

March 1945

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Recommended Citation

Edmund W. Burke, *War Contract Termination: The Contract Settlement Act of 1944*, 23 Chi.-Kent L. Rev. 107 (1945).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol23/iss2/2>

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CHICAGO-KENT LAW REVIEW

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VOLUME 23

MARCH, 1945

NUMBER 2

WAR CONTRACT TERMINATION: THE CONTRACT SETTLEMENT ACT OF 1944

Edmund Webster Burke*

FACED WITH the problem of avoiding economic upsets at the end of the present conflict such as followed World War I, Congress has enacted, as its solution, the Murray-George Contract Settlement Act of 1944.¹ That legislation provides for settlement of claims arising from termination of war contracts, whether entered into directly or indirectly with the government of the United States, for an overwhelming quantity of materials, supplies, services and facilities connected with war activities.²

The danger inherent in the war effort, and apt to be pre-

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¹ Ch. 358, Pub. Law 395; 50 U. S. C. A. App. § 370 et seq. Senate Bill 1718 was introduced on February 11, 1944, by Senators James E. Murray (D), Montana, and Walter F. George (D), Georgia. A companion bill, H. R. 4789, was introduced on May 10, 1944. The measure was enacted, with certain modifications, and approved July 1, 1944. It became effective on July 21, 1944.

² When reporting on the Contract Settlement Act of 1944, the House Committee on the Judiciary said: "The report of the House Special Committee on Post-war Economic Policy and Planning points out that approximately one-half of the total goods and services produced at the current rate of high production is for war purposes and of the persons now employed in manufacturing, about two-thirds are engaged in war work. The volume of our war production from July 1940 to the end of 1944 will total about \$205,000,000,000 of which \$130,000,000,000 represents the production completed by the end of 1943 and \$75,000,000,000 is scheduled for completion in 1944. The number of prime contracts has been variously estimated at from 100,000 to 250,000, depending upon what is counted as a separate contract. A survey made in September 1943 showed that there were 105,000 contracts for \$50,000 or more held by approximately 17,000 establishments, and another 100,000 smaller contracts. The number of subcontracts might run well over a million, involving 70,000 establishments, large and small." See H. R. 1590, June 1, 1944; U. S. Cong. Serv. (1944), p. 2-234.

cipitated by its sudden termination, is illustrated by the language of a subcommittee of the Senate Committee on Military Affairs when it reported on the proposed Full Employment Act of 1945. It said:

During the war, we have transferred our economy into an economic skyscraper of breath-taking magnitude. At present, our economy is producing goods and services at the rate of \$196 billion a year. This compares with a gross national product of around \$99 billion—or only about half the size—in 1929. . . . Almost half of the framework supporting this giant structure consists of war contracts. When war contracts are withdrawn, the danger is that the entire edifice will topple over. Unless an economic substitute is found for war contracts, mass unemployment will become a serious threat and the number of unemployed men and women in this country could easily surpass anything that was dreamed of during the last depression.³

The problem is not entirely new, however, for prior to the passage of the statute, many contracts had already been terminated by administrative action.⁴ Inventive genius, constantly seeking new or improved weapons and equipment, has rendered many of the older types obsolete. Sudden termination of certain contracts has been necessary even though, in part, compensated for by the substitute of others. Expensive re-tooling or even abandonment of expensive machinery and equipment has, not infrequently, been followed by the costly installation of other tools, machines or equipment equally expensive. If the terminated contract was not replaced by another, the contractor was faced with the necessity of reconversion, where possible, to normal production. In either case, financial burdens were tremendous, not alone by reason of the expense involved but also by loss of income during the non-productive period necessary to the reconversion.

Attempts to meet these situations through administrative action produced many complaints to congressional committees by contractors whose contracts had been terminated but whose claims remained unpaid. Several bills were introduced in

³ See H. R. 1162.

⁴ While a detailed discussion of administrative termination proceedings prior to the passage of the act is not within the scope of this article, some highlights of such procedure are noted by Glen A. Lloyd, "War Contract Termination," 33 Ill. B. J. 110 (1944).

Congress suggesting remedies.⁵ The situation was investigated by Bernard M. Baruch and John M. Hancock on behalf of the War and Post-War Adjustment Unit of the Office of War Mobilization.⁶ Finally, Senators Murray and George, whose committees had received many such complaints, introduced the legislation which, as finally passed, is the subject of this article.

That statute, according to Senator Murray, is based on two fundamental principles which govern substantially all of its provisions. They are: (1) in order to avoid mass business failures and wide-spread unemployment, termination claims of all war contractors—prime contractors and subcontractors alike — must be settled and paid with the greatest possible speed, and (2) the government, in settling and paying such claims, must be carefully protected against waste and fraud. By way of further comment, he once said:

The need for speed in contract termination settlements is too obvious to merit any discussion. The absence of speedy settlement machinery was the principal reason for the enactment of contract termination legislation. The need for protecting the Government against waste of funds and fraud is equally clear.⁷

That statement would appear to indicate that, at least in the opinion of one of the co-authors of the statute, the first principle is the primary one, but it should not be thought that, because of its position, the second is not equally important.

⁵ A review of such proposed legislation is provided by Clarence M. Updegraff, "War Contract Terminations—What Will They Signify?" in 29 Iowa L. Rev. 517 (1944).

⁶ Excerpts from their report are set out in 29 Iowa L. Rev. 517 at 519. The report stresses the need of immediate payment and recommends "a financial kit, complete enough to meet the varying needs of all war contractors." Such suggested financial kit was to include: (1) immediate payment—the full 100 per cent—for all completed articles; (2) on the uncompleted portion of the contract, immediate payment—the full 100 per cent—of the Government's estimate of "factual" items, where proof ordinarily is simple, such as direct labor or materials, and of other items on which the Government is able to satisfy itself, up to 90 per cent of the contractor's total estimated costs; (3) immediate payment—the full 100 per cent—of settlements with subcontractors as soon as approved; (4) payment by the government of interest on termination claims until settled; (5) as insurance against delays in validating claims a new, simplified system of T (termination) loans by local banks, with Government guarantees, to be available to all war contractors, primes and subs; (6) for those unable to obtain such loans from their local banks in 30 days, the Government to make the loans directly; (7) until the new T loans are authorized by Congress, extension of V and VT loans to all eligible borrowers; and (8) finally, for hardship cases, unable to use any of the tools outlined above, expedited settlements.

⁷ See 10 Law and Cont. Prob. 683 at 685. Substantially the same statement of principles appears in S. R. 836, May 2, 1944; U. S. Cong. Serv. (1944), p. 2-230.

Senator Murray has noted that some persons have seen fit to over-emphasize the importance of contract termination legislation in the reconversion picture.⁸ There is no doubt in the mind of this writer but that the question of contract termination has been over-emphasized. Such emphasis is only natural, however, when it is remembered that most of the agitation comes from the contractors themselves. They, after all, will be harmed first if termination and payment are not handled expeditiously. It is true that small contractors who lack resources to finance themselves during any extended period between termination and payment are apt to be facing bankruptcy. But sight should not be lost of the fact that all persons will be affected if the problem of war contract termination is not handled in a proper manner.

Success of the entire reconversion program is predicated upon the ability of the contractors of the United States, now mostly engaged in war work, to switch without financial embarrassment to the peace program which must follow the cessation of hostilities. But there are other problems facing the government today which are more important. A war must be won. A national debt of three hundred billion dollars or more must be faced. Post-war taxation will call for careful thought. Social security, housing programs, pensions and public works will make demands on public funds. Most important of all, the nation must preserve the economic, social, governmental, and constitutional system which has made it great.

Extended comment on these contemporary problems is not within the scope of this article. The subject at hand is the Contract Settlement Act of 1944. If it can help settle some of the other problems, much will have been accomplished. Analysis of that statute, section by section,⁹ may be of service to contractors and their lawyers, but analysis alone is worthless without some related comment which may serve to throw

⁸ 10 Law and Cont. Prob. 683 at 692.

⁹ Although the plan of this article contemplates a complete analysis of the act, article by article, the complete text is not repeated, except where exact quotation appears important. To facilitate reference to the act itself, each section, subsection, paragraph and sub-paragraph is treated under the same numerical and literal designation as it appears in the act.

light on the practical operation of the act. Such comment is, therefore, provided. One thing should be noted at the outset—the statute deals only with termination of contracts connected with the present war, and then applies only to such as are terminated for the convenience of the government as distinguished from those terminated for cause.

OBJECTIVES OF THE ACT

The two primary and basic ideas underlying the statute, speed in termination and protection of the government, are expressed in Section 1 through six objectives. They are:

- (a) To facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;
- (b) To assure prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts and adequate interim financing until such final settlement;
- (c) To insure uniformity among government agencies in basic policies and administration with respect to such termination settlements and interim financing;
- (d) To facilitate the efficient use of materials, man-power and facilities for war and civilian purposes by providing prime contractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder, as is feasible and consistent with the national security;
- (e) To assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;
- (f) To use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

The language of the sixth objective clearly indicates that, while it is the intent of Congress to make speedy settlement the primary concern, government protection must not be lost sight of. It is to be hoped that this will be borne in mind by the governmental agencies charged with the administration of the statute so that the very minimum of protective "red tape" consistent with reasonable protection will be interposed between termination and settlement. Complete investigation

of the individual contract settlement, if such should appear necessary, can come later.

SURVEILLANCE BY CONGRESS

Surveillance over the administration of the act, in order to assist the Congress in appraising its administration and developing such amendments and related legislation as may further be necessary to accomplish its objectives, is retained by Section 2. To this end, the statute requires (a) that appropriate committees of both houses of Congress shall study each report submitted to Congress under the act and otherwise maintain continuous surveillance of the operations of the government agencies charged with its administration, and (b) that the Director shall submit to both houses a quarterly progress report on the exercise of his duties and authority, the status of contract termination settlements and interim financing, and other pertinent information on the administration of the act. The reason for inclusion of this section is best expressed in the report of the Senate Committee on Military Affairs, when reporting out the bill for passage by the Senate, which states:

While the committee feels that the legislation in its present form meets all the requirements of an effective contract termination program, some clarifying amendments may nevertheless be deemed advisable in view of the complexity of the situation.¹⁰

Subsequent amendatory and related legislation, whether passed or introduced and pending since passage of the act, will be discussed later in this article.

To give clarity to the expression of Congressional thought and purpose, Section 3, typical of much recent legislation, provides definitions of many of the terms used in the act. Among such terms are relatively simple ones such as "prime contract," "prime contractors," "subcontract," "subcontractor," "war contract," "war contractor" and the like. Reference thereto is hardly necessary on the part of any one experienced in war production work. But of greater utility should be the definitions provided for more complicated expressions such as

¹⁰ S. R. 836, May 2, 1944; U. S. Cong. Serv. (1944), p. 2-229.

“material,” “government agency,” “contracting agency,” “termination claim,” “interim financing,” and “termination inventory.” One definition, that of “final and conclusive,” as used in connection with any settlement, should prove enlightening in the absoluteness of its character.¹¹

DIRECTOR OF CONTRACT SETTLEMENTS

The Office of Contract Settlement, created by Section 4(a) of the statute, has been placed with the Office of War Mobilization and Reconversion by subsequent legislation.¹² The former is visualized as the policy-making and co-ordinating agency under the statute and is headed by a Director, appointed by the President by and with the advice and consent of the Senate for a term of two years at an annual salary of \$12,000 per year. The appointment of Mr. Robert H. Hinckley to this office has been announced. Such Director, in order to insure uniform and efficient administration of the act by general orders or general regulations, is authorized by subsection 4(b) to prescribe policies, principles, methods, procedures and standards to govern the exercise of authority and discretion and performance of the functions of all government agencies operating under the act, and may require or restrict the exercise of any such authority and discretion, or the performance of any such function to such extent as he deems necessary.

Governmental agencies, by virtue of subsection 4(c), may in turn issue their regulations for the purpose of carrying out those promulgated by the Director or even issue further regu-

¹¹ Ch. 358, Pub. Law 395, § 3(m), declares: “The term ‘final and conclusive’ as applied to any settlement, finding or decision, means that such settlement, finding or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee or agent of the United States, or in any suit, action or proceeding, except as provided in the act.”

¹² The War Mobilization and Reconversion Act of 1944, Ch. 480, Pub. Law 458, U. S. Cong. Serv. (1944), p. 782, creates the Office of War Mobilization and Reconversion which now includes: (1) The Office of Contract Settlement; (2) The Surplus War Property Administration, established by executive order, until it is discontinued; (3) The Surplus Property Board created by the Surplus Property Act of 1944, Ch. 479, Pub. Law 457, U. S. Cong. Serv. (1944), p. 764, which will take the place of the Surplus War Property Administration; (4) The Retraining and Reemployment Administration, created by executive order, until it is discontinued; and (5) The Reemployment and Training Administration, created by the Mobilization and Reconversion Act, which takes the place of the Retraining and Reemployment Administration.

lations so long as the same are not inconsistent with those of the Director.

Success or failure in the operation of the act will depend largely upon the administration of the foregoing subsections 4(b) and 4(c). If that administration is geared to the requirements of modern business efficiency, much will have been done toward insuring successful operation. On the other hand, insistence of the "bureaucratic deliberation" and "red tape" heretofore characteristic of some governmental agencies will produce a certain failure.

It is not expected that the Director will personally perform the duties of negotiating settlements for he is authorized, by subsection 4(d), to discharge his duties through the personnel and facilities of the contracting agencies and other established governmental agencies at least to the extent that this will not interfere with uniform and efficient administration of the statute. To that end, he may employ and fix the compensation of necessary personnel for his office. Except for the Deputy Director and certain expert personnel, such employees are subject to the civil service laws as well as the Classification Act of 1923.¹³ He may also contract with certified public accountant firms and qualified firms of engineers for their services in connection with the performance of his duties.

All orders and regulations promulgated or prescribed by the Director or by any governmental agency operating under the act are, by reason of subsection 4(e), to be published in the Federal Register.

CONTRACT SETTLEMENT ADVISORY BOARD

Section 5 creates a Contract Settlement Advisory Board with which the Director is to advise and consult in the interest of full co-operation between the Director and the war agencies. That board includes the Director, as chairman, and the heads of the principal procurement agencies as members. Its membership will, therefore, consist of the Secretary of War,

¹³ 42 Stat. 1488; 5 U. S. C. A. § 661 et seq.

Secretary of the Navy, Secretary of the Treasury, Chairman of the Maritime Commission, Administrator of the Foreign Economic Administration, chairman of the Board of Directors of the Reconstruction Finance Corporation, chairman of the War Production Board, chairman of the Board of Directors of the Smaller War Plants Corporation and the Attorney General, or any alternate or representative designated by any or either of them. Whenever matters specially affecting other governmental agencies are under consideration, the Director is required to request them to participate in the deliberations of the Board. As a passing comment, it is hoped the word "deliberations" as used in the act will not be taken too literally by the membership of the Board. Where conflicting and antagonistic policies of the various procurement agencies represented are involved, resolution thereof is essential. Prompt decision, however, will do much to further the objectives of the act, whereas "bureaucratic deliberation" involving, as it usually does, too much delay in an endeavor to reach a perfect solution, will doom the statute to inevitable failure. The Contract Settlement Advisory Board may be what it is intended to be, to-wit: a co-ordinating agency; but it may become a "delaying agency," depending entirely upon the reaction of its members to the problems which will be presented to it.

