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*May 8, 9.
*Oct. 14.

LOCAL UNION NO. 1562, UNITED MINE WORKERS OF AMERICA AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM WILLIAMS AND W. H. REES (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Trade unions—Inducing dismissal of non-unionists by threatening strike—Right to damages—Liability of individual members—Practice and procedure—Unincorporated body—Representative action.

The respondents, being miners and members of the Local Union appellant, were employed by the Rose-Deer Mining Company. The manager of the company, becoming dissatisfied with the actions of the Union, closed the mine down with the object, successful for a time, of destroying the weight of the Union; but he opened it again, and the respondents returned to work, agreeing to the condition not to pay any Union dues. The respondent Williams then received an anonymous letter calling him a "scab." The manager of the company having taken the ultimate decision to live at peace with the Union for the security of his own interests, a new Local Union was organized, but both respondents refused twice the invitation to become members until the matter of the letter was "cleared up." Later on, the manager of the mining company advised the respondents that they would be discharged unless they settled with the Union as he had received notification that the Union would declare a strike if they continued to work. This notification was given by the appellants Young and Stefanucci. The respondents then applied for membership in the Union, but were refused, though the Union withdrew the objection formally taken to them as co-workmen in the mine. The respondents, having been subsequently discharged took an action against the individual appellants on the ground of conspiracy to injure them by inducing their dismissal and against the Local Union for unlawful intimidation by the threat of a general strike. The Local Union was not incorporated, nor registered under the "Trades Union Act"; and an application was made at the close of the trial to amend the statement of claim by making the individual appellants defendants in their representative capacity, but this was not granted.

Held that, upon the evidence, the respondent's action should be dismissed, except as to the appellants Young and Stefanucci; Idington and Mignault JJ. dissenting; Duff J. would have dismissed the action *in toto*.

Per Duff J.—The conduct of the appellant Young cannot be construed as intimidation or coercion by "threat" and did not expose him to an action in damages in the absence of the characteristic elements of a criminal conspiracy to injure. *Quinn* v. *Leatham* (1901) A.C. 495, discussed.

Per Duff J.—The object of "The Industrial Disputes Act" is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout; but there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

Per Anglin and Brodeur JJ.—In the absence of legal evidence that they were present at the meetings where the acts complained of were authorized or that they had otherwise sanctioned them, mere membership in the Local Union would not render the individual appellants personally answerable in damages for the results of these acts.

Per Anglin, Brodeur and Mignault JJ.—The dismissal of the respondents was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being therefore an unlawful means taken to interfere with the respondents' engagement, the liability of the Local Union appellant if suable is established, and the delivery of the message of the committee by the appellants Young and Stefanucci to the manager of the mining company, having regard to all the circumstances, makes them personally liable towards the respondents.

Per Anglin and Brodeur JJ.—The issue of want of legal entity was sufficiently raised by the explicit denial of the allegation that the Local Union was a body corporate.

Per Anglin and Brodeur JJ.—No action lies against an unincorporated and unregistered body in an action of tort such as the present one.

Per Anglin and Brodeur JJ.—The rule of practice by which, when numerous persons have a common interest in the subject matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one without evidence that the individual appellants could fairly be said to be proper representatives. Idington J. *contra.*

Per Idington and Mignault JJ. dissenting—The Local Union having throughout the litigation acted as if rightly sued, it is too late now to urge the objection of want of legal entity; and per Mignault J., the judgment of the trial judge should not be interfered with on a matter of procedure.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming, the court being equally divided, the judgment of the trial judge, Simmons J.(2), and maintaining the respondents', plaintiffs', action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

A. M. Sinclair K.C. and *H. Ostlund* for the appellants.

E. V. Robertson for the respondents.

IDINGTON J. (dissenting).—This appeal is taken jointly by all the defendants, condemned by the formal judgment of the learned trial judge, and maintained on appeal therefrom, by an equal division in the Appellate Division of the Supreme Court for Alberta.

The respondents' statement of claim presents several causes of action and prays for relief in more ways than one.

