"What I want to know specifically, Counsellor, is whether I should sign this lease with my landlord in view of Clause 16?"

"Well, that all depends. As I understand your situation, you propose to operate a clothing factory on the 5th floor of the Record Building. Clause 16 in express terms purports to release Mr. Record from any liability for negligence in maintaining plumbing and other fixtures."

"Correct. Suppose Mr. Record permits the water pipes on the 6th floor to fall into disrepair and to burst. They might flood out and ruin thousands of dollars worth of my clothing and supplies. Would I have any recourse against him in such case?"

"Unless Clause 16 violates public policy, no."

"Well, will that Clause hold up in a Court of Law?"

Granted that the above dialogue is an imaginary interview, nevertheless it is typical of the numerous commercial questions which confront practicing lawyers today. That, in itself, is not significant. What is significant is that lawyers recently returned from the wars, cannot decide such bread and butter problems relying merely on recollection of general legal principles. Undoubtedly, in the hidden recesses of our minds is stored the dogma that one cannot effectively contract away liability for his own negligence. On the other hand, in 1944 the Pennsylvania Supreme Court held that just such a clause was binding and prevented the lessee from recovering against a landlord who had negligently permitted his pipes to burst and to flood out the tenant’s clothing supplies. Yet, that general principle is not entirely

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untrue. Common carriers, at least, cannot immunize themselves from liability for negligence. See *Villari v. James.*

The point is that returning lawyer veterans simply cannot resume the practice of law, even bread and butter law, as though there had been no change during the war years either in the decisions or themselves. Moreover, to many veterans, recollections of even fundamental principles of law have become hazy and confused. Time away from the law office alone has not caused this. For some, war experiences have even eradicated memories of legal principles. The returning veteran's task is, therefore, to reacquire his general background of the law, and at the same time to understand the changes which have taken place during his absence.

Moreover, the ultimate mission of the returning lawyer is not to solve academic queries for scholastic grades. It is to answer clients' questions arising from day to day for fees. Obviously, these answers must be correct. The consequences of mistake may be slightly more tragic than examination failure.

Perhaps the most commonplace situations arise in the field of commercial transactions. Consequently, successful rehabilitation in the law may depend upon how well the lawyer veteran represents his clients who are actively engaged in business. Particularly is this so in an era of expanding economy.

A realistic approach to a "refresher" article demands that attention be focused upon the function which the lawyer veteran is called upon to perform. What is his task? In the field of commercial transactions, he acts in two capacities. In the area of agreement, he serves as draftsman of the contract. In the area of disagreement, he acts as counsel for a disputant. Fundamentally, there may not be a great difference. But functionally, there is a difference. To give high quality counsel while serving as draftsman of an agreement, specific factors should be considered! These are basically the same as those which normally determine the result once a dispute over an existing agreement arises. The analytical approach differs, though. It is doubtful whether lawyers who continued their practice, uninterrupted by the war, have articulated their method of analysis of contract problems. For lawyer veterans such articulation may be helpful. Exposition of the method of analysis also reveals the basic differences in the approach where the function is draftsmanship rather than advocacy. Most veterans are familiar with "check-off lists." To meet the issues arising in the field of commercial transactions, the following check-off list is suggested:

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A. For the lawyer acting as a draftsman, these factors must be considered:

1. Are the parties legally bound?
2. If so, are they bound in accordance with the deal?
3. Will the agreement stand up under attack?
   (a) by the other parties to the contract?
   (b) by creditors of either party?
   (a) The conflicts rule of what state is likely to be applied in the event of a dispute?
   (b) What is the place of contracting?
   (c) What is the place of performance?
5. Assignability.
   (a) To what extent are rights transferable?
   (b) To what extent are duties delegable?
   (a) To what extent may or must either party proceed with or cease performance?
   (b) What legal steps are required to secure a substitute for performance?
7. What language should be inserted and what should be excised from written contracts?
   (a) What are the relevant business and human factors?
   (b) What are the recent relevant decisions?
8. What are the tax consequences?

B. For the lawyer acting as an advocate, these factors must be considered:

1. In a multi-state situation, what law governs?
2. Is there a valid contractual obligation?
   (a) Formal requisites (offer, acceptance, consideration).
   (b) Defenses (lack of contractual capacity, illegality, duress, undue influence, fraud, mistake, statute of frauds).
3. Assuming that a contract came into existence, what does it mean (canons of construction, parole evidence rule)?

4. What are the rights and duties of the parties under the contract?
   (a) Who can sue or be sued thereon?
      (1) Fiduciaries and representatives.
      (2) Assignees.
      (3) Joint obligees and obligors.
      (4) Third party beneficiaries.

5. Performance or breach of contract:
   (a) Was there a breach of condition or a breach of promise?
   (b) If an arbitration clause exists, how does it operate?

6. Modification, merger or rescission.
   Was the original agreement later changed effectively?

The purpose of the above outline is to direct the lawyer's inquiry into channels which otherwise might be passed by. For instance, the conflicts question has achieved even greater significance during the war years. The Supreme Court of the United States, not so long ago, reversed a Circuit Court decision because the wrong choice of a conflicts rule was made. It is now settled that a federal district court must apply the conflicts rule of the state in which it sits. Thus, in an action tried in the eastern district of Pennsylvania, involving diversity of citizenship and in which the contract contains multi-state aspects, the trial judge must apply the Pennsylvania rule of conflicts. Under this rule, validity and interpretation of a contract are governed by the law of place of contracting. Questions of performance, including measure of damages, are controlled by the law of the place of performance. A Pennsylvania client enters into a contract with a resident of New Jersey. Properly to advise him, a choice of law must be made. This ought to be done in advance of any dispute. By careful stage-handling the last act necessary to bring the contract into existence may be made to occur in Pennsylvania—if that result is desired. When it comes to performance, which is after all, the raison d'être of the entire deal, the stage-managing is not so easy. Moreover, it may be

rather difficult after the controlling events have occurred to determine exactly where the place of performance was.\textsuperscript{7}

Apart from the conflicts question, there is the inevitable tax problem. So far as the draftsman is concerned, a difference of methods of achieving the desired commercial result may be critical in determining taxability. I am not so much referring here to nuances in language. The federal courts have just about eliminated "devices" to evade, or escape taxation.\textsuperscript{8} Nevertheless, within the area of honest business transactions a choice of modus operandi may influence taxation. It might be more profitable to forego certain benefits, because of lesser resultant taxation. Giving up such benefits makes sense. Moreover, it is not dishonest. Here, stage-direction may be effective.\textsuperscript{9}

Standard forms are bound to make their appearance—and very soon indeed after resumption of practice. Unfortunately most forms are inflexible and do not reflect changing business conditions. In considering the many unfair and inapplicable provisions to which your client may be subjected, a knowledge of the business aspects of the deal is essential.

In most cases, the critical question is concerned with the factors influencing supply and demand at a given time. Knowledge of your client's business is essential if you would venture economic advice. And, clients frequently expect economic counsel. More than one lawyer commands healthy fees because of his "smart" business counsel.

