PROTECTION OF MEMBERS' INTERESTS IN FUNDS OF UNINCORPORATED UNIONS

Labor union funds have assumed a position of influence in the nation's economy.[1] With this expansion has come increased concern for the propriety of their administration. Statutory regulation has often been proposed as essential to the adequate protection of the rights of union members in such funds.[2] Pressure has formed within organized labor itself toward more effective internal control of financial administration. The advent of trends toward legislation aimed at diminishing the risk of capricious handling of labor union funds evidences distrust of the adequacy of the common law to protect the interests of union members without imposing unwarranted restrictions on officials to whom the administration of union funds is entrusted. Realizing that the question of members rights in control of union funds is fused with legislative determinations of the degree of regulation to be imposed on labor unions in general, the courts have stated a policy of non-intervention in the internal affairs of unions.[3] The feeling has been that these problems are better settled by legislative pronouncement. However, it has been recognized that the desirability of non-interference is sometimes outweighed by the serious consequences which flow from failing to restrict the official.[4]

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1. It was estimated that in 1953, more than $17 billion were lodged in union pension funds alone, with a net annual increase of $2 billion. Federal Reserve Bank of New York, Monthly Review of Credit and Business Conditions, Dec. 1953, p. 187. As of February 28, 1955, United Auto Workers had resources of $19,704,015.13, an increase of $3,919,368.21 over the 1953 figure, Report of Emil Mazery, UAW secretary-treasurer to the 1955 UAW convention, 35 L.R.R.M. 101 (1955). The United Mine Workers Welfare Fund income for the fiscal year ending June 30, 1957 was $157.1 million; funds on hand $145.3 million; net gain $15.1 million. Newsweek, Sept. 13, 1957, p. 106.

2. Interim report of Ives subcommittee of the Senate Labor Committee Jan. 26, 1955 cited in 35 L.R.R.M. 43 (1955). Report, C.I.O. Standing Committee on Ethical Practices May 4, 1955, discussed in 35 L.R.R.M. 183, 187 (1955). Professor Walter Gellhorn of Columbia University in a speech before the Sidney Hillel Foundation luncheon in New York April 30, 1957 suggested the creation by the labor movement as a whole of a nationwide network of arbitration courts to provide impartial, quick and cheap settlement of members' grievances against the union. 40 L.R.R. 8 (1957).

3. Harris v. Missouri Pacific Railroad Company, 1 F.Supp. 946 (D.C. E.D. Ill. 1931). O'Neill v. United Ass'n of Journeymen Plumbers and Steamfitters of the United States and Canada, 348 Pa. 531, 36 A.2d 325 (1944). Some legislative regulation has been imposed. A union seeking to gain access to the National Labor Relations Board must file with the Secretary of Labor a copy of its constitution and by-laws, names and salaries of officers, a financial report and show that such financial reports are furnished to all members of the union. 61 Stat. 136, 9 f.)-g.), 29 U.S.C. 159 f.)-g.) (1947).

4. Discussion of the scope of labor union power over individual members. Summers, *Union Powers and Workers Rights*, 49 MICH. L. REV. 805, 816-37 (1951). For a discussion of labor unions as corporations and unincorporated associations, see ROTHENBERG, LABOR RELATIONS c. VI (1949).

Funds received by the local union through initiation fees, dues and assessments are usually applied, at least in part, toward local expenses such as rents and salaries of administrative officers. If the local is a member of a national or international union, part is forwarded to the central union. Special projects are sometimes financed by levying an assessment or setting aside a portion of dues.[5] The control of funds collected from the members rests solely in the hands of union officials and the documents which primarily determine their duties and liabilities with respect to such funds are the constitutions and by-laws of the local and international union. The constitution and by-laws of the local are a contract between each member of the local and all other members of the local.[6] Likewise, the constitution and by-laws of the central union constitute a contract between the local and its members and the central union and its members.[7]

A union officer is often described as a *fiduciary* in respect to funds collected from members of the union.[8] It has been said that such funds are trust funds, or in the nature of trust funds.[9] Patently, these terms are not synonymous since different legal consequences flow from each, yet the courts' use of them interchangeably demonstrates that difficulties are encountered in clearly defining the power, nature and scope of the official's obligation.

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5. HARDMAN, *"Dollar Worth" of the Unions* in THE HOUSE OF LABOR 408, 410-11 (1951).

