

The BAR

EFFICACY OF THE ANTI-TRUST LAWS

John Harlan Amen

STATUTE OF LIMITATIONS AND NEGOTIABLE
INSTRUMENTS

Essel R. Dillavou

LAW OF
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ARBITRATION

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RECENT DECISIONS

C.P.A. LAW QUESTIONS AND ANSWERS

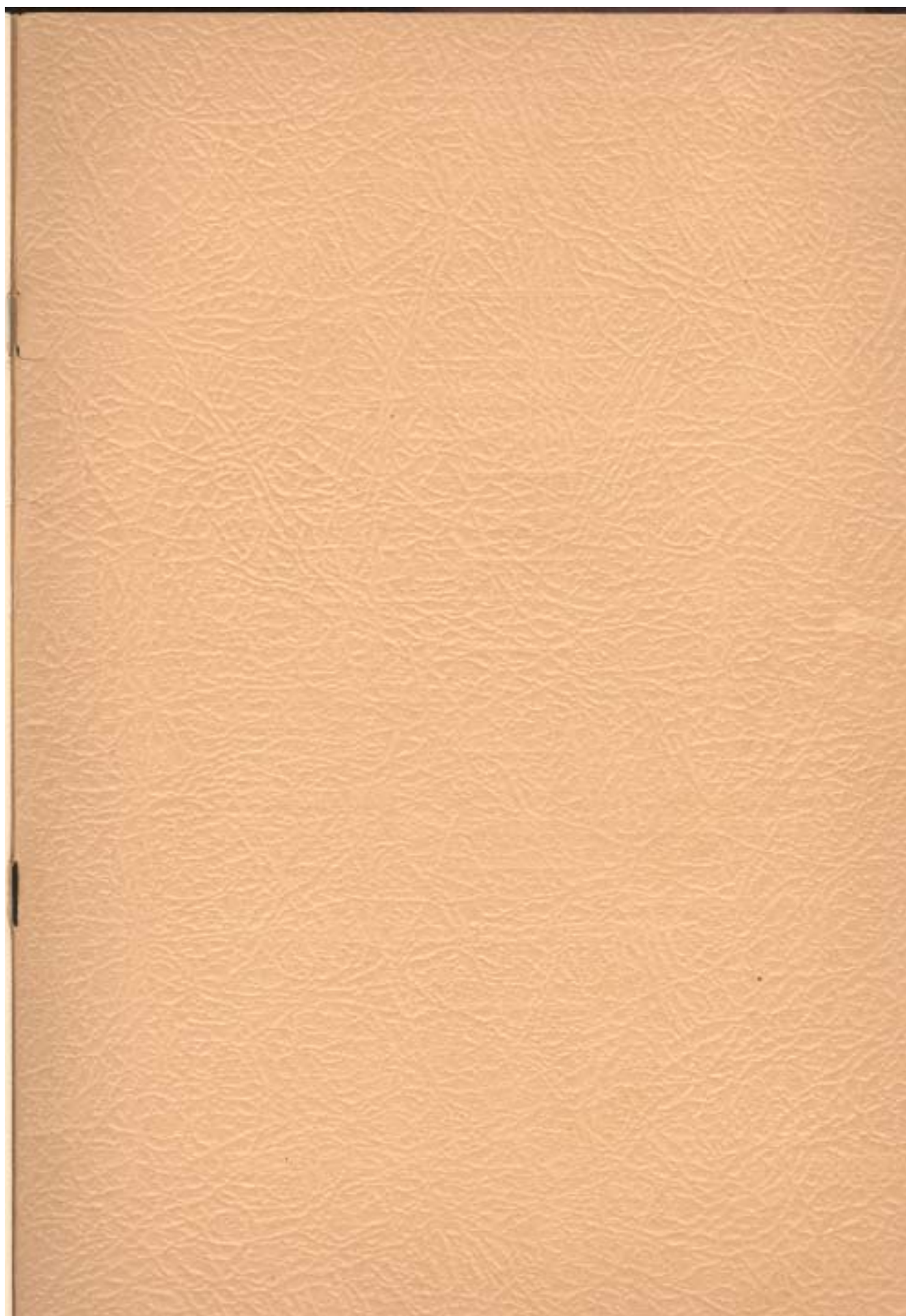
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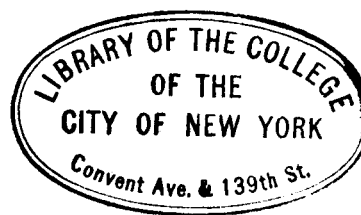
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EFFICACY OF THE ANTI-TRUST LAWS

John Harlan Amen

THE basic concept manifested in the anti-trust laws is that the economic vitality of the nation is best promoted through governmental prevention of practices whereby large shares of particular branches of commerce are concentrated in the hands of small groups. In effectuating the primary end of securing to the public the advantages deemed to flow from free competition among those engaged in the same line of industry,¹ a secondary purpose, no less important economically, is likewise achieved, namely, to protect the individual in his property and means of livelihood, and in his right to invest his money, mind and energy in any given line of trade. The anti-trust laws thus embody a principle of American, English and even Anglo-Saxon political economy—namely, protection of the rights of the individual. Hence, as long as we retain democratic and republican ideas and our existing form of government, it is not likely that these laws will be abandoned.

It is not the purpose of this article to re-examine the question whether monopolies and trade restraints, voluntary or coercive, benefit or injure the industrial activity of the nation.² The desirability of preventing these restraints must be

regarded as the settled legislative policy of the United States.³ Therefore, it is proposed simply to inquire into the degree of success achieved through administration of the Federal anti-trust legislation in effectuating the Government's policy.

EFFECT OF ANTI-TRUST LEGISLATION

Recent spectacular enforcement of the anti-trust laws has rekindled public interest in their efficacy. Such interest is not new, for the question of efficacy has been debated ever since statutes against restraint of trade first came into existence. Application of the anti-trust laws has been both condemned and praised in widely divergent opinions. From the unfavorable point of view, these laws have been described as constituting the chief causes of the depression. They have been charged with creating ruthless, savage and cut-throat competition, with encouraging large combinations, with creating monopoly and with dooming small enterprise.⁴ They have been ridiculed as a pretense, a fraud upon the public, used to divert the attack against monopolies into idle and deceptive ceremonies. It is said that the anti-trust laws have been employed by pretenders as a vehicle for spectacular but futile crusades and campaigns, yielding no real public benefit, but paying large dividends in personal prestige, aggrandizement and public worship of the crusader.⁵

1. **FASHION ORIGINATORS GUILD OF AMERICA v. FEDERAL TRADE COMMISSION**, Supreme Court of the United States, March 3, 1941, per Black, J.; see also **APEX HOSIERY CO. v. LEADER**, 310 U. S. 469, 490-2, and Note 51 *Harvard Law Review* 694-9.

2. For a general discussion of this question, see article entitled "Monopoly," *Encyclopedia of the Social Sciences*, Vol. X, where reference to other articles and to a substantial bibliography is provided. See also article entitled "Restraint of Trade," *Encyclopedia of the Social Sciences*, Vol. XIII.

3. **UNITED STATES v. TRANS-MISSOURI FREIGHT ASSOCIATION**, 166 U. S. 290.

4. "The Blue Eagle from Egg to Earth," *The Saturday Evening Post*, Vol. 207, No. 29, pp. 5, 73, January 19, 1935.

5. T. W. Arnold, *The Folklore of Capitalism*, pp. 211, 212, 217.

On the other hand, the anti-trust laws have been characterized by the Supreme Court of the United States as a charter of freedom.⁶ It is further said that they encourage, foster and protect trade, defend property rights, secure an equality of opportunity, and prevent private regulation of industry.

It is unfair to charge that statutes are ineffectual simply because conditions exist against which the statutes have never been invoked. Neither the anti-trust laws nor any other laws are equipped with self-starters. They operate only when the persons charged with their enforcement move, and they are effective only in the degree to which they are made effective by such persons.

The key to the question of the efficacy of the anti-trust statutes has been widely overlooked, perhaps because it is so simple. It lies in examining the record and thereby determining to what extent the laws have been effective over a period of many years. Results in specific cases must constitute the only reliable evidence, and that evidence is to be found in decrees, judgments and judicial opinions arising from anti-trust cases which have been dealt with by the courts. These judgments obviously provide the best indication of what has been accomplished.⁷

RESULTS OF ENFORCEMENT

Approximately fifteen hundred cases arising under the anti-trust statutes have been decided by the courts since the passage of the Sherman Act in 1890. Fifteen thousand printed pages, spread with judicial opinions, present the facts in these cases, and the views and actions of the

courts—all of which are at hand and readily available. To describe the facts and the action of the courts in fifteen hundred cases, or any substantial number thereof, would not be feasible here. Reference will be made to relatively few cases, chosen, not for their celebrity, size or spectacular character, but for their typicalness.

1911—In the *Standard Oil* case,⁸ the Supreme Court of the United States condemned the following practices as violative of the anti-trust laws: the acquisition and consolidation of numerous individual enterprises in the oil trade; malicious price-cutting; the procurement of preferences and discriminations in railroad rates seeking to injure, destroy and drive other competitors, both large and small, from the business. Here, establishment of a monopoly and the destruction of small factories was condemned and prevented by the anti-trust laws.

1911—In the *American Tobacco* case,⁹ the Supreme Court construed the anti-trust laws to prevent (1) the acquisition and consolidation of competitors into a huge corporate cluster; (2) covenants requiring individuals to refrain from engaging in business; (3) the operation of ostensible independent competitors; and (4) the reduction of prices for the purpose of ruining and driving smaller enterprises from the business.

1915—In *United States v. Eastman Kodak Company*,¹⁰ the anti-trust laws checked the acquisition, absorption and elimination of many individual enterprises in the photographic trade; prevented the procurement of a monopoly of raw material; and removed the compulsion upon dealers not to handle the goods of competitors.

1920—Many individual enterprises in the food trades were saved from extinc-

6. *APPALACHIAN COALS v. UNITED STATES*, 288 U. S. 344.

7. For an expression of views contrary to those hereafter developed as to the effectiveness of the enforcement of the federal anti-trust laws, see Simpson, *Fifty Years of American Equity*, 50 H.L.R. 171, 187-8, and Note 51 H.L.R. 694-9 referred to in footnote 1 *supra*.

8. *STANDARD OIL CO. v. UNITED STATES*, 221 U. S. 1 (May 15, 1911).

9. *UNITED STATES v. AMERICAN TOBACCO CO.*, 221 U. S. 106 (May 29, 1911).

10. 226 Fed. 62 (D.C.W.D.N.Y.; App. Dism. 225 U. S. 578).

tion by the application of the anti-trust laws in *United States v. Swift & Company*.¹¹ Here an injunction was issued against the acquisition and consolidation of many independent stockyard companies and of independent companies engaged in processing, packing, canning and distributing food products.

1926—In the case of *United States v. The Ward Food Products Corporation, et al.*,¹² the anti-trust laws prevented a monopoly in the baking trade. There, a plan to bring substantially all of the wholesale bakeries in the United States under the control of a single gigantic corporation was enjoined as violative of the anti-trust laws.

1926—A similar consolidation of many units was prevented by the anti-trust laws in the grocery and dairy products trades in the case of *United States v. National Food Products Corporation*.¹³ An injunction was entered against the organization of one great holding company for the purpose of acquiring and consolidating large chain grocery companies as well as numerous small and independent grocery, milk and dairy products businesses.

1927—The anti-trust laws saved the Porto Rican American Tobacco Company, operator of a minor factory in the cigarette trade in Puerto Rico, from destruction at the hands of the American Tobacco Company. Failure on the part of the Puerto Rican company to assist the American company in opposing an increase in the tax on cigarettes aroused the resentment of the latter, which laid the whip on the back of its smaller competitor by sharply and maliciously reducing prices. The Puerto Rican company would

have been exterminated had the courts not forced the American company to desist. The judicial opinion in this case was that "ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors."¹⁴

RECENT DECISIONS

1930—Sidney Morris & Company, dealing in stationery and office equipment in Chicago, was another individual enterprise saved from extinction by the anti-trust laws. Because it saw fit to sell its merchandise at its own prices instead of those fixed by others in the trade, this company became the victim of discrimination and a boycott promoted by the National Association of Stationers, Office Outfitters & Manufacturers. In a suit for treble damages against the Association, the court held that the attempt to destroy the Morris company was contrary to the Sherman Act.¹⁵

1930—William H. Rankin Company, Charles A. Ramsay Company and other individual enterprises in the advertising trade were awarded large damages against the Associated Billposters & Distributors of the United States and Canada because of a conspiracy to exclude them from access to the necessary advertising media. The suppressive actions of the defendants were declared to be violative of the anti-trust laws.¹⁶

1930—The Ladoga Canning Company, a small enterprise in the food canning trade, would also have been exterminated had it not been for the anti-trust laws. Discriminations in prices granted to one

11. Supreme Court of the District of Columbia; petition and consent decree filed February 27, 1920, orders overruling motions to vacate decree affirmed; 276 U. S. 311.

12. District Court for the District of Maryland; petition filed February 1926, consent decree entered April 3, 1926.

13. District Court, Southern District, New York; petition filed February 13, 1926, consent decree entered March 4, 1926.

14. *PORTO RICAN AMERICAN TOBACCO CO. v. AMERICAN TOBACCO CO.*, 30 F. (2d) 234; cert. den. 279 U. S. 858.

15. *SIDNEY MORRIS & CO. v. NATIONAL ASSOCIATION OF STATIONERS, etc.*, 40 F. (2d) 620.

16. *RANKIN v. ASSOCIATED BILL POSTERS, etc.*, 42 F. (2d) 152, cert. den. 282 U. S. 864; *RAMSAY v. ASSOCIATED BILL POSTERS, etc.*, 260 U. S. 501. See *SULLIVAN v. ASSOCIATED BILL POSTERS, etc.*, 6 F. (2d) 1000.

of the very large food canning companies had caused the Ladoga Company to suffer large losses and its business to decline greatly. As a result, the court awarded the Ladoga Company \$105,000 damages against the American Can Company.¹⁷

1931—A movement to transform the motion picture industry into a gigantic corporation was forestalled by the anti-trust laws in *United States v. Fox Theatres Corporation, et al.*¹⁸ Unification of two great groups of corporations engaged in the production, distribution and exhibition of motion pictures was dissolved by a decree entered in April 1931.