Section 6(a) declares it to be the policy of the government and the responsibility of the contracting agencies and the Director to provide war contractors with speedy and fair compensation for termination of their contracts, giving priority to those contractors whose facilities are privately operated. The wisdom of this priority in expediting return to civilian production of privately operated facilities is unquestionable. In arriving at compensation, subcontracts are to be placed on the same basis as prime contracts.

It is intended, by subsection 6(b), that each contracting agency shall establish its own methods and standards, suitable to conditions of various contractors, in determining fair compensation. The basis may be varied, however, and predicated on actual, standard, average or estimated costs, a percentage of the contract price based on the estimate percentage of com-

pletion, or any other equitable basis which the agency deems appropriate. Where accounting is required, it is to be adapted, so far as practicable, to the accounting systems of the contractors, if consistent with recognized commercial accounting practice. That subsection must, however, be read in connection with subsection 6(d) which discusses elements which may or may not be included in arriving at a fair compensation.

Termination claims may be settled in whole or in part by agreement, or by a determination of the amount due without agreement, under subsection 6(c). If the settlement is arrived at by agreement, such agreement is final and conclusive except (1) to the extent that the parties may have otherwise agreed in the settlement, (2) for fraud, (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act,¹⁴ unless exempt or exempted under that statute, or (4) by mutual agreement made before or after payment. Settlement without agreement possesses the same finality, and is subject to the same exceptions, as if made by agreement unless the contractor sees fit to appeal or bring suit under Section 13 of the act. However, no agreement involving more than \$50,000, or such lesser amount as the Director may from time to time determine, is binding on the government until it is reviewed and approved by a settlement review board consisting of three or more members to be established by the contracting agency. A feature of this provision, convenient to the contractor, is that such boards are localized within the area of the bureau, divisional, regional or district office or other unit of the contracting agency engaged in working out the settlement.

Even after disapproval by the board, the settlement may be approved by the head of the unit in which the board is established. Failure on the part of the review board to act upon any proposed settlement within thirty days from the time of its submission operates as an approval thereof, a provision most certainly designed to eliminate some of the "bureaucratic deliberation" which might be injected into the administration of the statute. Another provision apt to speed decision limits the function of the review board to a determina-

¹⁴ 56 Stat. 245; 50 U. S. C. A. App. § 1191 et seq.

tion of the over-all reasonableness of proposed settlements from the point of view of protecting the interests of the government. In determining whether review is required, no deduction from the amount involved may be made on account of credits for property chargeable to the government or for advance or partial payments. Amounts payable under the settlement agreement for completed articles or work at the contract price and for discharge of termination claims of subcontractors are, however, to be deducted.

In determining fair compensation for claims not settled by agreement, subsection 6(d) directs that the following items are to be taken into account:

- (1) The direct and indirect manufacturing, selling, and distribution, administrative and other costs and expenses incurred by the contractor, reasonably necessary for the performance of the contract and properly allocable to the terminated portion thereof under recognized commercial accounting practice.
- (2) Reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract.
- (3) Reasonable accounting, legal, clerical and other costs and expenses incident to termination and settlement.
- (4) Reasonable costs and expenses of removing, preserving, storing, and disposing of termination inventories.
- (5) Such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances.
- (6) Interest on the termination claim in accordance with subsection 6(f).

At the same time, the statute declares that the following are to be excluded as elements of cost:

- (1) Losses on other contracts, or from sales or exchanges of capital assets, fees or other expenses in connection with reorganization or recapitalization, anti-trust or Federal income-tax claims or other claims against the government, except as permitted in the third class of included items; losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.
- (2) Expense of conversion of facilities to uses other than performance of the contract.

(3) Expense due to negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(4) Costs incurred in respect to facilities, materials or services purchased or work done in excess of the reasonable requirements of the whole contract.

A failure to mention specifically any item of cost does not imply either allowance or disallowance, for the treatment thereof is left to the discretion of the Director in accordance with recognized commercial accounting procedure. The Office of Contract Settlement has already promulgated general regulations which must be taken into consideration in cases involving this provision of the act.¹⁵

In case of small claims, or where the nature of performance or production or other factors make application of the foregoing principles impracticable, the contracting agencies may establish alternate methods and standards. In no case, however, may the aggregate compensation allowed, excluding amounts allowable under the third and fourth classes of included items, exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract.

Subsection 6(d), when read in connection with subsection 6(b), has been termed the "Formula Method" for the settlement of claims. It presents, on the whole, a fair, equitable and well-planned method of arriving at the amount of fair compensation, but it can hardly be considered as a speedy method particularly where involved accounting and other technical procedures are concerned. It is unlikely, therefore, that it will always accomplish the primary purpose of the act. Interim financing, as provided in Sections 8, 9 and 10 of the statute, may provide some remedy for this defect. The extent to which this objective may be accomplished, however, cannot be determined except from an observation of the results achieved by the practical application of such method.

Termination claims are to be settled, according to subsection 6(e), by agreement to the maximum extent feasible. The

¹⁵ See Regulations 5 and 7, Office of Contract Settlement.

methods and standards established under subsection 6(b), that is the formulae to be set up by the contracting agencies, should be designed to facilitate such settlements. The Director may, however, to the extent that he deems it expedient, require the contracting agencies to take into account the factors of subsection 6(d) covering enumerated items of allowable or non-allowable compensation when establishing such methods and standards.

Interest is allowed by subsection 6(f) and is to be paid on the amount due and unpaid from time to time on the termination claim under a prime contract at the rate of two and one-half per cent. per annum, beginning thirty days after the date fixed for termination and ending with the date of final payment. The accumulation of such interest may be deferred if the contractor unreasonably delays settlement, at least for the period of such delay. If interest for the period after termination on any advance payment or loan made or guaranteed by the government has been waived for the benefit of the contractor, the interest so waived allocable to the terminated contract or terminated part thereof is to be deducted from the interest otherwise payable.

Appeal or suit by the contractor pursuant to Section 13 defers the accumulation of interest after the thirtieth day following delivery of the findings, on any amount allowed thereby, unless such amount is subsequently increased upon such appeal or suit. Interest due to subcontractors is allowed on the same basis, and subject to the same conditions, as would apply to a prime contractor.

Although the manner of calculating interest is probably not open to criticism, the rate payable cannot be passed without comment. That rate, i. e. two and one-half per cent. per annum, while no greater than the maximum payable on recent Treasury bond issues, would seem to be inadequate to compensate the contractor fully for that which he is apt to be required to pay for his interim financing, especially if furnished, as it should be, at commercial rates through his local bank or other commercial financing institution.¹⁶

¹⁶ The use of interim financing is discussed in connection with Sections 8 to 10 inclusive.

A debatable constitutional point is contained in subsection 6(g) which directs that a war contract which does not provide for, or provides against, fair compensation for its termination, may be amended.¹⁷ In such case, the contracting agency, either before or after termination, is required to amend the contract to provide for such fair compensation by agreement with the contractor, or to authorize, approve, or ratify such amendment by the parties thereto. This is important, since many war contracts entered into under emergency conditions were defectively or improvidently drawn and did not include termination clauses.

SUBCONTRACT SETTLEMENTS

The termination and settlement of war contracts involves not only the adjustment of prime contracts but also the question of the treatment to be accorded a host of subcontractors. In that regard, the provisions of Section 7 of the statute are worthy of close attention. Subsection 7(a) applies in situations where, in connection with the settlement of his termination claim, the contractor makes settlement of the termination claims of his subcontractors also. In such a case, the contracting agency is required to limit or even omit its review to the maximum extent compatible with the public interest, and (1) may approve, ratify or authorize such settlements with the subcontractors on such evidence, terms and conditions as it deems proper; (2) may vary the scope and intensity of its review in accordance with the reliability of the war contractor, the size, number and complexity of the claims, and other relevant factors; and (3) is required to authorize war contractors to make such settlements without review by the contracting agency, whenever the reliability of the war contractor, the amount and nature of the claims, or other reason appears to the contracting agency to justify such action. This subsection, where applicable, can do much to effectuate the primary purpose of the act, to-wit: speedy settlement and payment. The more liberally it is construed and the more broadly it is applied to specific cases, the greater will be its effect in ac-

¹⁷ See comment on a related problem in 22 CHICAGO-KENT LAW REVIEW 261, particularly pp. 262-4.

completing such objective. Conversely, if too much stress is placed on government protection, it may partly, or even wholly, fail in its obvious purpose. In cases where it is applied, the potential "bottle-neck" created by requiring presentation of settlements to a reviewing board will be materially reduced or may even be completely eliminated.

Protection of subcontractors against the liability of a war contractor to meet his obligations is provided for by requiring the contracting agency, when it is satisfied that such is the case, under subsection 7(b), to supervise or control payments due the war contractor on account of the claims of such subcontractors to the extent and in such manner as it may deem necessary or desirable to assure receipt of the benefit of such payments by the subcontractors. It is significant here that our experience following World War I disclosed that insolvency of war contractors, in numerous instances, caused heavy losses to or consequent insolvency of their subcontractors. If such can be avoided this time, substantial economic gain will have been achieved.

Pursuant to subsection 7(c), policies and methods for settlement as a group or otherwise are to be prescribed by the Director whenever the contractor has termination claims under contracts with one or more bureaus or divisions within a contracting agency; with one or more contracting agencies; or with one or more prime contractors and subcontractors. In such situations, the Director is empowered, after consultation with the contracting agencies concerned, to provide for assigning the war contractor to one particular agency for settlement. If that is done, such agency will then possess the authority to settle, on behalf of the others, such termination claims as are so assigned. This provision should be particularly effective in expediting settlement and payment where applicable since, instead of "piece-meal" settlements before separate bureaus, divisions or contracting agencies, the claims can be consolidated and settled in one proceeding.

Subcontractors are given further protection, through subsection 7(d), for they may arrange for direct settlement of their claims by the contracting agency, at least to the extent

that the latter may deem it necessary to an expeditious and equitable settlement. Such agency may either pay the claim or may purchase it. If the latter, it may agree to assume, or even indemnify the contractor against, any claim by any person in connection with such claim or the termination settlement. Should the contracting agency undertake to settle such claim directly, it is required to deliver to the subcontractor and the war contractor liable to him written notice of its acceptance of responsibility for the settlement of such claim and the manner of settlement or of any conditions applicable thereto. Upon consent thereto by the subcontractor, the government becomes responsible for the settlement of the claim in the manner specified. No limitation on the amount payable to the prime contractor shall have any bearing on the amount payable to the subcontractor under any such settlement, by reason of subsection 7(e).

Should any contracting agency determine that, in any particular case, equity and good conscience require that fair compensation be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure it, subsection 7(f) permits the agency to pay such compensation to him although it has already been included in and paid as part of a settlement with another war contractor. Without doubt, such provision places the war subcontractor in a much better position than the subcontractor engaged in peace-time pursuits for, even though the one actually bound to him has received the amount due the subcontractor as an included part of his settlement, if the prime contractor is unable to pay the subcontractor, the latter may still look to the government for his money. The possibility of double payment, inherent in this subsection, would seem more than overbalanced by the insurance it provides against economic upsets.

The statute is silent on the question as to whether or not such double payment could be recovered by the government from the defaulting contractor in case he was subsequently found to be solvent. Under well recognized principles of law, as a quasi-contractual obligation growing out of the doctrine of "unjust enrichment" if not otherwise, recovery could undoubtedly be sustained. It is believed that the primary pur-

pose of the act would be best subserved, in such cases, by a prompt, direct settlement by the government with the subcontractor, leaving to the government the burden of recovering the overpayment where possible.

The provisions of subsections (d), (e) and (f) of Section 7, as well as those of other sections of the act providing for direct settlement by the government with subcontractors, entirely ignore the lack of privity which exists between the government and the subcontractor. There is no question, however, but that the objective to be accomplished is more important than any which would be served by a rigid technical adherence to fixed principles of law. If liberally construed and administered, such provisions will afford relief where it is most likely to be needed, i. e. by the small subcontractor of limited financial resources who is apt to be driven into bankruptcy by delay in the settlement of his claim, whether consequent upon delaying circumstances in the settlement of the claim of his prime contractor, or the failure of the prime contractor, for other reasons, to make prompt settlement with him. Such direct settlement should serve to avoid the necessity of interim financing for such small concerns and enable them to reconvert promptly and with a minimum of hardship. The burdens concerned in securing interim financing as well as other incidents growing out of delayed settlement will thus be thrown upon the prime contractor who, in most instances, will be best able to bear them.

INTERIM FINANCING

Sections 8, 9 and 10 of the act, to many contractors whether holding prime or subcontracts, will probably be the most important sections. The magnitude and complexity of the situation presented by reconversion will inevitably produce some delays in settlement no matter how efficiently the other provisions of the act are administered. Interim financing is not settlement and payment and does not, therefore, directly accomplish the first basic idea behind the law. But, properly administered, with sympathetic understanding and knowledge of the fiscal problems facing the contractor whose contract has been terminated before completion, such interim

financing can be made most effective in preventing economic collapse. Incompetent and inefficient administration, on the other hand, could well nullify any basic purpose.

The policy of the government to provide war contractors, having termination claims pending, with adequate interim financing within thirty days after application therefor is made evident by Section 8(a). Responsibility for providing such financing is there placed on the contracting agencies and the Director.

Interim financing is, to the greatest extent deemed practicable, to be made available either through loans and discounts or by commitments and guaranties in connection therewith. It may however, by reason of subsection 8(b), be made in the form of advance or partial payments. If the latter device is used, the advance payment is, so far as practicable, to consist of the following:

- (1) An amount equal to 100% of the amount payable, at the contract price, for acceptable items completed prior to the termination date under the terms of the contract, or completed thereafter with the approval of the contracting agency; plus
- (2) An amount equal to 90% of the cost of raw materials, purchased parts, supplies, direct labor, and manufacturing overhead allocable to the terminated portion of the war contract; plus
- (3) A reasonable percentage of other allowable costs, including administrative overhead, allocable to the terminated contract not included in the foregoing; plus
- (4) Such additional amounts, if any, as the contracting agency deems necessary to provide the contractor with adequate interim financing.

Where detailed ascertainment of costs under clauses (2) and (3) is not suitable to the conditions of the contractor, and is apt to cause delay in the interim financing, that portion of the interim financing may, by reason of subsection 8(b)(5), be an amount not greater than ninety per cent. of estimated costs allocable to the terminated part or parts of the contract or group of contracts. Methods and standards for estimating such costs are to be prescribed by the Director.

Where available, the last mentioned provision should be particularly effective as a "speed-up" provision, so long as the

methods and standards to be prescribed are not made too rigid and exacting. If its application is made broad enough to include cases in which, although detailed cost ascertainment is possible, complicated accounting procedures would be involved which would cause delay, much time may be saved. It should be noted that unliquidated balance of partial or advance payments previously made to the contractor, allocable to the terminated contract or part thereof, are to be deducted from the amount of interim financing.

The Director is to prescribe, under subsection 8(c), certain forms which will become necessary such as:

- (1) The types of estimates, certificates or other evidence required;
- (2) The terms and conditions upon which interim financing will be made, including the use of standard forms for agreements where practicable;
- (3) Classes of cases wherein interim financing will be refused; and
- (4) Such methods of supervision and control as he deems necessary or desirable to assure adequate and speedy interim financing to subcontractors of the war contractor.

