Collective Bargaining in the United States of America

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The movement for collective agreements is a natural and almost inevitable outcome of the substitution of mass for individual production, and as such presents a problem of particular interest in the United States. Study of this problem from the legal standpoint is complicated by the almost total absence of legislation on the subject and the divergent attitudes of the various States. In the absence of a contract for a fixed term, the employer has absolute power to discharge and the employee to leave his work, and the specific performance of a contract for personal service cannot be enforced under existing law. Labour organisations are not legal entities, though some States have legislation providing for suits at law to which voluntary organisations are parties, and the Supreme Court has recently decided that such organisations can sue and be sued. The organisations themselves express a preference for determinations arrived at by the parties, an attitude which has restricted the volume and importance of court decisions and discouraged legislation on the subject. Recent tendencies, however, have made recourse to the courts more frequent and less undesirable, and there are indications that the enforcement of contracts not violating public policy will have the support of the courts. A growing sense of the responsibility of both parties to the contract, combined with respect for the rights of the consuming public, characterises recent judicial decisions, which are comprehensively surveyed and analysed in the following article.

A STUDY of collective bargaining in the United States of America from a legal standpoint is confronted with at least two initial difficulties : one, the paucity of legislation on the subject ; the other, the divergent and even conflicting attitudes of the courts of the various States. These reasons are of course to be considered in the light of the fact that each of the forty-eight States is competent to enact a law of its own, within the bounds set by its own and

the Federal Constitutions, and its courts are free to construe such statute, or the common law, without any obligation to conform to the rulings of the other jurisdictions ; though a decision by the Supreme Court of the United States would be highly influential, and even controlling in the field of construction of the Federal Constitution.

The Background

A collective agreement normally connotes a labour organisation. There is a very considerable amount of legislation relating to such organisations, or at least recognising their existence ; such as laws declaring the legality of labour organisations, protecting them in the proprietary use of the union label, union card, badge, or button, and giving them representation on boards for the arbitration of labour disputes. But none of these laws makes legal entities of such organisations, or bestows on them that status or capacity that is essential to the full exercise of power and responsibility in making contracts. Some States indeed have laws specifically directed to the incorporation of associations of workmen, and their incorporation would be feasible under the laws of any State ; but this privilege is rejected with practical unanimity, the organisations preferring almost without exception to remain unincorporated. The Federal Congress in 1886 enacted a law providing for the incorporation of national organisations, but the only use made of it has been by a very few and for the most part unimportant unions.

Incorporation would of itself result in the creation of a legal entity, with power to sue and be sued, and with legal and financial liability for corporate acts, to the extent of the corporate funds. Special legislation providing for suits at law to which voluntary associations are parties is found in some States ; and in the absence of such provision it has been held that suits may be brought against the members as individuals only, or action may be taken against one or more as representatives of all. The vagueness of this situation, and the lack of official, responsible representation, have afforded much difficulty in any consideration of the value and effectiveness of any agreement entered by or with such organisations; but a recent decision by the Supreme Court may exert a far-reaching influence in this regard, especially in constructions by the Federal courts, the position being there taken that, considering the extent of recognition by statute, and the actual force, influence

and powers exerted, such organisations, even though not incorporated, are in fact such entities as to be capable of suing and being sued[1].

If such capacity be recognised, together with responsibility for the unlawful or injurious acts of members engaged in carrying out the policies of the union, one of the difficult phases of the problem of the nature and validity of collective agreements will be disposed of. However, it is not essential to the existence of collective agreements that they should be subject to interpretation and enforcement in a court of law, just as treaties between nations have value despite the absence of a forum in which they may be construed and their observance compelled. It is often an evident aim and purpose of labour agreements to provide for their own enforcement by a system of forfeits, bonds, or deposits, or by arbitration, or by both, so as to secure the ends of the ordinary judicial procedure without resort to the courts. In other words, the lack, or at least the incompleteness, of forensic capacity is regarded by the organisations as an advantage, and preference is openly expressed for determinations arrived at by the parties rather than by recourse to judicial or other tribunals[2]. The result of these considerations has necessarily been to restrict the volume and importance of the decisions of the courts on the subject, and also to discourage legislation thereon.

In this latter connection it is of interest to note that the two outstanding enactments providing for effective union representation and the establishment of collective agreements are the objects of vigorous and persistent attack by organised labour. These are the Act of Congress creating the United States Railroad Labour Board[3] and the Act of the Legislature of Kansas creating a court of industrial relations[4]. The former Act provides for representation of the unions, both on the Board and in proceedings before it; while the latter declares unions in the industries coming within

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[1] United Mine Workers *v.* Coronado Coal Co. (1922), 259 U. S. 344, 42 Sup. Ct. 570.

[2] The President of the Glass Bottle Blowers' Association, speaking in 1920, reviewed the history of collective bargaining by that organisation for a period of some 35 or more years, and said: "In all the years of collective bargaining between the Glass Bottle Manufacturers' Association and the Glass Bottle Blowers' Organisation the contract has never been violated by either association; never has an arbitrator, mediator, or conciliator been called upon to settle any of the differences that have arisen from time to time, some of which were very serious."

[3] Act of 28 Feb. 1920, 41 Stat. 469; repealed by the Railway Labour Act of May 1926; see below, p. 206.

[4] Extra Session 1920, ch. 29.

its purview to be legal entities, with power to appear before the court of industrial relations by their proper officers, attorneys, or other representatives. While it would be too much to say that the fact of such recognition is the cause for the opposition of the unions, it is nevertheless true that it does not prevent or even modify such opposition. This attitude is explainable, in part at least, by the fact that both Acts suggest, if they do not actually embody, the principle of compulsory arbitration, which is definitely rejected by organised labour as well as judicially[1] ; while they also call for the intervention of a third party — a board or court — which is likewise held objectionable.

The movement for collective agreements is essentially revolutionary, but only as a natural and practically inevitable concomitant of the revolution effected by the substitution of mass for individual production, and of the delegated and indirect control of labour for the direct and collaborative system prevailing in the days of small shops and handicraft methods. The employer working with a small group of assistants, formulating his methods and working out his processes in immediate and constant contact with his men, was succeeded by the employer of hundreds and thousands, who sought to frame his rules and establish working conditions with an absolutism which developed with the failure to recognise the disappearance of these contacts. Just as the worker resisted the introduction of labour-saving machinery, even to the extent of breaking it up, so the employer has been unwilling to adopt the proposed methods, the purposes of which are to compensate for this loss of contact, and secure to the worker an opportunity for expression in regard to the question of employment conditions ; but when the employer has undertaken to combat the organisation of the worker, he has himself at times been compelled to recognise the ineffectiveness of pure individualism, and the necessity of an organisation of his own, in which he must concede something to the collective and co-operative aspects of the problem. In other words, he must delegate something of his personal authority, at the expense of his personal freedom, to the person or committee that undertakes on behalf of his group to formulate the plan, to be binding upon all, by which the difficulty confronting them is

[1] The Kansas statute was said by the Supreme Court to propose a system of compulsory arbitration, violative of personal and property rights, and interfering with the freedom of contract guaranteed by the Constitution of the United States, and therefore void. Chas. Wolff Packing Co. *v.* Court of Industrial Relations (1923), 262 U. S. 522, 43 Sup. Ct. 630.

to be solved. This may open the way for a new consideration of the demands of the organisation of workers that is the cause of his counter-organisation, with the possible consequence of a recognition of the benefits of an agreement therewith ; or he may choose as an alternative to offer to deal collectively with his own employees, through their representatives, in the formation of a shop or establishment agreement. But under either form, the change from the individual to the collective agreement is being made ; and " thus government by discussion enters into industry (as it did into the state) when the ruler can no longer arbitrarily force obedience to his laws, and must get the consent of those who are to obey the regulations "[1].

Naturally, shop agreements cannot vary widely from the practice of the competing establishments of the vicinity, and are as a result usually doubtful as to quality and precarious as to duration ; and this weakness has been so often demonstrated that such a " gift of the Greeks " is quite generally viewed with suspicion if not positively opposed. Obviously, it stands over against the idea of strong trade unions of general inclusiveness and corresponding effectiveness. Where, however, an establishment is large enough and the principle of employee representation is sufficiently developed, such an agreement may go far toward stabilising conditions and curing the inequalities of individual conditions that notoriously exist where organisation and a sense of community of interest among the employees are lacking[2].

