

TRADE UNION LIABILITY: THE PROBLEM OF THE UNINCORPORATED CORPORATION

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A COMMERCIAL world that does most of its thinking in terms typified by the corporation and the partnership, the entity and the aggregate, the named and the nameless, the state-created and the contractual, the limitedly liable and the unlimitedly liable, the perpetual and the temporary is likely to think strange the creatures that inhabit the non-commercial universe. For these non-commercial associations have at least some of the attributes of the corporation. In practice the trade unions, for instance, frequently make use of a common seal.¹ In fact they have as perpetual an existence and as perpetual a succession of interests as the corporation. Actually they own property even though to do so they may have to employ trustees.² And it cannot be denied that they make by-laws "or private statutes for the better government of the corporation" which, in controversies between member and union, are enforced by the courts.³ Here, then, are four of the indicia of

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1. In *Brotherhood of Locomotive Firemen v. Cramer*, 60 Ill. App. 212, 217 (1895), *aff'd*, 164 Ill. 9, 45 N. E. 165 (1896) and in *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N. E. 392 (1896), it was held that such use of a seal stopped the union from denying its corporate existence when it was sued as such. *Contra*: *Local 1562, United Mine Workers v. Williams*, 59 Can. Sup. Ct. 240, 49 D. L. R. 578 (1919).

2. LLOYD, *THE LAW RELATING TO UNINCORPORATED ASSOCIATIONS* (1938) 165 ff.; WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS* (2d ed. 1923) 336 ff.

3. The cases are few in which a union has sued to enforce its rules against its members. See, however, *National Sailors' and Firemen's Union v. Reed*, [1926] Ch. 536, 537 ("injunction to restrain the defendants, as branch secretaries or officials of the Union or in the name of the Union, calling members of the plaintiff Union out on strike . . . without the authority of the executive council of the Union"); *Western-United Dairy Co. v. Nash*, 293 Ill. App. 162, 12 N. E. (2d) 47 (1937) (joint suit by former employer and union to enjoin member from soliciting employer's customers contrary to collective agreement and the union's by-laws). *Cf.* *Thomas v. International Seamen's Union*, 101 S. W. (2d) 328 (Tex. Civ. App. 1937) (injunction, *inter alia*, against use of International's name in an unauthorized local strike by members who, though in good standing, were "in rebellion against their union"). On the collection of dues and fines by suit, see Comment, *Trade Unions—Rights and Obligations Arising out of Membership* (1934) 12 N. Y. U. L. Q. REV. 291, 295. More frequently the union resorts to self-help in the shape of expulsion for violation of a by-law and the question arises in a suit for reinstatement or for insurance benefits lost by the expulsion. See, *e.g.*, *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 286 Fed. 949 (D. Md. 1922), *aff'd*, 298 Fed. 1019 (C. C. A. 4th, 1924), *rev'd and bill dismissed for want of federal jurisdiction*, 270 U. S. 629 (1926); *Flynn v. Brotherhood of R. R. Trainmen*, 111 Kan. 415, 207 Pac. 829 (1922); *Wolstenholme v. Amalgamated Musicians' Union*, [1926] 2 Ch. 388. See also *Conniff v. Jamour*, 31 Misc. 729, 65 N. Y. Supp.

corporateness which have come down to us from Blackstone's time⁴ or before. Yet these associations lack that first indicium of corporateness, a charter. They cannot, in most jurisdictions, be sued in their own names. And no court has yet suggested that theirs is a limited liability.⁵

True, nearly twenty years ago the Supreme Court of the United States, in deciding the case of *Coronado Coal Company v. United Mine Workers of America*,⁶ tried to supply one of these lacks. Following the lead of the House of Lords in the *Taff Vale* case,⁷ the Court there held for the first time that a trade union could be sued in its own name. To many this seemed appropriate enough. Organizations that were as real and as important as trade unions ought to be made responsible. Constantly they were insuring their members and it was inevitable that claims arising out of these contracts should be the subject of controversy.⁸

317 (Sup. Ct. 1900) (constitutional provision denying accident benefits to members injured while working for less than union wages); *O'Keefe v. Local 463, United Ass'n of Plumbers*, 277 N. Y. 300, 14 N. E. (2d) 77 (1938).

4. 1 BL. COMM. *475.

5. Limited liability, of course, was not one of Blackstone's criteria of corporateness. Nor even today is it generally to be found playing that role in the legal literature. At least one American jurisdiction, Massachusetts, in the early stages of the development of the business corporation made the stockholders unlimitedly liable. But it was soon recognized, as it is today in the business literature, that as a practical matter the large group and unlimited liability are incompatible. See, e.g., Anonymous, *Manufacturing Corporations* (1829) 2 AMERICAN JURIST 92. In Pennsylvania, unlike Massachusetts, it seems to have been taken for granted by the legislature that limited liability was a *sine qua non* of corporateness. The granting of this privilege was one of the recurrent objections of the governors in their veto messages to the legislature. See, e.g., Governor Shunk's message of March 9, 1846, vetoing "An Act to Incorporate the Managers and Company of the Conestoga Steam Mills", 7 PA. ARCHIVES (4th ser. 1902) 83; Governor Bigler's message of March 29, 1852 vetoing "An Act to Incorporate the Charlestown Silver Lead Mining Company", *ibid.* at 554.

6. 259 U. S. 344 (1922).

7. *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426.

8. There is a noticeable tendency to allow a union to be sued in its own name when the suit is for insurance benefits even though such a suit could not be maintained under other circumstances: with *Fitzpatrick v. International Typographical Union*, 149 Minn. 401, 184 N. W. 17 (1921) (refusal to admit to printers' home) compare *St. Paul Typothetae v. St. Paul Bookbinders' Union*, No. 37, 94 Minn. 351, 102 N. W. 725 (1905) (breach of collective bargain); with *Clark v. Brotherhood of R. R. Trainmen*, 328 Mo. 1084, 43 S. W. (2d) 404 (1931) (life insurance) compare *Ruggles v. International Ass'n of Iron Workers*, 331 Mo. 20, 52 S. W. (2d) 860 (1932) (wrongful expulsion); with *Winchester v. Brotherhood of R. R. Trainmen*, 203 N. C. 735, 167 S. E. 49 (1932) (total disability beneficial certificate) compare *Hallman v. Wood, Wire & Metal Lathers' International Union*, 15 S. E. (2d) 361 (N. C. 1941) (black-listing). But cf. *Varnado v. Whitney*, 166 Miss. 663, 670, 147 So. 479, 480 (1933) (Our statute "unquestionably permit[s] suits on benefit certificates issued by these associations. . . . But to stop there would not be sufficient protection for them, for the integrity of their benefit certificates can only be maintained when the courts are

Continually they were disciplining their members; here again was a source of litigation. Time and again they were indulging, rightly or wrongly, in concerted activities — strikes, picketing, boycotts, and inducing breach of contract — against their employers; if the substantive law governing the use of these weapons was too harsh it should be corrected with an appropriate finesse instead of being left to the hit or miss method of a back-handed defense. So ran the argument. And today there would be added to this list of most frequent sources of trade union litigation, this time chiefly from the union side, the collective bargain.

But the *Coronado* case has not won favor with the State courts. In spite of the common name by which the union calls itself, the common treasury out of which it finances its activities, the common officers by which it is governed — all of them at war with the common law notion that equates an unincorporated association to a mere aggregate of men — it has been rejected in case after case that has been decided since 1922.⁹ The controversy within the Harvard faculty between Professor Warren¹⁰ (who argued for a construction of the holding based solely on the terms of the Sherman Act under which the suit in the *Coronado* case was brought) and Professor Dodd¹¹ (who foresaw a much wider meaning for it) has, for the most part, been won by the narrow-construction proponent. In the new Federal Rules of Civil Procedure it has been restricted to federal causes of action.¹²

open to them for the preservation of many other of their rights and duties ancillary to the issuance of such certificates"; so in suit by Varnado to garnish debt owing Whitney by Brotherhood of R. R. Trainmen, the claim against Whitney being for libel).

9. District No. 21, *United Mine Workers v. Bourland*, 169 Ark. 796, 277 S. W. 546 (1925); *Walker v. Brotherhood of Locomotive Engineers*, 186 Ga. 811, 199 S. E. 146 (1938); *Cahill v. Plumbers, Gas & Steam Fitters' and Helpers' Local 93*, 238 Ill. App. 123 (1925); *Tyler v. Boot & Shoe Workers Union*, 285 Mass. 54, 188 N. E. 509 (1933); *Grant v. Carpenters' District Council*, 322 Pa. 62, 185 Atl. 273 (1936); *West v. Baltimore & Ohio R. R.*, 103 W. Va. 417, 137 S. E. 654 (1927). See also cases cited *supra* note 8. Cf. *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N. W. 753 (no capacity to sue). Cf. *Unkovich v. New York Central R. R.*, 114 N. J. Eq. 448, 450, 168 Atl. 867, 868 (Ch. 1933), *aff'd*, 117 N. J. Eq. 20, 174 Atl. 876 (1934) ("There is no statute that I am aware of which provides that an unincorporated trade union . . . cannot be sued in this court in its established name" and our practice has been to the contrary; it is therefore immaterial whether the statutes do or do not cover equitable causes).

10. WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION*, 648 ff. (1929).

11. Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977, 1001 ff.

12. Rule 17(b): ". . . a partnership or other incorporated association . . . may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." The rule also allows such a suit to be maintained when it would be maintainable in the courts of the state in which the district court is held.

Whether this rejection is to be counted significant or not, whether it means a continued refusal to recognize the entity or nothing more than a reluctance to adopt a new procedural device,¹³ can be determined only by looking at the alternative methods of suit. For the lack of a name for purposes of suing and being sued is no very great matter if other devices are available to accomplish the same end. In most states there are such devices. The most important of them is the class suit. It speaks, in its usual formulation, the language of individuals; it accomplishes, when it is used properly, all that could be hoped for from a *Coronado* case doctrine. On it have been modeled or out of it have developed many of the more specialized methods which are set up in the statutes of various of the states.¹⁴ The problems which these statutes raise as well as those they seek to solve can best be understood against the background it furnishes. It is to the class suit, then, that chief attention will be given here.

Two principal questions face the litigant who attempts to use the class suit device in an action for damages: (1) whether it is available as a means of reaching the common funds of the union and (2) whether it can be used to hold the members of the union liable individually. The first of these found an answer in *Oster v. Brotherhood of Locomotive Engineers*.¹⁵ Here the widow of a union member, suing to recover on an insurance policy issued by the defendant, was unfortunate enough to have her claim stated in assumpsit. The court, not content with explaining that assumpsit would not lie against an unincorporated association, went on to say "that a plain remedy remains in equity, where suit may be brought against some of the members as representing them-

13. In both the *Coronado* and the *Taff Vale* cases there are expressions to the effect that the question there before the courts was one of form. See, *e.g.*, Taft, C. J. in the former at p. 390: "Though such a conclusion as to the suability of trade unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights . . . it is after all in essence and principle merely a procedural matter"; and Lord Lindley in the latter at p. 445: "The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used." But *cf.* Lord Brampton at p. 442: ". . . I do not see how it would be possible for these [common] funds to be made applicable for remuneration or recompense or redress for any wrongful act done by a body of men like the society unless the society could be sued in the way in which it is proposed to sue them, and as I think it may be." *Cf.* *Operative Plasterers' International Ass'n v. Case*, 93 F. (2d) 56 (App. D. C. 1937) (the question as one of "substance" or "procedure" under full faith and credit clause).

14. Collected citations to these statutes will be found in Cole, *The Civil Suability, at Law, of Labor Unions* (1939) 8 FORDHAM L. REV. 29, 33 n.; 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING* (1940) 1369; WARREN, *op. cit.* *supra* note 10, at 547 ff.

15. 271 Pa. 419, 114 Atl. 377 (1921).

selves and all others who have the same interest" and "that in the equity proceeding, after decree, the chancellor can be moved to compel the defendants to see that the treasury of the association pays the claim."¹⁶

If this case stood by itself, one could not feel any very great assurance about the inferences to be drawn from it. The suggestion of the court as to the equitable remedy could be said to be nothing more than dictum. But it cannot be dismissed so summarily as this. It is reinforced too strongly by other authority. The suggestion of the English courts (before the Trade Union Act of 1906 completely immunized union funds from tort liability)¹⁷ that the trustees of the union's funds be joined as parties defendant¹⁸ looks in the same direction. The rationale of the Canadian cases requiring that the plaintiff in a class action allege and prove that there is a common fund ("trust-fund" is the court's wording of the matter) from which any judgment that is entered will be satisfied¹⁹ reinforces it. And it is in accord with those cases in which, in fact, judgments against union funds have been secured by class actions.²⁰

16. *Id.* at 421, 114 Atl. at 377. *Accord*: *Gottselig v. Cigarmakers International Union*, 76 Pa. Super. 273 (1920). Under Rule 2153 of the Pennsylvania Rules of Civil Procedure, 332 Pa. cviii (1939), the practice has been somewhat modified and a suit may now be brought against an association in its own name or against an officer of the association as trustee *ad litem*. In either case, judgment against the association will support execution against its property (Rule 2158) but will not render the individual members liable (Rule 2155) unless they have been joined as parties defendant (Rule 2153(c)).

17. 6 Edw. 7, c. 47, § 4, 19 HALSBURY'S STAT. 687 (1906).

18. *Ideal Films v. Richards*, [1927] 1 K. B. 374 (C. A.). See *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426, 443 (per Lord Lindley): "I have . . . no doubt whatever that . . . some of its [the trade union's] members . . . could be sued on behalf of themselves and the other members of the society. . . . Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union." *Cf. Linaker v. Pilcher*, 70 L. J. K. B. 396, 401 (1901) (suit for libel against defendant-trustees of a trade union not, however, in a representative capacity: "There will . . . be judgment . . . for 1,000£ damages and costs against the defendants the trustees . . . and a declaration that they are entitled to be indemnified out of the funds of the society.")

19. *Robinson v. Adams*, 56 Ont. L. R. 217, [1925] 1 D. L. R. 359 (App. Div. 1924); *Barrett v. Harris*, 51 Ont. L. R. 484, 491, 69 D. L. R. 503, 510 (Sup. Ct. 1921) (non-trade union case; good summary of English and Canadian holdings).

20. *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N. E. 392 (1896) (creditor's bill based on prior judgment in *assumpsit*); *Bayci v. Rango*, 304 Ill. App. 203, 25 N. E. (2d) 1015 (1940); *Colt v. Hicks*, 97 Ind. App. 177, 179 N. E. 335 (1932) (suit for death benefits on statutory class action provision); *Nissen v. International Brotherhood of Teamsters*, 229 Iowa 1028, 295 N. W. 858 (1941) (mandamus for reinstatement in union plus damages); *St. Germain v. Bakery & Confectionery Workers' Union*, No. 9, 97 Wash. 282, 294, 166 Pac. 665, 669 (1917) ("In the decree, the costs were awarded

Such a judgment, it may be admitted, runs contrary to the frequent refusal of the courts to talk of the union as an entity. It is, however, a counterpart of group liability in other respects. The employer who seeks to enforce the arbitration provisions of a collective agreement, the members who contest the union's interpretation of its seniority rules,²¹ the former associate who claims to have been wrongfully expelled and asks for reinstatement,²² are all concerned with group responsibility in as real a sense as is he whose claim is for payment out of the common treasury. In none of these other cases is there any question as to the amenability of the group to suit as a group or as to the possibility of "recovery"

against certain of the respondents, but not against the unions . . ."; held: this was wrong); *Metallic Roofing Co. v. Jose*, 12 Ont. L. R. 200, C. R. [1909] A. C. 30 (C. P. 1905 & Div. Ct. 1906), *appeal dismissed*, 14 Ont. L. R. 156, C. R. [1909] A. C. 37 (C. A. 1907), *rev'd on other grounds*, [1908] A. C. 514, C. R. [1909] A. C. 44 (P. C. 1908); *Cotter v. Osborne*, 18 Manitoba 471, 482, C. R. [1911] 1 A. C. 137, 147 (C. A. 1909) (suit for injunction and damages for tortious interference with plaintiff's business: "There will be judgment . . . for \$2,000 and costs . . . against those defendants who are representatives as representing all persons who . . . constituted . . . The Journeymen Plumbers . . . Local Union, No. 62, and declaring that the property and assets of the said association . . . are liable to satisfy the claim of the plaintiffs against the said representative defendants for damages and costs.") See also the judgment of the trial court in *Furniture Workers' Union, Local 1007 v. United Brotherhood of Carpenters*, 108 P. (2d) 651, 655 (Wash. 1940): "Upon their first cause of action, plaintiffs are entitled to judgment . . . in the sum of \$3,954.42 . . . together with their costs and disbursements . . . against all of the members of Local 2097, so far only as it may be enforced against the property of Local 2097, which is the joint property of all of the members of Local 2097." *Accord*: *Pearson v. Andesburg*, 28 Utah 495, 80 Pac. 307 (1905) (non-trade union case). See *Newark International Baseball Club v. Theatrical Managers, Agents & Treasurers Union*, 125 N. J. Eq. 575, 577, 7 A. (2d) 170, 172 (Ch. 1939) ("In many jurisdictions in the absence of statute, it is held that a suit does not lie against a union by name, but that in equity a number of members may be made parties defendant as representatives of the union. . . . The same result accrues from this method of procedure and from a suit against the union by name. An injunction binds all officers and members of the union . . . and if costs be adjudged against the defendants, it seems the common property of the members is liable.") *Contra*: *District No. 21, United Mine Workers v. Bourland*, 169 Ark. 796, 277 S.W. 546 (1925) (writ of prohibition granted against lower court's entertaining a bill "brought in equity by certain coal operators to recover unliquidated damages for personal injuries to their servants and . . . their property" and asking that a receiver for the union-defendants' funds be appointed).

