

**LEGAL ASPECTS**  
**IN**  
**COLLECTION OF ACCOUNTS**  
**IN CUBA**

**U. S. DEPARTMENT OF COMMERCE**  
**BUREAU OF FOREIGN AND DOMESTIC\* COMMERCE**

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**LEGAL ASPECTS**  
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**COLLECTION OF ACCOUNTS**  
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## FOREWORD

The favorable reception accorded Trade Information Bulletin No. 748, *Legal Aspects in Collection of Accounts in Argentina*, published by the bureau early last year, has encouraged a more detailed analysis of the Cuban legal process in this second of a series of studies being made of the laws governing collection of accounts abroad.

The present bulletin discusses the salient features of the rules of procedure for the prosecution of actions filed in the courts of Cuba, the outstanding technicalities and the main sources of difficulty being pointed out. After an introductory treatment of the various Cuban courts and their jurisdiction and of the fundamental rules governing capacity of litigants and powers of attorney to sue, the study analyzes the actions which, ordinarily, may be instituted before Cuban tribunals. A discussion of special actions and proceedings follows, starting with arbitration. Particular attention has been given the executory action, the importance of which must be stressed in view of its effectiveness. The more common commercial actions, such as those grounded on negotiable instruments, refusal to accept goods sold, current accounts, and mortgages, are next considered. The final part of the bulletin is devoted to suspension of payments and bankruptcy proceedings.

A work of this nature should be of interest to all firms which under present conditions find themselves forced to contemplate the possibility, advantage, and difficulty of collecting, through proceedings at law, accounts due them in foreign jurisdictions; and it should be particularly helpful to the American exporter facing such litigation in Cuba in deciding the proper course to pursue.

It is the usual recommendation of the division of commercial laws to residents of the United States who are to become parties to litigation or who seek through judicial means to protect their rights in foreign countries that they consult their own attorneys and lawyers specializing in the law of the particular foreign jurisdictions and having correspondents there. These lawyers, having immediate knowledge of the questions involved, are not only in a position fully to advise as to the necessary steps to be taken to protect the rights of their clients, but also to prepare all necessary documents, thus assuring more prompt and efficient progress. Experience has shown that acting through counsel at the place of business of the client is not more expensive than dealing with attorneys at the place where the difficulties arise. Furthermore, definite information concerning the costs and progress of proceedings is readily procurable through these attorneys from their correspondents abroad, who file the action and represent the litigant therein.

Acknowledgment is made of the valuable assistance received in the preparation of this bulletin from several of the leading law firms in Habana and from Assistant Trade Commissioner R. Horton Henry, in reviewing the manuscript and verifying certain points of law.

FREDERICK M. FEIKER, *Director,*  
*Bureau of Foreign and Domestic Commerce.*

AUGUST, 1932.

# LEGAL ASPECTS IN COLLECTION OF ACCOUNTS IN CUBA

## CUBAN COURTS AND THEIR JURISDICTION

The Law of Civil Procedure of Cuba was promulgated on September 12, 1885. It is the Law of Civil Procedure of Spain of February 3, 1881, with certain modifications. The latter code is a revision of the law of October 5, 1855, which had been extended to Cuba on December 9, 1865. The main sources of all this legislation are Las Siete Partidas and the Novisima Recopilacion, two monumental compilations of Spanish law.

The organization of the judicial system of Cuba is provided by the Organic Law of the Judicial Power of July 1, 1909, while the Code of Commerce of 1885 regulates in part the bankruptcy of merchants. Suspension of payments may be invoked by virtue of special legislation, while other actions to which recourse frequently is had in Cuba in commercial transactions are based upon Civil and Commercial Code sources.

The Republic of Cuba is divided into six judicial districts, corresponding to the six Provinces, and several partidos and términos municipales. There is a Supreme Court, acting as a tribunal of last resort, at the capital; an intermediate court of appeals, known as audiencia, in each district; one or more courts of first instance in each partido and one or more municipal courts in each término municipal. (Arts. 12 and 13, Law of the Judicial Power of July 1, 1909, as amended by law of August 15, 1919.)

### THE SUPREME COURT

The Supreme Court is composed of a president, two chamber presidents, and 14 judges (magistrados). The court itself is divided into two chambers, one to hear civil and administrative cases and the other with jurisdiction over criminal cases. (Idem, arts. 19-21.)

The jurisdiction of the highest tribunal of Cuba, as provided in the organic law of the courts, appears to be the following (idem, arts. 122-125):

(1) The whole court, in one chamber, may entertain jurisdiction of crimes committed by the President and Vice President of the Nation and by the president, judges, and public prosecutor of the Supreme Court. It will also hear cases concerning civil liability of the last-mentioned officials. Proceedings involving the constitutionality of laws, decrees, regulations, and other dispositions may be entertained by the court sitting as a whole in one chamber.

(2) The chamber of civil and administrative proceedings has jurisdiction of (a) cassation and revision proceedings instituted in civil cases and of complaint proceedings (recursos de queja) which

arise therein, and of cassations admitted against judgments in administrative cases originally filed before audiencias, as well as of revision and complaint proceedings in administrative cases in general; (b) of litigation between the State, the Provinces, and the municipalities; (c) of issues on the merits (*cuestiones de fondo*) in civil and administrative cases, after cassation of judgment grounded on violation of law or legal doctrine; (d) of the question as to whether a litigant adjudged to be in default by the Supreme Court itself may be heard; (e) of the enforcement in Cuba of judgments rendered in civil matters by foreign courts as prescribed by treaties and laws, unless by the terms of such treaties the matters are to be submitted to another tribunal; (f) all other matters presented for its consideration by procedural or other laws.

It is stated that judgments rendered by the Supreme Court constitute the only source of jurisprudence in Cuba, and that two concurring decisions of that court are sufficient to establish a case of jurisprudence.

#### AUDIENCIAS

Audiencias are intermediate courts of appeals, one in each of the six judicial districts into which Cuba is divided. The one at Habana is composed of a president, 4 chamber presidents, and 15 magistrates. It has four chambers—one having jurisdiction of civil and administrative matters and composed of a president and six magistrates, and three with jurisdiction of criminal cases and composed of one president and three magistrates each. In all the other districts, audiencias are smaller, varying from a president and seven magistrates in Santa Clara and Oriente to a president and four members in Pinar del Rio. (Law of the Judicial Power, arts. 24–27.)

The jurisdiction of audiencias covers (1) the decision of issues concerning jurisdiction of courts of first instance and of municipal courts not of the same partido (*idem*, arts. 130–133); (2) cases concerning civil liability of judges of its district which are heard originally by audiencias; (3) appeals from courts of first instance in civil actions and in proceedings instituted in the latter courts based on decisions of registrars of property.

#### COURTS OF FIRST INSTANCE AND MUNICIPAL COURTS

Courts of first instance have jurisdiction of controversies concerning jurisdiction of municipal courts and of all civil cases where the amount in controversy exceeds \$500, provided the jurisdiction of the audiencia or Supreme Court is not exclusive. It has appellate jurisdiction of cases coming from the municipal courts. (Law of the Judicial Power, art. 134.)

Municipal courts have jurisdiction of civil cases when the amount in controversy does not exceed \$500. (*Idem*, art. 141.)

#### VENUE

The rules governing the jurisdiction of courts in Cuba are so numerous that in this brief discussion only those fundamental provisions of the Law of Civil Procedure directly and decisively affecting the filing of collection actions can be mentioned. They apply

to foreigners as well as to Cubans who seek redress, as either plaintiffs or defendants, in the tribunals of the Republic. The rules have repeatedly been interpreted by the Supreme Court of Cuba, the decisions of which in this regard should be carefully studied.

When a person is forced to seek redress through the aid of the courts the question naturally arises as to the tribunal which may properly assist him. In Cuba, such a person must go before the court to which the litigants have submitted expressly or impliedly. Such submission can be made expressly only by renunciation of the court that would otherwise hear the case and can be made only in favor of a tribunal having jurisdiction of cases of the same nature. Implied submission is accomplished by the filing of the action in a particular court by the plaintiff and by the entering of an appearance by the defendant other than to deny the jurisdiction or venue of a court. (Arts. 56-58, Law of Civil Procedure—abbreviated throughout the remainder of this bulletin to "L. C. P.")

If no express or implied submission to a tribunal is made, the following rules with regard to venue must be observed (L. C. P. 62):

1. In personal actions the court of the place where the obligation is to be performed has jurisdiction. If there be no court there, then, at the election of the plaintiff, the court at the domicile of the defendant or of the place of the contract has jurisdiction if the defendant is there even temporarily, so that summons may be served therein.

2. If the action is directed against two defendants, jointly and severally liable and residing in different places, the plaintiff may file the action in the court of either place, at his election.

3. In actions in rem concerning personal property and livestock, the court of the place where the property is or of the domicile of the defendant, at the election of the plaintiff, has jurisdiction. In actions in rem concerning land, only the tribunal where the property is may hear the case. If the action concerns one or several parcels of land in different jurisdictions, the case may be heard by the court in any one of the places.

4. In mixed actions, that is, actions concerning both personal and property rights, the court of the place where the property is or of the domicile of the defendant, at the election of the plaintiff, may hear the case. (See also L. C. P. 63 in this regard.)

5. In actions concerning voluntary civil insolvency or bankruptcy, the court of the domicile of the debtor has jurisdiction, while in civil insolvencies and bankruptcies brought about by the creditors any one of the places where executions are being made may hear the cases. In this latter event the court of the domicile of the debtor will be preferred if either the debtor or the majority of the creditors so demand; otherwise the court of the place where the civil insolvency or bankruptcy is decreed will be preferred.

In the application of these rules it becomes indispensable to know what is meant by domicile of certain parties. That of merchants, as regards mercantile acts and contracts and their consequences, is the town where they have their principal place of business. This is true also of civil or mercantile companies, provided nothing in this regard has been stipulated in the deed of organization. (L. C. P. 65-66.)



## SERVICE OF SUMMONS

The defendant in actions in Cuba must be served personally with summons, at his domicile. If he is not found therein, the summons may be left there with his closest relative or his servant, over 14 years of age; in their absence the summons may be left with the nearest neighbor, who is legally bound to give it to the defendant upon the latter's return. Where the defendant's domicile is not known the judge will order that service be made by posting the summons in the accustomed public place and publishing it in the *Gaceta Oficial*, the official journal of the Government. (L. C. P. 266-269.)

Whenever the defendant resides outside the place where the case is filed, service may be made on him by a *suplicatoria* when the request for such service is made to a higher court, by an *exhorto* when the request is made to a court of equal dignity, and by an order when addressed to a lower court. (L. C. P. 285.)

Service of summons in foreign countries is made by means of letters rogatory transmitted through the Ministries of Justice and State and diplomatic channels or as otherwise provided by treaties. (L. C. P. 300; Order 269 of 1900.)

Judgments obtained in Cuba in actions wherein service of summons is not made personally on the defendant are, as a general rule, not enforceable in jurisdictions within the United States. The courts in many of these jurisdictions refuse to execute the letters rogatory asking for the service of summons as stated in the preceding paragraph.

The summons must contain the following facts (L. C. P. 272-274):

- (1) The judge or court issuing it; date and nature of the action;
- (2) Full name of the defendant;
- (3) Purpose of the summons and name of plaintiff;
- (4) Warning to defendant that if he does not enter an appearance he shall be prejudiced as the law may direct;
- (5) Date;
- (6) Term within which the defendant must appear in the action and designation of court with which he must enter his appearance.

## CAPACITY OF PARTIES TO SUE

## LACK OF CAPACITY—HOW PLEADED

By "personalidad" in litigation in Cuba is meant the capacity of a person to file an action or appear therein in behalf of himself or another. The lack of such capacity in ordinary actions for a greater amount (*juicios de mayor cuantia*—that is, involving sums exceeding \$1,500) is pleaded by way of dilatory exception grounded on (1) the fact that plaintiff lacks the qualifications necessary to file action or appear therein, or fails to establish the position under which he presents the claim, (2) the fact that the power of the judicial agent (*procurador*) is insufficient or illegal, and (3) the fact that the defendant is not in the position under which he is sued. (L. C. P. 532.) These exceptions must be disposed of in a separate interlocutory proceeding known as an *incidente*, and the decision of the tribunal is rendered in the form of a writ. (L. C. P. 368, 535-538,

and 895.) If these defenses are not alleged as dilatory exceptions, they may be alleged, if at all, in the answer, as peremptory exceptions. In actions for a lesser amount (*juicios de menor cuantía*—that is, involving sums between \$500 and \$1,500) these defenses may be alleged in the answer, while in the executory action the allegations in question must be made in the defendant's first pleading in opposition to the suit (*escrito de oposicion*). (L. C. P. 541, 686, and 1461.)

In executory actions based on bills of exchange, lack of capacity can not be pleaded except as grounds for annulling the action. (L. C. P. 1465.) In verbal actions (*juicios verbales*—that is, involving sums of \$500 or less) the defense may be pleaded orally at the time the complaint is answered, and it is considered and disposed of in the judgment subsequently rendered.

#### PRIOR RECOGNITION OF CAPACITY

In Cuba it is an established principle that capacity, once recognized or acknowledged in another by a person in or outside an action, can not be denied. This principle, nevertheless, is subject to many limitations. For example, a person can not deny, in an action, the capacity of the plaintiff after having recognized it in other acts directly related to the matter in litigation; the existence of a company can not be denied by one who contracts with the entity; he who contracts with the representative of a company can not deny the representation upon demand being made of him for performance of the contract. The pleading of a counterclaim (*reconvencion*) impliedly accepts the capacity of the person who must answer it in behalf of the plaintiff; but there is an exception to this, and it is the case when the counterclaim affects directly the main cause of action as alleged in the complaint. (See "*La Personalidad y su Jurisprudencia*," by Manuel Martinez Escobar, p. 33 et seq.) The limitation placed upon the doctrine of estoppel to deny capacity based on prior recognition or acknowledgment is that it is only applicable in causes of actions arising out of a contract in which the capacity of the plaintiff or of the defendant, as the case may be, has been recognized or acknowledged. (Supreme Court decision of April 15, 1914.) Recognition of the capacity of an *apoderado* (the holder of a power of attorney) of a company to make a contract in its behalf does not prevent (*estop*) the obligor from denying the capacity of that agent to file an action on the same contract against the obligor, because the power to contract and the power to file actions are separate and distinct. (Martinez Escobar, *op. cit.*, pp. 41-44.)

#### FAILURE OF CAPACITY DURING ACTIONS

After civil proceedings have been instituted it often happens that one of the parties thereto dies, or becomes incompetent, or his judicial agent resigns, dies, is replaced, or for some other reason is able no longer to represent his principal. Any one of these events results in a failure of capacity, which must be remedied before the proceedings can be continued with success. (*Op. cit.*, p. 77 et seq.)

If the cause of the subsequent lack of capacity appears from the record of the case, a demand may be made by an *escrito* (a document

in the nature of a motion) requesting that the party in default re-establish his lost representation. If the failure is caused by the death of one party, his bankruptcy, the fact that he has become of age, expiration of the term for which a power has been given, or liquidation in the case of a company, the document evidencing the fact, together with the escrito, is sufficient for the court to consider the matter. But if further proof is necessary to establish the default, or if because of the default the nullity of prior proceedings is sought, an incidente (a separate proceeding, but a part of the main action) must be established.

If the judicial agent of one of the parties to an action resigns, his principal must appoint another upon request. If he fails to do so, all notifications, citations, and summons are served on him in court (en estrados) and judgments notified to him by publication. In the event of the agent's death the proceedings may be suspended until another agent is appointed.

Substitutions of agents can not be made except upon presentation of an instrument of power subsequent in date, or of the same one presented by both the agent replaced and his successor, with a resignation written therein by the former.

Where a substitution of parties to actions is made, the assignment of the credit or right, of itself, is not sufficient in order that the assignee may continue the prosecution of the suit or proceedings in his own name; it is indispensable that the transaction be recognized by resolution or final writ of the court (providencia o auto firme) in accordance with subdivision 4 of article 9 of the Law of Civil Procedure.

## THE JUDICIAL POWER OF ATTORNEY

### ENTRY OF APPEARANCE IN ACTIONS

Litigants in Cuba may appear in actions either personally or through a duly empowered judicial agent (procurador), attorney-in-fact (mandatario), or attorney. Any other person may be empowered to appear for another whenever one of the three above can not be found within the place where the action is filed, or are unfriendly to the party, or refuse to accept the representation offered. Companies and other juridical entities may appear in court through their legal representatives.

To the exporter, personal appearance in actions is perhaps of minor importance, since such appearance is not a common occurrence, and when it does happen it presents no major technical legal difficulties. The law of the person governs the capacity of the individual to appear in actions, the qualifications to be met being generally as regards legal age, mental competency, or other legal impediment or limitation.

In most instances exporters to Cuba are forced to file actions or to enter appearances as defendants through duly authorized representatives, unless the importance of the litigation warrants their personal appearance. In partnerships, because of the very nature of these entities managing partners may file actions and appear in their behalf or grant power to another person to do so. Corporations file actions or appear in litigation through agents, whose

power of attorney must show that the board of directors or a meeting of the shareholders authorized the grant. Where the charter of incorporation or the by-laws of a corporation extend authority to one of its officials to file actions in its behalf and to defend the interests of the entity in litigation, the power of attorney need only evidence this authority.

As a matter of practice, powers of attorney for litigation purposes are granted to attorneys and their judicial agents (*procuradores*) and are used directly by the latter in establishing suit under the direction of the attorney. The power of substitution which is generally contained in the instrument is used when litigation has to be instituted outside Habana and it is necessary to use a procurador or *mandatario* whose name may not be included in the power. The appointment of a procurador in litigation is essential in that notifications of court orders and proceedings must be made to him personally in order to bind the party represented by him. If no procurador is appointed, then notification need not be made personally to the party to be charged but may be made in open court (*en estrados*), whether the party to be charged or his representative is present or not.

#### FORM OF POWER FOR LITIGATION IN CUBA<sup>1</sup>

Under Cuban law, the most serious obstacle to litigation is the strict requirements of the courts regarding the power of attorney executed in favor of the legal representative, which must accompany all bills of complaint or answers at the time they are presented. It is imperative that every possible precaution be exercised to anticipate defects in the power of attorney, as the want of legal capacity to sue, on the part of either the attorney or his principals, is one of the first grounds for demurrer and will result in a dismissal with costs, without consideration being accorded to the merits of the case. Where a time limit in which to file suit or appeals is involved, the rejection of a defective power may be fatal to the right of action. In explanation, it may be pointed out that the hypercritical attitude of the judges is justified to a certain extent for the reason that lax enforcement of the legal requirements for a power of attorney may result in a suit against the judge for negligence.

In any effort to evade liability or to delay action, a defendant invariably attacks a power of attorney from every angle, and it has become increasingly difficult to prepare a power of attorney which will stand in court. It is interesting to note that the Supreme Court of Cuba rejected the power of attorney of the Bishop of Habana on the grounds that the court could not admit the bishop's unsupported statement as to his official character, even though it was well known and widely recognized.

The form of power of attorney issued by a corporation was considerably modified by the provisions of the Notarial Code of February 20, 1929, and under existing laws it has been found advisable

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<sup>1</sup>The information concerning the form of powers of attorney was procured by Assistant Trade Commissioner R. Horton Henry, with the assistance of Doctor Galdos of the law firm of Camacho, Collazo y Galdos, of Habana.

to draft these instruments in three parts, one accrediting the legal capacity of the company, another accrediting the authority of its officers to execute the power, and a third, or the power proper, specifically defining the powers of the agent.

