at the suit of a candidate applies to the entire section or only to the first portion.

<sup>86</sup> § 401(c). This provision represents a compromise with the original House version, which gave every candidate the right to copy the membership list. Unions objected on the ground that the list could be used by employers or other unions to unfair advantage.

<sup>87</sup> § 401(e). This subsection also provides that every member in good standing shall be eligible to be a candidate and to hold office, subject to Section 504 (relating to felons and Communists) and to reasonable qualifications uniformly imposed; and to vote for or otherwise support the candidates of his choice without discipline or interference. These provisions are discussed elsewhere.

4) Notice of the election must be mailed to all members at least fifteen days in advance.<sup>88</sup>

5) The votes cast by members of each local union must be counted, and the results published, separately.<sup>89</sup>

6) "Adequate safeguards to insure a fair election" must be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.<sup>90</sup>

7) Ballots and other records pertaining to the election (or, in the case of elections by delegates, then the credentials of the delegates and all minutes and other convention records pertaining to the election) must be preserved for one year.<sup>91</sup>

8) No union funds may be "contributed or applied to promote the candidacy of any person," though they may be utilized for "notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election."<sup>92</sup>

#### REMOVAL OF OFFICERS

The validity of removal or suspension of union officers poses much the same issues as the validity of member discipline in general. American courts have held that union office is a "property right"<sup>93</sup> which can be interfered with only for the reasons<sup>94</sup> and by the methods<sup>95</sup> specified in the union's rules; and the same sort of public-policy limitations upon the grounds for disciplinary action apply.<sup>96</sup> Adequate notice and hearing must also be granted,<sup>97</sup> though it is possible that a national union may, if its constitution so authorizes, remove local officers without hearing where the welfare of the union or its finances are threatened.<sup>98</sup> Though British courts have not passed upon all these questions, it appears

<sup>88</sup> § 401(e).

<sup>89</sup> *Ibid.*

<sup>90</sup> § 401(c).

<sup>91</sup> §§ 401(e) and (f).

<sup>92</sup> § 401(g). The section reads: "No moneys received by any labor organization by way of dues, assessment, or similar levy. . . ." *Quaere* whether the section applies to income from investments. The section also prohibits employers from contributing to union election campaigns.

<sup>93</sup> *E.g.*, *Bianco v. Eisen*, 75 N.Y.S.2d 914 (Sup. Ct. 1944). *Cf.* *Bires v. Barney*, 203 Ore. 107, 277 P.2d 751 (1954).

<sup>94</sup> *E.g.*, *Schrank v. Brown*, 80 N.Y.S.2d 452 (Sup. Ct. 1948).

<sup>95</sup> *E.g.*, *Sullivan v. McFetridge*, 183 Misc. 106, 50 N.Y.S.2d 385 (1944); *Barkowitz v. Bobelak*, 73 N.Y.S.2d 534 (Sup. Ct. 1947).

<sup>96</sup> *Cf.* *Schrank v. Brown*, *supra* note 94.

<sup>97</sup> *E.g.*, *Talton v. Behncke*, 199 F.2d 471 (7th Cir. 1952); *Harris v. Geier*, 112 N.J. Eq. 99, 164 Atl. 50 (1932); *Bianco v. Eisen*, *supra* note 93.

<sup>98</sup> *E.g.*, *Martin v. United Slate, Tile & Composition Roofers*, 77 A.2d 136 (Md. App. 1950). *Cf.* *Retail Clerks v. Westling*, 41 Wash. 2d 90, 247 P.2d 253 (1952) (national union may take over local's affairs in emergency, but may not suspend local officers without hearing).

that they, likewise, would apply to the removal or suspension of officers the same standards they apply to discipline of members.<sup>99</sup> In neither country, however, is the holding of office such a "property right" that the term of office cannot be cut short by appropriate amendment to the union's constitution or rules,<sup>100</sup> although it is possible that the displaced officer may have a claim against the union for salary for breach of contract.<sup>101</sup>

*Effect of the LMRDA.* The LMRDA hits at another problem entirely in this regard. On the basis of a finding that many unions do not provide adequate procedures for removal of union officers,<sup>102</sup> the Act provides indirectly that local unions must do so. The Secretary of Labor is authorized to promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of removal procedures, and if the Secretary finds, after hearing, that a particular union's constitution and bylaws do not meet those standards, then an officer of that union may be removed "for cause shown and after notice and hearing" by the membership voting in a secret ballot.<sup>103</sup> It has been held that the Act provides no protection to officers discharged or removed from office.<sup>104</sup>

### DIRECT MEMBERSHIP CONTROL

Apart from the election of officers and delegates, nearly all unions provide for some degree of direct membership control over union policies through meetings or referendum. A frequent source of litigation in both countries is the claim that the procedure followed in determining membership opinion violated some union rule or parliamentary principle of general application.