The first of these causes of action as stated, and in respect of which relief was sought, seemed to raise the question of a legal right of each of the respective respondents to become a member of the said Union but nothing has been determined in regard thereto, or raised by this appeal, save indirectly.

The second cause of action is framed as if against half a dozen members of the said Union for conspiracy with each other and other persons to wrongfully, unlawfully and maliciously injure the plaintiffs, now respondents, by depriving them and each of them of their employment and to induce the dismissal of

(1) 14 Alta. L.R. 251; 45 D.L.R. 150; [1919] 1 W.W.R. 217.

(2) 41 D.L.R. 719, [1918] 2 W.W.R. 767.

each from the employment of the Rose-Deer Mining Company, Limited, a mining company in Alberta.

It is further charged that pursuant to such conspiracy and combination they, by intimidation of the company and threatening to go on strike and tie up the mine, succeeded without lawful reason or excuse in having respondents dismissed and deprived of employment.

There is ample evidence to support these claims against some, at least, of these parties. Hence they should not succeed herein.

Seeing that the money has been paid into court to meet the judgment for damages without regard to any distinction between or amongst these several appellant parties and hence if the judgment appealed against stands against a single one of the defendants the judgment will be satisfied, it seems to me the rest of the appeal becomes somewhat academic.

In deference to the views of others whereby elaborate argument was heard, notwithstanding the admission of the payment thus made, I have examined the various questions presented.

In view of the following several considerations: that the misleading use by the appellant of a seal which presumably would be supposed to indicate a corporate capacity in the Union, and of the fact that no steps were taken to remove such impression, save by a formal denial in the pleadings; that the proceedings for discovery, and examinations for discovery, and indeed the whole trial were each allowed to proceed as if the Union was at least registered and thereby liable to be sued as a corporation, and that the parties defendant all joined in one defence, and no motion at any time to set aside such clearly erroneous proceedings if, as now contended, the Union was not a legal entity,

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Idington J.

I think the learned trial judge should at once, when asked by counsel for the plaintiffs (now respondents), have allowed the amendment of the pleadings to make them conformable to the case presented by the evidence adduced without objection. Then he should, if the defendants (now appellants) so desired, have given them an opportunity to answer the case so made. I presume as no objection made to amendment, or claim to adduce further evidence, appellants must have concluded nothing further in way of evidence for defence thereto was available.

Notwithstanding the case of *Walker* v. *Sur*(1), relied upon by appellant, I think the action of a representative character will still lie against an unincorporated union, for wrongs such as complained of. That case is easily distinguishable from the numerous other authorities relied upon by the respondents herein.

I agree with the view of Lord Macnaghten in the *Taff Vale Ry. Co.* v. *Amalgamated Soc. Ry. Servants* (2), at page 438, where he says:—

> I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body,

and also with what Lord Lindley says in the same case on the same subject.

And I may add that the obvious reason for the qualification of the representative persons chosen is to avoid the possibility of the Union being bound by a collusive action, or by one not properly defended by all the force it might officially choose to bring in its own defence if made a party.

The Union itself having taken part in the defence and being beyond doubt the party actively defending, cannot now be heard to set up such a mere technical objection occasioned by a slip in the pleading.

(1) [1914] 2 K.B. 930. (2) [1901] A.C. 426.

Surely at this time of day when we, sometimes at least, try to get at and grasp the realities instead of the mere formalities, such an objection comes too late.

The party that says it is not a legal entity has had the courage to proceed as if it were, whilst saying it was not.

It strikingly illustrates in doing so the course pursued in the circumstances, out of which this action arises, by its refusing on the one hand to admit the respondents as members, though well qualified to become such, and in no way disqualified except by reasons founded on the evidence of highly probable motives on the part of those possessed of obvious hate and malice, being permitted to direct such a course of conduct, and on the other at one and the same time, offering to let them work whilst creating an atmosphere that rendered the doing so an impossibility. I hope our law, begotten of freedom and justice, has not grown so feeble as to tolerate such injustice.