In most situations, an awareness of recent decisions is necessary. Many clauses are inserted in standard forms without benefit of judicial approval. In litigation resulting from time to time, such approval may be expressed or denied. Decisions may extract the teeth from certain form provisions. Conversely, new meaning may be found in them, as witness the clause relieving a landlord from the consequences of his own negligence; referred to in the imaginary interview.

Whether the contract is essentially a pot-boiler out of a standard form book or one custom tailored for the occasion, the give and take in addition and deletion of provisions depends largely on the human factor. Many a deal has been torpedoed because a party—or his lawyer—indulged in luxurious "face-saving." Though this is no place to analyze the numerous human factors that must be contended with,\textsuperscript{7}

\textsuperscript{7} See, for example, Texas Motorcoaches, Inc. v. A. C. F. Motors Co., id. at 93.


\textsuperscript{9} For example, a contract legitimately calls for two annual payments. Obviously, the tax rate to the payee is less than if the entire sum were paid in one advance. Yet, the payee must give up the benefit of the advance payment. Value of the use of this "cash might in many circumstances exceed the additional tax. See, generally, PAUL, \textit{STUDIES IN FEDERAL TAXATION} (1937) 9, setting forth a "Restatement of the Law of Tax Avoidance."
a few may at least be mentioned. Above all, the need to know your own client is obvious. His insistence on the solution of insubstantial details his way might jeopardize the entire transaction. It is well to point this out to him before the formal negotiations begin, certainly before settlement. Similarly, one ought to know the temper of the other party and, of course, his lawyer. And, many colleagues have affirmed the principle that the avoidance of issues over minor unessential points is paramount.

Take this as an illustration of the human factor involved. I was once asked to sign a form lease. The landlord was a rough and ready character, a former plumber. Very neatly, I lined out 27 or 32 printed clauses, handed the lease back to him and asked for his signature. "You know," he told me, "in 17 years of renting apartments, you're the first tenant who ever read one of these papers. I haven't read one through yet." He signed.

The check-off list set forth herein should at least stimulate thinking of specific matters which must be considered carefully in resuming the practice of law, particularly in the field of commercial transactions.

Its use is suggested only as an aid in the analysis of actual contracts cases. For sound hard thinking—at any stage of a lawyer's performance of his mission—is still paying handsome dividends.

III

Surprisingly enough, the digests reveal approximately 500 contracts and related cases in the Pennsylvania Appellate reports for the past five years. Obviously, not all of these decided novel, or even difficult—or interesting—questions of law. For example, several times the courts have had to lecture the bar on the distinction between failure of consideration and want of consideration as a defense to an action on a sealed instrument.¹⁰

In most instances, old principles have been applied to new fact situations. Yet, there have been some new developments. And of significance are certain evident trends.

Promissory Estoppel and Consideration

In Fried v. Fisher,¹¹ the Court, applying section 90 of the Restatement of Contracts enforcing a release which was otherwise unsup-

¹⁰. It is usually stated in this fashion: Want of consideration is no defense to an action on a sealed promise. Failure of consideration is a defense, even where the promise is under seal. If no consideration was ever intended the situation is labelled "want of consideration." If valuable consideration was contemplated but did not materialize the situation is labelled "failure of consideration." See Shinn v. Stemmler, 158 Pa. Super. 350 (1946); Independent Coal Co. v. Michalowski, 349 Pa. 349 (1944).

¹¹. Restatement, Contracts (1932) §90. This section provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a
ported by consideration.\textsuperscript{13} Any hope, or fear, that this forecast the
 doom of the doctrine of consideration in Pennsylvania was quickly
 dispelled by subsequent decisions. Thus, in \textit{Stelmak v. Glen Alden
 Coal Co.}\textsuperscript{14} and \textit{Volkwein v. Volkwein},\textsuperscript{15} the Court refused to apply
 section 90 to the particular fact situation before it.\textsuperscript{16} If a gener-
 alization is to be drawn, it is: Section 90 cannot be exploited.
 To expect the Court to apply the doctrine of promissory estoppel, there
 must be proof of a clear cut action taken in reliance on the promise
 and which would result in real financial harm if the promise were not
 enforced. Thus, in \textit{Fried v. Fisher, supra}, the promisee entered into
 an entirely new and different business on the strength of the contro-
 versial promise (release). In neither of the other two cases does it
 appear that the promisee took any substantial action in reliance on
 the promise. The issue thus gets down to a factual question in these
 cases. Moreover, there must be no confusion with the past considera-
 tion cases. It is well established that services rendered in the past may
 support a promise to pay for them and future services.\textsuperscript{17}

Before leaving the topic of consideration, though it is not other-
 wise \textit{a propos} here, reference will be made to \textit{Thomas v. R. J. Reynolds
 Co.},\textsuperscript{18} since it appears to be a case of first impression in Pennsylvania.
 It deals with the question of a novel idea as consideration for a promise.
 In 1934 the plaintiff wrote an unsolicited testimonial letter to the
 Reynolds Co. in which he stated that according to his tests Camels are
 only one-half consumed when other brands are smoked out. He
 offered them full use of his testimonial “provided you will recompensate
 me for my idea and test submitted.” The tobacco company never

\textsuperscript{13} A and B were partners in the florist business. A desired to enter the restau-
 rant business in another city provided the landlord would release him from further
 liability on the lease. This the landlord did. Relying on the release, A became a
 restauranteur and an ex-florist. After B defaulted, the landlord sued A, who pleaded
 the release. The landlord contended the release was not binding because of want of
 consideration.

\textsuperscript{14} 339 Pa. 410 (1940).

\textsuperscript{15} 146 Pa. Super. 265 (1941).

\textsuperscript{16} The \textit{Stelmak} case involved a controversy between the owner of surface
 land and a coal company which mined out the coal underneath, causing a subsidence.
 The surface owner sued in assumpsit alleging the coal company asked for permission to
 shore up his house, promising to make necessary repairs if, despite the shoring, a set-
 tlement occurred. After the surface owner permitted the coal company to shore up
 his house, it settled. \textit{Held:} Coal company not liable.

\textsuperscript{17} Pohl's Estate, 136 Pa. Super. 91 (1939) and Szusta v. Krawiec, 144 Pa. Super.
 530 (1941), in both of which \textit{past} consideration made the subsequent promise enforce-
 able.