<sup>99</sup> *Burn v. National Amalgamated Labourers Union*, [1920] 2 Ch. 364 (plaintiff's suspension from office held wrongful on grounds that (1) the union's rules did not give its executive committee authority to suspend a person from one office because of negligence in a prior office, and (2) in any event, no proper notice or hearing had been afforded); *O'Neill v. Transport & General Workers Union*, [1934] I.R. 634 (removal of branch officer for demanding investigation of union secretary held improper).

<sup>100</sup> *Amalgamated Society of Engineers v. Jones*, (1913) 29 T.L.R. 484; *Frolich v. Schimel*, 107 N.Y.S.2d 502 (Sup. Ct. 1951).

<sup>101</sup> *Cf. Elevator Operators v. Newman*, 186 P.2d 1 (Cal. Sup. Ct. 1947) (dicta); *Amalgamated Society of Engineers v. Jones*, *supra* note 100 (dicta). See the comparable problem in company law: *Southern Foundries Ltd. v. Shirlaw*, [1940] A.C. 701 (awarding damages for breach of contract by articles amendment cutting short plaintiff's term of office).

<sup>102</sup> Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. REP. No. 1417, 85th Cong., 2d Sess. 4 (1958).

<sup>103</sup> § 401(h).

<sup>104</sup> *Strauss v. International Brotherhood of Teamsters*, 179 F. Supp. 297 (E.D. Pa. 1959); *Jackson v. Martin Co.*, 180 F. Supp. 475 (D. Md. 1960); *Flaherty v. United Steelworkers of America*, 46 L.R.R.M. 2483 (S.D. Cal. 1960); *Kelly v. Streho*, 47 L.R.R.M. 2609 (E.D. Mich. 1961).



Where it is fairly clear that the action taken has the support of a majority of the membership, courts of both countries, as in the elections cases, are unwilling to interfere on the basis of minor irregularities in procedure. For example, though notice of the subject matter of a special meeting may be an implied requirement even where not expressed in the union's rules,<sup>105</sup> and though a major variance between the notice given and the subject matter acted upon may give rise to a claim for relief,<sup>106</sup> courts of both countries allow considerable latitude before intervening.<sup>107</sup>

On the other hand, both British and American courts have intervened to invalidate referendum votes taken in an unfair manner. For example, in *Brodie v. Bevan*<sup>108</sup> an English court held that a ballot for imposition of a levy was improperly taken where it contained the statement, "If you want the same society you must vote in favor of these proposals," and where the votes were counted separately for each branch rather than anonymously on a national basis, as required by the union's rules. A further ballot in the same connection was held improper because it contained the name of the voter, a requirement of secrecy being implied from the union's rules. Again, in *Booth v. Amalgamated Marine Workers Union*<sup>109</sup> a ballot for proposed amalgamation was held invalid on the grounds, among others, that in the first instance the balloting was not kept open a sufficient time to permit all members to vote, that it was later reopened because the results were not pleasing to the proponents, and that some members voted more than once.<sup>110</sup> Though American courts have not so far implied a requirement for

<sup>105</sup> *E.g.*, *Marvin v. Manash*, 153 P.2d 250 (Ore. Sup. Ct. 1944).

<sup>106</sup> *Ibid.* (special meeting called to take action on proposed contract could not dispose of funds).