21. On the use of the class suit in this type of case, see *Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 407, 31 P. (2d) 971, 982 (1934). On necessary parties in such a suit, see *Brotherhood of R. R. Trainmen v. Price*, 108 S. W. (2d) 239 (Tex. Civ. App. 1937); *Gordon v. Hawkins*, 66 S. W. (2d) 432 (Tex. Civ. App. 1933); *McMurray v. Brotherhood of R. R. Trainmen*, 54 F. (2d) 923 (C. C. A. 3d, 1931).

22. On the use of the class suit in this type of case, see *Biller v. Egan*, 290 Ill. App. 219, 8 N. E. (2d) 205 (1937).

from it as an "it." Yet, presumably the belief that the non-entity doctrine immunizes association funds from effective suit²³ inspired many of the statutes which are now on the books; one of their most common clauses is that giving a successful plaintiff recourse against collective funds of the group. Nevertheless, as the discussion above indicates, no such special statute is called for. With no more than the class action device to accomplish the job, the non-entity has been turned into a fully responsible corporate group. If we choose to think of the result as a procedural remolding of our concept of group liability, our so thinking is a reminder that in modern law, as Maine taught us was the case in ancient, substance is "gradually secreted in the interstices of procedure."²⁴

That not all jurisdictions are agreed on this is, of course, to be expected. In New York, for instance, the General Associations Law has made for a good deal of confusion. Section 13 of the Law, which at first glance would appear to be little more than a class action provision with a statutorily-named representative,²⁵ is not unambiguous in its wording:

"An action . . . may be maintained, against the president or treasurer of . . . an [unincorporated] association . . . upon any cause of action, for or upon which the plaintiff may maintain such an action . . . against all the associates, by reason of . . . their liability therefore, either jointly or severally."²⁶

But with the help of Section 15 which provides that where, in such an action, judgment is given for money it must first be satisfied "out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof" it ought not to be difficult to resolve the ambiguity of the earlier section in favor of group liability. Particularly would this be so when it appears that under Section 12 — a section analogous to 13 but dealing with the association as a party plaintiff instead — suit may be maintained for libel to the group without any showing that each member was so injured personally that he could maintain a similar suit in his own right.²⁷ The difficulty is

23. For an earlier case apparently so holding, see *Allis-Chalmers Co. v. Iron Molders' Union*, No. 125, 150 Fed. 155, 183 (C. C. E. D. Wis. 1906), *aff'd*, 166 Fed. 45 (C. C. A. 7th, 1908).

24. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* (1891) 389.

25. So characterized in *Society Brand Clothes v. Amalgamated Clothing Workers*, [1931] Can. Sup. Ct. 321, 324, [1931] 3 D. L. R. 361, 363 (1930).

26. N. Y. GEN. ASS. LAWS § 13.

27. *Kirkman v. Westchester Newspapers*, 261 App. Div. 181, 24 N. Y. S. (2d) 860 (1st Dep't 1941), *motion for leave to appeal to Court of Appeals granted*, 261 App. Div. 897, 26 N. Y. S. (2d) 315 (1st Dep't 1941); *Bradley v. Connors*, 169 Misc. 442, 7 N. Y. S. (2d) 294 (Sup. Ct. 1938); *Gardner v. Jonas*, 97 N. Y. L. J. 1558 (Sup. Ct. 1937). *Cf. Stone v. Textile Examiners & Shrinkers Employers' Ass'n*, 137 App. Div. 655, 122 N. Y. Supp. 460 (1st Dep't 1910).

that Sections 13 and 15 do not stand alone. Section 16, with its provision that upon return of an execution against the association wholly or partially unsatisfied an additional action may be brought against the individual members with recovery of the costs of the principal suit as part of the damages,²⁸ must also be reckoned with.

Probably it is this last section that explains the reluctance with which the New York judges have accepted suits for damages²⁹ under the Act. Their repeated insistence that it be alleged that the active participants in a transaction had authority to act for *all* of the members of the union³⁰ and their insistence that it be shown that this authority extended to binding the personal credit of all these members, even though, in the particular case, it would seem that suit was brought only to recover from the union treasury,³¹ can hardly otherwise be accounted for in rational terms. A result of this sort may be deplored, but it serves as a warning that what we may call the procedural question (How can a suit be maintained?) cannot be dissociated from what we may call the liability question (Who is liable and for how much?) or from what we may call the agency question (For whose acts are the group or its members liable?). The three questions are so bound

28. This does not mean, however, that in the subsequent suit the judgment against the union is *res judicata* as to all matters determined there. See *infra* p. 57. The discussion here is concerned only with § 16 as a device for interpreting § 13.

29. Apart from the expulsion cases, most of the citations below are to contract actions. The same rule has been applied in tort as well. See *Mazurajtis v. Maknawyce*, 93 Misc. 337, 157 N. Y. Supp. 151 (Sup. Ct. 1916); *Tannenbaum v. Hofbauer*, 142 Misc. 120, 253 N. Y. Supp. 90 (Sup. Ct. 1931).

30. See *Schouten v. Alpine*, 215 N. Y. 225, 232, 109 N. E. 244, 246 (1915); *People ex rel. Solomon v. Brotherhood of Painters*, 218 N. Y. 115, 123, 112 N. E. 752, 754 (1916); *Havens v. King*, 221 App. Div. 475, 481, 224 N. Y. Supp. 193, 200 (3d Dep't 1927), *aff'd*, 250 N. Y. 617, 166 N. E. 346 (1929). But *cf.* *Polin v. Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931). The remarks in these cases, all of which are suits for damages caused by an allegedly wrongful expulsion from a trade union, might be dismissed as dictum in view of the court's reiterated holding that there is no liability for a mistaken judgment on the part of the union officials in the absence of bad faith. But that they cannot be taken to mean no more than this is indicated by holdings clearly to the effect stated in the text in such non-trade union cases as *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728 (1892), the leading case on the subject, and the many others which have followed it including, among others, as of special interest, *Lightbourn v. Walsh*, 97 App. Div. 187, 89 N. Y. Supp. 856 (2d Dep't 1904); *Siff v. Forbes*, 135 App. Div. 39, 119 N. Y. Supp. 773 (1st Dep't 1909).

31. *Davis v. Young*, 123 N. Y. Supp. 363 (Sup. Ct. 1910) (suit to enforce payment of certificates of indebtedness issued in lieu of strike benefits); *Whitney v. King*, 210 App. Div. 312, 314, 206 N. Y. Supp. 194, 196 (3d Dep't 1924) (concurring opinion in suit to recover on beneficial certificates). *Cf.* *Strauss v. Thoman*, 60 Misc. 72, 111 N. Y. Supp. 745 (Sup. Ct. 1908), *aff'd*, 129 App. Div. 905, 113 N. Y. Supp. 1148 (1st Dep't 1908); *Meinhart v. Contresta*, 194 N. Y. Supp. 593 (Sup. Ct. 1922) (refusing to vacate attachment of union property in suit by business agent for salary past due).

together in any problem that comes before a court that no one of them can be understood without reference to the other two. They are so intertwined that no solution worked out by a court in a particular case can be appreciated or appraised without weighing its repercussions on all three. Thus, given unlimited liability such as the New York statute presupposes one cannot expect to find tolerance of procedural devices that would be usable where the liability is limited. Given unlimited liability one can also expect to see the field of the agent's authority considerably narrowed from what it would otherwise be. In contrast, the effect of a procedural device that reaches only the common funds, which ensures limited liability, can be expected to be a broadening of the scope of the officer's power to bind those funds — an effect that is amply illustrated by the expansion of his power in the case of the corporation during the nineteenth century.

Unfortunately there is little in the reports, apart from the New York cases just discussed, against which our conclusion as to the "agency" aspect of the problem can be checked with any satisfaction. Three of the fields of labor litigation are almost totally barren, a fourth is in hopeless confusion. The routinized transaction of issuing an insurance policy or a beneficial certificate, for instance, has yielded little on the subject, in spite of the scores of cases in which suits have been brought on such policies. The question of authority to make a collective bargain has hardly been mooted.³² And the problems arising from expulsion from the union have not been of this kind. Authority in this last matter is defined in fairly explicit terms by constitution and by-law; the "say", to use Llewellyn's term,³³ is well differentiated from the not-say. Perhaps it is significant that it is in these same fields where the authority of the immediate actors has been least questioned that the fullest measure of corporate responsibility has been achieved, so full a measure in fact that it is almost beyond question.

