THE CANADIAN BAR REVIEW

VOL. XXXIV DECEMBER 1956 NO. 10

WRONGFUL EXPULSION FROM TRADE UNIONS: JUDICIAL INTERVENTION AT ANGLO-AMERICAN LAW

ARTHUR J. STONE*
Halifax

I. *Introduction*

A discussion of the subject of wrongful expulsion from a trade union can be divided conveniently into three main heads: first, the bases upon which Anglo-American courts have assumed jurisdiction; secondly, what constitutes wrongful expulsion; and, thirdly, the judicial relief accorded a wrongfully expelled member. This paper is confined to a discussion of related problems in the United States, Great Britain and Canada.

II. *Judicial Intervention: Historical Development*

1. *General*

Anglo-American courts have pursued a traditional policy of non-intervention in the internal disputes of voluntary associations.[1] It is universally accepted that this reluctance is, as it has been expressed, "a product of a long judicial experience in attempting to settle family fights".[2] That the courts continued this hands-off

*Arthur J. Stone, B.A. (St. F. X.), LL.B. (Dal.), LL.M. (Harv.). This article is based on a paper written for a Labour Law Seminar conducted by Professor Archibald Cox at the Harvard Law School.

[1] See Chafee, The Internal Affairs of Associations not for Profit (1930), 43 Harv. L. Rev. 993.

[2] Summers, Legal Limitations on Union Discipline (1950), 64 Harv. L. Rev. 1049, at p. 1051.

policy when first presented with internal disputes in trade unions[3] is not surprising, for at that time the judiciary had apparently not fully appreciated the vital distinction both in constitution and in function between a voluntary association, such as a fraternal club, and a trade union. In fact, as will be seen later, judicial acknowledgement of any distinction is rarely found even now.

In the early years of the law's development in this field, the courts had to face the obvious truth that trade unions could and did practise various kinds of abuses upon their members. It was desirable to find ways of dealing with these incidents without doing violence to the traditional policy of staying away from what had been considered, up to this time, as analogous to a family dispute. The courts followed two theories which, though proclaimed as reasons for intervening, were little more than excuses for intervening.[4] The first, in order of time, was the property theory, which they borrowed from the social-club cases, and the second was the contract theory, which has survived to this day in most Anglo-American jurisdictions. To these two may be added a third, and it is submitted a more realistic, theory of how the courts intervene in cases of wrongful expulsion. This is the tort or status theory, which has found judicial expression in at least one Anglo-American court,[5] but which, as will be shown, can be buttressed by a recent trend among courts in the United States in the same direction.[6]

2. *The Bases of Jurisdiction.* (a) *the Property Theory*

Because of manifest abuses of power exercised by trade-union officials against members, the English courts, before intervening, examined the already recognized categories of the law for a technical basis upon which to found jurisdiction. They selected the field of property law,[7] the reasoning being that, when a man is separated

[3] See, *e.g.*, *Rigby* v. *Connal* (1880), L. R. 14 Ch. D. 482; *Myers* v. *Journeymen Stone Cutters' Assn.* (1890), 47 N. J. Eq. 519; *Thomas* v. *Musical Mutual Protective Union* (1890), 121 N.Y. 45.

[4] See Pound, Equitable Relief against Defamation and Injuries to Personality (1915), 29 Harv. L. Rev. 640, at pp. 678-679; Summers, *ante*, footnote 2, at p. 1054.

[5] *Tunney* v. *Orchard et al.* (1955), 15 W.W.R. (N.S.) 49, [1955] 3 D.L.R. 15 (C.A., Man.).

[6] See *post*, text to footnotes 31-34.

[7] Some writers in this field have contended that it was normal for the courts to seek a basis of intervention in settled principles of property law. The remedy usually sought by the expelled member was reinstatement to his union and, hence, the equitable jurisdiction of the court was drawn into play. But, as Professor Chafee points out, equity courts will open their doors only when a right of property is involved: Chafee, *ante*, footnote 1.

from his trade union in an unlawful manner, his property rights in the physical assets of the union have been interfered with, and the court can step in to protect them.[8]

When the problem first faced courts in the United States some ground had already been broken for them and, following perhaps the line of least resistance, as it were, they took over the English property-rights theory as their own.[9]

The property theory is susceptible to attack on a number of grounds. It is well-nigh impossible to find for the member any true "property rights" in the physical assets of a trade union. The union is scarcely the repository of any thing which the member can bequeath by a testamentary disposition; if there are any physical assets in which the member has a property right, his right does not accrue until the association is so impotent that it would be forced to dissolve and, when it reaches that stage, in most cases property rights vanish along with the physical assets.

Outside the courtroom the property theory has met with like objections, which have been expressed on both sides of the Atlan-

[8] In *Rigby* v. *Connal* (1880), L.R. 14 Ch. D. 482, at p. 487, Jessel M.R. said in a dictum: "I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the members of the society and of which he is unjustly deprived by such unlawful expulsion". The case had grown out of an alleged wrongful expulsion of a member who had apprenticed his son to a so-called "foul shop" (a non-union shop) contrary to the union's constitution. The member claimed, inter alia, a declaration that he was entitled to participate in the property and effects of the union. The court dismissed the claim on the narrow ground that to allow it would be enforcing an agreement for the "application of funds of a trade union, to provide benefits to members", something the courts were expressly forbidden from doing by section 4(3)(a) of the Trades Union Act, 1871, 34 & 35 Vict., c. 31.

Today the property theory is rejected in Great Britain. See, *e.g.*, the language of Denning L. J. in *Lee* v. *Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329, at p. 341, [1952] 1 All E. R. 1175 (C.A.), where he said: "It was once said by Sir George Jessel M.R., that the courts only intervene in these cases to protect rights of property . . . and other judges have often said the same thing: see, for instance *Cookson* v. *Harewood*, [1932] 2 K.B. 478, at pp. 481, 488. But Fletcher Moulton L.J. denied that there was any such limitation on the powers of the courts: see, *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. D. 540, at p. 562; and it has now become clear that he was right. . .".

[9] See *Fraelich* v. *Musicians' Mutual Benefit Assn.* (1880), 93 Mo. App. 383, where at p. 390 it was said, citing the *Rigby* case as authority: "It must . . . appear that some property or civil right is involved. . . . The courts will not interpose between [the union] and a member except for the sole purpose of protecting an interest the member may have in the property of the association."

In accord with the *Fraelich* case are: *Clutcher* v. *No. 321 Order of Railway Conductors* (1910), 151 Mo. App. 622; *Armstrong* v. *Duffy* (1914), 103 N. E. 760, 90 Ohio App. 232; *Fleming* v. *Motion Picture Machine Operators*, 1 A. 2d 850, at p. 853, affirmed in (1939), 1 A. 2d 386 (N.J.), in which Vice-Chancellor Barry held that "membership is a valuable property right"; *Nissen* v. *International Brotherhood of Teamsters* (1941), 295 N.W. 858, 229 Iowa 1028.

tic.[10] The courts have rejected the property theory as unacceptable even as a technique for intervening in cases of wrongful expulsion.[11]

(b) *The Contract Theory*

Although, as I have pointed out, the property theory was the invention of the English courts, it appears to have met with its earliest criticism in the United States. American courts seem to have originated the contract theory as a substitute for the property theory. The new theory took as its premise the proposition that a contract is made by the member when he joins the union, the terms of which are spelled out in the union's constitution and by-laws. The argument is that it would be a breach of contract for the union to dismiss a member contrary to the constitution and by-laws and, if he were dismissed, the court would intervene to protect his contractual rights.[12]

English[13] and Canadian[14] courts have adopted the contract theory in preference to one based on the alleged violation of a ghostly property right in the physical assets of the union. There

---

[10] See Lloyd, Judicial Review of Expulsion by a Domestic Tribunal (1952), 15 Mod. L. Rev. 413, at p. 424; Thomas, Expulsion from Trade Unions, in The Law in Action (1954); Chafee, *ante*, footnote 1, at pp. 999-1001; Summers, *ante*, footnote 2, at pp. 1053-1054, where he said: "It is significant to note that regardless of the particular property right discovered, the courts do not limit their relief to protecting that right, but order complete reinstatement in the union".

[11] See the dictum of Denning L. J. in the *Lee* case, *ante*, footnote 8; *Tunney* v. *Orchard et al.*, *ante*, footnote 5, *per* Tritschler J. A.

[12] The case of *Lawson* v. *Hewell* (1897), 118 Cal. 618, appears to have been the earliest to this effect. However, the language of Blackmore J. in *Krause* v. *Sanders* (1910), 122 N.Y. Supp. 54, at p. 54, is usually regarded as the most prominent source. He said: "Its [the union's] constitution constitutes a contract between the members which defines their rights and obligations. . . . the provisions for expulsion are part of the contract of membership binding on all members. If a member is expelled in conformity with these provisions, the contract is not broken . . . but if the expulsion is not in accordance with the contract the rights of the expelled member are violated, in this respect the contract is broken."

