LAW AND INDUSTRIAL RELATIONS: THE INFLUENCE OF THE COURTS: II

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PART ONE

1. *The Historical Background*

While the main purpose of this essay is to examine the judicial approach to industrial unions as corporations it is necessary by way of introduction to throw some light on two preliminary matters posed as questions. Why did New Zealand labour law cut adrift from the earlier English pattern to which it adhered during the earlier history of the settlement? Why was the corporation used as the vehicle for establishing the status of industrial unions in this country?

An answer to the first question provides the opportunity to emphasise an unusual movement in the progression of New Zealand's legal system by highlighting the rarity of a *volte face* when this country drew away from the normal common law path. What is equally significant is that this alteration in course came almost without warning. What happened was that up until the last decade of the century it seemed certain that local industrial law would become, as was true generally of the great bulk of law, a replica of the English system even though the situations were far from compatible in many instances. As to the common law itself the English maze of master and servant rules were to apply. With statutes the situation was similar and illustrations of this can be seen in the local statutes respecting truck payments, wage protection, workmen's liens, apprentice regulation, compensation for industrial injury, and visitorial powers over shops and factories. It is true that some minor variations could be seen between the two systems but these cannot detract from the overall scene. For example, the Truck Act 1891 (N.Z.) provided for cheque payments, a procedure which did not operate under the English statute for more than half a century, but these were slight points of detail. Of more direct relevance was the law's attitude to trade unions. In New Zealand it appeared as if the local unions were really only going to be something like subsidiaries of the more important English unions, different in fact but reasonably alike in name, form and attitude. Consequently it comes as no surprise to discover that union law in New Zealand germinated in the English mould—the Trade Union Act 1878 (N.Z.) was four square with the English counterpart of 1871 and 1876. Again while the two systems ran in the same harness there could be minimal differences. Picketing under the criminal law of England was governed by the Molestation of Workmen Act 1859 (U.K.) whereas in New Zealand an attempt to get a similar statute failed when the Threats and Molestation Bill 1885 was thrown out. In general terms however, local trade union law was in all but name English and about 1890 no New Zealander would have been concerned

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to learn that this was the pattern to be projected for the twentieth century.

While it is true that the Trade Union Act 1878 established the foundations by that date the law had not set and some flux was evident. Before the cast hardened three upsets of history took place which changed the entire course of local industrial law. All are inter-related, the first activated the second and that in turn made the third necessary. In brief these separate historical pressure points were conciliation, compulsion and status.

Conciliation as a device for determining industrial disputes in England achieved considerable popularity during the final decades of the last century and attracted much attention in parliamentary debates in this country. It had grown out of the earlier use of arbitration dating back to the start of the century in selected industries. This was first noted in the Combinations Act 1800 (40 Geo. 3 c. 106) which provided by section 18 that in labour agreements where wages between masters and men could not be mutually adjusted the matter could be sent at the request of either side to arbitration. An earlier statute of that year (40 Geo. 3 c. 90) confined arbitration to the cotton industries but this limitation disappeared from the later act. It is interesting to note that if arbitration did not produce settlement within three days the matter went to a magistrate for his decision. But the Combinations Act refused to recognise unions as entities and their validity as bargaining units was not established until the Trade Union Act 1871. During following decades the Combinations Act's emphasis altered from arbitration to conciliation and this transition received legislative support in the Masters and Workmen Act 1824, was extended in 1837 and 1845 and reached its zenith in the Councils of Conciliation Act 1867 which established industrial districts served by elected "equitable" councils of conciliation. Arbitration came to the fore again in the Arbitration (Masters and Workmen) Act 1872 where a complicated process involving an "implied" legislative term in individual contracts of employment sent disputes to arbitration. What is of interest in the New Zealand context was that these agreements were between individuals only, unlike modern 'industrial agreements' under the I.C. & A. Act 1954 where the parties are units of industrial unions and employers. A final swing from arbitration to conciliation came with the provision in section 4 of the Conciliation Act 1896 of conciliation boards for the various industrial districts.

With the English experience in mind it should be noted that during the closing years of the eighties in this country two elements united to pave the way for conciliation. On one hand the nation fell into an economic slump, on the other the new fledged unions chose this time to try their wings by holding a series of protracted strikes. A depression is not the most opportune time for strike action and the results were disappointing for the unions. Consequently labour meetings at Dunedin in 1885 and at Auckland in 1886 called for arbitration coupled to state intervention as a solution. State action was also advocated and in evidence to the Sweating Commission in 1890 J. A. Millar, later Minister of Labour, as the secretary of the Maritime Council who had led one strike, requested the appointment of a representative industrial court. Millar's Council was successful in the same year in bringing about the solution to the Petone rail strike by arbitration. By the following year the idea of arbitration was to find its way into the Coal Mines Act 1891 which contained an early form of disputes clause leading to arbitra-

tion on limited matters of interpretations. In this year also the Sweating Commission Report recommended conciliation and arbitration boards.