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[1] W. M. LEISERSON : " Constitutional Government in American Industries ", in *American Economic Review*, Supp., Vol. XII, March 1922.

[2] A striking illustration of this inequality has been disclosed in investigations of the wages of saleswomen in mercantile establishments, who are very imperfectly, if at all, organised. It was found to be a not unusual occurrence that women and girls entering employment should be cautioned not to tell others the rate of pay given the individual, the result being a wide and inexcusable diversity, due to the unrestrained individualistic mode of bargaining. The attempt to remedy this situation by the establishment of a minimum wage through governmental agencies, thus legislating a form of collective agreement, has been declared contrary to the principles of the Federal Constitution, so far as adult women are concerned, as an interference with the freedom of contract in matters of purely private concern, which is a guaranteed property right of all citizens (Adkins *v.* Children's Hospital (1923), 261 U. S. 525, 42 Sup. Ct. 394 ; Murphy *v.* Sardell (1925), 46 Sup. Ct. 22). Whether the very evident non-social tone of this opinion is an adverse indication as to the recognition of collective agreements voluntarily entered into is perhaps too theoretical to discuss profitably ; but of it, as of an earlier decision involving in part the same factors, it may be said that it was " decided upon an economic theory which a large part of the country does not entertain ". But whether or when a change will occur cannot be foreseen.

The Problem

The simplest conception of a collective agreement is that of a bargain entered into by an employer and his group of workmen ; but, as already pointed out, unless the employer occupies a sufficiently dominant position in his locality or his market, he may be placed at a fatal disadvantage in competing with those who do not conform to the standards agreed upon. This suggests the co-operation of a larger body of workers, to secure for themselves the stabilisation of the benefits provided for in the agreement by eliminating the undercutting process at the hands of nonconforming employers. If the workmen become sufficiently coherent and powerful, they may adopt standards which employers are constrained to accept as the price of obtaining the desired labour supply. In such a case there is legislation rather than bargaining, one side prescribing a rule which the other must obey. On the other hand, the employers may on their part unite also, with the result of a commerce between parties of such equal strength that the quality of the bargain is restored. It is obvious that, conditions permitting, either party may assume the attitude of legislator for the other, and either may break the cohesion that supports the bargaining power. If the groups entering into the agreements are extensive enough to dominate the field, whatever its boundaries, custom has been established as truly as if by statute or by those processes of long growth that shape the conditions of employment in industry under its familiar aspects[1].

Though collective agreements are far from new in the United States, some being found at least as early as the beginning of the last century, it is only comparatively recently that they have assumed their present-day importance. Just as the modern principle of compensation for injuries received in the course of employment made obsolete in a decade the older rule of " no liability without fault ", so the collective agreement proposes to re-align by conscious purpose and in specific terms the details of the employment

[1] " No practicable form of contract, however elaborate, could be presumed to embody all the conditions and consequences that result from the consent of the parties, the one to render service, and the other to receive it and to pay compensation therefor. In other words, there is formed a status of the two parties, determined by long usage, the rulings of the courts in unnumbered cases, and many statutory enactments, the details of which are to be known by a consideration of the whole law of employment, and which no contract attempts to express. " L. D. Clark : *The Law of the Employment of Labour*, pp. 1, 2 ; New York, Macmillan, 1911.

contract, with a resultant setting aside of many of the older inferences and assumptions. Whether this change is to be effectuated on a theory of individual assent by the parties to a general formula proposed for their acceptance or rejection, or whether it is based on a theory of agency by which the parties are bound in advance to accept terms formulated by delegated representatives, or whether some other principle is held to underlie ; whether the agreement avails only for those who maintain relationship with one or the other of the organised groups party to it, or whether it embraces non-members as well, all are questions that come up for answer. And though the lack of an answer does not actually prevent the development and practical operation of the agreements within limits, answers are nevertheless desirable and necessary before the boundaries of definition and theory can be established and the significance of the collective agreement correctly evaluated.

The questions involved in the development of a system of such agreements are social and economic rather than legal — of the spirit rather than of the letter. There must clearly be an abandonment of the individualistic concept that places the employer and each separate workman on an assumed equality, with an alleged equal bargaining power, for a concept more in accord with actual conditions[1]. Under the American law, in the absence of a contract for a fixed term, the power of the employer to discharge " for any reason or no reason " is absolute ; and the employee may with equal irresponsibility leave his work[2]. The consequences to each, as individuals, are often contrasting rather than comparable, yet both parties alike insist on a retention of this precious " right ". The specific performance or actual carrying out of a contract for personal service, which the labour contract usually is, cannot be enforced, under the law. Its breach only entails liability for damages, and such damages must be shown to be actual before any recovery can be had. But a judgment for damages against a wage earner would, in many cases to say the least, be without value, while an employer, being an owner of property, can, as a rule, be reached by a judgment.

Can a different rule of law be established in the case of a contract between an employer or a group of employers and an organisation or its representatives standing for the labour supply in the industry

[1] " Wherever the economic conditions of the parties concerned are unequal, legal freedom of contract merely enables the superior in strategic strength to dictate the terms. " S. WEBB : *Industrial Democracy*, p. 217.

[2] Coppage *v.* Kansas (1915), 236 U. S. 1, 35 Sup. Ct. 240.

and locality concerned? Or can a system of forfeits, bonds, or arbitral provisions secure the fulfilment of such a contract ? Or, again, can an intelligent co-operative spirit be developed that will supplant the all-too-common hostility as to working conditions and the returns of invested capital and productive labour, and secure the adjustment of the one and the distribution of the other on terms arrived at by actual agreement between the parties in interest? Up to the present time, the collective agreement has too often been the treaty after the battle fought, and neither party has regarded it with the full measure of sacredness that it must have before it can be called a solvent of the question, instead of a sort of truce between conflicts. A much more thorough organisation or co-operation of employers on the one hand, and of workmen on the other, is essential to the adoption of the collective agreement ; and some responsibility on the part of the workers' organisations is a natural and just correlative to the employer's financial responsibility for his breach of a legitimate agreement. It cannot be anticipated that the law-making bodies of the country will at any early date enact laws to enforce the suggested changes, nor can the courts assess penalties not provided by the law ; but there are here and there indications that contracts not violating public policy, freely entered into by the parties, will receive such construction by the courts as to make it clear that they are to be observed by the parties making them, and are to be respected by others.

There is a tendency toward the centralisation of control by a federation of the workers and their unions, and consequently toward one-sided formulation of rules and terms, in which the power of the employer to make a bargain is lost in the face of dictated conditions. This is the converse evil to that whose remedy is sought — that of a compulsory acceptance of the terms of employment as fixed by the employer. Such a result is no solvent of the problem ; but only where the national organisation of each party is represented in conference is actual bargaining possible. Local problems may still be worked out in district or city conferences ; but if only such conferences take place to consider a schedule adopted by a convention of workers, there is little or no true bargaining. Illustrative of the case is the instance of a city organisation of employers who agreed with the local branch of a national union of workers to arbitrate differences ; but when a point was proposed for arbitration, the reply was that the matter was determined by a national rule which was not subject to arbitration.

National organisations of employers are of service, therefore,

both as furnishing co-ordinate parties to national agreements, and as counterpoises to the influence of national labour groups in the settlement of local difficulties. Naturally, the formation of strong organisations on both sides entails the possibility of conflict as well as of co-operation. The city of San Francisco has developed employers' associations that have made vigorous efforts to establish what they call the " American plan " of the non-union shop ; while certain mine fields are nationally known for their endeavour to maintain an anti-union " closed shop ". Of these it may be said, as of the violent and coercive " general strike ", that they are obstacles and enemies to any just and enduring solution of the problem of industrial peace.

It would hardly seem necessary to add, except that the point has been vigorously and repeatedly litigated, that no agreement can validly be forced upon an employer against his will[1] ; and a strike to that end will be enjoined[2]. Nor, on the other hand, can a union, by injunction or otherwise, be compelled to enter into any contract with an employer desiring the same[3].

If to the foregoing illustrative items be added the declaration of unending hostility put forth by the Industrial Workers of the World in the words : " The working class and the employing class have nothing in common "[4], the problem is clearly seen to be one of understanding, of correlations and adjustments, into which, in the first instance, legislatures and courts cannot enter ; but the goal having been in measure attained by the discussions, concessions, and conclusions of the parties, the results may be clarified and stabilised by legal expression and interpretation.

Practical Recognition and Development

The actual adoption and practical operation of collective agreements have not awaited either legislative authorisation,

[1] O'Brien *v.* People (1905), 216 Ill. 354, 75 N. E. 108.

