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C. Lawrence Christenson  
*Indiana University*

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## LEGALLY ENFORCEABLE INTERESTS IN AMERICAN LABOR UNION WORKING AGREEMENTS\*

C. LAWRENCE CHRISTENSON\*\*

### PART I. THE PROBLEM AND ITS SETTING

A world of rapidly changing technology almost inevitably means the obsolescence of established rules of action. A growing conviction that this is true finds expression in the recently adopted National Industrial Recovery Act. Whatever its final effect, it is obvious that this measure is an attempt to redefine the principles under which employment relations may arise in terms thought to be more nearly harmonious with the current industrial setting.

The coming of the N. R. A. adds renewed interest to the question as to what has been the exact status of the standards established by trade union action before American courts of law. A re-examination<sup>1</sup> of the decisions which have passed upon union working agreements is therefore peculiarly appropriate at this time.

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\*\* Department of Economics and Sociology, Indiana University.

<sup>1</sup> Among earlier studies of this subject see: Ralph Fuchs, "Collective Labor Agreements in American Law" (1924), 10 St. Louis Law Rev. 1; Lindley Clark, "Legal Effect of Collective Agreements" (1912), 12 Monthly Labor Rev. 416, "Collective Bargaining in the United States of America" (1927), 15 International Labor Rev. 197; William G. Rice, "Collective Labor Agreements in American Law" (1931), 44 Harvard Law Rev. 572.

Warning should be issued against drawing any final conclusions regarding what will be the judicial treatment of the standards established under the Recovery Act from the analysis here presented. In accordance with Section 7, Subsection b, of the N. I. R. A., trade union agreements when approved by the President will have the same effect as codes adopted under the Act. Whatever final disposition the courts may make, it is clear that rights and duties which may be recognized when trade union agreements are approved by the President, are statutory. Moreover, none of the language of the Recovery Act nor the penalties accompanying violations of its provisions necessarily impose any obligation upon the courts to recognize contractual rights and duties in trade agreements. It is possible that this new measure may become an influence tending to encourage judicial recognition of contractual status in the trade agreement, but this influence is likely to be subtle and difficult to trace. The present undertaking is not concerned with conjecture as to what the future court decisions may hold; rather it is concerned with analysis of what the courts have actually done in litigations involving alleged obligations arising out of trade union agreements prior to the adoption of this new legislation. Against the background of such an analysis subsequent decisions which may reflect the effects of N. I. R. A. will be more easily understood and their full significance will stand out in sharper relief.

As late as 1915 the Commission on Industrial Relations was able to write:

It does not seem, nor has it been urged by any careful student of the problem, whether employer or worker, that any good end would be served by giving legal validity to joint agreements.<sup>2</sup>

More concrete evidence as to the attitude regarding the desirability of legal enforcement of the trade union agreement is found in the fact that a comprehensive abstracting service was able to report that prior to 1913 only one case could be found in which the question of the legal validity of the trade union agreement had been squarely presented.<sup>3</sup> It is clear, therefore, that whatever tendency there may be in the United States toward the legal enforcement of collective labor agreements as contracts has developed almost entirely within the last two decades.

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<sup>2</sup> Final Report (Washington, D. C., 1915), 193.

<sup>3</sup> 45 L. R. A. (N. S.) 184.

An essential preliminary to an intelligent consideration of the court decisions is an understanding of what the trade agreement is in practice and what it seeks to accomplish.<sup>4</sup> The terms "working", "trade", or "union" agreement as here used refer to an understanding, evidence of which is usually in writing, between the officers of a labor organization acting for its membership, and the representatives of an employer or of an employing group, governing the terms of employment and working conditions. There is usually an effort to create an agreement that is much more comprehensive in its scope than the individual contract of employment, although the trade agreement is normally concerned with much the same subject matter.

The exact terms of the trade agreement will differ considerably from one industry to another, but these differences will nevertheless be found to lie within the boundaries of a definable area. Thus, although it has been correctly stated that, "there is scarcely a provision common to all agreements," yet it will almost inevitably be found that the trade agreement contains some stipulation as to the rates of pay and the length of the working day.<sup>5</sup> Generally the agreement makes some mention of the way in which employees are to be represented, and frequently it calls for the exclusive employment of union members, i. e., the "union closed shop". On the other hand, the most commonly expressed obligation of the union will be found in prohibition upon strikes during the period of the agreement.

It will be noticed that the previous paragraphs make no mention of a promise by the union to furnish the employer's labor requirements for a definite period. Ordinarily no such promise is made, but it is not difficult to find trade agreements which either express or imply that the union is obliged to maintain an employment exchange, and that the employer must obtain his workers through the exchange. Finally, it should be mentioned

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<sup>4</sup> It is likely to be very misleading to approach a study of the legal decisions without specific knowledge of the character of trade agreements as they are actually made in the industry. Unfortunately, the reported decisions rarely reproduce the agreements in litigation. For copies of typical agreements see, U. S. Bureau of Labor Statistics, Bulletins 393, 419, 448, and 468. For a recent analysis of agreements from a wide range of industry see, C. L. Christenson, *Collective Bargaining in Chicago: 1929-30* (The University of Chicago Press, 1933).

<sup>5</sup> Perhaps the most important American trade agreement which must be an exception even to this general statement is that of the Actors' Equity Association. For details see, U. S. Bureau of Labor Statistics, Bulletin 402.

that agreements frequently embody some limitation on the employer's right to discharge his employees. While these statements indicate the general character of trade agreements, it cannot be emphasized too strongly that every agreement is a "made-to-order" instrument and is likely to have features peculiar to itself alone.

It will be well at this point to define more sharply the aims of the present study. First, it makes no assumption regarding the desirability of enforcing the trade agreement by legal means. Moreover, it frankly doubts whether an answer to this problem can be arrived at solely on the basis of a review of the legal decisions. Its attention is directed mainly at the narrower objectives of: 1. a determination of what interests<sup>6</sup> the law recognizes in these agreements; 2. an analysis of the principles upon which these interests are recognized. The study will attempt an entirely objective<sup>7</sup> investigation, and for the present, no suggestions will be made as to what the law ought to be with reference to the collective wage bargain.

In keeping with this purpose, much confusion will be avoided by studiously refraining from speaking of the trade agreement as a "contract"<sup>8</sup> except in those cases where courts have seen fit to recognize rights arising out of the union agreement.<sup>9</sup> In some cases it may be that in strictly legal terminology it is not even justifiable to speak of the trade agreement as a "bargain", although the term "collective bargaining" has become such common usage with reference to union activity that it might be well to designate "legal bargain" when it is used in its strictly technical sense.<sup>10</sup>

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<sup>6</sup> The word "interest" as here used is a generic term to denote any concernment or share whether or not it is legally recognized. When so recognized an interest becomes also a right, privilege, power or immunity. Thus a right is a "legally protected interest." Cf. *Encyclopedia of Social Sciences*, Vol. 8, p. 146, Col. 2.

<sup>7</sup> For an excellent statement of the aims of the objective viewpoint in social analysis see, F. H. Knight, 40 *Jour. of Pol. Econ.*, pp. 433 ff.

<sup>8</sup> The meaning adhered to will be: "A contract is a promise or a set of promises for the breach of which the law grants a remedy, or the performance of which the law in some way recognizes as a duty." *A. L. I. Restatement Law of Contracts* (1932), Vol. 1, Sec. 1.

<sup>9</sup> "Agreement has a wider meaning than contract, bargain, or promise. The word contains no implication that legal consequences are or are not produced. It applies to transactions executed on one or both sides, and also those that are wholly executory." *Ibid.*, Sec. 3.

<sup>10</sup> "Bargain has a narrower meaning than agreement since it is appli-

## II. LEGAL INTERESTS AND BASES FOR THEIR RECOGNITION

Among the more prominent obstacles to the recognition of enforceable interests under the trade union agreement is the common law rule that the unincorporated association is not a competent contracting party. In the absence of statutory provisions to the contrary, it is ordinarily held that such associations cannot assume legal obligations or acquire rights.<sup>11</sup> Since most American trade unions have in the past remained unincorporated,<sup>12</sup> it follows that where the common law alone is applicable, there are formidable obstacles which prevent the typical American union from creating enforceable interests through the making of trade agreements.

The manner in which the courts have met this situation has varied with the specific character of the agreement in litigation as well as with the particular interest which is in controversy. Where the effort has been to establish separate workers' interests the most common treatment<sup>13</sup> has regarded the trade agreement as a "usage" with reference to which the individual employers and employees might contract if they choose to do so. Under this treatment the trade union working agreement creates no legal rights or obligations so far as individual union members are concerned. Legal interests arise only where individuals adopt the terms of the trade agreement as a part of their contracts of employment.

Despite an opposing view, which may better be examined after a review of the decisions,<sup>14</sup> a critical investigation indicates that

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cable only to a particular class of agreements. A bargain is an agreement of two or more persons to exchange promises or performances." *Ibid.*, Sec. 4.

<sup>11</sup> *St. Paul Typothetae v. Bookbinders* (Minn. 1905), 102 N. W. 725; *West v. Baltimore and Ohio R. R. Co.* (W. Va. 1927), 137 S. E. 654.

<sup>12</sup> Investigation of the 148 labor unions of national significance listed in the Bureau of Labor Statistics, Bulletin 506, indicated only fourteen as incorporated in 1929. No such summary statement can be made for local unions, but it is known that the incorporated local union is uncommon. Cf. C. R. Daugherty, *Labor Problems in American Industry* (Houghton Mifflin Co., 1933), p. 395.

<sup>13</sup> A careful classification of the cases reported down to August, 1933, reveals that the statement, "The greater number of cases seem to base their decision on the third party beneficiary theory" (18 Va. Law Rev. at 185), is and was at the time it was written (December, 1931) grossly inaccurate.

<sup>14</sup> See *infra*, note 52.

there is no basis to conclude that these cases which illustrate the "usage" doctrine have modified this general rule in recent years. *Burnetta v. Marceline Coal Co.*<sup>15</sup> appears to be the earliest case in which an American supreme court was squarely confronted with the problem of deciding as to the interest of individual union members under a trade agreement. In that case *Burnetta*, a member of the "Miners Union",<sup>16</sup> after working for the defendant coal company about two months, requested on the next pay day (June 16), which fell four days after he had voluntarily left his employment, payment in full of all wages due him. On that same day, after being refused full payment because the company declared that he was bound by the terms of a trade agreement with the "Miners Union", which provided for semi-monthly pay days and for the withholding of approximately two weeks pay on every pay day,<sup>17</sup> *Burnetta* brought suit to enforce immediate payment. The company, although admitting the correctness of the amount, denied that a part of it (\$5.35) was due until a subsequent pay day (June 30) and pleaded the trade agreement as a defense. Upon appeal, the Supreme Court of Missouri sustained a judgment for the plaintiff and so held that the trade union agreement did not govern the plaintiff's rights in this case.