1933—Suppression and extinction of approximately three hundred and fifty small independent retail credit concerns were prevented by the anti-trust laws in *United States v. National Retail Credit Association*.¹⁹ A plan to monopolize the retail credit reporting business of the country had been devised and put into effect by the credit association. Members had been assigned regions in which each was to enjoy a monopoly. The three hundred and fifty outsiders were to be driven from the business by devices designed to cut off their supply of credit information and by the refusal of the members of the monopoly to deal except among themselves. The scheme was enjoined by a decree, based on the anti-trust laws, entered in October 1933.

1934—The destruction of many small enterprises in the ice trade was prevented by the anti-trust laws in *United States v. Kansas City Ice Company*.²⁰ This company had obtained control of 90% of the supply of ice through contracts to buy

the entire production of ice of many independent companies. The Kansas City Ice Company sought to use this control to take over and regulate the business of many retailers in regard to prices and related matters. A large number of other dealers were to be eliminated by cutting off their supplies. The scheme was thwarted by a decree under the anti-trust laws in June 1934.

1936-1938—In the cases of *United States v. Buchalter et al.* and *United States v. Lanza*,²¹ the anti-trust laws were responsible for the conviction and imprisonment of two of the nation's most notorious racketeers, Jacob Shapiro, alias "Gurrah," and Joseph "Socks" Lanza. Charged with providing the violence and "strong arm" work utilized to enforce the dictates of price-fixing combinations in the fur and fish industries of New York City, these racketeers were convicted by the author of this article acting as a Special Assistant to the Attorney General of the United States. Each of these individuals had hitherto escaped conviction under both state and federal statutes.

1938—The right of the forty-five thousand automobile dealers in the United States to patronize automobile finance companies of their own choosing and to remain free from the coercion of the large automobile manufacturers, was upheld in decrees under the anti-trust laws in the cases of *United States v. Chrysler Corporation* and *United States v. Ford Motor Company*.²²

1941—In *Fashion Originators Guild of America v. Federal Trade Commission*,²³ the anti-trust laws were construed by the Supreme Court of the United

17. *AMERICAN CAN CO. v. LADOGA CANNING CO.*, 44 F. (2d) 763, cert. den. 282 U. S. 899. See *VAN CAMP & SONS CO. v. AMERICAN CAN CO.*, 278 U. S. 245.

18. District Court, Southern District, New York; petition filed November 1929, consent decree entered April 15, 1931.

19. District Court, Eastern District, Missouri; petition and consent decree filed October 6, 1933.

20. District Court, Western District, Missouri; petition and decree filed June 5, 1934.

21. *UNITED STATES v. BUCHALTER et al.*, 88 F. (2d) 625, cert. den. 301 U. S. 708; *UNITED STATES v. LANZA*, 85 F. (2d) 544, cert. den. 299 U. S. 609.

22. District Court, Northern District of Indiana; complaints and decrees filed November 7, 1938, and November 15, 1938, respectively.

23. 114 F. (2d) 80, affirmed by the Supreme Court of the United States on March 3, 1941, 85 L. Ed. 557 (Advance Sheets).

States to prevent manufacturers of women's dresses and the textiles from which such dresses are made from combining to prevent the sale of dresses copied from their designs by boycotting and refusing to sell their merchandise to retailers who did not agree to refrain from handling the product of any manufacturer who copied the designs of members of the Guild.

TYPES OF ANTI-TRUST CASES

As stated, the foregoing examples constitute only a relatively few of the cases demonstrating the efficacy of the anti-trust laws. However, none of them differ greatly from the cases *en masse*. Anti-trust cases fall under three general classifications: (1) corporate combinations; (2) voluntary restraints such as price agreements; and (3) suppressive and coercive restraints.

Restraints like price agreements, and suppression and coercion, which comprise the last two types of unlawful practice, have seldom, if ever, escaped the condemnation of the courts. There is little uncertainty in that branch of the law. The rule of reason, said to be the chief source of obscurity, has not been applied in these latter cases.²⁴ Most criticism has

been levelled at the corporate combination cases, and yet the record of results there has been excellent. Twenty-nine corporate combination cases have been brought to trial since the passage of the Sherman Act fifty years ago, and in only six has the Government failed to achieve a victory.²⁵

There are, of course, many economic inequalities which the anti-trust laws have not removed and cannot remove since they are due to causes which such laws cannot reach. The Sherman Act was not designed as a cure-all, but there is no doubt that where the anti-trust laws have been invoked the degree of success has surpassed that attained under most other statutes.

NEED FOR INCREASED PENALTIES

It is, in addition, the writer's view that the purpose of the Federal anti-trust legislation would be more effectively achieved if the present criminal penalties (one year's imprisonment and a fine of \$5,000) were substantially increased. It is true of many penal statutes that an increase in penalty yields disappointing results. If juries do not exercise a practical veto power by returning acquittals, judges may still, and often do, mitigate the punish-

24. **FASHION ORIGINATORS GUILD OF AMERICA v. FEDERAL TRADE COMMISSION**, Supreme Court of the United States, March 3, 1941; **UNITED STATES v. SOCONY VACUUM OIL CO.**, 310 U. S. 150. That the "rule of reason," originally enunciated in **STANDARD OIL CO. v. UNITED STATES**, 221 U. S. 1, has found its chief expression in corporate combination cases, may be attributed to the fact that the restraints in such cases are consequences resulting more or less certainly as the case may be, rather than the avowed purpose of the combination. **APPALACHIAN COALS v. UNITED STATES**, 288 U. S. 344, represents another instance in which the "rule of reason" was applied, not to a corporate combination but to a combination in which, likewise, the restraint was not of the essence. It has been said (51 H.L.R., 694-9) that the early decisions relating to corporate combinations were an attack on

mere bigness. If so, the "rule of reason" may well have represented an effort to rationalize the judicial feeling that mere size does not necessarily involve an illegal restraint of trade.

25. **U. S. v. E. C. KNIGHT CO.**, 156 U. S. 1; **NORTHERN SECURITIES CO. v. U. S.**, 193 U. S. 197; **STANDARD OIL CO. v. U. S.**, 221 U. S. 1; **U. S. v. AMERICAN TOBACCO CO.**, 221 U. S. 106; **U. S. v. DUPONT CO.**, 188 F. 127; **U. S. v. UNION PACIFIC R. R. CO.**, 226 U. S. 61, 226 U. S. 470; **U. S. v. GREAT LAKES TOWING CO.**, 208 F. 733, 217 F. 656; **U. S. v. AMERICAN SUGAR REFINING CO.**, Southern District, New York; **U. S. v. LAKE SHORE RY. CO.**, 203 F. 295; **U. S. v. U. S. STEEL CORPORATION**, 251 U. S. 417; **U. S. v. UNITED SHOE MACHINERY CO.**, 247 U. S. 32; **U. S. v. INTERNATIONAL HARVESTER CO.**, 214 F. 987; **U. S. v. CORN**

(Continued on following page)

ment. So far as illegal combinations and restraints are concerned, it is the writer's view that this objection to an increase of penalty is not applicable. The evidence is usually so overwhelming that acquittals are not likely to increase. Sentences imposed, which usually bear some relationship to the ceiling, are apt to become more severe as the ceiling is raised.

The experience of those engaged in anti-trust enforcement is that individuals seldom receive jail sentences except where the violation is part of a racket involving violence. The maximum fine is not sufficiently proportionate to the resources of those engaged in the more seriously monopolistic practices. If the participants in nation-wide corporate combinations and restrictive conspiracies looked forward to the imposition of jail sentences and stiffer fines, the deterrent effect would be enhanced. It goes without saying that where the Sherman and Clayton Acts are em-

ployed in the prosecution of racketeering activities, the Government's weapons would be more lethal if they were charged with heavier shot.

Reviewing the record, with full allowance for the foregoing, I believe it can be concluded that the Federal anti-trust laws are not only well designed to effect their purpose, but in comparison have yielded far more efficacious results than the majority of laws on the Federal statute books. I am convinced that if the ridiculously small penalties were materially enlarged, the Sherman and Clayton Acts would undoubtedly advance in rank among the strongest legal weapons available to the Federal Government.²⁶

[The writer wishes to acknowledge with thanks the assistance of Russell Hardy, formerly a Special Assistant to the Attorney General of the United States in providing much of the material upon which this article is based.]

25. (Continued from preceding page)

PRODUCTS REFINING CO., 234 F. 964; U. S. v. EASTMAN KODAK CO., 226 F. 62; U. S. v. QUAKER OATS CO., 232 F. 499; U. S. v. READING CO., 253 U. S. 26; U. S. v. AMERICAN CAN CO., 230 F. 859, 234 F. 1019; U. S. v. SOUTHERN PACIFIC CO., 259 U. S. 214; U. S. v. LEHIGH VALLEY R. R. CO., 254 U. S. 255; U. S. v. NEW YORK, NEW HAVEN & HARTFORD R. R., Southern District, New York; U. S. v. NEW ENGLAND FISH EXCHANGE, 258 F. 732; U. S. v. SWIFT & CO., Supreme Court, District of Columbia; U. S. v. CEMENT SECURITIES CO., District of Colo-

rado; U. S. v. WARD FOOD PRODUCTS CO., District of Maryland; U. S. v. NATIONAL FOOD PRODUCTS CORPORATION, Southern District, New York; U. S. v. FOX THEATRES CORPORATION, Southern District, New York; U. S. v. RAND KARDEX BUREAU, Southern District, New York; U. S. v. FOSTER & KLEISER CO., Southern District, California; U. S. v. RADIO CORPORATION OF AMERICA, District of Delaware.

26. For a general discussion of the future of anti-trust law enforcement, see *Law and Contemporary Problems* (Duke University), Vol. VII, No. 1 (Winter 1940).



STATUTE OF LIMITATIONS & NEGOTIABLE INSTRUMENTS

Essel R. Dillavou

AT a recent bankers' conference certain legal problems were being considered and a question was raised concerning the time at which the statute of limitations began to run on a bank draft. Various views were expressed, although authority for the statements was not cited. It was in this manner that my attention was directed to the fact that in our treatment of negotiable instruments, the statute of limitations is sadly neglected. In a paper such as this an exhaustive treatment of the subject with a critical analysis of the cases is impossible, but it is purposed to summarize briefly the law as it relates to the various kinds of negotiable instruments, and, in so far as authority is available, to bring together in one article the law relating to the time at which the statute of limitations begins to run against the holder of legal rights arising out of such commercial paper.

FIXED MATURITY

Negotiable instruments bearing a fixed date of maturity usually cause little difficulty. Since the statute is so drawn in most states that it begins to run only from the time a cause of action accrues, the maturity date of time paper sets the point at which the statute begins to run against the primary party. By express provisions in many states a partial payment tolls the statute and starts it running anew. It might well be mentioned in passing that payments by a primary party do not extend the statutory period for secondary parties. Likewise, payments by an indorser will not extend the statute as against the maker of a note.

A problem is presented by those instruments which carry an acceleration clause. What is the true maturity date of an

instrument which provides for earlier payment in case a certain event, such as failure to pay interest, occurs? Should the statute of limitations begin to run from the fixed maturity date or, if the condition which is to hasten payment occurs, from the date upon which the holder might have demanded payment? A similar problem in negotiable instruments is presented in a consideration of holders in due course. Although the language employed in the instrument is clear and would indicate that acceleration is to be automatic, some of the courts hold that the provision is inserted for the protection of the holder and does not mature the instrument unless the holder has elected to declare it due. Other courts hold the provision to be self-executing, and any taker after the event has occurred which was to hasten payment is a taker after maturity. One would expect to find similar differences when the statute of limitations is considered, and this expectation seems to be fulfilled in two rather recent federal cases.

In the first of these¹ the New York statute was involved because of a note given by a director to bolster the financial condition of his bank. The note was to fall due one year from date or prior thereto "in the event of the suspension of the bank." The bank suspended payment in less than six months, and suit was started on the note more than six years after suspension but within six years of the fixed maturity date. The court found suit to have been instituted too late, and the maker was freed of liability. This appears to coincide with the view of the New York courts where a holder in due course is involved.

1. *NAGLE v. HEROLD*, 30 Fed. Sup. 905.

The second federal case² considered the statute of limitations³ as it related to a note which was to be "forthwith due" upon the appointment of a receiver for the maker, and in holding that the statute did not begin to run until the fixed maturity date, the court made use of the following language: "It is the rule in this circuit that the acceleration clause, 'shall forthwith be due,' is for the benefit and protection of the creditor, and that, in effect, it gives to the creditor the option or privilege of proceeding against the debtor upon the happening of the contingencies comprehended in the acceleration clause, and prior to the due dates set out in the notes, if he so desires. But if the creditor fails to take any action upon the happening of any such contingencies prior to the due date of the note, the statute of limitations on the debt does not commence to run until the due date of the note." These two cases suggest rather definitely that the court in any state would hold in a case involving the statute of limitations exactly as it has with reference to holders in due course.

It is in the case of demand paper that the problem presents its greatest difficulty, and it is proposed to consider the law as it applies to demand notes, certificates of deposits, certified checks, bank drafts, and cashier's checks. So far as space will permit, the liability of both primary and secondary parties will be presented.

DEMAND NOTES

The accountant has experienced little difficulty in disposing of demand notes that have been outstanding for a period in excess of that provided by the statute of limitations. Such an item has, in their mind, been outlawed and should be written off the books. This procedure is well supported by legal decisions, and in considering the running of the statute in such

a case, the court in *Hodges' Admin. v. Asher*,³ used language typical of many other courts in expressing its view. It said, "Though there is some authority to the contrary, the great weight of authority in America is to the effect that a note payable on demand is payable immediately, and the statute begins to run from the date of the instrument. The basis of the rule is that, as payment can be easily demanded, an actual demand is not necessary to complete the cause of action, but the commencement of the suit is a sufficient demand."

