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A Forward Step in Labor Regulation

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consult counsel, beset by fears and ignorant as to the proper course to pursue, can it be denied that the most natural thing for the accused to do under such circumstances is to keep silent?

RUBIN BARON.

A FORWARD STEP IN LABOR REGULATION.

At the start of the present year Justice Cotillo in Special Term of the New York County Supreme Court named three receivers to manage the affairs of Local 306 of the Motion Picture Operators' Union of Greater New York. This appointment came about as the result of charges of mismanagement of the Local by its parent organization, which was in control of the local by virtue of the lawful exercise of the right of suspension of local officers in an emergency.[1] The board was appointed by the court for a twofold purpose: "(1) To have custody of the funds of the union and to control its expenditures, with full recognition of its financial obligations to the superior union, and (2) to supervise the rights of individual members in their relation to the union and in the preservation of their contractual rights." [2]

This decision will be welcomed by those who regret the attitude of laissez-faire which has been adopted by the New York courts dealing with certain problems of labor.[3] The essential idea of laissez-faire consists in setting aside all interference (in theory at least) of government and all artificial control of groups within the state. It is not within the scope of this note to probe deeply into the fallacies of this principle. We think the present world-wide depression coming at the end of a period of rugged individualism is an adequate indictment. The author is in accord with the principles of that great Christian teacher Leo XIII,[4] that:

> "Laws, institutions, and administration must aim at public well-being as well as private property rights. A just freedom of action is only valid as long as the common good is secured and no injustice entailed. *Whenever the general interest of any particular class suffers, or is threatened with*

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[1] Kaplan v. Elliot, 145 Misc. 863, 261 N. Y. Supp. 112 (1932).

[2] These purposes were laid down in an opinion, denying a motion for reargument of the appointment, Kaplan v. Elliot, N. Y. L. J., January 5, 1933, at 57. The original order is reported in Kaplan v. Elliot, N. Y. L. J., December 28, 1932, at 3015.

[3] Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Stillwell v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Note (1932) 7 ST. JOHN'S L. REV. 68.

[4] LEO XIII, ENCYCLICAL ON THE CONDITION OF THE WORKING CLASSES (1892).

evils which can in no other way be met, the public authority must step in to meet them. The limits must be determined by the nature of the occasion which calls for the law's interference—the principle being this, that the law must not undertake more, nor go further than is required for the remedy of evil or the removal of the danger." [5] (Italics ours.)

Assuming in the *Kaplan* case [6] that the local was being mismanaged, then this was a situation where the evils to the local could only be prevented by the intervention of the public authority. The members had no further remedy within their own organization [7] and thus ample cause for public intervention existed. Under our present system of law such interference should properly come from a court of equity.

It is true that under the English jurisdiction there could be no receivership established.[8] This is due to the peculiar position (in the light of American ideals) which labor unions hold in that country. The British courts, bound by the traditions of the feudal overlords, made trade associations illegal at common law, inasmuch as their purposes were considered to be in unreasonable restraint of trade.[9] Although such organizations were legalized by the Trade Union Act of 1871, the same legislation expressly forbade the courts to enforce agreements, which are generally necessary to successful operation of a labor association.[10] The English have adopted what

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[5] Address by Justice Edward S. Dore, delivered at Fordham University, November 20, 1932. The Judge sets forth succinctly the ideas of the encyclical, using many of the Pontiff's own words.

[6] The court, *supra* notes 1 and 2, does not discuss the facts save in a very general way. It is possible that the Appellate Division reversed the Special Term, because there was not sufficient evidence that the local was being mismanaged by the parent organization. Kaplan, one of the plaintiffs in petition for the appointment of receivers, was recently convicted of coercion. The said crime was not wholly unconnected with the local's activities.

[7] *Supra* notes 1 and 2.

[8] "As the court cannot enforce any agreement for the application of trade-union funds in provision of benefits, a receiver cannot be appointed over the general fund, or funds collected for a special purpose, to prevent their application contrary to agreement." KERR, RECEIVERS (9th ed. 1930) 111, 112. It would seem that the inhibitions of the statute would also extend to the contract between the membership body and the officers elected by it, *infra* note 10.

[9] Russell v. Amalgamated Society of Carpenters and Joiners, [1912] A. C. 421.

[10] TRADE UNION ACT OF 1871, §4:

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

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members of such trade unions shall or shall not sell their goods, transact business, employ or be employed.