[2] United Shoe Machinery Corp. *v.* Fitzgerald (1921), 237 Mass. 537, 130 N. E., 86. " Whatever may be the advantages of collective bargaining, it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through them to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by law in the enjoyment of the benefits of any lawful agreement they make. " Hitchman Coal and Coke Co. *v.* Mitchell (1917), 245 U. S. 229, 38 Sup. Ct. 65.

[3] Saulsberry *v.* Coopers' International Union (1912), 147 Ky. 170, 143 S.W. 1018.

[4] Preamble to constitution. The second paragraph reads : " Between these

judicial recognition, or millennial peace. Furthermore, there has been a very significant amount of expression by bodies of an official and semi-official nature that suggests possibilities of an even wider change of attitude. Thus, the Anthracite Coal Commission appointed by President Roosevelt declared in 1903 that, if it were within the scope of its jurisdiction, the demand for collective bargaining and a trade agreement might reasonably be granted. The National War Labour Board, functioning during the war, recognised the right of workmen to make such agreements through their chosen representatives, and took ground against the discharge of employees on account of their membership in labour organisations; while the report of the Director-General of Railroads, relating to the same period, stated that " the principle of collective bargaining was frankly recognised "; and quite a number of years earlier, a Federal court directed a receiver of a railroad to make an " appropriate contract " with an organisation of railroad employees on the subject of the conditions of employment of its members[1].

Again, the Postmaster-General, in an order of 14 June 1919, declared that the employees of telephone companies should have the right to bargain as individuals, or collectively, through committees or representatives chosen by them to act for them. And in March 1924 the United States Railroad Labour Board, in its decision No. 2305, ruled that " the Transportation Act, 1920, in substance and effect, guarantees to every railway employee the right to participate in the selection of his representatives in the conferences, negotiations, and general procedure under the law "; while the Congress of the United States, at the date of this writing, at the request of representatives of the railroad officials and their employees, has enacted into law a " Railway Labour Act ", which is an agreed plan for the adjustment of differences as to wages and working conditions, such plan being the product of full and free conference between representatives of the two groups, and urgently advocated by both — a conspicuous example of an attempt on the part of employers and workmen to secure statutory recognition of an agreement fostered by them in joint conference.

It is worthy of note that the ruling of the Railway Labour Board noted above was made in a contention involving the identical point on which the first industrial conference called by President

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two classes a struggle must go on until the workers of the world organise as a class, take possession of the earth and the machinery of production, and abolish the wage system. " BRISSENDEN : *The I.W.W.*, p. 351.

[1] Waterhouse *v.* Comer (1895), 55 Fed. 149.

Wilson in 1919 was wrecked. Employee and employer representatives, together with those of the public, professed full assent to the principle of collective bargaining, but while the representatives of the employees and the public took the position that the employees might choose their spokesmen either from their own numbers or from members of their unions, not workmen in the establishments affected, the employers insisted on a claimed right to refuse to deal with any but their own employees. Following the disruption of this conference, a second one was called, at which only representatives of the public were present, and which declared: " The conference is in favour of the policy of collective bargaining. ... It believes that the great body of the employers of the country accept this principle. The difference of opinion appears in regard to the method of representation. " In the plan proposed by this conference, unrestricted selection of representatives was provided for, with an arrangement to secure choice by a majority of the employees, " in order that they may be able to bind them in good faith ".

The attitude of the National Association of Manufacturers, an active organisation of quite considerable influence, and often classed as conservative in this field, is expressed in a declaration adopted in 1919, which may fairly be accepted as responsive to the above. It was said that " employees have the right to contract for their services in a collective capacity ", but that employment contracts must be formed " without interference or dictation on the part of individuals or organisations not directly parties to such contracts "; nor may they stipulate " that employment should be denied to men not parties to the contract ". In other words, dealings are to be with employees only, and no provision for the closed shop is acceptable. In 1925, this association declared that " collective agreements should be the voluntary act of both parties " which must be recognised as a valid statement, and renewed its statement in opposition to the closed shop. Inasmuch as a not infrequently recognised aim of the collective agreement is to secure to the parties thereto an exclusive enjoyment of the employment relations and industrial opportunities represented by them, it is obvious that there is a wide contrast between a full endorsement of the idea and the expressions above recorded.

As indicative of a growth of opinion in favour of the sharing of responsibilities for the conditions of employment, mention may be made of the quite considerable extension of the practice of employee representation in industrial management. This idea

appears also in a form of governmental recognition in a law of the State of New York providing for the appointment of an " Industrial Council " in the Department of Labour of the State. This Council represents employers and employees by equal numbers on its membership, and is to act in an advisory capacity to the State Industrial Commission in considering administrative and industrial questions. Quite similar is the method of adopting safety codes for specific classes of establishments that has found favour in a number of cases, i.e. the appointment of representative workmen to consult with representative employers and others in the formulation of rules and standards which, when approved by the constituted authorities, have the force and effect of law in respect of safety devices and equipment ; and so also the wage boards in the different industries provided for by the minimum wage laws of the various States, employers and employees, and usually the public, being represented thereon, and recommending a wage rate on the basis of their consideration of the cost of living and the conditions of the industry, which, when approved and promulgated, became the legal standard for that industry.

A degree of recognition of the workman's interest in the undertaking in connection with which he is employed is to be found in the pronouncement of certain judges to the effect that employees going on strike do not by that act absolutely cease to be employees. A sort of surviving status exists differentiating the striking employees from other workmen.

> The relationship is an anomalous one, yet distinctive, and of such nature as to secure to the parties certain correlative rights under which acts may be performed that would assume a different aspect if done by absolute strangers or in different circumstances[1].

This recognition extends to statutory enactments as well, the Federal law regulating the issue of injunctions in labour disputes[2] permitting employees on strike to peaceably advise and persuade others to join them or to abstain from working for the person against whom the strike exists, or to cease to patronise him. Such permission is held to be limited to those who are personally classifiable in some direct way as employees, and does not extend to

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[1] Iron Molders' Union *v.* Allis-Chalmers Co. (1908), 166 Fed. 45, 91 C.C.A. 631.

[2] 38 Statutes at Large, p. 730.

workmen as a class, or even to members of the same union who are " in no relation of employment, past, present, or prospective "[1].

While no great significance can be attached to such expressions, they are indications, among others, of a measure of recognition of the employee's " right to the job " that entitles him to a voice in the determination of employment conditions in one way or another. Taken all together, there is a body of official and quasi-official opinion come to expression that is suggestive of advance. The question naturally arises as to the extent of actual adoption of such agreements as have been considered. No statistics of an inclusive nature are in existence, though the State of Massachusetts has made local studies of considerable completeness. Reports of these were issued covering the years 1911 and 1916. It is regrettable that the work has not been continued to cover a second five-year period. In connection with these dates it is of interest to note that they come closely upon the pronouncement of a careful student of the subject, made in 1912, calling attention to the rapid extension of the system of collective bargaining during the fifteen years then just ending — a growth that has apparently continued without noticeable diminution.

In 1911, of 1,282 local trade unions in the State of Massachusetts, 1,226, with 185,414 members, answered the enquiries as to collective agreements; and of this number 530 reported signed agreements with one or more employers, 42 others reporting verbal agreements. These two groups, comprising about 47 per cent. of the number of unions reporting, represented 61 per cent. of the membership. In other words, the more important unions had trade agreements, 259 reporting agreements signed with all firms within their jurisdiction. Five years later, 1,354 unions with 239,580 members reported; and instead of 47 per cent. having agreements, 61 per cent., embracing 76 per cent. of the membership, reported them. Many of these were for fixed terms of years, while a large number were for indefinite periods, subject to termination on notice of from 30 to 90 days. Some reported as effective in 1916 had had initial formation as far back as 1886, 1889, 1897, 1900, etc.

In some industries, as coal mining, and, within narrower geographical bounds, the building trades, textile industries, clothing trades, and the boot and shoe industry, the system of collective bargaining has been for several years either dominant or largely influential. The last-named industry was one of the earliest to

[1] Duplex Printing Press Co. *v.* Deering (1921), 254 U.S. 443, 41 Sup. Ct. 172.

take steps toward the adoption of the system, such efforts dating from the late 'sixties and early 'seventies of the last century. A parallel history, and perhaps even antedating its commencement, might be written for the stove trade. Here, well-recognised organisations of workers and manufacturers have dealt with each other in representative fashion continuously since 1872, with local activities of a considerably earlier date. A State board of arbitration and conciliation in Massachusetts in 1886 marks a form of recognition of the collective system. Laws for similar agencies, either State or local, were enacted in twenty States within the next decade.

