

Liability of Principal for Broker's Commission When Purchaser Defaults

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NOTES AND COMMENT

LIABILITY OF PRINCIPAL FOR BROKER'S COMMISSION WHEN PURCHASER DEFAULTS

I

No phase of the law is static. Constantly it must meet and solve new problems. It is just such an evolution we wish here to consider as to its justification and probable effect upon the commercial law of brokerage. To do so efficiently we must pause a moment in order to refamiliarize ourselves with some basic concepts of the law of contracts in this field.

II

A close inspection of any exposition of the rules governing brokerage will quickly disclose that many of the rules were born as a result of litigation involving real estate transactions. Therefore, in our development, we will borrow heavily from that phase of the law. Generally the rules are capable of transition and such a treatment will provide a correct brokerage background for any type of broker.

A broker, as any agent, is entitled under certain conditions to compensation. This right to payment is a matter of contract,¹ either express or implied. If implied the compensation may be determined by the local usage prevailing in similar circumstances,² but usage will not be permitted to contravene an express agreement.³ In the absence of both agreement and usage, the broker will be entitled to a reasonable compensation.⁴ However, it is always competent for the parties to agree upon the amount of compensation and the terms and conditions of its payment, and such agreements will be enforced to the exclusion of all other claims for compensation.⁵

Initially it was stated that a broker is entitled to compensation under certain conditions according to the provisions of his contract. The broker must show that he has completed his undertaking according to its terms, or that completion was prevented by the unlawful acts of his principal.⁶ He is never entitled to compensation for un-

¹ Clark v. Provident Trust Co. of Philadelphia, 329 Pa. 421, 198 Atl. 36 (1938).

² Groscup v. Downey, 105 Md. 273, 65 Atl. 930 (1907).

³ Sanford v. Rawlings, 43 Ill. 92 (1867).

⁴ Hollis v. Weston, 156 Mass. 357, 31 N. E. 483 (1892).

⁵ McDonald v. Ortman, 98 Mich. 40, 56 N. W. 1055 (1893).

⁶ 2 MECHAM, AGENCY § 2427 (2d ed. 1914).

successful efforts.⁷ A real estate broker properly authorized to sell property has performed his contract when he has produced a purchaser ready, willing and able to purchase upon the terms specified.⁸ If the principal has permitted a modification of those terms the broker is still entitled to his commissions.⁹

As to just what constitutes ability to perform involves various factors and usually is adjudicated in the light of the particular circumstances. Usually the proposed purchaser must have legal capacity and sufficient financial ability.¹⁰ Ordinarily at this point the broker's task is complete when he has brought the parties together and his principal has secured a binding contract.¹¹ However, this rule will give way in the event that the parties have expressly stipulated to the contrary by providing other supplementary conditions which must be met.¹²

Assuming the absence of these conditions most, but not all, jurisdictions will assert the right of the broker to his commission without regard to the ultimate consummation of the contract. While there are some decisions to the effect that there must be actual performance before commissions accrue, even though the contract of employment did not cover the point, the great weight of authority is that unless the broker and his employer have expressly stipulated to the contrary, the broker is entitled to his compensation upon completion of the negotiations. And this, irrespective of whether the contract negotiated is ever consummated, as long as the failure of the consummation is not due to any failure, fraud or bad faith upon the part of the broker. It will be noted that whether the buyer or the principal or both default, the broker still has earned his commission. This rule of ignoring consummation as a factor is not as harsh as it appears when viewed with the thought that the principal has the privilege of either rejecting the prospective customer before contracting with him or as an alternative, investigating the customer's capacity beforehand.¹³

Where special conditions exist—and these are neither more nor less than contract terms—such conditions have consistently been strictly interpreted, which is the usual procedure in the law of contracts; and the failure of the purchaser to carry out his contract has frequently been fatal to the agent's efforts to recover commissions

⁷ 8 A.M. JUR., Brokers § 168 (1937).

⁸ *Saum v. Capital Realty Development Corp.*, 268 N. Y. 335, 197 N. E. 303 (1935).

⁹ *Ibid.*

¹⁰ *Reynor v. Mackrill*, 181 Iowa 210, 164 N. W. 335 (1917).

¹¹ *Clapham v. Cosgrove*, 237 App. Div. 901, 261 N. Y. Supp. 819 (2d Dep't 1933).

¹² *Fittechauer v. Van Wyck*, 92 N. Y. Supp. 241 (Sup. Ct. 1905).