This conclusion was reached first on the ground that "the Miners Union, as an organization, cannot (could not?) make a contract in respect to performance of work and payment for it."<sup>18</sup> But since the defendant had not sought to establish the contract by the contention that the union had such power, the really significant basis for the court's decision was the answer to the question as to whether the trade agreement had been adopted as a part of the individual contract of employment. The

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<sup>15</sup> (Mo. 1904) 79 S. W. 136; 45 L. R. A. (N. S.) 187.

<sup>16</sup> Probably the United Mine Workers, but this fact is not definitely established in the report.

<sup>17</sup> No part of the agreement is given verbatim in the decision, and extensive search through trade union literature has failed to disclose an agreement which could with certainty be identified as the one in this case.

<sup>18</sup> Here the court was simply following the general rule applicable to agreements made by voluntary unincorporated associations. On this point the only case cited was *Richmond v. Judy* (1879), 6 Mo. App. 465, which involved the liability of members of a political club on agreements made for the club by its officers. The court stated its conclusion generally and did not consider whether there might have been an actual agency by the union in some particular cases.

company pleaded that the workman had adopted the terms of the union agreement, but "the sole testimony upon which the appellant (coal company) relied to establish its contention (was) that of the superintendent of the coal company." He had testified to the effect that when the plaintiff was hired he had given an affirmative reply upon being questioned as to whether he understood the rules. In view of: first, the bias of this testimony; second, the short period of employment; third, the passive role of the plaintiff, it is here submitted that the conclusion that this affirmative answer did not constitute a contractual promise is reasonable and is entirely consistent with the majority of subsequent decisions where the interests of an individual workman<sup>19</sup> have been involved.

It is in point to emphasize a feature of the Burnetta case which seems to have been repeatedly disregarded. It is the fact that the plaintiff played an exceedingly passive role in the proceedings. This is accounted for when it is observed that the real purpose of the case lay in the concern of the defendant coal company in securing a decision as to the constitutionality of a Missouri statute which limited mining companies in determining the manner by which miners were paid. It must have been a source of great disappointment to the coal company when the supreme court decided the case on grounds which made it unnecessary to pass upon the constitutionality of this bit of social legislation.

The difference between the decision of the Burnetta case and the more modern decisions where the usage doctrine has been applied is not so much in the holdings of law as in the facts. In the later cases the courts are not confronted with the curious spectacle of a coal mining company seeking in 1900 to enforce the terms of a trade union agreement!<sup>20</sup> What the Burnetta.

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<sup>19</sup> This view is at variance with that presented in 44 Harv. Law Rev. at 584. The justification for the present position will become clearer as subsequent cases are discussed.

<sup>20</sup> Anyone familiar with the history of the United Mine Workers must know that this was but three years after the first important successes of the union. The years subsequent to 1900 constituted the period when John Mitchell was pleading for the respectful observance of union agreements, but his plea was for "moral" rather than "legal" responsibility, and he was unwilling to support the corollary of legal enforcement, namely, incorporation of trade unions. See his *Organized Labor* (American Book and Bible House, 1903), particularly chapters 26 and 39. For indication that there were real doubts among the bituminous miners in 1902 as to whether the



case really stands for is the simple proposition that a court will not enforce the terms of a union agreement which limits the employee's right to collect wages upon termination of his employment, unless there is more evidence than the testimony of his employer that the agreement has been adopted as an individual contract of employment. No subsequent case has been found which can fairly be said to have reversed this specific rule.<sup>21</sup>

The Burnetta case was followed three years later by *Keysaw v. Dotterweich Brewing Company*,<sup>22</sup> in which the plaintiff, a union workman, sought to recover pay in accordance with a union agreement for overtime work done during two years while in the employ of the defendant. He was granted a judgment according to the trade agreement, not however because rights automatically inured to him as a member of the union, but rather because, "the defendant recognized the fact that the plaintiff was working for it under the terms of this contract (i. e., union agreement), the parties thus adopting the contract made in form with the plaintiff's union." Furthermore, "the contract made between the parties (i. e., employer and worker) was evidenced, not only by the two writings made between the defendant and the local union, but included what took place between the plaintiff and the defendant in adopting and supplementing the same."<sup>23</sup>

*Langmade v. Olean Brewing Company*,<sup>24</sup> decided by the same court in 1910, merely stated a corollary to the *Keysaw* case. It held that if the employee chose to make an individual agreement that departed from union standards, he could not recover upon the union agreement even though he had earlier subscribed to the trade agreement. The *Burnetta* case enunciated the principle that if an employee does not adopt the terms of a trade agreement in an individual contract of employment, then he acquires no rights or duties under the union agreement. *Keysaw v. Brewing Company* makes explicit the converse proposi-

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agreements should even be treated as morally binding, see M. D. Savage, *Industrial Unionism in America* (Ronald Press, 1922), pp. 83-4.

<sup>21</sup> The case which most closely resembles *Burnetta v. Marceline Coal Co.* is *The Henry S. Grove* (D. C. Md. 1927), 22 Fed. (2nd) 444, but the possibility of fraud in the latter case prevents one from concluding with certainty that the decisions are strictly in accord.

<sup>22</sup> (App. Div. 1907) 105 N. Y. Supp. 562.

<sup>23</sup> 105 N. Y. Supp. at 564.

<sup>24</sup> (App. Div. 1910) 121 N. Y. Supp. 388.

tion, while the Langmade case adds the logical corollary that individual agreements contrary to the union terms will prevent successful suits by workers upon the trade agreement. With these three cases the structure of what may be called the "adoption of usage" theory for the recognition of individual interests arising out of the trade agreement, is complete. Subsequent cases amplify and supplement this doctrine, but they do not change its basic structure. Except for the cases decided on principles of agency or third party beneficiary, which stand on an entirely different footing, only one case has been found which may with any certainty be regarded as in conflict with the three cases discussed in the preceding paragraphs.

Although the "adoption of usage" theory was complete with the Langmade case, it remained for the court in *Hudson v. Cincinnati etc. Ry.*<sup>25</sup> to summarize the doctrine. This summary is really only dictum so far as the Hudson decision itself is concerned.<sup>26</sup> but so frequently has it been referred to that it merits detailed paraphrasing here. The substance of the court's remarks on this matter is that, if an employee during the period of the operation of a trade agreement enters the service of an employer knowing of and assenting to the provisions of the trade agreement, or if the agreement was so generally known among that class of workers as to justify the presumption that he did know of its terms, and if then he made no express contract in conflict with any of its provisions, then (and then only?) the trade agreement enters into and becomes a part of the individual employment contract as if fully incorporated therein.<sup>27</sup>

In the light of this language the Burnetta decision may be reconsidered against its factual setting. That case arose at a time (1900) when the trade agreement in the coal industry was still a novelty. The employee in the case had worked for the coal company only two months. Finally, the only evidence submitted that he knew of the agreement and assented to its terms was the testimony of the official of the employing company which was seeking to enforce the agreement to the disadvantage of the employee. It is suggested that in view of these facts the court in

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<sup>25</sup> (Ky. 1913) 154 S. W. 47.

<sup>26</sup> It is reasonably certain that even if the employee did have rights arising out of the adoption of the trade agreement, in this case he had no cause of action because the terms had been complied with.

<sup>27</sup> This statement merely translates the language of the decision in general terms. See 154 S. W. at 50.

the Hudson case could consistently have written the decision of *Burnetta v. Marceline Coal Company*.

The cases thus far discussed are all of a pre-war vintage. However, examination of more recent decisions reveals that the doctrine that the trade agreement is a mere usage and by itself creates no legal rights in individual workers, unless adopted by them as a part of contracts of employment, continues to claim modern support.

In *St. Louis & B. P. M. Ry. v. Booker*,<sup>28</sup> a case which twice reached the Texas Court of Civil Appeals, the plaintiff, a member of an unincorporated railway union, obtained a judgment on his claim for wages lost prior to his reinstatement in accordance with the terms of a trade agreement. It should be observed, however, that at no time during the proceedings at either trials did the defendant railway company deny that the terms of the trade agreement had been incorporated into Booker's contract of employment; moreover, both the company and the plaintiff from the very beginning of the circumstances leading to the dispute acted as if they had adopted the terms of the trade agreement.<sup>29</sup> Hence, insofar as there is any expressed theory upon

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<sup>28</sup> (1926) 287 S. W. 130, (1928) 5 S. W. (2nd) 856, Certiorari denied (1926) 117 Tex. 611, Certiorari denied (1929), 279 U. S. 852.

<sup>29</sup> N. B. the following sequence of events:

1. November 30, 1920. P. discharged without trial.
2. December 16, 1920. At request of P. company held regular investigation, and although discharge held to be justified, company then by its own admission "paid Mr. Booker (\$116) for all time lost between the time pulled out of service and the investigation held, thereby complying strictly with Rule 37 of the national agreement." (See 287 S. W. at 132.)
3. At request of union representative, company permits appeal to Railroad Labor Board.
4. November 19, 1921. Labor Board orders reinstatement with pay for all time lost.
5. December 9, 1921. P. reinstated. Company official notifies P. by letter of award of Labor Board and requests him to file accurate statement of amount due him.
6. Statement filed, but company refused payment.

It would be difficult to find a case with stronger evidence that the trade agreement had been adopted as the employment contract. Just why the company refused to make payment after going so far in recognizing the employee's rights is not clear, but one may hazard a conjecture that refusal may have been connected with the fact that plaintiff participated in "an illegal shop crafts strike" shortly after his reinstatement. (See, 287 S. W. at 131.) The strike referred to could hardly have been the "shopmen's strike" as this did not officially begin until July 1, 1922. However, from early in 1921 there was restlessness among the railroad shop mechan-

which to base the plaintiff's claims, the language has the flavor of estoppel. Thus the second appeal decision reads:

All of the proceedings and actions taken by the appellant with reference to appellee's complaint . . . were had under the provisions of rules 36 and 38 . . . which were recognized by appellant as an existing part of the appellee's contract of employment.<sup>30</sup>

In view of the clear evidence pointing toward adoption in this case, it can scarcely be contended that the language of the decision goes any further in recognizing individual workers' interests under the trade agreement than did the holdings in the *Burnetta* or in the *Hudson* case. Careful analysis of two more recent Texas cases,<sup>31</sup> which involved questions and facts very similar to those in the *Booker* case strengthens this conclusion.