Important agreements covering a wide range of industries have been reproduced in the publications of the Bureau of Labour Statistics in the United States Department of Labour and its predecessors, from 1902 to the present date, though not continuously, and with no purpose of covering the field in detail. No census is therefore possible, nor do the reports usually disclose the extent of the acceptance of the agreement. Naturally, the greater number are between local unions and the employers or employers' associations of various cities, though these may be within the terms formulated by national bodies, and may be of influence quite beyond the groups actually party thereto. It is calculated that above 4,000 agreements have come to the attention of the Bureau within the years 1924 and 1925, while it is believed that the number of informal but accepted agreements is even larger than that of formal signed agreements, of which the above number is not, of course, offered as comprehensive of the total. Agreements are on file representing national organisations of bakers, barbers, brewery workers (including yeast, soft drinks, grain elevators, etc.), clothing trades, diamond workers, electrical workers, moving picture operators, painters, plumbers, pottery workers, printers, stove founders, window-glass blowers, and many others.

The United States Shipping Board has agreements with longshoremen's organisations at the principal ports, also with the seamen and officers on their vessels. The longshoremen of New York City also have an agreement with the lighter captains of that port, and the sailors of the Great Lakes with the Lumber Carriers' Association operating thereon. The employees of the railroads of the country are widely organised, and their employment conditions are very generally determined by collective agreements.

A publication of the American Federation of Labour, 1925, entitled *Wage Negotiations and Practices*, gives an account of

agreements of various ranges — national, regional, local under central supervision, and local — embracing many thousands of workers in some 70 odd categories.

It is evident that the foregoing statements lack exactness as to scope and the number of persons affected, and they are offered only as suggestive of the variety and extent of the recognition of the principles under consideration. Local agreements are reported in a number of places recognised as primary centres for the industries named. Such an agreement in the shoe industry, for instance, affected 15,000 workers, a longshoremen's 2,200, the railroad organisations have a field of approximately 2,000,000 workers, etc.

Not in itself capable of being party to collective agreements, but furnishing basis and direction for them, is the National Board for Jurisdictional Awards in the Building Industry. This board was organised on a plan adopted in 1919, at the annual convention of the Building Trades Department of the American Federation of Labour, for the purpose of providing means for the settlement of disputes as to jurisdiction among the seventeen unions affiliated with this Department. The Board is, therefore, a sort of arbitrator, to settle disputes not as to collective agreements, but as to the claims of rival groups in the building industry. Associated with these workers' representatives are members of architects', engineers', contractors' and other national associations, representing every aspect of the industry. One of these, the American Engineering Council, at its meeting in January 1915, after hearing reports of its activities, voted continuing participation therein, as beneficial to labour, the contractor, the building owner, and to the public as well.

Construction and Enforcement

The statement has already been made that the expressed preference of the parties to collective agreements is for construction by persons of their own selection and enforcement by sanctions of their own choosing. Happily, choice rather than compulsion is the more common factor in securing observance; or if discipline is required, it is more frequently supplied from within. A recent illustration is the suspension in the winter of 1924-1925 of the charters of a considerable group of unions of anthracite miners in Pennsylvania for refusal to conform to the terms of an agreement entered into by the United Mine Workers in behalf of the coal field. Similar action in other coal fields was taken in 1919, 1921, and 1923.

Another significant event was the exclusion of the Carpenters' Union, a powerful organisation, from the American Federation of Labour in 1921, on account of its rejection of the decisions of the National Board for Jurisdictional Awards in the Building Industry as to their claims in regard to setting metal doors and sashes. And the four great Railway Brotherhoods in 1920 said : " We insist that the members of these Brotherhoods do everything in their power to preserve their existing contracts. The laws of these organisations provide penalties for members engaging in illegal strikes, and these penalties will be enforced. " Other cases of the kind might be cited, but these will suffice.

An agreement may provide for joint conferences for dealing directly to adjust questions in dispute, with an impartial arbitrator to care for cases found incapable of settlement by this method. The direct conference naturally tends to result in decisions reflecting the relative strength of the parties. This may also influence the decisions of the arbitrator to some extent, but he is at least in a position to develop a line of precedents, and to seek to establish certain principles expressive of his ideas of the justice of the case.

The choice of recourse to such methods rather than to the courts naturally tends to the development of an extra-legal, or perhaps rather extra-judicial, body of precedents and rules of procedure. But recent tendencies and events have had the effect of making recourse to the courts not an unknown or entirely undesirable occurrence. It cannot be said now, at least in the inclusive sense in which the statement seems to have been made some years ago, that " the provisions of our joint contracts cannot be enforced in the courts ; labour organisations can neither sue nor be sued "[1]. Doubtless, incidental provisions of such agreements are not enforceable by action of the courts ; indeed, no contract for personal services is. But the general and fundamental elements of such agreements have received judicial construction and application to a sufficient extent at least to qualify in a considerable degree the statement quoted above.

Nor can such agreements and the conduct of the parties in carrying them out escape court supervision in circumstances warranting intervention by reason of their effect on the legal rights of the persons affected, whether parties thereto or third persons. A very recent case may be used to illustrate this principle, in which

[1] Address of John MITCHELL, President of the United Mine Workers of America, Convention of 1902.

a locomotive engineer, party to a collective agreement, incurred the displeasure of his union, which thereupon sought to eliminate him from the protection of the contract. An arbitrator's award construing the agreement in his favour was ignored, and for the resultant loss of employment he was said by the court to have a right to damages, since the award had effected a determination that was controlling, having been rendered in accordance with the exact provisions of the agreement[1]. A purely judicial determination, i.e. without the intervention of an arbitrator, was made in a very similar case by the highest court of the State of Kentucky, which also made an interesting appraisal of the union as party to a contract[2]. It was here said to be the primary purpose of labour organisations to secure to their members a fair and just remuneration for their labour, and favourable working conditions. The right or privilege secured by their agreements was said to become " the individual right of the individual member, and such organisation can no more, by its arbitrary act, deprive that individual member of his right so secured than can any other person ". It followed that a workman entitled to seniority rights under the agreement could not be deprived of them by an act of the union that would contravene such agreement, the court thus intervening to secure to the individual the benefits of a contract made for him by perhaps the very officials who were now attempting to bar him from its benefits.

It has long been established that, " whatever the parties may do if no one but themselves is concerned ", a collective agreement cannot be pleaded in extenuation of injuries to third persons, committed with the alleged purpose of carrying it out[3]. On the other hand, where an employer has broken his agreement with a union, it has at least a legal right to inform its members of his action, and an ensuing strike is justifiable[4]. In other words, an employer cannot disregard his contract with impunity, any more than the union can claim its protection for unlawful ends.

As to the status and liabilities of labour organisations, it has been determined that, even though not incorporated, they are subject to injunction[5]; their funds and the property of their members can be levied on for the recovery of damages resulting from

[1] Order of Railway Conductors *v.* Jones (Colo. 1925), 239 Pac. 882.

[2] Piercy *v.* Louisville and N. Ry. Co. (1923), 198 Ky. 477 ; 248 S.W. 1042.

[3] Berry *v.* Donovan (1905), 188 Mass. 353, 74 N.E. 603 ; Curran *v.* Galen (1897), 152 N.Y. 33, 46 N.E. 297.

[4] Greenfield *v.* Central Labour Council (1920), 104 Oreg. 236, 192 Pac. 783 ; Segenfeld *v.* Friedman (1922), 193 N.Y. Supp. 128.

[5] *In re* Debs (1895), 158 U.S. 564, 15 Sup. Ct. 900.

their unlawful acts[1]; and in general, they are subject to the same processes in law and equity as are other legal entities, at least so far as the Federal courts are concerned[2]. It is correlatively true that the courts are open for the redress of their grievances, and that they can initiate proceedings and bring actions in law and in equity, through proper representation[3].

The question remains: when the courts do take cognisance of the existence and terms of a collective agreement submitted for their consideration, how is it to be construed? Two principal positions have been taken, the first that such an agreement is merely a memorandum of rates of pay and of regulations governing the conditions of employment of the members of the union. "It is not a contract for labour or even an offer, but merely usage."[4] On the other hand, the contract may be held valid, imposing specific obligations, to be observed with exactness and good faith[5].