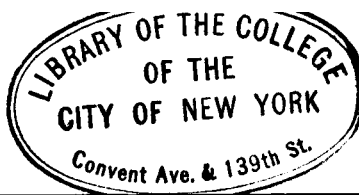
Professor Williston says,⁴ "It is a fundamental principle that the statute does not begin to run until any condition necessary to the existence of a right of action has happened, but . . . many obligations payable on demand are in fact payable without demand. Therefore, the statute begins to run immediately on delivery of the obligation of the maker of a note or the acceptor of a bill of exchange that is in its terms payable on demand."

Certificates of deposits issued by banks are in many respects quite similar to demand notes, although in other important respects they partake of the nature of a deposit in the bank. It is uniformly agreed that the statute of limitations does not begin to run against a bank deposit until a demand has been made upon the bank for payment. The contract implies that the bank is to retain the deposit until the depositor in some manner requests its return. The courts have been called upon to determine whether a certificate of deposit is more like a deposit than it is a demand note and, considering the language used in the certificates of deposit, the courts have generally held them to be like a deposit. It is customary to draw certificates of deposit so that they are payable "upon the return of this certificate properly indorsed." Occasionally

2. *CHASE NAT. BANK v. BURG*, 32 Fed. Sup. 230.

3. 224 Ky. 431, 6 S. W. (2) 451. See also 44 A.L.R. 397, citing N. Y. cases.

4. *Williston on Contracts*, Williston & Thompson, section 2040, vol. 6.



they are payable on demand and in some cases are payable at a definite period after date upon the return of the instrument properly indorsed. Reference to the language used in certain cases will disclose at least two rather strong reasons for holding that the statute of limitations does not begin to run until the instrument has been presented.

CERTIFICATES OF DEPOSIT

The court in *Elliott v. Capital City State Bank*⁵ spoke as follows: "Deposits are made in a bank in accordance with the universal usage, which becomes a part of the law of the transaction. They are neither loans nor bailments in the strict sense of the term. A deposit is a transaction peculiar to the banking business, and one which the courts should recognize and deal with according to commercial usage and understanding. . . . The transaction is in reality for the benefit and convenience of the depositors, and while the relation of debtor and creditor exists, and the bank has the use of the money for commercial gain, it assumes no further obligation than to pay the amount received when it shall be demanded at its banking house."

This reasoning merely suggests that a certificate of deposit is similar to other bank deposits and must be accorded different treatment than is given to the ordinary debtor and creditor relationship. A more significant reason for distinguishing between a certificate of deposit and a demand note is found in the use made of the instruments and in the language adopted in their creation. The court in the case of *McGough v. Jamison*⁶ says, "It is not payable on demand merely. It is payable to the order of the depositor, 'on the return of this certificate.' That superadded condition changes its character. A suit could not be maintained on

this instrument without returning it, or offering to return it." Since no action could be maintained until the return of the instrument, the statutory period began to run only after the holder had returned the certificate for payment. Cases are on record in which the holder failed to present the instruments for payment until thirty or forty years after their issuance and the courts have enforced payment. Although there is some slight authority to the contrary, this seems to be the manifest weight of authority.⁷ It is rather unique, however, to find some cases in which certificates having a fixed maturity are held not to mature for purposes of the statute of limitations until the certificate is returned.

In the case of *Baxley Banking Co. v. Gaskins*⁸ the following language is found: "It is plain that the money could not be withdrawn under twelve months from the date of the certificate. It is also clear that interest ceased after twelve months. When then is the certificate payable? It is not due until the 'return of the certificate properly indorsed' at any time. It might be payable twelve months after date on the return of the instrument properly indorsed, or subsequently. . . . The only difficulty we have in reaching the conclusion that the certificate of deposit in the present case is not due until a demand for payment is actually made, . . . arises from the sentence, 'Interest will cease at maturity.' At maturity of what? The word 'maturity' is somewhat confusing and at variance with the view above expressed. But the certificate must be construed as a whole, and not only on one isolated sentence, and, so construing it, we think the better view is to hold under the decisions above cited, that the certificate does not become due until it is returned to the bank properly indorsed, and a demand is actually made for payment."

5. 128 Iowa 275, 1 L.R.A. (U.S.) 1130, 103 N.W. 777.

6. 107 Pa. 336.

7. See 128 A.L.R. 157 and 23 A.L.R. 1 for additional citations. For New York authority see 253 N.Y. 295, 171 N.E. 61.

8. 145 Ga. 508, 89 S.E. 516.

CHECKS

The point at which the statute of limitations begins to run on a check seems rather clearly defined in the cases, although it is said to vary somewhat with the conditions. If the drawer has sufficient funds in the bank with which to meet his check, the check must be presented within a reasonable time or the drawer is released to the extent that the delay occasioned him damage. In the event the payee resides in the place where the bank is located, the instrument should be presented the day after its issuance. Because of this rule, which is part of the fundamental law of negotiable instruments, many of the courts have held that the statute of limitations begins to run against the drawer from the time the check should have been presented. Where the check is not supported by an adequate balance, thus dispensing with the necessity for presentment, the statute is said to run from the date of issue.

A New York court said,⁹ "If the evidence established that there were no funds in the bank to meet the check when it was drawn, the check was due immediately. . . . The rule is well established that if the drawer has no funds in the hands of the drawee, an action can be maintained against the former without any presentment or notice of payment. . . . As the cause of action was complete when the check was made, and the plaintiff could allege a want of funds as an excuse for nonpresentment of the check, and no presentment was required, it is very clear that the statute began to run from its date. . . . If he delays to enforce his claim by action within six years, the drawer may plead the Statute of Limitations as a bar."¹⁰

Several kinds of checks deserve special treatment where the statute of limitations is concerned because of the peculiar func-

tion they are called upon to serve. Since a suggestion is found in the authorities that a certified check is similar to a certificate of deposit, it will be considered first. The suggestion seems entirely out of place when the chore to be performed by a certified check is understood. Its customary objective, like that of any other check, is to satisfy an indebtedness. Because of the questionable credit of the drawer or because of the expense involved in collecting personal checks, a certain creditor demands that only certified checks be used in meeting obligations in its favor. Occasionally the payee or indorsee has a check certified, but this is likewise for the purpose of making it more clear to his creditor that the instrument will be met. In neither case is there a thought in the mind of the taker that he is in reality making an investment and thus expects to hold the paper for a considerable period of time. At times certified checks are posted when construction bids are made in order to insure that the successful bidder will enter into a contract according to the terms of his offer. The period during which such checks are held is, as a rule, relatively short, and there seems no real reason for deferring the running of the statute until the check is actually presented. Rather does it seem more reasonable to prescribe that the holder must make presentment within the period of the statute or have his claim outlawed.

The two cases in which the issue has been definitely presented are in conflict. The case of *Weaver v. Harrell*¹¹ is in accord with the view expressed above and in reaching this conclusion the court expresses itself as follows: "Since by certification a bank becomes primarily liable on the check, presentment for payment is not necessary to charge the bank. . . . Presentment not being necessary, the statute of limitations operates from the date of certification. . . . The amendment thereto (N.I.L.) by our legislature (made

9. *BRUSH v. BARRETT*, 82 N.Y. 400, 37 Am. Rep. 569.

10. For additional authorities see 4 A.L.R. 881.

11. 176 S.E. (W. Va.) 608.

in 1931) is as follows: 'The statute of limitations shall not begin to run against the holder of a certificate of deposit or a bank note until after presentment and demand for payment.' The failure of the Legislature to include certified checks in the exception to section 70 must be taken as conclusive of the legislative will that the statute of limitations should run against the holder of a certified check in favor of the bank from the date of certification."

Although the precise point was not in issue, the courts in several other cases have used language which indicates that the statute would run from the date of certification. In these cases, the bank was asserting that, in order to hold it liable, the checks had to be presented promptly following the certification, but in reply to that suggestion, the court¹² said, "So far as the drawee bank is concerned, demand for payment of a certified check may be made upon it at any time within the statute of limitations." Brady¹³ says, "The certification constitutes a new contract between the holder and the bank. . . . By certifying, the drawee bank enters into an absolute agreement to pay the check upon presentment at any time fixed by the statute of limitations."

In a recent Iowa case¹⁴ where the matter was considered, the court took a rather unorthodox view of the effect and function of a certified check. Being influenced materially by the accounting procedure involved, the court reached the conclusion that a certified check was similar to a certificate of deposit, and that the statute should not run until the check was presented for payment. Consequently, a check which had been certified and outstanding for eighteen years was held to be enforceable. The check was certified at the request of the holder and, in such

cases, it is customary for the bank to charge the drawer's account and credit some special account such as "Certified Check Account." Rather than being in effect a deposit by the holder, this appears to be merely the setting up of a different kind of liability on the bank's books, somewhat similar in effect to that for cashier's checks or notes payable. The same bookkeeping entry would be made whether certification is at the request of the drawer or the holder, and it is doubtful if the courts will in the future distinguish between cases in which the holder has the check certified as against those in which certification was sought by the drawer. Certain language used by the court is, however, worth considering, and reads as follows: "The reason is that upon its being certified at the request of the holder the check became in legal effect an ordinary demand certificate of deposit. . . . In this case the certifying was done by the bank at the request of the holder of the check. Such a transaction is practically this: the bank virtually says, 'The check is good; we have the money here to pay it. We will pay it now, if you will receive it.' The holder says, 'No, I will not take the money;' you may certify the check and retain the money for me until this check is presented.' . . . The effect of the banks certifying the check at the request of a holder is to create a new obligation on the part of the bank to that holder, the amount of the check passes to the credit of the holder, who is thereafter a depositor to that amount."

BANK DRAFTS

Since a bank draft is really nothing more nor less than a check, being drawn by one bank upon another bank, there seems to be no reason for departing from the ordinary rule applied to checks unless the function to be performed differs essentially from that of the check used by an ordinary depositor. Business usage and custom denotes no essential distinc-

12. **BULLIET v. ALLEGHENY TRUST CO.**, 284 Pa. 561, 131 A. 471.

13. Brady, *The Law of Bank Checks*, (1915) sec. 232.

14. **DEAN v. IOWA-DES MOINES NAT. BK. & TRUST CO.**, 281 N.W. (Ia.) 714.

tion. A bank draft, like any other check, is purchased by someone who desires to meet an obligation at some distant point, and is used to facilitate collection by the one who receives it. It is not an assignment of funds and gives the holder no claim against the drawee bank until it has been certified. Occasionally, it is true, a traveller may purchase a bank draft to be used as a substitute for a letter of credit, while in rare cases a person may be found who would rather hold a bank draft than have his money on deposit, but in such cases the bank draft is not serving its normal function. Although there is a paucity of authority, such as we have appears to support the view expressed above. In the Iowa case¹⁵ Justice Mitchell expresses himself as follows: "It must be conceded that it is the general rule that the plaintiff's cause of action has not accrued so as to start the statute of limitations running, unless all of the facts exist so that plaintiff can allege a case at bar. Namely, if the only act necessary to perfect the plaintiff's cause of action is one to be performed by the plaintiff and he is under no restraint or disability in the performance of such act, he cannot indefinitely suspend the statute of limitations by delaying performance of that act. . . . The undisputed evidence here is that no demand or presentation was made for more than nineteen years. The statute of limitations began to run after a 'reasonable time for presentment for the reason given in the case cited, namely, 'a creditor may not, by his own act or neglect, delay or postpone the running of the statute'."

With the exception of the recent Iowa case¹⁶ no case involving a cashier's check has been uncovered. The court in that case held that the statute began to run from the time it was issued, a demand not being required. It said, "If there was

any necessity to demand payment before suit, the nature of the instrument was such that the making of such demand may not be looked upon as something without which a cause of action did not exist previous to the demand. Nor does the instrument on its face appear to indicate that the parties intended that it have the characteristics of a certificate of deposit, nor was the amount of the liability uncertain, to be determined within a set limit by the creditor, and to be made certain only by a request or demand by the creditor. . . . Nor has anything been called to our attention that makes it appear that a demand for payment by defendant would have been more than a preliminary step to the enforcement of the remedy for the breach of an existing duty on the part of the defendant."

Thus far in our consideration it appears that against the holder of demand instruments the statute of limitations begins to run, in favor of the primary party, including drawers of checks, from the time the instrument is drawn, or at latest, at a reasonable time after issuance. To this one very definite exception is noted, namely, a certificate of deposit. The statute in such a case begins to run only after a demand has been made.

LIABILITY OF INDORSERS

There remains for our consideration only the duration of the liability of an indorser, and because of the limitation of space devoted to this article, only a brief summary of the law can be indicated. All unqualified indorsers have both conditional and unconditional liability and under the latter a cause of action arises as soon as the indorsement attaches. If at that time the instrument was not genuine, carried a forged indorsement or the signature of a minor, a warranty was violated and a cause of action accrued at once, although the indorsee might not learn of the violation until some time later. In the case of a note having many

(Continued on page 39)

15. *DEAN v. IOWA-DES MOINES NAT. BK. & TRUST CO.* (Rehearing) 290 N.W. (Ia.) 664. Also see *WRIGLEY v. FARMERS & MERCHANTS STATE BANK*, 76 Neb. 862, 108 N.W. 132.

16. See 13 *supra*.

LAW OF CREDITORS' RIGHTS

I. Arnold Ross

EVERY business day millions of commercial transactions take place in the City of New York based upon the extension of credit. The collection of the multitudinous debts created by these transactions is a colossal task and it is important that every business man should understand the rights and obligations of the parties involved. In this short article on the subject of the rights of creditors, the writer cannot, because of limitations of space, go into the minute ramifications of the principles of law which would be necessary were the article written for members of the Bar who make a specialty of the subject. It is the writer's hope that there is sufficient material here to give the ordinary business man some conception of his rights in enforcing the collection of his accounts.

In this discussion I shall mention the entry and enforcement of a judgment; the creditor's rights in connection with fraudulent transfers; the creditor's rights in insolvency proceedings; and the creditor's participation in the rehabilitation of the debtor.