<sup>107</sup> In Britain, this latitude may be expressed in the form of the rule in *Foss v. Harbottle*, *e.g.*, *Cotter v. National Union of Seamen*, (1929) 45 T.L.R. 352, 2 Ch. 58; or on the ground that the variance is a "mere irregularity," *e.g.*, *Amalgamated Society of Engineers v. Jones*, *supra* note 100 (notice of intent to alter rule by changing number of members of executive committee held sufficient to support amendment cutting short their term of office). In America, the cases have involved primarily votes for secession, *e.g.*, *Harker v. McKissock*, 1 N.J. Super. 510, 62 A.2d 405 (1948); *Suffridge v. O'Grady*, 84 N.Y.S.2d 211 (Sup. Ct. 1948). American courts have declined to intervene on the basis of other types of "minor irregularities" as well. *Cf.* *Mayo v. Great Lakes Greyhound Lines*, 333 Mich. 205, 52 N.W.2d 665 (1952) (seniority agreement was duly ratified despite plaintiffs' contentions that the question was unfairly stated at a union meeting, that there was not time for discussion, and that the vote was improperly taken, where it appeared that a majority favored the proposal and it was subsequently ratified by mail ballot); *Finley v. Duffy*, 88 Ohio App. 159, 94 N.E.2d 466 (1950) (referendum increasing salaries of officers upheld despite irregularities where it was subject to ratification by convention).

<sup>108</sup> (1921) 38 T.L.R. 172.

<sup>109</sup> [1926] Ch. 904.

<sup>110</sup> A further ground for decision was that the vote for amalgamation was not sufficient to satisfy the statutory requirements. See note 118 *infra*.

secret ballot,<sup>111</sup> they have enforced union constitutional requirements in that regard, even as against proof of custom that secret ballots were not ordinarily used.<sup>112</sup>

Finally, courts of both countries will intervene if the result of the vote taken does not satisfy the requirement of the union's rules for approval by more than a majority.<sup>113</sup> In Britain, where the rule in *Foss v. Harbottle* normally applies to intra-union procedure, such intervention falls within a well-recognized exception to that rule.<sup>114</sup>

Both countries have statutes requiring that particular intra-union matters be passed upon by specified procedures, though the matters covered are quite different. In Britain, political rules are required to be adopted by ballot in a special manner.<sup>115</sup> And the Trade Union Act of 1876,<sup>116</sup> as amended,<sup>117</sup> prescribes a procedure for amalgamation of unions,<sup>118</sup> as does the Societies Act of 1940 for "transfer of engagements,"<sup>119</sup> though whether those methods are exclusive is subject to question.<sup>120</sup>

#### EFFECT OF THE LMRDA

In the United States, the LMRDA prescribes statutory procedures for increases in dues and initiation fees and for the levying of general or special assessments. In the case of a local union, such action may be

<sup>111</sup> *E.g.*, *Rowan v. Possehl*, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940) (ballot adopting new constitution held valid despite fact that in some locals ballot was not secret: "I am satisfied on the evidence that the members in good standing freely and voluntarily voted overwhelmingly in favor of adoption of this constitution").

<sup>112</sup> *Waldman v. Ladisky*, 101 N.Y.S.2d 87 (Sup. Ct. 1950); *Wilkens v. Scofield*, 144 N.Y.S.2d 78 (Sup. Ct. 1955). *Cf.* *Fritsch v. Rarback*, *supra* note 69 (referendum invalid because not conducted by secret ballot, but equitable relief denied on ground of laches).

<sup>113</sup> *E.g.*, *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (vote to increase subscriptions, required by rules to be passed by two-thirds majority by ballot, was taken without any ballot); *Edwards v. Leopoldi*, 20 N.J. Super. 43, 89 A.2d 264 (1952) (vote for secession invalid where specified minority remained loyal; but *cf.* pp. 150 ff. *supra*).

<sup>114</sup> See pp. 86 ff. *supra*.

<sup>115</sup> Trade Union Act, 1913, 2 & 3 Geo. 5, c. 30. The ballot must be taken in accordance with the rules of the union, and those rules must satisfy the Registrar that every member has an equal right and, if reasonably possible, a fair opportunity of voting, and that true secrecy of the ballot is properly secured. § 4(1). Or, in the alternative, the political rules may be adopted in any manner which satisfies the Registrar that they have the approval of a majority of members voting, or of a majority of delegates voting at a meeting called for the purpose. § 4(2).

<sup>116</sup> 39 & 40 Vict. c. 22, § 12.

<sup>117</sup> Trade Union (Amalgamation) Act, 1917, 7 & 8 Geo. 5, c. 24.

<sup>118</sup> A ballot must be taken of the members of each union; at least half the members of each union must record their votes; and the vote in favor of amalgamation must exceed the vote against by at least 20 per cent.

