DICTA

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1942

The Denver Bar Association
The Colorado Bar Association
1942
Upon Information and Belief

The plan for legal internships, which has been used so successfully in Pennsylvania, is apparently receiving serious consideration by the legal profession throughout the United States. The latest state association giving consideration to the proposal is the Minnesota Bar Association, which has under advisement such a program for that state. The plan contemplates that law students or recent law graduates shall serve an apprenticeship with established law firms or law offices in order that the newly admitted lawyer familiarize himself with the practical aspects and procedure of court and office work.

The revival of interest in this proposal comes at an apt time when standards throughout the country are generally being lowered in favor of law students who are serving in the armed forces. The need for the adoption of such a plan becomes more apparent in cases of those men who are admitted to the profession without examination and, probably, in most cases, after some absence from their law school work.

It suggests an opportunity for bar associations to aid the legal profession, insuring high standards and better quality work, and to protect the public against those who may be not fully qualified to practice.

Calendar

April 6............................... Meeting of Denver Bar Association
May 9.................................. Law Day at Boulder
May 23.................................. Institute at Monte Vista
August 17......................... Meeting of the Committee on Uniform State Laws at Detroit
August 24......................... Meeting of the American Bar Association at Detroit
September 18-19 (tentative)......... Meeting of the Colorado Bar Association
We Want Dicta!

Yes, we really do. Your editors and your president have decided that your editors should have a complete set of Dicta. The point is that we don't want to publish something which we published last year. And so we have been trying, lo, these many months, to get together a full set. We have almost succeeded, but we need a few more copies. To be specific, we need Numbers 4 and 7 to 12 inclusive, of Volume 13; Number 13 of Volume 14, and Number 10 of Volume 15.

Mrs. Bouck very thoughtfully collected together the old issues which Chief Justice Bouck had saved and gave them to us. That was a great help, but we still need the numbers named above. So won't you look through your bookshelves, and if you have the missing numbers and will donate them to us, we will inscribe your name in the immortal pages of Dicta so that posterity may know of your kind and generous act.

Law Day at Boulder

The Law Day at Boulder has been set for Saturday, May 9. In past years the University has held a Law Day, an Engineering Day, a Business School Day, and so on, each being held at a different time. This year all will be held on May 8 and 9 under the name of C. U. Days which may be a pretty good idea. Years ago we had no trouble in handling those engineers, and we think we can still hold our own for a day or two. A complete program will be carried in the May issue of Dicta.

Memorial services for the late Mr. Justice Van Devanter were held in the United States Supreme Court on Monday, March 16. Attorney General Biddle presented resolutions to the court in memory of the Justice.

Must Have Been Something Serious

We are indebted to George Fischer of Brighton for pointing out to us a rather unusual provision in the printed form of Notice to Non-Resident of Probate of Will which has been in use for many years. It was "Officially adopted by the County Judges' Association of Colorado, March 18, 1904," so must be correct. Among other things, it is stated in the form "that the said decedent was, at the time of his disease, a resident of . . ."
Enforcement Provision of the
Wage and Hour Act

By Walter F. Scherer*

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 Of the Denver bar.
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. The leading example of that narrow construction of the commerce clause is *Hammer v. Dagenhart.* 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...

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*United States v. Darby Lumber Co.*, *supra*, note 2, and cases cited therein.
*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

\(^{\text{United States v. Darby Lbr. Co., supra note 2.}}\)
\(^{9}\text{Fleming v. Kirschbaum, 4 W.H.R. 171 (E.D. Pa. 1941).}\)
\(^{\text{United States v. Darby Lbr. Co., supra note 2.}}\)
\(^{\text{United States v. Darby Lbr. Co., supra note 2.}}\)
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is plain and simple no construction or interpretation is called for." The opinion of District Judge Jones in *Kuligowski et al. v. Hart* 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.

* * * *

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 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)

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11Decided by the northern district of Ohio on March 25, 1941, and unreported.
of the act, whether in state or federal courts. Also, the decision of the Supreme Court in *Erie Railroad Company v. Tompkins*, 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.

**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. 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 portion 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. 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 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*, 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*, 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.

