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# Trade Union Law in the British Welfare State

W. F. Frank\*

## A BRIEF SURVEY OF THE EXISTING LAW

"If men are ever to be able to break the bonds of oppression or servitude, they must be free to meet and discuss their grievances and to work out in unison a plan of action to set things right."<sup>1</sup>

A trade union is defined in English law as "any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects, namely the regulation of the relations between workmen and masters or between workmen and workmen or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business and also the provision of benefits to members. . . ."<sup>2</sup>

It should be noted that the definition is wide enough to include not only trade unions or workers but also employers' associations. A trade union, by its rules, may have any number of objects, but if it is to be a trade union in the legal sense its principal objects must include one or both of those mentioned. In order to ascertain which objects are the principal ones, the rules must be considered as a whole. Although the definition refers also to the provision of benefits to members, this is merely an ancillary object and an association formed solely for this purpose would not be a trade union.<sup>3</sup>

At common law, before the passing of the Trade Union Act, 1871,<sup>4</sup> a trade union was treated as an ordinary unincorporated association, such as a social or sports club. It differed, however, from other unincorporated associations in that it was regarded as an illegal association if its purposes were deemed to be in restraint of trade. This illegality would affect not only union contracts which would be unenforceable, but also the re-

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1. DENNING, *THE ROAD TO JUSTICE* 98 (1955).

2. Trade Union Act, 1913, 2 & 3 GEO. V, c. 30, §§ 2(1), 1(2).

3. *Of. Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87, 95.

4. 34 & 35 VICT., c. 31.

lationship between the trade union and its officials. A union whose objects were in unreasonable restraint of trade was unable to claim union funds which had been wrongfully taken by an official of the union.

The status of trade unions was fundamentally altered by the passing of the Trade Union Act.<sup>5</sup> This act provides that "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."<sup>6</sup> The effect of this section, if it were standing alone, would have been that the courts might have been called upon to enforce agreements in restraint of trade entered into by trade unions. Thus, a trade union might have been able to sue in damages a member who, in breach of the union rules, had refused to join a strike when called upon to do so by the union committee. In order to avoid placing the courts in such an invidious position, Section 4 of the 1871 act states that notwithstanding the provisions of the preceding section a court should not entertain proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of a number of agreements enumerated there. These include mainly agreements between the trade union and its members as to the payment of subscriptions and penalties by members and of benefits by the union. Agreements made between one trade union and another are also declared to be unenforceable. It must be recalled, however, that Section 4 applies only to trade unions which were illegal at common law. The contracts of trade unions which are not illegal at common law could be enforced by court action. It is unlikely that there are many trade unions in existence today whose rules would have been legal at common law.<sup>7</sup>

The rules of a trade union, like the rules of any other unincorporated association, represent a contract between the members of the union. Any member joining an existing union does so on the understanding that he subscribes to the rules. If a trade union acts in breach of its rules, any member may appeal to the court asking for a declaration that the action was illegal. Such a declaration will be granted as it is not looked upon as a

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5. *Ibid.*

6. *Id.* § 3.

7. Kahn-Freund, *The Illegality of a Trade Union*, 7 MODERN L. REV. 192, 204 (1944): "Yet, it still remains possible that at any given moment, a domestic trade union agreement might be declared directly enforceable by a Court of Law if the Court was not satisfied that the union was in restraint of trade."

means of "directly enforcing" one of the agreements enumerated in Section 4 of the 1871 act.<sup>8</sup> As long as the rules are not illegal, the court will not examine their reasonableness. Fairly far-reaching powers as to the expulsion of members may be granted to union committees. This issue will be further considered in the second part of this article.

The Trade Union Act, 1871,<sup>9</sup> introduced also a system of voluntary registration for trade unions. Registration takes place with the Registrar of Friendly Societies who acts also as Registrar of Trade Unions. "The object of introducing a system of registration for trade unions was to encourage the establishment of permanent and stable bodies having adequate written constitutions and regularly audited accounts."<sup>10</sup> The act details the matters to be covered by the rules of a registered trade union. The registrar has certain limited powers of supervision over the affairs of a registered trade union. Through registration a union acquires advantages not enjoyed by unregistered unions, such as exemption from income tax on such portions of its investment income as are applicable solely for the purpose of providing benefits (e.g., in sickness, old age, or unemployment). A registered trade union, though still legally an unincorporated association, may sue and be sued in its registered name and it possesses summary remedies against fraudulent officials. The property of any trade union, as that of any other unincorporated association, has to be held on its behalf by trustees, but the trustees may convey such property belonging to registered trade unions to their successors in that office without any need for a formal conveyance. The advantages of registration are procedural rather than material, but even so the large majority of trade unions of workers has registered and a substantial number of trade unions of employers has done so as well."

In order to achieve their objects, trade unions may wish to call a strike. At common law the calling of a strike was punish-

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

9. 34 & 35 VICT., c. 31.

