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Judicial Enforcement of Labor Contracts and Employment Rights under Pennsylvania Law

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JUDICIAL ENFORCEMENT OF LABOR CONTRACTS AND EMPLOYMENT RIGHTS UNDER PENNSYLVANIA LAW

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(Part I of this article begins on page thirty-two of Volume Five.[144])

V.

DECLARATORY JUDGMENTS UNDER PENNSYLVANIA LAW.

A. *The Development and Nature of the Uniform Declaratory Judgments Act.*

THE DECLARATORY JUDGMENT procedure initially suffered the usual trials and tribulations of new developments in the law.[145] Pennsylvania enacted the Uniform Declaratory Judgments Act (hereinafter called "Declaratory Judgments Act", or simply "Act") in 1923.[146] Since 1923, this Act has been thrice amended: once in 1935; and twice again in 1943.[147] The Act has also been further legislatively supplemented by a statute enacted in 1935.[148] At first the Pennsylvania

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144. 5 VILL. L. REV. 32, 32-58 (1959). The last footnote in the initial half of this article is numbered 143. For continuity and sequence, the first footnote herein is accordingly numbered 144.

145. A scholarly and full analysis of the historical evolution of declaratory judgments in Pennsylvania will be found in the special commentary on declaratory judgments in Pennsylvania written by Professor A. Leo Levin, in PA. STAT. ANN. tit. 12 (1953), introductory pages xv to xxxvii.

146. Act of June 23, 1923, P.L. 840, PA. STAT. ANN. tit. 12 §§ 831-846 (1953). PA. STAT. ANN. will hereinafter be cited as — P.S. § — (19—). The instant citation would read: "12 P.S. §§ 831-846 (1953)." It is apropos, too, to note that practically all states have enacted declaratory judgment statutes. The federal jurisdiction has its own act. See, 48 STAT. 995 (1934), as amended, 28 U.S.C. §§ 2201-2202 (1954).

147. Act of April 25, 1935, P.L. 72, 12 P.S. § 836 (1953), which amendment was enacted to clarify and ensure the optional aspect of declaratory judgment. Act of April 13, 1943, P.L. 43, 12 P.S. § 848 (1953), which amendment goes to the right of the petitioner making his own service and to related items. Act of May 26, 1943, P.L. 645, 12 P.S. §§ 836, 847 (1953).

148. Act of May 22, 1935, P.L. 228, 12 P.S. 836, 847-853 (1953). This supplementary act provides, *inter alia*; that every proceeding shall be commenced by petition; that the petition may have an endorsement thereon to plead in fifteen days; that there are certain requirements concerning service and return; that indispensable parties may be joined; that defendants may raise preliminary questions of law *in lumine;* and that parties may demand trial of fact issues by jury.

courts construed the Act in a narrow and limited fashion. However, declaratory judgment relief has been accorded more receptive and liberal judicial treatment with the years. Judicial experience has indicated that a declaration of rights is extremely useful under certain conditions. Then, too, the 1935 and 1943 amendments to the Act served to confer upon the Act an unequivocal legislative blessing and an expanded meaning which could not be gainsaid by the judiciary. Perhaps the following summary comment by the Superior Court of Pennsylvania on the expanding application of the Declaratory Judgments Act best makes the point. With respect to this expanded application, the court stated in *Guerra v. Galatic:*[149]

> ". . . The Uniform Declaratory Judgments Act of 1923, P.L. 840, 12 P.S. Section 831 et seq., as supplemented by the Act of 1935, P.L. 228, 12 P.S. 847 et seq., was originally narrowly interpreted. See Stofflet and Tillotson v. Chester Housing Authority, 346 Pa. 574, 31 A.2d 274. However, following the amendment of 1943, P.L. 645, 12 P.S. Section 836, the interpretation of the availability of the proceeding was greatly broadened. See Philadelphia Manufacturers Mutual Fire Insurance Co. v. Rose, 364 Pa. 15, 70 A.2d 316. It is now accepted even though under the facts a common law action might have been brought: Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 100 A.2d 595."

Several additional factors have tended to accelerate the more liberal approach by the courts in making declaratory judgment proceedings more readily available under Pennsylvania law. These include the remedial nature of the Declaratory Judgments Act and the increasing acceptance of the Act by sister states and the federal jurisdiction. The Pennsylvania Declaratory Judgments Act is a remedial statute. In this context the legislature has mandated the Pennsylvania courts to construe and to administer the Act in a liberal fashion.[150] In addition, the legislature has also directed that the Act be construed so as to harmonize and make the Pennsylvania law uniform with the law

149. 185 Pa. Super. 285, 288, 137 A.2d 886, 888 (1958).

150. DECLARATORY JUDGMENTS ACT, 12 P.S. § 842 (1953). Section 842 expressly mandates this rule of liberal statutory construction. Were this not so, the PENNSYLVANIA STATUTORY CONSTRUCTION ACT, (PA. STAT. ANN. tit. 46, §§ 501-602) would require that the Declaratory Judgments Act be both liberally and strictly interpreted. Provisions of the 1943 amendatory act would be liberally construed; and provisions of the 1935 and 1923 acts strictly construed. For a discussion on this rule of construction involving prospective and retroactive interpretation and the "cut-off" date of May 28, 1937, read Stern, *The Background and Public Policy of Pennsylvania Law on Collective Bargaining Agreements — Unshackling the Hold of the Common Law,* 3 VILL. L. REV. 441, 447-448 (1958).

in those states and in the federal jurisdiction which have enacted the Uniform Declaratory Judgments Act.[151]

The nature of a declaratory judgment proceeding is by its name self-explanatory. It involves nothing more, or less, than a declaration with respect to "rights, status and other relations". In Pennsylvania relief by declaratory judgment is limited to *civil* matters. The declaration in form and in result differs from the traditional coercive judgment or decree which can be executed upon for damages or enforced to restrain or command performance. Matters subject to declaratory relief, nonetheless, must be ripened to the point of "actual controversy", or an issue indicating "inevitable and imminent litigation". The court must be satisfied the proceeding will help terminate the uncertainty or the controversy.

In examining the provisions of the Act itself one will find that the stated scope of the Declaratory Judgments Act authorizes Pennsylvania courts of record, *in their jurisdiction:*

> ". . . to declare rights, status and other legal relations. . . . The declarations may be either affirmative or negative in form and effect [and] . . . shall have the force and effect of a final judgment or decree.[152] . . . A contract may be construed either before or after there has been a breach thereof."[153]

With reference to the power of the court to determine the question of construction or validity of instruments or legal relations the Act further provides that:

> "Any person interested under a . . . written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, . . . may have determined any question of construction or validity arising under the instrument, statute . . . contract, . . . and obtain a declaration of rights, or other legal relations thereunder."[154]

Provision is made for jury trial of issues of fact, but failure to demand a jury trial is treated as the equivalent of an agreement that

151. DECLARATORY JUDGMENTS ACT, 12 P.S. § 845 (1953). This provision is in accord with general Pennsylvania law on statutory construction with respect to uniform laws in other jurisdictions. See 46 P.S. § 557 (1952).

152. DECLARATORY JUDGMENTS ACT, 12 P.S. § 831 (1953).

153. DECLARATORY JUDGMENTS ACT, 12 P.S. § 833 (1953).

154. DECLARATORY JUDGMENTS ACT, 12 P.S. 832 (1953). Argument can be made that the power of Pennsylvania courts to render declaratory judgments would seem properly to extend to oral contracts. This is of importance in relation to labor contracts which ordinarily do not come within the purview of the Statute of Frauds: Warren v. Motion Picture Operators Union, 383 Pa. 312, 118 A.2d 168 (1955). *Cf.*, Moklofsky v. Moklofsky, 79 Cal. App. 259, 179 P.2d 628 (1947); Hohenberger v. Schniter, 235 S.W.2d 446 (Tex. 1951).

the proceedings will be heard by the court without a jury.[155] In such case, the court has the power to determine all issues of fact, in addition to questions of law.[156]

The judgment in a declaratory proceeding is in the form and has the effect of a *declaration.* The judgment does not provide coercive results. Where coercive relief is subsequently required supplemental, legal or equitable remedies are available to the moving party. It must be emphasized a declaration in favor of a petitioner will not, without more, permit the petitioner to levy and execute thereon. So, too, unlike a decree in equity, a declaration in favor of the petitioner will not, without more, mandate injunctive relief.[157]

Why, then, declaratory judgment? The short answer is that due to several remedial shortcomings the traditional coercive judgment and decree failed to fill a gap which imperatively called for repair. Declaratory relief has helped remedy the deficiency in this respect. Actions at law or suits in equity, on the whole, are considered prematurely brought unless a legal wrong has been perpetrated. These traditional legal and equitable actions and suits result in coercive judgments when they are available. In many situations, however, the coercive relief of money judgment or mandatory decree commanding or enjoining action is not in order. Any situations, for example, which involve delicate continuing relationships are in this area. It is far more desirable in situations involving such continuing relations to determine legal rights under declaratory judgment procedures before the wrong is actually committed, or prior to the time when the rights are actually violated.[158] This is especially the case in the field of labor relations. The union-employer relationship is a complex, continuing one. It often involves a multi-partite relationship which affects the separate interests or status of many. It has impact not only on the union and the employer—immediate parties to the labor contract—but it also concerns and affects the employee member or non-member, and third parties such as sub-contractors.