[^19]: Cole v. Harker (W.D. Tenn.), decided October 10, 1939, and not officially reported.
[^17]: U.S.C.A. Tit. 15, §1, et seq.
[^16]: F. (2d) 1000 (C.C.A. 2nd, 1925).
[^15]: Supra note 15.
[^19]: 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. 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 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

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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, 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. 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."
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. In Clint v. Franklin Bargain House, Inc., the court relied upon the opinion in Independent Transportation Company v. Canton Insurance Office, 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 employee."

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. This view is supported by a comparison of Section 16 (b) and Section 16 (a); the latter, providing criminal penalties, expressly

26Tedder 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).
27Supra note 26.
requires that the element of willfulness be established. Also the lan-
guage of Section 16(b) uses the mandatory expression that the em-
ployer "shall be liable . . . in an additional equal amount as liquidated
damages" and "the court . . . shall . . . award . . . a reasonable at-
torney'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 de-
cisions of the Supreme Court upholding similar state enactments al-
leged to be violative of the due process clause of the Fourteenth Amend-
ment. 30

SECTION 16 (A)

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

"Any person who willfully 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 sub-
section 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 Pur-
poses" 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

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:

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<th>Fall 1939</th>
<th>Fall 1940</th>
<th>Fall 1941</th>
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<td>129</td>
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<td>76</td>
</tr>
<tr>
<td>University of Denver</td>
<td>78</td>
<td>67</td>
<td>56</td>
</tr>
<tr>
<td>Westminster University</td>
<td>85</td>
<td>73</td>
<td>67</td>
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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.
Right of Enemy Aliens and Enemy Allies to Sue

BY WM. HEDGES ROBINSON, JR.*

Since the case of *Ex parte Don Ascanio Colonna,*\(^1\) decided by the United States Supreme Court on January 5, 1942, confusion seems to exist as to the rights of enemy aliens to prosecute actions in courts in this country. Much newspaper comment on this and subsequent decisions of inferior courts has created many misconceptions regarding the effect of this decision.

In the *Colonna* case, the Italian Ambassador sought permission to file writs of prohibition and mandamus directed to a federal district court upon the allegation that a vessel and its oil cargo, which were the subject of litigation in the district court, belonged to the Italian Government and were therefore entitled to the benefit of Italy's sovereign immunity from suit. After the petition was filed, war between the United States and Italy was declared. Section 7(b) of the "Trading with the Enemy Act"\(^2\) contains among other things, the following provision: "Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war except as provided in Section ten hereof: Provided, however, that an enemy or ally of enemy licensed to do business under this act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such licenses and so long as such license remains in full force and effect, and provided further: That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

In its opinion the court points out that the word "enemy" is defined by the act to include the government of any nation with which the United States is at war. It, therefore, declined to the plaintiff the right to file or entertain the application since "war suspends the right of enemy plaintiffs to prosecute actions in our courts."

In order, therefore, to understand what the court meant by "enemy plaintiffs" reference must again be made to Section 2 of the act\(^3\) for a definition of the word "enemy." The act provides as follows: "That

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*Of the Denver bar.
\(^1\)62 S. Ct. 373, 86 L. ed. 357 (1942).
\(^3\)50 U.S.C.A. Tit. 191, §2.

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the word enemy is deemed to mean (a) any individual or corporation of any nationality resident within the territory or territory occupied by any nation with which the United States is at war, or resident outside the United States and doing business in or being incorporated in such territory; (b) the government of any nation with which the United States is at war, or any political subdivision thereof, or any officer, official agent or agency thereof and (c) such other individuals as are natives, citizens, or subjects of any nation with which the United States is at war wherever resident and wherever doing business (other than citizens of this country) whom the President may by proclamation designate as an enemy." The words "ally of enemy" are similarly defined as they apply to allies of nations with which the United States is at war. In other words, an enemy or ally of enemy to come within the terms of the act, must be an enemy or enemy ally government or its governmental agency, a non-resident alien enemy or ally, or a resident alien enemy or ally who is designated as such by the President. Hence resident enemy aliens are not enemies within the meaning of the act unless proclaimed as such by the President. To this date no such proclamation has been issued. It should also be pointed out that no restriction of any sort appears against enemy aliens to defend any suit or action. If, however, their defense is in the nature of any affirmative relief, then the provisions of the act may apply.