1. To accredit the legal capacity of the company, there should be attached to the power of attorney a certified copy of the articles of incorporation issued by the State secretary of state as custodian of the original documents. (Art. 215, Cuban Notarial Code.) This is prima facie evidence of the company's corporate existence. (Art. XI, Cuban Civil Code; supreme court decision 66, of May 7, 1927.) As an additional precaution a statement by the State secretary of state certifying the existence of the company also should be procured.

2. To accredit the authority of the company's officers to execute the power, a certificate by the company's secretary, as custodian of its records, acknowledged before the notary simultaneously with the execution of the power, should be attached thereto, and contain exact quotations of the following (L. C. P. 502 (2); arts. 222 and 223, Notarial Code):

(a) The corporate by-laws and minutes of their adoption;

(b) The minutes of the meeting of stockholders showing the election of the board of directors;

(c) The minutes of the meeting of the board of directors showing the election of the officers; and

(d) The minutes of the board meeting showing the adoption of the resolution authorizing and directing the execution of the power of attorney.

In every instance the portion of the minutes quoted should be copied verbatim from the text, and include the heading and that part of the record showing the time and place of the meeting, due convocation, attendance of quorum, who presided, and who recorded, the adoption and discussion of the pertinent resolution, adjournment, and who signed the minutes.

3. In the power proper the notary should state that he has verified the facts set forth in the secretary's certificate, and that both this and the certificate of incorporation, with amendments, are attached to and made a part of the power. The power should be acknowledged before the notary by those persons authorized to do so by the resolution of the directorate, usually the president and secretary of the company. Signature by two officers is not essential, but desirable. Witnesses may be dispensed with, the notarial acknowledgment being sufficient. (Art. 126, Notarial Code.)

The notarial acknowledgment of the power and the certificate of the secretary should be authenticated by the corresponding county clerk. Then the signature of the county clerk and of the State secretary of state should be authenticated by the Cuban consul of the district. If there is no consul therein, the signature of the State secretary of state must be authenticated by the Secretary of State of the United States, whose signature must be authenticated by Cuban officials in Washington. The three sections of the power are then assembled and an additional certificate attached by the consul to the effect that they may be considered public documents. (Art. 215, Notarial Code.) The consul's signature must then be authenticated by the Secretary of State of Cuba.

It is believed that the following form of power of attorney complies with all the provisions of the law on the subject:

*Power of Attorney*

In the city of \_\_\_\_\_, county of \_\_\_\_\_, State of \_\_\_\_\_, United States of America, this \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_, before me, \_\_\_\_\_, a notary public duly appointed, commissioned, sworn, and qualified to act as such in and for the aforesaid county, with permanent residence therein, appear \_\_\_\_\_, who uses no other surname, born in \_\_\_\_\_ and a citizen of \_\_\_\_\_, of legal age, married [or single], in commerce, with residence in the said city; and \_\_\_\_\_, who uses no other surname, born in \_\_\_\_\_ and a citizen of \_\_\_\_\_, of legal age, married [or single], in commerce, with residence in said city.

The said \_\_\_\_\_ and \_\_\_\_\_ appear as president and as secretary respectively of the \_\_\_\_\_ company, a corporation organized \_\_\_\_\_ and existing under the laws of the State of \_\_\_\_\_, United States of America; a certificate of the articles of incorporation and of the amendments thereto, as filed and recorded in the office of the secretary of state of the State of \_\_\_\_\_, being annexed hereto as an integral part hereof.

The appearers evidence their authority and the powers for this execution and their respective offices with a certificate issued by the secretary of said company, which is likewise annexed hereto as an integral part hereof, with the prior authentication which I, the notary, make of the signature which authorizes it. I, the notary, do attest having personally compared the said certificate with the original minute book of the said company, exhibited to me in this act by the secretary of the company, which book is kept in accordance with the formalities required for such books by the laws of the State of \_\_\_\_\_; that the particulars certified therein are authentic, true, and faithful transcriptions of their originals; and that I authenticate the signatures authorizing the said original minutes being the legitimate signatures of the proper officers of the company, who are personally known to me.

The appearers assure me, the notary, that the said articles of incorporation, the amendments thereto, and the corporate by-laws are in full force and effect and wholly operative; that they still retain their respective offices of president and secretary of the said company; that the powers which have been conferred unto them have not been revoked, suspended, or limited; and that they and the company they represent are in the full enjoyment and exercise of their respective civil rights and privileges, with the legal capacity necessary to grant and execute these presents.

I, the notary, verily believe that both the appearers and the company they represent are in the full enjoyment and exercise of all their respective rights and privileges; and I am of the opinion that they have the legal capacity necessary for granting and executing these presents.

Having been duly advised of the value and effect of this instrument, the appearers freely and voluntarily state and depose:

That, in the name and on behalf of \_\_\_\_\_ company, hereinafter called the company, they give, grant, and confer power of attorney to \_\_\_\_\_, a domiciled citizen of the Republic of Cuba, of legal age, married [or single], in commerce [or a lawyer] and with residence in the city of Habana, to represent the said company in and before the courts of justice of the said Republic of Cuba, including the supreme court of justice, the audiencias, the courts of first instance, the courts of instruction, and the correctional and municipal courts, the departments and offices of the State, the Provinces, and the municipalities, boards of protest, commissions, including the Railroad Commission, or any authority, official, seat of governmental, military, or administrative order, and all and every natural or artificial person or persons, with the following powers:

[Define the powers specifically, in numbered paragraphs.]

Thus they state and depose in this act before me; and after I, the notary, duly advised appearers of the rights vested in them and they personally and individually read this instrument, they expressed their approval of and concurrence in its contents and fully ratified the same.

In witness whereof, these presents are signed and sealed before me, the notary; to all of which, as well as to my personal acquaintance with the ap-

peakers and knowledge of their country of birth, citizenship, legal age, status, profession, and residence, I, the notary, attest and hereunto subscribe my name and affix my seal of office.

[Corporate seal]  
[Notarial seal]

President.  
Secretary.  
Notary public.

*Certificate*

I, \_\_\_\_\_, secretary of the \_\_\_\_\_ company, a corporation organized and existing under the laws of the State of \_\_\_\_\_, United States of America, do hereby certify:

That, in the original minute book of the said company, under my custody and before me in this act, there appears the resolution adopting the corporate by-laws of said company, as approved by the annual meeting of the stockholders held in the office of the corporation on \_\_\_\_\_[date]\_\_\_\_\_, at \_\_\_\_\_ o'clock, which I literally transcribe as follows:

[Quote resolution and by-laws.]

That, in the original minute book of the said company, under my custody and before me in this act, there appears the resolution amending the corporate by-laws of said company, as approved by the annual meeting of the stockholders held \_\_\_\_\_[date]\_\_\_\_\_ at the office of the company, \_\_\_\_\_[address]\_\_\_\_\_, which I literally transcribe as follows:

[Quote resolution and amendments.]

That, in the original minute book of the said company, under my custody and before me in this act, there appears the record of the election of the board of directors by the annual meeting of the stockholders held \_\_\_\_\_[date]\_\_\_\_\_ at the office of the company, \_\_\_\_\_[address]\_\_\_\_\_, which I literally transcribe as follows:

[Quote record of election of the board.]

That, in the original minute book of the said company, under my custody and before me in this act, there appears the record of the election of the officers by the annual meeting of the directors held \_\_\_\_\_[date]\_\_\_\_\_ at the office of the company, \_\_\_\_\_[address]\_\_\_\_\_, which I literally transcribe as follows:

[Quote the record of the election of officers.]

That, in the original minute book of the said company, in my custody and before me in this act, there appear the minutes of the meeting of the board of directors held \_\_\_\_\_[date]\_\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_ m., at the office of the company, \_\_\_\_\_[address]\_\_\_\_\_, which I literally transcribe as follows:

[Quote the minutes with the resolution authorizing and directing the granting of the power of attorney.]

I further certify, under my responsibility: That, the inserts contained in this certificate are in full force and effect and that both Mr. \_\_\_\_\_ and the undersigned are in legal possession and exercise of our respective offices of president and secretary of this company.

In witness whereof, I have hereunto set my hand and affixed the seal of the company in the City of \_\_\_\_\_, State of \_\_\_\_\_, United States of America, this \_\_\_\_\_ day of \_\_\_\_\_, 193\_\_.

[Corporate seal]

Secretary.

STATE of \_\_\_\_\_

County of \_\_\_\_\_, ss.:

I, \_\_\_\_\_, a notary public duly appointed, commissioned, sworn, and qualified to act as such in and for the county of \_\_\_\_\_, State of \_\_\_\_\_, United States of America, with permanent residence therein, hereby certify:

That \_\_\_\_\_, whom I know personally, appeared before me, and, being duly sworn, acknowledged having signed the foregoing certificate, which I, the notary, authenticate as his legitimate signature, and he further acknowledged having affixed the seal of the \_\_\_\_\_ company, all of which I, the notary, attest under my faith; and

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at the city of \_\_\_\_\_, county of \_\_\_\_\_, State of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, in the year nineteen hundred and \_\_\_\_\_.

[Notarial seal]

Notary Public.

It is reported that since October of 1931 the courts of Cuba have been increasingly more liberal in their requirements with respect to powers of attorney, and that an abbreviated form of power may now be used, with a certain degree of safety, instead of the lengthy and expensive form set out above. The shorter form contains only quotations of the pertinent by-laws and certain minutes of meetings. Whenever the permanent legal representation of a corporation is involved, the more complete form is preferable as a matter of precaution.

#### COSTS OF PREPARING THE POWER OF ATTORNEY

No definite estimates can be made concerning the costs of preparing a power of attorney for the purpose of filing actions in Cuban courts. However, certain factors which merit attention in ascertaining the cost of drafting these instruments and authenticating them in proper form can be pointed out.

1. Fees charged by the attorney in the jurisdiction outside Cuba who prepares the power of attorney range from \$25 and over for powers granted by individuals to \$60 and over for those granted by corporations, depending upon the length and intricacy of the instrument and the technical problems arising in the particular case.

2. For authentication of signature of the county or state official or Secretary of State of the United States by the Cuban consul or minister a fee of \$3 per signature is collected. On Saturdays and holidays the fee is doubled.

3. Under Cuban law only the official translator of the Cuban State Department and notaries public are authorized to make official translations. Private translations by unauthorized persons cost about 40 cents per 100 words. If the power is not unreasonably long, the translation is included in the attorney's fee mentioned under 1.

4. A maximum fee of \$7.50 is allowed by Cuban notarial law for the protocolization of foreign powers of attorney, if only one person appears in the act of granting it (*comparece en ellos*); \$2 may be charged for each additional person; but notaries public reduce this fee by special arrangements with counsel. Foreign attorneys who have made such arrangements generally include this fee in the charge under 1 above. This is true also of the rates quoted below under 5 and 6.

5. Copies issued by Cuban notaries public of documents presented to them for protocolization cost \$2 per page if made by longhand and \$5 per page if printed or typewritten.

6. The original document which is protocolized must bear stamps of 5 cents per page. (Stamp-tax law of July 31, 1917.)

7. In addition to the consular authentication of signatures described above in paragraph 2, every such document should bear a consular certificate (art. 215 (A), Notarial Code) to the effect that such document is in proper legal form to be considered a public document. The consular fee for this certificate is \$5, except on Saturday and holidays, when the fee is doubled.



## RECORDATION IN CUBA

After the power is drafted and duly authenticated in the manner indicated, it must be protocolized before it can be used in actions in Cuban courts. By this is meant the filing of the instrument with a notary public in Cuba, who inserts it in his protocol (notarial record), after preparing the corresponding affidavit of authenticity (acta de protocolizacion). Certified copies of this entry and of the power are then made and given to the interested party for presentation in the corresponding actions. (Art. 215 et seq., Notarial Code.)

## ACTIONS IN GENERAL

The problems which most commonly face the exporter upon failure of a Cuban customer to meet his obligation concern the means which under Cuban law are available to make effective the rights accruing in his favor.

In certain defaults on the part of a buyer, summary actions in which his defenses are limited and terms restricted and in which security of judgment can be obtained are provided for by the procedural code. Whenever it is not possible to file such actions, the only procedure left is an ordinary action at law. Before recourse to the courts, the parties always may submit their differences to arbitrators or friendly mediators, whose awards are binding on the parties and enforceable at law. (L. C. P. 815-836.)

## THE ORDINARY ACTION AT LAW

Every litigation in Cuba for which the law of that country does not provide a special proceeding must be adjudicated in ordinary actions at law. These proceedings are divided into three kinds, depending on the amount of the claim involved, namely, actions in which the amount claimed exceeds \$1,500 (juicio de mayor cuantia), in which that amount exceeds \$500 but does not exceed \$1,500 (juicio de menor cuantia), and finally actions in which the amount claimed does not exceed \$500 (juicios verbales). (L. C. P. 480-485; articles 488-491 provide rules for determining the amount claimed.) In the course of the first four days of the time granted to answer, the defendant may question the amount involved in the proceedings. (L. C. P. 491.)

## ACTIONS FOR AMOUNTS IN EXCESS OF \$1,500

*The complaint.*—In juicios de mayor cuantia, or actions involving sums exceeding \$1,500, the complaint must allege the facts of the case and the provisions of law in support thereof, as well as the name of the defendant and the remedy desired. The nature of the action must be set forth, if this is necessary in order to determine the jurisdiction of the court. The complaint must be accompanied by the power of attorney, which evidences the judicial capacity (personalidad) of the procurador who appears on behalf of the plaintiff, the document or documents which evidence the judicial capacity of the plaintiff himself, and all other documents on which the interested party bases his rights. The defendant is served with a copy of the complaint, after which he must enter his appearance

within nine days, one additional day being granted for each 30 kilometers of distance from the court. If the defendant has not been served personally, a second service must be made in the same manner as the previous one, fixing a term of one-half the time originally granted to enter his appearance. If the defendant fails to enter his appearance, the complaint will be considered as having been answered and the proceedings will be conducted in default of defendant. (L. C. P. 523, 502-503, and 524-527.)

*The answer.*—The defendant's answer may allege dilatory exceptions not previously formulated, as well as peremptory exceptions and counterclaims which the court is competent to consider. Otherwise, counterclaims may be the subject of separate and distinct actions. The answer must be accompanied by documents similar to and for the same purpose as those which must accompany the complaint. The plaintiff has 10 days to file allegations in replication of the answer (replica). The defendant may file allegations in rejoinder (duplica) within the following 10 days. The replication may be waived; in which case the rejoinder is not admissible. Failure to answer to specific allegations in the complaint or evasive answers to same will be considered as admissions of such allegations, and a judgment on the pleadings may be demanded. (L. C. P. 539-542, 545, 546, and 548.)

*Procedure.*—Within 20 days after he is ordered to do so the defendant must answer the complaint. But he may file dilatory exceptions within six days after the order (L. C. P. 529 and 534), whereupon the term for answering is suspended until the exceptions are disposed of. The following allegations are admissible on dilatory exceptions (L. C. P. 532):

- (1) Lack of jurisdiction;
- (2) Lack of capacity in the plaintiff to appear because of lack of certain qualifications or failure to allege the character in which he sues;
- (3) Lack of capacity of the procurador because of insufficiency of or illegality in his power of attorney;
- (4) Lack of capacity in the defendant;
- (5) *Lis pendens*—that another case of the same nature is pending before another court between the same parties; and
- (6) Defect in the manner of formulating the complaint.

The plaintiff has three days thereafter to consider the exceptions, after which the court disposes of them in the manner prescribed for incidentes. If the tribunal rejects the exceptions, the defendant has 10 days in which to answer. (L. C. P. 536-539.)

*Exception when plaintiff is a foreigner.*—If the plaintiff is a foreigner, a dilatory exception may be alleged, grounded on his failure to give security to cover any liability to which he may be subject as a result of the action, if this is required of Cubans by the law of the plaintiff's country. By the treaty of Paris, Spaniards are exempted from this requirement. (L. C. P. 533.) Evidence showing the absence of this security requirement, as regards Cubans, under the laws of the plaintiff's country should be offered or the appropriate security furnished, either to avoid the allegation of the exception or in order to comply with the dispositions of the court concerning it.

*Appeals.*—Appeals from judgments and from resolutions concerning exceptions rendered by courts of first instance must be made within five days. The record must be sent to the higher court within 5 days thereafter and the parties summoned to appear there within 20 days. The appeal may or may not stop all proceedings below, depending upon how it is procured. In any event, the lower court retains jurisdiction to maintain the status quo and of incidentes which have been considered separately before the appeal. (L. C. P. 381 and 386-389.)

If the appeal is not from a judgment, the appellant may obtain extracts from the records within five days after the appeal is granted. The parties are summoned to appear within 15 days in the higher court, the appellant being forced to perfect his appeal within 15 days after the extracts are delivered to him. (L. C. P. 390-392.)

Against judgments and resolutions terminating actions of audiencias on second instance (appeal from courts of first instance), there is no other recourse than cassation. (L. C. P. 402.) (See discussion under "Cassation," p. 24.)

On appeal any one of the parties may petition the court for the admission of evidence within the terms and in the manner in which this is done when the case is first tried. Article 861 of the Law of Civil Procedure sets forth five grounds for such a petition. (The detailed regulations of proceedings in the appellate court are contained in articles 839 to 900.)

A judgment becoming final on appeal is notified by means of a certificate and an order to the lower court for execution purposes. If costs have been granted, a determination of their amount is previously made. (L. C. P. 849.)

#### ACTIONS FOR AMOUNTS BETWEEN \$500 AND \$1,500

The procedure in juicios de menor cuantia, or actions involving sums between \$500 and \$1,500, is similar to that in actions for amounts above \$1,500, with slight modifications. The defendant has nine days to answer the complaint after being served with summons personally. When served by publication he must enter an appearance within nine days and must answer within a further six days. The defendant must allege all his exceptions and counterclaims in the answer (plaintiff has four days in which to answer counterclaims), all of which the judge considers when the case is ready for decision.

If the parties are agreed on the facts, they are notified to appear in court within six days after the second day of the filing of the answer. Three days thereafter judgment is rendered. If the parties fail to agree on the facts, they have six days to offer their evidence. Within the next 20 days the evidence must be presented, which term may be extended 10 days. On the day following the expiration of this term the parties are cited to appear for final hearing, the court rendering judgment within the next five days. (L. C. P. 679-700.)

Appeals in juicios de menor cuantia must be perfected within five days. (L. C. P. 381.) The party aggrieved has a right to appeal to the audiencia of the district. If the appeal is granted, the record is sent to the audiencia and the parties are cited to appear

before the higher court within 10 days. Within six days thereafter the appellee may join in the appeal as to that part of the judgment which prejudices him. (L. C. P. 702-705.) Within the same six days either of the parties may ask the court to permit him to present additional evidence (L. C. P. 706) of the following nature (L. C. P. 861):

- (1) Evidence not admitted by the lower court;
- (2) Evidence which the party was not able to present below, through no fault of his own;
- (3) Evidence of new facts arising after the presentation of proof below and of importance to the litigation;
- (4) Evidence not previously known to the party and of great importance in the case; and
- (5) Evidence not previously presented, where a defendant in default enters an appearance after the expiration of the term for presentation of evidence below. In this event all the pertinent evidence offered by the parties will be admitted.

Twenty days are granted for presentation of evidence on appeal. The record is then transmitted to the ponente (the judge who has charge of the case on appeal and generally the one who writes the opinion for the court). After six days, the parties are cited for hearing within four days, and five days after that judgment is rendered. (L. C. P. 707-709.)

If the judgment affirms or is more prejudicial to the appellant than the one below, costs are granted to the appellee. The record is then returned to the judge below for execution of judgment. (L. C. P. 709 and 712.)