\textsuperscript{18} 350 Pa. 262 (1944).
replied. Four and one-half years later Camels advertised, “Penny for penny, your best cigarette buy. 25% slower burning.” The plaintiff sued in assumpsit claiming two hundred and fifty thousand dollars damages for breach of contract. In denying liability the Court laid down these tests: The idea which is asserted to be consideration must be (a) concrete and not abstract and (b) novel and not old. Here the defendant’s evidence showed that it had made comparable tests prior to the receipt of plaintiff’s letter and that in any event others had written to it before the plaintiff about the same idea. The interesting fact to note is that the Court does not define “concrete” and “novel” but rather expressly allows each case to be decided on its particular facts. This is a virtual invitation to further litigation.19

SANCTITY OF WRITTEN AGREEMENTS

The desire to uphold and enforce written agreements persists strongly. A rather heavy burden rests upon one who seeks to avoid the consequences of non-performance of a contract on the ground that it is violative of public policy. Thus, in Forbes v. Forbes,20 the Superior Court stated that judgment will not be given on the pleadings in favor of a defendant who seeks to avoid liability for non-performance of a contract because allegedly it violates public policy. The jury is to inquire into the entire matter.21 When the contract is valid on its face, the burden is on the defendant to show its invalidity.22 Reference has already been made to the sanctioning of a release of liability for negligence. In agreements not to compete, the court will expend considerable mental effort to uphold the contract. By construction, it is to be held legal, if possible. To do so, clauses are held “separable” and enforced.23 Moreover, even when a particular provision is illegal, the invalid clause will be disregarded so long as that will not defeat

22. Forbes v. Forbes, 159 Pa. Super. 243, 246 (1946), cited supra note 20. This case goes far in upholding an alimony and property adjustment between warring husband and wife as a “family settlement.” “Bona fide agreements relating to alimony or the adjustment of property rights between husband and wife, though in contemplation of divorce will be upheld if not directly conducive to the procurement of a divorce.” Quaere, where does “contemplation” end and “collusion” begin? Evidently, so long as the agreement contains the vital provision that it is “without prejudice to the right of either party to contest any divorce proceeding instituted,” the cry of “illegality” will remain unheard. This appears to be another fiction which achieves a “realistic” result.
the primary purpose of the bargain and provided the plaintiff is un-
tainted by "moral turpitude", the rest of the contract will be
enforced.\textsuperscript{24}

Sharply in contrast are cases dealing with the degree of proof
necessary to escape from a written agreement because of alleged fraud.
It has become bromidic in Pennsylvania that to void a written con-
tract on the grounds of fraud, the proof must be "clear, precise and
indubitable."\textsuperscript{25} It now appears that where the Court believes, from
the "surrounding circumstances," that actual fraud existed the writing
will be set aside even where the proof of fraud is oral testimony con-
tradicted by the other party.\textsuperscript{26} Otherwise, the "parole evidence" rule
of \textit{Gianni v. Russell} seems to be in full force and effect.\textsuperscript{27}

**Third Party Beneficiaries**

In the field of third party beneficiary cases, Pennsylvania law
has made the complete swing of the pendulum from the \textit{Greene County}
decision.\textsuperscript{28} In 1933, the Pennsylvania Annotator of the Contracts
Restatement began his comments on third party beneficiary cases thus:
"The law of Pennsylvania is very much confused on this topic." With
the assistance of the Restatement, since 1933 the appellate courts

\textsuperscript{24} Thus, in Forbes v. Forbes, 159 Pa. Super. 243, 246 (1946), cited \textit{supra} note
20, the husband pledged his future earnings as security for his promise to make periodic
payments. This was contended to be illegal. The Court pointed out that here the
husband had been paying, the suit was on the promise to pay and therefore the secu-
ritry provision was not yet in issue. If this "provision were illegal, which it does not
appear to be, it would not affect the right of the plaintiff to recover in this suit," citing
\textit{RESTATEMENT, CONTRACTS} (1932) \S 603.

\textsuperscript{25} See, for example, Brehn v. Brehn, 347 Pa. 271 (1943), where such proof was
found to exist. See also Bieranowski v. Bieranowski, 345 Pa. 447 (1942).

\textsuperscript{26} See in addition to Bieranowski v. Bieranowski, \textit{ibid.}, William Goldstein Co. v.
Joseph J. and Reynolds H. Greenberg, 352 Pa. 259 (1945). In this case Chief Justice
Maxey applies the doctrine of \textit{Meinhard v. Salmon}, 249 N. Y. 458 (1928), to joint
real estate operators, holding that a "fiduciary duty" is owed to each other while the
enterprise continues. Apart from the fiduciary duty, non-disclosure is fraudulent when
a fact is known by one party but not the other and is so vital that if the mistake were
mutual, the contract would be voidable and the knowing party also knows that the
other party does not know. See \textit{RESTATEMENT, CONTRACTS} (1932) \S 472.

\textsuperscript{27} 281 Pa. 320 (1924). Where an examination of a written contract shows that
the agreement is apparently complete without any uncertainty as to the object or ex-
tent of the engagement, it will be conclusively presumed that the parties have put their
whole engagement in writing. In the absence of fraud, accident or mistake, the con-
tract will be so treated and parole evidence to add to or substract from it will not be
admitted. First National Bank of Scranton v. Payne, 349 Pa. 446 (1944). In the fol-
lowing situations parole evidence will be admitted:

(A) Subsequent (as distinguished from "contemporaneous") oral agree-
ments: Nat. Bank of Fayette Co. v. Valentitch, 343 Pa. 132 (1941);

(B) Ambiguous or obscure writings: Pennsylvania Co. v. Wallace, 346 Pa.
532 (1943).

Super. 301 (1945).

\textsuperscript{28} Greene County v. Southern Surety Co., 292 Pa. 304 (1927), in effect overruled
have brought the Pennsylvania law of third party beneficiaries clearly in line with views generally accepted throughout the country. Thus, the right of a third party beneficiary to recover extends even to actions based on sealed promises.\(^9\) Originally, the Court was reluctant to label a particular third party beneficiary as a "donee" or "creditor" beneficiary.\(^0\) Certainly, this reluctance is justified where the distinction is academic. But in a recent case the rights of the parties depended upon whether the third party beneficiary was a "donee" or "creditor." The situation involved the familiar owner-contractor-materialman triangle. First, a stipulation against mechanics liens was filed. Next, owner exacted a bond extending to all provisions of the contract, which included a duty to provide and pay for materials. Materialman supplied materials. Owner then changed his contract with contractor. In a suit by materialman against the surety, the chief defense was the familiar principle that a variation of the main contract discharges the surety.\(^1\) Admittedly, this rule effectively bars the owner from recovery against the surety. If materialman was a "creditor" beneficiary, he too would, except under certain conditions, be barred from recovery against the surety.\(^2\) But, as a "donee beneficiary," his rights immediately became effective and were so "vested" as to be beyond the power of owner, contractor or surety.\(^3\) The Court found that materialman was a "donee" beneficiary and permitted recovery.\(^4\)

29. Philipsborn v. 17th & Chestnut Holding Corp., 111 Pa. Super. 9 (1933), relying on Restatement, Contracts (1932) § 134. See also Brill v. Brill, 282 Pa. 276 (1925) in the confused pre-Restatement era. Kephart, J., in Greene County v. Southern Surety Co., 292 Pa. 304, 317, cited supra note 28, was positive that "one not a party to a sealed instrument cannot sue on it."

