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Arbitration

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The principles of estoppel by judgment are discussed for a clearer insight into the method of determining what matters in the government litigation may be used in evidence in the private suit and the difficulties attending such a determination. The determination of the facts upon which the judgment was founded is the task of the trial judge in the private suit. This necessitates an examination not only of the record, proceedings, and evidence in the case but also of extrinsic evidence and other appropriate material.

In analyzing the cases decided since the enactment of the Clayton Act, the author finds that trial and appellate courts have established such erroneous and disastrous limitations on the force of the statute as: (1) a judgment for the government may not be used in support of a private claim not precisely coincident in time with matters in the government action; (2) a judgment, while proving the existence of an antitrust conspiracy, gives rise to no presumption in favor of the private plaintiff that the conspiracy is continuing, but, on the contrary, to a presumption favorable to the defendants that the conspiracy ended upon entry of judgment, even though compliance therewith has not occurred and is, by the terms of the judgment, postponed until some later date; (3) a judgment may not be used in a private suit based on matters occurring at a place other than that to which the judgment specifically refers; (4) a judgment based on findings of a nationwide violation is not prima facie evidence that any part of the violation occurred at a particular place; (5) a judgment may not be used unless the private and government suits are based on the same subject matter; and (6) no inference may be drawn in favor of a private litigant from any facts proven by such a judgment.

The judicial justification for each of the rules is weighed in the balance and found wanting, the author concluding that these rules—which result from an inappropriate application of principles of estoppel in the construction of the statute, and the hostility of some judges to antitrust cases, especially treble-damage and injunction suits—if left uncorrected, will render Section 5 useless as an instrument for the enforcement of the antitrust laws.

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ARBITRATION

JUDICIAL REVIEW OF ARBITRATION: THE JUDICIAL ATTITUDE, by Frances T. Freeman Jolet, 45 Cornell L. Q. 519 (Spring 1960).

The author, a member of the New York State Law Revision Commission, inquires in this article into the recurring criticism that judicial review has resulted in undue interference with the arbitration process. Her conclusion is that the charge of judicial intolerance is somewhat unjustified, and the judicial role, in its limited

form, is of unquestionable value in inducing arbitrators to act with caution.

The accusation of judicial jealousy takes three major forms, it being contended that courts have (1) substituted their judgment for that of the arbitrator, (2) under the guise of necessity for construction of the contract, usurped the arbitrator's function of interpretation, and (3) narrowed the arbitrator's jurisdiction by requiring the clearest and broadest language to justify a finding that he has any. This study examines the cases which give rise to the charges, and concedes that a certain degree of judicial hostility does exist.

Recent cases indicate a greater judicial regard for arbitration as a method of settling disputes with more respect being afforded the determinations of arbitrators even in cases where the reviewing court would have reached a result different from that of the arbitrator. Despite ambiguous and unclear language in a collective bargaining agreement, for example, arbitrators' interpretations have been upheld as not modifying the terms of the agreement.

Under Section 301(a) of the Labor Management Relations Act of 1947 provisions for arbitration contained in a collective bargaining agreement, in industries affecting interstate commerce, are specifically enforceable. In the *Lincoln Mills* case Mr. Justice Douglas found a federal policy requiring enforcement of agreements not to strike and a duty vested in the federal courts to fashion a remedy for the effectuation of this policy. Subsequent federal court treatment in such cases indicates a conscious effort on the part of the courts to fulfill their obligation in this regard without going beyond the bounds of judicial review.

Judicial review has been treated in the article under a broad definition of the term, so as to include its effect upon several phases of the arbitration process. The object of the approach is to gain a full appreciation for the scope of the court's exercise of the reviewing power. A final caveat for the reviewing court is that it be willing to recognize that, despite differences of method, an arbitrator is able to arrive at a just result.

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BILLS AND NOTES

NON-NEGOTIABLE INSTRUMENTS, by William F. Willier, 11 Syracuse L. Rev. 13 (Fall 1959).

Professor Willier examines and synthesizes over three hundred decisions of American Courts pertaining to non-negotiable instruments covering the period 1880 to 1958. The author formulates generalizations as to the law of non-negotiable instruments and in so doing has produced material which is unique. This article should be of interest to the practicing bar as it furnishes material not heretofore available.