6. Constitution and By-laws which are part of membership contract define the rights, privileges and duties of individual members. Low v. Harris, 90 F.2d 783 (7th Cir. 1937); Hopson v. National Union of Marine Cooks and Stewards, 116 Cal.App.2d 253, 253 P.2d 733 (1953); Miller v. International Union of Operating Engineers, 85 Cal. App.2d 66, 257 P.2d 85 (1953); Cameron v. Durkin, 321 Mass. 590, 74 N.E.2d 671 (1947); Sullivan v. Barrows, 303 Mass. 197, 21 N.E.2d 275 (1939); Barnhart v. United Automobile, Aircraft and Agricultural Implement Workers of America, 12 N.J. Super. 147, 79 A.2d 88 (1951); Harris v. Geier, 112 N.J. Eq. 99, 164 Atl. 50 (1932); Walsche v. Sherlock, 110 N.J.Eq. 223, 159 Atl. 661 (1932); Dakchoylous v. Ernst, 203 Misc. 207, 118 N.Y.S.2d 455 (1952), *aff'd*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953); Pratt v. Rudisule, 249 App. Div. 305, 292 N.Y.Supp. 68 (1936).

7. Harker v. McKissock, 7 N.J. 323, 81 A.2d 480 (1951); Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local Union No. 384, 119 N.J.Eq. 577, 183 Atl. 157 (1936); Alexion v. Hollingsworth, 289 N.Y. 91, 43 N.E.2d 825 (1942); Nilon v. Colleron, 283 N.Y. Supp. 84, 27 N.E.2d 511 (1940); Polin v. Kaplin, 257 N.Y.Supp. 277, 177 N.E. 833 (1931); Brotherhood of Painters, Decorators and Paperhangers of America v. Garrett, 185 Misc. 61, 56 N.Y.S.2d 30 (1945); Way v. Patton, 195 Ore. 36, 241 P.2d 895 (1951).

8. Dusing v. Nuzzo, 262 App. Div. 781, 27 N.Y.S.2d 382 (1941); 177 Misc. 35, 29 N.Y.S.2d 882 (1941); 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); 178 Misc. 965, 37 N.Y.S.2d 750 (1942); Wortex Mills Inc. v. Textile Workers Union of America, C.I.O., 380 Pa. 3, 109 A.2d 815 (1954).

9. Local Union No. 720, International Hod Carriers, Building and Common Laborers' Union of America v. Bednarsek, 119 Colo. 586, 205 P.2d 796 (1949). International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O. v. Becherer, 142 N.J.Eq. 561, 61 A.2d 16 (1948).

If the official's fiduciary obligations exist apart from any notion of a trust fund, then the injection of the trust concept only serves to becloud the real nature of the relationship. It is well recognized that the election or appointment of a union official creates an agency, the scope of which is defined by the constitution and by-laws.[10] It could then be said that the union official as an agent owes to his principal the same duties of good faith and honest effort as are owed by all agents to their principals.[11] Although the agency relationship offers a possible source for the "fiduciary" aspects of the offcial's duties, obstacles arise when an attempt is made to apply the concept to the existing situation. Problems such as those which are encountered in attempting to define the identity of the principal limit the utility of the agency relationship toward affording a theoretically sound explanation of the source and scope of these fiduciary duties.

Parties by Representation

Most local unions are unincorporated associations and have no legal existence apart from their membership; consequently, unless permitted by statute, no suit may be maintained by or against the local itself.[12] However, these statutes are designed to facilitate suits between the unincorporated union and third persons and not to further the enforcement of individual members' property interests in union funds.[13] The equitable doctrine of parties by representation must generally be invoked to permit the membership as a class to bring suit[14] and the suit is usually a class action in name only. While considerable unanimity of sentiment is often demonstrated in actions against third persons, misappropriation actions, although called class actions, are frequently characterized by such extreme lack of agreement, apathy or fear among members that only one member may in fact initiate suit.[15]

It is generally said that legal title to the property and funds of an unincorporated association is vested in the officers or trustees who hold

10. A.R. Barnes and Company v. Berry, 157 F. 883 (D.C. S.D. Ohio 1908); Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209 (1950).

11. See Mechem, Outlines of the Law of Agency c. XVI (4th ed. 1952).

12. Rifkind, D. J., "It is true that there is a growing tendency to regard labor unions, procedurally, as legal entities [See *e.g.*, Fed. Rule 17(b)]. But these are deviations from tradition. On the whole . . . . the unincorporated association is conceived of as an aggregate of individuals, all of whom have to be joined in order to obtain relief for or against the association. . . ." Tisa v. Potofsky, 90 F.Supp. 175, 180 (D.C. S.D. N.Y. 1950). For a discussion see Wrightington, Unincorporated Associations 307 (1916).

13. *Cf.* McNalty v. Higgenbotham, 252 Ala. 218, 40 S.2d 414 (1949).