30. Thus the plaintiff was allowed to recover in the Philipsborn case, ibid., as a "third party beneficiary." There may be an historical reason for this reluctance to choose between calling a third party beneficiary a "donee" or "creditor." Early Pennsylvania law denied recovery in most instances to creditor beneficiaries but sometimes permitted recovery where the plaintiff was found to be a donee beneficiary. Cf. Blymire v. Boistle, 6 Watts 182 (1837) with Tasin v. Bastress, 284 Pa. 47 (1925). See Corbin, The Law of Third Party Beneficiaries in Pennsylvania (1928) 77 U. of Pa. L. Rev. 1. Beginning with the Philipsborn case, supra, and Commonwealth v. Great American Ind. Co., 312 Pa. 183 (1933), cited supra note 28, the Pennsylvania view has gradually stabilized into consistency with the principles enumerated in the Restatement.

31. See Arant, Suretyship (1931) 264.

32. And, a discharge or variation of the promisor's duty to a creditor beneficiary is effective against the creditor beneficiary if (a) the creditor beneficiary does not bring suit or otherwise materially change his position in reliance thereon before he knows of the discharge or bar; and (b) the promisor's action is not a fraud on creditors. Restatement, Contracts (1932) § 143.


In *Pittsburgh v. Parkview Construction Co.*, the majority opinion, allowing a recovery, followed the usual procedure of referring to the successful plaintiff as a “third party” beneficiary. Mr. Justice Drew, concurring, reasoned that the plaintiff was a “donee” beneficiary and entitled to recover. Significantly, in *Williams v. Paxson Coal Co.*, the Court cast aside its previous reluctance to choose between “donee” and “creditor” beneficiary. Though apparently the choice could not affect the result in the particular case, the Court found that under the contract, a “donee” beneficiary’s rights came into existence, but was subject to defenses which the promisor might assert, such as a failure of consideration. And finally in *Pennsylvania Turnpike Comm. v. Andrews & Andrews*, Mr. Justice Drew writing for the Court construed a performance bond so as to permit recovery by the plaintiff as a “donee beneficiary.”

Thus has the “Pennsylvania view” coalesced into the “general view” third party beneficiary cases. A generous assist must be credited to the Restatement.

**INDUCING A BREACH OF CONTRACT**

It is well known that inducing breach of contract is becoming one of the less rare birds of tort law. A recent Superior Court decision upholds liability though the action was originated in assumpsit. One new aspect of this type of actionable conduct is illustrated by *Suburban Gas Co. v. Wagner*, which holds that in an action for non-performance of a contract it is a complete defense that the plaintiff in obtaining the defendant’s promise was himself guilty of inducing breach of contract. Thus, A has a contract to buy all of his requirements from B, and X, knowing of this contract, induces A to violate it by making a new contract to purchase his requirements from X. Assume A fails to buy from X. Can X recover for breach of contract? The Superior Court, in what is evidently a case of first impression, held in the negative. X’s contract was subject to the defense of “illegality.”

35. 344 Pa. 126 (1942).
Of course, B might have recovered in tort from X, for financial harm suffered if A failed to purchase his requirements from B.\(^\text{41}\)

In at least four major categories of commercial law, the Legislature has effected important changes.

**MARRIED WOMEN'S CONTRACTS**

For over 50 years, we have acted upon the general principle that married women have capacity to enter into binding contracts.\(^\text{42}\) One outstanding exception has been the ability of a wife effectively to act as an accommodation maker, endorser, guarantor or surety. In *First National Bank v. Walsh*\(^\text{43}\) Mr. Justice Stern laid at rest previous uncertainties in the application of the exception to the general rule. He teaches us the distinction between a suit on the note (or a renewal) and a controversy concerning a judgment based upon a note signed by a married woman. Thus, when the holder sues a married woman who has executed a promissory note, she has the burden of proving the accommodation quality of her participation. She may succeed in proving that her signature was for accommodation even though she falsely testified on the face of the note that it was given for her own benefit. If she does carry the burden of proving the note was an accommodation, that she signed renewals or even made payment of interest cannot deprive her of the complete defense to liability. However, once a judgment has been obtained a different situation exists. A judgment resulting from adversary proceedings is final. It cannot be "collaterally attacked." A judgment entered *pro confesso* (as in most cases) is "presumptively valid." A petition to strike or open may be granted provided the married woman (or her representative) acts "without laches." Undue delay in acting constitutes laches.\(^\text{44}\)

In May 1945, the Legislature overruled *First National Bank v. Walsh*.\(^\text{45}\) It provided that "hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing, or otherwise, but she may not execute or acknowledge a deed, or other written instrument, conveying her real

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\(^{41}\) See cases cited *supra*, note 38.

\(^{42}\) See MARRIED WOMEN'S ACT OF 1893, June 8, P. L. 344. This was amended by Act of May 17, 1945, P. L. 625, PA. STAT. ANN. (Purdon, Supp. 1945) tit. 48, §§ 31, 32.

\(^{43}\) 349 Pa. 241 (1944).

\(^{44}\) A twelve year lapse constitutes laches. Wilkes-Barre Deposit and Savings Bank v. Hermann, 334 Pa. 560 (1939). But in the *Walsh* case, the married woman died without knowing of the entry of judgment against her and a *scire facias* was issued against her administratrix who acted "promptly." It was held that a four year total delay was not "laches." Justice Stern pointed out that the bank (promisee) was not harmed in any way by the lapse of time.

property, unless her husband join in such conveyance.” Banks and Title Companies are not yet relying confidently upon the Act. Though some doubt has been cast upon its validity because of an asserted inconsistency it would appear to be an effective piece of legislation. It will be observed, however, that the Act does not apply to contracts consummated prior to May 17, 1945. Thus, the Walsh case will continue to control for some years to come litigation in which married women seek to escape liability on the ground that their signatures were for accommodation only.

INFANTS CONTRACTS

In the main there have been a few significant developments in the laws governing minors’ contracts. However, in two recent cases, the Supreme Court has defined “necessaries” for which a minor may effectively contract. In one, a minor child with an estate of $2600 asked his guardian to pay $200 for the funeral of his father who died insolvent. The Court refused to permit this. In the other, an eighteen year old widow asked an undertaker to bury her husband. She, too, was unable to make a binding contract to pay the undertaker.

By statute, minors of at least seventeen years may effectively contract for servicemen's readjustment loans. The Act of April 6, 1945, No. 73 empowers such minors “to enter into any contract in this Commonwealth for any loan or loans guaranteed by the United States, or any agency thereof in accordance with the provisions of the

46. Section 1 of the Act specifically gives the married woman the same right and power as a married man to acquire, own, possess, control, use, lease, mortgage, sell or otherwise dispose of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as a married man. Yet, § 2 (quoted in body of article) requires her husband's joinder in a conveyance of her real estate. There is no statutory requirement that the wife join in a husband's conveyance of his real estate. [For effect of conveyances by either spouse without joinder of the other, prior to the Act of 1945, see I LADNER, CONVEYANCING IN PENNSYLVANIA (2d ed. 1941) 50, 51, 560, §§ 34,143.] If any real inconsistency exists it may be expected to be solved by “interpretation,” if necessary to save the statute. See STATUTORY CONSTRUCTION ACT, 1937, May 28, P. L. 1019, PA. STAT. ANN. (Purdon, 1941) tit. 46, § 503 et seq., and cases cited therein.