#### ACTIONS FOR AMOUNTS NOT EXCEEDING \$500

Municipal judges of the first, second, and third class may hear juicios verbales, or actions involving sums not exceeding \$500, while judges of the fourth class may hear only cases in which the amount of the claim does not exceed \$100. But claims of third parties and counterclaims, otherwise within the jurisdiction of these courts by reason of the amount, may be entertained by the court wherein the principal case is under consideration. That court, in third-party claims (tercerias), will order the lower court to suspend proceedings until judgment is rendered on the third-party claim. (L. C. P. 715 and 738.) If the amount involved exceeds \$300 and the parties avail themselves of the services of counsel, attorneys' fees may be included in the costs.

The complaint in these cases is written out and, together with a copy for each defendant, is filed in court. The judge fixes the date for hearing and orders the citation of the defendant. If his domicile is not known, service is made by affixing notices at the place of trial and at the last domicile, and by publication. The date of hearing must be set within not less than 24 hours nor more than 6 days after the citation of the defendant. If service is not made personally, this term may be extended to 20 days. Judgment must be rendered immediately or one day thereafter. (L. C. P. 719-724 and 730.)

Appeals must be taken within three days after judgment is rendered. The record is then sent to the court of first instance, the parties being cited to appear therein within eight days. The judge of first instance summons the parties to a hearing, after which judgment is rendered immediately or on the following day. The judgment is returned to the lower court for execution in the same manner as all judgments in other actions are executed, except that the periods of time allowed are cut in half. (L. C. P. 731-737.)

#### PRESENTATION OF EVIDENCE

After the pleadings are filed both the plaintiff and the defendant have periods of 20 and 30 days, respectively, to offer and to present their evidence. Extensions will be granted up to two months when evidence is to be procured from other West Indies, the United States, or Mexico, and up to four months when it is to be procured from Europe. (L. C. P. 552 and 555.)

#### WITNESSES

Either party to an action may demand that the other one answer under oath questions formulated in writing. Witnesses may also be examined in court by means of written interrogatories filed by the litigants with the court. Cuban law offers little opportunity for cross-examination. Litigants are not permitted to interrupt the examination except when the witness has failed to answer certain questions, has contradicted himself, or has failed to make himself clear; under any of these circumstances the litigants may call the judge's attention to the situation, in order that he may, at his discretion, question the witness further. (L. C. P. 578-594 and 636-658.)

Either party litigant may impeach the witness of the other party within four days after the witness has given his testimony in court, on the ground (1) that the witness is a relative within the fourth degree of consanguinity or affinity of the litigant whose witness he is or (2) that the witness, at the time he gave his testimony, was a partner, employee, or servant of the litigant whose witness he is. (L. C. P. 659-660; see also arts. 1244-1248, Civil Code.)

#### EVIDENTIAL VALUE OF DOCUMENTS

*Public documents.*—Public documents are those drawn by notaries public in accordance with the formalities prescribed by the notarial laws. Certifications of exchange agents and brokers as regards the contents of their registry books, in accordance with article 64 of the Cuban Code of Commerce, documents drawn by public officials authorized to do so, and minute books, statutes, ordinances, registers, and other documents in public archives and the certified copies of same also are public documents. (L. C. P. 595; art. 1216, Civil Code.)

Public documents are admissible in evidence to bind third parties only as to the facts which caused the preparation of the documents and with regard to the date of such preparation. They are binding against the grantors and those who take from them in so far as

declarations made therein by the former are concerned. (Art. 1218, Civil Code.)

Before being admitted in evidence public documents must be checked against the originals except where there is no protocol or archive available. (L. C. P. 596-597.)

*Foreign documents.*—Documents drawn in foreign countries will have the same evidential value as those drawn in Cuba, provided (L. C. P. 599):

(1) That the object of the act or contract is legal and permissible in Cuba;

(2) That the grantors have capacity to bind themselves in accordance with the laws of their countries;

(3) That the form and solemnities prescribed by the laws of the foreign country have been observed;

(4) That the document has been properly legalized in order that it may be considered authentic in Cuba.

Every document drawn in a foreign language must be accompanied by a translation. If made privately, the translation may be attacked by the opposing party, in which event an official one must be made upon order of the court. (L. C. P. 600.) (See Decree 48 of April 11, 1908.)

*Private documents.*—Originals of private documents and correspondence are admissible in evidence. They may be acknowledged by the party whom they prejudice upon petition of the other party, but this is not necessary when the authenticity thereof has been admitted in the answer, replication, or rebuttal. (L. C. P. 601-604.)

#### EXPERTS—EXAMINATION BY COURT

Whenever a litigant denies or doubts the authenticity of a private document or that of a public document having no original and which can not be recognized by the official who drew it, a comparison of writings (*cotejo de letras*) by experts may be demanded. For the purpose of the comparison the following documents may be used:

(1) Those already acknowledged by the parties;

(2) Public documents;

(3) Private documents the handwriting or signature of which has been acknowledged in an action; and

(4) Such parts of the document to be compared as have been acknowledged by the party prejudiced.

If none of these documents are available, the party to be charged must take dictation from the judge with which to effect the comparison. The judge thereafter may compare the documents himself and may in his discretion disregard the opinion of the experts. (L. C. P. 605-608.)

Experts may also be consulted regarding other issues of fact. Furthermore, the judge may be asked to examine personally places or things either in litigation or indispensable in the disposition of the issues. (L. C. P. 609-635.)

#### FINAL DISPOSITIONS

As soon as the term for presentation of evidence has expired the judge notifies the parties, who may petition for a public hearing

within three days thereafter for the purpose of reviewing the evidence orally. If this is not done, the judge orders that the record be submitted to the parties for the purpose of preparing escritos de conclusiones, which are reviews and comments upon the evidence admitted and the law applicable in the case. Each party has from 10 to 30 days to prepare his respective *résumé*. (L. C. P. 666-669.)

As soon as the record is returned with the briefs prepared by the parties, the judge fixes a date for judgment within the following eight days. On that date the parties make a final and oral presentation of their cases. Within a maximum term of 15 days the court renders judgment. (L. C. P. 676-677.)

#### EXECUTION OF JUDGMENTS

Whenever a judgment becomes final by reason of the fact that the party aggrieved has not availed himself of existing recourses against it within the time prescribed by statute or because such recourses have been exhausted or are not permitted, execution of the judgment proceeds upon application of the interested parties. (L. C. P. 918.)

If the judgment requires the payment of a liquidated and determined sum, execution will proceed by attachment of goods without previous request for payment (L. C. P. 920), in the manner indicated under "The executory action" on page 28. If the judgment requires a person to do something and that person fails to do it within the term fixed by the court, the act will be performed at his cost; if this can not be carried out, it will be understood that the party has elected to pay damages. (L. C. P. 923.) If the judgment has fixed these damages, execution proceeds as in judgments for a liquidated sum; otherwise the party in whose favor the judgment runs may present a statement of the damages, which will be notified to the party to be charged, who must attack it within six days. (L. C. P. 927-929.) If he does, the parties may ask for 20 days to present evidence. Within the following eight days, the judge summons the parties for a hearing on the issues raised, and within three days thereafter issues his resolution of the controversy. (L. C. P. 936, 939, and 942.) Execution then proceeds if no appeal is taken.

If the party is ordered not to do a certain act, and he does it, it is understood that he has elected to pay damages. (L. C. P. 924.)

If the judgment orders the conveyance of immovable goods, the interested party will be put in possession immediately. The same rule is applicable in the case of movables. If the judgment can not be carried out, damages may be collected as indicated in article 927 and following (*supra*). If the judgment requires the payment of an unliquidated sum proceeding from fruits, rents, income, or products of any kind, the debtor is requested to file the liquidation in accordance with the rules set out in the judgment; upon his failing to do so, the creditor may file the liquidation. (L. C. P. 931-935.) If the parties are not agreed upon the liquidation, the proceeding is conducted in accordance with the provisions of articles 936 and following (*supra*).

#### ENFORCEMENT OF FOREIGN JUDGMENTS

The effect of final foreign judgments in Cuba is governed by existing treaties or considerations of reciprocity. Judgments from coun-

tries where Cuban judgments are not enforced have no effect in Cuba. If not within the foregoing classification, foreign judgments will be effective provided (1) they have been decreed as a consequence of the exercise of a personal action, (2) they have not been decreed in default, (3) the obligation sought to be enforced is lawful in Cuba, and (4) the writ of execution complies with the requisites necessary in the country of its origin to be considered authentic and those of the Cuban law to entitle it to faith and credit in Cuba. (L. C. P. 950-953.)

Enforcement of foreign judgments will be petitioned of the Supreme Court of Cuba except when provided otherwise by treaty. (L. C. P. 954.)

After translation of the writ of execution in accordance with the law, the defendant will be cited, through the audiencia (court of second instance) to appear within 30 days, and whether or not he appears a term of 9 days will be granted in which he and the fiscal (public prosecutor) may be heard, after which the court will determine whether enforcement shall be given. If enforcement is denied, the writ of execution will be returned to the party filing it; if enforcement is granted, the writ will be certified to the audiencia in order that this court in turn may order the court of first instance of defendant's domicile to give effect to the decree. (L. C. P. 955-957.)

The Bustamante Code of Private International Law, ratified by Cuba on April 20, 1928, provides rules for the enforcement of foreign judgments, but because the code has not been ratified by the United States it is not in effect between the two countries. However, its rules will affect judgments coming from jurisdictions which have ratified the code.

#### JOINDER OF ACTIONS

In Cuba it is possible for a person who has grounds for several lawsuits (causes of action) against another to join them in one action, provided they are not inconsistent with each other. Inconsistency exists whenever:

(1) The actions are mutually exclusive or contrary to each other, so that the filing of one prevents the filing of the other or renders it ineffective. For example, under the second paragraph of article 1124 of the Civil Code, the party injured by the breach of a contract involving reciprocal obligations may sue for full compliance with the agreement or, at his option, for its rescission, with damages in each case; but he may not join the action to enforce performance with an action to rescind or set aside the contract, as these two actions are mutually exclusive and contrary to each other. Likewise, a plaintiff may not join two actions wherein the petition in one of them is included as a part of the petition in the other. For example, if the plaintiff claims title to a piece of real estate, he can not join to this action another in which he claims an easement over the same piece of property.

(2) When the judge who has jurisdiction of the principal action is incompetent, by reason of the nature of the action or by reason of the amount in controversy, to take jurisdiction of the other action



to be joined. But actions which, by reason of the amount in controversy, are triable by verbal actions (*juicios verbales*) may be joined to actions for a larger or lesser amount (*juicios de mayor o menor cuantia*). (See pp. 12-16.) This section refers to a situation in which the judge competent to sit in the principal action lacks jurisdiction over the other action which it is desired to join to the former, by reason of its nature or amount. For example, it would be impossible to join an action to recover a sum of money being heard before a judge of Habana with another action to execute a mortgage on a piece of real estate located in Matanzas, because the Cuban mortgage law establishes that the only competent judge to sit on the said mortgage action is a judge who has jurisdiction over the territory in which the mortgaged property is situated—in this instance, the judge of first instance of Matanzas. For this reason, the judge of Habana would be incompetent to sit on the mortgage action, which latter could not, therefore, be joined to the action "in personam" established in a Habana court. Likewise, an action for the recovery of \$1,000 may not be joined to another action for the recovery of \$400, for the reason that the former requires the jurisdiction of a court of first instance and the latter is heard before a municipal court, which has no jurisdiction to sit on the \$1,000 action.

(3) The actions must be prosecuted and disposed of in suits of different nature. This section simply prohibits the joining of two actions when each requires a different procedure. For example, it would be impossible to join an ordinary action to an executory action. The former has many more phases, is much more deliberate and ample, and naturally requires far more time than the executory action, which embodies a special and rapid procedure.

Actions against several persons may be joined as well as actions of several persons against one, provided they arise out of the same right or are based on a single claim. This rule is understood to apply when a plaintiff has various actions against one defendant. Article 156 of the Law of Civil Procedure also authorizes the joining of several actions which one plaintiff may have against several defendants, or several plaintiffs against one defendant, "always provided that they arise from one right or are based on a single claim." The object of this rule is to simplify legal procedure; and the clause "provided they arise out of the same right or are based on a single claim" (*siempre que nazcan de un mismo titulo o se funden en una misma causa de pedir*) is intended simply to make it impossible to join, in one proceeding, several unrelated actions against different persons. For example, if a person holding a credit against another should die leaving several heirs, the credit would be divided among the said heirs; and, in accordance with this rule, the actions of the various heirs against the debtor could be joined because they arise from one right and are based on one cause of action. On the other hand, if A has an action against B to recover the price of a horse and another action against C for breach of a building contract, these actions could not be joined inasmuch as they arise from different rights and are based on different causes of actions.

No joinder of actions is permissible after the complaint originally filed has been answered; thereafter separate actions must be brought.

The joinder of actions permits the determination of the rights of the party in a single suit and by one judgment. (L. C. P. 153-159.)

Proceedings must be joined (L. C. P. 161):

(1) When the judgment in one proceeding will have the effect of *res adjudicata* (that the issues between the same parties concerning the same things have been disposed of previously) in the other proceeding;

(2) When a proceeding concerning the object of another and subsequent proceeding is instituted in the competent court;

(3) When a bankruptcy or composition-of-creditors proceeding is in existence at the same time that another proceeding is filed against the assets subject to the former;

(4) Whenever they pertain to testamentary and intestacy proceedings and another action is filed against the assets of the estate, which action may be joined therein according to article 1002 of the Law of Civil Procedure; and

(5) Whenever the various proceedings, if continued, cause a lack of unity in the action (*continencia de la causa*).

Lack of unity in the action will exist whenever in two or more proceedings (1) there is an identity of persons, things, and causes of action, (2) there is identity of persons and things, although not of causes of action, (3) there is identity of persons and causes of action, although not of things, (4) the actions have a common origin (*provengan de una misma causa*), although filed against several persons, (5) the actions have a common origin, although there is a diversity of persons and things, and (6) there is identity of actions and things, although there are several and distinct persons. (L. C. P. 160-162; see articles 163-187 for detailed rules concerning accumulation of proceedings.)

#### THE PREVENTIVE ATTACHMENT

The preventive attachment is a proceeding by means of which a creditor is able to assure the satisfaction of obligations outstanding, originally created in his favor and not as a result of an assignment of rights, through attachment of property of the debtor either before or after filing of actions. (L. C. P. 1399.) This proceeding can be instituted only when (L. C. P. 1398):

(1) The corresponding petition is accompanied by an instrument evidencing the existence of the debt; and

(2) (a) The debtor is a foreigner not naturalized in Cuba; (b) whether foreigner or not, he has no known domicile or immovable property, or agricultural, industrial, or mercantile establishment at the place where payment of the debt is demanded; (c) even though he meet the requirements outlined above, he has disappeared from his domicile or establishment without leaving a person in charge, or, if he has left one, that person ignores his residence, or the defendant hides, or there is reason to believe that he will conceal or dispose of his goods to the detriment of his creditors.

The petition must be filed in courts of first instance whenever the debt in question exceeds \$500. If the debt does not exceed that amount the municipal court may consider the petition, provided the complaint demanding payment of the debt is filed at the same time.

The latter court may consider also petitions for preventive attachments when the debt exceeds \$500, in cases of urgency, whenever the goods to be attached are in the town where the court is located. In such a case, the municipal court will remit to the corresponding court of first instance all the papers in the proceeding for further consideration. (L. C. P. 1395-1396.)

Unless the attachment is grounded on a document upon which an executory action (see "The executory action," p. 26) can be brought, or unless the debtor judicially acknowledges (see "Judicial acknowledgment," p. 27) the instrument, although he denies the debt, the preventive attachment will be granted only upon the creditor's filing of a bond. If the claim is not for cash, its cash value must be set by the creditor in order to determine the amount of the bond. (L. C. P. 1397 and 1399.)

A preventive attachment will be decreed upon petition of a merchant when the debt arises as a result of mercantile operations, if the debtor is or was a merchant or industrialist, provided payment of an amount in cash is claimed. In this event the attachment will be decreed upon the petitioner's sworn statements of the facts on which it is based, without the presentation of any document evidencing the claim. (L. C. P. 1399.)

Upon issuance of the order the court officers (*alguacil y actuario*) will effect the attachment of the property designated in the order. Real property is attached by an inscription (*anotacion preventiva*) in the corresponding registry. Movable goods and livestock are attached by depositing them with the debtor himself, who is subject to criminal prosecution if he disregards the order of attachment. (L. C. P. 1402-1407, and Order 176 of 1901.) If the goods belonging to the debtor are attached in the hands of third persons, the latter will be ordered to keep them subject to subsequent disposition by the court. The attachment will not be made if the person against whom it is directed pays the claim, deposits the goods, or files a bond to secure the sums claimed. (L. C. P. 1408 and 1403.)

Within 20 days after an attachment for more than \$500 is made, the creditor must file the corresponding action; otherwise the attachment becomes null and void and the creditor is liable for costs and damages to the debtor. (L. C. P. 1409 and 1411.) If the filing of the complaint in the subsequent action filed by the creditor is dependent upon the recognition of the debtor's signature to a document which evidences the debt due and that recognition is delayed through the fault of the debtor, that delay will be omitted in computing the term; but the 20-day period may be reduced upon request by the attached debtor that the creditor file his complaint within 10 days following the attachment. (L. C. P. 1412-1413.)

The attached debtor may oppose preventive attachment proceedings within five days after notification of the writ ratifying the attachment. (L. C. P. 1414-1415.)

In all preventive attachments the creditor must furnish security (*fianza*) not to exceed the amount claimed plus one-third more. (L. C. P. 1399.) (For a further discussion as to the effectiveness of attachments in Cuba, see p. 28 of this bulletin.)

## PROCEEDING WHEN DEFENDANT IS IN DEFAULT

Whenever the defendant in an action fails to enter an appearance in time and is adjudged in default, no further notifications are made personally to him. These will be made in court. Upon petition of the opposing party, the movable property of the defendant is detained, and the immovables are attached in the amount necessary to secure the object of the action. This property is placed in the custody of a depositary duly bonded. The attachment of immovables is made by a notation (anotacion preventiva) in the inscription of the property in the registry of property, by virtue of court order (mandamiento). (L. C. P. 761-763.)

The defendant in default may enter an appearance at any stage of the proceedings and petition that any attachments made be lifted, but the action will not be set back. The judgment in default will be notified personally to the defendant, if he can be found; if not, the notification is made by publication. Against the judgment, the defendant may appeal or file cassation. If the judgment has not been notified as herein indicated, the recourse of revision will be granted. (L. C. P. 765-768 and 770-772.)

Unless prevented from appearing in the action by uninterrupted force majeure, no defendant personally served with summons will be permitted to attack a final judgment in default. In such case the hearing must be demanded within four months of the publication of the judgment in the official newspaper of the country, at which hearing the force majeure must be proven. But defendants who are not personally served with summons may attack final judgments in default within eight months of the publication of the judgment in the official newspaper of the country. If the defendant was served by publication, his petition for a hearing directed against the final judgment in default will be admitted within one year of the publication of the judgment in the official newspaper of the country, provided he proves he was absent from the town in which the case was heard from the time he was served with summons until publication of the judgment, and from the town where he had his last domicile (residencia) at the time service by publication was made. (L. C. P. 773-774 and 776.)

The hearing petitioned by the litigant in default against the judgment in default may be entertained by the Supreme Court or audiencia, whichever rendered judgment, or by the court of first instance, the judgment of which becomes final. (L. C. P. 778-779.)

