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INTRODUCTION

It seems especially appropriate to discuss the rights of third party labor beneficiaries at this time, since the centennial anniversary of *Lawrence v. Fox*[1] has just occurred.[2] The same jurisdiction, New York, where that celebrated case was decided also saw one of the first third party labor beneficiaries succeed in obtaining judgment early in this century.[3] This was to be expected in a case originating in the modern birthplace of the third party beneficiary.[4]

Although the purpose of this article is to examine some of the leading cases which have enforced the collective labor agreement by the application of the third party beneficiary principle, a brief reference to other theories of recovery by the employee may prove useful.

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1 20 N.Y. 268 (1859).

2 For a general discussion of the case law and periodical literature, see Jaeger, Cases and Statutes on Labor Law (1939, 1959 Supp.), Chapter XI, Collective Labor Agreements; and Williston, Contracts (3d ed., Jaeger 1959) § 379A.

3 Gulla v. Barton, 164 App. Div. 293, 149 N.Y.S. 952 (3rd Dep't 1914).

4 In Dutton v. Poole, 1 Vent. 319, 2 Jones 102, 2 Lev. 210, 83 Eng. Rep. 156 (1677 K.B.), it was held that a contract made between a father and a brother for the benefit of a third party (the daughter and sister respectively of the contracting parties) was enforceable. However, in modern times the English courts have expressly rejected the third party beneficiary concept, Tweddle v. Atkinson, 1 B. & S. 393, 121 Eng. Rep. 762 (1861 Q.B.); Dunlop Pneumatic Tyre Co. v. Selfridge [1915] A.C. 847. See also note 32 infra.

"CUSTOM," "USAGE," OR "RULE"

The early cases held that the collective labor agreement was not a contract but merely a collection of customs, usages and rules governing the general working conditions in a given plant, factory, mine or other place of employment.[5] This has often been referred to as the usage theory, and one of the earliest cases adopting it is *Hudson v. Cincinnati, N.O. & T. P. R. Co.*,[6] where an engineer was discharged and brought action on the ground that such was in violation of a collective labor agreement. The court advanced the theory that the engineer's rights were based on his individual contract of employment, the collective agreement being merely a memorandum of the wage scale and of certain regulations incorporated by reference therein. The court discussed at some length *Burnetta v. Marceline Coal Co.*,[7] a case in which it was held that although the employee stated he understood the rules of the mine as embodied in the collective agreement, such was not tantamount to an incorporation of them by reference in his employment contract. As a consequence the trial court excluded evidence of the agreement. The ruling was upheld on appeal, it being found that the employee had not adopted the collective agreement as part of his individual contract of employment.

In a leading case, *Rentschler v. Missouri Pacific Railroad Co.*,[8] the Supreme Court of Nebraska comprehensively treated the subject of employees' rights under collective labor agreements and reviewed the authorities, considering the case as one of novel impression. When a reduction in force occurred among employees of the railroad, the plaintiff had been discharged. Contending that his seniority rights had been infringed, he brought action. The court in affirming judgment for the employee stated: "When the collective agreement is published by the managers, it becomes then the rule of that industry."[9]

In the more recent case of *Associated Flour Haulers & Warehousemen, Inc. v. Sullivan*,[10] it is stated:

> "The contract is a typical skeleton contract between employer and employee, where the details of the work to be done are purposely omitted, it being implied that the employee shall perform such work as would reasonably be

[5] Jaeger, supra note 2, at 761-762, 768.

[6] 152 Ky. 711, 154 S.W. 47 (1913); plaintiff engineer could not recover judgment, hiring held to be "at will."

[7] 180 Mo. 241, 79 S.W. 136 (1904).

[8] 126 Neb. 493, 253 N.W. 694 (1934).

[9] Id. at 501, 253 N.W. at 698, discussing numerous cases applying the "usage" theory.

[10] 168 Misc. 315, 318, 5 N.YS.2d 982, 984 (Sup. Ct. 1938).

> expected from the nature of the employment or such as practice and custom have presented. The parties by a course of conduct over a great period of years have built up such custom and practice herein which the law will read into the contract."

AGENCY THEORY

There is also a line of cases holding that the union is the agent of the individual employee for the purpose of making the contract.[11] As might be expected, since Massachusetts does not subscribe to the third party contract doctrine, examples of the agency theory are found in its jurisprudence notably in *Shinsky v. O'Neil,*[12] *Shinsky v. Tracey,*[13] and *Goyette v. Watson Co.*[14] Cases in other jurisdictions similarly holding include *Piercy v. Louisville & Nashville R. Co.,*[15] and *Shelley v. Portland Tug & Barge Co.*[16] In the latter case, the court, relying more specifically on Williston[17] which is quoted, and distinguishing *Yazoo & Mississippi Valley R. Co. v. Webb,*[18] states:

> "That [that] case is distinguishable from the instant case in many important particulars is obvious. There the Brotherhood, in making its contract with the railroad company, had authority to act for its own members. As to them the relation of principal and agent existed. In the instant case no employee of the defendant was a member of Local No. 17. Therefore, that organization had no authority to act for defendant's employees and, therefore, plaintiff's right to sue the defendant under the contract cannot be sustained upon the ground of agency, for, as said by Professor Williston: 'The right of a third person benefited by a contract to sue upon it has sometimes been defended upon the ground that the promisee was the agent of the third person. But the existence of any agency is a question of fact. It cannot be assumed as a convenient piece of machinery when in fact there was no agency.' "[19]

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[11] Jaeger, supra note 2, at 763-764, 782.

[12] 232 Mass. 99, 121 N.E. 790 (1919); cf. Berry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905); Hoban v. Dempsey, 217 Mass. 16, 104 N.E. 717 (1914).

[13] 226 Mass. 21, 114 N.E. 957 (1917).

[14] 245 Mass. 577, 140 N.E. 285 (1923).

[15] 198 Ky. 477, 248 S.W. 1042 (1923); Mueller v. Chicago & N.W. Ry. Co., 194 Minn. 83, 259 N.W. 798 (1935).

[16] 158 Ore. 377, 382, 76 P.2d 477, 479 (1938); cf. Gary v. Central of Georgia Ry. Co., 37 Ga. App. 744, 141 S.E. 819 (1928).

[17] Williston, supra at § 111, Consideration Distinguished from Motive.

[18] 64 F.2d 902 (5th Cir. 1933).

[19] Williston, supra note 2, at § 352, quoted in Shelley v. Portland Tug & Barge Co., supra note 16.

RATIFICATION

The employee has been required to ratify the contract made by the union in some jurisdictions, as exemplified by *West v. Baltimore & Ohio R. Co.*,[20] *Burnetta v. Marceline Coal Co.*,[21] and *Panhandle & Santa Fe R. Co. v. Wilson.*[22] In the *Burnetta* case,[23] ratification was held essential to the validity of a collective labor agreement, the court finding that in order to bind the individual members of the union, they must exercise assent to the terms of the contract. Such assent will not be implied from the fact that they have knowledge at the time of the contract.[24] In another frequently cited opinion,[25] it is stated:

> "And the rule seems to be that individual members of a labor union are not bound by contracts between the union and employers, unless such agreements are ratified by the members of the union as individuals, and that in the absence of such ratification by a member, no rights accrue to him which he can enforce against the employer."

Similarly in *Yazoo & Mississippi Valley R. Co. v. Webb*,[26] the court said: "When, however, the agreement purports to be limited to certain classes of employees, it has no application to employees of another class unless it be specially adopted in hiring them."

THE "TRUST" CONCEPT

In addition to the agency theory much more recently it has been suggested that the individual employee's rights might be well protected by using a trust concept.[27] The union or bargaining representative could be regarded as holding the employer's promises in trust for the benefit of the individual employees, the Massachusetts trust[28] being cited as a familiar situation wherein one party administers

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[20] 103 W.Va. 417, 137 S.E. 654, 655 (1927).

