

rule, it would be seen to lead to absurdities. For example, suppose the injured child dies some time after birth? Under the common law rule that the unborn child is a part of the mother, can it be said that a part of the mother has died (like a limb that is amputated) when in fact she is whole in all respects? Or, as in the case of *Kine v. Zuckerman*,³⁶ the child was born with one hand as a result of pre-natal injuries, can the mother allege that she has lost a hand, when by all the senses of mankind she in fact possess both hands? If the courts of law are willing to indulge in such absurdities to reach a just result, no one should seriously complain. The suggestion is that the courts should adopt one or the other courses of procedure, instead of buck-passing and allowing a wrongdoer to escape liability while a remedy at law, which might be adequate, is denied to the innocent victim.³⁷

Labor Law—Closed Shop Agreements in New Jersey

That the judicial process is primarily a function of the economic relationships obtaining in society, and that to a lesser degree the judicial process influences the development and evolution of these same economic relationships are perhaps best illustrated by an analysis of the judicial attitude toward the labor union and its various activities. It is here proposed to examine that attitude toward the "closed shop" in New Jersey courts.

The term, though occurring frequently in the law reports has not been adequately defined, and even in labor history has had various

36 *Supra*, note 12.

37. *Smith v. Luckhardt*, *supra*, note 14; *Snow v. Allen*, *supra*, note 15; *Baptist Hospital v. Branton*, *supra*, note 15; *Magnolia Coca Cola Bottling Co. v. Jordan*, *supra*, note 14; *Buel v. United Rys.*, *supra*, note 11; *Newman v. City of Detroit*, *supra*, note 11; *Lipps v. Milwaukee Elec. Ry. Co.*, *supra*, note 11; *In re Robert's Estate*, *supra*, note 11; *Allaire v. St. Luke's Hospital*, *supra*, note 11; *Nugent v. Brooklyn Heights Ry. Co.*, *supra*, note 13; *Dietrich v. Northampton*, *supra*, note 15; *Ryan v. Public Service Coordinated Transport*, *supra*, note 11; *Drobner v. Peters*, *supra*, note 14; *Stanford v. St. Louis & San Francisco Ry. Co.*, *supra*, note 13; *Gorman v. Budlong*, *supra*, note 14; *Walker v. Great Northern Ry. Co.*, *supra*, note 11.

meanings.¹ As used in this article, the closed shop contract will refer to two types of employer-labor union relationships,² the closed union shop with an open union, where employers are supposed to hire union men, but if these are not available, non-union workers may be employed with the express provision that they must join the union as soon as they enter the shop,³ and the closed union shop with the closed union where the employer is permitted to hire only men dictated by the union; he goes to the business agent of the union when he wants new men and his right to discharge is hedged with a number of restrictions.⁴

One of the earliest references to the problem was a dictum which indicated a liberal attitude⁵ The complainants, master stonemasons of the city of Newark sought to enjoin the journeymen's association from attempting to coerce or intimidate the complainants from hiring two journeymen, who were not members of the association and who were denied membership. The court said. "They (journeymen's association) have agreed not to work with any but members of their association and not to work for any employer who insists on their doing so, by withdrawing from his employment. So long as they confine themselves to peaceable means to effect these ends they are within the letter and the spirit of the law and not subject to the interferences of the courts." The law there referred to was the statute of 1883.⁶ A state-

1. Series XXIX, Johns Hopkins University Studies in Historical and Political Science, No. 3, STOCKTON, THE CLOSED SHOP IN AMERICAN TRADE UNIONS (1911), pp. 9-14; BEMAN, L. T., SELECTED ARTICLES ON THE CLOSED SHOP (1922).

2. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (1936), pp. 552-558.

3. Daugherty, *op. cit.*, p. 557, "the closed shop with open union is found mainly in highly competitive and seasonally unstable industries."

4. Daugherty, *op. cit.*, pp. 57-8, "Unions that insist on this kind of shop are so strong that they outnumber the non-union workers and feel no need for bringing them into the organization, preferring to eliminate their competition by depriving them of employment and driving them out of the industry. Such unions are able to limit their membership to rigid restrictions, thus creating a monopoly and artificially raising their wages. This is, of course, possible only where monopolistic skill exists untouched by the substitution of machinery, as in the building trades and part of the printing industry."

