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INDIVIDUAL RIGHTS ARISING FROM COLLECTIVE LABOR CONTRACTS

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The tremendous impetus given to collective bargaining by the National Labor Relations Act[1] and the numerous similar state statutes[2] has greatly increased both the economic and legal significance of collective labor contracts. It seems certain that this trend will continue. Perhaps because the background of bitterness and strife, which customarily attends the attempt of workers to organize into groups for collective bargaining purposes,[3] was absent in cases where individual employees asserted rights under collective labor contracts, these rights were recognized by the courts at a time when the great legal battles over the right of workers to organize were still to be waged.[4] Doubtless the arbitral machinery ordinarily established in such contracts, supplemented in extreme cases by group action on the part of the union,[5] will continue in the future, as it has done in the past, to provide the customary method for the enforce-

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1. 49 STAT. 457 (1935), 29 U. S. C. §§ 151 *et seq.* (Supp. 1937). Of course the Railway Labor Act of 1926, as amended 1934, 49 STAT. 1189 (1934), 45 U. S. C. §§ 151-164, 181-188 (Supp. 1937), and the Bituminous Coal Act of 1937, 50 STAT. 91 (1937), 15 U. S. C. §§ 828-848 (Supp. 1937), also protect the right of labor to bargain collectively. *Cf.* Merchant Marine Act of 1936, 49 STAT. 1992 (1936), 46 U. S. C. § 1131(a) (Supp. 1937).

2. Five states have enacted such legislation to date. See Mass. Acts 1937, c. 436; N. Y. Laws 1937, c. 443; Pa. Laws 1937, no. 294; Utah Laws 1937, c. 55; and Wis. Laws 1937, c. 51. The legislatures of twelve other states have recently considered the enactment of similar laws. See Note (1937) 51 HARV. L. REV. 722.

3. It is generally recognized that the most violent conflicts between employer and workers arise out of the attempts of the latter to organize for the purpose of bargaining collectively. In Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 42 (1937), the court said: "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." See also Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 545 (1937), and WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 201 *et seq.*

4. See Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071.

5. For convenience, the representative bargaining unit of employees will be referred to as the union.

ment of individual rights under these collective contracts. However, the large number of cases concerned with these rights which have reached the courts during the past few years indicates that the legal principles applicable to them will become increasingly important.

THE BASIS OF THE INDIVIDUAL RIGHT

The first difficulty encountered when resort was had to the courts for the enforcement of individual rights under collective labor contracts was the absence of any legal theory upon which their recognition could be founded. Early decisions denied that a collective labor agreement between a union and an employer or association of employers constituted a legally binding contract.[6] The well established common law principle that where there is no specific contract to the contrary, the relationship of master and servant may be terminated by either party at will was the most important factor in producing this result.[7] Since the collective agreement was not binding upon the parties, it necessarily created no individual rights in others.

In order to grant legal effect to these individual rights and to preserve at the same time the principle that the collective agreement was not a contract, the theory was evolved that the terms of the collective agreement relating to general conditions of employment, such as wages and hours, constituted "usages" which might be incorporated into the individual contract of employment under which each employee worked.[8] Some of the cases first recognizing the right of an individual employee to recover against an employer violating provision of collective labor agree-

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6. St. L., I. M. & S. Ry. v. Matthews, 64 Ark. 398, 42 S. W. 902 (1897); Hudson v. Cincinnati, N. O. & T. P. Ry., 152 Ky. 711, 154 S. W. 47 (1913); Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136 (1904).

7. See St. L., I. M. & S. Ry. v. Matthews; Burnetta v. Marceline Coal Co.; and Hudson v. Cincinnati, N. O. & T. P. Ry., all *supra* note 6.

8. Hudson v. Cincinnati, N. O. & T. P. Ry., 152 Ky. 711, 154 S. W. 47 (1913), is the leading case under this theory although its discussion of the doctrine is dictum. See also Panhandle & S. F. Ry. v. Wilson, 55 S. W. (2d) 216, 219 (Tex. Civ. App. 1932); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S. W. (2d) 692 (1928); West v. Baltimore & Ohio R. R., 103 W. Va. 417, 137 S. E. 654 (1927) (dictum). *Cf.* Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S. W. 1042 (1923). For a consideration of the theories upon which the individual right is based, see Fuchs, *Collective Labor Agreements in Americern Law* (1924) 10 ST. LOUIS L. REV. 1; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229; *Theories of Enforcement of Collective Labor Agreements* (1932) 41 YALE L. J. 1221; Christenson, *Seniority Rights Under Labor Union Working Agreements* (1937) 11 TEMPLE L. Q. 355; and Note (1938) 51 HARV. L. REV. 520.

ments may be rationalized upon the usage theory. Yet, the language of the decisions and their results[9] are clearly as consistent with the theory that the terms of the collective agreements were expressly incorporated by reference into the particular employment contract sued upon. The usage theory was not expressly mentioned in these cases. The fact that none of the so-called "usage" cases recognized the individual rights unless there was positive evidence of an express adoption by the employee of the terms of the collective agreement, makes it difficult to explain them upon that theory, since a usage enters into a contract by implication.[10] Consequently, to allow recovery upon the usage theory, it would be unnecessary for an employee to show that he had expressly adopted the terms of the collective agreement.

Not only is this line of authorities actually inconsistent with the theory upon which usages are deemed to have been incorporated into a contract, but it does not adequately explain the nature of an employee's right to recover for violation of the terms of a collective labor agreement. For example, it is generally held that the rights of an individual employee under such agreement may be altered or extinguished by a subsequent agreement entered into by the union and the employer.[11] If the basis of the individual employee's right were usage, once that right had vested, it could not be changed because it is absurd to predicate the right upon the generality and stability of the usage,[12] and then to allow the usage itself to be altered or modified as often as the parties to the principal agreement see fit to do so.[13] This theory was only made necessary by the fact that originally the individual right could not be based upon a collective agreement because the latter was not regarded as legally binding. Consequently, since these agreements are now recognized as being themselves enforceable

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9. Thus in Panhandle & S. F. Ry. v. Wilson, 55 S. W. (2d) 216, 219 (Tex. Civ. App. 1932), it was said: "While there is no direct testimony showing that Wilson as an individual ever assented to the contract made between the railway company and the employees' association, the case was tried upon that assumption in the lower court and is decided upon the same theory in this court." See also Aden v. Louisville & N. R. R., 210 Ky. 573, 276 S. W. 511 (1921).

10. 3 WILLISTON, CONTRACTS (rev. ed. 1936) §§ 651, 656; RESTATEMENT, CONTRACTS (1932) §§ 245-249. See also, Aulich v. Craigmyle, 248 Ky. 676, 59 S. W. (2d) 560 (1933).

11. See cases cited *infra* note 78.

12. Apparently this was the basis of the holding in Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S. W. 1042 (1923), which is the one case which refuses to allow the union to alter individual rights that have vested under a collective labor contract by changing that agreement.

13. See cases cited *infra* note 78.

at law,[14] there is no longer a need to rely upon it. Historically important because it provided a basis for the recognition of rights under collective contracts, this theory has been outstripped by the development of these rights, and the fact that no recent case has relied upon it shows its insignificance in the development of this branch of the law.

