

NOTES

THE PIT AND THE PATENTEE: TYING CLAUSES AS ANTI-TRUST VIOLATIONS PER SE*

*International Salt Co. v. United States*¹ forcibly reemphasizes the precarious position of the patentee who would use his patent as a lever to increase bargaining power in markets other than that of his invention. The first step beyond the immediate scope of his patent is now apt to be the long step into the pit of *per se* violation of the anti-trust laws.

International Salt owned valid patents for mechanical salt dispensers used in canneries. These patented dispensers were leased with the stipulation that the lessee must purchase salt only from the patentee. An equity suit was brought by the Government, and, on a bare motion for summary judgment, the leases were declared illegal *per se* under Section 1 of the Sherman Act² and Section 3 of the Clayton Act.³

It is certainly not new doctrine that the protection of the patent monopoly extends only to the patent itself.⁴ And at least since 1917 the courts have assumed that tie-in clauses conditioning use of the patent upon purchases of materials from the patentee are not within the scope of the patent.⁵ The problem,

* *International Salt Co. v. United States*, 332 U. S. 392 (1947).

1. 332 U.S. 392 (1947).

2. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1940). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

3. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1940). "It shall be unlawful for any person engaged in commerce, . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

4. *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659 (1895); *Morgan Envelope Co. v. Albany Paper Co.*, 152 U.S. 425 (1893). *But cf.* *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912); *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (1896).

5. *With Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917), tying clause agreements which by contract or affixed notice expressly restricted the right to use unpatented materials with a patented article were declared unenforceable in a situation of total market control. This principle has since been extended to cases where the tying clause takes the form, not of a prohibition, but of a royalty discrimination against licensees who purchase materials not covered by the patent from others than the patentee. *Dehydrators, Ltd. v. Petrolite Corp.*, 117 F.2d 183 (C.C.A. 9th 1941); *Barber Asphalt Corp. v. La Fera Grecco Contracting Co.*, 116 F.2d 211 (C.C.A. 3d 1940), on re-

however, has been one of selecting and defining the standards by which the legality of such patent-abetted techniques of market control should be judged.

Mr. Justice Clarke had been clear that the tie-in clauses in the famous *Motion Picture Patents* case were outside the orbit of the patent, and "therefore" that their legality was to be judged, like the exercise of other powers of property, under "general" law.⁶ Without relying on the Clayton Act, he held the tying clauses unenforceable, apparently on broad grounds of public policy. Since then, however, and especially since *Eric v. Tompkins*,⁷ the Supreme Court has articulated an increasingly close relationship between the patent field and the anti-trust laws. Initial cases here seemed to test the validity of devices extending the competitive force of a patent with those factual analyses of market control which were usually attendant upon determinations of "monopoly in any line of commerce" under the Clayton Act.⁸

By 1942, however, the Court could, without enquiry into actual market control, deny relief to a patentee suing for direct infringement of a valid patent, on the ground that his use of tie-in sales was contrary to the "policy" of the Clayton Act.⁹ Still the Court refrained from holding tie-in agreements illegal

hearing *aff'd*, 116 F.2d 216 (C.C.A. 3d 1940); *Oxford Varnish Co. v. Ault & Wiborg Corp.*, 83 F.2d 764 (C.C.A. 6th 1936).

Nor have the courts been impressed by patentees who by withholding infringement suits, tacitly license those, and only those, who purchase their unpatented materials from the patentee. *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938); *American Lecithin Co. v. Warfield Co.*, 105 F.2d 207 (C.C.A. 7th 1939), *cert. denied*, 308 U.S. 609 (1939). The difficulty of exploiting process patents invited practices of this type prior to their unqualified disapproval in *B. B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942); *Landis Machine Co. v. Chaso Tool Co.*, 141 F.2d 800 (C.C.A. 6th 1944).

The stricture has held whether the tied-in article is a staple or a necessary and exclusive component of the patented process or combination. *Mercoid v. Minneapolis-Honeywell Co.*, 320 U.S. 680 (1944) (staples—thermostatic switches); *B. B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942) (staples—webbing and rubber cement); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) (exclusively designed articles—cards for use in patented mechanical tabulators); *Autographic Register Co. v. Sturgis Register Co.*, 110 F.2d 883 (C.C.A. 6th 1940); *Philad Co. v. Lechler Laboratories*, 107 F.2d 747 (C.C.A. 2d 1939); *Alemite Corp. v. Lubrair Corp.*, 62 F.2d 899 (C.C.A. 1st 1933).

Section 3 of the Clayton Act applies whether the tie-in embraces a patented or unpatented article. *Mercoid v. Minneapolis-Honeywell Co.*, 320 U.S. 680 (1944); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27 (1931).

6. 243 U.S. 502, 512-13 (1917).

7. 304 U.S. 64 (1938). The nominal abolition of federal common law under the *Eric* rule would seem incompatible with the rationale of the *Motion Picture Patents* case. To achieve the same result the logic of the *Eric* rule would require that a new doctrinal basis be found.

8. *Pick Manufacturing Co. v. General Motors Corp.*, 299 U.S. 3 (1936); *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). *Cf.* *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), where for purposes of the Sherman Act market analysis under the rule of reason is also employed.

9. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942). In *Carbice Corp. v.*

under the anti-trust laws themselves. By refusing equitable relief to the patentee through a doctrine akin to "unclean hands," the leverage of the tie-in was defeated. But, also, in order to keep a semblance of balance between the parties, the infringer was denied treble damages.

With the much debated *Mercoid* cases¹⁰ there finally appears in recognizable form the doctrine that the patentee must be held to a higher standard under the anti-trust statutes than other members of the competitive business community. Said Mr. Justice Douglas for the majority:

"The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. . . . [T]he effort here made to control competition in this unpatented device plainly violates the anti-trust laws. . . ."¹¹

The *International Salt* case represents a vital next step in logical sequence. With the issue of legality squarely raised by the Government's suit under the Clayton and Sherman Acts the Court has brought agreements tying unpatented materials with the patent into the rapidly growing area of illegality *per se*, or almost *per se*. For there is still in Mr. Justice Jackson's opinion the suggestion of a bow in the direction of the older concepts of market control: "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial. . . ."¹² Nonetheless, for all practical purposes *International Salt*, along with *Masonite*,¹³ now stands with *Trenton Potteries*¹⁴ among the so-called exceptions to the rule of reason—"exceptions" so powerful and inclusive as to overshadow the older rule. Pragmatically speaking, the stringent remedy of treble damages will now be available, and without lengthy trial on issues of the reality and reasonableness of market control which have characterized patent anti-trust litigation.

In these cases the Supreme Court apparently starts with the premise that the patent monopoly itself is a special privilege potentially susceptible of abuses which can throttle competition to an important degree, and therefore that any attempt to use a patent to increase bargaining power should be forbidden in the name of the policy of the anti-trust laws. It is certainly clear that any attempt to broaden the scope of the protected patent monopoly would inevitably limit and perhaps eliminate actual or potential producers of the tied product, and might enable the patentee to fix the price of the tied product.¹⁵

American Patents Corp., 283 U.S. 27 (1931) the Court denied relief against contributory infringement where the patentee had sought to restrain the sale to licensees of a competing unpatented article. The Morton case goes further and denies relief for direct infringement where the patentee had sought to use his patent to monopolize an unpatented article.

10. *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944); *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944).

11. *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680, 684 (1944). But note that four justices concurred solely on the authority of *Morton Salt Co. v. G. S. Suppiger*, 314 U.S. 488 (1942).

12. 332 U.S. 392, 396 (1947).

13. *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

14. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

15. See MILLER, UNFAIR COMPETITION, c. X (1941) (a treatment of the possible market control effects of patent tie-in agreements).

The logical premise of the *International Salt* case, however, would seem to require a similar result in the situation where patents are tied not to unpatented commodities, but to other patents—perhaps *a fortiori* since potentialities of abuse would appear to be multiplied as patent control is extended.¹⁶ But where the case at bar has concerned patents in combination, the law has been more brave in dicta than in holding.¹⁷ Here the “rule of reason” has so far been retained.¹⁸ Guarded sanction has been accorded patent pooling arrangements assertedly in consideration of the statutory assignability of patents,¹⁹ the inexpeditious procedures presently available for resolving conflicting patent claims and the need for an efficient union of technological processes.²⁰

By abandoning in the *International Salt* case the criterion of reasonableness upon which the patent pooling cases have turned, does the Court imply that it

16. The considerations which circumscribe the patent in its orbit recognize that extension of that orbit comes to be used as a warrant for:

- “(a) The extension of the patent monopoly itself.
- (b) The rationalization and even suppression of competition.
- (c) The use of the license as an instrument of business warfare and economic control.
- (d) The reduction of capacity and the restriction of output.
- (e) The division of the market into proprietary desmesnes.
- (f) The creation of a private government for an industry.
- (g) The use of the public courts to police an industry and to punish those who break its laws.” Brief for the United States as *Amicus Curiae*, p. 65, *Mercoild Corp. v. Mid Continent Investment Co.* 320 U.S. 661 (1944).

17. See *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 459 (1940) (“The patent monopoly of one invention may no more be enlarged for the exploitation of another . . . than for the exploitation of an unpatented article. . . .”); *Standard Oil Co. v. United States* 283 U.S. 163, 174 (1931) (“The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition.”). *But cf.* *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 (S.D.N.Y. 1946).

18. Judicial willingness to differentiate “between legitimate use and prohibited abuse of the restrictions incident to [patent combination]” has permitted development of a variety of arrangements designed to extend the patent monopoly. The tie-in of a promise to license back improvement patents is a typical arrangement of most patent pools, and where, as was true in the glass industry, the pool is conducted by a central licensing authority, the licenses are often required, as a prerequisite to admission to the pool, not only to license but to assign back to the licensing authority all of their improvement patents. Another practice common to patent pools is a requirement that licensees take blocks of patents that they neither need nor want—a requirement particularly endemic to industries whose patents may be grouped into technical areas for licensing as a package rather than singly.

