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As we have seen from Mr. Montgomery's comprehensive article,[1] Sections 6 and 7 of the Fair Labor Standards Act provide for minimum wages and overtime compensation.

Violation of these provisions as well as others in the act is made a criminal offense and in addition the Administrator is authorized under Section 17 to institute injunction actions in the federal courts to restrain such violations.

Further and more important than these actions, Section 16 (b) of the act contains the following provisions creating a right of action and providing a remedy for any employee affected by a violation of Section 6 or 7:

> "Any employer who violates the provisions of Section 6 or Section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

As we know the constitutionality of the act as a whole was unanimously upheld in *United States v. Darby Lumber Company*,[2] and there seems to be no doubt as to the constitutionality of Section 16 (b).

I propose to consider briefly some of the questions arising under this section of particular interest to attorneys prosecuting or defending this type of action.

COVERAGE

At the risk of some repetition of what is contained in Mr. Montgomery's article concerning coverage, it may be well to reiterate some of the more prominent aspects as specifically directed to employee suits.

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[1]Montgomery, *Is Your Business Covered by the Wage-Hour Law?* (1942) 19 DICTA 39.

[2]312 U. S. 100. 61 S. Ct. 451. 85 L. ed. 609. 132 A.L.R. 1430 (1941).

The first question that confronts the attorney for the plaintiff, and one of equal importance to defense counsel, is whether the plaintiff's employment is within the coverage of the act. From a cursory exposition of the salient provisions of the act, it will be seen that coverage under the act is based upon the view that the power of Congress over interstate commerce extends not only to the regulation of the working conditions of employees engaged in that commerce, but also to *employees engaged in the production of goods* for that commerce. Indeed, most of the employees who now benefit from this law do so because they are "engaged in the production of goods for interstate commerce."

> Section 3 (j) defines "produced" to mean
> "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."

It is important then to know what interpretation the courts are inclined to place upon this new principle. The older cases concerned themselves with the "in commerce" concept and the courts generally hold that production of goods, i.e., manufacture, mining, etc., even though such goods were intended for shipment and were eventually shipped beyond the confines of the producing state, was not in itself interstate commerce, and therefore not within the regulatory power of the Congress under the commerce clause.[3] The leading example of that narrow construction of the commerce clause is *Hammer v. Dagenhart*.[4] However, recent decisions of the high court, culminating in the *Darby* opinion, indicate a decided departure from that position, and approval of the broader view that Congress may, in the exercise of its power over interstate commerce, regulate those productive processes and activities that "have a substantial effect on [that] commerce or the exercise of the Congressional power over it."

The Wage and Hour Division of the United States Department of Labor has stated that:

> "Employees are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. * * * The facts at the time that the goods are being produced determine whether an employee is engaged in

[3]United States v. Darby Lumber Co., *supra*, note 2, and cases cited therein.
[4]247 U. S. 251, 38 S. Ct. 422, 62 L. ed. 939 (1918).

the production of goods for commerce and not any subsequent act of his employer or of some third party."

And this interpretation has been approved by the Supreme Court.[5]

Except in a few instances, the act predicates coverage upon the nature of the employee's duties rather than the nature of the employer's business. The employer may be engaged in a purely intrastate activity, for example, the renting and maintenance of a loft building used by tenants engaged in producing goods for interstate commerce; but his maintenance employees may, nevertheless, be subject to the act because their activities are necessary to the production of goods for interstate commerce.[6] It follows that an employee complaint that fails to allege facts sufficient to show that the plaintiff is engaged in commerce or in the production of goods for commerce within the meaning of the act will be dismissed.

COURT OF COMPETENT JURISDICTION

It is now well established that an employee action under Section 16(b) of the act may be prosecuted in either the federal district courts or in any state court whose jurisdiction under the laws of the state is appropriate to the entertainment of such claims. The jurisdiction of the federal district courts is not dependent upon the sum or value in controversy or the citizenship of the parties, since the action is one arising under a law regulating interstate commerce. Nor are such actions "suits for penalties and forfeitures incurred under the laws of the United States"[7] so as to be without the jurisdiction of state courts.