<sup>119</sup> 3 & 4 Geo. 6, c. 19. The Act provides that one union may "transfer its engagements to another by a special resolution passed by two-thirds vote." See CITRINE, TRADE UNION LAW c. 8 (1950).

<sup>120</sup> See Citrine, *op. cit. supra* note 119, at 267.

taken only by majority of the members voting by secret ballot, either in a referendum or at a membership meeting "after reasonable notice of the intention to vote upon such question."<sup>121</sup> In the case of national unions or intermediate bodies, such action may be taken in any of three ways: (1) by majority of the members voting in a secret ballot referendum; (2) by majority of the delegates voting at a convention; or (3) by majority of the members of the executive board or governing body. The last method may be used, however, only if expressly authorized by the union's constitution and bylaws, and even then the action is effective only until the next regular convention of the union.<sup>122</sup>

### TRUSTEESHIPS

In the United States, locals are normally far more independent of national control than in Britain. But most American unions provide in their constitutions that under certain conditions a national union may place a local under "trusteeship" or "receivership," the effect of which is that a representative of the national union completely takes over its affairs, to the exclusion of its own officers and local control. Although such action is normally taken only in the event of dishonesty or wrongdoing on the part of local officials, occasionally the trusteeship is used as a device to stifle political opposition, or possibly even to enhance the financial position of union officers.<sup>123</sup>

The common law has proved only moderately effective in dealing with such situations. The courts will interfere if the union's constitution contains no provision for trusteeship;<sup>124</sup> or if the ground upon which the trusteeship is imposed is clearly beyond the scope of the grounds specified in the constitution;<sup>125</sup> or if the constitutional procedure is not followed.<sup>126</sup> In addition, courts will insist upon fair notice and hearing at some point,<sup>127</sup> though some courts permit the initial imposition of trusteeship without notice or hearing in the event of an "emergency," so long as an appeal is granted within a reasonable

<sup>121</sup> § 101(a)(3)(A). See *Brooks v. Local 30, Tile Workers*, 46 L.R.R.M. 2994 (E.D. Pa. 1960) (ambiguous ballot held proper in absence of fraud or proof of confusion).

<sup>122</sup> § 101(a)(3)(B).

<sup>123</sup> See Interim Report of the Select Committee, *supra* note 102, at 4.

<sup>124</sup> *E.g.*, *Harris v. Geier*, *supra* note 97.

<sup>125</sup> *E.g.*, *Canfield v. Moreschi*, 49 N.Y.S.2d 903 (1943).

<sup>126</sup> *E.g.*, *Spitzer v. Ernst*, 190 Misc. 47, 72 N.Y.S.2d 570 (Sup. Ct. 1947); *Local 2 v. National Organization of Masters, Mates & Pilots*, 11 D. & C.2d 75, 34 CCH LAB. CAS. ¶ 71,357 (Pa. C.P. 1955).

<sup>127</sup> *E.g.*, *O'Brien v. Matual*, 14 Ill. App. 2d 173, 144 N.E.2d 446 (1957); *Hickman v. Kline*, 71 Nev. 55, 279 P.2d 662 (1955) (no notice of charges); *Washington Local Lodge 104 v. International Brotherhood of Boilermakers*, 203 P.2d 1019 (Wash. Sup. Ct. 1949).

time.<sup>128</sup> Misuse of local funds during the existence of a trusteeship may be grounds for an accounting.<sup>129</sup> But courts have no way of restricting the duration of a trusteeship unless it lasts longer than a time specified in the union's constitution. As a result, members of local unions are sometimes deprived of any control over their union's affairs for long periods of time.<sup>130</sup>

#### EFFECT OF THE LMRDA

The LMRDA contains provisions designed to remedy some of these problems. First, it specifies the purposes for which a trusteeship may be established:

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements, or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.<sup>131</sup>

Second, it lessens the possibility of persons obtaining political or financial advantage through imposition of trusteeships by providing (a) that the vote of delegates of a local under trusteeship may not be counted unless the delegates were chosen in an election in which all members in good standing were eligible to participate by secret ballot, and (b) that the funds of a local under trusteeship may not be transferred to the parent body except for the payment of regular per capita taxes and assessments.<sup>132</sup>