But if there remains doubt as to whether the decision in *St. Louis B. M. Ry. v. Booker* really did support the law of *Burnetta v. Marcelline Coal Co.*, that doubt is finally removed by the decision of the still more recent case of *Panhandle & S. F. Ry. Co. v. Wilson*.<sup>32</sup> Here the employee, *Wilson*, sued the railway company for wages lost during the period between his discharge and reinstatement. The court concluded that even though the employee was originally working under the terms of a trade agree-

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ics, and the plaintiff may have been active in this preliminary agitation. See *H. D. Wolf, The Railroad Labor Board* (University of Chicago Press, 1927), pp. 232 and 238.

<sup>30</sup> 5 S. W. (2nd) at 858.

<sup>31</sup> *San Antonio A. P. Ry. Co. v. Collins* (Civ. App. Tex. 1930), rehearing denied 1931, 35 S. W. (2nd) 507. Approved with minor modifications (Tex. Sp. Ct. 1933), 61 S. W. (2nd) 84.

*Galveston H. S. A. Ry. Co. v. Eubanks* (Civ. App. Tex. 1931, rehearing denied 1931), 42 S. W. (2nd) 475. (Approved by Tex. Sp. Ct. 1933), 59 S. W. (2nd) 825.

The facts and holding of both of these cases are almost identical with those of the *Booker* case. In the *San Antonio* case the findings of fact of the trial judge contain the following significant statement: "The contract of October 15, 1920, executed by the defendant and a representative of its yardmen was in writing and was for the benefit and on behalf of all the employees of the defendant in yard service, and the contract was accepted by the plaintiff and other employees and was observed by them, and was likewise accepted by the defendant and observed by it, and copies of the contract were furnished each of the employees." 35 S. W. (2nd) at 508. Note plaintiff was not a member of the union which negotiated the agreement.

<sup>32</sup> (Civ. App. Tex. 1932) 55 S. W. (2nd) 216.

ment, he had no good cause of action because his discharge had been in accord with its terms. However, the court was explicit in its declaration that even if there had been a breach by the employer the worker could not claim rights under the trade agreement unless he had adopted its terms as his own. The decision then proceeds,

While there is no direct testimony showing that Wilson as an individual ever assented to the contract (sic) made between the railway company and the employees' association, (unidentified) the case was decided upon that assumption (that he did so assent) in the lower court and is decided upon the same theory in this court.<sup>33</sup>

After disposing of another element of the case which calls for no attention here,<sup>34</sup> the court then restated with approval the general rule which it considered defined employees' interests under trade agreements in almost the identical language of the Burnetta case. This general rule

. . . is that individual members of a labor union are not bound by contracts (sic) between the union and the employers unless such agreements are ratified by the members of the union as individuals, and that in the absence of evidence of such ratification by a member, no rights accrue to him which he can enforce against his employer.<sup>35</sup>

Cross Mountain Coal Co. v. Ault<sup>36</sup> has been cited as a case which illustrates that "the American doctrine annexes the rules of the (trade) agreement to the individual employment contract as a matter of law requiring no express adoption."<sup>37</sup> If it is assumed for the moment that there really is such an "American

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<sup>33</sup> 55 S. W. (2nd) at 219.

<sup>34</sup> This point involved the question as to whether the original union agreement, which the court assumed had been adopted by Wilson, had granted authority to union officials to negotiate for reinstatement of the plaintiff on terms which would have improved his seniority standing in return for a waiver of his claim to wages lost. 55 S. W. (2nd) at 218.

<sup>35</sup> 55 S. W. (2nd) at 219. Note that here, as on other occasions, the court uses the term "ratification." "Adoption" is a better term since in none of these cases is there any other suggestion of agency.

<sup>36</sup> (Tenn. 1928) 9 S. W. (2nd) 692.

<sup>37</sup> 26 Ill. Law Rev. 922.

doctrine" there is still some doubt regarding the use of this case as an apt illustration of it. Here, the workman who sued the coal company for breach of the terms of the trade agreement was an official of the union, and the agreement "was made by the plaintiff with the defendant through himself and agents." To be sure, it is true that the court said,

We think the legal effect of the agreement (N. B., this particular agreement) between the operators and miners is that it became a part of and formed the basis of each contract of employment between each operator accepting it and each of his employees, who entered or continued in the service and employment of such employer with knowledge of its execution, and in the absence of any express contract between the individual employee and his employer inconsistent with the terms of the agreement.<sup>38</sup>

This is the language of the Hudson case and like it is little more than a dictum. It certainly was superfluous so far as the establishment of the plaintiff's rights was concerned, for the coal company had waived all objections to the admission of a copy of the trade agreement as evidence, and the court went on to say, "Without referring to the evidence in detail, we think it clearly established that the employees of the coal company, including Ault, considered that they were working under this agreement as their contract of employment."<sup>39</sup> Whatever may be said of the "American doctrine", so far as the Cross Mountain Coal case is concerned it seems fairly clear that the terms of the trade agreement had been adopted by the employees. Certainly the plaintiff had adopted its terms as he was one of the officials who negotiated the agreement!

Gary v. Central of Ga. Ry.<sup>40</sup> was a case where in spite of the unincorporated character of the union involved, it was easy for the court to sustain individual rights under a trade agreement because the terms of the agreement had been incorporated textually into the individual employment contracts. In the most recent appeal of this case, the court clarified the theory upon which it had acted by stating,

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<sup>38</sup> 9 S. W. (2nd) at 694.

<sup>39</sup> *Ibid.*, at 694.

<sup>40</sup> (Ga. 1928) 141 S. E. 819; (1929) 149 S. E. 309; (1931) 160 S. E. 716.

The plaintiff's suit was predicated absolutely upon the theory that the rules and regulations of the brotherhood were embodied in his contract of employment.\* \* \* Be it said in this connection that this court did not hold, and did not intend to hold, in its original decision that the brotherhood had authority to enter into a contract with the defendant in behalf of the plaintiff member. The question was not involved since the petition alleged, in effect, that the plaintiff himself, either directly or by ratification, made a contract with the defendant containing the rules and regulations of the brotherhood, as agreed to by its officers and the officers of the defendant company.<sup>41</sup>

A Federal case, *United States Daily v. Nichols*,<sup>42</sup> appears to go a bit further in permitting rights and duties to accrue to individuals under the trade agreement without adoption. Upon scrutiny, however, it is doubtful whether even this case modifies the rule developed in these earlier decisions. In the *Nichols* case the plaintiff workman sued the publishing company for back pay which he claimed was due him under the union agreement. The significant feature of the agreement provided that at specified times upon notice by either the union or the employers' association the wage scale might be changed. While negotiations on the new rate were in progress, the scale was declared "open." The "open" scale meant that the old rate was observed tentatively with the understanding that when agreement was reached, the new scale would be retroactive to the date of the termination of the old agreement.

The defendant publishing company began business during a period when the scale was "open" and although it was not a member of the employers' association which negotiated agreements with the union, it applied to the union for labor and observed the old tentative union scale. The new union wage, fixed by agreement through arbitration, was somewhat above the old rate, and when the award was announced, the defendant refused to supplement the wages paid for work already performed. The court of appeals affirmed a judgment for the plaintiff allowing back pay in accordance with the union agreement.

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<sup>41</sup> (Ga. 1913) 160 S. E. at 718. Note the court cites on this point *Hudson v. Cincinnati* (Ky. 1913), 154 S. W. 47; *Piercy v. Louisville* (Ky. 1923), 248 S. W. 1042; *Snow v. Chadwick* (Mass. 1917), 116 N. E. 801.

<sup>42</sup> (Ct. App. D. C. 1929) 32 Fed. (2nd) 834.

Although some of the language of the decision would seem to indicate that the court would have held the employer and his workers bound by the union terms whether or not they had actually adopted such terms as a part of employment contracts, this language loses much of its significance when it is noticed that it is not essential to the conclusion of the case. The facts of the case revealed that the practice of regarding wage scales, agreed upon after an "open" period as retroactive, had been observed by all employers in the city of Washington for over fifty years; that union members were not permitted to work for less than the union scale; that the officials of the defendant were newspaper men of long experience and were thoroughly familiar with the practices in union shops; and finally, most significant of all, that the publishing company engaged a union foreman who proceeded to recruit compositors from the union ranks through the office of the union<sup>43</sup> and observed the tentative "open" union scale. Therefore, while it is true that the court refers to the retroactive feature of the new scale as a "custom so old, notorious, definite and uniform as to be binding on those within its purview," the decision continues, "one (a custom) admittedly known to the plaintiff in error and with reference to which the plaintiff in error contracted."<sup>44</sup>

Another recent federal case, *Kessel v. Great Northern Ry. Co.*,<sup>45</sup> not yet (September, 1933) carried beyond a district court, is of considerable significance because it represents one of the few cases in which an employer, sued for an alleged breach of contract, actually denies that a trade agreement creates any right of action vested in an individual union employee. It is unfortunate that in a case in which the issues are so clearly drawn, the reported decision contains but a very meagre statement of facts. All that may be said with certainty is that the plaintiff

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<sup>43</sup> The statement in 44 *Harv. Law Rev.* at 589 to the effect that "The defendant was not a member of the publishers association and had no dealings with the union" apparently overlooks the important fact that the defendant's foreman "advised the secretary of the local union that he was about to open a union newspaper shop in this city, and left word with him, the secretary, that he wanted union men." It seems certain, therefore, that even though the defendant was not a member of the publisher's association, he had substantially the same kind of direct dealings with the union as any of the other publishers.

<sup>44</sup> 32 *Fed. (2nd)* at 837.

<sup>45</sup> (D. C. Wash. 1931) 51 *Fed. (2nd)* 304.



workman sued his employer for an alleged violation of a clause in a trade union agreement which provided that there would be no discharge without trial. The court in passing upon the case denied that the plaintiff had established his claim to damages, saying,

No right of action accrued to the plaintiff by reason of the employment unless predicated upon contract or tort. The action is on contract and there is no allegation that the agreement was by reason of any stipulation incorporated with the service so as to entitle either party to enforce inter se the terms thereof.<sup>46</sup>

Although the court cites only a recent Canadian case,<sup>47</sup> it would seem (on the basis of the very scanty facts) that the Kessel decision is squarely in line with many American precedents.<sup>48</sup>

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<sup>46</sup> 51 Fed. (2nd) at 305.

<sup>47</sup> *Young v. Canadian Northern Ry.* (1930), 3 D. L. R. 352.

