judicial treatment of the two sections as an integrated unit and the Supreme Court's pronouncement that section 23(a)(2) is "comparable and in pari materia" with section 23(a)(1) and hence to be construed with reference thereto, would seem to compel a negative answer.

ROBERT H. MILLER.

LABOR LAW—*Specific Performance of Collective Bargaining Agreements.* (Federal)

Mountain States Division No. 17, Communication Workers of America, entered into three collective bargaining contracts with the Mountain States Telephone and Telegraph Company, one in January and two in May of 1947. The Union represented the Company's employees in Colorado, New Mexico, Arizona, Idaho, Utah, and El Paso, Texas. The agreements contained the usual collective bargaining provisions: bargaining and grievance procedures, arbitration, pensions, disability and death benefits, termination allowances, and provisions for payroll deduction of dues. The agreements were subject to termination by either party on sixty days' advance notice to the other. On May 15, 1948, the Company notified the Union that the contracts were terminated at midnight as of that day. Previous to this notification, there had been correspondence between the Company and the Union, initiated by the Union, for amendment and modification of the contracts. The Union then brought suit in the Federal District Court of Colorado, under Section 301(a) of the Labor Management Relations Act,[1] against the Company for an injunction directing the Company to continue the contracts in full force until they were terminated by their own provisions or by law. To support its demand for injunctive relief, the Union alleged irreparable damage and the lack of an adequate, speedy remedy at law. The Company countered that the Union had no cause of action, that the court lacked jurisdiction in the matter, and that the Union had an adequate remedy at law. *Held,* injunction granted. *Mountain States Division No. 17, Communication Workers of America v. Mountain States Telephone and Telegraph Company,* 81 F. Supp. 397, 15 Labor Cases 74,275, ¶64,724 (U.S.D.C., D. Colo., 1948).

[1] Public Law 101, 80th Congress, Chapter 120, 1st Session, H.R. 3020. § 301. "(a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C.A. 185 (1947).

In reaching this conclusion, Judge Symes of the District Court determined (1) that the contracts had not been terminated and were still in full effect; (2) that the employer's mistaken notion that the contracts were terminated was not an unfair labor practice and that therefore the District Court, and not the National Labor Relations Board, had jurisdiction over the matter; (3) that neither was the court's jurisdiction limited by the Norris-La Guardia Act, since an action to enjoin an employer from failing to perform a collective bargaining contract was not an action arising from a "labor dispute," but merely a disagreement as to whether or not certain contracts were in effect; and (4) that there was no adequate remedy at law, since damages could not be measured prospectively with sufficient accuracy.

Ever since *Schlesinger v. Quinto* [2] courts have granted injunctive relief in suits by trade unions to enforce provisions in collective bargaining agreements. Most of the injunctions have been prohibitory in nature, enforcing negative covenants of the agreement.[3] Recently the trend has been to compel employers to carry out their affirmative promises in the

[2] 210 App. Div. 487, 194 N.Y.S. 401 (1st Dept., 1922). A temporary injunction restrained an employers' association from violating its contract with the International Ladies' Garment Workers' Union and required the association to rescind its resolution abrogating the contract.

