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AN ANALYSIS OF THE PRESENT LEGAL STATUS OF THE COLLECTIVE BARGAINING AGREEMENT

Of the multitudinous provisions of the National Industrial Recovery Act ¹ perhaps none is destined to have such a far-reaching effect as the famous Section 7-A. That clause provides, among other things,

“ . . . that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ”

There can be little doubt about the proposition that the clause has made the industrial world “collective bargaining conscious.” The Act has given men in the so-called open shop industries the courage to unionize. And with the union organization of these employees comes collective bargaining as an automatic and inevitable concomitant which in turn gives rise to much dispute and litigation over the enforcement of the collective agreements. Although the Act has provided the compulsion and the basis for the negotiation of collective bargaining agreements it leaves the matter of their enforceability in a rather nebulous state. At the hearings on the bill it was objected by Senator Couzens that the labor provisions of the Act are wholly one-sided in that labor is protected but not restrained. The Senator queried the Committee as to the enforcement of the obligations assumed by labor:²

“ . . . and assume that the workers bargain with the cement industry and, based on the conclusion of this agreement, which the industry agrees to, the cement industry took a lot of contracts for public work, and after it had been running on for two or three months, as

¹ 48 STAT. 195, 15 U. S. C. A. § 702 (1933).

² Hearings Before Senate Committee on Finance, May 22-June 1, 1933, p. 30. See FEDERAL TRADE AND INDUSTRY SERVICE § 5902.

the case might be, those workers who entered into the collective bargaining decided they wanted more wages. What procedure would be taken under the act?"

Mr. Richberg replied:

"It would depend possibly upon the method by which they organized their collective bargaining. If they followed such procedure as we have in the railroad industry, they would apply for a change of contract and there would be conferences and consultations over it, and it might be that the Government would aid in bringing the parties to an understanding."

Senator Couzens:

"Might not that be too late? If the manufacturer of cement makes a contract to sell a million barrels of cement and he bases his contract on an agreement he has made with labor, and he furnishes 200,000 or 300,000 barrels, and he has 700,000 or 800,000 barrels to deliver, and going on, based on the collective bargaining, what happens if labor changes its mind and wants more pay?"

That question remains largely unanswered. Some authorities have interpreted the Act to mean that the enforcement should develop upon the Code administration.³ In the main, however, the underlying question of the legal status of a collective bargaining agreement is unsettled. Although the language of the Act is not new,⁴ still it does little to clarify an old situation; and it even renders it a bit more involved by the addition of further technicalities. The Act itself has not changed, it seems, the legal status of the collective bargaining agreement. It satisfies itself with merely setting forth in affirmative style that employees shall have the right to bargain collectively with their employer. For the validity and enforceability of such agreements, one must look to the judicial decisions before the passage of the National Industrial

³ See AMENDED CODE OF FAIR COMPETITION FOR THE COAT AND SUIT INDUSTRY, Art. V, § 11; FEDERAL TRADE AND INDUSTRY SERVICE § 12091, which incorporates such collective bargaining agreements into the Code and enforces them as such; 47 HARV. L. REV. 118.

⁴ The first provision is copied verbatim from the statement of policy in the Norris-LaGuardia (anti-injunction) Act (47 STAT. 70, 29 U. S. C. A. SUPP. VI, § 102 (1932)); and it resembles section 2 of the Railway Labor Act of 1926 (44 STAT. 577, 45 U. S. C. A. §§ 151-63 (1926)). See statement by President Green, FEDERAL TRADE AND INDUSTRY SERVICE § 5602. See, also, 47 HARV. L. REV. 118.

Recovery Act. The attitude that the courts took toward such agreements in the past is destined to be reemphasized with much force and vigor in the future decisions, in view of the statutory pertinence of the subject in the modern industrial world. It is with this purpose in mind that a cursory examination is here attempted that it might be better understood as to just what is the present legal status of the collective bargaining agreement about which we have all heard so much since the National Industrial Recovery Act was put on the statute books.

From the early days of the law there has been much consternation over the status and validity of that "hybrid contract" called a "collective bargaining agreement." A great bit of the perplexity arose out of the inchoate contractual nature of the agreements. The early judges saw that they were made between the employer and the employees' union but that they were obviously not a contract of employment,⁵ and, consequently, were of no practical value at all to either party unless the individual workers contemplated in the agreement separately contracted to work for the employer, since the collective agreements were referable solely and distinctly to a condition of employment. Moreover, these judges realized, as do the modern judges, that neither of the acquiescing parties could force the individuals to make contracts of employment anymore than the same individuals could be made to work against their will. On the other hand, neither the employee nor the union to which he belonged could force the employer to hire any workers at all. Hence, the most that could be said for such agreements was that they governed the relations of the employer with the employees only in the event that the individual agreements of employment were completed.

From this pristine view of the subject some of the courts came to the questionable conclusion that since these collective agreements were not contracts of employment they

⁵ *Harper v. Local Union No. 520*, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932).

were not contracts in any sense. These courts in the early adjudications said that such agreements were mere devices to induce the hiring of workers. In this manner there arose what is known as the "usage theory" of collective bargaining agreements. This theory considers the collective agreement to be not a contract but a mere usage which may become a part of the individual contract of employment. In *Hudson v. Cincinnati, N. O. & T. P. Ry. Co.*,⁶ a Kentucky decision and one of the early leading cases on the subject, although not holding affirmatively for the point, the plaintiff was a locomotive engineer who sued the defendant company for compensation for time lost following his summary discharge for an alleged infraction of the defendant company's rules. The plaintiff based his claim upon a provision contained in a collective agreement which his union had negotiated with the defendant company, which provision stipulated that a discharged employee should be entitled to a hearing within ten days of his dismissal and, further, that this and other regulatory provisions were to be in effect between the union and the employer for a period of two years. The plaintiff claimed that this constituted a mutual obligation of employment between the employer and the employees for the two-year period and that he had been discharged in violation of the agreement. The important part of the case is that in the course of the opinion the court said that a collective agreement is not a contract but "comes squarely within the definition of a usage."⁷ However, the court decided against the plaintiff here and held that the particular clause in question could not be understood to have been incorporated into the individual contract of employment because it was a contract terminable at will and as such was clearly inconsistent with any contrary provisions for

⁶ 152 Ky. 711, 154 S. W. 47 (1913).

⁷ See *Byrd v. Beall*, 150 Ala. 122, 43 So. 749, 124 Am. St. Rep. 60 (1907). There the court said a usage refers to "an established method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force, because people make contracts in reference to it."

a hearing or for a definite two-year contractual period. Hence, the rule of the case would seem to be that a collective agreement creates a usage which becomes a part of an existing or subsequent contract of employment between the employer and the employee in the absence of any deliberately conflicting contract between them.

In a later Kentucky case,⁸ however, the court took a more liberal view. Here the defendant, a freight conductor, sought to displace the plaintiff, a passenger conductor. The question was primarily one of seniority between the different classes of conductors and the railroad was joined as a nominal defendant. The court held for the plaintiff in the case despite the fact that he was not a member of the union with which the railroad had the collective agreement involving seniority. The court based its decision squarely upon the collective bargaining agreement between the union and the railroad and held that the terms of the agreement constituted a usage which the plaintiff and the railroad obviously intended should govern their relations and upon which the plaintiff was entitled to rely. And in keeping with this ruling the plaintiff was granted an injunction to restrain any interference with his seniority right. In accord with this Kentucky case there are several others which hold similarly that a collective bargaining agreement creates a usage which automatically becomes a part of the individual employment contract without any express adoption unless the individual contract is made contrary to the terms of the collective agreement.⁹

⁸ *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920).