14. See note 12 *supra*.

15. *Cf.* O'Connor v. Harrington, 136 N.Y.S.2d 881 (N.Y. Sup. Ct. 1954); *modified on rehearing*, 285 App. Div. 908, 138 N.Y.S.2d 285 (1955); Wrightington *op cit. supra* note 12, at 241.

for the benefit of the membership class,[16] but in spite of the fact that often only a single member is willing to bring suit, no definition is attempted of any separate property interest held by one individual member. A difficult question is presented when only one or a few members question the propriety of a particular appropriation. It has been said that "each member of the local union has an interest in the entire assets and property of the local . . ."[17] yet on the other hand it is said that such rights, rather than being held individually, are held jointly by the ". . . aggregate of individuals comprising the union, and this aggregate properly sues through its representatives for the enforcement of their joint or common rights."[18] Although the courts do not disagree in their desire to do justice, these statements demonstrate the lack of precise definition of the nature and separability of property interests in union funds which imposes unnecessary difficulties in the pleading of suit against the defalcating official and unduly complicates the task of the court.

To qualify under the doctrine of parties by representation a "group" right must be shown and not merely a multiple invasion by the officer of individual rights such as the right to equal work opportunities.[19] A single union member may sue as a representative of the membership to recover from the officer funds improperly expended or received but he must allege in his complaint that he sues not only for himself, but also for "all others similarly situated."[20] If this is not done, some courts would dismiss the suit on the ground that an individual member has no separate interest in union funds.[21] Even if a separate interest is recognized, other obstacles must be met. In *Seslar v. Union Local 901 Inc.*,[22] a suit in federal court, it was held that since the plaintiff did not allege that he represented all other members of the unincorporated union, he must represent only himself, and that the value of his individual property interest in the union funds could be determined by dividing the funds by the number of members. Since this amount came to less than the three thousand dollar jurisdictional requirement, the case could not be heard in federal court. The superficiality of the requirement of pleading that the

16. International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O. v. Becherer, 142 N.J.Eq. 561, 61 A.2d 16 (1948); Mursener v. Forte, 196 Or. 253, 205 P.2d 568 (1949).

17. Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 65 S.E.2d 562, 125 A.L.R. 1251 (1940).

18. Tisa v. Potofsky, 90 F.Supp. 175, 180 (D.C. S.D. N.Y. 1950).

19. Atkins v. Fletcher, 65 N.J.Eq. 658, 55 Atl. 1074 (1903).

20. See note 12 *supra*.

21. McNalty v. Higginbothom, 252 Ala. 218, 40 S.2d 414 (1949); Ford v. Houchins, 25 L.R.R.M. 2191 (Pa. Ct. of Common Pleas 1949) (dictum).

22. 186 F.2d 403 (7th Cir. 1951).

plaintiff represents a class is apparent in *O'Connor v. Harrington,*[23] where every member of the local except the plaintiff had voted in favor of financing an official's defense on a criminal charge. It was sufficient that the plaintiff alleged that he represented a class even though no such class existed.

Derivative Suit Analogy

Many of these complexities are attributable to the tacit recognition that the union local differs from other unincorporated associations such as religious and fraternal organizations and that legal devices adequate for the protection of the interests of members of these groups do not adequately protect union members. For this reason, it is sometimes said that the union members' suit is analogous to the shareholders derivative action.[24] By utilizing the analogy, the consequences of errors of pleading and the absence of a "class" are minimized. In theory the two are at odds since the shareholders' derivative action envisions the secondary enforcement by the shareholder of a property interest held by the corporation, while the union member's suit hinges on a primary property interest enforced by a member of the class to which it belongs.[25] Although the purpose of the analogy is to clarify and alleviate procedural problems, it has sometimes been carried to the unnecessary extreme of requiring that the member make formal demand of the union executive committee prior to bringing suit.[26] The rigidity of requiring such a demand has been appreciably relaxed even in the classic derivative suit and imposing it here merely further complicates an already cumbersome process. Naturally, difficulties are encountered in extending an analogy from a well settled theory, such as the derivative action, to a new area, such as the union members' suit. However, since the use of an analogy admittedly creates a new body of law and does not merely extend the old, it need not embrace formal requirements such as demand in order to incur the desired advantages.[27] The attempt to equate the members' representative action to the shareholders' derivative suit evidences a recognition of the inadquacies of the law of unincorporated associations as applied to the unincorporated labor union. This body of law developed at a time when local unions were similar to fraternal organizations and an infringement

23. 136 N.Y.S.2d 881 (N.Y. Sup. Ct. 1954); *modified on rehearing,* 285 App. Div. 900, 138 N.Y.S.2d (1955).

24. Perkins, *Protection of Labor Union Funds by Members Representative Suits: Massachusetts Practice,* 27 B.U.L. Rev. 1 (1947); Wilson v. Miller, 194 Tenn. 390, 250 S.W. 575 (1952).