10. CITRINE, *TRADE UNION LAW* 11 (1950).

11. At the end of 1955 there were 405 registered trade unions of employees with a total membership of 8,616,525. This compares with a figure of 251 unregistered trade unions having, however, merely 1,145,475 members. There were also 105 employers' associations registered as trade unions with a membership of 116,330. It is impossible to give even an estimate of the membership of unregistered employers' associations, but they must number about 1500. *Minister of Labour Gazette*, November 1956.

able as a criminal conspiracy.<sup>12</sup> The criminal liability of trade union officials calling a strike was removed by Section 3 of the Conspiracy and Protection of Property Act, 1875,<sup>13</sup> which provided that where an act is not illegal in itself, the fact that it is done in combination with others will not render it punishable as a criminal offense, provided that it was done in contemplation or furtherance of a trade dispute. The act did not define a trade dispute, but that has since been done by Section 5 of the Trade Disputes Act, 1906,<sup>14</sup> which states that a trade dispute means "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises."<sup>15</sup> The definition is sufficiently widely drawn to include all disputes having an industrial connection, such as closed shop disputes<sup>16</sup> and recognition disputes. It does not, however, include disputes resulting from purely personal quarrels<sup>17</sup> or disputes having primarily political objectives.<sup>18</sup>

The Conspiracy and Protection of Property Act, 1875,<sup>19</sup> while removing ordinary strike action from the criminal law, made breaches of contracts of employment criminal offenses in two cases, namely, where the breach is one by a person employed in the public supply of gas or water and the likely result of the breach is the interruption of that supply and breaches of service contracts in other employments where they are likely to lead to serious injury to persons or property. Sections 4 and 5 of the Electricity (Supply) Act, 1919,<sup>20</sup> have extended these provisions

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12. *Regina v. Bunn*, 12 Cox. Cr. Cas. 316 (Cent. Crim. Ct. 1872).

13. 38 & 39 Vict., c. 86.

14. 6 Edw. 7, c. 47.

15. For an interesting discussion of some of the problems arising out of this definition see Delany, *Immunity in Tort and the Trade Disputes Act*, 18 MODERN L. REV. 338 (1955).

16. *White v. Riley*, [1921] 1 Ch. 1.

17. *Huntley v. Thornton*, [1957] 1 Weekly L.R. 321 (Ch.), see further below.

18. Some writers have attacked the definition. "The definition of a trade dispute in the Act of 1906 rests on a theory of society and of politics which, even in 1906, was open to grave doubt and which today is plainly untenable. It rests on the assumption that one can separate economic from political motives and economic action from political action." Kahn-Freund, *Legal Framework*, in *THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN* 127 (Flanders & Clegg ed. 1954). If this is so, does there still exist a case for protecting action taken in furtherance of a trade dispute?

19. 38 & 39 Vict., c. 86.

20. 9 & 10 GEO. 5, c. 100, § 31.

also to persons employed in the supply of electricity. These provisions do not mean that strikes in the industries concerned are illegal since strike action could be taken without committing a breach of contract.

Although the 1875 act<sup>21</sup> had absolved trade unions from criminal liability for calling strikes, there still remained their civil liability for the tort of conspiracy. In the well-known case *Taff Vale Railway v. Amalgamated Society of Railway Servants*<sup>22</sup> the House of Lords held that a registered trade union could be sued in damages for the torts of its agents. The doctrine underlying this decision was subsequently reversed by the Trade Disputes Act, 1906,<sup>23</sup> which conferred on trade unions complete immunity from any action for tort committed by or on behalf of the union, whether or not in furtherance of a trade dispute. A similar immunity was also extended to trade union officials in their official capacity, though a trade union member remains personally responsible for any tort committed by him. Civil liability for the tort of conspiracy has been further whittled down by the general development of the common law regarding this tort. The general principles concerning civil conspiracy have been formulated as follows by Lord Cave in *Sorrell v. Smith*:<sup>24</sup>

- "1. A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
- "2. If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."

Much has been written about the problem of mixed motives. When union officials call out workers on strike, they may intend both to foster the sectional interests of their members as well as to teach the employers a lesson. This issue has now been finally resolved by the House of Lords in *Crofter Hand Woven Harris Tweed Co. v. Veitch*,<sup>25</sup> where it was stressed that the court had to consider the predominating motive that actuated the members of the combination.<sup>26</sup> Since, in practice, those combining will

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21. 38 & 39 VICT., c. 86.

22. [1901] A.C. 426.

23. 6 EDW. 7, c. 47.

24. [1925] A.C. 700, 712.

25. [1942] A.C. 435, 1 ALL E.R. 142.

26. "It is enough to say that if there is more than one purpose actuating a

almost always be able to satisfy the court that they were actuated mainly by self-interest (e.g., protecting their wage rates or their standard of living), the chances of a successful action for conspiracy are today definitely remote.<sup>27</sup>

Section 2 of the Trade Disputes Act, 1906,<sup>28</sup> declared also that it was lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or to abstain from working. Before the passing of this section it was open to doubt whether peaceful picketing was lawful<sup>29</sup> if it was used for the purpose of persuasion as distinct from that of communicating information. Picketing is now lawful not only when it takes place at a place of work, but also when the pickets visit private homes, provided of course that they limit themselves to peaceful persuasion. Picketing is unlawful if either the methods employed are unlawful or where the objects are unlawful, such as where the pickets are trying to persuade workers to commit a criminal offense, e.g., breaking one of the contracts mentioned in the Conspiracy and Protection of Property Act, 1875.<sup>30</sup> Pickets are not exempt from the general provisions of the law dealing with trespass, public nuisance, etc.

British trade unions realized at an early stage of their development that in order to achieve their objects political support was required. When the franchise was extended to wider sections of the population, the votes of trade unionists became increasingly important to the main parties in the country. At first, trade unions tended to support individual parliamentary candidates irrespective of their party allegiance on a purely personal basis, but from the early part of the present century most trade unions of workers have reserved their support entirely for the

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combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interests of the combiners, it is not a tortious conspiracy, even though it causes damage to another person." Per Simon, L.C., *id.* at 149.

27. STREET, *THE LAW OF TORTS* 368 (1955).

28. 6 EDW. 7, c. 47.