⁹ *Cross Mountain Coal Co. v. Ault*, 9 S. W. (2d) 692 (Tenn. 1928) (Holding that an agreement between coal mine operators and miners as to wages and conditions of employment became a part of, and formed a basis of, the contract of employment between each operator accepting it and each employee who entered into or continued in such operator's service with knowledge of its execution, in the absence of any express contract between the individual employee and the operator inconsistent therewith.); *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S. W. 436 (1920) (Holding that where the correspondence between the plaintiff window company and the defendants warranted the defendants in believing that they would be given employment at the plaintiff's plant from a

As opposed to this ruling there is another line of cases which hold that a usage so created may be incorporated into the individual contract of employment only by express adoption.¹⁰ In one of the leading cases on this point the Missouri court said¹¹ that the mere fact that one employed to work in a mine was asked on applying for employment if he understood the rules under which the mine was working, the days of payment, etc., and responded that he did, did not amount to an adoption by the parties, as a part of their contract, of an understanding between the mine owner and the Miners' Union, of which the servant was a member, governing the time and manner of the payment of the wages. Thus, the court here went to the other extreme and held that the terms of the collective labor agreement must be adopted expressly, if at all, even as between a member of the union and an employer who has an agreement with that union. There are, however, still other cases in this category which strike the medium view and hold that the collective labor agreement governs the individual employment if "known" at the time of hiring.¹² But, in any event, all the cases would agree that where the usage theory of

given date, or be paid \$20 a week until the plant was in operation, in accordance with the national agreement between the window glass manufacturers of the United States and the national window glass workers, and the defendants paid their own transportation and expenses from California to the plaintiff's plant in Arkansas but remained unemployed, the plaintiff cannot recover from them the \$40 paid them for two weeks and the defendants can recover the \$20 a week coming to them under the agreement.). See, also, *St. Louis B. & M. Ry. Co. v. Booker*, 58 S. W. (2d) 856 (Tex. Civ. App. 1928); *Hudson v. Cincinnati N. O. & T. P. Ry. Co.*, *op. cit. supra* note 6.

¹⁰ *Panhandle & S. F. Ry. Co. v. Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App. 1932) (The headnote states: "Individual members of labor unions are not bound by contracts between union and employers unless agreements are ratified by members, and in absence of such ratification, no rights accrue to employee."); *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S. W. 136 (1904). See *Rentschler v. Missouri Pac. R. Co.*, 253 N. W. 694 (Neb. 1934), which holds that a collective labor agreement, "being a general offer, becomes a binding contract when it is adopted into, and made a part of, the individual contract of each employee. A breach of its terms will give rise to a cause of action by either party."

¹¹ *Burnetta v. Marceline Coal Co.*, *op. cit. supra* note 10.

¹² *U. S. Daily Publishing Co. v. Nichols*, 32 Fed. (2d) 834 (1929) (A custom of paying wages subject to adjustment on the terminations for a new wage scale was held binding on a publisher opening a union shop with knowledge

the collective agreement is sought to be invoked any individual employment contract with terms contrary to the collective agreement amounts to a repudiation of the usage, leaving both the employee and the union without legal protection.¹³

As opposed to the usage theory of the collective bargaining agreement there is another which the courts and commentators have designated as the "agency theory."¹⁴ Under this scheme of reasoning the union is regarded as the agent for its members and the collective agreement as a contract negotiated with the employer for and on behalf of the employees.¹⁵ But, as was said in a Kentucky case, "a trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all of the other members, fair and just wages and good working conditions."¹⁶ And, of course, such an agency would not exist as to nonunion employees since their nonmembership in the agency would preclude any possibility of a presump-

of the custom even though the publisher was not a member of the association making the agreement.). See, also, *Cross Mountain Coal Co. v. Ault*, *op. cit.* *supra* note 9 (Recovery precluded if the employee was unaware of the collective agreement.).

¹³ *Langmade v. Olean Brewing Co.*, 137 App. Div. 355, 121 N. Y. S. 388 (1910) (Here there were special circumstances, *viz.*, the continuance of the plaintiff in the defendant's employ after his frequent demands for overtime pay had been refused, to rebut any presumption that might otherwise have existed as to the adoption of the terms of the collective labor agreement as a usage.).

¹⁴ For a general discussion of the various theories of enforceability of collective labor agreements, see: Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1930); Fuchs, *Collective Labor Agreements in American Law*, 10 ST. LOUIS L. REV. 1 (1925); Duguit, *Collective Acts as Distinguished From Contracts*, 27 YALE L. JOUR. 753 (1917).

¹⁵ *Barnes & Co. v. Berry*, 156 Fed. 72 (C. C. S. D. Ohio 1907) (This case treats unions as the agent and the collective agreement as the individual contract of employment.); *West v. B. & O. Ry. Co.*, 103 W. Va. 417, 137 S. E. 654 (1927) (An agreement between a labor union and an employer with respect to wages and conditions of service, not ratified by the members of the union as individuals, does not establish a contract between the individual member and the employer a breach of which will sustain an action by the individual.). See, also, *Aden v. Louisville & N. Ry. Co.*, 276 S. W. 511 (Ky. 1921).

¹⁶ *Piercy v. Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042, 1045 (1913).

tion that the union contracted in their behalf. Moreover, it would not be an easy thing to find such an agency as to employees who joined the union subsequent to the completion of the collective agreement¹⁷ since prior authority or subsequent ratification is necessary to validate an agency.¹⁸

Still another theory of enforceability is the "third party beneficiary theory." The rationale of this one is that the collective agreement is regarded as a contract valid and subsisting between the employer and the union for the benefit of the employees. In what is perhaps the leading case on this branch of the law the Supreme Court of Mississippi held¹⁹ that a working agreement between a labor union and an employer is primarily for the benefit of the individual members and rights thereunder are enforceable directly by the members. The court also outlined the circumstances under which a third party should be allowed recovery: "(1) When the terms of the contract are expressly broad enough to include the third party either by name or as one of a specified class, and (2) the third party was evidently within the intent of the terms so used, the third party will be within its benefits, if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract."²⁰ And in keep-

¹⁷ See 41 YALE L. JOUR. 1221 (1932).

See Rice, *op. cit. supra* note 14, at 594, for criticism of the agency theory, namely, that a contract between a union as the employee's agent and the employer is illusory since the union's principal, the employee, need not accept the employment at all; and if he does, he may, at his option, make a different contract.

¹⁸ According to the Burnetta case, *op. cit. supra* note 10, mere knowledge or understanding of the rules of the collective agreement would not be enough to constitute a ratification of the contractual agency; express consent is necessary.

¹⁹ Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 699 (1931) (The case follows Gulla v. Barton, 164 App. Div. 293, 149 N. Y. S. 952 (1914), and H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926)). See later cases in accord: Johnson v. American Ry. Express Co., 163 S. C. 198, 161 S. E. 473 (1931); Hall v. St. Louis & S. F. Ry. Co., 224 Mo. App. 431, 28 S. W.(2d) 687 (1930).

