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preventive power of a court of equity is a proper remedy for effectuating the rights of privacy. Moreover, equity is capable of granting relief in the average case awarding damages as incidental to an injunction.

In summation, it may be stated that the development of the law of privacy in various jurisdictions is favorable. The right of an individual to be let alone, or to live without unwarranted invasion by the public in matters of private nature has become more increasingly apparent during the last two decades. This view is evidenced by holdings in certain jurisdictions wherein the right of privacy has already received cognizance either as an individual [50] or property right.[51] However, New York courts have been very conservative in the past, holding steadfastly to the common law rule. With the exception of the statute,[52] they deny the legal existence of such right; and in view of the recent holdings of the *Baumann* [53] and *Somberg* [54] cases, it is seemingly evident that they will not for some time give recognition to the right of privacy as a common law right. But it is interesting to note that, of late years, they have more liberally construed the statute. It is some evidence that New York will subsequently follow the Georgian decision [55] either through judicial decision or further legislative enactment.

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RIGHT OF ACTION OF THIRD PARTY BENEFICIARIES UNDER THE N. I. R. A.

In the recently decided case of *Canton* v. *The Palms, Inc.*,[1] decided in the City Court of Buffalo, N. Y., an action involving the construction and application of the President's Reemployment Agreement and the Restaurant Industry Basic Code, approved by the N. R. A., it was held that the plaintiffs were entitled to recover the difference between wages paid under the contract of employment, and the minimum wage clause, as embodied in the Restaurant Industry Basic Code.

In line with the general tendency to effectuate the purposes of the N. I. R. A. this case was decided on the traditional doctrines of contract. In interpreting the President's Reemployment Agreement,

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[50] Pavesich v. New England Life Ins. Co., *supra* note 2.
[51] *Supra* note 5.
[52] *Supra* note 21.
[53] Baumann v. Baumann, *supra* note 1.
[54] Somberg v. Somberg, *supra* note 1.
[55] Pavesich v. New England Life Ins. Co., *supra* note 2.

[1] 152 Misc. 347, 273 N. Y. Supp. 239 (1934).

the court relied on the general principles as first laid down in this state by the case of *Lawrence* v. *Fox*,[2] and extended by *Seaver* v. *Ransom*.[3] The court pointed out various clauses in the P. R. A.,[4] together with the paragraph at the head of this agreement, stating the intent thereof, to wit, "To every employer: 1. This agreement is part of a nationwide plan to raise wages, create employment and thus increase purchasing power and restore business." Interpreting these as clauses binding upon the employer for the benefit of the employee, the court finds such employees as coming within the rule of third party beneficiaries with a right in them to sue on the contract. The court also states that the code involved herein is founded in and grows out of the P. R. A.

The rule of *Lawrence* v. *Fox*, modernizing "the archaic view of a contract as creating a strictly personal obligation," [5] as extended by later decisions, may well be applied to cases of this sort. As Kellog, P.J., writing for the lower court in *Seaver* v. *Ransom*, said: "The doctrine of *Lawrence* v. *Fox* is progressive, not to retrograde. The course of the late decisions is to enlarge, not to limit the effect of that case." Again in *Seaver* v. *Ransom*, Pound, J., said: "The right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions * * * and is said to be the prevailing rule in this country. * * * It has been said that 'the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety.'"

It would seem that today a third party beneficiary would encounter no great difficulty in asserting his rights under the contract, provided of course, the beneficiary is clearly designated as such.[6] In the principal case the employees, although not expressy named, may be considered sufficiently clearly designated to bring them within the rule.[7]

The question in these cases is: Does an individual have a right of action for damages arising out of a violation by the employer of the P. R. A. agreements, and the code provisions? The difficulty in

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[2] 20 N. Y. 268 (1859).

[3] 224 N. Y. 233, 120 N. E. 639 (1918).

[4] Not to pay certain of the classes of employees involved less than $15 per week; not to work any of the employees for more than forty hours in any one week; not to pay any employees of certain other classes less than forty cents per hour; not to use any subterfuge to frustrate the spirit and intent of the agreement which is, among other things, to increase employment by universal covenant, and * * * to shorten hours and to raise wages for the shorter week to a living basis, etc.

[5] See Langel v. Betz, 250 N. Y. 159, 163, 164 N. E. 890, 892 (1928).

[6] Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931). Cardozo, Ch. J., says: "In the field of the law of contracts there has been a gradual widening of the doctrine of Lawrence v. Fox (20. N. Y. 268) until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy."

[7] Whitehead v. Burgess, 61 N. J. Law 75, 38 Atl. 802 (1897).

arriving at a solution relates to the dispute as to whether the codes and agreements under the N. I. R. A. are contractual or legislative; and whether the enforcement is limited to the Federal District Attorneys instituting actions in the various Federal District Courts. In the main, the general tendency has been in favor of allowing a right of action to the individual on concepts of contract, with respect to the President's Reemployment Agreement. There have been cases allowing right of action to individuals with respect also to codes, but to a lesser degree. Many decisions in a number of states have adopted these views.[8] Individuals have also been upheld in injunction proceedings to restrain code violations.[9]

While, then, under the P. R. A. the opinions have generally upheld the contract view, the real dispute arises out of the construction of the codes. The chief contentions in support of the codes being strictly of legislative force follow:

In Title I of the N. I. R. A., Section 3-b, it is provided that when a code is approved it shall constitute a standard of fair competition for that industry. This applies, therefore, the force of law to the approved code of an industry governing those who have assented as well as those who have not assented. So, too, where codes have not been submitted or approved, the President may formulate and approve a code for that industry.