None of these devices is comprehended by the limited monopoly of the patent grant. Each can be readily employed as a bargaining weapon with which to capture technological advance. *Hearings before the Temporary National Economic Committee*, Part 3, *Proposals for Changes in Law and Procedure*, 835-1159; Part 31a, *Letters of Conveyance P. Coe and Thurman Arnold*, 18471-89; *Final Report and Recommendations*, S. Doc. No. 35, 77th Cong., 1st Sess., pursuant to Public Resolution No. 113, 75th Cong., 36-7.

- 19. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947).
- 20. *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931).

will follow the logic of its own premise and declare tie-ins of patent with patent to be equally illegal? An immediately antecedent decision suggests that the Court may not be disturbed by logical inconsistency and may not be ready to leave to Congress the task of assessing the necessity for special treatment of patent combinations. In *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.* it was held that the requirement that a licensee assign his improvement patents to the patentee was not an illegal tie-in agreement.²¹ The extent to which the Justices have now meant to undercut the *Transwrap* decision is the measure of the ultimate doctrinal thrust of *International Salt v. United States*. For the present, the hand of the party attacking a tie-in arrangement has been tremendously strengthened. For the patentee who walks on the brink of anti-trust violation, the precipice has been brought closer and its height increased by the *International Salt* decision.

PROCEDURAL "DUE PROCESS" IN UNION DISCIPLINARY PROCEEDINGS*

PROTECTION of the individual union member against his union is a uniquely contemporary problem. Libertarian political science of the 18th Century conceived the task of perpetuating a democratic society largely as a problem of protecting the individual against authoritarian repression by the State.¹ Autocratic action by organizations not strictly governmental was considered either of little significance in its effect on "democracy," or was thought to be a matter of "private" concern, beyond the proper scope of institutional protection. But the problem of maintaining an actual and meaningful "democracy" in today's pluralistic society is far more complex than an elementary State-versus-individual calculus would indicate.²

21. 329 U.S. 637 (1947).

* State *ex rel.* *Dame v. Le Fevre*, 251 Wis. 146, 28 N.W. 2d 349 (1947).

1. See LOCKE, OF CIVIL GOVERNMENT bk. 2, c. v. viii (general description of society), c. xviii (Of Tyranny) (1690); MONTESQUIEU, DE L'ESPRIT DES LOIS bk. 11, cc. i-vi (Political Liberty) (1777); U. S. CONST. AMENDS. I-X, XIII-XV.

2. For slowly expanding judicial awareness of this complexity, see *Munn v. Illinois*, 94 U. S. 113 (1877) (regulation of businesses "clothed with the public interest"); *Muller v. Oregon*, 208 U.S. 412 (1908) (state statute fixing maximum hours of employment of females upheld); *Nebbia v. New York*, 291 U.S. 502 (1934) (state may fix selling price of milk); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (fixing of minimum wages for women and minors within police power of state); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (federal regulation of labor-management relations a valid exercise of "commerce" power); *United States v. Darby*, 312 U.S. 100 (1941) (Congress may fix minimum wages and maximum hours of employees "engaged" in production of goods for interstate commerce); *North American Co. v. SEC*, 327 U.S. 686 (1946) (public utility holding companies may be restricted to single integrated system); *Marsh v. Ala-*

A more realistic analysis reveals the individual in contemporary society thrown into close contact with powerful organized groups, many of which are not literally "governmental" in the traditional sense, but all of which are susceptible to the abuses of concentrated control. Wherever the relations of the individual to any such group constitute a vital aspect of his economic, social or political life, serious problems of maintaining functional democracy recommend themselves to the attention of society. The position of the individual workman with respect to his union stands as a case in point.

Ink need not be expended describing the dominant role played by labor unions today in the lives of 15,000,000³ American workers. Not only is union membership a job prerequisite for millions of workers,⁴ but it provides an essential vehicle by which workers may achieve basic democratic goals—economic security,⁵ participation in industrial government,⁶ fellowship and respect of other people.⁷ Internal union democracy,⁸ freedom to criticize and oppose un-

bama, 326 U.S. 501 (1946) (free speech protected on thoroughfare in company town); *Smith v. Allwright*, 321 U.S. 649 (1944) (party imposed discrimination in primaries illegal under Fourteenth Amendment). See note 30 *infra*.

3. DIRECTORY OF LABOR UNIONS IN THE UNITED STATES, BUREAU OF LABOR STATISTICS BULL. No. 901, p. 1 (1947) (figures as of beginning of 1947).

4. In 1946 approximately 11,000,000 workers were subject to collective bargaining agreements requiring union membership as a condition of employment. UNION-SECURITY PROVISIONS IN COLLECTIVE BARGAINING, BUREAU OF LABOR STATISTICS BULL. No. 903, p. 6 (1947). The closed shop—employer may hire only union members—has been outlawed by § 8(a) (3) of the Taft-Hartley Act. Pub. L. No. 101, 80th Cong., 1st Sess. (1947), 29 U.S.C.A. § 141 *et seq.* (Supp. 1947). However, union security agreements are still permitted in the form of a union shop—those hired must join union within specified time—if authorized by a majority of employees eligible to vote in a bargaining unit as provided in § 9(e) (1). For many workers, expulsion from their union may mean loss of skill, in addition to loss of a job.

5. In addition to bargaining for economic advantages, and joint union-management welfare plans, many unions contribute material benefits to members through their own insurance, health, unemployment, welfare, and education programs. See generally, UNION HEALTH AND WELFARE PLANS, BUREAU OF LABOR STATISTICS BULL. No. 900 (1947); Minkoff, *Trade-Union Welfare Programs*, 64 MONTHLY LAB. REV. 201 (1947); Rosenthal, *Union-Management Welfare Plans*, 62 Q. J. ECON. 64 (1947); Held, *Health and Welfare Funds in the Needle Trades*, 1 INDUS. & LAB. REL. REV. 247 (1948).

6. ". . . The struggle of labor for organization is not merely an attempt to secure an increased measure of the material comforts of life, but is a part of the age-long struggle for liberty." *Final Report, Commission on Industrial Relations*, SEN. DOC. No. 415, 64th Cong., 1st Sess. 62 (1916). "There must be a division not only of the profits, but a division of the responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run." Testimony of Mr. Louis D. Brandeis, *id.* at 64.

7. Important factors motivating workers to join unions are that membership enhances a worker's personal integrity, and spreads comradeship on the job and in the community. Bakke, *Why Workers Join Unions*, 22 PERSONNEL No. 1, 1 (1945). See also Tannenbaum, *Social Function of Trade Unionism*, 62 POL. SCI. Q. 161 (1947).

8. Commonly accepted requisites of trade union democracy are: non-discriminatory admission policies; reasonable initiation fees; regular meetings and conventions; fair and secret elections; free discussion within the union of all union problems; control of dues,

ion officials without fear of arbitrary discipline, may possibly be as meaningful to union members as their civil rights as citizens of the state.

Adjustment of the relations of the union member with his union involves a difficult balancing of the desirability of individual expression against the need of a militant organization for a unified, well-disciplined membership.⁹ Abuses in some unions indicate that the scales have been weighted against the individual member. The growth of centralized union administration has brought an increase in misuse of disciplinary power;¹⁰ summary expulsions without trial and for vague substantive offenses have not been unknown.¹¹ Un-

assessments and finances by the membership; periodic financial reports; equal treatment with respect to job placement and seniority rights; protection against discipline without reasonable cause; and procedural "due process." AMERICAN CIVIL LIBERTIES UNION, *DEMOCRACY IN TRADE UNIONS* 68-9 (1943). See generally, Witmer, *Civil Liberties and the Trade Union*, 50 *YALE L. J.* 621 (1941); Taft, *Democracy in Trade Unions*, 36 *AM. ECON. REV. SUPP.* 359 (1946); Murdock, *Some Aspects of Employee Democracy Under the Wagner Act*, 32 *CORN. L. Q.* 73 (1946). On discriminatory admission policies, see Summers, *The Right to Join a Union*, 47 *COL. L. REV.* 33 (1947); and *Admission Policies of Labor Unions*, 61 *Q. J. ECON.* 66 (1946); Newman, *The Closed Union and the Right to Work*, 43 *COL. L. REV.* 42 (1943).

9. Discipline is essential to enable the union to present a common front to employers; and to meet demands of employers that the national organization curb local wildcat strikes and compel compliance with contracts. Indeed, self-preservation itself requires that the union have power to oust agents of employers and rival unions seeking to destroy it from within. Taft, *Judicial Procedure in Labor Unions*, 59 *Q. J. ECON.* 370-1, 380 and *passim* (1945).

10. A recent study of 167 national constitutions reveals the seeds of potential abuses embedded in these very documents. Suspensions without trial of local officers in 30 unions, of national officers in 36 unions, and of subordinate units in 63 unions are specifically authorized. Shister, *Trade-Union Government—A Formal Analysis*, 60 *Q. J. ECON.* 78, 94, n. 3 (1945). National constitutions of 60 unions are silent on the need for trials in local disciplinary proceedings. *Id.* at 100, n. 6. Even the highly democratic Typographical Union—motivated by a secession movement in 1943—provided for Executive Council expulsion without trial of any member aiding a rival union. INTERNATIONAL TYPOGRAPHICAL UNION PROCEEDINGS, EIGHTY-SEVENTH CONVENTION 72 (1944). The president of the Mine Workers may suspend executive board members—the appellate tribunal—for insubordination. United Mine Workers, Const., Art. IX, § 3 (1940). "There is an obvious need for the establishment of union tribunals distinct from the legislative and administrative offices of the Union." Chamberlain, *The Judicial Process in Labor Unions*, 10 *BROOKLYN L. REV.* 145, 162 (1940).

Prosecutions designed to stifle free expression within the union are facilitated by the following vague grounds for discipline disclosed by an examination of 81 union constitutions: violation of union constitution, by-laws, and rules (36 unions); disobedience of orders of officers (6 unions); slandering an officer or member (29 unions); circulating written material dealing with union business among members without executive board approval (21 unions); creating dissension (15 unions); and undermining the union (20 unions). Taft, *supra* note 9, at 377-81. See also, Chamberlain, *supra* at 145-48.