155. DECLARATORY JUDGMENTS ACT, 12 P.S. § 839 (1953).

156. DECLARATORY JUDGMENTS ACT, 12 P.S. § 852 (1953). Guerra v. Galatic, 185 Pa. Super. 385, 137 A.2d 886 (1958). Trials without juries in declaratory judgment proceedings are held pursuant to equity procedures, although declaratory judgments are considered as legal and not equitable judgments. McCandless v. Burns, 377 Pa. 18, 104 A.2d 123 (1954); Melnick v. Melnick, 154 Pa. Super. 481, 36 A.2d 235 (1944).

157. DECLARATORY JUDGMENTS ACT, 12 P.S. § 838 (1953). Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956); Philadelphia Mfr's Mut. Fire Ins. Co. v. Rose, 364 Pa. 15, 70 A.2d 316 (1950).

158. The leading decision on "case or controversy" is Muskrat v. United States, 219 U.S. 346 (1911), wherein the United States Supreme Court held, *inter alia,* that the judicial power "is the right to determine actual controversies arising between adverse litigants. . . . " 219 U.S. at 361.

There is still another aspect of the continuity of the union-employer relationship which is an important consideration. The labor contract and the marital contract are akin in a limited sense by way of the analogy. Both create a continuing relationship protected by law and fostered by public policy. Legal battle and victory notwithstanding—win, lose, or draw,—the continuing relationship as a rule is not terminated by either victory or defeat relating to a matter in dispute. After the fighting ceases, tumult and dislocation may continue rather than abate. Thus, damages won by an employer for breach of a labor contract which still continues valid and subsisting may possibly result in lasting scar tissue likely to plague the victor thereafter and forever more. It is evident in such circumstances that a declaration of rights which would decide, without more, the rights, status, or legal relationship of the parties would be wiser and better tailored for labor contract enforcement than coercive judgment.

Lest the foregoing discussion be misinterpreted or misapplied, let it be unequivocally noted that "justiciability" is a prerequisite for declaratory relief in Pennsylvania. In this sense the petition and thereafter the trial of the cause must establish imminent legal hurt, uncertainty and legal controversy, and a definite and concrete justiciable controversy which is ripe for judicial determination. If justiciability in the foregoing sense is not shown, the Pennsylvania courts will refuse to entertain the matter or give declaratory relief, just as they would refuse to render advisory opinions in the traditional legal-equity actions or suits.[159]

B. *Prerequisites and Standards for Declaratory Relief.*

Although the Pennsylvania law on declaratory relief is relatively new and its course not fully charted, some basic guideposts have been established. The legislative standards set forth in the Declaratory Judgments Act have been judicially interpreted and applied so as to render declaratory relief available, as follows:

(1) There must be a justiciable controversy. The court will therefore not render an advisory decision on hypothetical facts,[160] nor where the proceedings prove academic, nor concern a declaration of future

159. DECLARATORY JUDGMENTS ACT, 12 P.S. § 831, 836 (1953). See also, Silver v. Zoning Bd. of Adjustment, 381 Pa. 41, 112 A.2d 84 (1955); McCandless Twp. v. Wylie, 375 Pa. 378, 100 A.2d 590 (1954); Schoenbrun v. Nettrour, 368 Pa. 474, 61 A.2d 868 (1948).

160. For a detailed exposition of reasons why our courts will not render decisions on hypothetical facts see the dissenting opinion by Mr. Justice Bell in McCandless Twp. v. Wylie, 375 Pa. 378, 388, 100 A.2d 590, 595 (1954).

rights which may never be in question.[161] Section 6 of the Act[162] provides an excellent outline of the conditions precedent for declaratory judicial dispensation of relief, namely:

(a) The determination of an "actual controversy," or

(b) where "antagonistic claims are presented between parties involved indicating imminent and inevitable litigation," or

(c) where there is assertion of "a legal relation, status, right, or privilege" in which a party has a "concrete interest" and there is a "challenge or denial" thereof by an adverse party who has a like concrete interest, and declaratory judgment will "serve to terminate the uncertainty or controversy."

(2) Declaratory judgment procedure is available in a particular court where, and only in such case, the court has jurisdiction over the subject matter.[163] Such jurisdiction cannot be conferred solely by agreement of the parties[164] and the court may, on its own motion, raise the jurisdictional question despite an agreement of the parties.[165]

(3) The availability of declaratory judgment relief is ordinarily a matter of judicial discretion.[166] This discretion cannot, however, be exercised capriciously, arbitrarily or without limit.[167] Actually, the matter resolves into reasonable decision as to which remedy, if there is an election of more than one, will be most appropriate.[168] One interesting reverse approach on this score is presented in *White Oak Borough Authority v. McKeesport*[169] where the action was initiated by

161. Mr. Chief Justice Von Moschzisker pronounced the classic statement on this score in Kariher's Petition, 284 Pa. 455, 471, 131 Atl. 265, 271 (1925), when he stated: ". . . jurisdiction will never be assumed unless the tribunal appealed to is satisfied that an actual controversy, or the ripening seeds of one, exists between the parties. . . ." Professor Levin, in the special commentary on declaratory judgments in Pennsylvania, cited in note 145 *supra*, pithily comments on this classic statement as follows: "This is picturesque phrasing; it is an apt figure for a requirement which does not appear susceptible of hard and fast definition."

162. DECLARATORY JUDGMENTS ACT, 12 P.S. § 836 (1953).

163. DECLARATORY JUDGMENTS ACT, 12 P.S. § 831 (1953).

164. *Cf.*, Valley R.R. v. Delaware and L. & W. R.R., 346 Pa. 579, 31 A.2d 276 (1943); Moorehead v. Northumberland Cty. Retirement Bd., 25 North. L.J. 223 (Pa. 1954).

165. Norwood Park Corp. v. Norwood Boro., 33 Del. 107 (C.P. Pa. 1945). *Cf.*, Nesbitt v. Mfr's Cas. Ins. Co., 310 Pa. 374, 165 Atl. 403 (1933); Taylor v. Haverford Twp., 299 Pa. 402, 149 Atl. 639 (1930).

166. DECLARATORY JUDGMENTS ACT, 12 P.S. § 831 (1953). Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956); Eureka Gas. Co. v. Henderson, 371 Pa. 587, 92 A.2d 551 (1953).

167. Melnick v. Melnick, 145 Pa. Super. 564, 24 A.2d 111 (1954); Rose v. Rose, 88 Pa. D. & C. 59 (C.P. Mtgmy. 1954). *Cf.*, Lifter's Estate, 377 Pa. 277, 103 A.2d 676 (1954).

168. Lifter's Estate, 377 Pa. 277, 103 A.2d 676 (1954).

169. 379 Pa. 266, 108 A.2d 760 (1954).

a complaint in equity. In the *McKeesport* case the plaintiff sought clarification of certain rights under a written instrument. The court dismissed the complaint because it found that "a full, adequate and complete remedy is provided by law in the form of a declaratory judgment."[170] Plaintiff's failure in that case to pray for preliminary injunction pending final determination of the cause helped persuade the court to arrive at this result.

