Vanderbilt Law Review

Volume 8
Issue 1 *Issue 1 - December 1954*

Article 4

12-1954

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James C. Kirby Jr.

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JAMES C. KIRBY, JR.*

JURISDICTION

Any survey of a state's decisional law in the labor field should include some reference to the jurisdiction of its courts over labor controversies. There would be no separate body of substantive labor law but for the intervention of Congress into employment relations affecting interstate commerce with comprehensive legislation designed to strengthen the worker in his collective capacity.[1] The administration of this legislation by the National Labor Relations Board provides the great majority of case law governing the employment relationship. However, that residue which may be regulated exclusively or concurrently by the states is an important one, as evidenced by the number of states which have enacted their own labor relations acts.[2]

Express exclusions from national acts.—The obvious areas of labor relations open to state legislative and judicial sanctions are those which Congress either cannot regulate or has excluded from its legislation. Since federal legislation is limited by the commerce power, activities which are intrastate in character are subject solely to the state's labor law as limited by other constitutional provisions. For instance, picketing of a business which is outside the federal commerce power is no concern of the National Labor Relations Board and any state limitation placed upon it need only accord with the picketing-free speech doctrine developed by the United States Supreme Court.[3]

Supervisors, independent contractors, domestic servants, agricultural laborers, and persons employed by a parent or spouse are not "employees" within the National Labor Relations Act and thus are excluded from its coverage.[4] Also excluded are persons employed

*Associate, Waller, Davis & Lansden, Nashville, Tennessee.

1. National Labor Relations Act (Wagner Act) 49 STAT. 449 *et seq.* (1935), 29 U.S.C.A. §§ 151 *et seq.* (1947) as amended by the Labor Management Relations Act (Taft-Hartley Act) 61 STAT. 136 (1947), 29 U.S.C.A. §§ 141 *et seq.* (Supp. 1953).

2. Colorado, Connecticut, Kansas, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Rhode Island, Utah, Wisconsin.

3. See p. 81 *infra.*

4. Section 2(3). 61 STAT. 137, 29 U.S.C.A. § 152(3) (Supp. 1953). Board decisions excluding persons from the Act's protection as supervisors include A. S. Asbell Co., 81 N.L.R.B. 82 (1949); Ligget Drug Co. 80 N.L.R.B. 1099 (1948); Carolina Light and Power Co., 80 N.L.R.B. 1321 (1948). See Levinson, *Foremen's Unions and the Law,* [1950] WIS. L. REV. 79; Petro, *True Supervisory Status,* 1 LABOR L. J. 754 (1950). Board exclusions of independent contractors include Alaska Salmon Industry, Inc., 81 N.L.R.B. 1335 (1949); Southwestern Associated Telephone Exchange Co., 76 N.L.R.B. 1105 (1948).

by the United States and its wholly owned corporations, any Federal Reserve Bank, a state or political subdivision thereof, or charitable hospitals.[5] Subject to the congressional purpose behind each exclusion, these employees depend upon state law for the right to concerted action and collective bargaining.[6]

The NLRB has also effectively excluded some situations from the Act's coverage by its policy of dismissing complaints where it feels that interstate commerce is so little affected that the purpose of the Act would not be served by asserting jurisdiction.[7] It has set forth "jurisdictional yardsticks," based on volume of interstate operations, which it purports to apply in determining whether to take jurisdiction of a given dispute.[8]

Federal vs. State Jurisdiction.—Once Congress asserts its power to regulate some aspect of interstate commerce with detailed legislation providing a specialized agency for its administration, the question arises whether it intends to occupy the field to the exclusion of state legislative and judicial action. If so the supremacy clause of the Constitution invalidates state law which would arrogate part of the field and perhaps obstruct the effectuation of a uniform national policy.[9] The most controversial problem in the labor field today is the extent to which Congress has "pre-empted" the regulation of labor relations in industries affecting interstate commerce. Since the Wagner Act did not outlaw any form of concerted employee action, there was no basis for argument that the states were excluded from acting in this area.[10] Employers freely used state courts for injunctive relief from coercive and unlawful union activity.

5. Section 2(2). 61 STAT. 137, 29 U.S.C.A. § 152(3) (Supp. 1953).

6. For a case enjoining picketing to organize supervisors as contrary to state policy, see Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 261 P.2d 721 (Cal. 1953). For the application of a state labor relations act to charitable hospitals see Utah Labor Relations Board v. Utah Valley Hospital, 235 P.2d 520 (Utah 1951).

7. See Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir.), *cert. denied,* 342 U.S. 815 (1951).

8. In July, 1954, the Board issued a new set of standards designed to increase the restrictions on its acceptance of jurisdiction. These may be found in 1 CCH LAB. LAW REP. ¶ 1615 (Report No. 324, Aug. 19, 1954). In splitting over revising its old jurisdictional yardsticks, a majority of the Board stated that the new yardsticks would "reduce the Board's case load by no more than 10 per cent and in terms of employees will affect no more than 1 per cent of the total number of employees subject to the broadest reach of the Board's legal jurisdiction." According to Member Murdock, who strongly opposed the jurisdictional changes, "it seems probable that at least 25 per cent and perhaps as much as 33 1/3 per cent of our past jurisdiction is now eliminated." Breeding Transfer Co., 110 N.L.R.B. No. 64 (1954).

9. Napier v. Atlantic Coastline R.R., 272 U.S. 605 (1926).

10. Wagner Act regulation was sufficient for Federal preemption of the areas of employer unfair practices; regulation of peaceful strikes, International Union v. O'Brien, 339 U.S. 454 (1950); employee choice of bargaining representatives, Bethlehem Steel Co. v. New York State Labor Rel. Bd., 330 U.S. 767 (1947), Hill v. Florida, 325 U.S. 538 (1945); and the negotiation of collective agreements, Amalgamated Ass'n v. Wisconsin Employment Rel. Bd., 340 U.S. 383 (1951).

However, the enactment of the Taft-Hartley Act brought detailed prohibition of certain union unfair labor practices and the effect of this legislation on state power is not yet resolved.[11] State statutes or decisions clearly may not legalize conduct which is outlawed by federal law. But what of state law which is consistent with federal law? And may the states go beyond Taft-Hartley and regulate activity which that Act neither expressly condemns nor expressly privileges?

These questions were brought into sharp focus by the much discussed decision of the United States Supreme Court in *Garner v. Teamsters, Chauffeurs & Helpers Union.*[12] The defendant union had been enjoined by a lower Pennsylvania court from engaging in organizational picketing[13] where it represented none of the complaining employer's employees, on the theory that the pickets sought to induce the employer to violate the state's labor relations act. The Pennsylvania Supreme Court reversed, holding that the picketing was within the NLRB's exclusive jurisdiction to prevent unfair labor practices. The United States Supreme Court unanimously affirmed.

Mr. Justice Jackson's opinion in the *Garner* case did not consider whether the union's conduct violated federal law and apparently regarded this as immaterial. It noted that the case was one of which the NLRB would have assumed jurisdiction and reasoned that a prime purpose of the Board—the application of uniform national policy in labor disputes—would be defeated if disputes within the Board's purview could be subjected to the differing remedies and possibly conflicting adjudications of state courts.

The failure of the *Garner* opinion to consider the legality of the picketing under Taft-Hartley indicates that the Board's exclusive jurisdiction is not limited to union conduct outlawed by the Act. The opinion contains strong language which indicates that the Act is to be construed as privileging any peaceful picketing which is not forbidden by Section 8(b)(4).[14] Whether stranger picketing for or-

11. Among the vast law review comment on the subject the most comprehensive treatment is Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954). See also *e.g.*, Hall, *The Taft-Hartley Act v. State Regulation*, 1 J. PUBLIC L. 97 (1952); Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, 28 NOTRE DAME LAW. 1 (1952); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LABOR L. J. 750 (1952).

12. 346 U.S. 485 (1953), 7 VAND. L. REV. 422 (1954).

13. Organizational picketing is directed at the picketed employees and urges them to join the union. Recognition picketing is directed at the employer and seeks to induce him to recognize the union as bargaining agent. The legal status of such picketing when it is conducted by a minority union or a stranger union (one which represents none of the employees in the unit) is one of the most difficult and controversial problems in current labor law. See note 15 *infra*, and Petro and Koretz, *Labor Relations Law* (1953 Ann. Surv. Am. Law), 29 N.Y.U. L. REV. 353, 362 (1954).

14. "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other

ganization violates Taft-Hartley is an unsettled and highly controversial issue.[15] If the Court subsequently holds such picketing to be an unfair practice, the way is open to limit the *Garner* case to a holding that state jurisdiction is ousted only where federal law is consistent with state law. Some state courts have so construed the case and have continued to take jurisdiction over picketing which is not specifically forbidden by federal law.[16]

The *Garner* decision has many implications too far-reaching for full discussion here. It remains for congressional action, or a case by case judicial process, to define the line between state and federal power. The waters were muddied further by *United Construction Workers v. Laburnum Construction Corp.*,[17] which held that a state court could entertain an employer's damage action against a union which had intimidated his employees and forced him to abandon construction projects.[18] Although the union's conduct was an unfair practice under federal law and the NLRB could have issued a cease and desist order, the Board afforded no substitute remedy for relief by damages.[19] The *Garner* case was distinguished as holding that "preventive procedures prescribed by Congress precluded conflicting state procedure to the same end."

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methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed process to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." Garner v. Teamsters, Chauffeurs and Helpers Union, 346 U.S. 485, 499 (1953).

15. The Board holds that such picketing by a minority or stranger union may not be restrained unless there is a certified union representing the employees. United Brotherhood of Carpenters, 80 N.L.R.B. No. 91 (1948); Perry Norvell Co., 80 N.L.R.B. No. 47 (1948). At least one federal circuit court has disagreed. Capital Services, Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953), *aff'd*, 347 U.S. 501 (1954). The lower Pennsylvania court in the *Garner* case based its right to enjoin the picketing upon the Board's holdings that such conduct was not forbidden by Taft-Hartley. Garner v. Teamsters, Chauffeurs and Helpers Union, 21 CCH LAB. CAS. ¶ 67,034 (Ct. Com. Pl., Dauphin Co., Pa. 1951). In reversing, the state supreme court reasoned that such picketing is an unfair labor practice under Taft-Hartley. 373 Pa. 19, 94 A.2d 893 (1953).

16. See *e.g.*, Anheuser-Busch, Inc. v. Weber, 265 S.W.2d 325 (Mo. 1954), *cert. granted*, 23 U.S.L. WEEK 921 (U.S. Oct. 21, 1954); M & M Woodworking Co. v. United Brotherhood of Carpenters and Joiners, 26 CCH LAB. CAS. ¶ 68,767 (Cir. Ct. Multnomah Co., Ore. 1954); Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 25 CCH LAB. CAS. ¶ 68,310 (Cir. Ct., Milwaukee Co., Wis. 1954). State court decisions prior to the *Garner* case are collected at 32 A.L.R. 2d 1026 (1953).

17. 347 U.S. 656 (1954).

18. An analogous Tennessee case is McDaniel v. Textile Workers Union, 36 Tenn. App. 236, 254 S.W.2d 1 (E.S. 1952) in which a nonunion employee recovered damages from a union for personal injuries caused by picket-line violence.

19. The Board may only order reinstatement and back pay, and the latter only in discrimination cases. See Note, 51 COL. L. REV. 508 (1951).

It should not be readily assumed from the *Laburnum* case, however, that federal preemption is limited to situations where the Board and state courts afford equivalent remedies. *Laburnum* involved threatened violence—conduct which is tortious at common law whether it occurs in a labor dispute or elsewhere. The *Garner* case had reaffirmed earlier decisions which upheld the states' traditional power over public safety and order,[20] and the facts of *Laburnum* would have justified injunctive relief by the state court. It is unlikely that the Supreme Court would allow a state court damage action for injury caused by peaceful picketing such as the *Garner* case involved.[21] While less drastic than injunctive relief, the prospect of liability for damages in a state court would be something of a deterrent to peaceful picketing which should be within the jurisdiction of the NLRB.

This leads to the question of *Garner's* effect on the picketing-free speech decisions which permit a state to enjoin picketing which has an illegal objective. The Pennsylvania court had enjoined the picketing here because it sought a violation of the state's labor relations act. Does the Supreme Court intend to overrule cases like *Giboney*[22] and *Ritter's Cafe*?[23] In both these cases peaceful secondary picketing to enforce a boycott was enjoined under the states' antitrust laws and the Court sustained them. The *Ritter* case was decided before Section 8(b)(4) of the Taft-Hartley Act prohibited certain boycotts. Under *Garner's* reasoning, this may have legalized those not forbidden. Or under *Garner* as distinguished by the *Laburnum* case, this may merely preclude state preventive procedures. The *Giboney* case was

20. The following passage from the *Garner* opinion is its only hint as to permissible areas for state action:
"This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is governable by the state or it is entirely ungoverned. In such cases we have declined to find an implied exclusion of state powers. International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254. . . . Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740, 749. . . . Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. Nor is there any suggestion that petitioners' plea of federal jurisdiction and preemption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked." Garner v. Teamsters, Chauffeurs and Helpers Union, 346 U.S. 485, 488 (1953).

21. Unless the Taft-Hartley Act is to be given the anomolous effect of merely stripping state courts of injunctive power in labor disputes, thus making it a sort of Norris-LaGuardia Act for the states. *Cf.* Benjamin v. Foidl, 26 CCH LAB. CAS. ¶ 68,792 (Pa. 1954).

22. Giboney v. Empire Ice & Storage Co., 336 U.S. 490 (1949). However, it does not appear in this case that interstate commerce was affected. Likely it was not, since retail ice dealers were involved.

23. Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942).

decided in 1949 after Taft-Hartley gave rise to the preemption doctrine, but the question was not raised. The resolution of this question may depend upon analysis of the particular state law involved. It has been suggested that state statutes or common law rules which are aimed at labor relations *as such* should not be applied to labor disputes governed by federal law. But if union conduct violates a general state law relating to the protection of persons and property, the fact that the violation occurs in connection with concerted employee action should not insulate it from state sanctions.[24]

The preemption doctrine raises a perplexing problem in the "no man's land" of labor relations created by the NLRB's policy of declining to exercise its jurisdiction in disputes having an insufficient effect on commerce.[25] Since the Board acts under a Congressional delegation of power, its jurisdictional yardsticks should be given the effect of defining the excluded industries as intrastate commerce so far as labor disputes are concerned. The difficulty arises from the Board's failure in some instances to follow its own standards in taking jurisdiction.[26] It may be impossible in a given case to determine whether the Board will take jurisdiction of a dispute and thus "preempt" it from state sanctions.