29. CITRINE, *TRADE UNION LAW* 420 (1950); *Conspiracy and Protection of Property Act, 1875*, 38 & 39 VICT. c. 86, § 7.

30. 38 & 39 VICT. c. 86, §§ 4, 5.

labor party. In 1900, the Trades Union Congress (the body to which most of the large trade unions are affiliated) together with a number of other working class organizations formed the Labor Representation Committee which in 1906 was renamed the "Labor Party." The labor party depends financially to a very large extent on subscriptions from trade unions. In 1955, for instance, out of a total income of £192,000 no less than £141,000 had been contributed by trade unions.<sup>31</sup> In order to provide the necessary funds, trade unions make special levies on their members. In the case of *Amalgamated Society of Railway Servants v. Osborne*<sup>32</sup> the House of Lords had ruled that the objects of a trade union were restricted to those enumerated in the trade union acts and that if the rules contained also other objects, they were ultra vires and void. In *Osborne's* case the court ruled that the union was not permitted to spend money in trying to secure the election of a member of parliament. Trade unions, through their influence over the then powerful liberal party, were able to secure the passage of the Trade Union Act, 1913,<sup>33</sup> which provided that a trade union might pursue any lawful object as long as its main objects were statutory objects. If a union wishes to make payments towards "political objects,"<sup>34</sup> the following provisions will have to be complied with:

1. The furtherance of political objects must have been approved as one of the objects of the union by a resolution passed on a ballot of its members by a majority of those voting.<sup>35</sup>

2. The ballot has to be held in accordance with rules which have to be approved by the registrar of trade unions who must be satisfied that every member is assured the right to vote.

3. Any payments to be made by the union towards political objects must be made out of a separate fund (the political fund) and not out of the general fund of the union.

4. Every union which has resolved by ballot to set up a political fund must have special rules for the administration of the fund. These rules have to be approved by the registrar (even if

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31. REPORT OF THE 55TH ANNUAL CONFERENCE OF THE LABOUR PARTY IN BLACKPOOL 44 (1956).

32. [1910] A.C. 87.

33. 2 & 3 GEO. 5, c. 30.

34. *Id.* § 3(3). "Political objects" include the payment of the expenses of any candidate for Parliament or for any other public office, the cost of holding political meetings or distributing political literature in support of such a candidate or the payment to him of allowances when he has been elected.

35. *Id.* § 3(1).



the union is a non-registered one) and they must contain the following points:

a. All political payments must come out of the political fund only.

b. Any member of the union may give notice to the secretary that he does not wish to contribute to the political fund. This notice becomes effective as from January 1 next.

c. A member who has chosen to contract out from the obligation to contribute to the political fund may not be excluded because of that from any union benefits nor may he be placed under any disadvantage as compared with other members, except in relation to the management and control of the political fund, nor may contributions to the political fund be made a condition of admission to the union.

d. No monies other than those raised by the special political levy may be credited to the political fund.

5. If a union member feels aggrieved by a breach of the rules relating to the administration of the political fund, he may complain to the registrar who may order that the breach should be remedied. This order is binding on all parties and there is no right of appeal from it to the ordinary courts.

#### THE RIGHT TO WORK

"A man's right to work is just as important to him, indeed more important, than his rights of property."<sup>36</sup>

Since the end of the second world war, the power of the British trade union movement has been steadily increasing. The total membership has risen though the unions have not yet attained their aim of 100% union membership.<sup>37</sup> During the six years (1945-51) of the labor government the trade unions realized many of their political objectives, in particular the nationalization of the main public utilities (coal, gas, electricity, rail, road and air transport, and central banking) as well as the repeal of the hated Trade Disputes and Trade Unions Act, 1927.<sup>38</sup>

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36. DENNING, *THE ROAD TO JUSTICE* 103 (1955), quoting his own words in *Lee v. Showmen's Guild*, [1952] 2 Q.B. 329 (C.A.).

37. At the end of 1955 the total membership of trade unions was 9,662,000. The total number of persons in civil employment is approximately 23,000,000.

38. 17 & 18 GEO. 5, c. 22, repealed by the Trade Disputes and Trade Unions Act, 1946, 9 & 10 GEO. 6, c. 52.

This act, passed as a direct result of the general strike of 1926, had declared strikes illegal if they were not concerned with a trade dispute in the industry in which they were called and if they were aimed directly or indirectly at coercing the government. The act had also inconvenienced trade unions by replacing the system of "contracting out" for dissenters to political levies by one of "contracting in" for those who wished to pay. The repeal of the act, which meant a restoration of the *status quo* based on the 1913 act,<sup>39</sup> led to a substantial increase in the incomes of the political funds,<sup>40</sup> itself a clear sign of the general political apathy among rank-and-file trade unionists. The change of government in 1951 did little to reduce the power of trade unions. The new conservative administration went out of their way to demonstrate to the unions that it was not hostile to labor, and conservative leaders have steadfastly refused to act on the demands from many of their supporters to curb union power. Whether this refusal is based on political expediency or on a belief in the theory of countervailing power is impossible to say. This is not the place for a discussion of the relative pros and cons of trade union and business monopolies, but while business monopolies are subject to investigation by the Monopolies Commission set up by the Monopolies Act, 1948,<sup>41</sup> and now also to registration under the Restrictive Trade Practices Act, 1956,<sup>42</sup> neither of these acts extends to labor monopolies. It has been suggested that the procedure appropriate to business monopolies is not suitable for dealing with labor monopolies, but no attempt has been made to devise any alternative procedure for this purpose.