It is clear to my mind on the facts presented that such inconsistencies of conduct are attributable only to that malice in law by which the accused representatives of the Union are claimed to have been actuated.

Being moved thereby they cannot claim they were simply defending their honest legal rights in what they did.

And if the majority of the members of a union permit even a few of the master spirits to so illegally and improperly dominate the action of their union. then in law the union must suffer the consequences.

Added to this the intimidation of a strike which was threatened, regardless of the law as enacted in "The Industrial Disputes Act," sec. 56, was evidently illegal.

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The sooner that the mere offence of threatening to disregard such a law or any other is understood, the better for all concerned.

I think this appeal should be dismissed with costs.

DUFF J.—The view of the facts which I accept is that which is very fully and lucidly explained in the judgment of Stuart J.(1).

Three or four events are of capital importance. The lockout by Tupper in Jan., 1917, with the object, successful for a time, of destroying the weight of the Union; the ultimate decision of Tupper to live at peace with the Union for the security of his own interests and the consequent re-establishment of relations between them; the invitation given twice to the plaintiffs to become members of the Union and their refusal to do so; the application (the first) by the plaintiffs on Dec. 21st, and the answer of Jan. 6th, refusing to accept them as members but withdrawing the objection formally taken to them as co-workmen in the mine.

In order to prevent misconception, I ought to state, without passing any opinion upon the extent of the jurisdiction conferred by Rule 20 of the Alberta Rules (I need hardly say that I should hesitate before differing from the united opinion of Lord Macnaghten, Lord Lindley and Lord Dunedin) that this is not in my judgment, a proper case for amendment; and moreover, that in disposing of the appeal we are bound to give effect to the contention that the union is not a suable entity. I should also state explicitly that I concur with the conclusion of Mr. Justice Stuart that there is no evidence against Stefannuci, Gerew, Marcelli, Lorenzo and Kamuckle.

(1) 14 Alta. L.R. 251; 45 D.L.R. 150, at page 151; (1919), 1 W.W.R. 217, at page 221.

The case as presented in the Supreme Court was a case of conspiracy, it was tried as a case of conspiracy and as such it must succeed or fail.

Looking at the course of events broadly and especially noting those just mentioned, the evidence of actionable conspiracy seems to be too slight to support an affirmative finding.

For the principle to be applied it is my habit in these cases to resort to the charge of the trial judge in *Quinn* v. *Leathem* (Fitzgibbon L.J.)(1):—

> I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from the acts legitimately done to secure or advance their own interests.
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> * * * * *
>
> To constitute such a wrongful act for the purpose of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by which the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade.

This statement of the law received the approval of the Lords of Appeal.

Subject to special legislation contained in the "Industrial Disputes Act," as to which I shall have something to say presently, the union men were quite entitled to refuse as a body to work with non-union men and to advise their employer of their policy. Tupper appears to have been quite aware of the attitude of the union men and quite willing to take any course necessary to meet their views.

The whole weight of the case lies in the difficulties

(1) [1901] A.C. 495 at page 500.

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which are said to have been made regarding the reception of the plaintiffs as members of the Union. But the plaintiffs appear to have made no application until the end of December, the result being that the objection to them as miners was withdrawn.

The plaintiffs appear to have been reluctant to regularize themselves and I can see no ground for a finding that an earlier application would not have had the same effect as that of Dec. 21st.

I am quite unable to concur in a finding of intimidation or coercion. As already mentioned, Tupper had decided upon his course long before the incidents in question arose and I am convinced that Tupper's only concern was to know with certainty the attitude of the men. His course in consequence of that knowledge cannot fairly be attributed to anything which could properly be described as the imposition of their will upon his but should be ascribed to his deliberate choice of the policy of accepting the Union terms for the sake of peace and in his own interests.

The situation being quite well understood on both sides, I do not perceive the aptness of the description "threat" as applied to the communications made to Tupper.