In contrast with these situations is the industrial dispute broadly and, more narrowly, the picket line. Here is membership participation in an almost wholly unroutinized affair. Here, even if the "say" is fixed in by-law and resolution, its restraining power is not ubiquitous. No matter how hard the organization may try to maintain discipline, no matter how often its officers may exhort the members to be peaceable,

32. But compare *Fell v. Berry*, 124 App. Div. 336, 108 N. Y. Supp. 669 (1st Dep't 1908); *A. R. Barnes & Co. v. Berry*, 169 Fed. 225 (C. C. A. 6th, 1909). For discussions of authority in other sorts of contract cases, see *United Order of American Brick Layers v. Fitzgerald*, 59 Ill. App. 362 (1895); *Meyers v. Longshoremen's Protective Union*, 1 La. App. 767 (1925); *Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 6 S. E. (2d) 562 (1940).

33. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method* (1940) 49 YALE L. J. 1355, 1383.

there will be occasions when the more unruly will get out of hand. It is these occasions that have bred litigation. The results in the reports are as confusing as the occasions. If some courts have gone so far as to hold that the union which calls a strike must take the responsibility for all that the strikers thereafter do³⁴ (an attitude which dates from a time when strikes and strikers were alike unrespectable), if others, only a little more lenient, have held that a union which does not disavow its members' acts by expelling them is responsible for what they do³⁵ (an attitude which is only too likely to result in a union-breaking campaign), and if still others have looked upon the union's continued payment of strike benefits or its furnishing of counsel to defend its members as evidence of approval and, therefore, of "ratification,"³⁶ these can be readily matched with other cases in which the courts have passed over such points *sub silentio* and rejected a claim of union liability in the absence of such facts as would be needed to pass muster in a non-trade union vicarious liability case.³⁷ This last, it would seem, is the law that

34. *Franklin Union, No. 4 v. The People*, 220 Ill. 355, 379, 77 N. E. 176, 184 (1906) (contempt proceeding; two judges dissent); *Connett v. United Hatters*, 76 N. J. Eq. 202, 74 Atl. 188 (Ch. 1909). See *United Mine Workers v. Coronado Coal Co.*, 255 U. S. 344, 403 (1922).

35. *Alaska Steamship Co. v. International Longshoremen's Ass'n*, 236 Fed. 964, 972 (W. D. Wash. 1916); *Great Northern Ry. v. Great Falls Lodge, International Ass'n of Machinists*, 283 Fed. 557, 560 (D. Mont. 1922); *United Traction Co. v. Droogan*, 115 Misc. 672, 189 N. Y. Supp. 39 (Sup. Ct. 1921).

36. *Jones v. Maher*, 62 Misc. 388, 395, 116 N. Y. Supp. 180, 184 (Sup. Ct. 1909), *aff'd*, 141 App. Div. 919, 125 N. Y. Supp. 1126 (2d Dep't 1910) ("I think . . . that those lodges, in thus regularly sustaining the picketing by pecuniary support for so long a time, must be held to have so acted with knowledge, actual or constructive, of the unlawful conduct of the picketing, and, therefore, that they must be held to have aided and abetted such unlawful conduct"; *contra* for sporadic "acts of actual substantial violence"). See *Meadowmoor Dairies v. Milk Wagon Drivers' Union, No. 753*, 371 Ill. 377, 390, 21 N. E. (2d) 308, 315 (1939), *aff'd*, 312 U. S. 287 (1941).

37. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union, No. 131*, 165 Ind. 421, 430, 75 N. E. 877, 880 (1905) ("That fourteen of the six hundred members of the union did disregard the express instructions and declared policy of the union to conduct the strike peacefully, and of their own initiative indulged in acts of disorder . . . is not of itself sufficient to condemn the union as a body. The strike being properly conceived and conducted by the great majority of members, its purpose will not be defeated by the unlawful conduct of a few rowdies and lawbreakers . . ."); *Thomas Russell & Sons v. Stammers & Gold Leaf Local Union, No. 22*, 57 Misc. 96, 102, 107 N. Y. Supp. 303, 308 (Sup. Ct. 1907) ("No authority holding that the unlawful acts of one or more members of a voluntary association *ipso facto* bind the association has been brought to my attention. Conclusive proof should appear upon which to base the charge that the defendant associations, as such, promoted or ratified the acts complained of. . . . Until a labor union . . . shall be shown presumptively to have acted unlawfully it is entitled to be regarded as a law abiding body . . ."); *Segenfeld v. Friedman*, 117 Misc. 731, 732, 193 N. Y. Supp. 128, 129 (Sup. Ct. 1922) ("The defendant union cannot be enjoined *pendente lite* for no proof is presented to establish

is now established by Section 6 of the Norris-LaGuardia Act⁸⁸ and its state counterparts. It is clearly the rule applied in most instances in which the actor is an officer, rather than a member, of the union.⁸⁹

The problem of a union's responsibility for its members' acts is, moreover, one that has been largely tested in equity. And equity has known the use of the grandiose flourish in labor controversies, has often not molded its decrees as neatly as it might and as, in other situations, it professes to. Many of the cases in which a broad responsibility doctrine has been preached are, if we may believe the courts' stories of what happened, what we may call "big situation" cases — cases arising out of tumultuous occasions in which assaults, batteries, rioting and bloodshed were common. They are cases in which the court has sat as an *ad hoc* legislature, in which there has been no more attempt at careful inquiry into agency or liability, as these terms are understood at law, than there would have to be in the legislature itself. They do not, in their handling or in their outcome, resemble judicial decisions

that it either authorized or ratified the acts complained of."); *Aluminum Castings Co. v. International Molders' Union, Local 84*, 197 Fed. 221, 223 (W.D.N.Y. 1912) (though it appears that there have been assaults and other intimidating acts by members of the union "there is nothing to show that Local No. 84 or its principal officers have incited or coerced members of the union or other strikers" to commit them).

38. 47 STAT. 71 (1932), 29 U. S. C. § 106 (1934): "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable . . . for the unlawful acts of individuals, officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of acts after actual knowledge thereof."

39. *Cases imposing liability*: *Anderson & Lind Mfg. Co. v. Carpenters' District Council*, 226 Ill. App. 532 (1922), *aff'd*, 308 Ill. 488, 139 N. E. 867 (1923); *Clarkson v. Laiblan*, 178 Mo. App. 708, 161 S. W. 660 (1913) (injunction), 202 Mo. App. 682, 216 S. W. 1029 (1919) (damages); *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600 (C. A.). *Cases denying liability*: *Tannenbaum v. Hofbauer*, 142 Misc. 120, 121, 253 N. Y. Supp. 90, 91 (Sup. Ct. 1931) ("The plaintiff's evidence establishes for the purposes of this motion: (1) That the unlawful injury [assault and battery] to the plaintiff was effected by an agent of the defendant union in furtherance of a strike called by the defendant union; (2) that no by-law, resolution or official decree authorized this tortious act; and (3) that the unlawful activity of Powers and of other business agents were not continued over a long enough period or otherwise notorious enough to warrant an inference that the members of the defendant union knew of these illegalities and acquiesced in them"; hence, motion to set aside dismissal of complaint denied); *Rockwood Corp. v. Bricklayers' Local Union, No. 1*, 33 F. (2d) 25 (C. C. A. 8th, 1929); *United States v. International Fur Workers Union*, 100 F. (2d) 541, 547 (C. C. A. 2d, 1938) *cert. denied*, 306 U. S. 653 (1939) ("All that the [trial] court said . . . was that if the individual defendants did the things charged against the unions 'upon behalf of the unions', they might be found guilty along with the individuals. . . . It was erroneous; it excluded the issue whether the union had authorized or ratified what their officers did upon their behalf.")

at all. Often the premise, spoken or unspoken, has been that an injunction against wrongdoing does no harm to the peaceable.⁴⁰ In this light the requirement that "agency" be shown is hardly more than a requirement that numerous harmful acts have been done. But whether we think these cases rightly or wrongly decided, whether or not we believe that it would have been better for the courts not to have acted at all, whether we applaud or despair of similar instances in which they have not acted, there is little ground for believing that the doctrine taught and applied by those courts which have acted will be carried over to the "little situation," much less that it will be carried over to a suit for damages. Here that "fundamental difficulty" of which Middleton, J., spoke,⁴¹ the difficulty which arises "where the thing that is complained of cannot be brought home to any individual," is far more important and much less easily overcome than when the suit is for an injunction.

It may be worth suggesting, further, that this is a problem in which corporate responsibility and individual liability frequently merge. Picketing, to take an example, cannot be stopped unless pickets are stopped. In those instances in which the injunction against picketing is granted because the object of the collective action is improper,⁴² such a binding

40. For examples of such a view, see *United Traction Co. v. Droogan*, 115 Misc. 672, 189 N. Y. Supp. 39 (Sup. Ct. 1921); *Cumberland Coal & Ry. v. McDougall*, 44 Nova Scotia 535, 9 E. L. R. 204 (1910). See also the cases cited *infra* note 67. For a criticism of such an attitude, see *Union Pac. R. v. Ruef*, 120 Fed. 102, 116 (C. C. D. Neb. 1902); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. N. D. Ohio, 1906).