Third, it provides for disclosure of facts relevant to these limitations by requiring that the parent organization file a report with the Secretary of Labor within thirty days from the imposition of trusteeship and semi-annually thereafter, showing, among other matters, the reasons for establishing or continuing the trusteeship, and the nature and extent of participation by local members in the election of delegates and the election of national officers. The statement of the financial condition

<sup>128</sup> *E.g.*, *Mixed Local v. Hotel & Restaurant Employees*, 212 Minn. 587, 4 N.W.2d 771 (1942); *Garcia v. Ernst*, 101 N.Y.S.2d 693 (Sup. Ct. 1951). *Contra*, *International Union of Operating Engineers v. Pierce*, 321 S.W.2d 914 (Tex. Civ. App. 1959).

<sup>129</sup> *E.g.*, *O'Neill v. United Association of Journeymen Plumbers*, 348 Pa. 532, 36 A.2d 325 (1944); *Retail Clerks v. Westling*, 41 Wash. 2d 90, 247 P.2d 253 (1952).

<sup>130</sup> See Interim Report of the Select Committee, *supra* note 102, at 4.

<sup>131</sup> § 302.

<sup>132</sup> § 303(a). Willful violation is made a crime, subject to \$10,000 fine, one year's imprisonment, or both. § 303(b).

of the local under trusteeship and annual financial reports must be filed.<sup>133</sup>

The first two sets of limitations are enforceable either at the direct suit of any member or subordinate body affected by a violation, or at the suit of the Secretary of Labor upon complaint by any member or local of the national union involved.<sup>134</sup> If, however, the trusteeship was established in conformity with the procedural requirements of the union's constitution and bylaws, and was authorized or ratified after a fair hearing before the union's executive board or equivalent body, then it is "presumed valid" for a period of eighteen months, and is not "subject to attack" during that period except upon "clear and convincing proof" that it was not established or maintained for a purpose allowable by the Act. After eighteen months it is "presumed invalid" and its discontinuance must be decreed unless there is clear and convincing proof that continuance is necessary for an allowable purpose.<sup>135</sup> Presumably the phrase "subject to attack" refers to an attack on the very existence of the trusteeship, and does not preclude an attack upon the method of selection of delegates from a trustee local, or upon the use of the local's funds, whether or not the purpose of the trusteeship is proper. The disclosure provisions relating to trusteeships are enforceable in the same manner as other disclosure provisions of the Act.<sup>136</sup>

### THE DUTY OF FAIR REPRESENTATION

The foregoing portions of this chapter have dealt with what might be regarded as the procedural aspects of union democracy—with the mechanics by which the majority's will is expressed. But what about the minority? They have the right to express their opinions, but until such time as they may be successful in having those opinions adopted by a majority, do they have any legal right to object to substantive decisions of the majority which may appear arbitrary or discriminatory? In Britain, this question has not arisen in the courts and is not likely to do so. But in the United States, where many unions function as statutory bargaining representatives, and where the equal protection clause of the federal constitution provides a ready analogy, there is a growing body of precedent which imposes upon the union a duty to

<sup>133</sup> § 301(a). Willful violation is made a crime, subject to \$10,000 fine, one year's imprisonment, or both. § 301(b).

<sup>134</sup> § 304(a). *Executive Board, Local 28 v. International Brotherhood of Electrical Workers*, 46 L.R.R.M. 2159 (D. Md. 1960). *But cf. Rizzo v. Ammond*, 182 F. Supp. 456 (D.N.J. 1960) (holding members may not sue without first filing complaint with Secretary of Labor).

<sup>135</sup> § 304(c).

<sup>136</sup> See p. 170 *supra*.

represent all employees within the bargaining unit in a fair and impartial manner.<sup>187</sup>

The leading case is *Steele v. Louisville & Nashville R.R.*<sup>188</sup> The case arose from an attempt by the Brotherhood of Locomotive Firemen and Enginemen, which had been certified under the Railway Labor Act as bargaining representative for all firemen employed on the railroad, to make agreements with the company which would have the effect of excluding Negroes from seniority rights. Negroes were not permitted to become members of the Brotherhood, nor did they receive any notice of or opportunity to participate in the seniority decision. The plaintiffs, suing as representative of all Negro firemen, sought to enjoin enforcement of the agreements. The United States Supreme Court, reversing a judgment of an Alabama court, held that the plaintiffs were entitled to relief, saying:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. . . . Without attempting to mark the allowable limits of differences in the terms of contracts based on difference of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.