If the hearing is granted, the record is delivered to the petitioner for eight days in order that he may present his objections in the form of an answer. These objections are then notified to the judgment holder, who must reply within eight days more. Either party may petition for a term to offer evidence, which shall be half the period of time granted in the ordinary action. Thereafter the rules governing the ordinary action, including appeal and cassation, apply. (L. C. P. 782.)

The defendant in default in verbal actions heard by municipal courts will be granted a hearing in order to attack the judgment if the following circumstances coexist:

(1) That he petitions the hearing within three months after the notification in court of the judgment;

- (2) That he was not served personally with summons; and  
 (3) That the summons was not delivered to him through no fault of his own, or that when service by publication was made he was absent from the town and did not return during the presentation of the case. (L. C. P. 784.)

The party in whose favor judgment in default has been granted can not dispose of the property in litigation until the terms during which the party in default may be heard have expired. (L. C. P. 786.)

#### REVISION PROCEEDINGS

A revision proceeding is one which can be instituted before the supreme court by the party aggrieved by a final judgment of a lower court, in order that it may be revised or rescinded in whole or in part. The proceeding of revision will be granted when (L. C. P. 1794-1795; Order 92 of 1899):

- (1) Essential documents (*decisivos*) which have been withheld by the party in whose favor the judgment runs or which were not produced through no fault of the party aggrieved are obtained by the latter after the judgment;
- (2) The judgment was based on a document, acknowledged or declared, the falsity of which was not known by one of the parties and became known after the judgment;
- (3) The judgment is based on declarations of witnesses subsequently found guilty of perjury in making such declarations;
- (4) If the judgment was obtained unjustly, through bribery, violence, or any other fraudulent means.

The proceeding must be instituted within three months after the recovery of the documents or discovery of the fraud previously mentioned, but in any event it can not be prosecuted five years after the publication of the judgment.

The proceeding is initiated by the filing of a writing in the supreme court, setting out the grounds on which it is based. The court thereafter orders that the record of the case be sent up to it and summons the parties to appear therein within 40 days by means of briefs in support of their contentions.

Revision does not suspend proceedings below, unless the petitioner gives security to answer for possible damages which might be caused by the suspension.

If the judgment is rescinded, a new trial below must follow. The rescission has full force and effect at law, except that it does not defeat rights acquired and which must be protected by virtue of registration in the registry of property, in accordance with article 34 of the mortgage law. (Order 92 of 1899; L. C. P. 1794-1795.)

#### CASSATION

Cassation is a proceeding established in the Supreme Court of Cuba, based on definitive judgments of *audiencias*, on those of courts of first instance in unlawful-detainer actions (*desahucio*) heard on appeal, and on decisions of friendly mediators. (L. C. P. 1687-1688.) The proceeding must be grounded on:

- (1) Violation of law or legal doctrine;
- (2) Violation of essential forms in the trial; or

(3) Decisions of friendly mediators rendered after the expiration of the agreed terms for granting them or concerning points not submitted to them. (L. C. P. 1689; see articles 1690-1693 for interpretation of each one of these three grounds for cassation.)

Within five days after notification of a definitive judgment or decision the party aggrieved may file cassation proceedings with the tribunal which has rendered the judgment or decision. The initial document must set out the date of notification of the judgment or decision and of the writing itself, the provision of law on which it is based, and the grounds for its filing. The tribunal will examine the initial document to determine whether it alleges all these facts, and within three days thereafter issues an order admitting the proceeding and summoning the parties to appear before the supreme court, where the record is sent, within 10 days, except in cassations from audiencias of Camaguey and Oriente, when the term is extended to 20 days.

The admission of a cassation proceeding suspends proceedings below, unless the person favored by the judgment or decision furnishes security to answer for whatever he has received should the cassation against the judgment or decision be granted. If the lower court denies the cassation, the party aggrieved may go before the supreme court (*recurso de queja*) to petition the admission of the cassation proceeding.

After the expiration of the 10 or 20 day term previously mentioned the supreme court allows 15 days within which the parties may question the granting of the cassation and the grounds for the proceedings may be amplified. The court then fixes the date of the hearing after the next 10 days, but within 20 days. The parties and the court's solicitor (*fiscal*) present the case orally. Within the next 10 days the court renders judgment.

[NOTE: For a more complete study of cassation proceedings in Cuba reference should be made to Order 92 of 1899, set out in the Law of Civil Procedure.]

#### ARBITRATION PROCEEDINGS

Whenever persons are unable to settle amicably differences arising between them, they may elect to submit such differences to arbitration. An instrument drawn before a notary public must be prepared, containing the following facts: (1) Name, profession, and domicile of the parties; (2) name, profession, and domicile of the arbitrator or arbitrators, who must be one or an uneven number of lawyers over 25 years of age; (3) the nature of the differences submitted; (4) term within which the award must be made; (5) fine payable by the party who fails to perform the acts indispensable to the arbitration proceeding; (6) fine payable by the party who appeals from the award to the party who is willing to abide by it; (7) designation of place where proceedings are to take place; and (8) date of the instrument of arbitration. (L. C. P. 789-792.)

The arbitrators, upon acceptance of their appointments, will hold the hearings before the clerk of the court of first instance, selected by them, if nothing is provided to that effect in the arbitration agreement. The term fixed therein for the award begins to run from the time of acceptance of the appointments by the arbitrators. This

term may be extended by the parties by subsequent public document, or by the arbitrators if they have been authorized to do so in the original instrument of arbitration; but the extension may not extend over one-half the original term and must be subscribed to by all the arbitrators. (L. C. P. 801-803.)

Arbitrators will admit proof of each party's contention during one-fourth of the period of time prescribed in the deed of arbitration and will render their award by absolute majority of votes after hearing the parties. If no absolute majority exists, the court of first instance will decide the points on which the arbitrators disagree. An appeal may be made from the award to the corresponding *audiencia*. Against the judgment of the *audiencia*, cassation proceedings (P. 24) may be interposed. The award after it becomes final may be enforced as a judgment. (L. C. P. 805-825.)

The parties may also submit their differences to friendly mediators (*amigables componedores*) appointed by them upon the drawing of a deed before a notary public, in the same manner as previously indicated, which instrument in order to be valid must contain the provisions stated above under (1), (2), (3), (4), and (8). The award must be by absolute majority of votes, and against it cassation proceedings only can be instituted. When the award becomes final, it may be enforced as judgment by the corresponding court of first instance. (L. C. P. 826-838.)

Although arbitration affords an expedient way of promptly and economically disposing of controversies between merchants, it seldom is used in Cuba. The main difficulty apparently lies in the fact that it is not possible to-day to insert a clause in a contract to be performed in Cuba which will bind the parties to arbitrate disputes arising thereafter under it. When controversies arise in performance, there seems to be a natural disposition to litigate after negotiations between the parties have failed.

#### THE EXECUTORY ACTION

The executory action is a proceeding which, within strictly defined limits, enables a person to obtain payment of obligations through summary means, the debtor's defenses and the periods of time within which the various procedural steps are to be taken being greatly limited. The action is exceedingly important in mercantile cases by reason of the fact that rapid and effective protection of rights through litigation, when all other means have been exhausted, is essential to commerce.

#### GROUND'S FOR EXECUTORY ACTION

The executory action in Cuba only lies to recover, on a matured obligation, a liquidated sum of money in excess of \$500, or a liquidated sum in kind the value of which exceeds \$500. When the debt due is payable in kind, the jurisdictional limitation of \$500 will be determined by the price agreed upon in the obligation; if no such price has been named, then by the mean market price (*precio medio*) as certified by the college of brokers, if there is one; if not, by the corresponding municipal authority. For mercantile goods the certificate may be issued by the syndics of the college of brokers or, if

there is none, by two brokers or merchants. The certificate, which must accompany the complaint, is subject to jurisdictional attack by the debtor on the grounds that the amount estimated is excessive. The value of public and private securities listed in an exchange (admitidos a negociacion en bolsa) will be determined for purposes of ascertaining the amount in controversy in executory actions by the price quoted on the date of maturity of the obligation that is the object of the action. (L. C. P. 1433-1436.)

The action must be based on an instrument having executory force (que tenga fuerza ejecutiva); that is, on an instrument upon which, by statute, an executory action may be instituted. (L. C. P. 1427.) These are the following:

(1) Public document,<sup>2</sup> provided it is a first copy or a second drawn upon judicial order, after citation of the person whom it may prejudice;

(2) Any private document acknowledged under oath before a judge competent to issue execution;

(3) Admission (confesion) before competent judge;

(4) Bills of exchange, without judicial acknowledgment, as regards the acceptor who did not allege falsity in his acceptance at the time of the protest of the instrument for nonpayment (see p. 33);

(5) Any instruments (titulos) drawn "to bearer" or nominative, evidencing matured obligations, and the coupons of such instruments;<sup>3</sup> and

(6) Originals of contracts made through exchange or public brokers, signed by the contracting parties and broker, provided they are checked against their inscription in the corresponding register.

#### JUDICIAL ACKNOWLEDGMENT OF PRIVATE DOCUMENTS

Whenever the executory action is grounded on private documents the debtor must be summoned in order that he may acknowledge as his the signature to the instrument. If the debtor fails to appear on the date set by the court he is summoned a second time. If the private instrument has been protested or a demand for payment made by notarial act and the allegation of fraudulent signature has not been made, the executory action will be entertained upon the debtor's failure to appear after the second citation; otherwise he must be cited a third time, and, if he then fails to appear or to allege just cause for nonappearance, he will be held as having admitted the obligation (se le tendra por confeso) and the execution will issue upon request. (L. C. P. 1428-1429.)

If the debtor is unable to state whether or not the signature to the instrument is his own, the court may question him concerning the

<sup>2</sup>In Cuba this term generally includes instruments drawn before notaries public in the manner prescribed by notarial law, documents issued by public officials within the scope of their duties, certifications of acts, statutes, ordinances, registers and all other documents in the public archives, and judicial proceedings and final judgments (ejecutorias). (L. C. P. 595; arts. 1216-1224, Civil Code.)

<sup>3</sup>These instruments include obligations, warrants, or bank notes, "to bearer" or nominative, issued by railway companies and other public-works enterprises, banks of issue, banks of credit, and other mercantile and civil organizations and entities. Said obligations generally are amortizable by lot or at fixed intervals, with a specified rate of interest payable quarterly, semiannually, or annually, stated in the coupons attached to the certificates or instruments representing the obligations. Negotiable instruments such as drafts and promissory notes do not come within the operation of this section.



existence (certeza) of the debt. If he admits it, the execution will issue. If he denies it, and either refuses or is unable to acknowledge his signature, the executory action can not be entertained, the creditor being relegated to his ordinary action at law. (L. C. P. 1429 and 1431.)

Summons to appear in order to admit or deny the debt must be served personally on the debtor or left with his nearest relative at his living quarters. He must be summoned three times before he is held as having admitted the debt. (L. C. P. 1430.)

#### PROCEDURE

The initial step in an executory action is the filing of a complaint in the manner previously indicated in the discussion of the ordinary action at law (p. 12), accompanied by the necessary documents and copies thereof for delivery to the debtor. The judge, upon an examination of the documents filed, determines whether the action proceeds or not. If he denies it, the plaintiff may appeal to the audiencia in the manner described in the section on "actions in excess of \$1,500," page 14. If the judge decides that the action is well grounded, he issues a writ of execution, which the court marshal (alguacil del juzgado) serves on the debtor with a request for payment of the amount claimed. If the debtor fails to pay, an attachment of goods, sufficient to cover the sum claimed is made. If the debtor can not be found at his domicile after two visits within an interval of six hours, the service will be effected in the manner indicated on page 4, and the attachment will be entered immediately. If the debtor's domicile or his whereabouts are not known, the judge, at the request of the interested party, may order the attachment without prior notification to the debtor, by serving the papers on the person in charge of the debtor's property. In that event summons is subsequently served on the debtor at the same time and in the manner prescribed for notice of the judicial sale of the goods. (L. C. P. 1437-1443.)

#### ATTACHMENT OF GOODS

The debtor's goods must be attached in the following order (L. C. P. 1445): (1) Cash; (2) public securities (efectos publicos); (3) gold and silver jewels and stones; (4) credits which may be realized immediately; (5) fruits and rents of any kind; (6) livestock; (7) movable goods; (8) immovable property; (9) salaries and pensions to the extent of one-fourth part of the income derived therefrom if it does not exceed \$1,000 annually, one-third part if that income does not exceed \$2,250 annually, and one-half if it exceeds the latter amount; salaries of public-service employees and State, provincial, or municipal pensions are not attachable (L. C. P. 1449); (10) credits and rights not immediately realizable.

With the exception of railroad properties, for the attachment of which a special proceeding is provided by Order 34 of 1902, and the bed and clothing of the debtor, his wife and children, as well as the implements necessary in his art or occupation, no property is exempted from attachment in executory actions. (L. C. P. 1446-1447.)

If the obligation, object of the action, is payable in installments, and one or more of these fall due after the action has been filed, the attachments already made may be increased to cover the amounts subsequently due; but if the installments fall due after judgment new complaints have to be filed in the same action. The judge orders the party to appear before him immediately thereafter and gives the defendant three days to attack the new complaints. If he fails to do so, judgment is rendered increasing the one previously handed down. (L. C. P. 1454-1457.)

After the attachment is made the defendant is summoned for the adjudication of the property (*citado de remate*). If his domicile is not known, he is served by publication, nine days being allowed him for opposing the execution. The defendant's default will be entered if he fails to enter an appearance. If he appears within three days, provided service is not made by publication, a period of four days is granted in order that he may allege exceptions and offer evidence. A copy of the complaint and accompanying documents must be delivered to the defendant. (L. C. P. 1457-1461.)

#### EXCEPTIONS

The defendant may oppose the execution by filing exceptions to the complaint. He is limited by article 1462 of the Law of Civil Procedure to the following exceptions:

- (1) Falsity of the instrument on which the action is grounded, or of the act which gave the instrument its executory force;
- (2) Payment;
- (3) Compensation by liquidated credit, evidenced by a document upon which an executory action may be filed;
- (4) That the time for filing the action has run out;
- (5) Discharge of the obligation or extension of time;
- (6) Promise not to demand (*de no pedir*);
- (7) Lack of capacity (*personalidad*) in the plaintiff or his representative;
- (8) Novation;
- (9) Settlement;
- (10) Agreement to submit to arbitrators or friendly compounders, drawn in the manner prescribed by law; and
- (11) Lack of jurisdiction.

In executory actions on bills of exchange the defendant is limited in his exceptions to the first five enumerated above, the fifth one to be evidenced by a public instrument or by a private document judicially acknowledged. The extinction of rights (*caducidad*) evidenced by a bill of exchange (because of lack of presentment or protest) may also be alleged as an exception by the defendant in an executory action based on such instrument. (L. C. P. 1463.)

#### ANNULMENT OF PROCEEDINGS

Finally, the defendant may demand the annulment of the proceedings on the grounds that (L. C. P. 1465):

- (1) The obligation or document (*titulo*) on which the execution is based is null;

(2) The document in question (titulo) does not have executory force (that is, an executory action can not be filed on it) by reason of the fact that it is intrinsically defective, or the date of maturity has not arrived, or the amount claimed is not actionable or liquidated;

(3) The defendant has not been properly summoned for the adjudication (citado de remate); and

(4) The defendant is not invested with the authority or has not the character under which he is sued.

#### PRESENTATION OF EVIDENCE

The plaintiff is granted a period of four days to consider the exceptions, after which the case is made ready for the presentation of evidence during 10 days, which may be extended only when evidence is to be obtained from a place other than the one where the case is being heard and only for the time it takes the mail to reach the latter place. (L. C. P. 1466-1470.)

#### JUDGMENT

After the evidence is admitted the parties have four days more to consider the case, after which they are ordered to appear for the rendition of the judgment within the following six days. Three days thereafter the judge renders judgment, as follows: (1) That the execution go forward, with expression of the amount to be paid by the creditor; (2) that the judgment does not proceed; (3) that the action or part thereof is null. (L. C. P. 1470-1471.)

Costs will be imposed on the defendant in the first case above, on the plaintiff in the second, while each party will bear his own in the third case, unless one of them is guilty of temerity in the prosecution of the suit. If a court official has brought about the nullity of the proceedings, costs may be imposed on him by way of penalty. (L. C. P. 1472.)

Judgments in executory actions are appealable, but the execution thereof will not be stopped provided the plaintiff gives security, within six days after notification of the resolution permitting the appeal, to answer for all that he receives in case the judgment is reversed. The security is canceled when the judgment is affirmed. (L. C. P. 1474-1476.)

The executory action does not definitely settle the issues between the parties (does not have the effect of *res adjudicata*). Either party may file an ordinary action at law concerning the matters involved in the executory suit. (L. C. P. 1477.)

#### SATISFACTION OF JUDGMENTS

Satisfaction of the judgment (*procedimiento de apremio*), as herein previously indicated, proceeds when no appeal or other recourse has been interposed against it, when it is affirmed upon disposition of any one of such proceedings in a higher court, or when the plaintiff gives security pending appeal. In the first two instances the judgment may be said to be final.

The following rules may be applied in the satisfaction of judgments, as regards the disposition of the attached property (L. C. P. 1479-1486):

1. If it is money, salaries, pensions, or credits, which can readily be converted into cash (realizables), payment to the plaintiff of the principal and costs may be made immediately.

2. If it is indorsable commercial paper or government or company "bearer" obligations (stocks and bonds), they will be sold upon court order, at the market price on date of sale.

3. If movable goods, first they must be appraised by experts appointed by the parties and thereafter sold at auction, after 8 days' notice by publication of day, hour, and place where the adjudication is to take place in the case of fruits, livestock, or movables, and 20 days' notice in the case of jewels of considerable value.

4. In the case of immovable goods, a certificate must first be obtained from the corresponding registry of property as regards encumbrances upon the property, and the debtor must be requested to present the titles to the property within six days.

After notification to subsequent creditors who have inscribed their rights in the property in the corresponding registry, and after the examination of the debtor's titles by the executing creditor, the property must be appraised and thereafter sold at public auction, notice of which must be previously announced in public places and newspapers for 20 days. (For further details concerning the auction sale and disposition of movable and immovable property, see L. C. P. 1487-1529.)

#### THIRD-PARTY CLAIMS

Persons claiming rights in the property attached in executory actions may protect such rights by filing claims (*tercerias de dominio*) in the executory action. This proceeding will stop the execution sale of the property attached until the third-party claim is disposed of. If the third person simply claims a preferred obligation outstanding in his favor, the execution sale of the attached property will be made, but the proceeds will be deposited until the right to preference is determined. (L. C. P. 1530-1541.)

A person in possession of property either as owner or under authority from the true owner may seek the protection of the courts whenever he is deprived of or interfered with in the peaceful enjoyment of his possessory rights by judicial disposition or as a consequence thereof in a case to which he is not a party. (Order 362 of September 17, 1900.)

#### EFFECTIVENESS OF EXECUTORY PROCEEDINGS

The effectiveness of an executory proceeding depends, to a great extent, upon the nature of the instrument on which the action is based. To illustrate this principle, suppose that A, B, and C hold claims against D, which credits are evidenced, respectively, by a notarial instrument, an accepted draft protested in time, and a private document. C files an executory action against D, who acknowledges his signature to the instrument, and an attachment of all of D's property, which consists of merchandise, is made. In most

United States jurisdictions, as a general rule, and unless some special right such as a lien can be claimed, the only recourse left to creditors A and B, after C attaches D's property, is to throw D into bankruptcy, thereafter procuring an order staying the proceedings in C's action.