[21] Supra note 7.

[22] 55 S.W.2d 216 (Tex. Civ. App. 1932); cf. Young v. Canadian Northern Ry. Co., [1931] A.C. 83.

[23] Supra note 7.

[24] 180 Mo. 241, 79 S.W. 136 (1904) discussed in Rentschler v. Missouri Pacific Ry. Co., supra note 8.

[25] West v. B. & O. R.R. Co., supra note 20 at 422; Jaeger, supra note 2, at 764-765, 733.

[26] Supra note 18 at 904.

[27] Cox, Rights Under A Labor Agreement, 69 Harv. L. Rev. 601 (1956). Cf. Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 144 A.2d 88 (Md. Ct. App. 1958).

[28] For a suggestion that the Massachusetts business trust might serve as an analogy for this trust concept, see Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850 (1957).

contracts made for the benefit of a large and variable group of beneficiaries. Under this view, the union would be the party to bring suit against the employer and would hold any damages recovered in trust for the aggrieved employee. If the union failed in its trust, the employee would be obliged to sue the union, a step fraught with procedural problems, especially in state courts[29] where a union might not be suable.

In recent times, the collective labor agreement has gradually been given judicial recognition as a contract, partly, at least, due to public policy,[30] and partly attributable to more skillful draftsmanship. While the doctrines of custom and usage, agency, ratification, or trusteeship have been invoked in various courts or embodied in many statutes to afford the employee a means of recovery under the collective labor agreement, by far the greater number of recoveries have been held in reliance on the third party contract principles.

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[29] Jaeger, supra note 2, chapter II, § 5 The Union As a Party To Litigation; Williston, supra, note 2, § 308A and § 309A, wherein is discussed the original common law rule which refused to permit a member of an unincorporated labor organization to bring an action against it. Since all members of the association would have to be joined to permit such a suit would be tantamount to allowing a person to sue himself. McClees v. Grand International Brotherhood of Locomotive Engineers, 59 Ohio App. 477, 18 N.E.2d 812 (1938), citing in support Boone v. Century Athletic Club, 49 Ohio App. 155, 195 N.E. 395 (1934). Nor could the union bring an action unless all the members were joined therein, O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); St. Paul Typothetae v. St. Paul Bookbinders Union No. 37, 94 Minn. 351, 102 N.W. 725 (1905).

A case which fully espouses the common law point of view is Brotherhood of Railroad Trainmen v. Allen, 230 S.W.2d 325 (Tex. Civ. App. 1950), cert. denied, 340 U.S. 934 (1950). The action was for wages alleged to be wrongfully withheld from the plaintiff resulting from "a conspiracy" between the Texas and New Orleans Railroad and the Brotherhood. The plea in abatement filed by the Brotherhood was overruled by the trial court. The Court of Civil Appeals held that plaintiff, being a member of defendant union, would in effect be suing himself and therefore reversed. The Allen case was used to sustain a similar ruling in the recent case of Atkinson v. Thompson, 311 S.W.2d 250 (Tex. Civ. App. 1958). The court cites a number of cases in support including the McClees case, supra.

[30] McCoy v. St. Joseph Belt Railway Co., 229 Mo. App. 506, 516, 77 S.W.2d 175, 181 (1934); Rentschler v. Missouri Pacific Railroad Co., supra note 8; in New York, the courts early recognized the collective labor agreement as a contract, beginning with Curran v. Galen, 152 N.Y. 33, 46 N.E. 297 (1897), through Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905), and culminating in Schlesinger v. Quinto, 117 Misc. 735, 192 N.Y. Supp. 564 (Sup. Ct. 1922), aff'd, 201 App. Div. 487, 194 N.Y. Supp. 401 (1922); Maisel v. Sigman, 123 Misc. 714, 205 N.Y. Supp. 807 (Sup. Ct. 1924); Murphy v. Ralph, 165 Misc. 335, 299 N.Y. Supp. 270 (Sup. Ct. 1937); and Rolandez v. Star Liquor Dealers, 257 App. Div. 97, 12 N.Y.S.2d 17 (1st Dep't 1939).

Cf. Weber v. Nasser, 61 Cal. App. 1259, 286 Pac. 1074 (1st Dist. 1930), aff'd, 210 Cal. 607, 292 Pac. 637 (1930); Harper v. Local Union No. 520, 48 S.W. 2d 1033 (Tex. Civ. App. 1932).

THIRD PARTY LABOR BENEFICIARIES: AT COMMON LAW

For several decades, the judiciary was loathe to enforce collective labor agreements as such,[31] and in England even today, such an agreement is not recognized as a contract.[32] In addition since third party beneficiaries are not recognized by the British courts these agreements are completely unenforceable. Although originally the courts in the United States were inclined to follow the same view, today the great majority of American jurisdictions have adopted the third party beneficiary principle and apply it in suits by an employee under collective labor agreements. To show the extent and breadth of this application, a few of the leading and more representative cases have been selected for analysis and discussion.

Almost a half century has passed since the decision in *Gulla v. Barton*,[33] one of the earliest cases holding a collective labor agreement to be a binding and enforceable contract, with respect to which the employee Gulla was a third party beneficiary. He had worked in a brewery owned by the defendant Barton 29 weeks during 1911-1912, and 20 weeks during 1912-1913. He was paid nine dollars a week, the wage he and his employer had apparently agreed upon. He brought action in 1914 for an additional nine dollars per week, basing his claim upon the wage fixed by a collective labor agreement entered into between his employer and the Malsters' Union, of which he was a member. Judgment for the defendant upon a nonsuit was reversed by the Appellate Division[34] on the ground that the plaintiff was the intended beneficiary of the collective labor agreement.

In another more recent New York case, *Hudak v. Hornell Industries*,[35] the court rejected the employer's contention that the employees

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31 Yazoo & Mississippi Valley R.R. Co.v. Webb, supra note 18; Hudson v. Cincinnati, N.O. & T. Ry. Co., 152 Ky. 711, 154 S.W. 47 (1913); Associated Flour Haulers & Warehousemen v. Sullivan, supra note 10.

32 Young v. Canadian Northern Ry. Co., supra note 22; Aris v. Toronto, H. & B. R. Co. [1933] Ont. R. 142, [1933] 1 Dom. L. Rep. 634. Givry, Legal Effects of Collective Agreements, 21 Modern L. Rev. 501 (1958) to the effect that collective labor agreements are not enforceable in England as contracts.

33 Supra note 3.

34 164 App. Div. 293; 149 N.Y. Supp. 952 (3d Dep't 1914).

35 304 N.Y. 207, 214, 106 N.E.2d 609 (1952), reversing. 278 App. Div. 888 (4th Dep't 1952); the New York Court of Appeals cited with approval Gulla v. Barton, supra note 3, leaving no doubt that the third party beneficiary rule as applied to employees —"labor beneficiaries"—is fully recognized as a variant of Lawrence v. Fox, supra note 1, and Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918). Inasmuch as the courts have infrequently indicated which, if either, type of beneficiary an employee is, it may, perhaps be more accurate and in keeping with the actual facts to describe him as suggested above as a "labor beneficiary."

were not proper parties to the collective agreement because of lack of contract privity:

> "Defendant's final contention that plaintiffs are not proper parties plaintiff must also fall. Inasmuch as the contract directly affected these individual employees, there appears to be no good reason why they may not assert their rights thereunder as third-party beneficiaries."