¹³ See 8 A.M. JUR. Brokers § 179 (1937). The minority view holding that consummation is a condition precedent is gradually drifting towards obsolescence. New York supports the majority view. *Clapham v. Cosgrove*, 237 App. Div. 901, 261 N. Y. Supp. 819 (2d Dep't 1933).

under a special contract containing conditions beyond that implied by the ordinary broker's contract. Some conditions rigidly enforced in the past required: consummation of the sale; payment in full; or the sale being fully carried out according to the terms of a contract, etc.¹⁴ A search of these decisions reveals that the factor of net profit or loss to the principal was not considered as an element to be weighed in the balance.

So far we have briefly classified a broker's manner of employment into two general types based on the existence of either an implied or an express contract of employment. We have further demonstrated that if the type be the former, general, but well defined rules of agency exist, while if it be the latter, the well charted law of contracts must apply. As might be expected, though, men and their problems often refuse to be so sharply categorized. It is just such an obscure or rather novel situation we will now consider.

III

When the Appellate Division recently handed down its decision in *Kane v. Neptune Shipping, Ltda.*,¹⁵ the court very probably arrived at a most just conclusion. Nevertheless by a curious and not infrequent paradox of the law, justice and correct law are not always concomitant; as the existence of equity will confirm. Yet dubious legal reasoning no matter how justifiable the immediate end, must usually be deplored, for under our system of judicial precedents the improperly contrived cure for one ill may well be the germ of a hundred successive ills.

Furthermore this same system of judicial precedents in the hands of those to whom dogma is sacrosanct, can become an iron hand about the throat of vital progress. The conclusions of today while indicated by the decisions of the past must always be made in the light of present circumstances. In the event these circumstances dictate a departure from old patterns the departure should be made openly, supported by attendant logic; not presented secretly, weakly supported by lip service to case history. *Kane v. Neptune* seems to represent a forward stride in the development of brokerage law. An everyday commercial law problem, it nevertheless contains hidden, deep running currents of conflicting ideologies. Its conclusion though justified and courageous was born somewhat obscurely.

The *Kane* case was an action at law for the recovery of a ship broker's commission. The facts were not disputed. J. S. Gessel the plaintiff's assignor was a ship broker in Houston, Texas. Neptune Shipping, Ltda., the defendant was the time chartered owner of a Norwegian tanker the *Mosli*. On October 5, 1938, at Oslo, Norway, a charter party was arranged between the defendant and Eastern

¹⁴ See Note, 51 A. L. R. 1390, 1400 (1927).

¹⁵ 274 App. Div. 28, 79 N. Y. S. 2d 396 (1st Dep't 1948).

States Petroleum Sales Corporation as charterer for a twelve months' period beginning upon delivery of the vessel. Payment was to be made in cash, monthly in advance, in New York. The charter included among its terms one which permitted Neptune to withdraw the *Moshi* in event of a default, without prejudice to any claims to which Neptune may be entitled under the charter. No reference was made in the charter to the broker's commissions. However, defendant Neptune agreed by letter to pay Gessel 3½% brokerage commission on the hire to be earned *under the Oslo charter*.

A month later on November 5, 1938, Eastern States, the charterer, entered into a subcharter agreement with Distribuidora de Petroleas Mexicanos providing for exactly the same term but at a 10% higher rate. This charter known as the Houston Charter was permissible under the terms of the Oslo Charter. The vessel was delivered to Eastern States and then immediately to Distribuidora on November 28, 1938.

Despite the fact that monthly payments by Eastern States were consistently late the broker was paid commissions on the first six months of the charter. Prior to May 20, 1939, defendant dissatisfied with the dilatory tactics of Eastern States notified them that it was going to exercise its right to withdraw the tanker from the charter arrangement. On May 20, 1939, defendant and charterer in good faith but without the knowledge of the broker entered into an agreement whereby Eastern States assigned to Neptune all its right, title and interest in the Houston Charter, thereby making Distribuidora the charterer directly from Neptune. Eastern States guaranteed to Neptune the faithful performance of the contract by Distribuidora and in the event of default, undertook to remain fully responsible therefor. Eastern States further warranted that there were no brokerage commissions due under the Houston Charter. Finally the assignment provided as follows: "The time charter dated at Oslo, Norway, October 5, 1938, between Neptune . . . , as time chartered owner of the motor tank ship *Mosli*, and Eastern States Petroleum Co., Inc., as time charterer, is hereby cancelled, the intent of this agreement being that the time charter dated at Houston, Texas, November 5, 1938, between Eastern States . . . , as sub-time chartered owner and Distribuidora . . . , is in all respects to replace and substitute for the time charter dated at Oslo, Norway, October 5, 1938."¹⁶ The element of fraud or bad faith is concededly not present. Judgment is sought for brokerage commissions on the last six months of the term.