25. Perkins, *op. cit. supra* note 24, at 16-18.

26. McNalty v. Higgenbothom, 25 Ala. 218, 40 So.2d 414 (1949).

27. Perkins, *op. cit. supra* note 24, at 17-21.

of membership rights generally did not affect the livelihood of the injured member. It is apparent that legal procedures originally designed to protect interests such as the member's use of recreational facilities are not adequate to safeguard his economic wellbeing. The utilization of the derivative action analogy to alleviate these inadequacies requires the tedious construction of a body of case law pertaining solely to members rights in such "quasi-corporations." Much of the delay and uncertainty attendant to such judicial construction could be avoided by legislative action enumerating and clarifying the requirements of a union members' suit.

Trust Fund Concept

Just as the doctrine of parties by representation and the shareholders derivative action analogy fall short of affording complete satisfaction, the addition of the "trust fund" concept only servise to multiply incongruities. The official only holds "in trust" funds collected from the members. Thus when funds are received from non-members, such as a former employer who creates a fund to be used to benefit loyal employees, the individual member is generally at a loss to show that he holds the "property" interest necessary for suit.[28] In such a circumstance, the only duty imposed on the administering official is one of honesty, and unless a personal misappropriation of the fund can be shown, the member is remediless. Even if the funds in question were collected from the members it must be shown that they somehow became "union funds." In *Schimmel v. Messing,*[29] when the local by vote approved a testimonial dinner, the dinner was advertised as being sponsored by the local; tickets were sold to the members and the profits were split between two officers; the members were denied recovery. Since the funds had never been deposited to the local's account it was held that they had never become the property of the union, and hence the members could not show a personal misappropriation of so-called "trust funds." If the officials in question were in the true sense trustees, then it is well settled that the beneficiaries could recover any profit made as a result of their position even though the funds had never been earmarked or impressed with the trust. If the official used his position to return a profit, no misapplication of trust funds would need be shown.[30] Likewise in *Vaccaro v. Gentile,*[31] where

28. Geller v. Acwa Sportswear Manufacturing Company, 201 Misc. 381, 110 N.Y.S.2d 20 (1951); Jennings v. Jennings, 91 N.E.2d 899 (Ohio Ct. of App. 1949).

29. 117 N.Y.S.2d 423 (N.Y. Sup. Ct. 1952); *aff'd* 306 N.Y. 841, 118 N.E.2d 904 (1954).

30. *Cf.* 3 Bogert, The Law of Trusts and Trustees § 492 (1946).

31. 138 N.Y.S.2d 872 (N.Y. Sup. Ct. 1955). Even though plaintiff failed to show grounds for an accounting from the official, the court reasoned that plaintiff's counsel

the union pension fund suffered severe losses because the trustees had improperly invested in second mortgages and had financed an ill-fated office building, the court refused to remove the official from office and compel an accounting since no personal misappropriation by the officials had been shown. If a showing of personal misappropriation must be made, it is apparent that describing the official as a trustee contributes no more than the two theories previously discussed.

On the other hand, it cannot be said that the courts' reluctance to grant recovery in the absence of a showing of personal misappropriation is totally unjustified, since denying the union official discretion in the use of funds other than those set aside for long term security, such as pensions, limits his ability to meet emergencies requiring expenditures. Management representativs are in great part unbound in respect to the funds at their command, hence union officials need certain discretionary powers to keep equal footing.[32] Imposing the requirement of a showing of personal misappropriation serves to prevent a single member from judicially blocking every expenditure on which the entire membership does not agree. The membership could easily disagree on the advisability of financing lobbying against proposed state labor legislation, and allowing an individual member easy access to the courts and the delays of litigation might render the question moot.

Contract Rights

In other instances, rather than focusing on the property interest, the contractual rights of each individual member stemming from the constitution and by-laws are emphasized.[33] A suit on the contract is disarmingly appealing in its simplicity, since the only allegations and proof necessary are an expenditure by the official not authorized by these documents. However, defining the rights of the member in terms of these instruments also focuses the court's attention on the duties they

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had somehow benefitted the union, and granted plaintiff's counsel fees from the union's general fund. On recovery of counsel fees, see Perkins, *op. cit. supra* note 24, at 27-28.

32. Summers, *op. cit. supra* note 4, at 816-20.

33. "Each member of the local union has an interest in the entire assets and property of the local union. In addition, each member has a contractual right to have the assets and property of the local union used only for those purposes set forth in the constitution, and disbursed only in such manner as therein approved. Supplementary to those is the further right to have the assets and property of the local union remain under the control of both the local and national unions as such control is set forth and delineated in the constitution and by laws." Seslar v. Union Local 901 Inc., 87 F. Supp. 447, 450 (D.C. N.D. Ind. 1949), *reversed on other grounds,* 186 F.2d 403 (7th Cir. 1951). Recovery granted for funds received by official contra to constitution even though officials' open action showed no fraud intended. Local Union No. 720, International Hod Carriers, Building and Common Laborers Union of America v. Bednarsek, 149 Colo. 586, 205 P.2d 796 (1949); Bianco v. Eisen, 190 Misc. 609, 75 N.Y.S.2d 914 (1944); Duke v. Franklin, 177 Or. 297, 162 P.2d 141 (1945).

