

The Right to Membership of a Trade Union, by R. W. RIDEOUT, LL.B., PH.D., (The Athlone Press, University of London, 1963), pp. i-xliv, 1-243. Price £2 5s. Sterling.

‘ Nothing can be more obvious to the historian ’, Professor Kahn-Freund wrote several years ago, ‘ than the sequence of suppression, abstention, recognition, and attempted control in the attitude of the law towards the autonomous organisations of the working class ’.¹

Professor Kahn-Freund was commenting on the judicial reaction to section 4 of the English Trade Union Act 1871, which sought to remove from the purview of the Courts certain classes of trade union ‘ domestic agreements ’. The first stage of the ‘ judicial cycle ’ noted by Kahn-Freund was marked by the vigorous expression of judicial thought on the common law legality of unions, epitomised by the dictum of Crompton J. in *Hilton v. Eckersley*, decided in 1855, that ‘ combinations . . . were illegal and indictable at common law ’.² We are now in the last stage. Trade unions today are great aggregations of economic and social power. They have virtually nothing in common with the traditional legal view of them as mere voluntary associations. There has been increasing recognition that even their domestic affairs must, in the public interest, be to some extent amenable to judicial review. A powerful trade union, operating in a ‘ closed shop ’ industry can effectively deprive individuals of the opportunity of employment in that industry either by denying them admission or terminating their membership. As Denning L.J. (as he then was) put it in 1952,

It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They

¹ (1944) 7 *Modern Law Review* 192, 204.

² (1855) 6 *El. & Bl.* 47, 53; 119 *E.R.* 781, 784.

can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important to him, than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.³

Whilst the force of such arguments is admitted, the community also has an interest to ensure that trade union autonomy is not too drastically curtailed in the interests of individuals. A strong and effective trade union movement provides an insurance against other forms of economic and social injustice. The dilemma posed by the need to reconcile these interests is one which is increasingly presenting itself to the courts.

Dr Rideout's book, which is one of the University of London Legal Series published under the auspices of the Institute of Advanced Legal Studies, surveys these developments in the crucial area of the right to membership of trade unions. His procedure is to bring together material from the major common law jurisdictions 'to which, by reason of the influence of British trade unionism upon them, may be added Scotland and South Africa'.⁴

In the first section of the book, the author takes as his bench mark the traditional view that a trade union, even if it does possess features which might be said to take it out of the category of a voluntary association, may nevertheless reject, as it pleases, any applicant for membership. 'The members are the society and may associate with whom they wish.'⁵ He suggests that the courts may take one of a number of possible lines of approach to this issue. First, they may adhere to the traditional view that a union, as a voluntary association, has the right to exclude members as it sees fit and to impose a closed shop unless and until the legislature provides otherwise. Secondly, they may insist on a right to work so that a union would either have to admit applicants for membership or abandon its closed shop arrangements. Thirdly, they may meet the problem head-on by declaring that a trade union is a public body subject to regulation by the courts.

The author also mentions the complex problems created by the practice of some unions admitting certain categories of applicants to a subordinate status. Of the jurisdictions surveyed in this book, this problem is largely

³ *Lee v. The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 343; [1952] 1 All E.R. 1175, 1181.

⁴ P. vii.

⁵ P. 4.

confined to the United States. Such practices, of course, have the practical effect of channelling certain individuals into economically inferior positions. He suggests that the courts might meet this issue by holding that once an individual is admitted he is immediately entitled to the full rights of membership.

The author points out that there is very little English authority in this whole area. The generally accepted view is that there is no general right to order admission. Even if such a power to order admission were acknowledged, there would remain the problem of discovering a basis for the courts' interference. In short, the issues posed by this question are not readily amenable to the application of traditional legal tools and it is clear that 'if the Courts are going to tread in such thorny places they must be well shod' (page 9). The author suggests that the common law may well be incapable of development to meet this situation and that the only prospect of a satisfactory solution is through legislative action.

In the course of an examination of the legislative attempts which have been made there is a brief reference to the provisions of conciliation and arbitration legislation in Australia relating to admission and membership although the reference, apparently derived from secondary sources, is neither adequate nor accurate. The author believes legislation of this type to be more effective than the 'right to work' form of legislation which has become fairly common in the United States.