<sup>48</sup> This decision has been adversely criticized in 18 Va. L. Rev. 187, as follows: "The decision as it stands is a dangerous retrogression which may overthrow years of constructive development. That is not the spirit of our law. Should the courts follow this it will threaten destruction to a beginning of what has seemed to be a new and satisfactory era in the relations between employers and employees. Tear away the aid of the courts from the collective agreements, and we will return to the days of widespread strikes, boycotts, and acts of violence, by which employees who have no other means of procuring fair wages, fair hours and good working conditions, seek to equalize their bargaining power with that of their employer."

This, it is here submitted, is sheer romancing. The conclusion is based upon the following assumptions, all of which contain a large measure of error:

- a. That recent legal precedents do not support the Kessel decision.
- b. That what "seemed to be a new and satisfactory era" in industrial relations was due to the spread of collective bargaining. (Compare union membership of 1920 with that of 1930!)
- c. That there has been a decided retreat from violence in labor relations. (See Louis Adamic, *Dynamite* (Viking Press, 1931). Also, E. E. Witte, *The Government in Labor Disputes* (McGraw Hill Book Co., 1932), Chapters VI and IX.)
- d. That if strikes and boycotts have abated it has been because courts have recognized rights of union members as accruing under the trade agreement. (But note the retreat of unionism to sections of industry where for peculiar economic reasons, employers are willing to support, or at least tolerate collective bargaining. See Christenson, *op. cit.*, especially pp. 332, ff.)

The only case found<sup>49</sup> which clearly breaks this series of precedents is *Mastell v. Salo*.<sup>50</sup> Here, the plaintiff, Salo, a member of the United Mine Workers, had been employed by the defendant, an independent mine operator who had an agreement with the union. The agreement provided that in addition to the regular tonnage rates, miners whose working space was converted into entries through which to haul coal mined by other miners were to receive a yardage payment to compensate for the removal of dirt and rock from the space. After the plaintiff had been employed for some time, his employer decided to convert his working space into an entry. A short while thereafter it was brought to the attention of local union officials by some of the plaintiff's fellow workers that the plaintiff had received no "yardage" payment. It appeared that Salo did not know that the union agreement called for "yardage." Acting on his behalf, the union officials made a request for payment of "yardage," and when this was refused, agreed to submit the matter to arbitration. The arbitrator, a national officer of the union, ruled that Salo was entitled to payment for "yardage." When the operator still refused payment, this suit was brought. The reported decision of the Supreme Court is on an appeal from a judgment for the plaintiff.

From the standpoint of determining the legal rights of employees under trade agreements, the significance of the *Mastell* decision is blurred because of the possibility that the plaintiff might have recovered simply because he had ratified the acts of the union officials who negotiated for him during the arbitration proceedings, regardless of the terms of the original trade agreement. In spite of this possibility, however, it is clear that the case goes much further toward recognizing interests of union members as arising directly out of the working agreement than any other case yet reviewed.

There was testimony showing that for a long period Salo received semi-monthly statements of the amount due him for his work, that none of these statements included "yardage," and that Salo had been paid according to these and did not protest their correctness. On the basis of this testimony the defendant asked for an instruction to the jury to the effect that "if they so found

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<sup>49</sup> Except for the "third party beneficiary" and the "agency" cases, which stand on entirely different ground and which will be discussed later. See *infra* pp. 87, ff.

<sup>50</sup> (Ark. 1919) 215 S. W. (2nd) 583.

the failure to object to the accounts . . . would be regarded as an admission of their correctness." Although judgment for the plaintiff was reversed on another ground, on this crucial matter the appeal sustained the lower court in its refusal to give the instruction asked for, saying,

\* \* \* (the plaintiff) did not know that he was entitled to yardage until his attention was called to that fact by the pit committee, whereupon he then claimed it \* \* \* and the instruction was properly refused because it took no account of the issue that the appellee did not know when he received these statements that he was entitled to yardage.<sup>51</sup>

Here is a decision which does definitely break with the past. The plaintiff is entitled to a payment, called for by a provision of a trade agreement, of which provision on his own admission he was ignorant, and with reference to which he could not possibly have personally contracted.

Save for the Mastell case, from *Burnetta v. Marceline Coal Co.* to *Kessel v. Great Northern Ry.* the cases reviewed present an unbroken line of adherence to the rule that the trade agreement is a mere usage, creating no legal rights in the union members of employers who may observe it, unless its terms are adopted as a part of individual contracts of employment. The facts of the cases vary, but the law concerning individual employees interest under trade agreements of 1900 appears to be the law of 1933.<sup>52</sup>

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<sup>51</sup> 215 S. W. at 584.

<sup>52</sup> It will be noticed that this statement is sharply at variance with the first of the three main conclusions of Professor Rice, which reads:

From this review of the cases one may conclude with assurance that,

1. A collective employment agreement establishes a rule which, unless negatived, is a term of every employment relation established between any employer and any worker when each is a member of some organization which negotiated it, and perhaps when either the employer or the worker is so included; that it is a usage or, since knowledge of it is probably not necessary, a custom. 44 Harv. Law Rev. at 604.

If this means that a union member requires legally enforceable interests under a trade agreement when he accepts employment with a union shop, without any further evidence of adoption of the terms of the trade agreement, the "usage" cases discussed by Rice do not lend strong support to the conclusion.

The *Burnetta* case is admittedly out of line and regarded by Rice as "a fit contemporary for *Lockner v. New York.*" The *Hudson* case he

In all but one of the cases treated in the preceding section in which individual interests have been sustained, it has been shown that there has been evidence to justify the conclusion that the terms of the agreement were adopted by the employer and his workers as part of individual contracts of employment. But there are at least two other series of cases which stand on different grounds. The first of these consists of a group of cases in which the courts have regarded the union or its officials as authorized agents of the individual workers. A real difficulty in the application of agency principles is that ordinarily a trade agreement by itself does not create even the form of a complete contractual relationship between members of the union and any individual employer. Even with a trade agreement in force, the individual employment contract is ordinarily at will,<sup>53</sup> and it is only after performance by the employee that a unilateral contractual obligation arises.<sup>54</sup>

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regards as uttering only a dictum since the trade agreement had been complied with. If *Piercy v. Louisville & N. Ry.* was a "usage" case, there certainly was some evidence of adoption since the plaintiff had protested against modification long before he brought suit to protect his interests. See *infra.*, note 66. *Mosshamer v. Wabash Ry.* (Mich., 1922), 191 N. W. 210, holds merely that if the individual employee had acquired rights he could not enforce them by injunction. *Conductors v. Jones* (Col. 1925), 239 Pac. 882, was admittedly not clear, and *West v. Baltimore & Ohio* (W. Va. 1927), 137 S. E. 654, rejected the plaintiff's claim as "he was not shown to be within the collective agreement."

In the remaining four "usage" cases discussed by Rice individual interests were recognized, but there was ample evidence of adoption in each case (see *supra* pp. 76-83). The strongest case found which may support Rice's conclusion, *Mastell v. Salo*, he relegates to a footnote with only passing mention. Accuracy requires a return to the language of Fuchs, who, in spite of incomplete analysis of *Mastell v. Salo*, concluded his review of the early usage cases thus:

It is clear that in all the foregoing cases, the collective labor agreements \* \* \* were legal nullities. Of themselves they bound no one. In certain cases, however, where the facts warranted such a conclusion, they were vitalized as to certain terms by being expressly or impliedly incorporated into contracts to which the courts would give effect. (10 St. Louis Law Rev. at 5.)

Rice also appears to be responsible for the view expressed in Witte, *op. cit.* pp. 14-15.

<sup>53</sup> See *Hudson v. Cincinnati*.

<sup>54</sup> Professor Christ's extensive researches have disclosed a case which may be interpreted as holding that part performance by the employee creates bilateral contract. See J. F. Christ, "Federal Courts and Organ-

However, even where this is true, it does not absolutely prevent the recognition of workers' interests on the theory of agency. The fact that trade unions or union officials are not ordinarily vested with authority to make unconditional promises on behalf of union members does not mean that authority is also lacking to make conditional promises. The union officials may be given authority to promise that if any member of their organization accepts employment with any employer signing a trade agreement, he will do so on the union terms. In that event it may be said that the effect of the trade agreement is to define the employer's offer. The acceptance necessary to create contractual rights does not finally occur until some member of the union actually begins work. Once this has been done, unless the employer has repudiated the trade agreement in the meantime (which he may lawfully do, then contractual obligations might be defined by the union agreement.

Although not at once apparent, the use of this reasoning, where the facts permit, may give quite a different character to individual interests in union agreements than would be developed on an interpretation in terms of adoption of usage. If the interests recognized are contractual ones, then it would seem reasonable that individuals could hardly be supposed to have adopted provisions of which they had no knowledge<sup>55</sup> unless the provisions have been so long and commonly observed in the trade that it is fair to presume<sup>56</sup> them to be adopted if not specifically rejected. On the other hand there seems to be nothing in the principles of freedom of contract which is repugnant to permitting individual workmen to authorize officials chosen by them through more or less democratic machinery to make the kind of conditional promises suggested. Where such authority existed it would seem consistent<sup>57</sup> with the principles of contracts to enforce provisions of trade agreements even when employees might be ignorant of their specific nature.

The cases are not numerous, but circumstances have arisen in which the courts have found the use of the agency theory appropriate. The clearest application of this doctrine occurs in a series of New York cases where the individual interests of the

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ized Labor." *Journal of Business of the University of Chicago*, April, 1930, p. 218.

<sup>55</sup> As seems to be the case in *Mastell v. Salo*, see *supra*, pp. 22, ff.

<sup>56</sup> As perhaps might have been done in *U. S. Daily v. Nichols*, but in fact was not. *Supra*, pp. 18 ff.