[3] Grand International Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P.2d 971 (1934); Henderson v. Ugalde, 61 Ariz. 221, 147 P.2d 390 (1944); Corpus v. Hotel & Restaurant Employees' International Alliance, 61 Ariz. 483, 151 P. 2d 705 (1944); Montaldo v. Hires Bottling Co., 59 Cal. App.2d 642, 139 P.2d 666 (1943); O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); Evans v. Louisville & Nashville Rwy. Co., 191 Ga. 395, 12 S.E.2d 611 (1940); Janalene, Inc. v. Burnett, 220 Ind. 253, 41 N.E.2d 942 (1942); Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920); Mississippi Theatres Corp. v. Hattiesburg Local No. 615, 174 Miss. 439, 164 So. 887 (1936); Stephenson v. New Orleans & N.E. Rwy. Co., 180 Miss. 147, 177 So. 509 (1937); Dooley v. Lehigh Valley Rwy. Co., 130 N.J. Eq. 75, 21 A.2d 334 (1941), affirmed 131 N.J. Eq. 468, 25 A.2d 893 (1942), certiorari denied, 317 U.S. 649, 63 S. Ct. 45, 87 L. Ed. 523 (1942); Schlesinger v. Quinto, *supra* note 2; Goldman v. Cohen, 222 App. Div. 631, 227 N.Y.S. 311 (1928); Roosevelt Amusement Corp. v. Empire State Motion Picture Operators' Union, 144 Misc. 644, 258 N.Y.S. 240 (1930); Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N.Y.S. 87 (1931); Suttin v. Unity Button Works, 144 Misc. 784, 258 N.Y.S. 863 (1934); Wasserstein v. Beim, 168 Misc. 160, 294 N.Y.S. 439 (1937); Murphy v. Ralph, 165 Misc. 335, 299 N.Y.S. 270 (1937); Basson v. Edjomac Amusement Corp., 259 App. Div. 1005, 20 N.Y.S.2d 924 (1940); Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385, 196 A. 43 (1938); Harper v. Local Union No. 520 International Brotherhood of Electrical Workers, 48 S.W.2d 1033 (Tex. Civ. App., 1932); Fine v. Pratt, 150 S.W.2d 308 (Tex. Civ. App. 1941). In many of these cases injunctive relief enforced the closed shop or seniority rights provided for in the agreement. In the Pennsylvania case cited, the court enjoined the employer from moving his factory to another area, but intimated that it would not compel him to bring it back, where it would work a hardship.

agreement.[4] Heretofore, state courts have taken the initiative in specific enforcement of the provisions of collective bargaining pacts.[5] The present decision indicates that the federal courts have taken up the trend.

This trend of equitable enforcement of collective bargaining agreements, which has prevailed chiefly in the state courts until the present decision, naturally raises several questions. Two important questions that have been raised are (1) whether the collective bargaining agreement is in any sense a contract and (2) if it is, whether it merits equitable enforcement in the form of a decree for specific performance. It seems that the former scarcely needs an answer.

There are at least five theories concerning the nature of collective bargaining agreements. One is that they are extra-legal pacts without legal consequences, but it seems that no American court has assumed such a position.[6] A second is that they represent the mere embodiment of declared "usage" or "custom" to be read in construing the individual contracts between employer and employee.[7] A third is that they are contracts made between the union or its officers and the management for the benefit of the employees.[8] A fourth contention is that they are contracts

[4] Weber v. Nasser, 286 P. 1074 (Cal. App., 1930), granting enforcement of a contract calling for the maintenance of a minimum-size orchestra in a theatre; Ledford v. Chicago, Milwaukee & St. Paul Rwy. Co., 298 Ill. App. 298, 18 N.E. 2d 568 (1st Dist. 1939), granting a mandatory injunction commanding the employer to recognize seniority provisions of the agreement; Baton Rouge Building Trades Council v. T. L. James & Co., 201 La. 749, 10 So.2d 606 (1942), enforcing an agreement calling for a closed shop with both mandatory and prohibitory injunctions; Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1, 156 A.L.R. 644 (1944), compelling the employer to recognize wage assignments per the agreement; Ribner v. Rasco Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132 (1929); Farulla v. Ralph A. Freundlich, Inc., 155 Misc. 262, 279 N.Y.S. 228 (1934), requiring the employer to restore a local factory, in accord with the agreement, after having removed it to another state. De Agostina v. Holmden, 157 Misc. 819, 285 N.Y.S. 909 (1935), directing specific performance of a collective bargaining contract with one union by the employer and enjoining another union from intimidating the employer to breach the agreement; and Dubinsky v. Blue Dale Dress Co., 162 Misc. 277, 292 N.Y.S. 898 (1937), commanding the employer to return his establishment to New York after having removed it to another state in violation of the collective agreement. Whether the injunction is mandatory or prohibitory will depend on whether the covenant is stated in the affirmative or in the negative, though many courts do not bother to make the distinction and issue both mandatory and prohibitory injunctions to enforce both affirmative and negative provisions. In general, *see* Witte, *Labor's Resort to the Injunction*, 39 Yale L. J. 374 (1930).