41. *Robinson v. Adams*, 56 Ont. L. R. 217, 224, [1925] 1 D. L. R. 359, 364 (App. Div. 1924) ("The fundamental difficulty of suing a mob or any unorganized body cannot be avoided. Any individual guilty of a tortious act can be made answerable in damages, and in many circumstances an injunction may be awarded against him, but where the thing that is complained of cannot be brought home to any individual, it is hard to see how the person injured can successfully invoke the aid of a Court of justice.")

42. Now, however, that picketing has been granted protection under the Fourteenth Amendment, the propriety or impropriety of the object of the picketing will undoubtedly have much less determinative force than it formerly had. Already the Supreme Court has reversed one state court which had enjoined picketing carried on by a union none of whose members was employed by the plaintiff in order to induce him to "unionize" his shop [*American Federation of Labor v. Swing*, 312 U. S. 321 (1941)]; another which had enjoined picketing an employer who, at the expiration of a collective contract, had discharged the defendant's only member hired by him and had entered into a closed shop contract with a rival union [*Journeyman Tailors Union, Local 195, Amalgamated Clothing Workers v. Miller's*, 312 U. S. 658 (1941)]; and still another which had enjoined picketing of the plaintiffs' customers and suppliers in order to induce the plaintiffs who had theretofore hired no help at all to employ a member of the union [*Bakery & Pastry Drivers Local 802, International Brotherhood of Teamsters v. Wohl*, 61 Sup. Ct. 1108 (U. S. 1941)]. For the most part, the lower courts have accepted the new doctrine gracefully. Cf. *Culinary Workers & Bartenders Local 631 v. Busy Bee Cafe*, 115 P. (2d) 246 (Ariz. 1941) (to secure collective

of all the members of the union by a single decree is understandable enough. For the object is, *ex hypothesi*, one on which all the members are agreed; it is as improper for the individual member as it is for the whole group. More serious is the question when it is predicated on violence or some other similarly personal charge. In New York, for instance, it has been the rule of the Court of Appeals for some time that picketing should not be completely enjoined unless experience in the particular dispute has demonstrated that it cannot and will not be conducted peacefully.⁴³ Presumably in a jurisdiction which takes this attitude it would be improper to enjoin picketing by all members of the union if only some of them were of the unpeaceful sort. This would clearly be so if we thought of the injunction as running against individuals directly. Here it would be important to segregate the quiet, the peaceable and the polite from the noisy, the pugnacious and the vitriolic. No cause of action would be shown against the former and, on the assumption that even in a suit for an injunction the plaintiff must make out his case against those who are to be enjoined, no injunction which attempted to bind these should be granted. It ought to be no different if we change our verbal pattern and enjoin the union and, by this

bargain from unorganized employer); *Ellingsen v. Milk Wagon Drivers' Union, Local 753*, 35 N. E. (2d) 349 (Ill. 1941) (to get rid of "vendor" system of selling milk); *2063 Lawrence Ave. Bldg. Corp. v. Van Heck*, 35 N. E. (2d) 373 (Ill. 1941) (to "unionize" the employer); *Davis v. Yates*, 32 N. E. (2d) 86 (Ind. 1941) (against "lessor-lessee" operation of mine in place of employer-employee operation); *Blanford v. Press Publishing Co.*, 151 S. W. (2d) 440 (Ky. Ct. App. 1941) (to "unionize" plaintiff's plant); *East Lake Drug Co. v. Pharmacists & Drug Clerks' Union, Local 1353*, 298 N. W. 722 (Minn. 1941) (to secure a closed shop); *Feller v. Local 144, International Ladies Garment Workers Union*, 129 N. J. Eq. 421, 19 A. (2d) 784 (1941); *Edwards v. Teamsters Local Union 313*, 113 P. (2d) 28 (Wash. 1941) (to compel employer to abide by contract which itself required him to cancel contracts with others). Only a few have balked. *Cf. Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 149 S. W. (2d) 694 (Tex. Civ. App. 1941) (to induce owner of picketed premises to require third person with whom he had contract to deal with defendant union); *Borden Co. v. Local 133, International Brotherhood of Teamsters*, 152 S. W. (2d) 828 (Tex. Civ. App. 1941) (to induce plaintiff to discontinue sale of a supplier's products in order to unionize the supplier); *Wisconsin Employment Relations Bd. v. Milk & Ice Cream Drivers Union, Local 225*, 299 N. W. 31 (Wis. 1941) (to get a closed-shop contract without having the statutorily-required majority among the plaintiff's employees).

43. *J. H. & S. Theatres v. Fay*, 260 N. Y. 315, 183 N. E. 509 (1932); *Wise Shoe Co. v. Lowenthal*, 266 N. Y. 264, 194 N. E. 749 (1935); *May's Furs & Ready-to-Wear v. Bauer*, 282 N. Y. 331, 26 N. E. (2d) 279 (1940); *Baillis v. Fuchs*, 283 N. Y. 133, 27 N. E. (2d) 812 (1940) (all denying injunction against peaceful picketing). *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Steinkritz Amusement Co. v. Kaplan*, 257 N. Y. 294, 178 N. E. 11 (1931); *Busch Jewelry Co. v. United Retail Employees' Union, Local 830*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939) (all allowing injunction against peaceful picketing).

device, all who work on its behalf or, more familiarly, certain named defendants and their agents and associates. In either case the question is presumably one of preventing irreparable harm to the plaintiff. If this can be done by enjoining only those who engage in the wrongful conduct, the plaintiff will have been given all that he can ask for. If he is given more, it is to the irreparable harm of the union members who are willing to stay within the letter of the law. We are not dealing here with a problem of liability in damages. Without prejudicing later discussion of this point, it ought to be fairly clear that the agency-liability question assumes a very different aspect in the suit for an injunction. The case against the union *in toto* is not made out if the only relief that the plaintiff needs to protect his interests is restraint of the immediate offenders. Nor are we dealing here with the constitutional power of a court to impose what amounts to absolute liability under the circumstances—the problem that was before the Court in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*.⁴⁴ Though we might wish that Mr. Justice Black's opinion had prevailed as to the constitutional issue, it is enough for present purposes to know that the position that he took is in accord with the equities of the case:

“ . . . I fully recognize that the union members guilty of violence were subject to punishment. . . . And some of them have in fact been prosecuted and convicted. . . . But it is going a long way to say that because of the acts of these few men, six thousand other members of the union can be denied the right to express their opinion to the extent accomplished by the sweeping injunction here sustained.”⁴⁵

But this raises three closely related problems which it has not been important to discuss thus far: Is the class action available as a device for imposing individual liability? Are the members of a union a class within the meaning of the class suit rule? Who are the proper representatives of the members of the union when it is individual liability that the plaintiff seeks to impose?

Some early cases answered the first of these questions in the negative, even in suits for injunction.⁴⁶ If we still followed them there would, of course, be no need for discussing the other questions. American practice, however, has so generally accepted the class suit where equitable relief is asked that it is probably useless to discuss its propriety at large. But the discussion is not useless when the question is as to its availability in a suit for damages. Nor, we may hope, is it futile (whether

44. 312 U. S. 287 (1941).

45. 312 U. S. 287, 316 (1941).

46. *Temperton v. Russell*, [1893] 1 Q. B. 435 (C. A.); *Geddes v. Australian Meat Industry Employees' Union*, 17 New So. W. St. R. 119, 34 W. N. (N. S. W.) 42 (Eq. 1917).

the relief asked for is equitable or legal) when the concern is with the conditions under which it may be used.

That the class suit is, in any use of it to impose individual liability, a relaxation of the usual rule of our law that no person of sound mind and sufficient age shall be subjected to the liability that arises from a judgment against him without having been summoned and allowed to appear on his own behalf is not to be doubted. Whether or not it is an undue relaxation of that rule is a question the answer to which depends upon its use. Its defense against such a charge must rest not only on a plea of convenience, however great that may be, but on the assumption that those chosen to be representative defendants will be zealous to defend the interests of those whom they represent. This means that they must be real defendants—defendants with a personal interest in the outcome of the suit and a knowledge which enables them to advise the counsel who conducts their defense.⁴⁷ But the quantum of interest that is demanded goes even further, one may suppose. It goes to the point of requiring that they be in all respects subject to liability on the same grounds as those whom they represent, that the defenses open to them be in all respects the defenses which are open to those whom they represent, that, in short, the case against these other defendants be precisely what it is against them.⁴⁸

47. Compare *Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs Union*, 115 S. W. (2d) 89, 91 (Mo. App. 1938): "The rule that a few of the members may represent the others does not rest on the concern, or supposed concern, that the few may have for the interests of the others, but rests on the concern they have for their own interests which are such that in protecting their own interests they protect the interests of the others." Compare the problem where it is one of group liability only—*e.g.*, *Biller v. Egan*, 290 Ill. App. 219, 229, 8 N. E. (2d) 205, 209 (1937), where the representative defendant was a vice-president of an international union which was charged with interfering with a local's membership in the organization and the relief sought was an injunction against such interference: "The point made by appellant is that, since no action or threatened action on his part is alleged in the complaint, he cannot be presumed to represent the rights and interests of the persons whose action or threatened action is complained of. This contention overlooks the fact that appellant is made defendant 'as representative of the membership of said International Association.' If we are correct in our conclusion that he fairly represents the rights and interests of the association, relief may be granted against the association even though no action or threatened action on the part of appellant is alleged in the complaint."