<sup>57</sup> Not necessarily desirable, of course.

union members are treated collectively. Probably the most emphatic approval of the interpretation which regards the union as a legal agent of its members occurs in *Maisel v. Sigman*. Even though this case is important for its analysis of other points as well, its espousal of the agency theory is none the less clear. Concerning the trade agreement in litigation the court declared that,

In substance \* \* \* it is an agreement between employer and employees, and every clause of the same undertakes to regulate some phase of the relations between the parties as such employer and employees. \* \* \* The status of the union as such in connection with the agreement is primarily that of agent of the employees.<sup>58</sup>

It is worthy of emphasis that this language was not couched in general terms. It was drawn up with reference to the particular agreement of the International Ladies Garment Workers' Union, which was in litigation. The decision grew out of a natural interpretation of the intent of the parties as expressed in the agreement itself, which indicated that it was entered into "for and in behalf of the said union and for and in behalf of the members thereof, now employed and hereafter to be employed by the employer, with the same force and effect as if this agreement had been made between the said employer and the said union and all individual members now or hereafter employed by the said employer."<sup>59</sup> While it would be possible to avoid the conclusion that the union was meant to be regarded as an agent for its members (the agreement called for a union closed shop), it is certainly reasonable to interpret this language as indicating that members of the union authorized their organization to act for them.<sup>60</sup>

In an earlier case, *Schlesinger v. Quinto*, the same jurisdiction granted injunctive relief at the request of the officers of the

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<sup>58</sup> (Sp. Ct. N. Y. Cty. 1924) 205 N. Y. Supp. 807. Notice that the power of railroad employees to make even an unincorporated union an agent for them is now definitely established by Supreme Court interpretation of the Railway Labor Act of 1926. See *Texas and N. O. R. Co. v. Ry. Clerks*, (1930) 281 U. S. 548.

<sup>59</sup> *Ibid.*, at 820.

<sup>60</sup> Although it is not possible to be certain of all the terms from the reported decision, it is probable that this agreement was very similar to, if not identical with, that reproduced almost in entirety in U. S. Bureau of Labor Statistics, *Bulletin* 468, pp. 77 ff.

I. L. G. W. Union, who asked for an order requiring the employers' association in the case to rescind a resolution by which it was proposed to return to the practice of payment on a piece work basis in contravention of the terms of the trade agreement. For present purposes, it is important not to be misled to the conclusion that since the union officials brought suit they were acting on behalf of the union as a party principal. Rather it would seem that the action of the union officers was the formal means by which they sought to protect the individual interests of all the union members in a single suit. This at least seems to have been the treatment accorded by the court when in comparing the action with that in the Hitchman case<sup>61</sup> it said,

The only distinguishing feature in the instant case is that the applicants are workers. \* \* \* It cannot be seriously contended that the plaintiffs have an adequate remedy at law. \* \* \* There are over 40,000 workers whose rights are involved, and over three hundred members of the defendant organization.<sup>62</sup>

When the injunction was sustained by the Appellate Division, the statement that "the resolution \* \* \* required under the penalty provided in the by-laws of the (employers') association, that the employers break their agreements with their employees,"<sup>63</sup> indicated a similar interpretation of the rights involved.

Moreover, even though the point seems to have been only hastily considered, there is little room for doubt as to the manner in which the "rights" of these 40,000 workers had been acquired. In its summary of the facts, the Appellate Division states, "The union and the association made collective agreements with each other, with the authorization and on behalf of their respective members."<sup>64</sup> Later in the opinion, whatever doubt remains on the matter of whether the court actually meant to infer that a principal-agent relation existed is swept away by the observation,

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<sup>61</sup> Hitchman Coal & Coke Co. v. Mitchell (1917), 245 U. S. 229, in which officials of the United Mine Workers were enjoined from carrying on organization activities which interfered with individually made contracts of employment.

<sup>62</sup> (Sp. Ct. 1922) 192 N. Y. Supp. at 570.

<sup>63</sup> (App. Div. 1922) 194 N. Y. Supp. at 409.

<sup>64</sup> 194 N. Y. Supp. at 403.

Two organizations, one composed of employers and the other of employees, have entered into an agreement. Each had power through the consent of the members to enter into a binding obligation in their behalf.<sup>65</sup>

In view of the fact that the Schlesinger case and Maisel v. Sigman in all probability were concerned with identical agreements, and were decided in the same jurisdiction, is it not permissible to regard them as complementing each other and establishing beyond doubt a willingness of New York courts to recognize individual interests arising out of a trade agreement on agency principles where facts permit the interpretation that an association has the authority to act for its membership? Subsequent decisions from New York certainly encourage an affirmative answer.<sup>66</sup>

To the courts of New York also must go the credit for introducing the use of the third party beneficiary doctrine in the trade union agreement cases. The earliest application found is in the

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<sup>65</sup> *Ibid.*, at 410.

<sup>66</sup> See *Goldman v. Cohen* (App. Div. 1928) 227 N. Y. Supp. 311 and *Ribner v. Raco Butter & Egg Co.* (Sp. Ct. 1929), 238 N. Y. Supp. 132. It should be emphasized that in both these cases the court was mainly concerned with the interest of the union as a party principal, but there is evidence that it was also regarded as agent for the membership as well.

Also see *Meltzer v. Kaminer* (Sup. 1927), 227 N. Y. Supp., where at 461 the court says, "It is not unreasonable, therefore, that the local, which represented as agent each of its members, be restrained from calling the strike in violation of the written agreement."

*Barnes v. Berry* (C. C. A. 1909), 169 Fed. 225, and *Fell v. Berry* (1908), 108 N. Y. Supp. 669, were early cases decided on agency principles holding that in the particular circumstances the union officials had exceeded their authority. Aside from the New York cases the only ones found in which it seems reasonable to assume that the court adopted an agency interpretation are *Aden v. Louisville N. R. Co.* (Ky. 1921), 276 S. W. 511, holding that an employee having authorized union officials to negotiate for him cannot have injunction against operation of a trade agreement, and possibly *Piercy v. Louisville N. R. Co.* (Ky. 1923), 248 S. W. 1042, which the writer interprets on the agency theory and as holding that a union member may have injunction against modification of agreement where union officers act outside authority. But compare this interpretation with that by Rice, 44 *Harv. Law Rev.* at 595. In view of the fact that at least some of the New York cases were known to Professor Rice, the writer is at a loss in attempting to harmonize the conclusions here arrived at regarding the use of the agency theory with Rice's statement (after discussing *Barnes v. Berry*), "No other case has been found that deliberately adopts an agency theory."



case of *Gulla v. Barton*.<sup>67</sup> Here, a workman in ignorance of the exact terms of the working agreement of his union, upon discovering that he had worked for some time at less than the union scale, brought suit to recover the difference between the wages paid him and the amount he would have received according to the union rate. The theory upon which the court granted his request was clearly indicated in the declaration:

We have therefore a situation where the plaintiff received from week to week the wages contemplated by the contract of employment between him and the defendant, and his union unbeknown to him made a contract for his benefit based upon a separate consideration passing from the union, that he as a member thereof should receive a greater compensation.<sup>68</sup>

Although a number of courts have followed the holding in *Gulla v. Barton*, so far as can be determined from the reports, they have all overlooked the significant fact of incorporation<sup>69</sup> of the union involved in that case, and extensive search has revealed no other case decided on the third party beneficiary principle which involved an agreement by an incorporated union.

A case which illustrates the use of both agency and third party beneficiary principles is *Blum v. Landau*<sup>70</sup> in which the plaintiff, one Rose Landau, obtained a judgment for wages due under the terms of a trade agreement made by the International Ladies Garment Workers' Union with the Cleveland Garment Manufacturers' Association. Most of the opinion is given over to consideration of the obligation of the defendant employer, and the

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<sup>67</sup> (App. Div. 1914) 149 N. Y. Supp. 952.

<sup>68</sup> *Ibid.* at 953.

<sup>69</sup> Possibly a mechanical error accounts for the statement, "The plaintiff, a member of an unincorporated union, etc.," which appears in *Rice*, *op. cit.* 44 Harv. Law Rev. at 596. Because of the importance of the point, the exact language of *Gulla v. Barton*, which is certainly clear and unambiguous, may be quoted: "He (i. e., the plaintiff) brings this action \* \* \* basing his claim upon an agreement made between the defendant and the Malsters' Union 48 \* \* \* of which he was a member, and which was a local subordinate branch of the International Union of the United Brewery Workmen of America (name changed in 1918), the former being incorporated under the laws of the state of New York and the latter being incorporated under the laws of the state of Ohio. 149 N. Y. Supp. at 952-3. Cf. Comment in 41 Yale Law Jour. at 1224, note 25, which recognizes fact of incorporation in *Gulla* case.

<sup>70</sup> (Ct. App. Ohio 1926) 155 N. E. 154.

court held his duties under the trade agreement clearly established because of: 1. An original agent and principal relation between representatives of the employers' association and Blum and Company;<sup>71</sup> 2. Failure to give the required notice of desire to terminate; and 3. Acquiescence even after modification of the agreement.

While it is possible that the court might have held that the plaintiff had acquired rights by adopting the terms of the trade agreement,<sup>72</sup> it is clear that its decision on this point is based on other ground. The language, "The great weight of later decisions is to the effect that where the name of the third party does not appear to the contract, if the terms are made for the benefit of such persons, the provisions of the contract are enforceable \* \* \*" admits of only one interpretation.<sup>73</sup> Although it was known to the court that the union in the case was unincorporated, there is no indication that any consideration was given to the question of how an association, presumably incompetent to contract on its own behalf, could enter into a contract on behalf of third parties.

Two recent contemporary cases<sup>74</sup> have elicited approval of enforcement of employee interests upon third party beneficiary

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<sup>71</sup> The agreement itself stated, "\* \* \* this agreement is entered into between the Cleveland Garment Manufacturers' Association on behalf of those of its members whose signatures are attached hereto and the union."

<sup>72</sup> While discussing the obligations of the defendant the court recognized that "\* \* \* under all cases involving a voluntary unincorporated association, mere acquiescence is sufficient to make the contract valid and to bind the members of the association thereto." 155 N. E. at 156. Notice also that it is entirely possible that there might have been recovery in this case without direct reliance on the trade agreement simply on ground of quasi-contracts.

<sup>73</sup> 155 N. E. at 157. Although referring to "the great weight of later decisions," the court cites only one case, *Cleveland Ry. v. Heller* (1921), 15 Ohio App. 346, holding that a citizen, injured because of damaged pavement which defendant railway had contracted to keep in repair, has cause of action against railway company.

<sup>74</sup> Other possible third party beneficiary cases are *Hall v. St. Louis & San Francisco Ry.* (Mo. 1930), 28 S. W. (2nd) 687 and *David Adler & Sons v. Maglio* (Wis. 1929), 228 N. W. 123. Perhaps the early cases *Jacobs v. Cohen* (Ct. App. 1905), 183 N. Y. 207, and *Simers v. Halpern* (Sup. Ct. 1909), 114 N. Y. Supp. 163, may illustrate another variant in the third party beneficiary group, if it is permissible to interpret them as cases where the union was made a third party beneficiary in the event of breach of the individual contracts of employment of union members.