THE JUDGMENT AS A LIEN

Once a creditor's right to a judgment has been established and one has been granted by a court with the power and authority to do so, the judgment is recorded in the office of the clerk of the court. In order to become a lien upon real property, such judgment must be docketed in the office of the clerk of the county where the judgment debtor owns real property, and it becomes a lien on the debtor's real property from the time of the docketing of the judgment in the county clerk's office. This lien is effective

for ten years.¹

A lien is created against personal property owned by the judgment debtor when an execution is issued by the judgment creditor's attorney to a marshal or sheriff directing such officer to levy upon the judgment debtor's personal property.²

ENFORCEMENT OF A JUDGMENT

A judgment may be enforced directly by the issuance of an execution to a marshal or sheriff directing such officer to levy upon the personal property belonging to the judgment debtor. If the judgment is not satisfied upon such a levy, the judgment creditor may obtain an execution upon the wages or other income of the judgment debtor to the extent of 10% thereof if the wages or income exceed \$12.00 per week.³

The judgment creditor has the right to examine the judgment debtor concerning his assets in what are known as supplementary proceedings. The New York State Legislature in recent years has enlarged, to a great extent, the rights of the judgment creditor in such proceedings.⁴ The law directs that for two years after the service of a subpoena or order in supplementary proceedings upon the debtor, he is enjoined from making any transfers of his property. This is a valuable remedy because the transfer by a debtor of property in violation of the statutory injunction constitutes a contempt of court which is punishable by fine and imprisonment and cannot be discharged in bankruptcy. The judgment

1. Civil Practice Act, Section 510.

2. Civil Practice Act, Section 679.

3. Civil Practice Act, Section 684.

4. Civil Practice Act, Article 45.

creditor may also examine third parties who, there is reason to believe, have property in excess of \$10.00 belonging to the judgment debtor, or who are indebted to the judgment debtor.⁵ The statutory injunction applies to such third party, as well, and enjoins him from transferring to the judgment debtor, or any other person, property belonging to the judgment debtor which might be applied to the satisfaction of the judgment.⁶

In connection with the examination of the debtor or a third party the judgment creditor also has the right to examine witnesses who may have any knowledge or information concerning the assets of the judgment debtor which might be applied to the payment of the judgment.⁷ The right to conduct the above mentioned examinations is a very valuable aid in discovering property which might be applied to the payment of the judgment.

Where, in an examination in supplementary proceedings, it is discovered that a third party is indebted to the judgment debtor, the judgment creditor may obtain an order of the court directing such third party to pay over to the sheriff or to the judgment creditor so much of the indebtedness as is sufficient to satisfy the judgment.⁸ Any payment made by the debtor of a judgment debtor pursuant to such an order is a discharge of his indebtedness. If there is any question concerning the indebtedness to the judgment debtor, a judgment creditor may commence an action against the third party, or may have a receiver of the property of the judgment debtor commence such an action.⁹

Any time after the institution of a supplementary proceeding the judgment creditor is entitled to have appointed a receiver of the property of the judgment debtor,¹⁰ who then is vested with all the rights of property of the judgment

debtor.¹¹ This includes real property from the time when the order of appointment is filed with the clerk of the county where such real property is situated.

Where it appears that the judgment debtor has income with which he might satisfy the judgment, the judgment creditor may procure an order directing the judgment debtor to pay to the judgment creditor such portion of his income, either earned or otherwise acquired, after due regard for the reasonable requirements of the judgment debtor and his family, as the court may direct.¹² This is a very effective remedy. Many judgment debtors having substantial incomes from salaries or trust funds formerly were able to avoid or delay for a long time the collection of judgments against them by applying only 10% of such income to the payment of their debts under garnishment orders. The present statute permits the application of further sums above the 10% to the payment of the debtor's debts.

FRAUDULENT CONVEYANCES

Many debtors, in an effort to avoid their debts or to impede the collection of judgments against them, are wont to make transfers of their property for little or no consideration. The New York State Legislature, in 1925, adopted the Uniform Fraudulent Conveyance Act to deal with such conveyances (Article 10, Debtor and Creditor Law). Under this Article, a person is declared insolvent:

"when the present fair saleable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."¹³

The statute provides that:

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the con-

5. Civil Practice Act, Section 779.

6. Civil Practice Act, Section 781.

7. Civil Practice Act, Section 782.

8. Civil Practice Act, Section 794.

9. Civil Practice Act, Section 795.

10. Civil Practice Act, Section 804.

11. Civil Practice Act, Section 807.

12. Civil Practice Act, Section 793.

13. Debtor and Creditor Law, Section 271.

veyance is made or the obligation is incurred without a fair consideration."¹⁴

The statute also provides that conveyances made by persons in business without fair consideration¹⁵ and conveyances made by a person about to incur debts¹⁶ are fraudulent as to both present and future creditors. A conveyance made with the actual intent to:

"hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors."¹⁷

The law gives creditors who have matured or unmatured claims the right to have the fraudulent conveyance set aside or the fraudulent obligation incurred annulled to the extent necessary to satisfy their claims,¹⁸ and certain other rights and remedies.

INSOLVENCY PROCEEDINGS

All of the remedies mentioned in the foregoing paragraphs have dealt with the rights of individual creditors to reach the assets of debtors. When the debtor is insolvent, his property, if liquidated, must be distributed ratably to all of his creditors, bearing in mind their respective priorities. He may therefore take steps to apply all of his assets to the payment of all of his debts, or some of his creditors may commence proceedings against him toward such end.

The proceedings which may be taken by a debtor are three-fold. He may transfer his assets by a common law deed of trust to a trustee to be liquidated by the latter and the proceeds to be paid over to the creditors ratably; he may make a general assignment for the benefit of creditors under the New York State Debtor and Creditor Law, in which case the New York Supreme Court supervises in a general way the administration of

the "estate;"¹⁹ or he may file a petition in bankruptcy in the Federal Court and place control over the proceedings in the local United States District Court.²⁰ The "estate" consists of all of the assets of the insolvent debtor which are turned over to the common law trustee, to the assignee, or to a receiver or trustee in bankruptcy, as the case may be. In all of these insolvency proceedings all creditors may file claims against the insolvent debtor and when the assets have been marshalled and liquidated, the proceeds are applied to the payment of all the debtor's debts ratably. The same is true in involuntary bankruptcy proceedings where creditors of an insolvent debtor file a petition in the Federal Court and have such debtor adjudicated a bankrupt.

COMMON LAW DEED OF TRUST

A debtor has the right to transfer his assets to a trustee to be liquidated by the trustee and the proceeds paid over to his creditors. This may be done outside of court and depends for its effectiveness upon the unanimous consent of all the creditors. A creditor who refuses to accept payment may nevertheless proceed against the debtor to collect the full amount of his claim. This form of liquidation is sometimes used in the case of a small debtor with few assets and few creditors where the administration expenses of a court proceeding either in the State courts, under the Debtor and Creditor Law, or in the Federal bankruptcy courts, would dissipate all the assets.

BANKRUPTCY

An insolvent debtor has the right to file a petition in the United States District Court to have himself adjudicated bankrupt and have all of his remaining assets, if any, taken into custody of the Court and through the machinery of the bankruptcy court distributed among his

14. Debtor and Creditor Law, Section 273.

15. Debtor and Creditor Law, Section 274.

16. Debtor and Creditor Law, Section 275.

17. Debtor and Creditor Law, Section 276.

18. Debtor and Creditor Law, Sections 278 and 279.

19. Debtor and Creditor Law, Article 2.

20. 11 U. S. C., Section 22.

creditors.²⁰ If he has been truthful in his petition and has been cooperative in the administration of his "estate," has not committed any frauds upon his creditors, and has not destroyed his books, if he had any, the bankrupt is entitled to be discharged of all the debts which he owed at the time he filed his petition.²¹

Creditors of an insolvent debtor have the right to file a petition in the United States District Court to have such debtor adjudicated a bankrupt and to have the assets in question taken into custody of the court for liquidation and distribution.²⁰ In order to be entitled to file such an involuntary petition three or more creditors must join where there are twelve or more creditors of the debtor.²² The claims of the petitioning creditors must amount to at least \$500.00. If there are less than twelve creditors in all, a single creditor to whom the debtor is indebted in the sum of at least \$500.00 may file such a petition against the debtor. It must be remembered that the debtor may not be petitioned in bankruptcy merely by reason of his insolvency. Certain "acts of bankruptcy" are required to have been committed by the insolvent debtor in order to permit his creditors to file such a petition. The Bankruptcy Act defines these "acts of bankruptcy" as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditor over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date there-

of or at least five days before the date set for any sale or other disposition of such property; or (4) made a general assignment for the benefit of his creditors; or (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt." (11 U. S. C., Sec. 21).

One of the main reasons why creditors file petitions in bankruptcy against debtors is to take steps to set aside preferences made by the bankrupt to creditors within four months of the filing of the petition.²³ The Trustee in Bankruptcy may not only proceed to set such transfers aside, but, availing himself of Sections 67 and 70 of the Bankruptcy Act,²⁴ may undertake proceedings to set aside fraudulent conveyances. The Trustee has all of the powers that any creditor or group of creditors may have in bringing back to the bankrupt's estate any property dissipated prior thereto.²⁵ Such a petition must be filed within four months after the commission of the act of bankruptcy. The debtor is entitled to a discharge of his debts in involuntary bankruptcy the same as in a voluntary proceeding.

CHANDLER ACT

There were added, recently, to the bankruptcy statutes two chapters which deal with the reorganization of the affairs of a bankrupt. These are known as Chapters 10 and 11 of the "Chandler Act." Under Chapter 10 a corporation may apply to the Federal Court for a reorganization of its affairs.²⁶ This involves a *complete* reorganization and readjustment of its capital and other assets under the jurisdiction of the Federal Court. If the

21. 11 U. S. C., Section 32.

22. 11 U. S. C., Section 95 b.

23. 11 U. S. C., Sections 96 a and 96 b.

24. 11 U. S. C., Sections 107 and 110.

25. 11 U. S. C., Section 110 e.

26. 11 U. S. C., Sections 501-676 inclusive.

liabilities of such a corporation exceed \$250,000.00 the Court must appoint a Trustee to take over the assets of the corporation during the pendency of the proceedings. Under Chapter 11 the debtor, whether a corporation, partnership or individual, may apply to the Court for confirmation of a plan of arrangement whereby the debtor may reduce the amount payable and get additional time to pay.²⁷ The Court will confirm such a plan if it finds that it is fair and equitable to the various classes of creditors. Debtors who have filed petitions in bankruptcy voluntarily, or against whom petitions in involuntary bankruptcy have been filed, have the right to apply for relief under the reorganization statutes of the Chandler Act. If in such cases the applications for reorganization are rejected the ordinary bankruptcy proceeds as though the applications had never been made. Upon approval of the plans, the debtors obligations are limited to the extent that the Court has approved the plan.

CONSIGNED GOODS AND RECLAMATION PROCEEDINGS

Creditors sometimes find it expeditious to deliver goods to their customers "on consignment," intending thereby to retain title to the goods in themselves, so that in the cases of the debtor's insolvency the creditors may reclaim their goods and thereby save themselves from loss by reason of the debtor's insolvency. However, it is important to remember in this respect that merely labelling a transaction as a delivery on consignment does not make it so where the intention of the parties really is for a sale of the goods to the debtor and the transfer of the title to the debtor. If a transaction labelled as a consignment is in fact a sale, the creditor cannot reclaim the goods on the debtor's insolvency for the goods belong to the debtor and become part of his es-

tate which is distributable to all creditors ratably.

Goods actually delivered to a debtor on consignment and all other property which may be found on the premises occupied by the bankrupt but which in fact belong to third parties, may be reclaimed by them in appropriate proceedings in the bankruptcy court known as "reclamation proceedings." In effect, these are similar to replevin actions in the State courts.

BULK SALES

Under the New York State Personal Property Law a debtor has the right to sell all or a part of his assets in bulk only upon complying with certain requirements²⁸ which are, briefly, these:

Notice must be given to all of the creditors of the seller by registered mail at least ten days prior to the date of the proposed sale and an inventory must be delivered by the seller to the proposed purchaser showing in detail the goods sold and their cost. The purchaser must retain this inventory for at least 90 days after the date of sale and all creditors have the right to examine the inventory. If no adequate notice is given to creditors or if the inventory is not delivered as required, the purchaser may be declared to be the Trustee of the goods for the benefit of all creditors of the seller. If a proposed bulk sale will render the seller insolvent, creditors, of course, have the remedy mentioned above to treat the proposed sale as a fraudulent conveyance and to take steps accordingly to protect their rights.

It is the writer's hope that the foregoing has served to give some little enlightenment to the reader concerning the rights of a creditor in the collection of debts owing him. It has necessarily been extremely cursory, but it is hoped that sufficient is therein contained to help creditors decide upon appropriate legal channels in the protection of their rights.

27. 11 U. S. C., Sections 701-799 inclusive.

28. Personal Property Law, Section 44.

ARBITRATION

George W. Matheson

ARBITRATION, a device for the settlement of controversies, is an ancient practice, having existed at common law by voluntary agreement. In 1829 it first received statutory sanction in this State. Although in method and purpose it is similar to conciliation, it has, however, one distinct advantage in that arbitrators are not limited to inducing parties to a dispute to reach a settlement agreeable to both, but may render a binding decision enforceable in court.

The development of arbitration as a means of solving disputes has made substantial progress in the United States. Forty-six states have some kind of law applicable to it, although in many instances provisions for judicial review of awards, and voluntary withdrawal before final award, have weakened the effect of the legislation.

In 1920 New York State adopted the first effective state-wide statute and since that date thirteen states have passed acts modeled after it. By the act of 1920, arbitration was extended to controversies that might arise in the future, provided the parties to a contract agreed therein to this method of settling any differences that might arise thereunder. Prior to that time, the statutes of this State covered merely the settlement of existing controversies. This extension to include possible future differences has been of particular value in the field of Labor Law, since most contracts between employers and employees now provide for arbitration.

The most fertile field for the extension of arbitration has been in the realm of commercial disputes. Trade associations usually select certain of their members to whom controversies may be submitted. The familiarity of these men with the technical features and trade customs of

the business eliminates the necessity of instructing a court and jury concerning them, thus saving considerable time and money. The possibility of an erroneous verdict based on a lack of understanding of the business by a court or jury is also thus prevented. Entire fields of controversy have, during the past decade, been withdrawn from court litigation by the acceptance of arbitration for settling disputes. Matters pertaining to the theatre and the stock exchange illustrate this trend.

