

# The Incorporation of Trade Unions

“NO, THANK YOU!” SAYS GOMPERS

Louis D. Brandeis & Samuel Gompers

An address delivered [by Louis D. Brandeis] at a meeting of the Economic Club of Boston, December 4, 1902, and followed by an address on the same subject by Samuel Gompers, president of the American Federation of Labor.<sup>1</sup>

**L**EST WHAT I SAY on the advisability of incorporating trade unions be misunderstood, it seems wise to state at the outset my views of their value to the community.

[I consider the trade unions a highly beneficent institution.] They have been largely instrumental in securing reasonable hours of

labor and proper conditions of work; in raising materially the scale of wages, and in protecting women and children from industrial oppression.

The trade unions have done this, not for the workingmen alone, but for all of us; since the conditions under which so large a part of our fellow citizens work and live will deter-

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<sup>1</sup> Brandeis submitted the text of his opening statement for publication in the *Green Bag*, and that text is reprinted here. See Louis D. Brandeis, *The Incorporation of Trade Unions*, 15 *GREEN BAG* 11 (1903). The rest of the debate never appeared in the *Green Bag*, but Gompers' papers contain the missing portions from a December 5, 1902 report in the *Boston Globe* (entitled "No, Thank You!" Says Gompers), and that report is reprinted here as well, after Brandeis' opening statement from the *Green Bag*. See Stuart B. Kaufman, Peter J. Albert, & Grace Palladino, eds., 6 *THE SAMUEL GOMPERS PAPERS: THE AMERICAN FEDERATION OF LABOR AND THE RISE OF PROGRESSIVISM 1902-6* at 71. Bracketed text in Brandeis' opening statement indicates material added from the *Globe's* report. The *Globe's* introduction adds:

The speakers held the close attention of the audience of 600 or more. Neither speaker transgressed in the least on platform courtesy, and applause was freely given whenever either scored.

Mr. Brandeis was cool, impassive, clear and concise, and the major part of the applause went to him, perhaps in part because he was a Harvard man and a large part of the audience was nurtured in Cambridge.

Mr. Gompers was deliberate, but emphatic, and at times effective.

There was no decision either by judges or by the audience, so the debate closed with honors nominally even.

mine, in great measure, the future of our country for good or for evil.

This improvement in the condition of the workingmen has been almost a net profit to the community. Here and there individuals have been sacrificed to the movement, but the instances have been comparatively few, and the gain to the employé has not been attended by a corresponding loss to the employer. In many instances, the employer's interests have been directly advanced as an incident to improving the conditions of labor; and perhaps in no respect more than in that expressed by a very wise and able railroad president in a neighboring state, who said: "I need the labor union to protect me from my own arbitrariness."

It is true that the struggle to attain these great ends has often been attended by intolerable acts of violence, intimidation and oppression; but the spirit which underlies the labor movement has been essentially noble. The spirit which subordinates the interests of the individual to that of the class is the spirit of brotherhood – a near approach to altruism; it reaches pure altruism when it involves a sacrifice of present interests for the welfare of others in the distant future.<sup>2</sup>

Modern civilization affords no instance of enlightened self-sacrifice on so large a scale as that presented when great bodies of men calmly and voluntarily give up steady work, at satisfactory wages and under proper conditions, for the sole reason that the employer refuses the recognition of their union, which they believe to be essential to the ultimate good of the workingmen. If you search for the heroes of peace, you will find many of them among those obscure and humble workmen who have braved idleness and poverty in devotion to the

principle for which their union stands.<sup>3</sup>

[Criticize Evils, Not Unions.]

And because the trade unions have accomplished much, and because their fundamental principle is noble, it is our duty, where the unions misconduct themselves, not to attack the unions, not – ostrich like – to refuse to recognize them, but to attack the abuses to which the unions, in common with other human institutions, are subject, and with which they are afflicted; to remember that a bad act is no worse, as it is no better, because it has been done by a labor union and not by a partnership or a business corporation.

If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness; if their demands are unreasonable or unjust, resist them; but do not oppose the unions as such.