Here, again, the effectiveness of the provision will depend largely upon its administration. Unduly rigid requirements for detail and exactitude in the estimates required, or requirements for voluminous and complicated questionnaires or other paper work as a part of the "other evidence" required, will defeat the main purpose which is to get the money to which they are entitled into the hands of the contractors, whether holding prime or subcontracts, without delay.

To prevent too generous an estimate on the part of the contractor, subsection 8(d) imposes a penalty equal to six per cent. of the amount of any overstatement. Such penalty may be suspended or modified by the Director if, in his opinion, its imposition would be inequitable, but otherwise the penalty is to be deducted from amounts eventually found to be due the contractor or may be collected from him by suit as a debt due the United States.¹⁸ The provision for suspension or modification by the Director of the penalty is a wise one, and should

¹⁸ See R. S. 3466; 31 U. S. C. A. § 191.

be freely and liberally applied. In many instances, the speed with which the contractor is able to prepare and file his claim may mean the difference between healthy reconversion or a stalemate and bankruptcy. Under such high-pressure conditions, honest mistakes are bound to occur, and the imposition of a penalty in addition to the obligation to reimburse for an overpayment would certainly be inequitable.

Any contracting agency may allow any advance payments previously made or authorized by it in connection with performance of a contract, pursuant to subsection 8(e), to be used for payments and expenses related to termination settlement of such contract, upon such terms and conditions as it deems necessary or appropriate to protect the interest of the government. Terms for interim financing must, however, provide for liquidation by the contractor of all loans, discounts, advance payments, or partial payments under the contract not later than the time of final payment on the settlement of the termination claim or claims or such time thereafter as the contracting agency deems necessary for liquidation of such interim financing in an orderly manner. By so doing, in accordance with subsection 8(f), the contracting agency, in a proper case, will lighten the burden of the contractor in a situation where the requirement for complete liquidation before final payment would work an undoubted hardship.

The contracting agency is also authorized to settle, under subsection 8(g), upon such terms and conditions as it deems proper, any claim or obligation due by or to the government arising from or related to any interim financing made, acquired or authorized by it. That section also validates any interim financing made, acquired or authorized before the effective date of the act at least to the extent that it would be authorized under the statute.

Another form of interim financing without borrowing is recognized by Section 9(a) which provides for advance or partial payments to the war contractor. These payments may be made by any contracting agency, or the agency may authorize or ratify such advances or partial payments by the

war contractor to his subcontractor, upon such conditions as the contracting agency may deem necessary to obtain compliance with subsection 9(b). Final payments are to be made by the agency from time to time on partial settlements, or on settlements fixing a minimum amount due before complete settlement, or as tentative payments before any settlement.

Again, a penalty for overpayment is imposed by subsection 9(b). Where the advance or partial payment is made to the war contractor by the contracting agency or another war contractor, except as a final payment on partial settlement, any amount in excess of that finally found due on the claim is treated as a loan from the government to the contractor receiving it, payable on demand. The penalty this time is calculated at the rate of six per cent. per annum on the amount of the overpayment and runs from the date when the excess was received to that on which it is repaid or extinguished. If the advance or partial payment was authorized, ratified, or approved by the contracting agency, however, the contractor is not liable for any excess payment which he may have made in the absence of fraud on his part, and he is entitled to receive payment or credit from the government for the excess payment.

Section 10(a) authorizes co-operation by any contracting agency, in interim financing, with Federal Reserve Banks or other public or private financing institutions. Such co-operation may take the form of having the agency (1) enter into contracts with such financing institutions guaranteeing them against loss on loans, discounts or advances or on commitments in connection therewith, made to any war contractor for the purpose of financing him in connection with or in contemplation of termination of his war contracts or operations, or (2) participate with any other governmental agency or financing institution in the making of loans, discounts, advances or commitments directly to such war contractor. Financing in any form may, pursuant to subsection 10(b), be secured either by assignment of, or covenant to assign, some or all of the rights of the war contractor or in such other manner as the contracting agency may prescribe. The Federal Reserve Banks, subject to regulations of the Board of Gov-

ernors of the Federal Reserve System, are authorized to act as the fiscal agent of the government in carrying out the purposes of the act, but subsection 10(d) expressly declares that the statute shall not limit or affect any authority of any contracting agency, under any other statute, to make loans, discounts, advancements, commitments or guaranties.

It is believed that the economic interests of the nation, as well as the system of free, individual enterprise upon which our national economy depends, will best be served by placing interim financing, to the maximum extent possible, in the hands of local financing institutions, protected by the guaranties provided by the act, rather than by direct financing from governmental agencies, bureaus, or instrumentalities. Most contractors have an established line of credit with some local bank or financing institution, which, for its own protection, is bound to keep itself completely informed as to local conditions as well as the particular contractor's financial situation. Such local financing institutions will be in the best position to evaluate the statement of the contractor submitted with his application for interim financing. Approval by such bank of the contractor's statement together with its agreement to provide such financing on the basis thereof, should be sufficient to procure the guaranties provided by the act. Speedy interim financing would not only result but a profitable outlet for the funds of local banks and financing institutions would be provided, thereby safeguarding vital elements in an economic system based on free and individual enterprise.

This suggestion will no doubt be attacked by those who have been active in endeavoring to impose upon our economy too rigid supervision, dictation or regimentation, but it is the viewpoint of the author that local, independent financial institutions are well equipped for the speedy handling of interim loans. They have, for the most part, had previous financial dealings with the same individuals, partnerships or corporations who form the bulk of the war contractors, whether holding prime or subcontracts, and know them far better than could any government official. If the government, itself, is to be protected, the "personal risk" element must not be

neglected. The local banker will possess valuable first-hand knowledge in this regard.

Another point must not be lost sight of in connection with interim financing loans. Burdensome requirements as to collateral or the imposition of personal responsibility upon the borrowing contractor should be eliminated. The interim financing loan plan would be nothing but a sham and a delusion, in many instances, if the guarantor or the financial institution were to require anything more by way of collateral than the contractor's claim against the government. It is inconceivable that the large prime contractors would be required to furnish individual collateral or security. To impose that requirement on those least able to bear it, to-wit: the smaller individuals, partnerships and corporations, would defeat the end sought to be achieved. While there may be instances where the solvency of the prime contractor is in doubt, so that the subcontractor and his lending agency may require protection, it should be remembered that there are ample provisions in the statute to take care of such situations either directly or indirectly.

As the basic purpose of interim financing is to establish a ready supply of money in order to facilitate the job of reconversion, that purpose should not be tortured to authorize the setting up of still another governmental loan system with rules, regulations and requirements that would serve to deter honest men from utilizing the plan. Such men, without whom our war effort would have been unavailing, could not be blamed for not wishing to jeopardize personal wealth and security on the outcome of an honestly disputed claim against the United States Government.

ADVANCE NOTICE OF TERMINATION

One of the most shocking causes of economic upheaval which followed World War I was the drastic suddenness with which existing and long-range contracts were terminated without warning. Steps have already been taken to avoid

that consequence this time,¹⁹ but still other safeguards are provided by the statute in question. Section 11 directs that advance notice shall be given by the contracting agency to prime contractors before the termination of their contracts so far as is feasible and consistent with the national security without permitting unneeded production of performance.²⁰ The contracting agency is also required to establish procedures whereby prime contractors shall serve subcontractors affected with immediate notice of such termination, but it may permit continuation of some or all of the work under the terminated prime contract whenever continuation will benefit the government and would appear necessary to avoid injury to plant or property.

Suspension without termination may also take place, but if it does the contractor is protected, by subsection 11(b), against an indefinite period of idleness and consequent loss while the agency, having ordered suspension of work, is deciding whether or not to terminate the contract. In such case, the contracting agency is required (1) to compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension; and (2) the contractor, after such

¹⁹ The Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. App. § 1611, provides for co-operation in this and other matters between the Director of Property Settlement and the Director of Contract Settlement. Section 36 of that statute, 50 U. S. C. A. § 1645, states: "The Congress recognizes that, upon termination of war contracts, the plants of war contractors will be filled with vast termination inventories, which, until removed or disposed of, will prevent or interfere with the resumption of civilian production and re-employment, and that, so far as possible, decision should be made in advance of termination for the disposition and removal of such termination inventories, without delay when termination occurs. Measures should be taken to realize the greatest possible value of termination inventories. (b) In advance of termination, to the maximum extent practicable, (1) each contracting agency shall advise its war contractors of the classes of termination inventory the contracting agency will wish to retain for military purposes; and (2) the Board (Surplus Property) shall establish procedures for advising war contractors as to the care and handling or disposition of termination inventory not required for military purposes, in order to effectuate the policies stated in subsection (a) of this section and the policies of Section 11(a) (3) of the Contract Settlement Act of 1944. (c) To the extent that it is impracticable so to advise war contractors in advance of termination, the contracting agencies and the Board (Surplus Property) shall be prepared to give such advice as is practicable after termination of the war contract. (d) The Board and the Director of Contract Settlement shall cooperate in carrying out the provisions of this section."

²⁰ A bill introduced by Senator Murray in August, 1944, S. 2061, proposed to repeal subsection 11(a) and substitute other provisions. The bill, however, failed in passage, and the George War Mobilization and Reconversion Act of 1944, Ch. 480, Pub. Law 458, U. S. Cong. Serv. (1944), p. 782 et seq., which was substituted for it, contained no such repealer or substitution.

cessation or suspension has continued for thirty days, may elect to treat it as a termination by delivering written notice of such election to the contracting agency at any time before the agency directs resumption of work under the contract.

While the Director has no authority to regulate or control the classes of contracts to be terminated by the contracting agencies, for that power is reserved to them under subsection 11(c), his functions will commence immediately thereafter.

REMOVAL AND STORAGE OF MATERIALS

Termination will immediately engender problems as to removal and storage of materials. Congress has not been unaware of the situation which will face the contractor about to reconvert his plant,²¹ particularly if he were left with a large inventory of materials useless in peacetime production and which could be sold only at a heavy loss. For that reason, Section 12(a) declares it to be the policy of the government to assure expeditious removal from the war contractor's plant of the termination inventory not to be retained or sold by him.

To effectuate that policy, the contractor is required, under subsection 12(b), to submit to the contracting agency or to any other agency designated by the Director, statements showing what materials he claims to be termination inventory, and which he desires the government to remove. The form and detail of such statements, supporting certificates, and other data will be prescribed by the government. The form and detail prescribed will have a distinct bearing upon the effectiveness of this provision. The expeditious removal suggested in subsection 12(a) will obviously be greatly impeded with consequent distress to the contractor if the government insists upon lengthy, detailed statements involving complicated accounting procedures and calling for voluminous and involved questionnaires. Here, again, efficient administration will be needed. After the contractor has prepared and filed his statement, however, he is protected against undue delay in removal under other subsections which afford him the right

²¹ See note 19, ante.

to act promptly for his own protection if the government does not so do.

Thus, according to subsection 12(c), within sixty days after submission of the contractor's statement or any shorter period as may be prescribed, or within any longer period as may be agreeable to the contractor, the government agency is required either (1) to arrange for storage by the war contractor on his premises, or otherwise, of all such claimed termination inventory which the contractor does not retain or dispose of, except any part which may be determined not allocable to the terminated contract or contracts; or (2) to remove the same from the contractor's plant.

Upon failure of the government to act within the prescribed period, the contractor may, pursuant to subsection 12(d), but subject to regulations prescribed under the statute, remove such termination inventory from his plant and store it on his own premises or elsewhere at the account and risk of the government, using reasonable care in transportation and preservation. To obtain the benefit of this provision, the contractor must, at least twenty days before the date fixed for removal, deliver to the government agency concerned written notice of the date so fixed and a statement showing the quantity and condition of the materials to be removed, certified to have been prepared in accordance with a current physical inventory. The necessity of this additional statement does not appear, unless only a partial removal is contemplated, as the information contained therein would seem to duplicate that which is required to appear in the statement already submitted. It may, however, serve as an effective reminder to the governmental agency. Such notice may be delivered before or after the sixty-day period referred to in subsection 12(c), for the provision clearly indicates the intent of Congress to relieve the contractor of his termination inventory, should he so desire, at the end of the sixty-day period without interposing further delay made necessary by the requirement of notice. By serving his removal notice simultaneously with or shortly after the filing of the contractor's statement, the two periods will run concurrently.

If the governmental agency fails to check the materials at or before the time of removal, a certificate by the contractor specifying the materials so removed, filed with the governmental agency within thirty days after the date fixed for removal, is made prima facie evidence, under subsection 12(d), against the United States as to the quantities and conditions of the materials and the fact of their removal. Herein may be found further indication that Congress does not propose to have the contractor delayed in his reconversion plans by a failure of prompt action on the part of any governmental agency.

Notwithstanding any other provision of law, but subject to authority of the War Department, Navy Department or Maritime Commission, as provided in subsection 12(h), the contracting agency, the Director, or any governmental agency designated by him, may, by exercise of contract rights or otherwise, take over any termination inventory and any materials removed by the government or stored for its account, whether or not such materials are finally determined to constitute termination inventory. In that event, the government is liable to the contractor, in the absence of a different agreement between them, either for their return to him or their disposal value at the time of removal, or for the proceeds realized by the government for their disposal, whichever the governmental agency may elect. Any amount so paid or payable to the contractor for materials allocable to a terminated contract is credited against the termination claim under the contract, but, in the absence of an agreement otherwise, does not affect the amount due on the claim. Any materials so taken over by the Director are delivered for disposal to any government agency he may select.

Subjection of termination inventories to priority of the needs of the War Department, Navy Department or Maritime Commission for further war production is further confirmed and more emphatically stated in subsection 12(h) hereafter noted. This subsection, among other things, covers a situation which will often be presented, i. e. one where the war contractor has several contracts and precise segregation of his inventory between the terminated contract and those still

active is impracticable without delaying removal beyond the prescribed period. In such case, items finally determined not to constitute a part of the termination inventory are to be returned to him or he is to be reimbursed for them. However, the wisdom of the provision by which the government may elect, as a basis of reimbursement, the disposal value at the time of removal or the amount actually realized by the government, is open to question especially as to such materials as are finally found not included in the termination inventory. No restriction is placed upon the governmental agency as to such disposal, for it may dispose of such materials at a fraction of either their normal value or of their cost to the contractor with attendant heavy loss to him. Such items might also be included in some "lend-lease" transaction. Having taken over and disposed of such materials at its discretion, it would seem more equitable to impose any loss consequent upon such disposal upon the government rather than on the contractor for he has no control over such final disposition.

Another possible cause for delay in termination settlement is removed by subsection 12(f) which provides that contracting agencies are prohibited from postponing or delaying termination settlements beyond the sixty-day period above mentioned for the purpose of awaiting disposal, whether by the contractor or the government, of any termination inventory reported by the former. As many such termination inventories will include materials, parts or special machinery of limited application for other purposes, to force delay of termination settlement to await their eventual liquidation would be likely to prove disastrous to any contractor.