Section 3-c provides as follows: "The several District Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

It is this section, 3-c, which is pointed to as creating the exclusive remedy which is to be enforced in the particular way and in the particular tribunal mentioned therein, to the exclusion of all other remedies, parties, and courts. Certain courts, therefore, have denied actions by individuals on the ground that they have no right of action, and the court is unable to entertain same, by virtue of Section

[8] Beaton v. Avondale, Dist. Ct. 2d Jud. Dist. Colo., Oct. 25, 1933; see Mesloh v. Schulte, 151 Misc. 750, 273 N. Y. Supp. 699 (1934); Chipa v. Regas, Justice of the Peace Ct., Tuczon, Ariz., Nov. 24, 1933; Bethel v. Karras, Common Pleas Ct., Detroit, Mich., Nov., 1933; Godkin v. Jett, Mun. Ct. Hot Springs, Ark., 1933; Williams v. Rienze Valet Co., Mun. Ct., Chicago, Ill., 1933; Greleck v. Amsterdam, Mun. Ct. of Phila., Pa., Jan., 1934, No. 1105; Tedford v. Taylor, Justice of the Peace Ct., Kansas City, Mo., Jan., 1934; Parlo v. Hilton *et al.*, Justice of the Peace Ct., Mecklenburg Co., N. C., Feb. 9, 1934; Crowson v. Alley *et al.*, Justice of the Peace Ct., Precinct No. 1, Dallas, Tex., Feb. 20, 1934; Tracy v. Stureck, Mun. Ct., Omaha, Neb., 1934; Walter v. Hyman-Rose Tobacco Co., City Ct., Buffalo, N. Y., May, 1934.

[9] Sherman v. Abeles, 150 Misc. 497, 269 N. Y. Supp. 849, *aff'd*, 241 App. Div. 677, 269 N. Y. Supp. 1023 (1934); see Fryns v. Fairlawn Fur Dressing Co., 168 Atl. 862 (Ct. of Chancery, N. J., Nov. 14, 1933).

3-c.[10] In *Galveston H. & S. A. R. R.* v. *Wallace,*[11] the court states, at page 490, "Where the statute creating the right provides for an exclusive remedy to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right."

Since, then, the N. I. R. A. constitutes an approved code as law binding the industry; and since it empowers the imposing of a code upon an industry; thus binding non-assenters as well as assenters, the codes may be considered as purely legal; and the remedy stated in the N. I. R. A. as a special one, which alone must be pursued.

In opposition to the above, and in favor of actions in the individuals arising out of the codes, the following may be stated:

If the individual is not allowed to sue for the minimum wage, for example, then there is no way that payment may be enforced directly for the benefit of the injured individual. There is no provision in the N. I. R. A. awarding judgments in favor of the aggrieved party, although in a roundabout way, the employers may be forced, either by fine or injunctions, to make restitution. Should the employer refuse to pay, however, then actual payment to the employee cannot be enforced. As a matter of fact, in a number of instances the courts have allowed individuals to enforce these code violations, both by injunctions and actions for damages.[12]

With respect to Section 3-c, while apparently this section limits the jurisdiction of code violation cases to Federal District Courts, and the institution of these actions to the district attorneys, it is not an exclusive grant of jurisdiction, certainly not in terms, and unless the intention is to grant exclusive jurisdiction, the general rule that one who is injured by the violation of any right or obligation, whether it arises by contract or under a statute, whether state or federal, has a right of action in any court of competent jurisdiction,[13] should apply.

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[10] John Staley *et al.* v. Peabody Coal Co., U. S. D. C. for S. D., Ill., Dec. 16, 1933; see Purvis v. Bazemore, 5 Fed. Sup. 230 (1933); Colorado *et al.* v. United Dividend Corp., Dist. Ct. Colo. No. 5262, Nov. 28, 1933; Western Powder Mfg. Co. v. Interstate Coal Co., U. S. D. C. E. D. Ill., E. No. 208-D., Jan. 8, 1934.

[11] 223 U. S. 481, 32 Sup. Ct. 205 (1912).

[12] Brodsky v. Sharbu Operating Co., Sup. Ct. N. Y. Co., Spec. Term, N. Y. L. J., Feb. 8, 1934; see Sherman v. Abeles, 150 Misc. 497, 269 N. Y. Supp. 849, *aff'd,* 241 App. Div. 677, 269 N. Y. Supp. 1023 (— Dept. 1934); American Cloak and Suit Makers Ass'n, Inc. v. Merchant Ladies Garment Ass'n, Inc., Sup. Ct. N. Y. Co., Spec. Term, N. Y. L. J., Feb. 2, 1934; Hoffman v. Zerwos, Mun. Ct., N. Y. City, Bronx, 1st Dist., N. Y. Herald Tribune, Nov. 2, 1933, at 6.