The *Steele* doctrine of fair representation is applicable to unions

<sup>187</sup> See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

<sup>188</sup> 323 U.S. 192 (1944).

acting under Taft-Hartley as well as those acting under the Railway Labor Act,<sup>139</sup> and it extends, not only to the negotiation of a collective bargaining agreement, but to its administration as well.<sup>140</sup> Furthermore, as the *Steele* decision indicates, the doctrine is not limited to discrimination based upon race; all discriminations based upon differences irrelevant to the union's function in collective bargaining are prohibited.<sup>141</sup> In most nonracial situations, however, courts are reluctant to interfere unless the basis for discrimination is clearly arbitrary.<sup>142</sup>

Since the American union is supposed to be the statutory representative of *all* employees within the appropriate bargaining unit, regardless of membership or nonmembership in the union, it is a violation of the *Steele* doctrine for a statutory representative to discriminate against nonmembers in the negotiation or administration of collective bargaining agreements, except to require union membership as a condition of employment to the extent authorized by the applicable statute.<sup>143</sup> The doctrine is, in effect, codified in the Taft-Hartley provisions which prohibit a union from causing or attempting to cause an employer to encourage or discourage union membership by "discrimination in regard to hire or tenure of employment or any term or condition of employment."<sup>144</sup>

The National Labor Relations Board has applied the Taft-Hartley prohibitions in such a way as to regulate indirectly union discriminations not based upon union membership. In the *Mountain Pacific* case,<sup>145</sup> the Board held that a union may not operate an exclusive hiring hall (that is, an arrangement whereby employers are required to call on the union for employees) unless it meets certain conditions, one of

<sup>139</sup> *E.g.*, *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Syres v. Local 23, Oil Workers International Union*, 350 U.S. 892 (1956), *reversing per curiam* 223 F.2d 739 (5th Cir. 1955).

<sup>140</sup> *E.g.*, *Conley v. Gibson*, 355 U.S. 41 (1957). The duty applies also to unwritten discriminatory arrangements. *Dillard v. Chesapeake & Ohio Ry.*, 199 F.2d 948 (4th Cir. 1952).

<sup>141</sup> *Cf.* *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

<sup>142</sup> "... a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, *supra* note 141. For criticism of the "equal protection" standard as applied to the duty of fair representation, see Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1339-43 (1958).

<sup>143</sup> *Cf.* *Wallace Corp. v. NLRB*, *supra* note 139.

<sup>144</sup> §§ 8(a)(3), 8(b)(2).

<sup>145</sup> *Associated General Contractors (Mountain Pacific Chapter)*, 119 N.L.R.B. 883 (1958). Enforcement has been denied by the Court of Appeals for the Ninth Circuit, but that ruling has not affected the position of the NLRB. See also at common law: *Walsche v. Sherlock*, 110 N.J. Eq. 223, 159 Atl. 661 (1932) (injunction against discriminatory referral system); *Selles v. Local 174*, 50 Wash. 2d 660, 314 P.2d 456 (1957) (holding member discriminated against in job referrals may sue in tort for damages).

them being the posting of criteria to be used in selecting persons for referral to jobs. The stated reason for the requirement was that unless standards for referral were codified in some manner, the union dispatcher might give preference to those who were union members in good standing. The practical effect of the requirement, however, is to limit the exercise of the dispatcher's discretion so as to minimize other preferences (such as personal friendship) not based upon the union's function as bargaining representative.

In the absence of discrimination involving race or union membership, courts have granted union majorities wide latitude in bargaining over such matters as forced retirement,<sup>146</sup> computation of vacation pay,<sup>147</sup> and changes in seniority,<sup>148</sup> even where the results are clearly to the disadvantage of a minority. Occasionally, however, courts have invoked the duty of fair representation to invalidate majority action which deprives a minority of a right which they have enjoyed for a long period of time. For example, in *Brotherhood of Railroad Trainmen v. Luckie*<sup>149</sup> a union was enjoined from assigning employees of one railroad to operate a train on another, to the exclusion of the employees on the second railroad who customarily operated that train. And in *Hargrove v. Brotherhood of Locomotive Engineers*<sup>150</sup> employees of the Louisville & Nashville Railroad who for several years had enjoyed a separate seniority district within the Oak Ridge Atomic Energy Reservation were held to state a cause of action when they alleged that their union, for the purpose of permitting other members to take over their jobs, had negotiated a new contract with the railroad merging their seniority district with the remainder of the railroad's properties.