In the *Hall* case an employee recovered damages for breach of discharge clause, and the court used third party beneficiary language. It

principles by courts of last resort. In one of these, *Johnson v. American Railway Express Company*,<sup>75</sup> a member of an unincorporated<sup>76</sup> union, discharged without trial as called for in the union working agreement, brought suit for damages. The defendant express company's motion for nonsuit, granted in the lower court, was overruled upon appeal to the Supreme Court of South Carolina, and the case was remanded for a new trial. The basis upon which the court recognized the employee's rights in the trade agreement is indicated by the numerous cases<sup>77</sup> sustaining rights of third party beneficiaries, as well as by the language, " \* \* \* it is plain that if the contract be legal and valid and secures a benefit to the members, each would be entitled to enforce such benefit." In spite of the fact that the court clearly recognized the plaintiff's right to sue on the agreement as a third party beneficiary, however, the opinion continues,

No legal objection to the legality or validity of such an agreement has been urged by the employer or has occurred to the court. On the contrary, in the present case, it has been signed by the employer, promulgated and acted upon by it; it must be assumed that it was known to the employees and was an inducement to them to enter or continue in the service, the employer would be estopped to deny its binding force.<sup>78</sup>

After this language it is a matter for wonderment why the court feels impelled to repudiate the *Hudson* case and *Burnetta v. Marcelline Coal Co.*<sup>79</sup>

*Yazoo M. V. Ry. Co. v. Sideboard*<sup>80</sup> is less ambiguous and more daring. *Sideboard*, the plaintiff, had been employed by

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would appear, however, that there was an individual employment contract for three years, which although oral and therefore void, was not contested and might have been acceptable as evidence of adoption.

In the *Adler* case individual interests were not the primary concern and are not discussed in the reported appeal decision cited. But the decision in the lower court, a manuscript of which has been made available through the courtesy of Mr. William Quick, one of the attorneys in the case, is in terms of third party beneficiary rights.

<sup>75</sup> (S. C. 1931) 161 S. E. 473.

<sup>76</sup> Fact not stated in opinion, but see U. S. Bureau of Labor Statistics, Bulletin 420, p. 74.

<sup>77</sup> No less than fourteen cases are cited, but investigation shows that not one of them involved a union working agreement. See 161 S. E. at 476.

<sup>78</sup> 161 S. E. at 476.

<sup>79</sup> See *supra*, pp. 74 ff.

<sup>80</sup> (Sp. Ct. Miss. 1931) 133 So. 669.

the defendant railway for eighteen years, during the last ten of which the company had a working agreement with the Brotherhood of Railroad Trainmen. Some relevant parts of the agreement read: "Rights in this agreement shall be understood to apply for both white and colored employees alike," and "\* \* \* road trainmen performing more than one class of road service in a day or trip will be paid for the entire service at the highest rate applicable to any class of service performed."<sup>81</sup>

The plaintiff, who because of color was ineligible for membership in the Brotherhood, for fourteen years continuously performed the joint duties of porter and brakeman, and during the first seven years following the date the trade agreement went into effect (June 1, 1918),<sup>82</sup> he was paid the brakeman's scale in accordance with the union agreement. Four years before his discharge the company decided to pay him at a lower rate applicable to porter service. Although "appealing for a recognition of \* \* \* rights to brakeman's pay \* \* \*" the plaintiff accepted and cashed the checks offered at the lower rate, except during his last year of employment with the company, when he refused to do so and continued to work without receiving compensation. He was discharged when the company "saw that there was no probability of a change in attitude \* \* \* in respect to this matter of pay." For the period during which he had worked without compensation, the court recognized the plaintiff's right to wages at the union brakeman's scale, but held that during the previous three years he had waived his rights under the trade agreement by accepting pay at a lower rate.

After citing the Hudson, Burnetta, and West cases the court went on to say, "these rulings have been left in the rear in the advancement of the law on this general subject, and the holdings now are that these agreements are primarily for the individual benefit of the members of the organization, and that the rights secured by these contracts are the individual rights of the individual members of the union, and may be enforced directly by the individual."<sup>83</sup> But the cases which were cited<sup>84</sup>

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<sup>81</sup> 133 So. at 670.

<sup>82</sup> Some of the terms of the union agreement were originally effective as an order from the Director General of the Railroads during the period of Federal control, but there is no question as to novation as it is clear that the language of the order was incorporated in the agreement between the union and the company.

<sup>83</sup> 133 So. 671.

<sup>84</sup> *Piercy v. Louisville & N. R. Co.* (Ky. 1923), 248 S. W. 1042; *Gulla v.*

to illustrate the "advancement of the law," it was recognized did not go far enough to support the plaintiff's rights in this case. After noticing "that a third party may recover on a contract made expressly for his benefit," in Mississippi, the court proceeded to show that even though the plaintiff was not a member of the union, it was intended that he should be a beneficiary under the agreement. This is the distinctive feature of the Yazoo case; it provides the only decision found where a non-unionist is permitted to acquire interests in a trade agreement as a third party beneficiary.<sup>85</sup>

But the Yazoo decision must be interpreted squarely in the light of the particular agreement involved. The court did not say that a non-unionist would be permitted to recover on any working agreement made by a union with his employer.<sup>86</sup> It was clear that since the agreement did not provide for the closed shop, and since the union did not admit negroes, the provision which called for equal treatment was inserted intentionally to remove a possible cause for discrimination against union members.

The cases where courts have recognized individual workers' interests arising out of trade agreements on third party beneficiary principles furnish an appropriate transition to a consideration of the extent to which the union per se acquires legal rights or duties under working agreements. It will be recalled that in only one of these cases was there an incorporated union in-

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Barton (1914), 149 N. Y. Supp. 952; Blum v. Landau (Ohio, 1926), 155 N. E. 154; Cross Mt. Coal Co. v. Ault (Tenn. 1928), 9 S. W. (2nd) 692. The court overlooked the fact that the union was incorporated in the Gulla case, and there is certainly ample ground for holding that in Piercy and Cross Mt. cases there was either adoption by the individual or actual agency. This leaves the Blum case as the only one really parallel to the case at bar, and even it did not involve a suit on a union agreement by a non-member.

<sup>85</sup> But note Gregg v. Starks (Ky. 1920), 224 S. W. 459, permits non-unionist to protect seniority rights defined in trade agreement, probably because terms supposed to be incorporated in contract of employment.

<sup>86</sup> As seems to be implied in the note in 26 Ill. Law Rev. at 922, which concludes that the Yazoo decision "leads one to wonder whether organized labor has entrapped itself. Will labor favor a result which gives the benefits of its efforts to a non-union employee and indeed to members of a rival organization." In point of fact "labor" (i. e., organized labor) probably has less cause for concern when "the benefits of its efforts" do accrue to non-unionists than when they do not. For example consider the economic factors involved in Alco Zander v. Amalgamated Clothing Workers (D. C. Penn. 1929), 35 Fed. (2nd) 203.

volved,<sup>87</sup> and yet in none of them was there any discussion as to the question of competency. Because of this fact it is hardly warranted to conclude that this small number of cases, even in the jurisdictions in which those cases were decided, definitely establish that unions have come to be regarded as competent contracting parties. Nevertheless, the decisions are there, and they cannot be brushed aside merely as legal anomalies. The fact remains that in these decisions labor unions were permitted to act as competent parties, and therefore in these particular cases were to all intents and purposes competent. The cases might thus come to constitute steps in a movement to vest labor unions with new attributes<sup>88</sup> of legal personality without requiring the formal act of incorporation.

The same significance cannot be attributed to the cases where individual union members acquire rights because it is held that the union (not the union officials, who are rather in these cases agents of the union) has acted with authority from its membership. While it will be seen that some of the agency cases do go further in holding that the union is not merely an agent, competency of the union to contract on its own behalf is not implied from the fact that it is recognized as agent for its members.

An early case in which the union was recognized as having the power to act as an agent for its members, and in the exer-

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<sup>87</sup> i. e., *Gulla v. Barton*, 149 N. Y. Supp. 952. If *Hall v. S. F. Ry.* 28 S. W. (2nd) 687, is interpreted as decided on third party beneficiary lines, another exception might have to be made, although it is probable that even here the union was unincorporated.

<sup>88</sup> The rule that corporate responsibility may be attached even to unincorporated unions was clearly stated in New York as early as 1920 in *Micheals v. Hillman*, 183 N. Y. Supp. 195, and by federal courts in the now famous *Coronado Coal Co. v. United Mine Workers* (1922), 259 U. S. 344, (1925) 45 Sp. Ct. 555. Apparently the rule is gaining acceptance. See *Christian v. International Association* (D. C. Ky. 1925), 7 Fed (2nd) 481; *Alden Bros. v. Dunn* (Mass. 1928), 162 N. E. 775; *Syz v. Milk Wagon Drivers Ct.* App. Mo. 1930), 24 S. W. (2nd) 1080. It should be strongly emphasized that the rule of the *Coronado* case does not necessarily go so far as to recognize competency, for competency is a power. The court there held that because unions had been given some powers, they should also be forced to accept corresponding responsibilities. If the power to contract was not one granted by law apart from the *Coronado* case, that case does not necessarily grant the additional power of competency merely because it imposes a new corporate liability. The recognition of this power although it may not be far distant, is a separate step. Cf. E. H. Warren, *Corporate Advantages Without Incorporation*. (Baker, Voorhis & Co. 1929) especially pp. 648, ff.

cise of which, this power may have become "coupled with an interest" is that of *Saulsberry v. Coopers' International Union*.<sup>89</sup> Strangely enough, the decision in this case was issued by the same court<sup>90</sup> which one year later was to write the famous decision of *Hudson v. Cincinnati Ry. Co.* In the *Saulsberry* case the employer, who had been operating his cooperage factory with union labor, found that the union would not renew its agreement with him save at a higher wage rate than had been granted by agreement to other union employers in his vicinity. The officials had reclaimed the union stamp, and since there was a union rule to the effect that members could work only in an establishment supplied with the union stamp, this action amounted to calling a strike. The plaintiff's petition requested that the union be compelled, either to grant him the use of the stamp, or to make an agreement with him on the same terms as those granted to his competitors. From a judgment dismissing his petition the plaintiff appealed without success.<sup>91</sup>

It will be noticed that there was no question of enforcement of the trade agreement in the case since the agreement involved had terminated. The sole question was whether a court would compel a union to make a new trade agreement, but in deciding that question the court made the significant observation,

The old contract has been made with the union. The union alone was clothed with power to contract for its members, and the contract, if made at all, had to be made by the union. Hence the wish or will of individual members cannot be considered in determining the rights of the parties to the controversy. If the

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<sup>89</sup> (Ky. 1912) 143 S. W. 1018.