The confusion with which the Colonna case was first regarded is illustrated by Kaufman v. Eisenberg,\(^4\) where the New York Court at first ordered a tort action brought by a national of Germany stayed until the end of the war. Thereafter on its own motion, the court reversed itself stating that a different rule applies to cases dealing with resident enemy aliens than to cases dealing with non-resident enemy aliens. The court points out that a distinction was maintained at common law between the rights of non-resident and resident enemy aliens. The statute preserved this distinction and in addition gives to licensed enemy aliens the status of an "alien friend."

The court draws two conclusions. First, since the act is not of omnibus application and affects only the class or type of enemy alien therein proscribed, the resident enemy alien has a right to sue or prosecute in our courts until such right has been withdrawn by manifest legislative intention or presidential pronouncement. Second, the act is not intended to apply to non-commercial intercourse and since the instant suit was in tort, the status of the plaintiff was immaterial.

Prior to the Kaufman case, the federal district court in Pennsylvania on November 18, 1941, decided in the case of Verano v. De Angelis Coal Company,\(^5\) that since no formal declaration of war ex-

\(^4\)32 N. Y. Supp. (2d) 450 (1942).
\(^5\)41 F. Supp. 954 (1941).
listed at that date between Italy and the United States, a motion to stay a damage action on the ground that the plaintiff was a national of Italy and an undeclared state of war then existed between the United States and Italy, would be denied. It is not necessary that a formal declaration of war exists, the court stated, referring to Hamilton v. Mc Claughay, but a "condition of war" which is recognized by the proper political department is sufficient. The court was careful to state that if the plaintiff in that action should recover, and it "then appears to the court that a condition of war does exist between the two countries, appropriate action will be taken by the court on the basis of the facts and circumstances then existing." However, it should be pointed out that Section 2 of the Trading with the Enemy Act expressly defines the beginning of the war as "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." It would seem, therefore, that the limitations imposed by the act only apply when there has been an actual declaration of war by Congress; but this does not mean that limitations imposed on enemy aliens by common law may not be called into being in either situation.

The final decision appearing under the present re-enactment of the Trading with the Enemy Act is that of the Supreme Judicial Court of Massachusetts. In the case of Cappellote v. General Wool Company, the defendant's motion for a stay on the grounds that the plaintiff was an enemy alien was denied since the action sounded in tort and the plaintiff was a resident of the United States. Cases interpreting the act during the last war are of the same general trend. There is no doubt that the President may enlarge the definition of the term "enemy" but until he does it would seem that resident enemy aliens have free access to our courts. 8

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As Soon Come My Chake

Ray Moses of Alamosa sends us the following letter which was received in response to a request for payment of a delinquent account.

Antonito Colo Feb. 10 1942

Dear Friend I have a letter From you in what you say you Cant go so Far in my Count. Dont get so toff. I Start in my Job the third of this Month. As Soon Come my Chake I take Care in my Count. I Expect they Come Before the TWenty of this mount. You Know my Friend I was sow tight I cant send you all the amount But you wait for your money as soon they Come I send Some Money.

Your Verry Truley JOE C—————

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613 Fed. 445 (1905).
7Case No. 42587, decided Feb. 18, 1942.
8See statement of Attorney General Biddle under date of Jan. 31, 1942.
Judicial Vilification of a Blameless Juror

BY FRANK SWANCARA*

There are legal remedies against the private malefactor who commits an injury by libel or slander, but when judicial fangs make poisonous thrusts the victim has no relief and a protest might be contempt. This is "sound public policy." A judge was safe in saying to a lady witness: "... the place you are operating down there is such a dirty, low-down, and disorderly place ..."

All this is freshman knowledge, but who would expect an unprovoked judicial aspersion against the character of one juror who had acted exactly as his eleven associates?

Mr. Neild was a venireman in a homicide case, and was sworn in as a juror without objection or challenge. He was well known, previously having "been a candidate for county trustee, a circumstance well known to elicit and give publicity to every flaw and defect of character." He voted "guilty." So did all his associates in the box. The appellate court said the "evidence ... establishes a clear case of murder," and one judge said it was "a case of clear and aggravated murder."

The motion for new trial was "upon the ground that (Mr. Neild) one of the traverse jury was an atheist." This juror, because he served as such, was put upon trial. The defenders of the killer, for the killer's sake, became the prosecutors of the juror, and depended on the testimony of the Reverend Sirr. He testified that once "for the good of Neild" he talked with him, and that "... Neild did not in terms deny that there was a God. but from what he said, he (Rev. Sirr) took up the belief that he (Neild) was an atheist. ..."). The juror was defended by the witness Mason, who "said that he would have confidence in his honesty and integrity."