47. "Lord Coke said that an infant may bind himself for his meat, drink, apparel necessary physic and other such necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterward." O'Leary Estate, 352 Pa. 254 (1945), per Mr. Justice Drew. Cf. The Sales Act definition, § 2 of the SALES ACT, 1915, May 19, P. L. 543, PA. STAT. ANN. (Purdon, 1931) tit. 69, § 21: “Goods suitable to the condition in life of such infant or other person, and to his actual requirement at the time of delivery.” Whereas at the common law the minor was liable on the contract for “necessaries,” under the Sales Act his duty is to pay a reasonable price or return the goods in substantially the same condition within a reasonable time.

48. O'Leary Estate, 352 Pa. 254 (1945). Gratuitously, the Court suggested that Miss O'Leary ratify the contract after she comes of age.


50. PA. STAT. ANN. (Purdon, 1938) tit. 15, § 701.
Servicemen's Readjustment Act of 1944." The Pennsylvania Act expressly authorizes the minor to "execute and acknowledge all documents, deeds, mortgages, and other or similar papers necessary and incident to such contracts." An interesting provision absolves a parent, guardian or trustee of such minor from liability because of any contract or loan entered into by the minor, unless expressly made a party thereto.

ASSIGNMENT OF ACCOUNTS RECEIVABLE

One of the most irksome problems encountered by lawyers serving as counsel for the Philadelphia Loan Agency of the R. F. C. was the pledge of accounts receivable as collateral for loans to small businessmen. The difficulty arose in this manner. Many manufacturers, distributors and retailers qualified for R. F. C. loans. It was customary to take assignments of current accounts receivable in a ratio of 2 to 1 of face value over the amount of the loan. But R. F. C., the lender, was required to obtain a first lien on security pledged to it by borrowers. By Pennsylvania common law a subsequent assignee who gave prior notice to the obligor prevailed in a controversy caused by successive assignments of the same claim.

This had a serious effect in the bankruptcy courts. Under Section 60 of the Bankruptcy Act a voidable preference results when a transfer meets the following conditions: (a) it is for or on account of an antecedent debt; (b) it is made within four months of bankruptcy; (c) it is made when the debtor is insolvent; and (d) when it is made the creditor has reason to believe the debtor to be insolvent. Section 60 also provides that a "transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred, superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy . . . shall be deemed to have been made immediately before bankruptcy." As a consequence of Section 60 of the Bankruptcy Act and the Pennsylvania common law, where no notice had been given to the debtor of an assignment of an account receivable, the transfer could never become perfected. Thus, in all cases of non-notification financing, the assignment must be deemed to have been made immediately prior to bankruptcy of the assignor. If that be the critical time, obviously

the various conditions of Section 60 regarding voidable preference must of necessity exist and the assignment must be set aside upon attack by the trustee in bankruptcy. Moreover, it will be observed that the fact that present contemporaneous consideration was given for the assignment (the loan) becomes immaterial since Section 60 fixes the time of the transfer as immediately prior to bankruptcy. At that time, the consideration necessarily becomes "an antecedent debt." Such assignments of accounts receivable where notice was not given to the debtors thus become "secret liens" and will be stricken down in the Bankruptcy Court. See Corn Exchange National Bank and Trust Co. v. Klauder.54 But to give such notice is not only inconvenient to the assignee. It might also seriously adversely affect the assignor’s business standing. It publicizes to a wide audience (sometimes the number of accounts is in the hundreds or even thousands) that a business man is so far in extremis he must "hock" his accounts receivable. Thus, perfecting the transfer under Pennsylvania common law might easily defeat the entire purpose of the loan.

To correct this mischief, the Act of July 31, 1941, P. L. 606,55 was passed. It is now possible to perfect a transfer of accounts receivable whether outright or as security without giving notice to each debtor. Concurrently with the transfer, a record thereof must be made on the books of account so that upon their inspection the name of the transferee, the transfer and its date will be disclosed. By proviso, the principal debtor is protected if, in good faith without notice or knowledge of the assignment, he pays the debt fully or partially to the creditor or any transferee of the creditor. Of course, if it is desired to give actual notice to the debtor, no such record need be made.56

This is a very convenient statute. All that need be done now is to rubber stamp "this account has been assigned to ................ on ................. 19...." or some similar legend on each page of the books reflecting the account receivable. The lender is then protected. A subsequent lender ought at the least to inspect the account books. If he does so he will find the legend.57 At the same time, the borrower’s business standing remains unimpaired.


55. For the economic significance of non-notification financing see footnotes 10 and 11 of Mr. Justice Jackson's opinion in Corn Exchange National Bank & Trust Company v. Klauder, supra.


57. There is always the possibility that a fraudulent borrower might substitute a different set of books when making a subsequent assignment of the same claim. If the second assignee merely stamps the new account records shown to him the result is without doubt. The first assignee wins, since even at Pennsylvania common law, the prior in time assignee prevails where neither gives notice to the debtor. See Phillips' Estate (No. 3), 205 Pa. 515 (1903), cited supra note 52. Even if the second
The tie-in with the Bankruptcy Act is obvious. Today, in Pennsylvania loan transactions, the lender may perfect the transfer on the very date the assignment is made merely by stamping evidence of the transfer on the actual books of account. So long as this date is more than four months before bankruptcy, or actual consideration passes at that time, the lien will be invulnerable to attack in the Bankruptcy Court.

**Chattel Mortgages**

Another significant statutory change is the validation of chattel mortgages in Pennsylvania. This is accomplished by the Act of June 1, 1945, P. L. 1358. It will be recalled that prior to the Act, a chattel mortgage in Pennsylvania was ineffectual as against a subsequent bona fide purchaser for value. The Act of 1945 in sweeping terms makes possible the use of the chattel mortgage as a security device. Not only may it be used as collateral for current advances but also it may secure pre-existing debts or future advances. Noteworthy is the provision that the lien “dates back” in the case of future advances even where they are not obligatory. But the advances must be made within five years of the chattel mortgage’s execution and the amounts advanced must not exceed the aggregate amount stated in the mortgage.

One rather serious uncertainty exists. The language appears to limit the use of chattel mortgages to loan transactions. Quaere, will the purchase money chattel mortgage be fully upheld? The transaction very easily could be stage-managed so that the vendor makes the sale and “lends” the purchase price to the vendee who gives a chattel mortgage as security for the loan, paying the purchase price with the proceeds. Limiting the chattel mortgage to loans does not seem to make sense. Of course, one can always resort to the bailment lease and the conditional sale. An amendment so worded as to eliminate any doubt that the chattel may be used to secure a sale on credit would clarify this situation and is therefore suggested.