What of actions in a state court based on breach of a collective bargaining agreement? Since breach of a collective agreement is not of itself an unfair labor practice, there is no remedy with the Board, and state courts have traditionally entertained such actions.[27] But a preemption issue may be raised by Section 301 of the Taft-Hartley Act[28] which creates a federal substantive right to the performance of such agreements. It is unlikely that this ousts state courts of jurisdiction of such actions, but there is a danger of conflicting decisions if state law is applied in suits in state courts.[29]

The advent of preemption should not disturb any Tennessee decisions. In *Manning v. Friedelson*[30] the state Supreme Court refused to entertain a suit to enjoin the Regional Director of the NLRB from an improper distribution as trustee of a back pay award. It noted the Board's exclusive power to prevent unfair labor practices under the

24. Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1321 (1954).
25. See p. 74, *supra*.
26. The Board has declined jurisdiction over the hotel industry and refused to apply its jurisdictional yardsticks to it. Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951).
27. See *e.g.* cases collected at 18 A.L.R. 2d 352 (1951).
28. 61 STAT. 156 (1947), 29 U.S.C.A. § 185 (Supp. 1953).
29. *Compare* Shirley-Herman Co. v. Int'l Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Int'l Union of Operating Engineers v. Dahlem Construction Co., 193 F.2d 470 (6th Cir. 1951); *with* Patterson Parchment Paper Co. v. Int'l Brotherhood of Paper Makers, 191 F.2d 252 (3d Cir. 1951); General Building Contractors Ass'n v. Local Union No. 542, 370 Pa. 73, 87 A.2d 250 (1952). See cases at 17 A.L.R. 2d 614 (1951) and Cox, *supra* note 24 at 1335-1339.
30. 175 Tenn. 576, 136 S.W.2d 510 (1940).

Wagner Act and held that the employees should apply to the Board for a construction of its order granting back pay. In 1944 the *Oliver* case[31] considered an employees' suit complaining of a discharge under a War Labor Board maintenance-of-membership clause. It was held that the alleged discriminatory discharge was an unfair labor practice exclusively within the jurisdiction of the National Labor Relations Board. In 1948, the state Supreme Court considered a case identical with the *Garner* case. The union was picketing for recognition although it had no members among the complainant's employees. Preemption was not discussed but the court interpreted decisions of the United States Supreme Court to hold that it could not prohibit peaceful picketing merely because of the absence of a "labor dispute."[32]

Robinson v. Chauffeurs, Teamsters, Warehousemen and Helpers[33] involved a strike apparently caused by the employer's discharge of employees who had designated the defendant union as bargaining representative. The chancellor had enjoined picketing on the theory that the union lost the right to picket by striking without attempting to bargain in good faith. He found the union guilty of an unfair labor practice, apparently by a misapplication of the 60-day waiting period in Section 9(d)(1) of the Act. The court of appeals held that the matters were exclusively within the jurisdiction of the National Labor Relations Board and it would not usurp the Board's functions by attempting to enforce the Act.[34]

In 1953 the Tennessee Supreme Court summarized its position on limitations on its jurisdiction to enjoin picketing. It stated:

> "We think the Chancellor was correct in holding that he had no jurisdiction to determine whether or not the union was qualified to act as bargaining agent for the company's employees. This is strictly within the scope and purview of the Labor Management Relations Act of 1947 (Taft-Hartley); nor has the court any authority to determine whether or not an employer is guilty of an unfair labor practice, or if any strike is lawful or unlawful. . . .
>
> "This Court is not concerned with the question of causes which give rise to a strike, and not until strikers are guilty of acts which result in irreparable damage to property, will a court of chancery issue an injunction to restrain the commission of such unlawful acts."[35]

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31. Oliver v. Local or Subordinate Lodge No. 56, Int'l Brotherhood of Boilermakers, 182 Tenn. 236, 185 S.W.2d 525 (1944).
32. Ira Watson Co. v. Wilson, 187 Tenn. 402, 215 S.W.2d 801 (1948).
33. 20 CCH LAB. CAS. ¶ 66,463 (Tenn. App. E.S. 1951).
34. *But see* Chattanooga Blow Pipe & Roofing Co. v. Sheet Metal Workers, Local 51, 12 CCH LAB. CAS. ¶ 63,706 (Ch. Ct. Shelby Co., April 1, 1947), a clearly erroneous decision. It enjoined picketing for a closed-shop contract on the theory that the union, by failure to seek a contract since its last one expired in 1939, lost its bargaining rights by laches and was therefore now committing an unfair labor practice under the National Labor Relations Act.
35. Lodge Mfg. Co. v. Gilbert, 260 S.W.2d 154, 156 (Tenn. 1953).

The court then approved an injunction of violence, intimidation and mass picketing, limiting the number of pickets to one.

In *Broome v. Louisville & Nashville R.R.*[36] the Tennessee Supreme Court refused to take jurisdiction of a suit for wrongful discharge under a collective agreement subject to the Railway Labor Act. Although it would have jurisdiction of an action at law for damages,[37] it could not take jurisdiction of an equity action to compel reinstatement. The latter action affects the future status of all employees in the bargaining unit, and, unlike a damage action, seeks relief which the Railway Adjustment Board is empowered to administer. Therefore state jurisdiction yields.

THE LABOR INJUNCTION

The availability in a state court of an injunction against unlawful picketing may well be of vital importance to an employer. Even though irreparable injury may be threatened to his business, he may find that the obstacles of the Norris-LaGuardia Act deny access to Federal courts and that the procedures of the NLRB are either inadequate or too slow to be of real assistance to him.[38] Any right he may have to such relief is of course subject to the usual equity limitations. But it is also clouded by two of the most vexing and conceptually difficult problems in this field, the extent to which Congress has preempted the field of interstate labor relations and the "picketing-free speech" doctrine developed by the Supreme Court of the United States.

Picketing for unlawful objective.—What is probably the first reported decision involving an injunction of picketing in Tennessee is *Southern Ry. Co. v. Machinists Local Union No. 14*,[39] decided in 1901. In that case a federal circuit judge applied Tennessee's "enticement statute"[40] and enjoined the defendant union from inducing by any method—picketing, persuasion or otherwise—the breach by plaintiff's apprentices of their four-year contracts of employment. The remainder of the sweeping injunction which was issued against the union's activities is not material here since Tennessee law was not involved. The enticement statute has not been invoked again to curb

36. 194 Tenn. 249, 250 S.W.2d 93 (1952). For a discussion of this case see Sanders, *Labor Relations—1953 Tennessee Survey*, 6 VAND. L. REV. 1193, 1197 (1953).

37. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953); Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950).

38. It has even been held that it would deny due process to exclude a picketed employer from local courts and limit him to the Board's procedures. Winkleman Bros. v. Local Union No. 329, 22 CCH LAB. CAS. ¶ 67,262 (Cir. Ct., Wayne Co., Mich. (1952). See also State *ex rel.* Tidewater Shaver Barge Lines v. Dobson, 195 Ore. 533, 245 P.2d 903 (1952).

39. 111 Fed. 49 (Tenn. 1901). See p. 98 *infra*.

40. TENN. CODE ANN. §§ 8559-8560 (Williams 1934).

concerted employee action, but neither has it been rejected. It is still the law of Tennessee and a separate section of this article is devoted to it.[41]

Apparently the Tennessee courts did not consider an injunction of peaceful picketing until 1939 when *Lyle v. Local No. 452, Amalgamated Meat Cutters*[42] was decided by the state Supreme Court. There the defendant butchers' union picketed a small grocery operated by Lyle, his wife, and one clerk who did no butcher's work. Its object was to induce Lyle to join the union and conform his wages and hours of business to union standards. During two months of such picketing the complainant's business had fallen off one third. The Tennessee Supreme Court held that Lyle was entitled to an injunction and in substance applied the prima-facie tort theory,[43] reasoning that the right to conduct a business is a property right protected by the common law, and that "so-called peaceful picketing" by those in the positions of the defendants was an unjustifiable interference with that right. The court did not regard the picketing of a sole proprietor as a legitimate "labor dispute" and relied on a number of decisions prohibiting concerted employee action against a party with whom they have no contractual relation. One of these cases was the decision of the Illinois appellate court in *Swing v. American Federation of Labor*.[44]

In 1941 the *Swing* case was reversed by the United States Supreme Court[45] in an application of the picketing-free speech doctrine initiated in *Thornhill v. Alabama*[46] in 1940. In 1948 the Tennessee Supreme Court repudiated the *Lyle* case to the extent required to allow peaceful picketing by a union for recognition where it represented a majority of the employees.[47] Soon thereafter it expressly overruled the *Lyle* case in permitting a union to picket for organization or recognition even though it represented no employees in the unit.[48]

The requiem for the *Lyle* case was sung too soon. The *Swing* decision had held that a state could not prohibit picketing by a stranger union for recognition merely because of the absence of an employer-employee relationship. It was soon established, as the picketing-free speech doctrine began to wither, that a state could enjoin picketing which had an objective illegal under its law, whether the objective

41. See p. 95 *infra.*
42. 174 Tenn. 222, 124 S.W.2d 701 (1939).
43. See p. 91 *infra.*
44. 298 Ill. App. 63, 18 N.E.2d 258 (1938); *aff'd,* 372 Ill. 91, 22 N.E.2d 857 (1939).
45. American Federation of Labor v. Swing, 312 U.S. 321 (1941).
46. 310 U.S. 88 (1940).
47. Rowe Transfer and Storage Co. v. Int'l Brotherhood of Teamsters, 186 Tenn. 265, 209 S.W.2d 35 (1948).
48. Ira A. Watson Co. v. Wilson, 187 Tenn. 402, 215 S.W.2d 801 (1948).

was made illegal by a criminal statute,[49] or by legislative policy,[50] or by public policy as declared by the state's courts.[51] Then in *International Brotherhood of Teamsters v. Hanke*[52] it was held that a state could enjoin peaceful picketing of a self-employer upon a judicial finding that it violated the public policy of the state. The arrival of the *Hanke* decision meant that the *Lyle* case is again good law in Tennessee, upon its facts, if the court makes appropriate findings of public policy.[53]

If a union strikes or pickets to induce a Tennessee employer to agree to a union or closed shop, it should be enjoined because the objective sought would violate the state's Open Shop Law.[54] Although the Tennessee Supreme Court hesitated on this question in 1948,[55] a subsequent decision of the United States Supreme Court has established that such an injunction may issue.[56]

In *Waverly Transfer Co. v. Teamsters, Chauffeurs, Warehousemen and Helpers*,[57] an unreported chancery decision, the "unlawful objective" rule was further applied. The Teamsters union was picketing the terminal of a nonunion trucker. Employees of connecting truck lines refused to cross the picket line. An injunction was issued on the reasoning that the purpose of the picketing was to prevent the performance by common carriers and their servants of their common law duty to the public. This decision and the few in accord with it from other jurisdictions[58] raise problems of implications too broad for discussion here.[59]

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49. Giboney v. Empire Ice & Storage Co., 336 U.S. 490 (1949).

50. Building Service Employees Int'l Union, Local 262 v. Gazzam, 339 U.S. 532 (1950).

51. Hughes v. Superior Court of California, 339 U.S. 460 (1950).

52. 339 U.S. 470 (1950).

53. The limits of the rule that picketing which violates judicially declared policy may be enjoined are yet to be determined. In a questionable decision, California recently enjoined peaceful picketing aimed at compelling an employer to bargain with a supervisors' union as contrary to its public policy. Safeway Stores, Inc. v. Retail Clerks, 261 P.2d 721 (Cal. 1953).

54. TENN. CODE ANN. §§ 11412.8-11412.11 (Williams Supp. 1952). Prior to this statute picketing for a closed shop was enjoined by one Tennessee court as inducing the employer to commit an unfair labor practice under the National Labor Relations Act. Chattanooga Blow Pipe and Roofing Co. v. Sheet Metal Workers, 12 CCH LAB. CAS. ¶ 63,706 (Ch. Ct. Shelby Co., April 1, 1947).

55. In the case upholding the constitutionality of the Open Shop Law, the court left the lower court's injunction in effect. On rehearing, the injunction was modified so as to permit peaceful picketing "as held by the Supreme Court of the United States," Mascari v. Int'l Brotherhood of Teamsters, 187 Tenn. 345, 215 S.W.2d 779 (1948).

56. Local No. 10, United Ass'n of Journeyman Plumbers v. Graham, 345 U.S. 192 (1952).

57. Ch. Ct. Pt. 2, Davidson Co., June 19, 1952. Cited in 3 LAB. L.J. 566 (1952).

58. *Accord*, Montgomery Ward and Co. v. Northern Pacific Terminal Co., 23 CCH LAB. CAS. ¶ 67,713 (D. Ore. 1953) (damage action); General Drivers v. American Tobacco Co., 258 S.W.2d 903 (Ky. App. 1953); Truckdrivers v. Whitfield Transportation, Inc., 259 S.W.2d 947 (Tex. Civ. App. 1953); *contra*,

Boycotts—Labor cases arising in Tennessee are remarkably free of boycott situations. This is probably due to the relative weakness of the labor movement here as compared with other states and the resulting scarcity of aggressive unions.[60] It is possible that federal legislation will be held to have preempted the field of regulation of picketing for boycotts.[61]

In an unreported case, *Southern Bell Tel. and Tel. Co. v. Communications Workers*,[62] the chancellor referred to a prior decree he had issued in which he enjoined picketing of a gas station by a painters' union. The union had a dispute with an oil company which leased the premises to the complainant and furnished him with gas and oil products. The chancellor issued injunctions in both cases because of the lack of any dispute between the picketed employer and the union. The gas station case involves "product picketing" which is non-enjoinable under the New York "unity of interest" doctrine[63] if the pickets' signs are properly labeled.

Mass picketing and violence—Rowe Transfer and Storage Co. v. International Brotherhood of Teamsters[64] involved an employer who had refused to recognize the defendant union as bargaining agent for his employees. It picketed his premises, seeking recognition and also to induce his employees to join the union. Upon the employer's affidavit of mass picketing and threats of violence the chancellor issued a blanket preliminary injunction of *all* picketing. After a hearing and jury findings of *threatened* violence, the decree was made final. The court of appeals modified the injunction so as to permit peaceful picketing and the Supreme Court affirmed. The court followed the principles of *Milk Wagon Drivers Union v. Meadowmoor Dairies*,[65] and held that it was error to issue a blanket injunction unless the threats of violence were so enmeshed with the picketing that it was "tinged with violence." Acts of violence disassociated in time and place from the picketing could not justify such an injunction.

The opinion of the court of appeals in this case[66] contains a valu-

S. E. Overton Co. v. Int'l Brotherhood of Teamsters, 115 F. Supp. 764 (W.D. Mich. 1953).

59. The *Montgomery Ward* decision, *supra* note 58, has an excellent discussion of the position of a carrier in labor disputes. See Petro and Koretz, *Labor Relations Law* (1953 Ann. Surv. Am. Law) 29 N.Y.U. L. REV. 353, 375-78 (1954).