In deciding for the broker the majority opinion reached its far seeing conclusion by a consideration of eight cases all of which are imperfectly analogous to the instant case.¹⁷ Throughout these eight cases ran one weak but consistent thread, and this thread was the

¹⁶ *Id.* at 30, 79 N. Y. S. 2d at 398.

¹⁷ The court stated no case squarely in point had been brought to its attention.

key to decision not in the eight cases but in the ninth, the one under discussion. The court noticed in its study that in every instance where the broker failed to recover his commissions the principal was not in as satisfactory a position as he would have been had there been no default. Conversely where there was a recovery the principal had been substantially made whole. From this tenuous thread it reasoned it was justified by precedent as well as by the equities involved in permitting the broker in the *Kane* case to recover commissions upon the hire earned under the Houston charter even though his contract read that they were to be paid on hire earned under the Oslo Charter.

The first of the cases presented for consideration in its opinion was *Herschfield v. Jamaica Savings Bank*¹⁸ in which a broker was awarded commissions after his principal had successfully settled a suit for specific performance. The trial court found that the defendant had obtained by law a performance of the contract. So too in *Haber v. Goldberg*¹⁹ and *Dermody v. New Jersey Realities, Inc.*,²⁰ the broker was permitted recovery. In all these cases the buyer defaulted and the principal was able to recoup either by way of a suit for specific performance or a settlement for substantial damages so that the principal was relatively in the same position, as if there had been no default. Before distinguishing these cases let us mention one other which refers to and approves of the last two mentioned. In *Amies v. Wesnofske*²¹ a broker attempted to recover commissions on a defaulted contract for the purchase of real estate. As a settlement the vendor kept a \$10,000 down payment and released the buyer from further obligation. The contract with the broker provided for his payment "on the closing of title," which condition was not fulfilled. Refusing to permit recovery the court based its decision mainly on the theory that the express contract condition had not been fulfilled nor had any waiver of this condition been shown. They did not advance as their reason for this decision the view that the principal had not been made whole. Whether or not \$10,000 plus retention of the property made him whole was not decided by the case though it would appear on the surface a profitable transaction. As to the *Haber* and *Dermody* cases the court felt it could distinguish them, though in the event this was not successful they ended by denying the theory of these cases. This attempt to distinguish was quoted in the *Kane* case by the court, and appears below with, however, the addition of the last sentence which the court omitted:

The decisions in *Haber v. Goldberg* (. . .) and *Dermody v. New Jersey Realities, Inc.* (. . .) are not necessarily at variance with the decisions cited. In the first case the vendor sued the vendee and obtained damages for non-

¹⁸ 257 App. Div. 991, 13 N. Y. S. 2d 643 (2d Dep't 1939).

¹⁹ 92 N. J. Law 367, 105 Atl. 874 (1918).

²⁰ 101 N. J. Law 334, 128 Atl. 265 (1925).

²¹ 255 N. Y. 156, 174 N. E. 436 (1931).

performance. In the second case the vendor was not content to accept a forfeiture, in addition to retaining the down payment made, he exacted and received upon a settlement, a substantial sum in lieu of damages. In each case the vendor made use of the contract, secured for him by his broker, to obtain an advantage from the defaulting vendee. Although he did not secure actual performance of the contract, he received, in the one case, an award representing the benefit lost; in the other, an agreed payment which presumably measured it with approximate accuracy. It might well have been reasoned that the precise equivalent of performance was received in each case; therefore, that in effect the condition had been performed. However that may be, the two cases do not derogate from the principle that to establish a waiver by a vendor of a condition of payment of commission to his broker, viz., that an actual sale be consummated, there must be a positive act by the vendor hindering or preventing performance.²²

Continuing their argument the court next considered *McDowell-Peterman Co., Inc. v. Independent Packing Co.*²³ which presented, as usual, a broker attempting to recover his commissions after the buyer had defaulted. The contract of brokerage contained the clause "when goods are shipped" as a condition of payment of commissions. In addition, this was also the usual custom of the trade. When the buyer defaulted after a small portion of the goods had been shipped, the seller went through quite a series of financial maneuvers in order to salvage the contract. Eventually, however, the buyer was adjudged a bankrupt and the default was an accomplished fact, with a loss to the vendor of over \$200,000.