The truth seems to be that the impulse behind those communications came from the men as a body and that the emissaries who interviewed Tupper were really the agents of the men and that in these communications they were faithfully imparting to Tupper (as he desired them to do) the facts as regards the terms on which the men could be induced to work. No authority so far as I am aware warrants the suggestion that such conduct exposes either the members of the Union as such, or the Union officials as such, to an action in the absence of the characteristic ele-

ments of the class of cases to which *Quinn* v. *Leathem* (1), belongs, cases of criminal conspiracy to injure. Lord Lindley goes further perhaps than any other legal authority of his eminence has gone in countenancing the doctrine that threats when they result in coercion—threats, that is to say, of "serious annoyance and damage" as distinguished from threats to do something itself punishable by law (as threats of bodily harm—are in themselves *primâ facie* "wrongs inflicted upon the persons coerced;" but it is evident from his judgement (1), at pages 507 and 508, that Lord Lindley would not have considered what occurred here to be within the category of "coercion by threats."

As to the special legislation ("The Industrial Disputes Act") the object of the statute is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout. But there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

I am not satisfied that what was said necessarily meant that the men intended to act illegally. If the point had been taken at an earlier stage the facts would no doubt have been more closely investigated.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The history of the events out of which this litigation arose and the material facts are fully stated in the judgments of the learned trial judge

(1) [1901], A.C. 495.

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(1), and of the Appellate Division of the Supreme Court of Alberta(2). The plaintiffs hold a judgment against all the defendants for $100 for general damages and for $435.62 for loss of wages.

Local Union No. 1562, U.M.W., an unincorporated and unregistered Trades Union, was sued as a corporation and the six other defendants as individuals and not in any representative capacity. There appears to be some uncertainity whether the trial judge intended that judgment should be entered against the Local Union. It would seem to have been his opinion that the assets of that body could be reached "only by suing the individual members"—presumably all of them or certain members properly selected as representatives of all treated as a class. But an amendment asked for by the plaintiffs at the close of the trial whereby the six individual defendants should be constituted representatives of all the members of the Local Union and authorized to defend as such, while not refused, does not appear to have been allowed and the formal judgment was entered against the Union as well as against the individual defendants personally. The appeal taken from that judgment to the Appellate Division stands dismissed by the order of that court, which consisted of four members. Two of them (Stuart and Hyndman JJ.) would have allowed the appeal, holding that no actionable wrong had been established. The learned Chief Justice of Alberta was of the opinion that the appeal should be dismissed with costs. Mr. Justice Beck,

in view of the difference of opinion amongst the members of the Court,

concurs in the disposition of the appeal made by the

(1) (1918), 41 D.L.R. 719; (1918), 2 W.W.R. 767.

(2) 14 Alta. L.R. 251; 45 D.L.R. 150; (1919), 1 W.W.R. 217.

Chief Justice: but, if giving effect to his own view, he would have required the plaintiffs to elect to

take judgment (1) against the individual defendants in their individual capacity, or (2) against the individual defendants as representing the Union, or (3) against the Union by name.

The grounds of appeal to this court are:—

(1) That no actionable wrong has been proved against any of the defendants; and (2) that the Local Union, as an unincorporated and unregistered Trades Union, cannot be sued.

To deal with the appeal satisfactorily it is necessary to appreciate the cause or causes of action as formulated in the statement of claim. Against the Local Union there are two distinct grounds of complaint: (1) that the plaintiffs were twice wrongfully refused membership in it contrary to the terms of its constitution and by-laws; and (2) that by wrongfully and maliciously objecting to their being employed by the Rose-Deer Mining Company, Limited, and intimidating that company by threatening a general strike the Local Union induced it to dismiss the plaintiffs from its employment. Against the six individual defendants the cause of action set up is wrongfully and unlawfully and maliciously conspiring and combining to deprive the plaintiffs of employment and to induce their dismissal by the Rose-Deer Company and in pursuance thereof intimidating that company by threats etc., resulting in the plaintiffs' discharge etc.

It will be convenient to deal first with the case of the individual defendants. The learned trial judge, as I read his judgment, makes no finding of conspiracy or combination. In this he may possibly have been well advised.