The spread of the closed shop movement<sup>43</sup> has led to a keen discussion of the problem of the right to work. The United Kingdom possesses no code of fundamental rights, so that the liberties of the British citizen are those only which are enshrined in the common law. The right to work<sup>44</sup> is not among

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39. 2 & 3 GEO. 5, c. 30.

40. In 1945, before the repeal of the 1927 act, 2,917,000 members out of a total membership of just over 6,000,000 were contributors. In 1946, after the repeal, there were 5,262,000 contributors out of a membership of just under 7,000,000. ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 371 (1956).

41. 11 & 12 GEO. 6, c. 66.

42. 4 & 5 ELIZ. 2, c. 68.

43. We understand by the "closed shop" an establishment, employment in which is restricted to members of any recognized trade union. This has to be distinguished from the "union shop," where employment is limited to the members of a particular union.

44. For a discussion of some of the theoretical issues involved, see Frank, *The*

these and many lawyers would contend that it is so far unknown to English law.<sup>45</sup> Among the fundamental liberties of the subject we find the right of association and the whole history of trade union law is really the story of the evolution of this right. As long as trade unions were weak and powerless bodies there was no need to consider the logical counterpart of the right of association which is the right not to join an association. Trade union leaders would not deny the existence of such a right; but they claim that they, on their part, have a right to refuse to work with persons who do not belong to their association. Where a union is strong enough to impose its will on the employers, refusal to work with the non-union man is tantamount to depriving him of his opportunity to earn his living<sup>46</sup> in the way he has been accustomed to. The attitude of the common law to this question was clearly explained by Lord (then Lord Justice) Denning as follows: "When a man joins a trade union he is bound by the rules. The rules are said to be a contract between the men themselves and between them and the union. But they are in no sense a contract freely negotiated. A man must accept them or go without employment. They are nothing more nor less than the legislative code laid down by some members of the union to be imposed on all members of the union."<sup>47</sup>

Since trade unions are voluntary associations there can be no doubt that they may refuse to admit new members.<sup>48</sup> If this refusal makes it impossible for the person turned down to earn his living in a particular occupation, so much the worse for him.

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*Right to Work*, 6 INDUSTRIAL L. REV. 247 (1951). See also THE REPORT OF THE LIBERAL TRADE UNION COMMISSION 19 *et seq.* (1949)

45. "The 'closed shop' agreement has never occupied the attention of courts and legislators in England to anything like the same extent as in the United States. The probable reason is that public opinion in England, including the trade unions themselves, still overwhelmingly opposes compulsion to join the union." FRIEDMANN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* 132 (1951). It is highly doubtful whether this is still true today though it may have been true when Friedmann wrote. Official trade union policy in Britain (as expressed by the Trades Union Congress) is in favor of the closed shop, though not in favor of the union shop. *Cf.* ROBERTS, *TRADE UNION GOVERNMENT AND ADMINISTRATION IN GREAT BRITAIN* 47 (1956), where also details of relevant union rules are given.

46. "Freedom to organise is rapidly becoming compulsion to organise." FRIEDMANN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* 147 (1951).

47. DENNING, *THE ROAD TO JUSTICE* 102 (1955).

48. Judge of Appeal O'Halloran in the Court of Appeal for British Columbia thought otherwise. His views, reported in the Privy Council decision in *White v. Kuzych*, [1951] 2 T.L.R. 277, 281, though not approved by their lordships, bear close examination. He said: "A man has a right to work at his trade. If membership in a union is a condition attached to working at his trade, then he has an indefeasible right to belong to that union. It must be so, or else the union can have no right to agitate for a closed shop."

Law will intervene, however, in certain cases where a union member is expelled from the union. In the days before the closed shop became as important as it is today, the courts would not normally intervene in the decisions of a union as to membership, provided that the union had not offended against the principles of natural justice. Since the war, however, the courts have gradually extended their control over union decisions to expel members. This trend is another instance of the eternal vitality and vigilance of the common law which is able to adapt itself to the changing needs of the moment. The present position may be summed up as follows:

1. A trade union has a right to expel a member only where this right is conferred by the union rules. If the rules make no mention of expulsion, a member of the union may not be expelled. Thus, in *Spring v. National Amalgamated Stevedores and Dockers Society*<sup>49</sup> the defendant union had for some time been engaged in recruiting the members of another union, the Transport and General Workers' union. Such an action represents an infringement of a resolution passed at the Trades Union Congress meeting in Bridlington in 1939. This resolution provided that no union affiliated to the Trades Union Congress should admit members of another affiliated union to membership unless the persons produced a clearance certificate from their former union. No such certificate had been given in the present case and, acting on a complaint from the Transport and General Workers' Union, the disputes committee of the Trades Union Congress ordered the stevedores union to return the poached members to their former union. After lengthy opposition, the defendant union gave way and informed the members in question, the plaintiff among them, that their membership had lapsed. Spring asked the court for a declaration that the purported expulsion was void and that he was still a member of the defendant union. He relied on the fact that the union rules contained no reference to expulsion. The defendant union argued that the terms of the Bridlington resolution had become an implied term of the contract of membership of all their members, but this argument did not commend itself to the court and the plaintiff got his declaration.

2. Where the rules of a union confer on it the power of expulsion, an expulsion will be valid only if the power has been

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49. [1956] 1 Weekly L.R. 585 (Ch.).

exercised in strict conformity with the rules. In *Bonsor v. Musicians' Union*<sup>50</sup> the plaintiff, a band conductor, was expelled from the union for non-payment of union dues. The union rules permitted such an expulsion, but the decision to expel should have been made by the branch committee, while in fact Bonsor was informed by the branch secretary that he was no longer a member of the union. Again, the expulsion was set aside by the court.