GROWTH OF ARBITRATION

In 1926 the American Arbitration Association was formed "for the purpose of establishing and maintaining a national system of commercial arbitration, and to carry on the education and research necessary to the development of such a system, and to provide an arbitration tribunal available in any part of the country in which commercial disputes could be settled in record time and at little cost by submitting them to impartial arbitrators of the parties' own choosing." This Association maintains a National Tribunal which offers a quasi-judicial system of arbitration in accordance with the prevailing law of the several states. The Tribunal is open to any and all parties willing to arbitrate under its rules, and its functions are limited to controversies that the parties have agreed in writing to submit to arbitration. This National Tribunal is composed of some 6,000 members, representing almost every occupation and industry in about 1600 cities of the United States. Since the largest volume of arbitration is carried on in New York City, about 2,000 of the arbitrators are located here. A special

panel of lawyers is subject to call by the Association when questions of law are involved, or the parties desire a lawyer as one of the arbitrators.

The Association maintains its headquarters in New York City and those in charge of its administrative work receive requests for arbitration, and make complete arrangements for all hearings. The fees which are charged the parties, or the voluntary appropriations made by trade or commercial organizations for this work, support the Association. The costs of the services of this Association are fully standardized and are very reasonable. In a report made by the American Arbitration Association in 1936, on the tenth anniversary of its founding, it was disclosed that from 1926 to 1936 over 5,600 controversies were referred to the Association for arbitration. Over 88% of the decisions were immediately complied with and did not have to be filed in court for enforcement.

Arbitration is by no means a small claims remedy. On the contrary, where large sums of money are involved in commercial disputes, the average business man would rather submit to the judgment of other business men in the same or similar calling than to risk a trial by a jury, where so many elements, other than the merits of the case, might determine the verdict.

Arbitration has won the support of a great majority of lawyers, especially in New York. Hundreds of attorneys are serving on panels of arbitration while many others are appearing daily in organized tribunals to argue cases for their clients. The fact that you can avoid the delay occasioned by a congested court calendar, save the expensive court costs, and have your controversy determined by a group of experts engaged in a similar business, appeals to the attorney who has his client's interest in mind. The American Bar Association has approved the use of arbitration and has an active committee studying the development of this method of dispute settlement.

REGULATION OF ARBITRATION

In conclusion, a summary of the most important features of the legislation in New York State covering arbitration may be of interest. Arbitration is dealt with in Article 84 of the Civil Practice Act, Sections 1448-1469. In brief, these sections provide that two or more persons may submit to arbitration any matter which might be the subject of an action, or they may enter into a contract to submit to arbitration any controversy thereafter arising between them, except where one of the parties is an infant or otherwise incompetent to manage his affairs, or except where the controversy arises respecting a claim to an estate in Real Property in fee or for life. The contract to arbitrate must be in writing and must be signed by the party to be charged by it or his lawful agent. If one of the parties to an arbitration agreement refuses to carry out his contract, the other party may appeal to the Supreme Court for an order directing the delinquent party to proceed as provided in the contract. Notice of this application must be given to the delinquent party. If the court finds there is no reason for failure to proceed to arbitration, the court may enter an order directing the parties to arbitrate as heretofore agreed upon. A provision is made that if the arbitration agreement does not designate the method of appointing the arbitrators or the parties refuse to avail themselves of the method described, the Supreme Court may, on application, designate an arbitrator or arbitrators.

The act provides that before taking testimony the arbitrators must take an oath to faithfully and fairly hear and determine the matters in controversy and make a just award. Witnesses may be compelled to attend to give testimony and fees may be awarded not exceeding the fees allowed to a like number of referees in a Supreme Court action. The award of the arbitrators must be in writing,

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THE FAIR LABOR STANDARDS ACT

Joseph E. Brill

IN February of 1941 the Supreme Court of the United States, in two broad and sweeping opinions, gave its blessings to the Fair Labor Standards Act of 1938¹ and, thus, permanently fixed into the economic life of the nation social legislation prescribing a ceiling over hours and a floor under wages.

These two unanimous opinions of the Court delivered by Mr. Justice Stone in *U. S. v. F. W. Darby Lumber Co., et al.*² and *Opp Cotton Mills Inc., et al. v. Administrator of Wage and Hour Division of Department of Labor*³ merit attention, not only for the broad determination that Congress was within its constitutional powers under the Commerce Clause⁴ in providing for minimum wages and maximum hours for employees "engaged in commerce or in the production of goods for commerce,"⁵ but also for the specific sections of the statute which were upheld.

SUPREME COURT INTERPRETATIONS

Perhaps the most important and far-reaching result flowing from the Darby case, from the viewpoint of effect upon the average small business man, is the determination that congressional powers include within their scope the enactment and regulation of hours and wages for employees engaged in the production of goods for commerce.⁶ In short, the multitude of the nation's small local manufacturers and producers have been put on

notice that they must comply with the law or be prepared to suffer the severe penalties provided therein for violators.⁷ The oft-heard exculpatory cry of the local small manufacturer or producer that only a small negligible portion of his goods crosses the boundaries of his home state would appear to be silenced by the language of Mr. Justice Stone (at page 461) when he says:

"Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. (See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7.) The legislation, aimed at a

6. Sections 6, 7 and 15(a) (2), Fair Labor Standards Act. Commerce is defined by the Fair Labor Standards Act (Sec. 3(c)) as "trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof."

7. Section 16(a) and (b). Criminal proceedings may result from wilful violations of the act. Although no person may be imprisoned except for a second conviction the violator is liable to a fine of not more than \$10,000. Upon second conviction the fine may be imposed as well as imprisonment. Section 16(b) permits the recovery in any court of competent jurisdiction from an employer who has not paid the required minimum wages or overtime of not only the amount in default but an equal amount in addition thereto as well as counsel fees.

1. More commonly referred to as the Wage and Hour Law.

2. 61 Supreme Court Reporter 451.

3. 61 Supreme Court Reporter 524.

4. Article I, Section 8, Clause 3, U. S. Constitution.

5. Sections 6 and 7 of the Fair Labor Standards Act.

whole, embraces all its parts. Cf. National Labor Relations Board v. Fainblatt, supra, 306 U.S. 606, 59, S. Ct. 671, 83 L. Ed. 1014."⁸

Not the least significant of the consequences of the Darby case is the constitutional approbation afforded by the Supreme Court to Section 15(a) (1) of the Fair Labor Standards Act.⁹ By that section there is prohibited the transportation, shipment, sale or delivery in commerce of goods in the production of which employees were employed at wages less than the prescribed minimum or for hours in excess of the statutory maximum without the payment of overtime compensation therefor. In justification of its reasoning, the court found it necessary to and did expressly overrule the long discredited but often reconciled *Hammer v. Dagenhart* decision.¹⁰ Thus, approval was placed not only upon the actual regulation and limitation of hours and wages for those employed in industries manufacturing or producing goods for commerce but also upon provisions prohibiting the shipment in commerce of goods tainted by production under substandard conditions.

APPLICATION OF THE ACT

What is the practical effect of the court's opinion in the Darby case?

The myriad of heterogeneous producers and manufacturers engaged in manufacturing or like operations who occupy

such a large niche in our economic system may no longer rely upon the claim that wage and hour regulation as applied to them is beyond the range of congressional power and an invasion of state rights.¹¹ Emphatically and beyond question the Supreme Court has followed the trend indicated by the cases upholding the National Labor Relations Act.¹² Hours and wages as well as other conditions of employment are the subject of congressional concern under the commerce clause. No longer valid is the doctrine that the process of manufacturing is not the subject of regulation under the powers given to congress to regulate commerce.¹³

The extent of the coverage and application of the Fair Labor Standards Act is probably best illustrated by the meaning given to "produced" by the statute. Section 3 (j) of the Fair Labor Standards Act defines "produced" as:

"'Produced' means produced, manufactured, mined, handled or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

The administration has further construed the scope of the acts coverage with respect to those engaged in the production of goods for commerce in *Interpretative*

8. This substantially supports the construction given to the act by the Administrator in *Interpretative Bulletin No. 5* issued by the office of the General Counsel to the Administrator, Release No. R-113, December 2nd, 1938. Revised November, 1939.

9. The so-called "Hot Goods" provision.

10. 61 Supreme Court Reporter at page 458. There the Supreme Court held unconstitutional an act of Congress prohibiting the transportation in interstate commerce of goods produced by child labor on the grounds that the act was an attempt to regulate production, control local activity and not to regulate interstate commerce.

11. Mr. Justice Stone made short shrift of the contention advanced in the Darby case that the 10th amendment of the U. S. Constitution prohibited the enactment of the Fair Labor Standards Act.

12. See N.L.R.B. v. JONES & LOUGHLIN, 301 U.S. 1; FRUHAUF TRAILER CO. v. N.L.R.B. 301 U.S. 49; N.L.R.B. v. FRIEDMAN HARRY MARKS CLOTHING CO. 301 U.S. 58.

13. See U. S. v. E. C. KNIGHT CO. 156 U.S. 1. Substantially criticized in STANDARD OIL v. U.S., 221 U.S. 1 at pages 68 and 69.

*Bulletin No. 1.*¹⁴

It becomes incumbent upon the small processor or manufacturer to re-examine his business with an eye towards conforming to the Fair Labor Standards Act. The wide extent of the Act's application has been alluded to herein. Severe hardship and possible ruin can be the result of neglecting to conform thereto.

ENFORCEMENT OF THE ACT

Illustrative of what can happen by reason of a failure to recognize the import of the law is the situation which recently confronted certain members of the bookbinders industry in the City of New York.

Members of that industry perform services for printers and stationers such as binding books and other publications and, by a machine process, ruling and placing lines on plain paper. The industry consists in the main of numerous small enterprises and the services per-

formed are generally limited for printers and stationers located in the City and State of New York.

It was not until some time in the middle of the year of 1940 that the industry as a whole was informed, as a result of a general inspection by the regional office of the Wage and Hour Division in the City of New York, that its employees were covered by the provisions of the Fair Labor Standards Act. Thus, for a little over a year from the effective date of the Act, October 24, 1938, these businesses were not in compliance. In many instances, under press of competitive and economic conditions, compliance by less than all would have been impossible. As a rule, competitive conditions necessitated employees working from 50 to 60 hours a week at straight time rather than time and one-half for overtime. In most cases, the employees worked these hours gladly and willingly in order to increase their earnings.

However, the day of reckoning arrived with the entrance of the Wage and Hour Division inspectors. Compliance with the law from the date when informed of its application was not enough. There had to be restitution to employees for that year or more in which there were not followed the conditions of the statute. In one instance, a small book binding and ruling establishment, where the three partners themselves operated machines and where business conditions had never allowed the accumulation of a surplus, were met with the necessity of paying several thousand dollars in restitution to their employees. In some cases, employees, learning of their rights, instituted suits under Section 16(b) of the Act, thus, forcing the employer to pay double the amount if he could not effect a compromise.

REDUCING WAGE COSTS

The natural inquiry of the business man is, "What are the methods, if any, which may be legally and properly utilized

14. U. S. Department of Labor, Wage and Hour Division, Office of the General Counsel, Release No. 62, Oct. 12, 1938. It was said there:

"The second category of workers included: those engaged 'in the production of goods for (interstate) commerce,' and applies typically, but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in Section 3(j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.' Therefore, the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of the goods."

It has been held that the *Interpretative Bulletin* should be given considerable weight by the courts.

in order to reduce wage costs?" There are such methods. Unfortunately limitations of space permit mention of only a few of the techniques which may be adopted for avoiding increased costs and at the same time compensating employees at a decent legal wage.

Comprehension of the basic nature of the coverage of the Fair Labor Standards Act is essential to an understanding and appreciation of the methods from which labor savings can result. The emphasis of the coverage feature of the statute is directed, not at the nature of the business conducted by the employer, but at the character of the work performed by the individual employee.¹⁵ Congress did not say that employers who were engaged in commerce must conform to the specified wages and hours conditions with respect to their employees but, on the other hand, declared that an employer must comply with the statutory requisites only as to any of his employees who might be engaged in commerce or in the production of goods for commerce.¹⁶

Obviously, then, it is possible that certain employees may fall within the purview of the statute while other employees of the same employer do not. Again a particular employee may be entitled to the benefits of the Act some weeks and not during other weeks of his employment.¹⁷

Those employers, producers, or business men, the greater part of whose activities are within the state of their loca-

tion may, by careful planning, so allocate the work of personnel so as to limit certain employees for certain periods to work done only for intra-state commerce. Such employees would not fall within the coverage of the Act.¹⁸ Likewise, it may be possible to limit the performance of overtime labor to the particular employees who are working on goods which will not leave the employer's home state.

Of course it is necessary that accurate records be kept of all of the jobs done by the employer, which records will reflect each employee who performed any work thereon. Allocation of the tasks of the employees in the fashion described will often permit large savings in overtime compensation without violating the spirit and purpose of the Fair Labor Standards Act.

"TIME OFF" PLAN

For those employers who desire their employees to be paid a constant wage or salary from pay period to pay period and not have such compensation fluctuate in accordance with overtime performed during any one week, an approved formula is that which has come to be known as the "time off" plan.¹⁹ The adoption of this plan requires the employer to use as a pay period a unit longer than a week. It may be two weeks, three weeks, four weeks, etc. The operation of this scheme is simple. If the employee works overtime during any one week of the pay period, that employee is laid off during

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15. *Interpretative Bulletin No. 6*, Wage and Hour Release No. R-116, December 7, 1938.

16. Sections 6 and 7 of the Fair Labor Standards Act.

This is not true, however, of some of the exemptions to coverage contained in Section 13 of the Act. For example, the exemption granted to employees engaged in a retail or service establishment, the greater part of whose selling or servicing is in intra-state commerce.

17. The work week is taken as the standard in determining the applicability of the Act. See *Interpretative Bulletin No. 5*.

18. It is the opinion of the administrator, set forth in *Interpretative Bulletin No. 5*, "that, if in any work week an employee produces goods for commerce and also produces goods for local consumption or performs work otherwise outside the coverage of the Act, the employee is entitled to both the wage and hour benefits of the Act for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material."

