come when one association destroys the other, but when one association destroys the excesses of the other. This kind of progress is going on in the several industries mentioned above. There the open shop question has never been even considered or mentioned, or else in course of time it has become only an academic question, because the employers' association takes up and remedies every real grievance or disproves every fictitious grievance that provoked the union into existence, and does not permit any of its members to smash or undermine the union. The bad methods of the union are gradually reduced by discussion backed by the power of organization, and its good methods are encouraged. Education improves both parties; mutual respect succeeds suspicion. In those industries it is accepted that protection to capital carries with it protection to labor; that fair profits imply fair wages; that well disposed associations on each side shall together discipline the nonunionist the same as the unionist; that the employers, having lost despotic control of their labor, regain a nobler control through co-operation with the union; that the opposition to nonunionists is not based alone on sentiment or malice, but on economic necessity; and that a question, which only stirs up class hatred in the field of pronunciamentoes and abstract rights, works out a peaceable solution when men acknowledge mutual rights.

THE LAW AND THE CLOSED SHOP CONTRACT.

BY WALTER DREW.

[Walter Drew, lawyer; born Williamstown, Mich., September 13, 1873; graduate of literary and law departments of University of Michigan; instrumental in organization of employers and business men in Citizens' Alliances first of Grand Rapids and later of Bay City, Saginaw and Muskegon; as manager of employers' campaigns during strikes he has had prominent part in labor troubles in Michigan.]

A closed shop may be defined as a shop in which none but members of a certain union or unions can secure employment. Shop is a general term for any business requiring the employment of labor. A closed shop in itself is a mere condition, and cannot properly be spoken of as lawful or unlawful. The law, however,will look to the active forces by which the condition known as the closed shop is brought about or maintained and will determine if those forces in their purposes or workings be lawful or unlawful.

A closed shop contract is a contract the immediate purpose of which is to secure or maintain the condition known as a closed shop.

Such contracts are susceptible of division into several classes according to the parties to them.

(1) Contracts among the several members of a union in which they agree not to work in a shop where nonunion men are employed. These contracts are usually in the form of by-laws.

(2) Contracts between a union and an employer by which none but members of the union are to be employed in the employer's shop.

(3) Contracts between a proprietor and a contractor by which the contractor is to employ none but union labor upon work to be done for the proprietor.

Such contracts may also be classified as public and private. A public closed shop contract is one which a public corporation, such as a city, county, or board of education is a

party. A private contract is one all of the parties to which are private persons or corporations.

The courts have unequivocally condemned public closed shop contracts as unlawful and void upon constitutional and other grounds, and with no diversity of opinion.

The legal history of trades unions, their conduct, incidents and agreements, is in large measure a history of the application to labor combinations of the common laws of conspiracy. It seems to have been true under early English common law that workingmen had no right to combine for any purpose connected with labor conditions and that their mere combination was a criminal conspiracy. The restrictions upon the right of workingmen to act in combination have been more and more removed, until, at the present time, there is no substantial difference from a legal standpoint between a labor combination and any other combination. The old common law restrictions upon combinations of workmen in general also applied to combinations of masters, the courts viewing with distrust any combined effort to influence or control trade conditions. This removal of restrictions or grant of greater freedom to act in combination may be called the development of the right to combine.

All the different legal questions connected with trades union activities are directly or indirectly connected with this so-called right to combine. The right to strike is the right of men to combine to quit work in a body. The right to boycott is the right of men to combine to refuse to deal with another. So too the closed shop contract is related to the right to combine, for it is the act of men in combination, and expresses the terms upon which they have combined. The right to make such a contract necessarily presumes the right to combine.

Besides the greater recognition by the courts of the workingmen's rights to act in combination, there are two other doctrines associated with recent judicial views upon labor questions. One is the comparatively recent doctrine that labor is a commodity to be bought and sold in the market in like manner as any other article of trade. The other is the right of individual contract, which, by the development of the view of labor as a commodity, has gained a new meaning or

application in labor matters. The workingman like the merchant has something to sell, and has the right of individual contract in regard to the terms of sale. The fact that his commodity is labor, and not goods, has ceased to make any difference in the methods he may use in his bargaining. Undoubtedly these views have influenced the attitude of the courts toward labor combinations and have had much to do with the judicial recognition of the workingmen's right to combine.