Acceptance of the idea of conciliation and arbitration led to the second stage in the development of affairs culminating in the I.C. & A. Act 1894—compulsion. This was to form the backbone of the whole system and brought with it the Court as a third party and the concept of a legally enforceable award. It is on this matter that the initial split from the English attitude can be seen.[1] Reeves was convinced that conciliation and arbitration could not succeed—and he used failures elsewhere as justification for this view—unless it was compulsory. As events turned out it was this aspect of the bill which generated almost all the heat and it was twice rejected by the upper chamber. But Downie Stewart's earlier bill which was permissive only had fared no better. Perhaps with an eye to history the Canterbury Times in its leader (almost certainly written by Reeves) claimed that "the man who will make arbitration compulsory in this land, will not require a statue to perpetuate his memory in a world free from industrial troubles".[2]

It is the use of compulsion as an essential feature of the New Zealand process which pin points the width of the divergence from England for the phrase is anathema to contract with all the latter's emotive theories of "freedom of contract". Contract was replaced by status and Maine's dicta must swing into view once more. In England the status aspect of industrial matters was eroded finally with the repeal of the Statutes of Labourers and Artificers in 1813 and 1814 and labour law *in toto* became a matter of contract. This was part of contemporary political philosophy which held, said Dicey, "that the law ought to extend the sphere and enforce the obligation of contract. . . . "[3] It was also joined to the idea of individualism that one man should count individually, a belief which explains why the legal recognition of trade unions was neglected. Dicey dwelled on the fact that full freedom of contract also enabled a person to contract his freedom away and that the Irish tenancy legislation had turned contract into status for that very reason.[4]

For New Zealand unions freedom of contract held no particular attraction unless there was also to be mutuality of bargaining power so a compromise struck was that the unions would forego the strike weapon in exchange for arbitration made mandatory on employers. The Industrial Conciliation and Arbitration Act 1894 which put this compromise into action encompassed within it conciliation, compulsory arbitration and status, the three ingredients of the local system examined in the preceding pages.[5] Clearly, the concept of status was intended to restore the balance between workmen and employer but it brought with it additional features which will be discussed below.

1 Under the conciliation and arbitration scheme in England which culminated in the Conciliation Act 1896 the power given to the Board of Trade was to arrange the forum for conciliation and see to conciliation personnel but arbitration remained voluntary and awards not legally enforceable even under the Arbitration Act. Matters of industrial dispute go to the Industrial Court under the Industrial Court Act 1919 only with the consent of the parties.

2 17 July 1890; K. Sinclair, *William Pember Reeves* (1965), 111.

3 A .V. Dicey, *Law and Public Opinion in England* (1905), 149.

4 Dicey, *op. cit.*, 264; Landlord and Tenant (Ireland) Act 1870, Land Law (Ireland) Act 1881.

5 The courts recognised the swing to status in the first cases arising out of the Act: see e.g. *Taylor and Oakley* v. *Edwards* (1900) 18 N.Z.L.R. 876, 885 (Stout C.J.); contrast this view with: *Printing and Numerical Registering Co.* v. *Sampson* (1875) L.R. Eq. 462, 465 (Jessel M.R.).

2. *The Corporate Entity*

Perhaps the most neglected feature of industrial law in this country has been the failure to appreciate the importance of the deliberate choice of status as the basis of the Act and the form in which status was to operate in relation to industrial unions. No research has been done on this topic and it is not possible to analyse the details here, but two suggestions may be noted. The timing of the Act 1894 is important. This was the age in which collective ideas were suspect, the belief that there was something sinister in group power. Yet the Act made it clear that recognition was to be the direct acceptance of collectivism. But collectivism in disguise? For reasons not at all clear, but presumably because the joint stock company was not considered to be a political device, those critics of collectivism who really equated this theory with a dangerous form of socialism, neglected to paint companies with the same critical brush. Critics were, however, uneasy about "Association", that is the joining together of individuals to form power blocks and much of this uneasiness was aimed at unions. By using the term company or corporation some of this criticism was allayed. Maybe it was this reason why the corporate device was used to give industrial unions in New Zealand their status—certainly the incorporation of unions in itself did not generate debate which was aimed only at the powerful position unions would occupy.[6]

But this is conjecture and in order to try to get down to the core of the question we must turn to the Act itself. In this respect attention should be paid to a factor of legislation which has not received sufficient study—the role of the draftsman. There can be little doubt that in many instances the draftsman makes substantial contributions to the substance of legislation—especially if his instructions ask only for a result rather than the means by which it is to be achieved. Evidence on this is not forthcoming because it is not available to the public. One example may be used here. When the 1909 British budget ran into difficulties because of Lords opposition Sir Courtney Ilbert, who had played a strong role as advisor to draftsman but was at that time clerk to the House of Commons, presented Asquith with a memorandum under which taxes would be collected only on the power of a resolution, which of course lacked legal force, and added that there were occasions "when respect for the constitution must over-ride respect for the law".[7] On the local scene few would doubt that during his time as draftsman Salmond must have had much direct personal influence on a mass of legislation. In the case of the Industrial Conciliation and Arbitration Act 1894 Reeves was the draftsman and almost certainly was responsible for the incorporation of industrial unions.[8] It is not easy to guess why he did so except to suggest that he was eager to see unions placed in a strong position and felt that incorporation would safeguard that position but not subject them to the collectivism criticism mentioned

6 The entity point was not debated: the Appendix *post* p. 310 provides an example of the debate on union power.

7 Asquith Papers: Box XXI, 274-9 quoted in Roy Jenkins *Asquith* (1964) 223. This advice led to prolonged tax litigation not long afterwards.