Since he had not paid for the goods title never passed to the purchaser and his being able to use them as collateral for a loan was significant not of consummation but only of the generous treatment of the vendor. Among other pleas plaintiff broker despite the non-fulfillment of the condition precedent claims commissions on these financial machinations internal to the ultimate end of the contract. In rejecting these pleas the court pointed out not only the condition unfulfilled but the loss of the principal of over \$200,000. The emphatic language of the court leaves little doubt as to the rule of law for which it may be cited:

It is very clear that the shipment of the merchandise was a condition precedent to the earning of brokerage commissions by the plaintiff. Not only that but the evidence offered by the defendant clearly showed without contradiction that such a construction was borne out by the previous dealings between the parties and by custom of the trade. . . . The contract provides that commissions were payable "when goods are shipped." There is no allegation in the complaint or elsewhere, either that shipment was made or that there was any other arrangement substituted therefor, or to take the place of shipment. The undoubted construction of the contract is that commissions were not to be paid until the goods were shipped.²⁴

²² *Id.* at 164, 174 N. E. at 440.

²³ 211 App. Div. 781, 208 N. Y. Supp. 341 (1st Dep't 1925).

²⁴ *Id.* at 789, 208 N. Y. Supp. at 348.

So too in its discussion of *Lougheed & Co., Ltd. v. Suzuki*,²⁵ the court seized upon a collateral fact and ascribed to it a significance which it did not deserve. Because of a protracted delay in delivering a vessel, a charterer used his option to cancel the contract of hire. The delay was due to no fault of defendant. Nevertheless the plaintiff sued for his fees on the theory that he had fulfilled his duties when the valid contract of hire had been formed. Fortunately for the defendants they had protected themselves against this eventuality by insisting upon inserting in the brokerage contract, a limitation upon their liability for fees. This condition that payment was due to broker "on monthly payment of hire" was the factor upon which the court decided the case and not because the principal was not made whole. The opinion didn't mention this theory but expressly predicated their solution on contract grounds when they said:

Finding that plaintiff's right to brokerage extended to monthly hire only, as paid to defendants, . . . it follows that a verdict should have been directed in favor of defendants. . . .²⁶

Finally the last two cases considered were *Caldwell Co., Inc. v. Connecticut Mills Co.*²⁷ and *Daly v. Chapman Manufacturing Co.*²⁸ In the former case plaintiff had secured for his principal a huge contract for the purchase of their goods. The buyer defaulted and after negotiations, vendors agreed to accept a large sum in settlement of their claims. No brokerage was paid on this sum for under the terms of the brokerage agreement commissions were to be paid only on goods shipped from the mill and accepted by the customer. Despite the large sum paid as damages it was undisputed that on the whole the defendant suffered a loss when the cost of overhead charges on his idle plant were considered. The court refused recovery by the broker, because the condition precedent had not been met. In addition they substantiated this line of reasoning by refusing to permit a recovery on an equitable basis since the principal had actually lost money because of the default. From this negative dictum we find the court in the *Kane* case affirmatively deciding that there is an equitable basis for the decision; and that this basis is the doctrine of equivalent performance. Such a theory was expressly rejected by the court in the *Caldwell* case when they said:

We are not concerned, therefore, with any claim of fraud, nor may we predicate a judgment upon any general considerations of what would constitute equitable or generous treatment to the plaintiff. This is an action at law upon a written contract, and that contract is the charter of the plaintiff's rights. It is quite beside the point for plaintiff to urge that inasmuch as the defendant

²⁵ 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dep't 1926).

²⁶ *Id.* at 494, 215 N. Y. Supp. at 512.

²⁷ 225 App. Div. 270, 232 N. Y. Supp. 625 (1st Dep't 1929), *aff'd*, 251 N. Y. 565, 168 N. E. 429 (1929).