In Cuba, A and B need not do that. A could file a third-party claim (*terceria de mejor derecho*) under subdivision A of part 3 of article 1924 of the Civil Code, which grants to holders of public documents a preference over creditors of C's nature upon the debtor's movable property. B's position is not so secure. He may file an executory action based on the protested draft and attach the same property. As between C and B, the one who obtains a judgment first (*sentencia de remate*) takes to the exclusion of the other. Now, unless B can in some way delay C's proceeding until he obtains judgment, the only course open to him is to throw the debtor into bankruptcy if he is a merchant, or into civil insolvency if a nonmerchant, and recover under the orders of payment provided in these proceedings if a satisfactory settlement has not been made in the meantime. Whatever attachments A, B, or C may effect upon D's property in no way will prejudice rights of other creditors of D who are entitled by law to a preference upon the debtor's property by reason of the nature of their claims. These preferences generally will be made effective also through third-party claims (*tercerias de mejor derecho o de dominio*).

#### ACTIONS ON DRAFTS

The holder of a draft upon which payment is due in Cuba may seek redress through litigation after all other means have failed to bring about the desired results. Naturally, the creditor may expect opposition at every step. It is advisable, therefore, that he be well informed of his rights and that no delays be incurred in the prosecution of judicial actions once it is decided to institute them.

Delays are to be avoided because of the possibility of conveyances of property out of which satisfaction of judgment might be obtained. Although Cuban law provides remedies in cases of conveyances in fraud of creditors, the chances of success in the proper actions are problematical—a fact typical of proceedings of this nature in most countries. Such actions at best are costly in time, energy, and money.

The creditor should familiarize himself with the means afforded by law to make effective obligations outstanding in his favor, in order to avoid technical pitfalls in procedure as well as the filing of exceptions to his pleadings and collateral proceedings (*incidentes*).

#### THE EXECUTORY ACTION ON DRAFTS

##### PREREQUISITES TO BE FULFILLED

Discussion of the executory action on drafts and its prerequisites can perhaps most readily be presented through hypothetical cases based upon the normal transactions effected in trade. In the average export shipment, bills of lading with drafts attached are transmitted by the exporter A through a bank or agent in Cuba, for delivery of

the bills of lading to the buyer B upon his acceptance of the draft. B accepts the instrument, is handed the bills of lading, and thereafter receives the goods. At maturity the draft is not paid. Whether it is sound business for A to protest the draft against B and thereby expose his financial embarrassment does not enter here; selection of the course to pursue depends upon innumerable factors such as the credit, morality, and business responsibility of B and many other somewhat indefinite considerations. From the legal standpoint, A must protest for nonpayment before sunset of the first working day following the day on which payment was refused (art. 504 (1), Code of Commerce), in order to preserve his right to executory action on the instrument. The protest is made through a notary public and must be evidenced by a certified copy of the writing in which the act of protest is set out. (Art. 508, Code of Commerce.) This requirement of protest, essential for the executory action, can not be obviated by a waiver-of-protest clause, the effect of which is to prejudice the draft and to turn it into a promissory note. (Art. 450, Code of Commerce.)

The executory action may be instituted within three years after the maturity of the document (art. 950, Code of Commerce), provided the acceptor did not allege falsity in his acceptance at the time the protest for failure to pay was made. (L. C. P. 1427 (4).) The action will proceed in the absence of such an allegation even if the protest was not made personally to the acceptor but to another person in his stead, as provided by article 504 of the Code of Commerce. (See decisions of October 25, 1913, and April 16, 1914, Audiencia de la Habana.) If the acceptor makes the allegation at the time of protest, the right of executory action is in effect lost and the holder of the instrument must resort to an ordinary action at law. The qualifying phrase, "in effect," is used because, although the holder may still petition the court for a judicial acknowledgment of the signature to the acceptance (L. C. P. 1428-1429), it is certain that the acceptor, in that proceeding, will not acknowledge his signature, to avoid inconsistency with his allegation in the protest. (M. Martinez Escobar, "Letras de Cambio, Libranzas, Cheques, etc.," p. 234.)

If no allegation of falsity is made by the acceptor, the holder of the draft may then file a petition for executory action against him, accompanied by the draft and the document of protest. (Art. 521, Code of Commerce.)

#### EXCEPTIONS THAT MAY BE INTERPOSED

In the executory action the acceptor may interpose the following five exceptions (L. C. P. 1463):

(1) Falsity of the instrument or its protest. This exception must be based on a criminal falsity which would permit of a criminal action on the court's own motion (*de officio*). In this event, the judge should stop all proceedings when the case is ready for judgment until the termination of the corresponding criminal proceedings. (L. C. P. 361; see also L. C. P. 513 and Martinez Escobar, *op. cit.*, p. 243.)

(2) Payment. This exception may be evidenced by a copy of the draft in which payment is duly set out (*conste el reembolso*), private

or public document, or oral evidence which must be weighed with care in accordance with article 1248 of the Civil Code. The best evidence of payment, of course, is the draft itself with a receipt of payment written in it, but this evidence could not be produced unless the holder were suing on a second or third copy.

(3) Compensation. This is a reciprocal liberation between two persons who are both creditor and debtor to each other. (Arts. 1195-1202, Civil Code.) For this exception to proceed it must meet two requirements, namely, that the credit alleged in compensation is liquid and is evidenced by an instrument on which an executory action could be based. (L. C. P. 1462 (3).)

(4) Prescription. That three years have elapsed since the draft matured. Against this exception the holder may allege that the prescriptive period stopped running by any kind of judicial demand made by the debtor or by the acknowledgment of the obligation before the period ran out. In order to stop the running of the prescriptive period the judicial demand must not be abandoned or thrown out (*desiste de ella, caducare la instancia o fuese desestimada la demanda*—Martinez Escobar, *op. cit.*, p. 392) and must have been successful.

(5) Discharge of the obligation or extension of the time for payment. This exception must be evidenced by a public document or one acknowledged in the action. (Decision of January 13, 1920, Supreme Court of Spain.)

#### ADDITIONAL ALLEGATIONS WHICH DEFENDANT MAY PLEAD

The debtor-acceptor, B, as defendant may also plead the nullity of the proceedings, based on the plaintiff's failure to observe one of its numerous technical requirements. (L. C. P. 1465.) This allegation may also be pleaded on the grounds that the instrument (*titulo*) on which the action is based is not one which, by reason of the amount in controversy, permits of executory action. In this regard it may be well to observe that when the amounts of two drafts are claimed, each of which is less than \$500 but which added together exceed that sum, an executory action may be based on both. (L. C. P. 153 and 155.) If the amount of a draft is less than \$500 but with interest and costs exceeds that sum, the executory action will also lie on it. (Decision of October 26, 1929, Audiencia de la Habana.)

Lack of jurisdiction in a court to consider an executory action may be pleaded by the defendant B by a petition to the competent court for a writ addressed to the court where the action has been filed, requesting it to refrain from considering the case and to remit the record to the competent court. This procedure is known as *inhibitoria*. (Decision No. 23 of October 23, 1924, Audiencia de la Habana.) A supreme court decision published in the *Gaceta Oficial* for August 19, 1929, is in point. In this case the buyer, A, with his place of business in the town of Majagua, judicial district of Ciego de Avila, bought goods of B at Santiago. The goods were shipped to Majagua, risk of loss on the buyer. A bill of exchange was drawn by the seller and accepted by the buyer, who failed to pay when demand was duly made. Upon suit in execution of the

instrument being brought in Santiago, the defendant objected to the jurisdiction of the court, alleging that since the bill itself was the basis of the action and it had been accepted at Majagua, Ciego de Avila, suit must be filed in that district.

The court decided that since the bill of exchange was just a convenient means of obtaining payment and did not constitute a novation of the original contract of sale, the gist of the action still was the claim for the price of goods sold. Inasmuch as the sale was consummated at Santiago where delivery was made, payment must be made at Santiago, and, consequently, the court there had jurisdiction of the case in question in accordance with rule 1 of article 62 of the Law of Civil Procedure.

In determining the proper tribunal to hear the case, the court based its ruling upon the original contract of sale even though the suit was an executory action upon a negotiable instrument. Under this decision of the Cuban Supreme Court, a trial court will look behind a bill of exchange and ground its jurisdiction upon the contract under which the bill is made.

Perhaps the allegation most commonly pleaded in litigation in Cuba, and particularly in executory actions based on drafts and other negotiable instruments, is that of lack of capacity (*personalidad*) in the plaintiff or his procurador. It can not be pleaded by way of exception but as grounds for the nullity of the proceedings. (L. C. P. 1465 (4) and 1463.)

The acceptor, B, as defendant may plead "plus-peticion," that is, that the claim made against him is excessive in amount by reason of a reduction through partial payment, error in computation or exchange, inclusion of illegal interest, etc.

If the acceptor did not specifically acknowledge the acceptance at the time of protest, or if the protest was not made against him personally, he may allege falsity, thereby causing a suspension of the proceedings, as herein indicated (p. 33).

#### EXECUTORY ACTION AGAINST ACCEPTOR

In the hypothetical case set out above suppose the exporter-drawer assigns the draft, after the protest, to C by a simple statement of assignment on it (he could not indorse it after protest), in order that the executory action may be filed against B, or suppose that the exporter is the holder of a draft assigned to him after protest. The assignee enjoys the same rights that his assignor had—no more, no less. (See *Martinez Escobar*, op. cit., ch. XV.)

Suppose that after acceptance the note is indorsed by the exporter A to C in order that C may thereafter collect on it. In the decision of November 6, 1929, the Audiencia de la Habana held that in such a case C would have to prove the authenticity of the indorsement to him were it attacked by the acceptor-defendant B. In order to obviate this difficulty the indorser A may acknowledge his signature. As a practical matter this is difficult if A is outside Cuba. Possibly he may do so either by empowering a third party to acknowledge in his behalf or by actually acknowledging his indorsement by a separate public document executed at his domicile. (*Martinez Escobar*, op. cit., pp. 261 and 235.)



## THE ORDINARY ACTION ON DRAFTS

If the right to executory action is lost, the holder's only recourse is an ordinary action at law. As against the drawer A the acceptor may allege all exceptions and defenses he has. As against an indorser from A the only exception he can interpose, in the ordinary as well as in the executory action, is that of falsity in the acceptance. No other defects in the instrument excuse the acceptor from his obligation of payment. (Supreme Court decision No. 32 of September 12, 1928.) It would seem advisable, therefore, that the exporter A, if he is the drawer of the draft, indorse the instrument, before acceptance, to a third party, C, who thereafter may sue on it in the event of nonpayment at maturity of the accepted draft duly protested.

In the ordinary action the plaintiff may not attach property of the defendant immediately upon the filing of the action. The only way he can protect his interests against a possible effective transfer of assets by the debtor is by means of a preventive attachment. (See section on "Preventive attachments," p. 21.)

In view of the burdens imposed upon indorsers, as herein indicated, wherever the drawer foresees the necessity of indorsing the instrument in order to collect from the acceptor B by filing actions against him through indorsers, the indorsements should be made before acceptance. In the corresponding action the indorsee who obtained the acceptance will not be required to prove the authenticity of the indorsement, nor will he be subject to the defenses of the acceptor against the drawer (provided the indorsee is a bona fide holder for value; he will appear as such from the face of the indorsement—which fact the acceptor will find difficult to rebut).

## INDORSEMENT FOR COLLECTION

Suppose A indorses to C for collection or fails to date his indorsement to C, which failure results in an indorsement for collection only, under Article 463 of the Code of Commerce. Such indorsement does not transfer title (*propiedad*) to the draft, and consequently C can not sue on it. His rights are limited to the procurement of payment through extrajudicial means. The same principle applies in the case of promissory notes. (Supreme Court decision No. 74 of May 29, 1924, and *Audiencia de la Habana*, decisions of April 3 and February 23, 1926. See also *Martinez Escobar*, op. cit., ch. XIV.)

## ACTIONS ON PROMISSORY NOTES

There is one fundamental distinction in character between drafts and promissory notes which must be brought out. Drafts are exclusively governed by the provisions of the Code of Commerce. The rules of common law (*derecho comun*)—that is, the body of general laws of a country as differing from special laws, such as apply to provinces, districts, and municipalities, armed forces, ecclesiastical entities, and commerce (*Escrache*, "Diccionario de Legislacion y Jurisprudencia," p. 545)—apply to drafts only in the absence of provisions in the Code of Commerce. If a draft is defective or lacks

certain legal formality, it is considered a promissory note in favor of the payee and against the drawer. (Arts. 443, 2, 16, 50, and 450, Code of Commerce.)

The promissory note, on the other hand, may be mercantile or civil and consequently may be governed by the provisions of either the civil or the commerce code. This distinction is important because the right of action is extinguished within three years after maturity if mercantile, while suit may be filed within 15 years if the note is civil in character. (Art. 950, Code of Commerce; art. 1964, Civil Code.)

When is a promissory note civil and when is it mercantile? Even if it conforms strictly to the requirements of article 531 of the Code of Commerce, a promissory note may still be civil in character notwithstanding all the parties to it are merchants. The factor decisive as to the character of the instrument is whether it arose out of a mercantile transaction. This is hardly an explanation unless something is added concerning mercantile transactions, but an accurate definition of the term would necessitate extensive discussion foreign to the purpose of this bulletin. Reference is made, therefore, to a few of the more common and recognized examples, such as the sale-purchase of movable goods, when the buyer intends to resell the goods, in the same form or in a different one, with intent to derive a profit thereby (art. 325, Code of Commerce), or loans made between merchants, the thing loaned being used in acts of commerce (art. 311, Code of Commerce). It is sufficient that the money was loaned for use in acts of commerce, although subsequently the borrower used it in a different way. (See Martinez Escobar, op. cit., pp. 359 et seq.)

An executory action may be filed on promissory notes regardless of their character under subdivision 4 of article 1427 of the Law of Civil Procedure, but a judicial acknowledgment of the maker's signature must first be obtained. If the acknowledgment is refused, an ordinary action is the only recourse left.

As against the maker promissory notes need not be protested prior to the filing of actions based on them, but must be protested when the action is directed against indorsers. Otherwise the joint and several liability of indorsers ceases. (Auto de la Audiencia de la Habana, April 18, 1922.)

#### IS JUDICIAL ACKNOWLEDGMENT INDISPENSABLE?

May the requirement of judicial acknowledgment necessary for the executory action on promissory notes or on drafts, when the acceptor alleged falsity in his acceptance at the time protest was made, be obviated? This would seem possible at first thought, if the signature of the maker or the acceptor, as the case may be, was authenticated by a notary public at the time the corresponding obligation was incurred. But further consideration of the problem would establish that such an authentication can not take the place of the judicial acknowledgment, nor does it convert the instrument into a public document on which executory action lies in accordance with subdivision 1 of article 1427. Its only advantage is the fact that it obviates the necessity of the third citation mentioned in the discussion of judicial acknowledgments in the section on executory actions.

(Martinez Escobar, *op. cit.*, pp. 374, 378, and 239.) This situation will be changed if the proposed Code of Commerce becomes law in Cuba.

### ACTIONS UPON REFUSAL OF GOODS

Suppose that an exporter in New York accepts an order from a customer in Cuba and ships him goods, transmitting shipping documents with draft attached through a local bank with instructions to deliver the documents upon acceptance of the draft. Suppose that upon the arrival of the goods the buyer refuses to accept them on the grounds that they are not of the kind, quality, and quantity contracted for. This is the more likely to happen when the market price of the goods has fallen considerably after shipment and before acceptance; it is a difficulty which must be contended with not only by exporters everywhere but by vendors in the local markets. When a buyer realizes that the market has gone decidedly against him, the possibility exists that he will try to avoid the impending loss or at least to minimize it.

If an exporter is faced with such a difficulty, what may he do to protect his contractual rights? The first step he should take is to have the goods examined by experts, to determine whether they conform to the kind, quality, and quantity stipulated, and to have the experts' findings evidenced in a notarial instrument (*escritura publica*). In addition, written evidence of the seller's performance according to the contract as regards time, place, and delivery should be procured. Having substantiated every step in this manner, the seller is ready for his next move.

### EFFECT OF CHARACTER OF SALE ON PROCEDURE

After the seller has acted as indicated above, it becomes necessary to determine the character of the sale, that is, whether it is a civil or a mercantile transaction, in order that the corresponding procedure may be followed.

A sale is mercantile in character when it concerns movable goods purchased for the purpose of reselling them, either in the same form or in a different one, with the intent of deriving a profit in the resale. (Art. 325, Code of Commerce.) The following are not considered mercantile (art. 326, Code of Commerce):

(1) Purchases of goods to be consumed by the purchaser or by the person for whom they are bought;

(2) Sales by tillers of the soil, cattlemen, and property owners, of the fruits and products of the harvest, or cattle, or of things paid by way of rent;

(3) Sales by artisans of objects made in their shops; and

(4) Resales by persons, not merchants, of the remainder of the goods gathered to be consumed by them.

Sales not mercantile in character are considered civil.

### PROCEDURE IN CIVIL SALES

In suits involving civil sales the vendor may demand performance of the contract, in which event he must keep the goods at the disposal of the buyer. In other words, if he demands performance, the seller himself must be ready and willing to perform his contractual obli-

gations. - (Art. 1451, Civil Code.) If circumstances such as the changing economic situation of the purchaser make this course of action inadvisable, the seller may sue for damages, and in that action may recover the profits which he failed to realize. (Arts. 1101 and 1106, Civil Code.) It would seem that he may recover the difference between the amount paid by him for the goods and the contractual price and expenses of delivery if the buyer specifically agreed to pay for same. If the seller has suffered loss in the subsequent resale of the goods, it would seem that he may also recover this under articles 1101 and 1106 of the Civil Code.

#### PROCEDURE IN MERCANTILE SALES

If a mercantile sale has been made the vendor may:

(1) Demand performance of the contract. In this case he must make a judicial deposit of the goods, which fact must be set out in the complaint in order that a good cause of action may be alleged in it; otherwise it is subject to attack on these grounds. This deposit must be petitioned of the competent court, in writing; the petition must contain a complete description of the goods to be deposited and must designate a registered merchant as depositary, if there be one; if not, a taxpayer who pays an amount of taxes which the court considers sufficient guaranty to answer for his acts. (L. C. P. 2080.) The buyer must pay the expense of the deposit. (Art. 332, Code of Commerce.)

(2) Rescind the contract. If circumstances do not permit a demand for performance of the contract, the seller may elect to rescind it (art. 332, Code of Commerce), in which event he may thereafter sue for damages suffered and profits he failed to earn, as previously indicated.

#### ACTIONS ON CURRENT ACCOUNTS

Suppose that an exporter has been negotiating with a Cuban customer who has a current account with him, and that due to some circumstance the account is closed and a balance in favor of the exporter results. The customer does not accept the liquidation of the account, thus forcing the exporter to resort to an action at law to seek recovery.

Only an ordinary action can be brought in this case, inasmuch as no grounds for an executory action exist. The complaint will allege the existence of the account, its termination, and the balance. The evidence necessary to make out the case consists, generally, of the orders placed by the defendant, exchange of correspondence, cables, and other documents evidencing shipments and acceptances of same by the defendant. This proof should date back to the last liquidation of the account accepted by the customer.

#### FORECLOSURE OF MORTGAGES

Upon the nonpayment of a mortgage obligation at its maturity the creditor may seek collection of the amount due through the executory mortgage action (ejecutivo hipotecario). (See arts. 127-133 of the mortgage law and arts. 168-176 of its regulation.)