48. Compare *BATY, VICARIOUS LIABILITY* (1916) 54: "Representative actions were never meant to be used in order to enable plaintiffs to get cheap judgments by the gallon. They are only proper where, as in the Chancery practice from which they were copied, the position of the parties who are represented by one of their number is substantially identical. One of ten cousins of a testator, one of fifty creditors of a deceased, may fairly be allowed to represent his class. But nothing can be less proper than to conclude delicate questions of knowledge and intention on the part of members [of a trade union] . . . by an action brought against one of them of

Such in substance has been the suggestion in connection with the picketing problem. And such is the import of the remarks by Swinfen Eady, L. J., in *Mercantile Marine Service Association v. Toms*⁴⁹ where the suit was for damages for libel and the representative defendants selected by the plaintiffs were the officers and trustees of an association with a membership of 15,000 or more:

"I have great difficulty in seeing that in this case there are numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorized its publication are liable. The various members of this association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorized the publication of the libel, they could raise such defenses as might be open to them. It might be that their defense would be that the words complained of were not capable of the meaning alleged or of any defamatory meaning, or that the words did not refer to the plaintiffs. The other members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorize their publication; that they were on the high seas and knew nothing about the matter."⁵⁰

which the rest know nothing." Who shall be chosen as representative defendants is a question little discussed in the reports. But see *Hill v. Eagle Glass & Mfg. Co.*, 219 Fed. 719 (C. C. A. 4th, 1915), *rev'd on other grounds sub nom. Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275 (1917); *Local Union No. 1562, United Mine Workers v. Williams*, 59 Can. Sup. Ct. 240, 258, 49 D. L. R. 578, 590 (1919) (per Anglin, J.); and the comments of Lord Macnaghten on *Temperton v. Russell*, [1893] 1 Q. B. 435 (C. A.), in *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426, 439: "The persons there selected as representatives of the various unions intended to be sued were selected in defiance of all rule and principle. . . . They represented nobody but themselves. Their names seem to have been taken at random for the purpose, I suppose, of spreading a general sense of insecurity among the unions who ought to have been sued, if sued at all, either in their registered name . . . or by their proper officers—the members of their executive committees and their trustees." Whether this last suggestion is correct is a matter discussed further in the text. See *Cotter v. Osborne*, 18 Manitoba 471, C. R. [1911] 1 A. C. 151 (C. A.), on the effect on represented class of representative defendants' disobedience of court's order to produce documents.

49. [1916] 2 K. B. 243, 246 (C. A.). Apparently, in this case, the plaintiffs were trying to recover from the organization's funds. That the suit was disallowed under these circumstances of course indicates a great deal as to the English view of unincorporated associations. But for our purpose its relevance is as stated in the text.

50. *Accord*: *Barker v. Allanson*, [1937] 1 K. B. 463 (C. A.). Here the suit was for goods sold and delivered and the claim was that the debt "is due and owing to the plaintiff from the members of the said Lodge and is payable to the plaintiff out of the funds of the said Lodge." The court nevertheless refused to allow a representation order. See the remarks on the *Toms* case, *supra* note 49.

The result of Swinfen Eady's reasoning is, one may suppose, that if there are any significant differences among the members of the described class there is no longer a class but two or more classes each of which must be appropriately represented. To put it otherwise, the question whether the members of a trade union constitute a class is a matter which cannot be settled by saying that they call themselves by a common name. Rather is it a question which can be answered only by looking to the law of unincorporated associations applicable to the particular case. Where it turns out that there is more than one class, each will have to be represented and the plaintiff will have to resort not only to the class action rules but to the rules governing joinder of parties if the suit is to be prosecuted all at once.⁵¹

Measured by standards such as these any attempt by statute to name a representative defendant and, at the same time, to impose individual liability on the union members in the event of an unsuccessful defense of the suit is likely to be highly defective. This may be said even if we grant, in the first instance, the propriety of using a class suit to impose such liability. For the statute furnishes no guarantee that the representative it chooses will be representative; it gives no assurance that there will not be an unwarranted commingling of classes to each of which different defenses may be available. Good as its choice of the president or treasurer may be when the question is one of corporate liability, the choice may be completely irrelevant when the problem is one of individual liability. Only on an assumption, contrary to the usual law of voluntary associations, that no more need be shown to establish a member's liability than that he was a member can such a statute be supported at all. The assumption becomes a result under the construction of two Vermont statutes adopted in *F. R. Patch Manufacturing Co. v. Capeless*.⁵² Here was an imposition of unlimited liability on the members of the union without requiring that they be brought into court in the first instance and without giving them any opportunity subsequently to contest the correctness of the decision in the primary suit. Apart from any question of the wisdom or unwisdom of attempting to treat

51. This is no guarantee, of course, that the prosecution will be equally successful against all the represented classes. In many instances it might very well not be. In the case under discussion the result would be an injunction against some of the union members and not against others. Our concern here is only with this sort of case. But in a jurisdiction which tests the liability of the group assets by the liability of the union members individually—compare the *Toms* and *Barker* cases, *supra* notes 49 and 50—the result would presumably be no liability in the absence of an adjudication against all the represented classes. In this country, as has already been indicated, the problem is handled for the most part as one of agency. The class suit-joinder of parties approach suggested in the text is adumbrated in *Wood v. McCarthy*, [1893] 1 Q. B. 775.

52. 79 Vt. 1, 63 Atl. 938 (1906).

a trade union as a partnership, we may still believe not only that it is unfair to do so without providing the safeguards which our usual partnership procedure guarantees but also that the validity of so doing is doubtful under the due process clause of the Fourteenth Amendment.⁵³ Far more consonant with our usual notions of fair play is the procedure required by the New York law mentioned above which goes as far in the direction of safeguarding the member's interests as it fails to go in providing for group liability. For it seems quite clear that under this statute no judgment obtained in the earlier group suit will, *ipso facto*, be the basis of a recovery out of the individual members' pockets.⁵⁴

But the assumption which has been indulged up to this point that under the class suit rules an unlimited out-of-pocket liability can be imposed on the individual members of the union provided only that they have been adequately represented is itself of doubtful validity. The question was raised in the Massachusetts court in *Maguire v. Reough*⁵⁵ at almost the same time that the Pennsylvania court, deciding the *Oster* case, was suggesting the availability of this device as a means of reaching the common funds of the union. Like the Pennsylvania case the one in Massachusetts was to recover a death benefit. The two named defendants in it were alleged to be "co-partners in a voluntary association under the name and style of United Brotherhood of Carpenters and Joiners of America." The further allegation was made that the action had "been brought against the defendants as representing all the individual members of said voluntary association."⁵⁶ This turned out to be as unfortunate as the selection of the assumpsit action in the *Oster* case. The plain equitable remedy which the Pennsylvania court saw in that case was matched with the plain remedy at law seen by the Massachusetts court in this one:

53. Compare *Flexner v. Farson*, 248 U. S. 289 (1919); *Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806 (1911); *Woodfin v. Curry*, 228 Ala. 436, 153 So. 620 (1934); *Webb & Martin v. Anderson-McGriff Hardware Co.*, 188 Ga. 291, 3 S. E. (2d) 882 (1939). Even where the liability is limited to the unpaid portion of a subscription for stock, levy on a stockholder's property after return of execution against the corporation unsatisfied without giving the stockholder a prior opportunity to be heard "upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself" is a denial of due process under the rule stated in *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 423 (1915).

54. N. Y. GEN. ASS. LAW, § 16, provides that the subsequent action against the members may be maintained "as if the first action had not been brought."

55. 238 Mass. 98, 130 N. E. 270 (1921).

56. *Id.* at 98. Why the plaintiff chose to sue in this form is not made clear from the report of the case. Perhaps it was done in order to avoid having to go outside the jurisdiction to reach the principal officers of the national union. Whatever the reason, labelling the union members "co-partners" was most unfortunate.