²⁰ *Cf.*: CONTRACTS, 13 C. J. 703-711; CONTRACTS, 6 R. C. L. 882-890; 2 ELLIOTT ON CONTRACTS § 1412 *et seq.*; Smyth v. City of New York, 203 N. Y. 106, 96 N. E. 409 (1910).

ing with this principle the case held that the plaintiff, a colored brakeman on a passenger train, had a sufficient interest in a collective contract between the railroad and the labor union to entitle him to maintain an action for compensation under the agreement.²¹

Obviously, this theory meets with acceptance only in those jurisdictions that approve the doctrine of *Lawrence v. Fox*.²² As was indicated in the Mississippi case,²³ it is immaterial that the employee is not a member of the union (a fact fatal to the agency theory) if an intent can be found in the collective agreement to benefit nonunion employees. Likewise, since a donee beneficiary can acquire rights under a contract even though he is unidentified at the time the contract is made,²⁴ it does not matter under this third party beneficiary theory of collective agreements that an employee has joined the union or has become an employee since the consummation of the collective agreement.²⁵ Nor can the terms of an individual contract preclude the application of the collective agreement to the individual employee but, *a fortiori*, the two agreements may even be in conflict.²⁶ Furthermore,

²¹ The labor union was composed exclusively of white men but the agreement contained a provision that it should apply to white and colored employees alike. Plaintiff was denied recovery, however, because his acceptance of the railroad checks as "payment in full" acted as an estoppel to deny.

²² See: I WILLISTON, CONTRACTS § 368; RESTATEMENT OF THE LAW OF CONTRACTS (1932) § 133; 31 COL. L. REV. 1156. Contra, see, *Young v. Canadian Northern Ry. Co.* [1931] A. C. 83; *Kessell v. Great Northern Ry. Co.*, 51 Fed. (2d) 304 (W. D. Wash. 1931); *St. Louis I. M. & So. Ry. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902 (1897).

²³ *Yazoo & M. V. R. Co. v. Sideboard*, *op. cit. supra* note 19.

²⁴ I WILLISTON, *op. cit. supra* note 22, at § 378; RESTATEMENT OF THE LAW OF CONTRACTS § 139.

²⁵ *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802 (1897).

²⁶ See *Gulla v. Barton*, *op. cit. supra* note 19 (An employer, to prevent strikes and in consideration of the right to use the union name and label, entered into a contract with the labor union by which only union men were to be employed and all employees were to be paid \$18 a week. The plaintiff, a member of the union, without knowledge of such contract, worked for the employer for a considerable period for \$9 a week, the wages agreed upon by him and the employer. Upon learning of the union contract the plaintiff informed the employer that he would seek to recover his back pay at law, and thereafter he was paid the union wages. Held, that the plaintiff, having been a party intended to be benefited by the agreement, and having been connected with the consideration

the third party beneficiary is not bound at all by the terms of the collective agreement since he was not one of the contracting parties and has not participated directly in the *quid pro quo*. Hence, as between the employer and the employee and their mutual relations it is entirely a one-sided arrangement, the employer having no remedies at all against the employee for a breach of the agreement. Moreover, since the third party beneficiary theory does not provide for the creation of rights against individuals not parties to the agreement directly, it is as a consequence said to be defective not only as above, where the employer attempts to sue the employee, but also where the employee attempts to assert rights against an individual employer under an agreement which is made by an employers' association with the union.²⁷ In the first instance, however, the handicap is not a serious one if the employee can be held bound under the usage theory by the incorporation of the collective agreement into his individual contract of employment.²⁸

In all three theories there is always the question of agency, usage, or third party to be settled. Withal it skips the further problem of whether or not the direct parties to the agreement (that is, the union and the employers' association) are bound in their associate capacity by its terms and suable for a breach of the said agreement. That problem resolves itself into the question of whether the collective agreement may

therefore by reason of his paying fees and dues as a member of the union, was entitled to enforce the contract and to recover the difference between the wages paid him and the union wages. Moreover, the plaintiff did not, by entering into an independent agreement, express or implied, with his employer or otherwise, waive the benefit of the contract between the employer and the union.).

²⁷ See Rice, *op. cit. supra* note 14. Of course the employer might be considered bound under a theory of principal and agent with the employer's association being the agent in making the contract, but a ratification would be a necessary part of the proof.

²⁸ See *Whiting Milk Companies v. Grondin*, 282 Mass. 41, 184 N. E. 379 (1933), where an agreement between the union and the employer preventing the employee from selling dairy products to the employer's customers as the servant of another employer for a period of 90 days from the date of the cessation of employment was held binding on the milk wagon driver who worked under the agreement as a member of the union.

be said to constitute a bilateral contract between the two associations. The greatest obstacle to such legal recognition lies in the dubious legal status of the parties, that is, the dispute as to whether the unincorporated trade unions and employers' associations should be regarded as legal entities, and whether such associations exist at all in the eyes of the law. It might be interpolated here that to recognize an employee as a third party beneficiary of a collective agreement does not automatically give legal recognition to the unincorporated union for the contract may as well be regarded as one between the employer and the officers of the union who participate in making the agreement for the benefit of the employees.²⁹

For a long time the courts held that such unincorporated associations did not exist as legal entities and regarded them as mere collections of individuals, like a partnership, and their names but collective pseudonyms for the individuals composing them.³⁰ Chief Justice Taft gave a summation of the matter in the famous *Coronado* case³¹ when he said.

"Undoubtedly, at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett v. Walsh*, 192 Mass. 572, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421, 2 L. R. A. (N. S.) 788, 75 N. E. 877, 6 Ann. Cas. 829; *Baskins v. United Mine Workers of America* . . . 234 S. W. 464 [Ark. 1921]. But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary."

In the opinion in this case it was stated that a union is an entity which is suable as such, upon process served on its principal officers, for damages arising from its violation of the Sherman Act and the torts committed by it during

²⁹ But see: 31 COL. L. REV. 1156 (1931); 9 IND. L. JOUR. 69 (1933).

³⁰ See Fuchs, *op. cit. supra* note 14.

³¹ *United Mine Workers v. Coronada Coal Co.*, 259 U. S. 334, 385 (1922).

strikes; and the strike funds are subject to be levied upon in execution of the judgment.³² It would seem to follow logically from this holding that since it can be sued for the tort it commits a union should also be suable for a breach of the contract it makes. Many cases in accord with this principle have indirectly recognized such associations as entities at law³³ and they are consistently being dealt with as such.³⁴ Thus, in a Federal case an action for damages against the union for an alleged breach of its collective agreement was sustained and the court went completely over to the contract view of the matter when it held that a contract between labor unions and a number of employers regulating wages and terms of employment, and absolutely binding the employers to employ none but members of the unions, if such members were available, imposed the reciprocal obligation on the members of the unions to work according to the contract in good faith; and the case further held that the unions were responsible for the action of a considerable number of their members in refusing to unload a ship for one of the employers unless paid more than the rate of wages set forth in the collective agreement and the unions were liable for this breach.³⁵

³² See Dodd, *Dogma and Practice In The Law Of Associations*, 42 HARV. L. REV. 977 (1929).