8 Industrial unions were automatically incorporated under Industrial Conciliation and Arbitration Act 1894 s.6; by I.C. & A. Act 1900 s.7 incorporation was "solely for the purpose of this Act"—this limitation was deleted in the I.C. & A. Act 1954 s. 56: see *Progress Advertising (N.Z.) Ltd.* v. *Auckland Licensed Victuallers I.U.E.* [1957] N.Z.L.R. 1207, 1209 (Shorland J.).

above. He behaved incidentally, as a typical Fabian Socialist would be expected to behave in the circumstances. Originally the Fabians were in favour of the nationalisation of public utilities by making them departments of state—"gas and water socialism". But eventually departmental nationalization was discarded and replaced by the corporate scheme, the public or government corporation which became the form used later to nationalize the public sector in Great Britain. What is of interest is that by using the corporate device Reeves set the seal of approval on status in no uncertain terms for legislative incorporation of industrial unions under the I.C. & A. Act 1894 section 6 was like marriage, divorce, adoption, naturalization—the bestowal of status, recognition and acceptance by the state in a formal manner. If status was granted to industrial unions in New Zealand did not this state act of acceptance in itself answer all criticisms of union power which had been the subject of such prolonged debates in both parliamentary chambers? Who can know if this was in Reeves' mind at the time? What we know now is that the joining of status to unions did in fact work and thenceforth industrial unions became a power in the land.

PART TWO

3. *Corporate Industrial Unions and the Courts*

While suggestions about judicial attitudes are difficult to formulate, sufficient cases involving industrial unions exist to enable some tentative suggestions to be made. The first tendency arising from the litigation indicates a rigidity of approach which limits the capacity of unions and narrows their scope of activity. The second is a reluctance by the courts to accept the distinctive corporate features of industrial unions.

As to the rigidity of approach it is necessary only to look at a few situations, disputes, industrial matters, *ultra vires*. A basis of the legislation is the elimination of strikes and to that end disputes clauses featured in awards and have more recently become mandatory.[9] If the disputes committee is unable to propound a solution the problem can be referred to the Court of Arbitration which happened with a Builders' Labourers Award where the employer had agreed to provide suitable board and lodging and in particular to supply "mattresses, pillows, and stretchers". The question for the Court was simple—does this phrase include blankets, sheets and pillow cases? In arriving at its conclusion the Court appears to have forgotten the general responsibility of the employer regarding board and lodging and on this particular clause found as to the controversial problem of "rights" and "interests" that the disputes committee could not deal with this item for " . . . if we held that the dispute should be settled by ordering the provision of blankets, sheets and pillow cases, it would be tantamount to amending the award".[10] It is difficult to conceive of a more narrow interpretation and the case makes odd reading in the light of the debates surrounding the original legislation where the value of the new system was to be a fluid and flexible approach to industrial matters unfettered by lawyers!

9 I.C. & A. Amendment Act 1970.
10 Builders' Labourers, Quarry Workers, Tunnellers, and General Labourers Award (1961) 61 B.A. 1341 (Tyndall J.).

This case emphasises the fact that New Zealand unions do not employ lawyers on their staff and when that day comes it will not be surprising to see the expansion of awards to include widely drafted disputes clauses. What would be the reaction of the Court to a proviso that the disputes committee has jurisdiction to settle all matters arising out of the terms of the award either directly or by implication? If an award was filed containing a clause empowering the committee to handle disputes as to interests as well as rights what would the judicial view be?[11]

This narrowness of approach can be found in most compartments of this subject and is an important restriction on one of the motivating ingredients of the system—"industrial matters". In its entirety the legislation turns on the operation of this phrase which in the interpretation section means:

> all matters affecting or relating to work done or to be done by workers, or the privileges, rights and duties of employers or workers in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence; and includes all matters affecting the privileges, rights and duties of unions or associations or the officers of any union or association; or affecting or relating to the preferential employment or the non-employment, of any person or class of persons, whether a member or members of a union of workers or not, but not so as to prevent any employer from engaging any person who at the time of engagement is not a member of a union; and also includes all matters which by this or any other Act are declared or deemed to be industrial matters; but does not include any matter relating to the compulsory membership of a union of workers by a person, as a condition of his employment, before such employment commences.