[5] *Supra* notes 3 and 4.

[6] Holland v. London Society of Compositors, 40 T.L.R. 440 (1920).

[7] Kessel v. Great Northern Rwy. Co., 51 F.2d 304 (W.D., Wash., 1931); Yazoo & Mississippi Valley Rwy. Co. v. Webb, 64 F.2d 902 (C.C.A. 5th, 1933); Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S.W. 136 (1904).

[8] Yazoo & Mississippi Valley Rwy. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); Rentschler v. Missouri Pacific Rwy. Co., 126 Neb. 493, 253 N.W. 694 (1934); H. Blum & Co. v. Landeau, 23 Ohio App. 426, 155 N.E. 154 (1926).

made by the union or its officers as agents for the individual employees.[9] The fifth concept advanced is that they are a "new species of juridical act, distinct from ordinary contracts." [10]

Whichever theory one prefers, it appears that one writer has well summed up the problem involved: "Collective agreements were conceived to meet adequately the need of a new social situation and are *sui generis*. They involve a three-party or four-party relationship, with some of the parties having a shifting personnel of many individual members. . . . It is apparent therefore that an attempted application of two-party contract rules with rights and duties flowing therefrom is fraught with insurmountable difficulties when applied to a social situation involving multiple-party relationship." [11]

Objections interposed to the enforcement of such contracts have been the lack of contractual capacity in the union (in most instances an unincorporated association), the lack of mutuality or failure of consideration,[12] and the policy against the enforcement in equity of personal service contracts.

Most of these arguments have since been answered. Labor unions have been given capacity to sue and to be sued in their own name by statute. Section 301 (a) [13] of the Labor Management Relations Act specifically provides for this. Thus, the union has achieved the status of a legal entity. The question of mutuality and consideration has also been answered. It has been pointed out that consideration may be found for the employer's promises in the granting of the use of the union label, promising not to strike, and agreeing to furnish workers to the extent of the union's available membership.[14]

[9] Boucher v. Godfrey, 119 Conn. 622, 178 A. 655 (1935); Gary v. Central of Georgia Rwy. Co., 37 Ga. App. 744, 141 S.E. 819 (1928); Piercy v. Louisville & Nashville Rwy. Co., 198 Ky. 477, 248 S.W. 1042 (1923); West v. Baltimore & Ohio Rwy. Co., 103 W. Va. 417, 137 S.E. 654 (1927).

[10] Anderson, *Collective Bargaining Agreements*, 15 Ore. L. R. 229 (1936); Fuchs, *Collective Labor Agreements in American Law*, 10 St. Louis L. Rev. 1 (1925); Pound, *Administrative Applications of Legal Standards*, 44 Am. Bar Ass'n Rep. 445 (1919). See also, Duguit, *Collective Acts as Distinguished from Contracts*, 27 Yale L. J. 753 (1918). No American court has accepted this theory.

[11] Anderson, *Collective Bargaining Agreements*, 15 Ore. L. R. 229, at 250 (1936). For further discussion of the problem *see* Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 Mich. L. R. 1109 (1941); Pipin, *Enforcement of Rights Under Collective Bargaining Agreements*, 6 U. of Chi. L. Rev. 651 (1939); Rice, *Collective Agreements in American Law*, 44 Harv. L. Rev. 572 (1931); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195 (1939); and Wolf, *The Enforcement of Collective Labor Agreements: A Proposal*, 5 Law and Contemp. Prob. 273 (1938), in addition to the authorities cited in note 10.

[12] For cases answering this argument, *see* Henderson v. Ugalde, 61 Ariz. 221, 147 P.2d 390 (1944); Montaldo v. Hires Bottling Co., 59 Cal. App.2d 642, 139 P.2d 666 (1943); and Murphy v. Ralph, 165 Misc. 335, 299 N.Y.S. 270 (1937), among others.

[13] *Supra* note 1.

[14] Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195 (1939), fn. 33.