Accord, Dachoylons v. *Ernst* (1954), 118 N.Y. Supp. 2d 455, 203 Misc. 277; *Hopson* v. *Marine Cooks* (1954), 253 P. 2d 733; *Allen* v. *Southern Pacific* (1947), 110 P. 2d 933, 166 Ore R. 290; *Polin* v. *Kaplin* (1931), 257 N.Y. 277, 177 N.E. 833.

[13] See *e.g.*, *Lee* v. *Showmen's Guild of Great Britain*, *ante*, footnote 8; *Abbott* v. *Sullivan*, [1952] 1 K.B. 189, [1952] 1 All E.R. 226 (C.A.); *Bonsor* v. *Musicians' Union*, [1955] 3 All E.R. 518 (H.L.). For comments on the *Lee* and *Abbott* cases see, Lloyd, Judicial Review of Expulsions by a Domestic Tribunal (1952), 15 Mod. L. Rev. 413; Hendry, Trade Unions — Wrongful Expulsion from Membership — Basis of Individual Liability — Vicarious Liability (1952), 30 Can. Bar Rev. 844; Whitmore, Trade Unions — Disciplinary Action against Members — Ability of the Union's Constitution to Curtail Access to the Courts — Contrast with Kuzych v. White et al. (1952), 30 Can. Bar Rev. 617.

[14] See, *e.g.*, *Kuzych* v. *White* (1950), 2 W.W.R. 193, [1950] 4 D.L.R. 187 (C.A., B.C.).

is no doubt today that most courts in the Anglo-American world think in terms of contract law when cases of wrongful expulsion arise.[15]

Despite this almost universal acceptance of contract as the true ground for intervention, the theory itself is subject to a number of criticisms which throw doubt upon its validity. Certainly, especially where a man's right to work depends upon membership in a closed-shop union,[16] it is difficult to say that he has "consented" to the rules and regulations defining his rights as a member.[17] If he wants to work at his occupation, and union membership is a condition precedent, he has not really voluntarily subscribed to a set of rules and regulations, especially if they do not meet with his approval. Besides, his contract could not usually be with the union as such, since in most jurisdictions the union is considered as merely a voluntary association.[18] Thus the conclusion that contracts exist between each member and every other member, with the unfortunate result that a wrongfully expelled member must, if we are to push logic to the ultimate, recover against each other member of the union, although in most cases the wrongful expulsion is traceable to the union's officials alone. Not only is this procedural problem difficult to avoid, but, once the wronged member does bring the other members to court, logic would seem to demand that his relief be against those union members and not against the union. Some jurisdictions have now begun to allow relief against the common fund of the union,[19] and in England it has been recently held that a trade union is virtually a legal entity[20]

---

[15] See, *e.g.*, *Kuzych* v. *White*, *ante*, footnote 14.

[16] See, *e.g.*, *Bonsor* v. *Musicians' Union*, *ante*, footnote 13; *Kuzych* v. *White*, *ante*, footnote 14; *Carson* v. *Glass Bottle Blowers Association* (1951), 231 P. 2d 6, 37 Cal. 2d 134.

[17] See the criticisms of Chafee, *ante*, footnote 1; Lloyd, The Disciplinary Powers of Professional Bodies (1950), 13 Mod. L. Rev. 281; Whitmore, Trade Unions—Action for Wrongful Suspension—Applicability of Kuzych v. White—Representative Defendants (1956), 34 Can. Bar Rev. 188, at pp. 194-195.

[18] See *post*, footnote 118.

[19] See, *e.g.*, *Tunney* v. *Orchard et al.*, *ante*, footnote 5.

[20] *Bonsor* v. *Musicians' Union*, *ante*, footnote 13. The case may have left some doubt on the question of trade-union status. Lord Porter clearly thought that the registered union was a legal entity, and Lord Morton held that this was virtually the case. But Lord MacDermott, with whom Lord Somervell concurred, would not agree. It would appear that Lord Keith's decision is the crucial one and, with respect, it is by no means clear whether or not he was opposed to giving the union legal status. Professor Carrothers thought that, on this point, Lord Keith joined with Lord MacDermott and Lord Somervell, ". . . giving them the importance of a majority, that a union is an unincorporated association . . ." (1956), 34 Can. Bar Rev. 70, at p. 77. It is significant to observe the following sentence from Lord Keith's judgment: "It would not, I think, be wrong

and is capable of being sued as if it had legal status. Even if we admit that trade unions are legal persons, however, whose funds are therefore vulnerable to a claim for relief from a wrong traceable to the union, the fundamental objection that members rarely can be said to have consented to join a closed-shop union has not been answered.[21] It may well be argued nevertheless that, even where he joins a closed-shop union, the member, while not agreeing in principle with the price of making a living, has accepted that price. Even if the contract theory is invulnerable on the question of consent, it is difficult to reconcile it with the fact that the courts do grant relief in cases where the principles of natural justice have been violated. At best, the contract theory is but a technique for judicial intervention, and surely it will not survive careful legal analysis. If we are to follow a strict contract theory, legal relief would not be adequate, and in some cases it would be negligible.

In view of the many criticisms which have been levelled against the contract theory, it is not surprising that a legal writer has contended that "there is need for a new pronouncement of principles governing judicial intervention in internal union matters. The older theories [that is, property and contract] beg the very question they are called upon to decide."[22]

(c) *The Tort Theory*

Over the past quarter century various writers have been arguing that the legal relationship between the member and the union is not entirely contractual[23] and that, though it is born in contract, it blossoms into a status. A wrongful expulsion is an interference with the member's status and it constitutes a tort,[24] giving the courts a ground upon which to intervene.

to call it [the union] a legal entity" (p. 579). The case is commented upon by an anonymous contributor in (1955), 220 L.T. 295, under the heading, "Remedy Against Trade Union".

[21] See *post*, text to footnotes 86-99, 110-128.

[22] Frankle, Judicial Intervention in Internal Union Affairs (1955), 18 Ga. Bar J. 223, at p. 224.

[23] See, *e.g.*, Chafee, *ante*, footnote 1, at pp. 1007-1010; Hendry, Trade Unions—Wrongful Expulsion from Membership—Basis of Individual Liability—Vicarious Liability (1952), 30 Can. Bar Rev. 844, at p. 848; Whitmore, Trade Unions—Action for Wrongful Expulsion—Applicability of Kuzych v. White—Representative Defendants (1956), 34 Can. Bar Rev. 188, at p. 195; Carrothers, Trade Unions—Wrongful Expulsion from Membership—Causes of Action in Contract or Tort—Representative Form—Liability of Union and Members to Declaration, Injunction and Damages (1956), 34 Can. Bar Rev. 70, at pp. 79-81.

[24] But see Fridman, Status and Tort (1956), 30 Aust. L.J. 183, where the writer rejects the status approach as enunciated in the *Tunney* case. Though Mr. Fridman recognized that "Justification for such an approach

This theory of Professor Chafee, and others who have supported him, remained no more than a passage in a law-review article until very recently. Then a provincial court of appeal in Canada adopted the approach *in toto* in the case of *Tunney* v. *Orchard et al.*,[25] which involved the wrongful expulsion of a milk-wagon driver from his union, the expulsion being found unlawful because it was attended by bad faith. The union had a closed-shop agreement[26] with the employer and the latter was called upon to discharge the plaintiff, who, before exhausting all the remedies within the union,[27] sought relief from the courts. Mr. Justice Tritschler,

---

[the status approach] may well be found in the lack of some other more appropriate remedy . . .", he contended that ". . . developments must proceed very carefully, and be justifiable on grounds of legal principle as well as necessity" (p. 186). He could justify neither. In any event, there is a noticeable absence of any analysis of the contract approach, and, with respect, it is submitted that the relationship between the member and the union is not, as Fridman intimated, ". . . purely a matter of contract" (p. 184). See also p. 186.

Lloyd, *ante*, footnote 13, while noting that though the law of torts is said to "enshrine a general principle of liability for unjustifiable harm", thought that it has proved to be "an insufficiently flexible instrument" to meet modern economic and social conditions (p. 424).

In this connection it is interesting to examine this passage from Prosser, Law of Torts (1941): "New and nameless torts are being recognized constantly, and the progress of the law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set . . ." (p. 5).

[25] *Ante*, footnote 5; Carrothers, Trade Unions—Wrongful Expulsion from Membership—Cause of Action in Contract or Tort—Representative Form—Liability of Union and Members to Declaration, Injunction and Damages (1956), 34 Can. Bar Rev. 70; Whitmore, Trade Unions—Action for Wrongful Suspension—Applicability of *Kuzych* v. *White*—Representative Defendants (1956), 34 Can. Bar Rev. 188.

[26] It is submitted that the presence or absence of a closed shop should not be permitted to determine whether a status exists between the union and the member. In the Massachusetts case of *Malloy* v. *Carrol* (1934), 287 Mass. 376, 191 N.E. 661, it was said: "In the thirty months' period that the plaintiffs were excluded from membership in the union, they were deprived of certain rights and privileges incidental to membership . . . The right to have a voice in the conduct of the organization, in the shaping of its policies and in the election of its officers; The privileges of attending meetings and their associating with their fellow craftsmen whose interests the union was formed to serve; The opportunity to participate with others in lawful efforts made by the union as a whole to improve common working conditions and increase the wages of its members."