11. Many abuses probably never come to light because aggrieved workers lack publicity channels and the means for court relief. Moreover, many potential abuses are probably not precipitated because the mere threat of arbitrary expulsion is often sufficient to silence opposition. See Taft, *supra* note 9, at 376, 384-5. Nevertheless, there is ample evidence of past arbitrary discipline by racketeers and autocratic leaders in *some* unions.

restricted control by the union leadership is unacceptable to a democratic social philosophy, but unlimited freedom of action by the union member is not practicable. A complete body of substantive principles governing the intricate relations of union and member, though slowly evolving, may not yet be formulable so as to provide adequately for the needs of both.¹² But it would not seem premature to suggest that procedural due process represents a minimal societal requirement¹³ protecting the individual workman from excesses on the part of

Expulsions or suspensions of members, officers and even entire locals have occurred despite lack of notice, a hearing, an unbiased tribunal and the right of cross-examination. See cases cited note 34 *infra*.

Substantive grounds for expulsion have included: testimony under subpoena before an administrative agency, *Abdon v. Wallace*, 95 Ind. App. 604, 165 N.E. 63 (1929); testimony in court, *St. Louis S.W. Ry. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1903); petitioning state legislature to repeal a law advocated by union, *Spayd v. Ringing Rock Lodge No. 665, Brotherhood of R.R. Trainmen*, 270 Pa. St. 67, 113 Atl. 70 (1921); voting for another union in an election under the Railway Labor Act, *Ray v. Brotherhood of R.R. Trainmen*, 182 Wash. 39, 44 P. 2d 787 (1935); acting as an observer for a rival union at an NLRB election, *Local No. 2880, Lumber and Sawmill Workers v. NLRB*, 158 F.2d 365 (C.C.A. 9th 1946); and opposition to candidate backed by union officials in 1944 Presidential election, *Morgan v. Local 1150, United Electrical Workers*, 16 Lab. Rel. Rep. 720 (Ill. Super. Ct. 1945), *rev'd*, 72 N.E. 2d 59 (Ill. App. 1947). Similar abuses have been unearthed by civic groups, AMERICAN CIVIL LIBERTIES UNION, *op. cit. supra* note 8, at 39, 68; CITY CLUB OF NEW YORK, REPORT ON CERTAIN ASPECTS OF LABOR UNION RESPONSIBILITY AND CONTROL 16 (1937), and Congressional committees, SEN. REP. No. 105, 80th Cong., 1st Sess. 7 (1947). See generally SEIDMAN, UNION RIGHTS AND UNION DUTIES c. 2 (1943); Chamberlain, *supra* note 10, at 162-5; Mintz, *Trade Union Abuses*, 6 ST. JOHN'S L. REV. 272 (1932); Steever, *The Control of Labor Through Union Discipline*, 16 CORN. L. Q. 212 (1931); Note, 56 YALE L. J. 1048 (1947); Comment, 45 YALE L. J. 1248 (1936).

12. For disciplinary provisions in union constitutions approved by one organization, see AMERICAN CIVIL LIBERTIES UNION, *op. cit. supra* note 8, SUPP. at 3-5.

13. Legal protection and encouragement of unionism contained in federal and state labor relations acts is often asserted as the justification for government action. *E.g.*, see SEIDMAN, *op. cit. supra* note 11, at 206. Indeed, a union certified as bargaining representative by the state has been termed an "agency" of the federal government and therefore subject to the Fifth Amendment. *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831 (1946); Note, 56 YALE L. J. 731 (1946). But suppose unions choose to forego their legal rights, as has been done by certain unions which refuse to submit non-Communist affidavits required by § 9(h) of the Taft-Hartley Act. N. Y. Times, May 18, 1948, p. 17, col. 4 (United Steelworkers, CIO). Or suppose all laws protecting unions are repealed. Many unions would still retain economic power and wield great influence over workers. Hence it would seem preferable to look to the prevalence of union power and internal abuses rather than to a notion of legal reciprocity to justify societal intervention. *Cf. Rice v. Elmore*, 165 F. 2d 387 (C.C.A. 4th 1947), *cert. denied*, 68 S. Ct. 905 (1948) (political party not a "private club," although all state laws regulating primaries repealed, and may not restrict primary voting); *Smith v. Allwright*, *supra* note 2.

One writer, who reflects union sentiment, opposes extension of judicial, and presumably administrative, review of union disciplinary actions as "an unnecessary interference . . . with the internal affairs of unions. . . . To ask a court to substitute itself for a union tribunal is to invite the ultimate destruction of the union itself." Thatcher, *Shall We Have More Regulation of the Internal Affairs of Labor Unions?* 7 LAW GUILD REV. 14, 16 (1947). For instances in which courts' antipathy to unions has influenced decisions, see Comment, *Disputes Within Trade Unions*, 45 YALE L. J. 1248, 1266 (1936).

his private government, the union.¹⁴

Most internal unions have found it possible to compromise,¹⁵ to retain sufficient disciplinary powers while generally maintaining self-imposed standards of "fair play"¹⁶ toward a member allegedly erring. Internal remedies are available to curb deviations by subordinate locals.¹⁷ But no machinery exists within either the AFL or the CIO for an impartial appeal from a final decision of an affiliated international union which violates or tolerates violations of common notions of "due process." Where internal remedies have been unavailable,

14. Even unions which operate under democratic disciplinary processes may be tempted to depart therefrom in the heat of internal political and ideological strife prevalent today in some unions. An instance of such strife within Local 301 of the United Electrical Workers, C.I.O. is contained in the files of the American Civil Liberties Union (expulsion of leaders of anti-Communist faction). See also N.Y. Times, June 4, 1948, p. 1, col. 2 (expulsion of anti-Communist leaders from Local 3, Retail, Wholesale and Department Store Union, C.I.O.). Moreover, certain unions are gradually being forced to change their discriminatory admission policies. AMERICAN CIVIL LIBERTIES UNION, LIBERTY ON THE HOME FRONT 44 (1945); Note, 56 YALE L. J. 731, 735 n. 29 (1947). These democratic gains might be negated if unions are permitted to expel arbitrarily workers begrudgingly admitted to membership.

15. The great majority of unions are free of disciplinary abuses. AMERICAN CIVIL LIBERTIES UNION, *op. cit. supra* note 8, at 39. "Although arbitrary action . . . against . . . members is certainly not unknown, it can not be called common. Our present information furnishes no basis for estimates." Taft, *supra* note 9, at 376. ". . . machinists, printers, railway unions, hatters, some of the garment trades, and a number of other unions are not in danger of abuse of power by the top officials. It would be unsafe to say as much for the unions in the building trades and in the coal-mining industry." *Id.* at 385.

16. Union disciplinary procedures usually provide for filing of specific charges in writing, membership referral of charges to a trial committee, timely notice of charges to the accused, and a hearing thereon. Each side may select counsel from among union members, and some unions permit members of the trial committee to be challenged. The accused has the right to present evidence and to cross-examine prosecution witnesses. A trial committee verdict—majority vote usually suffices—is generally no more than a recommendation to the next local meeting at which the accused must be present. An accused in effect thus receives a second hearing when he appears before the membership which may accept, reject or amend the recommendations by either a majority, two-thirds, or three-fourths vote. If a verdict of guilty is approved, a penalty of a fine or reprimand usually requires a majority vote, while a two-thirds or three-fourths vote is required for suspension or expulsion. Taft, *supra* note 9, at 381-4. In some unions, the national president, executive board, or both, may initiate and hear charges against members of subordinate units. "Even when the authority to try members is not expressly given, the general officers can force the locals to act, because they usually have the authority to intervene in the affairs of the union and to suspend and replace officers." *Id.* at 384. See also Shister, *supra* note 10 at 100, n. 6.

17. Virtually all unions permit appeals by either accuser or accused. The usual line of appeal from original verdicts of locals is to the national president, executive board, and the convention. Shister, *supra* note 10, at 100, n. 6. Some unions do not enforce the penalty while an appeal is pending, other unions do, and the constitutions of several unions are silent on this matter. Taft, *supra* note 9, at 383. Union appeals machinery has been criticized as too slow and complex. Reynolds, commenting on Taft, *Democracy in Trade Unions*, 36 AM. ECON. REV. SUPP. 359, 383 (1946); Chamberlain, *supra* note 10, at 168.

or have failed to remedy abuses, the aggrieved have resorted to the courts. Their reception has not always been cordial.

Dame, a union member and officer, was accused of breaching the union's secrecy provisions,¹⁸ an offense punishable by expulsion.¹⁹ The constitution provided no procedure for such disciplinary action. Notified to attend an apparently routine executive board meeting,²⁰ Dame, like the Oysters invited to dine, was kept in ignorance of the purpose of the gathering. Suddenly confronted with the charges placed against him, he refused to stand trial without preparation. Nevertheless, by a narrow seven-to-six vote, Dame was expelled from the union, and, though he did not lose his job, was deprived of the emoluments and prestige of his union offices.²¹ By-passing a potential internal appeal,²² Dame brought against the union a mandamus action for reinstatement, *State ex rel. Dame v. Le Fevre*.²³

In securing an adjudication on the merits, Dame was in a sense fortunate. Many similar complainants seeking reinstatement have, by failing to comply with various technical requirements, been denied a determination of the actual due process issue. Non-exhaustion of internal union appeal machinery appears to be the most frequent ground for dismissing complaints.²⁴ Some courts have

18. "All business of the union shall be kept strictly private from persons who are not members of the union, unless publication . . . is authorized by the general executive board or general council." Const., Telephone Guild of Wisconsin, Art. IV, § 4(B) (1938). Dame's alleged infraction arose out of his forwarding to the Telephone Company a resolution passed by the Racine district—headed by Dame—criticizing the manner in which Guild officers were negotiating with the company. The resolution directed only that a copy be sent to the executive officers and that it be published in *The Guild News*. *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W. 2d 349, 352-3 (1947).

19. "Any violation of this section shall be punished by assessment, suspension or expulsion as the general executive board may decree." Const., Telephone Guild of Wisconsin, Art. IV, § 4(C) (1938).

20. The meeting was called by the general president at the instance of the Milwaukee locals which desired to bring Dame to trial. Brief for Appellants, p. 134, *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W. 2d 349 (1947).