60. It may be due in part to a fear of the Tennessee statute awarding treble damages in an action for inducing breach of contract. Witness the fate of the electrical workers in Haven v. Howard, *infra* note 115.

61. See p. 77 *supra*.

62. 21 CCH LAB. CAS. ¶ 66,961 (Ch. Ct. Pt. 2, Shelby Co. No. 54172 R.D., Apr. 10, 1952).

63. Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937).

64. 186 Tenn. 265, 209 S.W.2d 35 (1948).

65. 312 U.S. 287 (1940).

66. Rowe Transfer and Storage Co. v. Int'l Brotherhood of Teamsters, 13 CCH LAB. CAS. ¶ 64,160 (Tenn. App. E. S. Nov. 24, 1947). A prior opinion of the supreme court denying certiorari and supersedeas upon the preliminary

able discussion of sound equity practice in such matters. It considered the propriety of the blanket preliminary injunction issued by the chancellor, a question not reviewed by the supreme court. The gravity of this relief was emphasized along with the particularity which should be required of affidavits, and it was held to be error to issue such a decree where the affidavits were without detail as to whether the threats were so closely connected with the picketing as to warrant a blanket injunction. However an interlocutory injunction against violence and continued threats is permissible upon proper allegations since "no great harm can result even though the charge turns out to be untrue or exaggerated." A decree limiting the number of pickets would also be proper at this stage. Then, if the facts as shown upon a hearing warrant, the injunction against intimidation and violence may be made permanent and all picketing enjoined.

But exactly what findings of fact are sufficient to meet the objection that an injunction of peaceful picketing is a denial of labor's right to communicate the facts of a dispute? The *Rowe* case contains dicta that a blanket injunction is proper where "it is necessary to prevent future acts of intimidation which in the light of past conduct may reasonably be anticipated."[67] This is an understatement of the *Meadowmoor* doctrine. *Reasonable anticipation* of future acts of intimidation is not sufficient. The lower court in the *Meadowmoor* case had found in effect that "peaceful" picketing was impossible. The past picketing was set in such a "background of violence" that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[68] In other words, the picketing must be so interwoven with violence that in the future the simple act of picketing would itself be coercive. In light of this strict limitation it is doubtful if the United States Supreme Court would hold that mere unexecuted threats of violence, such as the proof in the *Rowe* case showed, could ever justify an injunction of all peaceful picketing.

As yet no Tennessee decision has denied the right to continue to picket peacefully because of attendant violence in the past. The procedure in the *Rowe* case of enjoining excesses and allowing peaceful picketing was followed in at least four other cases, some of which limited the number of pickets by their decrees.[69]

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injunction in this case appears at 11 CCH LAB. CAS. ¶ 63,293 (July 23, 1946).

67. Rowe Transfer and Storage Co. v. Int'l Brotherhood of Teamsters, 186 Tenn. 265, 271, 209 S.W.2d 35, 37 (1948).

68. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 294 (1940).

69. Lodge Mfg. C o. v. Gilbert, 195 Tenn. 403, 260 S.W.2d 154 (Tenn. 1953) (one picket); United Steel Workers v. Nashville Corp., 187 Tenn. 444, 215 S.W.2d 818 (1948); Ira A. Watson Co. v. Wilson, 187 Tenn. 402, 215 S.W.2d 801 (1948); American Snuff Co. v. United Steel Workers, 19 CCH LAB. CAS. ¶ 66,127 (Tenn. App. W.S., Jan. 11, 1951).

Fraudulent picketing—In no reported case has the issue of permissible language in picketing signs been dealt with directly. In *Ira A. Watson Co. v. Wilson*[70] the union had failed to win a single employee in its attempt to unionize the complainant's store. It then picketed the store as "unfair." The chancellor prohibited the use of the word "unfair" and limited the union to informing the public that it was a "nonunion store" because "it ought to be more definite and ought to speak the truth and not a conclusion."[71] The supreme court left the decree undisturbed.[72]

Criminal Liability of Unions and Their Members

Criminal contempt—The only case in which the Tennessee Supreme Court has considered convictions for criminal contempt for violation of a labor injunction is *United Steel Workers v. Nashville Corporation.*[73] There the chancellor had permitted peaceful picketing but enjoined violence and intimidation, limited the number of pickets and restricted the area of picketing. On appeal, the defendants who were convicted of violating the injunction contended that it violated their constitutional rights and challenged the sufficiency of the proof to sustain their convictions.

The court indicated approval of the injunctive decree, but held that even if it were erroneous or irregular it must be obeyed. This is the general rule so long as the court has jurisdiction of the parties and the subject matter[74] because the essence of criminal contempt is an offense against the dignity of the court. If a court issues a preliminary injunction in a case where its jurisdiction is challenged, the question of John L. Lewis' famous contempt case is presented. It was held there by the United States Supreme Court that a court may preserve the subject matter of a suit by preliminary injunction while it determines the question of its own power and that violations of its order are punishable regardless of final disposition of the jurisdictional issue.[75] This rule could become one of increasing importance while

70. 187 Tenn. 402, 215 S.W.2d 801 (1948).

71. This is shown in the opinion of Prewitt, J. denying rehearing. It is reprinted at 15 CCH Lab. Cas. ¶ 64,575. In Cafeteria Employees v. Angelos, 320 U.S. 293, 295 (1943), New York had enjoined picketing of a restaurant where the union had no members and in which all the employees were partners, relying in part on the basis that the statements of the placards were false. The Supreme Court reversed in an opinion by Justice Frankfurter in which he stated, "And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies —like 'unfair' or 'fascist'—is not to falsify facts."

72. An employer may possibly have a libel action against a union which publicizes him as "unfair." Paducah Newspapers, Inc. v. Wise, 247 S.W.2d 989 (Ky. 1952), *cert. denied* 343 U.S. 942 (1952).

73. 187 Tenn. 444, 215 S.W.2d 818 (1948).

74. Howat v. Kansas, 258 U.S. 181 (1922). *In re* Vanvaver, 88 Tenn. 334, 12 S.W. 786 (1890).

75. United States v. United Mine Workers, 330 U.S. 258 (1947).

the jurisdiction of state courts in labor disputes is in a state of uncertainty under the hazy doctrine of federal preemption.[76]

In the *Nashville Corporation* case the Tennessee Supreme Court applied its general rule for criminal appeals, that a convicted defendant is presumed guilty on appeal and to upset the conviction he must show that the proof preponderates against the findings.[77] A subsequent unreported case in the court of appeals, *American Snuff Co. v. United Steel Workers,*[78] involved similar facts and demonstrated the difficulty of discharging this burden. There several defendants had been convicted of contempt for violating an injunction by assaulting nonstriking employees. Apparently the only evidence in some instances was the contradictory testimony of the defendant and the victim of the assault. The appellate court followed the *Nashville Corporation* case and viewed the assignments as questions of fact under which the chancellor had refused to believe the defendants' testimony. All convictions were upheld.

In both the *Nashville Corporation* and the *American Snuff* cases, the question arose as to the proof of notice of the injunction as to defendants who were not personally served but who were charged with contempt of the decree or abetting in a contempt. The cases leave the question in some doubt. In the first case notice was not denied but the supreme court discussed the matter at length. Two defendants had indicated by their testimony that they had knowledge of the injunction and a third, who did not testify, had been charged twice before with violations of the injunction. The fourth did not take the stand; but he was a member of the union enjoined; the injunction had been discussed at union meetings; and he was among strikers who congregated around the plant. The injunction had been posted and publicized in the press and apparently all his associates had knowledge of it. The court reasonably concluded:

> "In other words a court must assume under these proven facts that Stephens had the required knowledge and notice of this injunction in the absence of his denials thereof. We would stultify ourselves if we concluded otherwise."[79]

In the *American Snuff* case the proof was not so strong and the court of appeals was faced with denials of knowledge of the injunction by three defendants. The three were not members of the union

76. For an interesting federal case which arose in Tennessee and involved this issue, see American Federation of Musicians v. Stein, 213 F.2d 689 (6th Cir. 1954).
77. State v. Daugherty, 137 Tenn. 125, 191 S.W. 974 (1916).
78. 19 CCH LAB. CAS. ¶ 66,127 (Tenn. App. W.S. 1951).
79. Nashville Corp. v. United Steel Workers, 187 Tenn. 444, 453, 215 S.W.2d 818, 822 (1948).

involved but were charged with an assault in conjunction with a union striker who admitted knowledge of the decree. The only other circumstances cited by the Court were that two of the defendants were members of an affiliated CIO union at another plant, and the third defendant was a brother-in-law of one, and a neighbor of the other, of the first two. All three had congregated with pickets around the struck plant and could have seen large notices of the injunction posted there. These circumstances may not appear sufficient to a legalistic observer but the matter is one highly difficult of proof. The court in effect placed the burden on the appellants to show lack of knowledge of the injunction, thus including this element within the general rule of presumption of guilt on appeal.

In the *American Snuff* case questions arose as to the application of the terms of the decree. Five defendants were charged with violating the portion of the decree limiting the number of pickets. They denied that they were "pickets" although the proof showed that they were in a sympathetic crowd which congregated around those carrying signs and which obstructed access to the plant. The court viewed them as at least aiding and abetting in a violation and stated:

> "In view of the admitted sympathetic attitude of all the appellants for the cause, their availability to assist in the acts of obstruction, their close proximity to those actually effecting the obstruction, and their obvious approval of the act, it matters not which ones wore the signs, or physically stood in or walked in and across the driveway, or whether they were employees of complainant."[80]

Four other defendants were charged with assaulting a photographer hired by the employer to take pictures of the strikers. The assault occurred in the parking lot across the street from the plant. This was held to be within the part of the decree enjoining any denial of ingress or egress to a person having the right of access to the employer's place of business. Also, even though the photographer might be an independent contractor, the assault was held to violate the spirit of that part of the injunction prohibiting the intimidation of complainant's "employees."[81]

The convictions of all the defendants were unheld and sentences of light fines and jail sentences sustained. Apparently the union as such

80. American Snuff Co. v. United Steel Workers, 19 CCH LAB. CAS. ¶ 66,127, p. 78,759 (Tenn. App. W.S. 1951).

81. Citing Blair v. Nelson, 67 Tenn. 1 (1874), for the proposition that violating "the spirit of the injunction" is a contempt. In Jones v. State, 170 Ark. 863, 865, 281 S.W. 663, 664 (1924), unionists had been enjoined from "congregating in large or small numbers at, or near, the place of business of the plaintiffs . . . for the purpose of intimidating through force of numbers, any officer, agent or employee of plaintiffs. . . ." The defendant led a procession of about two hundred miners' wives upon the property of plaintiff. On appeal from a conviction of criminal contempt this was viewed as a "technical violation" and the sentence of a heavy fine and jail sentence was reduced to a $50 fine.

was not cited for contempt in either of the above cases. It would seem that since unions as entities are proper parties defendant in Tennessee,[82] a court may punish any official union acts which violate its decree by fines assessed against union property. Such fines may be used for punitive purposes and also may be designed to secure future compliance with the Court's decree. In *United States v. United Mine Workers*[83] the union had been fined $3,500,000 for contempt. On appeal to the United States Supreme Court this was modified to require a payment of $700,000, with payment of the additional $2,800,000 conditioned on future compliance with the injunction.

Criminal Conspiracy—The early common law view that combinations of workers were illegal conspiracies[84] had probably disappeared from American cases before trade unions developed in Tennessee. In possibly the first case which could have raised the question it was declared:

> "A labor union organized for the purpose of regulating the wages of its members and the promotion of their interests as laboring people is lawful."[85]

Two cases have removed all doubts as to whether Tennessee's special anti-conspiracy statute[86] can be applied to conspiracies among union members to commit unlawful acts in furtherance of a union objective. The scope of the statute had been considerably clarified in 1929 by Chief Justice Green's opinion in *Trotter and Arnold v. State*[87] which held that it did not apply to a conspiracy to appropriate public funds by a school official and a building contractor. The opinion noted that the act had been aimed at "white cap" or "night rider" groups which were terrorizing communities by the acts listed in the statute and whose existence was a public scandal at the time of its passage in 1899. It was conceded that literally the statute might apply to the conduct in issue but such would not effect the true intent or spirit of the act which was intended to combat an organization, combination or conspiracy "with an existence more or less protracted."

In *Asbury v. State*[88] three members of the United Mine Workers had been convicted under this statute for the beating of a nonunion foreman. In a brief opinion it was held that the statute applied to organizations "created" for the purposes set forth in the statute. Since it was conceded that the union was created for lawful purposes

82. See p. 90 *infra*.
83. 330 U.S. 258 (1947).
84. See Neiles, *Commonwealth v. Hunt*, 32 COL. L. REV. 1128 (1932); White, *Early American Labor Cases*, 35 YALE L.J. (1926).
85. Powers v. Journeyman Bricklayers, 130 Tenn. 643, 646, 172 S.W. 284, 285 (1914).
86. TENN. CODE ANN. § 11608 (Williams 1934).
87. 158 Tenn. 264, 12 S.W.2d 951 (1929).
88. 178 Tenn. 43, 154 S.W.2d 794 (1941).

the indictment on this count was defective and the conviction was reversed.

The *Asbury* case established that the mere fact that individual union members conspire to commit a single criminal act to accomplish an objective of the group does not bring them within the statute. But what of the case where a conspiracy to commit a series of such acts is official union policy for the accomplishment of some union objective such as winning a strike?

This question was answered in *State v. Cox.*[89] Thirteen defendants, including the local president and two national representatives, all members of the Steel Workers Union, were indicted under Section 11608. The indictment followed the language of the statute and charged a conspiracy to further a strike and impede plant operations by inflicting corporal punishment on employees and destroying the property of both employer and employees, the conspiracy to continue until the employer yielded. The indictment was quashed and the supreme court affirmed. The statute contemplates a "society or association which has as its purpose a violation of law . . . an organized body to effect some general policy continuing in its nature or permanent in its purposes."[90] Since the confederacy charged in the indictment was to exist only until the strike was won, the statute did not apply.

The result of these cases is that the "white cap" statute cannot apply to the typical labor organization. Only a union which is created and operated under a scheme of violence and unlawfulness to accomplish its purposes indefinitely could come within its narrow prohibition.