The change in the attitude of the courts is perhaps best reflected by the language of the court in *McCoy v. St. Joseph Belt R. Co.*[36]

> "So that, although only a few years ago the courts were holding that an individual member of a labor union could not maintain an action for the breach of an agreement between an employer and the union of which the plaintiff was a member in respect to wages and other rights fixed in the contract,[37] these rulings have been left in the rear in the advancement of the law on this general subject, and the holdings are now that these agreements are primarily for the individual benefit of the members of the organization, and that the rights secured by the contracts are the individual rights of the individual members of the union, and may be enforced directly by the individual."[38]

One of the best known and widely-quoted cases, *Yazoo and Mississippi Valley Railroad Co. v. Sideboard,*[39] involved an employee of the railroad who started as a freight brakeman in 1910. Four years later he was transferred to passenger service and served as porter and brakeman for 14 years, during which time he was paid only the wages of a porter, despite his claim for wages as a passenger brakeman. When the railroad refused to accede to his demands, he brought action on the collective labor agreement although he was not a union member. The court granted recovery stating that "the contention that a third party may recover directly on a contract made especially for his benefit is not an open question in this state [Mississippi] since *Canada v. Yazoo & M.V.R. Co.*, 101 Miss. 274, 57 So. 913. . . . The reasoning of these cases is this: First, when the terms of the contract are ex-

[36] Supra note 30.

[37] Hudson v. Cincinnati, N.O. & T. Ry. Co., supra note 31; Burnetta v. Marceline Coal Co., supra note 7; West v. Baltimore & O. R.R. Co., supra note 20.

[38] McCoy v. St. Joseph Belt Railway Co., supra note 30, quoting Piercy v. Louisville & Nashville Railway Co., 198 Ky. 477, 248 S.W. 1042 (1923); cf. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N.E. 154 (1926); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692 (1928).

[39] 161 Miss. 4, 133 So. 669 (1931).

pressly broad enough to include the third party, either by name, as one of a specified class, or, second, where the third party was evidently within the intent of the terms so used, such party will be within its benefits, if, third, the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract."[40]

In a subsequent case, *Moore v. Illinois Central R. Co.*,[41] the plaintiff was a member of the Brotherhood of Railroad Trainmen, a party to a collective labor agreement with the defendant railroad. After being discharged, allegedly, "without just cause," (a requirement of the agreement) Moore brought suit. The judgment for the railroad was reversed on appeal reliance being had on *McGlohn v. Gulf & Ship Island Railroad Co.*,[42] in which the Supreme Court of Mississippi held that a collective labor agreement was a contract made for the benefit of employee-union members and was enforceable by them as third party beneficiaries.

Following the remand of the *Moore* case, removal was had. The federal district court, considering itself bound by state law, followed the decision of the Mississippi Supreme Court.[43] The Fifth Circuit reversed,[44] "declining to follow the Mississippi Supreme Court's ruling [on the applicable statute of limitations],"[45] whereupon the United States Supreme Court affirmed the decision of the high court of Mississippi and of the United States District Court and held the employee to be a third party beneficiary under the written collective labor agreement.[46]

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[40] Jaeger, supra note 2, at 772.

[41] 180 Miss. 276, 176 So. 593 (1937); Dufour v. Continental Southern Lines, Inc., 219 Miss. 296, 68 So. 2d 489 (1953).

[42] 179 Miss. 396, 401, 174 So. 250, 254 (1937), where "the court held that a contract by a labor union with an employer . . . was: (1) Valid; (2) that a member of the labor union which made the contract could sue thereon, although he had not, himself, agreed to work for the employer for any definite time; and (3) could not be discharged by the employer at will." This holding is in line with the weight of authority and should be approved.

[43] Moore v. Illinois Central Railroad Co., 24 F.Supp. 731 (S.D. Miss. 1938) which follows the same case as decided by the Mississippi Supreme Court, supra note 41.

[44] Illinois Central Railroad Co. v. Moore, 112 F.2d 959 (5th Cir. 1940).

[45] The Court of Appeals held that the action was brought on Moore's oral contract of employment with the railroad, rather than on the written collective labor agreement, thereby reversing the decision of the Mississippi Supreme Court, supra note 41, followed in 24 F. Supp. 731 (S.D. Miss. 1938), supra note 43.

[46] Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1941), where the Supreme Court of the United States said, quoting the Mississippi Supreme Court: "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen . . . ." To the defense that Moore's suit was prematurely brought "because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U.S.C. § 151, *et seq.*," the Court replied

THE PAST DECADE, 1950–1960

Concentrating on the cases decided during the past decade, one is immediately impressed by the enormous increase in the decisions sustaining the employee's right of action on collective labor agreements. In jurisdiction after jurisdiction, the courts have applied the third party beneficiary principle in enforcing the rights of the individual employee. Thus, in *MacKay v. Loew's, Inc.*,[47] the court suggested that the collective labor agreement contained certain rights enforceable by the union and others which were for the primary benefit of the employee: "The employee, in addition to having rights under his individual contract of employment, may sue directly on the collective bargaining contract as a third party beneficiary to enforce the provisions in the contract which have been made for his benefit."

The right of an employee to bring an action against his employer for the breach of a collective labor agreement entered into between the latter and the employee's union was sustained in *Tennessee Coal, Iron & R. Co. v. Sizemore*,[48] wherein the court held that the employer's failure to maintain proper ventilation as required by the contract was the cause of the employee's silicosis.

Another typical case is *Lammonds v. Aleo Manufacturing Co.*[49] in which the employer's breach of contract was established by arbitration, the court merely being required to award damages to the employee.

In the District of Columbia, where there had been some doubt as to whether a third party beneficiary could prevail upon a contract to which he was not privy, the Court of Appeals answered the question affirmatively at the turn of the half century, in *Marranzano v. Riggs National Bank of Washington*,[50] a case in which an employee of the Washington Star was recognized as being able to bring an action for damages for breach of a collective labor agreement made for her benefit. In passing, it may be noted that suits against unincorporated unions are permitted in the District of Columbia the latter being treated as quasi-legal entities, as is demonstrated by the case of *Busby v. Electrical Utility Employees Union*.[51]

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that this was not such a "dispute" and that Moore did not seek reinstatement, but was seeking the common law remedy of damages for breach of contract by wrongful discharge; see Williston, supra note 2, § 379A, note 7, at 993.

[47] 182 F.2d 170, 172 (9th Cir. 1950), cert. denied, 340 U.S. 828 (1950).

[48] 258 Ala. 344, 62 So. 2d 459 (1953).

[49] 243 N.C. 749, 92 S.E.2d 143 (1956).

[50] 184 F.2d 349 (D.C. Cir. 1950); cf. United States Daily Publishing Corp. v. Nichols, 59 App. D.C. 34, 32 F.2d 834 (D.C. Cir. 1929), where the court followed the "usage" or "custom" theory in giving the employees a right of action.

[51] 79 App. D.C. 336, 147 F.2d 865 (D.C. Cir. 1945).

In *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*,[52] decided by the Court of Appeals of the neighboring jurisdiction Maryland, an extensive discussion is had of the various means employed to enforce employee's rights under a collective labor agreement. The case involved an action for damages for wrongful discharge brought by an employee who based her rights on a collective labor agreement between her employer and the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 149, a union of which she was a member. Citing the *Marranzano* case, the court held the great weight of authority sustained the individual employee's right of action on a collective labor agreement.[53]

The California Courts have been liberal in enforcing employee rights. In *Leahy v. Smith*,[54] the court states:

> "The sole question presented by this appeal by the plaintiff from the judgment of nonsuit is whether the plaintiff, a non-union employee of defendant, is entitled to rights as third-party beneficiary under two collective bargaining agreements entered into between the Union and the defendant employer. Plaintiff does not claim to be a union member and holds only a 'work permit' card issued by the Union.
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> "The right of a union member to recover as a third-party beneficiary under such an agreement has been recognized in California.[55] But whether a non-union employee is such an intended beneficiary has not yet been decided."