Another doctrine which was early invoked to sustain the decision that an employee might recover damages because his employer had violated a collective labor agreement was that which allows a third party to enforce the provisions of a contract for his benefit.[15] It has been used to permit recovery by an employee who was not a member of the union which negotiated the collective labor agreement,[16] and in order to enable

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14. Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc., 265 Fed. 397 (E. D. La. 1920); Cook v. Des Moines Union Ry., 16 F. Supp. 810 (S. D. Iowa 1936); Weber v. Nasser, 61 Cal. App. 1259, 286 Pac. 1074 (1930), *appeal dismissed because question moot,* 210 Cal. 607, 292 Pac. 637 (1930); Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905); Chinese-American Restaurant v. Finnigan, 272 Mass. 360, 172 N. E. 510 (1930); Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1st Dep't 1922); Maisel v. Sigman, 123 Misc. 714, 205 N. Y. Supp. 807 (Sup. Ct. 1924); Seidner v. Fish, 131 Misc. 203, 226 N. Y. Supp. 411 (N. Y. City Ct. 1927); Ribner v. Racso Butter and Egg Co., 135 Misc. 616, 238 N. Y. Supp. 132 (Sup. Ct. 1929); Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N. Y. Supp. 87 (Sup. Ct. 1931); American Cloak & Suit Mfrs.' Ass'n. v. Brooklyn Ladies' Garment Mfrs.' Ass'n, 143 Misc. 319, 255 N. Y. Supp. 614 (Sup. Ct. 1931); Farulla v. Freundlich, 152 Misc. 761, 274 N. Y. Supp. 70 (Sup. Ct. 1934); De Agostina v. Holmden, 157 Misc. 819, 285 N. Y. Supp. 909 (Sup. Ct. 1935); Harper v. Local Union No. 520, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932). *Contra*: Wilson v. Airline Coal Co., 215 Iowa 855, 246 N. W. 753 (1933). *Cf.* Ahlquist v. Alaska-Portland Packers' Ass'n, 39 F. (2d) 348 (C. C. A. 9th, 1930); Goyette v. Watson Co., 245 Mass. 577, 140 N. E. 285 (1923); Meltzer v. Kaminer, 131 Misc. 813, 227 N. Y. Supp. 459 (Sup. Ct. 1927); Polk v. Cleveland Ry., 20 Ohio App. 317, 151 N. E. 808 (1925), *motion to certify record overruled,* 23 Ohio L. R. 243 (1925).

15. Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914). This was the first case allowing an employee to recover damages for violation of individual rights under a collective labor contract. The action was by a union member employee to recover difference between wages received and those established by collective contract of which he was unaware. The court said: "The union entered into the contract for the benefit of the plaintiff and the other employees in the defendant's brewery, and for the benefit of all union workmen. . . . It was a contract made by his representative for his benefit. . . ." Yazoo & M. Valley R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931). In sustaining the right of non-union employee to recover on collective contract expressly referring to him, the court saying: "Thus the interest of the union members in respect to the rate of pay was substantially tied into or united with that of nonunion men, including colored train employees; and the contract results in this manner to and for the benefit of all of them so far as the rates of pay were concerned; and, being so, appellant as a third party in interest could accept and rely on its benefits in respect to the rate of pay and sue for the same. The remedy is as broad as the contractual rights." See also Rentschler v. Missouri Pac. R. R., 126 Neb. 493, 253 N. W. 694 (1934); Johnson v. American Ry. Exp. Co., 163 S. C. 191, 161 S. E. 473 (1931); Marshall v. Charleston & W. C. Ry., 164 S. C. 283, 162 S. E. 348 (1931). But *cf.* Mueller v. Chicago & N. W. Ry., 194 Minn. 83, 259 N. W. 798 (1935).

16. Yazoo & M. Valley R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931). *Cf.* Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902 (C. C. A. 5th, 1933), and Gregg

the conclusion to be reached that the employee is bound by any changes made in the collective contract.[17] Unlike the usage theory, this latter principle depends for its application upon the enforceability of the collective agreement. Although it is more nearly adequate than the former doctrine to explain the nature of the individual right, objections to this theory have been made. It has been urged that this theory provides no basis for holding that the employee is liable to the employer for breach of the collective contract since ordinarily a third party beneficiary of a contract incurs no duties under it.[18] For the same reason this theory does not account for the right of a union to proceed against an individual employer for a breach of a collective agreement made between the union on the one hand and an association of employers on the other.[19] These criticisms are valid and, although the general trend in recent cases is to rely upon this theory as a justification for the enforcement of individual rights, since it gives these greater plasticity than other doctrines do, it is not completely satisfactory.

It has also been suggested that an employee secures individual rights under a collective bargaining contract because the union in making the contract acts as his agent.[20] This rationale is obviously inadequate to account for the fact that the contract is binding upon the union,[21] since a contract entered into by an agent as such does not generally impose any duties upon him.[22] Nor does it explain the fact that an employee can take advantage of a contract executed before the beginning of his employment,[23] or that nonunion workers may recover under a collec-

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v. Starks, 188 Ky. 834, 224 S. W. 459 (1920). *Contra*: Shelley v. Portland Tug & Barge Co., 5 Law Week 816 (Ore. Sup. Ct. 1938).

17. See cases cited *infra* note 77.

18. In Whiting Milk Co. v. Grondin, 282 Mass. 41, 184 N. E. 379 (1933), the right of an employer to an injunction against a former employee to enforce a restrictive provision relating to solicitation of employer's customers was recognized and damages were allowed in a suit instituted by the employer against the former employee and his new employer. An injunction was refused upon the ground that damages were adequate. *Cf.* Strobe v. Netherland Co., 245 App. Div. 573, 283 N. Y. Supp. 246 (4th Dep't 1935), refusing the request of an employee for a declaratory judgment determining the validity of a similar restrictive provision in a collective labor contract.

19. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926).

20. Gary v. Central of Georgia Ry., 44 Ga. App. 120, 160 S. E. 716 (1931); Hall v. St. Louis-San Francisco Ry., 224 Mo. App. 431, 28 S. W. (2d) 687 (1930); *cf.* McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175, 179 (Mo. App. 1934).

21. See cases cited *supra* note 14.

22. Hartzell v. Crumb, 90 Mo. 629, 3 S. W. 59 (1886); Hunt v. Sanders, 313 Mo. 169, 281 S. W. 422 (1926).

23. Burton v. Oregon-Washington R. R. & Navigation Co., 148 Ore. 648, 38 P. (2d) 72 (1934); San Antonio & A. P. Ry. v. Collins, 61 S. W. (2d) 84 (Tex. 1933).

tive contract executed by the union, or that an employee may recover under the terms of a collective contract, although he has no knowledge of its existence.[24] The theory is also subject to the same criticism that may be levelled against the usage doctrine because it does not account for the fact that the union may alter the rights of the individual under such a contract,[25] since of course the agent who enters into a contract upon behalf of his principal does not ordinarily have the power subsequently to alter the rights of the latter. It has never been of any importance in the development of these individual rights, for no case has ever protected such rights in reliance upon it. Without support either in logic and authority, it is not the law and should not be.