Mr. Justice Stuart says:—

With respect to the matter of conspiracy or combination, there does not, in fact, appear to be any evidence at all against the defendants

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Stefanucci, Gerew, Marcelli, Lorenzo and Kamuckle that they took part in any way whatever in the matter. Whether they were present when any concerted arrangement or combination was made or not, or had anything to do with it in a meeting or otherwise, is not suggested anywhere in the evidence. I cannot assent to the contention that every member of the Union is individually liable for whatever the other members may have done quite apart from him, and with no evidence at all of his connection or participation therein, unless, of course, the Union were (what it is not) in itself an unlawful association with unlawful objects, in which case it might be otherwise.

Except probably as to the defendant Stefanucci, who accompanied the defendant Young and one Rose (not made a party) on a mission to communicate the attitude of the Local Union to Tupper, the manager of the Rose-Deer Company, this statement of the effect of the evidence appears to be accurate. Redpath's evidence on discovery, as an officer of the Local Union, that Gerew and Kamuckle attended a meeting at which the plaintiffs' applications for membership were rejected is not admissible against them in their individual capacity. There appears to be no evidence that Marcelli attended any meeting and nothing except the silence of the statement of defence to shew that Lorenzo was even a member of the Local Union.

As to Stefanucci and Young, apart from any question of conspiracy and combination, as delegates of the Local Union they personally conveyed the message of that body to Tupper. If the delivery of that message, having regard to all the circumstances, amounted to a coercive threat designed to bring about the dismissal of the plaintiffs and had that result, there is in my opinion no room to doubt the individual liability of these two defendants. That they acted as agents for the Union, or, to speak more accurately, of its members, of course affords them no answer in this action for tort.

Nor do I think they should be heard to set up that the only case alleged against them is one of

conspiracy. As to them there is probably sufficient evidence to sustain a judgment on that ground also. But, at the trial, they made common cause with the Local Union, and the substantial defence of both was a justification of all that had been done by the Union and on its behalf. Moreover, they are charged with having actually intimidated the plaintiffs' employer by threats and thus procured their discharge. The allegation that this was done in pursuance of a conspiracy, if not proven, may be treated as surplusage. I would incline to hold them liable on both grounds—but, at all events, on that of participation in the actual commission of the wrong done the plaintiffs.

The learned trial judge rests his judgment against the other four individual defendants solely on their responsibility as members of the Union for the authorized acts of its duly constituted agents. What he says as to the liability of these defendants is contained in the following passage from his judgment:—

> The officers of the Local Union were the agents for the individual members and the principal is bound by the authorized acts of the agent acting within the scope of his authority.
>
> The individual members of the association or Local Union were each liable for what was done by their agents.
>
> The defendants do not deny membership in the Local Union during the period when the boycott took place. Two of them, Young and Stefanucci, took an active part as officers of the Union.

With great respect, in the absence of some evidence, admissible against them, that they were at least present at the meetings when the acts complained of were authorized or approved of, or that they otherwise sanctioned them, I think a case has not been made against these defendants. Mere membership in the Union would not, in my opinion, render them personally and individually answerable in damages for the results of those acts. There is no evidence

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of any participation by them in the commission of the actual wrong done the plaintiffs.

The evidence, however, convinces me that, acting through authorized agents, the Local Union as a body brought about the dismissal of the plaintiffs by threatening a general strike should they be retained in the company's employment and I think it is a fair inference from the proven facts, that while subsequently professing willingness to allow them to be re-employed by the company, the Local Union in fact made their re-employment impracticable and that it fully intended to bring about that result. I am, with great respect, unable to appreciate how the complacency of the manager of the Rose-Deer Company, induced by various considerations which Mr. Justice Stuart emphasizes, affects the matter. It merely served to render easier the accomplishment of the Local Union's design. Nor do I perceive the force of the distinction which that learned judge draws between the responsibility of the Union as a body for the threat of a strike and that of its members as employees of the Rose-Deer Company. The threat was made by the Union through its delegates on behalf of all its members who were the company's employees. It was the act of the Union (so far as such a body can be said to act) done by its instructions and for its purposes.