(4) Declaratory relief may be sought as an *alternative* procedure even though the controversy could be resolved by another form of action. The Declaratory Judgments Act, with respect to the court's discretion to afford an alternative remedy in the form of declaratory relief, expressly provides that:

> ". . . the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, whether such a remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment or decree where other essentials to such relief are present. . . ."[171]

Apropos this discretionary power of the court, declaratory relief has been held to be available even though, under the facts of the case, a common law action might have been instituted.[172] So, too, declaratory relief can be partial relief only, despite the possibility that supplementary or independent proceedings may subsequently be called for or needed to complete effectively the circle of relief for the litigant.[173] Judicial discretion to afford or refuse declaratory relief is not without limitation. Although it is ordinarily within the discretion of the court to determine whether jurisdiction will be taken in any particular case, it has been heretofore indicated that a trial court will be reversed for manifest abuse of discretion in refusing to entertain a declaratory judgment proceeding.[174]

(5) The courts cannot entertain declaratory proceedings where statutory prescription provides for a "special form of remedy for a

170. *Id.* at 268, 108 A.2d at 761. In this action, the failure of plaintiff to apply for interim injunctive relief pending the outcome of his case was fatal.

171. DECLARATORY JUDGMENTS ACT, 12 P.S. § 836 (1953).

172. Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814, *affirming per curiam*, 5 Pa. D.&C.2d 314 (C.P. Clear. 1956); Guerra v. Galatic, 185 Pa. Super. 285, 137 A.2d 886 (1958).

173. Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956); Philadelphia Mfr's Mut. Co. v. Rose, 364 Pa. 15, 70 A.2d 316 (1950).

174. DECLARATORY JUDGMENTS ACT, 12 P.S. § 836 (1953).

specific type of case."[175] This approach is not only logical but is in full accord with Pennsylvania law in general.[176]

C. *The Labor Contract and Declaratory Relief.*

Declaratory relief is, within its limits and availability, eminently suited for resolving a large area of oft-recurring controversies involving either the construction of the labor contract or the declaration of rights thereunder. The remedial shortcomings of traditional coercive legal or equitable remedies as to labor contract enforcement are glaringly apparent. First, the traditional forms of action are ordinarily unavailable until the wrong has been committed.[177] Then, in addition, the coercive relief afforded may result in negating the benefits otherwise resulting to the prevailing party to the labor contract. This, unfortunately, is so because of the very nature of the relationships created and thereafter ensuing as a result of a valid, enforceable labor contract. In the continuing, and delicately balanced relationships between union, employer, and employee under the labor contract and in the day-to-day employment contract, it is often imperative that legal rights be determined prior to chancing a breach of contract. A victory in the form of coercive relief may be costly because it triggers a vendetta. On the other hand a declaration of rights, without more, may afford a remedy without disastrous post-victory repercussions. And in the case where the declaratory relief does not complete the circle of relief, supplementary relief is available if necessary; even to the point of effectuating the declaratory judgment or decree by coercive relief.[178]

Declaratory judgment is an eminently appropriate judicial remedy under Pennsylvania law to determine the validity and construction of, and the rights, status, and legal relations created by or arising under collective bargaining agreements. Decisional law in Pennsylvania and in other jurisdictions, including the federal jurisdiction, is in accord

175. Creasy v. Lawler, 389 Pa. 635, 133 A.2d 178 (1958); Brotherhood of R.R. Trainmen v. Walker, 377 Pa. 396, 105 A.2d 363 (1954).

176. DECLARATORY JUDGMENTS ACT, 12 P.S. § 836 (1953). This rule is in accord with Pennsylvania statutory mandate in general which provides that special statutory remedies must be exclusively pursued and applied in both civil and criminal proceedings. See Act of March 21, 1806, P.L. 558, PA. STAT. ANN. tit. 46 § 156 (1952). See also, South Broad St. Corp. v. Philadelphia, 372 Pa. 557, 94 A.2d 772 (1953).

177. Equity ordinarily will not enjoin a possibly harmful act which is not reasonably certain to occur. Curll v. Dairymen's Coop. Ass'n, 389 Pa. 216, 132 A.2d 271 (1957). One is nevertheless not required to await the occurrence of an irreparable injury which is imminent and clearly impending. It is hornbook law in Pennsylvania that equitable relief will be available in such latter event. But this is the exception rather than the rule.

178. DECLARATORY JUDGMENTS ACT, 12 P.S. § 838 (1953). Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956); Philadelphia Mfr's Mut. Fire Ins. Co. v. Rose, 364 Pa. 15, 70 A.2d 316 (1950).

on this point. In this respect it is interesting to note that the declaratory judgment procedure was involved in one of the most dramatic cases decided by the Supreme Court of the United States during the first half of this century, *United States v. United Mine Workers.*[179] The *Mine Workers* case is essentially labelled as a "contempt" case. However, the Supreme Court of the United States held in that case that the federal Declaratory Judgment Act provided a proper vehicle for a declaration on the legal validity of a unilateral termination by the union of the so-called "Krug-Lewis" labor agreement entered into between the United States and the union.[180]

Pennsylvania courts have applied declaratory judgment relief in the determination of the validity and construction of the labor agreement. Thus, in *O'Donnell v. City of Philadelphia,*[181] a declaratory judgment proceeding determined the alleged rights of non-union employees, in relation to a city ordinance, to obtain the benefits of a labor contract. So, too, in *American Federation of State Employees Council No. 33 v. Philadelphia,*[182] the court determined the validity and impact of certain provisions of a labor contract.

Three caveats are appropriate at this point, namely:

> (1) Procedural requirements of the Declaratory Judgments Act should be observed; (2) statutes have been enacted which mandate that an administrative agency rather than the courts will have exclusive jurisdiction to determine certain rights and liabilities which are known as "public rights"; and (3) where special statutory remedies have been provided, such remedies are exclusive and must be applied for specific types of cases. The following cases in each of these three cautionary areas may be helpful.

Federation of Salaried Unions v. Westinghouse Corporation[183] is a case in point on the procedural requirements of the Declaratory Judgments Act. In *Federation of Salaried Unions* the union joined with individual members in a "spurious" class action permitted by the PENNSYLVANIA RULES OF CIVIL PROCEDURE, and filed a *complaint* for a declaratory judgment determining overtime payments for overseas duties under a labor agreement. The Pennsylvania Declaratory Judgments Act expressly provides that "Every proceeding for a declaratory judgment shall be commenced by a *petition* . . ." (emphasis added).[184]

179. 330 U.S. 258 (1947).
180. *Id.* at 265-266.
181. 385 Pa. 189, 122 A.2d 690 (1956).
182. 83 Pa. D. & C. 537 (C.P. Phila. 1952).
183. 7 Pa. D.&C.2d 281 (C.P. Alleg. 1956).
184. DECLARATORY JUDGMENTS ACT. 12 P.S. § 847 (1953).

Preliminary objections were sustained because the proceeding had been initiated by complaint instead of by petition as required by the Declaratory Judgments Act.

A decision illustrating the second caveat relating to exclusive jurisdiction is *Kohv v. Pennsylvania Labor Relations Board.*[185] The labor board in Pennsylvania is given the exclusive power to prevent unfair labor practices.[186] Labor contracts which are the fruits of unfair labor practices therefore must fall. The *Kohv* case involved such a contract. An employee was summarily dismissed for union activities during an organized campaign. Subsequently, the employer recognized the union as the bargaining representative. As a quid pro quo, the union settled the representation controversy by agreeing to the discharge of the employee and absolving the employer from any repercussions insofar as remedying the unfair labor practice. The court held that this contract settlement absolving the employer from liability for the discharged employee, was invalid and unenforceable as against public policy. The determination as to whether a contract is against public policy is a question of law which is for the court to decide based on the facts of each case.

A case illustrating the application of special statutory remedies to specific cases is *Brotherhood of Trainmen v. Walker,*[187] where mandamus instead of a declaratory proceeding was held to be the proper remedy to compel the Secretary of Labor to promulgate railroad safety rules.

The Pennsylvania Declaratory Judgments Act encourages uniform interpretation and application of the statute. The Pennsylvania courts are urged to establish accord and rapport with the construction of the Declaratory Judgments Acts by sister states and by the federal jurisdiction.[188] Courts in other jurisdictions have held that declaratory relief is appropriate to determine rights, status and other legal relationships arising under labor contracts. Thus, an employer's suit in a federal court for declaratory judgment to determine the arbitrability of union grievance claims for compensation during a period of injury, has been held to be properly instituted.[189] Another such suit in a federal court related to the issue of whether an alleged existing labor contract

185. 6 Pa. D.&C.2d 250 (C.P. Mtgy. 1955). *Cf.* Local 492 v. Schauffler, 162 F. Supp. 121 (E.D. Pa. 1958); Phillips v. United Bhd. of Carpenters and Joiners, 362 Pa. 78, 66 A.2d 227 (1948).

186. PENNSYLVANIA LABOR RELATIONS ACT, 43 P.S. § 221.8 (1952).

187. 377 Pa. 396, 105 A.2d 363 (1954).