3. Unless the rules clearly state that a member may be expelled at the complete discretion of the committee or other body of the union, this body will be deemed to be acting in a quasi-judicial capacity and it must therefore observe the principles of natural justice. These principles are generally stated under three main headings, namely:

a. Where a member is charged with some offense against the union, he must be informed of the nature of the charge. He must receive sufficient advance notice to enable him to prepare his defense.

b. The member must be given an opportunity of defending himself. The old maxim *audeatur et altera pars* will be strictly applied. The hearing must be a fair one and its result must not be a foregone conclusion.

c. The body conducting the hearing must proceed in an unbiased manner and no person who is in any way interested in the issue may serve as member. In *Abbott v. Sullivan*<sup>51</sup> the facts were as follows: The plaintiff, a corn porter at London docks, was a member of the corn porters' committee formed to protect the interests of corn porters. Although the committee was not a trade union and had no written constitution, it exercised even so considerable de facto powers. No person could be employed as a corn porter in the port of London unless his name appeared on the register kept by the committee. The committee could by way of disciplinary action remove a person's name from the register and thus deprive him of the opportunity of working as corn porter. The plaintiff had been fined by the committee because of some complaints made against him by fellow members. Immediately after the hearing he assaulted a trade union official who had attended the committee meeting on the street outside

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50. [1956] A.C. 104.

51. [1952] 1 K.B. 189 (C.A.).

the building where the committee had met. The official at once reconvened the meeting and the committee decided to remove the plaintiff's name from the register of corn porters. The plaintiff obtained a declaration from the court that the resolution of the committee was invalid since they had no right to use their disciplinary powers in a matter solely affecting one of their members in his personal capacity, not connected with the interests of corn porters as such.

4. It must not be overlooked, however, that compliance with the principles of natural justice may be excluded by the rules. There is not a great deal of authority on this point but the author of the main textbook on trade union law supports the view expressed by Maugham, J., in *Maclean v. The Workers' Union*<sup>52</sup> where the learned judge said: "A person who joins an association governed by rules under which he may be expelled . . . has in my judgment no legal right of redress if he be expelled according to the rules, however unfair or unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith. It is impossible to doubt that, if the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard . . . a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation." This opinion that a member is entitled to a fair hearing only if the rules provide that there should be a hearing at all has not gone uncontested. Brett, L. J., argued, for instance, in *Dawkins v. Antrobus*<sup>53</sup> that the court could interfere where the rules themselves were opposed to natural justice.

5. When the union rules provide for some special appeal procedure, a member of the union aggrieved by his expulsion could not ask the court to set aside the expulsion until he had exhausted the union's own appeal procedure.<sup>54</sup>

6. Until recently it was believed that the only grounds on which an expelled member could contest his expulsion in the courts were the absence of a power to expel, or non-compliance with the principles of natural justice. The position has been clarified by Somervell, L. J., in *Lee v. Showmen's Guild*<sup>55</sup> as follows: "I am alive, I hope, to the important and necessary work

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52. [1929] 1 Ch. 602, 624.

53. 17 Ch. D. 615, 630 (1881).

54. *White v. Kuzych*, [1951] 2 T.L.R. 277 (P.C.).

55. [1952] 2 Q.B. 329, 341 (C.A.).

done by domestic tribunals, normally with care, skill and fairness. I am also alive to the principle, reiterated more than once, that this court cannot be made a court of appeal from decisions of such tribunals. On the other hand, a power of expelling a member is a drastic power which in many cases, as here, may affect the plaintiff's livelihood or reputation. There is, in my opinion, a distinction between cases where the decision challenged is under the rules based on the opinion of a committee on a matter which is primarily one of opinion, and those cases, such as the present, where the decision is, or should be, based primarily on the legal construction of words in a rule."

The plaintiff in *Lee v. Showmen's Guild* was a travelling showman who made his living from exhibiting at local fairs a "Noah's Ark." The guild is a registered trade union (though of course not of workers) representing the interests of travelling showmen. A dispute had arisen between Lee and another showman as to who should occupy a certain favorable site at the Bradford Summer Fair. The other member complained to the guild. One of the rules of the guild provides that no member should indulge in unfair competition in the renting of sites. The rules also stated that where a breach of the rules had been committed a fine might be imposed and that a member failing to pay the fine could be expelled. Lee was fined and when he refused to pay the fine he was expelled from the guild. The court of appeal unanimously upheld the trial judge who had declared the expulsion void since the words "unfair competition" properly construed bore a different meaning from that given to it by the guild.

7. One of the most important decisions on trade union law in recent years was that of the House of Lords in *Bonsor v. Musicians' Union*.<sup>56</sup> The facts of the case have been given already. In addition to the declaration, which he had obtained already from the trial court, the plaintiff had also asked for damages for wrongful expulsion from the union. In doing so, Bonsor was faced with a clear precedent against him in the form of the court of appeal decision in *Kelly v. National Society of Operative Printers' Assistants*.<sup>57</sup> Lord Justice Swinfen in that case ex-

56. [1956] A.C. 104. This decision has been widely commented on in our periodical literature, e.g., Lloyd, *Damages for Wrongful Expulsion from a Trade Union*, 19 MODERN L. REV. 121 (1956); Thomas, *Trade Unions and Their Members*, CAMBRIDGE L.J. 67 (1956); Wedderburn, *The Bonsor Affair: A Post-script*, 20 MODERN L. REV. 105 (1957).