Nor is this list exhaustive. A person's standing in the community as a whole is bound to suffer regardless of whether the expulsion means the loss of a job. The National Labor Relations Act, 61 Stat. (1947), 29 U.S. C.A. (Supp. 1951), provides in section 8 that closed shops are illegal in the United States, and under section 8(b)(2) it is unlawful for any labour organization to call for the discharge of a union member who has been expelled for a reason other than failure to tender or pay necessary fees and dues. Hence, in the United States, rarely will a man lose his job for wrongful expulsion from his union; the same thing is not necessarily true of his reputation.

[27] See *post*, text to footnotes 73-85.

with whom the other members of the Manitoba Court of Appeal agreed, directly or indirectly, made the following statement, which constitutes the core of his decision:

> If the law is too rigid who makes it so? . . . the judges found it possible to move from property to contract to meet the exigencies of the times. The step from contract to status is not more revolutionary. . . . *In my opinion the destruction of the plaintiff's union status was a tort.*[28]

It seems that the courts in Great Britain[29] will not go as far as did this Manitoba court unless section 4 of the Trade Disputes Act[30] is repealed or modified. That section immunizes the union from any action in tort.

Though judicial support for the status theory is not entirely lacking in the United States, it is not yet possible to find any case expressly adopting it. In *Carson* v. *Glass Bottle Blowers Association*,[31] the language of Gibbon C. J. may suggest a trend. He said:

> . . . the 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. . . . the action partakes of the nature of both tort and contract.[32]

The upshot seems to be that, while professing to apply a contract theory as a basis of intervention, courts in the United States are beginning to allow relief which cannot be explained on contractual grounds alone.[33] To summarize, it appears that these courts are

---

[28] *Tunney* v. *Orchard et al.*, *ante*, footnote 5, at p. 76 (emphasis supplied).

[29] In *Abbott* v. *Sullivan*, *ante*, footnote 13, the court came face to face with the problem but placed their decision on the ground that no breach of contract could be found since the corn porter's society, to which the plaintiff belonged, had no written constitution. Lord Justice Denning wrote a vigorous dissent in which he showed his dissatisfaction with the contract theory. During the course of his judgment he cited with approval the case of *M'Millan* v. *Free Church of Scotland* (1861), 23 Dunl. (Ct. of Sess.) 1314, in which Lord Inglis said: "The possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold certain offices, is a thing which the law will recognize as a patrimonial interest, and no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy".

In the light of the unanimous opinion of the House of Lords in the *Bonsor* case, adopting the contract theory, the law in England is not likely to change in the immediate future.

[30] 6 Edw. VII, c. 47, s. 4. The House of Lords in *Vocher and Sons Ltd.* v. *London Society of Compositors*, [1913] A. C. 107, held that the section conferred absolute immunity in actions of tort.

[31] (1951), 231 P. 2d 6, 37 Cal. 2d 134. The plaintiff had been expelled from a closed-shop union. See also *ante*, footnote 26.

[32] (1951), 231 P. 2d 6, at p. 10.

[33] In *Local Union No. 57, etc.* v. *Boyd* (1944), 16 So. 2d 705 (Ala.), the court, in allowing exemplary damages in addition to an injunction and a declaration, justified the award on the ground that "Equity delights to do justice but not by halves".

unwilling to adopt the tort theory *per se*, but prefer for the time being to proceed on a combination of both contract and tort.[34]

III. *What Constitutes Wrongful Expulsion*

1. *General*

Thus far it has been shown that the basis of judicial intervention in cases of wrongful expulsion from trade unions is traceable from a property, through a contract, to, possibly, a tort theory. Because most courts insist on following the contract theory, an attempt will now be made to determine when a member's contract with the union is broken, for, unless in fact it has been broken, the member is unlikely to succeed in any action he may take. Our next line of inquiry, therefore, involves an attempt to answer the question: What constitutes *wrongful* expulsion?

2. *Judicial Standards*

The courts have developed their own standards of what they will regard as a wrongful expulsion. To say the least, it is difficult to fit these various tests into a contractual framework, but they have been utilized by the courts and apparently will be followed in some form or other in the future, whether or not a general shift in the basis of intervention is made from contract to tort.

The case usually cited in Great Britain and in Canada as the answer to these problems is *Dawkins* v. *Antrobus*,[35] which concerned an alleged wrongful expulsion from a voluntary club. Lord Justice Brett thought that the only questions the court could properly consider were:

> . . . whether anything has been done which is contrary to natural justice although it is within the rules of the club—in other words, whether the rules are contrary to natural justice; secondly, whether a person who has not condoned the departure has been acted against contrary to the rules of the club; and thirdly, whether the decision . . . has been come to *bona fide*.[36]

---

[34] See, *e.g.*, *Taylor* v. *Marine Workers Union* (1953), 256 P. 2d 595, at p. 600.

[35] (1881), 17 Ch. D. 615, 44 L.T. 557 (C.A.). For a Canadian case approving the Brett dictum, see, *Essery* v. *Count Pride of Dominion* (1883), 22 O.R. 596, at p. 608.

[36] *Dawkins* v. *Antrobus*, *ante*, footnote 35, at p. 630. The dictum was followed in a number of subsequent English cases, among which are: *Lambert* v. *Addison* (1886), 44 L.T. 20; *Wienberger* v. *Inglis*, [1918] 1 Ch. 517, 87 L.J. Ch. 345, 118 L.T. 769, affirmed by the House of Lords in [1919] A.C. 606, 88 L.J. Ch. 287, 121 L.T. 65.

Several courts in the United States have likewise taken the *Dawkins* case to state the law correctly. See, *e.g.*, *Otto* v. *Journeymen Tailors' etc.* (1888), 17 P. 217, 25 Cal. 308; *Snay* v. *Lovely* (1931), 176 N.E. 791, 276

To paraphrase, if the expulsion is contrary to the union's constitution and by-laws, or if they are followed but bad faith is exercised, or if the constitution and by-laws are themselves invalid as being contrary to natural justice, the expulsion is wrongful. These standards are easier to state than to apply, and they will now be discussed in greater detail.

The majority of cases in which an argument based upon a breach of the principles of natural justice is put forward concern the removal of a member of the union under a procedural rule which is said to be contrary to these principles, or where no rules in accord with them can be found at all. Two questions arise here: (1) when is a given rule contrary to natural justice? and (2) if the rule is contrary to natural justice or no rule in accord with natural justice exists at all, can it be said, as a matter of contract law, that the member has consented to be expelled?

Although the term "natural justice" is difficult to define,[37] it may be possible to give it some content in the context in which it is now being used. Two English cases[38] are helpful, the cumulative effect of them being that, if the constitution and by-laws fail to provide for an impartial tribunal[39] or the charged member is other-

---

Mass. 119; *Carson* v. *Glass Bottle Blowers Assn.* (1950), 220 P. 2d 34, affd. (1951), 231 P. 2d 6, 37 Cal. 2d 134.

[37] In *MacLean* v. *Workers' Union*, [1929] 1 Ch. 602, at pp. 624-625, Maugham J. thought it wrong to say that there is any "justice natural among men. The phrase . . . can only mean . . . 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 be given his chance of defence and explanation."

In *Green* v. *Blake*, [1948] Ir. R. 242, at p. 268, Blake J. said that natural justice means "no more than justice without any epithet. I take the essentials of justice to mean those desiderata which, in the existing state of our mental and moral development, are regarded as essential, in contra-distinction from the many extra precautions, helpful to justice but not indispensable to it . . .".

In *Kuzych* v. *White*, *ante*, footnote 14, at pp. 205-206, Sidney Smith J. A. described the term "natural justice" as having "little meaning, and that little misleading. . . . The miscarriages usually termed 'breaches of natural justice' are failure to hear both sides, and tribunals adjudicating in a matter in which it is not disinterested."

In *The Queen ex rel. Municipal Spraying, etc.* v. *Labour Relations Board (N.S.)* (1955), 36 M.P.R. 240 (N.S. Sup. Ct.), Doull J. said (p. 272): " 'Natural justice' is not a very exact term and its meaning seems to vary to suit circumstances . . .".

[38] *Leeson* v. *General Council of Medical Education and Regulation* (1889), 43 Ch. D. 366; *Allison* v. *General Council of Medical Education and Regulation*, [1894] 1 Q.B. 750.

[39] At page 762 of the *Allison* case, *ante*, footnote 38, Lopes L. J. said: "That an accuser must not be also a judge is in accordance with public policy and natural justice, and is a principle too well established to require any comment".

wise deprived of a fair trial,[40] the expulsion does not accord with natural justice.