19. *Interpretative Bulletin No. 4*, originally issued November 1938, revised December 1939, July 1940, and Nov. 1940.

STANDARD LEGISLATIVE LEASES

Emanuel Redfield

One of the most common sources of friction in this community is the relationship between landlord and tenant. Aside from the rights and duties that are fixed by law between them, further rights and duties are commonly fixed by a lease, the terms of which, if not contrary to any provision of law fix the agreement of the parties.

In theory, persons have a free right to make their own bargain. This has always been the keystone of liberty of contract. A more penetrating analysis reveals, however, that conditions do not always permit unlimited choice. One of those conditions is the wide use, either by custom or by force of combinations, of a standard form of agreement. When one offers something on the same terms which almost every other person offers, the offeree has very little to pick in the terms. The result is that the persons offering the terms and conditions are in reality making the law with the same force and effect as if the Legislature had enacted them.

Leases when widely used have the effect of compelling a tenant to accept certain duties. When unfairly prepared the demands upon the tenant are out of proportion to the rights conferred upon him. Such a lease is the lease called the Real Estate Board form of lease that is very prevalent in this City. It is prevalent in the type of building where leases have real effect. Therefore, if almost every landlord insists upon the use of that form, its terms for all practical purposes become the law between landlord and tenant.

The effect of the general use of this lease form is that the tenant has little choice, and is, therefore, relegated to a status. This reverses the observation of Sir Henry Maine that the progress of

laws has been from status to contract. The tendency in standardization of contract forms is from contract to status.

It will be noted that the tenant usually is not the one who prepares or presents the lease. It is the landlord who does so. Experience reveals that when the landlord presents the lease, changes are infrequent. If changes are allowed, they occur after heated dispute.

Choice, of course, remains to the tenant whether or not he wishes to rent particular premises. He even has a choice to make his home on a park bench. So much has been assumed. But when an effective choice is considered, a choice that considers the gratification of one's wishes to live in a civilized community according to one's circumstances, then the terms and conditions are the subject matter of this paper.

It is not intended to censure landlords. They have their own special difficulties. Many of the terms of the agreement are necessary for their protection. Their part of the bargain is to turn over an estate to a tenant who thereupon comes into control. It is, therefore, necessary to have a statement governing the liabilities of the tenant in assuming control. It is only intended to point out that the lease form mentioned is not a fair one to the tenant.

Experience is a guide to the conclusion that an agreement that is unfair is not a good agreement to either side. This applies with all the more force to a lease. If a tenant finds himself irked by the yoke of the conditions imposed upon him, there are many practical means he can use to overcome his legal fetters. To avoid spreading such practices, specific instances are not mentioned. It is, therefore, for the landlord's benefit as well as for the tenant's that an equitable arrangement be made.

PRESENT FORM UNFAIR

The Real Estate Board form is not a fair one. Not only does it require a tenant to waive such an ancient right as the trial by jury, not only does it insist upon a right of the landlord to exhibit the premises seven months prior to the expiration of even a one-year lease, but it has a greater fault, which is one of method in introducing the clauses. Whenever a law is enacted or a decision handed down which confers a benefit to a tenant, the lease form is amended and revised by the Real Estate Board which then distributes the new edition. This means that the Board with studied care frustrates any right that tenants may gain. This seems to be a vicious practice. Why should an association, having no power to pass laws, yet in effect have the prerogatives of a legislature?

Evidence for this practice is readily discernible by a lawyer who studies the various editions that are published. Examination of them demonstrates that modifications are made whereby the tenant is required to waive a benefit that had been recently conferred upon him by law.

Sometimes the makers of the lease are defeated by the subsequent legislation which declares such waivers to be a nullity. As an illustration, leases of the type under consideration used to have a clause exempting the landlord from liability for damages resulting from the negligence of the landlord or his employees. This indeed was a most unfair exculpation. Think of it! The landlord had caused the damage, yet made himself immune from responsibility. The New York Legislature by section 234 of the Real Property Law voided such clauses.

Another unfair provision was (and still is) the automatic renewal clause in apartment leases. These usually provide that unless the tenant notify the landlord three months before the expiration of the lease, of the tenant's desire not to stay on, then the lease would be deemed to have renewed itself for a further year.

That this proved a hardship, and unfair, is known to persons in this community. Most apartment leases expire on September 30. Three months prior to that date is July 1. At that time persons are usually busy with summer problems, such as vacation and seashore residence. The renewal of the present lease is far removed from their minds. If they forgot (which they did) to send the notice, they became bound for another year. In the event they moved on September 30, they were confronted with a lawsuit for the rent for a new term. This general hardship brought about the enactment of Section 230 of the Real Property Law which provides that if the landlord wishes to give efficacy to such an automatic renewal clause, he must notify the tenant personally or by registered mail at least 15 days and not more than 30 days before the time the tenant must notify him under the lease, calling his attention to the existence of the clause in the lease.

These piecemeal enactments are helpful and have alleviated the difficulties sought to be remedied. But why should the Legislature be obliged to keep on the trail of every new edition that comes forth. Why should it be the Legislature that must be ever vigilant and on the defensive against these enactments of law by the publishers of the lease, who for practical purposes, as indicated, are usurpers of legislative power. Aside from the offensiveness in the challenge to the legislative power of duly constituted governmental bodies it must be remembered that legislatures cannot act with the expedition necessary to throttle a wrong the day after it appears. In the interim many suffer from the wrong.

STANDARDIZED LEASE

The ideal situation would be for a voluntary standardized lease to exist which would take care of the rights and duties of both parties in an equitable fashion. Then there would be no need for constant revision of the published

standard form of lease. Then it would not become necessary for the Legislature to be continuously alert against new wrongs. Piecemeal legislation would not be necessary. This would avoid the attendant confusion of jumping from the lease to the law books to discover the lawful arrangement between the parties.

This ideal, however, is far from realization. Several years ago the Association of the Bar of the City of New York proposed such a lease. Copies of it were published by stationers. It was given publicity. It is undoubtedly known to real estate associations. Yet its use is entirely absent. Since a voluntary use of a fair and equitable form is an impossibility, the alternative lies in directing by legislative command the use of a standard form.

Such use is not without precedent. In the insurance field, certain mischiefs called for legislative action. Among others, there were practices of insurance companies requiring holders of policies to waive precious rights while the insured was impotent to object; policies containing these provisions were in fine print and, like leases, were seldom read. To overcome these hardships, the Legislature enacted laws which set forth standard clauses that are required to be inserted in every policy issued. Thus, the policy holder has the assurance that even if he doesn't read the policy or is not able to object to certain of its terms, the law looks after his best interests. It avoids the necessity of continuous piecemeal legislation to protect the public.

Such a legislative standard lease may be the best answer as a remedy for the conditions mentioned. The case of leases is not in every respect parallel to that of insurance policies because there are many more variable factors in the landlord-tenant relationship. In principle, however, there is the same justification for the use of a legislative standard form.

What provisions should be incorporated into such a standard lease? No attempt is made here to be complete; nor are any

constitutional problems considered. The suggestions are a rough sketch around which other ideas should be arranged.

PROVISIONS OF PROPOSED FORM

These are some of the primary requirements.

No lease executed to affect real estate in this state shall contain a provision:

1. Requiring the tenant to waive his rights to a jury trial.

2. Waiving the right of a tenant to hold the landlord for damages sustained by the tenant through the fault of the landlord or his employees.

3. Requiring the tenant to permit the landlord to exhibit the premises to a prospective tenant for a period of more than three months prior to the expiration of the lease and that the landlord shall be entitled to possession for any purposes until the expiration of the term, except by operation of law.

4. Requiring the tenant to pledge as security for performance of the lease personal property exempt by law from levy upon execution.

5. Requiring the tenant to give notice prior to expiration of the lease in order to avoid having the lease deemed renewed automatically. Only new agreements or holdovers should be considered as entitling the landlord to bind the tenant for a new term.

6. Giving the landlord the option of terminating a lease because of objectionable conduct of the tenant, unless the clause provides that the landlord shall give ten days' prior written notice to the tenant to cease such conduct.

7. Requiring the tenant to purchase electricity from the landlord or any one other than a public utility company.

8. Exempting the landlord from keeping property free from noxious and unwholesome conditions which render the premises unusable or uninhabitable.

9. Requiring tenant to pay expenses including counsel fees of landlord in instituting any proceedings by reason of the tenant's default.

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Recent Decisions

Edited by Morris Berkowitz

Statute of Limitations on action for breach of warranty—(*Martha Schlick v. New York Dugan Bros., Inc.*, *City Court of New York*, July 10, 1940, 175 Misc. 182). The plaintiff, Schlick, purchased a jar of jam from the defendant company. She suffered injuries when she partook of some of the jam because of the presence of some glass imbedded therein. After a lapse of over three years, plaintiff commenced this action for personal injuries alleged to have been sustained as a result of this occurrence. The complaint is predicated on the theory of breach of warranty. The answer denies the allegations of the complaint and sets up, as a separate defense, the Statute of Limitations applicable to tort actions (three-year limitation). The plaintiff contends that since the complaint alleges a single cause of action for breach of warranty, a contract action, the six-year statute should apply and moves that the separate defense be struck out as insufficient.

Held, by Hearn, J., that the gist of the action is in tort and the three-year Statute of Limitations applies. The motion of the plaintiff is denied.

An action to recover damages for personal injuries based on breach of warranty is essentially a tort action and is only nominally based on contract. While there are no cases directly passing on the subject, the Court of Appeals, in an action brought under Section 130 of the Decedent Estate Law, which permits a suit for a wrongful act, neglect or default, based solely on a breach of warranty, said:¹ "The inquiry here is whether the breach of implied warranty . . . was a 'wrongful act, neglect or default.' The answer depends wholly upon a solution

of the question as to whether breach of the implied warranty . . . is tortious in nature and effect. . . ." The question was answered in the affirmative.

Furthermore, the usual rule of damages in a breach of contract action has never been applied in an action for breach of warranty. The plaintiff in such an action can recover for all personal injuries sustained just as if the action were in negligence.²

Determination of net income—Co-suretyship—Realization on a worthless note—(*Helvering v. Roth, et al.*, 115 F. 2d 239, *Circuit Court of Appeals*, Nov. 4, 1940).

1. Henry Roth, who died in 1918, owned 300 of 1000 shares of the Newman & Carey Construction Co., Henry Newman owned 350, William Newman 120, and James L. Carey 230 shares. This company had, in 1915, undertaken to build a piece of subway in New York City and Roth lent it \$250,000. Later, performance having turned out to be more expensive than was expected, Roth agreed to procure such money as was necessary, and in the end he, and his trustees after death, advanced in all \$798,411.10. Some of the notes on which Roth or the trustees procured these additional funds were indorsed by the Newmans and Carey, others were not. Roth's trustees claimed that the three were liable for the advances in proportion to their holdings. The Newmans and Carey denied this but, after long negotiation, they signed a contract agreeing to pay their proportionate part of the advances, without interest, as described in the contract. They were holders of shares in another company, Necaro

2. RYAN v. PROGRESSIVE GROCERY STORES, 255 N. Y. 388.

1. GRECO v. KRESGE CO., 277 N. Y. 26, 31.

Co., Inc., and agreed to apply one-quarter of the dividends received from this company to their obligations to Roth's trustees. In addition, they agreed that, if any of them should die before payment of his proportion was complete, one-quarter of his Necaro shares should be transferred to the trustees. All the parties to the contract further agreed that, if the construction company collected any money, it should be paid to the trustees to be credited upon the debt owed them up to the amount of the principal, any surplus to be credited to interest.

Up to 1935, the trustees had received a \$20,000 payment from the construction company, Necaro shares valued at \$19,305.35 from William Newman who died, and \$80,000 representing Necaro dividends from Henry Newman and Carey. In 1935, the trustees received \$986,864.95 out of a judgment against the city. Of this, \$679,105.60 (difference between Roth's advances and the payments received by the trustees) was treated, by the Commissioner of Internal Revenue, as repayment of principal and \$307,759.35 was held to be interest. The Board of Tax Appeals, however, reversed this ruling claiming that the payments made by the Newmans and Carey did not reduce the principal and should also be deducted in determining the income.

Held, by L. Hand, C. J., that, of the proceeds of the judgment, only the difference, after subtracting the payments made by the Newmans and Carey from the interest, is taxable. The decision of the Board is sustained.

If the Newmans and Carey had *unconditionally* admitted liability, there can be no doubt that they would have been entitled to reimbursement for their advances and the trustee's interest would have been reduced accordingly. The contract, however, stipulated that the liability of the Newmans and Carey should be limited. If they had acknowledged the liability, it might be argued that the limitation was a consideration for the surrender of all rights of contribution in case the company

reimbursed the trustees. But, they did not acknowledge the liability; it was the primary object of the settlement to get some acknowledgment of it. That being so, it seems far more reasonable to say that what the Newmans and Carey paid, they paid as co-sureties, that being the only possible theory on which the trustees could assert any claim against them. If so, the trustees were liable to them for the principal of their advances as soon as the trustees were themselves reimbursed. There is nothing in the contract forbidding such an interpretation. In fact, it is written precisely as it would be if the parties had expressly agreed that the obligors should have the status of co-sureties, except, of course, that that was not declared.

2. When Roth died in 1918, he held a number of notes of the construction company. In the appraisal of his estate they were taken as worthless; it was then supposed that the construction company was hopelessly insolvent. However, when the judgment was paid, the construction company took up these notes from the trustee. The Commissioner treated the entire amount paid on the notes as a gain, i.e., an increase in value of the property held by the trustees. The Board, however, held otherwise.

Held that the ruling of the Board be reversed as to the gain from the notes and that the amount received on the notes is income.

Section 111(a) of the Internal Revenue Act of 1934 provides that income shall include "the gain from the sale or other disposition of property." When a maker takes up a note it can properly be said to be a "disposition of" the note. When the executors got the notes they were actually worthless, nothing could have been realized on them. When they were paid in full, there was a realized gain and not a mere increase in value. The intent of the statute was to tax all realized gains. There is no reason to let such a case escape through its meshes.