impose upon members. Many union constitutions require the members to exhaust internal remedies before resorting to the courts for relief, and, in accord with their policy of non-interference with internal affairs of unions, the courts have generally required compliance with such clauses;[34] however, if a class action rather than one on the contract is brought, it may be possible to argue that the requirement of exhaustion of internal remedies pertains only to the enforcement of individual rights and not group property interests.[35] In addition, the premature bringing of suit is often expressly made a valid ground for disciplinary expulsion from the union.[36] Realizing the economic sanction implied in the threat of expulsion, the lack of enthusiastic pursuit of the defalcating official is not surprising.[37] If the suit is prematurely brought and the member is expelled, since continued membership is required for standing to sue, the expulsion can effectively deny the ex-member any future opportunity to litigate the matter.[38]

Another weakness of suit on the contract is its inapplicability to the recovery of funds from third persons to whom the official has improperly paid them. The member must resort to an action for conversion, but since proof of a property interest is required, the same theoretical barriers re-appear.[39] The contract theory lends itself to the recovery of funds from the official himself but not from non-members to whom they have been paid.[40]

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34. Way v. Patton, 195 Or. 36, 241 P.2d 895 (1951); PERKINS *op. cit. supra* note 24, at 22-27. *But see* Cosentino v. Goldman, 183 Misc. 539, 49 N.Y.S.2d 467 (1944) where the court, in discussing the requirement of exhaustion of internal remedies, reasoned that since the union constitution contained no express provision for obtaining an accounting from the official by internal appeal, the member was jutsified in resorting directly to the courts. However, it may be that if the member has never received a copy of the constitution, he will not be bound by a provision requiring exhaustion of internal appeal. Chew v. Manhattan Laundries, 134 N.J.Eq., 36 A.2d 205 (1944). A provision calling for expulsion for the premature bringing of suit is not binding when passed after the member has filed his bill. Lo Bianco v. Cushing, 177 N.J. Eq. 593, 177 Atl. 102 (1935).

35. Bell v. Sullivan, 183 Misc. 539, 89 N.Y.S.2d 467 (1944).

36. Burke v. Monumental Division No. 52, Brotherhood of Locomotive Engineers, 273 Fed. 707 (D.C. Md. 1919). Lesser acts such as the making of false and libelous statements against an officer may be grounds for expulsion. Hall v. Marion, 293 S.W. 435 (Mo. 1927); Ames v. Dubinsky, 70 N.Y.S.2d 706 (N.Y. Sup. Ct. 1947).

37. It has been said that officers are not liable to an erroneously expelled member in the absence of a showing of fraud or bad faith. Schouten v. Alpine, 215 N.Y. 225, 109 N.E. 244 (1915).

38. *Accord,* Harris ex rel. Carpenter's Union No. 2573 of Marshfield Oregon, Lumber and Sawmill Workers v. Bachman, 160 Or. 520, 86 P.2d 456 (1939); S.K.F. Employees Association v. Root, 57 Pa. D. & C. 12 (1947).

39. Local No. 2618, Plywood and Veneer Workers of the United Brotherhood of Carpenters and Joiners of America v. Taylor, 197 Wash. 515, 85 P.2d 1116 (1938).

40. The right to recover from third persons is not absolute and must be viewed in the light of agency principles as they apply between the official, the local, and third persons. Third persons must be able to depend on the authority of the official to per-

Aside from the difficulties which arise in choosing a theory toward establishing a cause of action, the remedies available are not entirely satisfactory. The court may compel an official to give an accounting to the membership for the funds in his control, but the constitution and by-laws may reduce the effectiveness of the remedy by requiring exhaustive appeal through union channels prior to recourse to the courts.[41] It may also be difficult for a single member to prove that he as an individual may compel an accounting.[42] In *Collins v. International Alliance of Theatrical Stage Employees,*[43] although the court granted an injunction to prevent future compulsion, an accounting for "kicked-back" funds was denied since the member by submitting to the practice had somehow become *in pari delicto* with the official as to the funds already paid. If it can be shown that the official has made expenditures not authorized by the constitution or by-laws, or has received funds to which he is not entitled, he may be compelled to return them.[44] Likewise, if it can be shown that the official plans to improperly dissipate funds, a prohibitory injunction may issue.[45] Affirmative relief, however, is much more reluctantly granted. When the required property interest is alleged, there has been a general willingness to grant recovery from third persons who have received funds improperly paid over by the official,[46] and in some particularly flagrant cases, realizing that permitting the officer to stay in office assures him an opportunity for retribution, the court may even remove the errant official and appoint a receiver to conduct union affairs until another election can be held.[47] However, others have indicated that only negative relief is available and that unless the union constitu-

form acts of the general kind authorized by the constitution and by-laws, although the specific act performed may be beyond his authority, such as purchasing specific land for the local. Hartley v. United Mine Workers of America, Local Union No. 6321, 381 Pa. 430, 113 A.2d 239 (1955). *Cf.* Wortex Mills v. Textile Workers Union of America, C.I.O., 380 Pa. 3, 109 A.2d 815 (1954).