<sup>90</sup> There is some question as to how the Kentucky courts could acquire jurisdiction as this union was treated as an entity and central offices of both local and international were in Cincinnati, while the employer's business was in Covington. Although the report does not so state, it is probable that both unions were unincorporated. On this latter point see *Hopkins v. Oxley Stave Co.* (C. C. A. 1897), 83 Fed. 912.

<sup>91</sup> Note that the holding is not necessarily in conflict with the contemporary case of *Powers v. Journeyman Bricklayers Union* (Tenn. 1914), 172 S. W. 284, where the union "assumed \* \* \* the obligation to give notice of terms" and where failure to give such notice resulted in contractor paying more than the union scale. Such failure was regarded as a "continuing misrepresentation" resulting in damage to the employer, for which the union was liable but since it was unincorporated, the court held its membership must be sued by the device of representative actions.

union had a right through its representatives to contract, which is not denied, then the desire of the individual members cannot be taken into consideration at all, and it is immaterial whether they were satisfied or dissatisfied with the proposed arrangement.

It is remarkable that this is from the same court,<sup>92</sup> even from the same judge,<sup>93</sup> who only twelve months later was to write,

A labor union as such engages in no business enterprise. It does not and cannot, bind its members to a service for a definite, or for any period of time, or even to accept the wages and regulations which it might have induced an employer to adopt in the conduct of his business. \* \* \* Contracts between an individual member of a union and an employer for personal service, being merely incidental to the broad purposes of the union, its agents, in action for the union, in no way bind the individual members thereof.

While it is true that this is really dictum so far as the result in the Hudson case is concerned,<sup>95</sup> nevertheless, this dictum has been so influential in later cases that it is worthwhile analyzing the contrast between this holding and the Saulsberry decision.<sup>94\*</sup> Suppose in the latter case that all the employees of the plaintiff had been willing to work for the rate of 35 cents per hour, while all the other members of the union voted to establish the scale of 40 cents per hour, and that the union officials succeeded in getting all the union employers, except the plaintiff to agree to pay the higher scale. Now, since the union has also by the majority rule determined that no members can work in any shop not supplied with the union stamp, it can, in accordance with the Saulsberry decision, effectively deny members their power of making individual employment contracts while they remain in the union.

Here is personality; here through the principle of majority rule the organization acts as a unit; the wills of individual members do not matter; by agreement they have created a collective will, which creation may appear to be an anomaly in language,

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<sup>92</sup> One of the seven members of the bench was new in 1913.

<sup>93</sup> J. Lassing wrote the opinion in both the Hudson and Saulsberry cases.

<sup>94</sup> See *supra*, p. 12, also Rice *op. cit.* p. 585.

<sup>95</sup> See p. 100.



but is in fact a reality. It does not follow, however, that the results in these two cases are inconsistent merely because the theory upon which they are decided appears to be. In the Hudson case the individual union man who brought the suit alleged that all those members of the union "who accepted employment under the contract, undertook to work for a period of two years," merely because the trade agreement was to be effective for that length of time. Now anyone at all familiar with trade union practice knows that this is certainly not the intent of the parties at the time a trade agreement is made. Neither the employers, the union representatives, nor the individual workers who accept employment in union shops ordinarily anticipate that the employment will be for the period of the trade agreement. Apparently in the Hudson case the court was faced with a contention, so far from the ordinary contemplation of collective bargaining, that it felt under obligation to refute it, even though the refutation was irrelevant to a holding on the plaintiff's substantive rights and even at the expense of generalizing too broadly.

But in the Saulsberry case the court was confronted with a *fait accompli*. The union there actually had made an agreement "by the terms of which the union was to furnish union labor \* \* \* for one year at the stipulated price of 35 cents per hour for a day's work consisting of nine hours. The union supplied (the) shop with a stamp \* \* \* which was to be used on all cooperage manufactured at (the) factory \* \* \* (and) under this agreement, the business was conducted during the life of the contract."<sup>96</sup> It was in this situation that the court held that, "If the union had a right, through its representatives to contract (which was not denied), then the desire of the individual members cannot be taken into consideration at all."<sup>97</sup> Which perhaps demonstrates nothing more than that even the judicial mind

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<sup>95</sup> The language of the Burnetta decision which the court quotes with approval in the Hudson case is still more pointed: "That the Miners union, as an organization, cannot make a contract for its individual members in respect to the performance of work and the payment for it, in our opinion is too clear for discussion." 79 S. W. at 139. Evidently the court had not discovered the Burnetta case when the Saulsberry decision was written. Perhaps the decisions are to be explained as holding merely that the facts of the Burnetta case did not warrant the conclusion that the "Miners' Union" had power to act for its membership while in the Saulsberry case there was evidence of actual authorization.

<sup>96</sup> 143 S. W. 1019.

<sup>97</sup> 143 S. W. at 1020.

works more accurately when dealing with concrete facts than it does in a vacuum.

In the *Saulsberry* case it is clear that the union is given a real part in the cast.<sup>98</sup> The relation existing between the individual members and the union officials is not that of principal and agent.<sup>99</sup> The principal-agent relation exists rather between the individual members and the union, as a result of which fact the agency power tends to take on an irrevocable character so far as any single union member is concerned.<sup>100</sup> The agency relation is brought about, not by the direct delegation of authority to a real person, but rather by the subordination of the wills of individuals to a "collective will" functioning through the principle of "majority rule." Hence, "if the union [has] a right (power?) to contract \* \* \* then the desire of the individual members cannot be taken into consideration at all, and it is immaterial whether they are satisfied or dissatisfied."

Thus it is clear that through association and the operation of "majority rule" an artificial personality has been created. It does not follow, of course, that this personality has the power to enter into contracts on its own behalf. Persons otherwise incompetent may have capacity to act as agents.<sup>101</sup> Similarly, it may be noticed that the equitable device of representative actions,<sup>102</sup> the numerous statutes which provide for special procedure against unincorporated associations,<sup>103</sup> and even the laws which

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<sup>98</sup> Compare this case with *Meltzer v. Kaminer* (Sp. 1927), 227 N. Y. Supp. 459. Although scanty facts are included in the report, it seems clear that the *Meltzer* decision illustrates a similar judicial treatment of the relation between the union and its members. See particularly p. 461.

<sup>99</sup> Though the union officials might, of course, be agents of individual members.

<sup>100</sup> Mark that this is not because agency power has become "coupled with an interest" as is true in some cases. In some of the union agency cases, however, the union may actually have rights also. See *Mechem, Agency* (2nd Edition Callaghan 1914), Vol. I, fig. 570.

<sup>101</sup> See *Ibid.* Vol. 1, fig. 154.

<sup>102</sup> See 32 *Yale Law Jour.* 59. Federal Equity Rule 38, see 226 U. S. 659.

<sup>103</sup> New York statute permits suit by or against union in name of president or treasurer. *Cahills Consolidated Laws* (1923), Ch. 20, Art. 3, Fig. 12. Maine, similarly, *Rev. St.* (1916), Ch. 87, Sec. 29, p. 1225. In Conn. and Mich. association may be sued in association name. See *Conn. Gen. Sts.* (1918), Vol. 2, Ch. 293, Sec. 5611; *Mich. P. Acts* (1897), Art. 25, Fig. 1.

Cf. E. E. Witte, *Government Labor Disputes* (McGraw Hill Book Co. 1931), pp. 142 ff.; also *Warren op. cit.* pp. 542 ff.

allow for incorporation of unions,<sup>104</sup> do not any of them necessarily imply contractual capacity.

A search for evidence of judicial willingness to recognize interests in trade agreements as accruing to the labor union per se, meets with its initial success in the New York state cases. Although not by any means inevitable, this perhaps represents a natural development from previous evolution. New York, as early as 1851, by statute, adopted procedure for suits by or against unincorporated unions in the name of president or treasurer, and very early permitted incorporation under the Membership Corporation Law. Even though not followed in modern cases, its courts appear to be among the first to apply the third party beneficiary theory, and have on several occasions recognized union capacity to act as a legal agent for its members. Moreover, even before the Federal Supreme Court had placed its approval on the rule of union responsibility in the Coronado case, New York had clearly enunciated the doctrine.<sup>105</sup>

Against this background appears the case of *Goldman v. Cohen*,<sup>106</sup> bringing with it what seems to be the first clear recognition of an interest in a trade agreement vested in a union acting as a principal party. In spite of the fact that this case is frequently treated as parallel with *Schlesinger v. Quinto*, it is

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104 " \* \* \* nothing \* \* \* in any of the laws relating to stock corporations provides for the actual business of trade unions in contracting with employers as agents of the employees. This primary object of trade unions finds no recognition of course, in the non-stock corporation laws, although the unions that have incorporated in New York have done so under the Membership Corporation Law, which applies to benevolent, charitable, scientific and missionary societies." (New York State Dept. of Labor, 1914), Annual Report of Commissioner, Part VII, p. 279.

Recall that in *Gulla v. Barton* the local and international unions involved were incorporated in New York and Ohio respectively. In light of the quotation above, it seems doubtful whether the local union had acquired competency by incorporating in New York, although perhaps the language of the Ohio law, which permitted incorporation of mechanics' associations formed for "mutual protection" was sufficiently broad to grant legal capacity to contract. See Twenty-Second Annual Report of Commissioner of Labor (Washington, 1907), p. 986.

<sup>105</sup> See *supra*, p. 38, note 88. Note also that in 1922 a Supreme Court of New York County used the following language, "To identify the union with the acts of others, clear and convincing evidence is required. A labor union is a legal entity. Between it and its members there is a distinction as well defined as that existing between the individual members of the union." *Segenfeld v. Friedman*, 193 N. Y. Supp. 128.

<sup>106</sup> (App. Div. 1928) 227 N. Y. Supp. 311.

clear that the Goldman case stands on other ground. In it the plaintiff was an official of the International Pocket Book Workers Union, who requested an injunction against an employer who had threatened breach of a union working agreement. The case as reported was on the employer's appeal from an order which granted the plaintiff's motion for a temporary injunction, and from an order which had granted a motion to resettle. Although the order as resettled was held to go beyond the sphere justified by the terms of the agreement, nevertheless, the appeal court clearly recognized the plaintiff's right to injunctive relief.

Whether the union may collect damages on behalf of individual employees it is not necessary to decide . . . it is certain that the union has more at stake . . . than the sum of the damages occasioned by the unlawful discharge of all the members of the union . . ."<sup>107</sup>

Here is language without precedent.<sup>108</sup> Before this no court had recognized such rights as accruing under a trade agreement to an unincorporated union. But *Goldman v. Cohen* has not been without its lineal descendants<sup>109</sup> even in other jurisdictions, although they have not been numerous.