## JURISDICTION—DOCUMENTS REQUIRED

The executory action is instituted by the filing of a complaint with the competent court at the place where the mortgaged realty is. If several parcels in different jurisdictions are the subject of the action, the court designated in the mortgage instrument has jurisdiction; if no court has been named, that within whose jurisdiction the highest-priced parcel is situated has jurisdiction, but, if there is more than one parcel, all of equal value, in different jurisdictions, the court in any one may take jurisdiction. The value is that specified in the mortgage document. This writing must be accompanied by (1) the public document evidencing the mortgage obligation, with notation thereon of its having been inscribed in the corresponding registry; (2) a certificate issued by the registrar to the effect that the obligation due has not been canceled in his books or is pending cancellation—this certificate must set out literally all the inscriptions made of the property and must be dated not more than 15 days prior to the filing of the action; (3) the documents evidencing the authority of the procurador, if the action is not filed personally by the creditor or his legal representative.

## ALLEGATIONS IN THE COMPLAINT

The complaint, signed by an attorney, must allege the facts giving rise to the action, the legal reasoning determining the existence and effectiveness of the credit (*certeza, subsistencia, y exigibilidad del credito*), and the jurisdiction of the court (*competencia*); it must allege the amounts collected by way of interest or as part of the capital sum, and the liquid amount of the claim to which the creditor will be liable by the mere act of instituting the action, to answer for whatever damages the debtor or interested third parties may suffer by reason of malice or negligence in the truthful exposition of the facts and circumstances which the court must consider.

## ORDER OF PAYMENT—ATTACHMENT

If upon examination of the complaint and accompanying documents the court finds all requirements of law to have been complied with, it will issue a writ (*auto*) ordering payment of the amount claimed within 30 days by the persons who, according to the certificate of the registrar, are in possession of the mortgaged property, whether the debtor has kept it or has transferred it to a third person, in whole or in part. If costs have been included in the mortgage security and inscribed in the registry, the order of payment will include them. The writ will declare that if payment is not made as ordered the mortgaged goods will be sold at public auction. Upon petition of the plaintiff the attachment of the mortgaged property will be decreed; this is accomplished by an order (*mandamiento*) to the registrar to enter a preventive annotation (*anotacion preventiva*) in the inscription of the property, in the amounts claimed. If the court finds that legal requirements have not been complied with, it will refuse to issue the order of payment, which resolution may be appealed. Whenever the person or persons in possession of the property do not reside within

the jurisdiction of the court, service will be made on the person found on the premises, to the end that he may notify the owner thereof. But, if the property has been abandoned, the order will be served on the corresponding municipal administrative authority, with a request that it notify the debtor.

Whenever the order of payment is not served on the person under obligation of payment at his domicile, nor on the apoderado (person holding a power of attorney) or the lessee in charge of the property, it will be published in the *Gaceta Oficial*, in which event the 30-day term will start to run from the date of such publication.

The order of payment must also be served on any person enjoying rights in the property inscribed subsequently to those of the plaintiff.

#### DEFENSES

The mortgage action can not be suspended except by:

(1) Documentary proof of the existence of a criminal proceeding grounded on the falsity of the mortgage title, object of the mortgage action, in which criminal proceeding an accusation (*querrela*—Law of Criminal Procedure 270 et seq.) or writ of prosecution (*auto de procesamiento*—Law of Criminal Procedure 301) has been admitted;

(2) The filing of a third-party claim based on ownership (*terceria de dominio*) accompanied by the document of title to the property in question, inscribed in favor of the third-party claimant on a date prior to the inscription of the credit of plaintiff in the main action; the fact that the inscription of title of the third party has not been canceled must also appear;

(3) The presentation of either a certificate of the registrar to the effect that the mortgage has been canceled or a certified copy of the public instrument by means of which said mortgage is canceled, with notation of presentation by the proper registry. This notarial instrument must have been drawn at the request of the mortgage creditor or those taking through him, who must prove the corresponding conveyance by means of documents.

The mortgage action is stopped until the termination of the criminal proceedings, in the first case; until the termination of the third-party claim, in the second case; in the third case, the judge summons the parties to a hearing within four days, after which he decides the controversy through the issuance of a writ within the next two days. An appeal may be taken in the event the action is suspended.

All other claims concerning nullity of the title or procedure, maturity, authenticity, or extinction of amount of the debt can be considered only in an ordinary action at law, which may be filed after the termination of the mortgage action. This provision, while intended to expedite the prosecution of the foreclosure proceedings, offers a serious difficulty in that it permits the debtor to disregard the summary suit and thereafter file action against the execution creditor for its nullity and damages on any one of the grounds hereinbefore stated. It is essential, therefore, that the strict wording of the statute regulating the mortgage action be observed and all its numerous technicalities be complied with in order to prevent or defeat the ordinary action at law, which might be filed subsequently as indicated above.

## SALE OF THE MORTGAGED PROPERTY

If at the expiration of the 30-day period the debtor has not deposited the amount due or alleged the defenses previously indicated, the judge will order the auction sale of the mortgaged property. Notice of the sale must be published for 20 days in the official newspaper and posted in the usual public places. These notices must set out the date, hour, and place of the sale, name of all parties interested according to the certificate of the registrar, and the amount of the lowest bid. "The lowest bid" is the value given to the property in the mortgage instrument if it exceeds the amount of all the obligations secured by the property in preference to that of the mortgage creditor; but if the latter exceeds the former, the lowest bid is the amount of such obligations.

## ADJUDICATION OF THE PROPERTY

If there are no bidders at the first auction, the mortgage creditor may demand adjudication of the property in his favor for the lowest bid; he is liable for all credits preferred to his own and must deposit any resulting excess after his credit is covered. If he does not demand this adjudication, he may request another auction with a reduction of 25 per cent in the lowest bid, provided all credits secured by the property and preferred to his own are secured. Other auctions may be demanded if no bids or petitions for adjudication are received. But if no bids are admitted or adjudication made, the proceeding is ended, the creditor being at liberty to collect his credit by the ordinary means permitted by law against all other goods of the debtor. Costs of the foreclosure action, in such cases, are imposed on the creditor.

## ASSIGNMENTS OF RIGHTS

In general, both civil and mercantile obligations may be assigned in Cuba without the consent of the debtor, but he should be notified of the assignment in order that he may make payment to the assignee. (Arts. 1112, 1198, and 1526-1536, Civil Code; art. 347, Code of Commerce.)

It has been suggested that whenever a person *residing outside* Cuba has to file an action before the courts of that country, the expense and uncertainty surrounding the necessary power of attorney could be obviated by an assignment of the claim to a resident in Cuba, who brings the action in his own name. If the claim is evidenced by a negotiable instrument, such assignments are possible by the mere indorsement of the obligation; but it is believed that in assignments of obligations of a different nature, such as debts due on open accounts, the difficulties mentioned are not effectively eliminated. If the assignor is a juridical person (such as a company), the instrument of assignment is subject to attack on the question of whether or not the person who acted for the company in making the assignment was properly authorized. To insure success in such attack the same care and skill must be exercised in drawing the assignment as in preparing the power of attorney.

The assignment has one distinct advantage in that it obviates the possibility of the defendant's filing a dilatory exception requesting

damages-and-costs bond on the ground that the plaintiff is a foreigner. The action would be filed in the name of the assignee, who, to escape a possible demand for this security, must be a Cuban citizen.

#### ASSIGNMENTS IN ACTIONS NOT EXCEEDING \$500

Another advantageous use of the assignment device has been pointed out by Dr. Wolf E. Klawans, an attorney at Habana. In isolated verbal actions which foreign companies desire to file in the municipal courts of Cuba, this attorney suggests that the claimant execute a simple power of attorney, in the ordinary informal way in which powers are evidenced in the United States, in favor of a member of his Cuban attorney's staff, authorizing this employee, in the name of the company, to execute assignments of any and all claims of the company against the particular person or persons residing in Cuba. This simple power can be drawn and legalized at small cost. The holder of the power then executes the assignment of the claim in order that another member of the law firm, who is a licensed procurador, may present it in court in his own name. At the trial the attorney empowered by the company to execute assignments in its name appears in court as a witness for the assignee, testifying to the authenticity of the assignment and exhibiting his power of attorney. In this action, which is summary in nature, the defendant is not allowed to impugn the power of attorney of a person not a party to the suit, nor can he attack the capacity (*personalidad*) of the assignee who appears in his own name.

#### SUSPENSION OF PAYMENTS

Undoubtedly there is no proceeding at law of more vital importance to the exporter to Cuba than that which governs the disposition of the assets of his Cuban debtor whenever that debtor is financially embarrassed in his business or enterprise. Generally, this situation becomes known through the various channels of trade and more particularly through credit-information agencies. Such advices are not necessarily conclusive as to what may follow, but as soon as the debtor fails to meet his matured obligations a manifest sign of his financial difficulties has been disclosed. Immediately thereafter the exporter may expect the debtor, if he is a merchant, to petition for a suspension of payments or voluntary bankruptcy. If the debtor is not a merchant, he may seek *quita o espera* (discharge or extension) or *concurso voluntario* (voluntary civil insolvency). The creditor may collect through actions at law, in a *concurso involuntario* (involuntary civil insolvency), or in bankruptcy proceedings.

It is evident, therefore, that Cuban law provides different rules governing collection as against embarrassed debtors, depending upon whether the debtor is or is not a merchant. Accordingly the distinction between merchant and nonmerchant must be made before the rules of law applicable to each case can be determined. Under article 1 of the Code of Commerce, individuals who, having legal capacity so to do, engage habitually in commerce are merchants. Clerks, managers, salesmen, administrators, company directors, mem-



bers of the crew of vessels, and brokers are not considered merchants, but commission agents and industrial and mercantile companies organized in accordance with the provisions of the Code of Commerce are included within that term. (See Lorenzo Benito, "Manual de Derecho Mercantil," p. 355.) Individuals have legal capacity to engage in commerce whenever they are over 21 years of age, not subject to marital authority, and enjoy the free disposition of their property. (Art. 4, Code of Commerce.) The definition of "merchant" in the Code of Commerce is question begging. To make that definition clearer it would be necessary to discuss the nature of activities generally considered within the term "commerce," and, in the case of companies, the intricate problems which arise through failure to comply strictly with code requirements governing organization. Such detailed comment is beyond the scope of the present bulletin.

#### TWO COURSES OPEN TO EMBARRASSED DEBTOR

In the conduct of their business merchants may be hard pressed to meet their obligations and may have occasion to seek a suspension of payments by court order. In Cuba this may be done (1) when the merchant, although having enough property to cover his obligations, may foresee his inability to meet them at maturity, or (2) when the merchant is unable to meet his obligations because of unfortunate or involuntary circumstances.

The debtor may simply request an extension of time within which to pay or he may seek a discharge. In either case the debtor must secure the payment of not less than 50 per cent of the outstanding credits not privileged in payment or secured by pledge or mortgage. The security (*fianza*) may be in money or in the nature of a mortgage or pledge (*pignoraticia*). In case of petition for extension (*espera*) a bond equivalent to 50 per cent of the liabilities must be given as security for the performance of the agreement to pay within the time of the extension. (Art. 870, Code of Commerce.)

A merchant may present himself in suspension of payments within 48 hours following the maturity of an unpaid obligation, the payment of which has been requested judicially or by notary public. (Art. 871, Code of Commerce.) The established practice in Cuba has been to permit a debtor to petition for a suspension of payments within 48 hours after his failure to meet a second judicial or notarial request for payment, notwithstanding 48 hours had already elapsed since such request for payment had been made on an obligation maturing on a previous date. It seems that this question was not raised in litigation until the case of *Hewitt Gutta Percha Rubber Co. v. Fox Brothers Co.* was decided by a judge of first instance in Habana on May 11, 1931. It was there held that the defendant could not petition for suspension of payments on the grounds stated under (1) *supra*, because a draft had been previously protested against him and 48 hours had elapsed since that act, the debtor failing to petition suspension of payment within that time. In support of this holding the court cited decision No. 214 of April 29, 1929, of the Audiencia of Habana, to the effect that the grounds for suspension of payments under article 870 of the Code of Commerce, (1) and (2) *supra*, are separate and distinct from that under article 871 of the same code, and, consequently, when a draft has been pro-

tested against a debtor he may petition for suspension of payments only under article 871 and not under article 870. This case is now on appeal, so that the decision herein discussed is by no means indicative of the possible reception meted out to a theory which apparently runs counter to the established practice.

#### OBLIGATIONS OF PETITIONER

The merchant or company requesting a suspension of payments must comply with the following prerequisites (art. 872, Code of Commerce):

(1) Present a writing signed by an attorney stating the reason for his or its request to be declared in suspension of payments and the fact that the case falls within the provisions of either article 870 or article 871 of the Code of Commerce;

(2) Offer security in the manner indicated under article 870 of the Code of Commerce;

(3) File at the same time a detailed inventory of his or its goods and balance of assets and liabilities of his or its establishment. When the case falls within the provisions of article 871 of the Code of Commerce, an extension not to exceed five days may be asked in order to complete the inventory if it can not be made in time because of the nature and extent of the business;

(4) File a list of the creditors, with their addresses and the amount of their credits, stating under oath that those listed are the only creditors of the petitioning debtor;

(5) Prove that he or it is inscribed in the mercantile registry and, if a company, present a resolution adopted by the majority of its members authorizing the declaration of the concern in suspension of payments;

(6) Present the offer of extension of time (*espera*) for payment, which may not exceed three years except upon the unanimous consent of all creditors; or that of release (*quita*), with copies for each creditor;

(7) Name the merchant to represent the debtor in the examining board (*infra*); and

(8) Deposit with the clerk of the court an amount at least 10 per cent in excess of what approximately must be used to defray expenses of service of notifications (*exhortos*), letters rogatory, dispatches, and publications of all kinds incident to the notification of creditors.

#### JUDICIAL DISPOSITION AFTER FILING OF PETITION

Upon presentation of the petition the court will order, within three days, the preparation of the security, and upon compliance with this order a temporary writ of suspension of payments will be issued in which the following provisions will be included:

(1) Removing the debtor from the control of his or its establishment and appointing a local merchant, not a creditor in the case, to control it temporarily, supervising operations, accounting, and conduct of the business until the creditors may provide what is proper. This merchant is known as the *interventor*.

(2) Summoning of the local creditors to a meeting in order that, within three days, they may elect, by majority of votes, one of them

or a third party who, together with a merchant designated by the debtor and one appointed by the court, may proceed to check the assets and liabilities of the debtor. (This is the board mentioned under (7) supra.) Foreign creditors may appear at this meeting either personally or through duly appointed representatives. If there are no creditors in the locality or if none appear, whether local or foreign, it is understood that they accept the appointment of the merchant by the court to verify the balance sheet. The merchant or merchants so designated are known as *comisionados*.

(3) Ordering the writ of suspension of payments to be communicated to the registrar of property for recordation in the corresponding page and its preventive notation (*anotacion preventiva*) in the inscription of immovable goods or rights in property (*derechos reales*), which the debtor has made in the registry, in order that such immovable goods or rights may not be encumbered or conveyed without court order.

(4) Granting the 5-day extension under (3) of "Obligations of petitioner," supra. (See law of June 24, 1911.)

#### LIMITATIONS UPON RIGHTS OF PARTIES

From the time the debtor petitions a declaration of suspension of payments no creditor may execute his credits, nor file actions against him, nor claim preference or privilege over the goods of the debtor, except mortgage or pledge creditors or those for personal services rendered. (Law of June 24, 1911.)

All private agreements between the debtor and his creditors after the suspension of payments are null. If made, the creditor loses his right to claim and the debtor will be considered a culpable bankrupt. Obligations entered into after the declaration of suspension of payments do not prejudice the rights (*preferencia*) of creditors who approved the suspension-of-payments agreement. (Law of June 24, 1911.)

#### EXAMINATION OF DEBTOR'S ESTATE

Within 15 days after appointment of a creditor to the board under (2) supra, the verification of assets and liabilities and the report thereof must be submitted. In order to do so, the board may enter warehouses and establishments of the debtor and take possession of of his books, correspondence, and papers, which thereafter are left in the custody of the judicial clerk until the report is issued. The report must state whether assets and liabilities as given in the balance are correct; whether the bookkeeping was done according to law, and any lack of formalities and any errors, and whether or not the causes of the suspension of payments exist. The merchant appointed by the court [see (1) supra] will inform the tribunal whether the debtor by his conduct merits the benefits of the suspension; if granted, the court must take necessary steps toward preventing the debtor from mispending his property to the prejudice of creditors. (Law of June 24, 1911.)

The court, after considering the reports, may ratify the provisional suspension of payments within 3 days after the term of 15 days noted in the preceding paragraph.

Upon the confirmation of the suspension of payments the debtor must present to the court a yearly balance and a detailed balance sheet showing progress of the business during the year. The creditors may examine these reports, making to the court the observations and claims which they deem proper.

#### MEETING OF CREDITORS

In the writ ratifying the suspension of payments creditors will be summoned to a meeting, to be held within one month if all creditors reside in Cuba or within a period not to exceed four months if some are domiciled in foreign countries. Notifications of the meeting are made by letters rogatory to foreign creditors, in addition to notice by registered mail, with copy of the settlement offered by the debtor and advice that the creditors should appear with the evidence of their credits (*titulo de credito*). Creditors whose addresses are unknown are summoned by publication in the official newspaper.

Creditors may be represented at the meeting by third persons authorized by power of attorney, which must be presented and added to the record. The representatives have but one vote although acting for more than one creditor, but all credits represented by them will be considered in determining the majority in amount.

On the designated date the meeting of creditors is presided over by the judge, assisted by the clerk, the interventor, and *comisionados*. The clerk writes down the names of those in attendance, setting out the amount of each one's claim, and stating whether anyone appears in behalf of another after the judge passes upon the sufficiency of the powers of attorney. If those present represent 75 per cent of the liabilities, the meeting will be considered as validly constituted. The list of creditors presented by the debtor, the balance sheet and the reports of the *comisionados* and interventor are next read. The creditors then vote upon the recognition of claims by majority of creditors present, regardless of the amount. Those excluded have the right to file an *incidente*—a separate proceeding, which does not stop the execution of the suspension-of-payments agreement approved by the creditors—but measures must be taken to pay off those claims if sustained subsequently by final judgment.

The creditors discuss the debtor's offer of settlement, which, with such modifications as are agreed upon, is put to vote. To be approved it must receive a majority (one-half plus one) of the votes of creditors representing 75 per cent of all the liabilities of the debtor. A record of the proceeding and action taken at the meeting will be drawn up, read, and signed by the judge and those voting. If an agreement has been reached, it must be notified and published in the official newspaper and inscribed in the mercantile and property registries. Said agreement may provide for the continuation of the business or its liquidation. In the latter case, the debtor may not incur further obligations; he must simply terminate and dispose of those pending. If the minimum payment of 50 per cent provided in article 870 of the Code of Commerce is accepted, it must be paid immediately unless there is a stipulation to the contrary. (Law of June 24, 1911.)

## ATTACKING THE SETTLEMENT

Creditors who have protested against the settlement and those who were not present at the meeting may attack it within five days after notification. Within 10 days after the approval of the agreement the debtor may demand that the creditors who were not present at the meeting and who were summoned to it by publication be notified, upon his disclosing their domiciles, which, he must state under oath, were unknown by him until then. The personal notification of these creditors will then be ordered, with notice that unless they attack the settlement within five days thereafter it will be held as consented to and firm.

Foreign creditors not represented at the meeting may attack the agreement within two months after its publication in the official newspaper if they reside in North America and within six months if they reside anywhere else. After the expiration of these periods they still may proceed against the debtor but not against the creditors who agreed to the composition.