41. See note 34 *supra.*

42. See McNalty v. Higgenbotham, 252 Ala. 218, 40 So.2d 414 (1949).

43. 119 N.J. Eq. 230, 182 Atl. 37 (1935).

44. Local Union No. 720, International Hod Carriers, Building and Common Laborer's Union of America v. Bednarsek, 119 Colo. 586, 205 P.2d 796 (1949); Duke v. Franklin, 177 Or. 297, 162 P.2d 471 (1945).

45. Robinson v. Nick, 235 Mo. App. 461, 136 S.W.2d 374 (1940); McCrae v. Severino, 249 App. Div. 112, 291 N.Y.S. 303 (1936).

46. See Low v. Harris, 90 F.2d 783 (7th Cir. 1937); Local No. 2508, Lumber and Sawmill Workers v. Cairns, 197 Wash. 476, 85 P.2d 1109 (1938).

47. Dusing v. Nuzzo, 262 App. Div. 781, 27 N.Y.S.2d 382 (1941); 177 Misc. 35, 29 N.Y.S.2d 882 (1941); 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); 178 Misc. 965, 37 N.Y.S.2d 750 (1942). The receiver, if need be, may bring suit for the union to compel the remaining officers to perform all acts necessary to keep the local functioning during litigation. Mullins v. Merchandise Drivers Local No. 641, 120 N.J.Eq. 307, 185 Atl. 51 (1936). However, even after a receiver is appointed, a member may sue the defalcating official for the union if the suit will not interfere with the performing of the receiver's duties. Duke v. Franklin, 177 Or. 297, 162 P.2d 141 (1945).

tion expressly so provides, the court is powerless to remove the funds of the union from the hands of duly elected officials.[48] It has been said that even injunctive relief for a threatened unauthorized disposition of funds will be denied if the official is adequately bonded.[49]

Of the available approaches, the contract theory provides the greatest ease and certainty of relief. The contract right is admittedly individual with each member and the quagmires of class action pleading are avoided. If the member can show a disbursement not authorized by the constitution and by-laws, then relief will be granted, regardless of any attempt by the executive board[50] or majority of the local members[51] to sanction the expenditure.

In most instances there is a possibility, and in actions on the contract a high probability, that the complaining member will be required to exhaust the union appellate process prior to bringing suit;[52] however considering the uncertainty of litigation, internal appeal may offer the most expeditious means of rectification.[53] The constitution of the central union, or articles of affiliation between the parent and local generally reserve plenary powers to the president or board of the parent union to deal with misconduct of local officials. The president usually is empowered to oust local officials and appoint a temporary receiver.[54] The

48. Vaccaro v. Gentile, 138 N.Y.S.2d 872 (N.Y. Sup. Ct. 1955). The court refused to remove the official even though he was in a position of conflict of interests as a director of a corporation.

49. United Electrical, Radio and Machine Workers of America, Local 735 v. Kraft, 25 L.R.R.M. 2174 (Ohio Ct. of Common Pleas 1949); Ford v. Houchins, 25 L.R.R.M. 2191 (Pa. Ct. of Common Pleas 1949).

50. Local Union No. 720, International Hod Carriers, Building and Common Laborer's Union of America v. Bednarsek, 119 Colo. 586, 205 P.2d 796 (1949); Steinmiller v. McKeon, 21 N.Y.S.2d 621 (N.Y. Sup. Ct. 1940).

51. Low v. Harris, 90 F.2d 783 (7th Cir. 1937); O'Connor v. Harrington, 136 N.Y.S.2d 881 (N.Y. Sup. Ct. 1954); *modified on rehearing*, 285 App. Div. 900, 138 N.Y.S.2d 285 (1955).

52. See note 34 *supra*.

53. Another disability suffered by the individual member appears when suit is attempted by one member against the entire local. It is said that the member may not sue the local since his identity is merged with that of the local; rather, he must join each member who participated individually. *Cf.* Marchitto v. Central R.R. Co. of New Jersey, 9 N.J. 456, 88 A.2d 851 (1952).