On review, Judge Peck held that "the evidence is full upon the point" that Mr. Neild was "an atheist," and said: "By our constitution such a person could not hold a civil office; ... Why, it may be asked. It is answered, because he cannot take an oath—he cannot be trusted."

If in Russia the tables were turned, and the "constitution" were to disqualify non-atheists to be witnesses or jurors, on the pretext that

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1Note, L.R.A. 1915E 1051.
2Young v. Moore, 29 Ga. App. 73, 113 S. E. 701 (1922).
3McClure v. State, 1 Yerger (Tenn.) 206, 213 (1829).
4Ibid. p. 220.
5Ibid. p. 212.
6Ibid. p. 215.
they "cannot be trusted," it is easy to guess what would be said about it. The Tennessee constitution, to which Judge Peck referred, has this clause:

"No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."

It would not be difficult to make up a list of eminent men who could not be Tennessee jurors, if residing in that state, because of private denial of, or non-belief in, "a future state of punishments."

Judge Peck said that "the constitution has pointed her artillery against" atheists. True, but the "artillery" aims against non-believers in "a future state of punishments" also. The judge in question exhibited no regret for his judicial conclusions. Evidently he rejoiced, for like Brutus, not satisfied with one stab, he added:

"This person called as a juror had no moral capacity to be bound by the obligation of an oath. . . . He was an evil genius, in a sacred place."

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**Larimer County Bar Meets**

The Larimer County Bar Association met at Fort Collins, March 3 to hold its annual meeting and elect officers. Winton M. Ault of Fort Collins was selected president; Hatfield Chilson of Loveland, vice-president, and Jerome Smith of Fort Collins, secretary-treasurer. The first member of the Larimer County association to be called to the army was Robert McCreary of Loveland, who was presented by the association with an engraved rabbit's foot.

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**Tough Break**

Among the defendants charged with violating the Volstead act were a husband and wife, both Italians. The wife insisted that she alone was guilty and that her husband, who had suffered other convictions of like nature, was innocent. The husband pleaded not guilty, and since the evidence against the husband was very weak, Judge Symes discharged the husband, and sentenced the wife to thirty days in jail.

As soon as the court adjourned, the husband was out in the hall cursing Judge Symes. One of the district attorneys went over to the man and told him that he had better cease, and moreover the fellow should feel lucky that the judge had not given his wife a stiffer sentence.

"That's just the trouble!" complained the man bitterly. "I had it all fixed up with my sweetie to come up to the house while my wife was in jail. And that . . . judge only sentenced her to thirty days!"
American Bar Reports on Income Tax Amendment to Avoid Accrual Method in Death Cases

It cannot be doubted that the decisions in the case of Helvering v. Enright,\(^1\) and Pfaff v. Commissioner of Internal Revenue,\(^2\) if left unlimited by legislation, will result in great hardships upon the dependents of lawyers, doctors and other professional men, and of all taxpayers whose income consists largely of compensation for personal services not immediately paid for. Section 42 of the Internal Revenue Code requires that upon the death of taxpayers who have made Federal income tax returns on the basis of cash receipts (which is the basis used by nearly all individuals), the return for the year in which death occurs shall include "accrued" income as well. The result of the Supreme Court decisions above cited is that all uncollected and even undetermined compensation for personal services is to be included, at a valuation fixed (subject to review) by the Treasury Department.

While the two cases cited happened to involve the estates of members of partnerships, and certain specific objections to the tax were based upon partnership sections of the Internal Revenue Code, the results are by no means limited to members of partnerships but are fully applicable to lawyers practicing as individuals. Numerous decisions of the lower courts and Board of Tax Appeals since the Enright and Pfaff opinions were handed down, show the lengths to which the doctrine of those cases will be carried. In Estate of Geo. W. Wickersham\(^3\) (former U. S. Attorney General and member of Cadwallader, Wickesham & Taft), the "accrued" additional items upon which income taxes were assessed included more than $78,000, "in connection with which no agreement with the client as to the amount of compensation existed at the time of decedent's death, and no other facts existed at that time from which it was possible to ascertain definitely the amount of the fee which would be charged or collected."