Employer's right to dismiss workers—employees' right to select own agent— (*National Labor Relations Board v. Automotive Maintenance Machinery Co.*, 116 F. 2d 350, Circuit Court of Appeals, Dec. 12, 1940). The N. L. R. B. issued a complaint upon the petition of the S.W.O.C.¹ wherein the respondent company was charged with unfair labor practices in that it initiated, sponsored, and subsequently dominated AMMCO,² refused to bargain with the C.I.O., discharged and refused to reinstate three employees because they were active in the C.I.O., and intimidated its employees in the exercise of their right to self-organization. The evidence in the case was contradictory at points. In summary, the court found that the following events occurred:

The respondent's plant is located near the Fansteel Corp. in which a sit-down strike took place in 1937. The unrest spread to the respondent's plant causing the efficiency of the men and production to fall off. The plant foreman ordered a secret ballot on whether the employees wanted an inside or an outside union. An inside union was chosen. A meeting of the workers was then called and AMMCO was formed. It was incorporated and was recognized by the company as the sole bargaining agent of the employees.

Subsequently, the CIO launched a membership drive. An organizer for the SWOC, Mills, by name, appointed a committee of three employees to meet the superintendent and president of the company to discuss the status of the CIO on Saturday, May 15, 1937, at 2 p.m. This meeting was subsequently called off because the president was called away. At the arranged time, however, Mills appeared at the plant. All the doors were

locked. A part of the force was working overtime inside. The superintendent of the plant, Travis, talked to Mills through a locked door and, after ordering Mills away, went to the second floor of the plant. When he returned he found that two workers, Warner and Jordan, were not at their bench and that they were talking to Mills in the basement. The door had been unlocked and Mills admitted to the plant. These workers, who were members of the committee formed by Mills, were subsequently discharged.

Held, by Evans, C. J., that the petition should be denied.

It is not necessary that the respondent justify the discharge of Warner and Jordan. An employer is within his rights in discharging an employee who is not doing his work faithfully. The discharge may be with or without good reason, provided it was not because of the employee's union activities.³ The discharge of Warner and Jordan was made because, during working hours, they went to a locked door in the basement to let a Union organizer into the factory well knowing that the organizer could not negotiate with the president who was away. Their actions were wholly inconsistent with loyalty to their employer or their employment. They knew that unionization during working hours is inconsistent with the full performance of their duties, that the president was away and Mills' entry could not have been to further CIO unionization *legitimately*. As to the third employee, the examiner found that his discharge was not because of union membership or activity.

The Board also found that the respondent coerced its employees in their right to self-organize. Some thirty-one employees testified at the hearing. Thirty-one of them declared that they were members of AMMCO and wished AMMCO to represent them. The Na-

1. Steel Workers Organizing Committee, a labor organization affiliated with the C.I.O., hereinafter called SWOC.

2. A labor organization known as AMMCO Workers' Association, hereinafter called AMMCO.

3. N.L.R.B. v. JONES and LOUGHLIN STEEL CORP., 301 U.S. 1, 45, 47 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352; MARTEL MILLS CORP. v. N.L.R.B., 4 Cir., 114 F. 2d 624, 633.

tional Labor Relations Act was passed to protect the employees, to give them free and unrestricted right to organize and to bargain collectively and to select the agent to represent them in collective bargaining. The Board, by eliminating the local union, would limit the employees' choice to one and, thus, would actually select the union for the employees. Furthermore, the fact that thirty-one out of thirty-one witnesses favored AMMCO cannot be ignored. The court is convinced that the order of the Board should be reversed.

Declared capital stock value may be amended after expiration of filing date—

(*Lerner Stores Corp. v. Commissioner, U. S. Circuit Court of Appeals, 2nd Circuit, March 24, 1941*). The petitioner, Lerner Stores, filed a capital stock tax return for the first year ending June 30, 1936, within the permitted time. The declared value of its capital stock was stated to be \$25,000. This figure was entered in error through a mistake by an employee of the petitioner. After discovering the error on January 27, 1937, the petitioner filed an "amended return" for the year ending June 30, 1936, in which the declared value of its capital stock was given at \$2,500,000 and payment was made of the additional tax, penalty and interest.¹ The Commissioner refused to accept this "amended return" and the money paid was refunded. The Board of Tax Appeals sustained the Commissioner's ruling saying that, although the value of \$25,000 was due to a mistake on the part of one of the petitioner's employees, such finding was immaterial "inasmuch as in these matters either a mistake or a change of mind has the same legal consequences."

1. While increasing the declared value of the capital stock increases the capital stock tax liability, the saving effected on the declared value excess profits tax greatly exceeds this additional liability. (The declared value of the capital stock is the basis for a deduction from the net income subject to excess profits tax.)

Held, by Swan, C. J., that where an error in calculation has been made an amended return may be filed after the due date has expired.

Section 105 (a) of the Internal Revenue Act imposes an annual tax on domestic corporations of \$1.00 for each \$1000 of the adjusted declared value of its capital stock. Section 105 (f) provides that "For the first year . . . the adjusted declared value shall be the value as declared by the corporation in its first return . . . (which declaration of value cannot be amended). . . ." Despite this provision, a capital stock tax return may be amended within the time fixed for filing the first return.²

The purpose of the statute is to allow the taxpayer to fix for itself the base for computing the capital stock and excess profits taxes in further years. Up to the time when the return is due, the taxpayer may change his judgment and report a higher value, as in the Haggar case; but, a change of judgment thereafter cannot affect its taxes, for "the declaration of value cannot be amended."

In the case at bar we are not confronted with a change in judgment, but a situation is presented where the taxpayer has made but one "declaration of value" and, due to an employee's error, it has been inaccurately reported. The statute did not contemplate that the computation of the tax would be based on clerical mistakes and no good reason is presented for construing it to forbid their correction, either before or after the return date, in the absence of facts raising an estoppel against the taxpayer. However, it is true that strict proof should be required to establish that the value stated in a return resulted from a clerical mistake; corporations should not be permitted to use the amendment to serve their own ends. But, granted the valuation stated in the return was due to a clerical error, there is no sound reason for not permitting it to be corrected before the Commissioner has acted in reliance on it.

2. *HAGGAR CO. v. HELVERING*, 308 U.S. 389.

COURT OF CLAIMS PROCEDURE

George R. Shields

(Ed. Note: One of the deceased partners of the author, George A. King, in 1919, wrote an article descriptive of the powers and procedure of the United States Court of Claims, which had rather wide attention at the time and was supposedly of great assistance to those having multitudinous claims against the Government growing out of the so-called World War (1917-1918). In the following article the author presents the gist of what is therein stated.)

THE Court of Claims was originally created in 1855 merely as an agency for relieving Congress of some of its work with respect to claims asserted against the United States. Under the original act it could only make findings of fact and report the same to Congress. Its jurisdiction some years later was amended to include the entry of judgment against the United States in cases growing out of contracts or treaties. It has also the additional jurisdiction of making reports of findings of fact on cases referred to it by Congress for that purpose.

There is a more or less popular opinion that the Court of Claims is the "graveyard" of claims against the United States. Such an opinion is entirely unjustified. It arises from the fact that many of its findings on Congressional references are not carried into effect by Congress until after long delay. The court thus gets the blame for delayed consummation of all such claims.

It should be stated that the jurisdiction of the court to enter judgment extends only to claims arising within six years of the time the petition is filed. Any claims older than that can only be considered by Congressional reference and cannot be the subjects of judgment.

TWO CLASSES OF CLAIMS

From this it will be seen that there are two classes of claims occupying the attention of the court: (1) On Congressional reference merely for findings of fact, and (2) on statutory consideration of claims arising within the six-year period. This latter class may go to a formal judgment which is automatically included in the first deficiency bill, and when the money is appropriated it is paid in due course. There is not and never has been any considerable delay by the court in the consideration and determination of cases which justify judgments on the merits.

To define the jurisdiction of the court more specifically, it extends to "all claims founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." In other words, the act creating the court's jurisdiction waives the inhibition against suits against the United States. The provision as to admiralty claims is now obsolete.

The court is composed of five judges, appointed for life by the President and confirmed by the Senate, who sit *en banc* with the majority controlling. A suit is instituted in the court by the filing of a petition giving a brief and concise statement of the facts, and in a contract case, it is accompanied by a copy of the contract upon which the suit is based.

The trial of a case is conducted by one of the court's Commissioners, who hears the evidence, has it reduced to writing, and has the authority to pass upon the admissibility thereof. Upon the conclusion of the testimony, both the plaintiff and the defendant submit a statement of the facts they think the evidence warrants the Commissioner to find; and with these statements of fact before him, he makes his own report of the facts, as established by the evidence, to the court. Either side may take exceptions to the Commissioner's report of the established facts. Each side then submits a brief of its argument, both as to the law and facts involved, and the court then will decide what the facts are and what its conclusion is, rendering a judgment where the plaintiff has made a case and dismissing the petition where no such case is established.

As a part of the evidence in a case, either side may produce documents from the Department involved showing what the transactions were, subject always to objection of the other side as to the materiality thereof.

The Court of Claims is a very important court in the judicial system of the United States. From its decision there is no right of appeal, but only the right to apply to the Supreme Court of the United States by petition for *certiorari* for a review of the lower court's decision. The Supreme Court does not ordinarily consider the correctness of the facts as found by the Court of Claims, but only the accuracy of its conclusions of law. The instances where the decisions of the court have been overruled by the Supreme Court are not numerous.

RELATIONS WITH THE GOVERNMENT

It is sometimes supposed that there is something more or less sacrosanct about

relations with the Government—that they should not be subject to judicial review. In the very early days of the Republic it was announced as a principle:

“When a government enters into contract with an individual, it deposes as to the matter of the contract its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual.”

The Supreme Court itself in the same connection has said:

“A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.”

Therefore, it may be correctly stated that any one having a claim against the Government, growing out of a contract or other relation enumerated in the jurisdictional act, has a perfect right, if not a duty, to see that any rights pertaining to him under the contract, or otherwise, are enforced by law. The Court of Claims affords a tribunal for such adjudication. The general public ought better to understand the provisions of law in this respect. There is not and never has been the delay attributed to the court in the adjudication of cases coming before it. In general, it may be said that a case, not complicated too much by disputed questions of fact, can be submitted, tried, heard and judgment obtained in a time comparable with that ordinarily required in the civil courts of the country.

The court as constituted at present, consists of five judges, selected presumably on the basis of their outstanding qualifications, and certainly all of a disposition to do speedy justice in the cases which come before them.



Answers To

C.P.A. Examination Commercial Law April 1941

GROUP I

Answer all questions in this group.

- 1 *In a bank's relations to the general public, its responsibilities and rights, unless specifically provided for by statute, are governed by general rules of law as to agency, contracts, interest, negotiable instruments, etc.*
 - a. *Is a bank liable to the holder of a check before it certifies it?*
 - b. *Are the drawer and indorsers of a check liable upon it after the bank upon which it is drawn has later certified it?*
 - c. *After the death of a depositor, may or must the bank honor checks which were issued by him before his death?*
 - d. *After the death of one of the depositors in a joint account, may or must the bank honor the checks of a surviving depositor as it did before the death of the other?*
- (a) No, the bank is not liable to the holder of a check until it certifies it.
- (b) No, if the check was certified on the request of the holder of the check.
- (c) The death of the drawer of a check before its certification, acceptance or payment revokes the authority of the bank to pay it, and payments with knowledge of the death is wrongful. If, however, the bank has not yet been notified of the fact of death and it honors a check drawn by the decedent, the N. Y. Courts have held that the check may properly be charged to the account of the deceased.
- (d) Yes, a joint deposit ordinarily is a joint tenancy.
- 2 a. *Define bill of lading and state what it represents and how it is regarded in commercial law.*
 - b. *When are freight charges payable to a common carrier?*
- (a) Bill of lading is a written acknowledgment of the receipt of certain goods and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person named therein (straight bill) or to his order (order bill). A straight bill of lading is merely a receipt for the goods and a contract for the transportation of the goods. An order bill, however, is a symbol of the goods. It may be negotiated and sold as though it actually was the goods.
- (b) Freight charges are payable before the carrier accepts the goods for shipment. The carrier need not ship until they are paid.
- 3 *Give 3 reasons or more that justify charging of interest.*
 1. A charge for the use of money.
 2. Compensation for credit risk.
 3. A charge for investigation.
- 4 a. *State how a real-estate mortgage should be executed by (1) an individual, (2) a corporation.*
 - b. *State why a real-estate mortgage should be recorded.*
- (a) 1. An individual, in executing the mortgage, merely signs it and has the signature notarized.
2. Before a real estate mortgage can be executed by a corporation, the

consent of the holders of not less than two-thirds of the total shares outstanding entitled to vote thereon must be secured. A certificate that such consent was given, subscribed by the president or vice-president and the secretary or assistant secretary of the corporation must be filed with the mortgage.

- (b) The mortgage should be recorded to put creditors and subsequent purchasers and mortgagees on notice as to the existence of the lien on the property.

5 a. *Has a stockbroker, in order to recover advances made by him, the right to sell stock bought by him for the account of his customer on margin?*

b. *If so, under what terms and conditions may he sell the stock?*

(a) Yes.

(b) When the money or securities deposited by the customer do not sufficiently protect his account, the broker has a right to demand margin. If this additional margin is not delivered within a reasonable time, the broker may sell the securities.

GROUP II

Answer five questions from this group.

6 *A certified public accountant of the State of New York was engaged by a client to design a proper system of accounting and other records for a corporation in another state. Because the accountant was not fully informed as to the laws of the other state, he did not provide for certain records required by its laws.*

a. *Is the certified public accountant liable for damages resulting to the client from this omission?*

b. *Give reasons for your answer.*

(a) Yes.

(b) An accountant who assumes an engagement should familiarize himself with all the requirements of his engagement. He holds himself out as an expert and is in a responsible position, his client being wholly dependent upon his judgment and ability. If he is negligent in his work, he is liable to his client for any damages suffered because of the negligence.