Now, the best friends of labor unions must and should admit that their action is frequently hasty and ill-considered, the result of emotion rather than of reason; that their action is frequently arbitrary, the natural result of the possession of great power by persons not accustomed to its use; and that the unions frequently ignore laws which seem to hamper them in their efforts, and which they therefore regard as unjust. For these defects, being but human, no complete remedy can be found; but the incorporation of labor unions would in some measure tend to correct them.

The general experience in this country, in respect at least to the great strikes, has been that their success or failure depended mainly upon whether public opinion was with or against the strikers. Nearly every American who is not himself financially interested in

2 This paragraph and the preceding paragraph appear in the *Green Bag*, but are not present in the *Globe's* report.

3 The *Globe* report replaces this last sentence with "The history of trades unions shows this has been done not merely in times of prosperity and when supported by a strong union, but also where the risks involved, the horrors and privations attendant upon prolonged idleness, must have been apparent to every man."

a particular controversy sympathizes thoroughly with every struggle of the workingmen to better their own condition, to get a larger share of the fruits of industry. But this sympathy is quickly forfeited if the conduct of the strikers is unreasonable, arbitrary, unjust or lawless. The American people with their common sense, their desire for fair play, and their respect for law, resent such conduct.

[Advantage to Unions.]

The growth and success of labor unions, therefore, as well as their usefulness to the community at large, would be much advanced by any measures which tend to make them more deliberate, less arbitrary, and more patient with the trammels of a civilized community. They need, like the wise railroad president to whom I referred, something to protect them from their own arbitrariness. The employer and the community also require this protection. Incorporation would serve to this end.

When, in the course of a strike, illegal acts are committed, such as acts of violence or of undue oppression, the individual committing the wrong is, of course, legally liable. If the act is a crime, the perpetrator may be arrested and punished; if it is a mere trespass, he may be made to pay damages, if he is financially responsible; and if money damages appear not to be an adequate remedy, an injunction against the wrongful acts may be granted by a court of equity. If the injunction is disobeyed, the defendant may be imprisoned for contempt.

Now, it seems to be a common belief in this country that while the individual may be thus proceeded against in any of these ways, the labor union, as such, being unincorporated, that is, being a mere voluntary association, cannot be made legally responsible for its acts.

The rules of law established by the courts of this country afford, it is true, no justifica-

tion for this opinion. A union, although a voluntary unincorporated association, is legally responsible for its acts in much the same way that an individual, a partnership, or a corporation is responsible. If a union, through its constituted agents, commits a wrong or is guilty of violence or of illegal oppression, the union, and not merely the individuals who are the direct instruments of the wrong, can be enjoined or made liable for damages to the same extent that the union could be if it were incorporated; and the funds belonging to the unincorporated union can be reached to satisfy any damages which might be recovered for the wrong done. The Taff Vale Railway case, decided last year in England, in which it was held that the Amalgamated Society of Railway Servants could, as a union, be enjoined and be made liable in damages for wrongs perpetrated in the course of a strike, created consternation among labor unions there, but it laid down no principle of law new to this country.

[Immunity Not an Advantage.]

Numerous instances may be found in our courts where labor unions have been enjoined, and in our own state, more than thirty years ago, an action was maintained against a union for wrongfully extorting from an employer a penalty for having used the product of "scab" labor. But while the rules of legal liability apply fully to the unions, though unincorporated, it is, as a practical matter, more difficult for the plaintiff to conduct the litigation, and it is particularly difficult to reach the funds of the union with which to satisfy any judgment that may be recovered. There has consequently arisen, not a legal, but a practical, immunity of the unions, as such, for any wrongs committed.<sup>4</sup>

This practical immunity of the unions from legal liability is deemed by many labor leaders

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<sup>4</sup> This paragraph is in the *Green Bag's* version, but not in the *Globe's* report.

a great advantage. To me it appears to be just the reverse. It tends to make officers and members reckless and lawless, and thereby to alienate public sympathy and bring failure upon their efforts. It creates on the part of the employers, also, a bitter antagonism, not so much on account of lawless acts as from a deep-rooted sense of injustice, arising from the feeling that while the employer is subject to law, the union holds a position of legal irresponsibility.