Special attention is given, through subsection 12(g), to the many cases where the contractor, upon termination, will have on hand government-owned machinery, tools, or equipment which would prove to be useless to him on reconversion to civilian production. In much the same fashion as is true of the termination inventory, the contracting agency, upon sixty days' written notice, is required to remove or provide for the removal of such government property unless the contract between the agency and the contractor provides otherwise on this point. The agency concerned may waive or release, on

behalf of the United States, any obligation of the war contractor in respect to such government property. Again, the contractor is protected against failure on the part of any agency to act for he may, subject to regulations, remove all or part of such property and store it upon his own premises or elsewhere for the account of and at the risk of the government provided he uses reasonable care for its transportation and preservation. Just as is true of most of the provisions of the act, enforcement of this subsection is subject to "regulations to be prescribed under the act," or to "such terms and conditions as the agency deems appropriate." The reasonableness of such regulations, terms and conditions, bearing in mind the primary purpose of the act, may mean the difference between its success or failure.

The authority of the War Department, Navy Department or Maritime Commission to take over termination inventories and to retain them for their own use for any purpose, to dispose of them for the purpose of war production, or to authorize any contractor to retain or dispose of such inventories for the purpose of war production, is not limited or affected by anything contained in the act and is expressly recognized by subsection 12(h). Since winning the war is the one objective before which all others must, and should be, submerged, no restriction ought to be placed, in this respect, upon the power of the three departments named. It has, however, been heretofore noted that the contractor ought always be protected against loss in connection with such disposal.

It might also be noted that the contractor is not prevented, by this section of the statute, from removing and storing any termination inventory at his own risk. In many instances, it might be to the distinct advantage of the contractor to remove the same immediately upon termination of his contract rather than to wait for the expiration of the sixty-day period which is allowed to the contracting agency before it is required to act. If space is at a premium, the contractor might well determine that the risk assumed by prior removal is warranted, consequently subsection 12(i) grants him such right.

APPEAL AND SUIT

There is no likelihood that all contract settlements will be made in such fashion and upon such terms as will be acceptable to all war contractors. The possibility of legitimate dispute over facts and figures is no less likely in the rush to reconversion than would be true of peace-time affairs, in fact may even be increased. For that reason, recourse to an appeal from the determination of the governmental agency is essential. Section 13 of the statute sets forth the provisions for appeal. Where necessary, appeal will always present a "bottle-neck" of some sort which cannot be eradicated despite the obvious intent of Congress to eliminate such things where possible consonant with protection for the government. The dissatisfied contractor should, therefore, keep this section clearly in mind.

Whenever the contracting agency responsible for settling termination claims has not settled a claim by agreement or has done so only in part, two alternatives are provided by subsection 13(a). Under one of them, the agency may, at any time, determine the amount due on such claim or unsettled part and prepare and deliver to the contractor written findings indicating the basis of its determination. By the other, if the claim has been submitted substantially as prescribed by the act, the contractor may make written demand upon the agency, whereupon the agency must determine the amount due on the claim or unsettled part and deliver its findings to the contractor within ninety days after it receives such demand. In either event, the agency may require the contractor to furnish such information and submit to such audits as are reasonably necessary. When such findings have been made, and within thirty days after the delivery thereof, the contracting agency is obliged to pay to the contractor at least ninety per cent. of the amount thereby determined to be due, less any outstanding interim financing applicable thereto. It is thereby, to some extent, prevented from dragooning a contractor in straitened financial circumstances into a forced settlement with a tacit ultimatum to take what is offered or else appeal or sue and get nothing until the case is finally decided. Even so, the delay of 120 days possible under this subsection

does appear excessive and, except to the extent that the contractor might find relief through interim financing, might prove disastrous to a contractor of limited financial resources.

Any contractor aggrieved by the findings, or failure to make findings, of the contracting agency, may (1) appeal to an Appeal Board created by subsection 13(b), or else (2) bring suit against the United States in the Court of Claims or any appropriate District Court.²² Should the contracting agency be the Reconstruction Finance Corporation or any corporation organized under the Reconstruction Finance Corporation Act,²³ or any corporation owned or controlled by the United States, suit may be brought in any court of competent jurisdiction.

Rather drastic limitations on the right to sue are laid down in subsection 13(c) which imposes the following conditions:

First: When a procedure for protest or other appeal is provided within the contracting agency, the contractor, before proceeding (i) in his discretion, may resort to such procedure within the time specified in the contract, or, if no time is specified, within thirty days after delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director. Failure of the contracting agency to act upon such required protest or appeal within thirty days serves to operate as a refusal to modify its findings. Any revision of the findings, upon protest or appeal within the agency, is treated as the agency's findings for purpose of appeal or suit. Notwithstanding any provision in his contract, no contractor is required, however, to protest or appeal from such findings except in accordance with the foregoing provisions.

Second: The contractor's proceedings, whether appeal or suit, may be initiated (i) within ninety days after delivery to him of the agency's findings, or (ii) in case of protest or appeal within the agency, within ninety days after the determination of the protest or appeal, or (iii) in case of failure to deliver such findings, within one year after the contractor's demand therefor. These periods of time are important for if the contractor fails to initiate such procedure within the time specified, he is precluded thereby and the findings of the contracting agency become final and conclusive, or, if no findings have been made, the contractor is deemed to have waived his termination claim.

²² 43 Stat. 972, § 24(20); 28 U. S. C. A. § 41(20).

²³ 47 Stat. 5, as amended; 15 U. S. C. A. §§ 601-17.

Third: Notwithstanding contrary provisions in the contract, the findings of the contracting agency are to be treated by the Appeal Board or the court as *prima facie* correct but not conclusive. The contractor has, therefore, the burden of establishing that the amount due him exceeds that allowed by the contracting agency. A finding by the Appeal Board or by the court that the contractor failed to negotiate in good faith before appeal or suit, or failed to furnish the agency any information reasonably requested by it regarding his claim, or failed to prosecute diligently any protest or appeal required to be taken, might result in any one of the following actions, to-wit: (1) a refusal to receive in evidence any information not submitted to the contracting agency, (2) a denial of interest on the claim or part thereof for such period as it deems proper, or (3) the case may be remanded to the contracting agency for further proceedings upon such terms as the Appeal Board or court see fit to prescribe.

Unless the case is remanded, the Appeal Board or court will enter the appropriate award or judgment on the basis of the law and facts. It may, therefore, increase or decrease the amount allowed by the contracting agency. Regardless of any such proceedings, the contracting agency may make settlement of the termination claim, or any part thereof, by agreement with the contractor, at any time before the proceedings are concluded.

The Appeal Board, which will most likely receive the bulk of the work of handling disputes, is to be appointed by the Director and may consist of such number of members as he deems necessary from time to time. The personnel must consist of qualified and experienced attorneys, engineers, accountants, or persons possessing sufficient business experience or professional skill. They are to be appointed without regard to the civil service laws and the Classification Act of 1923,²⁴ and while their compensation is to be fixed by the Director it, together with the term of office, is subject to statutory limitation. For the convenience of contractors having pending matters, panels of one or more members of the Appeal Board shall sit from time to time in scattered localities throughout the country as needed. A single member may hear the appeal if the amount in controversy is \$25,000 or less or even when it exceeds that amount if the contractor has failed to demand a panel of three at the time of filing his appeal.

²⁴ 42 Stat. 1488; 5 U. S. C. A. § 661 et seq.

A contractor aggrieved by the decision of the Board or its panel, other than an order remanding the case to the contracting agency, may, within ninety days after such decision, still bring suit, which proceeds as if no appeal had been taken. The cost of such litigation, however, is to be borne by the contractor unless the court should give judgment for an amount in excess of that awarded by the Appeal Board. Failure on the part of the contractor to sue within the ninety-day period so fixed makes the decision of the Appeal Board final and conclusive.

Practice and procedure before the Appeal Board, as in most administrative agencies, is to be prescribed by the Director who may delegate that authority to the Appeal Board if he so desires. The Board or its panel is, however, empowered to administer oaths and issue its subpoenas, including subpoena *duces tecum*, although provisions of the law relating to subpoenas issued under the Federal Trade Commission Act both with regard to penalties and also as to self-incrimination,²⁵ are made to apply to subpoenas issued by the Appeal Board.

Arbitration, by agreement, under the provisions of the United States Arbitration Act,²⁶ regardless of the amount in dispute and to the same extent as if authorized by the original agreement between the government and the contractor, is permitted by subsection 13(e). The arbitration award made pursuant thereto is as final and conclusive upon the United States as would be a voluntary settlement except that such award is not subject to approval by any settlement review board. Disputes between contractor and subcontractor regarding any termination claim may, by agreement, be submitted by either (1) to the Appeal Board, or (2) to a contracting agency for mediation or arbitration, whenever authorized by the agency or required by the Director. In such case, the award or decision is final and conclusive as to the parties submitting the dispute and may not be questioned by the United States in settling any related claim, in the absence of fraud or collusion.

²⁵ 38 Stat. 722; 15 U. S. C. A. § 49.

²⁶ 43 Stat. 883; 9 U. S. C. A. §§ 1-15.

These provisions for arbitration have received wide publicity by, and support from, the American Arbitration Society. In many cases, arbitration would be beneficial, and undoubtedly preferable to a long-drawn out dispute before the Appeal Board or a court. In the absence of an arbitration provision in the contract, however, special agreement between contractor and contracting agency, or contractor and subcontractor, will become necessary. It should also be remembered that arbitration is not always rapid, particularly if complicated cost accounting problems are involved, so where settlement is to be arrived at through arbitration, resort to interim financing will often be necessary to relieve the contractor and prevent failure of the primary objective.

COURT OF CLAIMS

Controversies arising out of war contract termination which are taken to the United States Court of Claims will be regulated by Section 14 of the act. To expedite adjudications, that court is now authorized to appoint not more than ten auditors and not more than twenty commissioners in addition to those already provided by former statutes,²⁷ which former statutes are to apply to such additional auditors and commissioners in all respects without limitation as to the nature of their duties.

When proceedings under the statute are brought before the Court of Claims, it may, on motion of either party or upon its own motion, cause additional parties to be brought in prior to judgment. While the usual rules of service apply, subsection 14(b) permits service by publication in case any party resides outside of the United States, is unknown, or cannot be personally served, provided a copy of summons is also mailed to such person's last known address. The court may, upon motion of the Attorney General, where there may be persons having possible interests in the proceeding, notify such persons to appear to assert and defend such interests. Upon failure to appear, any and all of their claims and interests in claims against the United States in respect of the subject matter of the proceedings are forever barred, and the court may

²⁷ 43 Stat. 964-5; 28 U. S. C. A. §§ 269-71.

enter judgment *pro confesso* against any claim or contingent claim of the United States asserted against them in the proceeding. Should any person so notified appear for the purpose of asserting his rights, the case is to be treated as if an independent proceeding had been instituted by such person under Section 145 of the Judicial Code, as amended,²⁸ and had thereafter been consolidated with the one in which such summons or notice was issued. Jurisdiction thus acquired, however, may not be used by the United States to assert any counterclaims, claims for damages, or other demands against such persons, other than those for recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of such case. If such person asserts a claim therein against the United States, then the Court of Claims is given jurisdiction to adjudicate, as between adverse claimants, their respective interests in any matter in suit and, if necessary, to award several judgments in accordance therewith. While prompt disposition of claims is not likely to follow on the use of such power, it does provide a single proceeding in the nature of interpleader capable of settling all rights in a complicated situation.

Although the jurisdiction of the Court of Claims in this respect has been enlarged, subsection 14(c) declares that this has been done only to the extent necessary to give effect to the foregoing arrangement. No person, therefore, may recover on a claim or any interest therein which he would not have had a right to assert had subsection 14(b) not been enacted.

PERSONAL FINANCIAL LIABILITY

Possibility of delay caused by disbursing officers who might become unduly exacting in their requirements through fear of personal financial liability, is struck down by Section 15(a). They are thereby authorized to make payments on duly certified vouchers, just as other governmental officials and agents are authorized to approve settlements and issue vouchers for payment, free from personal liability except for

²⁸ 36 Stat. 1136; 28 U. S. C. A. § 250.

the perpetration of fraud. The General Accounting Office, when settling the accounts of any disbursing officer, must allow all such disbursements notwithstanding any other provision of law. Reliance by any governmental agency, when making termination settlements or granting interim financing, upon such certificates of war contractors as it may deem proper will also serve to relieve from any personal financial responsibility. For that matter, any agency may permit war contractors and other persons to rely upon such certificates without assuming personal financial liability, according to subsection 15(b), provided there is no fraud on their part. The obvious intent thus displayed is to remove as much formal restraint as possible in order that honest men may receive prompt satisfaction without delay caused by fear that some dishonest claimants may, temporarily at least, come into the possession of public funds.

GENERAL ACCOUNTING OFFICE

While the General Accounting Office has served as the "watchdog" of Congress over the disbursement of public funds, Section 16(a) very wisely defines and limits the functions of that office with respect to termination settlements. In the first place, it has nothing to do with the settlement itself, thereby removing a potential slowdown in the settlement procedure. Furthermore, any other provision of law notwithstanding, the function of the General Accounting Office is confined to determining, after final settlement, simply (1) whether the payments to the war contractor were made in accordance with the settlement, and (2) whether the records transmitted to it, or other information, warrant a reasonable belief that the settlement was induced by fraud. It may, however, for this purpose, examine any record maintained by the war contractor relating to the termination settlement.

If the Comptroller General is convinced that a settlement was induced by fraud, he is required to certify that determination to the Department of Justice, to the Director, and to the contracting agency concerned. The Department of Justice is then required to investigate and, until it notifies the contracting agency that in its opinion the suspicion of fraud is un-

founded, the contracting agency, by set-off or otherwise, may withhold from amounts due the war contractor from the United States, the amount of the settlement or portion thereof under suspicion of fraud. Should fraud appear evident, the Department of Justice will undoubtedly take appropriate action to recover payments made to the war contractor, but the General Accounting Office may not suspend credit to any disbursing officer on any disbursements made by him under such settlement unless he has consciously participated in the fraud.

The procedure outlined places fraud investigation where it should be, i. e. after settlement instead of before. As will be demonstrated later, very few cases of fraud have been found in the investigation of war contracts. Of the few contractors who might be inclined toward dishonesty, most of them would deem it unwise to run the risk of the penalties provided, both by this act and by general law.²⁹ The probability of discovering a few guilty persons before they have been paid hardly justifies the delay which would attend on fraud investigation before settlement particularly when that delay would be an expense on the tremendous majority of honest contractors in urgent need of prompt payment in order to enable them to do their part in returning our economy to a peace-time basis promptly. The few who are guilty may be uncovered later. When caught, the act would appear to afford sufficient protection to the government, especially if it is a fact that protection of the government is but a secondary purpose. As injustice and even hardship could easily result to honest contractors from an exercise of the provision for withholding funds where fraud is suspected, an injustice which would not really be removed merely by saying that the suspicion turned out to be unfounded, that provision should be applied with extreme caution and, where funds are so withheld, the investigation should be especially prompt and speedy.