³³ *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. S. 401 (1922); *Goyette v. Watson*, 245 Mass. 577, 140 N. E. 285 (1923); *Nederlandsch Amerikaansche Sloomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc.*, 265 Fed. 397 (1920); *Gulla v. Barton*, *op. cit. supra* note 19.

³⁴ For full discussion of the subject see: Roberts, *Labor Unions, Corporations—the Coronada Case*, 5 ILL. L. QUAR. 200 (1923); Sturgess, *Unincorporated Associations as Parties To Actions*, 33 YALE L. JOUR. 383 (1924).

Prior to the Coronada decision the uniform current of authority in the United States was to the effect that, apart from statute, an unincorporated labor union could neither sue nor be sued as such. See LANDIS, *CASES ON LABOR LAW* (1934) footnote, p. 378; *American Steel and Wire Co. v. Wire Drawers' and Die Makers' Unions*, 90 Fed. 598 (C. C. N. D. Ohio 1898); *American Federation of Labor v. Bucks Stove & Range Co.*, 33 App. D. C. 83 (1909); *Grand Internat'l Brotherhood of Locomotive Engineers v. Green*, 206 Ala. 196, 89 So. 435 (1921).

³⁵ *Nederlandsch Amerikaansche Sloomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc.*, *op. cit. supra* note 33, at 399. See 43 HARV. L. REV. 1009, for growing tendency to recognize union associations as entities. See *David Adler & Sons Co. v. Maglio*, 228 N. W. 123 (Wis. 1929), in which the Wisconsin court allowed an association to appear as a party.

Besides the direct recognition of collective bargaining agreements as valid contracts by the courts of law there has been also an indirect recognition to a limited extent by the courts of equity.³⁶ For example, collective agreements have been protected from intentional interference by third persons where the equity court, on the petition of either party to the collective agreement, has issued an injunction restraining any third party who has set about to induce or compel one of the contracting parties to repudiate or to breach the agreement. The indirect legal recognition of such agreements comes from the underlying necessity for every court of equity to judge of the legality of an act sought to be enjoined, and in view of the additional rule that the validity of acts in combination depends upon the lawfulness of purpose.³⁷ Thus, in *Tracey v. Osborne*³⁸ the Massachusetts Court held that where a labor union and certain employers stipulated that the union, so long as it was able to do it, should have all the employers' work, another labor union's exertion of pressure upon the employees to have them break the contract was an invasion of the contracting union's right and as such would be enjoined. In this manner the court recognized indirectly the contractual validity of the collective agreement and said "the rights secured to the plaintiffs under their contracts are such as are protected in the ordinary case by injunction. *Beekman v. Masters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201. . ." And a later Massachusetts decision³⁹ held similarly that the remedy at law of a labor union against the members of another, which by solicitation, intimidation and violence are seeking to cause employers to repudiate their contracts with the plaintiffs and to cause the plaintiffs' members to repudiate the contract with the employers, is not

³⁶ *Goyette v. Watson*, *op. cit.* *supra* note 33; *Tracey v. Osborn*, 114 N. E. 959 (Mass. 1917).

³⁷ See *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912).

³⁸ *Op. cit. supra* note 36.

³⁹ *Goyette v. Watson*, *op. cit. supra* note 33.

plain and adequate so as to defeat injunctive relief. The case of *Stillwell Theatre v. Kaplan*⁴⁰ illustrates the contrary doctrine. There the New York court denied an injunction to a theatre owner who sought to restrain members of a second union from picketing to persuade the public not to patronize the petitioner's theatre; the court refused to issue the restraining injunction even though the acts of the defendant union were calculated to cause the theatre owner to breach his contract with the first union which contract provided that he should employ their labor exclusively. The New York court, quoting from the earlier case of *Exchange Bakery & Restaurant v. Rifkin*,⁴¹ said:

"Resulting injury [from lawful picketing] is incidental and must be endured."

And, further, the court said:

"The interests of capital and labor are at times inimical and the courts may not decide controversies between the parties so long as neither resorts to violence, deceit, or misrepresentation to bring about desired results."⁴²

The foregoing discussion concerns equitable relief by injunction against interference by third persons with the rights created by the collective bargaining agreement. Another type of judicial recognition of the contractual status of such agreements lies in the possibility of equitable restraint of a breach of the agreement by one of the parties to it. Such relief against one of the contracting parties (that is, the union or the employer) was at first denied because it was thought that the granting of such relief would be a violation of the rule that equity will not enjoin a breach of contract for personal services except where the services are unique or extraordinary in character; and the further rule that

⁴⁰ 182 N. E. 63 (N. Y. 1932).

⁴¹ 245 N. Y. 260, 157 N. E. 130 (1927).

⁴² This case is contra to *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1918). See 11 N. Y. UNIV. L. QUAR. REV. 262, 268, for the proposition that the *Stillwell* case is to be distinguished in that the plaintiff himself was the one that the defendants were inducing to breach the contract.

Accord: *J. H. & S. Theatres Inc. v. Fay*, 260 N. Y. 315, 183 N. E. 509 (1932); *Church Shoe Co. v. Turner*, 218 Mo. App. 516, 279 S. W. 232 (1926).

equity will not accomplish indirectly, by an injunction, that which it could not enforce directly by a decree of specific performance. In other words the courts feared that such relief would be a violation of the principle that in equity there must be a mutuality of remedy and hence equity will not enjoin a breach by one party if it would not, in the opposite case, issue a decree of specific performance. Thus, an early New York court held that an injunction will not lie to restrain the breach of a contract to employ only members of a certain "stone cleaners' and pointers' union," the employment not being unique or extraordinary.⁴³ It would seem that in this early case the court failed to distinguish between a collective bargaining agreement and an individual contract of employment. The later case of *Schlesinger v. Quinto*⁴⁴ made clear this distinction. In that case an association of employers passed a resolution which, if effectuated, would have violated the collective bargaining agreement between the union and the association. The court there granted an injunction restraining the association from such action and, after referring to the doctrine that there must be a mutuality of both remedy and obligation, said:

"The distinguishing feature of those cases and this under consideration is in the principles applicable to each. In the first, the court cannot supervise his work, and has no power against the man's will to make him work; also in the first and second cases, another man can be employed to do the work, and any detriment could be compensated in damages. The instant case does not arise out of a contract for individual employment. Two organizations, one composed of employers the other of employees, have entered into an agreement. Each had power through the consent of its members to enter into a binding obligation in their behalf. By the constitution or by-laws of each, power is given to the organization to enforce, through disciplinary proceedings which have been demonstrated to be effective, compliance with the terms and conditions to which it has subscribed. This contract had mutual obligations binding on the parties thereto. Each party

⁴³ *Stone Cleaning and Pointing Union v. Russell*, 38 Misc. Rep. 513, 77 N. Y. S. 1049 (1902). Accord: *Schwartz v. Wayne Circuit Judge*, 217 Mich. 384, 186 N. W. 522 (1922).