21. As president of his local, Dame was entitled to \$1.00 per regular and special meeting, and to \$30.00 per year as chairman of his district council. Const., Telephone Guild of Wisconsin, Art. V, § 4(10). Article II, B authorizes the union to render aid "to members who are sick or in trouble," but this provision had not been put into practice at the time of suit. Brief for Appellees, p. 22, *State ex rel. Dame v. LeFevre*, 251 Wis. 146, 23 N.W. 2d 349 (1947).

22. "All acts of the general executive board shall stand as the acts of the general council unless reversed by that body." Const., Telephone Guild of Wisconsin, Art. VI, § 2(A) (3) (1938).

23. 251 Wis. 146, 28 N.W. 2d 349 (1947).

24. The general rule is that an aggrieved member may not resort to the courts until he has exhausted internal union remedies as provided in the union constitution even if hardships might result. *Dragwa v. Federal Labor Union No. 23070*, 136 N.J. Eq. 172, 41 A.2d 32 (1945) (general rule applied where "property rights" involved); *Bush v. International Alliance of Theatre Stage Employees*, 55 Cal. App. 2d 357, 130 P.2d 783 (1942) (relief denied where plaintiff failed to appeal to convention after having appealed to international president and executive board); Note, *Exhaustion of Remedies Within Labor Union as Condition of Resort to Civil Courts by Expelled or Suspended Member*,

refused to entertain mandamus actions against unincorporated unions operating without a "franchise" from the sovereign.²⁵ A philosophic determination

168 A. L. R. 1462, 1463 (1947). However, the exceptions to this rule are legion. While the rule covers actions for specific relief, an action for damages is exempt on the theory that internal reversal of a penalty would not fully redress injury to "property rights." *Id.* at 1482; *Smith v. International Printing Pressmen & Assistants' Union*, 190 S.W.2d 769 (Tex. Civ. App. 1945); *rev'd on other grounds*, 198 S.W.2d 729 (Tex. 1946). Even in actions for specific relief, "if property rights are involved, in the absence of an express agreement to exhaust the remedies . . . the member may resort to the courts. . . . [Likewise] if [the remedies] would be futile, illusory or vain." *Nissen v. International Brotherhood of Teamsters etc.*, 229 Iowa 1028, 1042-3, 295 N.W. 858, 866 (1941). "Also if the action of the association is wrongful, or without jurisdiction, or is without notice or authority, or not in compliance with the rules or constitutional provisions, or is void for any reason. . . ." *Id.* at 1043, 295 N.W. at 867 (citing cases). See also *Leo v. Local Union No. 612 of International Union of Operating Engineers*, 26 Wash. 2d 498, 174 P.2d 523 (1946) (court has jurisdiction where entire proceeding void because charge not authorized by union constitution); *Local Union No. 57, Brotherhood of Painters, Decorators and Paperhangers v. Boyd*, 245 Ala. 227, 236, 16 So. 2d 705, 712 (1944) (delay in meeting of executive board). Witmer has criticized the growth of so many exceptions to the rule. *Supra* note 8, at 630, n.35.

The issue of exhausting internal remedies was not discussed in the *Dame* case. However, the court below held plaintiff's internal remedy to have been "vague and inadequate." Opinion quoted in Brief for Appellants, p. 101, 114, *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W. 2d 349 (1947). See note 22, *supra*.

25. While mandamus will issue to an incorporated union as a "creature of the state," it will generally not issue to an unincorporated union. A member of the latter has only a "private contract right," and he must seek specific relief in equity. OAKES, *THE LAW OF ORGANIZED LABOR & INDUSTRIAL CONFLICTS*, § 66 (1927); Note, *Mandamus to Compel Reinstatement of Suspended or Expelled Members of Labor Union*, 141 A.L.R. 617, 618 (1942). An exception in some states permits mandamus to issue to an unincorporated union if "property rights" are involved. *Smetherham v. Laundry Workers' Union*, Local No. 75, 44 Cal. App. 2d 131, 111 P.2d 948 (1948) (right to a job); *Nissen v. International Brotherhood of Teamsters, etc.*, 229 Iowa 1028, 295 N.W. 858 (1941) (same). But an action of mandamus is made equitable by statute in Iowa. II CODE OF IOWA, § 661.3 (1946).

A recent case holding that a union officer has a "vested right" to his office and allowing mandamus to issue, seems to abolish the paper distinction between incorporated and unincorporated unions. ". . . [Labor] organizations are no longer comparable to voluntary fraternal orders, . . . they are *sui generis*, and approximate corporations in their methods of operation and powers." *Elevator Operators and Starters Union, Local 117 v. Newman*, 180 P. 2d 42, 48 (Cal. App. 1947); *modified*, 186 P. 2d 1 (Cal. 1947). *But cf.* 1 TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* 291 (1940) (incorporated unions governed by the law of corporations, and unincorporated unions by the law of voluntary associations). Yet cases involving both types of unions are cited interchangeably in the reports, which indicates the distinction is not as sharp as drawn by Teller. *E.g.*, see cases cited in *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931).

Plaintiff in the *Dame* case hoped that the Wisconsin courts, on a question of first impression, would consider state statutory control of unions justification for disregarding the distinction, and allow mandamus to issue to the unincorporated defendant union. Alternatively, he relied on the "property rights" exception to the rule, on the ground he was deprived of potential benefits under Art. II, § B of the Guild constitution (see note 21, *supra*), and of the aid of the Guild in controversies with his employer. Brief for Appellees pp. 21-2, *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W. 2d 349 (1947).

The court below in granting mandamus, upheld plaintiff on both theories and said:

that "property rights" are not involved—an independent ground for denial of equitable relief²⁶—has been coupled as an additional ground for dismissal.

"the court may well take judicial notice . . . that membership itself in an association [like] . . . the Guild . . . , with its necessary incidents . . . is a valuable property right." Opinion quoted in Brief for Appellants, p. 101, 104. See discussion of "property rights," note 26 *infra*.

26. The "property rights" requirement was early applied to a suit for reinstatement in a union. *Rigby v. Connol*, 14 Ch. Div. 482 (1880). Professor Chafee has seemingly interpreted denial of relief in this case as standing for the proposition that union membership does not involve "property rights." Chafee, *Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1001 (1930). While the decision may be explained by plaintiff's failure to allege injury to property, the court relied too on broader grounds. Even in this early case plaintiff's right to participate in benefit funds was recognized as "property rights" which equity would protect. But relief was precluded by the Trades Union Act of 1871, and by the fact that the union was an unlawful association. *Rigby v. Connol*, *supra* at 487.

Although Dean Pound has pointed out the fictional nature of the "property rights" requirement, Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 678 (1916), it finds uniform acceptance in the reports. Note, 168 A. L. R. 1462, 1479 (1947). Perhaps plaintiff in the *Dame* case eschewed equitable relief because of anticipated difficulty in demonstrating injury to "property." (In a mandamus action, plaintiff could rely on an alternative theory even if he failed to come under the "property rights" exception to the rule barring issuance of mandamus to unincorporated unions. See note 25 *supra*.) Yet few American cases have actually denied relief to wrongfully expelled union members or locals solely because "property rights" were not involved. *Cf. O'Brien v. Musical Mutual Protective & Benevolent Union, Local No. 14*, 64 N.J. Eq. 525, 54 Atl. 150 (1903).

Virtually all courts today recognize the right to a job, and interests in benefit funds as "property rights." Note, 168 A.L.R. 1462, 1479-82 (1947). An interest in the treasury surplus and property of a union is also considered "property." *Weiss v. Musical Mut. Protective Union*, 189 Pa. St. 446, 42 A. 118 (1899) (incorporated union); *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y.S. 336 (1st Dept. 1931) (unincorporated union); *McNichols v. International Typographical Union*, 63 F.2d 490 (C.C.A. 7th 1933). But *cf. Hall v. Morrin*, 293 S.W. 435 440, (Mo. App. 1927) citing *State ex rel. Hyde v. Jackson County Medical Soc'y*, 295 Mo. 144, 243 S.W. 341 (1922) (relief denied because plaintiff had no severable proprietary interest in real estate owned by society).

Seniority rights have been called "contract rights" in the past, but the tendency is to regard them as "property." Note, 142 A.L.R. 1055, 1060-61 (1943). Some courts refer to the benefit of collective bargaining as a "property right." *Obergfell v. Green*, 29 F. Supp. 589, 591 (1939); Note, 49 YALE L. J. 329 (1939); *rev'd on other grounds*, 121 F.2d 46 (App. D.C. 1941). Even internal incidents of union membership are labelled "property rights" by some courts. *E.g., Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941) (member has enforceable interest in union election and accounting of union funds as required by union constitution). But *cf., Carey v. International Brotherhood of Paper Makers*, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924) (dispute over election returns for office carrying annual salary of \$5,000 does not involve property rights). The *Dusing* case apparently adheres to the theory that a "contract of membership" is a sufficient "property" interest to warrant equitable relief for its breach. *Krause v. Sander*, 66 Misc. 601, 122 N.Y. Supp. 54 (Sup. Ct. 1910). "The courts seem to feel that the presence of a contract overcomes the orthodox difficulty of giving relief, when the member would otherwise be held to have only interests of personality." Chafee, *supra* at 1002. However, one writer disputes the notion that courts "protect the contract as property. They enforce it specifically because damages for its breach would be inad-

Availability of the remedy of damages²⁷ may be negated by procedural difficulties in suing the union.²⁸ Moreover, damages would seem an inadequate remedy when reinstatement is desired. The court in the *Dame* case, however, attacked the merits of the case, liberally asserting its willingness to grant whatever legal or equitable relief it found to be warranted by the facts.²⁹

But no relief was found warranted. The Wisconsin Supreme Court conceived the issue as one of implying into the union constitution a requirement that plaintiff be accorded "the requisites of a common law hearing." In a unanimous reversal, it held plaintiff was not entitled to "the requisites of a common law hearing," since none was provided for in the "contract" of mem-

equate." WALSHE, EQUITY 276 n. 38 (1930). Dean Pound has criticized the "contract theory" of equitable jurisdiction as inexpedient "from the standpoint of dispatch of public business in the courts." Pound, *supra* at 680-1. One court states in a dictum that equity may protect *personal* and property rights of individuals in their membership. American Federation of Labor v. Mann, 188 S.W. 2d 276, 286 (Tex. Civ. App. 1945).