The General Accounting Office is, however, made the agent of Congress for purpose of surveillance over the operation of the statute. That function, imposed by subsection 16(c), appears in many ways more important than the in-

²⁹ See Sections 8(d), 9(b), and 19(c) of the Contract Settlement Act of 1944, and Section 35 of the Criminal Code, 18 U. S. C. A. § 80.

vestigation of fraud. In that regard, the Comptroller General may investigate settlements for the purpose of reporting to Congress (1) whether the settlement methods and procedures employed are of a kind and type designed to result in expeditious and fair settlements in accordance with and subject to the act and the orders and regulations of the Director; (2) whether such measures and procedures are followed by each agency with care and efficiency; and (3) whether such measures and procedures adequately protect the interest of the government. Should he find that such methods and procedures fail to meet those standards, he is to make suggestions and recommendations to the agency concerned for its improvement, and to Congress for any additional legislation which might be needed. Before forwarding any report to Congress, the Comptroller General is required to deliver a copy thereof to the agency concerned thirty days in advance of its submission as well as to the Director, and to forward to Congress, together with the report, any comments of the agency with respect thereto. Placing both sides of the picture before Congress in that fashion should prove profitable for the agency may be able, in some instances, to show that the Comptroller's recommendations were impracticable or inadvisable.³⁰ It may be noted that the jurisdiction of the Comptroller General, like that of the Court of Claims, is not affected by the act except to the extent necessary to give effect to its provisions.

DEFECTIVE, INFORMAL AND QUASI CONTRACTS

Section 17 takes cognizance of the fact that, in the haste necessary and incident to mobilization and war preparation as well as changes produced in requirements by reason of a rapidly changing military situation, large quantities of materials and services were furnished under oral or written instructions or requests from governmental agencies or their officers, which were fatally defective as formal contracts. In such cases, the contractor would often rely, in good faith, upon the apparent authority of an officer or agent of the con-

³⁰ Surveillance for the purpose of suggesting amendatory or clarifying legislation possesses particular importance in the light of the statement of the Senate Committee on Military Affairs noted ante at footnote 10.

tracting agency but that innocent reliance would not be enough to hold the government liable.³¹ These informal contracts are, however, protected by the following provisions.

Where any person has so arranged to furnish or has furnished such materials, services or facilities on written or oral instructions or any other request from a contracting agency, he is, according to subsection 17(a), entitled to fair compensation therefor. If any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency would serve to invalidate the contract or commitment, the contracting agency is not to take advantage of such defect or omission, but is required to amend, confirm or ratify such contract or commitment without consideration, in order to cure the same. Moreover, the agency is duty bound, by subsection 17(b), to make a fair settlement of any obligation thereby created or incurred, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract. Should the contracting agency fail to settle any such claim by agreement, the dispute between it and the contractor is subject to the provisions of Section 13 of the statute relating to appeal.

The Director is instructed, by subsection 17(d), to require each contracting agency to formalize all such defective and informal obligations and commitments within such period as he deems appropriate. Such formalization, as to contracts still active, is desirable, but it is to be hoped that this requirement will not be extended to require formalization after the contractor has received notice of termination, as a condition precedent to settlement.

RECORDS, FORMS AND REPORTS

Section 18(a) instructs the Director to establish policies for such supervision within the contracting agencies of termination settlements and interim financing as he deems necessary and appropriate to prevent and detect fraud, to assure uniformity in administration, and to provide for expeditious settlement. For this purpose, he is to prescribe (1) such rec-

³¹ On that point, see Paul Edward Thurlow, "Some Aspects of the Law of Government Contracts," 21 CHICAGO-KENT LAW REVIEW 300 (1943).

ords to be prepared by the contracting agencies and war contractors as he deems necessary in connection with such settlements and interim financing; and (2) to cause the records in connection therewith to be transmitted to the General Accounting Office.

The Director is required to reduce the amount of record keeping, reporting and accounting to the minimum compatible with the expressed objective. Each contracting agency is to prescribe forms for use by war contractors to the extent it deems necessary and feasible. The general orders and regulations of the Director under this section will have much to do with the success or failure of the purpose of the act. Requirements as to records, reports and accounting, it is hoped, will at all times be kept at the absolute minimum and geared to the practical speed and efficiency of modern business practice.

In addition, the Director is authorized, by subsection 18(b), to require the governmental agencies performing functions under the act to prepare such information and reports as he deems necessary to assist him in appraising their operations or to assist him or other governmental agencies in performing their functions. He may permit such information and reports to be made available to other governmental agencies, but information deemed to affect the national security may be confined to the use of the Director alone. The purpose of this latter provision is, of course, obvious yet it achieves the objective of keeping the Director completely informed as to matters which might affect his decisions while preserving secrecy over matters of military importance. To preserve unanimity of effort, however, the Director may, through subsection 18(c), give such advance notice or other information as he deems necessary and appropriate on cut-backs in war production resulting from terminations or failures to renew or extend war contracts to any interested governmental agency.

In making such investigations as he deems necessary or desirable, the Director may utilize the facilities of existing agencies, but if he determines they are inadequate, he may establish a unit in his office to supplement and facilitate their work. As is the case with the Comptroller General, the Director is obliged, by reason of subsection 18(d), to report all

indications of fraud to the Department of Justice, and the procedure to be followed in such cases, outlined in subsection 18(e), is closely assimilated to that previously noted. The potential injustice or hardship which may be inflicted upon an innocent contractor unjustly suspected of fraud has already been suggested. It is again urged that action should be taken only where the case is a flagrant one, for interim financing would scarcely serve to remedy the situation as it is inconceivable that any financing institution would advance funds on account of a settlement suspected to be fraudulent.

PRESERVATION OF RECORDS; PROSECUTION OF FRAUD

In the interest of eventual re-examination of all contract settlements, it is highly desirable that the contractor preserve all records pertaining thereto and to his war-time operations. Emphasis is given to this point by Section 19(a) which provides for substantial penalties of fine and imprisonment for any person who wilfully secretes, mutilates, obliterates or destroys, or causes to be secreted, mutilated, obliterated or destroyed (1) any records of a war contractor relating to the negotiation, award, performance, payment, interim financing, cancellation or other termination, or settlement of a war contract calling for \$25,000 or more; or (2) any records of a war contractor and a purchaser relating to any disposition of termination inventory in which the consideration received by any war contractor or any governmental agency amounts to \$5,000 or more. Destruction of such records either (1) five years after such disposition of termination inventory by the war contractor or governmental agency, or (2) five years after final settlement of the contract, or (3) five years after termination of hostilities in the present war as proclaimed by the President or Congress, whichever applicable period is longer, will not be visited by any penalty. "Records" are defined to include, but not limited to, books, ledgers, checks and check stubs, pay-roll data, vouchers, memoranda, correspondence, inspection reports, and certificates. The Director may, by regulation, authorize an earlier destruction of such records, but if he does so he may impose terms and conditions thereon such as the retention of photographs or microphotographs

thereof. Copies so made are to have the same force and effect as the originals and may be so treated for the purpose of admissibility into evidence.

Several changes have been produced with regard to prosecutions for fraud. Thus the statute of limitations³² has been amended to cover offenses committed in connection with contracts related to the present war by subsection 19(b).³³ In addition, new penalties have been imposed, through subsection 19(c), for the perpetration of frauds. Every person who, after the effective date of the act, makes or causes to be made or presents or causes to be presented any claim or supporting document therefor, knowing that it is false, fraudulent or fictitious, or to be based on any false, fraudulent statement or entry, or who shall cover up or conceal any material fact, or shall use any other fraudulent trick, scheme or device for the purpose of obtaining or aiding to obtain, for any person, any benefit of a contract with the United States or with any other person, and every person who enters into a combination or conspiracy so to do, is to be penalized as follows: (1) by being obliged to pay to the United States an amount equal to twenty-five per cent. of any amount sought to be wrongfully secured or obtained but not actually received, and (2) by the forfeiture and refund of any such benefit received. In addition (3) he is required to pay to the United States \$2,000 for each act, double the amount of damage sustained by the government, and also the costs of suit. The penalties provided in this and other sections of the act³⁴ and in the Criminal Code³⁵ would appear amply sufficient to dissuade the very few dishonest

³² 18 U. S. C. A. § 590a.

³³ That section reads: "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or, with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing laws."

³⁴ See Sections 8(d) and 9(b).

³⁵ 40 Stat. 1015; 18 U. S. C. A. § 80.

contractors who might be tempted to present fraudulent claims. As Section 16(b), already noted, makes efficient provision for catching such persons after settlement, it is believed any special fraud investigation before settlement based on mere suspicion or slight and inconclusive evidence is not contemplated by the act. Where, during the normal procedure for settlement, the element of fraud appears obvious or the evidence thereof is strong, convincing and reasonably conclusive, prompt and drastic action under this subsection is indicated for the protection of the government. The resultant punishment and publicity should serve as a strong deterrent to others who might be inclined to cheat over final settlements.

Jurisdiction over such cases is vested in the several district courts, whether for the United States, the District of Columbia, or the Territories, wherein the person or persons charged, or any one of them, resides or can be found. Parties not inhabitants of or found within the district in which suit is brought, may be served personally, by publication or in such other reasonable manner as the court may direct, according to subsection 19(c)(2).

In addition to the foregoing, the provisions of section 35-A of the Criminal Code³⁶ are made to apply to any statement, representation or document made or used for any purpose under the act or any regulation pursuant thereto, by reason of subsection 19(d).

Employees of governmental agencies, including commissioned officers assigned to duty therewith, during the term of their service and for two years thereafter, are prohibited by subsection 19(e) from prosecuting or acting as counsel, attorney or agent for prosecuting any claim against the United States involving any subject matter directly connected with which such person was so employed or performed duty. The maximum penalty for any such violation is a \$10,000 fine or imprisonment for one year, or both.

³⁶ 52 Stat. 197; 18 U. S. C. A. App. § 80.

GENERAL PROVISIONS

Section 20(a) confers authority on each contracting agency, notwithstanding any other provisions of law other than those contained in the act itself, to do either of the following, to-wit: (1) amend by agreement any existing contract, before or after notice of termination, as it deems necessary and appropriate to carry out the provisions of the act; and (2) when settling any termination claim, to assume or indemnify the war contractor against any claims in connection therewith. This subsection does not limit or affect in any way any authority of any contracting agency already granted by the First War Powers Act.³⁷ Such agencies may also prescribe the amount and kind of evidence required to identify any person as a war contractor, or any contract, agreement or purchase order as a war contract, and, pursuant to subsection 20(b), any determination so made is final and conclusive for purposes of the statute. Appropriations for administering the act are also authorized.

All policies and procedures prescribed by the Director of War Mobilization or any contracting agency, in effect upon the effective date of the act and not inconsistent therewith, are retained under subsection 20(d), unless and until superseded by the Director in accordance with the act, or by regulations of the contracting agencies not inconsistent therewith or with the policies prescribed by the Director. Nothing in the act, however, is to be deemed to impair or modify any war contract or any assignment of any claim thereunder without the consent of the parties thereto, if the contract or assignment would otherwise be valid, for such transactions are expressly preserved by subsection 20(e).

The policy of Congress to throw the strength of the government behind the reconversion movement is also evidenced by subsection 20(f) which allows any contracting agency to authorize and direct its officers and employees to advise and assist war contractors in preparing and presenting claims, obtaining interim financing, and on other related matters. Such advice and assistance is expressly declared not to be a

³⁷ 55 Stat. 838; 50 U. S. C. A. App. § 601 et seq.

violation of Section 109 of the Criminal Code³⁸ or of any other law, provided the officer or employee does not receive benefit or compensation for such assistance from the contractor. The penal scope of subsection 19(e), previously noted, is therefore eliminated in cases where advice or assistance is rendered to contractors by government employees or officers under authorization and direction from the agency, if given without compensation from the contractor. There will probably be instances of "off the record" demands for compensation by government employees, but such cases, if detected, should call for prompt application of criminal punishment under applicable statutes.

Of particular value to small business concerns should be subsection 20(g) which directs the Smaller War Plants Corporation (1) to disseminate information among such concerns regarding interim financing, termination settlements, and removal and storage of termination inventories; and (2) to assist such concerns in connection with securing of interim financing, preparation of applications therefor, effecting termination settlements, removal and storage of termination inventories, and the making of interim loans and guaranties, in order to assure that they will receive fair and equitable treatment from prime contractors and intermediate subcontractors.

OTHER FUNCTIONS OF THE DIRECTOR

Section 21 assigns to the Director, as additional functions, the duty to (a) promote training of personnel for termination settlement and interim financing by contracting agencies, war contractors, and financing institutions; (b) collaborate with the Smaller War Plants Corporation in protecting the interests of smaller war contractors in obtaining fair and expeditious settlements and interim financing; (c) promote decentralization of administration by fostering delegation of authority within contracting agencies and to war contractors, to the extent he deems necessary and feasible; and (d) to consult with war contractors through advisory committees or such other methods as he deems appropriate.

³⁸ 35 Stat. 1107; 18 U. S. C. A. § 198.

The training function above mentioned is a matter of vital importance. Intensive and thorough training of personnel to whom authority is to be delegated under this section and Section 23, hereafter noted, is essential for any attempt to administer the act through untrained and inefficient personnel would completely defeat its purpose. The voluminous and complicated regulations already issued and the constant additions likely to be made thereto, will add not a little to the task of the personnel and with which they must be thoroughly familiar. It is also hoped that the Director will be liberal in his ideas as to what he deems "necessary and feasible" to promote decentralization, for utilization thereof to the maximum extent possible is necessary to insure success of the act.

USE OF APPROPRIATED FUNDS

Prompt payment of settled claims or speedy disbursement on interim loans would be defeated if Congressional action through appropriation bills were to become frequently necessary, for the passage of even the most essential legislation takes time. Of interest, therefore, is Section 22 which authorizes any contracting agency to use for interim financing, payment of claims, and any other purpose authorized in the act, any funds appropriated or allocated, or which are, or may become available to it, for such purpose or for the purposes of war production or war procurement. Interchange of unappropriated fund balances between contracting agencies for authorized purposes is also permitted, and the Director may determine, between several agencies, either by their agreement, joint estimate, or any other method, the part of any expenditure so made to be paid by each contracting agency concerned. Transfers of funds between them, particularly if based on appropriation credits carried on the books of the Treasury, are to be made by the Secretary of the Treasury according to joint requests of the contracting agencies involved.

DELEGATION OF AUTHORITY

It has already been noted that it is not intended that the Director should personally handle all contract settlements.

His authority to delegate the powers granted to him is contained in Section 23. Subsection (a) thereof permits the Director to delegate full authority and discretion to any Deputy Director, or, upon such terms and conditions as he may prescribe, to the head of any governmental agency to the extent necessary for the handling and solution of problems peculiar to that agency. Such delegated authority and discretion, if not abused, should expedite settlement or interim financing in many instances, particularly where the Deputy Director or the head of the agency is competent to make the decision.

The head of any governmental agency, in turn, has full power by subsection 23(b) to re-delegate authority and discretion to any officer, agent, or employee of such agency or to any other agency, and may authorize successive re-delegations. Such broad power of delegation and re-delegation can be very useful, and is absolutely necessary to extensive decentralization, but could become dangerous unless considerable caution is exercised to make sure that the recipient of the power is efficient, thoroughly trained, and otherwise competent. Careful observation and supervision of such delegates is indicated, however, if intended results are to be attained. Joint exercise of authority is permitted by subsection 23(c). The Director is not, however, prevented by the act from exercising any authority conferred upon him by any other statute.