The development of the right to combine, or rather, the greater recognition by the courts of the right to combine, from the time when a combination of workmen for any purpose connected with labor matters was held to be a conspiracy, to the present, is summed up and expressed in the modern definition of a conspiracy. A conspiracy at common law has now come to be generally defined as a combination to do an unlawful act, or to do any act by unlawful means. In other words, mere combining is no longer criminal. It must be further shown that the combination has an unlawful purpose in view, or contemplates the employment of unlawful means.

With the former restrictions upon the right of workmen to act in combination in mind it becomes clear that the question of the validity of a closed shop contract must be a comparatively recent one. Under the early doctrines such a contract would have been not only void, but also evidence of a criminal conspiracy. Does the right to act in combination as now recognized justify or legalize the closed shop contract?—is the question to be answered.

In this country the right to combine on the part of workmen has been fully established and recognized by the courts without the coercion of any statute. This right to combine was not recognized by the common law at the time our country was separated from England and English common law became American common law. The action of the American courts, therefore, in recognizing this right on the part of workmen, though not so stated, has been in the nature of a departure from the early English common law and has amounted to a grant or creation of a right not before enjoyed. Of course there are cases to be found where our American courts have

followed to a greater or less extent English precedents. These cases, however, have been more and more discredited until it may be considered as firmly established in this country that there are no restrictions whatever upon the laborer's right to combine, other than that the combination shall not be for an unlawful purpose or employ an unlawful means.

We come now to the discussion of the closed shop contract as affected by the recognition by the courts of the right to combine within the limits of the law of conspiracy.

Every contract starts with a presumption of validity. It may be said, therefore, that a closed shop contract is valid unless its purpose be unlawful or it be secured or enforced by unlawful means. But no closed shop contract which has ever come before the courts has stood this test. There is no case at law or in equity holding such a contract valid; there are many and some most recent holding such contracts void.

A closed shop contract, the purpose of which is to establish or foster a monopoly of the labor market, is contrary to public policy and void.

The rule that a contract, the purpose of which is to secure a monopoly, is void, is a familiar one. In its application to closed shop contracts two classes of cases arise: (1) Where the court holds that it is apparent on the face of such a contract that its manifest purpose and inevitable tendency is to establish a monopoly, and, therefore, that such a contract is per se void. (2) Where the courts do not hold such a contract void per se, but inquire whether under the facts of each case the purpose of the particular contract is to secure a monopoly. In the first class of cases no outside or extrinsic evidence is necessary. In the second, outside evidence is considered in order to make clear the purpose of the particular contract in question.

The purpose of compelling nonmembers to join the union against their will is unlawful. Closed shop contracts having such a purpose, are, therefore, unlawful, and the attempt to enforce such a contract to the injury of persons not parties to it, is an actionable wrong.

This is practically the same rule as the one preceding, except that it is stated from the standpoint of the nonunion

man. Evidently the ultimate purpose of compelling nonunion men to join the union is to create a monopoly of the labor market. From the standpoint of the public, as we have seen under the previous rule, this purpose is contrary to public policy. From the standpoint of the nonunion man sought to be coerced, this purpose is not only unlawful, but if attempted to be carried out to his injury, it gives him a right of action.

The agreements or conduct of combinations must have a legitimate and proper motive. The injury of third persons from mere malice, or without any justification, is an actionable wrong.

Under this head come chiefly cases involving attempts to enforce or perform closed shop contracts and the rights of third parties affected thereby.