In essence the Court of Arbitration has no jurisdiction over matters unless they are industrial matters and under this rubric the subject matter of awards is limited to matters very much out of date at the present time.[12] Out of date in the sense that the awards are silent on a number of matters, e.g. a right to a say in the management of a company, workers' shares, profit-sharing—which would be the subject of collective bargaining in other jurisdictions. Cases decided to date have placed an interpretation on "industrial matters" which curb the opportunity of unions to go much beyond negotiating wages, hours and physical conditions of work.[13]

In a like context the judicial view of the powers of industrial unions falls into the same limiting pattern and a disregard for the essence of the corporateness of the union is evident. In this area perhaps more than elsewhere the courts have applied outmoded ideas neglecting developments in company law on a wider front. By the use of the *ultra vires* theory the courts confine the operations of a company to its objects as stated in its memorandum. Under the I.C. & A. Act 1954 the contents of a union's object clause are established by reference to section 66 which requires the union rule book to specify the purposes for which the union is formed including a number of stated provisions. In addition the rule book may make provision for any other matter not contrary to law. In view of this it might be assumed that it was open to the union to vest itself with a list of wide ranging powers and that

11 The Supreme Court power over the Court of Arbitration is not affected by I.C. & A. Act 1954 s.47 on *ultra vires* questions.

12 The 1961 Amendment to "industrial matters" has not taken the matter very far.

13 *N.Z. Waterside Workers I.A.W.* v. *Frazer* [1924] N.Z.L.R. 689, *Butt* v. *Frazer* [1929] N.Z.L.R. 636, *Magner* v. *Gohns* [1916] N.Z.L.R. 529, *Wilson and Horton Ltd.* v. *Hurle* [1951] N.Z.L.R. 368.

they would be upheld by the courts. Unfortunately such a view is not borne out by the cases which place on the objects clause of unions restrictions unknown in other company spheres. The view advanced by Chapman J. in 1917 that the be all and end all of unions was "wages, conditions, and hours" and that these embraced the "whole objects of the existence of industrial unions" is still at the centre of the judicial stage.[14] Such an attitude neglects the movement which has taken place in company law in relation to *ultra vires*. Early company cases confined corporate powers rather stringently and as a consequence two developments grew up. Soon the courts were willing to extend the stated objects by implication and at the same time the range of objects grew rapidly and memoranda increased correspondingly in length.[15] Consequently at the present time the *ultra vires* rule does not normally restrict unduly the operations of companies and in England the objects clause is freely alterable without reference to the court.[16] So widespread is the acceptance of the freedom of companies to do what they want that the *ultra vires* rule has been repeatedly attacked by reform committees as no longer necessary.[17] In addition the courts continue to adopt a flexible attitude to the interpretation of objects clauses[18] and more recently upheld a clause which enabled a company to carry on any other trade or business which in the opinion of the directors could be carried on advantageously.[19] Therefore, while it remains true that you "still cannot have an object to do every mortal thing you want",[20] you can get very close to it.

Let the company lawyer turn to industrial unions and he is in for a shock when he discovers that the *ultra vires* rule is applied with such rigour that even arguments as to union powers arising by implication will almost certainly fall on stony ground.[21] This is rendered more curious by the fact that much of the impetus for the adherence to a strict application of the *ultra vires* rule can be traced back to the New Zealand adoption of the *Osborne* decision[22] which was full of political implications in England at that time, and which because it involved a non-incorporated association, had no application to the local circumstances of incorporated industrial unions. There is also an additional point worth mentioning and that is that Chapman J.'s catalogue of

14 *Ohinemuri Mines and Batteries Employees I.U.W.* v. *Registrar* [1917] N.Z.L.R. 829, 836.

15 See e.g. *Cotman* v. *Brougham* [1918] A.C. 514, *Christchurch City* v. *Flamingo Coffee Lounge* [1959] N.Z.L.R. 986.

16 Companies Act 1948 (U.K.) s.5, cf. Companies Act 1955 (N.Z.) s.18, where application to court is still required.

17 See e.g. Cmnd. 6659 (U.K.) para. 12; Cmnd. 1749 (U.K.) para 35-43.

18 It is of interest to note a rare return to the old ideas of strict enforcement of the *ultra vires* rules concerned payments made to redundant workers: *Parke* v. *Daily News* [1962] Ch. 927.

19 *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656. Up until this case it had been assumed that under *Re Crown Bank* (1890) 44 Ch. D. 634 the *Bell Houses* power would fail.

20 *Introductions Ltd.* v. *National Provincial Bank* [1969] 2 W.L.R. 791, 794 (Harman L.J.).

21 See e.g. *Wellington Amalgamated Watersiders I.U.W.* v. *Wall* [1962] N.Z.L.R. 777, *McDougall* v. *Wellington Typographical I.U.W.* [1913] 16 G.L.R. 309, *Auckland Freezing Works I.U.W.* v. *N.U. Freezing Works I.A.W.* [1951] N.Z.L.R. 341. In *Gould* v. *Wellington Waterside Workers I.U.W.* [1924] N.Z.L.R. 1025 the *ultra vires* point "was not much argued". *ibid.* 1034.