5. *Mayer v. Journeymen Stonecutters' Association*, 47 N.J.Eq. 519, 20 Atl. 492 (Ch. 1890).

6. R.S. 34:12-1. "It shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or other-

ment in a case⁷ shortly thereafter represented substantially the same approach, the court there recognizing that the rules and regulations of a labor union are designed to "impose restrictive conditions on the individual right of contract and on the conduct of a trade and to secure within a certain district the monopoly so far as possible of a particular kind of labor" in order to effectuate its purposes and that these methods are not unlawful. These cases seemingly sanction the attainment of closed shop conditions without mentioning the mutual recognition thereof by both employer and labor union in a binding contract. The first reference to an agreement between a union and employers is found in *Brennan v. United Hatters*,⁸ where it was stated that the legality of an agreement on part of the union with manufacturing hatters in all factories throughout an extensive district to the effect that none but members of the association should be employed in their shops admitted of question and that it would be necessary to await further decisions to determine the status of the contract in New Jersey.⁹ When, however, the specific question did come before the courts in later cases wherein the legality of the closed shop agreement and of activity designed to procure such agreement was in question, the various dispositions made of the cases indicate that the status of the contract in New Jersey has not yet been determined and reflect the unsettled state of the law.

One of the factors considered by the courts as determinative of the problem is the element of compulsion. So, the right of labor unions to

wise to persuade, advise or encourage, by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person." L. 1883, c. 28, sec. 1, p. 36.

7. *Alfred O'Brien et al v. Musical Mutual Protective and Benevolent Union, Local No. 14, National League of Musicians et al.*, 64 N.J.Eq. 525, 54 Atl. 150 (Ch. 1903).

8. 73 N.J.L. 729, 65 Atl. 165, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 549, 9 Ann. Cas. 698 (E. & A. 1906).

9. The court referred to three decisions from other states, which were to have an important influence on the later development of the problem. *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, writ of error dismissed in 199 U.S. 612, 50 L. Ed. 333, 26 S. Ct. 745 (1905); *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297, 37 L.R.A. 802, 57 Am. St. Rep. 496 (1897); *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 330 (1900).

persuade and induce, by all lawful means, employers to employ only union labor is not denied, but no employer can be lawfully compelled to do so against his will.¹⁰ And yet in another part of the decision the attempt to secure a closed shop agreement was held to be illegal as an attempt to secure an unlawful object, without any reference to the method of attaining it. The same inconsistent position was taken in a later case¹¹ and followed in other cases.¹² This approach was criticized in a decision¹³ where the vice chancellor used the following argument: "Complainant argues that while an employer may of his own free will employ only union men and while he may voluntarily enter into a contract with a union to that end, yet the union cannot compel him to do so. Of course not. Neither can it compel him to raise wages or shorten hours or enter into any contract whatever. What is meant by compel? . . . A labor union offers an employer alternatives—higher wages, shorter hours and a closed shop or a strike. He weighs the situation and chooses; in a legal sense he is not compelled. Under our law, strikes and picketing are lawful inducements; they become unlawful only when conducted in an unlawful manner or for an unlawful object or for an object not substantially connected with the economic well-being of the members of the union."¹⁴ It may be significant that in none of the cases after this has the same objection been made.

Another element considered by the courts is the motive of the union in seeking the closed shop agreement.¹⁵ Obviously this is of

10. *Elkind & Sons, Inc. v. Retail Clerks International Protective Association*, 114 N.J.Eq. 586, 169 Atl. 494 (Ch. 1933).

11. *Wasilewski v. Bakers' Union*, 118 N.J.Eq. 349, 179 Atl. 284 (Ch. 1935).

12. *International Ticket Company v. Wendrich et al.*, 122 N.J.Eq. 222, 193 Atl. 808 (Ch. 1937); *J. Lichtman & Sons v. Leather Workers Industrial Union et al.*, 114 N.J.Eq. 596, 169 Atl. 498 (Ch. 1933); *Blakely Laundry Company v. Cleaners' and Dyers' Union*, 11 N.J.Misc. 915, 169 Atl. 541 (Ch. 1933). Despress, L. M., *The Collective Agreement for the Union Shop*, 7 *UNIV. OF CHICAGO LAW REVIEW* 32, for cases where striking to obtain a closed shop agreement where such agreement is legal, is enjoined.