Finally, it has been proposed in at least one decision that an individual employee is entitled to recover from an employer for violation of the provisions of a collective labor agreement because the agreement constitutes an open offer by the employer which is accepted by each individual who enters into his service.[26] It is impossible to explain those authorities which permit an employee to enforce the terms of a collective contract of which he has no knowledge upon this principle, since it is apparent that an employee cannot accept an offer of which he is unaware. Nor does it account for the fact that an employee may hold his employer to the terms of a collective contract executed by an association of which the employer is a member,[27] or the right of the union to alter the employee's rights by a change in the collective agreement.[28]

Some confusion has arisen as to whether or not an individual employee may by express contract provide terms and conditions of employment which differ from those established for employees generally by a collective labor contract.[29] Of course, an individual employee cannot alter the terms of the collective agreement itself, but there is no reason why an individual employee may not make a separate and different contract of employment.

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24. See Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914). *Cf.* Florestano v. N. P. Ry., 198 Minn. 203, 269 N. W. 407, 408 (1936).
25. See cases cited *infra* note 78.
26. Rentschler v. Missouri Pac. R. R., 126 Neb. 493, 253 N. W. 694 (1934). *Cf.* Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902 (C. C. A. 5th, 1933).
27. See *supra* note 19.
28. See *infra* note 77.
29. Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S. W. (2d) 692 (1928); Panhandle & S. F. Ry. v. Wilson, 55 S. W. (2d) 216 (Tex. Civ. App. 1932). The converse question arises when the individual rights are altered by subsequent agreement between the union and employer. See *infra* note 78, and text thereto.

If the employer were able to exact individual contracts less favorable to the employee than the collective contract, the natural tendency would be for an employer to enter into as many separate contracts as possible, and the ultimate result might well be the emasculation of the collective agreement.[30] However, it can scarcely be urged that an individual contract less favorable to the employee than the collective agreement is so diametrically opposed to public policy that it will not be recognized as binding at law. The possibility that this situation may arise could be obviated by the union, requiring either that the collective agreement contain a closed shop provision or that the terms of the collective agreement should apply to all employees, even though some of them were not members of the union.[31] These provisions would invalidate a subsequent individual contract of employment which did not conform to the terms of the collective contract if the employee making an individual contract knew at the time that it violated the collective agreement, in which event his action might constitute the tort of inducing a breach of contract.[32] The question is largely academic because few collective agreements fail to cover all employees in the type of service to which they relate and it is practically impossible for a worker to be unaware of the collective bargain.[32a]

The very recent cases in which it has been recognized that individual rights may arise from collective labor contracts have not as a rule devoted extensive consideration to the theoretical foundation of the rights enforced.[33] The present trend is to grant recognition to these individual

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30. Compare the language quoted from Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931), and Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45 (1937).

31. As was provided in the collective contract considered in Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).

32. Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1st Dep't 1922). However some courts allow the union to enjoin the employer from violating the collective labor contract. Cohen v. Berkman, 130 Misc. 725, 225 N. Y. Supp. 135 (1st Dep't 1927); Ribner v. Racso Butter & Egg Co., 135 Misc. 616, 238 N. Y. Supp. 132 (Sup. Ct. 1929); Farulla v. Freundlich. 152 Misc. 761, 274 N. Y. Supp. 70 (Sup. Ct. 1934); Harper v. Local Union, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932). But *cf.* Goyette v. Watson, 245 Mass. 577, 140 N. E. 285 (1923). This problem raises questions as to the restriction of the jurisdiction of equity courts by anti-injunction legislation which are beyond the scope of this article.

32a. See, Chicago, R. I. & P. Ry. v. Sawyer, 176 Okla. 446, 56 P. (2d) 418 (1936) (indicating that neither employer or employee can make an individual contract in conflict with the collective agreement).

33. This attitude was expressed by the court in Beatty v. Chicago, B. & Q. R. R., 49 Wyo. 22, 52 P. (2d) 404 (1935): "But there has lately been a distinct tendency in the other direction, and the majority of the decisions bearing on the point hold, upon one theory or another, that a contract entered into between an employer and a trade union is primarily one, as far as it goes, for the benefit of each individual member of the union. . . ."

rights but to shape them so that they do not interfere with the process of collective bargaining. These rights have been extended and strengthened, but no recent case has ever permitted the rights of an individual under a collective labor contract to interfere with the enforcement or alteration of the latter contract.

THE MISSOURI CASES

The evolution of individual rights out of collective labor agreements and the independence of those rights from the theories that have been invoked to sustain their enforcement is vividly illustrated by an analysis of the Missouri cases in which they have been considered.

Burnetta v. Marceline Coal Co. was the first Missouri case to consider the effect of a collective labor agreement upon the individual workers.[34] In this case a mine worker instituted an action against his employer to recover wages for work performed. The employer contended that, under the terms of a contract between a group of coal operators, including the employer, and a miners' union of which the plaintiff was a member, part of the wages claimed were not due at the time the action was instituted because they were payable monthly and not, as plaintiff asserted, semi-monthly. Upon the trial, the lower court had held that evidence of the collective agreement was inadmissible, although the defendant had endeavored to lay a foundation for its admission by introducing testimony of the mine superintendent to the effect that at the beginning of the plaintiff's employment the latter had agreed to abide by the rules of the company. The action of the trial court in rejecting the evidence of the collective agreement was sustained upon the ground that the plaintiff had not expressly adopted it.[35] The court indicated that there could be no duty

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34. 180 Mo. 241, 79 S. W. 136 (1904). This seems to be the first reported case in which the effect of a collective labor agreement upon the individual rights and duties of an employee is considered. It was relied upon in Hudson v. Cincinnati, N. O. & T. P. Ry., 152 Ky. 711, 154 S. W. 47 (1913), and this became the source of the rule that no individual rights arose from these agreements.

35. *Id.* at 249, 79 S. W. at 139, the court said: "This testimony was the only foundation laid for the offer made by defendant, that the coal operators in this mining district had a contract with the Miners' Union, of which this plaintiff is a member, by which the miners were to be paid in the way in which the defendant offered to pay plaintiff. This offer was excluded by the court, and correctly so, for the reason there was no sufficient showing that plaintiff, in entering the employment of appellant, adopted the contract as made by the organization known as the Miners' Union, nor was there any testimony making the contract of the miners' union any part of the contract of the plaintiff." The defendant had offered an instruction predicated apparently upon the theory that

imposed upon the plaintiff by the collective agreement independent of his individual contract for service by saying:

> "The Miners' Union is not an organization for the purpose of conducting any business enterprise, but is purely one for the protection of labor against the unjust exactions of capital. The members of the union do not labor in coal mines for the organization, but each member works for himself, and whatever compensation he receives is for the benefit of himself and his family. That the Miners' Union, as an organization, can not 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."[36]

Since the plaintiff's individual contract did not contain any provision relating to the time of payment, the question was settled by implication and it was held that the time for payment had elapsed when the suit was instituted.[37]

The question was not again considered by the courts of Missouri for over a quarter of a century, when the Springfield Court of Appeals, in *Hall v. St. Louis-San Francisco Ry.*,[38] affirmed a judgment granting nominal damages[39] for breach of a collective labor contract, without mentioning the *Burnetta* case[40], and without citing a single authority in support of its decision. In holding that the plaintiff could take advantage of the provision of the collective contract which required an investigation before discharge, the court apparently proceeded upon the theory that the plaintiff was a third party beneficiary, under that agreement, for it said:

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the collective agreement established a custom which could be read into the individual contract by implication. The trial court refused to accept it and the Missouri Supreme Court sustained the refusal.