Relying on *Vazoo & Mississippi Valley R. Co. v. Sideboard*,[56] supra, *Gregg v. Starks*,[57] and *Coyle v. Erie R. Co.*,[58] *inter alia*, the Superior Court quoted from a former opinion to the effect that "a non-union member may recover" under the circumstances stated in the discussion of the *Sideboard* case, supra,[59] to wit, when such employee is an intended beneficiary. The appellate court, reversing the

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[52] 144 A.2d 88 (Md. Ct. App. 1958), supra note 27.

[53] The court cites and discusses various articles dealing with collective labor agreements, especially Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

[54] 137 Cal.App. 2d 884, 885, 290 P.2d 679, 680 (Sup. Ct. App. Dep't 1955).

[55] Here, the court cites Sublett v. Henry's Turk & Taylor Lunch, 21 Cal. 2d 273, 131 P.2d 369 (1942); Department of Industrial Relations v. Dennis, 81 Cal.App. 2d 306, 183 P.2d 932 (4th Dist. 1947); MacKay v. Loew's Inc., supra note 47.

[56] Supra note 39.

[57] 188 Ky. 834, 224 S.W. 459 (1920).

[58] 142 N.J.Eq. 306, 59 A.2d 817, (1948) rev'd on other grounds, 1 N.J. 350, 63 A.2d 702 (1949).

[59] Supra note 39.

judgment of the Municipal Court of the Los Angeles Judicial District, decided in favor of the non-union employee's right to maintain the action as a third party beneficiary.[60]

Presenting facts of a somewhat unusual nature, the decision in *Benane v. International Harvester Company*[61] lends emphasis to the breadth the third party beneficiary doctrine has achieved in the more recent cases. It also arose in California the question being whether there may be a waiver under a collective bargaining agreement of an employee's statutory right to pay while voting in a political election.[62] When an employer deducted two hours' wages because 59 of his employees absented themselves during working hours on "a General Election Day," the employees brought suit for the pay which had been deducted. The employer alleged that "By the plain terms of the collective bargaining contract, the appellants waived their right to compensation while taking time off to vote." However, in reversing the trial court, this "waiver" was held invalid since the pay-while-voting statute was considered a right "created in the public interest [which] may not be contravened by private agreement."[63] There was no question but that the employees were third party beneficiaries.

Holding that there was a common law right of action against an employer under a collective labor agreement, but none against the union of which the employer was a member,[64] a Texas court concluded that under the doctrine of *Moore v. Illinois Central R. Co.*,[65] there was no necessity that the employee "must first exhaust his administrative remedy . . . The Supreme Court [of the United States] held that he need not do so, but he could treat the discharge as final and sue for damages for wrongful discharge,"[66] at common law.

Applying the law of Alabama, the Court of Appeals for the Fifth Circuit,[67] after analyzing the effect of the decisions in *Westinghouse*[68] and *Lincoln Mills*,[69] decided that two employees who com-

[60] Supra note 54.

[61] 142 Cal.App. 2d 874, 879, 299 P.2d 750, 753 (Sup. Ct. App. Div. 1956).

[62] § 5699, California Election Code; similar provisions have been held constitutional, e.g., Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[63] De Haviland v. Warner Bros. Pictures, 67 Cal.App. 2d 225, 229, 153 P.2d 983, 986 (2d Dist. 1944), applying § 2855 of the California Labor Code.

[64] Atkinson v. Thompson, 311 S.W.2d 250 (Tex. Civ. App. 1958).

[65] Supra note 46.

[66] Atkinson v. Thompson, supra note 64, quoting the Moore case, supra note 46, and citing and discussing Texas & New Orleans R.R. Co. v. McCombs, 143 Tex. 257, 183 S.W.2d 716 (1944), which follows Moore.

[67] Woodward Iron Company v. Ware, 261 F.2d 138 (5th Cir. 1958).

[68] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955).

[69] Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

plained of wrongful discharge were entitled to maintain their action as third party beneficiaries, citing *J. I. Case Co. v. National Labor Relations Board*[70] in support. An affirmance was had of the judgment for damages for wrongful discharge.[71] In the course of its opinion, and relying on the *Sizemore* case[72] as declaratory of the applicable Alabama law, the court states: "Contrary to appellant's contention, there is not much doubt as to the standing of an individual employee to sue his employer on a collective contract.[73] Most cases rest their holding on the principle that a collective bargaining agreement is a contract for the benefit of a third person."[74]

Even in Massachusetts, where the third party beneficiary principle has not been viewed with favor,[75] individual employees have been permitted to bring their actions on collective labor agreements made for their benefit.[76] In *Karcz v. Luther Manufacturing Co.*,[77] two employees complained that their employment had been improperly terminated, and that they were wrongfully deprived of their right to "retirement separation pay." Without questioning their right to bring the action, the court proceeded to an analysis of the provision of the collective labor agreement which reads:

> "Nothing contained herein shall be deemed to give any employee the right to be retained in the service of the employing mill or to interfere with the right of the mill to discharge any according to the provisions of this Agreement."

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[70] 321 U.S. 332 (1944).

[71] The Court held that wrongful discharge concerned a distinctly personal right as distinguished from a union right.

[72] Supra note 48.

[73] In addition to the Sizemore case, the court cited Augustus v. Republic Steel Corp., 200 F.2d 334 (5th Cir. 1952), and in a footnote, stated: "The cases are collected in Annotation, 18 A.L.R.2d 312 (1951)." Various law review articles or notes are also cited.

[74] Woodward Iron Co. v. Ware, supra note 67, at 140-41: The Court then quotes J.I. Case, supra note 70, to the effect that "an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective agreement . . . ."

[75] Mellen v. Whipple, 67 Mass. (1 Gray) 317 (1854); Exchange Bank v. Rice, 107 Mass. 37 (1871); Terry v. Brightman, 132 Mass. 318 (1882); Borden v. Boardman, 157 Mass. 410, 32 N.E. 469 (1892); Bianconi v. Crowley, 256 Mass. 187, 152 N.E. 305 (1926); Pike v. Anglo South American Trust Co., 267 Mass. 130, 166 N.E. 553 (1929).

[76] Askinas v. Westinghouse Electric Corp., 330 Mass. 103, 111 N.E.2d 740 (1953); Leonard v. Eastern Massachusetts Street Ry. Co., 335 Mass. 308, 140 N.E.2d 187 (1957); Simons v. American Dry Ginger Ale Co., Inc., 335 Mass. 521, 140 N.E.2d 649 (1957).

[77] 338 Mass. 313, 315, 155 N.E.2d 441, 443 (1959), discussing McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958), Lincoln Mills, supra note 69, and citing Woodward Iron Co. v. Ware, supra note 67.

The employer's "management decided to liquidate the defendant [Company, the employer] 'because . . . imports had made it impossible to compete and operate at a profit' and gave notice of its intention on May 8, 1956."[78] Thereafter the Company ceased operations and the work of its employees terminated. The court held this was not a breach of contract and affirmed the lower court's decision for defendant Company.

In a case with somewhat similar facts, *Hudson County Newspaper Guild v. Jersey Publishing Co.*,[79] it was held that closing of business by the employer was not a breach of the collective bargaining agreement, and consequently the employee had no right to two weeks' notice in addition to severance pay.