Professor Chaffee is wont to term the "Hot Potato Policy." [11] The idea being, that no matter what regulation of internal affairs is made, someone will always be dissatisfied, so the best policy to follow is that of non-interference. That this view has been followed by the New York courts under the guise of extreme paternalism has been demonstrated above.[12]

From the last statement it is not to be inferred that the writer is out of sympathy with all the adjudications of labor problems in this state. On the contrary it seems that as a general rule our tribunals have taken a genuinely fatherly attitude toward the workingman.[13] Only in a relatively few decisions have the courts adopted the role of the over-indulgent as distinguished from the cautious parent.[14] By appointing receivers for a union, when it is being fraudulently mismanaged, and there is no possiblity of fair relief within the organization, the courts are not only setting a splendid sociological principle but they are also following logically the precedent of the expulsion cases.[15] These opinions laid down the rule

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"2. Any agreement for the payment by any person of any subscription or penalty to a trade union.

"3. Any agreement for the application of the funds of a trade union—

"(a) To provide benefits to members; or

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

"(c) To discharge any fine imposed upon any person by a court of justice.

"4. Any agreement made between one trade union or another; or

"5. Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

For a further discussion of this subject see Geldart, *The Status of Trade Unions in England* (1912) 25 HARV. L. REV. 579; also SLESSER AND BLAKE, THE LAW OF TRADE UNIONS (1921).

[11] Chaffee, *Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993, 1026.

[12] The "Hot Potato Policy" seems to be the real reason behind the picketing cases cited *supra* note 3.

[13] National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919); Stuyvesant Lunch & Bakery Corp. v. Reiner, 110 Misc. 357, 181 N. Y. Supp. 212 (1920), *aff'd*, 192 App. Div. 951, 182 N. Y. Supp. 953 (1st Dept. 1920); Schwarcz v. International Ladies Garment Workers' Union, 68 Misc. 528, 124 N. Y. Supp. 968 (1910); Jaeckel v. Kaufman, 187 N. Y. Supp. 889 (1921); Benito Rovira Co. v. Yampolsky, 187 N. Y. Supp. 894 (1921).

[14] *Supra* note 3.

[15] Polin v. Kaplan, 257 N. Y. 277, 177 N. E. 833 (1931); Strauss v. Thoman, 60 Misc. 72, 111 N. Y. Supp. 745 (1908), *aff'd*, 129 App. Div. 905, 113 N. Y. Supp. 1148 (1st Dept. 1908); Ranken v. Probey, 131 App. Div. 328, 115 N. Y. Supp. 832 (3d Dept. 1909); Grassi Bros. v. O'Rourke, 89 Misc. 234, 153 N. Y. Supp. 493 (1915); Mintz, *Trade Union Abuses* (1932) 6 ST. JOHN'S L. REV. 272, 276-310; Note (1931) 6 ST. JOHN'S L. REV. 143.

that: "The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members." [16] Thus it is that equity might, in view of the breach of the contract by the fraud, intervene to give specific performance. While such a decree would be open to the objection that it would require continuous supervision, which is inhibited by a long line of cases,[17] nevertheless, it might well be answered by showing that the courts have enforced performance of such contracts when an important public interest or irreparable injury was involved.[18] Certainly the necessity of protecting the working man from unscrupulous exploitation is of supreme interest to the man himself and the country at large. Although no New York case has gone so far as to appoint a receiver to enforce a simple agreement, our neighboring state of New Jersey has indicated that this remedy might be resorted to.[19] In that decision no principle of public welfare was invoked. The appointment was suggested on the ground of irreparable injury. Equity with conditions similar to those supposedly existing above would appoint a receiver, for a corporation, whose directors have breached a fiduciary duty,[20] for mortgaged property, when the mortgagee has defaulted,[21] and to replace an executor who is acting in violation of his trust.[22]

Those who oppose the contract theory for permitting intervention by the courts into the internal affairs of associations, feel such an action should be laid in tort.[23] Of course, equitable relief might well be opposed in the case of a mere social club, since a right of substance would not be involved in a purely non-profit-making society of this sort. However, members in a labor group have a very substantial right to protect. For if the union's affairs are mismanaged they may find themselves unable to obtain employment. Thus we see that, whether we predicate the action on the theory of contract or on that of tort, equity should intervene. The only possible legal means by which such intervention could be properly accomplished is by the appointment of receivers.

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[16] Polin v. Kaplan, *ibid.* at 281, 177 N. E. at 836.

[17] Marble Co. v. Ripley, 77 U. S. 339 (1870); Beck v. Allison, 56 N. Y. 366 (1874); Stanton v. Singelton, 126 Cal. 657, 59 Pac. 146 (1899); Blackett v. Bates, 1 Ch. App. 117 (1865); Wheatley v. Westminister, L. R. 9 Eq. 538 (1869); Powell v. Duffryn Steam Coal Co. v. Taff Vale R. Co., L. R. 9 Ch. App. 331 (1874).