188. DECLARATORY JUDGMENTS ACT, 12 P.S. § 845 (1953).

189. Pittsburgh Rys. v. Street Elec. Employees of America, Division 85, 176 F. Supp. 16 (W.D. Pa. 1959).

or a former labor contract was valid.[190] State courts in sister states, in like manner, have entertained declaratory judgment proceedings with respect to rights, status or other legal relations under or affected by a labor contract.[191]

Despite its availability and suitability in determining the rights, status and legal relations arising from a labor contract, resort to declaratory relief has not been frequent. The short answer explaining the dearth of judicial declaratory determination in this area of the law would seem to be based on two reasons. First, declaratory judgment is a relatively new form of action and is relatively unfamiliar to the legal profession. More important, however, is the growing impact of labor arbitration provisions in collective bargaining agreements as adjustment machinery for the settlement of disputes. A final and binding decision by arbitration award usually terminates the controversy. All but the exceptional labor contract of this day provide for settlement of contract term disputes by final and binding arbitration. Exhaustion of the arbitration contract remedies is generally imposed by the law as a condition precedent to qualifying for judicial relief, absent proof of fraud or collusion.

VI.

THE PENNSYLVANIA COURTS AND INDIVIDUAL ENFORCEMENT OF RIGHTS UNDER OR AFFECTED BY THE LABOR AGREEMENT.

A. *The Merger of Individual Rights into the Group Interest.*

> "Every sweet has its sour . . . and for everything you gain, you lose something. . . ."
>
> RALPH WALDO EMERSON,
> *Essay on Compensation.*

The world trend in all areas of human activities and relationships during the last three decades, has been in the direction of merger of individual rights into the amalgam known as the *"common interest,"* the *"group interest"* or the, more euphonious, *"public interest."*[192] This

190. Kennametal, Inc. v. International Union, U.A.W., AFL-CIO, 161 F. Supp. 362 (W.D. Pa. 1958).

191. El Paso Bldg. & Constr. Trades Council v. Texas Highway Comm., 231 S.W.2d 533 (Tex. Civ. App.) *rev'd on other grounds,* 149 Tex. 457, 234 S.W.2d 857 (1950); Christiansen v. Local 680, 126 N.J. 508, 10 A.2d 1108 (1940).

192. LLOYD, LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY 102-03 (1959), wherein the author states: "And with the recognition that the law may be required in the interest of society to intervene at almost every point of human activities grew the realization that not only was there no automatic solution of human conflicts by the merger of the individual in the common interest but that on the contrary perhaps

trend is especially evident to the student of American and, more particularly, Pennsylvania labor law.

The big depression which began in 1929 and the immediately following years of lean pickings mandated an acceleration in recognizing and solidifying these group rights. In the field of labor relations, the choice seemed to narrow down to an election between modifying our free enterprise system by fostering collective bargaining or the alternative of accepting fascistic or communistic economic control. Effective collective bargaining via strong labor unions was encouraged by national policy, in order to provide pump-priming of consumer purchasing power—the antidote to counteract the creeping paralysis of a crippled economy atrophying because of lack of such consumer purchasing power. Pennsylvania, in 1937, by legislative promulgation, adopted the national policy with respect to collective bargaining. Beginning with 1937, and without change since then, the public policy of Pennsylvania has been four square and unequivocally for the encouragement of both collective bargaining and, as well, the consummation and enforcement of the resultant collective bargaining agreement.[193] The consequent material gains on the national and on the Pennsylvania level to individual employees and to the economy as a whole cannot be gainsaid.

But the law of compensation must assess its inexorable "pound of flesh." In this case, the piper is perforce sometimes paid with loss of individual rights which would otherwise have remained undisturbed and inviolate. The merger of certain rights of the individual employee into group interests has its advantages, but it also has some inherent disadvantages. While the author believes that the good accomplished by collective bargaining far outweighs the disadvantages, delicate and fundamental issues are nonetheless posed. The individual employee's interests, it is true, are by and large in harmony with, parallel to, and served by interests of the bargaining unit and the labor union. But at times these individual interests run counter to, or even clash violently with, the group interest. This is the delicate area of conflict which has engendered real concern and differences of opinion by the judiciary in the several jurisdictions.[194]

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the fundamental problem of our times is the clash between the public interest and the interests of the individual citizen." This is cited in 27 U. CHI. L. REV. 79, 82 (1959).

193. See, Stern, *The Background and Public Policy of Pennsylvania Law on Collective Bargaining Agreements — Unshackling the Hold of the Common Law,* 3 VILL. L. REV. 441 (1958).

194. A good general analysis of this problem will be found in Cox, *Individual Enforcement of Collective Bargaining Agreement,* 8 LAB. L.J. 850 (1958). See also, Cox, *Rights under a Labor Agreement,* 69 HARV. L. REV. 601 (1956); Gregory,

Some of the more important areas which will be explored in the following sections are: The nature and impact of majority rule; the prerequisites for bringing an individual suit; and the forms of actions available.

B. *Majority Rule and Individual Enforcement.*

The National Labor Relations Act and the Pennsylvania Labor Relations Act[195] both provide that an employer shall bargain exclusively with the majority representative on the mandatory subjects of collective bargaining. The area of mandatory collective bargaining is for practical purposes all-encompassing and includes "rates of pay, wages, hours of employment, or other conditions of employment."[196] A certification of a labor union is effective for at least one year except under unusual circumstances. By virtue of so-called "contract-bar" rules administratively created by the respective Pennsylvania and National Labor Boards, and approved by the courts, the expiration period of the labor contract is usually the only opportunity for a redetermination of the bargaining representative. Finally, under majority rule a union member is held to have designated the union as his agent, and he is ordinarily bound "lock-stock-and-barrel" by the provisions of the labor agreement. All of these factors, of course, militate against individual determination or individual enforcement of the terms of the labor agreement.

The comman law's approach, too, is somewhat unsympathetic in permitting individual enforcement of labor contracts by the courts; and Pennsylvania is a great common law state. The common law approach to the usual employment contract is that it is terminable at the will of either the workingman or the employer. Then, too, there are technical pleading and procedural problems insofar as individual enforcement of a labor agreement is concerned. The union involved and the employer are, *eo nominee,* the actual parties to the labor agreement. Even though the terms of the labor agreement may be for the benefit of the member, the member is not an actual party, *eo nominee,* to the labor agreement. A decision in 1930, prior to Pennsylvania's adoption of the Restatement of Law's third party donee beneficiary rules, decisively makes this point. *Babbit v. Wilmer and Vincent, Inc.*

Fiduciary Standards and the Bargaining and Grievance Procedure, 8 LAB. L.J. 843 (1957); Hanslowe, *Individual Rights in Collective Labor,* 45 CORN. L.Q. 25 (1959).

195. NATIONAL LABOR RELATIONS ACT, 61 STAT. 136 (1947) as amended, 29 U.S.C. §§ 141-168 (1952); PENNSYLVANIA LABOR RELATIONS ACT, 43 P.S. §§ 211.1-211.13 (1952).

196. NATIONAL LABOR RELATIONS ACT, § 9(a) *supra,* note 196; PENNSYLVANIA LABOR RELATIONS ACT, § 9(a) *supra,* note 196. The Phraseology in both statutes is identical.

thus held that a union member was barred from being the plaintiff in an action to enforce wages due him under a contract which the court found was "made for the benefit of the members of the union."[197]

On the other side of the coin is of course the basic guarantee of the right to earn a living. This is a fundamental right which has recently been reaffirmed by the Supreme Court of Pennsylvania in *MacDonald v. Feldman,* namely: "The right to engage in remunerative employment is a valuable right . . . and an improper interference with it is answerable in a common law action in trespass . . . [or] in equity. . . ."[198]

Another development in emphasizing the rights of individual employees has been recent judicial demarcation of those rights under a labor agreement which accrue to the *uniquely personal* benefit of the individual employee in contradiction to those benefits which flow directly to the union. In *Association of Westinghouse Employees v. Westinghouse Electric Corporation,*[199] the landmark case on this point, the Supreme Court of the United States held that a union could not sue, under Section 301 of the Taft-Hartley Act, for wages of its members pursuant to a labor contract. The basic ground of the holding by the majority was that Section 301 did not permit an action by a union to enforce *uniquely personal* rights of its members.