Civil Liability of Unions and Their Members

Jurisdiction and Process in Suits Against Unions.—Generally, at common law, labor unions, like other voluntary associations, were not regarded as legal entities and could not be sued as such.[91] However, some courts, including Tennessee,[92] allowed such associations to be sued in equity in a class or representative action where the individual defendants were numerous and a common interest prevailed between them. The leading judge-made departure from the common-law rule in actions at law was *United Mine Workers v. Coronado Coal Co.*,[93] in which the United States Supreme Court held that a labor union had a separate entity apart from its members and could be sued in

89. 16 CCH Lab. Cas. ¶ 65,022 (1949).
90. *Id.* at p. 75,260. Chief Justice Neil concurred specially indicating that the statute might apply to subversive groups within a union who used union activity as a guise while seeking to overthrow the government by violence.
91. 2 Teller, Labor Disputes and Collective Bargaining 1362 (1940). For a survey of statutory and case law on the subject See Sellers, *Suability of Trade Unions as a Legal Entity*, 33 Cal. L. Rev. 444 (1945).
92. Powers v. Journeyman Bricklayers, 130 Tenn. 643, 172 S.W. 284 (1914).
93. 259 U.S. 344 (1922).

its common name by service of process upon its principal officers.

The entity theory of union suability is now the law of Tennessee by virtue of a 1947 statute[94] which requires both resident and non-resident associations to appoint agents for service of process before doing business in the state. If the association fails to do so, all process may be served on the Secretary of State who is required to forward a copy to the association's last known address. The act further provides that such service is to be binding upon the association and that

> "any judgment recovered in any action commenced by service of process, as provided in this act, shall be valid and may be collected out of any real or personal property belonging to the association or organization."[95]

In McDaniel v. Textile Workers Union of America[96] the constitutionality of this statute was sustained over objections of a non-resident national labor organization. The court observed that it applied only to suits arising out of business conducted within the state which in this instance was picketing in the course of a strike. The plaintiff had been shot while crossing a picket line. He joined as defendants two individual union men who fired shots, the local, and also the national organization. The court upheld a judgment for the plaintiff against the individuals and the local and reversed a dismissal for want of jurisdiction as to the national. The court expressly held that the statute authorized suits against labor organizations as such, noting that it also provided for service of process and judgment.[97]

For purposes of suits in federal courts for breach of collective agreements under Section 301 of the Taft-Hartley Act unions are treated as legal entities.[98] This is true regardless of state law on the subject since the act creates a federal substantive right.[99] In civil suits other than those enforcing a federal right, Rule 17 (b) of the Federal Rules of Civil Procedure provides that the capacity of an unincorporated association to be sued is determined by the law of the state in which the district court is held.

Liability of unions.—The common law went through an intensive struggle in its attempts to apply traditional standards in determining the lawfulness of collective employee action.[100] The two tests most

94. TENN. CODE ANN. §§ 8681.1-8681.3 (Williams Supp. 1952).
95. *Id.* § 8681.3.
96. 36 Tenn. App. 236, 254 S.W.2d 1 (E.S. 1952). See Sanders, *Labor Law—1953 Tennessee Survey*, 6 VAND. L. REV. 1193, 1194 (1953).
97. See also American Federation of Musicians v. Stein, 213 F.2d 689 (6th Cir. 1954).
98. Section 301 (b). 61 STAT. 156 (1947), 29 U.S.C.A. § 185 (b) (Supp. 1953).
99. Shirley-Herman Co. v. Int'l Hod Carriers, 182 F.2d 806 (2d Cir. 1950); *but see* Patterson Parchment Paper Co. v. Int'l Brotherhood of Paper Makers 191 F.2d 252 (3d Cir. 1951).
100. See SMITH, CASES AND MATERIALS ON LABOR LAW 12 (1953) for a summary for the various common law theories used.

frequently employed have been the "ends-means" test, which condemns concerted action if either the objective or methods are improper,[101] and the "prima facie tort" or "just cause" test which makes actionable the intentional infliction of economic injury upon another unless it is justified by serving some legitimate interest of the actor.[102]

The prima-facie tort theory was rejected by the Tennessee court in 1884 in *Payne v. Western and Atlantic R.R.*[103] The railroad had threatened to discharge all employees who traded in the plaintiff's store. He alleged that its action was a malicious attempt to destroy his business. A majority of the court conceded that the plaintiff's interest in his business was a protectable property right and that if the defendants had driven away his customers by intimidation or violence he would have an action irrespective of their motive because of the illegal means employed. But they held that the malicious exercise of the employer's right to discharge employees at will could not give rise to any action despite resultant injury to plaintiff's business. Judge Freeman dissented vigorously in a scholarly statement of the prima-facie tort theory. He reasoned from the proposition that a man must use his own property so as not to injure others. The legal right to discharge employees was used here, not to secure any advantage to the defendant, but solely to injure the plaintiff in his business. This should be actionable unless the defendant could show some justification such as that the trader debauched the employees, or sold unsound food, or in some way affected the employees' usefulness to him. He concluded:

> This is not in any way to interfere with the legal right to discharge an employee for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold the threat over the employee in *terrorrem* to fetter the freedom of the employee, and for the purpose of injuring an obnoxious party.[104]

Judge Freeman's view became the law of Tennessee in 1915 when *Hutton v. Waters*[105] expressly overruled the *Payne* case and followed his dissent. The plaintiff, who operated a boarding house, sued the president of a private school for maliciously attempting to destroy her business by threats against students who boarded with her. She alleged that the defendant acted not to secure any business or com-

101. This is asserted as the basic standard of liability in RESTATEMENT, TORTS § 775 (1935).
102. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).
103. 81 Tenn. 507 (1884).
104. *Id.* at 542.
105. 132 Tenn. 527, 179 S.W. 134 (1915). See also Gregory v. Dealers' Equipment Co., 156 Tenn. 273, 300 S.W. 563 (1927); McKee v. Hughes, 133 Tenn. 455, 181 S.W. 930 (1916).

petitive advantage but solely out of ill will because of her refusal to discharge a boarder whom the defendant disliked. It was held that she stated a cause of action.

There has been little occasion for the application of the prima-facie tort theory to collective employee interference with the right to conduct a business. In essence the court applied it in the *Lyle* case,[106] where picketing to compel a sole proprietor to join a union was enjoined. Picketing was not considered to be a justifiable advancement of legitimate self-interest when directed at one with whom the pickets had no contractual relation. Some courts have regarded picketing for a unionized shop as justifiable concerted action because of a union's interest in eliminating nonunion competition and protecting union standards.[107] The *Lyle* case could be considered today under the "ends-means" reasoning since its objective could be held to violate the public policy of the state.[108]

What of the case where an employee alleges that the union has unjustifiably interfered with his employment by causing his discharge? *Dukes v. Brotherhood of Painters, Decorators and Paperhangers*[109] held that an existing employment is a property right which is protected from malicious interference. The defendant union was charged in an action for damages with causing the plaintiff's discharge by false and malicious statements to his employer that he had been expelled from the union. The union had indicated to the employer that he would be unable to hire union labor unless the plaintiff was fired. The allegation of fraud should have been sufficient to support a cause of action because of the unlawful means employed, but the court chose to rely on the allegation that the union had acted maliciously. Apparently the plaintiff had lost out in some internal union politics and the victors were seeking to punish him. Although the union may have had a right to withhold its labor from the employer for a legitimate purpose, it could not do so solely to injure the plaintiff.

Griffith v. Stove Mounters International Union,[110] an unreported case, presented a similar situation. The action was based upon an alleged conspiracy between the union and the employer to discharge the plaintiff because of his activities on the union's grievance committee. The action was dismissed as to the employer, but the union's demurrer was overruled because it could have been guilty of wrongfully causing the discharge.

106. Lyle v. Local No. 452, Amalgamated Meat Cutters, 174 Tenn. 222, 124 S.W.2d 701 (1939), discussed *supra* at p. 81.
107. C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal. 2d 389, 106 P.2d 414 (1940).
108. See *supra* p. 82.
109. 191 Tenn. 495, 235 S.W.2d 7, 21 TENN. L. REV. 884 (1950).
110. 17 CCH LAB. CAS. ¶ 65,537 (Cir. Ct. Hamilton Co., Nov. 28, 1949).

A union is of course liable to injured parties if it commits an act which is unlawful in itself. It is held for breaches of its contracts to the same extent as are other associations and it is liable for torts instigated to further its objectives. One of the earliest civil actions against a union in Tennessee[111] involved a fraud perpetrated upon an employer. The Journeyman Bricklayers' Union had a monopoly of its craft in Knoxville and set wage scales by which all bricklayers agreed to abide. It followed its usual practice of announcing its schedule of wages for the coming year and notified Powers, a contractor, that it was to be 62½ cents per hour. The scale was later reduced but Powers was not notified and he continued to pay the higher scale. He sued the union for damages in the amount of the excessive wages he had paid and the supreme court ruled in his favor. The announcement of the wage scale was treated as a continuing representation that it was the agreed basis of contract for bricklayers. It became a continuing misrepresentation when the scale was changed. The court emphasized the union's monopoly power and in effect imposed upon it a duty to exercise that power fairly by giving notice of changes in its unilaterally fixed rates. The case is somewhat unique[112] but the result is a fair one and upon its facts it should still be good law.

A successful union boycott is apt to result in the breach of existing contracts. The Tennessee statute providing for treble damages in an action for inducing breach of contract[113] has apparently never been applied in a reported case.[114] But its potential is suggested by a recent unreported decision in a trial court.[115] In an extremely brief statement of the case, it appears only that the jury found that an electrical workers union had unlawfully "procured a breach of City Electric Services' contract with L. A. Warlic Co." and found damages of $7,330. The chancellor concurred in these findings, trebled the damages, and awarded a judgment for $21,990.

Fixing Union Responsibility.—The mere fact that torts are committed by union members in the conduct of union activity is not sufficient to establish union liability. While the ordinary rules of

111. Powers v. Journeyman Bricklayers Union, 130 Tenn. 643, 172 S.W. 284 (1914).

112. The Note at L.R.A. 1915E 1006 regards it as a case of first impression.

113. "It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of said contract; and the party injured by such breach may bring his suit for said breach and for such damages." TENN. CODE ANN. § 7811 (Williams 1934).

114. See 21 TENN. L. REV. 856 (1951). The statute was held inapplicable in Watts v. Warner, 151 Tenn. 421, 269 S.W. 913 (1925) (contract violated statute of frauds); Johnson v. Ford, 147 Tenn. 63, 245 S.W. 531 (1922) (good faith of defendant); Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (1938) (inducement of refusal to contract).

115. 32 LRRM 2673 (No. 3785 Ch. Ct. Bradley Co., Aug. 13, 1953).

agency apply to such situations, torts are usually committed in a confused factual setting of strikes and picketing, and proof of union responsibility may be difficult.

The only Tennessee case which has dealt directly with the point in an action for damages is *McDaniel v. Textile Workers Union of America*[116] which involved union responsibility for gunshots fired from a picket line. It illustrates the sort of circumstantial evidence which of necessity must be used. The evidence showed that union members were in the picket line just prior to the shooting and had no opportunity to leave. Forty-seven shots were fired and it was shown that the individual defendants, both union members, fired shots. Officers of the local were seen frequently in the picket line and the business agent was heard to tell two men to "thin out" the workers as they came out the gate. A judgment against the local union was affirmed.

Enforcement of Judgments.—The statute dealing with service on unincorporated associations provides that service pursuant to it will bind the association to any judgment recovered thereunder and that the judgment may be recovered out of any real or personal property belonging to the association.[117] Tort actions will usually find members or officers of the union joined as defendants. They are of course then personally liable for any judgment rendered if the action is sustained as to them.

Exemption of Union Property from Taxation. Local unions in Nashville formed a corporation to hold title to a building which was used for union meetings and for free vocational instruction for members and the general public. *Nashville Labor Temple v. City of Nashville*[118] held the building to be exempt from taxation as property held for educational purposes. Apparently no other state has held in accordance with this case[119] and the scope of the exemption has since been considerably narrowed.[120] If the holding were followed to its logical extreme it could result in exemption of such property from tort liability also.[121]

116. 36 Tenn. App. 236, 254 S.W.2d 1 (E.S. 1952).

117. TENN. CODE ANN. §§ 8681.2-8681.3 (Williams Supp. 1952). The Taft-Hartley Act has a similar provision for actions brought under Section 301.

118. 146 Tenn. 429, 243 S.W. 78 (1922).

119. The annotator at 23 A.L.R. 813 (1923) found it to be the first case in which union property had been claimed to be tax exempt. The case was distinguished by the Florida Supreme Court on similar facts. It held that a union's educational activities were only incidental to its main purpose of improving the status of its members. Johnson v. Sparkman, 159 Fla. 276, 31 So.2d 863 (1947); *accord*, County Assessor v. United Brotherhood of Carpenters and Joiners, 202 Okla. 162, 211 P.2d 790 (1949); *cf.* Lane v. Wilson, 103 Colo. 99, 83 P.2d 328 (1938).

120. See *e.g.*, Baptist Memorial Hospital v. Couillens, 176 Tenn. 300, 140 S.W.2d 1088 (1940); State v. Waggoner, 162 Tenn. 172, 35 S.W.2d 389 (1931); Knoxville v. Fort Sanders Hospital, 148 Tenn. 699, 257 S.W. 408 (1924).

121. Baptist Memorial Hospital v. Couillens, 176 Tenn. 300, 140 S.W.2d 1088 (1940).

THE TENNESSEE ENTICEMENT STATUTE

Sections 8559 and 8560 of the Tennessee Code[122] are as follows:

> § 8559. It shall be unlawful for any person, knowingly, to hire, contract with, decoy or entice away, directly or indirectly, any one, who is at the time under contract or in the employ of another; and any person so under contract or employ of another, leaving his employ without good and sufficient cause, before the expiration of the time for which he was employed, shall forfeit to the employer all sums due for service already rendered, and be liable for such other damages the employer may reasonably sustain by such violation of contract. (1875, ch. 93, sec. 1.)
>
> § 8560. Any person violating the provisions of the first clause of the preceding section shall be liable to the party who originally was entitled to the services of said employee, by virtue of a previous contract, for such damages as he may reasonably sustain by the loss of the labor of said employee; and, whether he had knowledge of an existing contract or not, if he fails or refuses to discharge the person so hired, or to pay such damages as the original employer may reasonably claim, after he has been notified that the person is under contract, or has violated the contract with such other person, which amount shall be ascertained, and the collection enforced by action for damages before any court or justice of the peace of the county where said violation occurs, or the party violating said section may reside. (Id., sec. 2, modified.)

Several things should be noted. Section 8559, by using the terms "under contract or in the employ of another," could be construed as protecting from willful interference both employments at will and contracts of employment for a term. But Section 8560 then gives an action only to one who was entitled "by virtue of a previous contract" to the services of the person enticed away. The second part of 8560 which requires the innocent "enticer" to either discharge the employee or to respond in damages uses the language "whether he had knowledge of an existing contract or not." The second clause of 8559 makes the employee liable only if he left his employment without cause "before the expiration of the time for which he was employed." Thus it appears from a reading of the statute as a whole that it was intended to apply only to employment contracts for a term and not to employments at will.[123] The language of the first clause "under contract or in the employ" is probably intended to include a person who has made a contract for a future term of employment but has not yet entered into the employer's service. A federal court which applied the statute in 1901 in a labor injunction case[124] held expressly that it did not include employments at will, but

122. TENN. CODE ANN. (Williams 1934).

123. The state supreme court has held that the two sections must be construed as a whole. See note 139 *infra*.

124. Southern Ry. v. Machinists Local Union No. 14, 111 Fed. 49 (C.C. W.D. Tenn. 1901). In Hardie-Tynes Mfg. Co. v. Grogan, 189 Ala. 64, 66 So. 597 (1915), Alabama applied its statute to ordinary employees but its terms differ materially from the Tennessee act.