This practical immunity of the labor unions from suit or legal liability is, in my opinion, largely responsible for the existence of the greatest grievances which labor unions consider they have suffered at the hands of the courts, that is, the so-called "government by injunction." It has come about in this way: An act believed to be illegal is committed during a strike. If that act is a crime, a man may be arrested, but in no case can he be convicted of a crime except on proof beyond a reasonable doubt and a verdict of the jury, which is apt to contain some members favorable to the defendant. Many acts, however, may be illegal which are not criminal, and for these the only remedy at law is a civil action for damages; but as the defendant is usually financially irresponsible, such action would afford no remedy.

The courts, therefore, finding acts committed or threatened, for which the guilty parties cannot be punished as for a crime, and cannot be made to pay damages, by way of compensation, have been induced to apply freely, perhaps too freely, the writ of injunction. They have granted, in many instances, this writ according to the practices of the court of equity upon preliminary application, wholly *ex parte*, and upon affidavits, without any chance of cross-examination. If the courts had been dealing with a responsible union instead of

with irresponsible defendants, they would, doubtless in many of the cases, have refused to interfere by injunction and have resolved any doubts for defendants instead of plaintiffs.

### [Immunity Dearly Bought.]

In another respect, also, this practical immunity of the unions has been very dearly bought: Nearly every large strike is attended by acts of flagrant lawlessness. The employers, and a large part of the public, charge these acts to the unions. In very many instances, the unions are entirely innocent. Hoodlums, or habitual criminals, have merely availed themselves of a convenient opportunity for breaking the law, in some instances even incited thereto by employers desiring to turn public opinion against the strikers. What an immense gain would come to the unions from a full and fair trial of such charges, if the innocence of the unions were established and perhaps even the guilt of an employer! And such a trial would almost necessarily be had before a jury, upon oral testimony, with full opportunity of cross-examination; whereas now, nearly every important adjudication involving the alleged action of unions is made upon application to a judge sitting alone, and upon written affidavits, without the opportunity of cross-examination.

It has been objected by some of the labor leaders that incorporation of the unions would expose to loss the funds which have been collected as insurance against sickness, accident and enforced idleness; that these funds might be reached to satisfy claims made for wrongs alleged to have been committed by the union. I can conceive of no expenditure of money by a union which could bring so large a return as the payment of compensation for some wrong actually committed by it.<sup>5</sup> Any such payment would go far in curbing the officers and mem-

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<sup>5</sup> In the *Globe's* account, this sentence begins, "The amount of such claims recovered in any judgments would doubtless be small, but ..."

bers of the union from future transgression of the law, and it would, above all, establish the position of the union as a responsible agent in the community, ready to abide by the law. This would be of immense advantage to the union in all its operations.

[Unjust Decisions.]

Again, it has been urged that the incorporation of the union would lead to a multiplication of law suits, which would involve the union in great expense; but the expense of conducting such litigation would be insignificant as compared with the benefits which would result to the union from holding a recognized and responsible position in the community.

Again, it has been urged that the unions would not fear litigation if justice were promptly administered; but that it was the dragging out of litigation which was to be apprehended. I take it that so far as the unions have suffered from the administration of the law, it has not been from delays but from precipitancy. They have suffered at times in the granting of preliminary injunctions, injunctions which have been more readily granted because of the irresponsible position of the defendants.<sup>6</sup>

Again, it has been urged that the unions might be willing to submit themselves readily to suit if the rules of law, as now administered by the courts, were not unjust to labor. I am inclined to think that there have been rendered in this country many decisions which do unduly restrict the activity of the unions.<sup>7</sup> But the way to correct the evil of an unjust decision is not to evade the law but to amend it. The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and thus

show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men.



GOMPERS' REPLY

When I entered this hall this evening I had no notion that there was any formal resolution to be presented to this meeting, and while individually I am willing to bow to the majority opinion of any assemblage which I may have the honor and the privilege to address, I am announced to take part in this debate as president of the American Federation of Labor, and I have neither the authority nor the desire that the question can, or that I can submit the organization to a vote of this or any other meeting than the organization itself.

The honorable chairman advises me that you do not propose to take any vote – and that reassures me. (Laughter.) It is more than pleasing to a lifelong trades unionist to hear the splendid tribute paid by the gentleman who has addressed you – the splendid tribute to the work, the efficiency and the results of trades union effort. And hence, so far as that part of his very eloquent address is concerned, it needs no further consideration at our hands except to say that it is highly pleasing to have one who takes an opposite position on what we consider a vital question pay the tribute to our movement and the men and women engaged in it.