22 *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87.

very limited union objects stated in the *Ohinemuri Mines* case[23] was in fact the adoption of administrative action of the Registrar who refused to accept the objects of the union involved. So we have a situation in which one of the basic rules of industrial law and corporate industrial action is grounded as to one foot on the application of an English rule which had no direct bearing on the matter, and as to the other foot on the reinforcement of administrative action undertaken by a non-judicial administrative officer. Regardless of its historical background anyone connected with New Zealand industrial law is forced to accept that the pressure of the courts on the question of *ultra vires* has always been to enforce the rule in its widest setting. It is unlikely that this attitude could alter without legislative intervention.

In this review of judicial attitudes to industrial unions as corporations one conclusion keeps cropping up which is difficult to explain within the compass of a short essay. Perhaps it can be offered in the form of a comment. The bulk of case law on the topic suggests that there has occurred some sort of polarization whereby the company law rules which restrict union activity appear to have been applied readily while this cannot be said of those rules which facilitate union action. The sketch of *ultra vires* illustrates the point. It was adopted on the shaky authority of the *Osborne* case but the alterations to the theory under which its rigours have softened in the company law forum have not been implemented in the union setting. Turn now to other concepts and something similar may be seen.

There can hardly be a more inhibiting rule on the right of shareholders than the rule of *Foss* v. *Harbottle*.[24] Its origin is somewhat obscure but it grew out of a combination of partnership rules and the recognition of the corporate entity as an object of rights and duties. In brief it means that the entity must sue in normal circumstances to redress corporate injury suffered. Its adoption limits shareholders' actions which in company law are termed derivative actions. The use of the rule in New Zealand respecting industrial unions means perforce that members have their power of control over their executive committee very much reduced. In this sense the history of the rule has some added significance because it was concerned with shareholders' rights of litigation and is tied to that rule of partnership that the court will not interfere in the management of a partnership unless the partnership is to be terminated. This aspect, now usually forgotten, is of equal importance with the corporate entity aspect.[25] If one pauses now to consider the New Zealand situation a glaring difference between industrial unions and joint stock companies is seen—the former have no shareholders. After all the basis of the *Harbottle* rule is the catalogue of instances when shareholders may and may not pursue a derivative action. But it is too late now to split hairs on this question of membership since the *Harbottle* strictures have been applied to industrial unions in *Humphries* v. *Auckland Tailoresses I.U.W.*[26] by means of an importation route which has some odd features. If the opinion was that since industrial unions are by statute corporations and therefore the *Harbottle* rule should become

23 See note 14 *supra.*
24 The rule is so well known that it hardly needs citation, (1843) 2 Hare 461.
25 The actual facts of the case must be kept in mind, the company involved was a statutory incorporation.
26 [1950] N.Z.L.R. 380.

applicable the method of application would be direct and concise. But this did not happen, in fact the Court went to English cases and came away with *Cotter* v. *N.U.S.*[27] and applied it to industrial unions. The oddness of this procedure can be seen at once—trade unions in England are not incorporated and consequently the facts of the *Cotter* case have no application to industrial unions. It is true that *Harbottle* was applied in that latter case but the whole of the procedural rules respecting trade unions in England is going through a period of transition and must really be accepted as peculiar to themselves. Trade unions have more and more been given some of the characteristics of corporate bodies quite outside the Trade Union Act 1871. This entire process is simply a curious phenomenon of the English scene. Therefore if *Harbottle* was to be applied to industrial unions locally it was both unwise and unnecessary to follow the circuitous maze of the *Cotter* case. Actually this point emerged in the *Humphries* case when mention was made of the fact that the *Harbottle* rule had not been cited in the *Osborne* case but the significance of the matter was not appreciated.[28] A question still outstanding is the full implication of the equation propounded by Finlay J. when he places shareholders and union members on the same footing, " . . . shareholders (and, consequently, members of trade unions . . .)". Is this to be confined solely to *Harbottle* disputes or are members/shareholders one and the same for all other purposes? Surely this analogy will become of vital importance when the actual nature of a member's rights comes up for investigation before the courts? May we look forward to learned argument as to whether membership of an industrial union gives its owner the same species of interest as that enjoyed by a shareholder?[29]

Part of this question came up for review in *Prior* v. *Wellington United Warehouse I.U.W.*[30] when the I.C. & A. Act 1954 section 57 was examined. But Haslam J. did not use the company approach[31] and explained the relationship between the union and its members by using English cases involving members' rights in unincorporated union associations.[32] In the report of the case no cases are cited in argument and it must be assumed that the company point was not raised. But a reading of the I.C. & A. Act 1954 section 57 and the Companies Act 1955 section 34 suggests that the latter was almost certainly in the mind of the draftsman when the former was drafted and the similarity of text is significant. This indicates that in some future case arising out of section 57 the full implications of the rule in *Hickman* v. *Kent* or *Romney Marsh Sheep Breeders Association*[33] will have to be examined in the New Zealand union background. It should be noted that in enforcing this membership contract in a well known Irish case the Court described it as a contract of "the most sacred character".[34] If the company law rule is adopted it will be seen that there is a contract