7 a. *Can a large contract be bound by a small consideration?*

b. *Name four things that will constitute valuable consideration.*

(a) Yes. The law will not enter into an inquiry as to the adequacy of the consideration. Anything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised. This is not true if the consideration is of the same nature as the thing promised.

- (b) 1. Payment of money
2. Forbearance for a certain length of time to institute a suit upon a valid or doubtful claim, but not one utterly unfounded.
3. Incurring a legal liability to a third party.
4. Marriage.

8 a. *State how shares of a corporation are issued and transferred.*

b. *How may the owner of a lost certificate of stock obtain a new one?*

(a) The certificate of incorporation contains the number and par value of each class of stock to be issued. The stock is then issued to subscribers. Shares can be transferred (1) by delivery of the certificate, properly indorsed, either in blank or to a specified person; (2) by delivery of the certificate and a separate document containing an assignment of the certificate or a power of attorney

to sell, assign or transfer; (3) by delivery of a separate instrument containing an assignment of the certificate and the certificate at an execution sale.

- (b) If the corporation refuses to issue a new certificate, the owner may apply to the Supreme Court in the district wherein he resides or the corporation is located. If the court is satisfied that the certificate has been lost, it will order a new certificate to be issued upon the owner's depositing in a public office designated by the court, such security as the court deems sufficient to indemnify the corporation or any other person who shall thereafter be found to be the lawful owner of the lost certificate.

9 *Understanding that public accountants are subject to the same penalties as other persons for crimes or misdemeanors committed by them, answer the following questions with brief explanations:*

- a. *Is a certified public accountant subject to any further penalty?*
 - b. *Is there any provision of law in this state applying specifically to public accountants who are not CPA's?*
- (a) Yes. Public accountants are liable to their clients for negligence. They are liable to third parties for fraud and misrepresentation.
- (b) No. Except that the law prohibits accountants who are not CPA's from holding themselves out as CPA's.

10 a. *What is meant by the expression privileged communication or confidential communication?*

b. *Answer yes or no (with explanation if you wish) as to its applicability to a statement made by an interested person to (1) his physician, (2) his attorney, (3) his attorney's clerk, (4) his attorney's interpreter, who was the medium for the communication, (5) his auditor, (6) his auditor's staff accountant.*

- (a) A privileged communication is a communication made upon any subject in which the party communicat-

ing has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty. The person receiving such a communication is precluded from disclosing it when called upon as a witness.

- (b) 1. Yes.
2. Yes.
3. Yes.
4. Yes.
5. No.
6. No.

11 *W was employed by A. E. corporation, of which Q was an officer. A. E. owed \$9000 back salary. W. demanded payment and Q told W that he would pay the money himself if the corporation did not do so. Q also wrote W a letter reading as follows: "I will personally see that it is taken care of in a few days, as this is my responsibility." W sued Q for the salary. Can he recover? Give reasons.*

No. The agreement between W and Q is not enforceable. Firstly, an officer is not liable personally for the debts of the corporation which employs him, and, secondly, there is no consideration for the promise given W by Q.

12 *By an acceptance, what does the acceptor (a) admit, (b) not admit?*

- (a) The acceptor admits (1) the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument, (2) the existence of the payee and his then capacity to indorse, and engages that he will pay the instrument according to the tenor of his acceptance.

- (b) He does not admit that the holder has good title to the instrument and that any party other than the drawer and payee had capacity to contract.

13 *Under the dissolution of the partnership, owing to the death of a partner, is the survivor, in the absence of an expressed agreement, entitled to continue the business or must he account for the goodwill and other assets to the representative of the deceased partner?*

He must wind up the business as soon as possible and account to the representative of the deceased partner for the goodwill and other assets. However, he may, with the consent of the representative, carry on the business with the estate of the deceased as an active or silent partner.

14 *A manufacturer delivers identical merchandise to*

A upon a conditional sale,

B upon a lease with option to purchase

C upon a consignment

Discuss each transaction with special reference to the rights of the manufacturer and the records he should make.

In the conditional sale to A, the title to the merchandise is retained by the manufacturer, although A has possession of the goods. The manufacturer can repossess the merchandise if A defaults in his payments. The manufacturer should file a copy of the contract in the city or town in which A resides, or, if he is not a resident of this state, in the city or town where the property is located. In New York City, the contract must be filed in the borough in which A lives and in which the property is located.

If the amount to be paid to exercise the option is small in proportion to the

aggregate of the rental payments already made, the lease is considered by the courts to be a conditional sale and the contract must be filed as specified in A.

The manufacturer has title to the goods at all times and can reclaim the goods in the event of C's bankruptcy. The consignee should be required to segregate the goods, keep the proceeds of sales in a separate account, make periodic reports of sales and remittances and insure the goods for the account of the manufacturer.

15 *Is the legal liability of a trustee in the case of a loss any greater where the trust funds are not kept separate, than where they are kept in a separate deposit, it being admitted that the trustee acted in good faith. Explain.*

Yes. A trustee is a fiduciary and is charged with the duty of protecting and preserving the trust property. As a fiduciary, he must exercise due business prudence in respect to his trust, and the mingling of trust funds with personal funds is a violation of such prudence. Even though he may have acted in good faith, and had no intention of violating his position of trust, his liability would be greater because of the mingling of funds.

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By

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FAIR LABOR STANDARDS ACT

(Continued from page 25)

another week of the pay period a sufficient number of hours to off-set the amount of overtime earned so that for the pay period the employee will receive the desired salary or wage. The substance of the plan is a control over earnings through a control of the number of hours worked. The employee does not suffer by the lay-off as his earnings for the pay period do not vary but remain the same irrespective of the number of hours he may be laid off in any particular week of the pay period. The employer, by adding to the duration of the pay period, is enabled to govern the hours worked and obviate the annoyance and lack of predictability incident to fluctuating wages.

Turning again to the decision of Mr. Justice Stone in the Darby and Opp cases, a discussion would not be complete without noting that in the former case the court approved the record keeping requirements of the Act,²⁰ while, in the

latter, it upheld the creation, technique and procedure of industry committees appointed by the administrator.²¹ The industry committees after factual investigation recommend to the administrator the adoption of wage orders providing for hourly wages for the particular industry at rates other than the inflexible ones set forth in Section 6 of the Act.

The last obstacle to a permanent place in the economic life of the nation of wage and hour regulation having been removed by the Supreme Court, every employer of labor should review his organization and the nature and character of operations and make certain that his establishment is conducted in conformity with the provisions of the Fair Labor Standards Act.

20. Sections 11(c) and 15(a) (5) of the Fair Labor Standards Act.

21. Sections 5, 8 and 10 of the Fair Labor Standards Act.

STATUTE OF LIMITATIONS
(Continued from page 14)

years to run, it may be that the holder would not learn of breach of the warranty until after the statute of limitations had run. Despite this fact, the courts are generally in agreement¹⁷ that the statute runs from the time the indorsement is placed upon the instrument and delivery to the indorsee consummated.

The same appears to be true of the liability of an indorser on a demand instrument when presentment and notice have been waived. Since no conditions precedent are required to create the so-called conditional liability, the cause of action accrues at the time of the indorsement and the statute of limitations begins to run at that time.¹⁸

The conditional liability of an indorser of time paper would not appear to be outlawed until the full period had run

following the maturity of the paper, whereas for ordinary demand paper, since the liability does not arise until after presentment, dishonor and notice, the statute runs only from the time these formalities are complied with. Some question appears as to whether a reasonable time for presentment, in order to hold an indorser, might ever exceed the statute of limitations. An early New York case¹⁹ so held, although under normal circumstances a reasonable time for presentment would usually be much shorter than the customary six or ten years permitted by the statute of limitations.

17. See 117 A.L.R. 1164 and *LEATHER MFGRS. NAT. BK. v. MERCHANTS NAT. BK.*, 128 U. S. 26, 32 L. ed. 342, 9 S. Ct. 3.

18. *BROADWAY BK. & TRUST CO. v. LONGLEY*, 116 Conn. 557, 165 A. 800.

19. 98 N.Y. 379, 50 Am. Rep. 683.

LEGISLATIVE LEASES*(Continued from page 28)*

10. Exempting landlord from liability for failure to give possession.

Every lease affecting property located in the State of New York shall contain the following provisions:

a) A statement concerning the premises rented, the duration of the term, and the rent agreed upon.

b) A requirement that the tenant keep the property in good care and repair, and comply with all ordinances and regulations, and to surrender the premises at the end of the term in good condition, except wear and damage by elements.

c) Statement concerning rights of assignment or sub-letting; if consent of landlord is necessary, then same shall not be unreasonably withheld.

d) Survival clause providing that landlord may relet as agent of tenant only after ousting the tenant from the premises for default in payment of rent for ten days, or if tenant vacates.

e) A provision that damage of premises due to fire may terminate lease in case fire is so extensive as to render premises unusable. In other cases, the rent should be apportioned.

f) A provision requiring tenant to conduct himself in such a way as not to annoy other tenants or to do anything to injure the property in regard to safety and esthetic considerations.

These are the general ideas. A great deal of work and study will be required to embody the details. It might be wise to use the Bar Association form as a guide.

It will be a difficult struggle to obtain such legislation. Many interests are affected. Opposition to change will be inevitable. It will be remembered that the opposition to the standard insurance provisions was fierce. Now standard legislative insurance policies are the accepted practice.

ARBITRATION*(Continued from page 21)*

subscribed by the arbitrators and acknowledged or proved in a manner similar to that required of a deed in order that it may be recorded. The award is filed in the office of the court specified in the arbitration agreement or, if none is specified, with the Clerk of the Supreme Court, or the award may be delivered to the parties or their attorneys.

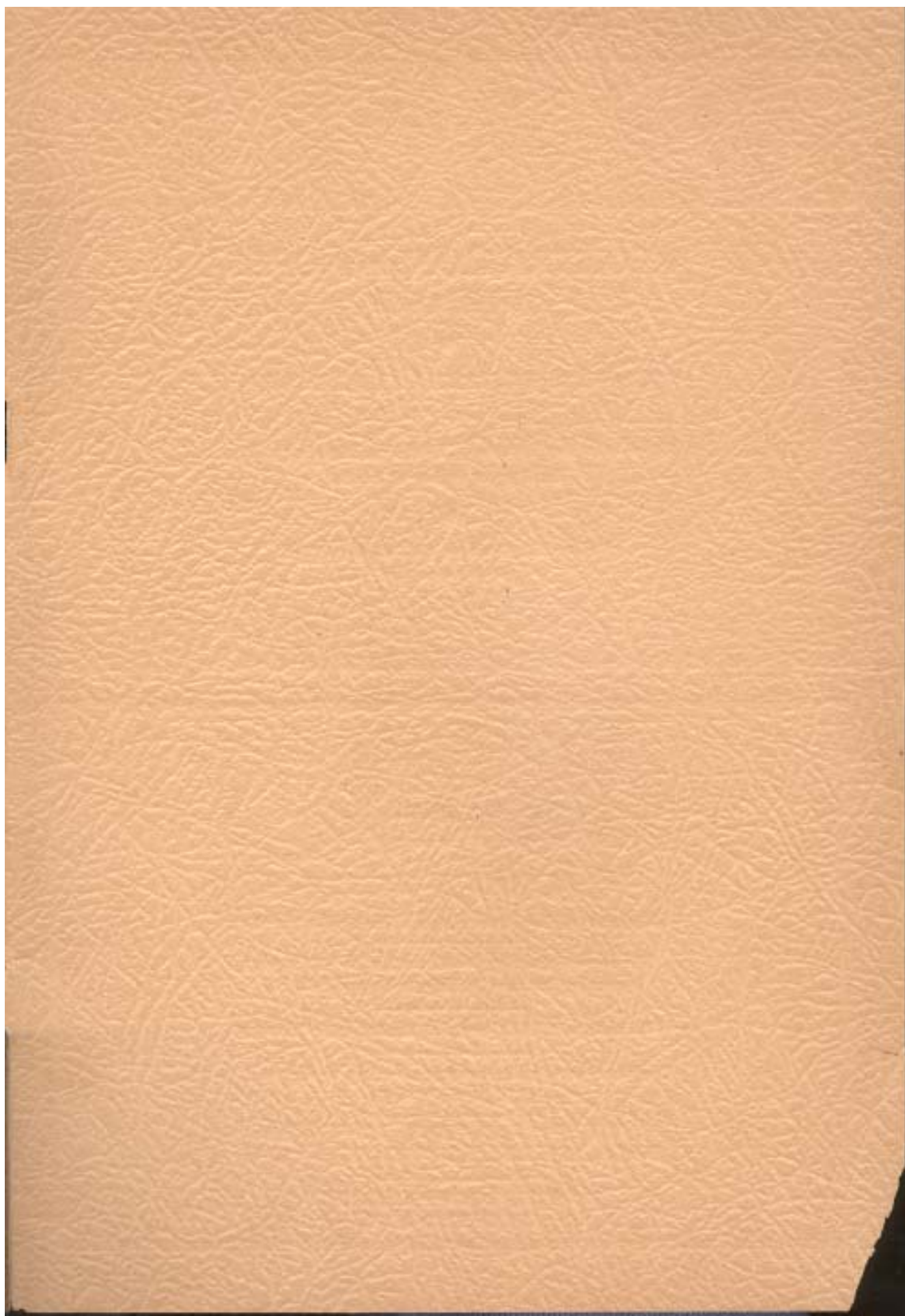
Anytime within one year after an award is made, a party to the contract may apply to the appropriate court for an order confirming the award. The award will be confirmed unless the court is satisfied that it was procured by corruption or other undue means, or that the arbitrators had been guilty of misconduct in the conduct of the hearing, or that the arbitrators had exceeded or imperfectly executed their powers. A party desiring to vacate or modify or correct an award must make an application to do so within three months after the award is filed or delivered. When an order has been made confirming or modifying or correcting an award, judgment is entered thereon in the same manner as upon a referee's report and costs not exceeding \$25 may be awarded. The judgment roll to be filed in the County Clerk's Office must contain, the award, the application to confirm the award, and a copy of the judgment. The judgment when entered has the same force and effect as if rendered by the court having jurisdiction of the subject matter. Appeals from this judgment may be taken in the same manner and subject to the same rules as appeals in actions in courts of record.

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