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predominant test in determining the applicable period of limitations and the date of accrual of the cause of action, thus satisfying the demands of consistency and also preventing a party from finding himself in the position of having his action barred before he knows of the breach. However in New York the liability of the wroug, for breach of warranty, arises on the date of sale, *Liberty Mutual Ins. Co.* v. *Sheila Lynn, Inc., supra,* and "except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Schmidt* v. *Merchants Despatch Trans. Co.,* 270 N. Y. 287, 200 N. E. 824, 104 A. L. R. 450 (1936).

Finally, a third theory might be that, since the action has a dual aspect, suit must be brought within six years from the date of sale or three years from the date of injury whichever is the shorter of the two periods.

John G. Wick

LABOR LAW — DISCRIMINATION BY UNION SEEKING UNION SHOP ON BASIS OF SEX HELD "UNREASONABLE"

Defendant unions picketed plaintiff's tavern to induce acceptance of a union shop. Plaintiff was willing to comply, and her employees were willing to join the unions. But three of plaintiff's bartenders were women and the bartenders' union strict policy was to admit only male bartenders to membership. Thus, compliance with the union's demand would require plaintiff to discharge, or at least take from behind the bar, the three barmaids. *Held:* injunction restraining picketing of plaintiff's establishment granted, "unless the defendant unions agree, in the alternative, either to admit the barmaids presently employed by the plaintiff . . ., or to modify their demand for a union shop, so as to exempt the barmaids now employed by the plaintiff from the requirement that all the plaintiff's employees be or become members of defendant unions." *Wilson* v. *Hacker,* 101 N. Y. S. 2d 461 (Sup. Ct. 1950).

It has become well established during the past two decades that at least in respect to employees at the time the union contract is entered into, a union cannot demand a closed shop while at the same time maintaining an arbitrarily closed union. *Clark* v. *Curtis,* 273 App. Div. 797, 76 N. Y. S. 2d 3 (1947). The principle has been justified in various ways, the first of these theories being that of a principal-agent relationship. A union is required to act as exclusive bargaining agent for all the employees in a given bargaining unit [see N. Y. Labor Law § 705(1) and N. L. R. A. § 9a] and therefore must represent each employee fairly and impartially. Any arbitrary conduct or discrimination on the part of the union which would deprive any of the employees who are will-

ing to join the union of any rights accorded to the members of the union would be unlawful conduct against which, in an appropriate case, an injunction might issue. *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944).

That nebulous factor known as public policy has also been important in frustrating a closed union's attempt at enforcing a closed shop agreement in a situation such as that presented in the principal case. This was especially true in cases in which a union had, through closed shop agreements with most of the employers in a particular industry in a given area, gained what the courts considered a monopoly over the labor market. By reason of this monopoly a union controlled the job rights in the area and as was pointed out in *Wilson* v. *Newspaper and Mail Deliverers' Union,* 123 N. J. Eq. 347, at 350, 197 A. 720, at 722 (1938) ". . . the holders of monopoly must not exercise their power in an arbitrary unreasonable manner so as to bring injury to others." Many of the earlier cases laid great weight on the fact that the union possessed such a monopoly that by refusing an otherwise qualified individual admittance into the union, they were in fact depriving that person of the right to work. *Carroll* v. *Local 269, I. B. E. W.,* 133 N. J. Eq. 144, 31 A. 2d 223 (1943); *James* v. *Marinship Corp.,* 25 Cal. 2d 721, 155 P. 2d 329 (1944). However in many later cases relief has been granted where there was no indication of a monopoly by the union. In two recent California decisions it was specifically held that failure to allege a monopoly was not fatal to the cause of action in the "closed shop-closed union" situation because relief is based on the theory that such collective labor activity does not have a proper purpose and constitutes an unlawful interference with an employee's right to work. *Williams* v. *Brotherhood of Boilermakers,* 27 Cal. 2d 586, 165 P. 2d 903 (1946); *Thompson* v. *Moore Drydock Co.,* 27 Cal. 2d 721, 165 P. 2d 901 (1946).

The language in many of the cases, including the principal case of *Wilson* v. *Hacker,* seems to indicate that the prohibition against the co-existence of a closed shop and a closed union may not be absolute and there may be an area where the two would be allowed to exist concurrently. In *Wilson* v. *Hacker,* the union argued, and the court agreed, that the advancement of the union's economic interest is a good justification for union activity, even though that activity may cause injury to another. *Barile* v. *Fisher,* 197 Misc. 493, 94 N. Y. S. 2d 346 (Sup. Ct. 1949). "However," said the court, 101 N. Y. S. 2d at 470, "the means used to advance the economic interests of the union must be legitimate ones," ones which the law will recognize, citing *Advance Music Corp.* v. *American Tobacco Co.,* 296 N. Y. 79, 70 N. E. 2d 401 (1946). The union's attempt to better the economic position of its male members by means of discriminating against women was not one which could be recognized as legitimate. The union further argued that the presence of barmaids constituted a risk to the liquor industry, but they failed to convince the court that this risk

existed. But the court at least seemed to indicate that had the union shown reasonable grounds for excluding the barmaids, an injunction would not have been granted.