27 [1929] 2 Ch. 58.
28 See [1950] N.Z.L.R. 380, 388.
29 See e.g. *Borland's Trustee* v. *Steel* [1910] 1 Ch. 279, *I.R.C.* v. *Crossman* [1937] A.C. 26.
30 [1958] N.Z.L.R. 97.
31 The company analogy can be seen in Companies Act 1955 s.34.
32 *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329; *Abbot* v. *Sullivan* [1952] 1 K.B. 189, *Bonsor* v. *Musician's Union* [1954] Ch. 822.
33 [1915] 1 Ch. 881.
34 [1920] 1 I.R. 107, 112 (Ross J.).

not only between the union and the member but also amongst the members *inter se*.[35]

Space does not allow all the situations in which the Courts have accorded recognition of true corporate status to industrial unions to be be examined, nor is it possible here to explore all the ramifications involved. Note has to be taken of the forceful manner in which Shorland J. applied the *Turquand* rule to industrial unions in *Progress Advertising (N.Z.) Ltd.* v. *Auckland Licensed Victuallers I.U.E.*[36] when he said:

> In my opinion, just as the statutory requirements that the documents of an incorporated company, which furnish its constitution and the powers of its officers, must be registered and be available for inspection by all people result in constructive notice of their contents to any person dealing with the company, so the requirements of the Industrial Conciliation and Arbitration Act 1954, that the rules of a registered and incorporated union which contain its constitution and the powers given to its officers must be registered and must be made available to any person, results in constructive notice of their contents to any person dealing with a union.

Any attempt to summarize the judicial attitude to the industrial union as a corporation may only suggest that there is vacillation in some instances—in the *Prior* case[37] the company doctrine was ignored while in the *Progress* case[38] the link between the company rule and the union was accepted as direct. Few people can doubt that the recognition of the inter-relation between company law and industrial law will continue to expand. But still the fact remains that the industrial union as corporation dates back to 1894 and the realization of its significance has been unduly delayed.

4. *Whither Corporations?*

When the progress of law depends as here on the use of analogy it becomes complicated to try to chart the future development of the concept of the union as corporation. Some points will almost certainly have to receive detailed review. The whole matter of the rights of union membership will have to be scrutinized and the doctrines of enforcement explained. Up until the present date almost all of the law has been grouped around the sort of situation which arises out of the I.C. & A. Act 1954 section 174 (H) or problems of expulsion. These matters in themselves are only a small portion of the whole. Now that company law principles are coming to the fore it will be of interest to see how entrenched the principles of natural justice in membership rights will prove, especially in the light of *Gaiman* v. *National Association for Mental Health*[39] where Megarry J. emphasised that the point of importance was the corporate entity and that the company powers had to be exercised for its benefit. With that as the criterion he found no need for natural justice when examining the expulsion power of the

35 *Rayfield* v. *Hands* [1960] Ch. 1. The question of the member's interest in his membership touched on in note 29 *supra* becomes of direct importance here: see *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317 as to a shareholder's power to get an award of damages against the company of which he is a member.

36 [1957] N.Z.L.R. 1207, 1213. (At p. 1209 Shorland J. also touches on the deletion from the present act of the limitation under the I.C. & A. Act 1925 s.7 of incorporation "solely for the purposes of" the Act.)

37 Note 30 *supra.*

38 Note 36 *supra.*

39 [1970] 2 All E.R. 362.

directors over members. If this ruling applies to industrial unions, and it is difficult to see why it should not, established views as to the role of natural justice in this sphere will have to be drastically reviewed.

Other problems appear like spring flowers. If the *Harbottle* rule is used as an example it will be evident at the outset that care will have to be exercised in operating the well known exceptions. What will constitute "fraud on the minority" and what is to be considered a situation where the "personal rights" of a member have been infringed? As to ratification of the committee's actions will the case of *Grant* v. *U.K. Switchback Ry.*[40] apply?

As to the responsibilities of industrial unions in the light of company rules a number of situations spring to light. Is the vacarious liability approach as seen in *Gould* v. *Wellington Waterside Workers' I.U.W.*[41] to hold the stage or will it give way when necessary to the "organic theory" originating from *Lennard's Carrying Co.* v. *Asiatic Petroleum Ltd.*?[42] In a similar vein what consequence will *R.* v. *McDonnell*[43] have respecting the law of conspiracy in relation to industrial unions? Or will the New Zealand courts in this type of situation make use of the established procedure and "lift the corporate veil"?

On the company constitutional front other complications must arise sooner or later. In the company setting the constitution consists of the memorandum and articles, while the union constitution consists of the rule book. The actual machanics of union constitutions have been given little attention in the courts but the separation of powers could lead to disputes of a kind similar to the one in *Black White and Grey Cabs Ltd.* v. *Fox*[44] involving the union system in the question of the exact separation of the powers of management between the committee of management and the general members of the union. After a period of uncertainty over the intention of Article 80 of Table A of the Companies Act 1955 the separation of powers argument is now settled completely in favour of the directors. Would a similar line of reasoning convince a court that the committee of management is in an unassailable position?