REMOVAL FROM STATE TO FEDERAL COURTS

There have been three decisions by federal district courts on the question of removal of employee actions under Section 16(b) from state courts to federal courts. In *Ricciardi v. Lazzara Baking Corporation*,[8] the court, while rejecting plaintiff's contention that such actions were not subject to removal and stating that Section 16(b) could not be deemed to have qualified the Removal Act, granted the motion to remand, upon the ground that the petition for removal had not been filed within the prescribed time.[9] In *Stewart v. Hickman*,[10] the motion to remand was granted, there being no diversity of citizenship and the court finding that no federal question was involved since "the statute

[5]United States v. Darby Lbr. Co., *supra* note 2.
[6]Fleming v. Kirschbaum, 4 W.H.R. 171 (E.D. Pa. 1941).
[7]U.S.C.A. Tit. 28, §371.
[8]32 F. Supp. 956 (D.N.J. 1940).
[9]U.S.C.A. Tit. 28, §72.
[10]4 W.H.R. 47 (W.D. Mo. 1941).

is plain and simple no construction or interpretation is called for." The opinion of District Judge Jones in *Kuligowski et al. v. Hart*[11] is to the same effect. The complaint, filed in the state court, alleged that plaintiffs had not been paid overtime compensation as required by Section 7 of the Fair Labor Standards Act. The defendant removed the case to the federal district court upon the ground that it "arises under the * * * laws of the United States; * * * involves a substantial federal question; and the sum in dispute exceeds the jurisdiction amount." On motion by the plaintiff to remand, the court held:

> "The case, as made in the plaintiff's petition, does not, as I see it, involve more than fact questions; does not present a federal question calling for a construction of the federal statute; nor is it a cause, the decision of which depends upon the construction of the federal statute under which the action was brought. *Gully, etc. v. First National Bank*, 299 U. S. 109, 114.
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> "It would be a vain thing for Congress to provide that such action as this could be maintained in any court of competent jurisdiction, only to permit the action so commenced to be removed to the federal court.
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> * * *
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> Since all jurisdiction of the district courts arises out of congressional grant, so the Congress may modify or withdraw jurisdiction. To the extent that it has given the right to employees to maintain actions in other courts of competent jurisdiction, it seems reasonable to conclude that it intended to give the employee the choice of jurisdiction, not the employer."

APPLICABLE STATUTE OF LIMITATIONS

No time is specified in the act within which actions to recover back wages must be instituted. While Section 971, Title 28 of the United States Code provides a limitation of five years within which a suit or prosecution for "any penalty or forfeiture" accruing under the laws of the United States must be commenced, as we have seen, an action for back wages and the additional liability provided in Section 16(b) of the act is not such a suit. The Conformity Act[12] requires that, in the absence of a federal statutory provision to the contrary, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. It would seem then that under this provision the applicable state statute of limitations will govern in all actions instituted under Section 16(b)

[11]Decided by the northern district of Ohio on March 25, 1941, and unreported.
[12]U.S.C.A. Tit. 28, §725.

of the act, whether in state or federal courts. Also, the decision of the Supreme Court in *Erie Railroad Company v. Tompkins*,[13] indicates that such corollary points as the time when the cause of action accrues, etc., will be governed by the state courts' decisions under such applicable statutes of limitations.[14]

SURVIVAL OF ACTIONS

The general rule is that a cause of action given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the formation of the Union. And the Statute of Edward III is regarded as a part of that common law.[15] Generally rights of action based on contract survived at common law, while those sounding in tort abated. However, even in tort actions, if the injury giving rise to the right affected the property of the decedent, such actions, by virtue of the Statute of Edward III, did not abate. It would seem that the porion of the liability under Section 16(b) for actual as distinguished from liquidated damages is founded upon contract. The duty to pay arises out of the employment contract with the statute as an operative provision of that contract.[16] Hence there can be no question of survival as to that portion of the liability.