There is yet a third recent development which can be argued in favor of some limited legal right of the individual to enforce his employment rights pursuant to terms of a labor agreement. In *Amalgamated Association of Street Electric Railway Employees v. Pittsburgh Railway Company,*[200] the Supreme Court of Pennsylvania held that a labor contract is a trade agreement rather than a contract of employment. Although the individual employee's contract of employment therefore necessarily adopts the terms of the labor agreement, it is by the same token an agreement separate and apart from the labor agreement itself.[201]

One may well query as to the significance and impact of these developments and rules of law. Where do the trails lead? Can one strike a fair and practical balance between individual rights on the one hand and the collective interest on the other? It would seem, in

197. 14 LEH. L.J. 94 (C.P. Pa. 1930).
198. 393 Pa. 274, 277, 142 A.2d 1, 3 (1958).
199. 348 U.S. 437 (1955).
200. 393 Pa. 219, 142 A.2d 734 (1958). The rule of the leading federal decision on the nature of a collective bargaining agreement, J.I. Case Co. v. NLRB, 321 U.S. 332 (1942), was adopted in the Amalgamated Ass'n case.
201. A detailed discussion of this point may be found in Stern, *Pennsylvania Law on the Nature and Theory of Collective Bargaining Agreements,* 32 TEMP. L.Q. 29, 50-52 (1958).

summarizing, that an employees rights which stem initially from the terms of a labor contract should be governed by the remedies provided in the contract itself. The union and the employer are the parties to the labor contract. Therefore, the union and *not* the employee, except for the most atypical circumstances of fraud, conspiracy or caprice, should be the proper party to pursue the rights thereunder. The author is aware that this proposed approach would seem to fly in the face of the *Westinghouse* case[202] doctrine that uniquely personal rights belong to and may be enforced by the individual member. But one must remember that this *Westinghouse* case was decided partly on the ground that, as a non-diversity action, federal courts in entertaining the cause under the statute might run afoul of the constitutional bounds of federal judicial jurisdiction as limited by Article III, Section 2 of the federal Constitution. In any event, the dissent by Mr. Justice Douglas, rather than the majority of opinion, is more in tune with the spirit of collective bargaining insofar as this author views it. Mr. Justice Douglas held, among other things that: "What union obtains in the collective agreement it should be entitled to enforce or defend. . . ." Contract enforcement by individuals of their employment rights, on the other hand, should be afforded by courts in exceptional cases where the union has—capriciously, fraudulently, or by corrupt agreement with the employer or with other employees—refused to vindicate rights of or failed to seek redress for the wrongs to an individual member pursuant to terms of a valid labor agreement. In two cases decided by Pennsylvania trial courts, the union has been accorded the right to bring suit on behalf of either itself or its members to enforce uniquely personal rights under a labor agreement.[203] This is as it should be. It must be emphatically added, and it will be later developed in some detail, that this does not prevent actions at law by the individual employee for damages to enforce rights which stem from the labor agreement.

C. *Theories Permitting Enforcement of the Labor Contract by Individual Employees.*

In Pennsylvania, judicial enforcement of the labor contract by individuals is premised on one of two theories: the third party donee beneficiary theory or the agency theory.

202. Association of Westinghouse Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

203. International Union of Elec. Workers v. Westinghouse Elec. Corp., 7 Pa. D.&C.2d 290 (C.P. Mercer 1956); Federation of Salaried Unions v. Westinghouse Elec. Corp., 7 Pa. D.&C.2d 281 (C.P. Alleg. 1956).

(1) *The Third Party Beneficiary Theory:*

One of the problems involved in a suit by an individual employee arises in part because the individual employee is not *eo nominee* a party to the labor contract, although the contract was consummated for his benefit as well as for the benefit of others in his group. Prior to 1931, Pennsylvania law on third party beneficiaries would have barred such an employee from bringing an action to enforce his benefits under the contract. Since 1931, when the leading case of *Commonwealth v. Girard Indemnity Company*[204] was decided, the Pennsylvania courts have adopted the donee beneficiary rules of the Restatement of the Law of Contracts. *Chernko v. Moore*[205] cites four of the more pertinent sections of the Restatement on this score, namely:

Section 133:

"(1) Where the performance of a promise in a contract will benefit a person other than the promisee, that person is, . . . (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise . . . is . . . to confer upon him a right against the promissor to some performance neither due or supposed or asserted to be due from the promisee to the beneficiary."

Section 135:

"(a) A gift promise in a contract creates a duty of the promissor to the donee beneficiary to perform the promise; and the duty can be enforced by the donee beneficiary for his own benefit; . . . ."

Section 139:

"It is not essential to the creation of a right in a donee beneficiary . . . that he be identified when a contract . . . is made."

Section 345 (1) (b):

"[T]he donee beneficiary can get judgment for the value of the promised performance, with interest. . . ."

In *O'Donnell v. City of Philadelphia,*[206] the Pennsylvania Supreme Court recently entertained a third party donee beneficiary suit for the enforcement of labor contract rights by municipal employees who were not members of the union. The action was dismissed on the merits. The court found that the employer and the union had not intended, in fact the contract had provided expressly to the contrary, that these suing employees should be beneficiaries. Pennsylvania third party

204. 321 Pa. 183, 167 Atl. 793 (1933).
205. 64 Pa. D. & C. 638, 639 (C.P. Fayette 1948).
206. 385 Pa. 176, 122 A.2d 690 (1956).

beneficiary law, in this respect, requires that *both* parties to a contract must have contemplated the existence of, and intended a benefit to, a donee beneficiary.[207] Where this standard is not met, third parties are deemed merely incidental beneficiaries without cognizable justiciable rights. The court held in *Chernko v. Moore*[208] that an employee member of a union, as a third party donee beneficiary, may bring an action for wages due him according to a labor contract wage schedule.

(2) *Agency Theory:*

The agency theory proceeds on the rationale that a union is the agent of its members; and that the union-employer labor contract is the member's contract and the terms thereof are binding upon the member. This agency theory also embraces employees who are engaged to work in the bargaining unit subsequent to the date of execution of the labor agreement by application of the contract theory of ratification. *Duquesne Brewing Company v. Unemployment Compensation Board of Review*[209] and *Povey v. Midvale Steel Company*[210] are two Pennsylvania cases, among many, most frequently cited for the agency theory.

(3) *Employee Election of Agency or Donee Beneficiary Theory:*

The foregoing discussion has developed the fact that Pennsylvania law permits an individual employee's judicial enforcement action of a labor contract to proceed on the donee beneficiary theory and on the agency theory. *Miller v. Johnstown Traction Company*[211] holds that the election of the theory upon which the employee's action is based is solely the employee's choice. The averments of the pleadings accordingly will determine the theory of the action. Hence, where the individual employee union member plaintiff averred in the *Johnstown Traction Company* case that his union was the collective bargaining *agent* of plaintiff, the member was held bound by this allegation and the court applied the agency theory.

207. Isbrandsten Co. v. Local 1291, International Longshoremen's Ass'n, 204 F.2d 495 (1953); International Bhd. of Elec. Workers v. Warfel, 5 Pa. D.&C.2d 695 (C.P. Lanc. 1955).

208. Chernko v. Moore, 64 Pa. D. & C. 638 (C.P. Fayette 1948).

209. 359 Pa. 535, 59 A.2d 913 (1948); *Accord,* Prenctice Unemployment Compensation Case, 161 Pa. Super. 630, 56 A.2d 295 (1948).

210. 175 Pa. Super. 395, 105 A.2d 172, *cert. denied,* 348 U.S. 875 (1954).

211. 167 Pa. Super. 421, 74 A.2d 508 (1950).

D. *Federal Preemption and the Right of Individual Enforcement by the Courts.*

Where a complete and adequate administrative remedy is provided by the National Labor Relations Act, as amended, Pennsylvania has recognized that its courts are barred from taking jurisdiction over the subject matter unless concurrent jurisdiction is expressly ceded by Congress.[212] The problem arises especially in determining those situations where the plaintiff contends that remedies under the National Act are not adequate. Apropos the subject matter under present consideration in this respect is the issue as to whether damages for all tortious conduct, including tortious conduct within the definition of "unfair labor practices" under the National Act, still remains within the jurisdiction of Pennsylvania courts. *United Construction Workers v. Laburnum Construction Corporation*[213] is a leading tort action where the plaintiff claims inadequate remedy under the National Labor Relations Act. In the *Laburnum* case, an interstate employer sued a labor union in a state court in tort for damages. The conduct complained of, marked by violence and threats, also constituted an unfair labor practice. The Supreme Court of the United States held in the *Laburnum* case that the traditional law of torts and the legislative intent in the National Labor Relations Act would permit a state court to award damages. The rationale of the *Laburnum* case was two-fold; first, that the remedies provided by the National Labor Relations Act were prospective and did not compensate for past damages. Finally, the dominant interest of the state in the public welfare and safety would not be gainsaid unless Congress provided expressly to the contrary.[214]

The recent United States Supreme Court decision of *San Diego Building Trades Council v. Garmon*[215] and several other decisions[216] which have followed, unequivocally hold that the National Labor Relations Board has primary jurisdiction over *non-violent* tortious conduct protected or prohibited by the National Labor Relations Act. State courts are required to honor this primary jurisdiction and are accordingly precluded from entertaining litigation involving such *non-violent* tortious conduct.