In Estate of Lewis Cass Ledyard, Jr.\(^4\) (member of Carter, Ledyard & Milburn), the additional assessment of tax by the Commissioner was more than $300,000, although this was reduced somewhat by the Board, which allowed credit for a liability which was undetermined at the time of death.

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\(^*\)Article prepared by Frank M. Cobourn of Toledo, member of the firm of Welles, Kelsey, Cobourn & Harrington, under the auspices of the Taxation Section of the American Bar Association.

\(^2\)312 U. S. 646, 61 S. Ct. 783, 85 L. ed. 1099 (1941).
\(^3\)44 B. T. A. 619.
\(^4\)44 B. T. A. 1056.
A computation of the additional income tax liability upon the
estate of a lawyer dying November 1, 1941, with an annual net income
of $30,000 ($25,000 for the 10-months' period) and having uncol-
clected and undetermined fees amounting to $45,000, shows additional
income tax on the $45,000 which was not actually received, of nearly
$26,000. When it is realized that the fees for such services are un-
determined and uncollected and that there may be very considerable
uncertainty and delay on both counts, and that the determination by
the Treasury Department is likely to be at least a reasonably generous
valuation, the extent of the hardship is apparent.

Even in cases involving much smaller amounts, the liability is
likely to be unreasonably high, and the requirement of arranging for
cash payment may make necessary the sale of other assets of the estate
at a sacrifice. For example, with an annual income of $6,000 ($5,000
for the 10 months) and uncollected fees valued at $10,000, the ad-
ditional income tax on the amount not actually received is about $2,360.

A great many lawyers, recognizing the severe and seemingly unfair
tax burdens resulting from this situation, and believing that Congress
never intended that Section 42 (which was adopted in its present form
in the 1934 law) should be so interpreted, have written to the Treas-
ury Department and to members of the House Ways and Means Com-
mittee and Senate Finance Committee, seeking some reasonable relief
by amendment of the section. As a result of the report of its Federal
Income Tax Committee and other memoranda and correspondence on
the subject, the Tax Section of the American Bar Association, at its
meeting in Indianapolis early in October, 1941, unanimously recom-
mended an amendment as follows:

"Sec. 42. Period in Which Items of Gross Income Included. The
amount of all items of gross income shall be included in the gross income
for the taxable year in which received by the taxpayer, unless, under
methods of accounting permitted under section 41, any such amounts
are to be properly accounted for as of a different period. In the case of
the death of a taxpayer there shall be included in computing net income
for the taxable period in which falls the date of his death, amounts
(other than undetermined amounts for personal services) accrued up
to the date of his death if not otherwise properly includable in respect
of such period or a prior period."

The change from the present law consists of the insertion of the
parenthetical clause which appears in italics. The explanation made
in the American Bar Association Tax Section's report reads as follows:

"The above Resolution proposes a change in Section 42 of the
Internal Revenue Code which, in its present form requires the inclusion
in the last income tax return of a decedent of amounts of income 'ac-
crued' up to the date of his death. This provision has been interpreted
so as to expand the concept of accrual to include items which are unas-
certained and uncertain in amount and which the decedent's estate may
never become entitled to receive. As a result large amounts of income
are being taxed in the last return of a decedent at a time before the
executors have received the money with which to pay the tax and be-
fore it is determined that the estate will ever receive the money. The
situation is particularly aggravating in cases where the income of a
decedent is income from professional personal services, such as attorneys'
fees, doctors' fees, etc. The proposed Resolution recommends that un-
determined amounts for personal services be excluded from the last return
of a decedent.”

This recommendation, as part of the Taxation Section's report,
was approved and recommended by the House of Delegates on behalf
of the American Bar Association. At the meeting of the Ohio State
Bar Association in Toledo October 23rd last, the Taxation Section by
the unanimous vote of those present approved the amendment as previ-
ously recommended by the American Bar Association, and this action
has now been approved by the officers and Executive Committee of the
Ohio State Bar Association. It is submitted for the consideration of
Ohio lawyers with the suggestion that those approving it do what they
can to influence officials of the Treasury Department, Representatives
and Senators to approve and enact this amendment or similar remedial
legislation.