Attempts to classify "labor" beneficiaries as donee or creditor have been infrequent; yet, because union members employed by the Olga Coal Company paid dues to the union, they were "creditor beneficiaries" with rights which the equity court would enforce, *Pettus v. Olga Coal Company*.[80]

The Supreme Court of Arkansas has also recently held[81] that employees may bring an action for overtime pay as direct beneficiaries of a contract made between the United States government and their employer, in which was stipulated their rate of pay. The court said: "We have repeatedly held that a contract made for the benefit of a third party is actionable by such third party. . . .[82] We adhere to the above statement. The plaintiffs were not mere 'incidental beneficiaries,'[83] but were 'direct beneficiaries,'[84] and are entitled to proceed under the American majority rule . . . .[85] Thus, the plaintiffs come within the holdings which allow third party beneficiaries to invoke the contract."[86] In light of this holding, the opinion in *Roberts v. Thompson*[87] rendered by the United States District Court in Arkansas

78 Karcz v. Luther Mfg. Co., supra note 77, at 443.

79 23 N.J. Super. 419, 93 A.2d 183 (1952).

80 137 W.Va. 492, 72 S.E.2d 881 (1952).

81 H.B. Deal & Co. v. Marlin, 209 Ark. 967, 971, 193 S.W.2d 315, 318 (1946), quoted in H.B. Deal & Co., Inc. v. Head, 221 Ark. 47, 251 S.W.2d 1017 (1952).

82 Jaeger, Law of Contracts, 350-351 (1953).

83 The Court in the Head case, supra note 81, states: "The rule as to incidental beneficiaries is stated in 12 Am. Jur. 834. A case involving incidental beneficiaries is German Alliance Co. v. Home Water Co., 226 U.S. 220."

84 "The rule as to direct beneficiaries is stated in 12 Am. Jur. 833, and see also Annotations in 81 A.L.R. 1271 and 148 A.L.R. 359." H.B. Deal & Co., Inc. v. Head, supra note 81.

85 The court quotes 12 Am.Jur. § 277.

86 H.B. Deal & Co., Inc. v. Marlin, 209 Ark. 967, 968, 193 S.W.2d 315, 317 (1946).

87 107 F. Supp. 775 (E.D. Ark. 1952), citing Petty v. Missouri & Arkansas Ry. Co., 205 Ark. 990, 167 S.W.2d 895 (1943), St. Louis, Iron Mountain & Southern Ry. Co. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897).

seems all the more astonishing purporting as it does to follow Arkansas law. It was there held that an employee discharged in violation of a collective bargaining agreement could not maintain an action for damages because of the "unilateral" nature of the contract described as "lacking in mutuality, since the employee does not bind himself to work for any specified period of time and is at liberty to cease work at will." In addition to being contrary to the Arkansas cases, it is in conflict with the great weight of authority, and represents a retrograde tendency not in keeping with the times.

As the Supreme Court of the United States recently said: "The employees have always been able to enforce their individual rights in the state courts. They have not been hampered by the rules governing unincorporated associations. To this extent, the collective bargaining contract has always been 'enforceable.' "[88] Nevertheless the Court of Appeals for the Eighth Circuit cited the *Roberts* case in *Smithey v. St. Louis Southwestern R. Co.*[89] and held that "no right to recover damages for wrongful discharge is recognized in favor of any employee . . ." These decisions may possibly be explained on the narrow ground that they dealt only with discharges of employees under the Railway Labor Act.

Williston, in the latest edition of his authoritative treatise on the law of contracts, observes:

> "A gradual development in the field of third-party agreements has been the enforcement of collective bargaining agreements between labor organizations and employers by the individual employees. While these employees are not parties to the agreement, they are being recognized as third party beneficiaries in an ever increasing number of jurisdictions, even in the absence of statutes."[90]

Under the Statutes

The further consideration of the status of the third party labor beneficiary will be had under the following captions: the status of the collective labor agreement and of the third party beneficiary; conditions precedent to third party's right to bring action including internal union procedure and administrative remedies; and the effect of *Lewis v. Benedict Coal Corporation*.[91]

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[88] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., supra note 68.

[89] 237 F.2d 637, 638 (1956); it was further held that there was "a lack of mutuality." Cf. Williston, op. cit. supra note 2, § 379A. Collective Labor Agreements.

[90] Williston, supra note 2, § 379A.

[91] 80 S.Ct. 489 (1960).

STATUS OF COLLECTIVE LABOR AGREEMENTS AND THE THIRD PARTY

While the earlier cases demonstrated a marked reluctance to view the collective labor agreement as a contract,[92] there is no room for doubt (and the point is now rarely raised) that under the existing statutes, these agreements are contracts. In fact, they are contracts and something more well describable as "contracts affected with a public interest." As interpreted by the Court of Appeals for the Third Circuit in the *Westinghouse* case,[93] the opinion of the Supreme Court in *J. I. Case Co. v. National Labor Relations Board*,[94] seemed to denote a slight recrudescence of the early reluctance of recognition of contract status for labor agreements by its reference to the collective agreement as a "trade agreement." But eleven years later, in the *Westinghouse* case,[95] the Supreme Court rejected the interpretation of the Court of Appeals and indicated the collective labor agreement was a contract giving rights to both the union and the individual employee. In a footnote,[96] the court referred expressly to the third party beneficiary doctrine as a means whereby individual employee rights may be enforced in state courts and cited the following cases discussed or noted by Professor Williston:[97] *Gulla v. Barton*,[98] *H. Blum & Co. v. Landau*,[99] *Mastell v. Salo*,[100] *McGregor v. Louisville & N. R. Co.*,[101] *O'Jay Spread Co. v. Hicks*,[102] *Rentschler v. Missouri Pac. R. Co.*,[103] *Volquardsen v. Southern Amusement Co.*,[104] *Yazoo & M. V. R. Co. v. Sideboard*,[105] *Cross Mountain Coal Co. v. Ault*,[106] *Hall v. St. Louis-San Francisco R. Co.*,[107] *Moore v. Illinois Central R. Co.*,[108] *J. I. Case Co. v. National Labor Relations Board*.[109]

The Court then continued: "And such suits are still being enter-

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92 Jaeger, supra note 2, at 761-762, 768.
93 Supra note 68.
94 Supra note 70.
95 Supra note 68.
96 Supra notes 29 and 68.
97 Williston, supra note 2, § 379A.
98 Supra note 3.
99 Supra note 38.
100 140 Ark. 408, 215 S.W. 583 (1919).
101 244 Ky. 696, 51 S.W.2d 953 (1932).
102 Supra note 29.
103 Supra note 8.
104 156 So. 678 (La. Ct. App. 1934).
105 Supra note 39.
106 Supra note 38.
107 224 Mo.App. 431, 28 S.W.2d 687 (1930).
108 Supra note 46.
109 Supra note 70.

tained.",[110] and proceeded to add to the list *Dufour v. Continental Southern Lines, Inc.*,[111] *Donahoo v. Thompson*,[112] *Marranzano v. Riggs National Bank of Washington, D.C.*,[113] *MacKay v. Loew's Inc.*[114]

In *J. I. Case Company*, supra, the United States Supreme Court had occasion to examine and determine the relationship between individual contracts of employment and collective labor agreements. Holding that the individual contract, when in conflict with the collective labor agreement "must yield or the Act[115] would be reduced to a futility," the court said that the employee "becomes entitled by virtue of the Labor Relations Act[116] somewhat as a *third party beneficiary*[117] to all benefits of the collective trade agreement."[118] This approach was followed by the courts until they were confronted with the question: How are the individual rights of the employees to be enforced?