13. *Flour Plating Co. v. Mako et al.*, 122 N.J.Eq. 298, 194 Atl. 53 (Ch. 1937).

14. Citing *New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators and Paper Hangers of America*, 96 N.J.Eq. 632, 126 Atl. 399, 47 A.L.R. 384 (E. & A. 1924), reversing 95 N.J.Eq. 108, 122 Atl. 622 (Ch. 1923).

15. See OAKES, *ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* (1937), Appen-

importance only if it be held that a closed shop agreement may be lawful under some circumstances or if the proper motive obtain. Motive, as contemplated by the courts in such matters means that "the object sought to be accomplished must have a direct relation to the improvement of the condition of the workmen."¹⁶ So in one case,¹⁷ it was said that the "continuity of employment" advanced as one of the purposes for negotiating the closed shop agreement "could as readily have been accomplished by binding the parties to a performance for the time stipulated. The closed shop feature obviously bears no relation whatever to the other and legitimate purposes of the contract." The point of cleavage is stated to be that *prima facie* a strike for a closed shop is unlawful, but may be justified by showing that it was inaugurated to advance the material interest of the union.¹⁸ The court in *National Protective Association of Steam Fitters and Helpers et al v. Cumming*,¹⁹ although cited in a New Jersey report²⁰ as a case wherein it was found that the motive of the union was the securing of work for its own members and that although the means resorted to were calculated to intimidate the employers of the non-union complainants, the union was justified on the ground of lawful competition and that the injury to the plaintiffs in thus preventing from working or getting work was incidental and so *damnum absque injuria*,—also used the following language: "The propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it. But there is . . . no legal objection to the employee giving a reason. If he has one. . . The same rule applies to a body of men who having organized for purposes deemed beneficial to themselves refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest, as members of an organization to refuse longer to work, it is their legal right to stop. . ." And further "to state it concretely

dix B, Effect of Motive to Make Otherwise Lawful Acts, Actionable.

16. 16 R.C.L. 433.

17. *Lehigh Structural Steel Company and Donnell-Zane Company, Inc. v. Atlantic Smelting and Refining Works*, 92 N.J.Eq. 131, 111 Atl. 376 (Ch. 1921).

18. *White Mountain Freezer Co. v. Murphy*, 78 N.H. 398, 101 Atl. 357 (1917).

19. 170 N.Y. 315, 63 N.E. 369, 50 L.R.A. 135, 88 Am. St. Rep. 648 (1902).

20. *Lehigh Structural Steel Company v. Atlantic Smelting and Refining Works*, *supra*, note 17.

if an organization strikes to help its members, it is lawful. If its purpose be merely to injure non-members, it is unlawful. If the organization notifies the employer that its members will not work with non-members and its real object is to benefit the organization and to secure employment for its members it is lawful. If its sole purpose be to prevent non-members working, then it is unlawful. I do not assent to this proposition. It seems to me illogical and little short of absurd to say that every-day acts of the business world, apparently within the domain of competition may be either lawful or unlawful according to the motives of the actor." Although representing the liberal view, V.C. Bigelow felt constrained, in a case to announce a finding to the effect that the motives of the union was to obtain employment for themselves and to protect themselves against discrimination.²¹

The primary consideration of the courts of New Jersey in treating the problem however is that of monopoly or monopolistic control and it is upon this factor that the decisions are so unsettled and conflicting. The first case²² wherein an attempt to secure a closed shop agreement was held illegal announced that "the illegality of such contracts is pronounced upon the fundamental principles of our theory of government, to which monopolies of any kind, affecting in any way the utmost

21. *Flour Plating Company v. Mako et al.*, *supra*, note 13.