Thus in the borderline situation of the principal case where plaintiff retained his job and the union had no benefit funds, it would require a liberal construction of "property rights" to obtain equitable relief, even if the expulsion be wrongful. Suits for injunctive relief by members against their own unions have been held not to constitute "labor disputes" within anti-injunction statutes. Note, *Suit Between Labor Organizations or Members Thereof as Involving A Labor Dispute Within Anti-Injunction Statutes*, 138 A.L.R. 287, 297 (1942). *But cf.* Obergfell v. Green, 121 F. 2d 46 (App. D.C. 1941).

27. It is generally held that one unlawfully expelled or suspended from a union may sue for damages. Note, *Liability of Labor Union or its Members for Unlawful Suspension or Expulsion of Member*, 62 A.L.R. 315 (1929). The advantage of such a suit, when reinstatement is not desired, is that it is excepted from the rule requiring exhaustion of internal remedies. See note 24 *supra*. In addition to direct damages, judgments have been awarded for mental anguish, loss of participation in membership activities, and as punishment for malice. *Id.* at 316-17.

28. The rule that unincorporated unions are not suable as entities at law persists in some states, although abrogated by statute in most states, including Wisconsin. 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, §§ 462, 465 (1940 and Cum. Supp. 1947); Cole, *The Civil Suability, At Law, Of Labor Unions*, 8 FORD. L. REV. 29, 32-3 nn. 17-19 (1939). In the absence of statute, a class suit in equity is often available to secure judgments against union funds. Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L. J. 40, 43-46 (1941). But some jurisdictions forbid a member to sue his union for damages. *Id.* at 63. On procedural difficulties as to necessary parties in a class suit, see McMurray v. Brotherhood of R.R. Trainmen, 54 F.2d 923 (C.C.A. 3d 1931); Brotherhood of R.R. Trainmen v. Price, 108 S.W.2d 239 (Tex. Civ. App. 1937). Though a union be suable, a money judgment may be difficult to obtain. In New York, damages for wrongful expulsion are obtainable only on proof of fraud or bad faith on the part of the membership as a whole. Browne v. Hibbets, 290 N.Y. 459, 467, 49 N.E. 2d 713, 717 (1943). See generally, Witmer, *supra*; Note, *Liability of Unincorporated Labor Organization to Suit*, 149 A.L.R. 508 (1944). See note 48 *infra* for the federal practice.

29. State *ex rel.* Dame v. LeFevre, 251 Wis. 146, 28 N.W. 2d 349, 351-2 (1947). A decision as to the proper remedy was made unnecessary by the court's ruling on the substantive issue. Left unanswered were the questions of whether mandamus may issue to an unincorporated union (see note 25 *supra*), and whether plaintiff had sufficient "property rights" to warrant equitable relief (see note 26 *supra*). Presumably damages would be granted, even if these questions were answered in the negative (see note 27 *supra*).

bership, the union constitution; and the "due process clauses of the state and federal constitutions are not applicable to contract relationships between individuals."³⁰

In this context, a Willistonian contract rationale seems peculiarly inapposite. One may seriously question the doctrinal validity of applying standard *quid pro quo* contract concepts to legal problems concerning the relations even between truly voluntary organizations and their members.³¹ Relatively insignificant social consequences obtain when the contract analogy is restricted to genuinely voluntary associations. But to apply to unions what is at best a dubious analogy in field of voluntary organizations, it is necessary to categorize unions as "voluntary." Commendable conclusions seldom derive from unrealistic premises. If it is necessary to reason by analogy, reference of the relations between union and member to the analogous relations between state and citizen has the advantage of reality and the effect of focusing attention upon the very real issues of operating democracy which are raised by litigation like the *Dame* case—issues which are totally submerged by talk of "contract relationships between individuals."

Furthermore, few courts adopting the "contract" theory have applied it in the undiluted form manifested in the *Dame* decision.³² Delimited though review be under this judicial "hands-off" policy,³³ it has been broad enough in

30. *Id.* at 28 N.W.2d at 353. *But cf.* *Marsh v. Alabama*, 326 U.S. 501 (1946) (First Amendment protects sidewalk evangelists in company town); *Smith v. Allwright*, 321 U.S. 649 (1944) (political party is more than private club as regards restrictions on primary voting); *Rice v. Elmore*, 165 F.2d 387 (C.C.A. 4th 1947), *cert. denied*, 68 S.Ct. 905 (1948); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946) (see note 13 *supra*); *Hurd v. Hodge*, 68 S. Ct. 847 (1948) (court will not enforce private restrictive covenants). See also Comment, *Federal Power to Prosecute Violence Against Minority Groups*, 57 YALE L. J., 855 (1948); Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344, 352 (1948) ("Whether or not it ever was the law, it is not true today that 'Individual invasion of individual rights is not the subject matter of the Amendment.'")

31. Professor Chafee has trenchantly criticized application of the "contract theory" not only to labor unions, but to any voluntary association. Chafee, *supra* note 26, at 1001-07. "The member's 'contract' . . . is often a legal fiction which prevents the courts from considering . . . genuine reasons for and against relief." *Id.* at 1007.

32. Adherence to the contract analogy would require courts to review disciplinary proceedings de novo, to interpret the terms of the constitution, and to enforce expulsions conforming to the contract even though motivated by malice and/or lacking in procedural due process. *Id.* at 1004-07. But courts do not follow such rules under the law of voluntary associations. See note 33 *infra*.

33. Courts assert they will not review the merits of the decisions of union tribunals or their interpretation of valid union rules. *Local Union No. 57, Brotherhood of Painters, Decorators and Paperhangers of America v. Boyd*, 245 Ala. 227, 234, 16 So.2d 705, 711 (1944). *But cf.* *Gordon v. Tomei*, 144 Pa. Super. 449, 466, 19 A.2d 588, 596 (1941) (courts must make own interpretation of union rules and legal relations of members). Review is confined to whether the member received a fair trial upon proper and substantial charges prosecuted in good faith and supported by evidence. *OAKES, op. cit. supra* note 25, § 61. However, even this limited review permits courts to supplement, modify or disregard the consensual elements of the relation between the member and his

the past to permit courts accepting jurisdiction to impose fairly adequate procedural standards by the familiar device of implying conditions into the contract,³⁴ proceedings lacking notice or hearing, even if expressly sanctioned by the union rules, have been held void.³⁵ But the Wisconsin court refused to imply common standards of "fair play" where the union constitution was merely silent on the matter of disciplinary procedure, and thus narrowed even the limited interference usually permitted by the "contract" theory.

Though the case represents an extreme example of the "hands-off" attitude, a modified policy of non-intervention is perhaps as much as can properly be executed by the judiciary. The many legal obstacles placed before the expelled union member seeking redress are clearly protective devices reflecting the courts' recognition of their inability to administer a program of more extensive review,³⁶ or to cope with the complex internal disputes which underlie many disciplinary actions. The judiciary is justifiably wary of tangling with conflicts over political ideology, contests for union leadership, organizational rivalries, struggles over economic militancy and clashes between local and national

union. Chafee, *supra* note 26, at 1005. An expulsion must be in accordance with the "contract of membership," but in addition the rules and proceedings must not be contrary to "natural justice." *Id.* at 1014.

34. "Whether or not the by-laws of an association provide for it, a member is entitled to know the charges against him, . . . to an opportunity to be heard, and a fair trial." *Glauber v. Patof*, 183 Misc. 400, 402, 47 N.Y.S.2d 762, 763 (Sup. Ct. 1944). Indeed, a Texas court felt constrained to reverse itself on rehearing to maintain consistency of American authorities as to the need for notice and hearing. *United Brotherhood of Carpenters and Joiners of America v. Carpenter's Local Union No. 14*, 178 S.W. 2d 558, 569 (Tex. Civ. App. 1944). Even a de facto member is entitled to such rights. *Leo v. Local Union No. 612 of International Union of Operating Engineers*, 26 Wash. 2d 498, 174 P.2d 523 (1946). See also *Coleman v. O'Leary*, 58 N.Y.S. 2d 812 (Sup. Ct. 1945) (charges must specify act allegedly done by accused; member of trial committee may not act as witness or prosecutor); *Cohen v. Rosenberg*, 262 App. Div. 274, 27 N.Y.S. 2d 834 (1st Dept. 1941) (expulsion voided where trial board prejudiced); *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S.2d 114 (1st Dept. 1940) (accused has right to confront witnesses against him); *Gordon v. Tomei*, 144 Pa. Super. 449, 19 A.2d 588 (1941) (prosecution must not be motivated by malice); *Gallagher v. Monaghan*, 58 N.Y.S. 2d 618 (Sup. Ct. 1945) (violation of "natural justice" for president of international union to order accused to stand trial in distant city). However, accused's counsel may be excluded from union trial, see *Morgan v. Local 1150, United Electrical, Radio and Machine Workers*, 72 N.E.2d 59 (Ill. 1947), and double jeopardy is permitted if authorized by union rules. *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S.E. 580 (1919). *But cf. Rueb v. Rehder*, 24 N.M. 534, 174 Pac. 992 (1918). For additional cases see *Witmer, supra* note 8, at 632-3 nn. 36-41; Note, *The Elements of a Fair Trial in Disciplinary Proceedings by Labor Unions*, 30 COL. L. REV. 847, 856-9 (1930).

35. See cases cited *Witmer, supra* note 8, at 632, n. 36.

36. *Pound, supra* note 26, at 680. Bulging court dockets and delays in the administration of justice are continuing problems and sources of adverse criticism of the judiciary. REP. ATT'Y GEN. 1-6 (1937); *Barns, Efficient Court Structure is Chief Present Need*, 22 J. AM. JUD. SOC'Y 251, 254 (1939). While contraction of jurisdiction enables courts to stem the tide of such criticism, it is at the cost of leaving an aggrieved member remediless.

power.³⁷ It cannot be expected that the courts will so far retreat from their present diffidence as to provide satisfactory procedural standards for the protection of the individual union member.³⁸ The time and expense of a court action, the general unavailability of a stay of union disciplinary orders pending exhaustion of internal remedies,³⁹ and the inadequacy of the remedy in damages further underscore the need for a more effective instrument to supervise union disciplinary procedures.⁴⁰

An indirect and perhaps ill-considered attack on the problem has been made by the Labor-Management Relations Act, 1947 (the Taft-Hartley Act).⁴¹ On its face, the new Act embodies a "hands-off" policy by protecting "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."⁴² Specifically rejected by Congress was a proposal in the House version of the bill to make it an unfair labor practice for a labor organization to "expel or suspend any member without affording him an

37. AMERICAN CIVIL LIBERTIES UNION, *op. cit. supra* note 8, at 35-40; Comment, *Disputes Within Trade Unions*, 45 YALE L. J. 1248 (1936).