MISCELLANEOUS PROVISIONS

According to Section 24(a), the act became effective on July 21, 1944, twenty days after its enactment. With the exception of paragraphs (b), (c), (d), and (e) of Section 12 and of Sections 6, 7, 8, 9, 10, and 13, the act is retroactive and applies to any terminated war contract actually finally settled at or before its effective date. The statute does not, however, limit or affect any authority conferred by the Act of March 11, 1941, as amended,³⁹ or acts supplemental thereto.

Section 25 permits any contracting agency, subject to

³⁹ 55 Stat. 31; 22 U. S. C. A. § 411 et seq.

policies prescribed by the Director, to exempt from some or all of the provisions of the act (a) any war contract made or to be performed outside the continental limits of the United States or in Alaska, (b) any termination inventory similarly situated, or (c) any modification of a war contract pursuant to its terms for the purpose of changing plans and specifications applicable to the work without substantially reducing its extent.

The usual provision for separability is contained in Section 26 which directs that if any provision of the act is held invalid the remainder is not affected thereby. The statute concludes with the direction that it may be cited as the "Contract Settlement Act of 1944."

While the statute is fairly lengthy, it does not compare with the tremendous gloss already being imposed thereon in the form of regulations. It is particularly important, since the agencies charged with administration of the act are given a wide field of discretion, that contractors having termination claims, as well as their attorneys and accountants, become familiar with such regulations as well as the changes which, from time to time, will be made therein. In addition to those promulgated by the Director, noted in connection with the discussion of Section 6(d), the former Procurement Regulations and the Termination Accounting Manual⁴⁰ have both been reissued under date of November 11, 1944, as the combined regulations of the War and Navy Departments, under the title "Joint Termination Regulation, including Joint Termination Accounting Manual," to be designated as "JTR." This publication is in the same loose-leaf form as the former P. R. 15. Changes therein are published by reprinting the pages on which the changed sections appear. It contains standard forms, recently developed, to be used in connection with the various phases of contract settlements, including interim financing, and should be thoroughly studied and kept strictly up-to-date as to changes. It is, in effect, the "bible"

⁴⁰ See War Department P. R. 15 (1943), and Termination Accounting Manual (T.A.M.).

of attorneys and accountants engaged in contract termination settlement practice.⁴¹

CONCLUSION

The act is cumbersome and involved, perhaps necessarily so, but this should not defeat its purpose if capably and efficiently administered. To reiterate, its two primary purposes or principles are: (1) speed in terminating war contracts to enable war contractors to reconvert with the minimum of economic disturbance, and (2) protection of the government from fraud and waste.

Considering the second of these objectives for a moment and speaking with a sense of realism, it is the least likely of the two to fall short of success. In 1921, Secretary of War Newton D. Baker wrote, concerning the same problem as it had confronted the nation in World War I, that:

It gives me great delight to be able to say that in all that vast and intricate undertaking it was so rare a thing that I do not now recall an instance of finding a business or a businessman who really was seeking to take an unjust advantage of his Government by reason of these contracts.⁴²

Despite this statement, Congress appropriated \$500,000 to be expended by the Attorney General for the investigation and prosecution, either by civil or criminal process, of alleged frauds against the United States growing out of or arising in connection with activities concerned in the prosecution of that war.⁴³ The Attorney General, pursuant to such statute, in July, 1922, created the War Transactions Section of the Department of Justice. Four whole years were devoted by this group to a re-examination of settlements which had previously been made on war contracts. Instead of finding the

⁴¹ They would do well, also, to observe any proposals by Senator Murray who has displayed keen appreciation of the critical economic problems involved in reconversion and has been most active in presenting remedies. Prior to the passage of the instant statute, he had already introduced two bills for the same purpose, S. 1268 and S. 1470, noted in 29 Iowa L. Rev. 517, which were rejected in favor of the measure introduced by his colleague Senator George, enacted as the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U. S. C. A. App. § 1651 et seq. Senator Reynolds and Representatives May and Vinson have also been active in trying to promote a legislative solution for the reconversion problem.

⁴² Baker, *Some Legal Phases of the War*, 7 A. B. Jour. 321 at 328 (1921).

⁴³ 42 Stat. 543 (1922).

wholesale fraud which had been suspected, rash accusations of which had led to the investigation, they found practically none. The Section in fact reported:

Charges that fraud and profiteering were committed on a large scale have been frequent, and yet comparatively few cases involving actual fraud have been discovered. Although thirty-seven indictments charging war frauds have been returned, only two convictions and two pleas of guilty have been obtained.⁴⁴

That result is not surprising for contractors then were primarily Americans in the truest sense of the term. Their modern counterparts are no different, the overwhelming majority of them being just as patriotic, honest, law-abiding, and sensible. In view of the penalties provided by the present act, to-wit: six per cent. penalty for overstatement or overpayment; fine and imprisonment for concealment of records; payment of twenty-five per cent. of any amount sought wrongfully to be secured even though not obtained; forfeiture and refund of any benefit wrongfully secured; and payment of \$2,000 for each act, double the amount of damage sustained by the government and the costs of suit; as well as criminal penalties of fine up to \$10,000 and imprisonment up to ten years, or both, in addition to others provided by law; it is inconceivable that any sensible contractor, even if lacking in the other attributes, would contemplate perpetrating a fraud in a termination settlement of his contract with the government. Very few have tried to perpetrate frauds of that nature.⁴⁵ The publicity and punishment which have followed such attempts have bred a whole-hearted respect for the efficiency of the prosecuting arm of the national government. There is little to fear, therefore, that the second objective will fail.

The greater concern, then, must be over the first basic principle. If it is not attained, both prime contractors and sub-

⁴⁴ Final Report of the War Transactions Section, June 30, 1926.

⁴⁵ Statistics found on p. 117 of the Annual Report of the Director of the Administrative Office of the United States Courts, year ending June 30, 1941, indicate that of a total number of 49,237 defendants whose cases were disposed of during that year, 233 were charged with violations of income tax laws, of whom 102 were convicted. Disposition of the remaining 131 cases showed that 57 cases were nolle prossed or discontinued, 47 indictments were quashed, only 25 were acquitted, while 2 cases received some other treatment.

contractors will be seriously impeded in their efforts to reconvert the forces of the nation to peace-time industry. Many of them will face imminent bankruptcy. Others will find themselves either out of business or faced with terrific competition, their rightful places taken by persons more fortunate because they were not engaged in the war effort or had funds with which to resume business more speedily. Effective termination, then, must provide financial support as well as fair dealing to make speedy reconversion possible.

No matter how favorably they may be viewed, the provisions of the act will not alone produce speedy settlement and payment. Before any of its time limitations begin to operate in his favor, the contractor must prepare and file his claim. This may well be a major operation requiring considerable time, particularly if segregation of termination and non-termination inventories is necessary, if costs have to be allocated between terminated and non-terminated contracts, and if other operations involving long and complicated accounting procedures are required to produce the contractor's statement. After the claim is filed, more time must elapse before it is settled. Although settlement may be by agreement, no one can be so naive as to believe that all, or perhaps even most, contracts will be settled by agreement. Honest differences are bound to arise, and it certainly is not the spirit of the act to force "shot-gun" settlements. If amicable settlement cannot be arrived at, the contracting agency has ninety days after the contractor's demand to prepare and deliver its findings. The contractor then has thirty days in which to protest. Thereafter, if the agency fails to modify its findings in a manner satisfactory to the contractor, he has ninety days in which to prepare and file his appeal with the Appeal Board, his suit in the Court of Claims, or, if the amount is less than \$10,000, to begin proceedings in the United States District Court. Where the dispute is submitted to the Appeal Board and the contractor is aggrieved by its decision, he may still bring suit in the Court of Claims or District Court as if he had not so appealed. Even where, by agreement, the dispute is submitted to arbitration, there is no assurance of a speedy award. All of these procedures involve time and militate against the first

objective unless the contractor, discouraged by the delay, elects to waive his honestly-asserted rights and accept whatever amount he is offered.

Interim financing, although it does not constitute settlement and payment, has been presented as the method of saving the war contractor from financial embarrassment. It can be given that effect, at least approximately, by sufficiently broad and liberal construction and administration. But that matter is entirely within the control of the Director and the contracting agencies, for the contractor has nothing to say about it unless he relies on his own credit. Should complicated accounting procedures be required in producing the statement necessary to obtain such financing, or requirements for collateral in addition to the termination claim itself be imposed, the object of speedy relief to the contractor with its attendant resumption of peacetime production will not and cannot be attained.

The plan herein suggested for local handling of such loans could do much to insure the release of needed funds where settlement procedures under the act delay the final payment. But even then, the contractor may not be made whole. Although he may be penalized at the rate of six per cent. for overestimate or overpayment, he is to receive only two and one-half per cent. interest for delays in settlement lasting longer than thirty days. As that rate may be inadequate to compensate him for the interest he must pay, at commercial rates, on his interim financing loans, the difference is clear loss unless the statute is amended to place the risk of such increased cost on the government for whose benefit delays in settlement are provided.

As has already been emphasized and re-emphasized, success or failure of the act must depend largely upon its administration. The statute necessarily vests a large measure of discretion in the Director and in the governmental agencies. Whether or not that measure is too great can only be determined from an observation of practical results. It is to be hoped that the history of the National War Labor Board, before it was decentralized into twelve regions, will be borne in mind by those charged with the administration of this stat-

ute. Effective decentralization is absolutely necessary and if not provided, either by amendment or by regulation, the tremendous volume of settlement claims which will be presented will produce the same breakdown that was witnessed in the early days of the National War Labor Board. The placing of control over interim financing in local institutions is not the least form of decentralization which appears desirable to make the act into an operative plan.

One suggestion which may be worthy of consideration would be to enlarge the act or give it such construction as would permit a settlement procedure analogous to, or rather the reverse of, that used in the collection of income taxes. Immediate payment in full on small claims, and payment of a substantial percentage on larger claims, could be made by government disbursing agents, instead of collectors, immediately upon the filing of a brief contractor's statement or estimate of money due. Refund with interest as provided in the act in case of overpayment where no fraud is involved, and assessment of penalties in cases of fraud, could later be demanded upon subsequent audit of the claim as is done by the Internal Revenue Department when the taxpayer has incorrectly computed the amount of his tax and an additional assessment is made. Such proposal has the advantage of speed, eliminates the inequity of forcing the contractor to borrow while his own funds are being held by the government during audit and settlement, and in most cases will not require the making of demands for refunds.

If the government is entitled to ask for income tax payments on the basis of estimated income, it would not seem unreasonable to expect that the government should pay on similar estimates, particularly in the light of substantially similar penalties for missatement. Preparation of detailed reports, audits, schedules, etc., could well come later and, freed from the necessity of haste in order to avoid delay in settlement, they would be more likely to be accurate than those now made necessary in advance of settlement. Possible loss to the government under such a plan would be negligible, and would be more than compensated for by the speedy restoration of a sound peace-time situation in American industry.

SURVEY OF ILLINOIS LAW FOR THE YEAR

1943-1944*

VIII. PUBLIC LAW

THE COURTS of Illinois have had little to say during the past year on matters affecting the law as it relates either to administrative tribunals or to public utilities while those decisions which involve principles of conflict of laws have already been noted elsewhere.¹ Some other decisions concerning aspects of public law are, however, worthy of comment and are presented in the following sections.

CONSTITUTIONAL LAW

The constitutionality of the federal Emergency Price Control Act of 1942² was involved in the case of *Regan v. Kroger Grocery & Baking Company*³ which was a proceeding begun to collect damages for violations of Section 205(e) of the Act.⁴ Plaintiff alleged that he had been charged more than the ceiling prices established by the General Maximum Price Regulation of May 18, 1942, on three different occasions and asked judgment for \$50.00 for each alleged violation. Among other defenses, the defendant claimed that (1) the statute was unconstitutional, and (2) that the provisions of Section 205(e) were penal in character hence could not be enforced in the courts of Illinois. General attack on the statute was made on the ground that it was beyond the power of Congress to regulate the prices at which personal property might be bought in purely local or intrastate transactions. It was also argued that Section 204(d) violated the due process clause of the Fifth Amendment to the Federal Constitution by denying to the state courts the power to pass upon the validity of the act

* The first seven sections of this survey appeared in 23 CHICAGO-KENT LAW REVIEW 1 et seq.

¹ See comment on *Atkins v. Atkins*, 386 Ill. 345, 54 N. E. (2d) 488 (1944); *Brown v. Hall*, 385 Ill. 260, 52 N. E. (2d) 781 (1944); and *Fuhrhop v. Austin*, 385 Ill. 149, 52 N. E. (2d) 267 (1944), which appeared in the section on Family Law, 23 CHICAGO-KENT LAW REVIEW 47-51.

² 50 U. S. C. A. Appendix § 901 et seq.

³ 386 Ill. 284, 54 N. E. (2d) 210 (1944). Thompson, J., wrote a dissenting opinion based primarily on the ground that the judgment was against the weight of the evidence.

⁴ 50 U. S. C. A. § 925(e).

or of any price regulation made pursuant to it.⁵ The court, nevertheless, interpreted the language of that section to mean that the jurisdictional limitations applied only to suits in equity brought to restrain the enforcement of the act and to questions involving the validity of regulations promulgated under the act as distinguished from questions involving the validity of the act itself. Since the validity of the act could be made an issue in actions to enforce its provisions, there was no violation of due process. The court further upheld the constitutionality of the statute under the war powers of the Congress. By way of answer to the contention that the Illinois courts should not enforce the provisions of Section 205(e) because they were penal in character, the court held the rule inapplicable to statutes of the United States. It was said to be established law that Illinois courts will not enforce the penal laws of a foreign jurisdiction. Acts of Congress, however, are laws of Illinois and together with the State laws form one system of jurisprudence. The State courts are merely given concurrent jurisdiction with the federal courts to enforce the laws of a common country.

In *Metropolitan Trust Company v. Jones*,⁶ the Supreme Court held unconstitutional the provision of the Small Loans Act which prohibits a licensee thereunder from pledging any note or security given by a borrower, except with a bank authorized to transact business in Illinois under an agreement permitting the Director of Insurance to examine the papers so hypothecated.⁷ Plaintiff, a trust company, sought an injunction to restrain the enforcement of the provision and the regulation thereunder on the ground that the due process and equal protection clauses were violated. The court held that

⁵ 50 U. S. C. A. § 924(d) declares that: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 . . . of any price schedule effective in accordance with the provisions of section 206 . . . and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

⁶ 384 Ill. 248, 51 N. E. (2d) 256 (1943).

⁷ Ill. Rev. Stat. 1943, Ch. 74, § 30.

the exemption of banks, which was refused to trust companies, was unreasonable and arbitrary in view of the fact that trust companies were under the same supervision as banks and no reason appeared to exist why the purposes of the Small Loans Act were better served by refusing the exemption to them. Other provisions of the statute were not disturbed by the ruling.

A third decision of interest was that in the case of *People ex rel. Baker v. Strautz*.⁸ In that case the statute authorizing a judge or justice of the peace to order examination and treatment of any person charged with crime who may be suffering from any communicable venereal disease⁹ was held not to violate the due process clause. The statutory language authorizes the judicial officer to proceed "when it appears . . . from the evidence or otherwise that any person coming before him on any criminal charge may be suffering from any communicable venereal disease. . . ." Such language was held not to confer any power upon such officer outside of the evidence before him but to limit his power to cases in which the evidence tends to create a reasonable suspicion of the existence of communicable disease. However, it was decided that a charge of soliciting to prostitution in itself created such a reasonable inference.