In *Berry v. Donovan*, *supra* note 9, the plaintiff, a non-union worker, was discharged from his employment by the employer at the request of the defendant labor union after a closed shop agreement had been negotiated, the court saying: "The gain which a labor union may expect to derive from inducing others to join it is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business. . ." The discharged employee had been requested to join the union but he refused. To the same effect are *Plant v. Woods* and *Curran v. Galen*, *supra*, note 9. But *cf.* *Hoban v. Dempey*, 217 Mass. 166, 104 N.E. 717, L.R.A. 1915 A, 1217, Ann. Cas. 1915 C, 810 (1914); *Shinsky v. O'Neil*, 232 Mass. 99, 121 N.E. 790 (1919); *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280 (1905). See also *Abelow*, *The Closed Shop in New York*, 7 BROOKLYN LAW REVIEW 459 (1938), and *The Strike for the Closed Shop: Massachusetts Precedents*, 45 H.L.R. 1226 (1932).

22. *Baldwin Lumber Co. v. Local No. 560, International Brotherhood, etc.*, 91 N.J.Eq. 240, 109 Atl. 147 (Ch. 1920).

freedom of the individual to pursue his lawful trade or business are abhorrent. The authorities cited²³ hold such contracts to be "violative of public policy." This doctrine was given a further impetus by the statement in a later case that "the principle of the closed shop, i.e., the monopolization of the labor market has found no judicial sponsor. In whatever form organized labor has asserted it, whether to the injury of the employer, or to labor, or to labor unions outside of the fold, the judiciary of the country has responded uniformly that it is inimical to the freedom of individual pursuit guaranteed by the fundamental law of the land and contravenes public policy. On the other hand public policy favors free competition and the courts have been keen to recognize the right of organized labor to compete for work and wages and economic and social betterment and to use its weapon—the strike—to realize its lawful aspirations, but none has gone to the length of sanctioning a strike for a closed shop which has for its object the exclusion from work of workmen who are not members of the organization."²⁴ This statement represents in essence the rationale of the opposition with which the closed shop agreement in New Jersey has to contend.²⁵ It will be noted that the primary concern of the courts in

23. *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600 (1913); *Berry v. Donovan*, *Plant v. Woods*, *Curran v. Galen*, *supra*, note 9.

24. *Lehigh Structural Steel Company and Donnell-Zane Company, Inc. v. Atlantic Smelting and Refining Works*, *supra*, note 17.

25. *Walsche v. Sherlock*, 110 N.J.Eq. 223, 159 Atl. 661 (Ch. 1932). "If the object of the organization, although undeclared is the monopoly of a particular class of labor, it is not necessary for this court to await its accomplishment before affording relief."

Elkind & Sons, Inc. v. Retail Clerks International Protective Association et al., 114 N.J.Eq. 586, 169 Atl. 494 (Ch. 1933). "The admitted demands of the defendants for the closed shop are unlawful." In *Armco, Inc. v. Panaswitz*, docket 99, page 172, is an unreported opinion, V.C. Buchanan referring to a strike to enforce the closed shop said: "That purpose has been repeatedly denounced as unlawful. . . Trade unions are lawful and laudable in themselves. But any endeavor on their part to establish a monopoly of employment—utterly to deprive other men of an equal right to the opportunity for similar employment in the locality—is as reprehensible, as indefensible, as unlawful as would be a combination of employers in an agreement that no members of a union would be employed by them. It is absolutely contrary to the principles of liberty and freedom of opportunity, to the preservation of which this country is dedicated," followed in *Wasilewski v. Bakers Union*, 118 N.J.Eq. 349, 179 Atl. 284 (Ch. 1935).

those cases where it is held that a monopoly obtains is the monopoly of labor operating or designed to deprive a non-union worker of the opportunity to secure work. Consequently, the problem arises as to what is necessary to constitute a monopoly or monopolistic control and whether there is any compromise possible between a closed shop agreement and a man's right to work.