But when consideration is given to the "additional equal amount" provided in Section 16(b), we have an action which, though contractual in form and substance, permits damages to be given as for a wrong. The question of survival of similar actions under the Anti-Trust Act[17] has been before the courts. Section 15 of that statute provides for triple damages to the party injured by a violation of that act. In *Sullivan v. Associated Bill Posters*,[18] an action for triple damages under the Anti-Trust Act was held to survive against the estate of the deceased wrongdoer; and in *Moore v. Backus*,[19] a similar action was held to survive in favor of the estate of the deceased plaintiff. The rule is apparently the same where the "deceased party" is a dissolved corporation.[20] These cases proceed upon the theory that the action for triple

[13]304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487 (1938).

[14]See also Moore v. Illinois Cent. R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. ed. 1089 (1941).

[15]Moore v. Backus, 78 F. (2d) 571, 101 A.L.R. 379 (C.C.A. 7th, 1935), cert. den. 296 U. S. 640, 56 S. Ct. 173, 80 L. ed. 455 (1935); United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 577 (C.C.A. 2nd, 1916).

[16]Cole v. Harker (W.D. Tenn.), decided October 10, 1939, and not officially reported.

[17]U.S.C.A. Tit. 15, §1, *et seq.*

[18]6 F. (2d) 1000 (C.C.A. 2nd, 1925).

[19]*Supra* note 15.

[20]Imperial Film Exch. v. General Film Co., 244 Fed. 985, 986 (S. D. N. Y. 1915).

damages is an action for injury to the plaintiff's property as a result of an illegal conspiracy; and that while such an action sounds in tort, it survives and may be pursued against the estate of a deceased person because the property or the proceeds or value of the property belonging to the plaintiff have been appropriated by the deceased person and added to his own estate or money.[21] This exception, as originally stated in the Statute of Edward, covered only the death of the injured party. However, judicial decisions have extended its application to cases where the defendant wrongdoer is the deceased; provided always, that the wrongful act resulted in both a decrease in the estate of the injured party and an increase in that of the wrongdoer.

If then, the "additional equal amount" provided in Section 16(b) is merely an incident to the main liability for back wages and takes upon itself the character of such main liability, it is contractual in nature and will survive. If, on the other hand, recovery of the "additional equal amount" be deemed to be separable and sounds in tort, it is believed that, on the basis of the reasoning applied in the above cases under the Anti-Trust Act, and action under Section 16(b) would also survive; the estate of the deceased plaintiff-employee is decreased and that of the deceased defendant-employer is correspondingly increased by the difference in money between what was actually paid and what might have been found due under Section 16(b).

PARTIES

Section 16(b) provides for three kinds of employee actions: an action by the individual employee for himself only; an action by one or more employees on behalf of himself or themselves and other employees "similarly situated"; and an action by an agent or representative of an individual employee or employees on behalf of all employees "similarly situated." The first type of action presents no unusual difficulties; the question of parties being governed by general principles of law. The second and third type have occasioned several questions; principally, the application of Rule 23(a) of the Federal Rules of Civil Procedure.

Paragraph (a) (1) of Rule 23. As indicated by Professor Moore[22] this paragraph of the rule provides for "true class actions" as the same were known at common law. The test of a joint or common right is whether the owners of the right are so related that no one of them could enforce the right, or his interest in the right, without the compulsory joinder of all of the others. Under this test both the class

[21]Patton v. Brady, 184 U. S. 608, 615, 22 S. Ct. 493, 46 L. ed. 713 (1902); United States v. Daniel, 6 How. 11, 12 L. ed. 323 (1848); Moore v. Backus, *supra* note 15; Sullivan v. Associated Bill Posters, *supra* note 18.

[22]2 MOORE, FEDERAL PRACTICE, 2236.

and the representative action provided by Section 16(b) of the act are clearly not true class actions. Normally the relationship of each employee to his employer results from a contract between the two, express or implied, and such contract is unrelated, in the rights and duties thereby created, to the contractual relations that might exist between the employer and his other employees. Any one employee could, at common law, sue his employer for unpaid compensation without being compelled to join all of his fellow employees in the action. There is nothing in Section 16(b) or in its legislative history to indicate that Congress intended to change this situation and provide for the compulsory joinder of employee claims under the act.