212. Garner v. Teamster Union, 346 U.S. 485, *affirming,* 373 Pa. 19, 94 A.2d 893 (1953).

213. 347 U.S. 656 (1954).

214. *Ibid.*

215. 359 U.S. 236 (1959).

216. DeVries Elec. Workers Local 426 v. Baumgartner's Elec. Constr. Co., 359 U.S. 498 (1959); Grocery Drivers Union Local 848 v. Seven-Up Bottling Co. of Los Angeles, 359 U.S. 434 (1959).

The recent Pennsylvania Supreme Court case of *MacDonald v. Feldman*[217] would therefore appear to be incorrectly decided. This case involved a tort action sounding in trespass. A blouse machine operator brought suit against a union and its officer to recover damages as a result of an alleged wrongful and malicious interference with her employment. Although the plaintiff was not a member of that union, she alleged that the union threatened to call a strike against her interstate employer in the event he refused to discharge her. She alleged that as a result her employment was terminated. The majority opinion of the Supreme Court of Pennsylvania in the *MacDonald* case affirmed a cause of action on what would appear to be an erroneous application of the rationale of the *Laburnum* case. The majority opinion is presumed on the traditional jurisdiction of Pennsylvania courts to prevent and compensate for the unjustified interference with the right to engage in gainful employment. Mr. Justice Cohen, in the *MacDonald* dissent, correctly argued that the reach of the *Laburnum* case rule is overextended by the majority by permitting Pennsylvania courts to assume primary jurisdiction in all tort cases, including those involving as the *MacDonald* case did *non-violent* tortious conduct otherwise within the preempted purview of the National Labor Relations Act. *Benjamin v. Foidl*[218] is another case, involving the same problem, which would appear to have been incorrectly decided by the Pennsylvania Supreme Court because of an apparent predilection to afford damages in tort actions arising in the context of labor relations.

E. *The Requirement To Exhaust Labor Contract Remedies.*

Judicial enforcement of a labor contract should not be available as an optional substitute for otherwise adequate remedies and machinery of settlement provided in a labor contract. Any standard less demanding than such exhaustion of internal remedies is out of step and out of tune with the spirit of collective bargaining and the need for continuity in employer-union relationship. The labor contract of this day, almost without exception, provides for a grievance procedure and for arbitration of disputes as the terminal extra-judicial final and binding procedure. An action at law or suit in equity to resolve disputes arising under a labor contract should be dismissed as being premature where there has been a failure first to resort to and exhaust such contract grievance and arbitration procedure.

217. 393 Pa. 274, 142 A.2d 1 (1958).
218. 379 Pa. 540, 108 A.2d 300 (1954).

The rule of exhaustion of internal remedies is not a novel one in the law.[219] It makes particularly good sense in its application to enforcement by the individual of rights under labor contracts for a number of reasons. First, many of the rights in dispute, which never existed nor were dreamed of at common law, are the sole creation of the parties to the labor agreement. Certainly the employee is not such a party, *eo nominee*. Let us examine seniority benefits in this sense. Seniority rights are created solely by contract. These rights do not exist under common law as part of the individual employment contract. Secondly, exhaustion of contract remedy affords stability and orderliness to the union-employer relationship. This is precisely what the parties agreed to in consummating the contract. Thirdly, there is the statutory scheme to consider as encompassed by the basic public policy of encouraging collective bargaining under a system of free enterprise. Judicial enforcement of alleged labor contract rights without requiring exhaustion of the internal remedies obviously runs counter to this concept. Finally, the vast body of general and procedural law is in harmony with the exhaustion of remedy approach.

A search for Pennsylvania appellate decisions directly on point involving exhaustion of remedies has been largely unproductive. The general rules of law previously discussed herein under the heading "Majority Rule and Individual Enforcement," are consonant with the "exhaustion" principle. Thus, it has been held that an existing labor contract between unions and employer is part of the union member's employment contract.[220] Members of the union are, by the same token, bound by the labor agreement comprehending all aspects of the labor-management relationship, which in turn includes the adjustment of disputes arising under the labor contract.[221] This is an incident of membership in the union.[222] The case of *Mack Manufacturing Company v. United Automobile Workers,*[223] while not precisely on point because enforcement was not pressed by individual members, nonetheless supports this "exhaustion" approach by analogy. In the *Mack Manufacturing* case, a collective bargaining agreement provided for

219. Adjudication by way of administration process, for example, is extra-judicial process which by analogy is akin to the extra-judicial process of collective bargaining. The requirements of exhaustion of administrative process before judicial relief can be available is treated in DAVIS, ADMINISTRATIVE LAW TEXT 356-71 (1959).

220. Kern v. Duquesne Brewing Co., 17 Pa. D.&C.2d 299 (C.P. Alleg.), *aff'd per curiam,* 396 Pa. 279, 152 A.2d 682 (1959); Povey v. Midval Co., 175 Pa. Super. 395, 105 A.2d 172, *cert. denied,* 348 U.S. 875 (1954).

221. *Ibid.*

222. For citations of a number of Pennsylvania cases directly on point see Stern, *Pennsylvania Law on the Nature and Theory of Collective Bargaining Agreements,* 32 TEMP. L.Q. 29, 49-53 (1958).

223. 368 Pa. 37, 81 A.2d 562 (1951).

arbitration of any unsettled grievances concerning layoffs and seniority. A complaint in equity seeking to dismiss the arbitration proceedings concerning an unsettled layoff grievance was filed by the employer. The complaint was dismissed on the rationale that arbitration proceedings, as required by the labor contract, had not been exhausted. Following this principle to its inevitable conclusion, where the union has acted in good faith and has exhausted the contract machinery although without satisfactory result to the individual employee, the case of *Capecci v. Capecci*[224] holds that the dissatisfied individual employee cannot thereafter be heard to complain. The Pennsylvania courts, in such event, will refuse to entertain a subsequent legal action brought by the employee to vindicate his alleged rights pursuant to the terms of a labor contract.

F. *The Prerequisites of Ripeness, Primary Jurisdiction, Inclusion in Unit, and Indispensable Parties.*

(1) *Ripeness.*

Unless a dispute has ripened into a justiciable controversy Pennsylvania courts cannot grant relief. Advisory opinions will not be given. The matter, to be ripe for judicial review, must involve the classic concept of "case or controversy." The courts thus will hold that an action is premature if it involves merely a legal opinion—or in other words—a decision relating to the expectation of possible events which may in fact never materialize. This entire concept, needless to elaborate, is much easier to formulate as a rule of law than to apply in the context of disputed facts. Suffice it to note that reasonable men will differ in the application of the rule as to when the imaginary line has been crossed into the no man's land separating an advisory opinion from a decision involving "case or controversy." *Gavigan v. Bookbinders Union No. 97,*[225] is a case which decides precisely this point of the prerequisite of "ripe" dispute. In the *Gavigan* case, union members filed an equity proceeding to determine and protect their seniority rights. No damage had been suffered by employees as of the time of filing the action. The Supreme Court of Pennsylvania dismissed the suit on the grounds that the action must fail because it was prematurely instituted. One of the cornerstones of the *Gavigan* decision was the determination that the employee plaintiffs had not to that date suffered

224. 11 Pa. D.&C.2d 459, (C.P. Phila.), *aff'd per curiam,* 392 Pa. 32, 139 A.2d 563 (1958).

225. 394 Pa. 400, 147 A.2d 147 (1959).

a legally redressable "hurt" as a result of the alleged improper interpretation of the seniority provision in the labor contract. *Bonanno v. Murray Corporation of America*[226] deals with an analogous problem involving, in a sense, "ripeness." In this case a probationary employee filed an action in assumpsit seeking to recover lost earnings for a discharge allegedly based upon improper grounds under a labor agreement. The Superior Court of Pennsylvania held, *inter alia,* that the purpose of probationary employment was to give the employer an opportunity to determine the fitness of an employee. Hence, the action by this probationary employee would necessarily be premature and the court found that it presented no justiciable controversy.