As a rule, when men love an institution and are proud of the work it has achieved, it does not always seem meet to expose to public gaze any particular weakness therein. The weakness is communicated to friends – the

<sup>6</sup> This paragraph and the preceding paragraph are not present in the *Globe's* report.

<sup>7</sup> The *Globe* adds, at the end of this sentence, "... notably decisions in some of the western states, which have held to be unconstitutional many laws passed in the interests of labor."

friendly criticism comes, but not the public exposition.

However, in so far as the charge of violence against the trades unions is concerned, I unhesitatingly and unequivocally repudiate it. It is not true.

It is true that for purposes of dividing the unions of labor[,] employers and their advocates and their counsels and their apologists and special pleaders charge the unions and the union men with violence and lawlessness, but in truth it does not exist.

As a matter of fact, in numberless instances where violence and lawlessness have been laid at the door of organized labor the corporations and the employers, through their own emissaries, have been guilty of lawlessness, intending to provoke the public indignation against and upon the heads of men engaged in the organized labor movement. (Applause.)

Our friend says that the incorporation of the trade union would prevent the emotional action of the men in the organizations – it would tend to obviate the arbitrariness and would eliminate the disregard of the unions for law.

### **Experience as Trade Unionist.**

Now, I have been connected with the unions of labor since my 14th year. The chairman referred to the fact that at 10 years of age I entered a factory. I was a journeyman workman at 14. The unions at that time prescribed no age limit as to either youth or old age, and I became a member then.

I think I have had about as much access to the unions of labor in the United States as has our friend who addressed you just now. I think that I have had as much means of knowing what transpires in the unions of labor as he has, and I say to you in all candor, without any mental reservation whatsoever, that I have yet to hear the first threat or declaration or address or speech made by any man in a union

that implied lawlessness, much less threatened it, and that I have never known of a union of labor either advising, consenting or conniving at violence or lawlessness. (Applause.)

To every student, and particularly to those who are active in the labor movement, it is a fact known beyond question and so easy of demonstration that I am astounded to find that it should escape the attention of the average man, and it is this: That there is no strike of workmen so bitterly conducted, in which there is such hostility, in which there is so much lawlessness or violence as the strike of the nonunion men, the strike of the unorganized men. (Applause.)

The union of labor implies first, a mutual interdependence. The unions of labor instill dignity, a strength of character, a self-restraint and the restraint of one member upon the others. Nonunion labor, unorganized labor, striking in sheer desperation against unjust exactions visit the bitterness of their wrath and indignation upon the heads of their employers against whom they strike with the same relentlessness, with the same bitterness that the employers usually manifest to their unorganized nonunion workmen.

Our friend says that this proposition to incorporate the trades unions ought to be welcomed by them. Well, we have not reached that stage of appreciation of this kind offer which is made to us. (Laughter.) Perhaps we are placed in the position, judging from the experience of wage workers and workers throughout the ages – to which I shall refer in a few moments – that we are permitted, perhaps, to say that we fear the Greeks even when they bear us gifts. (Laughter.)

### **The Taff Vale Decision.**

Our friend referred to the Taff Vale case in Great Britain, in which the house of lords, the highest court of that country, upheld a decision mulcting in damages the union of railway employés.

He failed to call your attention, or I failed to hear his statement, that the union of these men never took any action, never advised, never consented to the action that these men on strike took, but that the suit was brought against the union for the action of the men as individuals.

As a matter of fact, the union was mulcted in damages for the individual action of its members unknown to the union as such.

I made a note while our friend was speaking, and he partially answered himself, but for fear that it may escape the attention of any of us, I want to repeat it. He said that the union was liable under the law now, and I made the note, "Then why demand the incorporation of trades unions?" And he answered that under the law at present the trades unions can be attacked, but that it is difficult of application, and it is because it is difficult to get at the funds of the trade unions that the proposition is made to incorporate them. (Laughter.)

Attention is called to the financial irresponsibility of trade unions. Well, heavens, that may be true; but that is not our fault. It is the fault of you employers of labor who have given us so low wages that we cannot put funds in our trade unions. (Laughter and applause.) You cannot take much from those who have so little; but we protest against you putting your hands upon that little. (Applause.)