57. 84 L.J.K.B. 2236 (1915).

pressed the court's point of view quite clearly when he said:<sup>58</sup> "I am not aware of any authority for the proposition that a member of a voluntary unincorporated<sup>59</sup> association can recover general damages against the association as such for a breach of the rules, or of the contract contained in the rules." The reason for this proposition is quite simple. An unincorporated association is not a legal person and its officials in administering its rules act thus on behalf of all the members and not on behalf of the association as such. If a member wrongfully expelled were to sue the union for the act of the officials he would be met by the defense that he himself had impliedly authorized the act of the officials.

The House of Lords in *Bonsor's* case overruled the decision in *Kelly's* case and awarded damages to the plaintiff's estate, the plaintiff having died before the hearing of the appeal. Unfortunately, it is difficult to ascertain the *ratio decidendi* of the case. Two of the law lords<sup>60</sup> argued that a registered trade union was in effect a legal person *sui generis*. If that was so, an action against the union for breach of contract would of course be quite feasible. Two other law lords<sup>61</sup> denied that a registered trade union was a legal person and based their decision on an entirely different reasoning. They claimed that when the local secretary expelled Bonsor from the union he acted in breach of the union's rules. Although an official of an unincorporated association is acting as agent by implication for all the members, he could, in the view of the two law lords, not have acted as agent for Bonsor who was the victim of the wrongful expulsion. Referring to this matter, Lord MacDermott said:<sup>62</sup> "To say that that is done on behalf of the person expelled seems to me an unwarranted extension of the agency and quite out of keeping with reality." The fifth law lord<sup>63</sup> expressed an opinion which fell half way between that of his colleagues. He claimed that a trade union, while still remaining an unincorporated association, was nevertheless a legal entity. As an unincorporated association it had a permanently changing membership while as a registered trade union it had a permanent identity. When wrongfully expelling the plaintiff, the secretary had acted as

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58. *Id.* at 2238.

59. The report, probably through a misprint, reads "incorporated."

60. Lords Morton and Porter.

61. Lords Macdermott and Somervell.

62. [1955] 3 Weekly L.R. 788, 815 (H.L.).

63. Lord Keith of Avonholm.



agent for the legal entity and this entity was thus liable for breach of contract. It is interesting to note that the headnote to the All England Report<sup>64</sup> of the case brackets Lord Keith with Lords Morton and Porter as a supporter of the view that a registered trade union is a legal person while the Weekly Law Reports<sup>65</sup> quote him, in my opinion rightly, as a supporter of the opposing view. One might just add that Bonsor's action was not defeated by Section 4 of the Trade Union Act, 1871,<sup>66</sup> as an action to restrain a union from wrongfully expelling a member is not construed as a "direct enforcement" of the union rules.<sup>67</sup>

In the light of the above decisions of the courts can it be said that the British worker is assured of his right to work? The answer must be definitely in the negative. In the first place, he need not be accepted as member by the trade union to which he has to belong to secure employment. If he is a member and is expelled, his chances of having the expulsion reversed will depend on the union rules and on whether the principles of natural justice have been complied with. Trade unions were rather shocked by some of the decisions quoted here, particularly by *Bonsor's* case, and it may be assumed that their legal advisers are busy at work redrafting their rules. Any proposed amendments would of course have to be approved by the union membership. If the rules are properly drafted the expelled member may be deprived of all remedies.<sup>68</sup> We have seen already that compliance with the principles of natural justice could be dispensed with by the rules<sup>69</sup> and the right to claim damages from the union for breach of contract could also be easily ruled out contractually.<sup>70</sup>

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64. [1955] 3 All E.R. 518 (H.L.).

65. [1955] 3 Weekly L.R. 788 (H.L.)

66. 34 & 35 Vict., c. 31.

67. *Of*. Lord Macdermott, [1955] 3 Weekly L.R. 788, 803, 812 (H.L.).

68. Thomas, *Trade Unions and Their Members*, 1956 CAMBRIDGE L.J. 78 suggests a rule in the form that "a member may be expelled for conduct which, in the opinion of the union, is contrary to the interests of the union."

69. If the unions were to adopt such a policy the likely outcome would be intervention by Parliament, perhaps on the lines suggested later in this article. After all, we must not forget that, in the words of Scrutton, L.J., in *Czarnikow v. Roth*, [1922] 2 K.B. 478, 488, "there must be no Alsatia in England where the King's writ does not run." This danger must also have been in the mind of the legal adviser to the Trades Union Congress when he recommended against the taking of any of the measures discussed above because this might "involve the risk of inviting other reforms on the law affecting trade unions." REPORT OF THE GENERAL COUNCIL OF THE T.U.C. FOR 1956, ¶ 437.

70. This might possibly be done by an express provision in the rules of the union, stating that they do not constitute a legally binding agreement. It would still remain to be seen whether the registrar would accept such rules as satisfying the requirements of the Trade Union Act, 1871.