54. Suspension not valid if not for one of grounds listed in union constitution, Schrank v. Brown, 192 Misc. 80, 80 N.Y.S.2d 452 (1948); expulsion held valid, Margolis v. Burke, 53 N.Y.S.2d 157 (N.Y. Sup. Ct. 1945). There is a strong indication that a union tribunal may remove an officer on grounds which might not be sufficient to warrant a court to do so. George Meany, A.F.L.-C.I.O. president, regarding the A.F.L.-C.I.O. Executive Council's removal of Dave Beck as an A.F.L.-C.I.O. vice president and council member said, "Whether he [Beck] has violated any laws, state or Federal, dealing with theft, misappropriation or embezzlement, is not for us to consider or determine. . . . . Whether Beck stole the funds or borrowed them, the record shows he took advantage of his position as a trade union official to use money belonging to dues-paying members for his own personal gain and profit." Indianapolis Star, May 21, 1957, p. 3, col. 4.

local membership may petition the president to remove an official,[55] but the president may cause removal at his own instance, even over the objection of local members if he feels summary action is warranted.[56] The constitution may entitle the president to compel an accounting of the local official for local funds in his control.[57] The official may be expelled,[58] removing any possibility of holding office in the future and the president may consolidate the local with another for more satisfactory supervision.[59]

The availability of these means of immediate relief makes the internal appeal appear to be more advantageous to the complaining member

55. Leventhal v. Jennings, 311 Mass. 622, 42 N.E.2d 595 (1942).

56. *Cf.* Way v. Patton, 195 Or. 36, 241 P.2d 895 (1951). *But see* Sullivan v. McFetridge, 55 N.Y.S.2d 511 (N.Y. Sup. Ct. 1945), where international president was denied an accounting when the local had re-elected the expelled local president. It was said that the re-election caused the supervision of the international to end.

57. Grand Lodge of International Association of Machinists v. Reba, 97 Conn. 235, 116 Atl. 235 (1922). In the absence of such a clause, the president's only alternative is a suit as representative of a class. However, he cannot represent the members of the local, for he is not a member of that class. United Electrical, Radio and Machine Workers of America v. Dickerson, 102 A.2d 921 (Del. 1954); McLane v. Romano, 372 Ill. App. 700, 54 N.E.2d 715 (1944). If he sues as a representative of the international, then he must show that the international has some property interest in the local funds. However, it is usually said that the international has no such property interest, rather the dues called for in the international charter give the international rights in the nature of an account receivable. Duris v. Iozzi, 6 N.J. Super. 530, 70 A.2d 793 (1949); International Union Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O. v. Becherer, 142 N.J. Eq. 561, 61 A.2d 16 (1948). When the international constitution states that on disaffiliation, local funds become the property of the international, and the local does disaffiliate, then the international has a property interest in the local funds. Harker v. McKissock, 7 N.J. 323, 81 A.2d 480 (1951). Such forfeiture clauses must be express and will not be implied. Grand Lodge of International Association of Machinists v. Reba, 97 Conn. 235, 116 Atl. 235 (1922). In the absence of a forfeiture clause, the local keeps its funds on disaffiliation. Local 1140 v. United Electrical Radio and Machine Workers of America, 232 Minn. 217, 45 N.W.2d 408, 23 A.L.R. 1197 (1950). Even an express forfeiture clause may not be operative if the international revokes the charter of the local. Grand Lodge v. Reba, *supra; but cf.* Mursener v. Forte, 196 Or. 253, 205 P.2d 568 (1949). If the locals are dependent rather than affiliated with the international, it has been said that all members of all locals have a property interest in the funds of each dependent local. Harker v. McKissock, 1 N.J. Super. 510, 62 A.2d 405 (1948). It has been intimated that even though no property interest of the international could be found in the funds of a disaffiliating local, a contract action might lie against the local for breach of the implied promise of loyalty to the international. Suffridge v. O'Grady, 84 N.Y.S.2d 211 (N.Y. Sup. Ct. 1948). The classification of the right of the parent as an account receivable is widely accepted. Therefore, an attachment would not lie against the property of the local to satisfy a judgment against the central union. Local No. 500 Brotherhood of Painters, Decorators and Paper Hangers of America v. Wise, 269 S.W.2d 271 (Ky. 1954); but it may be that the debt owed the parent union by the local for dues could be the subject of a garnishment action. See Varnado v. Whitney, 166 Miss. 663, 147 So. 479 (1933).

58. Margolis v. Burke, 53 N.Y.S.2d 157 (N.Y. Sup. Ct. 1945). Realizing the importance of unions to economic life, it has been held that a union official has a property right in his office (even though non-paying) and that he may sue to recover it when wrongfully removed. Bianco v. Eisen, 190 Misc. 609, 75 N.Y.S.2d 914 (1944).