Tennessee decisions have not been so explicit.

This statute, enacted in 1875, is in many respects an anachronism. Enticement statutes are peculiar to the southern states, some ten of them having adopted similar acts during the Reconstruction period.[125] Although basically similar, statutes varied in some respects. For instance, North Carolina and Georgia first protected only written contracts but their statutes were later amended to include oral agreements.[126] Some expressly provided both civil and criminal sanctions[127] and Louisiana provided for criminal penalty only.[128] The Mississippi and North Carolina statutes have been held inapplicable if the servant has not yet entered the master's service even though he may have contracted to do so,[129] a result which should not obtain in Tennessee if the author's foregoing analysis of its statute is correct. Some statutes expressly applied only to farm tenancies and share-cropper agreements.[130]

The enticement statutes were designed to meet certain difficulties which beset the South's agrarian economy during the Reconstruction era. Several have been since repealed[131] and they are rarely applied today.[132] Some states' decisions frankly admit that their statutes were precipitated by the instability of agricultural labor resulting from the abolition of slavery. The Supreme Court of Georgia in upholding that state's enticement statute observed:

> And the Legislature of 1866, looking to the derangement of an entire system of labor, and warranted by the facts growing out of the circumstances in which the colored element was wholly irresponsible for any breach of contract, and consequently regardless of it, and the failure of all law to enforce such contracts, or provide any remedy or redress for such wrongs and appreciating the great public necessity of punishing employers whose acts contributed to the violation of such contracts, enacted this salutary law, which we hold first, it was within their constitutional power to do. . . .[133]

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125. ALA. CODE tit. 26, §§ 330-333 (1940); ARK. STAT. §§ 81-210 (1947); FLA. GEN. LAWS, §§ 7166, 7167 (1927) (repealed in 1943; see FLA. STAT. ANN. § 448.02); GA. CODE ANN. §§ 9902-9905 (1952); KY. REV. STAT. § 310 (1948); LA. CRIM. STAT. § 57 (Marr. 1929) (no longer in effect); MISS. CODE ANN. § 2129 (1942); N.C. GEN. STAT. §§ 14-347, 14-348 (1953); S.C. CODE § 454 (1952).

126. See Hudgens v. State, 126 Ga. 639, 55 S.E. 492 (1906); Hightower v. State, 72 Ga. 482 (1884); State v. Rice, 76 N.C. 194 (1877).

127. Arkansas, Georgia, Kentucky, Mississippi, North Carolina.

128. See Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902).

129. Hendricks v. State, 79 Miss. 368, 36 So. 708 (1901); Sears v. Whitaker, 136 N.C. 37, 48 S.E. 517 (1904).

130. North Carolina.

131. Florida, Louisiana.

132. The cases digested in the National Reporter System indicate that only the Mississippi statute has been applied to any substantial degree in the last twenty years.

133. Bryan v. State, 44 Ga. 328, 333 (1871).

The Mississippi Supreme Court found a similar background for its statute:

> The section of the Code was designed to stabilize the agricultural industry, the chief industry of the state, and to this end the Legislature penalized all efforts of one farmer to persuade the tenants of another farmer to "jump their contracts." The agricultural labor of this state is overwhelmingly of African descent. They are credulous and fickle, and are easily persuaded, and thus for the common good this statute was enacted.[134]

The text and historical background of the Tennessee statute indicate then that it was intended to apply only to contracts of employment for a term and then only to stabilize agricultural employment by preventing farmers from bidding for each other's labor. But the few cases decided under it have not been so limited.

In 1883 the Tennessee Supreme Court considered two cases under the statute. It held in *McCutchin v. Taylor*[135] that the statute applied to a sharecropping agreement. In *Morris v. Neville*,[136] agricultural laborers were again involved. The owner of the plantation to which the laborers moved after having put out crops on the plaintiff's farm defended that the employees had voluntarily broken their contracts before he dealt with them. He requested a charge that he was not liable if they had left the plaintiff's employ either "with or without cause." The court affirmed the denial of this request noting that under Section 8560 the defendant was liable even though he hired the persons without knowledge of a prior contract, if upon receiving notice he failed to discharge them.

The opinion in the *Morris* case does not indicate the terms of the charge given in the court below but it implies that the subsequent employer might be liable even if the prior contract was breached with good cause. This question was answered in the negative in the third and last case in which the supreme court considered the enticement statute. In *Jordan v. Lewis*[137] it was held that where a tenant farmer left his first landlord with cause this defense was available in an action against his subsequent employer. Although the statute literally makes breach for cause a defense only for the employee as against his first employer, the court held that 8559 and 8560 must be read together. If the laborer is justified in quitting his employment, a third person commits no wrong in hiring him. Any other holding

134. Evans v. State, 121 Miss. 252, 83 So. 167, 168 (1919).
135. 79 Tenn. 259 (1883).
136. 79 Tenn. 271 (1883). *Contra*, Jolms v. Patterson, 138 Ark. 420, 211 S.W. 387 (1919); Evans v. State, 121 Miss. 752, 83 So. 167 (1919); Minton v. Early, 183 N.C. 199, 111 S.E. 347 (1922). These cases reason that a denial of the right to employ one who has voluntarily abandoned his prior employment would be unconstitutional.
137. 162 Tenn. 953, 39 S.W.2d 743 (1931).

would have nullified a wronged employee's right to leave and seek a livelihood elsewhere.

The enticement statute was invoked more recently in the Western Section of the Court of Appeals in 1947 in *Stewart v. Price*.[138] Price had won a judgment in the lower court. On appeal Stewart's theory was that the evidence showed that he did not hire the plaintiff's tenant until two days after the tenant had repudiated his agreement to make a crop for the plaintiff. The court conceded this *arguendo* but upheld the judgment because the jury could have found that Stewart had induced the employee to breach his contract by certain statements made to him before the contract was repudiated. This suggests that the "enticing away" and a subsequent hiring are each separate and distinct violations of the statute both of which would be actionable, a question which will be discussed shortly.

The unsuccessful defendant was again before the court of appeals in *Stewart v. Parker*.[139] In Price's action against him the proof of damages had included an advancement of $339.81 which Price had loaned the tenant on the strength of the crop to be made. The debt was subsequently paid and Stewart sought to enjoin the execution of Price's $500 judgment to this extent. The court held that Stewart's complaint was properly dismissed because he had been adjudged guilty of violating the state's public policy as declared in the enticement statute and came into equity with unclean hands.[140]

The foregoing decisions raise no serious questions as to the proper scope of the enticement statute. All involved breaches of agricultural contracts of employment for a term and all involved suits against defendants who employed the contract breakers with knowledge or subsequent notice of the contracts. Although the wisdom of the statute may be questioned in present-day Tennessee, these decisions are in harmony with its original purpose. But two other decisions raise troublesome questions. In one a labor union was the defendant and in the other the employee was "enticed" to join a partnership.

A strike of railway employees led to the decision in *Southern Ry. v. Machinists Local Union No. 14*.[141] Federal Judge Hammond issued a sweeping, detailed injunction in which he prohibited all picketing to induce the railroad's ordinary employees to join the strike and persuasion of any sort to induce apprentices to quit their jobs. The latter's contracts of employment were held to be within the entice-

138. 12 CCH LAB. CAS. ¶ 63,819 (Tenn. App. W.S. 1947).
139. 33 Tenn. App. 316, 232 S.W.2d 57 (W.S. 1950).
140. The chancellor did not rely on this. A more sound basis for the decision would seem to be that the court could not determine if, and to what extent, the jurors in reaching their verdict had assumed that the tenant would fail to discharge his debt. The appeal assigned as error the exclusion of statements of three jurors.
141. 111 Fed. 49 (C.C.W.D. Tenn. 1901).

ment statute's protection since they were contracts for a term, but it was held to be inapplicable to employees at will. To the argument that the statute should not apply to labor unions, the court answered:

> It may be conceded that it is not at all likely that a Tennessee legislature intended to make by this statute a law against strikes and strikers and the labor unions. . . . But this consideration cannot control the courts in the construction of the statute, if it be broad enough in the language used to cover the case of strikes and the labor unions.[142]

In *Crim Motor Co. v. Shackleton*[143] the plaintiff was a garage operator. The defendant had persuaded a mechanic to leave plaintiff's service in order that the two might form a partnership and run a garage in a nearby town. The court of appeals reversed a verdict directed for the defendant. The lower court had held that the statute applied only to a defendant who *employed* the person under contract and not to one who entered a partnership with him because only a subsequent employer could "discharge" the employee as directed in 8560 upon notice of a prior contract. The decision concedes *arguendo* that where a partnership is formed without the third party's knowledge of the prior contract there might be no liability because of the inability of one partner to discharge another. But the court viewed a violation of 8559 as complete when the defendant had "enticed away" the mechanic with knowledge of the prior employment irrespective of the nature of their subsequent relationship. It does not appear if the prior employment of the mechanic was at will or for a term.

It is submitted that the lower court employed the better reasoning. Its interpretation of the statute would not only avoid the harsh result of this case but insure that it is not again applied to union activities as it was in the *Southern Ry.* case. The reasoning of the *Crim Motor Co.* case that the wilful enticement alone is actionable means that a husband would be liable for having persuaded his wife to leave a job in order to marry him. If X persuaded Y to leave his job and Y then hired his services to Z, would the prior employer then have actions against both X and Z, one for the enticing and one for the hiring? A literal construction of Section 8559 standing alone may require such a result but the Supreme Court of Tennessee has held that the statute must be construed as a whole[144] and Section 8560 indicates that only subsequent *employers* are within its condemnation.

An act which places such restrictions on freedom of contract should be strictly construed if it is to be retained at all. Its application should certainly be limited to contracts for employment for a term

142. *Id.* at 57.
143. 9 Tenn. App. 678 (W.S. 1929).
144. Jordan v. Lewis, 162 Tenn. 953, 39 S.W.2d 743 (1931).

and possibly to subsequent employers of agricultural laborers who have breached such contracts. Should the state's highest court ever consider these questions it is hoped that it will look beyond the literal terms of the enticement statute, as it did with the "white cap" statute,[145] and adopt such an interpretation. Rights guaranteed by federal legislation would prevent its application to union activities in industries in interstate commerce. The picketing-free speech doctrine might preclude a denial of rights of picketing and persuasion in intrastate situations. However, if the proper approach is taken to the statute, these constitutional questions need not arise.

THE COLLECTIVE BARGAINING AGREEMENT

Union Security Clauses.—The trend of the common law towards favoring concerted employee action to secure closed or union shop agreements has been effectively arrested by state and federal legislation on the subject. The Taft-Hartley Act forbids all closed shop agreements and permits the union shop with certain limitations.[146] An increasing number of states have outlawed all forms of union security.[147] Tennessee joined this group in 1947 by enacting its "right to work" statute[148] which provides in section 11412.8:

> It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.

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145. Trotter and Arnold v. State, 158 Tenn. 264, 266, 12 S.W.2d 951, 953 (1929). "In construing a statute, the court may with propriety, recur to the history of the times when it was passed. This is often necessary in order to ascertain the reason as well as the meaning of particular provisions in it. The court should place itself in the situation of the legislature to ascertain the necessity and intent of the statute and then give such construction to the language used as to carry such intention into effect, so far as it can be gathered from the terms of the statute. Things that are within the intention of the makers of a statute are as much within the statute as if they were within the letter thereof. And things, although within the letter of the statute, are not truly within the statute unless they be within the intention of the framers." This statement should be contrasted with the literalistic approach of the *Southern Ry.* case to the enticement statute, *supra* note 142.

146. Section 8(a)(3). 61 STAT. 141 (1947), 29 U.S.C.A. § 158(a)(3) (Supp. 1953).

147. In 1950 twelve states had measures which effectively outlawed all forms of union security. These were Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kansas, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Texas and Virginia. Delaware and New Hampshire had repealed such statutes. Note, 36 VA. L. REV. 477, 479 (1950). Alabama, Mississippi, Nevada, and South Carolina have since enacted such statutes and none have since been repealed. For general discussion of these measures, see Brown, *State Protection of the Right to Work*, 3 LABOR L.J. 32 (1953); Whiting, *The Right to Work*, 30 DICTA 303 (1953); Note, 36 VA. L. REV. 477 (1950). Alabama's recent enactment is discussed in 6 ALA. L. REV. 129 (1953).

148. TENN. CODE ANN. §§ 11412.8-11412.11 (Williams Supp. 1952).

Section 11412.9 makes it unlawful to enter a contract providing for the objectives outlawed in the first section. Section 11412.10 then forbids exclusion from employment for payment of, or failure to pay, union dues or assessments. Section 11412.11 then exempts contracts "in force" when the act is passed, but provides that it shall apply to new contracts and renewals or extensions of existing contracts. Criminal sanctions are provided in Section 11412.12 with each day of violation made a separate offense.

Most of the reported litigation concerning this Act concerns its constitutionality and its application to contracts in force at the time of its passage. Both are moot questions now and merit little discussion.

By protecting both union and nonunion employees from discrimination the Act outlaws the "yellow dog" contract, by which an employer exacts as a condition of employment a warranty that the employee will not join a union. In 1920 the Tennessee Supreme Court held in *Nashville Railway and Light Co. v. Lawson*[149] that such contracts violate no public policy of the State and enjoined a union organizer from inducing employees under such contracts to join the union. Although federal legislation has forbidden such contracts in interstate commerce since 1935,[150] the *Lawson* case was the law of Tennessee until the enactment of the Open Shop Law.

In *Mascari v. International Brotherhood of Teamsters,*[151] its constitutionality was upheld and the United States Supreme Court soon affirmed the correctness of that decision by upholding similar statutes of Nebraska and North Carolina.[152] In answer to the argument that the statutes denied equal protection of the law, the highest court noted that both acts, like that of Tennessee, protected employees from denials of employment because of union affiliation, as well as for lack of such affiliations. The question of whether restricting an employer's freedom to contract exclusively for union labor denied him due process of law was answered by a reference to the trend of constitutional decisions since 1934 in which the Court had permitted expanding state intervention into business and industrial conditions. Justice Black's opinion concluded, "Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers."[153]

Two lower Tennessee courts disagreed on the applicability of the

149. 144 Tenn. 78, 229 S.W. 741 (1921), following Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917).