⁴⁴ *Op. cit. supra* note 33. This was one of the earliest cases on record where the union was awarded an injunction.

knows the obligation that it has assumed and the consequence of the failure or refusal to perform those requirements. Through its control of its members it can compel performance. Under such circumstances, a decree of a court of equity can be enforced against either party and in favor of the other. . . . An organization having such power to require performance by individual members can, through its officers, be compelled to exercise that power. There is in this contract a mutuality of obligation, and there is also a mutuality of remedy for its enforcement."⁴⁵

The same distinction was earlier pointed out by a Federal Court in the well-known case of *Barnes v. Berry*⁴⁶ in which the court granted a restraining injunction against the union officers, and said:

"The service of the employees, members of the union, is neither special, extraordinary, nor unique in the sense that it could not otherwise be supplied, and that its loss would cause irreparable injury, and it is not sought to restrain them from quitting the service of their employers, but only that their officers, agents and representatives be restrained from inciting them to strike, unless the contract be so modified as to make provision for the 'eight hour day' and the 'closed shop' and to make it effective at once. It is not a question, therefore, of whether the men at work shall be enjoined from striking, but it is a question of whether the officers, and agents, and representatives of these men, who represent the organization and control it, shall be permitted to incite the men to strike, to induce them to strike, and thereby repudiate the contract which was made by them through their agents at the January convention of 1907."

It is in conformity with this principle that many cases have held that attempts by a union to incite its men to strike in violation of the collective agreement between the union and the employer may be enjoined, upon a petition by the employer, on the ground that such a breach will cause ir-

⁴⁵ Accord: *Weber v. Nasser*, 286 Pac. 1074 (Cal. App. 1930), *appeal dismissed*, 210 Cal. 607, 292 Pac. 637 (1930) (A musicians' union was held entitled to enforce a collective bargaining contract calling for the maintenance of minimum sized orchestras in theatres.); *Pearlman v. Millman*, 7 Law & Labor 286 (Mass. Super. Ct. 1925); *Ribner v. Rasco Butter & Egg Co.*, 135 Misc. 616, 238 N. Y. S. 132 (1929); *Harper v. Local Union No. 520*, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932). See Witte, *Labor's Resort to the Injunction*, 39 YALE L. JOUR. 374 (1930). Contra: *Swartz v. Wayne Circuit Judge*, *op. cit. supra* note 43; *Schwartz v. Cigar Makers' Internat'l Union*, 219 Mich. 589, 189 N. W. 55 (1922); *Stone Cleaning and Pointing Union v. Russell*, *op. cit. supra* note 43.

⁴⁶ 156 Fed. 72 (1907).

reparable injury to the employer's business.⁴⁷ To invoke the aid of equity in this regard, however, it is necessary that the employer be performing his part of the collective agreement in keeping with the equitable doctrine that "He who comes into a court of equity must come with clean hands." The New York Supreme Court sets out the principle quite clearly:

"It is within the right of any man to cease work whenever he likes, but the determination to quit work must be his and not that of another. It matters not whether the agreement between the local and the employers was one which might be terminated at will or at the end of a year, the rule would apply with equal force. *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229, at page 251. . . . A contract creates property rights. Those rights may not be taken away from a party to the contract unless by his consent or through his own default or his failure to comply with the terms thereof. These plaintiffs desire to continue under the contract until its termination. The local council has expressly provided that work would continue uninterrupted as long as the agreements were lived up to by the employers. No cause is shown for the termination of the agreement, except the desire for an increased wage, and, while that may be desirable from the standpoint of the local union and its members, they should not be permitted to disregard the obligations of their contract to the great detriment of these plaintiffs when the contract has been fully performed by the plaintiffs. *Altman v. Schlesinger*, 204 App. Div. 513, 198 N. Y. S. 128; *Schlesinger v. Quinto*, 201 App. Div. 487, 194, N. Y. S. 401. The granting of the relief asked for here is not a mere gesture. If the members of this local perform services in violation of the orders of the officers of the local, they will be in bad standing in the union and subject to the penalties prescribed thereby. If the strike may not be called by reason of the intervention of the court, the men may continue to work if they please without the danger of suffering the penalties provided in the event of their failure to follow the commands of the officers of the local."⁴⁸

Under this view a collective bargaining agreement is a contract between the union and the other party, either a single employer or an employer's association. A contract creates property rights. And equity will enjoin any real or

⁴⁷ See *Burgess v. Georgia, F. & A. Ry. Co.*, 92 Ga. 53, 96 S. E. 854 (1918); *Meltzer v. Kaminer*, 227 N. Y. S. 459 (1927); *Barnes v. Berry*, *op. cit. supra* note 46. Contra: *Stone Cleaning and Pointing Union v. Russell*, *op. cit. supra* note 43.

⁴⁸ *Meltzer v. Kaminer*, *op. cit. supra* note 47, at 461, 462.

threatened injury with a property right provided there is no plain and adequate remedy at law for the injury, and, provided, that the petitioning party has acted in good faith throughout. Hence, any strike contrary to the terms of the collective bargaining agreement is unlawful and the said strike together with its incidents, the picket and the boycott, will be enjoined by a court of equity along with any aid or instigation by union officials.⁴⁹ But of course, where the employer breaches the agreement himself and by the operation of the "clean hands" doctrine precludes the invocation of the aid of equity it would seem that the employees are released from any restraints that the agreement might otherwise impose and should be allowed to strike and picket peacefully the same as in a case where there is no governing collective bargaining agreement. The operation of the principle was illustrated in an Oregon case⁵⁰ where an employer sought to enjoin labor unions from picketing; it was held there that since the retail shoe-store owner had broken the agreement previously made with the Clerks' Union the strike by the Clerks' Union was legally justified and the union through its members had a right to notify union men that the storekeeper was unfair to organized labor if the notification was accomplished in a peaceful and lawful manner, the damage to the storekeeper being simply "*damnum absque injuria*." And in a New York case,⁵¹ on a similar point, the plaintiffs' (employers) motion to continue an injunction from picketing was denied because the plaintiffs themselves had broken the wage-scale provision of the collective bargaining agreement with the union without resorting to the readjustment machinery agreed upon.

It would follow likewise on principle that if the union of employees which is a party to a collective agreement with

⁴⁹ See *Barnes v. Berry*, *op. cit. supra* note 46; FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* 104.

⁵⁰ *Greenfield v. Central Labor Council of Portland*, 104 Oregon 236, 192 Pac. 783 (1920).

⁵¹ *Seegenfeld v. Friedman*, 117 Misc. Rep. 731, 193 N. Y. S. 128 (1922).

an employer is guilty of conduct inimical to the agreement the employer should be released from any contractual trammels against "locking out" the said union employees. And in a recent New York case ⁵² it was held on this point that no injunction may issue against a lockout by an employers' association if the agreement between the association and the plaintiff labor union was previously breached by the plaintiff or if the said agreement did not prohibit a lockout expressly or by implication. Albeit a resort to such common means of securing respective labor rights is not obviated once the prevailing collective agreement has been breached by the union or the employer, nevertheless, it can be safely concluded from this cursory glance at the cases holding with the majority view of the matter that the court of equity is able to maintain industrial peace in the absence of a preliminary breach and, what is more, is able to do so in a manner beneficial to both parties in the conflict and in strict consonance with the terms that the parties themselves have assumed.