36. *Id.* at 250, 79 S. W. at 139. The only case cited by the court is Richmond v. Judy, 6 Mo. App. 465 (1879), in which recovery against certain members of a voluntary association in an action on contract was allowed upon the ground that express agency was shown. It was suggested that the individual members as such were not bound, absent facts from which the principal and agent relationship could be inferred.

37. It should be borne in mind that the result of this case was to relieve an employee from the obligations of a collective labor agreement. In this respect the last line of the decision is, perhaps, illuminating: "The judgment in this cause was manifestly for the right party, and is affirmed." In view of this, it is ironical that this case is the origin of the rule denying employees *rights* under collective contracts. See *supra* note 34. Corporate employers must now pay wages as often as semi-monthly in Missouri. Mo. Rev. Stat. (1929) § 4608.

38. 224 Mo. App. 431, 28 S. W. (2d) 687 (1930).

39. The plaintiff tried unsuccessfully to recover punitive damages also, and although his failure in this respect is unexplained by the report of the case, the result is in accordance with the correct rule. See *infra* note 86.

40. See *supra* note 34.

> "Defendant next seeks to invoke the rule that in the absence of a showing of employment for a definite period of time an employee could not recover for a wrongful discharge. . . . We can see no impropriety in any person or corporation who employs a large number of men who are members of a labor union making and being bound by an agreement made with the representatives of a labor union for and on behalf of members of that union such as was entered into between defendant and the union of which this plaintiff was a member. We hold that the agreement referred to was binding and the plaintiff was entitled to the benefit of its provisions relative to a discharge by defendant."[41]

If the *Hall* case is characterized by a cavalier contempt for elaborate reasoning and the citation of authority, the next Missouri case to consider the problem suffers from a plethora of precedent and a maze of theories. In *McCoy v. St. Joseph Belt Ry.*,[42] the Kansas City Court of Appeals recognized the right of an employee to recover damages for the breach by his employer of the provisions of a collective labor contract establishing seniority rights, but it is difficult to ascertain the precise ground upon which the right to recover was based. Throughout the opinion there is language indicating that great reliance was placed upon the fact that there was evidence from which it could be inferred that the plaintiff had "authorized" or "ratified"[43] the collective contract,[44] yet it was intimated that the absence of such evidence would not have been sufficient to defeat recovery, for the court said:

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41. Hall v. St. L.-S. F. Ry., 224 Mo. App. 431, 435, 28 S. W. (2d) 687, 689 (1930).

42. 77 S. W. (2d) 175 (Mo. App. 1934).

43. *Id.* at 179, the court said: "This case is different from one wherein the contract is made between the union on one side and the employer on the other, and in which there is nothing in the evidence to show that the employee has in any way *authorized* the contract to be made for him or for his benefit. . . . So that there is evidence of plaintiff having authorized the contract and that such contract was executed." This aspect of the case was further emphasized: "We again wish to state that the contract involved in the case at bar is (so far as its connection with plaintiff is concerned) much stronger than the contracts involved in the cited cases, for this contract was made by a committee elected by the employees to meet with the employer and formulate the contract which was afterwards ratified by the employees." The "cases cited" were Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931) (third party beneficiary); Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902 (C. C. A. 5th, 1933) (open offer), both cited *supra* note 16; Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S. W. 1042 (1923) (usage), cited *supra* note 8.

44. Apparently the court felt it was necessary to find some closer connection between the plaintiff and the collective agreement than that which resulted from the bare fact of employment in order to circumvent the Burnetta case. See *supra* note 34. However, it is difficult to reconcile this portion of the opinion with the following language used at p. 181: "Hence it cannot be successfully contended that the suit cannot be maintained because the contract sued on was never proved and that there is no showing that plaintiff ever individually signed the same or, expressly or impliedly, gave his assent thereto."

> "On the other hand, it is well settled that a third party, for whose benefit a contract is made, may enforce it notwithstanding he is neither named therein nor is in privity to the consideration. Crow v. Kaupp (Mo. Sup.), 50 S. W. (2d) 995. While the contract in the case at bar was signed by defendant president representing the railway company and the committee representing the defendant's yardmen, yet manifestly it was for the benefit of each and every individual employee in the yards coming within the classification of the term "yardmen" or "switchmen" therein, and the terms of said written contract were therefore a part of the contract of employment entered into by each individual yardman in accepting and entering upon the work of switching in said yards; and this was thoroughly understood by the railway company and such employees coming within the above category. Hence it cannot be successfully contended that the suit cannot be maintained because the contract sued on was never proved and that there is no showing that plaintiff ever individually signed the same or, expressly or impliedly, gave his assent thereto."[45]

The court propounded three answers to the contention that the contract was not binding upon the defendant because it was unilateral in that plaintiff did not agree to work for any specified period:

1. Although the employment was indefinite in duration, it was a relationship while it lasted and was subject to the conditions fixed in the contract.[46]

2. The contract provided that it was to continue until terminated by thirty days' notice by either party.[47]

3. The action was not to recover damages for wrongful discharge because the relationship of employer and employee had not been severed.[48]

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45. *Id.* at 180-181. There seems to be a commingling here of the usage theory and the third party beneficiary theory. Nor is the situation clarified by the citation of Crow v. Kaupp, 50 S. W. (2d) 995 (Mo. 1932), although in that case the court states the third party beneficiary rule, the statement was *dictum*, since the action was one by the assignee of a lessor to recover rents from the assignee of the lessee.

46. *Id.* at 182. Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902 (C. C. A. 5th. 1933), was relied upon. This injects the fourth theory into the case. Apparently the contract meant is the individual contract of employment, since it alone supports the individual right under the theory of the Webb case. See *supra* note 26. That part of the opinion in Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931), which disapproved the Burnetta case, 180 Mo. 241, 79 S. W. 136 (1904), cited *supra* note 34, was quoted with approval.

47. *Id.* at 182. Evidently there is a shift in the point of view here and reliance is placed upon the collective agreement, since the individual contract of employment presumably did not require thirty days' notice of termination.

48. *Id.* at 182-183. The court said: ". . . the suit is not for a *discharge* or *termination* of the employment, but for damage for not respecting his seniority rights in recalling him to work after a 'lay off' on account of a lack of work to be done. So far as he knew, plaintiff was not *discharged* or his employment *relationship* terminated. He was still holding himself ready for service, though protesting all the while that his seniority rights were being violated." Compare

Rather the suit was to recover for violation of plaintiff's seniority rights under the contract.[49]

It is almost impossible to identify the principle which emerges victorious from this welter of ideas. The result, however, is important and easily marked. One working under a collective labor agreement may recover damages for a breach of its provisions although without it the ordinary principles governing the relationship of employer and employee would preclude recovery as a matter of law.[50] It was recognized that the question of whether or not the work is being performed under a collective labor contract depends upon the facts, for the court said:

> "In other words, the cases when carefully analyzed do not hold that contracts similar to the one here involved are held *unenforceable as a matter of law*, but that their enforceability depends upon the evidence either as to its adoption or as to what has been done in that particular case."[51]

The result of this rule would be to make the question of enforceability one for the jury in the ordinary case.[52]

In subsequent cases the courts of Missouri have been content to rely upon the *McCoy* case as authority for holding that individual employees are not barred from enforcing the provisions of collective labor contracts as a matter of law and have not attempted to refine the reasoning of that decision. In *Lyons v. St. Joseph Belt Ry.*,[53] the Kansas City Court of Appeals followed its prior decision in affirming a judgment for nominal damages[54] which an employee had secured against an employer upon the ground that the latter had violated the provisions of a collective labor agreement prohibiting discharge without cause and requiring an investigation before discharge in any event. Arguments that that contract was

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cases cited *infra* note 96, holding that an employee must hold himself ready for service in order to recover damages for wrongful discharge. Clearly, these three "answers" to the contention that the contract was unilateral do not demonstrate that it was not unilateral. The result reached would seem to be that the employee may recover although he is not bound to work for a definite time and if so it appears to be correct.