The grounds upon which the settlement may be attacked are:

(1) Defects in the procedure observed in the convocation and holding of the meeting;

(2) Lack of capacity (*personalidad*) in certain persons voting, if those votes made possible the necessary majority in numbers of votes and amount;

(3) Presentation of simulated credits or creditors, exaggeration in the amounts, increase in assets or diminution in liabilities in order to assure to the debtor the majority in amount (necessary to put the settlement into effect);

(4) Fraudulent understandings between debtor and one or more creditors in order that the latter may vote in favor of the settlement offered.

The complaint in the action to set aside the settlement must be formulated in the same manner as one in an ordinary action for sums exceeding \$1,500 (see p. 12), the debtor and creditors supporting the settlement litigating jointly, while all complaints presented by different creditors directed against the settlement may be joined in one proceeding.

If at any time the debtor fails to comply with the obligations of the settlement, two or more of his creditors may petition his bankruptcy upon certification of the debtor's nonperformance.

Those who simulate or exaggerate the amount of their credits or aid in any other artifice of the debtor in the preparation of the suspension of payments or during its course are guilty of embezzlement or fraud (*estafa o falsedad*).

If from the reports of the *interventor* and *comisionados* it appears that before the approval of the settlement the debtor was in a condition which would give rise to bankruptcy proceedings, he must be declared in bankruptcy. (Law of June 24, 1911.)

## GENERAL REMARKS

It is stated by those experienced in Cuban legal procedure that in actual practice suspension of payments frequently has proven unsatisfactory to the creditors. In some instances debtors have been known

to falsify the statements presented by themselves in support of their petitions, despite the fact that this is punishable under article 554 of the Criminal Code. Further, there is the difficulty of determining the real security afforded by the bond filed by the petitioner of the suspension as security for 50 per cent of his obligations.

Perhaps the greatest difficulty arising in the case of foreign creditors is that such creditors can not as a practical matter, take an active part in the suspension proceedings unless the amount of the claim involved is large, for the costs of such participation necessarily are high. This results, not infrequently, in foreign creditors accepting offers of settlement which might have been made more favorable to them if the cost of investigating and determining the merits of the situation were lowered and other difficulties lessened.

### BANKRUPTCY PROCEEDINGS

In Cuba bankruptcies are classed as voluntary (proceedings instituted by the insolvent merchant) or involuntary (proceedings instituted by any one of his creditors) and as fortuitous, culpable, or fraudulent. Only in a fortuitous or culpable bankruptcy may the debtor be discharged of his obligation; in a fraudulent bankruptcy, not only is he not discharged but he is held criminally liable. (Arts. 875, 886, 895, and 920, Code of Commerce.) All merchants, whether inscribed as such or not, are subject to bankruptcy proceedings in the proper circumstances and not to civil insolvency, the rules of which apply to bankruptcy only when the bankruptcy rules do not cover the particular case. (L. C. P. 1316.)

#### DECLARATION IN BANKRUPTCY

##### UPON PETITION OF CREDITORS

The petition for a declaration in bankruptcy of a merchant-debtor may be filed by his creditors on the following grounds:

(1) By one creditor, if the petition is grounded on a paper (título) upon which execution (ejecucion o apremio) has issued and it appears from the attachment that sufficient unencumbered goods out of which to make payment are not available (art. 876, Code of Commerce);

(2) By several creditors who, without having obtained an order of attachment, prove their credits and the fact that the merchant has failed in a general way to pay his obligations or has failed to present a proposal for settlement, in case of suspension of payments, within the periods of time specified in that proceeding;

(3) By one creditor, upon proof of his credit and of the fact that the debtor has fled or concealed himself, closing his offices, warehouses, and establishments, without leaving anyone to manage them and discharge his obligations. In cases of notorious flight and of certainty concerning the facts, the courts may order the taking of the establishments of the debtor and will prescribe, on its own motion, the necessary measures for their conservation until the creditors avail themselves of their right to seek a declaration of bankruptcy.

Upon presentation of the creditor's petition, he must first prove his right to file the petition by means of a certificate of the issuance

of execution in favor of his credit against the debtor or by a document evidencing with certainty (*fe haciente*) his credit; thereafter the remaining proof necessary to support the grounds of the petition will be admitted. (L. C. P. 1323.) The court will then declare the bankruptcy of the debtor without previously citing or hearing him, but the debtor may attack the declaration within eight days after he is notified, the record of the proceedings being delivered to him for this purpose for three days. (L. C. P. 1323-1324.) The creditor will be notified of the debtor's opposition, and, at the same time, admission of proof for 20 days will be decreed. The parties are then cited for judgment, which will be rendered within five days, after two days have elapsed following the citation of the parties. (L. C. P. 754 et seq.) The judgment of the court may be appealed. If the judgment revokes the declaration of bankruptcy, the debtor has a right to sue the petitioning creditors for damages if they acted maliciously, fraudulently, or manifestly unjustly. (L. C. P. 885 and 1330.)

#### UPON VOLUNTARY PETITION

Every merchant who is in a state of bankruptcy must so notify the court of first instance of his domicile within the three days following the one on which he failed in the current payment of his obligations (art. 874, Code of Commerce), presenting to that effect a petition in bankruptcy, stating the place of his residence (*habitacion*) and all the offices, warehouses, and any other establishments of his business. (L. C. P. 1322.) The petition must be accompanied by:

- (1) A general balance sheet of the business;
- (2) A statement expressing the direct and immediate causes of the bankruptcy. All documents in support of this statement may be attached thereto, while in the general balance sheet the debtor must state the value of his movable and immovable property, effects, and commercial goods, credits, and rights of any nature, as well as his debts and outstanding obligations. (L. C. P. 1322.)

These documents must be signed by the debtor or his representative with special power to do so, a certified copy of which power must accompany the documents. (L. C. P. 1322.)

#### EFFECTS OF THE DECLARATION OF BANKRUPTCY

Bankruptcy procedure is divided into five sections as follows (L. C. P. 1319-1320):

- (1) All matters relative to the declaration in bankruptcy, the dispositions following it and its execution, the appointment, removal, and reappointment of trustees (*sindicos*), and the settlement which terminates the proceedings;
- (2) Acts incident to the taking of possession of the bankrupt's property and everything relative to the administration of the bankruptcy until the total liquidation and presentation of accounts by the trustees;
- (3) Actions arising out of the retroaction of the bankruptcy upon the contracts and administrative acts of the bankrupt preceding the declaration;

(4) Examination and recognition of credits against the estate and the order of payment and payment of creditors; and

(5) Classification of the bankruptcy (whether fortuitous, culpable, or fraudulent) and rehabilitation (discharge) of the bankrupt.

Upon declaration in bankruptcy the debtor is deprived of the right (disqualified) to administer his property. All acts of ownership and administration subsequent to the date for which the bankruptcy becomes effective are null. (Art. 878, Code of Commerce.)

Amounts paid in money, goods, or credit securities within 15 days preceding the declaration in bankruptcy, upon debts and obligations the maturity of which was subsequent in date to the declaration, must be returned to the mass of the estate by those who received them. The diminution of assets within the same period of time by the debtor is indicative of the anticipatory payment of obligations not yet due. (Art. 879, Code of Commerce.)

Contracts made by the debtor within 30 days preceding his bankruptcy are considered fraudulent and ineffective as regards his creditors, in any of the following cases (art. 880, Code of Commerce): (1) Gratuitous conveyance of immovable property; (2) dowry settlements to daughters out of property belonging exclusively to the debtor, not forming part of the conjugal property of debtor and wife (see arts. 1392 et seq., Civil Code); (3) grants and conveyances of immovable property in payment of debts which had not matured when the bankruptcy was declared; (4) voluntary mortgages concerning obligations of a previous date and not of the same kind, or given for loans of money or merchandise, the delivery of which is not made at the time the obligation is entered into before the notary public and witnesses; and (5) gifts inter vivos which are not plainly remuneratory, granted after preparation of the balance sheet prior to the bankruptcy, if from that balance sheet it appears that the liabilities exceed the assets of the bankrupt.

At the demand of creditors the following transactions may be annulled, upon proof that the debtor acted with intent to defraud (art. 881, Code of Commerce):

(1) Conveyances of immovable property made during the month preceding the bankruptcy for a consideration (a *titulo oneroso*);

(2) Dowry settlements in favor of daughters, effected during the month preceding the bankruptcy out of property belonging to the conjugal partnership, or any other conveyances of the same property without consideration (a *titulo gratuito*);

(3) Dowry settlements or acknowledgment of sums made by a merchant in favor of his/her spouse within the six months preceding the bankruptcy, provided they are not immovable goods of the inheritance of the latter or acquired or possessed previously by the spouse in whose favor the acknowledgment of dowry or sum is made;

(4) Every confession of receipt of money or goods in the nature of loans in which, although transacted by public instrument within the six months preceding the bankruptcy, delivery thereof is not certified to by the notary public (*fe de entrega de notario*) or, if made by private instrument, it does not uniformly appear from the books of the contracting parties; and



(5) All contracts, obligations, and mercantile transactions of the bankrupt negotiated within 10 days prior to the declaration of bankruptcy.

All gifts and contracts effected within two years prior to the bankruptcy may be set aside on demand of creditors, upon proof of falsity or simulation made in fraud of creditors. (Art. 882, Code of Commerce.)

All debts of the bankrupt pending at the time of his declaration in bankruptcy will be considered as matured. If payment is made before the time set, the corresponding discount will be allowed. From the time of the declaration all debts of the bankrupt will not bear interest, except credits secured by mortgage or pledge (*credito pignoraticio*) as far as the security extends.

#### PROCEDURE TO SET ASIDE PRIOR TRANSACTIONS

The trustees (*sindicos*) as representatives of the creditors of the bankrupt estate and legal administrators of its mass have capacity (*personalidad*) to exercise the right to set aside acts performed in prejudice of the bankruptcy by the bankrupt after his disqualification or transactions which, by reason of their fraudulent nature, may be annulled even though they are made prior to disqualification of the bankrupt. (Art. 878, Code of Commerce; L. C. P. 1364.) The creditors may call the attention of the referee (*juez comisario*) to any omission on the part of the trustees in order that the corresponding actions may be instituted. If the referee fails to act, the creditors may complain to the court having jurisdiction of the case. (L. C. P. 1365.)

The trustees are obliged to prepare, within the 10 days immediately following the delivery of the books and papers of the bankruptcy, the following statements:

(1) A statement of all payments by the bankrupt within the 15 days preceding the declaration of bankruptcy on account of direct debts and obligations the maturities of which were subsequent to the date of the declaration;

(2) A statement of the contracts negotiated within the 30 days preceding the declaration of bankruptcy, which are ineffective in accordance with article 880 of the Code of Commerce (L. C. P. 1366);

(3) A statement of contracts entered into by the bankrupt which fall within any of the five cases included in article 881 of the Code of Commerce; and if, upon investigation, evidence of fraud in the making of certain of these contracts is found, a detailed report will be prepared by the trustees and presented to the referee, who will grant or deny authority to the trustees to file the actions proposed in their reports. (L. C. P. 1368.)

The statements under (1) and (2) above will be approved and countersigned by the referee. The trustees will then make extrajudicial demands for the purpose of obtaining the return to the estate of that which belongs to it; if these demands are ineffective, the trustees will avail themselves of the means provided by law, upon approval of the referee. (L. C. P. 1367.)

The complaints which the trustees file in actions to recover assets disposed of in the manner indicated in article 879 of the Code of Commerce, *supra*, must be accompanied by the documentary evi-

dence showing that payment was made at an improper time and that the obligation did not mature until after the declaration in bankruptcy. If it is necessary, the trustees may prepare their actions upon the judicial confession of the debtor. The trustees' allegations are notified to the defendant, who may answer within the following three days. If he fails to answer or if his answer does not overcome the evidence presented by the trustees, the defendant is ordered to return the assets taken. If the answer warrants it, the judge will receive evidence for eight days, after which he will render his decision. (The proceeding is in the form of an incidente, that is, a proceeding subordinate and incident to the principal case, namely, the bankruptcy. It falls within the third section of the main action.) To obtain the return of the assets after judgment in any one of the cases herein previously enumerated, under article 880 of the Code of Commerce, the procedure in the interdicto de recobrar will be followed. This is a special proceeding to recover property. (L. C. P. 1369-1373 and 1649-1660.)

The action to annul or set aside contracts made by the bankrupt in fraud of creditors will be tried as an ordinary action according to the amount involved and in the court having jurisdiction thereof. (L. C. P. 1375.)

#### DISPOSITIONS INCIDENT TO DECLARATION IN BANKRUPTCY

Upon issuing the writ (auto) declaring the bankruptcy the court appoints the referee (comisario), who must be a registered merchant. (L. C. P. 1331.) The court will also order:

(1) The arrest of the bankrupt at his home, if bond is given; if not, the bankrupt will be jailed (L. C. P. 1333-1334);

(2) The taking of possession of all the property and books, papers, and documents of the bankrupt (see articles 1046-1047, old Code of Commerce, for detailed procedure in this regard);

(3) The appointment of a receiver (depositario), who is trusted by the court and who will preserve all the property taken until the trustees are appointed. The receiver must be a merchant of good standing (whether a creditor of the bankrupt or not), who will swear to exercise his duties well and faithfully. He is entitled to an allowance (dieta) fixed by the court in accordance with the amount of property constituting the deposit, and, in addition, 0.5 per cent of amounts received by him and the necessary expense incurred in the discharge of his duties;

(4) The publication of the bankruptcy in the domicile of the bankrupt and in the other places where he has mercantile establishments, and in the newspaper of the place or province. The posting of notices announcing the bankruptcy will be made by the actuario (a court official), who must evidence his action in this regard in the record of the case. The notices to other cities where the bankrupt has mercantile establishments will be addressed to the judicial authorities, requesting a return to the effect that the publication requested has been made, which return will be entered in the record of the case. (L. C. P. 1335.) These notices must include a statement to the effect that no one is to make payments or delivery of goods to the bankrupt but to the receiver, on penalty of not being discharged of their obligations to the estate, and that persons pos-

sessing property of the bankrupt must make a declaration thereof to the referee on penalty of being held as having concealed property and as being accomplices (complices) in the bankruptcy.

(5) Retention of the bankrupt's correspondence, which will be opened at the place and hour fixed by the referee—by the bankrupt or, if he fails to appear, by the referee and the receiver. (L. C. P. 1337.)

(6) Convocation of creditors for the first general meeting. The date of this meeting will be fixed by the court upon the referee's report on the creditors, which report must be filed within three days after the declaration in bankruptcy. (L. C. P. 1340; see also arts. 1044, 1049, 1056, 1058, old Code of Commerce.)

#### DUTIES OF REFEREES

In addition to the duties pointed out in the preceding paragraphs, referees must (1) authorize all acts of taking of possession of goods and papers of the business of the bankrupt; (2) take such temporary steps as are necessary to keep the mass of the estate safe and well preserved until the court provides otherwise; (3) preside over meetings of creditors ordered by the court; (4) examine all books, documents, and papers of the bankrupt in order to report as the court may order; (5) inspect all operations of receiver and trustees and report to the court all abuses committed by them; (6) approve (*visto bueno*) all indorsements, receipts, and other documents binding or discharging the estate, drawn by the receiver; (7) approve sales and expenditures to be made by the receiver (arts. 1045, 1054, and 1055, old Code of Commerce); (8) report that he has finished the taking of possession and examination of books, documents, and papers of the bankrupt's business, in order that the latter's petition for his own release may be considered.

#### MEETING OF CREDITORS

Upon the filing of the referee's report on the bankrupt's creditors, the date for the first meeting of creditors will be fixed by the court. (L. C. P. 1340.) The meeting must be held within 30 days of the declaration of bankruptcy. Local creditors are notified of the meeting by circulars delivered at their domiciles, while those residing outside are notified by mail. Creditors whose addresses are unknown will be notified by publication. (Art. 1063, old Code of Commerce.) If the meeting can not be held on the appointed day, it must be held within the next 15 days, the new date being announced by simple notice at the court (*en astrados*). (Art. 1062, old Code of Commerce.) The bankrupt must be summoned to the first meeting of creditors. (L. C. P. 1341.)

All the proceedings in the bankruptcy will be on hand in order to inform creditors fully concerning action taken up to the time of the meeting. (L. C. P. 1342.)

On the day of the meeting the referee will examine the powers of attorney of the persons appearing on behalf of creditors. Persons representing more than one creditor have but one vote, but the credits represented will be considered in determining the majority

by reason of amount. (L. C. P. 1343.) The referee, on his own motion or upon petition of creditors, may examine the credits of creditors even though they are reported in the list and balance sheet of the bankrupt. Persons not mentioned therein may be admitted to the meeting upon presentation of documents evidencing their liquid credits against the bankrupt, on penalty of being considered as accomplices in the bankruptcy in case of fraudulent misrepresentation of credits (*suposicion fraudulenta*). (Art. 893, Code of Commerce; arts. 1064 and 1067, old Code of Commerce.)

The receiver will present to the meeting a report concerning the condition of the property and the conclusion which may be drawn therefrom, as well as a statement of recoveries and expenses up to that day. (Art. 1067, old Code of Commerce.)

### TRUSTEES AND THEIR FUNCTIONS

#### APPOINTMENT OF TRUSTEES

Three trustees are elected by vote of the creditors present. Any creditors of the bankrupt may be elected trustees, whether they are creditors in their own right or by representation. Those who have engaged in commerce will be preferred for the position; they must be over 25 years of age and residents of the place where the bankruptcy takes place. (Arts. 1069 and 1070, old Code of Commerce.) The trustees must be natural persons, not companies. The election must be notified to creditors not attending the meeting. (Art. 1072, old Code of Commerce.) Within three days after the meeting is held, the election may be attacked by the debtor or by any creditor not attending or who protested the election immediately after it was held. The grounds of attack may be legal impediment of the person elected, violation of procedure for calling and holding the meeting and deliberating therein, and lack of capacity (*personalidad*) of anyone voting in the majority if in the absence of his vote no majority in number or capital would have been possible. (L. C. P. 1345 and 1218-1222.)

A creditor or the referee may seek the removal of a trustee on account of abuses in the performance of his duties. The decision of the court upon the matter is final. (L. C. P. 1346-1347.)

The appointment of trustees will be ratified by the creditors recognized as such in the meeting held for the purpose of qualifying (*calificar*) credits, or a new election will be held if ratification is denied the trustee whose credit is not recognized as authentic in that meeting or who for any reason files an action against the estate and therefore is separated from his position as a matter of right. (Arts. 1074-1076, old Code of Commerce.)

#### DUTIES OF TRUSTEES

Upon acceptance of their positions and oath of faithful and able execution thereof the trustees enter upon the discharge of the following duties (art. 1073, old Code of Commerce):

(1) Administer all goods and assets of the bankruptcy in the manner of an able merchant;

(2) Gather and collect all credits of the estate, and pay costs of the administration of its assets if such costs are of absolute necessity to preserve and benefit the assets;

(3) Check and ratify the general balance sheet previously made of the bankrupt's condition, preparing the one which is to govern as an exact statement of the true condition of the business of the bankrupt;

(4) Examine all documents indicative of the creditors of the bankrupt estate in order to prepare a report on each one for presentation to the meeting of creditors;

(5) Defend all rights appertaining to the bankruptcy and file all proper actions and exceptions;

(6) Cause the calling and holding of meetings of creditors in the cases and for the purposes determined by law, and for extraordinary reasons deemed sufficient;

(7) Attempt the sale of the property of the estate whenever it must be made in accordance to law.