In all of the foregoing theories anent the recognition and enforcement of a collective bargaining agreement as a valid contract at law, the presumption has been indulged in that all of the necessary elements of a valid contract were present. Yet one of the most formidable objections to such contractual recognition is that a true contract must be entered into voluntarily, and there is, as a matter of fact, seldom accompanying a collective bargaining agreement that species of contractual freedom which the courts zealously demand as a *sine qua non*. It is very likely, however, that this criticism may be relegated to the very dim background with the advent of the modern conception of economic freedom in place of the antiquated doctrine of abstract freedom.

Another objection to contractual recognition that has been broached is that collective agreements lack that necessary contractual element of consideration because all of the

⁵² Moran v. Lasette, 221 App. Div. 118, 223 N. Y. S. 283 (1927).

promises are made by the employer and seemingly none by the union. Economic thought has had a major part in moving the courts to look with a new light on this situation as well and the modern courts have seen fit to circumvent the obstacle by taking the realistic approach and, as a consequence, deeming it unnecessary that the collective agreement should contain in it any provision which will guarantee to the employer the services of the employees since modern economic compulsion will operate to take the place of legal force in compelling performance in this regard.⁵³ Thus, in *Cross Mountain Coal Co. v. Ault*⁵⁴ the court said:

"We think, however, that the failure of the plaintiff to bind himself to continue in the service of his employer cannot impair or render unenforceable the contractual undertaking of the employer to refrain from discharging the plaintiff under such circumstances as to do him an injustice and to abide by the award of the board of arbitration. . . and also to refrain from discriminating against the plaintiff as an employee because of membership in any organization. The plaintiff had accepted the terms of employment and had worked under them from April, 1920, to May, 1921, and had held himself in readiness to resume work under the contract until the mine was reopened in November, 1921. There was certainly sufficient consideration passing from the plaintiff to his employer to support the contract and render it enforceable in the particulars here involved."

Consideration for the employer's promises, however, when not specifically mentioned in the agreement, is often found in the implied promise of the union to refrain from interfering with the employer's conduct of the business.⁵⁵ And a promise not to interfere would qualify as good consideration since it is undoubtedly a legal detriment in view of the now universally recognized right of a union to call a strike for a lawful purpose when it is not in violation of any specific covenant.⁵⁶

⁵³ See 18 MARQUETTE L. REV. 251.

⁵⁴ *Op. cit. supra* note 9, at 696.

⁵⁵ See *Harper v. Local Union No. 520*, *op. cit. supra* note 5. Cf. *Gulla v. Barton*, *op. cit. supra* note 19; 18 MARQUETTE L. REV. 251; 41 YALE L. JOUR. 1221, 1225.

⁵⁶ See Sayre, *Labor and the Courts*, 39 YALE L. JOUR. 682, 696.

There remains the further consideration of the validity of the collective bargaining agreement that provides for a "closed union shop": that is, an agreement with the employer that every employee shall be a member of the controlling union. This phase of the subject is of especial importance in view of the effect, or proposed effect, of Section 7-A of the National Industrial Recovery Act. The validity of the so-called "closed shop" has long been a mooted legal point and, sad to say, the recent Federal legislation as to labor has been of no material aid in settling the issue but really, by its emphasis on collective bargaining, leaves this ramification in a more turbulent state than before. However, the common law on the subject will first receive attention.

Some of the early decisions of the courts put the burden of proof on the labor union which procures the closed shop; that is, these courts have held that a justification for the closed shop provision must be proved else it becomes the basis for the presumption of an attempted monopoly of labor in restraint of trade and void by reason of being opposed to public policy. Thus, in a New Jersey case on the subject.⁵⁷ it was held that the provision of a contract between an association, representing nearly all the building contractors of New York City and Long Island, and an association representing the labor unions thereof violated public policy as to monopolies when it sought to bind the said contractors to employ only union men in their enterprises and had for its object the closed shop and the monopolization of that labor market by the unions. In so holding this case follows the early leading case of *Connors v. Connolly*⁵⁸ in which the Connecticut Court said:

" . . . the authorities are, as far as we have observed, in complete accord in holding that, where the agreement is one which takes in an entire industry of any considerable proportions in a community, so

⁵⁷ *Lehigh Structural Steel Co. v. Atlanta Smelting and Refining Works*, 92 N. J. Eq. 131, 111 Atl. 376 (1920).

⁵⁸ 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564 (1913).

that it operates generally in that community to prevent or to seriously deter craftsmen from working at their craft or workingmen obtaining employment under favorable conditions without joining a union, it is contrary to public policy. . . . It needs no argument to demonstrate that any combination between employers and employed, which creates a condition in a community such as has been hereinbefore described, is a serious menace to the craftsman or workingman who, in the exercise of his free right of choice, does not wish to join a union. It is calculated to place upon his freedom of choice and action a coercion which leaves him no longer wholly free. Its tendency is to expose him to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of and what other people need from the open market, or perhaps from any market."

And both of these cases cited obviously follow the earlier case of *Brennan v. United Hatters*⁵⁹ where it was said:

"The common law has long recognized, as a part of the boasted liberty of the citizen, the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part. . . ."

And in *Curran v. Galen*,⁶⁰ which was long the law of New York on the subject of the closed shop, the court said in a *per curiam* opinion:

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper, or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities."⁶¹

Where, however, the closed shop is of not so wide a scope and falls short of effecting a monopoly of the labor market the tendency of the courts in recent years is to regard the

⁵⁹ 73 N. J. Law 729, 65 Atl. 165 (1906).

⁶⁰ 152 N. Y. 33, 46 N. E. 297 (1897).

⁶¹ Cf. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 (1905).

agreement merely as one of the valid incidents of union activities. Thus, in *Jacobs v. Cohen*⁶² Judge Gray, who wrote the opinion in *Curran v. Galen*, sets forth the contrary doctrine and distinguishes the two cases as follows:

"It would seem as though an employer should be, unquestionably, free to enter into such contract with his workmen for the conduct of the business, without its being obnoxious on any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employees concerning the conduct of the business for one year and securing to the latter an absolute right to limit the class of their fellow workmen to those persons who should be in affiliation with an organization entered into with the design of protecting their interests in carrying on the work. . . . Their combination is lawful when it does not extend so far as to inflict injury upon others, or to oppress or crush them by excluding them from all employment, unless gained through joining the labor organization or trades union."

And this more liberal view of the matter was followed in the later New York case of *Kissam v. U. S. Printing Co.*⁶³ in which it was held that a contract between an employer and trades unions prohibiting the employment of nonunion workmen is not invalid as to such workmen where it results in great benefit to the employer, disposes of differences between him and the labor unions, is not entered into with malice against the nonunion workmen nor with the intent to injure them, and where it is not sought to compel them to join the union.⁶⁴ This liberal view would seem to be the better one. The employees are not absolutely precluded, in such a limited case, from finding work elsewhere, and the incidental fact that the labor market is partially curtailed is more than compensated in the broad perspective of the matter by the undeniable social advantages which are ef-

⁶² 183 N. Y. 207, 76 N. E. 5 (1905).

⁶³ 199 N. Y. 76, 92 N. E. 214 (1910).