[18] Prospect Park R. R. Co. v. Coney Island R. R. Co., 144 N. Y. 152, 39 N. E. 17 (1894); St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (1903); Lawrence v. Saratoga Lake R. R. Co., 36 Hun 467 (N. Y. 1885).

[19] See Curtis Brothers v. Catts, 72 N. J. Eq. 831, 834, 66 Atl. 935, 936 (1907).

[20] Hallenborg v. Greene, 66 App. Div. 590, 53 N. Y. Supp. 403 (1st Dept. 1901); Note (1926) 43 A. L. R. 242.

[21] See Hollenbeck v. Donnell, 94 N. Y. 342 (1884).

[22] Jenkins v. Jenkins, 1 Paige 243 (N. Y. 1828).

[23] Chaffee, *supra* note 11, at 1007.

Yet the Appellate Division set aside the appointment without a written opinion. However, on oral argument one of the justices interposed the remark that a receivership would put the court into the business of running a union.[24] We respectfully submit that this should make no difference. For whenever a court appoints a receiver it takes over the management of an enterprise. Can it be that the courts will protect the interests of capital in preventing the frittering away of assets by fraudulent directors,[25] and yet refuse to protect the interests of the laborer whose representatives are willing to barter away the union's interest for the sake of private gain or factional ascendency. Certainly here is a situation where equity, the freer of the oppressed, should intervene. Indeed it is to the greater interest of the country that workingmen's rights be preserved for "it is only by the labor or workingmen that states grow rich.[26] Regardless of whether it would be within the common law jurisdiction of equity to grant such relief we think that Section 974 of our Civil Practice Act would give the court the power to appoint a receiver for the union.[27]

Those who hold that the courts should adopt a "hands-off" policy think that human element in the individual judge, shaped by his education and environment, must necessarily have some effect in his decision in a particular labor dispute brought before him.[28] We do not feel that because of the individual prejudices of a few judges we should indict our entire judiciary. The writer is in accord with the view of Professor Kennedy, who, in speaking of the influence of peculiarly individual traits and prejudices upon the judicial process, remarks,[29] "However real may be the 'unconscious

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[24] N. Y. Times, Jan. 21, 1933, at 11.

[25] *Supra* note 20.

[26] *Supra* note 4.

[27] N. Y. C. P. A.:

"Sec. 974. Receivers, generally.

"In addition to the cases where the appointment of a receiver is specially provided for by law, a receiver of property which is the subject of an action in the Supreme Court or a county court, may be appointed in either of the following cases:

"1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in the property, where it is in the possession of an adverse party and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed. * * *"

The word "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

[28] "As in all other fields of human endeavor and thought, the truth is found at neither the extreme nor in between, but shot through the woof and web of the fabric. Judicial decision varies with the setting in which it is expected to operate and the individuals who manipulate the controls. So, clearly, this is not a government of laws, for there is no unchangeable and unvariable standard whose objective effect may be thus gauged and dispensed." Rothschild, *Men and Law* (1932) 1 BROOKLYN L. REV. 1, 4-5.

[29] Kennedy, *Men or Law* (1932) 2 BROOKLYN L. REV. 11, 21.

mind,' let us not forget the 'conscious mind' still exists; in this emphasis upon the dark, one is apt to forget there is such a thing as *light. Lux fiat!* The recent eclipse of the sun obscured the rays of the solar body for a brief period of time. But why argue that this momentary darkness is a customary or frequent occurrence in bodies planetary." In other words because, on some rare occasions, a judge has been swayed by some *idee fixee,* rather than by principles of law, shall we say that all judges will act in a similar manner. The fallacy is self-evident. There is no more justification in raising the cry of favoritism in labor adjudications than in any other controversies, in many of which the judge may have a set personal opinion. That the courts realize only too well that their decisions are not to be swayed either by popular frenzy or private prejudice is evidenced by the following courageous avowal by our Court of Appeals:[30]

> "We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, *J.,* in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400), are not to change their form and content in response to the 'hydraulic pressure' (Holmes, *J., supra*) exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."

Is this the declaration of a judiciary that will permit itself to be swayed by personal opinion?

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RESPECTIVE RIGHTS OF MORTGAGOR AND MORTGAGEE TO INSURANCE FUNDS.

The case of *Savarese et al.* v. *Ohio Farmer's Insurance Co. of Le Roy, Ohio, et al.*[1] recently decided by the Court of Appeals raised

[30] Matter of Doyle, 257 N. Y. 244, 268, 177 N. E. 489 (1931).

[1] 260 N. Y. 45, 182 N. E. 665 (1932).