We are told that the acts of the union are not amenable to the law, and in appreciation of all the splendid work that the trade unions have done, you want to make a law so that the unions shall be more amenable than they are at present. And amenable for what? For any crime?

If any crime has been committed by any man or set of men, there is an ample remedy at law, and if there be no crime in the doings of organized labor, if there be no violence of the law in the doings of organized labor, I protest against the attempt to invent new laws so as to create a new crime to apply to organized labor

alone. (Applause.)

Our friend says that the unions, instead of protesting against incorporation, ought to welcome it, and that no money could be put to better use than the payment of damages caused by a decision of a court in a matter of which he spoke. Well, I have read and have seen the play *The Lady of Lyons*, and when our friend addressed you upon that subject the character of Claude Melnotte came forcibly home to my mind.

You know that in the effort to deceive the Lady of Lyons they conspired to dress up Claude Melnotte – the flower of the youth of the country do this – the farm hand, in the character of a prince and give him almost untold wealth.

Assuming the character he goes about presenting watches and diamond rings and purses and jewels, and the sponsors to the conspiracy just nag for a while and call him to account, and Claude Melnotte, raising himself to his full stature, says: "Princes must be generous – with other people's money." (Laughter.)

The idea upon which this entire proposition is predicated is that the trade unions are irresponsible, that they are unfaithful to an obligation or an agreement, that they do not adhere to agreements entered into with employers, and hence their employers want this financial responsibility in unions in order that in the event of their violating these agreements then they can be sued in the courts for damages.

Now, as a matter of fact, there are few, exceedingly few, of the unions of labor who break agreements, who violate the terms of agreements. In truth, those who violate agreements between organized workmen and employers usually are the employers.

### Origin Long Ago.

The whole history of this species of legislation now advocated had its origin hundreds and hundreds of years ago, when the

condition of the workmen was such that when he left his employment he was brought back by the law and branded upon his forehead with the letter V, indicating that he was a villain.

If he attempted to escape again from his employer and was arrested and brought back he was branded with the letter S, indicating that forever he was a slave. If he again made an attempt to find freedom or liberty or employment anywhere, and if he were arrested and brought back, he was hanged upon the charge that he robbed his employer of his labor.

The history of the guilds is the history of a continuous crime of the courts and the judges in confiscating the funds of the workmen who had contributed to them for the purpose of providing them against old age and to protect the widows and orphans.

The old-time laws of the conspiracies of workmen regarding the effort to unite to raise wages, to discuss the question or conditions of labor, were all of them conspiracies in restraint of trade.

Then, follow the new and other interpretation of conspiracies to raise the price of labor. Prof. Thorold Rogers in his *Six Centuries of Work and Wages*, a professor of the university of Oxford, shows a record of decisions in which the guilds of the workers of Great Britain were mulcted and confiscated by judge and courts and kinsmen, ruler, prince and baron that is a record of crime unparalleled in any other country.

We may perhaps imagine that because of these things having existed in Great Britain they have no application here. First let me say, as a layman I say this, and I think our friend, who is, I understand, a most excellent attorney, will admit that the general principles of law and the common law, the highest and best interpretation, or what is supposed to be the highest and best interpretation of the law, holds good in almost all English-speaking countries.

### **Judge Jackson.**

You may know something of the injunctions that have been issued and know, too, of the men who have been incarcerated in the prisons of our country because they dared organize with their fellow workmen and endeavor to improve the condition of the craft – men sent to prison for meeting, for discussing their questions of labor, for discussing questions of their mutual improvement. I shall for a few moments call your attention to a decision recently rendered by a judge of the federal courts, Judge Jackson. You may have heard of the gentleman wearing the ermine.

Let me call your attention to a case in which he said, speaking of restraining men from “moving in or near the pits or moving in or near the mines,” restraining men from getting near their homes, and adding “that the defendants are further restrained from assembling in or near the approaches or roads upon or near said property leading to and from their homes and residences to the mines.”

Further on they are prohibited from “marching near to or in sight of said mines.” The approaches to the mines are in South Africa as well as they are in West Virginia. (Laughter.) In one portion of this very same decision of his honored Judge Jackson, he says “Are the dire evils which follow in the train of such people as you” – addressing strikers – “who are preaching the most detestable heresies and doctrines – to be protected by the constitution of the United States?”