Of course not every case falls under one or the other of these definite positions; and indeed a practical consequence of the doctrine of the unions themselves is to give something of a midway position to their agreements; while students of the question who have regarded such agreements with favour recommend leaving their observance to good faith rather than to enforcement by judicial procedure. In some instances, also, the courts have seemed to adopt a sort of "hands off" policy, recognising the propriety of the parties' action in formulating rules to govern their relations if they so desire, but looking upon those rules as of a moral and voluntary nature, rather than as legal and binding.

Thus in a case in which a third party complained of the effect of an agreement between a group of employers and a labour union, it was said that while a collective agreement might involve elements rendering it invalid and unenforceable in a court of law (i.e. as between the parties), they are not necessarily "illegal in the sense of giving a right of action to third parties for injury sustained; . . . when equal rights clash the law cannot interfere"[6]; and that as

[1] Loewe *v.* Lawlor (1908), 208 U.S. 274, 28 Sup. Ct. 301.

[2] United Mine Workers *v.* Coronado Coal Co. (1922), 259 U.S. 344, 42 Sup. Ct. 570.

[3] Schlesinger *v.* Quinto (1922), 192 N.Y. Supp. 564; St. Paul Typothetae *v.* St. Paul Bookbinders' Union (1905), 94 Minn. 351, 102 N.W. 725; Branson *v.* Industrial Workers of the World (1908), 30 Nev. 270, 95 Pac. 354; Coronado case, *supra.*

[4] Hudson *v.* Cincinnati, etc. R. Co. (1913), 152 Ky. 711, 164 S.W. 47.

[5] Nederlandsch Amerikaansche Stoomvart Maatschappij *v.* Stevedores' Beneficial Society (1920), 265 Fed. 397.

[6] National Fireproofing Co. *v.* Mason Builders' Association (C.C.A. 1909), 169 Fed. 259.

regards enforcement or construction, " the law takes them as it finds them, and as it finds them leaves them ". In other words, rules affecting members of such groups may be valid as to them, while unenforceable at law, the courts going no farther than to say that the persons party thereto are left to their own contracts, unless actually unlawful, " and the courts will not, either directly or indirectly, compel their performance "[1]. But neither will they dissolve such a contract at the instance of an outsider who is adversely affected, in the absence of a superior legal right, as by an existing contract, in the absence of unlawful or oppressive objects or methods of enforcement.

In the langage of one of the courts[2]:

> A contract between private persons may provide that it shall cease to be obligatory or be void if either party to it shall employ non-union men, and the law will permit the provisions to have full force ; and so with an inhibition against the hiring of union men, and with all other stipulations which are not impossible of performance, not immoral, nor contrary to public policy.

Clearly, the idea of enforcement is not in mind, but only of a permission, within the limits of legality. But it was held in this case, and uniformly by the courts, that a municipality or similar public agency cannot enter into any agreement to make any provision by which preference shall be given to union workmen, or employment conditions be determined by organisations of workmen[3]. This is said to be on grounds of avoiding any tendency towards monopoly, and increasing the cost of public works in violation of public policy.

That collective agreements lie outside the realm of judicial construction and enforcement appears also to have been the attitude of the Supreme Court of Minnesota in passing on an action for damages for the breach of such an agreement on the part of the union[4]. Right to sue was denied because the parties were unincorporated associations and therefore not legal entities. It was intimated that a proceeding in equity might be available in a proper case ; but any action at law must be in the name of the individuals

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[1] O'Brien *v.* Musical Protection and Beneficial Union (1903), 64 N.J. Eq. 525, 54 Atl. 150.

[2] State *v.* Toole (1901), 26 Mont. 22, 66 Pac. 496.

[3] Adams *v.* Brennan (1898), 177 Ill. 194, 52 N.E. 314 ; Marshall and Bruce Co. *v.* Nashville (1903), 109 Tenn. 495, 71 S.W. 815; Wagner *v.* City of Milwaukee (1922), 177 Wis. 410, 188 N.W. 487.

[4] St. Paul Typothetae *v.* St. Paul Bookbinders' Union (1905), 94 Minn. 351, 102 N.W. 725.

composing the association, however numerous they might be. The question was raised but not answered whether the associations could be regarded as the agents of their members ; though if this view were accepted the fact of agency would require clear proof. In another view, the members might be held liable because holding themselves out as agents of a non-existent principal[1]. However, a law of Pennsylvania was said by a Federal court to relieve from personal liability the members of an association sued by an employer for breach of a collective agreement, and recourse to " the more flexible remedy in equity " was suggested as probably more suitable in an effort to enforce liability against the treasury of the association[2].

The view of non-enforcement was likewise expressed in a case[3] where it was said that, granting that the company had certain agreements recognising the union, there was no contract requiring the employment of any number of men for any particular time ; and even though a binding contract might exist, a court of equity would not direct a preferred employment of one man over another, the remedy for broken contracts being in an action at law. Furthermore, " running through the entire structure of the [railroad] brotherhoods [the unions concerned] is the thought that the brotherhoods themselves provide the tribunals for the final settlement of the rights of the members ". The court therefore declined to intervene ; and in a slightly earlier case the same court refused an injunction to restrain employers from breaching an agreement, even though their action was " a direct violation of contract "[4].

If a personal appraisal may be made of these opinions, it is to the effect that this court has unwarrantably confused the mandatory and restrictive aspects of the injunctions sought, and has likewise without warrant refused to give effect to arrangements entered into by competent minds acting in a manner of their own choosing ; for while in no case can an employer be coerced by strike or boycott into an acceptance of a collective agreement that will be recognised by any court[5], the fact that workmen refuse to continue in service until an employer has signed such an agreement does not furnish grounds for evading its terms[6] ; and practically to deny any binding

[1] Lewis *v.* Tilton (1884), 65 Iowa 220, 19 N.W. 911.
[2] Ehrlich *v.* Willenski (1905), 138 Fed. 425.
[3] Mosshamer *v.* Wabash R. Co. (1922), 221 Mich. 407, 191 N.W. 210.
[4] Schwartz *v.* Driscoll (1922), 217 Mich. 384, 186 N.W. 522.
[5] O'Brien *v.* People (1905), 216 Ill. 354, 75 N.E. 108.
[6] Maisel *v.* Sigman (1924), 205 N.Y. Supp. 807.

effect to an agreement made by competent parties is to disregard widely recognised developments in this field. Such was the vigorous contention of two judges in a minority opinion in opposition to the judgment of the Supreme Court of the State of Mississippi, when, sitting as a court of equity, it refused to construe an agreement purporting to give certain employees, members of the contracting association, preference on account of seniority[1]. The court's refusal was based on the ground that it could not decree specific performance of a contract for personal service ; but the dissenting opinion pointed out that no such proposition was involved in the case, but merely the construction of a contract regulating the rights of the parties, and its enforcement by granting an injunction against its violation. It was said that the contract was lawful, and on a lawful subject matter ; and further that :

> The courts ought to keep pace with the progress and advancement of the country. Old principles should be extended and applied to new conditions ; and, if necessary to the ends of justice, new principles should be developed and declared by the courts.

A rather noncommittal recognition of collective agreements was given by the Supreme Court of Connecticut in a case[2] where coercion to secure the acceptance of such an agreement was penalised, though it was said to contain " no provisions which are contrary to the criminal law of this State ", nor was the mere purpose to procure acceptance in itself criminal ; but there could be no intimidation to secure that end. A like statement was made by a Federal judge in a case in which coercive methods were adopted, the court adding[3] :

> It is true that they [the members of the union] have the right to combine and act through agents selected by themselves to apply for said work and bargain collectively as to the terms upon which it is to be done ; but the combined right is, in law, no greater than the right of a single worker.

Doctrine of Usage

The significance of that construction of a collective agreement that classes it merely as a memorandum of rates of pay, etc. is further indicated by saying that it simply sets forth " an established method of dealing, adopted in a particular place, or by those engaged

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[1] Chambers *v.* Davis (1922), 128 Miss. 613, 91 So. 346.
[2] State *v.* Stockbridge (1904), 77 Conn. 227, 58 Atl. 769.
[3] J. C. McFarland Co. *v.* O'Brien (1925), 6 Fed. (2d) 1016.

in a particular vocation or trade, which acquires legal force because people make contracts with reference to it "[1]. In line with this attitude is that of another court in an earlier case[2], where it was said: " That the miners' union, as an organisation, cannot make a contract for its individual members in respect to the performance of work and payment for it, in our opinion, is too clear for discussion. " And a widely recognised compendium of law[3] says:

> A labour union ordinarily has no authority to contract with employers of its members in respect to the performance of work and payment for it. In order to bind the individual members, 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. It cannot maintain an action to enforce a contract made by it on behalf of its members. Nor is it liable to suit on such a contract, which is enforceable only against the individual members who are guilty of a breach of it. An individual member of a labour union, not being bound by the terms of the contract made between the union and his employers as to the time of payment of his wages, has no right to sue therefore on the completion of his work, in the absence of any express contract with him[4].