The effect of a number of American decisions would seem to be the same. For example, the court in *Otto* v. *Journeymen Tailors'*[41] found a lack of natural justice where the expelled member was not given ". . . an opportunity to explain misconduct".[42] It has been held, also, that members must be given written notice of charges before trial,[43] and the charges must clearly reveal the nature of the alleged offence;[44] the hearing must be held at a proper time and place;[45] the member must be given the opportunity to confront his accusers and to hear the testimony against him;[46] the member may testify in his own defence and call witnesses on his own behalf;[47] the trial must be conducted in good faith before a regularly authorized union tribunal with constitutional procedures;[48] no member of the trial body may be an interested party in the case;[49] only properly authorized penalties may be imposed.[50] Generally, a member cannot be expelled without notice and without an opportunity to defend himself.[51]

The second question to be answered is whether a member, by joining the union, can be said to have agreed to a constitution which does not provide for a proper hearing, or which expressly provides that no hearing will be afforded a member charged with having committed an offence for which expulsion is called. The issue here would appear to be whether natural justice can be ousted by a simple provision, or the lack of one, in the rules of the union.

At one time the courts in England thought it was possible for

---

[40] At page 383 of the *Leeson* case, *ante*, footnote 38, Bowen L.J. made the following observations: ". . . the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice . . . the particulars . . . should be brought to his attention in order to enable him to meet that charge . . . ."

[41] (1888), 17 P. 217, 25 Cal. 308.

[42] (1888), 17 P. 217, at p. 218.

[43] See, *e.g.*, *Harmon* v. *Matthews* (1941), 27 N.Y.S. 2d 706.

[44] See, *e.g.*, *Coleman* v. *O'Leary* (1945), 58 N.Y.S. 2d 812.

[45] See, *e.g.*, *Harmon* v. *Matthews*, *ante*, footnote 43.

[46] *Ibid.*

[47] See, *e.g.*, *Bartone* v. *DiPietro* (1939), 18 N.Y.S. 2d 178.

[48] See, *e.g.*, *Gilmore* v. *Palmer* (1919), 179 N.Y.S. 1.

[49] See, *e.g.*, *Reilly* v. *Hogan* (1940), 32 N.Y.S. 2d 864, affirmed (1942), 36 N.Y.S. 2d 422.

[50] See, *e.g.*, *Polin* v. *Kaplan*, *ante*, footnote 12.

[51] See, *e.g.*, *Polin* v. *Kaplan*, *ante*, footnote 12. Cf. *Dame* v. *LeFevre* (1947), 251 Wis. 146, 28 N.W. 2d 349, where a member was expelled without notice and without the opportunity of defending himself.

a union to deny a member the requirements of natural justice by including an exclusionary provision in its rules, the members' "contract" so-called. Maugham J. so held in the *MacLean* case.[52] While the majority of the Court of Appeal purported to follow the *MacLean* case in *Russell* v. *Norfolk (Duke) and Others*,[53] the case is distinguishable, and Maugham J.'s analysis has been rejected recently by at least one member of the Court of Appeal,[54] the remainder of the court making no attempt to challenge him.

Various courts in the United States have held that the requirements of a fair trial will be imposed even though the rules of the union fail to provide for them.[55] It is doubtful whether an exclusionary provision would be valid.[56]

Another aspect of this problem which merits some consideration is whether, apart from any procedural question, the substance of the rule under which a member has been expelled can be said to be void for want of natural justice. The argument may be made that, under the contract theory, the member has bound himself to the substantive rule under which he was expelled. American courts do not speak here of natural justice, reserving the term for matters of procedure, apparently, and have spoken rather in terms of "public policy" and "illegality". Thus in *Schneider* v. *Local Union No. 60, etc.*,[57] two members were expelled for not voting to elect a fellow member as plumbing inspector, they being members of the City Plumbing Board. The court, premising that the board was required by law to make a free selection, held the

[52] *MacLean* v. *Workers' Union*, *ante*, footnote 37, at p. 623: "If . . . there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question . . . I see no reason for supposing that the Courts would interfere . . .".

[53] [1948] 1 All E. R. 488, affirmed: [1949] 1 All E. R. 109 (C.A.). It was found as a fact that, although the constitution and by-laws did not provide for an inquiry, one which satisfied the demands of natural justice was held. During the course of his judgment Lord Justice Denning made this remark: "It might, perhaps, be possible . . . to stipulate expressly for power to condemn a man unheard, but I should doubt it" (page 119).

[54] In *Lee* v. *Showmen's Guild of Great Britain*, *ante*, footnote 8, at p. 342, Lord Justice Denning rejected the holding of the *MacLean* case on this point. He said: "The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. *Any stipulation to the contrary would be invalid.*" (Emphasis supplied.) He thought this conclusion was "to be preferred to the dictum of Maugham J. in *MacLean* v. *Workers' Union* to the contrary".

[55] See, *e.g.*, *Carson* v. *Glass Bottle Blowers Assn.*, *ante*, footnote 37; *Taboada* v. *Sociedad Espanola, etc.* (1923), 191 Cal. 187, 215 P. 673, 27 A.L.R. 1508; *Von Arx* v. *San Francisco, etc.* (1895), 113 Cal. 377, 45 P. 685; *Ellis* v. *A.F.L.* (1941), 48 Cal. App. 2d 440.

[56] See, *e.g.*, *Carson* case, *ante*, footnote 37. But cf. *Dame* case, *ante*, footnote 51.

[57] (1905), 40 So. 700, 116 La. 270.

expulsions "illegal" and contrary to "public policy". A similar result was reached in *Spayd* v. *Ringing Rock Lodge*,[58] where the plaintiffs had been expelled for opposing the Full Crew Law, which the union favoured, the court saying, in answer to the defendant's contention that the members had delegated their constitutional right to oppose the bill to the union by joining it, that such an agreement was "against public policy and void".

Under the contract theory it would appear to follow that the union, in expelling a member, may only do so under a clause in the constitution or by-laws defining the offence.[59] One might think it would then follow that the union could expel members for doing any act made an offence by the constitution or by-laws. This is not so.[60] This aspect of the discussion can be broken down into at least two topics: (1) whether an expulsion can be effected in the absence of an express expulsionary provision; and (2) the judiciary's rôle in reviewing expulsions which are based upon the alleged violation by the member of a constitutional provision or by-law.

It has been held in the United States that a member may be expelled from his union for "such conduct as clearly violates the fundamental objects of the association and if persisted in and allowed would thwart those objects or bring the association into disrepute".[61] If unions do have the power, it is seldom exercised, mainly because most union constitutions include *express* catch-all clauses, providing, for example, that members may be expelled for "conduct unbecoming a union member".[62] This places the problem under the second topic just mentioned, and the position appears to be the same in Canada and in England.[63]

Our major concern, then, must be with this second heading, namely, assuming that the constitution or by-laws contain an express expulsionary provision, either in the form of a specific or a catch-all clause, what rôle should the judiciary play in determining whether the act done by the member violates a particular

[58] (1921), 270 Pa. 67, 113 Alt. 70.

[59] For an excellent discussion of the disciplinary rules in the constitutions of various American unions, see Summers, Disciplinary Powers of Unions (1950), 3 Ind. & Lab. Rel. Rev. 483; and *ante*, footnote 2, at pp. 1062-1072.

[60] The fact that the expulsion was based upon an express rule does not necessarily validate it. See, *e.g.*, *Schneider* v. *Local Union No. 60, etc.* (1905), 40 So. 700, 116 La. 270. The rule itself may be held "illegal" or against "public policy". See, *ante*, text to footnotes 57-60.

[61] *Otto* v. *Journeymen Tailors', etc.*, *ante*, footnote 36. See *Weiss* v. *Musical Mut. Pro. Union* (1899), 189 Pa. 566, 42 A. 118.

[62] See, *e.g.*, *Ford Motor Co. and U.A.W. (C.I.O.)* (1944), 14 L.R.R.M. 2625; *Dragwa* v. *Federal Labor Union No. 23070* (1945), 136 N.J. Eq. 172, 41 A. 2d 32.

[63] See, *e.g.*, *ante*, footnote 54.

clause? Courts in the United States and in Great Britain have reached the same conclusion here: it is the function of the judiciary to construe such clauses whether they be specific[64] or general.[65] No doubt the main reason why this task has been assumed by judges is the fact that union constitutions and by-laws usually define offences in vague language.[66] It is difficult to favour a limitation of the court's function as an interpreter, although there is a danger that it will go on to decide cases on their merits.

Though an expulsion may be based upon a valid rule and the proceedings accord with natural justice, the expulsion may yet be set aside if it can be shown to have been made in bad faith. Although the line between bad faith and failure to meet the requirements of natural justice is not easily drawn, it would appear that, whereas the term "natural justice", as used in this area of the law, relates to the quality of the *proceedings* under which a member is expelled, for example the fact that no hearing is held, "bad faith" goes to *substance* rather than to the form, for example, the state of mind of the expellor.[67]

In the United States, the case of *Eachman* v. *Huebner et al.*[68] is an example of a situation where the court will set aside an expulsion because of an absence of good faith. After finding as a fact that bad faith had entered into the plaintiff's removal from the union, the court granted the desired relief because there was evidence "tending to show that the defendants entertained a malicious intent to 'get' the plaintiff and thus eliminate his opposition to them".[69]

The presence of bad faith has led courts in Canada and in Great

---

[64] See, *e.g.*, *Lee* v. *Showmen's Guild of Great Britain*, *ante*, footnote 8.