The Supreme Court of the United States answered that question to some extent in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*,[119] by holding that the individual or "uniquely personal" rights of the employees under a collective labor agreement would not be enforced by the federal courts under § 301(a) of the Labor Management Relations Act.[120] This, of course, leaves unresolved the meaning of "uniquely personal" or even "personal" rights, a problem which may give rise to considerable further litigation, when taken in conjunction with *Textile Workers Union of America v. Lincoln Mills*.[121] As Williston says:

> "The Westinghouse and Lincoln Mills cases have left the federal courts somewhat baffled; some intriguing questions have presented themselves: What are 'personal' (described in a concurring opinion in the Westinghouse case as 'uniquely personal') rights of an employee, as distinguished from union rights? What is the theory of enforcement of individual rights by an aggrieved employee? Is he

[110] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., supra note 68, at 500, citing in support Williston, supra note 2, § 379A.
[111] Supra note 41.
[112] 270 S.W.2d 104 (Mo. Ct. App. 1954).
[113] Supra note 50.
[114] Supra note 47.
[115] National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-188 (1958).
[116] Ibid.
[117] Emphasis supplied.
[118] J.I. Case Company v. NLRB, supra note 70, at 336.
[119] Supra note 68.
[120] 61 Stat. 143 (1947), 29 U.S.C. § 159 (1958).
[121] Supra note 69.

> a third party beneficiary, or are the terms of the collective labor agreement embodied in the terms of his employment contract? What is the result if the state does not recognize third party beneficiaries?"

And in the language of a United States District Court:[122]

> "Federal courts, labor lawyers and legal scholars alike have been confounded in their attempts to distill from the Westinghouse case the precise holding in that case."

Of course, it is clear that certain of these rights are bound to be strictly personal, whereas others will be held to benefit the union only. But there is apt to be a penumbra, a twilight zone where the nature of these rights will be in doubt and recourse will be had to the courts. And under the most recent labor legislation, The Labor-Management Reporting and Disclosure Act of 1959,[123] this twilight zone and the opportunity for litigation may be greatly enlarged.

Conditions Precedent to Third Party's Right of Action

Assuming that the employee is in a jurisdiction which recognizes his rights as a third party beneficiary under a collective labor agreement, there is a collateral question: Must the employee exhaust union grievance procedures and administrative remedies before having access to the courts? In short, is this a condition precedent?

Grievance Procedures. By the great weight of authority, as exemplified by numerous decisions,[124] a union member is required to follow the grievance procedures constituting a part of his contract (the union charter and by-laws) with the union.[125] This requirement closely resembles the "self-denying" attitude of the courts when the dispute is between the individual member and his union.[126] But, under certain circumstances, an aggrieved employee will not be denied access to the courts even in such cases. This is well illustrated by *International Association of Machinists v. Gonzales*[127] and *Russell v. United Auto*

122 Tool & Die Makers Lodge No. 78 v. General Electric Co., 170 F.Supp. 945, 948 (E.D. Wis. 1958).

123 Also described as the Landrum-Griffin Act, 73 Stat. 519 (1959).

124 Rentschler v. Missouri Pacific R.R. Co., supra note 8, contains a comprehensive review of the earlier cases cited in notes 38, 39, 41, 42, 86, 100, 101, 104, 112; also, Jaeger, supra note 2, Ch. XI. For the recent cases, see Williston, supra note 2, § 379A, especially notes 4 et seq.

125 See Jaeger, supra note 2, at Ch. II, § 4, for a discussion of the contractual character of the constitution and by-laws of the union as constituting binding obligations upon the union members. See also Williston, supra note 2, at §§ 308A, 309A.

126 McClees v. Grand International Brotherhood of Locomotive Engineers, supra note 29.

127 356 U.S. 617 (1957).

Workers.[128] Thus, where there is a lack of due process in the grievance procedure, or there is fraud or collusion, and finally where the union arbitrarily and unreasonably fails to present his grievance, the member may bring an action against the offending union. In this connection, federal and state courts have said that "as a general rule grievance procedures provided by a collective bargaining agreement should be a bar to suits by individuals against the Employer based upon alleged violations of the agreement, but that such suits are not barred if the Union acted unfairly towards the employee in refusing to press the employee's claim through to, and including, arbitration under the collective bargaining agreement."[129]

But it has also been held that a "grievance" does not include a total breach of contract as in the case of the wrongful dismissal of an employee: "The grievance referred to in the contract does not apply so as to prevent an employee from suing to recover damages for which the defendant is liable to him by reason of a breach of the contract for his direct benefit. There is no obligation on the part of the plaintiff to bring a grievance on account of a breach of the contract, which is complete, resulting in damage to the plaintiff."[130]

The further question arises as to whether, in addition to his action at law on the contract made for his benefit, the employee may bring a suit in equity to enjoin his dismissal or to compel action by the employer, the union, or both to protect rights granted him by the collective labor agreement. It has, of course, been decided that the union may compel arbitration where the labor agreement has a compulsory arbitration provision "with respect to arbitration of grievances even where those grievances involve the personal rights of the employees."[131] This has been held to involve union rights, "and not

[128] 356 U.S. 634 (1957).

[129] Ostrofsky v. United Steelworkers of America, 171 F.Supp. 782, 791 (D. Md. 1957).

[130] Tennessee Coal, Iron & R. Co. v. Sizemore, supra note 48.

[131] Independent Circulation Union v. Item Co., 163 F.Supp. 399 (E.D. La. 1958). However, there appears to be a split of authority as to whether the federal courts may enforce arbitral awards based on the individual rights of employees. In A.L. Kornman Co. v. Amalgamated Clothing Workers, 264 F.2d 733 (6th Cir. 1959) the court held affirmatively, as did Textile Workers Union v. Cone Mills Corp., 268 F.2d 920 (4th Cir. 1959), cert. denied, 80 S.Ct. 157 (1959). In the Kornman case, the court said: "The company contends that this means of enforcement [suit by the union] is prohibited by the *Westinghouse* case, *supra* (note 68), and that the sole means of redress is for each employee to institute a separate action in a state court for his, or her, portion of the award (presumably on the principle of a third party beneficiary).

"We are not in accord with that argument. If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards. . . ." 264 F.2d at 737 (parenthetical material added).

uniquely personal rights of employees sought to be enforced by a union."[132] But the further question remains as to what rights the individual employee has if the union declines to espouse his grievance and neither seeks to enforce internal union-management grievance procedures, nor compulsory arbitration provisions of the collective labor agreement. The courts are not in accord as to the employee's rights when he reaches such an impasse.

In one significant case, *Mello v. Local 4408, CIO United Steelworkers,*[133] an employee complained of his discharge after being accused of bookmaking on the employer's premises. He alleged that the accusations were untrue and that he had been improperly discharged. He further alleged that he had urged the company and the union to afford him the requisite grievance procedure, but they had refused. The Supreme Court of Rhode Island denied him equitable relief since he was not a party to the contract and would merely "benefit if the arbitration provided for therein [the agreement] was held and resulted successfully."[134]

In a more recent case, *Parker v. Borock,*[135] the New York Court of Appeals sustained a judgment of the Appellate Division granting defendant's motion for summary judgment in an employee's action for wrongful discharge, his union, the International Association of Machinists, having refused to invoke the arbitration machinery provided for in the collective bargaining agreement. The court said: "We conclude that the employee is the direct beneficiary of such provisions [of the collective labor agreement] . . ."[136] and held that the arbitration provision inured solely to the benefit of the union. If the union arbitrarily and unreasonably refused to invoke the grievance procedure, the employee's action would have to be brought against the union.[137]

Cf. Item Company v. New Orleans Newspaper Guild, 256 F.2d 855 (5th Cir. 1958) and Refinery Employees' Union v. Continental Oil Co., 160 F. Supp 723 (W.D. La. 1958) where the courts discuss at some length the effect of the Westinghouse and Lincoln Mills cases on collective labor agreements, the rights of the parties thereto, and of the individual employees affected thereby.

132 Textile Workers Union of America v. Lincoln Mills of Alabama, supra note 69.

133 82 R.I. 60, 105 A.2d 806, 809 (1954).