MUNICIPAL CORPORATIONS

The validity of municipal ordinances vacating public streets was questioned in two cases during the past year in each of which the municipality attempted to justify its action under pertinent provisions of the statutes which purport to declare that municipal action in such cases is conclusive. In the first of them, that of *People ex rel. Hill v. Eakin*,¹⁰ a majority of the court found that some public benefit was derived from the vacation ordinance so decided to treat the action of the city council thereon as final and conclusive.¹¹ In the other, that of

⁸ 386 Ill. 360, 54 N. E. (2d) 441 (1944).

⁹ Ill. Rev. Stat. 1943, Ch. 23, § 392.

¹⁰ 383 Ill. 383, 50 N. E. (2d) 474 (1943). Gunn and Thompson, JJ., dissented.

¹¹ The statute there involved, Ill. Rev. Stat. 1941, Ch. 145, § 1, was subsequently repealed but the substance of the language thereof was incorporated in Ill. Rev. Stat. 1943, Ch. 24, § 69-11.

People ex rel. Foote v. Kelly,¹² the court indicated that the determination of the city council is not necessarily conclusive on the courts despite statutory language purporting to achieve that result¹³ so that, if there is allegation that no public benefit arises from the vacation ordinance, the court may conduct inquiry to ascertain if there has been an abuse of discretion in that regard.

More has been said on the subject of municipal liability for salaries due firemen and policemen under "minimum salary" statutes.¹⁴ The Appellate Court holding in *George v. City of Danville*,¹⁵ which had held invalid an agreement by firemen to accept a lesser salary in consideration that none would be discharged and all would have less work to do, was carried to the Illinois Supreme Court where such holding was affirmed over a vigorous dissent that to permit recovery would perpetrate a fraud on the municipality.¹⁶ In *Patteson v. City of Peoria*¹⁷ it was held that a minimum salary statute, since repealed,¹⁸ applied to six female employees of a police department, two of whom were policewomen, two matrons, and two clerks in the bureau of identification, as all were deemed to be performing police duties in a regularly constituted police department and the word "policeman," as used in such statute, was not limited to male persons. Provisions of such statutes were also held to apply to *de facto* officers in *Kohler v. City of Kewanee*.¹⁹

Liability on municipal contracts was considered in two cases where, upon finding that the public corporation had no right to make a valid binding contract, recovery in quasi-contract for benefits received through such transactions was like-

¹² 385 Ill. 543, 53 N. E. (2d) 429 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 296. Murphy, J., wrote a dissenting opinion in which he relied on *People ex rel. Hill v. Eakin*, 383 Ill. 383, 50 N. E. (2d) 474 (1943).

¹³ Ill. Rev. Stat. 1943, Ch. 24, § 69-11.

¹⁴ *Ibid.*, Ch. 24, §§ 11-2 and 12-2.

¹⁵ 315 Ill. App. 17, 42 N. E. (2d) 300 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 63.

¹⁶ 383 Ill. 454, 50 N. E. (2d) 467 (1943), noted in 42 Mich. L. Rev. 720, affirming 315 Ill. App. 17, 42 N. E. (2d) 300 (1942). Smith, J., wrote a dissenting opinion.

¹⁷ 386 Ill. 460, 54 N. E. (2d) 445 (1944), reversing 318 Ill. App. 245, 47 N. E. (2d) 867 (1943).

¹⁸ Ill. Rev. Stat. 1937, Ch. 24, §§ 860a-860b.

¹⁹ 321 Ill. App. 479, 53 N. E. (2d) 479 (1944)

wise denied. In *Ashton v. County of Cook*²⁰ a contract by a private attorney to collect forfeited taxes on a contingent basis was rejected and recovery on *quantum meruit* was denied because the function of collecting such defaulted taxes belonged to the state's attorney, a constitutional officer. Failure by the municipal corporation to provide an appropriation in advance was held reason to repudiate a contract to purchase a road grader in *Galion Iron Works & Manufacturing Co. v. City of Georgetown*²¹ and, as that transaction was invalid, it necessarily followed that there could be no recovery for the use made by the municipality of the equipment.

Questions concerning tort liability of municipal corporations have led to some hairline distinctions in the past between governmental and proprietary functions. Three such cases arose during the period of this survey. In *McKeown v. City of Chicago*²² the negligent act of city firemen in flooding a vacant lot for ice-skating purposes was held sufficient to establish municipal liability since it did not constitute a governmental function. For that matter, carelessness in burning brush which had been removed from city streets after a heavy storm, so that private property was destroyed, was held actionable in *Peterson v. City of Gibson*²³ against the claim that the municipal employer was rendered immune because acting in its governmental capacity. In *Sykes v. City of Berwyn*,²⁴ however, the carelessness of a police officer while cleaning out a squad car was deemed insufficient to establish municipal liability as the act being done was held to be immediately related to a clearly governmental function.

A unique case involving municipal power to levy a special assessment was presented in *City of DesPlaines v. Boeckenhauer*²⁵ where a sewer assessment had been levied against land outside of but adjoining the municipality. After confirmation of the assessment and payment of three of the in-

²⁰ 384 Ill. 287, 51 N. E. (2d) 161 (1943).

²¹ 322 Ill. App. 498, 54 N. E. (2d) 601 (1944).

²² 319 Ill. App. 563, 49 N. E. (2d) 729 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 96.

²³ 322 Ill. App. 97, 54 N. E. (2d) 79 (1944). Leave to appeal has been denied.

²⁴ 320 Ill. App. 440, 51 N. E. (2d) 587 (1943). Leave to appeal has been denied.

²⁵ 383 Ill. 475, 50 N. E. (2d) 483 (1943).

stallments, the land owner petition to have the same declared null and void. The city contend that inasmuch as the property in question had been, subsequent to the special assessment proceeding, annexed to the municipality the assessment should stand particularly since the petition amounted to a collateral attack on the judgment of confirmation. It was, nevertheless, held that the original proceeding was wholly void and that no estoppel had arisen from the fact that the landowner had expressly requested that the land be assessed for the improvement made thereto. The action of the trial court in quashing the assessment was, therefore, confirmed.

The final chapter in the litigation involving the power of a municipality to prevent the use of paper milk containers appears to have been written by the decision in *Dean Milk Company v. City of Chicago*.²⁶ Federal proceedings, which had been instituted to test the validity of a city ordinance requiring that milk be delivered in "standard milk bottles,"²⁷ had been suspended to await the outcome of state court proceedings on the same point. It has now been decided, by a divided court, that paper containers do not measure up to the standard fixed by the ordinance and that such ordinance does not conflict with the provisions of the statute regulating the pasteurization of milk.²⁸ Municipal power to act on the subject was said to rest on several sections of the Cities and Villages Act.²⁹ The position of the city having been vindicated, the ordinance in question was subsequently amended to permit the use of paper containers as well as glass milk bottles.³⁰

Only one zoning case is worthy of mention, and that case is *City of Watseka v. Blatt*³¹ wherein was involved the validity of a zoning ordinance which forbade the use of land for a junk yard unless the same was located in an industrial district and

²⁶ 385 Ill. 565, 53 N. E. (2d) 612 (1944). Stone, J., wrote a dissenting opinion in which Wilson and Gunn, JJ., concurred.

²⁷ *Fildcrest Dairies, Inc. v. City of Chicago*, 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 75.

²⁸ Ill. Rev. Stat. 1943, Ch. 56½, § 115 et seq.

²⁹ *Ibid.*, Ch. 24, §§ 23-63, 23-64, 23-81 and 23-105.

³⁰ Mun. Code, Chicago, § 154-14 as amended March 16, 1944, permits the use of single service containers complying with United States Public Health Service standards for the duration of the war and six months thereafter.

³¹ 320 Ill. App. 191, 50 N. E. (2d) 589 (1943).

then permitted such use only if frontage consents were given and specific approval was obtained from the board of zoning appeals. It was held that the power of the city council to adopt zoning ordinances³² was a delegated power which could not be re-delegated by it to a zoning board, hence the restriction in question was invalid.

TAXATION

An old tax question, complicated by modern developments, came before the court in *Sanitary District of Chicago v. Rhodes*³³ in which case the district sued to enjoin the county collector of Will County from collecting real estate taxes levied against that portion of the district's main channel located within such county. Exemption was claimed on the theory that the channel constituted "public grounds owned by a municipal corporation and used exclusively for public purposes."³⁴ Upon finding that the channel was not used exclusively for public purposes, a decree denying an injunction was affirmed on the fundamental proposition that laws exempting property from taxation will be subject to strict construction.³⁵

Attention was called last year to decisions concerning the applicability of the Retailers' Occupation Tax Act to the solicitation of retail sales in this state by out-of-state vendors.³⁶ Subsequent to the outcome of such cases, the legislature amended Section 1b of the statute³⁷ so as to make the same apply to sales by foreign vendors operating through soliciting agents in this state. Further litigation ensued over the question of the validity of such amendment and it is understood that the Circuit Court of Sangamon County declared the same to be unconstitutional.³⁸ No review of such ruling has been sought by the Department of Finance. In view of the

³² Ill. Rev. Stat. 1943, Ch. 24, § 73-1 et seq.

³³ 386 Ill. 269, 53 N. E. (2d) 869 (1944).

³⁴ Ill. Rev. Stat. 1943, Ch. 120, § 500(9), grants an exemption in such cases.

³⁵ *People ex rel. Thompson v. First Cong. Church*, 232 Ill. 158, 83 N. E. 536 (1908).

³⁶ See comment on *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 50 N. E. (2d) 505 (1943), in 22 CHICAGO-KENT LAW REVIEW 70.

³⁷ Laws 1943, Vol. 1, p. 1121; Ill. Rev. Stat. 1943, Ch. 120, § 440b.

³⁸ See report of decision in *Ex-Cell-O Corp. v. Collins*, in *Corp. Tax Service* (Illinois) p. 6501.

little publicity given to such holding, it is deemed wise to give emphasis thereto.³⁹

The holding of the earlier Appellate Court decision in *People's Drug Shop, Inc. v. Moysey*,⁴⁰ dealing with the right of the retailer to pass the occupation tax on to the consumer, was affirmed when that case reached the Illinois Supreme Court.⁴¹ As could be expected in view of the theory underlying such tax⁴² and the unambiguous language of the statute,⁴³ the court held the levy was one imposed on the retailer and one which he could not, unless as a hidden charge or by express agreement, pass on to the consumer. Suits for refunds based on Section 6 of the same statute were presented in *Svithiod Singing Club v. McKibbin*⁴⁴ and *People ex rel. Sterling Lumber & Supply Company v. Workman*⁴⁵ in both of which cases recovery was denied as neither plaintiff was able to show that it had repaid the purchasers the amounts collected from them, repayment of which was a condition to recovery of a refund from the state.⁴⁶

Injunction to restrain an alleged illegal levy of tax under the same statute was sought in *Owens-Illinois Glass Company v. McKibbin*⁴⁷ but was resisted on the ground that, inasmuch as the statute permits the payment of tax under protest and provides for an orderly process to obtain a refund, resort to equity was unnecessary and improper. Such injunction was upheld on the theory that courts of equity have always granted injunctions against the levy of an illegal tax as an

³⁹ Other cases dealing with the application of the statute prior to its amendment as aforesaid are *Allis-Chalmers Co. v. Wright*, 383 Ill. 363, 50 N. E. (2d) 508 (1943), and *Ayrshire Corp. v. Nudelman*, 383 Ill. 345, 50 N. E. (2d) 509 (1943). In each case sales were made by out-of-state vendors through soliciting agents in Illinois, but the property sold was located outside of the state, title passed outside thereof, and the orders were actually accepted in the foreign state. Such sales were held to be non-taxable.

⁴⁰ 317 Ill. App. 370, 45 N. E. (2d) 978 (1943).

⁴¹ *People's Drug Shop, Inc. v. Moysey*, 384 Ill. 283, 51 N. E. (2d) 144 (1943).

⁴² *Reif v. Barrett*, 355 Ill. 104, 188 N. E. 889 (1933).

⁴³ Ill. Rev. Stat. 1943, Ch. 120, § 441.

⁴⁴ 384 Ill. 493, 51 N. E. (2d) 550 (1943). A companion case, that of *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 44 N. E. (2d) 904 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 69 and 38 Ill. L. Rev. 107, had decided that the club in question was not a retailer within the meaning of the statute.

⁴⁵ 385 Ill. 18, 52 N. E. (2d) 259 (1944).

⁴⁶ Ill. Rev. Stat. 1943, Ch. 120, § 445.

⁴⁷ 385 Ill. 245, 52 N. E. (2d) 177 (1944).

exception to the general rule that equity will not take jurisdiction where there is an adequate remedy at law.

Application of the statute to particular occupations was also considered in two cases. In *Stolze Lumber Company v. Stratton*,⁴⁸ a materials supply concern which furnished building materials to contractors and subcontractors successfully contended that the 1941 amendment to the statute seeking to impose tax liability on such concerns⁴⁹ was unconstitutional as not being within the scope of the title of the statute and, absent such provision, they were not engaged in selling at retail.⁵⁰ In the other case, that of *Huston Brothers Company v. McKibbin*,⁵¹ a similar holding was reached with regard to a drug concern furnishing medical and pharmaceutical supplies to doctors and hospitals.

Legislative attempts to impose taxes on the production of oil within the state⁵² collapsed under the impact of the decision in *Ohio Oil Company v. Wright*⁵³ which held the statute unconstitutional as a direct violation of Section 1 of Article IX of the state constitution. The court's reasoning therein followed the pattern that, as applied to royalty owners, the tax was not one on an occupation but rather constituted a direct tax on income from property hence amounted to a direct tax on the property itself.⁵⁴ As applied to actual producers of oil, the court indicated that the statute might form an acceptable basis for regulating an occupation but because it was lacking in uniformity the court felt obliged to declare the statute void *in toto*.

Several cases have arisen in the general property tax field. The rule of *Mobile & Ohio Railroad Company v. State Tax Commission*⁵⁵ was productive of further litigation to deter-

⁴⁸ 386 Ill. 334, 54 N. E. (2d) 554 (1944).

⁴⁹ Laws 1941, Vol. 1, p. 1079; Ill. Rev. Stat. 1943, Ch. 120, § 440.

⁵⁰ *Material Service Corp. v. McKibbin*, 380 Ill. 226, 43 N. E. (2d) 939 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 70.

⁵¹ 386 Ill. 479, 54 N. E. (2d) 564 (1944).

⁵² Laws 1941, Vol. 1, p. 1068; Ill. Rev. Stat. 1943, Ch. 120, § 416.1 et seq.

⁵³ 386 Ill. 206, 53 N. E. (2d) 966 (1944).

⁵⁴ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895).

⁵⁵ 374 Ill. 75, 28 N. E. (2d) 100 (1940).

mine the function of the Department of Revenue which is obliged to value railroad property and capital stock.⁵⁶ It was held, in *People ex rel. Little v. Collins*,⁵⁷ that the work of the Department combines two separate functions, namely assessment and equalization, and that the "original assessments" referred to in the statutory requirement concerning publication thereof dealt with the established fair cash value of property and not the equalized tax which might be imposed thereon. In *People ex rel. Voorhees v. Chicago, Burlington & Quincy Railroad Company*⁵⁸ it was held that a town levy for "home relief (including veterans)" was invalid as the burden of providing relief for destitute veterans was on the county⁵⁹ whereas the township was limited to the care of paupers generally.⁶⁰ Efforts to collect a judgment against a county, by compelling the county board to levy a tax for its satisfaction, came to naught in *Woodmen of the World Life Insurance Society v. Cook County*⁶¹ when the court found that constitutional limits on taxation would be violated by an additional levy while the maximum tax permitted was being entirely devoted to current and necessary expenses and liabilities.