[65] See, *e.g.*, *Smetherham* v. *Laundry Workers' Union* (1941), 111 P. 2d 358, 44 Cal. App. 2d 131.

[66] Summers, Disciplinary Powers of Unions, *ante*, footnote 59, at p. 513: "There is a large element of uncertainty as to what conduct constitutes a punishable offence. This is principally a product of describing almost all of the offences in broad language and loose wording."

[67] *Fleming* v. *Motion Picture Machine Operators*, *ante*, footnote 9. The court granted reinstatement in a union whose officers ordinarily did not strictly enforce its rules on payment of dues, but did so in this instance to eliminate members who had joined in a suit to restrain racketeering practices by union officers. See also *Kinane* v. *Fay* (1933), 111 N.J.L. 553, 168 Atl. 724.

[68] (1922), Ill. App. 537.

[69] *Ibid.*, at p. 555. At page 541, the court recites part of the plaintiff's testimony. Shortly after the expulsion, the plaintiff met one of the defendants on the street, to whom the plaintiff directed this remark: "I see you got my card, you got me out of work". To which was replied: "That's the way to fix fellows like you. We put them on the bum and as long as Huebner and I are in there, you will never get in. We'll put a stop to your fighting us."

Britain[70] to set aside a member's expulsion from his union. In the *Kuzych* case,[71] while still in the British Columbia Court of Appeal, O'Halloran J. A. made the following observation:

> . . . the union trial committee . . . was in fact carrying out the declared policy of the union to get rid of the respondent as anti-labour. The verdict was decided in advance, the trial was a mere matter of form.[72]

In summary, it is not easy to fit the three tests discussed within the law of contract. Courts sometimes try to avoid the difficulty by saying that the contract contains implied terms that the expulsion must not be in bad faith or contrary to natural justice and that, if the expulsionary provisions in the constitution or the by-laws are in need of construction, the constituted courts of the land and not the union tribunal must have the final word. But if it can be validly said that a true contract is never created between the member and the union, especially where a closed-shop exists, it would seem to follow, *a fortiori*, that such terms could scarcely be implied.

3. *The Exhaustion of Internal Remedies*

A general rule of law in Anglo-American jurisdictions requires an expelled union member to exhaust all remedies within the union before going to the courts.[73] Where the courts apply the rule, no judicial review of the expulsion, *per se*, is required. On the other hand, the rule admits of several exceptions, presently to be discussed, with the result that review by the courts is not entirely prevented.[74]

---

[70] See, *e.g.*, the dissenting opinion of Fry L. J. in *Lesson* v. *General Council of Medical Education and Regulation*, *ante*, footnote 38, at p. 390, where it is pointed out that the union must not be "prejudiced" or "biassed". The majority, taking a different view of the facts, held that no bad faith had been shown in evidence. The court in *Dawkins* v. *Antrobus*, *ante*, footnote 35, likewise required that the expulsion be in good faith and found it had been.

[71] *Kuzych* v. *White*, *ante*, footnote 14.

[72] (1950), 2 W.W.R. 193, at p. 206; [1950] 4 D.L.R. 187 (C.A., B.C.). One of the plaintiff's witnesses was reminded by a union official that the plaintiff would be "crucified" at the hearing and if he (the witness) did not desist from supporting the plaintiff he also would "get the business".

[73] See, *e.g.*, *Thorn* v. *Foy* (1952), 103 N. E. 2d 416, 328 Mass. 377; *Trainer* v. *International Alliance of Theatrical Stage Corp., etc.* (1946), 46 A. 2d 463, 353 Pa. 487. The rule has been held to apply, *a fortiori*, where the constitution contains a clause requiring the member to exhaust his internal remedies before resorting to the court. See, *e.g.*, *Thorn* v. *Foy*, *ante*, footnote 71; *White* v. *Kuzych*, [1951] A. C. 585 (P.C.), [1951] 3 D.L.R. 641; *Magelever* v. *Newark Newspaper Guild* (1938), 199 A. 56, 124 N.J. Eq. 60; *Mulcahy* v. *Huddell* (1930), 172 N.E. 796, 272 Mass. 539.

[74] In reviewing an expulsion, the court will not require that the union tribunal has followed strict rules of evidence, see, *e.g.*, *Bush* v. *International Alliance of Theatrical Emp. etc.* (1912), 130 P. 2d 788, 55 Cal. App.

It has been held by one court in the United States that the member is not obliged to exhaust his union remedies if he had been expelled "without power and illegally".[75] The exception, so stated, might be too general. Indeed, all cases of wrongful expulsion could very well fall within one of those broad categories, but appeal to the union tribunal should not always be discouraged. The courts' dockets are already so crowded that the road to judicial relief could very well be a long and, in most cases, an expensive one. It is well to make an earnest effort to settle as many of these disputes as possible within the union framework and this would be more likely to result if the court's intervention were permitted only in cases involving unreasonable delay[76] or futility of appeal.[77]

It is submitted that an expulsion made in bad faith need not always be appealed within the union. No appeal should be required where the bad faith permeates the entire union structure, as in the case of an expulsion for advocating a union shop where the policy of the local and of the international union is clearly the closed shop.[78] On the other hand, where the bad faith is merely of a local nature, with the chance that an appeal to a higher union tribunal would undo the mischief,[79] the member should exhaust his union remedies unless to do so would result in an unreasonable delay. In the absence of bad faith, where for example the expulsion is contrary to the rules and proceedings set forth in the consti-

2d 357. The theory is, mainly, that the evidence taken at such a hearing is not given under oath: see, *e.g.*, *MacLean* v. *Workers' Union*, *ante*, footnote 37. As to the union's finding that the member has violated a particular rule, the courts follow the "substantial evidence" rule used in administrative law: see Summers, *ante*, footnote 2, at pp. 1084-1086, and cases cited therein.

[75] *Tesariero* v. *Miller* (1949), 88 N.Y.S. 2d 87, 274 App. Div. 670, at p. 672. The value of the case as a precedent may be saved by the fact that the member would have had to wait for two years and then travel two thousand miles to have his appeal heard by the international convention — an unreasonable delay.

[76] See, *e.g.*, *Tesariero* v. *Miller*, *ante*, footnote 75; *Gleeson* v. *Conrad* (1949), 81 N.Y.S. 2d. 368, at p. 372, "Justice delayed for the greater part of five years is justice denied".

[77] See, *e.g.*, *Crossen* v. *Duffy* (1952), 103 N.E. 2d 769, 90 Ohio App. 252.

[78] See, *e.g.*, *Kuzych* v. *White*, *ante*, footnote 14; Summers, *ante*, footnote 2, at p. 1088, ". . . at times the various appellate bodies are but successive links in a single chain of control".

[79] In *Dallas Photo-Engravers Union No. 38* v. *Lemmon* (1941), 14 S.W. 2d 954, at p. 955, the court said that "as long as there is another body which has power to reverse the sentence, and which has not been appealed to the presumption is that . . . the sentence, if illegal, would have been set aside". The statement would appear too broad but it could be narrowed and applied to cases other than where the expulsion is made in that kind of bad faith which permeates the entire union, or where the appeal would be unreasonably delayed though the bad faith is merely a local matter.

tution or by-laws, appeal to the courts should not be entertained if an avenue of appeal within the union is open to the member and he would not be unreasonably delayed by exhausting it.

It has been contended by Professor Summers[80] that, besides the usual futility-of-appeal and unreasonable-delay exceptions to the rule requiring the exhaustion of internal remedies, three others exist. Cases can be found, he asserts, holding that the court will permit an appeal where the member asks the union for damages, a remedy which the union constitution prohibits. It is submitted that it may not be wrong to place such a case under the ordinary "futility" exception. In any event, the authority cited by Professor Summers for his proposition may not have gone so far as he suggests.[81]

It is further contended by Professor Summers that the member need not exhaust internal remedies where a "property right" is involved. Not only is a property right difficult to find,[82] but it is doubtful whether the *Nissen* case, which is offered as authority, supports the contention. Here the court held that appeal to it should be allowed chiefly because an appeal within the union would have been "futile, vain or illusory".[83]

Finally, it is suggested by Professor Summers that no exhaustion is required where the proceedings under which the expulsion took place were void. He contends that the proceedings are void and the union tribunal lacks jurisdiction where the union tribunal is improper, the procedure unfair or the offence not punishable under the constitution. I submit that tribunal is usually improper where it, either in good or bad faith, is not constituted according to the constitution or by-laws. If the union tribunal is, in good faith, improperly constituted, an appeal within the union should be taken unless it would result in unreasonable delay. If, on the other hand, the union tribunal is, in bad faith, improperly constituted, the ordinary rules on futility of appeal should be followed. The same reasoning seems applicable where the procedure is unfair. If the expulsion is not based upon the constitution or by-laws, the court should not accept an appeal unless exhausting the union remedies would lead to excessive delay; if such expulsion was ac-

[80] Summers, *ante*, footnote 2, at pp. 1088-1089.