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<sup>107</sup> *Ibid.* at 314.

<sup>108</sup> The court cites *Reynolds v. Davis* (Mass. 1908), 84 N. E. 457; *Folsom v. Lewis* (Mass. 1911), 94 N. E. 316; *Nat'l Protective Ass'n v. Cummings*, 65 N. Y. Supp. 946, affirmed (1902) 63 N. E. 369; and *Schlesinger v. Quinto*. Of all these citations that of *Schlesinger v. Quinto* is the most appropriate, but even this case is not strictly in point. See *supra*, pp. 28 ff.

<sup>109</sup> *Engelking v. Independent Wet Wash Co., Inc.*, may be nothing more than a repetition of *Schlesinger v. Quinto*, but it resembles the Goldman case in some respects. (Unreported, Sup. Ct. 1931), 13 *Law and Labor* 224; *Weintraub v. Spilke* (1931), 255 N. Y. Supp. 50. Here, even internal reorganization of the union was held not to influence employers' obligations under the trade agreement. In *Moran v. Lasette* (1927), 223 N. Y. Supp. 283, it was suggested that a union might have an injunction against a lockout where it was in violation of a working agreement though it could not obtain one in this case because of previous breach. *Lundoff-Bicknell Co. v. Smith* (Ohio App. 1927), 156 N. E. 243, may appear to deny a similar remedy to an employer, but here the injunction was really denied because a sympathetic strike had not been authorized by the union.

But in *Preble v. Architectural Iron Workers* (1931), 260 Ill. App. 435, an injunction against a strike in direct violation of agreement was sustained, saying, "We think that the contract (trade agreement) entered into between the complainant and the Iron League of Chicago, and the defendant union is a valid contract." p. 440. (Note the union was incorporated.)

Two recent cases from widely separated jurisdictions merit detailed attention. *Chinese American Restaurant Inc. v. Finigan*<sup>110</sup> was decided on appeal to the Supreme Judicial Court of Massachusetts in 1930. The plaintiff, a restaurant proprietor, brought a bill in equity to restrain the officers of an unincorporated musicians' union with which the plaintiff had a trade agreement, from interfering with the employment relations of the musicians hired under this agreement. After sustaining a demurrer to the original bill, the trial judge gave permission to file an amended bill. The "amended and alternative" bill alleged a separate oral contract between the plaintiff and the musicians employed by him, and in a second hearing the lower court stated that, ". . . if it stood alone, . . . the alternative bill would not be open to demurrer, but treated as an alternative ground for relief, it appears to be inconsistent with the allegations in the amended original bill in that it ignores the contract with the union pleaded in the original bill."<sup>111</sup> Accordingly the bill was dismissed, and upon appeal this final decree was affirmed.

It seems that by the trade agreement in this case, effective to June 1, 1930, "the association (musicians union) agreed to furnish eight musicians, members of local nine, as their agent, at the restaurant for a stipulated weekly price." On October 19, 1929, the officers of the union notified Bittel, the orchestra leader, whose orchestra had been playing at the plaintiff's restaurant, that in accordance with a policy adopted by the union, he was to be transferred to another location. The plaintiffs alleged that

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The decision of this case was not availing to the writer when the manuscript for *Collective Bargaining in Chicago* was undergoing its final revision. Hence, then the exact form of the injunction was not clear. It is certain, however, that circumstances surrounding the case included a wage dispute which was not in violation of the agreement and to which the court decision does not refer. See Christenson, *op. cit.* p. 51 ff.

A case in which a union was granted an injunction against third parties who were interfering with relations with employing contractors is *Carpenters Union v. Citizens Committee* (1928), 333 Ill. 225.

A case in which a discrete union interest in a trade agreement was sustained on what appears to have been very inadequate attention to the particular facts, and where the court assumes without discussion that the New York cases were parallel is *Weber v. Nasser* (Cal. 1930), 286 Pac. 1074, but the question as to enforceability had become moot upon appeal, so that the supreme court failed to pass on the decision, (1930) 292 Pac. 637. See also *Ribner v. Racso Butter & Egg Co.* (1929), 238 N. Y. Supp. 132.

<sup>110</sup> (Mass. 1930) 172 N. E. 510.

<sup>111</sup> 172 N. E. 511.

this order was not only an effort to bring about a breach of a personal oral agreement with Bittel that he would continue in his employment with the plaintiff until June 1, 1930, but also that the order was a direct violation of the trade agreement itself.

A fair interpretation of this case must emphasize the fact that the plaintiff did not contest the existence of a valid contract in the trade agreement. While admitting the fact of the trade agreement, he sought rather to enforce a personal oral agreement, which the court held to be an inconsistent position upon a proper interpretation of the union agreement. Nevertheless, for present purposes the case is significant because the court does recognize that a union per se may acquire rights and duties under a trade agreement.<sup>112</sup>

A stronger case<sup>113</sup> illustrating union interest comes from the Texas Court of Civil Appeals. The action was brought by an unincorporated union which asked for an injunction to restrain breach of a closed shop rule in its agreement with the defendant employer. From an order granting the injunction the employer appealed, but without success.

In a lengthy opinion, which fortunately embodies a detailed statement of facts although it evidences an uncritical reading of the legal literature, the court not only sustained the plea for relief, but actually went out of its way to make clear that its decision was based upon a recognition of a union interest. The ingenious brief for the union had made it clear that the plaintiff's plea did not rest upon the claim that the union per se had a legal interest in the agreement. Rather it was argued that the union represented the individual members and it was alleged, That under the contract (sic) . . . the defendants bound and obligated themselves to employ their electricians from among the membership of the said Local Union . . . ; that no specific number of employees were named who were to be so employed, nor the length of time they were to be retained . . . and that therefore, these plaintiffs come and say that the damages sustained by them and each of them cannot be measured by any pecuniary standard known to the law.<sup>114</sup>

In spite of this pleading, the court states :

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<sup>112</sup> "With this contract in force the association violated no duty it owed to the plaintiff \* \* \* but was exercising rights acquired by its contract \* \* \*" 172 N. E. at 512.

<sup>113</sup> Harper v. Local 520 (Tex. 1932), 48 S. W. (2nd) 1033.

<sup>114</sup> Ibid at 1039-40.

We are not concerned here with the agreement from the viewpoint of the legal rights inuring thereunder to the individual members of the union; . . . (here the court cites 44 Har. Law Rev. 572).

Aside from those aspects of the agreement which give rise to legal rights in favor of the individual members of the union as such . . . the collective agreement is now treated in a number of jurisdictions as a contract also between the organization or group as such and the employer.<sup>115</sup>

Although the specific defenses were on other grounds,<sup>116</sup> and although the plaintiff's argument did not rest upon the contention of union competency, it is clear that the decision of the court is based squarely upon the assumption that the union per se is a distinct personality which has somehow acquired the power to make contracts. The opinion will be searched in vain, however, for an explanation of how this capacity was created.

### III. SUMMARY AND CONCLUSIONS.

In spite of some clear inconsistencies in the decisions, as well as of doubts which must exist regarding their interpretation, certain conclusions emerge from this discussion. The first is that, on occasions courts have recognized rights arising out of the trade agreement in favor of the union as a personality, as well as for the benefit of individual employees.

In the cases involving individual interests under union agreements, three lines of reasoning have found clear expression, but these are not necessarily in conflict. It may be that they represent not essentially different rules of law, but that each one is applicable to different sets of facts.

In the first group of cases reviewed, which seem to represent by far the most common circumstances where litigation has involved the trade union agreement, all that may be concluded with certainty is that the terms of the union agreement will define the workers' rights where there is a fair basis upon which to presume that they were adopted as a part of the contract of em-

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<sup>115</sup> *Ibid* at 1037.

<sup>116</sup> The defense argument was based upon 1, absence of consideration; 2, inappropriateness of injunctive relief; 3, public policy. If the opportunity presents itself the writer proposes, at a later time, to undertake an intensive analysis of the treatment of all three of these matters in the cases involving trade union agreements.

ployment. Unless there is evidence of actual agency or unless the union itself is regarded as competent, only two or possibly three cases, justify even a suspicion that the courts will go beyond this point and recognize individual workers' interests where there is no evidence that the agreement has been incorporated into the employment contract. Whether or not these doubtful cases constitute the first step in the evolution of a legal rule which will permit suits on the trade agreement by or against union members who enter into employment in union shops, without further evidence of the adoption of the terms of the agreement, is as yet premature.

Application of the third party beneficiary interpretation of workers' rights first appeared in New York in a case involving the agreement of an incorporated union, but no subsequent case has been found where the courts of that state have continued this precedent. All the third party beneficiary cases from other jurisdictions appear to have been concerned with agreements of unincorporated unions. These cases necessarily imply that the union, although not incorporated, has somehow acquired competency. Where unions are incorporated, there still might be some question as to whether corporate charters grant the power to make the particular type of contracts which would grow out of the trade agreements. In spite of these questions, at least two courts of last resort have clearly approved of supporting claims of individual workmen to rights under trade agreements, on third party beneficiary reasoning. The fact that the same conclusion might have been reached in both of these cases on other grounds, however, tends to rob the decisions of some of their meaning, in spite of the high authority from which they come.

New York again leads the way in the use of agency principles to sustain workers' interests. The cases thus far decided, however, appear to have considered agreements which were especially designed to be enforced by law; they do not therefore warrant the conclusion that even the New York courts will enforce union workers' interests in any union agreement on agency principles.

The courts of the Empire State also appear to have initiated the movement, if it may be spoken of as a movement at this early date, to recognize a corporate union interest in addition to whatever rights may accrue to individual workmen. Although not many decisions have involved the point, New York courts have clearly and unmistakably shown a tendency to recognize con-



tractual rights arising out of trade agreements, even in unincorporated unions. Whether this tendency may be regarded as indicating a permanent rule, and whether it may be expected to spread to other jurisdictions is still uncertain. A few cases have been found which indicate a willingness of other jurisdictions to follow the New York lead.

If this summary seems to leave many matters still unsettled, the only defense offered is that it is as complete as the decisions justify. The position here taken is that nothing is gained for the present by attempting to express more definite rules than can be found in the actual language of the courts. One conviction appears to emerge clearly from a study of the judicial opinions. It is that much of what appears to be conflict in the legal rules results from the fact that trade union agreements and trade union practices vary widely. Many of the judicial errors are probably produced by that familiar desire, not confined to the bench alone, to generalize more widely than facts permit.