Still on constitutional questions the all important matter of amendment of the constitution is one which in company law has generated a number of reasonably well defined rules. A fundamental rule is that any alteration must be for the benefit of the company as a whole. What application would that rule have to an industrial union rule book? Under the I.C. & A. Act 1954 section 66 (n) the process of alteration is left to be established by the rules but the Registrar can exercise considerable influence by using the registration procedure.[45]

Finally a query must be posed concerning the rights of the members to control the use made by the committee of powers delegated to it by the rules. Under the I.C. & A. Act 1954 section 66 (b) it is provided

40 [1888] 40 Ch. D. 135.
41 [1924] N.Z.L.R. 1025.
42 [1915] A.C. 705 (cf. *Bolton (Engineering) Co. Ltd.* v. *Graham* [1957] 1 Q.B. 159.)
43 [1966] 1 Q.B. 233 (cf. D. L. Mathieson *Iudustrial Law* (1970) 116 (note 49a.)
44 [1969] N.Z.L.R. 824.
45 See *Wellington District Hotel I.U.W.* v. *Attorney-General* [1951] N.Z.L.R. 1072. The significance of I.C. & A. Act 1954 s.70 under which the Registrar may refuse to register rules which are oppressive, unreasonable or unjust is difficult to assess; *Patea Freezing Workers I.U.W.* v. *Registrar* (1954) 54 B.A. 734. Mathieson (note 43 *supra*) 164 suggests that the scope of s.70 may be too limited to be effective.

that the union rules must make provision regarding the powers and duties of the committee. The details of the functions and responsibilities of committee members are left to the actual rules and many vary widely from union to union. But the same is true of the articles of association of a company which leave the scope of the powers of the directors in the hands of the shareholders who normally delegate full power to the board. Until comparatively recently it was not clear what restrictions were placed on the exercise of those delegated powers but with the wide use of take-over bids and more especially the techniques of opposing bids employed by sitting directors the whole system came under review. As a result the courts concluded that when exercising their powers the board had to act bona fide in the interests of the company, but more important they had to use those powers for the purpose for which they were intended. So since the power to issue shares was intended to raise capital, not to dilute voting rights so a take-over bidder would have his voting rights diminished, an issue of shares for that collateral purpose would be void.[46] This proper purpose rule has proved valuable in controlling the actions of directors otherwise free from restraints under widely drafted empowering articles. It is not at first easy to see how relevant this rule may be in controlling the activities of union committee members. Cases are not forthcoming although in one instance it was suggested that union levies imposed on members were similar to calls made on shareholders.[47] If this is so it can be suggested that the proper purpose rule applies to calls and using this analogy the purpose rule would be applicable to committee members.

5. *Conclusion*

Many of the preceding cases draw attention to the actual or apparent relationship between the rules of company law and the rules of industrial unions. Because of differing circumstances probably not all company rules will apply strictly to unions. Yet it is important to establish the pattern. At the present time the full appreciation of the corporate status of unions has been neglected by the courts. There are a number of reasons for this not the least of which is the intention of the I.C. & A. Act 1954 section 47 which is aimed at keeping most matters outside the jurisdiction of the Supreme Court. But this section would not prove an obstacle to the litigation of most of the company law concepts touched on in this essay. In addition to this privative section there has always been widespread belief that unions are best removed from law and this point is raised frequently in parliamentary debates. To those who pause long enough to consider this matter however, there can be no advantages gained by unions remaining outside the judicial forum. They are not faced by the problems which beset unions elsewhere that the collective agreement is not legally enforceable or by other procedural difficulties under which some unions overseas are forced to operate. But the true significance of their corporate status still fails to be recognised. This situation will prevail until unions make much wider use of legal

46 *Hogg* v. *Cramphorn* [1967] Ch. 254; *Bamford* v. *Bamford* [1969] 2 W.L.R. 1107.

47 *Gould* v. *Wellington Waterside Workers I.U.W.* [1922] N.Z.L.R. 1025, 1031 (Hosking J.).

advisors or until sooner or later members raise complicated corporate problems.[48]

Now when the I.C. & A. Act 1954 is under constant pressure from all sides as being outmoded and incapable of meeting the needs of the present industrial society perhaps a pause should be made for reflection? Is the full implication of the Act really understood? A purpose of this essay is to suggest that as far as the industrial union as corporation theory is concerned the answer must be in doubt. It would seem a pity to throw away a statute which has given unions corporate standing just at a period when in other parts of the world reformers are reaching the conclusion that incorporation is one of the essential features of a workable industrial scheme.[49]

APPENDIX

Extract from the debate on the third reading of the Industrial Conciliation and Arbitration Bill: September 16, 1892: 78 *N.Z. Parliamentary Debates,* 152 (Sir J. Hall), 181-182 (Mr W. P. Reeves).