⁶⁴ Accord: *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. S. 185 (1904); *Jacobs v. Cohen*, *op. cit. supra* note 62; *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790 (1919); *Harper v. Local Union No. 520*, *op. cit. supra* note 5.

fectured by allowing the employees to so bargain collectively since it is perhaps the only method by which they are able to deal on an even economic plane with their employer.⁶⁵ If, however, the closed union shop binds such a proportion of the employers in the community that the nonunion men can obtain employment only with extreme difficulty, then, according to the prevailing line of decisions,⁶⁶ the agreement would be void by reason of being opposed to public policy which forbids unreasonable interference with the freedom of the individual in the pursuit of his trade. The whole subject is well summarized in *McCord v. Thompson-Starrett Co.*:⁶⁷

"... while an individual employer may lawfully agree with the labor union to employ only its members, because such agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet... such an agreement when participated in by all or by a large proportion of employers in any community becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade, and imposes upon them, as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

Section 6 of the Clayton Act⁶⁸ provided that labor was not a commodity and exempted labor organizations from being

⁶⁵ See Lasch and Toll, *The Validity of Agreements to Employ Union Labor Exclusively*, 3 TEMPLE L. QUAR. 421 (1929); 2 WIS. L. REV. 369 (1924); 22 MICH. L. REV. 376 (1924).

"A bargains with a labor union to employ only union labor. The bargain is legal unless the union has such a monopoly as virtually to deprive nonunion workers of any possibility of employment; and even in that case it is not illegal if a statute legalizes such labor unions." RESTATEMENT OF THE LAW OF CONTRACTS § 515 (18) (1932).

⁶⁶ See *Connors v. Connolly*, *op. cit. supra* note 58.

⁶⁷ 113 N. Y. S. 385, 387 (1908).

⁶⁸ 38 STAT. 731 (1914), 15 U. S. C. A. § 17 (1926) ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, or under the antitrust laws.").

construed as illegal combinations in restraint of trade. But in the case of *Duplex Printing Press Co. v. Deering*⁶⁹ the Supreme Court of the United States said:

"But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal or legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissive construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the anti-trust laws."

Under this line of reasoning a closed shop agreement would not, under the anti-trust laws, be *ipso facto* illegal, in view of the exemption granted to labor unions under the Clayton Act. However, if such agreement operated to bind an entire labor market of a trade which directly affected interstate commerce it would be judged an illegal restraint of interstate commerce in violation of the Sherman Act,⁷⁰ or in violation of the particular state anti-trust act if such agreement had a similar effect on purely domestic commerce.⁷¹

Still another aspect of the closed shop that demands consideration is the question of whether or not such an agreement may be tortious in that it induces the breach of an existing individual contract of employment between the same employer and a nonunion employee subsequently discharged as a consequence of the closed shop provision of the collective agreement. The well-known rule covering this subject is that the intentional procurement of the breach of an existent contract, if done with knowledge of the contract and without just cause or excuse, makes him who causes the breach liable for the resulting damage, and this is so even though the tort-feasor acted in promoting his own legitimate interests.⁷² This principle originated in 1853 with the

⁶⁹ 254 U. S. 443 (1921).

⁷⁰ *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921).

⁷¹ *Overland Pub. Co. v. Crocker Co.*, 193 Cal. 109, 222 Pac. 812 (1924).

⁷² *R and W Hat Shop v. Sculley*, 98 Conn. 1, 118 Atl. 55 (1922).

English case of *Lumley v. Gye*,⁷³ in an action on the case for the breach of a contract of service. The English court there announced the rule that the duty rests on all persons not parties to the contract, but having knowledge of it, not to maliciously procure the breach of the contract, and that such a violation of the duty is wrongful and for it an action on the case lies. *Bowen v. Hall*⁷⁴ reaffirmed this principle as being applicable to all contracts, and so the law of England remained. In these cases "maliciously" was used not in the sense of ill will but rather that the act done was a wrongful and unlawful act. Lord Crompton, in *Lumley v. Gye*, said that

"... a person who wrongfully and maliciously or, which is the same thing, with notice, interrupts the relation subsisting between master and servant . . . whereby the master is injured, commits a wrongful act. . ."

And Lord James, in *South Wales Mining Federation v. Glamorgan Coal Co.*,⁷⁵ observed:

"If the breach of the contract of service by the workmen was an unlawful act, anyone who induces and procures the workmen, without just cause or excuse, to break such contract, also acts unlawfully, and thus the allegation that the act done was wrongfully done is established."

In *Bromage v. Prosser*⁷⁶ the court defined "maliciously" by saying that "in a legal sense it means a wrongful act done intentionally, without just cause or excuse." And for the Supreme Court of the United States Mr. Justice Brewer held, in the famous *Angle* case,⁷⁷ that "if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." A subsequent Supreme Court case⁷⁸ explained how the word "maliciously" was used in the *Angle* case:

⁷³ 2 El. & Bl. 216 (1853).

⁷⁴ 6 Q. B. Div. 337 (1881).

⁷⁵ [1905] A. C. 249.

⁷⁶ 4 Barn. & Cress. 247 (1825).

⁷⁷ *Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1 (1893).

⁷⁸ *Bitterman v. L. & N. Ry. Co.*, 207 U. S. 205, 223 (1907).

"It is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the Angle case. The wanton disregard of the rights of a carrier causing injury to it . . . constitutes legal malice within the doctrine of the Angle case."

And this doctrine of the necessity for justification for inducing the breach of a contract was reemphasized in the Massachusetts case of *Berry v. Donovan*⁷⁹ where it was said:

"The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. . . . Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such right, without lawful justification, is malicious in law, even if it is from good motives and without express malice."

Thus, in the Massachusetts case of *R and W Hat Shop v. Sculley*⁸⁰ the court held that the representatives of the labor union were liable for the resulting damage where, for the purpose of securing steady employment for the union men, they induced the manufacturer to breach his contract with the plaintiff of which contract they had full notice. It is important, however, to note that many cases have held that there is no tort involved in inducing the discharge of an employee who is hired under a contract terminable at the will of either employee or employer since there is no property right in employment for no fixed period. Thus, in *Harmon v. United Mine Workers of America*⁸¹ it was held that where the mining company had contracted with the Miners' Union to employ only its members, the discharge of the plaintiff, who was employed for no definite period, procured by the union on the ground that he was no longer a member of the union, gave the plaintiff no cause of action against the union. However, in *Berry v. Donovan* the contrary was held; and the court said that the inducement of the discharge of an employee working under a contract terminable

⁷⁹ 188 Mass. 353, 74 N. E. 603, 604 (1905).

⁸⁰ *Op. cit. supra* note 72.

⁸¹ 166 Ark. 255, 266 S. W. 84 (1924). Accord: *Mills v. U. S. Printing Co.*, *op. cit. supra* note 64.

at will was actionable as an inducement of the breach of a contract.⁸² It is submitted by one authority⁸³ that in view of these Massachusetts decisions anent union liability for inducing breaches of employment contracts the labor unions in that state, after negotiating a trade agreement for a closed shop, resort to the subterfuge of having the employer first discharge all his workers, then negotiate the agreement in its binding form, then have the employer reemploy union men only. This artifice obviates any possible action for inducing a breach of an employment contract since the parties apt to claim injury by the operation of the closed shop agreement are discharged beforehand.