The courts in many of those cases where strikes to obtain the closed shop have been held unlawful, have commented upon the territory or area to be covered by the proposed agreement. So, where the complainants seeking injunctive relief were fifteen dealers in lumber and mason materials in Hudson County, practically all the dealers in the territory, the union seeking the closed shop with the open union, the court said: "Contracts of this character designed to unionize an entire industry in a territory as large as Hudson County do not appear to have come directly before our courts for consideration. In other jurisdictions where they have been involved, they have uniformly been held to be illegal as against public policy."²⁶ And where the closed shop contract involved the Building Trades Employers Association of New York and the New York Building Trades Council of Greater New York (an association of all the trades unions) and a sympathetic strike was called in New Jersey to enforce the New York contract, the court found that the ultimate thing organized labor sought was the monopolization of labor in all lines of building within the territory to which the contract applied.²⁷ Monopolistic control was also found to exist

International Ticket Company v. Wendrich *et al.*, 122 N.J.Eq. 222, 193 Atl. 808 (Ch. 1937), *aff'd*, 123 N.J.Eq. 172, 196 Atl. 474 (E. & A. 1938); Canter Sample Furniture House, Inc. v. Retail Furniture Employees Local No. 109 *et al.*, 122 N.J.Eq. 575, 196 Atl. 210 (Ch. 1937). "This court has expressly held that closed shop contracts and a strike to obtain or enforce them are usually declared illegal because they create or tend to create a monopoly in the labor market and are thus opposed to public policy." Heyl v. Culinary Alliance, Local 611, 126 N.J.Eq. 384, 9 Atl. 2d) 331 (Ch. 1939); Lora Lee Dress Co., Inc. v. International Ladies Garment Workers Union, Local No. 85 *et al.* (127 N.J.Eq. 564, 14 Atl. (2d) 46 (Ch. 1940); F. F. Fast Company, Inc. v. United Oystermen's Union, No. 19600 *et al.*, 12 N.J.Eq. 27, 15 Atl. (2d) 129 (Ch. 1940).

26. Baldwin Lumber Co. v. Local No. 560, International Brotherhood, etc., *supra*, note 22.

27. Lehigh Structural Steel Company *et al.* v. Atlantic Smelting and Refining Works, *supra*, note 17.

where the union covered all north Jersey,²⁸ where the contracts included 52 out of 80 furniture upholsterers in the Newark metropolitan area,²⁹ all but one magazine mailing shop in Newark,³⁰ and where the contract included 95% of all those engaged in the oyster industry.³¹ It is not merely where the union seeks closed shop contracts to operate over large areas; the courts have also been diligent in ascertaining the intention of the unions and have found that monopolistic control is the aim ultimately to be sought, even though the controversy before the court involved only a single retail furniture store.³² The court said: "There are many other facts and circumstances connected with this controversy which indicate that this strike is but part and parcel of an attempt to unionize the entire retail furniture industry in Newark and vicinity and of the widespread campaign on behalf of labor to unionize all industry in this country.³³ It would seem from these cases that even assuming the legality of a closed shop contract in one factory, any attempt on the part of the union to get such contracts with other employers would invite the charge of seeking monopolistic control.

28. *Walsche v. Sherlock*, 110 N.J.Eq. 223, 159 Atl. 661 (Ch. 1932).

29. *Upholsterer's Carpet and Linoleum Union v. Essex Reed and Fibre Co.*, 12 N.J.Misc. 637, 174 Atl. 207 (Ch. 1934).

30. *Wilson v. Newspaper and Mail Deliverer's Union*, 123 N.J.Eq. 347, 197 Atl. 720 (E. & A. 1938).

31. *F. F. East Company, Inc. v. United Oystermen's Union No. 19600 et al.*, 128 N.J.Eq. 27, 15 Atl. 2d) 129 (Ch. 1940).

32. *Canter Sample Furniture House, Inc. v. Retail Furniture Employees Local No. 109 et al.*, 122 N.J.Eq. 575, 196 Atl. 210 (Ch. 1937).

33. *Upholsterer's Carpet and Linoleum Union v. Essex Reed and Fibre Co.*, *supra*, note 29, ". . . the present contract is but part and parcel of an attempt to unionize whole industry in metropolitan area and to create a monopoly of labor in that industry. Such contract is opposed to public policy and void." *Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108 et al.*, 126 N.J.Eq. 374, 5 Atl. (2d) 682 (Ch. 1939). "Even if this were only the first step of this union to establish a monopoly in employment, . . . the complainant has the right to halt the progress so as far as its business is concerned," citing *J. Pitney in the Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229, 62 L. Ed. 269, 38 S. Ct. 65, L.R.A. 1918 C. 497, Ann. Cas. 1918 B, 469 (1917), "Unionizing the miners is but a step in the process of unionizing the miners followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employees are concerned and to be protected against irreparable injury resulting from either."