Of similar import is the view of a United States Circuit Court of Appeals that unincorporated associations of employers and employees respectively lacked the " juristic personality "[5] necessary to the making of a binding agreement, and, " so far as there was any real contract at all, it must have been between the individual members of the different local associations "[6]. However, this opinion may be regarded as going beyond a recognition of the doctrine of a mere declaration of usage, as it states that though there was formally a contract between the two international associations, it was really a separate contract between each employee and his employer; " or rather, that the provisions of the contract, upon its being entered into, became terms of the separate contracts of employment between each member of the . . . [employers' association] and the members of the union in his employ ".

The result of this conclusion seems to be that the collective

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[1] Cited in the Hudson case, *supra*.

[2] Burnetta *v.* Marceline Coal Co. (1904), 180 Mo. 241, 79 S.W. 136.

[3] *Cyclopedia of Law and Procedure.*

[4] 24 Cyc. 824.

[5] In this connection, attention may be called to the recognition of " juristic personality " by the Supreme Court of the United States in the Coronado case, *supra*, where the capacity of labour organisations to be sued was definitely asserted, their capacity to sue being as clearly implied; and if legal persons in these respects, capacity to contract would seem of necessity to follow.

[6] A. R. Barnes and Co. *v.* Berry (1909), 169 Fed. 225, 94 C.C.A. 501.

agreement offers a standard form of contract, binding on the individual as are ordinary personal contracts, as and when accepted by him by rendering or receiving service subsequent to the agreed date of inception of the agreement. The court below had taken the ground that the contract could not be enforced against the men if they chose to leave employment, which is obviously correct; but it was regarded as affording grounds for enjoining the officers from instigating strikes in violation of its provisions[1] — a rule that was also clearly laid down in a case decided the next year in another court of the same class[2]. On further proceedings in the Barnes case, it was found that no contract had really been entered into, the proposal having been formally rejected by the union; and, in any case, it was " not a contract of employment between members " of the two associations, but only a contract between the two associations to secure certain uniform and fair conditions, and avoid disputes. No effort would therefore be made by the courts to enforce, either directly or indirectly, the employers' claim of a contract[3] — a position that, as already indicated, was sustained by the higher court.

Doctrine of Legal Validity

In considering the principle of the legal validity of collective agreements it must be understood that they cannot exceed, certainly as regards the services of individual members, the binding effect of separate and individual contracts. No absolute enforcement of a contract for merely personal services is possible in view of the constitutional restriction on involuntary servitude, and for other reasons. But just as damages may be recovered for a breach of personal contracts, so the parties to collective agreements may be held to account for losses occasioned by their breach, but cannot be compelled by legal or equitable processes actually to observe the specific terms of the contract. This was the exact situation in the Nederlandsch, etc. case cited above. The failure of the union to carry out its agreement to furnish the necessary labour caused damage to the shipping company, for which the union was held liable, the contract being regarded by the court as valid and imposing on the union the same responsibility to work, or rather

[1] A. R. Barnes and Co. *v.* Berry (1907), 156 Fed. 172.
[2] Delaware, L. and W. R. Co. *v.* Switchmen's Union (1908), 158 Fed. 541.
[3] Same case (1908), 157 Fed. 883.

to furnish workmen, as on the employer to pay wages for services rendered.

This latter aspect of such a contract was considered in a New York case[1], where a workman was allowed to recover the difference between the wages the employer had paid him and the amount agreed upon in the employer's contract with the union. " The agreement referred to was a valid contract, which may be enforced in any proper manner. " And a note given to secure the observance of such an agreement is not void for want of consideration[2].

This principle has been carried so far as to permit an agent of a union to present the agreement in a case in which an employee, uninformed as to the particular item involved, had accepted a smaller sum than was due in settlement for his labour, the agreement being declared to be the controlling factor[3]. The same court applied the terms of a national agreement to a case in which workers were asked to report for duty in advance of the time of opening of the plant, the employer being required to pay the sum fixed for time lost on account of failure to give immediate employment[4].

Conversely, where a union agreed to a wage rate below that previously reported to an employer operating under a collective agreement, and the latter continued to pay the higher rate, the union was required to reimburse him in respect of such excess payment[5].

Of like effect with the Gulla case, above, is one in which a workman was held to be entitled to overtime pay, such provision existing in the employer's contract with the union of which the workman was a member[6]. Here, working under the collective contract was held to be an acceptance of it by the individual parties ; but if the circumstances of one's employment indicate specific provisions not in harmony with the terms of the collective agreement, the individual contract will be held to control[7].

How far enforcement, or rather restraint of violation, will go,

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[1] Gulla *v.* Barton (1914), 149 N.Y. Supp. 952.

[2] Simers *v.* Halpern (1909), 114 N.Y. Supp. 163.

[3] Mastell *v.* Salo (1919), 140 Ark. 408, 215 S.W. 583.

[4] Moody *v.* Model Window Glass Co. (1920), 145 Ark. 197, 224 S.W. 436.

[5] Powers *v.* Journeymen Bricklayers (1914), 130 Tenn. 643, 172 S.W. 284.

[6] Keysaw *v.* Dotterweich Brewing Co. (1907), 121 App. Div. 58, 105 N.Y. Supp. 562.

[7] Langmade *v.* Olean Brewing Co. (1910), 137 App. Div. 355, 121 N.Y. Supp. 388.

was considered in a New York case[1], in which an employers' association had passed a resolution contravening the terms of an existing collective agreement. The carrying out of this resolution during the period of existence of the agreement was forbidden by an injunction procured at the instance of the officials of the union, the court saying :

> Each party knows the obligation that it has assumed and the consequences of failure or refusal to perform these requirements. Through its control of its members it can compel performance. An organisation having such power to require performance by individual members can, through its officers, be compelled to exercise that power. There is in this contract a mutuality of obligation, and there is also a mutuality of remedy for its enforcement.

And in a somewhat earlier case[2] it was said :

> Where a strike, or other action, is threatened by a labour union in violation of its contract, ...the jurisdiction of a court of equity to issue an injunction is well recognised.

In line with the Schlesinger case is the action of an inferior court of the State of Ohio in granting an injunction against employers conspiring to breach of an agreement with a union[3] ; while employers were active in securing injunctions against strikes threatened in violation of agreements in a New Jersey case[4], where it was said that a contract promising avoidance of labour troubles on condition of a wage increase was valid, and to be construed just as contracts between individuals ; and in a case in the courts of the State of Georgia[5], in which unions, their officers and members were enjoined against action tending to breach an existing agreement.

Rival unions in conflict as to employment privileges were parties in a case[6] in which a decree refusing an injunction was affirmed, where the object was to disrupt a collective agreement. The latter was said to have been freely made, without infringing on existing contracts, and within recognised lawful principles, so that it would not be disturbed. The same rule was followed in a

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[1] Schlesinger *v.* Quinto, *supra.*

[2] Grassi Contracting Co. *v.* Bennett (1916), 174 App. Div. 242, 160 N.Y. Supp. 279.

[3] Herman Leveranz *v.* Cleveland Home Brewing Co. (1922), Court of Common Pleas, Cuyahoga Co.

[4] Gilchrist Co. *v.* Metal Polishers, etc. (1919), N.J. Eq., 113 Atl. 320.

[5] Burgess *v.* Georgia, F. and A. R. Co. (1918), 148 Ga. 417, 96 S.E. 865.

[6] Hoban *v.* Dempsey (1914), 217 Mass. 166, 104 N.E. 717.

later case[1]; but the agreement there sustained was held not to be a defence in the case of a former member of the union and party to the agreement, now expelled for infractions of his obligations, seeking an injunction and damages for loss of employment on account of the action of the union. He was allowed damages, the court saying that it was not stated in his contract that employment was to be limited by his continuance in membership in the union[2]. However, this position seems to have been taken because of an alleged " dominant purpose " to make the plaintiff " an example before their membership ", so as to hold the union more effectively together, questions of motive as well as status being involved in the decision. But when later the same plaintiff renewed his efforts against the union, and the court found that his status was the same as that of any other person outside the scope of the agreement which he was attacking, inasmuch as it was a valid contract between the parties, he was held to have no redress[3].