Assignee gives notice to the debtor, the first assignee would prevail provided he made a proper record as required by the statute. The language in the Act is sweeping and without exception: “... such sales, assignments, transfers or pledges shall be valid in law as, and enforceable, against all subsequent purchasers, assignees, transferees, pledgees, execution, attaching or other creditors, notwithstanding the fact that notice of such sales, assignments, transfers or pledges has not been given to the person or persons indebted or obligated to pay the said accounts receivable. ...” Act of 1941, July 31, P. L. 606, § 1, Pa. Stat. Ann. (Purdon, Supp. 1945) tit. 69, § 561.


In describing the personal property which may be mortgaged, the Act again uses sweeping language: “any chattel.” This phrase is then expressly made to include livestock, poultry, farm machinery, farm equipment and crops, “grown or growing,” and future crops to be planted or grown within one year of the execution of the mortgage. Subsequently acquired property of the “same class as that described in the mortgage” may also fall within the sweep of a chattel mortgage. 60

One particular type of chattel, however, requires special treatment. That is the motor vehicle (including trailer and semi-trailers). Before a chattel mortgage may be safely relied upon to constitute a lien on a motor vehicle a statement of such lien must be noted on the appropriate certificate of title.

The priority of lien dates from the moment proper filing of the chattel mortgage has been accomplished. The lien is then good against all comers for five years and may be extended for an additional five years by filing an affidavit of amount owing. As between the parties, of course, the mortgage is valid until the indebtedness is paid.

A proper filing may be achieved as follows. The original executed document witnessed and acknowledged, or a true copy duly certified by the prothonotary, must be filed in the office of the prothonotary of the county where the chattels (or a portion thereof) are located at the time the mortgage is executed. The prothonotary maintains a “Chattel Mortgage Book.” Here each chattel mortgage is docketed with essential facts set forth as well as the date and hour of filing. The original or the true certified copy is kept in his office, subject to public inspection. The same official also maintains a “Chattel Mortgage Index.” This is an alphabetical index of mortgagors and mortgagees with dates of filing.

An interesting feature is the remedy in case of default by the mortgagor. The mortgagee is given the right to resume possession by replevin or “without process of law.” Presumably, this refers to peaceable self-help. Quaere, what result follows if the mortgagee obtains repossession from a defaulting mortgagor by trick or fraud? 61

After the chattel is repossessed, the mortgagee may sell it at a public or private sale. Ten days notice of a private sale must be sent to the

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60. “Subsequently acquired property” which may thus become subject to the mortgage includes the following:
   a) Replacements of any originally mortgaged property.
   b) “Increase, issue, progeny and produce of any and all property . . . including the increase, issue, progeny and produce of any original increase, issue or progeny.”
   c) A mortgage of sheep and goats shall be held to include the wool or mohair clipped therefrom.

61. For the law in other jurisdictions, see 125 A. L. R. 306, 327, annotating the effect of fraud, malice, etc., by the mortgagee, in taking possession of the chattel.
mortgagor's last known address. Foreclosing by private sale is a very handsome power for the mortgagee but may lead to abuses. Though the Act is silent, "phony" sales will doubtlessly be subject to judicial correction in one form of action or another. Of course, other standard methods of foreclosure may also be used.62

Rather elaborate provisions cover the situation where the chattel is removed from one county to another. If the removal is without the mortgagee's written consent, the property remains subject to the lien. If the mortgagee has given written consent to the removal, the chattel remains subject to the lien of the mortgagee even as against subsequent bona fide purchase for value but for six months only from the date of the removal. Within that period of time, a true copy of the mortgage may be filed in the office of the prothonotary for the county to which the property is removed. If that is done, the lien of the mortgage continues as if there had been no removal. A wrongful removal by the mortgagor is of course a default.

The property may be sold by the mortgagor. If sold with the mortgagee's written consent, the purchaser takes free of the lien. If without the mortgagee's written consent, a default occurs. In such case, the mortgagee has his option to take the proceeds or assert his lien against the property in the hands of the purchaser.

Teeth are put in the Act by the provision that for any willful default, the mortgagor can be imprisoned for one year or fined a sum double the value of the property.

These are the main provisions of the Act.

It is doubtful whether the advent of the chattel mortgage will lessen the popularity of the bailment lease or the conditional sale. For one thing, there is the uncertainty whether a chattel mortgage may be used effectively in a sale. For another, the bailment lease requires no filing whatsoever and presumably will continue to be valid—unless the court can be persuaded to cast off completely the lovely fiction that a chattel is "leased" rather than "sold" and "rent" rather than "installments of the purchase price" are paid. Though this is quite possible, the long existing and judicially approved commercial practice of using the bailment lease lessens the likelihood of its happening.

**Inadequacy of Consideration or Better Offer as Affecting Fiduciary's Contract**

Since the rather surprising case of Orr's Estate 63 was decided by the Pennsylvania Supreme Court, a fiduciary could escape from

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62. The Act provides that upon default the mortgagee may foreclose by "any of the methods authorized by law for the foreclosure of a mortgage, including the entry of judgment on the bond, or note secured by the chattel mortgage."

63. 283 Pa. 476 (1925).
any contract merely because of the subsequent receipt of a better offer. But, this rule operated in both directions. Even where he wanted to, the fiduciary was unable to bind himself irrevocably by any contract, no matter how fair at the time of its consummation. It is rather doubtful that many self-respecting fiduciaries approved of the rule.

In *Kane v. Girard Trust Co.*, testamentary trustees with power to convert real estate on May 5, 1943, entered into a written contract with plaintiffs to sell land for $28,500, of which $20,000 was to be represented by a purchase money bond and mortgage. The buyer then deposited the full consideration money with the title company and the trustees gave him possession of the premises and an assignment of the leases. However, before the deed was acknowledged and delivered the trustees received an offer of $30,000 cash on June 3, 1943. The trustees notified the plaintiff of this new offer but no further action was taken by the plaintiff. Three days later the property was conveyed to the subsequent offeror and the hand money with unexecuted documents were returned to the plaintiff. A suit was brought in the equity side of the Common Pleas Court against the trustees and the subsequent purchaser praying for a reconveyance to the trustees and for the specific performance of the agreement of sale to the first purchaser. The Chancellor granted the relief. By a 4 to 3 decision, this was reversed. Chief Justice Maxey, Justices Horace Stern and Allen Stearne concurred only on the ground that the action was improperly brought in the Common Pleas Court whereas it should have been originated in the Orphans' Court. But, since the majority felt disposed to decide the case on the merits, the minority set forth their opinion, stating, "If the question were still open and had not become a settled Pennsylvania rule of property which only the legislature should now change, we would strongly question the principle of *Orr's Estate*, supra, and the cases which follow it. In the absence of fraud, accident or mistake, and when the price is adequate, we can discover no reason why an honest sale made by a fiduciary should be set aside merely because of a subsequent higher offer. A beneficiary is not sacrosant and a fiduciary ought not to be permitted to repudiate his contract any more than he could do if he were acting as an individual. Curiously enough, the effort to benefit trusts and persons under a disability, under the above principle, has in fact, worked to their detriment, as evidenced by the results, because of the uncertainty in fiduciary sales of real estate." The minority then argued that *Orr's Estate* ought not to be extended to the facts in the *Kane* case, finally concluding with a note to the Legislature: "We also suggest that the