Think of it, friends, a judge of the federal courts of our country saying to a prisoner at the bar that, “Do you think that the protection of the constitution of the United States is going to be afforded to you?” For heaven’s sake, what was the constitution enacted for, after all, if it was not to protect men and enable them to defend their honor and their interests? (Loud applause.)

Do you blame us if we fear to place further power in the courts and judges of our country



when they have gone so far, stretching their power to an extent never contemplated by the law, never contemplated by the constitution of our country, for on no statute books in the whole land can you find one provision upon which is based any authority for the issuance of injunctions in these labor disputes.

When courts so far transgress upon the rights of wage earners, when they will invade the rights to which the toilers are entitled, you must excuse us, if you please, if we decline your invitation to step into your parlor. (Loud applause.)



### BRANDEIS CLOSES.

The eloquent address of Mr. Gompers has not wholly removed from my mind the fear that the action of the labor union may be sometimes governed by emotion. (Laughter.)

Mr. Gompers' excursion into literature recalled to my mind that poem of Longfellow in which he tells of the man who came before the magistrate:

*He came confiding in his cause,  
But somewhat doubtful of the laws.*

It seems to me the whole of Mr. Gompers' address is directed to that doubt of the law, that doubt of the judges. It can hardly be of their integrity because at least in this commonwealth we have never heard even the suggestion of any doubt as to the integrity of our judiciaries. (Loud applause.) We find fault with decisions – perhaps not infrequently when we are defeated. (Laughter.) But when we find fault with decisions, we endeavor to have them reversed, or if they are too radical for reversal, we appeal to the legislature in the hope of amending a bad law. (Applause.)

That I suggest, and that I suggest to Mr. Gompers is the position which should be taken. I well believe and I appreciate that Mr. Gompers and his associates may look with

suspicion on that which is suggested by one who is not a member of his union – he may well look with suspicion upon that which is suggested and advocated by men whom he is accustomed to fight with in some departments of life. But while he may look with suspicion upon such suggestions I trust it will not make him deaf to argument or blind to reason. (Applause.)

He says he has never known of a union proposing and advocating or condoning an act of violence or lawlessness. If that condition of "spotless purity" actually exists in respect to the unions of this country, then it should be determined, and determined publicly, and in a way in which you and I and every one may have proclaimed – the act that there alone, there alone in this mighty land exists a body of men who are absolutely innocent of the thought of wrong doing. (Laughter and applause.)

All the argument which Mr. Gompers has made is simply apprehension of the law, apprehension of the courts and apprehension of every one who sustains the law and the courts. That I say is a position which we cannot admit. (Applause.)



### GOMPERS CLOSES.

The bargain, the joint bargain between the union and the employer for the labor of the members of the union is the ratification, is the expression of the members of the organization themselves in official and regular form – the best expression of the judgment of each and all in order to obtain the best possible conditions for the employment and labor of all.

We want fair play. What chance has labor, the laborers, for fair play when the whole history of jurisprudence has been against the laborer? (Applause.)

There was never a tyrant in the history but

who found some judge who clothed in judicial and lawful form the tyranny exercised and the cruelty imposed upon the people. (Renewed applause.)

I take second position to no man in this country in my respect for the laws and for the judges, too, if I as an individual and as an American citizen should be brought before them for any act as a man and a citizen.

But the whole history of jurisprudence and the practice has been to look upon the laborer as the property of the employer. (Applause.) And it is the trade union effort to emerge out of that. This may be emotional. It is simply emphatic – that's all. (Enthusiastic applause and laughter.)

I should as willingly admit my insanity as to imagine that the organizations of labor are composed of archangels. (Laughter.) It is

rather a stretch of the imagination for my friend to make me say that those organizations are the only institutions in our country that are pure absolutely and never guilty of wrongdoing. (Applause.)

Now, I have not with me the full decision in the Taff Vale case, but if you will remember our friend quoted that part of the decision in which the court refers to the union or its agents and construed the action of the members as the agents of the union.

No, I am neither vain enough nor poor enough to imagine that I know much about the law, but I do know – perhaps instinctively feel, if I lack the comprehension to understand – when an effort is made to put the clutches upon the trade unions and prevent their development and their growth. (Applause.) *GB*