²⁸ 246 Mass. 118, 140 N. E. 677 (1923).

has received the amount by which it would have profited by performance of the agreement, it should in good conscience pay the plaintiff what it would have to pay him upon performance by the Fisk Rubber Company. Indeed the premise that it has received the equivalent of its legal damages is effectively challenged by the appellant. Even if that challenge is unsuccessful, however, it was still perfectly competent for these parties to contract that in no event should commissions be payable except upon the price of goods actually shipped.²⁹

Any lingering doubt as to the opinion of the Court of Appeals upon this subject is inevitably dissipated when after a review of several somewhat analogous cases,³⁰ they summed up by saying:

It is clear from these authorities that the plaintiff cannot rest upon the proposition that it is entitled to recover merely because the defendant has secured a benefit equivalent to performance of the contract.³¹

Lastly cited by the court in the *Kane* decision was the case of *Daly v. Chapman*.³² It differs little from the *Caldwell* case as to the fact situation but in refusing the plaintiff his commissions on the ground of failure of a condition precedent the court did mention more positively and more favorably the latent equitable factors influencing its decision. As in the *Caldwell* case upon the purchaser's default a settlement was made in which the vendor recovered a sum equal to that profit which would have been realized on the contract. Upon first glance this would appear to have left the manufacturer whole, yet because a condition precedent concerning delivery of goods was not fulfilled, permit him to escape liability for commissions. However, as it was pointed out in the *Kane* case, the manufacturer in vainly trying to keep his concern in business after the default continued to pay overhead charges and eventually wound up suffering substantial losses. Just how much of a part this equitable factor played in influencing the decision is problematical. But it must be admitted that while the case was ultimately decided on the obvious meaning of the contract terms, the court did ascribe more significance to equitable factors than any cases heretofore discussed.

IV

This then was the conventional approach to what constituted in the final analysis an unconventional solution. At best the thin con-

²⁹ See note 27 *supra* at 273, 232 N. Y. Supp. at 628.

³⁰ *Lougheed & Co., Ltd. v. Suzuki*, 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dep't 1926); *McDowell-Peterman Co. v. Independent Packing Co.*, 211 App. Div. 781, 208 N. Y. Supp. 341 (1st Dep't 1925); *Watson v. Muskegon Steamship Corp.*, 208 App. Div. 158, 203 N. Y. Supp. 194 (1st Dep't 1924); *Fuller v. Bradley Contracting Co.*, 183 App. Div. 6, 170 N. Y. Supp. 320 (2d Dep't 1918).

³¹ See note 27 *supra* at 278, 232 N. Y. Supp. at 634.

³² See note 28 *supra*.

necting thread which linked these cases lends only weak persuasive weight to the conclusion. At worst the cases deny the conclusion affirming as they do the view that contract law should be applied and that equitable factors play no part.

However, as the court pointed out no case exactly in point had been brought to their attention. Unfettered as they were then by exact precedents they were comparatively free to create new law. This they did and probably, most justifiably. To carp then at the manner of their development while agreeing with their conclusion seems somewhat pointless until one realizes that the decision in solving one problem has revived and created several others.

The obscurity of the decision is at once apparent when one attempts to state the principle for which the case stands. A broker is entitled to recover commissions despite failure of a condition precedent when the principle secures equivalent performance from one other than the broker procured defaulting vendee. What does this mean? Does it destroy the power of individuals to contract between themselves substituting in its stead not what the parties intended but rather the test of the principals' ultimate profit or loss? Does it mean that in all cases where the principal locates a substitute vendee the broker recovers despite the fact the broker had nothing to do with procuring the substitute? Or must there be some causal linkage traceable to the broker? Is this linkage a question of fact to be ascertained in the light of individual circumstances? Since the opinion doesn't mention them, can we assume that all distinction between Law and Equity have been abolished? Was this decision based on legal or equitable grounds? Will this case bear citing for situations other than the present one?

Before attempting to postulate answers to these questions it is necessary to mention two possible theories upon which the court predicated its solution. Assuming (the language of the decision hardly permits it) the court treated the problem as one of law they may have reasoned thusly. The Neptune people in permitting the substitution of charterers while retaining all their remedies against the original charterer have so conducted themselves with the aid of the contract their broker procured that they are deemed to have waived the condition precedent. This is in line with the two New Jersey cases mentioned earlier.³³ But to so assume makes pointless the exhaustive search for equitable factors. Nor does it explain the strong contrary statement in the *Amies* case.³⁴ Still another possible rationale might be found in the old equitable principle that "Equity distinguishes between those terms and stipulations which are of the essence, and those which are not, and does not permit the defendant to set up the breach of the latter as complete bar to all

³³ See notes 19 and 20 *supra*.

³⁴ *Supra* text p. 73.

relief. . . ."³⁵ Before applying this principle, however, they would first have had to decide that the condition precedent was not of the essence. In the present case such a conclusion would be far-fetched for the condition is unambiguous and has no good reason for its insertion except to limit the defendant's liability. To disregard this considered attempt at self protection³⁶ because the principal has suffered no loss evidences liberal thinking. This liberality, however, if not watched closely and applied sparingly can well spell the end of contract law substituting in its stead a somewhat elastic benevolence.