The second and major part of the book is concerned with the question of expulsion of members. The author has prefaced this section with a short survey of the disciplinary practice and procedure of unions in relation to their members and a brief account of the general attitude adopted by the courts towards the question of expulsion. The author acknowledges that in this field legal reasoning needs to be tempered by awareness of the need to adjust a number of conflicting interests. 'Whatever solution is found to each case of alleged wrongful expulsion it is bound to be a compromise between the claims of conflicting parties and, as such, not entirely satisfactory to either'.⁶

The author examines the grounds on which the courts will review expulsion and the basis of their jurisdiction. These chapters contain a detailed, vigorous and, in parts, refreshingly critical examination of the development of the law in this area. They are notable, too, for the manner in which the author has succeeded in assembling and using an extremely large range of authorities from English, North American, South African, Australian and New Zealand jurisdictions; indeed the book breaks new ground in this respect. The remainder of the book is devoted to a short survey of the extent of statutory intervention in England, Australia, New Zealand and North America, the remedies available in case of wrongful expulsion and a brief, almost fleeting, summing up of the author's own broad conclusions.

Considering the vital role that legislation has to play in the progress of this branch of the law, it is particularly regrettable that the chapter on

⁶ P. 49.

statutory intervention in the internal affairs of unions is the least satisfactory part of this book. The section dealing with the English statutory position is good, containing in a few pages a sound and critical appraisal of the judicial reaction to section 4 of the English Trade Union Act 1871. The remainder of this chapter suffers by comparison. The section on Australia, whilst it does convey something of the character of the legislation, is so inaccurate that, from the Australian reader's viewpoint, it would have been better omitted. In the preface, the author states that overseas material has been corrected as nearly as possible to 16 June 1962. However, in respect of Commonwealth legislation he refers to the provisions of the Conciliation and Arbitration Act 1904-1950 thus ignoring the sweeping amendments to the Act made necessary by the decision in the *Boilermakers' Case*.⁷ This is the more surprising as the author cites in a footnote, *R. v. Spicer and Others; Ex parte Australian Builders' Labourers' Federation*⁸ without referring to the subsequent amendments of the Act nor the later cases concerned with the validity of section 140 of the Act.

The chapter on remedies is short, the author being at pains to point out that his remarks 'are not intended to represent any sort of exhaustive survey of the law regulating the forms of remedy available to an aggrieved trade union member or applicant for membership'.⁹ In his discussion of the execution of damages against union funds he provides a useful and concise account of the 'entity theory' of the legal status of unions registered under the provisions of the English Acts and legislation copied from these Acts. In dealing with the position of Australian unions registered under this form of legislation, however, he relies on older Australian authorities and concludes that 'so far as there is authority on the position of a union registered under the old system it favours the Taff Vale doctrine'.¹⁰ The forthright remarks of the High Court in *Williams v. Hursey*¹¹ (which, incidentally, is persistently cited as '*William v. Hursey*') on this question are allowed to pass unnoticed. This is puzzling as a few pages earlier in this chapter the author, in a footnote, remarks that the answer adopted in *Williams v. Hursey*¹² favoured the entity theory.¹³ Nor can one be entirely happy with the author's treatment of this case, particularly in relation to the issue of civil conspiracy. The author also fails to mention the Australian cases of *Coal Miners Industrial Union of Workers of Western Australia*, *Collie v. True*¹⁴ and *McKernan v. Fraser*¹⁵ in this context. These shortcomings show how difficult it is for anyone not familiar with the Australian system to deal adequately with

⁷ *R. v. Kirby and Others; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254.

⁸ (1957) 100 C.L.R. 277.

⁹ P. 209.

¹⁰ P. 218.

¹¹ (1959) 103 C.L.R. 30; 33 A.L.J.R. 269.

¹² *Ibid.*

¹³ P. 214.

¹⁴ (1959) 33 A.L.J.R. 224.

¹⁵ (1931) 46 C.L.R. 343.

our trade union law. The different atmosphere due to the pervasive influence of Australian 'industrial jurisprudence' is not readily appreciated.

But it would be ungracious to quibble too much about what is, after all, a very small part of the book. Dr Rideout has succeeded in drawing together a vast amount of material and providing a valuable conspectus of his subject. It is clearly a significant contribution to an understanding of the manner in which the law concerning this dynamic problem is developing.

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