I think it is also a fair inference from all the circumstances in evidence that a desire to prevent the plaintiffs continuing in the employment of the Rose-Deer Company and to punish them for remaining non-union men after the re-establishment of Local Union 1562, in 1916, and their refusal to join it when it was first suggested to them to do so actuated its conduct in seeking their dismissal rather than any genuine wish to promote the interests of trades-union-

ism generally or its own immediate welfare. Otherwise I find it very difficult to understand the Local Union's refusal to accept the plaintiffs as members even when urged to do so by the officers of the Union of District No. 18, to which it is in some degree subordinate.

On this view of the evidence the liability of the Local Union, if it be susceptible of being held responsible and be suable as a body, or the liability of all its members who participated in or sanctioned the steps taken to secure the dismissal of the plaintiffs, if the application made by the plaintiffs' counsel at the trial to amend by making the individual defendants defendants also in a representative capacity on behalf of its members should be granted, is, in my opinion, established. Injury to the plaintiffs has been proved. That injury was the direct and intended outcome of action of the Local Union's committee taken by its direction for that purpose. That action amounted to a coercive threat and was therefore an unlawful means taken to interfere with the plaintiffs' employment, the use of which, damage having ensued, constituted in itself an actionable wrong. The authorities bearing on this aspect of the case at bar have been so fully and carefully reviewed in the able judgment recently delivered by McCardie J. in *Pratt* v. *British Medical Association*(1), that further reference to them seems unnecessary. See especially pages 256-7, 260, 265-8, and 277-8.

Perhaps it may not be amiss, however, to mention as very closely in point Lord Justice Romer's judgment in *Giblan* v. *National Amalgamated Labourers' Union* (2), and Lord Lindley's speech in *Quinn* v. *Leathem*(3).

(1) [1919] 1 K.B. 244. (2) [1903] 2 K.B. 600, at pp. 619, 620.
(3) [1901] A.C. 495, at pp. 534-5.

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The Local Union's vindictive motive excludes any possible defence of "justification" or "just cause" in the present case, if, indeed, where unlawful means have been resorted to that defence would be open however innocent or even laudable the purpose may have been. This aspect of the case is fully discussed by McCardie J. in the *Pratt Case*(1), at pages 265 *et seq.* See too the *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2).

I have reached the foregoing conclusions of fact without taking into consideration, except as against himself, the discovery evidence given by Albert Young, which, I agree with Mr. Justice Stuart, would be inadmissible against the Local Union, even if it had been properly sued either as a corporation or quasi-corporation or is estopped by its conduct from denying that it was so sued, or as against the other defendants either individually or in any representative capacity. Young was examined for discovery solely as an individual defendant and not in any sense as an officer selected to make discovery on behalf of the Union or its members. His evidence so given is not within the provisions of Alberta Supreme Court Rule 250. If the Local Union, though not a corporation, had been rightly made a defendant the evidence of Redpath would be a admissible as against it, and, having regard to the provision of Rule 3 of the Alberta Supreme Court that

> as to all matters not provided for in these rules the practice, as far as may be, shall be regulated by analogy thereto,

I incline to think it would also be admissible against the individual defendants if sued as representatives of all the members of the Union.

There remain for consideration the questions whether the Local Union was properly made a defendant in the first instance or is estopped from denying

(1) [1919] 1 K.B. 244. (2) [1905] A.C. 239.

that it was so; and, if both these questions should be answered in the negative, whether the plaintiffs' application to amend should be granted.

I have no doubt that the Local Union, as an unincorporated and unregistered body, was not properly made a defendant and that service on it must have been set aside had application been made for that relief. *Metallic Roofing Co.* v. *Local Union No. 30*(1).