It is only in an attempt to be thorough that these last two possible rationales have been mentioned, for though incompletely postulated the decision almost certainly presents a departure from existing rules. That it did not do so unequivocally was probably the result of attempting to justify it as an extension of presently existing case law. In its present state the decision should only be absolutely relied upon as law for precisely similar situations. However, some practical information as to the state of the law may be deduced from it.

The decision does not change the existing rule that strict contract rules will be enforced where it can be shown that the principal has suffered a loss. Furthermore, these losses need not be immediately connected with the issue so long as they are causally linked. In some cases they may be somewhat obscure, discoverable only through elaborate cost accounting systems³⁷ while in others they may be so remote in time as to include the consequential loss of attempting to remain in business while seeking other customers even though the defaulter paid in damages the anticipated profits.³⁸ In some instances this loss becomes difficult of ascertainment when for example questions of personal preferences not completely reducible to dollar equivalents, are involved. In this wise it might be interesting to note again that in *Amies v. Wesnofske*³⁹ the \$10,000 plus retention of the land did not deter the court in refusing to award commissions. In the light of the present decision the *Amies* case now rests on very shaky ground for should it be decided, and it is a question of fact, that the vendor had profited, and he seems to have, consistency would demand that the decision be reversed.

Basically, of course, the problem is sociological. With the years has come the wane of rugged individualism and in its stead there has been an increasing tendency towards paternalism on the part of gov-

³⁵ 4 POMEROY, EQUITY JURISPRUDENCE § 1297 (5th ed. 1941).

³⁶ It will be recalled that without this protective clause had the principal not been able to secure a substitute he would still have had to pay commissions, for in that event, the usual rule that a broker has earned his fees when he procures for his principal a binding contract, would apply.

³⁷ *Caldwell Co., Inc. v. Connecticut Mills Co.*, 225 App. Div. 270, 232 N. Y. Supp. 625 (1st Dep't 1929), *aff'd*, 251 N. Y. 565, 168 N. E. 429 (1929).

³⁸ *Daly v. Chapman Manufacturing Co.*, 246 Mass. 118, 140 N. E. 677 (1923).

³⁹ See note 21 *supra*.

ernment. This trend has influenced the attitudes of the courts and nowhere is this more clearly shown than in the choice of language presenting the *Kane* majority and minority opinions. The majority spoke equity, the minority talked law. One looked for an escape from what was considered a disadvantageous contract, the other stressed the necessity for exactness and stability in commercial law. Each possessed merit and had the decision presented its conclusion in a more exact form so as to allay the fears of the dissent a more serviceable future standard would have resulted. However, in its present condition the case will provide just more fuel for the old conflict of form versus substance, which despite the merger of Law and Equity under the code pleadings still rears its head from time to time. While the problem persists and certainly so long as the *Kane* case is law an alternative demand for equitable relief (absent in the instant case) is indicated.

From a less theoretical standpoint there can be little doubt that the practical result of this decision will be a great increase of cases of this type. No longer will complainants be deterred from presenting what had heretofore seemed hopeless pleas. By the same token, however, these suits will force the courts to enunciate more definitive limits to this type of relief. In short order then a more concrete standard should appear. Meanwhile and even after these clarifications appear much litigation can be avoided by including in all brokers' contracts clear cut provisions anticipating possible defaults.

HAROLD MCCOY.

PRESENT STATUS OF INDUSTRIAL HOMEWORKERS AS EMPLOYEES UNDER THE SOCIAL SECURITY ACT

I. *Introduction*

During the past few years there has existed a conflict as to the coverage of certain individuals, such as industrial homeworkers,¹ under the Old-Age and Survivors Insurance Program of the Social Security Act.² This conflict concerned the interpretation and definition to be given to the word "employee" in said Act, and was finally settled on June 14, 1948 by Congressional amendment to the Social Security Act.³ A chronological approach is used herein to show how the conflict arose over a period of years and how it was settled in the second session of the 80th Congress.

¹ See *Hearings before Committee on Finance on H. J. R. 296, 80th Cong., 2d Sess. 128 (1948)*.

² 49 STAT. 620 (1935), as amended, 42 U. S. C. §§ 301-1307 (1946).

³ Pub. L. No. 642, 80th Cong., 2d Sess., § 2(a) (June 14, 1948).