Quite similar to the Hoban case above was one[4] in which a rival union sought to displace one already in contract relations with an employer. Such action was said to afford ground for relief against the offending union. At the same time an injunction was allowed to prevent the same competing organisation from interfering with the employees of an employer party to the agreement[5]. These decisions sustained the agreement as valid, and entitled not only to observance by the parties thereto, but also to respect by third parties. Another point decided at the same time was that an employer will not be enjoined from hiring non-union workmen if the union with which he is in contract relations is unable to supply him with a sufficient number of men[6].

Within the rule above set forth is a finding that an employer freely and legally contracting for the exclusive employment of the members of a specified union cannot be enjoined from discharging non-union employees[7]. Still less would it be objectionable to agree to employ a stated percentage of union members where the union comprises a larger proportion of local labour of the class

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[1] Tracey *v.* Osborne (1917), 226 Mass. 25, 114 N.E. 959.
[2] Shinsky *v.* Tracey (1917), 226 Mass. 21, 114 N.E. 957.
[3] Shinsky *v.* O'Neil (1919), 232 Mass. 99, 121 N.E. 790.
[4] Lovely *v.* Gill (1923), 245 Mass. 577, 140 N.E. 285.
[5] Knipe Bros. *v.* White, *ib.*
[6] Goyette *v.* Watson, *ib.*
[7] Mills *v.* United States Printing Co. (1904), 99 App. Div. 605, 91 N.Y. Supp. 185 ; Kissam *v.* Same (1910), 199 N.Y. 76, 92 N.E. 214.

affected than that named[1]. And in another case[2] the court pronounced agreement by a manufacturing company to give all its work to the members of a union " legal and valid ", for the enforcement of which a strike might be legally undertaken ; but if such exclusive provision is not incorporated in the agreement, a strike to compel a closed shop would be enjoined ; nor will presumptions be indulged in as to the power of union officials to " create either by word or conduct a binding bargain in behalf of members of their union ", in the absence of authorisation, express or implied, " by the members in some form sufficient to show mutuality of will and consent "[3].

Though, as indicated by the Mills and Kissam cases above, an employer can without liability discharge one objectionable to the union with which he has contract relations, since he may at any time and for any reason — or without reason for that matter — dismiss a workman not under contract for a definite term, the union cannot offer such contract as a defence if the employee sues for damages for causing his discharge, since his right to choose his own course and relationships is entitled to protection[4]. However, it has been held that no liability attaches where the contract is for the employment of members in good standing and a workman by his conduct incurs suspension from the union and consequent discharge[5]. So also where officers of a union merely inform an employer that a workman in his employ under a contract for no definite term is not a member of the union and his discharge follows, it has been held that the union incurs no liability therefor[6].

In line with the principles stated above is a statement of the Supreme Court of the State of Washington[7], that it was not a strike for workmen to leave an employer who had lost membership in an association with which the union had a reciprocal closed agreement, since, on account of his own conduct leading to expulsion, " he had placed himself in a position where certain workmen could not remain in or enter into his employment without violating their agreement ".

Appeal to a court of law rather than one of equity was broadly

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[1] Underwood *v.* Texas P. R. Co. (1915), Tex. Civ. App., 178 S.W. 38.

[2] Smith *v.* Bowen (1919), 232 Mass. 106, 121 N.E. 814.

[3] W. A. Snow Iron Works (Inc.) *v.* Chadwick (1917), 227 Mass. 332, 116 N.E. 801.

[4] Berry *v.* Donovan (1905), 188 Mass. 353, 74 N.E. 603 ; Curran *v.* Galen (1897), 152 N.Y. 33, 46 N.E. 297.

[5] Scarano *v.* Lemlein (1910), 121 N.Y. Supp. 351.

[6] Cusuman *v.* Schlesinger (1915), 152 N.Y. Supp. 1081.

[7] Uden *v.* Schaefer (1920), 110 Wash. 391, 188 Pac. 395.

intimated in a case[1], where it was said that if an employer broke his contract, the union might proceed as in any other case of wrongful discharge of an employee. The recovery of agreed sums as liquidated damages for breach of such contract has been recognised by the courts[2]; nor can duress be pleaded in excuse of failure to pay a sum awarded by arbitration in accordance with the terms of an agreement[3]; but where it appeared that the payment of a fine was secured by coercion for an alleged but unproved violation of an agreement by the employer, he was held entitled to recover the sum paid[4]. In any case, the end in view in forming the contract must be lawful, and an agreement that involves illegal consequences, as of monopoly or interference with the business rights of others, loses its validity thereby, and forfeitures or penal assessments for failure to carry it out will be classed as coercive and unlawful[5].

An unusual construction was one that opened an agreement between an organisation and an employer fixing working conditions for a specified class of workers, so as to extend its provisions to include a member of that class, not a member of the union[6]. Thus, not only did the agreement establish usage, but it fixed the employment conditions for all who recognised it and treated it as determinative. And the same court, in an earlier case[7], ruled that the union alone was clothed with power to contract for its members so long as they remained in membership, so that employees willing to continue at work under an expired contract could not do so in opposition to the rules of the union; nor could the employer have an injunction to prevent the calling out of the workmen so continuing to work, or the termination of his right to place the union label on his products.

An incidental consequence of the acceptance of the terms of a labour organisation as controlling the conditions of employment was developed in a case[8] in which the Supreme Court of Louisiana refused to hold a contracting stevedore liable for the injury of a

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[1] Stone Cleaning and Pointing Union *v.* Russell (1902), 77 N.Y. Supp. 1049, 38 Misc. 513.

[2] Jacobs *v.* Cohen (1905), 183 N.Y. 207, 76 N.E. 5; Simers *v.* Halpern (1909), 114 N.Y. Supp. 163.

[3] Maisel *v.* Sigman (1924), 205 N.Y. Supp. 807.

[4] Burke *v.* Fay (1908), 128 Mo. App. 690, 107 S.W. 408.

[5] Martel *v.* White (1904), 185 Mass, 255, 68 N.E. 1085.

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

[7] Saulsberry *v.* Coopers' International Union (1912), 147 Ky. 170, 143 S.W. 1018.

[8] Farmer *v.* Kearney (1905), 115 La. 722, 39 So. 967

workman in the hold of a vessel, due to the negligence of a workman on deck. Both workmen were members of unions whose rules controlled the engagement of the men and their working conditions in every respect, so that an employer accepting their services on such terms was held to be absolved from liability for the negligent act causing the injury ; and so where union miners undertook to furnish a shot firer[1]. The same rule was applied by another court in a later case involving injury to a labourer employed by the agent of a union which exercised exclusive jurisdiction over longshore workers at a certain dock, except that a compensation statute was in force[2].

An opposite view, at least to the Edwards case, was taken by courts of the States of Iowa and Washington. In the former[3], the court regarded the shot firer as essentially the employee of the mine operator, and his delegation to the miners of the right to hire and discharge a workman performing an indispensable duty in connection with the operation under their agreement did not change the relationship. In the second case, a longshoremen's union had furnished the workman found incompetent, but the employer was held responsible as he had made no enquiry as to the fitness of the workman for the specific job at which he was employed[4] ; nor could the employer plead his contract with the union to furnish competent help as a defence.

The question of monopoly, either actual or potential, was urged in several of the cases noted above, but was resolved in favour of the agreements. However, where monopoly is actually created or threatened, an agreement so restricting employment in an industry will be declared invalid[5], since to hamper the freedom of employment or coerce workmen into undesired associations " militates against the spirit of our government and the nature of our institutions ". Therefore, an association of employers practically covering their trade locally cannot enter into a closed shop agreement with a labour organisation, though an individual employer might do so[6]. In an Illinois case[7] it was broadly stated that a contract providing for the exclusive employment of the members

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[1] Edwards' Adm'r *v.* Lam (1909), 132 Ky. 32, 119 S.W. 175.
[2] Hines *v.* Henry I. Stetler, Inc. (1921), 188 N.Y. Supp 73.
[3] Bidwell Coal Co. *v.* Davidson (1919), 189 Iowa 809, 174 N.W. 592.
[4] Pearson *v.* Alaska Pac. S.S. Co. (1909), 51 Wash. 560, 99 Pac. 753.
[5] Curran *v.* Galen, *supra.*
[6] McCord *v.* Thompson-Starrett Co. (1910), 198 N.Y. 587, 92 N.E. 1090.
[7] Christensen *v.* People (1904), 114 Ill. App. 40.

of unions would be unlawful as tending to create monopoly. And invalidity will certainly be declared where the agreement is found to conflict with a statute forbidding combinations in restraint of trade[1]. And where an agreement existed that established a practical monopoly, it was held that a workman thereby excluded from employment was entitled to damages, the agreement being of an unlawful nature, containing " not only the seeds but the fruit of monopoly "[2].