150. By making it an unfair labor practice for an employer to discriminate because of union affiliation.

151. 187 Tenn. 345, 215 S.W.2d 779 (1948), *cert. dismissed* 335 U.S. 907 (1949).

152. Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., and Whitaker v. North Carolina, 335 U.S. 525 (1949) (two cases).

153. *Id.* at 537.

Act to closed shop contracts which contained automatic extension clauses. In both cases the contract was to run for one year and thereafter until a party gave a certain number of days' notice. In the chancellor's unreported opinion in the *Mascari* case[154] it was held that when such a clause operated, it was a "renewal or extension" within Section 11412.11 and that the Act therefore outlawed it. In *Phillips v. Stove Mounters International Union,*[155] also unreported, it was held that the act contemplated only renewals or extensions effected by affirmative action of the parties. The state supreme court considered in *American Federation of Labor v. Roane-Anderson Co.*[156] the Act's effect upon an executory contract. A closed shop contract had been signed two days before the statute was passed but was not to become effective for one week. It held that the statute applied. In *Federal Firefighters of Oak Ridge v. Roane-Anderson Co.,*[157] the supreme court allowed voluntary dismissal of an appeal from a ruling that the statute applied to a closed shop contract which had not been reduced to writing and was within the statute of frauds upon the effective date of the Act.[158]

In *Combustion Engineering Co. v. Thompson,*[159] the Tennessee Supreme Court declined to render a declaratory judgment on a closed shop contract which had expired after the law's passage. The question of the employer's refusal to discharge a nonunion man under the contract while it had still been valid was regarded as moot because he could now re-hire him immediately if he did so.

A question of continuing interest was presented by *Dukes v. Brotherhood of Painters, Decorators and Paperhangers.*[160] Dukes charged that the union had caused his discharge by making false and malicious statements to his employer that Dukes had been expelled from the union and demanding that Dukes be fired or else the union would go on strike. It was held that one count in the declaration stated a cause of action for malicious interference with Duke's employment. A second count, however, was based upon an alleged violation of the Open Shop Law, Section 11412.8, which forbids exclusion from employment of nonunion employees, and Section 11412.10, which forbids such exclusion for nonpayment of union dues. The demurrer

154. Mascari v. Int'l Brotherhood of Teamsters, 13 CCH LAB. CAS. ¶ 64,036 (Ch. Ct. Shelby Co., Sept. 22, 1947). When the case reached the supreme court this question had apparently become moot. The parties had then agreed on a closed shop provision to be effective if the Open Shop Law were declared unconstitutional.

155. 17 CCH LAB. CAS. ¶ 65,537 (Cir. Ct. Hamilton Co., Nov. 28, 1949).

156. 185 Tenn. 363, 206 S.W.2d 386 (1947).

157. 185 Tenn. 320, 206 S.W.2d 369 (1947).

158. The facts of the case do not appear in the supreme court's opinion but may be found in the report of the chancellor's decision at 12 CCH LAB. CAS. ¶ 63,782 (Ch. Ct. Anderson Co., Apr. 15, 1947).

159. 191 Tenn. 98, 231 S.W.2d 580 (1950).

160. 191 Tenn. 495, 235 S.W.2d 7 (1950).

to this count was sustained because "These two sections of the Code, as relied upon by the plaintiff are not applicable herein because they are directed toward the employer and not to any situation as represented by the declaration herein."[161]

This holding is certainly correct in its interpretation of what constitutes a violation of the Open Shop Law. Its terms are such that it is violated only by an employer who denies employment to a nonunion man under the first or third sections and by both the employer and the union if they enter a union security agreement within the second section. Since no such contract was alleged, Dukes alleged no criminal conduct on the union's part and the employer was not named as a defendant.

Assuming that Duke's employer violated the Open Shop Law, is the union guilty of tortious conduct by threatening to strike and thus inducing the employer to commit a crime? It is well established that picketing for an invalid closed shop contract is unlawful and may be enjoined.[162] It is also generally held that a strike for an unlawful objective may be enjoined.[163] Of course a court cannot compel individual workers to remain at their jobs by injunction. This would be involuntary servitude forbidden by the Thirteenth Amendment. But a concerted refusal to work may be enjoined and a union may be enjoined from inducing such concerted action.[164]

If a strike for violations of the Open Shop Law is tortious, then a threat to strike should be actionable at the instance of one injured as a direct and intended result. To limit union civil responsibility under this law to cases where it signs a closed shop contract, or engages in open picketing to compel the execution of one, will seriously impair its effectiveness. With the law's heavy criminal penalties no union is apt to ask for such a contract, but employers may be pressured to discharge nonunion men whom a strong union finds objectionable, and may choose to comply in the interests of harmonious union relations. Unless such pressures are penalized the law can be effectively circumvented.

The only possibility for a valid union security clause in Tennessee is under the Railway Labor Act which permits union shop agreements notwithstanding the provisions of any state law.[165] This would seem

161. *Id.* at 497, 235 S.W.2d at 9.
162. *Supra*, p. 82.
163. Int'l Union, United Auto Workers v. Wisconsin Employment Rel. Bd., 336 U.S. 245 (1949).
164. Justices Rutledge and Murphy concurring in the *Whitaker* and *Federal Union* cases, *supra* note 152, emphasized that no strike was involved and questioned whether the concerted refusal of union men to work with nonunion men could be denied under the Thirteenth Amendment. Subsequent decisions seem to have ignored this issue. See FORKOSCH, A TREATISE ON LABOR LAW 489 (1953).
165. 45 U.S.C.A. § 152 (11) (1954).

to pre-empt the field of railway agreements, but the few decisions on the question are divided.[166]

If an invalid closed shop clause is included in a collective agreement, what is its effect upon the other provisions? The United States Supreme Court held that it was severable and did not invalidate the balance of the agreement, thus allowing the employer to enforce a no-strike clause against the union.[167]

Enforcement of Collective Agreements.—After some initial hesitation, the great majority of states now regard the collective agreement as a valid and enforceable obligation. Since violation of such an agreement is not an unfair labor practice under federal law, remedies for breach lie in state courts and in federal court under Section 301 of the Taft-Hartley Act.

Since the parties to a collective agreement are the employer and the union, there may be a question in a given case whether an individual employee may bring suit to enforce its provisions. This should depend upon analysis of the particular provision involved. Insofar as the contract establishes wage rates, seniority rights and other conditions of individual employment, it is usually intended to confer individual rights upon the employees covered. However, there may be other provisions which by their terms or nature are not intended to benefit the employees as individuals. An arbitration clause may be so phrased as to indicate that it is to be invoked only at the instance of the union.[168] A suit by individual employees to enforce a union security clause may be unsuccessful because it is in the nature of a contract only as between the employer and the union.[169]

In 1928 the Tennessee Supreme Court allowed an employee to sue for damages for breach of a collective agreement, treating it as the "basis of the contract of employment" between the employer and each of his employees.[170] In a later case in the court of appeals the right of an employee to enforce provisions of a collective employment was dealt with more at length. The court held that the employee was a third party beneficiary of procedures provided by the contract to be followed in discharge cases.[171]

166. For holdings that state law is inapplicable, see *In re* Florida East Coast Ry., 24 CCH LAB. CAS. ¶ 67,806 (U.S. Dist. Ct. S.D. Fla. 1953); Moore v. Chesapeake & Ohio Ry., 26 CCH LAB. CAS. ¶ 68,640 (Richmond City Ct., Va. 1954); *contra,* Hanson v. Union Pacific R.R., 24 CCH LAB. CAS. ¶ 68,095 (Dist. Ct., Douglas Co., Neb. 1954); Sandsberry v. Gulf, Colorado & Santa Fe Ry., 25 CCH LAB. CAS. ¶ 68,128 (Dist. Ct., Potter Co., Tex. 1954) *In re* Florida East Coast Ry., 24 CCH LAB. CAS. ¶ 67,806 (Fla. 1953).

167. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

168. *Cf.* Curtis v. N.Y. World Telegram Corp., 282 App. Div. 183, 121 N.Y. S.2d 825 (1st Dep't 1953).

169. MacKay v. Loew's, Inc., 182 F.2d 170 (9th Cir. 1950).

170. Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692 (1928).

171. Cincinnati, N.O. & T.P. Ry. v. Hill, 5 CCH LAB. CAS. ¶ 60,749 (Tenn. App. E.S. 1941).

Although no Tennessee cases have denied an employee the right to claim the benefits of a collective agreement one case in particular leaves some doubts as to the exact nature of the relation of the individual employee to the collective agreement. In *Earle v. Illinois Central R.R.*[172] the court of appeals considered a contract which provided that seniority rights were preserved for employees who were out of service less than six months by virtue of layoffs. The complainant had been laid off for a longer period but returned to work four days during the interim. In an action for reinstatement and damages he claimed he was not "out of service" for the prescribed period and therefore the defendant's refusal to reemploy him had wrongfully deprived him of seniority rights.

In a careful and exhaustive process of construction the court in the *Earle* case looked beyond the contract's language to the plant's "extra board practice" and concluded that the employee was not "in service" on the odd days worked because he was not listed on the "regular extra board." By custom and practice those not so listed were regarded as doing emergency work and not in regular service within the meaning of the seniority provisions. A decree in the complainant's favor was reversed.

This result seems sound but it was reached on two bases. The court first regarded the employee's rights as arising from his individual contract of employment and not the collective agreement which was merely the basis for the individual contracts of employees who "entered or continued in the service of such employer with knowledge of its existence."[173] The complainant's suit was regarded as enforcing his individual contract which was in part the collective agreement but which also contained "additional terms of local application which . . . rested solely in parol or were implied from the circumstances under which in some instances he worked."[174] To the extent that the *Earle* case may be taken as holding that an employer and employee may enter an individual contract which is inconsistent with the collective agreement,[175] it is believed to be unsound—at least in contracts under the National Labor Relations Act. It is an unfair labor practice for an employer to negotiate individually with his employees if a collective agreement is in effect. The United States Supreme Court held in *J. I. Case Co. v. NLRB*[176] that individual contracts were no bar to a union's efforts to negotiate a contract for all the employees in a

172. 25 Tenn. App. 660, 167 S.W.2d 15 (W.S. 1942).
173. *Id.* at 674, 167 S.W.2d at 25.
174. *Id.* at 675, 167 S.W.2d at 25.
175. The court relied on a dictum in Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692, 694 (1928), which indicated that the collective agreement became each employee's individual contract in the absence of inconsistent agreements.
176. 321 U.S. 332 (1944).

bargaining unit. This is necessitated by the Congressional mandate that the terms of employment fixed by collective bargaining shall be the terms for *all* employments within the unit. In view of this statutory policy inconsistent employment contracts should not be recognized.

The second basis of the *Earle* opinion is not so questionable and justifies this aspect of the court's holding. The court regarded the evidence of the extra board practice as parol evidence admissible to show the practical construction that the parties placed on the phrase "in continuous service." Unless collective agreements are to be intolerably detailed and inelastic such evidence of custom and usage must be used in applying the contract to particular situations. Therefore proof of the "extra board practice" and the fact that failure to list an employee on the regular extra board meant the parties regarded his work as temporary in nature was properly considered in deciding whether the plaintiff's lay off was terminated or whether he continued "out of service" and thus lost his seniority.

The restoration of seniority rights was also the subject of an employee's suit in *McClure v. Louisville and Nashville R.R.*[177] McClure, a telegraph operator, had joined the defendant's transportation department in 1912, but in 1917 he voluntarily left it to take a job with its separately managed freight department. He was then drafted and while he was in service the government seized the railroads and ordered that established seniority rights were to be preserved for returning veterans and that efforts were to be made to provide jobs for those who had no seniority rights. During his absence telegraph operators organized and secured a contract recognizing departmental seniority. Upon McClure's return he was denied his former job but was given another. He was unsuccessful in his suit claiming seniority rights dating from 1912.

The court of appeals reasoned that any seniority rights the complainant may have had in 1917 were lost by his voluntary transfer to an independent department. Although a subsequent agreement in 1924 provided for retention of seniority upon interdepartmental transfers, it was not retroactive so as to affect rights as they existed in 1917. Since he had no seniority rights in 1917, the Government order was of no assistance to him. The court further held that since a successful action by McClure would displace thirty-three employees of lesser seniority, they should have been made parties to the suit. This aspect of the holding is highly questionable and has been applied in no other case.

It should be noted that both the *Earle* and *McClure* cases involved railway employees' suits which primarily sought specific performance

177. 16 Tenn. App. 369, 64 S.W.2d 538 (E.S. 1933).

by a restoration of seniority rights. Under the Tennessee Supreme Court's subsequent holding in *Broome v. Louisville and Nashville R.R.*[178] the state courts' jurisdiction is limited to actions at law for damages if the contract is subject to the Railway Labor Act. Therefore actions of the type involved in these two cases should not arise again in Tennessee courts.

The usual remedies under collective contracts are specific performance for the restoration of rights, an action for damages, an injunction against breach, or a declaratory judgment. The latter was involved in *Combustion Engineering Co. v. Thompson,*[179] whose vexing facts cannot arise again. The union and employer had a closed shop agreement which apparently expired six months after the Open Shop Law was passed. But before it expired the union asked that certain employees be fired for non-payment of union dues. The employer sought a declaratory judgment as to his duty under the contract because the union threatened suit if he did not discharge the men, and the employees threatened suit if he did. The chancellor held that contract was valid when the employees became delinquent and that the employer's duty was to fire them. The court of appeals reversed[180] and the supreme court affirmed. By the time the suit was brought the contract had expired and if the employer now fired the employees he could immediately re-hire them because of the Open Shop Law. The union insisted that he perform his contractual duty anyway because a discharge would end their seniority rights and thus benefit the union men. Seniority rights were held to be too "nebulous" for declaratory relief.

The opinion should not be taken to imply that seniority rights can never be the subject of a declaratory judgment. They generally, as in this case, are so qualified by factors of skill, physical handicaps, etc., that they may appear "nebulous" if an attempt is made to gauge their effect before a given situation, such as promotion or lay off, calls for application of seniority standards. But an employee may have a present definite right, by virtue of length of service, that these agreed standards are to be applied to his position for lay off or promotion purposes. The *Combustion Co.* case seems sound because of the declaratory judgment problem. There was no justiciable controversy until the employees were fired, re-hired, and at some time in the future claimed benefits of prior seniority.