59. *Cf.* Cameron v. Durkin, 321 Mass. 59, 74 N.E.2d 671 (1947).

than attempted litigation, and such is probably the case. On the other hand, invoking the exercise of such untrammeled discretion invites its abuse. Removing the control of the local from its elected officials and delegating it to an appointee incurs the risk of further inequities. The duration of the receivership may be unnecessarily prolonged, the opportunity for elections denied, and defalcations multiplied.[60] Although the supervisory powers of the parent union enable expeditious removal of a local official from his position, thus eliminating his opportunity for retribution over the complaining members, these powers may also enable the parent union to seize complete control. The local then must resort to the courts and, by showing that the necessity for supervision has ended, request removal of the parent union's receiver and the holding of elections.[61] Although in all probability, internal appeal offers the most effective and equitable means of settling union affairs, hazards also result from bringing unrest in the local to the attention of the parent union.

CONCLUSIONS

The high degree of public interest, as well as the severity of the procedural barriers which presently limit the protection afforded member's interests in union funds, argue in favor of immediate action to alleviate these handicaps. Realizing that requiring the exhaustion of internal remedies serves to prevent the undue restriction of the offiicals' activities, this requirement should be maintained. However, once internal remedies have been exhausted, or on a showing that internal appeal would be futile or involve unreasonable delay, effective judicial relief should be available. The present barriers to litigation are a result, not of a desire to handicap the member, but rather of conceptual difficulties resulting from historical development. The major problem facing the courts in each case is not deciding whether recovery should be allowed, but deliberating the propriety of the theory advanced. It is this conceptual impasse which makes the courts' role difficult and which could be rectified by legislation.

Since in each case, regardless of the theory advanced, an expenditure which is not authorized by the constitution or by-laws must be shown, and since each member has an admittedly *individual* contract right to pre-

60. See Robinson v. Nick, 235 Mo. App. 461, 136 S.W.2d 374 (1940); Dusing v. Nuzzo, 262 App. Div. 781, 27 N.Y.S.2d 382 (1941); 177 Misc. 35, 29 N.Y.S.2d 882 (1941); 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); 178 Misc. 965, 37 N.Y.S.2d 750 (1942).

61. O'Neill v. United Association of Journeymen Plumbers and Steam Fitters of United States and Canada, 348 Pa. 531, 36 A.2d 325 (1944). However, such action raises the risk that the president may disciplinarily suspend or expel the entire local. Biller v. Egan, 290 Ill. App. 219, 8 N.E.2d 205 (1937); O'Neill v. United Association of Journeymen Plumbers, *supra*.

vent or recover expenditures not authorized by these documents, a statutory prescription adopting the contract theory in these cases would render arguments concerning the "property" rights of individual members academic. Likewise, the pleading and proof requirements of the contract theory lend themselves to more efficient litigation.[62] Only in a suit to recover funds from a non-member is proof of a "property" interest necessary, and it is in reference to the handicap attendant to suits against non-members that those who argue for legislative action present their strongest case.

Although future litigation might provide the opportunity for judicial clarification of the elements of the member's cause of action against the official and the recipients of unauthorized disbursements of funds, a realistic examination of the detriments presently suffered by members of unincorporated unions, as well as a realization of the interrelationship of this question with that of the degree of governmental supervision to which labor unions are to be subjected, argues in favor of legislative action. Such legislation should provide that once internal remedies have been exhausted, or on a showing that internal appeal is futile or involves unreasonable delay, any member or group of members of an unincorporated union should have immediate access to the courts. On showing an application of funds not authorized either expressly or by implication by the union constitution and by-laws, a recovery for the benefit of the union from the official who improperly applied them, or from a third person to whom they have been paid[63] should be granted, and the member reimbursed from such funds for costs and attorney's fees.

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62. The language of contract lends itself to other litigation involving local unions. See Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, 118 N.J.Eq. 11, 176 Atl. 692, 97 A.L.R. 594 (1935); where the court stated that a constitutional provision calling for racial discrimination was void as against public policy and a Negro member could not have assented to such an illegal clause by joining the union. Likewise it has been said that a clause making criticism of union officials grounds for expulsion would be unenforceable. Schrank v. Brown, 192 Misc. 80, 80 N.Y.S.2d 452 (1948) (dictum).

63. In some cases, the official has already been held personally liable for losses suffered by third persons, such as injury caused by the official's failure to properly maintain a building belonging to the union; Marion v. Chandler, 81 S.E.2d 89 (W. Va. 1954); and illegal acts of pickets employed by the official; Local Union No. 313, Hotel and Restaurant Employees International Alliance v. Staltrokis, 135 Ark. 86, 205 S.W. 450 (1918) (dictum); however not an implied warranty of fitness or honesty of an employee sent under a closed shop hiring hall contract, Aldmon v. Consolidated Garage Corp., 194 Misc. 793, 87 N.Y.S.2d 773 (1949).