Paragraph (a) (2) of Rule 23. Since the class or representative action under Section 16(b) does not have for its object "the adjudication of the claims which do or may affect specific property involved in the action," obviously Rule 23(a) (2) has no application.

Paragraph (a) (3) of Rule 23. It follows that if the class or representative action provided in Section 16(b) of the act is to be brought within the purview of Rule 23(a) of the Federal Rules of Civil Procedure, it must necessarily come within paragraph 3 of that rule. While the rights of the individual employees may be several, and common relief in the form of money damages may be sought, it is by no means certain that in each case a common question of law or fact affecting the several rights will be involved. Assuming, however, that this latter qualification may also be satisfied, there would seem to be no material advantage to be gained by attempting to bring such actions within the limits of paragraph 3 of Rule 23. The judgment rendered in actions under this paragraph of Rule 23 binds only those parties actually before the court,[23] and recovery is limited to the plaintiff or plaintiffs named in the complaint and to such other employees as intervene, or joins in the suit as plaintiff, or actually designate an agent or representative to maintain the suit on their behalf.[24] As Professor Moore points out:

> "A person, who because of a common question of law or fact may be said to be a member of a class on whose behalf or against whom a spurious class suit (actions falling within Rule 23(a) (3)) is pending, may either ignore the action or intervene and become a party of record. Once having done the latter, however, he is a party to the action and whatever decree is rendered becomes *res judicata.*"[25]

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[23] 2 *Ibid.* 2291.

[24] Saxton v. Askew Co., 35 F. Supp. 519 (N.D.Ga. 1940); Tedder v. Economy Wholesale Grocery Co. (S.D. Fla.), decided January 30, 1941; Brooks v. Southern Dairies, Inc., 4 W. H. R. 191 (S. D. Fla. 1941). But *cf.* Cissel v. The Great A. & P. Co., 4 W. H. R. 135 (W.D. Ky. 1941).

[25] *Supra* note 22 at 2292.

The class or representative action under Section 16(b) is authorized by that section, and the additional authority provided in Rule 23 (a) (3) is not necessary.

When are employees "similarly situated" within the meaning of Section 16(b)? In several cases instituted by former employees on behalf of themselves and other employees of the defendant similarly situated, the defense has been made that the plaintiff, not being a present employee of the defendant, cannot be deemed to be similarly situated to defendant's present employees. This contention has been consistently overruled.[26] In *Clint v. Franklin Bargain House, Inc.*,[27] the court relied upon the opinion in *Independent Transportation Company v. Canton Insurance Office*,[28] and held that the word "employed," as used in the definition of "employee" in Section 3(e) of the act, "is a verb of past and present tense," and that "it is obvious that one who had worked and not been paid according to the act could bring the action the same as if he were still employed." The court also overruled the contention that "similarly situated" referred to defendant's other employees who are in the same class or in the same department as the plaintiff, and held that "taking the purpose of the act into consideration" the term "similarly situated" means "all employees who have not been paid according to the provisions of the act." "The act was intended to and does link together all employees who are not paid according to its provisions and as to them creates a question of common interest. Each is given the right to have his claim presented in the action of a fellow employe."

MANDATORY NATURE OF THE ADDITIONAL LIABILITY ATTORNEY'S FEES, ETC.

In several decisions under Section 16(b) it has been held that an award of the "additional equal amount" plus attorney's fees and cost is mandatory, and not dependent upon the willfulness of defendant's violations.[29] This view is supported by a comparison of Section 16(b) and Section 16(a); the latter, providing criminal penalties, expressly

[26]Tedder v. Economy Wholesale Grocery Co., *supra* note 24; Rakestraw v. Miami Bottled Gas Co. (S.D. Fla.) decided January 30, 1941; Clint v. Franklin Bargain House (Ct. of C. P., Lucas County, Ohio, No. 158,258, decided about April 1, 1941).

[27]*Supra* note 26.

[28]173 Fed. 564 (W.D. Wash., 1909).