134 Under the new legislation, the Labor-Management Reporting and Disclosure Act, supra note 123, Title I, the result might have been different.

135 5 N.Y.2d 156, 156 N.E.2d 297 (1959).

136 Here the court cites Gulla v. Barton, supra note 3, and Rotnofsky v. Capitol Distrs. Corp., 262 App. Div. 521, 20 N.Y.S.d 563 (1st Dep't 1951).

137 Donato v. American Locomotive Corp., 283 App. Div. 410, 127 N.Y.S.2d 709 (3d Dep't 1954), aff'd, 306 N.Y. 966, 120 N.E.2d 227 (1954), quoted in the principal case (Parker v. Borock), supra note 135, where the court also said: "There has been a growing recognition by the courts that the collective agreement can modify the terms of the contract of hiring. (See Williston, Contracts, Section 39A (3d ed.), and Section 379A (Rev. ed.) . . . ."

However, in *Fagliarone v. Consolidated Film Industries, Inc.*,[138] the converse was held essentially on the ground that the collective labor agreement gave the employee the right to have a grievance arbitrated if the employee felt "that he or she has been unjustly discriminated against . . . ."

Administrative Remedies. Aside from the requirement that members must exhaust their union grievance procedures, there is a further question as to whether the individual employees must exhaust available administrative remedies. In *Moore v. Illinois Central R. Co.*,[139] the United States Supreme Court held that whether an employee must first have recourse to administrative remedies in case of contract breach involving an allegedly wrongful discharge is a question to be decided on the basis of the law of the state where the remedy is sought. As the Mississippi Supreme Court had previously answered this question in the negative, such became the law of the case. As a third party beneficiary, the plaintiff was held entitled to bring his action on the collective labor agreement. The Mississippi courts have continued to uphold this right on the basis "that the court remedy is concurrent with the contractual remedy."[140]

Since *Moore v. Illinois Central R. Co.*,[141] two other cases of considerable moment have been decided: *Slocum v. Delaware, L. & W. R. Co.*,[142] and *Transcontinental & Western Air, Inc. v. Koppal.*[143] In the *Slocum* case, the Supreme Court continued to distinguish between the employee's common law action and any administrative remedy which in this case the National Railroad Adjustment Board might afford, saying:

> "Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*[144] Moore was discharged by the railroad. He could have challenged the validity of his discharge before the [arbitration] Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A

[138] 20 N.J.Misc. 193, 26 A.2d 425 (Cir. Ct. 1942).

[139] Supra note 46.

[140] Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., supra note 27, citing Moore v. Illinois Central R.R. Co., 180 Miss. 276, 176 So. 593 (1937).

[141] Supra note 46.

[142] 339 U.S. 239 (1950).

[143] 345 U.S. 653 (1953).

[144] Supra note 46.

> common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."[145]

The foregoing demonstrates that unless the state law makes recourse to the appropriate administrative body compulsory, as in *Transcontinental & Western Air, Inc. v. Koppal,* supra, the ex-employee may, upon discharge, elect to use his common law remedy and sue on the collective labor agreement as a third party beneficiary. In the *Koppal* case, decided under Missouri law requiring recourse to the administrative remedy, the United States Supreme Court emphasized the existence of this common law right, but held that the plaintiff had failed to exhaust his administrative remedies since he did not appeal from hearing officer's decision and "did not allege any arbitrary action by the hearing officer."[146]

Representative of the state court decided cases is *Stroman v. Atchison, Topeka & Santa Fe Ry. Co.*[147] Here, the plaintiff claimed she had been wrongfully discharged in violation of her seniority rights and in contravention of the provisions of the collective labor agreement under which she was working. She was granted summary judgment by the Superior Court of the City and County of San Francisco despite her failure "to exhaust her administrative remedies provided in the Collective Bargaining Agreement." On appeal, after discussion of *Transcontinental & Western Air v. Koppal,* supra, the court said: "The California law requires an employee to exhaust his administrative remedies under his employment contract before he may bring an action for damages for violation of such contract."[148] While concededly the plaintiff had only appealed to the General Manager although the employee's Vice President was the highest officer designated to hear such complaints, the court found that the plaintiff's superiors having informed her that the General Manager was the company's highest officer to receive complaints, the company was "estopped from urging this defense. Underlying the proper interpretation of the Collective Bargaining Agreement are certain fundamental principles

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[145] Slocum v. Delaware, L. & W. R.R. Co., supra note 142, at 244, quoted with approval in Woodward Iron Co. v. Ware, supra note 67.

[146] Transcontinental & Western Air, Inc. v. Koppal, supra note 143, discussed in Atkinson v. Thompson, supra note 29.

[147] 161 Cal.App. 2d 151, 326 P.2d 155 (1st Dist. 1958).

[148] Id. at 164, citing Cone v. Union Oil Co., 129 Cal.App. 2d 558, 277 P.2d 464 (2d Dist. 1954); Hagin v. Pacific Gas & Elec. Co., 152 Cal.App. 2d 93, 312 P.2d 356 (1st Dist. 1957); Williams v. Pacific Elec. Ry. Co., 147 Cal.App. 2d 1, 304 P.2d 715 (2d Dist. 1956).

of morality and fair play. While the company was under no duty to speak, when it did speak through its responsible agents, it was under a duty to speak the truth, and not to mislead the plaintiff to her damage."[149] This being "another factual issue that should have been submitted to the jury" the appellate court reversed the judgment,[150] emphasizing that:

> "The United States Supreme Court has ruled that under this statute an appeal to the Adjustment Board is not a condition precedent to filing a court action."[151]

While there is nothing in recent labor legislation which affects the administrative jurisdiction of the Railway Adjustment Board or similar administrative bodies, such legislation has had a considerable impact upon grievance procedures, whether embodied in collective labor agreements or contained in union membership contracts.

Effect of the Labor-Management Reporting and Disclosure Act

Under Title I—Bill of Rights of Members of Labor Organizations of the Landrum-Griffin Act,[152] the union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such [labor] organizations or any officer thereof: . . .". The same Section 101 gives the individual member a right of action against a labor organization or its officers. Section 102 gives a similar right to "Any person whose rights . . . have been infringed by any violation of this title" to bring a civil action in a United States District Court. "Any person" would thus assure a non-union employee the rights of a third party beneficiary under a collective labor agreement made for his benefit. Not being a member of the union, its grievance procedure should not apply to him, especially since a proviso in Section 101(A)(4) is limited to "any such member [who] may be required to exhaust reasonable hearing procedures."[153] It does not use the term "any person."

In passing, it may be noted that the Act requires a copy of "each collective bargaining agreement" be furnished upon request of any

149 Supra note 148.

150 The court stated that if the jury found that the alleged representations were not made, then "the company is not estopped," and "defendant would be entitled to a summary judgment."

151 Citing in support Moore v. Illinois Central R.R. Co., supra note 46, and Transcontinental & Western Air v. Koppal, supra note 143.

152 Supra note 123.

153 Id. § 101.

employee "whose rights as such employee are directly affected by such agreement." The distinction in the use of the terms "employee" and "member" is further emphasized in the same Section 104 in connection with the obligation to furnish similar copies "to each constituent unit (e.g., local unions) which has *members* directly affected by such agreement."[154] (Italics and parenthetical material added.)

Lewis v. Benedict Coal Corporation

In the most recent case dealing with collective labor agreements, *Lewis v. Benedict Coal Corporation*,[155] the United States Supreme Court examined the nature of the collective bargaining agreement and the rights of third parties. Before the court was the National Bituminous Coal Wage Agreement of 1950 which provided, *inter alia*, for a union welfare fund meeting the requirements of § 302(c)(5) of the Labor-Management Relations Act. Under the agreement, various signatory coal operators undertook to pay into the United Mine Workers of America Welfare and Retirement Fund of 1950, thirty cents (later increased to forty cents) per ton of coal produced.