However at the same time that these principles with respect to monopolistic control were being announced, other decisions were proclaiming a more liberal approach consonant with the present day legislative trend. The proponent of this attitude is V.C. Bigelow whose statements represent an adherence to the policy indicated by the earliest New Jersey cases referring to the problem.³⁴ In the case of *Harris v. Geier*,³⁵ he said: "For many years we have witnessed the growth of trade unionism, narrowing the opportunity of employment for those who are not members of the union. When a trade union becomes powerful enough, its members refuse to work with non-members; it contracts with employers that only union men will be employed. The purpose and the result is monopoly. This process has been notorious; it has been patent to the legislature and they have taken no steps to check it. On the contrary well knowing that a strike is the usual weapon employed to secure and enforce such a monopoly, they have enacted laws in aid of the right to strike."³⁶ And in a case before our highest court, it was stated that "it is manifestly not essential to the legality of the combination that it be confined to the same community. . . The law does not impose any limit upon the bargaining power which labor may acquire by union."³⁷ A closed shop agreement was enforced in another

34. *Mayer v. Journeymen Stonecutters' Association*, *supra*, note 5; *Alfred O'Brien et al v. Musical Mutual Protective and Benevolent Union, Local No. 14, National League of Musicians et al.*, *supra*, note 7; *Jersey City Printing Co. v. Cassidy*, 63 N.J.Eq. 759, 53 Atl. 230 (Ch. 1902).

35. 112 N.J.Eq. 99, 164 Atl. 50 (Ch. 1932).

36. P. L. 1883, p. 36, *supra*, note 6; P. L. 1926, p. 348. "No restraining order or writ of injunction shall be granted or issued out of any court of this state in a case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons either singly or in concert from terminating any relation of employment, or from ceasing to perform any work or labor; or from peaceably and without threats or intimidation, recommending, advising or persuading others so to do." (R.S. 2:29-77.)

37. *Bayonne Textile Corporation v. American Federation of Silk Workers et al.*, 116 N.J.Eq. 146, 172 Atl. 551, 92 A.L.R. 1050 (E. & A. 1934). Here the complainants operated its plant on the open shop basis. The defendants, a voluntary association of silk workers of national authority whose design and purpose with respect to the complainants was to compel it to operate its plant as a closed shop and to coerce it into employing none but members of the defendant union fomented a strike. The court quoted C. J. Taft in *American Steel Foundries*

case.³⁸ And finally in the case of the *Flour Plating Co. v. Mako*,³⁹ for the first time is announced expressly the doctrine perhaps to be implied from the previous cases that there is a distinction between a closed shop in a single factory or group of factories and a closed shop in substantially an entire industry throughout a considerable area; the former valid, the latter presenting two alternatives. There a further "distinction must be made between a closed shop sought by a union as a protective measure⁴⁰ and one sought in order to create a monopoly of labor. By the great weight of authority, the last case is held to be contrary to public policy. As to the question of a closed shop in substantially an entire industry based on motives intrinsically self protec-

v Tri-City Central Trades Council, 257 U.S. 184, 66 L. Ed. 189, 42 S. Ct. 72, 27 A.L.R. 360 (1921). "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.

New Jersey Painting Co. v. Local No. 26, 96 N.J.Eq. 632, 126 Atl. 399, 47 A.L.R. 384 (E. & A. 1924). "Co-operation in some form now seems to be an economic necessity in all businesses, trades and occupations throughout the United States if not throughout the entire world." In the *Bayonne Textile* case, although the court recognized that one of the ends of the strike was the closed shop, that word was not again used in the opinion, the court however permitting peaceful picketing to continue.