(2) *Primary Jurisdiction.*

The doctrine of primary jurisdiction and exhaustion of remedies are at the same time both akin and different. Each of these two doctrines is concerned with the element of timing or of proper sequence. They are distinguishable in the sense that exhaustion of remedy controls the timing of review as to the *stage* of the intra-party procedure which must first be exhausted prior to judicial review. Primary jurisdiction, on the other hand, determines whether the courts, without prior extra-judicial procedure, can *initially* entertain the action.

The "primary jurisdiction" problem in labor matters usually arises where statutory prescription directs that initial proceedings shall be commenced in an administrative or extra-judicial forum. In such cases courts must refuse to entertain initial action on that score.

Wagner v. International Brotherhood of Electrical Workers[227] is a recent case decided by the Supreme Court of Pennsylvania which recognizes and applies the primary jurisdiction rule. In the *Wagner* case, a former railroad employee instituted an equity action against his union for damages for wrongful discharge under the labor agreement and for reinstatement in the union. The court affirmed the dismissal of the action. As to reinstatement the *Wagner* decision held:

> ". . . However, in considering the other matter involved here we find that plaintiff is seeking reinstatement into the Union, as a result of which it becomes necessary to interpret his right under the agreement between the defendant Railroad and defendant Union. In this situation this case comes directly within the decision set forth in the case of Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 557, 94 L.Ed. 795, holding that disputes,

226. 185 Pa. Super. 230, 137 A.2d 833 (1958).
227. 16 Pa. D.&C.2d 489 (C.P. Alleg.), *aff'd per curiam,* 395 Pa. 380, 150 A.2d 530 (1959).

> grievances and claims of employees arising out of agreements drawn in consonance with the Railway Labor Act must be presented before the National Railroad Adjustment Board."[228]

The Pennsylvania Labor Relations Act provides that the labor board shall be empowered to prevent unfair labor practices. This Act expressly directs that:

> "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise."[229]

In *Kohv v. Pennsylvania Labor Relations Board*,[230] an employer summarily dismissed an employee for engaging in union activity. Three days later, the union commenced picketing with striking employees. Subsequently, the employer and union entered into an agreement which settled the strike. The labor agreement recognized the union as bargaining agent. As part of the agreement, the union absolved the employer of liability for the unfair practice involved in the discriminatory discharge previously committed. The court applied the labor board's exclusive power to remedy unfair labor practices. It held in the *Kohv* case that "a contract between an employer and a union which would deprive a union member of individual rights guaranteed to him by the Pennsylvania Labor Relations Act and existing prior to the date when the union became his exclusive bargaining agent, is contrary to public policy and unenforceable." In answer to the employer's argument that settlement of labor controversies should be encouraged as a matter of public policy, the court further held that:

> "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practice by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose."[231]

(3) *Requirement That Employee Be in the Unit.*

An individual employee cannot bring an action to enforce a benefit arising under the labor contract unless he is included within the bargaining unit for which the contract was negotiated. Thus in *Gordon v.*

228. 16 Pa. D.&C.2d at 492, 150 A.2d at 532.
229. PENNSYLVANIA LABOR RELATIONS ACT, 43 P.S. § 211.8 (1952).
230. 6 Pa. D.&C.2d 250 (C.P. Mtgy. 1955).
231. *Id.* at 257.

Braeburn Alloy Steel Company[232] the court dismissed an action because the employee was not included in the unit covered by the contract. In the *Gordon* case a supervisory employee commenced an action against his employer to recover wages allegedly wrongfully deducted. The employee argued that these deductions were not permitted pursuant to a labor contract then subsisting. The court did not question the general right of an employee judicially to pursue his wage claim arising under the provisions of the labor contract if such a claim existed. The *Gordon* case did, however, expressly hold that the plaintiff's supervisory classification, under the terms of the labor contract, excluded him from the bargaining unit. The plaintiff was therefore not covered by the contract and the benefits under the contract did not flow to him.

A caveat is apropos at this point on the right of a former employee to file a suit in equity pursuant to Pennsylvania law. Problems in this respect arise where an employee has been discharged allegedly in violation of his seniority rights under the labor contract. Pennsylvania law will limit such former employee to a cause of action at law. Equitable relief, by means of mandatory reinstatement to the former employment, is unavailable. The leading case on this point is *McMenamin v. Philadelphia Transportation Company.*[233] The Supreme Court of Pennsylvania held in the *McMenamin* case that a former employee will fail in his suit in *equity* to compel reinstatement to a job from which he had been fired because of a wrongful discharge insofar as the seniority provision of a labor contract is concerned. This case emphasizes the distinction in Pennsylvania law between existing property rights which have as their foundation a valid subsisting employment contract and inchoate or potential rights which can ripen into actual existence by an additional affirmative act, namely: either the creation or the reinstatement of an employment contract. A discharged person, whether justly or unjustly severed from employment, thus was held in the *McMenamin* case to have but inchoate or potential property rights. Since equity will not take jurisdiction of matters in this area which do not involve existing property rights, equity will not entertain a suit brought by such discharged person for an injunction to compel his reinstatement on the grounds that his seniority rights had been violated.

It is the serious conclusion of this author that the principle established by the *McMenamin* decision is impractical in its results and is based on a somewhat tortured and devious application of the law. If the law would be practical in this respect it would refrain from the

232. 364 Pa. 586, 73 A.2d 367 (1950).
233. 336 Pa. 88, 51 A.2d 702 (1947).

hypertechnical approach of the *McMenamin* case. The remedy of damages is not always a complete remedy in this area of labor law. The many intangibles involved in employment rights are difficult to assess for their true values. If one grants, for the sake of this phase of the discussion, that an employee has been discharged in violation of his contract seniority guaranties, then the employee has indeed lost very valuable present property rights. Equity has recognized pension, health and welfare rights as property rights. Therefore if in fact the discharge is improper, why cannot equity perform its traditional role in the law of the conscience of society and determine that this employee has never, in essence, changed or lost his status as a current employee? Why should the employer, who in our hypothetical case has wrongfully discharged under the seniority clause and therefore comes into court with unclean hands, be afforded the fruits of absolute victory by virtue of dismissal by equity of the employee's suit on grounds of lack of jurisdiction? To be slightly facetious, this equity principle is inequitable. It simply fails to afford a just result.

Damages in an action at law, on the other hand, are available under Pennsylvania law for wrongful discharge in violation of seniority rights under a labor contract.[234]

O'Donnell v. City of Philadelphia[235] is another case where the issue involved the point as to whether the union and the employer intended the benefits to flow to certain non-union members who were not, as a matter of law or a matter of fact, a part of the bargaining unit. The *O'Donnell* case held that incidental beneficiaries have no cause of action under the terms of a labor contract, and the plaintiffs' action therefore failed.

(4) *Requirement To Join Indispensable Parties.*

An indispensable party is one who is so directly interested in the litigation that a final judgment or decree could not be entered without inevitably affecting his interests, rights and duties so as to require his joinder for a final determination of all the issues involved in the action.[236] In other words, an indispensable party is really a party without whom the action cannot proceed to final judgment or decree. Failure to join an indispensable party is therefore a fatal procedural error.[237] Our Pennsylvania courts have held that the rule of indis-

234. Wagner v. International Bhd. of Elec. Workers, 16 Pa. D. & C. 489 (C.P. Alleg.) *aff'd per curiam*, 395 Pa. 380, 150 A.2d 530 (1959).
235. 385 Pa. 176, 122 A.2d 690 (1956).
236. Powell v. Shepard, 381 Pa. 405, 113 A.2d 261 (1955).
237. Forbes Rock Rd. Union Church v. Salvation Army, 381 Pa. 249, 113 A.2d 311 (1955).

pensable parties goes to the very jurisdiction of the court and absent the presence of such an indispensable party, the court will not assume or retain jurisdiction of the subject matter.[238] Hence, in *Gavigan v. Bookbinders Union No. 27,*[239] the Supreme Court of Pennsylvania held *inter alia* that the failure to join the employer as party defendant was fatal to the action. The *Gavigan* case involved an action by employee-members of a union brought against the union without joining the employer, for an interpretation of the seniority clause of the labor contract. It was brought in order to safeguard the seniority rights of these plaintiff-employees. On the other hand, in *Kern v. Duquesne Brewing Company of Pittsburgh,*[240] another action by employees involving labor contract seniority rights, where the local union had been joined and no redress was being sought from either the international union or an employers' association, the court held that it was not mandatory that the latter two be joined as "necessary parties."[241]

VII.