An employer likewise may have both an injunction and damages where unions of employers use their agreement with the workmen's unions to undertake to drive the non-member employer out of business, both because it is an unlawful interference with his property rights and because the existing agreement " tended and was calculated to create a virtual monopoly " of the work affected[3]. Nor can an agreement tending toward a monopolisation of the labour market afford any basis for interfering with the conduct of an undertaking by one not a party thereto, or make it an excuse for terminating existing contracts[4]. It has been held, however, that an anti-trust statute that " speaks in terms of business or commerce, produce, merchandise, or commodity " does not apply to a collective agreement in respect of its establishment of the " closed shop ", even though the agreement is with the " greater number " of the employers in the industry in the locality[5]. If the agreement does no more than to regulate conditions of employment for a group of workers who represent only one section of an industry in which there is effective competition, or if but a single employer is involved, the parties will be left free to formulate and carry out their plans without interference by the courts[6].

An attack on an agreement between organisations of employers and employees by an employer outside the association on the ground that he was thereby deprived of the services of union workmen was rejected by a California court on the ground that the situation was merely the result of the exercise by the parties of their

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[1] Campbell *v.* People (1922), 72 Colo. 203, 210 Pac. 841.

[2] Connors *v.* Connally (1913), 86 Conn. 641, 86 Atl. 600.

[3] Brescia Construction Co. *v.* Stone Masons' Contractors' Ass'n (1921), App. Div., 187 N.Y. Supp. 77.

[4] Lehigh Structural Steel Co. *v.* Atlantic Smelting, êtc. Works (1920), 92 N.J. Eq. 131, 111 Atl. 376.

[5] Reihing *v.* Local Union No. 52, I.B.E.W. (1920), 94 N.J.L. 240, 109 Atl. 367.

[6] Window Glass Mfrs. *v.* United States (1923), 263 U.S. 403, 44 Sup. Ct. 148 ; Jacobs *v.* Cohen, *supra.*

right of freedom to make or refuse contracts of employment, either singly or in co-operation[1]. But when it was shown that the associations were practically monopolising the local printing industry in restraint of trade or commerce, their conduct was found to be " tainted with illegality ", and coercive methods adopted to force the plaintiff employer into the association became actionable[2]. Similarly, the validity under an anti-trust law of an agreement that related only to service was upheld in a New York case[3]; but when the union sought to extend the contract so as to fix the price of the employers' products, the factor of illegality became a bar to such proceeding and a strike to secure the purpose indicated was held subject to an injunction[4].

Conclusion

The reader who has had the patience to go through the variant — sometimes concordant, sometimes conflicting — expressions of the courts given in the foregoing pages is entitled to the satisfaction of knowing that he has traversed practically the field of decisions on the subject; so that if it were possible to piece together into a congruous system the opinions presented, the result would be the judicial declaration of the law of collective agreements. But the present impossibility of such an achievement is evident from a comparison of the position taken, for instance, by the courts of New York and New Jersey with that of the courts of Illinois

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[1] Overland Publishing Co. *v.* Union Lithograph Co. (1922), 57 Cal. App. 366, 207 Pac. 412.

[2] Overland Publishing Co. *v.* H. S. Crocker Co. (1924), 193 Cal. 109, 222 Pac. 812.

[3] People *v.* Epsteen (1918), 102 Misc. 476, 170 N.Y. Supp. 68.

[4] Standard Engraving Co. *v.* Volz (1922), 200 App. Div. 758, 193 N.Y. Supp. 831. Reference may here be made to an opinion of the Supreme Court delivered since this article was written. The building contractors, manufacturers of millwork (window and door frames, mouldings, etc.), and the carpenters' union of Chicago formed an agreement to prevent the use of non-union-made millwork in the city of Chicago. The District Court found that this was an agreement in restraint of inter-State commerce; the Circuit Court of Appeals reversed this judgment on the ground of failure of proof to support the charge, the agreement dealing merely with the product of non-union labour regardless of its origin. The Supreme Court, in reviewing and reversing this decision, found that the purpose of the agreement was to eliminate the competition of non-union mills located outside Illinois which sold their product in the Chicago market cheaper than local manufacturers who employed union labour could afford to do, and that, " as intended by all the parties, the so-called outside competition was cut down and thereby inter-State commerce directly and materially impeded. " (U.S. *v.* Brims, Sup. Ct. No. 212, October term 1926.)

and Michigan. However, certain agreements of opinion are apparent ; as that, while no coercion in the formation of agreements is permissible, when the agreement is once formed the courts generally favour its observance, in the absence of monopoly, as against alleged grievances suffered by persons not party to them ; and the larger number of courts in which the issue has been raised recognise claims for damages as in the case of the breach of any other service contract, though admittedly some courts seem to assume an attitude of unconcern.

The highly regarded judicial opinion of the State of New York is to the effect that observance of such agreements is procurable through procedure in law or in equity as the circumstances may indicate, agreed penalties or proved damages being recoverable on a proper showing, threatened violations being also subject to injunction. The same position has been adopted in some other States and by various Federal courts, and the attitude of the latter, so far as expression has been developed, appears to be favourable to the observance of such agreements.

Cases are found in encouraging numbers and on satisfactory reasons, calling for an exact application of the terms of an agreement to the contract of the individual whether employer or workman ; and no arbitrary or *ex parte* modification or interpretation will be allowed ; though over against them is the less common opinion that nothing more than a mere memorandum of usage is formulated.

Though not brought to exact expression in any considerable number of instances the conclusion seems nevertheless to be warranted that a union will be held responsible for failure to employ disciplinary measures to procure the performance of an agreed undertaking, even when an individual workman could not be so controlled. In this fact lies one of the most potent suggestions of effectiveness, not only because the courts so hold, but even more because the central bodies of the labour unions, with their wider perspective, have assumed such attitude with reference to constituent unions on various occasions. Keeping in mind that the reciprocal application of this rule equally affects employers, whether groups or individuals, this fact illustrates the so-called " constitutionalising of industry " in one of its most striking aspects.

The basis of such a development is the recognition of the interest of the employee as well as the employer in the undertaking in which both are engaged — a recognition which tends to sustain and extend the idea of " government by discussion ". How far mutual agreements are to be encouraged. and to what subjects they shall extend,

is a matter of primary importance. Almost without exception so-called monopoly is subjected to judicial condemnation; but if harmony and fairly uniform and equitable wages and employment conditions are desirable for a portion of the group, why not for all? The solution is not to be found in disintegration or the abolition of organisation; no return to the complete individualism of the middle ages of industry can be conceived of as possible. Nor is it in a compulsory membership in associations of either employers or employees, though perhaps favoured treatment, as practised in some European countries, might produce desirable results in the way of solidarity. Nor, again, can the rights of the consuming public be overlooked; neither can they, as human nature now is, be left entirely to the conclusions arrived at by the parties engaged in production. Rights and interests correlate and interact — are even in conflict, as usually regarded; but there is a challenge to human intelligence and judgment to develop an adequate *modus operandi*, so as permanently to eliminate such terrific wastes as those involved, for recent illustration, in the anthracite coal strike of 1925-1926, giving rise to losses estimated to be in excess of half a billion dollars, besides much suffering. This was adjusted at length by a collective agreement of five years' agreed duration; but more than battle and treaty — with a poorly camouflaged bill of costs to be paid by the until then excluded third party — must constitute the established economic mechanism.

No perfect system brought full-fledged into the world can be looked for. Rather, the process will be that described by one of our venerable justices of the Supreme Court:

> New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But it seems obvious, in the light of present developments, that an outstanding factor in the hoped-for adjustment will be the collective agreement, freely formed, equitably balanced as regards employer, employees, and the public, and faithfully observed in the light of its conception and just interpretation.