Other forms of amendments have been submitted and several were
carefully considered by members of the Tax Section of the American
Bar Association, but the one which was approved, as above set forth,
seemed most desirable because of its simplicity and the fact that prac-
tically all it undertakes to do is to revise the concept of accrued income
within limits which probably go as far as Congress intended when Sec-
tion 42 was changed to its present form. The amendment in no way
changes or interferes with the basic purpose of that section, which is
that all actually accrued income should be subject to tax at some proper
time, but merely eliminates from tax as not being "accrued," certain
items which have never been looked upon as income, and as a practical
matter are not such prior to or at the time of decedent's death.

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Denver Bar Association to Hear Address
on Price Control Act of 1942

The next regular monthly meeting of the Denver Bar Association
will be held on April 6 at 12:15 p. m. in the Chamber of Commerce
dining room. The principal address will be given by John A. Carroll,
Regional Attorney for the Office of Price Administration, on the sub-
ject, "Legal History and Analysis of the Emergency Price Control Act
of 1942."
The Unfortunate Fate of the Peroxide Blond

BY IVOR O. WINGREN*

The advocate of the story-book and play is a master of cross-examination. Always he slowly, methodically and unmercifully entangles the witness in a maze of actual or apparent contradictions. Laymen are impressed by his skill, and many lawyers are forced to yield him their admiration. Even more they are forced to envy his in-varying success. But as every trial practitioner knows, the hot breath of cross-examination, if carried too far, may produce an explosive backfire, equally fatal to the equanimity of the cross-examiner and the cause of his client. And such was the unhappy experience of the unfortunate Mr. McCoy.

Harry McCoy had been making money, but according to the government, his product was not the "real McCoy." As the trial opened and he sat at the table with his youthful counsel, he presented a strange sight indeed. He was a large man, tall and well built. His face was adorned with glasses and a long black mustache. But the most startling feature about him was his abundant golden-yellow hair.

Harry was a graduate of the Wyoming state penitentiary at Rawlins where he had studied the art of counterfeiting, and under some very capable teachers, too. The one weakness of the course, though, was that it was necessarily theoretical. Laboratory work was not permitted. But when Harry was discharged from the penitentiary, he sought to remove this deficiency. He immediately moved in with his brother Leonard in Denver, and the two decided to put into practical application the education which Harry had so recently acquired.

At that time one of the larger dealers in chemicals maintained its sales office within half a block of the Post Office Building. And the Post Office Building housed not only the post office, but also the office of Mr. Rowland K. Goddard, United States Secret Service Supervising Agent. Goddard had developed, and still possesses, a strong aversion, amounting almost to an obsession, against counterfeitters. But along with his obsession, he had developed an idea. He reasoned that it might be easier to trace the materials as they went into the counterfeiter's plant than to trace the counterfeiter's products back to his plant. And so he made an arrangement with his neighbor the chemical dealer.

*Of the Denver bar and Assistant United States Attorney.
The dealer sold a wide variety of chemicals, and it was not uncommon for customers to inquire as to the effects of different chemicals on various materials. But the clerks were shrewd and could usually sense whether the customer was an honest citizen, intent only on the most effective use of his purchase in a legitimate enterprise, or whether he was seeking information for an unlawful purpose. They were particularly vigilant when confronted by soft spoken inquiries concerning the effect of certain chemicals on copper plates, and even more so when the inquiry was followed by an order for those chemicals. In those cases the desired chemical was always in the farthermost corner of the basement and a considerable time was consumed in securing and preparing the order. In the meantime the clerk would telephone Goddard of his suspicions and allow sufficient time for Goddard or one of his men to come up the alley, enter the salesroom from the rear and have a good look at the customer. Then if all went well, when the customer reached his home or plant, Goddard's man would be not far behind.

Harry McCoy had studied diligently his course in counterfeiting, but he had not learned to demean himself as an honest man. And because of that, when he finally secured his purchase, stepped out of the salesroom of the chemical dealer and walked to his home, Goddard's man watched him every step of the way. Likewise a close acquaintance of Mr. Goddard's was not far away when Harry purchased green ink at one place, a printing press at another and, at still another, copper plates of the variety used by engravers.

Goddard waited until he felt that the business had progressed far enough, and then, with a proper search warrant, he and his agents searched the McCoy residence and found, not only a complete counterfeiting plant, but also counterfeit bills in all stages of manufacture. Some were completely finished and ready for passing. They also found Leonard McCoy, but Harry was nowhere to be found. He had taken a trip and was out of town. Leonard was arrested, promptly pleaded guilty and told the whole story.