Many of the recent trade disputes in this country led to bad feeling between members of different unions. If union *A* calls out its members on strike and union *B* does not, the members of *B* union may be called blacklegs by their mates in union *A* if they stay at work. When the strike is eventually settled the *B* union members may find themselves "sent to Coventry" by the ex-strikers and if there are few *B* union members relatively to those in *A* union their position may become a precarious one.<sup>71</sup>

Such an after-strike situation had to be resolved by the court in *Huntley v. Thornton*.<sup>72</sup> The Amalgamated Engineering Union called a national one-day strike in December 1953 in support of a wage claim. Huntley, a member of the union, refused to join the strike on the ground that it had been called in an unconstitutional manner. After the strike, Huntley was invited to attend a meeting of the local branch committee of his union from which he walked out after some rather strong language had been used by both sides. In his absence, the committee recommended his expulsion from the union. Such a recommendation has to be approved by the national executive of the union who, to their credit, refused to agree. Afterwards, life was made so difficult for the plaintiff at his place of work that he felt compelled to hand in his notice and to try to find work elsewhere. The secretary of the local branch of the union wrote now to the secretaries of other branches in the neighborhood and asked them to insure that the plaintiff should not get employment. This proved successful and the plaintiff was dismissed through union pressure from a number of positions which he had secured. He now brought an action against the secretary and some other committee members of the local branch for conspiracy and was awarded £500 damages. Harman, J., held that the acts of the defendants amounted to a conspiracy to injure the plaintiff in his occupation and that they were not done to further the legitimate trade interests of the defendants. The defendants were not protected by the provisions of the Trade Disputes Act, 1906,<sup>73</sup> since there was no trade dispute in existence at the time when

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71. During the railway strike of 1955 the National Union of Railwaymen (N.U.R.), which organizes mainly the less skilled grades of railway staff but has also a number of engine drivers among its members, instructed its members not to join the strike called by the Associated Society of Locomotive Engineers and Firemen. After the strike had been settled, some of the N.U.R. members who had worked during the strike were "sent to Coventry" by the ex-strikers and this forced some of them to suicide.

72. [1957] 2 Weekly L.R. 321 (Ch.).

73. 6 Edw. 7, c. 47.

they acted, the dispute having been settled previously. The defendants had tried to injure the plaintiff in furtherance of a personal grudge and not in furtherance of a trade dispute.

#### THE FUTURE OF TRADE UNION LAW

"The law is inadequate to protect a man's right to work."<sup>74</sup>

If we look back upon the attitude of the law to trade unions we observe the remarkable fact that from being oppressed bodies, membership of which was visited with criminal sanctions, they have become in little more than a century the pampered darlings of the law.<sup>75</sup> Until 1947<sup>76</sup> they shared with the Crown the privilege of immunity from torts; now that the Crown is liable for the tortious acts of its servants and agents, trade unions enjoy this privilege in splendid isolation. It cannot be denied that trade unions have used this privilege with a good deal of restraint but from time to time the mask of restraint is dropped and the privilege is exploited up to the hilt.

In this context reference must be made to the legal position of collective agreements.<sup>77</sup> Collective agreements are not directly enforceable in English law. If they are agreements between a trade union of workers and an employers' association they will be unenforceable by virtue of Section 4 of the Trade Union Act, 1871,<sup>78</sup> but even if the agreement is one between a trade union and an individual employer it is probably unenforceable as it lacks the essential ingredient of a contract, namely the wish to establish a legally binding relationship. This does not mean to say, of course, that collective agreements are legally worthless. When the agreement provides for higher rates of pay, for instance, and the new rates are applied by an employer to his employees, the presumption will arise that they have become impliedly embodied in their contracts of service. Furthermore, if an employer fails to honor the terms of the collective agree-

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74. DENNING, *THE ROAD TO JUSTICE* 102 (1955).

75. Darling, J., commenting on the 1906 act, said in *Bussy v. Amalgamated Society of Railway Servants*, [1908] 24 T.L.R. 437 (K.B.): "From the humiliating position of being on a level with other lawful associations of his Majesty's subjects the statute of 1906 has relieved all registered trade unions, and they are now *super legem*, just as the medieval Emperor was *super grammaticam*."

76. Crown Proceedings Act, 1947, 10 & 11 GEO. 6, c. 44.

77. The best exposition of the legal position is found in FLANDERS & CLEGG, *THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN*, c. 2 (1954). This chapter on the legal framework of industrial relations has been contributed by Professor O. Kahn-Freund.

78. 34 & 45 VICT., c. 31.

ment negotiated for his industry, the union involved may report this fact to the Minister of Labour and National Service with a request that he should refer it for settlement to the Industrial Disputes Tribunal.<sup>79</sup> The tribunal may then order the employer to pay wages or offer terms of employment which are not less favorable than those generally accepted in the industry. This may be done incidentally even in respect of an employer who is not a member of the employers' association which negotiated the agreement. In theory, an employer may similarly report to the minister a case of non-compliance by a union with the terms of an agreement, but, although the awards of the tribunal are legally binding, it is difficult to see how an unfavorable award could be enforced against a union. After all, no court or tribunal in a democratic country can compel people to work against their will. It appears then that while unions can effectively insure that collective agreements are honored by employers, the employers have no similar powers in respect of the unions. In recent years collective agreements have generally followed the line of unions securing wage increases and promising in return to help in increasing productivity, or in removing labor restrictive practices, or reducing absenteeism, or agreeing to the installation of labor-saving devices. Naturally, these promises by the unions are in any case much too indefinite to form the subject matter of a reference to the tribunal.

The acts passed under the late labor government (1945-51) for the nationalization of certain basic industries have also helped to strengthen the hands of trade unions in that the duty to bargain collectively has been imposed on the boards of the public corporations set up to administer the industries.<sup>80</sup> Furthermore, where a government department issues a contract to a private firm, the department is bound by the terms of a resolution of the House of Commons<sup>81</sup> to insist on the contractor complying with certain conditions. These include, apart from the payment of wages not lower than those generally prevailing in the industry in question, the assurance that the employer will allow his employees to be members of trade unions. Most local authorities impose similar conditions on the contractors working for them.

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79. Set up by the Industrial Disputes Order, S.I. 1951, No. 1376.

80. For details consult Gratwick, *Labor Relations in Nationalized Industries with Particular Reference to the Coal Mining Industry*, 16 LAW & CONTEMP. PROB. 652 (1951).