38. *Hudson Bus Drivers' Association v. Hill Bus Co.*, 121 N.J.Eq. 582, 191 Atl. 763 (E. & A. 1937). Complainant and defendant had an agreement whereby only members of the complainant would be permitted to operate a bus owned by the defendant. Complainant obtained an injunction against the defendant employing non-member drivers or discharging contrary to the terms of the agreement. In *Canter Sample Furniture House, Inc v Retail Furniture Employees Local No. 109 et al*, 122 N.J.Eq. 575, 196 Atl. 210 (Ch. 1937), V.C. Berry denies that the Hudson case impliedly upholds the legality of closed shop contracts and that they are not contrary to public policy, and states that, after an examination of the record of the case, the legality of the contract involved was not in issue before the court. It would seem, however, that such contract were in fact illegal or against public policy, the court would on its own initiative have decided to that effect.

39. 122 N.J.Eq. 298, 194 Atl. 53 (Ch. 1937).

40. See *supra*.

tive, the authorities are conflicting. But the decisions are almost unanimous that a closed shop in a single factory is consonant with public policy and lawful."⁴¹ It is interesting to note that the Restatement of Contracts takes the position that a bargain with a labor union to employ only union labor is legal unless the union has such a monopoly as virtually to deprive non-union workers of any possibility of employment; and even in that case it is not illegal if a statute legalizes such labor unions.⁴² Vice Chancellor Bigelow reaffirmed his position announced in the above case, in a recent decision to the effect that "whoever attacks such a contract (closed shop agreement) must show that it unreasonably restrains trade or tends to create a monopoly. Only when it appears that the contract by itself or in conjunction with other similar contracts or understandings or customs impose a closed shop in substantially an entire industry throughout a considerable area, does the contract become *prima facie* void and the burden arises of justifying it by showing special circumstances. Whether it is susceptible of justification at all is a question on which I express no opinion."⁴³

As noted above, the court's ultimate concern where they have struck down closed shop contracts or enjoined attempts to procure such contracts on grounds of monopoly is the deprivation of the non-union workers right to work. An attempt was made to resolve this conflict between the closed shop and a man's right to work by stating that the policy of New Jersey approves of the organization of employees in trades unions which are governed on democratic principles and mem-

41. In *Paramount Markets, Inc. v. Jersey City, etc. Clerks Union* (docket 110/628), an unreported memorandum V.C. Buchanan, the same principle is enunciated. Commenting on the principle case, V.C. Berry in the *Canter* case, *supra*, note 32, says: "While it is true that ordinarily, in the past, the closed shop in a single factory not controlling an entire industry has been held to be entirely consonant with public policy, that rule cannot be uniformly applied today unless the obvious is entirely ignored. . . The individual strike or the attempt to unionize a single shop or place of business cannot today be considered in isolation from the wave of strikes and labor controversies sweeping the country from east to west and from north to south; but every strike or labor controversy must be considered with some relation to general industrial and economic condition, of which the court will take judicial notice."

42. 2 RESTATEMENT: CONTRACTS, sec. 515.

43. *Carl Christiansen et al v. Local 680 of the Milk Drivers and Dairy Employees of N. J. et al.*, 126 N.J.Eq. 508, 10 Atl. (2d) 168 (Ch. 1940).

bership in which is open, on reasonable and equal terms to all persons of good character and of skill in the trade; that the monopolistic tendencies or purposes or contracts of such unions are not contrary to the policy of the state.⁴⁴ And this was carried further by making an open union a condition precedent to a "monopolistic" closed shop contract in that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade.⁴⁵ The difficulty with this position is that the courts have time and again maintained that trade unions have an unquestionable right to make by-laws and rules for the admission of members; may restrict membership to the original promoters or limit the number to be thereafter admitted and that no person has any abstract right to be admitted to such membership.⁴⁶ Consequently under these cases it is within the power of the union to make any closed shop agreement legal by admitting new members who may be affected by the agreement. Such a provision would do much to overrule the force as precedents of those cases⁴⁷ upon which the opposition to the closed shop agreement is based. There the agreements operated to effect the discharge of employees already working but who were not members of the union. These cases had already, however, been overruled in substance in their respective

44. *Harris v. Geier*, 112 N.J.Eq. 99, 164 Atl. 50 (Ch. 1932).

45. *Wilson v. Newspaper and Mail Deliverers' Union*, 126 N.J.Eq. 347, 197 Atl. 720 (E. & A. 1938). The complainant's discharge was requested by the defendant after a closed shop contract had been signed with the employer. The complainant had been denied membership in the union.