Sir J. Hall. " . . . My strongest objection of all, however, is that the benefits of the Bill are to be confined to one set of men—namely, those who have organized themselves into unions—while the larger number, who do not belong to a union, are excluded from the benefit of the Bill. It would have been perfectly easy to so alter the Bill as to give them the benefit of its provisions. The Bill appears to me an attempt to drive working-men into unions, and to deprive them of the independence and freedom of action which they should possess. While I should have gladly hailed, and would have been glad to give my utmost help to, a Bill which would have been really a conciliation measure, tending to bridge over difficulties between the different classes of the community engaged in industrial work, I must say that this Bill entirely disappoints me. I believe that, as it is now framed, it will be looked upon by a large number as a piece of class legislation—a tyrannical measure, which will not tend to the reconciliation of classes, but to their estangement."

Mr W. P. Reeves. " . . . It is stated that because I based this Bill on unionist lines I propose to confine it to men of the unions of the colony, and therefore I am, in the first place, shutting out a lot of men who would like to come in; and, secondly, I am driving all these men into the unions. My reason for not extending it to all workmen is a very simple one, and a very businesslike one. There are species of disputes in which public opinion has asked the State to interfere—that is, disputes between organized labour and employers; but disputes between unorganized labour and employers have never alarmed the public ,have never paralyzed industry, half-ruined employers, beggared men, women, and children, and desolated homes. The industrial conflicts that have arisen from disputes between unions and employers, however, have done all these evil things, and will do them again. That

48 One which springs to mind turns on the suggestion that the status of unions as corporations also affects the relationship between members and union which may be seen to be not contractual but status based and open to protection by actions grounded in tort for the protection of status.

49 The Donovan Report (Cmnd. 3623) recommended incorporation for trade unions in Great Britain. So far this has not received government approval: "In Place of Strife" (Cmnd. 3888) (White Paper).

these conflicts have alarmed the public, and have done a great deal to shake public confidence in different countries in the world, there is no doubt; and yet at the same time those who study labour questions must come to the conclusion that, unless some machinery, some safety-valve, is provided for dealing with disputes between masters and men, these strikes are an absolute necessity; and it is not fair to say to the men they shall not strike, because, unless they do strike, how will they be able to gain freedom and advancement for themselves? If you wish to put a stop to strikes you must provide the machinery; and that is what this Bill proposes to do. Why should we interfere in disputes between masters and men in which public opinion has never asked us to interfere? Why should we bring in a Bill to interfere with a sort of men who have never asked us to interfere, and do not want us to interfere? I refer to unorganized labourers and their masters. They do not want Boards of Arbitration and Courts of Conciliation; they do not want to be meddled with at all; and therefore I do not propose to meddle with them. Honourable gentlemen complained that this Bill is an interference with the liberty of the subject, and yet they demanded that its scope should be extended still further, in order to interfere with a large number of men who do not ask to be interfered with at all. Is there any logic or any consistency in these arguments? There is another reason why we should not interfere with unorganized labourers, and that is, there is no security that such men will not come into Court over frivolous matters, and will not put their employers to all sorts of expense and trouble without any real reason for it at all. A union, after all, is a substantial and responsible body; it has a reputation to keep up; it has to keep control over its members, and attach them to it, and not disgust them and drive them out; it must not suck the pecuniary blood from its men; it must not drain their pockets by legal expenses. These are reasons why the unions could not be perpetually dragging their members before the Court of Conciliation, or Board of Arbitration, both of which will cost money. In addition to that, you must remember this: If we limit the applications to these Courts to applications by unions on the one side and employers on the other, we do something towards freeing the employer from a number of applications, because in that case it will not be just the two or three men who are most closely concerned in some petty quarrel with an employer who will be able to drag the employer into Court. The men will have to go first of all to an informal Court of Appeal, in the shape of an established union and its officers; they will have to submit the questions to them; and it is these persons, many of whom will not be personally concerned in the dispute, who will have to decide whether it is advisable to drag the master into Court or not. So that, before any disputes can be subjected to any such machinery as is provided for in this Bill, they will be considered and revised by an unofficial tribunal to which they will be submitted. Then there is another great reason why, I think, we should continue the application to our Courts to unions. It is stated I shall be forcing, perhaps, the so-called free labourers to join unions. It is argued in that way that this Bill is to build up and strengthen unions; while on the other hand, other honourable speakers are equally emphatic that it is a Bill for the disruption and ruin of unions. These two points are urged yet both cannot be true. If the Bill was going to destroy the unions it cannot build them up. In my opinion, neither of these statements is exactly true. To suppose the Bill will utterly destroy and disrupt

unionism is, of course, absurd; but, on the other hand, I deny that the action of the Bill will drive these unorganized labourers into the unions. They do not want this machinery of arbitration. They are not supposed to be at loggerheads with their employers. They are supposed to be so contented that they see no reason to join the unions. Why should they be driven into the unions in order to go into the Court of Arbitration? The foundation of unionism is supposed to be that the men cannot get their rights from them. There is no doubt that but for that there would be no unions in the world. The men who do not join unions are men who are presumed to get on so well with their employers that they do not want union interference of any kind. These men are by my Bill left exactly as they are. They are just where they would be if this Bill were not passed at all. And yet honourable gentlemen get up and declare that this Bill will drive hundreds and thousands of these men into the unions! This Bill does not interfere with these men."