While I should have thought it better, had the defence in addition to the bare denial of incorporation contained a plea that the Local Union is not registered, is not a partnership, and, as an entity not known to the law, cannot be sued by its adopted name (R. 93), I incline to think this issue was sufficiently raised by the explicit traverse of the allegation that the Local Union is a body corporate. But, if not, the objection to suing the Local Union being its non-existence as an entity known to the law, I confess my inability to understand how any conduct of those representing that body, such as that here relied on, can create an estoppel which would justify the granting of a judgment against it. A judgment should not wittingly be entered against a non-entity.

In *Krug Furniture Co.* v. *Berlin Union of Woodworkers*(2), relied upon by the Chief Justice of Alberta and Mr. Justice Beck, the defendant Union, sued as a corporation, appeared, apparently as such, unconditionally and its statement of defence did not contain the plea *nul tiel corporation* as required by the Rules of Court. Its incorporation was accordingly presumed. The explicit denial of incorporation in the present instance precludes any such presumption. In my opinion the judgment against the Local Union in its adopted name cannot be maintained.

(1) 9 Ont. L.R. 171, at p. 178. (2) 5 Ont. L.R. 463.

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The question of representation presents more difficulty. The selection for that purpose of the six individual defendants before the court was not happy. Four of them are admittedly persons of no importance in the Local Union and cannot fairly or properly be said to represent it. The remaining two were Young and Stefanucci. Young was an ex-secretary and both he and Stefanucci had "represented" the Union in discussions with the Rose-Deer management on several occasions and also had had interviews with the plaintiffs on its behalf. These are the only grounds on which it can be claimed that they would be proper representative defendants. Neither of them appears to have been an officer of the Union at the time the action was begun. Whatever funds or other property the Local Union may possess, there is nothing to shew in whose name or names such funds or other property stand; and if, as is probable, these are held by trustees, the trustees are not before the court; nor is it sought to add them as defendants. Yet the avowed purpose of suing the Local Union is to reach its funds. If the case were otherwise one in which an order might be made for representation of the members of the Local Union by properly selected defendants, I strongly incline to the view that in the exercise of a sound judicial discretion the six individual defendants now before the Court, whom it is asked to approve for that purpose and to authorize to defend the action on behalf of the membership, should be held not to be proper representatives. (See observations of Lord Macnaghten in the *Taff Vale Case*(1)), and that on that ground, strengthened as it is by the fact that it was sought only at the close of the trial, the suggested amendment should be refused.

(1) [1901] A.C. 426, at pages 438-9.

Moreover, notwithstanding what was said *obiter* in *Duke of Bedford* v. *Ellis*(1), (a case of representative plaintiffs), in *Taff Vale Rly. Co.* v. *Amalgamated Society of Rly. Servants*(2), (where a Union was successfully sued in its registered name) and in *Cotter* v. *Osborne*(3), and *Cumberland Coal & R. W. Co.* v. *McDougal* (4), to which I refer in order to make it clear that they have not been overlooked, I am with respect, of the opinion that in two recent cases, *Walker* v. *Sur*(5) and *Mercantile Marine Service Association* v. *Toms*(6), the English Court of Appeal has made it clear that the rule of practice invoked in support of the application for an order for representation cannot properly be applied in such an action as this. Rule 20 of the Alberta Rules is an adoption, substantially *in ipsissimis verbis*, of English Order XVI., r. 9. All the objections to the applicability of that rule indicated by the Lords Justices in the *Walker Case*(5), exist here, notably those mentioned by Kennedy L.J. on page 937. As is pointed out by Swinfen Eady L.J. in the *Toms Case*(6), many members of Local Union 1562 might have defences not open to the proposed representative defendants, and there are many other reasons against applying the rule in cases of tort such as this. Lord Parker of Waddington, whose authority in regard to the scope and purview of an equity rule such as O. XVI., r. 9, is of the highest, in his speech in *London Association for Protection of Trade* v. *Greenlands Limited*(7), points out some of the serious difficulties which must be encountered in seeking to apply it to such a case as this. Fully as I realize the desirability of finding some method whereby bodies such as Local

(1) [1901] A.C. 1.
(2) [1901] A.C. 426.
(3) 10 W.L.R. 354, at p. 356.
(4) 9 E. L.R. 204, at pp. 207-8.
(5) [1919] 2 K.B. 930.
(6) [1916] 2 K.B. 243.
(7) [1916] 2 A.C. 15, at page 39.