[81] Professor Summers cites *Grand Central B. of L.* v. *Green* (1923), 210 Ala. 496, 98 So. 569, as the leading case. As a matter of fact, the court found that the expulsion was malicious or in bad faith, in which case it falls within the usual futility category.

[82] See *ante*, text to footnotes 12-13.

[83] *Nissen* v. *International Brotherhood of Teamsters* (1941), 295 N.W. 858, at p. 866; 229 Iowa 1028.

companied by bad faith, appeal to the court should be governed by the usual futility rules.

To summarize, it would appear that there are only two general exceptions to the rule requiring exhaustion of internal remedies, namely, futility of appeal and unreasonable delay, the others suggested being only variations of one or the other.

The position of Canadian and English courts on the exceptions to the exhaustion requirement parallels the position of courts in the United States as already described. The Privy Council held in the *Kuzych* case[84] that, regardless of the nature of his expulsion, the member was bound by a contract, expressed in the union's constitution and by-laws, to exhaust all union remedies. It made no apparent difference to the board that an appeal to the international convention, the supreme union tribunal, would be unlikely to succeed since the expulsion had been made for opposing the union's policy, both local and international, favouring the closed shop. Subsequent Canadian cases[85] have found ways of avoiding the Privy Council's decision. In the *MacRae* case the court dispensed with the need for appeal by holding that the proceedings were irregular and that an appeal could not be taken from a nullity. The same distinction was made in the *Tunney* case, although the court gave considerable attention to the fact that to require an appeal within the union two months hence in Miami, Florida, would be unreasonable. On this point, Adamson C.J.M. said: "To require a milk wagon driver with a wife and family and with earnings of $40.00 or $50.00 a week to pursue such an appeal is not reasonable. The conditions which the constitution and the union impose on the plaintiff to pursue such an appeal left him as helpless as if they had asked him to appear at the South Pole in 1960."

IV. *Judicial Relief against Wrongful Expulsion*

1. *Great Britain and Canada*

It is well established in Canada and in Great Britain[86] that the equitable remedies of declaration and injunction are available to

[84] *White* v. *Kuzych*, *ante*, footnote 73.

[85] *MacRae* v. *Local No. 1720*, [1953] 1 D.L.R. 327; Whitmore, Trade Unions—Action for Wrongful Expulsion—Domestic Tribunal Acting without Jurisdiction and in Disregard of Prescribed Procedure—Right to Commence Action without Exhausting Domestic Remedies (1952), 30 Can. Bar Rev. 525; *Tunney* v. *Orchard et al.*, *ante*, footnote 5.

[86] *E.g.*, *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite*, [1922] 2 A.C. 440, at p. 471 (H.L.); *Bonsor* v. *Musicians' Union*, *ante*, footnote 13, at p. 537 (*per* Lord MacDermott).

a wrongfully expelled member. The declaration in effect states that the plaintiff is a member in good standing and the injunction restrains the union's servants or agents from interfering with the plaintiff's rights as a union member.

That damages are available to a wrongfully expelled member in Great Britain and in Canada would appear to be beyond question.[87] The important question is not their availability but their adequacy. The subject is complicated by the results reached in two leading cases, one English and one Canadian,[88] in which the courts differed over the true theory upon which judicial intervention is to be founded. Too, the question of whether the union, as an entity or as a voluntary association, should be held liable in every case, or whether rules of agency should determine liability must be discussed. It is desirable to approach the problem from the point of view of, first, whether damages are available and in what amount; secondly, whether the defendant should be the union or the individual wrongdoers; and, finally, if the union is the proper defendant, how it is to be brought before the court.

It was held in the *Bonsor* case[89] that damages were in fact available on the theory that the plaintiff had been improperly excluded from his union in breach of contract. But what about the quantity of damages? On a strict breach-of-contract approach, the only damages available to the wronged member would be such as were in the contemplation of the parties at the time they made the contract or which otherwise naturally flowed from a breach of contract.[90] The rub is that while the member is entitled to "all the remedies appropriate to a breach of contract",[91] such "remedies" would not compensate for the sense of shame, humiliation and injury to character and reputation, since it has been held by no less an authority than the House of Lords that exemplary damages for breach of contract are not available in cases of wrongful expulsion.[92] Returning the member to his job, even with back pay, does not compensate him for the injury done to his character and reputation, and it does not properly discipline those responsible for the abuse of power.

On the other hand, the Manitoba Court of Appeal in the

---

[87] *E.g.*, *Bonsor* v. *Musicians' Union*, *ante*, footnote 13.
[88] *Bonsor* v. *Musicians' Union*, *ante*, footnote 13; *Tunney* v. *Orchard et al.*, *ante*, footnote 5.
[89] *Ante*, footnote 13.
[90] *Hadley* v. *Baxendale* (1854), 9 Ex. 341.
[91] *Bonsor* v. *Musicians' Union*, *ante*, footnote 13, at p. 524.
[92] *Addis* v. *Gramophone Company Limited*, [1909] A.C. 488. Lord Collins wrote a vigorous dissent, but it has never taken root.

Tunney case[93] allowed damages on the ground that it was tortious for a union to interfere with the member's status by expelling him wrongfully. Not only does this theory avoid the questions whether a true contract exists and who are the parties to it, but the quantum of damages is not restricted to those granted for a breach of contract. Damages commensurate with the impairment or destruction of the status would be allowed, which would fully relieve the member. The only contract here is the bare agreement to become a member. Other rights flow from the relationship thus created and, when the relationship is interfered with, the law will grant a right of remedy.

The next, and equally important, question to be considered is who should be made defendants. Neither in Great Britain nor in Canada is this aspect of the law settled. But there appears to be no doubt that, if the wrongful act of expulsion is traceable to a servant or agent whose act the union has neither authorized nor ratified, the individual and not the union is liable.[94] On the other hand, it is not yet clear whether, assuming that the union is liable, it can be sued as an entity either in its registered name or in a representative suit.

One of the chief considerations before the House of Lords in the *Bonsor* case[95] was whether anything could be done about the procedural problem posed by the *Kelly* case,[96] in which the Court of Appeal had held that the expelled member could not sue the union for damages because the plaintiff himself, being a member of a voluntary association, had authorized the doing of the act of which he now complained. If Lord Keith's opinion can be added to that of Lord Morton and of Lord Porter, the *Bonsor* case would be authority for saying that the wrongful acts of the union's servants or agents, if authorized or ratified, are attributable to the union itself, and hence it could not follow that the plaintiff was the victim of his own folly. It was probably on this view that a majority of the House of Lords overruled the *Kelly* case, and, if the union is virtually a legal entity, the suit can be brought against it as if it were a natural person. The minority saw no intention of Parliament to create a legal person and held that the union was

[93] *Tunney* v. *Orchard et al.*, *ante*, footnote 5.

[94] See, *e.g.*, the language of Lord Keith in *Bonsor* v. *Musicians' Union*, *ante*, footnote 13, at p. 541, where he expresses the opinion that while the member would be immediately restored to membership, he would have to sue the individuals responsible for his expulsion for damages. See also *post*, text to footnotes 115-128.

[95] *Bonsor* v. *Musicians' Union*, *ante*, footnote 13. See *ante*, footnote 20.

[96] *Kelly* v. *National Society of Operative Printers, Assistants* (1915), 84 L.J.K.B. 2236.

suable in its registered name, distinguishing the *Kelly* case on the ground that in that case it was impossible to say that the wrongfully expelled member had authorized his own expulsion.

In Canada, unions are not generally considered legal entities at common law and suits against them are usually representative in nature. In the *Tunney* case[97] the suit was so constituted, although Tritschler J. A. would have been willing to consider the union a legal entity.[98] In any event, the point was left open and the court went on to adopt the language of Lord Macnaughten in the *Taff Vale* case:

> I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body.[99]

2. *The United States.* (a) *the Proper Forum*

At present the problem in the United States is not so much whether the wrongfully expelled member will be granted adequate relief as it is where he should seek that relief. Under section 8(b)(2) of the Taft-Hartley Act it is an unfair labour practice for a labour organization to cause or attempt to cause an employer to discharge a union member for any reason other than for failure to tender his dues or initiation fees.[100] Under section 8(a)(3) Congress impliedly outlawed the closed shop, but permitted in its stead the union shop so long as the requirements of the proviso to section 8(a)(3) are satisfied. It would be improper, in fact an unfair labour practice, to interfere with a man's right to work except as limited by section 8(b)(2). That the union's power otherwise to discipline its members is left unaffected by the Taft-Hartley Act is clear from other parts of the act.[101]

---

[97] *Ante*, footnote 13. In this case the representative suit was authorized under Q.B.R. 58 (Man.).