81. Fair Wages Resolution of October 16, 1946.

It is a sign of the times that no serious suggestion for the reform of trade union law has come from the trade unions themselves since the abolition of compulsory arbitration of trade disputes and of the prohibition of strikes in 1951.<sup>82</sup> Trade union opponents, especially among the right-wing members of the conservative and liberal parties, have produced in print many such proposals dealing with such diverse issues as the holding of compulsory ballots before strike action, the disqualification of communists from holding union office, etc. These proposals fail to meet the real issue that is at stake. Repressive legislation against trade unions, whatever form it may take, is quite out of question today. Not only would it not be politically feasible, it would also deprive the country of the valuable services that a constructive and properly operating trade union movement may render.

The solution towards which we should be aiming has been outlined already some sixty years ago by that great American scholar, Henry Carter Adams. In his presidential address delivered before the American Economic Association in 1896<sup>83</sup> he reasserted his faith in a system of proprietary labor rights. He claimed that the more violent methods used by the trade unions of his day were the result of the fact that under the existing system they had nothing to lose. "Not only is there no liberty for the worker without a (*sic*) property but there is no stability to industry, unless in some way he is made responsible for the fulfilment of his contracts; and this . . . can only result from the possession of some privilege or advantage that he can place in jeopardy."<sup>84</sup> It may have been this suggestion which induced the British conservative party to place a statutory labor contract high among the aims of the party in their "Workers' Charter." It is good to know that the present Minister of Labour, Mr. Ian Macleod, himself one of the authors of the charter, is further pursuing this idea.<sup>85</sup>

It is impossible to examine here the social and economic implications of such a policy, but its legal implications might be summarized as follows:

1. Every worker should be entitled to a written service con-

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82. Industrial Disputes Order, 1951, S.I. 1951, No. 1376.

83. *Economics and Jurisprudence*, reprinted with *RELATION OF THE STATE TO INDUSTRIAL ACTION* (1954).

84. *Id.* at 174. The property rights which Adams had in mind were the workers' rights to their jobs.

85. *The Sunday Times* (London), May 12, 1957, p. 1. col. 8.

tract outlining clearly his rights and duties vis-à-vis his employer.

2. The worker should be entitled to reasonable security of employment, the length of notice depending on the length of his employment.

3. The security provisions of the worker's contract would cease to be operative if he breaks his contract, such as by joining a strike without giving notice.

4. Trade unions should be given legal personality and collective agreement should be made fully binding on both sides.<sup>86</sup> No change need be made in the present immunity of trade unions from tort liability, though the immunity should be clearly restricted to torts committed in furtherance of a trade dispute. At the same time it might be advisable to codify the existing trade union law.

5. Registration of trade unions should be made compulsory and all strikes, unless called by a registered trade union, should be illegal.<sup>87</sup> Where a trade union breaks one of its agreements, provision should be made for the cancellation of its registration.

6. Trade union rules should be subject to approval by the registrar, especially as far as the provisions for the admission of new members and the expulsion of existing members are concerned. The right to work for a closed shop cannot be denied to a trade union, but where a union tries to achieve this end, its rules must provide for the admission of all persons who have satisfied certain specified conditions.<sup>88</sup>

7. A trade union appeal court should be set up to which a person could appeal if he had been refused admission to a union or if he had been expelled from it.<sup>89</sup>

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86. Suggestions on similar lines have also been made by Wedderburn, *The Bonser Affair: A Post-script*, 20 MODERN L. REV. 122 (1957) and by The Economist (London) May 4, 1957, p. 377.

87. Cf. TURNER-SAMUELS, *BRITISH TRADE UNIONS* 204 (1949).

88. "Trade unions that operate 'union-shop' or 'closed shop' agreements are in a different position, for they become in effect compulsory societies. Members who disagree with union policy or methods cannot, without losing their jobs, leave their union to express their dissatisfaction. In such cases it is important that the union constitutions should be democratic and that they should be used effectively by rank-and-file members. It is so important, in fact, that it justifies the intervention of Parliament to supervise the working of the constitutions in exactly the same way as the control by Parliament of any other form of private concentration of power is justified." ALLEN, *POWER IN TRADE UNIONS* 64 (1954).

89. Commenting on a recent case where a man summonsed for arrears on a maintenance order pleaded inability to pay because he had lost a laborer's job in

This is merely a rough outline of a new approach to an old problem, namely that of reconciling authority with responsibility. The main weakness of the existing British trade union law is, in the author's opinion, that it tries to deal with the powerful trade unions of the twentieth century as if they were still the downtrodden and voluntary bodies of the nineteenth century.<sup>90</sup>

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which he earned £12 a week, having been expelled from his union because union contributions amounting to 3s 6d were twelve weeks in arrears, the North London magistrate, Mr. Seymour Collins, stated: "He must be very thankful that the question of the payments to his children is being dealt with in a court of justice and not by his union." The secretary of the union in question (the National Society of Operative Printers and Assistants) stated that the worker could apply for reinstatement in the union, but only after six months. The magistrate said: "This is not a question of a society or a club. It is not a question of the right to go and play billiards. It is a question of a right to work, and this union, being a closed shop, has denied this man the right to work in his own trade and that seems to me inconsistent with ordinary justice." There will be many people who will agree with the magistrate's further remark when he called the union's attitude "un-British." (Reported in *The Daily Telegraph* (London), October 24, 1957).

90. Wedderburn, *The Bonsor Affair: A Post-script*, 20 MODERN L. REV. 122 (1957).