49. See *supra* note 48.

50. See *supra* note 7.

51. McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175, 182 (Mo. App. 1934).

52. This is an echo of the obsolete usage doctrine and is unsound for the rights of the individual employee depend upon the construction given to the collective agreement by the court. In recent cases Missouri courts have always found that these rights existed. See *infra* notes 53, 60, 65, and text thereto.

53. 84 S. W. (2d) 933 (Mo. App. 1935).

54. Punitive damages had been sought in the lower court but had not been recovered. See *supra* note 39, and *infra* note 86.

not enforceable at all and that in particular it was unenforceable because indeterminate in respect to duration were disposed of summarily, the court saying:

> "The evidence further shows that plaintiff was working under such contract at the time of his discharge . . . . notwithstanding such a contract may be indeterminate as to duration, it is nevertheless enforceable according to its terms so long as it is in force between the parties."[55]

This case seems to put at rest, as far as the Missouri courts are concerned, the troublesome doctrine that because the employee does not agree to work for a definite time the contract of employment is so lacking in mutuality that he cannot recover damages for its breach.[56] This dogma has infected every growth in this field of the law.[57] There is no reason for it to continue to do so. Mutuality of benefit is not the essence of contractual obligation, for that is forged from the doctrine of consideration. Here apparently is the source of the confusion.[58] Originally, the collective agreement was denied legality, and then, of course, no individual rights could rest upon it, but after its legal effect was granted, no necessity to find consideration moving from the individual employee existed, for his rights are derivative. The equitable principle that conditions the right to relief on mutuality of remedy has doubtless also clouded the nature of the problem. Temporal indefiniteness obstructs valuation of the contractual right but does not frustrate its creation.[58a]

The right of an employee to recover upon a collective labor contract in an action against an employer was thoroughly recognized by the inferior

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55. This was upon the authority of McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175 (Mo. App. 1934). The Lyons case decided one point left in doubt by the McCoy case, for in the former there was no doubt that the plaintiff had been discharged while the latter case had placed some stress upon the fact that employment had not been terminated. See *supra* note 48.

56. Missouri courts have not yet satisfactorily solved the very difficult problems that flow from this indefiniteness of duration in cases where damage for breach of seniority rights to reinstatement must be measured. See *infra* notes 88 to 94, and text thereto. An employee of a corporate employer has a statutory cause of action in Missouri for wrongful discharge if the employment is for a definite term. MO. REV. STAT. (1929) § 4612.

57. See *supra* note 7, and text thereto.

58. For further discussion of this question, see Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572, and Note (1938) 51 HARV. L. REV. 520. Although most recent cases seem to find the individual's right in the collective agreement (see cases cited *supra* note 33), one recent case indicates that the legal vitality springs from the individual contract of service. Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902, 903 (C. C. A. 5th, 1933).

58a. See cases cited *infra* note 97.

appellate courts of Missouri,[59] before any other than nominal damages were permitted. However, in *McGee v. St. Joseph Belt Ry.*,[60] a judgment granting the employee substantial compensatory damages was affirmed.[61] The facts of the case were practically identical with those in the *McCoy* case,[62] and the right of the plaintiff to rely upon the collective labor agreement was sustained upon the authority of that decision without elaboration.[63] The court was apparently untroubled by the arguments which were directed against the contention that any individual rights arose out of the collective agreement, and which had been given detailed consideration in the *McCoy* case, for it disposed of them summarily by saying:

> "In the course of presentation in defendant's brief, distinctions are mentioned as between the contract signed by the brotherhood representatives and the *individual contract* with plaintiff. Complaint is made that the term "collective bargaining agreement" is used in the instructions.
>
> "In view of what this court said in the McCoy Case, supra, 77 S. W. (2d) 175, loc. cit. 180, 181, paragraphs (2) and (3), we conclude that such language does not present prejudicial error.
>
> "The plaintiff's cause of action for all practical purposes is based upon the written contract known and designated as the collective bargaining agreement."[64]

Later Missouri cases[65], while recognizing the right of an individual

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59. The Supreme Court of Missouri has not considered the question. Although Lyons v. St. Joseph Belt Ry., 84 S. W. (2d) 933 (Mo. App. 1935), was affirmed by the highest court of the state in State *ex rel.* St. Joseph Belt Ry. v. Shain, 108 S. W. (2d) 351 (Mo. 1937), the question of the employee's rights under the collective contract was not discussed since the appeal related to other issues in the case.

60. 93 S. W. (2d) 1111 (Mo. App. 1936).

61. The amount of the damages awarded was $4700.00.

62. See text at note 42.

63. The court saying: "Practically the same issues as are herein presented and growing out of the same contract herein involved were before this court for consideration in McCoy v. St. Joseph Belt Railway Co., reported in 77 S. W. (2d) 175. . . . For the same reasons as were given in the case *supra*, we conclude the plaintiff herein had a right to sue for breach of the terms of the agreement."

64. McGee v. St. Joseph Belt Ry., 93 S. W. (2d) 1111, 1119 (Mo. App. 1936).

65. Reed v. St. Louis S. W. R. R., 95 S. W. (2d) 887 (Mo. App. 1936). Judgment for plaintiff was reversed because he had failed to exhaust the remedies provided by the collective contract. The court said, at p. 889: " 'It is well settled that, where contracting parties either agree or are required by law to resort to a designated tribunal for the adjustment of controversies, they must exhaust such remedy before resorting to the courts for redress. . . .' " McCrory v. Kurn, 101 S. W. (2d) 114 (Mo. App. 1936). Judgment sustaining the demurrer of the defendant to the plaintiff's case was reversed. In McGee v. St. Joseph Belt Ry., 110 S. W. (2d) 389 (Mo. App. 1937), judgment for defendant upon the pleadings was reversed. *Cf.* State *ex rel.* St. Joseph Belt Ry. v. Shain, 108 S. W. (2d) 351 (Mo. 1937), cited *supra* note 59.

employee to recover upon a collective labor agreement, do not discuss its theoretical foundations.[66]

At least until a finally authoritative decision upon the subject is rendered by the Supreme Court of Missouri, it may be said that the right of an employee to enforce the terms of a collective labor contract exist in Missouri and that this right is based directly upon the collective agreement.[67] The Supreme Court of Missouri could recognize such a right upon the basis of persuasive precedent and public policy without necessarily adopting any of the theories that have been advanced to explain its genesis, for none of these completely explains this right as it has been developed by the cases.[68] This course would enable that court to grant ample recognition to the individual right and still leave freedom for its development in accordance with the demands of collective bargaining.