Coal produced by the defendant operator resulted in a royalty of $177,762.92 of which he paid all but $76,504.21 into the Fund. The latter sum he withheld contending that strikes and work stoppages entitled him to do so. This was contested by the union and trustees of the Fund as third party beneficiaries. In the trial court, Benedict's right to a set-off against the union was upheld. Judgment was also given in favor of the trustees' execution being stayed until Benedict's judgment should be satisfied. The Court of Appeals for the Sixth Circuit affirmed, except as to the amount of the set-off which was deemed to be excessive. Certiorari was granted to the Supreme Court.[156]

So much of the holdings below relating to the determination that the union had violated the collective bargaining agreement was affirmed.[157] However, the operator's right to withhold, because of these violations, any part of the amounts payable into the Fund was denied, the court determining "that the union's performance of its promises is not a condition precedent to Benedict's duty to pay royalty" the operator's obligation being an independent covenant. In this connection the court observed,

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[154] Id. § 104.

[155] 80 S. Ct. 489, 4 L. Ed. 2d 442 (1960).

[156] As the federal court is bound to apply the local law in diversity cases, Tennessee law as expounded in Cross Mountain Coal Co. v. Ault, supra note 38, recognizing the rights of third party beneficiaries, would govern.

[157] Lewis v. Benedict Coal Corp., 259 F.2d 346 (6th Cir. 1959).

"a third-party beneficiary has made no promises and therefor has breached no duty to the promisor. Accordingly to hold, as the lower courts in this case did, that a promisor may 'set off' the damages caused by the promisee's breach is actually to read the contract, which is the measure of the third party's rights, as so providing. . . .

"This may be a desirable rule of construction to apply to a third-party beneficiary contract where the promisor's interest in or connection with the third party, in contrast with the promisee's, begins with the promise and ends with its performance. . . .

"This collective bargaining agreement, however, is not a typical third-party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty. It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. . . . In a very real sense Benedict's interest in the soundness of the fund and its management is in no way less than that of the promisee union. This of itself cautions against reliance upon language which does not explicitly provide that the parties contracted to protect Benedict by allowing the company to set off its damages against its royalty obligation."

In short, the collective labor agreement is something more than the usual contract being, in effect, an agreement affected with a public interest: "Finally a consideration which is not present in the case of other third-party beneficiary contracts is the impact of the national labor policy[158] . . . [which] becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here."[159] The Court concludes that in the absence of a clear provision in the agreement to the contrary, the set-off against the third party beneficiary is not permissible.

A similar case, *Lewis v. Barnes Contracting Company*,[160] also involved the National Bituminous Coal Wage Agreement and its

158 The Supreme Court of the United States here cites § 301(b) of the Taft-Hartley Act, 29 U.S.C. § 185(b) (1958), supra note 120.

159 Lewis v. Benedict Coal Corp., supra note 155.

160 179 F.Supp. 673 (N.D. W.Va. 1959).

enforcement. The trustees of the Fund contended that new strip mines being worked by the defendant company were within the purview of the Agreement, a contention denied by the Company as not being the intention of the parties. The District Court for the Northern District of West Virginia, citing the Court of Appeals decision in *Lewis v. Benedict Coal Corporation,* held that "The Fund is, in effect, a third-party beneficiary to the collective bargaining contract."[161] This conclusion was reached pursuant to West Virginia law this being a diversity case.[162]

Summary and Conclusions

While it is true that the application of the third party beneficiary doctrine to collective labor agreements has been criticized,[163] the critics recognize that it has been adopted in a great majority of the cases,[164] of which *Lewis v. Benedict Coal Corporation,*[165] is the most recent. Since the courts have given the doctrine such wide-spread recognition, there seems to be no particularly sound reason why it should not prevail in labor cases as in other contract situations. True, there are jurisdictions which do not subscribe to the doctrine, but these are in such a slim minority as to be well-nigh negligible. In any event, Massachusetts, the leading opponent of the third party beneficiary rule, enforces employee rights without cavil. However, this criticism and the confusion that is apparent in some of the cases is probably the result of attempts to fit the beneficiary under a collective labor agreement into one of the two classic categories: creditor or donee. It may well be time to admit that the employee does not fit into either category and simply recognize him as a "labor beneficiary."

Of the other theories supporting enforcement of employee rights, the custom or usage theory which denies to the collective labor agree-

[161] Id. at 674, citing Lewis v. Mearns, 168 F.Supp. 134 (N.D. W.Va. 1958), aff'd, 268 F.2d 427 (4th Cir. 1958).

[162] That West Virginia recognizes and applies the third party beneficiary principle as applied to collective labor agreements, see West. v. B. & O. R.R. Co., supra note 20.

[163] Chamberlain, Collective Bargaining and the Concept of Contract, 49 Colum. L. Rev. 829 (1948); Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958); Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109 (1941); Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572 (1931); Warns, The Nature of the Collective Bargaining Agreement, 3 Miami L.Q. 235 (1949); Witmer, Collective Labor Agreements in the Courts, 48 Yale L.J. 195 (1938).

[164] Jaeger, Cases and Statutes on Labor Law, 759, note 2, where are listed a number of the articles dealing with this question. The Ability of an Individual Employee to Sue His Employer on a Collective Bargaining Agreement, 3 Buffalo L. Rev. 270 (1954); see supra preceding note. Cf. Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850 (1957).

[165] Supra note 155.

ment the status of a contract, appears to have been definitely laid to rest by the virtually universal acceptance of these agreements as contracts. Another theory, not yet accepted, would accord to these agreements the force and effect of a code[166] or organic law for a given industry[167] and as such govern the terms of the individual employment contracts.[168] The agency theory has been discarded largely because if pressed to its logical extremity, it would make the union member an agent and principal in the same transaction. This theory is also unsatisfactory in that it leaves unanswered the question as to the position of the employee who does not join the union until after the agreement has been made. Procedural difficulties preventing suits against the union by its members raise further problems.

In summary, then, it seems clear that if the right of the employee to enforce the collective labor agreement under the common law may have been doubtful in some jurisdictions, the federal statutes appear to have removed that doubt. In any event, the employee, regardless of his membership in the union which negotiated the collective labor agreement, is entitled to enforce rights embodied therein for his benefit. According to the *Westinghouse* case, he is free to pursue these rights, certainly as against the employer, in the state courts. As against the union, the latest federal legislation, The Labor-Management Reporting and Disclosure Act affords him access to the federal courts.

The conclusions to be drawn therefore are

1. AT COMMON LAW, the individual employee is a third party beneficiary and should be described as "a labor beneficiary."

2. To be a labor beneficiary, an employee need not, as a basis for his action, be a member of the union which entered into the collective labor agreement.

3. UNDER THE STATUTES, a collective labor agreement is a contract affected with the public interest.

4. The collective labor agreement embraces rights personal to the employee and others, enforceable only by the union.

5. These rights are created by the negotiated agreement viewed as a contract, but augmented by statutory obligation.

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166 As, for example, in France; cf. Duguit, Collective Acts as Distinguished from Contracts, 27 Yale L.J. 753 (1918).

167 NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940), where the court said: "The trade agreement thus becomes . . . the industrial constitution of the enterprise . . . ." Cf. Yazoo & M.V. R.R. Co. v. Webb, supra note 18; see Chamberlain, op. cit. supra note 163 and 6 N.Y.U. Conference on Labor (1953); cf. Sullivan, Book Review, 12 J. Legal Ed. 464 (1960).

168 J.I. Case Co. v. NLRB, supra note 70.