"The chief ground on which the plaintiff asks the court of equity to take jurisdiction of this contract case is the alleged inadequacy of the legal remedy, because at law all the members of the labor union must be made parties defendant. But the remedy she seeks is a legal one for judgment and execution against the association for the death benefit of \$300. We have merely a large number of persons alleged to be liable as partners for a single debt. If the plaintiff desires to hold each of them liable, there is nothing inequitable in requiring that each should have due notice and an opportunity to defend."⁵⁷

Maguire v. Reough, it may be admitted, is not unambiguous. Coming as it does from a jurisdiction where law and equity are still separate, it is not clear whether the court's objection is a formal one directed against an attempt to make an equity case out of a legal cause of action in order to get the advantages of equitable procedure or whether, quite apart from the equity-law aspect of the case, it is the far more substantial one that under the plaintiff's procedure individuals would be subjected to personal liability without having an opportunity to defend. If it is the former only, damages might still be recovered as incidental to equitable relief where the cause of action is otherwise properly laid. If it is the latter, the rationale precludes resort to class suits to secure an out-of-pocket judgment even in code states and under the Federal Rules.

Damages have been recovered in class suits incidentally to equitable relief in Massachusetts. But they have been recovered with a warning from the court that practice in this situation varies considerably from that used in the case of equitable relief pure and simple, that before a decree for damages can be entered against the class the members of the class must be identified, their names set out. "A decree against defendants generally who became parties only as members of a class and are not identified by a finding as to their names is ineffective," said the court. "Their identity is a matter for judicial determination and its lack cannot be supplied by a clerk of court in making the entry of an award of damages or in issuing an execution."⁵⁸

This, of course, does not carry us very far if the identification need be made only by the representative defendants. Unless there is an opportunity for each person immediately affected by the decree not only to contest the identification but also to show at least that he was inadequately represented, in the sense in which that phrase has been used heretofore, the objection to imposing monetary liability on non-defending defendants, which the same court made in the earlier case, remains. Whether there is such an opportunity, at what stage of the procedure it shall come, and what questions may be raised, are then matters of

57. 238 Mass. 98, 100, 130 N. E. 270, 271 (1921).

58. *Malloy v. Carroll*, 287 Mass. 376, 392, 191 N. E. 661, 668 (1934).

importance. The answer of the federal courts is that there is an opportunity and that when it comes every issue that was before the court at the original trial may be contested.⁵⁹ For, although the Federal Rules seem to invite plaintiffs to use the class suit against numerous defendants in the type of case we are considering, the invitation is not accompanied by a guarantee that a judgment secured under it will hold good. What effect such a judgment has is not treated by the Rules,⁶⁰ but is left to

59. For a recent case so holding, see *Christopher v. Brusselback*, 302 U. S. 500 (1938), where the suit was to enforce statutory double liability against the stockholders of a Federal Joint Stock Land Bank and the issue was whether a judgment of the bank's insolvency made in a prior class suit was *res judicata* against the present defendants who were not parties of record in the earlier suit: "There is nothing in the statute relating to the organization of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure for determining in their absence the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment." The Court here deals with a case not discussed in the text, *viz.*, that of limited out-of-pocket liability as opposed, on the one hand, to a liability limited to the union's assets and, on the other, to an unlimited out-of-pocket liability. *Cf.* *Wood v. McCarthy*, [1893] 1 Q. B. 775 (representation order allowed in suit for mandamus ordering union to make a levy of 6d. for his benefit on every member of his organization).

A discussion in *Christopher v. Brusselback* (omitted from the above quotation) of cases in which limited out-of-pocket liability has been held allowable when the statute gives a proper beforehand warning "that the benefits of [corporate] membership carry with them the risk that the corporation may stand in judgment" for the stockholder is, of course, no basis for asserting that the same result would or ought to follow if the liability were unlimited. *Quaere* whether the latter is not the rule that should prevail for absent defendants in suits for injunctive relief—*i.e.*, whether an absent defendant should not have an opportunity to contest the validity of the injunction in a contempt action. Surely it cannot be contended that, though of a different sort, the liability here is less than that in a suit for money damages. However wise it may be to refuse to open the injunction to collateral attack by an active defendant, there seems to be no good reason for refusing to do so in the case of the non-party to whom not even an appeal is open. *Cf.* *Shaughnessey v. Jordan*, 184 Ind. 499, 503, 111 N. E. 622, 624 (1916): "No one of the members of the various unions, not served with process nor appearing in the court below, could have properly appealed from the judgment rendered, though each of them, or persons not members of any union, might have been punished for contempt for violating the court's order, and from the judgment for contempt, but no other, might have appealed." See also *Lehman, J.*, dissenting, in *Geller v. Flamout Realty Corp.*, 260 N. Y. 346, 352, 183 N. E. 520, 523 (1932) on the suggested distinction in treatment of parties and non-parties; *Ex parte Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938), [with which, however, compare *Ex parte Fortenbury*, 38 Cal. App. (2d) 284, 101 P. (2d) 105 (1940)] and *Local 13, Int. Brotherhood of Teamsters v. Perry Truck Lines*, 106 Colo. 25, 101 P. (2d) 436 (1940), in both of which review of an unconstitutional injunction against peaceful picketing was granted in habeas corpus proceedings after commitment for contempt.

60. That a proposal to incorporate a section on the effect of a judgment under a class suit was made to the committee which drafted the Federal Rules and was rejected by them, see 2 MOORE, FEDERAL PRACTICE 2283 (1938).

the substantive side of the law. And here, we are told, we encounter the doctrine of the "spurious" class suit⁶¹ — a class action that is not *res judicata* for the represented members of the class, that can be contested by those members of the class who so wish even though they were otherwise properly represented. The result is that, on the procedural side at least, there is, in the absence of a statute more elaborate than those governing class suits, no simple device for imposing unlimited liability on all of the members of the union at once. And such a result, it may be emphasized again, is fair enough. The procedural device adopted ought to be consistent with the liability imposed; if unlimited liability is to be the rule, then the procedure must be such as will bring home to each individual concerned the basis on which it is imposed, such as will ensure him an opportunity to defend on the merits and on the whole merits.

Were cases of this nature all that we had to rely upon there would still be justification enough for our saying that as a practical matter most members of unions are not liable in damages, that theirs is a limited liability. But the case is stronger than this. It is extremely doubtful whether the plaintiff in *Maguire v. Reough* could have recovered even had she followed the court's suggestion and brought her suit in law. Here the teaching of the New York courts in contract cases that there must be explicit authority in the officers to pledge the personal credit of the members comes into play.⁶² Here, too, the holding of the English Court of Appeal in *Barker v. Allanson*⁶³ is appropriate. Here the explicit holding of the Missouri court that, unless it is the understanding of the parties to a contract "that each member of the association is to be personally responsible for the entire loss," the liability is not a partnership liability is in point.⁶⁴

Nor is the case different in tort. We may put to one side those cases in which the members are active participants in the tort. Of course, there is no difficulty in holding them liable in such a case. Likewise,

61. See 2 MOORE, *op. cit. supra* note 60, at 2283 ff. For a criticism of the doctrine of "spurious" class suits — in no wise affecting the conclusions reached in the present text, however — see Kalven and Rosenfield, *The Contemporary Function of the Class Suit* (1941) 8 U. OF CHI. L. REV. 684, 707. These writers are concerned chiefly with its usefulness where the class is plaintiff; see at 696 n. for a useful discussion of the differences between this situation and one in which the class is defendant.

62. See note 31 *supra*.

63. See note 50 *supra* at 472 (per Greer, L. J.): "It is indisputable that only the persons who as members of the Lodge had authorized the order for meat and groceries given by the secretaries in 1921 could be made liable in an action for goods sold and delivered."

64. *O'Neal v. Brotherhood of R. R. Trainmen*, 216 Mo. App. 212, 222, 261 S. W. 128, 131 (1924). *Accord*: *Brady v. Mutual Benefit Dep't, Order of Ry. Conductors*, 215 Ky. 177, 284 S. W. 1045 (1926).

we may put to one side those cases in which the members, though not actual participants, are actively contributing to the accomplishment of the wrong through financial aid made with knowledge that it is being carried on. *Lawlor v. Loewe*,⁶⁵ we may believe, goes no further than this. The trial court's charge, under which the defendants were convicted, is clear enough on the point:

"Now if this evidence falls short of satisfying you that certain of these defendants did know of this unlawful conspiracy, or were in duty bound to know of it, or did tacitly approve of it, then such defendants should be acquitted. . . . Membership in a Labor Union and the payment of dues, are not acts of themselves that necessarily constitute counselling, advising, aiding or abetting. Membership and payment of dues are the life of the voluntary association, and are the foundation of all its authority and the source of financial assistance in executing that authority.