[29]Le Fevers v. General Export Iron & Metal Co., 36 F. Supp. 838 (S.D. Tex. 1940); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (N.D. Tex. 1940); Emerson v. Mary Lincoln Candies, 17 N.Y. Supp. (2d) 851 (1940); Eichorn v. Kilkenny, 1940 Wage and Hour Manual 354 (Com. Pl., Passnic Co., N. J. 1939); Floyd v. Dubois Soap Co., 4 W. H. R. 77 (Com. Pl. Hamilton Co., Ohio); Abroe v. Linsay, 4 W. H. R. 38 (Mun. Ct. Minneapolis, Minn. 1941).

requires that the element of willfulness be established. Also the language of Section 16(b) uses the mandatory expression that the employer "shall be liable . . . in an additional equal amount as liquidated damages" and "the court . . . shall . . . award . . . a reasonable attorney's fee . . . and cost of the action" in the event judgment is awarded to the plaintiff. That Section 16(b), in providing for liquidated damages, attorney's fees, and cost to the successful plaintiff, does not contravene the due process clause of the Fifth Amendment seems to be established both by analogy to the Anti-Trust Act, *supra*, and the decisions of the Supreme Court upholding similar state enactments alleged to be violative of the due process clause of the Fourteenth Amendment.[30]

SECTION 16(A)

Section 16(a) of the act is as follows:

> "Any person who wilfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

It will be noted that the question of specific intent is material under this subsection. As a matter of record the Wage and Hour Division has only filed criminal charges in cases where the violations were flagrant, chiefly the payment of sub-minimum wages, and where the defendant has evidenced a wilful and deliberate attitude of defiance of the law. The Division has filed a total of 190 cases; convictions were secured in 145 cases while 3 defendants were acquitted. Fines imposed ranged from $1.00 to the $10,000.00 maximum. As yet the Division has not had occasion to file a second offense case and consequently no one has as yet received a jail sentence.

INJUNCTION PROCEEDINGS

The Administrator is authorized under Section 17 to bring in the federal courts an action for injunction to restrain violations of the act. The statutory action entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes",[31] provides the procedure and the usual allegations of an ordinary injunction action are included in the complaint. An added feature is the inclusion in the prayer that the decree in addition to restraining

[30]Life & Casualty Co. v. McCray, 291 U. S. 566, 54 S. Ct. 482, 486, 78 L. ed. 987 (1934), and cases reviewed therein.

[31]U.S.C.A. Tit. 28, §381.

future violations, restrain the shipment in interstate commerce of goods produced in violation of the act.

Complaints of this nature have been filed in 2,523 cases, decrees being entered in 2,512. In many instances where the employer has voluntarily agreed to make restitution of back wages to his employees and to comply with the act in the future, the Administrator has waived the "hot goods" restraint allegation and the employer has been allowed to ship his product without hindrance.

The courts have now, three years after the effective date of the act passed upon almost every conceivable legal aspect and while the several courts have often times arrived at different conclusions substantial precedent now exists on most problems of legal interpretation. The Division has maintained an excellent publicity service and is most anxious to serve, not only the employee and his counsel but also the employer, to the end that the principal objectives of the act, "the maintenance of minimum conditions necessary to the health, efficiency and general well-being of workers" may be soon universally achieved.

Law School Enrollment Drops

Law school enrollment in Colorado has been vitally affected by the war, and further drop in enrollment for the fall of 1942 is expected. "Speed-up" courses and courses on military law will not, however, be offered by the law schools in this state.

Part of the decline in enrollment in law schools seems to be attributed to causes other than the war. For the period 1938-1941 the decrease in the number of law students in the United States was approximately 13,000, or 35 per cent of the total law school enrollment in the United States.

Law school attendance for the three law schools in the region are as follows:

	Fall 1939	Fall 1940	Fall 1941
University of Colorado	129	106	76
University of Denver	78	67	56
Westminster University	85	73	67

Present enrollment in each of the three schools in the order named above is 52, 33, and 55 students respectively. It is expected that these present enrollments may drop by forty per cent by the fall term of 1942.