That seniority benefits are purely the product of the collective agreement and are circumscribed by it is emphasized by *Sanders v. Louisville and Nashville R.R.,*[181] a case arising in Tennessee and

178. 194 Tenn. 249, 250 S.W.2d 93 (1952). See p. 80 *supra.*
179. 191 Tenn. 98, 231 S.W.2d 580 (1950).
180. The court of appeals' opinion is reported at 16 CCH LAB. CAS. ¶ 65,114 (Tenn. App. E.S. 1949).
181. 144 F.2d 485 (6th Cir. 1944).

decided by the Sixth Circuit. During a layoff Sanders had failed to report his address every sixty days as required by the contract in order to preserve seniority. He argued that this was unnecessary because the person to whom he was to report knew his address at all times. The contract terms were applied literally and Sanders was denied a declaratory judgment re-establishing seniority. An alternative basis was that his action was based on contract and accrued more than six years past, when he was dropped from the seniority roster. He was therefore barred by the Tennessee statute of limitations.

Turner v. Tennessee Products Co.[182] denied an action for vacation benefits on a contract executed by the government while the mines were seized and which on resumption of private ownership was not expressly adopted by the owners. The problems raised have been well analyzed elsewhere[183] and need not be considered here.

An uncertain question in Tennessee law is whether an employee may resort to the courts before exhausting the procedures provided in the contract for settlement of grievances. In the *Earle*[184] case the complainant had partially pursued those remedies and after initial rulings against him brought this action. The court of appeals held that since he asserted a "property right" he could go directly to the courts for relief. It is the general rule, however, that the parties to a contract may either impliedly or expressly make submission to arbitration or other contractual tribunals a condition precedent to a suit on the contract.[185] The only Tennessee authority cited by the court of appeals to the contrary is a case where a member of a mutual benefit society sued on an insurance contract without appealing to the association's internal tribunals. But in that case the court stated:

> ". . . where property rights are involved, as here, a member may first bring suit without appealing to the judicatories within the order, unless there is found incorporated in the laws of the order, or the contract, an express inhibition to the contrary. . . . No such express inhibition is contained in the constitution or by-laws of the Society herein."[186]

If the mere assertion of a property right is held to excuse a failure to exhaust contractual remedies there would be few employee's suits

182. 36 Tenn. App. 77, 251 S.W.2d 441 (E.S. 1952).

183. Sanders, *Labor Law—1953 Tennessee Survey*, 6 VAND. L. REV. 1197 (1953).

184. Earle v. Illinois Central R.R., 25 Tenn. App. 660, 167 S.W.2d 15 (W.S. 1942).

185. Pettus v. Olga Coal Co., 72 S.E.2d 881 (W. Va. 1952); Note, 117 A.L.R. 301 (1938).

186. Atkinson v. Railroad Employees Mutual Relief Soc., 160 Tenn. 158, 167, 22 S.W.2d 631, 633 (1929).

which could not be brought to the courts in the first instance. A contractual requirement of exhaustion of internal remedies would be almost meaningless.

The only other decisions cited on this point in the *Earle* case were those of the federal courts in *Moore v. Illinois Central R.R.*[187] which held merely that the Railway Labor Act did not require that an employee apply to the Railway Adjustment Board before suing for damages. It has since been held that state law is controlling in this matter.[188]

The only case in which the Tennessee Supreme Court has considered the question is *Cross Mountain Coal Co. v. Ault.*[189] There an employee sued for damages for a discharge which violated the collective agreement. His failure to appeal to the board of arbitration as provided in the contract was pleaded by the employer as a defense. The court did not even consider the possibility that the plaintiff had no duty to first exhaust this remedy, but held that he was excused because of the employer's repudiation of two previous decisions of the board and announcement that he would not abide by its awards.

The right of minority members of a union to enjoin the execution of a new contract or the performance of an existing one arose in *Haynes v. United Chemical Workers.*[190] The plaintiffs were about to be discharged in accordance with seniority provisions which gave newly employed veterans seniority credit based on years in military service. As a result the plaintiffs were being laid off before veterans who had joined the employer later than they. The relief was denied, the court holding the contract violated no public policy but instead accorded with state and federal statutory policy favoring employment benefits for servicemen. On identical facts the United States Supreme Court agreed in *Ford Motor Co. v. Huffman,*[191] citing the *Haynes* case in reaching its decision. Although seniority benefits are rights of value they are solely the product of the collective agreement and may be altered by the union and employer by a new contract for any reasonable purpose or upon a change of business conditions.[192] They are protected from arbitrary or capricious action however.[193] It is

187. Illinois Central R.R. v. Moore, 112 F.2d 959 (5th Cir. 1940), *rev'd,* 312 U.S. 630 (1941).

188. Transcontinental & Western Airline, Inc. v. Koppal, 345 U.S. 653 (1953).

189. 157 Tenn. 461, 9 S.W.2d 692 (1928).

190. 190 Tenn. 165, 228 S.W.2d 101 (1950).

191. 345 U.S. 330 (1953).

192. Hartley v. Brotherhood of Railway and Steamship Clerks, 283 Mich. 201, 277 N.W. 885 (1938); Leeder v. Okla. Cities Service Oil Co., 199 Okla. 618, 277 N.W. 885 (1938).

193. Piercy v. Louisville and Nashville R.R., 198 Ky. 477, 248 S.W. 1042 (1923); Belanger v. Local Division No. 1128, Amalgamated Ass'n of Street Electric Railway and Motor Coach Employees, 254 Wis. 344, 36 N.W.2d 414 (1949).

the union's duty to fairly represent all members of the bargaining unit in negotiating an agreement.[194]

INTERNAL UNION AFFAIRS

A labor organization is theoretically like any other unincorporated association and the law of its internal operations has been fashioned from the rules governing such organizations generally. But it is unique in at least two important respects; first, under modern legislation giving organized labor the right of collective bargaining, the union is an intermediary which controls the members' relation to a third party, their mutual employer; secondly, a member's status with the union may have a serious effect upon his right to pursue his trade. For these reasons much litigation has arisen concerning internal union operations and it has practically developed a case law of its own.

The first law which governs union affairs is the members' self-imposed law, the constitution and by-laws. Methods of procedure and a hierarchy of tribunals are provided for internal settlement of disputes. A basic question in this area is the extent to which the courts will intervene in the operations of this structure and afford relief from its administration.

Cases presenting this problem start from the proposition that one who is aggrieved by an action of his association cannot resort to the courts until he has first exhausted his remedies within the organization.[195] One of the situations where the courts have been quick to find exceptions to this rule is where members allege fraud on the part of the officers.[196]

In *Wilson v. Miller*,[197] the Tennessee Supreme Court allowed a class action against union officers to be brought by a member on behalf of himself and others similarly situated seeking relief from fraud and mismanagement in the union's operations. The bill sought an accounting for funds allegedly defalcated over an eleven-year period, restitution of union assets, and a decree ordering a court-supervised election to end minority domination. The union constitution and by-laws provided for settlement through internal procedures as a condition of any court action, but it was alleged that any such appeal would be useless because final decision lay with the International President who had been indifferent to past complaints. It was held that the chan-

194. Steel v. Louisville and Nashville R.R., 323 U.S. 192 (1944).

195. Barthell v. Zachman, 162 Tenn. 336, 36 S.W.2d 886 (1931); Murray v. Supreme Hive, 112 Tenn. 679, 80 S.W. 827 (1904). See Vorenberg, *Exhaustion of Intraunion Remedies*, 2 LABOR L.J. 487 (1951). Cases are collected at 168 A.L.R. 1462 (1947).

196. See SMITH, CASES AND MATERIALS ON LABOR LAW 934 (1953). The conclusion there is that the courts will intervene here "simply on the realistic ground that patently unlawful acts have been committed."

197. Corregan v. Hay, 94 App. Div. 71, 87 N.Y. Supp. 956 (4th Dep't 1904).

cellor properly took jurisdiction of the entire matter and that failure to exhaust internal remedies is excused where such an attempt would be "futile, illusory or vain."

Where union finances are in jeopardy a variety of relief may be appropriate in equity. The alleged inadequacy of union financial procedures and personnel in the *Wilson* case justified granting an accounting; to preserve the property of the union a receiver may be required, although none was sought in that case; and the additional remedy of supervised elections is available if past elections have been fraudulent or it is necessary to insure proper union administration in the future.[198]

Intervention of the national union into a similar situation in the local gave rise to *Liming v. Maloney*.[199] The defendant, acting under his constitutional power as International President, had taken possession of the local's property, removed its officers and appointed new ones. On appeal from an unsuccessful suit to set aside this action the court of appeals affirmed. It held first that the evidence showed the action to have been justified and in the local's best interests because of disorderly meetings, exorbitant officer's salaries and financial mismanagement. It held, secondly, that in any event the plaintiffs should have exhausted their remedies within the organization before resorting to the courts.

This second basis troubled Judge McAmis who concurred on the first grounds alone. And well he might, because it was alleged that appeal lay to the International Convention which met only once in four years and that such an appeal would be futile because it lay to those who had acted wrongfully. This latter allegation, if proved, would bring the case within the rule excusing exhaustion of internal remedies where the appeal would be futile, illusory, or vain as announced in *Watson v. Wilson*.[200] But an exception is also applied, at least in members' actions for wrongful expulsion, where internal procedures would cause undue delay.[201] Whether the fact that the

198. Robinson v. Nick, 235 Mo. App. 461, 136 S.W.2d 374 (1940); Collins v. Int'l Alliance of Theatrical Stage Employees, 119 N.J. Eq. 230, 182 Atl. 37 (Ch. 1935); Chalgian v. Int'l Brotherhood of Teamsters, 114 N.J. Eq. 497, 169 Atl. 327 (1933); Local No. 11, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers v. McKee, 114 N.J. Eq. 555, 169 Atl. 351 (1933); Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941); Washington Local Lodge No. 104 v. Int'l Brotherhood of Boilermakers, 33 Wash. 2d 14, 203 P.2d 1019 (1949). See Chamberlain, *The Judicial Process in Labor Unions*, 10 BROOKLYN L. REV. 145 (1940); Pressman, *Appointment of Receivers for Labor Unions*, 42 YALE L.J. 1244 (1933); Summers, *Union Powers and Workers' Right*, 49 MICH. L. REV. 805 (1951).

199. 17 CCH LAB. CAS. ¶ 65,558 (Tenn. App. E.S. 1950).

200. 194 Tenn. 390, 250 S.W.2d 575 (1952).

201. Local Union No. 57 v. Boyd, 245 Ala. 227, 16 So.2d 705 (1944), (two and one half months an undue delay); Kaplan v. Elliott, 145 Misc. 863, 261 N.Y. Supp. 112 (1932) (eighteen months an undue delay). See Note, 35 COL. L. REV. 951 (1935); Note, 168 A.L.R. 1462 (1947).

convention met only once in four years meant undue delay in the *Liming* case depends of course upon the date of the next meeting which does not appear from the opinion. The court did not consider this question.

Although Judge McAmis declined to pass on the question as to whether the union by-laws provided for an adequate and speedy settlement, he concurred in the holding because the evidence was such that had the plaintiffs exhausted their union remedies and lost, the court upon then reviewing the action would not have upset it. In other words the *plaintiffs* had lost nothing by the court's taking jurisdiction. But in such an action it is the *defendant* who resists the court's entertaining the action and asks that a member complaining of union procedures be held to his contractual agreement to utilize internal tribunals. If there is no rule of law which excuses the dissident member from following procedures prescribed in the by-laws and constitution, does not a court remake their contract by adjudicating his dispute? If upon his proof no actual justification is shown for the departure from agreed methods, should not the action be dismissed? Unless these questions are answered in the affirmative, the mere allegation of an excuse for failure to exhaust internal remedies is sufficient to evade the rule and any member can force the union into court to defend against real or imagined grievance.

A further question raised in the *Liming* case was whether the complainants asserted a "property right" which excused them from failure to exhaust internal remedies. This exception is of long standing and probably arose where a member expelled from a fraternal benefit society later sued on a policy of insurance.[202] The complainants in *Liming* alleged that members' rights in $180,000 worth of the local's property were at stake. The court refused to apply the property right exception and gave it little discussion. The holding on this point appears to be sound. To regard a member's undivided interest in jointly owned union assets as a property right for this purpose would allow all disputes of this sort and all wrongful expulsion claims to be litigated in the courts in the first instance.[203]

The clause under which the defendant acted in the *Liming* case suggests a problem which has become of increasing concern to the courts and to scholars in this field. It gave the International President arbitrary power to suspend and expel local officers and to take over

202. See Atkinson v. Railroad Employee's Mutual Relief Society, 160 Tenn. 158, 22 S.W.2d 631 (1929).

203. A different approach is warranted if the dispute is between the local and national organizations. Here it is generally held that if property rights are involved the local's charter may not be revoked without a fair trial. Ellis v. American Federation of Labor, 48 Cal. App.2d 440, 120 P.2d 79 (1941); Furniture Workers Union, Local 1007 v. United Brotherhood of Carpenters and Joiners, 6 Wash. 2d 654, 108 P.2d 651 (1940).

local assets without notice or trial. The Washington Supreme Court has indicated that such a clause is contrary to public policy and action under it will be enjoined.[204] Another court regarded a clause giving similar powers as innocuous because of the International President's presumed insulation "from local prejudices and antipathies."[205] The problem suggested is that of the growing centralization of power in national organizations at the expense of locals. It is evidenced by a tendency to increase the powers of the national president[206] and the move towards bargaining on a nationwide basis.[207]

Tennessee would probably recognize the numerous other exceptions with which the courts have weakened the exhaustion rule.[208] Internal remedies need not be exhausted where an expelled member sues for damages rather than reinstatement,[209] or where initial proceedings did not accord a fair trial,[210] or the trial body lacked jurisdiction,[211] or the proceedings did not comply with rules or constitutional provisions.[212] The exhaustion rule is still applicable, however, in the absence of some such showing.[213]

The question of the duty of union officials to instruct a member concerning the union's rules and regulations arose in the unreported case of *McAfee v. Chattanooga Paper Products Workers Specialty Union*.[214] The plaintiff had been discharged under a valid closed-shop contract which made "bad standing" in the union a basis for discharge. While laid off from her job she became delinquent in the payment of dues to the international. Union officers had told her she was excused from paying local dues but made no mention of the international

204. Washington Local Lodge, No. 104 v. Int'l Brotherhood of Boilermakers, 33 Wash. 2d 1, 203 P.2d 1019 (1949).

205. Gleeson v. Conrad, 81 N.Y.S. 2d 368 (Sup. Ct. 1948).

206. See the clause setting forth the power of James L. Petrillo of the Musicians Union, admittedly an extreme case, in SMITH, CASES AND MATERIALS ON LABOR LAW 931 (1953).

207. See Chamberlain, *The Judicial Processes in Labor Unions*, 10 BROOKLYN L. REV. 145 (1940); Witmer, *Civil Liberties and the Trade Unions*, 50 YALE L.J. 621 (1941); TELLER, A LABOR POLICY FOR AMERICA 67 (1945).

208. See Vorenberg, *Exhaustion of Intraunion Remedies*, 2 LABOR L.J. 487 (1951).

209. Porth v. Local Union 201, United Brotherhood of Carpenters and Joiners, 231 P.2d 252 (Kan. 1952); Grand Int'l Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923).