"If these members paid their dues and continued to delegate authority to their officers and agents to commit unlawful deeds . . . under such circumstances as lead you to believe that they knew, or ought to have known, and that such officers and agents were, in that matter, warranted in the belief that they were acting within their delegated authority, then such members are jointly liable, and no others."⁶⁶

It was conviction under the latter part of this charge that the Supreme Court was called on to, and did, approve. The rule may be unwise, for if it were often applied it would be an encouragement to the union member to stay away from meetings and to remain ignorant of his organization's doings. It may be harsh, for it amounts to a get-out-or-be-liable rule so far as the informed member is concerned.⁶⁷ But,

65. 235 U. S. 522 (1915).

66. Reprinted in the opinion of the Circuit Court of Appeals, 209 Fed. 721, 727 (C. C. A. 2d, 1913) where objection to the "ought to have known" phrase is met by saying: "If these words had been used alone, with no qualification or explanation, there might be some room for criticism, but when considered in connection with the rest of the charge, we are entirely satisfied that the jury could not have been misled. As previously pointed out, in cases of conspiracy it is sufficient if a state of facts be shown from which the jury are justified in drawing the conclusion that the defendants must have known of the existence of the conspiracy. It was in this sense that the judge used the words 'ought to have known.'" See also the comments of the court on the same problem in an earlier suit, *Lawlor v. Loewe*, 187 Fed. 522, 526, 528 (C. C. A. 2d, 1911), *cert. denied*, 223 U. S. 729 (1912).

67. Compare *Baush Machine Tool Co. v. Hill*, 231 Mass. 30, 40, 120 N. E. 188, 191 (1918) (suit for injunction against aiding a strike, one of the objects of which was improper; 28 of the 250 member-defendants renounced the improper object; "It is plain . . . that they wanted to get out of the illegal strike . . . being maintained by the union. . . . But they did not want to leave the union. To get out of the strike and to keep in the union they hit upon [and the trial court allowed] the novel scheme of renouncing the illegal purpose of the strike. But that was a futile

to the extent that it is a liability-imposing rule, it is still a rule covering only continuing or deliberate torts. For the remainder, the casual wrong, the unrepeatable harm, it is clear enough from the cases that the members of the union are not personally liable, that they enjoy the same immunity as do stockholders in a business corporation.⁶⁸ And to the cases today may be added, as in the problem of union liability for the acts of its officers and members, the rule laid down in Section 6 of the Norris-LaGuardia Act and its state counterparts.⁶⁹

The sum of the matter, then, is this: that it is the decided tendency of the cases in the United States today to make the trade union, on the substantive side of the law, as fully answerable as is any business corporation; that the procedural devices for imposing such liability are at hand; that, on the substantive side, it is the decided tendency of the cases to give the non-participating member the same limited liability, so far as money damages are concerned, as the stockholder; and that, procedurally, the non-participating member has an opportunity to show this immunity at any appropriate time. Ordinarily, then, the judgment of the trial court in *Furniture Workers' Union, Local 1007 v. United Brotherhood of Carpenters*⁷⁰ is the one that is to be expected in any successful suit against a trade union: "Upon their first cause of action, plaintiffs are entitled to judgment . . . in the sum of \$3,954.42 . . .

proceeding, being, as it was, nothing more than a statement of their motive in continuing members of the union and so of necessity parties to the illegal strike. It had no effect upon their liability as parties to the strike and in the final decree no distinction should have been made between the twenty-eight and the two hundred and twenty-two members of the two unions here in question.") *Accord*: *Illinois Central R. R. v. International Ass'n of Machinists*, 190 Fed. 910 (C. C. E. D. Ill. 1911). But *cf.* *Great Northern Ry. v. Great Falls Lodge, International Ass'n of Machinists*, 283 Fed. 557 (D. Mont. 1922). On the principal question in the Massachusetts case—that is, the legality of concerted action with two or more objects, one of which is improper—compare 4 RESTATEMENT, TORTS § 796.

68. *Sweetman v. Barrows*, 263 Mass. 349, 355, 161 N. E. 272, 275 (1928) ("The plaintiff's action is against all the members of the local union, many of whom were not present at the meeting at which the plaintiff was expelled, and who were not shown to have had knowledge of the various acts complained of or in any way to have participated in them. Mere membership in a voluntary association does not make all the members liable for acts of their associates done without their knowledge or approval . . ."); *Quinton's Market v. Patterson*, 303 Mass. 315, 21 N. E. (2d) 546 (1939) (wrongful picketing; good for contrast in treatment of injunction and damages issues); *Hill v. Eagle Glass & Mfg. Co.*, 219 Fed. 719 (C. C. A. 4th, 1915), *rev'd on other grounds sub nom.* *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275 (1917); *Local 1562, United Mine Workers v. Williams*, 59 Can. Sup. Ct. 240, 253, 49 D. L. R. 578, 587 (1919) per Anglin, J.; *Cotter v. Osborne*, 18 Manitoba 471, 481, C. R. [1911] 1 A. C. 137, 146 (C. A. 1909). *Semble contra*: *Clarkson v. Laiblan*, 202 Mo. App. 682, 216 S. W. 1029 (1919), with which, however, compare *Clarkson v. Garvey*, 179 Mo. App. 9, 161 S. W. 664 (1913).

69. See note 38 *supra*.

70. 108 P. (2d) 651, 655 (Wash. 1940).

together with their costs and disbursements . . . against all of the members of Local 2097, so far only as it may be enforced against the property of Local 2097, which is the joint property of all of the members of Local 2097." The summary can itself be summarized by saying that, consciously or unconsciously, we have created an unincorporated corporation. The repercussions, if any, of the acceptance of such a doctrine on problems other than the immediate one of liability — on the right of the member to inspect the books of the union,⁷¹ for instance; on the doctrine, still accepted in a few jurisdictions, that a member may not sue his union for damages;⁷² on the teaching that a union's property is its members' property and, therefore, that a distribution of beer, for instance, by the former to the latter is not a sale or gift within the meaning of a statute requiring a license so to distribute,⁷³ or that an automobile is improperly registered unless it is registered in the name of all of the members of the union;⁷⁴ on the diversity of citizenship required for federal jurisdiction;⁷⁵ on the applicability to the trade union of the contract, combination and conspiracy concepts of the Sherman Act; on the doctrine of corporate personality⁷⁶ — are matters that the present discussion must leave unanswered.

71. Compare *Norey v. Keep*, [1909] 1 Ch. 561; *Dodd v. Amalgamated Marine Workers' Union*, [1924] 1 Ch. 116 (C. A.).

72. *McClees v. Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 18 N. E. (2d) 812 (1938); *Storms v. United Grain & Millworkers' Union*, 64 Ohio App. 19, 27 N. E. (2d) 781 (1940), *appeal dismissed*, 137 Ohio St. 267, 28 N. E. (2d) 561 (1940); *Kelly v. National Soc. of Operative Printers' Assistants*, 84 L. J. K. B. 2236 (C. A. 1915); *Rex v. Cheshire County Court Judge*, 90 L. J. K. B. 772 (C. A. 1921).

73. *People v. Budzan*, 295 Mich. 547, 295 N. W. 259 (1940).

74. *Hanley v. American Ry. Exp. Co.*, 244 Mass. 284, 138 N. E. 323 (1923).

75. It is the parties of record that are determinative of the court's jurisdiction in a class suit. See *Moreschi v. Mosteller*, 28 F. Supp. 613, 617 (W. D. Pa. 1939). Compare the requirement that it be shown that all members of the union have the proper citizenship when the suit is against the union in its own name. *Ex parte Edelstein*, 30 F. (2d) 636 (C. C. A. 2d, 1929), *cert. denied sub nom.* *Edelstein v. Goddard*, 279 U. S. 851 (1929); *Levering & Garrigues Co. v. Morrin*, 61 F. (2d) 115, 117 (C. C. A. 2d, 1932) ("That an unincorporated labor union is suable as a legal entity implies nothing as to the citizenship of its members for purposes of federal jurisdiction"), *aff'd*, 289 U. S. 103 (1933); *Rosendale v. Phillips*, 87 F. (2d) 454 (C. C. A. 2d, 1937); *International Allied Printing Trades Ass'n v. Master Printers Union*, 34 F. Supp. 178 (D. N. J. 1940); *Green v. Gravatt*, 34 F. Supp. 832 (W. D. Pa. 1940). On the domicile or residence of an unincorporated association for other purposes, compare *RESTATEMENT, CONFLICT OF LAWS* (1934) §41, comment *d*; *Brotherhood of R. R. Trainmen v. Cook*, 221 S. W. 1049 (Tex. Civ. App. 1920), *writ of error refused*, 226 S. W. xvi (1921).

76. See generally *COMMONS, LEGAL FOUNDATIONS OF CAPITALISM* (1924) 143 *et seq.*; *HALLIS, CORPORATE PERSONALITY* (1930); *Laski, The Personality of Associations* (1916) 29 *HARV. L. REV.* 404; *Singleton, Entities and Real and Artificial Persons* (1911) 12 *J. OF COMP. LEG.* 291; *Sturges, Unincorporated Associations as Parties to Actions* (1924) 33 *YALE L. J.* 383.