Despite the fact that the courts do, on occasions, speak of "reasonable grounds for exclusion," it appears that there are no cases holding that such grounds did exist. In the only case where a closed union and closed shop situation withstood a challenge by an employee who was deprived of a job as a result thereof, the employee was one who came to work after the agreement had been entered into. *Walter* v. *McCarvel,* 309 Mass. 260, 34 N. E. 2d 677 (1941); see also *Courant* v. *Int. Photographers Local 659,* 176 F. 2d 1000 (1949). This would seem to indicate that the closed union-closed shop cases protect a worker only from being deprived of his present employment. But see Summers, *The Right to Join a Union,* 47 COL. L. REV. 33, 73 (1947).

Because of the lack of cases and authorities, it is impossible to spell out what are "reasonable grounds for exclusion." However, an examination of grounds that have been held unreasonable may be helpful. Among the foremost of these grounds is that of race or color. Many cases have held that a union cannot demand a man's discharge because he is not a member of the union and simultaneously deny him admission because of the pigmentation of his skin. *Wills* v. *Local 106, Hotel Employees Alliance,* 26 Ohio Nisi Prius, N. S. 435 (1927); *James* v. *Marinship Corp., supra; Williams* v. *Brotherhood of Boilermakers, supra.* In New York unions are expressly prohibited by statute from discriminating on the basis of race, creed, color, or national origin. Civil Rights Law, § 43.

It has been held that a union had no reasonable grounds for excluding workers and thus depriving them of the right to work because there were union men unemployed, *Ryan* v. *Simons,* 98 N. Y. S. 2d 243 (Sup. Ct. 1950), reversed on other grounds, 277 App. Div. 1000, 100 N. Y. S. 2d 18 (1950) —— (see note on this case, *supra* at); *Schwab* v. *Moving Picture Operators Local 159,* 165 Or. 602, 109 P. 2d 600 (1941); because the worker sought to be excluded had been active in another union, *Dorrington* v. *Manning,* 135 Pa. Super. 194, 4 A. 2d 886 (1939); see also *Wallace Corp.* v. *N. L. R. B.,* 323 U. S. 248 (1944); or because the person seeking admission was actually an independent peddler working for himself. *Bautista* v. *Jones,* 25 Cal. 2d 746, 155 P. 2d 343 (1944). In the *Bautista* case the court could have found that the union had reasonable grounds for excluding those who sought admission, and three of the seven judges of the California Supreme Court so found. The situation there involved independent milk peddlers who purchased their dairy products from the larger dairies which were 95% unionized. The union demanded that these peddlers employ union drivers. The peddlers refused but offered to join the union themselves and they were turned down. The union

thereupon wrote to the dairies requesting them to enforce the agreement between the dairies and the union to the effect that the dairies would not sell to any independent peddlers who did not observe the same conditions of employment as those maintained in the organized plants. This action by the union was held to constitute the seeking of an unlawful end by the use of unlawful means. But as was pointed out by the dissent, the peddler-distributors "were engaged in a type of activity which justifiably may be considered by labor as a whole as inimical to its own economic interests . . . and we cannot justifiably pronounce that unions must either admit to membership such opponents or else refrain from taking economic measures against them." *Bautista* v. *Jones, supra* at 772, 155 P. 2d at 357.

The situation above relates one instance in which it may be that a union has reasonable grounds for excluding an individual even if it does deprive him of his job in a particular situation. It may also be reasonable for a union to refuse to admit Communists and thus keep them from working on the grounds that in times such as these they would be unsafe to work with, and also on the ground that they would weaken the union internally and in the public eye. As *Wilson* v. *Hacker* points up, the primary question is whether a union has reasonable grounds for keeping a man off the job; the matter of exclusion from the union is secondary. And the case clearly states that a union can have reasonable grounds for getting a man discharged. However, since the court here failed to find such grounds, and since all the prior cases reach the same result, the law remains that: "A union may restrict its membership at pleasure; it may under certain conditions lawfully contract with an employer that all work shall be given to its members. But it cannot do both." *Wilson* v. *Newspaper and Mail Deliverers' Union, supra* at 351, 199 A. at 722.

David Buch

MUNICIPAL CORPORATIONS — NOTICE OF CLAIM — INFANTS

A conflict in lower court decisions regarding the applicability of § 50-e of New York General Municipal Law (N. Y. Laws 1945, c. 694) to infants has finally been resolved by the Court of Appeals in *Martin* v. *School Board of Union Free District,* 301 N. Y. 233, 93 N. E. 2d 655 (1950).

Section 50-e makes it necessary to file a notice of claim, as a condition precedent to the commencement of an action against a municipal corporation, within 90 days after the cause of action accrues (effective Sept. 1, 1950 N. Y. Laws 1950, c. 481; prior to this date, the time allowed was 60 days). Subdivision 5 of that section provides an exception for infants and other incapacitated persons by allowing them up to one year after the cause of action accrues, instead of only 90 days, to apply for leave to serve the notice of claim.