Ordinarily, the act of an individual done with malice involves no greater legal liability than one done without malice. So long as the individual stays within his strict legal rights his motive is immaterial. Many judicial utterances may be found to the effect that the same rule applies to combinations, and the question has been much debated. It may be said, however, that the later authorities, and the present weight of authority, is to the effect that malice or other improper oppressive purpose on the part of a combination resulting in injury to a third party, confers a right of action upon the one injured. In other words, malicious conduct on the part of a combination is unlawful when it would not be so on the part of an individual.

A closed shop contract must be the voluntary act of all the parties to it, both in its inception and in its performance.

This is a most important limitation upon closed shop contracts. It means that closed shop by-laws or closed shop agreements with an employer, adopted by a majority vote of the union, do not bind the minority. It means that the vote of a majority ordering a strike or boycott to enforce a closed shop by-law or contract, does not bind the minority. It further means that if the assent or co-operation of the minority is secured by means of any coercive measures such as fines, forfeitures or other penalties, the contract becomes

unlawful, and its enforcement to the injury of others becomes an actionable wrong.

If this article shall have made it clear that the closed shop in and of itself is not an unlawful thing, and has further clearly defined the limits set by the courts upon efforts to secure or maintain the closed shop, it has accomplished its purpose. The question of the closed shop contract, and the other labor questions now of such acute interest, are but different phases of an epoch in industrial history through which we are passing. The epoch started with the entry into the labor world of the spirit of combination. The epoch may be called the epoch of incomplete combination.

The very fact that combination on the part of labor is partial and incomplete, makes inevitable strife and war and legal questions. If there were 1,000 carvers in the United States, all of whom belonged to a union, it could not be said that such a union was trying to gain a monopoly or to injure nonunion men in any agreements it might make. Such a union could carry on its collective bargaining with the employer unhampered. It could name any wage or other conditions it saw fit, and the employer would have no option but to accede or go without the services of its members. Unreasonable demands would thwart their own purpose, for the public would arrange to do without services for which a wage not warranted by trade conditions was insisted upon. In other words, complete combination of labor secured and maintained would do away with the present epoch of strife, with its attendant bitterness and legal questions. It would bring an era of collective bargaining when the different questions at issue between labor and capital would be settled more than ever before by the laws of trade and not by the laws of the courts.

It is the belief of the writer that the courts are more and more recognizing the fact stated, that they look upon complete combination of labor as a good and not as an evil; and that within the limitations already set they will put no unnecessary obstacle in the way, but that their attitude toward labor in combination will be broad and liberal.

WRECKED LABOR ORGANIZATIONS.

BY ETHELBERT STEWART.

[Ethelbert Stewart, special agent, United States Bureau of Labor; born in Illinois, April 22, 1857; educated in the public schools of Illinois; commissioner of labor in Illinois for eight years, and special agent in the United States Department of Labor since September, 1889. Author, Fines and Fining Systems in Illinois, Early Organization Among Printers, Restriction of Output, etc.]

Talking with a man who believes trade unionism is about to be wiped out in the United States, he said: They come up and go down. The wrecks of labor organizations are strewn all along our path for forty five or fifty years. This is quite true; indeed, he might have said 3,000 years, for trade unionism, of a kind, was as strong in Rome at the birth of Jesus as it is in Chicago to-day. The shores of time are strewn with the wrecks of trade unions.

The shores of time also are strewn with the wrecks of kings, of empires, of governments. You find wrecks of religions, too, along that shore, and yet the real solid foundation of religion as a spiritual inspiration and ethics is stronger to-day than it ever was. You will find civilizations among the wrecks; and whole races have gone out—but man is still here, more numerous than ever before. The only sane purpose there can be in studying wrecks upon the sands of time is to know whether the wrecking of the vessel was due to mistakes of the crew; if so, avoid them; or to bad construction of the boat; if so, build a better one.

When a king went down another king or a better thing than kings came on to take the place. The wreckage of governments along the line has humanized and improved; remodelled, helped to perfect governments—it has not abolished them.

Government, in the sense of an organization of the people for a purpose, is, as an idea and as a fact, stronger among mankind to-day than it ever was. Its form and its purpose may be changed frequently, but it stays.