[13] Minneapolis & St. Louis R. R. v. Bombalis, 241 U. S. 211 (1916); see Claflin v. Houseman, 93 U. S. 130, 137 (1876): "So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the state courts, competent to decide rights of the like character and class; subject to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Court, exclusive jurisdiction."

Since the P. R. A. is more nearly contractual than are the codes, it is more readily understood why many more decisions have upheld the actions of third party beneficiaries, under these than under the codes. To say, however, that the codes are strictly legal and not contractual, is not entirely correct. As among the signatories to the codes some rights on which a signatory can sue others, either in injunction or damages would probably be allowed. As regards third party beneficiaries, their rights are not as clear as under the P. R. A. Nevertheless, it cannot be denied that they are clearly and distinctly set forth as beneficiaries under these codes, whether contractual or statutory, and their rights to such benefits should be safeguarded in order to carry out the very intent of these code provisions. They may be safeguarded under the view that the codes are contractual or that they may sue in their own name and for their own benefit for the damages sustained by them where they are injured beneficiaries of a statute.[14] As said in *Willy* v. *Mullady*,[15] "It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract, or by statute, a breach of such duty causing damage, gives a right of action."

For if the codes are considered strictly of legal force, and the individual is not allowed his right of action, then strictly speaking the following absurd situation might result: An employer had been paying his employee a certain wage under a pre-code contract. With the adoption of the code the minimum wage clause entitles the employee to a greater wage. The employer then refuses to pay any wages after a certain length of service. If the employee wishes to sue for damages, how much shall he sue for? If he sues for the code minimum, he is met with the view that the codes are not contractual, and the remedy is limited to Section 3-c of the N. I. R. A., and that his remedy is to complain to the N. R. A. authorities. If he does so, he still may not receive his money, by virtue of the fact that there is no authority in the law allowing an award of judgment in favor of the employee. In practice, the employee would probably be compensated because of the remedies provided for code enforcement, to wit, (1) the District Court injunctions, Section 3-c; (2) the provision that every violation of an approved code affecting interstate and foreign commerce shall be a misdemeanor, punishable by a fine of five hundred dollars for each offense, Section 3-f; and the power of the President to license business enterprises in order to make effective codes or agreements; with the penalty of a maximum of $500 fine and six months' imprisonment, or both, to one carrying on business without such a license, Section 4-b. But theoretically, and practically, too, in the remote cases of complete refusal of an employer to pay, irrespective of penalties or injunctions, the indi-

[14] Willy v. Mullady, 78 N. Y. 310 (1879); see Amberg v. Kinly, 214 N. Y. 531, 108 N. E. 830 (1915).

[15] At p. 314.

vidual may get no satisfaction. If then the employee wishes to sue for his wages, shall he sue under the pre-code contract of his employment. If so, he can only sue for his pre-code wages, but the code benefits are here too denied him. Then, too, what happens to the original contract of employment? Is it still a contract, or does the code supersede and destroy or impair it? It would seem, therefore, that whether you allow the individual his right of action for the code minimum wage under the doctrine of contract, or as a beneficiary to enforce his right corresponding to the duty imposed by the statute, a recovery by the individual in his own name, is indicated. Otherwise, the benefits granted to him under the Recovery Act, while they may be detriments to the recalcitrant employer, to the employee may be no benefits at all.

It is submitted, that were the codes interpreted, as in some instances they have been, to give the individual his right of action, that this would be the most direct and simplest method of procedure. While it is true that the codes have the force of law, it is, nevertheless, also true that they were conceived and executed in the nature of agreements.[16] Ordinarily they cannot be both, and yet they are not clearly and exclusively either. Perhaps, in view of the fact that this is emergency legislation, which creates distinctly new conditions and relations among individuals, groups of individuals, and the government, both legal and, in a sense, contractual, a new category may arise to cover these codes, or "contractual statutes," if you will, with the following, admittedly strained, but perhaps not totally unreasonable, interpretation: Codes to be considered as having the attributes of both legislation and contract, a dual nature, so to speak, in order to allow the individual his right of action in his own name and for his own benefit, following doctrines of contract, and at the same time, enforcing their legal aspect by the methods provided for in the various sections of the Recovery Act.

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THE SECONDARY BOYCOTT IN NEW YORK.

The failure of the National Recovery Administration to enforce its own laws for the protection of labor[1] has forced the realization

[16] See President's Special Message, May 17, 1933, recommending passage of Bill introduced by Sen. Wagner (later to become the N. I. R. A.): "But the public interest will be served if, with the authority and guidance of the government, private industries are permitted to make agreements and codes insuring fair competition."

[1] INT. JUR. ASSN. BULL., Vol. 3, No. 2 at 6 (July, 1934); *id.* Vol. 3, No. 4 at 8 (Sept., 1934); *id.* Vol. 2, No. 9 at 1 (Feb., 1934); *id.* Vol. 2, No. 12 at 11 (May, 1934).