[98] *Ante*, footnote 13, at p. 49: "One of the exigencies of modern life is the fact that a trade union has a personality of its own distinct from its members".

[99] *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, at pp. 438-439.

Accord, Jose v. *Metallic Roofing Co.*, [1908] A.C. 514.

Contra, Local Union No. 1562, U.M.W.A. v. *Williams* (1919), 49 D.L.R. 578; *Barrett* v. *Harris* (1921), 69 D.L.R. 503; *Robinson* v. *Adams*, [1925] 1 D.L.R. 359.

[100] 61 Stat. (1947) 29 U.S.C.A. 158 (2) (b) (Supp. 1951). It is an unfair labour practice by the union "To cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such labour organization has been . . . terminated on some ground other than failure to tender the periodic dues and the initiation fees . . .".

[101] Proviso to section 8(b)(1)(A): ". . . this paragraph shall not impair the right of a labour organization to prescribe its own rules with respect

One might conclude, from this analysis, that, except where the member has been expelled for failure to tender necessary dues or initiation fees, state courts, in cases of wrongful expulsion, would be competent to grant the appropriate remedies. Such a construction is at least doubtful. In one of the earliest cases on this point, *Taylor* v. *Marine Cooks & Stewards Assn.*, the court thought that: "Nowhere in the Taft-Hartley Act is the National Labor Relations Board given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order the members' reinstatement in the union or to award damages resulting from wrongful expulsion".[102] It must be admitted that this observation was by way of dictum. But, in *Born* v. *Laube*,[103] after the member had been wrongfully expelled from the union and later became the victim of a section 8(b)(2) unfair labour practice, he sought relief in the state court (Alaska), asking for reinstatement and damages. The lower court found itself without jurisdiction to grant the plaintiff's claim and, on appeal to the Circuit Court of Appeals, it was affirmed. The appeal court noted that, since the Taft-Hartley Act "provides a procedure for redress and a corresponding remedy, both the procedure and the remedy are exclusive".[104] It thought further that the act's provision for a comprehensive remedy precluded "a different or additional remedy for the correction of the same grievance".[105]

The court seems to have confused a case of wrongful expulsion with a violation of section 8(b)(2), for it did not recognize that section 8(b)(2) does not make it an unfair labour practice to expel improperly a member from his union. One would think that the jurisdiction of the National Labor Relations Board would not be drawn into play where the case is one of wrongful expulsion. Often, however, once a union expels a man, it will seek to sever all connection with him by asking the employer to discharge him, even though the expulsion was for a reason other than failure to tender periodic dues or initiation fees. By doing so the union would no doubt be violating section 8(b)(2). At this stage the member usually seeks relief in the state court. Should its doors be closed to him?

---

to . . . the retention of membership therein"; section 8(b)(5) making it a union unfair labour practice to require an entrance fee which the board finds "excessive or discriminating".

[102] *Ante*, footnote 34.

[103] (1954), 213 F. 2d 407, 34 L.R.R.M. 2244; rehearing denied: (1954), 214 F. 2d 349, 34 L.R.R.M. 2515; certiorari denied: (1954), 348 U.S. 855.

[104] 34 L.R.R.M. 2244, at p. 2246.

[105] *Ibid.*

This type of case came before the Washington Supreme Court in *Mahoney* v. *Sailors' Union*.[106] The plaintiff's claim was so phrased that it covered both the unfair labour practice and the wrongful expulsion. The court, in granting relief for the wrongful expulsion, distinguished the *Born* case on the ground that the plaintiff in that case had sought "to protect his right to earn a livelihood",[107] something Congress had undertaken to preserve through the National Labor Relations Board. It then separated the claim for relief from the unfair labour practice and the claim for relief from the wrongful expulsion, and granted relief against the wrongful expulsion. Certainly, in the same way as the state court lacks power to remedy an unfair labour practice, the National Labor Relations Board lacks power to remedy wrongful expulsion—something which is not made an unfair labour practice.

The decision in the *Mahoney* case was followed by the Appellate Division of the New York Supreme Court in *Real* v. *Curren*,[108] where it was said:

> The fact that the plaintiff has requested relief which the court should or could not grant, does not necessarily deprive the court of jurisdiction. Thus [in the *Mahoney* case] it was found that the union's conduct constituted a violation of section 8(b)(2) for the redress of which the board has exclusive jurisdiction. The state court, nevertheless, refused to dismiss the suit, for the reason that it had jurisdiction to order the plaintiff's restoration to union membership, a remedy which . . . the Board could not award. It is sufficient that the plaintiff alleges a cause of action within the court's power and seeks relief it is competent to award.[109]

In summary, by giving the *Born* case its widest holding the anomalous situation would arise in which the state courts would be deprived of their power to grant relief in cases of wrongful expulsion, and the board would be powerless to intervene since wrongful expulsions are not made unfair labour practices. It is submitted that the *Mahoney* and the *Real* cases correctly state the law (even though they scarcely distinguish the *Born* case), namely, that relief from wrongful expulsion is to be had in the state courts and not from the National Labor Relations Board.

---

[106] (1955), 275 P. 2d 440, 35 L.R.R.M. 2111.

[107] 35 L.R.R.M. 2111, at p. 2116. The distinction does not appear to exist, since the plaintiff asked also for reinstatement to the union and exemplary damages for being expelled wrongfully.

[108] (1955), 285 N.Y. (App. Div.) 552, 35 L.R.R.M. 2688.

[109] 35 L.R.R.M. 2688, at p. 2690. It would seem unnecessary to add that any state remedy for wrongful expulsion other than "restoration to union membership" would likewise be available to the expellee.

(b) *Relief*

The equitable remedies of declaration and injunction are no doubt available to a wrongfully expelled member. In *Polin* v. *Kaplan*[110] it was said that where the proceedings are irregular they will be "set aside and the associate restored to membership".[111]

Generally speaking, damages are also available to the victim of a wrongful expulsion,[112] but it has been urged in New York State that no damages will be allowed in the absence of fraud or bad faith:

> In the absence of allegations and proof of fraud or bad faith on the part of the membership as a whole no recovery of damages may be obtained.[113]

The court in the *Browne* case found, as a fact, that the expulsion was in complete good faith but, while granting reinstatement, it denied a claim for damages. It appears that the court confused the reason why the expulsion was wrongful with the consequences of a wrongful expulsion, and it is submitted that, while bad faith, in some cases, is decisive as to whether or not the expulsion was wrongful, it should not be conclusive of whether the expelled person is to be allowed damages. To be sure, bad faith ought to be considered as a factor bearing upon the quantum of damages. It should not affect their availability. Of course, other factors should be considered, such as loss of wages, shame, humiliation, general injury to character and reputation, even if the contract theory is being followed,[114] and certainly if the tort theory has been adopted.

Merely to decide that the wrongfully expelled member is entitled to damages is not to clear his road to judicial relief of all obstructions. Not all cases of wrongful expulsion are traceable

---

[110] *Ante*, footnote 12.

[111] *Ante*, footnote 12, at p. 282. *Accord, Browne* v. *Hibbets* (1943), 290 N.Y. 459, 49 N.E. 2d 713; *Ray* v. *Brotherhood of Railway Trainmen* (1935), 44 P. 2d 787, 182 Wash. 39; *Local Lodge No. 104, etc.* v. *Boilermakers* (1949), 203 P. 2d 1019, 33 Wash. 2d 1.

At one time the writ of mandamus was used. See, *e.g.*, *Smetherham* v. *Laundry Workers' Union, ante*, footnote 65. However, the remedy was limited by the rule that it would not lie against a voluntary association. See, *e.g.*, *People et al. Soloman* v. *Brotherhood of Painters* (1916), 218 N.Y. 415, 112 N. E. 752. A few jurisdictions have removed this limitation by statutory enactment. See, *e.g.*, *Petri* v. *Ruehl* (1940), 22 N.Y.S. 2d 549.

[112] See, *e.g.*, *Local Union No. 57, etc.* v. *Boyd, ante*, footnote 33; *Carson* v. *Glass Bottle Blowers Assn., ante*, footnote 37.

[113] *Browne* v. *Hibbets, ante*, footnote 111. The case was followed in *Coleman* v. *O'Leary* (1946), 58 N.Y.S. 2d 812; appeal dismissed, 58 N.Y.S. 2d 358. *Contra, Smetherham* v. *Laundry Workers' Union, ante*, footnote 65.

[114] See, *e.g.*, *Local Union No. 57, etc.* v. *Boyd, ante*, footnote 33; *Carson* v. *Glass Bottle Blowers Assn., ante*, footnote 37; *Nissen* v. *International Brotherhood of Teamsters, etc., ante*, footnote 83; *Malloy* v. *Carroll, ante*, footnote 26.

to the union, for it is conceivable that situations will arise where the union may not have authorized the improper act and, furthermore, did nothing to ratify it. Again, once it has been decided that the union's treasury is open to payment of damages, the further complication emerges of the manner of bringing the suit. To a large degree these questions merge into each other and they will be considered together.