The third objection—the policy against the equitable enforcement of personal service contracts—has become almost historical. As one writer has remarked: "It has dissolved . . . in the hands of courts friendly to collective agreements. They have got around it by taking a sensible distinction between an agreement to hire a particular person or persons and an agreement to hire unspecified persons from a specified group." [15]

The conclusion which most of the courts have reached concerning the collective bargaining agreement is that it is an enforceable agreement. It has been recognized both by Congress [16] and many state legislatures.[17] There is no longer any doubt that the collective agreement is a contract enforceable by both the employer and the union.

The second question is perhaps even more difficult for some to answer —whether such agreements should be specifically enforced in equity. But the difficulty should not be great. Before courts recognized the collective bargaining agreement, the only remedy which the union had was to strike or to exert other economic pressure upon the employer to compel him to carry out his promises. When the courts first recognized collective agreements, it was in suits to recover damages, generally by members of the union under the third-party beneficiary theory.[18] Still the union had to strike if it wanted the employer to carry out his promises, where suits at law to recover damages were not too effective a measure of compulsion. In 1922 the courts of New York first granted equitable relief by way of injunction to enforce the provisions of a collective agreement;[19] but as has been shown, such relief enforced negative covenants, such as are also found in trade agreements among manufacturers or between manufacturers and their agents.

In determining whether courts should grant specific enforcement of collective bargaining agreements, it seems that not only the interests of the employer and the union should be taken into consideration, but also the interest of the public, which far too seldom enters the picture. If unions must be left to their remedy of the strike to enforce the employer's promises, the law has not advanced far. Neither the employer nor the union benefits from a prolonged strike in the long run. The public suffers great inconvenience, to say the least, especially in regard to strikes affecting public utilities, such as in the principal case. To compel the employer or the union to continue to observe its contract until it is properly terminated

[15] *Ibid.*, at 204, citing Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936).

[16] Labor Management Relations Act, § 301(a), *supra* note 1.

[17] California Labor Code, § 1126, provides: "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State." CAL. STATS. c. 1188, § 1 (1941).

[18] *Supra* note 8.

[19] Schlesinger v. Quinto, 210 App. Div. 487, 194 N.Y.S. 401 (1st Dept., 1922).

seems the more practical answer. At least, it avoids the violence that often attends strikes. In recent years the unions have more and more taken their grievances to the courts, rather than resort to the strike as a means of enforcement.

It is the writer's belief that this trend should continue and that it will lead to more peaceful and orderly relations between employers and unions. As a New York Court has said in regard to specific enforcement of collective bargaining agreements: "It is in the interest of good government that labor unions and employers should be afforded this reciprocal protection in their lawful contractual undertakings. It is proper and praiseworthy that a union . . ., having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public." [20]

The District Court of Colorado has taken up a trend, which till the present has prevailed in many state courts. This trend appears to be a real advancement in the law. We can hope that other federal courts will follow its lead.

WILLIAM B. DAVENPORT.

PLEADING, PRACTICE AND PROCEDURE—*Effect of Failure to Plead the Statute of Limitations as an Affirmative Defense.* (Illinois)

An action was filed to set aside certain deeds which the plaintiff urged were clouds on his title to a parcel of real estate. After a hearing a decree was entered granting the relief prayed.

On appeal, the defendant urged that it had acquired title to the premises by virtue of continuous possession under the deeds in question and payment of taxes for a period of seven years as provided in Section 6 of the Limitations Act.[1] This defense was not specially pleaded in the court below. On appeal, *held*: Affirmed. Though a defense not made in the trial court will not generally be considered on review, courts take judicial notice of public acts, and therefore defense of the seven-year statute of limitations was available to defendant though the defense was not pleaded. However, the evidence does not prove adverse possession

[20] Ribner v. Rasco Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132, at 138 (1929).

[1] ILL. REV. STAT., c. 83, § 6 (1947). In the opinion the court points out that though appellant's claim is based on section 6 of the Limitations Act, it is section 7 of the Act which applies to vacant unoccupied lands and thus to this case.