210. Johnson v. Int'l Brotherhood of Carpenters and Joiners, 52 Nev. 400, 288 Pac. 170 (1930) (due notice); Rueb v. Rehder, 24 N.M. 534, 174 Pac. 992 (1918) (double jeopardy); *contra*, Simpson v. Grand Int'l Brotherhood of Locomotive Engineers, 83 W.Va. 355, 98 S.E. 580 (1919); Brooks v. Engar, 259 App. Div. 333, 19 N.Y.S. 2d 114 (1st Dept. 1940) (secret evidence); Callegher v. Monoghan, 58 N.Y.S. 2d 618 (Sup. Ct. N.Y. Co. 1945) (unreasonable place of trial). See Note, 21 A.L.R. 2d 1937 (1952).

211. Walsh v. Reardon, 274 Mass. 530, 174 N.E. 912 (1931); Gersh v. Ross, 283 App. Div. 552, 265 N.Y. Supp. 459 (1st Dept. 1933).

212. Leo v. Local Union No. 612, 126 Wash. 2d 498, 174 P.2d 523 (1946).

213. Haynes v. United Chemical Workers, 190 Tenn. 165, 228 S.W.2d 101 (1950); Liming v. Maloney, 225 S.W.2d 276 (Tenn. App. E.S. 1949).

214. 17 CCH LAB. CAS. ¶ 65,558 (Tenn. App. E.S. 1950).

"per capita tax." The union constitution and by-laws made delinquency in this automatic "bad standing." She sued the union alleging that it caused her discharge because she was the sister-in-law of a nonunion foreman and also that the union officers violated a duty to instruct her as to the union rules regarding the per capita tax, and furthermore should have granted her a hearing on her bad standing status. The court of appeals upheld a dismissal of her suit. The evidence was such that it could have been found she was fired for her bad standing and not for her relation to the foreman. Since she had a copy of the union constitution and by-laws and knew that good standing in the union was a condition of her employment, there was no duty upon the officers to instruct her as to union rules. It was not necessary that she be adjudged by the union to be in bad standing because under the by-laws this was automatic when she defaulted in payment of the per capita tax. The result seems harsh to this point but the court left a way out upon other facts by this observation:

> "There is no proof that she was denied a reasonable opportunity to place herself in good standing. She does not claim that she ever made a tender of the per capita tax."[215]

Wilson v. Miller[216] established that in Tennessee a class suit much in the nature of a stockholder's derivative action may be available to union members to reach officers who default in their duties. This device is useful in order to make the union a party defendant so that the court may have jurisdiction over its assets.

ARBITRATION

It is generally accepted that voluntary arbitration is a desirable and expedient method of settling labor disputes,[217] and a standard feature of collective agreements is a provision that arbitration is to be the terminal point of all grievance procedures.[218] However, Tennessee, like the majority of states, has a general arbitration statute[219] which is ill-designed to meet the realities of modern labor relations. Unlike modern statutes which provide for the specific enforcement of agreements to arbitrate future disputes,[220] Tennessee recognizes only the

215. *Id.* at p. 76,901.
216. 194 Tenn. 390, 250 S.W.2d 275 (1952).
217. See Gregory and Orlikoff, *The Enforcement of Awards in Labor Disputes*, 17 U. OF CHI. L. REV. 233, 252-255 (1950).
218. The Bureau of Labor Statistics found in 1952 that 89% of collective agreements provide for arbitration of future disputes. FORKOSCH, A TREATISE ON LABOR LAW 852, n. 77 (1953).
219. TENN. CODE ANN. §§ 9359-9382 (Williams 1934).
220. Seventeen states have such statutes, but only ten of these enforce future disputes when they are contained in collective labor agreements. FRIEDIN, LABOR ARBITRATION AND THE COURTS 2 (1952).

submission of existing "causes of action" to arbitration.[221] The common-law rule that submission to arbitration may be revoked at any time before award[222] can be avoided by making the submission a rule of court by entering it of record or by a written agreement that it be so entered.[223] The award must be docketed with the court specified in the submission[224] and in a suit thereon it may be rejected for "any legal and sufficient reason."[225] The statute was strengthened in 1946, however, by its amendment to provide for the appointment of an arbitrator by the court should a party fail to appoint one as provided in a submission agreement.[226]

Despite the unavailability of the remedy of specific performance, arbitration agreements apparently are widely used in Tennessee. A reference to published arbitration decisions shows a substantial number of awards rendered in this state upon collective agreements in effect in Tennessee industries.[227] This is probably due to the fact that in firms enjoying good labor relations the enforcement of such clauses depends upon the good faith of the parties rather than upon effective legal sanctions. Nor are agreements to arbitrate without legal effect in Tennessee. It may be that submission to arbitration is a condition precedent to an action on the contract.[228] If a party refuses to perform an agreement to arbitrate, an action for damages should be available.[229] Such an action has been held to lie in federal court under Section 301 of the Taft-Hartley Act.[230] It is almost universally held that an action may be brought upon an award rendered upon an executed agreement for arbitration of future disputes.[231]

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221. Section 9359 provides that "all causes of action whether there be a suit pending or not" may be submitted to arbitration with certain exceptions not material here. This requirement of a justiciable controversy would eliminate some labor disputes even if submitted to arbitration, *e.g.*, a dispute relating to terms of a new contract. See *In re* Buffalo and Erie Ry., 250 N.Y. 275, 165 N.E. 291 (1929); Gregory and Orlikoff, *supra* note 217, at 248-52.

222. Key v. Norrod, 124 Tenn. 146, 136 S.W. 991 (1911); Dougherty v. McWhorter, 15 Tenn. 239 (1834).

223. TENN. CODE ANN. § 9367 (Williams 1934); Key v. Norrod, *supra* note 222. If the dispute is before a court, the common law rule applies and a parol submission is valid. Common-law and statutory arbitration exist concurrently in Tennessee. Halliburton v. Flowers, 59 Tenn. 25 (1873).

224. TENN. CODE ANN. §§ 9375-9376 (Williams 1934).

225. *Id.* § 9377.

226. *Id.* § 9361 (1952 Supp.).

227. See *e.g.*, American Metal Products Co., 22 LABOR ARBITRATION REPORTS 181 (Union City, Feb. 18, 1954); Crane Co., 20 LABOR ARBITRATION REPORTS 561 (Chattanooga, Apr. 20, 1953); Florence Stove Co., 19 LABOR ARBITRATION REPORTS 650 (Lewisburg, Sept. 23, 1952); Mead Corp., 20 LABOR ARBITRATION REPORTS 25 (Harriman, Aug. 25, 1952).

228. Cole Mfg. Co. v. Collier, 91 Tenn. 525, 19 S.W. 672 (1892); Tolley Co. v. Marr, 12 Tenn. App. 505 (E.S. 1931).

229. Berkoritz v. Arbib, 230 N.Y. 261, 130 N.E. 288 (1921).

230. Shirley-Herman Co. v. Int'l Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950).

231. Note, 135 A.L.R. 85 (1941).

It is unlikely that a future disputes clause entered into in a foreign state which recognized them would be enforceable in Tennessee. Since arbitration is regarded as remedial, the law of the forum is generally applied.[232] But an award rendered in a foreign state pursuant to a statute enforcing such clauses is entitled to full faith and credit unless the forum regards the agreement as contrary to its public policy.[233] In *Hirsch Fabrics Corp. v. Southern Athletic Co.*,[234] suit was brought in the federal court for the Eastern District of Tennessee upon an award rendered in New York. The parties, one of them a New York corporation, had agreed that their contract was to be governed by New York law and that any disputes were to be arbitrated according to its statute which enforces future disputes clauses. Judge Taylor held that the award was entitled to full faith and credit.[235]

Whether the Federal Arbitration Act[236] is available for the specific enforcement of future disputes clauses in collective agreements is an issue yet to be resolved.[237] Most decisions have held that its exclusion of contracts of employment of workers engaged in interstate commerce makes it inapplicable.[238] But a decision in the Third Circuit holds that this excludes only collective agreements in industries which are instrumentalities of commerce and applies the Act to an arbitration agreement in an industry which merely affects commerce.[239]

MISCELLANEOUS

State antitrust law—The Tennessee anti-monopoly statute[240] has never been applied to a typical employee organization. However, in *Bailey v. Association of Master Plumbers*[241] it was invoked against a group of plumbing contractors who did plumbing work and also sold the fixtures which they installed. A by-law of their association provided a schedule of penalties to be paid to the association by

232. Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716, 728 (1934).
233. Shafer v. Metro-Goldwyn-Mayer Distrib. Corp., 36 Ohio App. 31, 172 N.E. 689 (1929) (denying enforcement); *contra*, Gilbert v. Bernstein, 255 N.Y. 348, 174 N.E. 706 (1931).
234. 98 F. Supp. 431 (E.D. Tenn. 1951).
235. For an excellent discussion of conflicts problems in this field, see Stern, *The Conflict of Laws in Commercial Arbitration*, 17 LAW & CONTEMP. PROB. 567 (1932).
236. 61 STAT. 669 (1947), 9 U.S.C.A. §§ 10-14 (1953).
237. See Sturges and Murphy, *Some Confusing Matters Relating to Arbitration Under The United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 582 (1952).
238. Amalgamated Ass'n of Street Electric Ry. and Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310 (3d Cir. 1951), 193 F.2d 327 (3d Cir. 1952); Int'l Union United Furniture Workers v. Colonial Hardware Flooring, 168 F.2d 33 (4th Cir. 1948). See 65 HARV. L. REV. 1239 (1952).
239. Tenney Engineering, Inc. v. United Electrical Workers, 207 F.2d 450 (3d Cir. 1953).
240. TENN. CODE ANN. §§ 5880-5886 (Williams 1934).
241. 103 Tenn. 99, 52 S.W. 853 (1899).

members who did work in competition with other members. In a suit brought to collect such penalties, the by-law was held invalid as an unreasonable restraint of trade at common law and also as violating the Tennessee antitrust law since it was destructive of competition and arbitrarily raised prices to the public.

Since the statute applies to combinations which "tend to advance, reduce, or control" prices, it literally might apply to traditional union action for higher wages. Although such an application is unlikely, Tennessee courts would probably follow the lead of federal decisions[242] under the Sherman Act and condemn alliances between unions and employers which restrain competition and affect prices.

Such a situation is suggested by *Lichter v. Fulcher*[243] although the state antitrust statute was not invoked and the union was not a party. The Nashville Mason Contractors Association and the local masons' union agreed that the latter's members would work only for contractors approved by the association. An outside contractor was successful in an action against the association and its officers for damages caused when the arrangement interfered with its securing local union labor. The defendants were held to be guilty of civil conspiracy in attempting to control the supply of union mason labor and thus eliminate outside competition for contracts. The Court of Appeals observed:

> The progress of labor in its efforts to attain reasonable hours, proper working conditions and a fair wage has been slow. The progress made thus far should not be jeopardized by an attempt by designing individuals to use the progress thus gained to serve entirely separate interests.[244]

Labor disputes and unemployment benefits—The Tennessee unemployment compensation statute[245] disqualifies from receiving benefits employees who are unemployed because of participation in a labor dispute or membership in a "grade or class of workers . . . any of whom are participating in the dispute."[246] Although this is now a complete bar, prior to 1947 such disqualification was effective only for the first four weeks of employment.[247]

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242. Allen-Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers, 325 U.S. 797 (1945). A Tennessee union was indicted under this principle in United States v. Chattanooga Chapter, National Electrical Contractors Ass'n, 116 F. Supp. 509 (E.D. Tenn. 1953).

243. 22 Tenn. App. 670, 125 S.W.2d 501 (E.S. 1938).

244. *Id.* at 675, 125 S.W.2d at 507.

245. TENN. CODE ANN. §§ 6901.25-6901.44 (Williams Supp. 1952).

246. *Id.* § 6901.29 (E).

247. TENN. CODE ANN. § 6901.5 (d) (3) (Williams 1934).

In its first decision under this provision[248] the state supreme court held that a disqualifying "labor dispute" was present where the employer and union agreed that operations should cease until a new contract had been negotiated. In *Clinton v. Hake*[249] striking employees were denied benefits upon a finding that they were "fully employed" in picketing the plant and therefore were neither unemployed nor available for other suitable work. However, *Milne Chair Co. v. Blake*[250] refused to apply this reasoning where the pickets had been discharged by the employer after going on strike and the employer had rejected their offer to return to work.

Two cases have considered the position of nonunion employees who are unemployed because the union's strike closes down the plant. The *Queener* case[251] granted such benefits to nonunion employees limiting the disqualified "grade or class" of workers to those acting in concert in the dispute. However, this decision was distinguished in the *Anderson* case[252] where the striking union had been certified by the NLRB. Since such a union is the lawful bargaining agent for all employees in its unit, all those within the unit are regarded as within the same "grade or class" and thus disqualified from unemployment benefits. Since any union whose strike is strong enough to close down a plant is likely to have won certification, successful strikes will usually disqualify both union and nonunion employees from receiving benefits. Unions favor such a construction of these statutes because the contrary would cause defections from the union and weaken strikes.

Ordinance requiring city to purchase union made goods.—In 1897 Nashville apparently had a strong and influential printers' union. A city ordinance, passed in that year, required that all city printing bear the union label of either the Nashville Allied Trades Council or the International Typographical Union. In 1902, this enactment was invalidated by the Tennessee Supreme Court in *Marshall & Bruce Co. v. City of Nashville.*[253] It conflicted with the city charter's requirement that such contracts be let out at competitive bidding to the lowest responsible bidder. The ordinance was also held to be unconstitutional on the grounds that it denied equal protection of the law

248. Block Coal and Coke Co. v. United Mine Workers, 177 Tenn. 247, 149 S.W.2d 469 (1941).

249. 185 Tenn. 476, 206 S.W.2d 889 (1947), followed in Adams v. American Lava Corp., 188 Tenn. 69, 216 S.W.2d 728 (1948).

250. 190 Tenn. 395, 230 S.W.2d 393 (1950).

251. Queener v. Magnet Mills, 179 Tenn. 416, 167 S.W.2d 1 (1942).

252. Anderson v. Aluminum Co. of America, 193 Tenn. 106, 241 S.W.2d 932 (1951).

253. 109 Tenn. 495, 71 S.W. 815 (1902).

to nonunion workers, constituted an expenditure of public funds for the benefit of private groups, and tended to create a monopoly.[254]

254. The majority of jurisdictions are in accord. Note, 110 A.L.R. 1408 (1937). It may be, however, that public officials have discretion to consider whether a contractor employs union labor in determining the responsibility of a low bidder. Pallas v. Johnson, 100 Colo. 449, 68 P.2d 559 (1937); A. H. Pugh Printing Co. v. Yeatman, 22 Ohio C.C. 584 (1901).