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Union 1562 may be made answerable in the courts for wrongs similar to that done to the plaintiffs, the two authorities to which I have referred seem to me to afford sound reasons for the conclusion that that desirable end cannot be attained by an application of Rule 20. Nor does the other rule invoked, No. 31(2), corresponding to English Order XVI., r. 32 (b), appear to advance the plaintiffs' case. Any attempt to apply it here is open to the same objections which preclude an application of Rule 20. The caution with which Rule 31(2) should be applied is shewn by the course taken by Buckley J. in *Morgan's Brewery Co.* v. *Crosskill*(1). Moreover, not a little may be said in favour of restricting the meaning of the word "class" in that rule by reason of its collocation with "heirs or next of kin." I cannot think it was ever intended to provide by it for such a case as that at bar.

In view of the fact that Rule 20 is a reproduction of English Order XVI., r. 9, I am unable to accept the ingenious suggestion of Mr. Justice Beck that because law and equity have always been concurrently administered by the same court in the Province of Alberta, Rule 20 may be extended to a case held not to fall within its prototype in England. I should add that I have not overlooked Lord Atkinson's comprehensive observation in *London Association, etc.* v. *Greenlands, Limited*(2), Neither the *Walker Case*(3), nor the *Toms Case*(4), however, appears to have been cited at their Lordships' bar.

In the result I am of the opinion that the action fails and must be dismissed except as against the defendants Young and Stefanucci, as to whom the appeal should be dismissed.

(1) [1902] 1 Ch. 898.
(2) [1916] 2 A.C. 15, at page 30.
(3) [1919] 2 K.B. 930.
(4) [1916] 2 K.B. 243.

BRODEUR J.—I concur with my brother Anglin. The appeal should be allowed and the action dismissed, except as to the defendants Young and Stefanucci. There should be no costs here or in the Court of Appeal.

MIGNAULT J. (dissenting).—After carefully reading the evidence and considering the authorities, I can see no sufficient reason for disturbing the judgment of the learned trial judge as to which the learned judges of the Appellate Division were equally divided. The defence of the defendants that the acts done by them with reference to the plaintiffs were

done solely with intent to further the legitimate objects of the organization known as the United Mine Workers of America and not with the intent to injure the plaintiffs or either of them,

is not, in my opinion, made out. On the contrary, the defendants twice refused to admit the plaintiffs into their Union, and then notified the mine operator that they declined to work with them, so that the mine operator, who was told that he could choose between operating his mine with the two plaintiffs alone or with the members of the Union without the plaintiffs, considered it good business to choose the latter alternative and to refuse to employ the plaintiffs. It is unnecessary, under the circumstances of this case, to decide whether the conduct of the defendants would have been actionable had they allowed the plaintiffs to join their Union and refused to work with them if they did not join. But here the door was closed on the plaintiffs when they claimed admission to the Union and under the circumstances the refusal of the defendants to work with them—and no sufficient reason is shewn for refusing to admit them in the Union or to work with them—was in my opinion a wrongful act and a deliberate and successful attempt to obtain their dismissal from the mine.

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I feel some doubt whether the Local Union No. 1562, not being an incorporated body or a registered labour union, could be sued as has been done in this case. But throughout this litigation the local Union has acted as if it had been validly sued, has joined with the other defendants in contesting the action by one and the same plea and has also united with the other defendants in appealing by one appeal from the judgments of the trial court and the Appellate Division. I consider therefore that it should not now be heard to urge the objection that it could not be sued. Further, this is a matter of procedure on which I would not interfere with the judgment of the trial court.

Appeal allowed in part.

Solicitor for the appellants: *H. Ostlund.*
Solicitor for the respondents: *E. V. Robertson.*