Civil complaints against the bankrupt pending at the time of the declaration in bankruptcy and those subsequently filed against the property must be continued and pursued with the trustees. The trustees will also continue all civil actions started by the bankrupt before the bankruptcy and will file all executive actions against debtors of the estate, but may not start any other judicial proceedings by reason of transactions and interests of the bankruptcy without the knowledge and authority of the referee. (Arts. 1090 and 1091, old Code of Commerce.) All actions pending or filed against the estate must be joined to the bankruptcy proceedings. (See L. C. P. 1377, 1184, 1171, 1002; also the section on "Joinder of actions," p. 19 of this bulletin.)

#### LIABILITY AND REMUNERATION OF TRUSTEES

Trustees are responsible to the estate for all damages caused by reason of abuse in the exercise of their authority or because of lack of the diligence which a careful merchant exercises in the management of his business. The trustees will see that all formalities necessary to preserve the rights of the estate in bills of exchange, public documents, credit paper, and any other documents belonging to it are observed, on penalty of liability. (Arts. 1077 and 1097, old Code of Commerce.)

Trustees are entitled to a remuneration of 0.5 per cent of all collections made by them of credits and rights of the estate, 2 per cent of the produce of sale of merchandise of the estate, and 1 per cent of sales and adjudications of immovable goods or property of any other kind not of the business of the bankrupt. (Art. 1078, old Code of Commerce.)

#### ADMINISTRATION OF THE BANKRUPT ESTATE

The administration of the bankrupt estate is conducted as a separate section in the record of the bankruptcy, by the trustees, who immediately upon their appointment commence—together with the bankrupt, if he appears after being duly summoned—the preparation of the formal and general inventory of all assets, goods, books, and

documents. All ordinary expenditures such as payment of taxes, encumbrances on immovables, and costs of custody and conservation may be made by the trustees upon authority of the referee if such expenses do not exceed 250 pesos. Sales of movable goods must be made by brokers; if no brokers are available, then at public auction. Immovable goods must be disposed of by public auction always. Deposits of sums collected must be made weekly, while monthly statements must be prepared and filed by the trustees. Upon the termination of the liquidation of the estate the trustees must present a final account to a general meeting of creditors called for that purpose by the court. The creditors and bankrupt may claim damages in the same proceeding against the trustees for fraud, malversation, or culpable negligence to the detriment of the estate. (L. C. P. 1335 and 1348-1363.)

#### EXAMINATION OF CREDITS

After the trustees are elected the court will fix the time for the presentation of documents evidencing credits outstanding against the estate, which period can not exceed 60 days. The court will also set the day for the meeting of creditors for the purpose of examining and recognizing credits, which day must be the twelfth after the period for presentation of credits expires. All creditors will be notified, and publication of that date made in the newspaper of the city or province. (Art. 1101, old Code of Commerce.)

The aforementioned documents, with copies thereof, must be presented to the trustees, who, upon finding the copies correct, will write thereon an acknowledgment of having received the originals and will return the copies to the creditor. The trustees will examine the credits presented and prepare a report on each and, eight days after the expiration of the time for presentation, will present to the referee a general statement of credits, giving a copy to the bankrupt. The referee will close the statement; thereafter all creditors who have failed to present their claims will be guilty of delay and consequently lose any privileges which they may have, being reduced to the category of common creditors, recognition of their credits being made thereafter at their expense. If they appear after the estate has been distributed, they will not be heard. (Arts. 1102-1104 and 1111-1112, old Code of Commerce.) At the meeting the general statement and the report on each credit will be read. The creditors will approve or exclude each claim by majority (one-half plus one) of votes representing three-fifths of the total number of credits. Creditors whose rights are rejected may establish separate proceedings (incidentes) within the bankruptcy action. (Art. 1105, old Code of Commerce, and L. C. P. 1379.)

#### PROPERTY NOT INCLUDED IN BANKRUPT ESTATE

Merchandise, effects, and any other kinds of goods in the mass of the bankrupt estate, the ownership (propiedad) of which was not transferred to the bankrupt by a legal and irrevocable title, are considered as belonging to other persons and will be placed at the disposal of the true owners upon recognition of their right at a meeting of creditors or by final judgment. The estate retains in that property any rights enjoyed in it by the bankrupt. (Art. 908, Code

of Commerce.) The following property is included within this rule (art. 909, Code of Commerce) :

(1) Property held as dowry (see art. 1346, Civil Code), kept by the husband, if it appears from a public document duly inscribed in the mercantile registry that he received it;

(2) Private property of the wife (*bienes parafernales*) (see arts. 1381-1391, Civil Code) acquired by reason of inheritance, bequest, or gift, whether kept in the same form or changed into another (*subrogado o invertido*) if that change was inscribed in the mercantile registry;

(3) Goods which the bankrupt holds by way of deposit, administration, lease, rent, or usufruct;

(4) Merchandise held by the bankrupt on commission to buy, sell, transport, or deliver;

(5) Bills of exchange or promissory notes which were sent to the bankrupt for collection, without indorsement or any other expression transmitting ownership, and those acquired on behalf of another person, drawn, made, or indorsed directly to that person;

(6) Money sent otherwise than on current account to the bankrupt and which he holds in order to deliver to a person in the name or on account of another or for the purpose of satisfying obligations which must be performed in the domicile of the bankrupt;

(7) Amounts owed by the bankrupt on account of sales made on behalf of another and the bills of exchange and promissory notes in such transactions held by the bankrupt although not drawn in favor of the owner of the merchandise sold, provided it is proven that the obligations arise out of them and that they were held by the bankrupt in behalf of the owner in order to cash them and remit the amounts thereof to the owner, which fact will be presumed at law if the transactions were not entered in current account between the parties;

(8) Goods sold to the bankrupt for cash and not paid in whole or in part, while they remain unpacked in the warehouse of the bankrupt or in the manner in which delivery of them was made to him and which may be specifically distinguished by marks and numbers on the bales or packages; and

(9) Merchandise bought on credit by the bankrupt while material delivery of them is not made in the warehouse of the bankrupt or at the agreed places, and merchandise the bills of lading of which were sent to the bankrupt after being charged to the account and at the risk of the buyer. In both of these last two cases the trustees may elect to keep the goods and pay the price thereof to the seller.

#### ORDER OF PAYMENT OF CREDITS

Creditors will be paid out of assets of the bankrupt estate, after the deductions indicated in the preceding paragraphs are made, in accordance with the rules immediately following (art. 911, Code of Commerce) :

*Credits upon movable property.*—Credits are divided into two classes, namely, those payable out of proceeds of movable goods and those payable out of the proceeds of immovable goods. (Art. 912, Code of Commerce.) Credits of the class first mentioned are paid in the following order (art. 913, Code of Commerce) :

(1) Creditors preferred in payment in this order—(a) creditors for burial, funeral, and testamentary expenses, (b) creditors for necessities of life (alimentos) furnished to the bankrupt and his family, (c) creditors for personal services, including commercial clerks (dependientes) for work done during the six months preceding the bankruptcy;

(2) Creditors who enjoy preferred rights in accordance with the Code of Commerce;

(3) Creditors preferred in accordance with common law (arts. 1921–1929, Civil Code), and legal-mortgage creditors (a legal mortgage is one which must be granted by special disposition of law, generally in connection with dowry, guardianship, and administration of property; see articles 157 et seq. of the mortgage law) in the cases in which they enjoy preference over movable goods under general principles of law;<sup>4</sup>

(4) Creditors whose claims are evidenced by public instruments (escriturarios) jointly with those by reason of mercantile titles or contracts in which agents or brokers intervened;

(5) Ordinary creditors by reason of mercantile transactions; and

(6) Ordinary creditors according to common law. (See arts. 1921–1929, Civil Code.)

*Credits upon immovable property.*—Credits of the second class are paid in the following order (art. 914, Code of Commerce):

(1) Creditors by reason of real rights, who are paid in the manner and order provided by the mortgage law (see arts. 26, 50, 51, and 64 of the mortgage law); and

(2) Creditors especially preferred and the others already enumerated in the first class, in the order therein established.

Creditors will be paid without regard to dates, pro rata within each class, and in the order indicated above, except (art. 916, Code of Commerce):

(1) Mortgage creditors, who are entitled to be paid in the order of the inscription of their rights in the corresponding registry; and

(2) Creditors whose claims are evidenced by public instruments or mercantile documents (titles) negotiated through agents and brokers, who are entitled to be paid in the order of the dates of the documents.

*Other provisions regarding credits.*—Notwithstanding the foregoing provisions, the preferences established by the Code of Commerce upon specific property remain unaffected, the same general rules concerning order of payment applying to them whenever there are several creditors of the same class.

No proceeds from sales will be distributed within the enumerated class until the claims prior in the order have been paid in full. (Art. 917, Code of Commerce.)

#### ■ PAYMENT OF CREDITS SECURED BY PLEDGES OR MORTGAGES

Creditors whose claims are secured by pledge evidenced by public instrument or in a document (poliza) authorized by an agent or

<sup>4</sup> Sums received by these legal creditors out of the movable property will be credited to that which they are to receive out of the immovable property; and if they receive the total amount of their credit, the next creditor in the order of payment will be considered. (Art. 915, Code of Commerce.)



broker are not under obligation to return to the estate the securities or goods pledged unless the representatives of the estate desire to recover them, paying in full the claim secured thereby. If the estate does not exercise this right, the property pledged may be sold at the exchange if it can be quoted therein; otherwise, through a broker or agent (*agente colegiado*) if available; if not, the goods may be sold at public auction. If the proceeds from the sale exceed the value of the claim, the excess must be returned to the estate; on the other hand, if such proceeds are not sufficient to satisfy the claim in full, the creditor will be considered as one whose claim is evidenced by public document and will recover according to the date of the contract. Mortgage creditors, whether by law or by voluntary agreement, who are not paid in full out of the mortgaged property, will be considered as creditors whose claims are evidenced by public document and will recover also according to the date of their titles. (Art. 918, Code of Commerce.)

#### CLASSIFICATION OF THE BANKRUPTCY

The classification of the bankruptcy—that is, the determination of whether it is fortuitous, culpable, or fraudulent—and the question of the discharge of the bankrupt are treated within one of the five sections into which the bankruptcy proceeding in Cuba is divided.

#### MANNER OF MAKING THE CLASSIFICATION

The classification of the bankruptcy is made by the court after consideration of the referee's report based on the examination of the books and papers of the bankrupt for the purpose of determining (1) the conduct of the bankrupt in the performance of the obligations prescribed by articles 1017 and 1018 of the old Code of Commerce (cited in this bulletin under "Voluntary petition," p. 50), (2) result of the balance sheet of the estate, (3) condition in which the books of the business are found, (4) the statement which the bankrupt must file, setting out the immediate and direct causes of his bankruptcy and whatever may be determined in this regard from the books, documents, and papers, and (5) the merits of claims filed against the bankrupt and his property during the progress of the proceedings. The trustees, within 15 days after their election, must also file a report concerning the character of the bankruptcy, indicating its classification. This report, together with the record of the proceedings, is referred to the prosecuting attorney, who will also indicate a classification. (L. C. P. 1380-1381; art. 1138, old Code of Commerce.)

#### NOTIFICATION TO BANKRUPT—OPPOSITION TO CLASSIFICATION

The record with these two indications will be delivered to the bankrupt, who must answer within six days. If he fails to answer or oppose the indicated classification, the court will make it in accordance with the reports available and the declaration. If the bankrupt answers and opposes the classification, the proceeding will continue as an *incidente*, a maximum period of 40 days being granted for presentation of proof. Judgment is appealable but may be executed as regards freeing the bankrupt if it is so decreed therein. (L. C. P. 1380-1383; art. 1138, old Code of Commerce.)

## CLASSES OF BANKRUPTCY DEFINED

A bankruptcy is fortuitous whenever the assets of the merchant are reduced to such an extent, by reason of casual misfortunes in the regular and prudent conduct of the business, that the debts can not be paid in full or in part. (Art. 887, Code of Commerce.)

The bankruptcy of a merchant in any of the following cases is considered culpable (art. 888, Code of Commerce) :

(1) If his domestic and personal expenses were excessive and out of proportion to his liquid assets, taking into consideration his standing and family;

(2) If he suffered loss in any kind of games which exceeds that which a careful father would risk in this kind of entertainment;

(3) If loss occurred by reason of large and imprudent bets, or through purchases and sales or other operations intended to delay the bankruptcy;

(4) If within the six months preceding the declaration of bankruptcy the bankrupt sold, at a loss or at a price less than that current at the time, goods bought on credit and for which he still was indebted; and

(5) If it appears that during the time which elapsed from the last preceding inventory until the declaration in bankruptcy there were occasions when the bankrupt, by reason of direct obligations, owed twice the amount of the liquid assets resulting from that inventory.

The following also are considered culpable bankrupts (they may offer and prove exceptions to show the contrary (art. 889, Code of Commerce) :

(1) Those who did not keep books in accordance with the legal requirements or who made errors therein which caused damage to third persons;

(2) Those who did not manifest their bankrupt condition by petitioning suspension of payments within 48 hours after the maturity of an unpaid obligation, the payment of which was demanded judicially or by notary public (art. 871, Code of Commerce) ; and

(3) Those who, absenting themselves at the time of the declaration in bankruptcy or during the progress of the action, failed to appear personally in the cases in which such appearance is required by law, no justifiable impediment existing.

A bankruptcy is considered fraudulent if the bankrupt (art. 890, Code of Commerce) :

(1) Absconded with all or part of his property;

(2) Entered simulated goods, credits, debts, losses, and expenses in his balance memoranda, books, or other documents of his business;

(3) Failed to keep books or made entries therein to the detriment of third persons;

(4) Tore, erased, or altered in any other way the contents of books to the detriment of third persons;

(5) Failed to record, in his bookkeeping, disbursements and the existence of assets according to the last inventory, and money, securities, movable goods, and effects of any kind which are found in the possession of the bankrupt subsequently;

(6) Concealed in the balance an amount of money, credits, goods, or any other kind of property;

(7) Consumed or applied to his own business funds and goods belonging to someone else, and which were given to him as a result of a deposit, an administration, or a commission;

(8) Negotiated, without authority from the owner, bills of exchange delivered to him for collection, remission, or any other purpose different from the negotiation effected, if he failed to remit the proceeds;

(9) Concealed from the owner, for any period of time, transactions made by him concerning commissions for sale of goods or the negotiation of credits or commercial securities;

(10) Simulated transfers of all kinds;

(11) Conceded, signed, consented to, or acknowledged simulated debts; in the absence of proof to the contrary, all debts lacking consideration (*causa de deber*) or fixed valuation are presumed to be simulated (*supuestas*);

(12) Bought immovable goods, effects, or credits, putting them in the name of third persons, to the detriment of his creditors;

(13) Anticipated payments to the detriment of creditors;

(14) After the last balance, negotiated bills of exchange drawn by himself on persons with whom he had not funds or credit or without authority to do so; or

(15) After the declaration in bankruptcy, received and applied to his personal use money, effects, and credits of the estate or took from it any property belonging thereto.

The bankruptcy of a merchant whose exact condition can not be determined from his books is presumed fraudulent in the absence of proof to the contrary. (Art. 892, Code of Commerce.)

#### DISCHARGE OF THE BANKRUPT

There is a fundamental difference between the discharge in bankruptcy as provided by the bankruptcy act in force in the United States and the provisions of Cuban law on the matter. In the United States, upon his own application a bankrupt may be discharged of his obligations except certain debts such as taxes due, salaries and wages owed, and those not scheduled in time or created by his fraud. (Sec. 17 of the United States bankruptcy act.) His creditors, of course, may oppose his discharge on several grounds, such as the commission of crimes, fraud, or other acts as indicated in section 14 of the act. In Cuba, a bankrupt, after the proceedings relative to the classification of the bankruptcy are terminated, may petition for his discharge. (L. C. P. 1386.) If the bankruptcy is adjudged fraudulent, no discharge is possible. In any other case the discharge proceeds only upon two grounds, namely, upon proof of having complied fully with a composition with his creditors or of having satisfied in full all debts recognized in the bankruptcy proceedings, either with the proceeds of the estate or by subsequent payments. (Arts. 920-921, Code of Commerce.) In the second case, there is really no discharge in bankruptcy; it is simply satisfaction in full of all obligations which in any other manner besides bankruptcy would have to be satisfied in full in order to be judicially relieved thereof.

## COMPOSITION WITH CREDITORS

After the examination and recognition of credits and classification of the bankruptcy has been completed, the bankrupt may petition and the court will order a meeting of creditors, provided the bankruptcy is not considered culpable or fraudulent, for the purpose of considering compositions. (L. C. P. 1387-1388.)

All creditors with recognized claims and with claims pending will be notified of the meeting, which will be held not less than 15 days nor more than 30 days after the convocation. The referee must give the creditors exact and complete information of the condition of the estate and of the classification made, the last balance sheet drawn up in the bankruptcy proceeding being read at the meeting. (L. C. P. 1388 and 1305-1308; art. 1152, old Code of Commerce.)

The proposition of the bankrupt will be read, studied, discussed, and voted upon by the creditors. It becomes binding if approved by a majority of one-half plus one of the creditors present, representing three-fifths of the liabilities. Creditors especially preferred by law and mortgage creditors may abstain from taking part in this meeting, their votes and claims being excluded from the count indicated above; but if they elect to vote, they become subject to the provisions for discharge and extensions of time for payment (*quita o espera*) granted to the bankrupt. The composition is signed at the same meeting and delivered to the court for its approval. (Arts. 901 and 900, Code of Commerce; art. 1156, old Code of Commerce.)

## OPPOSITION TO THE COMPOSITION

Within eight days after the meeting the dissenting creditors or those who did not attend the meeting may oppose the composition on the grounds of (1) a defect in the formalities prescribed for the convocation and holding of the meeting and deliberations therein, (2) fraudulent understanding between bankrupt and a creditor, if the vote of the latter made up the majority in number or amount, (3) lack of capacity (*personalidad*) or representation in one of those voting, if that vote was needed to constitute a majority in number or amount, (4) fraudulent exaggeration of credits in order to obtain a majority in amount, (5) fraudulent inaccuracies in the general balance sheet of the business of the bankrupt or in the reports of the trustees in order to facilitate consideration of the proposals of the bankrupt in the composition. (Arts. 902-903, Code of Commerce.)

Creditors who approved the composition may not oppose it. The opposition is notified to the bankrupt and trustees, a period of 30 days being granted for presentation of proof. The court then fixes the day for judgment, and after hearing the contesting parties at that time renders its decision. (L. C. P. 1391-1394.)

If no opposition is made within the eight days provided by law, the court considers the composition approved by the parties, and, upon the court's approval, it becomes binding on all creditors. The trustees will deliver to the bankrupt before the referee all the goods, effects, books, and papers, presenting to him an account of the administration within the next 15 days. (Art. 1160, old Code of Commerce.)

By virtue of the composition the bankrupt is discharged of his obligations, but if he fails to perform in accordance with the agreement the rescission of the composition and continuation of the bankruptcy proceedings may be demanded. (Arts. 905-907, Code of Commerce.)

#### GENERAL REMARKS

Attorneys familiar with the practice in Cuba state that the procedure in bankruptcy is seldom followed in all the details outlined herein. It is said that debtors are not disposed to file voluntary petitions in bankruptcy because of the theory that bankruptcies may be presumed fraudulent under section 892 of the Code of Commerce, which presumption, if sustained, renders them criminally liable. It is also said that the proceeding offers opportunities for prolonged litigation, a deterrent to the filing of petitions by creditors. In some instances, however, creditors have been known to secure a decree in bankruptcy in the hope that, as a result, a quick settlement will be made, but with no intention of prosecuting the bankruptcy itself to a final conclusion.