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64. 351 Pa. 191 (1945).
attention of the Legislature might well be called to the question of the advisability of changing by statute the effect of the decision in *Orr's Estate* and the cases which have followed it." 65

Happily, the ubiquitous Legislature of 1945 acted upon this suggestion. By Act of May 24, 1945, No. 374, 66 it is specifically provided that hereafter "neither inadequacy of consideration nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the fiduciary of the obligation to perform his contract." Moreover, the court may not set aside the contract or refuse to enforce it by specific performance or otherwise for that reason. A proviso leaves unaffected the "inherent right of a Court to set aside a contract for fraud, accident or mistake."

However, the Act did not stand long unchallenged. In two Allegheny County cases, the Orphans' Court held the Act unconstitutional, at least as to "sales by fiduciaries controlled by and accountable to the Orphans' Court." 67

The reasoning seems to be this. Article V, Section 22 of the Pennsylvania Constitution declares that the Orphans' Court shall exercise all the jurisdiction and powers now vested in or which may hereafter be conferred thereon. One power "now vested" in the Orphans' Court is the setting aside of fiduciaries' contracts when a subsequent higher offer is received before settlement. Therefore, the Legislature may not effectively "deprive" the Orphans' Court of such power. This is a rather strange and jealous concept of "jurisdiction." In reality, it is a dissent from the policy expressed by the Legislature in the Act of 1945.68

The Supreme Court, as might have been anticipated by the strong dissent in *Kane v. Girard Trust Co., supra*, reversed the Allegheny County court and upheld the validity of the Act.68a To the Supreme Court, the constitutional provision was merely descriptive of the existing powers and jurisdiction of the Orphans' Court and in no way impaired the regulative power which the Legislature has always had over that court, a power which authorized the legislation in controversy. Thus, the rule of *Orr's Estate*, which plagued fiduciaries and prospective buyers, alike, has met a legislative death.

65. Id. at 200.
It is apparent that during the war years more and more parties resorted to arbitration for the settlement of contractual disputes. Unfortunately, the large number of cases taken to the appellate courts on issues relating to the operation and effect of the arbitration clause makes it at least of questionable efficacy. If its design is to stop litigation, it doesn't seem to be serving its purpose.\textsuperscript{69} Perhaps one reason for the multitude of cases is the fluid state of the law concerning arbitration.

A primary difficulty is the coexistence in our law of a "common law" and a "statutory" arbitration.\textsuperscript{70} Substantively and procedurally these differ greatly. Moreover, draftsmen have frequently left undecided which of the two types was intended in a particular contract. The present approach of the court comes to this. First, decide whether any arbitration was intended.\textsuperscript{71} If so, next decide whether the case is governed by common law or statutory arbitration. This determined, the following legal attributes result:

\begin{align*}
\textbf{Common law arbitration} & \quad \textbf{Statutory arbitration} \\
1. \text{No writing is necessary} & 1. \text{Writing is necessary} \\
2. \text{Must be expressly intended} & 2. \text{Must be expressly intended} \\
3. \text{Revocability} & 3. \text{Irrevocable—even if arbitrators} \\
\quad a. \text{if arbitrators are named in} & \quad \text{are not named in advance} \\
\quad \text{advance—irrevocable} &
\end{align*}

\textsuperscript{69} The writer, of course, has no way of knowing how many cases have been settled by arbitration without benefit of litigation. Presumably, a great many have. No account is here taken of cases arising under the Federal Arbitration Law. See 9 U. S. C. A. § 1 \textit{et seq.} (1942).


\textsuperscript{71} Thus, an oral agreement for the "settlement" of a dispute between produce merchants by a committee of the New York Produce Exchange with no provisions for hearings, etc., was held not to be a contract for arbitration. A suit on the basic contract was therefore permissible. Scholler Bros. v. Otto A. C. Hagen Corp., 158 Pa. Super. 170 (1945).

\textsuperscript{72} For a common law arbitration, no technical or formal words need be used. So long as it clearly appears that the intent of the parties was to submit their differences to a tribunal and to be bound by the decision reached by it after deliberation, a common law contract of arbitration will result. Scholler Bros. v. Otto A. C. Hagen Corp., 158 Pa. Super. 170 (1945). But there can be no agreement to arbitrate by "implication." For example, two parties agree that their attorneys should "adjust and settle" their differences. This does not constitute a contract of arbitration. Weichardt v. Hook, 83 Pa. 434 (1877). In Canuso v. Philadelphia, 326 Pa. 302 (1937), a city contract provided that a finding by the "Director of Public Works shall be binding and conclusive on the parties." The Director's Finding was upheld. In Seaboard Surety Co. v. Commonwealth, 345 Pa. 147 (1942), reaffirmed in 347 Pa. 562 (1943), a Commonwealth contract provided for "all questions of disputes to be referred to the Secretary of Highways and the Attorney-General whose decision and award shall be final." Held, a statutory arbitration resulted. Therefore the decision was subject to review. In this case the Attorney-General and the Secretary of Highways made inde-
Common law arbitration

b. if arbitrators are not named in advance—revocable

4. Procedure before arbitrators—informality is permitted so long as "minimum requirements" are met.

5. Finality of award—arbitrators are final judges of law and fact.

Statutory arbitration

4. Procedure before arbitrators must be formal and in accordance with statutory requirements.

5. Finality of award—award is subject to review just as in jury trial. Judgment n. o. v. possible.

Under section 16 of the Arbitration Act, "Provisions of the Act shall apply to any written contract to which the Commonwealth of Penn-

pendsent investigations, ex parte admitting hearsay, etc. This was held to constitute a misbehavior of the arbitrators, justifying reversal. The Court distinguished the Canuso case, saying that it did not involve an "arbitration." Evidently, the present view of the Pennsylvania Supreme Court is that the Canuso case was one where a decision of a public official was accorded an administrative finality; whereas the Seaboard case presented for review a full-bloom "arbitration award."


74. In common law arbitration, certain minimum standards indispensable to the securing of a fair and impartial disposition of the merits of the controversy must be met. These include:

1) Previous notice of meetings of the arbitrators.
2) All arbitrators must sit at the hearing in dispute.
3) Each side is entitled to be heard and be present when the other party's evidence is being given.
4) All arbitrators must join in the award unless the submission allows a decision by a majority.
5) The swearing of witnesses is not regarded as a minimum requirement but is a technicality which is "waived" if unobjected to. See Scholler v. Otto A. C. Hagen Corp., 158 Pa. Super. 170 (1945).