46. *Mayer v. Journeymen Stonecutters' Association*, 47 N.J.Eq. 519 (Ch. 1890); *O'Brien et al v. Musical Mutual Protective and Benevolent Union*, 64 N.J.Eq. 525, 54 Atl. 150 (Ch. 1903). These cases, however, must be qualified in the light of *Cameron v. International Alliance, etc.*, 118 N.J.Eq. 11, 176 Atl. 692, 97 A.L.R. 594 (E. & A. 1934), that membership in such a body cannot be conditioned upon the surrender of the member's individual constitutional rights when that would not subserve the public interest, in this case the power of the seniors over the juniors with respect to the available positions of employment being almost complete. See also *Collins v. International Alliance, etc.*, 119 N.J.Eq. 230, 182 Atl. 37 (Ch. 1935). See also Series XXX, Johns Hopkins University Studies in Historical and Political Science, No. 3, Wolfe, Admission to American Trade Unions.

47. *Curran v. Galen*, *supra*, note 9; *Plant v. Wood*, *supra*, note 9, and *Berry v. Donovan*, *supra*, note 9. In all of these cases, however, the complainants had been offered membership in the defendant unions and had refused.

states.⁴⁸ Other states have attempted to solve this problem by enacting statutes establishing the legality of the closed shop, making membership in the union a condition of employment, provided the labor organization does not deny membership in its organization to a person or persons who are employees of the employer at the time of the making of such agreement if such employee was not employed in violation of any previously existing agreement with said labor organization.⁴⁹ In a recent decision the New York court absolved the judiciary of any responsibility for monopolistic results of a closed shop agreement by declaring that if there be an evil in the monopoly of the labor market in a particular industry by labor organizations, it is a matter to be considered by legislatures and not by the courts.⁵⁰

With decisions ranging from those upholding the closed shop agreement to those holding any closed shop agreement invalid, it would be futile to attempt to reconcile the cases and abstract thereby valid generalizations. The conflict is recognized by the courts themselves, who have attempted to distinguish the cases⁵¹ but without success. Those cases holding the agreements void or attempts to secure them illegal manifest an extremely hostile attitude to the union shop contract, aside from the specific aspect of monopoly, upon which the judicial "hat" is "hanged." The word "monopoly" indeed has become a strong competitor of "malice" as a preferred container of the court's ratiocinative processes.⁵² It seems odd that the courts in considering monopoly, are concerned not with the relationship between the labor union and the employer against whom the labor union was designed to operate

48. *Supra*, note 21.

49. *Laws of Pennsylvania, 1939*, p. 296, (the Labor Relations Act), sec 6C. See also *Wisconsin Laws, 1939*, c. 57 (Employment Peace Act), sec. 111.06, legalizing a closed shop agreement on certain conditions but granting to the board power to declare such "all union agreements terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer. . ." But these statutes seem to refer only to employees engaged at the time of the negotiation of the closed shop agreement.

50. *Williams et al v. Quill et al.*, 277 N.Y. 1, 12 N.E. (2) 547 (1938).

51. *Flour Plating Co. v. Malco*, *supra*, note 13; *Canter Sample Furniture House, Inc. v. Retail Furniture Employees*, *supra*, note 32.

52. *Despres, The Collective Agreement for the Union Shop*, 7 *UNIV. OF CHICAGO LAW REVIEW*, 24 at p. 36 (1939).

but with protecting the non-union worker from his organized co-workers. The cases in the highest court of the state⁵³ tend to support the more liberal attitude in recognizing the validity of the agreement and of activity to procure such agreement. It is submitted that the problem is primarily economic and not judicial. Whether the concessions made to the closed shop agreement where no monopoly results are substantial and enable the labor union to effect its purposes in promoting the interests of labor is not for the court to determine. The most efficient solution of the problem seems to be that reached in New York,⁵⁴ wherein the question of monopoly was left to the legislature for its disposition.

53. Bayonne Textile case, *supra*, note 37; Wilson v. Newspaper and Mail Deliverers Union, *supra*, note 45.

54. Williams v. Quill, *supra*, note 50.