There remains the final discussion of the validity of the closed shop agreement under the National Industrial Recovery Act, Section 7-A. The closed nonunion shop is clearly barred by the Act by operation of clause two of the labor section: ". . . no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting, a labor organization of his own choosing. . ." Leaders of industry have contended that the closed union shop is similarly barred under the spirit of the Act. Unfortunately, the latter view of the matter is a mere opinion and is entitled only to that much credence. It is to be regretted that there is no express declaration in the Act itself as to whether the closed union shop was intended to be barred along with the closed nonunion shop. Some evidence of the underlying intent of the framers of the Act may be gleaned from the Congressional history of the Bill. In the first draft of Section 7-A as it came from the Senate to the House Ways and Means Committee, the closed union shop was clearly forbidden since the clause then provided that "no employee and no one seeking employment shall be required as a condition of employment to join any *organization*." It was at

⁸² For full discussion of the subject see Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923).

⁸³ LANDIS, CASES ON LABOR LAW 378, footnote.

the express request of President Green of the American Federation of Labor that the phrase "company union" was substituted for the word "organization" by the House Committee.⁸⁴ Mr. Green there said:

"... we suggest that you substitute the words 'company union' for the word 'organization' . . . It is the opinion of the representatives of the American Federation of Labor that this amendment would make clear and definite the real meaning and purpose of this part of the Act."

As a result of the House amendment there is nothing in the Act itself which expressly states that an employee or a candidate for employment shall not be required as a condition of employment to join a labor union, that is, nothing which would automatically make the closed union shop invalid. The first Administrator of the National Industrial Recovery Act, however, intimated that the Act does make the closed union shop unlawful when he said:

"If an employer should make a contract with a particular organization to employ only members of that organization, especially if that organization did not have 100% membership among his employees, that would in effect be a contract to interfere with his workers' freedom of choice of their representatives or with their right to bargain individually and would amount to employer coercion on those matters which is contrary to the law."⁸⁵

In contrast to this theory, however, it might be pointed out that the *Houde* case "majority rule" decision⁸⁶ really renders the majority legally capable of bargaining for all of the

⁸⁴ Hearings before the House Committee on Ways and Means, May 18-20, 1933, p. 117. See FEDERAL TRADE AND INDUSTRY SERVICE § 6003.

⁸⁵ Excerpt from address by the Administrator, Official Release, No. 625, Sept. 4, 1933, p. 14. See FEDERAL TRADE AND INDUSTRY SERVICE § 5803.

See conversation between Senator Wagner and Mr. Lewis relative to the closed shop, in Hearings before the House Committee on Ways and Means, May 18-20, 1933, p. 115; FEDERAL TRADE AND INDUSTRY SERVICE § 5807.

Cf. Joint statement of Johnson and Richberg: "The words 'open shop' and 'closed shop' are not used in the law and cannot be written into the law. . . . These words have no agreed meaning and will be erased from the dictionary of the N. R. A. . . ." FEDERAL TRADE AND INDUSTRY SERVICE § 5802.

⁸⁶ In re *Houde Engineering Corp.*, Nat. Labor Relations Board, Sept. 1, 1934, Official Release § 141, FEDERAL TRADE AND INDUSTRY SERVICE § 8384 (Held, negotiation with an association representing the minority group of employees in addition to the union chosen by the majority may constitute a violation of Section 7-A.).

employees and thus lays the perfect foundation for a closed union shop made up of the employee-members of that union. That, however, is but the view of the National Labor Relations Board and as such it lacks that judicial sanction of a court of law. The only legal adjudication on the subject under the National Industrial Recovery Act to date is the New York Supreme Court case of *Farulla v. Ralph A. Freundlich, Inc.*,⁸⁷ where, in August, 1934, the court held as to the collective bargaining agreement in question:

"The agreement, in so far as it provides for a 'closed shop,' does not violate the law as a monopoly. The amended complaint . . . states that about 75 per cent. of the manufacturers in the industry in New York City have signed—48 in number out of 64, employing about 2,000 workers out of about 2,650. Under the circumstances it cannot be said that the agreement is per se illegal. It does not violate section 7 (a) of the National Industrial Recovery Act . . . The act was never intended to take away any of the rights of labor which it had acquired after decades of struggles and conflict. The section merely provides that no employee and no one seeking employment shall be required as a condition of employment to join any company union or refrain from joining, organizing, or assisting a labor organization of his own choosing. It was enacted to strengthen the arm of labor in collective bargaining with capital. It sought to prevent recourse to subterfuge by employers who were able to dominate their own unions. The plaintiff is not a company union. There is no other rival labor union. . . . The 'closed shop' was upheld as legal before the National Industrial Recovery Act. Surely Congress had no intention of declaring it illegal in 1933 when the act was passed; and it did not so declare it."

In the second part of the same case, handed down three months after the preliminary decision quoted above, the court cited the leading common law decisions⁸⁸ upholding the validity of closed shop agreements and concluded:

"In section 7 (a) we have reached the rubicon of industrial relations. If 7 (a) is sustained, better relations between employer and employee may go forward. If it is nullified, that progress may be temporarily halted. If it is to be used as a fort, behind which either side may retire every time a situation arises not entirely to its liking, its passage instead of being a benefit will be a detriment to the rights of everybody. In interpreting it, therefore, great care must be taken to

⁸⁷ 274 N. Y. S. 70 (1934).

⁸⁸ *Schlesinger v. Quinto*, *op. cit. supra* note 33; *Ribner v. Rasco Butter & Egg Co.*, *op. cit. supra* note 45; *Tracey v. Osborn*, *op. cit. supra* note 36.

consider the evils at the time it was intended to remedy, and whether the remedy is constitutional. It is not part of the duty of this court to say whether the act is or is not perfect. But the court knows of no more courageous piece of legislation ever adopted or more appropriate to such a pressing emergency. If employers after all the laborious investigation by an impartial arbitrator can violate their agreement and his findings on the ground that the agreement is in violation of 7 (a) of the National Recovery Act . . . then the unions could likewise break their solemn contract. This would cause a chaos of uncertainty which would result in great damage, not only to employers and employees, but to the whole public. It would be a throw-back to the lawless days which it has been the prime object of the National Industrial Recovery Act to abolish, and it is unthinkable that the Congress which passed the act had any such idea."⁸⁹

This concludes the examination into the legal status of the collective bargaining agreement. The subject has so many ramifications that it is literally impossible to set down with any degree of certainty the exact legal situation that the collective bargaining agreement is destined to occupy in the future. The increased importance of collective bargaining under the new system is bound to lead to an abundance of litigation on the point, and this litigation will without a doubt take the form of an examination into the judicial treatment of the question in the past. Out of it all will be inevitably chrystallized some definite conception of the collective agreement as a legal document, and then, it is hoped, the legal scales will strike a happier balance. For the nonce it is sufficient to leave the question with the remark that the subject has judicial and extrajudicial connotations which are of vast importance to our modern society. Once collective bargaining agreements are signed they become the "law" of the parties to them; once the specific agreement is adjudicated it becomes a part of the law of trade and industry; and the latter is the governing force behind the production of the bread and butter of a great nation.

Henry Clay Johnson.

Washington, D. C.

⁸⁹ 277 N. Y. S. 47, 62 (1934).