DEFENSES

The most common defense relied upon in cases where individuals seek relief for violation of collective labor contracts is the failure of the plaintiff, before the institution of the action, to exhaust his remedies provided by the contract.[69] The general rule is that no recovery may be had in such a case unless the remedies provided by the collective contract have been exhausted.[70] This result is founded upon well established principles of the

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66. Thus the Springfield Court of Appeals, in McCrory v. Kurn, 101 S. W. (2d) 114, 122 (Mo. App. 1936), cited *supra* note 65, said: "We think we are sustained in this conclusion by some of the reasonings in each of the following cases: McGee v. St. Joseph Belt Ry. Co. (Mo. App.), 93 S. W. (2d) 1111; McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S. W. (2d) 175; Hall v. St. L.-S. F. Ry. Co., 224 Mo. App. 431, 28 S. W. (2d) 687; Lyons v. St. Joseph Belt Ry. Co. (Mo. App.), 84 S. W. (2d) 933".

67. See *supra* note 50, and text thereto.

68. See *supra* note 33.

69. This results merely from the general principle that compliance with a contract is a condition precedent to the enforcement of any rights under it. *Cf.* Martin v. Mahan Jellico Coal Co., 205 Ky. 156, 265 S. W. 496 (1924).

70. Harrison v. Pullman Co., 68 F. (2d) 826 (C. C. A. 8th, 1934); Bell v. Western Ry. of Ala., 228 Ala. 328, 153 So. 434 (1934); Keller v. Western Ry. of Ala., 228 Ala. 336, 153 So. 441 (1934); Norfolk & W. Ry. v. Harris, 260 Ky. 132, 84 S. W. (2d) 69 (1935); Reed v. St. Louis S. W. R. R., 95 S. W. (2d) 887 (Mo. App. 1936); Cousins v. Pullman Co., 72 S. W. (2d) 356 (Tex. Civ. App. 1934); Swilley v. Galveston, H. & S. A. Ry., 96 S. W. (2d) 105 (Tex. Civ. App. 1936). See also Mallehan v. Texas & P. Ry., 87 S. W. (2d) 771 (Tex. Civ. App. 1935). But where the employer makes it impossible for the employee to pursue the course prescribed by the collective contract, the employee's failure to do so is of course no defense. Youmans v. Charleston & W. C. Ry., 175 S. C. 99, 178 S. E. 671 (1935) (employer refused to grant hearing). Or where the employer waives the right to require the employee to comply with the contract. George v. Chicago, R. I. & P. Ry., 237 N. W. 876 (Minn. 1931).

law of contract,[71] and is solidly supported by the purpose of the collective agreement. If agreements of this character are to fulfill their function of preserving industrial peace and supporting that cooperation between employer and employee which, when the parties have more or less equal bargaining power, is a chief source of economic well being, it is absolutely essential that both parties be left free to determine the constitution of their relationship subject only to the claims of society as a whole. Certainly these agreements should not be stultified by permitting either an individual employee,[72] or an individual employer,[73] to resort to the courts for redress without having first tried to settle the controversy in every way that the collective contract provides.

Closely akin in principle to this defense is that one applied in those states which permit not only common law arbitration but also allow the presence or absence of liability to be determined by arbitration,[74] in cases where breach of contract is alleged. In jurisdictions where this rule is followed, recovery is refused to an employee against whom an arbitration award has been rendered,[75] unless he can show that the arbitration has been fraudulent, capricious or grossly unfair.[76] Another defense springing directly from the necessity to subordinate individual rights under collective labor contracts to rights of the principal bargaining parties re-

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71. General rules of the law of contract are applied to collective labor agreements if obstacles to collective bargaining do not result. Thus where the collective agreement is in writing the limitation period governing the individual right is that for written contracts. Davis v. Rush, 288 S. W. 504 (Tex. Civ. App. 1926).

72. See cases cited *supra* note 69.

73. The question arises where an employer seeks an injunction against the union. Fell v. Berry, 124 App. Div. 336, 108 N. Y. Supp. 669 (1st Dep't 1908); Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N. Y. Supp. 258 (Sup. Ct. 1928). Or against other employers. *Cf.* American Cloak and Suit Mfrs' Ass'n v. Brooklyn Ladies' Garment Mfrs' Ass'n, 143 Misc. 319, 255 N. Y. Supp. 614 (Sup. Ct. 1931). Or relies upon the contract as a defense to an action by the union. Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N. Y. Supp. 87 (Sup. Ct. 1931).

74. McLean Piece Dye Work v. Verga, 13 N. J. Misc. 416, 178 Atl. 625 (1935), arbitration award in employee's favor under New Jersey Arbitration Act sustained. One court has held that where the arbitration is provided by a federal statute the common-law rule that arbitration ousting the jurisdiction of the courts is against public policy, does not apply. Bell v. Western Ry. of Ala., 228 Ala. 328, 153 So. 434 (1934). *Cf.* Gord v. Harmon & Co., 188 Wash. 134, 61 P. (2d) 1294 (1936) (arbitration as to wage scale good under common-law rule.)

75. The same rule is applied here as in cases where the employee asserts rights against the union. See *infra* note 99, and text.

76. But the award must dispose of all the matters in controversy. Iowa Transfer Ry. v. Switchmen's Union of North America, 66 F. (2d) 909 (C. C. A. 8th, 1933); Ryan v. N. Y. Central R. R., 267 Mich. 202, 255 N. W. 365 (1934).

sults from the rule that alteration of the collective agreement by the union[77] may change or abolish previously existing individual rights arising under it.[78] The first case to consider the question held that once the right of an individual under the collective agreement had vested, it could not be altered without his consent,[79] but all subsequent decisions have recognized that the individual right is less important than the collective agreement and that an alteration of the latter may operate to modify or destroy the former.[80]

In connection with matters of defense, an interesting question arises where there has been a violation of the customary provision of a collective contract requiring a hearing prior to discharge, but it is shown by the employer that in fact a proper cause for dismissal existed. In support of the right of the employee to recover in such a case, it may be argued that there is at the very least a technical breach of the contract which is not affected even by uncontroverted evidence that justifiable cause existed. If the purpose of the investigation is to determine whether or not good cause exists, then at the most no more than nominal damages could be recovered by the employee since he suffers no actual damages as a result of being deprived of a hearing which would only have disclosed a valid ground for discharge.[81] The precise question has only arisen in two cases and in each it was held that the showing of ground for discharge went not merely to the extent of the damages recoverable

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77. But the authority of individuals purporting to act for the union must be shown when this defense is relied upon. McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175 (Mo. App. 1934); McGee v. St. Joseph Belt Ry., 93 S. W. (2d) 1111 (Mo. App. 1936) (holding this a question of fact under the circumstances.) *Cf.* Panhandle & S. F. Ry. v. Wilson, 55 S. W. (2d) 216, 219 (Tex. Civ. App. 1932).

78. Battle v. Atlantic Coast Line R. R., 132 Ga. 376, 64 S. E. 463 (1909); Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (1934); *cf.* Casey v. Brotherhood, 197 Minn. 189, 266 N. W. 737 (1936). Many cases hold that the employee is bound by the construction placed upon the collective contract by the union. Louisville & N. R. R. v. Bryant, 263 Ky. 578, 92 S. W. (2d) 749 (1936); Burton v. Oregon-Washington R. R. & Nav. Co., 148 Ore. 648, 38 P. (2d) 72 (1934); McClure v. Louisville & N. R. R., 64 S. W. (2d) 538 (Tenn. App. 1933), *cert. denied*, Oct. 14, 1933. West v. Baltimore & O. R. R., 103 W. Va. 417, 137 S. E. 654 (1927). *Cf.* Brotherhood of Railroad Trainmen v. Price, 108 S. W. (2d) 239 (Tex. Civ. App. 1937).

79. Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S. W. 1042 (1923).

80. Emphasis is placed upon the fact that the union represents the employee and he is deemed to consent to its action in regard to his rights under the collective contract. Yazoo & M. V. R. R. v. Mitchell, 173 Miss. 594, 161 So. 860 (1935).

81. Punitive damages cannot be recovered for breach of the collective contract. Manley v. Exposition Cotton Mills, 47 Ga. App. 496, 170 S. E. 711 (1933); Holland v. Spartanburg Herald-Journal Co., 166 S. C. 454, 165 S. E. 203 (1932).

but that it completely barred the right of the employee to recover at all.[82] These decisions are clearly erroneous, for, unless the provision requiring a hearing prior to dismissal is waived, failure to grant it is a violation of the contract and presence of a cause for discharge would at most mitigate the damages recoverable.

Remedies of the Individual Employee

In seeking the protection of their individual rights under collective labor agreements, employees have sought either damages, injunctions, declaratory judgments or various combinations of all three remedies. Ordinarily, attempts to secure damages have met with far greater success than attempts to secure either of the other two remedies, for once the existence of the individual right is recognized as a matter of law, upon its violation nominal damages follow as a matter of course. Here, as elsewhere,[83] the rule that, in the absence of an express agreement to the contrary, the relationship of employer and employee is indefinite in duration because terminable at the will of either party, has caused confusion since it is exceedingly difficult to ascertain the measure of damages for breach of a contract of employment for an indefinite term.

The proposal that the damages may be based upon the duration of the collective agreement has been rejected.[84] In one case the trial judge allowed the extent of the damages to be based upon the assumption that the contract was to last for the life of the employee but the appellate court rejected this erroneous if interesting result.[85]

The correct rule would seem to be that the damages should be the amount which the wrongfully discharged employee could have earned from the date of discharge until the institution of the action, less whatever

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82. Swilley v. Galveston, H. & S. A. Ry., 96 S. W. (2d) 105 (Tex. Civ. App. 1936) (demurrer to plaintiff's evidence sustained). Marshall v. Charleston & W. C. Ry., 164 S. C. 283, 162 S. E. 348 (1931) (Employee conceded violation of a rule justifying discharge and the court.) But *cf.* Lyons v. St. Joseph Belt Ry., 84 S. W. (2d) 933 (Mo. App. 1935).

83. See *supra* note 7. Two recent cases have refused to allow an individual employee to recover damages. Kessell v. Great Northern Ry., 51 F. (2d) 304 (W. D. Wash. 1931); and Davis v. Davis, 197 Ind. 386, 151 N. E. 134 (1926).

84. Barth v. The Addie Co., 271 N. Y. 31, 2 N. E. (2d) 34 (1936), *motion for reargument and to amend remittitur denied*, 271 N. Y. 615, 3 N. E. (2d) 211 (1936). *Cf.* Cross Mountain Coal Co. v. Ault, 157 Tenn. 216, 9 S. W. (2d) 692 (1928) (no wages recoverable for period after expiration of collective contract).

85. Galveston, H. & S. A. Ry. v. Eubanks, 42 S. W. (2d) 475 (Tex. Civ. App. 1931).

amount he has been able to earn in the meantime.[86] The question becomes somewhat complex in a case where the plaintiff is seeking damages not for wrongful discharge but solely for breach of his seniority rights. If the employer continues to employ the plaintiff and the latter complains only of the fact that his seniority rating under the collective contract entitled him to a more remunerative position than that which the employer gave him, the measure of damages is the difference between the amount which the plaintiff earned and that which he would have received if employed in the preferred job.[87]

The greatest difficulty in measuring damages has been encountered where the plaintiff was not recalled to work when his seniority standing entitled him to employment. Missouri courts have wrestled with the question in three cases, but the decisions are inconclusive.

In *McCoy v. St. Joseph Belt Ry.*,[88] plaintiff recovered a judgment although the jury was not instructed either upon the law governing liability or upon the principles defining the measure of damages. The judgment was reversed upon the ground that there was not sufficient evidence to justify any damages whatever, since there was no showing as to how long the plaintiff might reasonably have hoped for the reinstatement which his seniority right required, and compensation for this period only could be recovered.[89]

The meaning of this decision is elusive. Even though seniority

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86. Gary v. Central of Georgia Ry., 160 S. E. 716 (Ga. App. 1931); McGee v. St. Joseph Belt Ry., 93 S. W. (2d) 1111 (Mo. App. 1936); Rentschler v. Missouri Pac. R. R., 126 Neb. 493, 253 N. W. 694 (1934); Barth v. The Addie Co., 271 N. Y. 31, 2 N. E. (2d) 34 (1936), *motion for reargument and to amend remittitur denied*, 271 N. Y. 615, 3 N. E. (2d) 211 (1936); St. Louis B. & M. Ry. v. Booker, 5 S. W. (2d) 856 (Tex. Civ. App. 1928); Galveston, H. & S. A. Ry. v. Eubanks, 42 S. W. (2d) 475 (Tex. Civ. App. 1931); and San Antonio & A. P. Ry. v. Collins, 61 S. W. (2d) 84 (Tex. Comm. App. 1933).

87. Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931). Acceptance of lower pay by the employee may be waiver of claim to the collective contract wages. Langmade v. Olean Brewing Co., 137 App. Div. 355, 121 N. Y. Supp. 388 (4th Dep't 1910). Or it may constitute an accord and satisfaction. Yazoo & M. V. R. R. v. Sideboard, *supra*. But the facts must be strongly against the employee for he is a "necessitous" man. McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175, 183 (Mo. App. 1934). *Cf.* Taylor v. Mathews, 112 Pa. 160, 170 Atl. 309 (1934); George v. C. R. I. & P. Ry., 183 Minn. 610, 235 N. W. 673 (1931).

88. 77 S. W. (2d) 175 (Mo. App. 1934).

89. The court said:

"Nor is it (evidence) definite and specific as to *when or how long* he could reasonably have hoped to be recalled to work and therefore rightfully hold himself in readiness to work; for only *to this extent* could he recover damages for loss of wages. In other words, the evidence as to the amount of his damages is, to say the least, hazy and uncertain." *Id.* at 183.

rights could be violated only while the contract of employment existed, and even though protracted failure to recall to work might indicate dismissal, to measure damages collectible for violation of the former by the time until discharge becomes apparent is to confuse the conditions sustaining contractual obligation with those determining the value of the harm caused by its breach. This rule would force the plaintiff to split his cause of action on the contract since, presumably, recovery for the wrongful discharge could also be secured. Perhaps the decision proceeded upon the theory that the provision of the contract conferring seniority rights was not an essential term of it and that therefore its violation did not give the employee the right to treat the whole contract as terminated and to recover damages calculated accordingly.