It may be that the duty of fair representation extends beyond a duty not to discriminate unfairly and embraces a duty to act affirmatively for the best interests of members. Such a duty might be discussed in terms of the due process clause of the American constitution, but more appropriate is the analogy to the duty of an agent to represent his principal with due diligence, or to the duty of a corporate director to exercise reasonable business judgment in the conduct of the corpora-

<sup>146</sup> *E.g.*, *Goodin v. Clinchfield R.R.*, 229 F.2d 578 (6th Cir. 1956); *McMullans v. Kansas, O. & A. R.R.*, 229 F.2d 50 (10th Cir. 1956).

<sup>147</sup> *E.g.*, *Foster v. General Motors Corp.*, 191 F.2d 907 (7th Cir. 1951) (in absence of bad faith, permissible to compute vacation pay on basis of earnings during preceding calendar year). *Accord*, *Doherty v. General Motors Corp.*, 176 F.2d 561 (3d Cir. 1949).

<sup>148</sup> *Britt v. Trailmobile Co.*, 129 F.2d 569 (6th Cir. 1950), *cert. denied*, 340 U.S. 820 (1950) (to give employees of one company seniority over another). *Cf.* *Walker v. Pennsylvania Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A.2d 453 (1948) (in merger of two companies, it was permissible to dovetail the seniority rosters).

<sup>149</sup> 286 S.W.2d 712 (Tex. Civ. App. 1955).

<sup>150</sup> 116 F. Supp. 3 (D.D.C. 1953).



tion's affairs. In one recent case, for example, a member of a union was held to have stated a cause of action when he alleged that union officers responsible for administering the collective bargaining agreement had failed to prosecute his wage and seniority claims against the employer with due diligence.<sup>151</sup> Clearly this is dangerous ground for legal intervention, but it probably represents the frontier in the American law relating to legal control over intra-union affairs.<sup>152</sup>

<sup>151</sup> *Glover v. Brotherhood of Railway & Steamship Clerks*, 108 S.E.2d 79 (N.C. Sup. Ct. 1959). See also *Fletcher v. Colorado & Wyoming Ry.*, 347 P.2d 156 (Colo. Sup. Ct. 1959) (allegations of fraud). *Cf. Marchitto v. Central R.R.*, 9 N.J. 456, 88 A.2d 851 (Ct. Err. & App. 1952) (complaint of negligence held to state a cause of action against officer, but not against union). *Accord, McClees v. Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 18 N.E.2d 812 (1938). *But cf. Terrell v. Local Lodge 758, International Association of Machinists*, 309 P.2d 130 (Cal. App. 1957) (no cause of action for failure to process grievance in absence of express agreement to do so). The problem relates to whether a member himself has standing to sue or to compromise a claim arising under a collective bargaining agreement. See Cox, *Individual Enforcement of a Labor Agreement*, 8 LAB. L.J. 850 (1957).

<sup>152</sup> *Cf. Allen v. Local 820, Armored Car Chauffeurs*, 45 L.R.R.M. 2067 (D.N.J. 1960) (LMRDA held inapplicable to suit for failure to process grievance).