It was decided in the *Browne* case[115] that, where an expulsion arises out of fraud or bad faith, it must, if the plaintiff is to succeed, be traceable to the "membership as a whole". Inferentially, the union or the membership is not always liable for the acts of its officers or agents. It was said in *Sizar* v. *Daniels*[116] that the members can be held liable only if it can be shown that they gave ". . . their consent before the act which it is claimed binds them is done, or they, with full knowledge of the facts, ratify and adopt it". In other words, if damages are to be had against the union treasury, the wrongful expulsion must have been authorized, expressly or impliedly,[117] by the union membership or later ratified by it.

Now, it has been held by courts in the United States that trade unions are voluntary associations and not legal entities.[118] Therefore, if the wronged member is to succeed in a claim for damages against the union's funds, he has the heavy task of showing that every member either authorized the act or later ratified it.[119] While it is true that some states allow the union to be sued in its registered name,[120] or in the name of its officers,[121] their statutes merely simplify the procedural steps and the substantive rights of the parties remain unaffected. The member is still confronted with the original task of proving authorization or ratification by the union members.[122]

It is not suggested that the rule requiring authorization or

---

[115] *Ante*, footnote 111.

[116] (1876), 66 Barb. 426, at pp. 432-433. The statement was approved in *Martin* v. *Curran* (1951), 303 N.Y. 276, 101 N.E. 2d 683, at p. 685.

[117] *Pandolfo* v. *Bank of Benson* (1921), 273 F. 48.

[118] See, *e.g.*, *Schultz* v. *Chicago Flat Janitors' Union* (1950), 91 N.E. 2d 471, 340 Ill. App. 278; *Local No. 458* v. *Hall Baking Co.* (1947), 69 N.E. 2d 111, 320 Mass. 286.

[119] In *U.M.W.A.* v. *Coronado Coal Co.* (1921), 259 U.S. 344, at p. 389, Chief Justice Taft said in a dictum: ". . . to remand injured persons to a suit against each of the . . . members to recover damages . . . would be to leave them remediless".

[120] See, *e.g.*, New Jersey, Stat., Anno., tit. 2, c. 78, s.2: 78-1 (1939).

[121] See, *e.g.*, New York, General Association Laws, Art. 2., s. 13 (1920), McKenney's Consol. Laws, tit. 18-A.

[122] In *Martin* v. *Curran*, *ante*, footnote 116, at p. 685, Judge Desmond pointed out that the New York statute "created no new substantive rights or liabilities", but was solely procedural.

ratification should be abolished. That could open unions to a flood of trumped-up charges whose burden upon their treasury would be difficult to support. Indeed, if unions are to fulfil their rôle as effective bargaining agents, the funds necessary to finance the carrying-out of economic action should not be lightly depleted. Perhaps the way out of the dilemma is to recognize unions for what they are—legal entities.[123] By so doing, the rules of agency could still be left to apply to the determination of liability, but no longer would it be necessary to trace the wrongful act to each individual member: it would be sufficient to trace it to the union itself.

To be sure, it is not enough to say that the union, as a legal entity, would be liable if it authorized or ratified the wrongful expulsion. The difficulty is to determine in each case whether, in fact, the act was authorized or ratified by the union. Judge Walter, in the *Coleman* case,[124] perhaps stated too broad a test when he said that the membership should be held liable in every case of wrongful expulsion because the act was "ordered by officers and agents of their own choosing". It is submitted that where the rule under which the member is charged is against public policy, or the proceedings under which the member is tried are contrary to natural justice, but the constitution gives a trial committee or a union official power to proceed, the agents of the union are sufficiently authorized. On the other hand, where the expulsion is not in accord with the rules and proceedings, no authority has been given and the union ought not to be liable unless it ratifies. Under the status theory, a tort has been committed and the principal can ratify a tort,[125] the ratification usually being by conduct if the union has not repudiated the wrongful act within a reasonable time.[126]

---

[123] Judge Walter in *Coleman* v. *O'Leary* (1946), 58 N.Y.S. 2d 812, at p. 817, tended toward that conclusion when he said: "I would have thought that upon finding their expulsion to be illegal the court could and should award them judgment against the union . . .". However he felt himself bound by the *Browne* case.

Dicey, The Combination Law and Opinion (1904), 17 Harv. L. Rev. 511, at p. 513, spoke of trade unions thus: "When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted".

[124] *Coleman* v. *O'Leary*, *ante*, footnote 123, at p. 817.

[125] See, *e.g.*, *Dempsey* v. *Chambers* (1891), 154 Mass. 330, 28 N. E. 279. However, the actual wrongdoers would remain liable. See, *e.g.*, *Osborne* v. *Morgan* (1881), 130 Mass. 120, 39 Am. Rep. 437.

[126] See, *e.g.*, *Lemcke* v. *Funk* (1914), 78 Wash. 460, 139 Pac. 234; *Robbins* v. *Blanding* (1890), 87 Minn. 246, 91 N.W. 844.

In view of numerous state statutes allowing unions to be sued in their registered names or as legal entities, it is unlikely that the courts will find a way out of the difficulty. This was made only too evident in the recent case of *Martin* v. *Curran*,[127] where Judge Desmond made the following significant remark:

> Much of the appellant's brief is given over to the policy argument that large associations like the National Maritime Union should be held accountable. . . . *But such consideration of policy cannot be allowed to control our decision when . . . we are under the command of a plainly stated, plainly applicable statute. . . .*[128]

It is suggested, in the light of the judicial attitude, that this is one area of the law in which the legislature could play a leading rôle.

V. *Conclusion*

As long ago as 1922 expulsion from a trade union was termed the "industrial death"[129] of the person expelled. The term has scarcely grown obsolete during the intervening thirty-four years. It is true that in the United States legislation has insulated a man's membership, or lack of it, in a trade union from his right to make a living. Great Britain and Canada have not made similar provision.

Even where a man can obtain work without being a union member, improper expulsion from his union is bound, in most cases, to draw after it an unfair reflection upon his character and reputation, not only among his fellow workmen but also among citizens at large. And one cannot lightly dismiss the reception the worker is likely to encounter in seeking work with another employer. The plaintiff in the *Tunney* case, for example, while soliciting a new job was asked by his prospective employer whether he (the plaintiff) thought the employer was "crazy" enough to employ an expelled man.[130]

The judicial machinery to correct wrongful expulsions has been examined and found wanting. The contract theory, which has been almost universally applied, is subject to a number of criticisms. Where the closed shop is in effect, it may strain the concept of a consensus usually attributed to the parties entering a contract to say that the member has "agreed" to become a union

---

[127] *Ante*, footnote 116.
[128] (1951), 303 N.Y. 276, 101 N.E. 2d 683, at p. 685 (emphasis supplied).
[129] The term was used by Younger L. J. in *Braithwaite* v. *Amalgamated Society of Carpenters, etc.* (1922), 91 L.J. Ch. 55, at p. 68. There was no closed shop.
[130] *Tunney* v. *Orchard et al.*, *ante*, footnote 5.

member.[131] The bargaining appears to be entirely one sided: either the man becomes a member or he will be shut off from earning a living at his trade. Even where no closed shop exists, it is still exceedingly difficult to determine the parties to the contract, since unions are generally regarded as voluntary associations. In England one court has held that a union is virtually a legal entity,[132] capable of being sued as such. This simplifies a procedural problem only, for even then one is faced with the problem of reconciling the amount of damages usually granted for a breach of contract with the relief that, in fairness, ought to be allowed a wrongfully expelled member. Courts in the United States have recognized that expulsion from a union sounds in tort as well as contract and, on some principle or other, have allowed exemplary damages. By far the brightest star on the horizon is the *Tunney* decision holding that, in the case of a closed-shop union at least, though a member's relationship to his union begins in contract, it is the relationship itself, namely, the status, which is to be protected and not bare contractual rights. To interfere improperly with a member's status is to commit a tort.

Of course I recognize that, even under a tort theory, it may not be wise to abandon the union constitution as the statement of the offences for which a member may be punished. The constitution, and the by-laws if applicable, perform a useful rôle in this respect and may be permitted to do so in the future. Remedies will still have to be exhausted where they exist, but no longer need one grope around in the fanciful world of contract law, as applied to cases of wrongful expulsion, to locate a firm legal foundation upon which to rest judicial relief.

The Sense of Community

The legal history of man is an age-long struggle with his own weaknesses — weaknesses which at intervals threaten to overpower him. The present is a time of crisis, because these weaknesses have now been armed with weapons that are rapidly developing towards total destructiveness. Law is our collective name for what is perhaps the most important set of institutions by which man has sought to reinforce his reason against his passions. It presupposes a consensus upon certain values or desiderata to which the immediate demands of the individual are to be subordinated. It consists of the rules and mechanisms by which these agreed values are protected against the explosive impatience of the human animal. (Percy E. Corbett, Morals, Law, and Power in International Relations (1956) p. 28)

[131] See the language of Denning L. J. in *Lee* v. *Showmen's Guild of Great Britain*, *ante*, footnote 8, at p. 1181.

[132] See *ante*, footnote 21.