In *McGee v. St. Joseph Belt Ry.*,[90] the same court, untroubled by these questions, sustained a judgment awarding damages for violation of an employee's seniority right of recall to service.[91] The most recent Missouri decision[92] to consider the question arose out of the same situation involved in the preceding case. Having recovered damages in that action only for time lost prior to its institution, McGee brought another one to recover compensation for the subsequently continuing violation of his seniority right to reinstatement. His right to successive recoveries was sustained by the court upon the ground that the violation of his seniority right to work was not a total breach of the contract, and consequently the second suit was not barred by the former one. It is exceedingly difficult to find any distinction between violation of a seniority right to work and wrongful discharge of an employee who is working. In both situations the employee has been deprived of the most important single right he secures under the collective contract, the right to work until discharged for good cause. The error in the decision results from a failure to distinguish between a seniority right which constitutes such an essential term in the contract that its violation would be a total breach and one which does not penetrate to the core of the obligation.

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90. 93 S. W. (2d) 1111 (Mo. App. 1936).

91. The court made no reference to the doctrine announced in McCoy v. St. Joseph Belt Ry., 77 S. W. (2d) 175 (Mo. App. 1934), that damages for violation of a seniority right to employment are limited by the period of the employer's probable penitence. In discussing damages, it said:

"If plaintiff has a right to recover, and the jury has so found, then he is entitled to the wages he would have received if the contract had been lived up to less such remuneration as he has been able to receive for such work as his diligence would enable him to earn." p. 1119.

92. McGee v. St. Joseph Belt Ry., 110 S. W. (2d) 389 (Mo. App. 1937).

Under the typical collective labor agreement governing working conditions in a large industry where employment is standardized, most of the ordinary preferences and privileges of service are allocated among the workers upon the basis of their seniority standings. Obviously, it is not every deprivation of any of these rights that will entitle an employee to treat the employment as terminated.

The difference between a partial and a total breach is a function of numerous factors.[93] The decision in the second *McGee* case assumed the point at issue by presupposing that the only total breach of a contract of employment is a positive act, wrongfully discharging the employee,[94] while it placed a higher value upon the partial breach by allowing several recoveries of damages that could have been recovered but once in an action for total breach by dismissal. Ascertainment of damages for violation of these contracts is difficult at best, but refusal to recognize that failure to reinstate an employee, in accordance with his contract, is a total breach of the contract merely augments confusion.

In all cases the employee is under the usual duty to mitigate the damages by making reasonable efforts to secure employment,[95] and he must at all times hold himself ready and available to work for the employer.[96]

As a general rule a mandatory injunction requiring the reinstatement of a wrongfully discharged employee is refused upon the ground that equity will not grant specific enforcement of a contract for personal services.[97] The question most frequently arises in cases where it is claimed

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93. RESTATEMENT, CONTRACTS (1932) § 275.

94. The court said:
"However, there is a difference between discharging an employee and retaining his services but preventing him from laboring, such as is presented in this case. Where the breach of a contract is equivalent to a termination of it or putting an end to it, then, there is no question but that the breach goes to the entire contract and but a single cause of action arises thereon to the party damages. . . . Defendant did not terminate the contract and plaintiff was not required to treat it as having been terminated. The posting of an altered seniority list by defendant was no more than a refusal by defendant to recognize plaintiff's rights so long as the list existed which might have been changed at any time." McGee v. St. Joseph Belt Ry., 110 S. W. (2d) 389, 391 (Mo. App. 1937).

95. But he is not required to accept employment in a distant place. San Antonio & A. P. Ry. v. Collins, 61 S. W. (2d) 84, 89 (Tex. Comm. App. 1933).

96. Gary v. Central of Georgia Ry., 44 Ga. App. 120, 160 S. E. 716 (1931). Plaintiff not entitled to recover damages for the time during which he was not a a member of the union because by letting union membership lapse he lost benefit of collective contract. But *cf.* Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).

97. Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922). *Contra*: Gregg v. Starks, 188 Ky. 834, 224 S. W. 459 (1920). But this rule is not applicable where the union seeks to enforce a collective labor contract. Ribner v. Racso Butter & Egg Co., Engelking v. Independent Wet Wash Co., Harper v. Local Union No.

that the breach of contract deprives the employee of seniority rights, and in the typical case the union and employee,[98] who has the position which the plaintiff claims by virtue of seniority, are joined with the employer as defendants. In these cases, since the union has acquiesced in and agreed to the course of action which the employee complains is wrongful, relief against the union is denied upon the ground that the complaining employee's rights in regard to the union are determined by its constitution and by-laws by which he is bound, and the courts will not interfere in the internal affairs of such an association.[99] And relief against the employer is denied upon the ground that the union has abolished the right upon which the employer relies.[100]

Similar reasons have been assigned for refusing to grant a declaratory judgment in actions where the deprivation of seniority rights has been asserted.[101] Upon analysis it seems clear that neither an injunction nor a declaratory judgment should be granted in a case where the union is a defendant. The theory of collective bargaining which gives rise to collective labor contracts is that the minority of workers should be bound by the action of the majority in respect to terms and conditions of employment affecting all alike.[102]

Conclusion.

The legal right of an individual to recover damages for violation of a collective labor contract which injures the employee is definitely established. No single principle that has been advanced to explain the origin of this right adequately accounts for all of its consequences. Nor is this surprising, in view of the confusion which still shrouds the nature

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520, all *supra* note 14. *Cf.* Virginian Ry. v. System Federation, 300 U. S. 515, 549 (1937).

98. Cannon v. Brotherhood of Railroad Trainmen, 262 Ky. 113, 89 S. W. (2d) 620 (1935); McClure v. Louisville & N. R. R., 64 S. W. (2d) 538 (Tenn. 1933) (Actions against union and employer held not maintainable of because individual occupying job plaintiff claimed was not a party).

99. Harris v. Missouri Pacific R. R., 1 F. Supp. 946 (E. D. Ill., 1931); Wilson v. Airline Coal Co., 215 Iowa 855, 246 N. W. 753 (1933); Long v. Baltimore & Ohio R. R., 155 Md. 265, 141 Atl. 504 (1928); Mosshamer v. Wabash Ry., 221 Mich. 407, 191 N. W. 210 (1922); Ryan v. N. Y. Central R. R., 267 Mich. 202, 255 N. W. 365 (1934); Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (1934).

100. See cases cited *supra* note 78. *Cf.* Wilson v. Airline Coal Co., 215 Iowa 855, 246 N. W. 753 (1933).

101. Burton v. Oregon-Washington R. R. & Nav. Co., 148 Ore. 648, 38 P. (2d) 72 (1934); Beatty v. Chicago, B. & Q. R. R., 49 Wyo. 22, 52 P. (2d) 404 (1935) (union not a party).

102. Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44 (1937); Virginian Ry. v. System Federation, 300 U. S. 515, 548 (1937).

of the collective contracts from which these rights are derived. Veneration for the ancient law of master and servant has worked powerfully against the recognition of these rights as it has against acceptance of collective bargaining generally. Yet it has not restrained the courts from extending protection to the individual interests that emerge from collective labor contracts. Although actual recovery has been allowed in few cases for infringement of these rights, this has resulted rather from the reluctance of the courts to allow individual rights to destroy the collective interest than from a hesitation to safeguard the former.

Equitable doctrines prohibiting specific performance of contracts for services and requiring a correlative right for each enforceable duty have so far defeated any attempt by an employee to require the employer to abide by the terms of a collective labor contract. In most cases, where relief has been denied upon these grounds, the result was required by the purposes of collective bargaining since the employee complained of action carried out by the employer in concert with the union. Further development in the field of law will probably occur incidentally to the attempt of the courts and the legislatures to solve the difficult and important problem of balancing individual right and collective interest throughout the whole field of collective bargaining.