Labor Law—Contracts—Rights of Employee under Collective Agreement [Illinois].—Defendant employer had entered into an agreement with a union providing that employees were to receive a compensation of $50 per week, and that no contract should be made with employees inconsistent with the agreement. After having paid the union rate for a time, defendant notified his employees that they would have to work at a lower salary. Plaintiff employee, a member of the union, objected, but continued to work, being paid the lower wage. He then sued the defendant for the difference between the union wage and the wage he had received. *Held*, the employer having entered into a valid contract with the union for the benefit of its members, the plaintiff, not having consented to a lower wage, may enforce his rights under the contract as a third party beneficiary. *Dierschow v. West Suburban Dairies Inc.*, 276 Ill. App. 355 (1934).

Though legal recognition is not always given the interest of an employee in a collective agreement between employers and a union, *Kessell v. Great Northern Ry. Co.*, 51 F. (2d) 304 (D.C.W.D.N.D. 1931); *Young v. Canadian Northern Ry. Co.*, [1929] 4 D.L.R. 452, [1931] A.C. 83, where it is legally recognized, the courts have used three theories: (1) the usage theory, (2) the agency theory, (3) the third party beneficiary theory.

The usage theory, the oldest, treats the collective agreement not as a contract, but as merely creating a usage which may become part of individual contracts of employment. *Aulich v. Craigmyle*, 248 Ky. 676, 59 S.W. (2d) 560 (1933); *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S.W. 136 (1904); *Keysaw v. Dotterweich Brewing Co.*, 121 App. Div. 58, 105 N.Y.S. 562 (1907); *West v. B. & O. Ry. Co.*, 103 W.Va. 417, 137 S.E. 654 (1927). Some courts have held the usage so created may be incorporated into the individual contract only by express adoption. *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S.W. 136 (1904); *Panhandle & S.F. Ry. Co. v. Wilson*, 55 S.W. (2d) 216 (Tex. Civ. App. 1932). Other courts do not require express adoption, holding that the usage becomes a part of the individual employment contract unless the individual contract is made contrary to the terms of the collective agreement. *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S.W. 436 (1920); *Hudson v. C.N.O. & T.P. Ry. Co.*, 152 Ky. 711, 154 S.W. 47 (1913); *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 9 S.W. (2d) 692 (1928); *St. Louis B. & M. Ry. Co. v. Booker*, 5 S.W. (2d) 856 (Tex. Civ. App. 1928). In any event, under this theory an individual employment contract with terms contrary to the collective agreement, amounts to a repudiation of the usage, leaving both the employee and the union without legal protection. *Langmade v. Olean Brewing Co.*, 137 App. Div. 355, 121 N.Y.S. 388 (1910).

The agency theory, perhaps the least prevalent, regards the union as the agent of its members, which by means of the collective agreement makes contracts for its members with the employer. *A. R. Barnes & Co. v. Berry*, 156 Fed. 72 (Circ. Ct. S.D. Ohio 1907); *Aden v. Louisville & N. Ry. Co.*, 276 S.W. 511 (Ky. 1921); *Piercy v. Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923); *contra: Hudson v. C.N.O. & T.P. Ry. Co.*, 152 Ky. 711, 154 S.W. 47 (1913). An agency, however, would not exist as to non-union employees, and would be difficult to find as to employees who joined the union subsequent to the collective agreement. 41 Yale L. J. 1221 (1932); *cf. Yazoo & M.V. Ry. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931).

Under the third party beneficiary theory the collective agreement is regarded as a contract between the union and the employer for the benefit of the employees. *Yazoo & M.V.R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); *Gulla v. Barton*, 164 App. Div.

293, 149 N.Y.S. 952 (1914); *H. Blum & Co. v. Landau*, 23 Ohio App. 426, 155 N.E. 154 (1926); *Johnson v. American Railway Express Co.*, 163 S.C. 191, 161 S.E. 473 (1931). As a donee beneficiary the employee would have rights recognized in most but not in all jurisdictions. 1 Williston, Contracts (1920), § 368; Restatement, Contracts (1932), § 133; 31 Col. L. Rev. 1156 (1932); 16 Minn. L. Rev. 100 (1931). It is immaterial under this theory that an employee is not a member of the union if an intent can be found to benefit non-union employees. *Yazoo & M.V.R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931). Nor does it matter that an employee has joined the union or become an employee after the collective agreement has been made, for a donee beneficiary may acquire rights under a contract even though he is not identified at the time the contract is made. *Palmetto Ins. Co. v. Beha*, 13 F. (2d) 500 (D.C.S.D.N.Y. 1926); *Whitehead v. Burgess*, 61 N.J.L. 75, 38 Atl. 802 (1897); 1 Williston, Contracts (1920), § 378; Restatement, Contracts (1932), § 139. The situation is perhaps analogous to that where an individual citizen asserts rights under a contract between a municipality and a public service corporation, where the trend is to deny recovery. *Peck v. Sterling Water Co.*, 118 Ill. App. 533 (1905); *Mott v. Cherryvale Water Co.*, 48 Kan. 12, 28 Pac. 989 (1892); 1 Williston, Contracts (1920), § 373, n. 19; *cf. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); *contra: Harlan Water Co. v. Carter*, 220 Ky. 493, 295 S.W. 426 (1927); *Pond v. New Rochelle Water Co.*, 183 N.Y. 106, 96 N.E. 409 (1911). See 28 Harv. L. Rev. 427 (1915); 26 Mich. L. Rev. 445 (1927); 16 Minn. L. Rev. 100 (1931).

To recognize an employee as a third party beneficiary of the collective agreement does not necessarily imply recognition of an unincorporated union as a legal entity, for the contract may be regarded as one between the employer and the officers of the union, who participate in the making of the agreement for the benefit of the employees. But see 31 Col. L. Rev. 1156 (1931); Christensen, Legally Enforceable Interests in American Labor Union Working Agreements, 9 Ind. L. Jour. 69 (1933). So far as unincorporated unions are recognized as legal entities, the union may be regarded as a party to the contract. *Cf. United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922); Dodd, Dogma and Practice in the Law or Associations, 42 Harv. L. Rev. 977 (1929). See *Gulla v. Barton*, 164 App. Div. 293, 149 N.Y.S. 952 (1914) where the union was incorporated. The third party beneficiary theory, however, does not provide for the creation of rights against individuals not parties to the agreement; consequently, it is said to be defective where an employer attempts to sue an employee or where an employee asserts rights under an agreement made with an unincorporated employers' association rather than with an individual employer. Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572 (1930). This objection is not serious in a suit by the employer against an employee, for the collective agreement under which the employee is a third party beneficiary has become a part of the individual employment contract which binds the employee as a party. *Whiting Milk Companies v. Grondin*, 282 Mass. 41, 184 N.E. 379 (1933).

To avoid the difficulties of these theories, it has been suggested that collective labor agreements are unique, and because of the social interests involved require a new legal category. Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572 (1930); Fuch, Collective Labor Agreements in American Law, 10 St. Louis L. Rev. 1 (1925). See Duguit, Collective Acts as Distinguished from Contracts, 27 Yale L. J. 753 (1917).