38. Where relief has been granted, adequate standards of "fair play" have evolved. But courts would seem to lack the special competence to dispose of underlying substantive issues in the vocabulary of procedural "due process." See Steever, *supra* note 11, at 221. "Few are the issues of procedural due process . . . that have not been raised where a union's judgment has been attacked in court." Witmer, *supra* note 8, at 632.

Different standards may be necessary for unions at different stages of organization. Too, domination of union tribunals may enable union officials to pay lip service to both procedural and substantive "due process" and still discriminate against an accused. Particularly is this possible where tribunals are hand-picked by the president who may also be the accuser. See Chamberlain, *supra* note 10, at 162-5. Expertise is demanded in the handling of such problems.

39. *But cf.* Powell v. United Ass'n of Plumbers, and Steamfitters, 240 N.Y. 616, 143 N.E. 728 (1925) (consolidation of local unions stayed pending appeal to convention).

40. Recourse to administrative agencies by ousted members is generally fruitless. In Massachusetts, however, an employee expelled from a union may appeal to the State Labor Relations Commission before he is discharged from his employment under a union-security contract. The Commission may order a union, in the union's discretion, to restore the employee to membership, or to refrain from seeking his discharge. Mass. Acts 1947, c. 657, §§ 1, 2, 6, amending Mass. Gen. Laws c. 150 A (1932). See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 295-6 (1948). Certain agencies may exercise informal persuasive powers with unions in this connection. See, e.g., Glauber v. Patof, 183 Misc. 400, 403, 47 N.Y.S. 2d 762, 764 (1944) (New York State Labor Relations Board requested union to reconsider an expulsion which occurred without notice or hearing). Federal and state labor relations boards could bring indirect pressure for reinstatement by refusing to certify a union which violates procedural "due process" as collective bargaining representative. This is NLRB policy as regards unions which practice discriminatory admission policies. 10 N.L.R.B. ANN. REP. 17-8 (1946). However, it is questionable whether Congress intended for the Board to use such indirect pressure to force reinstatement under the Taft-Hartley Act since Section 8(b)(1) insulates internal union affairs from Board interference.

41. Pub. L. No. 101, 80th Cong., 1st Sess. (1947) 29 U.S.C.A. § 141 (Cum. Supp. 1947), hereafter referred to by section number only.

42. § 8(b)(1).

opportunity to be heard."⁴³ Nevertheless the Act does place an effective curb on union disciplinary proceedings, for it makes it an unfair labor practice for a union to discriminate against, or cause an employer to discriminate against, an employee expelled from the union for any substantive reason other than his failure to pay dues and initiation fees.⁴⁴ An employer is also guilty of an unfair labor practice if he bows to union pressure and discharges such an employee.⁴⁵ By according job protection even to members expelled after a fair trial on reasonable substantive grounds, the Act vitiates the union's strongest disciplinary sanction.⁴⁶ It thus becomes less hazardous for members who would destroy the union to engage in disruptive activities—a result hardly balancing the conflict between the polar objectives of individual democracy and group discipline.⁴⁷

On the other hand, the unfairly expelled union member is left without suitable relief under the Act. Although he is somewhat aided by the statute in a damages action against the union,⁴⁸ he must still rely for reinstatement on the

43. H. R. 3020, 80th Cong., 1st Sess. § 8(c) (6) (1947). The "Limitations" section of the Act, which acquiesces in state anti-strike and anti-union shop laws, is silent on the effect of the Act on state regulation of internal union affairs. §§ 13 and 14 (b). It is therefore arguable that Congress intended to pre-empt the field and make the internal affairs of unions which "affect" interstate commerce free from state as well as federal control. It is more probable, however, that a Congress which otherwise placed many curbs on unions meant only to free unions from NLRB control of internal affairs, and to leave undisturbed existing state statutory and judicial regulation thereof.

44. § 8(b) (2). The provision enjoining union discrimination against the employee apparently embodies the "fair representation" principle of the *Steele* and *Tunstall* cases. A union certified as exclusive bargaining representative must bargain in good faith for non-union as well as union workers under this theory of "representation without representation." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944). Attempts by unions to blacklist-expelled members would also seem to be prohibited.

45. § 8(a) (3). One writer warns that this provision will encourage employers to meddle in internal affairs of unions. Watt, *The New Deal Court, Organized Labor, and the Taft-Hartley Act*, 7 LAW GUILD REV. 193, 211 (1947). While an expellee is thus protected in his job, other very important incidents of union membership remain unprotected. See notes 6 and 7 *supra*.

46. Union sanctions may include reprimand, fine, suspension, expulsion and discharge under a union security agreement. See note 16 *supra*. "We may in many cases be willing to see the recalcitrant member expelled from the bargaining organization where we should object to his being deprived of an accustomed livelihood. We may in other instances conclude that even the pressure of expulsion alone ought not to be permitted. And we may quite often believe that the union should be free to impose whatever discipline it chooses." Witmer, *supra* note 8, at 627. These difficult questions would seem best left for determination in each case by an expert body if societal supervision of substantive grounds for discipline were instituted.

47. Not only are employer spies and/or dual unionists protected in their jobs; but if the union is a certified bargaining representative, it is duty bound to represent them on a non-discriminatory basis. See note 44 *supra*.

48. § 301(b). "Any labor organization which represents employees in an industry affecting commerce . . . may sue or be sued as an entity . . . in the courts of the United

judicial remedy, the inadequacies of which remain unaffected. It may even be questioned whether state courts will continue their limited interference with procedurally defective expulsion proceedings since the right to a job—the main “property right” motivating equity court interference in the past—⁴⁹ is protected by the Act.

The present insufficiency of judicial and statutory machinery begs more fundamental Congressional action. A statute requiring unions to adhere to specified high standards of procedural “due process,” such as has been passed in one state,⁵⁰ would seem to represent an effective solution. Enforcement of the legislation could best be lodged, not in the courts, but in the National Labor Relations Board, with authority to prosecute violations as unfair labor practices.⁵¹ It would also seem advisable to provide for stay of union penalties pending internal union and NLRB review, in order to mitigate economic and social damages.⁵²

Failure of Board efforts at informal settlement⁵³ would bring formal complaint procedures⁵⁴ into action in behalf of a victimized member, thus sparing him the expense of court litigation. Coverage would be nationwide, an evolving uniformity of standards adjusted to the needs of unions at different stages

States. Any money judgment . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.” Prior to the Act, unions were classified as entities for federal jurisdictional purposes only if a federal question were involved, or if unions were so classified under state law. FED. R. CIV. P., 17 (b).

49. See note 26 *supra*.

50. TEX. REV. CIV. STAT. ANN., tit. 83, art. 5154a, § 10 (Vernon, Supp. 1946). Enforcement of a reinstatement provision is through the courts, which mars the statute's effectiveness. However, § 11 making violation of the statute a misdemeanor may serve—aside from deterring abuses—as an indirect pressure to compel reinstatement. Section 11 is enforceable only by a state official. *Lundine v. McKinney*, 183 S.W. 2d 265, 273 (Tex. Civ. App. 1944). Compare the Massachusetts statute, note 40 *supra*.

51. This method of enforcement was embodied in a proposed bill covering all phases of internal union democracy. AMERICAN CIVIL LIBERTIES UNION, BILL TO AMEND THE NATIONAL LABOR RELATIONS ACT, (1947). A purpose of the bill was to avoid the need for outlawing the closed shop by promoting internal democracy. Labor acceptance of such a bill might well have avoided the more restrictive provisions of the Taft-Hartley Act.

52. A bond could be posted by the union in situations where it is necessary for sanctions to be enforced at once, *e.g.*, during a strike, or during a life and death struggle with a rival union.

53. An informal conference of interested parties to an unfair labor practice charge—employer, union, complaining member—is usually arranged where each party can openly state his position without being held to any admissions made. Such discussion often sets the groundwork for a voluntary settlement. ATT'Y GEN'S COMM. AD. PROC., NLRB MONOGRAPH No. 18, 10-12 (1940). This practice is largely responsible for the commendable record of the Board in closing 93 percent of the unfair labor practice charges at the informal level in the fiscal year ending June 30, 1947. 12 N. L. R. B. ANN. REP. 2 (1947). It would appear that a procedure capable of effectively settling charges against employers would be equally effective in disposing of charges by members against unions, and in educating union leaders in the standards of “fair play” required by law.

54. ATT'Y GEN'S COMM. AD. PROC., NLRB MONOGRAPH No. 18, 18-73 (1940).

of development would simplify the task of union compliance, while enforcement would be facilitated by the expertise and experience of the NLRB.

In this way the rights of individuals deprived of the significant incidents of union membership without procedural "due process" could be protected, while the union's disciplinary sanctions would remain unfettered. Development of substantive standards whereby the exercise of union discipline may be judged must be a process of slow accretion.⁵⁵ A more limited, but nevertheless valuable democratic objective is obtainable today—procedural due process.⁵⁶

DISCLOSURE REQUIREMENTS IN OVER-THE-COUNTER TRADING*

THE INABILITY of non-professional investors to discover independently the market price of securities traded off the exchanges has presented the Securities and Exchange Commission with a major problem in investor protection.¹ In theory, information about over-the-counter price movements is available to the public from the "specialists," who perform the function of exchanges

55. It is of course possible for union officials arbitrarily to expel members on vague substantive grounds while adhering to high procedural standards. Experience under a system of efficient enforcement of procedural "due process" would provide necessary data for a judgment as to the feasibility of societal supervision of substantive grounds for discipline through an administrative agency.