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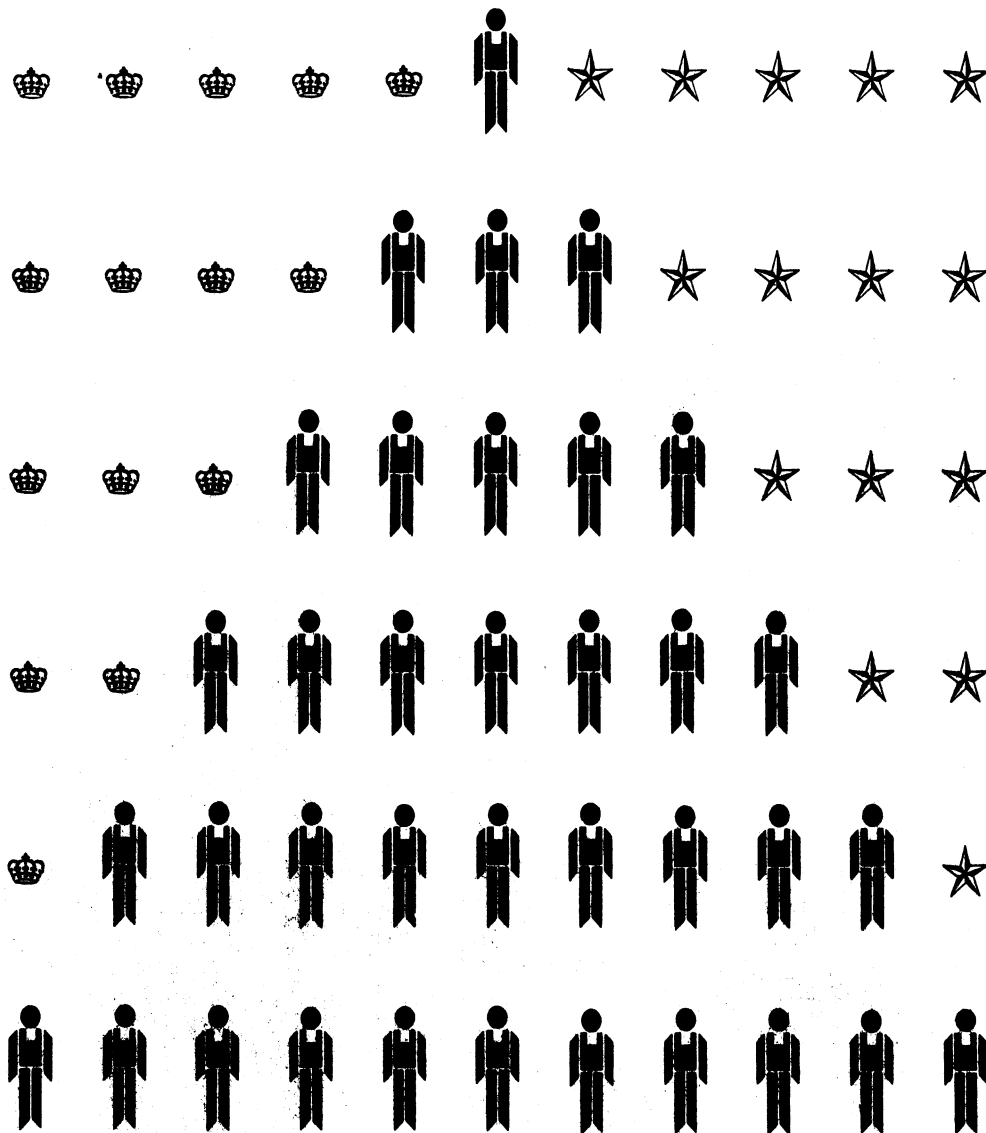
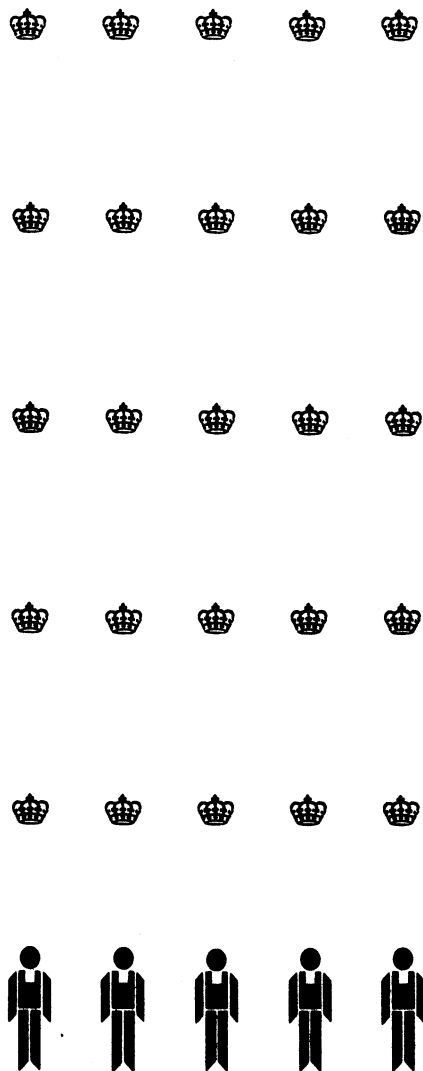
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