The statutory procedure is well defined. It includes the following:

(a) All arbitrators must sit unless by written consent all parties agree to proceed with the hearing with a less number.
(b) Arbitrators may summon witnesses in writing and to bring books, documents, etc.
(c) Such a summons is in effect an administrative subpoena which may be enforced by petition to the Court of Common Pleas.
(d) Testimony must be under oath or affirmation.
(e) Stenographic record must be made at the request of either party or the arbitrators.


75. In common law arbitration, the Court will not review the decision of the arbitrators except that the arbitration, in the procedure followed thereof, is, of course, always subject to review. If the minimum requirements set forth in note 74 supra are not met, the award of the arbitrators will not stand. On the other hand, in statutory arbitration the Court reviews the award just as in the case of a jury trial and it may modify or correct the award or re-submit the case to the arbitrators. Navarro Corp. v. Pittsburgh School District, 344 Pa. 429 (1942).

sylvania, any agency or subdivision or any municipal corporation or political division shall be a party.” The Supreme Court has held that whenever such a contract contains an arbitration clause the statutory form must be used.\textsuperscript{77}

Of course, invocation of the arbitration clause is itself always governed by the express provisions of the contract. Thus, even in public contract, if there is a condition precedent to the arbitration, the condition must be fulfilled before arbitration is permitted.\textsuperscript{78}

Aside from the public contract cases, it would appear that the choice between common law and statutory arbitration is one which is governed by the intent of the parties. This, as in all other cases of interpretation, depends upon the language used and surrounding circumstances if any ambiguity exists. Obviously, this question ought to be decided in advance by the draftsman of the contract. To lessen the likelihood of litigation, which is—after all the purpose of the clause, it should be expressly stated which of the two types of arbitration is desired. This done, a workable clause is possible and may be highly desirable under the circumstances.\textsuperscript{79}

Apart from the topics touched upon herein no startling wartime changes have been found in the Pennsylvania Law affecting commercial transactions. As a matter of convenience, however, an appendix is included. This contains approximately 100 citations of interesting cases in contracts and related fields decided by the Pennsylvania appellate courts during the war years. There is no extended discussion of these cases. Only enough information is given to point the reader to a decision which might be relevant to the solution of a particular problem.\textsuperscript{80}

\textsuperscript{77} Philadelphia Housing Authority v. Turner Construction Co., 343 Pa. 512 (1942).

\textsuperscript{78} A Commonwealth contract containing an arbitration clause provided that “Reference of questions by arbitration shall not be made until final quantities are determined and must be made within 30 days thereafter and prior to payment therefor.” The Court held that any arbitration must have been made within 30 days of the final determination of the quantities. Failure to do so resulted in loss of the right to arbitrate under the contract. Dickens v. Penna. Turnpike Comm., 351 Pa. 252 (1945).

\textsuperscript{79} For a thought provoking and critical analysis of arbitration, particularly in its use as an instrument of cartels and monopolies, see Kronstein, Business Arbitration—Instrument of Private Government (1944) 54 Yale L. J. 36.

\textsuperscript{80} The breakdown and grouping, it will be observed, follows the analysis suggested for the lawyer when acting as an advocate in an action on a contract.
APPENDIX

1. **Multi-State Problem** (assuming Pennsylvania forum)
   a. Conflicts rule of forum applicable
      Klaxon Co. v. Stentor, 313 U. S. 487 (1941)
   b. Pennsylvania Conflicts rule in contracts cases
      1. Essential validity and interpretation of contract
      2. Questions of performance and measure of damages

2. Is there a valid contractual obligation?
   A. Formal requisites
      1. Offer and acceptance
         a) Conditional Acceptance—Counter Offer
         b) Acceptance by conduct
            Gum, Inc. v. Felton, 341 Pa. 96 (1941) (negotiations concerning a lease); Home Protection Building & Loan Association Case, 143 Pa. Super. 96 (1940) (quantum meruit for services).
         c) Duration of offer
         d) Indefiniteness
   B. Consideration
      a) Promissory estoppel, moral obligation
      b) Antecedent debt as consideration
      c) Novel idea as consideration
      d) Sealed instruments
      f) Statute of Limitations and Laches
C. Defenses

I. Lack of contractual capacity

(a) Minors


(b) Effect of infancy during coverture; joint obligations in which one obligor is infant


c) Minors seventeen years of age, authority to contract for servicemen’s readjustment loans


d) Married Women


(e) Insanity


(f) Intoxication

Heffernan v. Heffernan, 344 Pa. 137 (1942) ; Thorne’s Estate, 344 Pa. 503 (1942) (How much intoxication is necessary to make drunkard’s contract “voidable”?).

(g) Illiteracy


(h) Illegality

Problem: What kind of illegality is a defense and at what stage of proceedings is such a defense appropriate?

Release of liability for one’s own negligence or that of an agent


Restraint of trade, agreement not to compete


Construction Contracts


Inducing breach of contract with third party

WAR AND POST WAR PENNSYLVANIA CONTRACTS

Contingent fees

Agreements in contemplation of divorce

Agreements in violation of H. O. L. C. regulations

Practicing profession without a license

Illegality raised by Court sua sponte

Illegality pleaded by one in pari delicto

Partial performance of contract tainted with illegality

Subsequent Repeal of statute as removing illegality

(i) Fraud

(j) Duress

3. Assuming that a contract came into existence, what does it mean?
A. Canons of construction—most commonly used rules
3. Interpret contract as a whole; all writings forming part of the same transaction are interpreted together: Landreth v. First National Bank of Phila., 346 Pa. 551 (1943).
5. Adopt that interpretation which, under all the circumstances ascribes the most reasonable and natural conduct to the parties: Wiegand v. Wiegand, 349 Pa. 517 (1944).

7. Printed forms are interpreted strongly against their proponent, e.g., note must be interpreted "most strongly against the bank": Landreth v. First National Bank of Philadelphia, 346 Pa. 551 (1943).

8. Ordinary meaning of language throughout the country is given to words unless circumstances show different meaning applicable: D'Orazio v. Masciantonio, 345 Pa. 428 (1942).


Significant recent cases construing contracts:


Use of Declaratory Judgment


B. Conflict between written and oral manifestations


C. "Parol evidence" rule in Pennsylvania


Patent ambiguity


Latent ambiguity


Subsequent oral modification


4. What are the rights and duties of the parties under the contract?

(a) Who can sue or be sued thereon?

Policies and representatives


Joint obligations

Third Party Beneficiaries contracts

Assignments

5. Performance or breach of contract

Distinction between condition and promise

“Satisfaction”

Requirements contracts

Substantial performance

Contingent liability as condition

Prevention of performance and impossibility

Acceptance of Performance

Tender

Anticipatory Breach

Waiver of non-performance, estoppel

Damages for breach of contract

Specific Performance
Arbitration Clause


6. Modification of contract