56. The possibility of undue interference in internal affairs and fettering of disciplinary proceedings with a myriad of technicalities by over-zealous administrators should be recognized. Suggestions have been made that unions form a court composed of impartial friends of labor to which aggrieved members could resort for quick review of final decisions within their unions. Taft, *supra* note 9, at 385. See also Mark Starr's comments on Taft, *Democracy in Trade Unions*, 36 AM. ECON. REV. SUPP. 359, 379 (1946). Such a court might utilize the services of impartial umpires in various industries to achieve nationwide coverage. Decisions of the court could be accorded the same status of conclusiveness given awards under arbitration agreements. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS, § 235 (1930). Action of this sort on labor's part might well head off societal interference.

* Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, Feb. 20, 1948, as supplemented by Securities Exchange Act of 1934 Release No. 4073, April 5, 1948.

1. A great majority of all bond transactions takes place in the over-the-counter market. And although exact figures are not available, the value and volume of other over-the-counter trading is known to be enormous. SEC, REPORT ON FEASIBILITY AND ADVISABILITY OF THE COMPLETE SEGREGATION OF THE FUNCTIONS OF DEALER AND BROKER 67 (1936) (hereinafter cited as SEC, REPORT). The number of stock and bond issues traded over-the-counter far exceeds that of securities listed on the exchanges. SEC, REPORT *supra* at 67; Lesh, *Federal Regulation of Over-the-Counter Brokers and Dealers in Securities*, 59 HARV. L. REV. 1237, 1239 (1946).

by their continued readiness to buy or sell particular securities.² In fact, the difficulty in locating the proper specialist forces the public to deal with broker-dealers on the basis of second-hand information furnished by them.³ Since the broker-dealers usually transact business as principals,⁴ investors must depend for protection on the integrity of their trading adversaries.

Such integrity has been encouraged by two enunciations of Commission policy. In *Matter of Duker and Duker*, the Commission revoked the license of a broker-dealer for "unreasonable" mark-ups over the current market price of securities.⁵ And the SEC has recently supplemented the *Duker* doctrine with specific disclosure requirements.

In *Matter of Arleen W. Hughes*,⁶ Mrs. Hughes, registered with the Commission as a professional investment adviser and a broker-dealer,⁷ traded for her own account with customers to whom she rendered paid advice. Despite the registrant's contention that a cryptically phrased memorandum afforded her clients sufficient notice of her capacity and of the cost and market price of securities handled as well, few of her customers had deduced these facts from

Characteristics of a security, which make it suitable for over-the-counter trading, include: 1) lack of speculative interest; 2) small capitalization; 3) limited distribution; 4) high price and 5) desirability for the portfolios of such institutions as insurance companies. TWENTIETH CENTURY FUND, *THE SECURITY MARKETS* 263 (1935). But small buyers also trade extensively in over-the-counter securities. See p. 1320 *infra*.

2. These dealers are "the medium through which supply and demand over a period of time set the price." DICE AND EITEMAN, *THE STOCK MARKET* 107 (1941). Their remuneration is the difference between the bid and asked prices quoted by them. LOESER, *THE OVER-THE-COUNTER SECURITIES MARKET* 43 (1940). For other aspects of the specialist's activities, see *id.* at 10-12, 35-46.

3. Ability to identify a particular security with its specialists derives primarily from trading experience of which the broker-dealers have a virtual monopoly. SEC, REPORT 65-6; TWENTIETH CENTURY FUND, *op. cit. supra* note 1, at 265. In addition to securing bid and asked prices directly from the specialists, broker-dealers derive some information from quotations circulated exclusively to them by private services. SEC, REPORT 65; TWENTIETH CENTURY FUND, *op. cit. supra* note 1, at 265; Lesh, *supra* note 1, at 1242-3.

4. Lesh, *supra* note 1, at 1240.

5. 6 S.E.C. 386 (1939). Under the theory behind the *Duker* decision a broker-dealer's entry into security transactions carries an implied representation that he will treat fairly with customers; when his prices are not reasonably related to current market conditions, his representation is fraudulent. For a collection of SEC decisions following the *Duker* case, see 10 SEC ANN. REP. 74, n. 56, 57 (1944). The *Duker* rule received judicial approbation in *Charles Hughes & Co., Inc. v. SEC*, 139 F.2d 434 (C.C.A. 2d 1943), *cert. denied*, 321 U. S. 786 (1944).

6. Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, Feb. 20, 1948, as supplemented by Securities Exchange Act of 1934 Release No. 4073, April 5, 1948.

7. "Use of the mails or any means or instrumentality of commerce" in connection with his business is denied to any broker-dealer or investment adviser who is not registered with the Commission. Securities Exchange Act, § 15(a), 49 STAT. 1377 (1936), 15 U.S.C. § 78o(a) (1940); Investment Adviser's Act, § 203(a), 54 STAT. 850 (1940), 15 U.S.C. § 80b-3(a) (1940).

the document's obscure terminology.⁸ Acting under the broad antifraud provisions of both the Securities Act and the Securities Exchange Act,⁹ the SEC revoked Mrs. Hughes' registration¹⁰ on the ground that a broker-dealer occupying a fiduciary relationship could not trade as principal with customers without disclosing his capacity, the cost to him and the market price of the securities he buys or sells.¹¹

8. The cost and market price information consisted of intricate formulae, solution of which demanded a high degree of mathematical competence. Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, *supra* note 6, at 1. Most clients considered the agreement to be thoroughly innocuous. It was "some legality 'that it was necessary for the office to go through with'; 'a protection'; 'just according to comply with the law'; or 'simply a business arrangement'." *Id.* at 13.

It does not appear, however, that Mrs. Hughes' mark-ups were unreasonable in any transaction.

9. Section 17(a) of the Securities Act of 1933 makes it illegal ". . . 1) to employ any . . . artifice to defraud, or 2) to obtain money or property by . . . any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading, or 3) to engage in any transaction . . . which operates . . . as a fraud or deceit upon the purchaser." 48 STAT. 84 (1933), 15 U.S.C. § 77q (1940).

Sections 10(b) and 15(c)(1) of the Securities Exchange Act outlawed "manipulative, deceptive or other fraudulent" devices and invested the Commission with power to define these malpractices. 48 STAT. 891 (1934), 15 U.S.C. § 78j(b) (1940); 49 STAT. 1378 (1936), 15 U.S.C. § 78o(c)(1) (1940). Subsequent Commission definitions, relied upon in the instant case, are a virtual paraphrase of the provisions of Section 17(a) of the Securities Act, *supra*. Rule X-10B-5, 17 CODE FED. REGS. § 240.10b-5 (Cum. Supp. 1944); Rule X-15C1-2, 17 CODE FED. REGS. § 240.15c-2 (1939), as redesignated, 17 CODE FED. REGS. 240.15c1-2 (Cum. Supp. 1944).

10. Revocation of broker-dealers' registration is authorized by § 15(b) of the Securities Exchange Act. 49 STAT. 1378 (1936), 15 U.S.C. § 78o(b) (1940). The violator is also subject to criminal penalties, Securities Exchange Act, § 24, 48 STAT. 87 (1933), 15 U.S.C. § 77x (1940); Securities Exchange Act, § 24, 48 STAT. 904 (1934), as amended, 15 U.S.C. § 78ff (1940); and to suits for rescission or money damages. Securities Exchange Act, § 29(b), 48 STAT. 904 (1934), as amended, 52 STAT. 1076 (1938), 15 U.S.C. § 78cc(b) (1940); *Geismar v. Bond & Goodwin Inc.*, 40 F. Supp. 876 (S.D.N.Y. 1941). *See Goldstein v. Groesbeck*, 142 F.2d 422, 427 (C.C.A. 2d 1944); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946).

Discovery of violations normally occurs in the exercise of visitorial powers granted to the Commission by § 17(a) of the Securities Exchange Act. 48 STAT. 897 (1934), as amended, 15 U.S.C. § 78q (1940). Of the 4,000 to 4,500 broker-dealers registered with the Commission over an ordinary twelve-month span, as many of 1,087 broker-dealer houses have been investigated in one year. 10 SEC ANN. REP. 70, 73 (1944), 11 SEC ANN. REP. 22 (1945); 12 SEC ANN. REP. 33 (1946).

11. By market price is meant the best bid or asked quotation ascertainable from specialists, in the exercise of "reasonable diligence." Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, *supra* note 6, at 7, 9, 19.

All disclosures must be made prior to completion of each transaction in a manner so clear that each client can be expected to understand their significance. The amount of information necessary to impart such understanding will vary according to the experience of the customer. *Id.* at 12, 14, 19. Rule X-15C1-1(b) defines "completion of the transaction" generally as the time when the security is delivered or payment is made, which-

Since professional investment advisors are universally conceded to be fiduciaries,¹² the finding of a fiduciary relationship in the instant case was inevitable. More difficult is a decision as to the existence of such a status when the advice is given without obligation to pay.¹³ For this determination the Commission, in the *Hughes* case, essayed a distinction by way of dictum between non-fiduciaries, whose advice is "incidental," and fiduciaries, whose advice follows the "cultivating of a position of trust and confidence."¹⁴ Conceivably, the "cultivation" category might embrace *all* attempts to instill trust, whether the attempts were successful or not. If so, virtually every broker-dealer would be labeled a fiduciary, since attempts at such instillation usually precede or attend the transmission of specific suggestions.¹⁵

But such a literal application of the "cultivation" yardstick seems unlikely

ever is last. 17 CODE FED. REGS. § 240.15c-1 (1939), as redesignated, 17 CODE FED. REGS. § 240.15c1-1 (Cum. Supp. 1944).

12. Registrant in the instant case admitted her fiduciary status. Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, *supra* note 6, at 7. For voluntary acknowledgement of this status by other professional investment advisers, see *Hearings before Committee on Banking and Currency on S. 3580, 76th Cong., 3rd Sess. 713, 719-20 (1940)*. See also Lee, *The Financial House And Its Customers*, 15 B. U. L. REV. 234, 237-8 (1935).