That was in the spring, and Harry was not apprehended until a few days after the court recessed from jury trials for the summer. Because he had not been caught red-handed, and because he was more experienced in the ways of crime than his brother, he decided to plead not guilty and take his chances with a jury. He was unable to provide bond so was sent to jail for the summer.

At that time both the warden of the jail and the United States marshal had one thing in common. Both thoroughly enjoyed a practical joke. One might suspect that even the occasional acquittal of an
accused was, to them, perhaps not too great a price to pay for the fun which they created for themselves.

The case came on for trial in September. The defendant had no money, not even any that he had made himself, with which to employ an attorney, so in accordance with the prevailing custom, one of the younger members of the federal bar was appointed to defend him. The government's case was in the hands of the Assistant United States Attorney.

Harry McCoy was brought in by the marshal and seated at the table of his youthful counsel. As the marshal turned to leave, he grinned at the Assistant United States Attorney.

"Harry McCoy has got a surprise for you." That was all he said.

One of the government's principal witnesses was the clerk for the chemical dealer. He testified concerning the chemicals purchased by the accused and the inquiries which the accused had made at the time. He also testified that the man sitting at the table with the counsel for the defendant was the same man who had made the purchase and inquiries.

Counsel for the defendant lost no time in his cross-examination.

"Did the man who bought these materials from you wear glasses?"

"No."

"Did he have yellow hair?"

"No."

"Did he wear a mustache?"

"No."

The prosecutor was visibly disturbed. This was serious. Was this the surprise the marshal had told him about? He began to think of the witnesses he would have to call to prove the changes that McCoy had made in his appearance.

The young defense counsel rushed in for the kill. "How, then—," and he swept his arm majestically toward the accused. "How, then, can you say that this man purchased those materials?"

A hush came over the court room as the witness looked calmly at the accused.

"See those ears? I could never forget those ears!"

With one accord every person in the court room looked at the defendant's ears and burst into laughter. They were enormous. Few had ever seen ears so large.

It was then disclosed that the defendant had grown the long black mustache during the summer he had spent in jail and that during the same time the marshal and warden had permitted him to obtain peroxide with which to bleach his hair.

Oh, yes, the verdict. Guilty. It took the jury fifteen minutes.
Nolo Contendere?

One of the most delightful books about lawyers is the autobiography of John C. Knox, *A Judge Comes of Age*. In it he relates many of his experiences on the bench. One of the most interesting stories concerns the cross-examination of a "rotund, cherubic, soft-voiced and lisping" Negro who was testifying against his former companions in a mass bootlegging trial. After a series of vilifying and brow-beating questions directed to this witness, by one of defense counsel, each of which boomeranged, "the attorney," recounts Judge Knox, "certain now that he had as yet failed to create the impression before the jury for which he had hoped, decided to make one more effort. It seemed to me that I saw certain signs of desperation. The lawyer pointed dramatically at the Negro.

"'For what else have you been arrested?' he demanded.
"'Well, suh,' came the soft reply, 'theah's nothin' Ah kin recollect.'
"'Do you mean that?' shouted the lawyer.
"'Yes, suh. Ah means whateveh Ah says, suh.'

"With a solemn manner and a deep voice the lawyer offered another question.
"'Do you mean to tell this court and jury that you were not arrested for rape?'
"'Oh, yes, suh,' he smiled. 'Ah clean forgot 'bout dat. It jes' slipped mah mind.'

"'And what did you get for that?' shrieked the lawyer.
"I listened intently for the answer, and so, I am sure, did every juror. Yet the Negro's manner did not change an iota, and his voice, if anything, grew still softer.
"'Married,' he replied.'

Mesa County Bar Acts on Important Matters

The Mesa County Bar Association met in February to form plans whereby a committee on standards for title options would be formed. The tentative plans formulated by the association contemplate that the procedure will be on lines similar to that used by the Denver committee. The association also is directing the purchase of the county law library which was established at Grand Junction a number of months ago under the authority of recently enacted legislation. Plans have been made to purchase about 1400 volumes of the Reporter System as a start for the county library.

At its annual meeting the Association elected Cecil S. Haynie president and Lincoln D. Coit secretary for the coming year.
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