SELECTED PROCEDURAL REQUIREMENTS FOR SUITS BY AND AGAINST LABOR ORGANIZATIONS AND EMPLOYERS PURSUANT TO THE PENNSYLVANIA RULES OF CIVIL PROCEDURE.

For the most part, the Pennsylvania procedural requirements are identical for actions in law or suits in equity.

A. *Juridical Status of Labor Unions.*[242]

All of the following comments and analyses refer solely to labor unions which are voluntary unincorporated associations.

The PENNSYLVANIA RULES OF CIVIL PROCEDURE govern actions at law or in equity by or against labor unions constituted as voluntary

238. Gavigan v. Bookbinders Union No. 97, 394 Pa. 400, 147 A.2d 147 (1959); Kelley v. Kelley, 382 Pa. 537, 115 A.2d 202 (1955).

239. 394 Pa. 400, 147 A.2d 147 (1959).

240. 17 Pa. D.&C.2d 299 (C.P. Alleg.), *aff'd per curiam,* 396 Pa. 279, 152 A.2d 682 (1959).

241. "Necessary" and "indispensible" parties have often been used interchangeably by the Pennsylvania courts. The distinction between the two concepts is therefore at best a hazy one. If a decree or a judgment cannot finally resolve the issue involved without the presence of a certain party, such a party is "indispensable". On the other hand in cases where parties cannot be served or joined, and the interests of such parties are separable, it is more practical to litigate the matter to a conclusion than to dismiss it. In the latter case, the party is a "necessary" but not an "indispensable" party. In other words, the absence of a "necessary" party should not result in a complete failure of the cause, whereas the absence of an "indispensable" party should.

242. The summary of Pennsylvania law on the juridical status of labor unions is taken in part from a previous article on this subject by the author. Stern, *Intra-Union Activities, Membership and Collective Bargaining Rights under Pennsylvania Law,* 29 TEMP. L.Q. 38, 40-41 (1955).

unincorporated associations.[243] An unincorporated labor union, as such, must mandatorily be sued as an entity, *eo nomine;* or by means of an action against an officer of the union as "trustees *ad litem.*"[244] Suits by or against labor organizations cannot be brought as a class action.[245] An action by the labor union must be prosecuted in a representative form, *i.e.,* in the name of an officer or a member or members of the union as "trustees *ad litem.*"[246]

An action may be instituted as an action at law by a labor union against one or more of its members, or by one or more of its members against the labor union. In this respect an independent basis must be found for equitable actions.[247]

The venue of action against labor unions, with a few stated exceptions, is a local one. Thus an action may be brought in, and only in, the county where the union regularly conducts business or activities, or where the cause of action arose, or where a transaction out of which a cause of action arose[248] took place.

A judgment entered against a union sued in the name of the union or in its name by a trustee *ad litem,* binds the union's assets and supports execution thereon.[249] An individual member must be named as an additional defendant in order to impose individual liability upon him.[250]

B. *Service of Process.*

Service of process should also be explored in passing. *Quinn v. Pershing*[251] involved service upon non-residents, and the precise issue

243. PENNSYLVANIA RULES OF CIVIL PROCEDURE, 12 P.S. Appendix, Rules 2151-2175 (1951). The Rules will hereinafter be cited "Pa. R.C.P. Rule — (1951)." This citation would therefore read, "Pa. R.C.P. Rule 2151-2175 (1951)."

244. Pa. R.C.P. Rule 2153 (1951).

245. The official rules committee note on Pa. R.C.P. Rule 2230 reads: "Suits by or against unincorporated associations are not to be brought as class suits under this rule. Such suits are not regulated by Pa. R.C.P. Rules 2152 and 2153, 12 P.S. Appendix." See 3 GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE, §§ 2152-2 (1953); 4 ANDERSON, PENNSYLVANIA CIVIL PRACTICE 1954 (1950). *Accord,* Underwood v. Maloney, 256 F.2d 334 (3d Cir. 1958).

246. Pa. R.C.P. Rule 2152 (1951). The Rule provides that an action so prosecuted shall be entitled, "X Ass'n by A and B, Trustees Ad Litem" against the party defendant. Trustees ad litem may be officers or ordinary members of the union; but the action cannot be brought in the name of the union alone. 4 ANDERSON, PENNSYLVANIA CIVIL PRACTICE 195-196 (1950).

247. Pa. R.C.P. Rule 2145 (1951). This is a procedural rule and does not negate such requirements as exhaustion of internal remedies. 4 ANDERSON, PENNSYLVANIA CIVIL PRACTICE 200 (1950). Nor does it enlarge substantive rights or create any rights of action which did not previously in such case exist. Walsh v. Brotherhood of R.R. Trainmen, 71 Dauph., 333 (C.P. Pa. 1958).

248. Pa. R.C.P. Rule 2156 (1951). The exceptions involve attachment, seizure, garnishment, sequestration or condemnation or an action to recover possession of or to determine title to real or personal property.

249. Pa. R.C.P. Rule 2153 (1951).

250. Pa. R.C.P. Rule 2153 (1951). 3 GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE § 2153(c)-2 (1953).

251. 367 Pa. 426, 80 A.2d 712 (1951).

arose concerning service of process upon a union officer in charge of a regional office although that officer was not a registered agent. The court held that a valid service upon him had been made pursuant to PENNSYLVANIA RULES OF CIVIL PROCEDURE, Rule 2157. The court in the *Quinn* case dismissed the argument that this result would violate due process.

Spica v. International Ladies Garment Workers Union[252] is a leading recent decision which establishes standards inherent in "doing business" or the meaning of "association activity" under Pennsylvania law for service of process. In the *Spica* case, the court held that an international union with main offices in New York, was amenable to service of process made on an officer of a joint board located in Philadelphia. Some specific facts which the Supreme Court of Pennsylvania found persuasive in determining that the service of process was valid may be of interest and therefore follow: The International Union had the ultimate power to determine grievances, conduct finances, and supervise strikes. These facts evidenced to the court that the joint board was a creature of the International Union and effectuated its objects. The court noted, *inter alia,* that:

> "The name of the International is displayed across the entire front of the building . . . whereas . . . the Joint Board appears only on the door; the dues cards carry the signature of the President of the International Union . . . the letterhead of the Joint Board bears the official seal of the International, . . . organizing activities . . . have been carried on in the name of the International, or both . . . ; a very constant stream of communication was carried on between the North Broad Street office (in Philadelphia) and the offices in New York City, . . . a per capita . . . payment was regularly collected by the North Broad Street office and transmitted to the New York office; auditors selected and employed by the New York office regularly audit books . . . in Philadelphia; . . . a (labor) contract bears the signature . . . not only of the former manager of the Joint Board, but also that of Dave Dubinsky, President of the International."[253]

VIII.

CONCLUSION.

The very strength of the common law, with regard to its stability and predictability, has been a source of weakness in the law of labor contracts. It has resulted in rather slow, measured changes in Penn-

252. 388 Pa. 382, 130 A.2d 468 (1957).
253. *Id.* at 391-93, 130 A.2d at 473-74.

sylvania law on collective bargaining agreements when basic and speedy changes were the order of the day. The greatest recent forward strides have been paced by legislative action, which fortunately has been more sympathetic and responsive to the real needs. Pennsylvania public policy now unequivocally mandates that collective bargaining and the making and enforcing of its resultant labor agreements should be encouraged. Inherent in this approach is the end rule that enforcement of the labor agreement should be governed wherever possible by the internal machinery for its enforcement.

That enforcement by individual members should be discouraged unless fraud or corrupt agreement has reared its ugly head is clearly evident. Objective and fair effectuation of the labor agreement is thereby rendered impossible.[254] Enforcement by judicial process, in any event, should be the exception rather than the rule. But whether by means of grievance or other extra-legal machinery established by the terms of the labor contract, or by means of actions at law or suits in equity, a valid subsisting labor agreement should under all circumstances be considered and treated as an inviolate, enforceable, and legally binding agreement.

254. This salutary rule that a union is entitled to exercise its honest discretion and independent judgment has been applied in two trial court opinions. Chaco v. Pittsburgh Steel Co., 105 PITTS. L.J. 429 (C.P. Pa. 1957); DiSanti v. United Glass and Ceramic Workers Union, 37 Wash. 258 (Pa. 1957).