13. Even where there is a fiduciary relationship, it is highly improbable that the *Hughes* rule will apply to all transactions in unlisted securities. In 1942 the Commission circulated a proposed rule which would have required market price disclosure in every over-the-counter deal. Securities Exchange Act of 1934 Release No. 3940, April 2, 1947. The proposal was completely scrapped, however, on the questionable theory that transactions in securities specifically exempted from other provisions of the Securities Exchange Act, although not mentioned in the anti-fraud section pertaining to broker-dealers (§ 15(c)(1) *supra* note 9), were nevertheless beyond the reach of that provision. Securities Exchange Act of 1934 Release No. 3940, *supra*. For a listing of classes of "exempted securities" see Securities Exchange Act, § 3(a)(12), 48 STAT. 834 (1934), 15 U.S.C. § 78c(12) (1940).

The *Hughes* doctrine also appears unnecessary where the fiduciary does not trade for his own account. Under Rule X-15C1-4 every broker-dealer, regardless of fiduciary relationship, must declare in writing to his customers whether he is acting as principal or agent. 17 CODE FED. REGS. § 240.15c-4 (1939), as amended, 17 CODE FED. REGS. § 240c-1-4 (Cum. Supp. 1944). If he confirms as agent under the rule, he must disclose further the name of the person with whom he has dealt for his client and the source and amount of all commissions received in connection with the transaction. *Ibid.* These disclosures would seem to fulfill the same function as those required by the *Hughes* case.

If the broker-dealer confirms as principal, he is subjected to no other duties under Rule X-15C1-4. *Ibid.* The *Hughes* holding, on the other hand, will presumably require capacity disclosure of a more extensive nature. See note 11 *supra*.

14. Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, *supra* note 6, at 12.

15. For the universality of the broker-dealers' practice of "cultivating trust and confidence" see 10 SEC ANN. REP. 74 (1944); SEC, REPORT 71, 72.

The rendering of investment advice is a "common practice of over-the-counter firms generally." Arleen W. Hughes, Securities Exchange Act of 1934 Release No. 4048, *supra* note 6, at 12. See also SEC, REPORT 72.

in view of the conspicuous citation of court cases to buttress the *Hughes* holding: judicial authority has established the probability of customer reliance as the determinant of a fiduciary status.¹⁶ Indicators of the probability of reliance have included the regularity of patronage,¹⁷ and the use of words of agency by the customer where securities or funds are entrusted to the broker-dealer.¹⁸ Most important, however, is the degree of customer sophistication:¹⁹ the broker-dealer who is a fiduciary when transacting business with an ignorant and aged widow is more apt to be a non-fiduciary when dealing with an experienced investor.²⁰ The fact that there is little purpose in forcing the

16. *E.g.*, *Haines v. Biddle*, 325 Pa. 441, 188 Atl. 843 (1937) (fiduciary relationship where customer sold stocks in reliance on advice received); *Birch v. Arnold & Sears*, 288 Mass. 125, 130, 192 N.E. 591, 593 (1934) (fiduciary relationship where every investment was made by customer "in reliance on the statements and advice of Arnold"); *Dwight v. Hazlett*, 111 W. Va. 109, 113, 161 S.E. 434, 436 (1931) (no fiduciary relationship where customer "perceived the effect of this course of dealing and . . . acted in the light thereof"); *Steiner v. Hughes*, 172 Okl. 268, 270, 44 P.2d 857, 860 (1935) (no fiduciary relationship where customer "on the very morning in question had called other dealers to ascertain what was the market price of this particular stock. . .").

17. *Williams v. Bolling*, 138 Va. 244, 250, 121 S.E. 270, 271 (1923) (fiduciary relationship where customer was "constantly seeking the advice and judgment" of brokers with whom he had traded for years).

18. *E.g.*, *McNulty v. Whitney*, 273 Mass. 494, 174 N.E. 121 (1930) (broker received funds with instructions to purchase stocks for customer); *Wisbey v. Alan Shepard & Co.*, 268 Mass. 21, 167 N.E. 334 (1929) (customer delivered stocks to dealer to sell for him); *Johnson v. Winslow*, 155 Misc. 170, 279 N.Y.S. 147 (Sup. Ct. 1935), *aff'd*, 246 App. Div. 800, 285 N.Y.S. 1075 (1936), *aff'd*, 272 N.Y. 467, 3 N.E. 2d 872 (1936) (customer believed that agency relationship existed where securities were deposited with broker-dealer).

The Commission has invoked court tests of fiduciary relationship to strengthen holdings in cases applying the *Duker* rule. *See Allender Company, Inc.*, 9 S.E.C. 1043, 1053 (1941) (combination of inexperience of customers, discretionary trading authority and words of agency); *William J. Steelmack Corp.*, 11 S.E.C. 601, 617-8 (1942) (clear customer reliance on advice); *Trost & Company, Inc.*, 12 S.E.C. 531, 536 (1942) (words of agency and customer's belief that company was acting as agent). *See also*, *Oxford Company, Inc.*, Securities Exchange Act Release No. 3769, pp. 8, 9, 14-5 Jan. 4, 1946; *Norris v. Hirshberg, Inc.*, Securities Exchange Act of 1934 Release No. 3776, pp. 22-3 Jan. 24, 1946. For analysis of the foregoing cases, see *Lesh*, *supra* note 1, at 1248-58, 1262-8.

19. Fiduciary relationship: *Norris v. Beyer*, 124 N.J.Eq. 284, 1 A. 2d 460 (1938) (customer was 75-year-old retired domestic servant); *Butcher v. Newburger*, 318 Pa. 547, 179 Atl. 240 (1935) (customer unable to distinguish between Class A and common stock); *Birch v. Arnold & Sears, Inc.*, 288 Mass. 125, 192 N.E. 571 (1934) (client had to be instructed how to clip coupons from bonds); *Tatsuno v. Kasai*, 70 Utah 203, 259 Pac. 318 (1927) (customer was uneducated and inexperienced); *Wahl v. Tracy*, 139 Wis. 688, 121 N.W. 660 (1909) (customer was surgeon unfamiliar with security transactions). No fiduciary relationship: *Steiner v. Hughes*, 172 Okl. 268, 44 P.2d 857 (1935) (customer was experienced real estate and stock trader); *Dwight v. Hazlett*, 111 W. Va. 109, 113, 161 S.E. 434, 435 (1931) (customer was a merchandise broker who "had wide experience in dealing in stocks"); *Trowbridge v. O'Neill*, 243 Mich. 84, 89, 219 N.W. 681, 683 (1928) ("purchaser knew just as much as the broker knew himself. . .").

20. *E.g.*, *Compare* *Norris v. Beyer*, *supra* note 19, *with* *Steiner v. Hughes*, *supra* note 19.

broker-dealer to show his hand to such an investor also points to the Commission's adoption of the courts' standard of reliance.

Although coincidence of the Commission's fiduciary criteria with those of the courts appears likely, the obligations imposed by the two on discovered fiduciaries will necessarily differ. Whereas the *Hughes* decision requires divulging of market price, cost and capacity, the judicial rule holds that only capacity need be revealed.²¹ From this disclosure courts have implied that the ensuing transaction enjoys the client's informed consent,²² on the apparent assumption that, thus warned, the clients can protect themselves by checking elsewhere the value of the securities involved.²³ Since only broker-dealers can discover these facts,²⁴ intelligent assent by customers to over-the-counter transactions is, under the court rule, purely fortuitous.²⁵

Plugging this gap by compelling disclosure of market price may well render superfluous the revelation of capacity and cost. The customers' knowledge of these items scarcely affects desirability of the transaction once the broker-dealer has disclosed the best price available from the specialist. Furthermore, cost, in most instances, will coincide with market price since broker-dealers usually cover transactions with clients by simultaneously executing other deals with specialists.²⁶ But the apparent non-utility of the cost and capacity aspects of the *Hughes* doctrine does not vitiate the value of the doctrine itself. These seemingly redundant requirements inflict no onerous duty on the broker-dealers, and the rule's core, that customer reliance demands disclosure of market price, affords needed protection to unsophisticated investors in unlisted securities.

21. *Schofield v. Jackson*, 99 Conn. 515, 122 Atl. 98 (1923) (no further disclosure required of fiduciary who revealed that he was selling his own stocks). Although no other case directly holds that disclosure of capacity discharges fiduciary obligations, dicta to this effect have been sprayed liberally throughout opinions holding the fiduciary's disclosure inadequate. See, e.g., *In re B. Solomon & Co.*, 268 Fed. 108, 112-3 (C.C.A. 2d 1920); *Haines v. Biddle*, 325 Pa. 441, 444, 188 Atl. 843, 845 (1937).

The broker-dealer's failure to disclose capacity when selling to or buying from his customer entitles the latter to rescind and elect between the *status quo ante* or an accounting for secret profits. *Birch v. Arnold & Sears, Inc.*, 288 Mass. 125, 172 N.E. 571 (1934); *Tatsuno v. Kasai*, 70 Utah 203, 259 Pac. 318 (1927). For a mixed collection of real property and securities cases on this subject see Note, 62 A.L.R. 63 (1929).

22. Courts often state that a fiduciary may not deal for his own account without the "confirmation . . . [of his client . . . based on] full knowledge of all the facts." But disclosure of capacity is the only issue considered by the courts in fixing a fiduciary's obligations. See, e.g., *Williams v. Bolling*, 138 Va. 244, 256, 267-70, 121 S.E. 270, 273, 276-7 (1923).

23. By converting the fiduciary-client relationship into that of vendor and vendee, judges have held that disclosure of capacity permits application of the doctrine of caveat emptor. Compare *Doyen v. Bauer*, 211 Minn. 140, 146, 300 N.W. 451, 455 (1941) (real property), with *Steiner v. Hughes*, 172 Okl. 268, 270-1, 44 P.2d 857, 860 (1935) (securities).

24. See p. 1316-7 *supra*.

25. Although one court conceded the inadequacy of divulging capacity, it refused to impose any duty of further disclosure. See *Johnson v. Winslow*, 155 Misc. 170, 178-81, 279 N.Y.S., 147 158-9 (Sup. Ct. 1935).

26. TWENTIETH CENTURY FUND, *op. cit. supra* note 1, at 266; Lesh, *supra* note 1, at 59.