Enforcement of tax liens by foreclosure was given added impetus by the decision in *Village of Palatine v. Palanois Estates, Inc.*,⁶² where the court held that foreclosure for unpaid special assessments was permissible even though the property was also encumbered by general property tax liens. It was indicated that to deny the right of the local government to sue except as a party to foreclosure proceedings brought to enforce general taxes would amount to an impairment of the authority to make local improvements.⁶³

Still another, and apparently the final, chapter in the liti-

⁵⁶ Ill. Rev. Stat. 1943, Ch. 120, § 618.

⁵⁷ 386 Ill. 83, 53 N. E. (2d) 853 (1944).

⁵⁸ 386 Ill. 200, 53 N. E. (2d) 963 (1944).

⁵⁹ Ill. Rev. Stat. 1943, Ch. 23, § 154a.

⁶⁰ *Ibid.*, Ch. 139, § 39(3½).

⁶¹ 322 Ill. App. 112, 53 N. E. (2d) 994 (1944), cause transferred 381 Ill. 558, 46 N. E. (2d) 35 (1943).

⁶² 319 Ill. App. 474, 49 N. E. (2d) 655 (1943).

⁶³ Ill. Rev. Stat. 1943, Ch. 24, § 84-1 et seq.

gation to compel payment of the 1928-9 tax anticipation warrants issued by the Board of Education of the City of Chicago was written in two decisions delivered last year. In the first, that in *Leviton v. Board of Education of City of Chicago*,⁶⁴ the statute purporting to authorize school boards to issue bonds to pay judgment indebtedness⁶⁵ was held unconstitutional as applied to judgments on such tax warrants because the effect thereof would be to make the same payable from revenue other than that upon which such warrants were drawn. In the other, that of *People ex rel. Reconstruction Finance Corporation v. City of Chicago*,⁶⁶ mandamus was held properly denied on the ground that such warrants do not create a debt on the part of the issuing body. Judgments based on such warrants were left undisturbed, but the effect of the decision was to make the same unenforcible. The holders of the warrants in question would now seem to be without relief except so far as they might be able to get contribution through an accounting proceeding against former holders who had been paid in full.

Questions arising under the Unemployment Compensation Act⁶⁷ do not, technically, belong in the classification of taxation for the contribution collected thereunder is not a form of taxation although often thought of in that light. That statute was, however, held constitutional in *Oak Woods Cemetery Association v. Murphy*⁶⁸ as a proper exercise of the police power. At the same time, the court found therein that the exemption granted thereunder to agricultural labor did not extend to greenhouse workers employed by a cemetery. Other constitutional issues were raised in *Zehender & Factor, Inc. v. Murphy*⁶⁹ where it was argued that property was being taken without due process by reason of attempts to impose assessments on distinct corporate entities merely because the same happened to be owned or controlled by the same inter-

⁶⁴ 385 Ill. 599, 53 N. E. (2d) 596 (1944).

⁶⁵ Ill. Rev. Stat. 1943, Ch. 122, § 327.62 et seq.

⁶⁶ 386 Ill. 522, 54 N. E. (2d) 508 (1944).

⁶⁷ Ill. Rev. Stat. 1943, Ch. 48, § 217 et seq.

⁶⁸ 383 Ill. 301, 50 N. E. (2d) 582 (1943).

⁶⁹ 386 Ill. 258, 53 N. E. (2d) 944 (1944).

ests.⁷⁰ The court observed that the legislative purpose was to prevent decentralization of business to avoid being obliged to make contribution to the unemployment compensation fund and regarded the statute as one which established a reasonable basis for classification.

Applicability of the statute to particular occupations and to unusual features of employment would seem to be likely to generate as much litigation as that which arose under the Retailers' Occupation Tax Act. Such inference at least would seem to follow from the decision in *Ozark Minerals Company v. Murphy*⁷¹ where certain silica workers were held not to be employees but independent contractors because they were paid on a per ton basis of accepted output and were free to work when they pleased so long as they maintained a desired quota. The point of separation between employee and independent contractor may be hard to determine hereafter.⁷² Benefits under the statute, however, are to be paid only in case of an involuntary unemployment, according to *Walgreen Company v. Murphy*,⁷³ which denied compensation to employees who had participated in a labor dispute and thereby produced the stoppage of work out of which the claim of compensation arose.

⁷⁰ Ill. Rev. Stat. 1943, Ch. 48, § 218(e) (5).

⁷¹ 384 Ill. 94, 51 N. E. (2d) 197 (1943). *Murphy, J.*, wrote a concurring opinion. *Thompson, J.*, wrote a dissenting opinion.

⁷² In *Zelny v. Murphy*, 387 Ill. 492, 56 N. E. (2d) 754 (1944), not in the period of this survey, the court was able to find some evidence of control by the employer so as to support imposition of the burdens of the statute, although the contracts were practically identical with those in the *Ozark* case.

⁷³ 386 Ill. 32, 53 N. E. (2d) 390 (1944).

NOTES AND COMMENTS

STATUS OF LABOR UNIONS UNDER THE SHERMAN ACT

Until the enactment of the War Labor Disputes Act, commonly known as the Smith-Connolly Act,¹ partisans of labor were of the opinion that the use of peaceful coercive measures in labor disputes had obtained both governmental and judicial approval. That statute, the first anti-labor law in the past three presidential terms, passed over presidential veto, has placed tremendous obstacles in the path of such activities when directed against plants, mines or facilities in the possession of the United States.² While the act was primarily intended to prevent stoppage in war production,³ the heated discussions and the critical situations which preceded its passage disclosed what disastrous effects could be produced on the national economy by the uncontrolled activities of labor unions. When hostilities cease and the statute is no longer operative, the government will most assuredly be confronted with the necessity of curbing union activities that might threaten a reconversion program. Of interest in that regard is the question as to what, if any, legal sanctions will be available or whether new legislation will be required.

Dicta by the United States Supreme Court in the cases of *Apex Hosiery Company v. Leader*⁴ and *United States v. Hutcheson*⁵ would seem to indicate that the rule in the Danbury Hatters' cases⁶ is no longer law and that the provisions of the Sherman Act⁷ do not apply to labor unions, but the court in those decisions never directly overruled the Danbury Hatters' cases nor declared that the Sherman Act could have no application to union activities. It would seem, there-

¹ 50 U. S. C. A. App. § 1501 et seq.

² Section 6(a) of the statute, 50 U. S. C. A. App. § 1506(a), reads: "Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lockout, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lockout, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment."

³ Section 10 of the statute, 50 U. S. C. A. App. § 1510, declares that the statute shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President.

⁴ 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044 (1940).

⁵ 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941).

⁶ *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488 (1908). See also 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341 (1915).

⁷ 15 U. S. C. A. § 1 et seq.

fore, that the provisions of that statute might still be invoked, at least in some respects, to control certain union practices.

Adequate understanding of the relationship of the Sherman Act to labor unions can only be obtained from a study of the decisions of the United States Supreme Court starting with the Danbury Hatters' cases, although the decision in *In re Debs*⁸ must not be overlooked even though it is earlier in point of time. While it is true that the last mentioned case dealt more nearly with governmental control over the mails rather than the Sherman Act, it is significant in any analysis of this question.

Basis for the dispute which gave rise to the decision in the Danbury Hatters' cases lay in the fact that the plaintiffs therein conducted non-union plants for the manufacture of hats which were shipped in interstate commerce. Defendants were members of a union which, by strikes and boycotts, strove to compel plaintiffs to unionize their shops. The suit was designed to recover damages under the Sherman Act on the theory that the union activities amounted to an unlawful restraint upon interstate commerce. It was alleged therein that the organization to which the defendants belonged was attempting to force all manufacturers into the organization so as to be able to control all labor and operations in the industry and that, at the time of suit, seventy out of the eighty-two manufacturers engaged in the production of fur hats had yielded to the pressure placed on them. Specific reliance was placed on that part of the statute which declared: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."⁹ In both decisions, that on the pleading question as well as after trial, it was held that the defendants were liable in damages.

When the case first reached the Supreme Court, Chief Justice Fuller said: ". . . the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."¹⁰ After trial, Justice Holmes observed that "irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibi-

⁸ 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895).

⁹ 26 Stat. at L. 209, 15 U. S. C. A. § 1.

¹⁰ 208 U. S. 274 at 293, 28 S. Ct. 301, 52 L. Ed. 488 at 496.

tions of the Sherman act if it is intended to restrain and restrains commerce amongst the states."¹¹

Although dictum therein declares that an actual restraint on interstate commerce would violate the statute, whether by direct action or by secondary boycott, no mention was made of the problem as to whether intent to accomplish that objective would suffice in the absence of an actual restraint or what the consequences would be if the interference was confined solely to the place of manufacture or point of shipment. Moreover, no general rule was laid down therein to determine when the conduct would "essentially obstruct the free flow of commerce" for although the acts complained of clearly constituted an attempt to dominate the industry concerned the court made no mention of domination of competitive markets as a standard for testing the essentiality of a restraint of trade.

Aroused by the decision in the Danbury Hatters' cases, partisans of labor clamored for remedial legislation. The Clayton Act, amended at their behest, declared: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."¹²

The first case to require an interpretation of that provision was *Duplex Printing Press Company v. Deering*¹³ wherein plaintiff, an open-shop manufacturer of printing presses sold throughout the country, sought an injunction against the defendants, members of a union, to restrain them from interfering with the sale of its products by means of a secondary boycott. The facts were essentially the same as in the Danbury Hatters' cases except that the secondary boycott was not as extensive being carried on only in New York State, principal center of the industry and plaintiff's main market for products manufactured in, and shipped from, Michigan. The two cases also differed in the relief sought, for the earlier case had demanded damages whereas injunctive relief was now being sought. It was argued that the Clayton Act had changed the law but this contention was decided in the negative and injunction was ordered by a divided court.¹⁴ Justice Pitney, speaking for the majority, said with reference to the statute: "The section assumes the normal objects of a labor

¹¹ 235 U. S. 522 at 534, 35 S. Ct. 170, 59 L. Ed. 341 at 349.

¹² 38 Stat. at L. 731, 15 U. S. C. A. § 17.

¹³ 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921).

¹⁴ Justice Brandeis wrote a dissenting opinion concurred in by JJ. Holmes and Clarke.

organization to be legitimate, and declares that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust Laws.”¹⁵

Lawful conduct in labor disputes did not extend to secondary boycotting, hence such conduct was condemned when the court observed: “Congress had in mind particular industrial controversies, not a general class war . . . The extreme and harmful consequences of the construction adopted in the court below are not to be ignored . . . An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant’s customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute,—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-trust Laws, of which the section under consideration forms, after all, a part.”¹⁶

Although he had written one of the opinions in the Danbury Hatters’ cases, Justice Holmes joined in the dissenting opinion written by Justice Brandeis. The latter wrote to the effect that the intent of the Clayton Act was to recognize the right of industrial conflict within and beyond the narrow boundaries imposed by the majority.¹⁷ He did not, however, attach constitutional or moral sanction to such latitude for he concluded his dissent by saying: “Because I have come to the conclusion that both the common law of a state and a

¹⁵ 254 U. S. 443 at 469, 41 S. Ct. 172, 65 L. Ed. 349 at 358.

¹⁶ 254 U. S. 443 at 472-7, 41 S. Ct. 172, 65 L. Ed. 349 at 359-61.

¹⁷ See, for example, the statement: “But Congress did not restrict the provision to employers and workmen *in their employ*. By including ‘employers and employees’ and ‘persons employed and persons seeking employment,’ it showed that it was not aiming merely at a legal relationship between a specific employer and his employees.”—254 U. S. 443 at 487, 41 S. Ct. 172, 65 L. Ed. 349 at 365.

statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."¹⁸

The Duplex case, like the Danbury Hatters' cases, involved clear and substantial interference with competitive markets, but while the intent in the Danbury Hatters' cases was to dominate the competitive market, that concerned in the Duplex case was primarily to unionize the plant with interference in the competitive market a subordinate and incidental matter. The court, however, made no distinction between the two situations over that fact so left it conjecturable if intention to foster monopoly was essential to a violation of the Sherman Act. That case also furnished no clarification as to the extent to which the restraint must proceed before it "essentially obstructs the free flow of commerce."

Questions thus left unanswered were taken for consideration when the Supreme Court entertained appeals in three significant cases, opinions in which were written by Chief Justice Taft. The first of them, that of *United Mine Workers of America v. Coronado Coal Company*,¹⁹ involved a strike through which the union prevented the mining of coal by local activities such as illegal picketing, intimidation of workers and destruction of property. The interference prevented the mining of some five thousand tons of coal per week, for which the owners sought treble damages under the Sherman Act. The complaint therein was ordered dismissed when the court concluded that interference with interstate commerce must be intended as a direct and not merely an incidental consequence of the conduct and, as the quantity involved was minor when compared with a national production of from ten to fifteen million tons per week, no such interference could be found. That idea was expressed in the following words, to-wit: "Obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and sub-

¹⁸ 254 U. S. 443 at 488, 41 S. Ct. 172, 65 L. Ed. 349 at 366.

¹⁹ 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975 (1922).

stantial effect to restrain it that the intent reasonably must be inferred."²⁰ While the court agreed that a secondary boycott was a restraint of trade within the meaning of the Sherman Act, still it held that not every interference with interstate commerce fell within its provisions and only those could be so treated when intention to interfere was found to exist or else where substantial interference had occurred.

Further treatment of the problem came in *United Leather Workers' International Union v. Herkert & Meisel Trunk Company*,²¹ where the facts were very similar to the first Coronado case except that injunctive relief rather than damages was sought. The threatened damage was slight, totalling only about \$3,000 and injunction was denied when the court said: "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price, or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."²² While the doctrine of substantial interference may not have been in the mind of Congress when it enacted the statute, the court was obliged to limit the applicability of the statute as a practical matter to prevent every strike-bound firm which had done business in interstate commerce from seeking relief in the federal courts.²³

Perhaps influenced by the dictum in the preceding case, the mine-owners in the Coronado situation amended their complaint and showed a stoppage of output amounting to five thousand tons of coal per day as well as an intent to drive nonunion coal off the market. This time they succeeded, for in *Coronado Coal Company v. United Mine Workers of America*²⁴ judgment in their favor was affirmed when the court said: "We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets or other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines . . ."²⁵

²⁰ 259 U. S. 344 at 411, 42 S. Ct. 570, 66 L. Ed. 975 at 995.

²¹ 265 U. S. 457, 44 S. Ct. 623, 68 L. Ed. 1104 (1924). McKenna, Van Devanter and Butler, JJ., dissented.

²² 265 U. S. 457 at 471, 44 S. Ct. 623, 68 L. Ed. 1104 at 1109.

²³ See, for example, the dissenting opinion of Stone, Ch. J., in *United Leather W. I. U. v. Herkert & Meisel Trunk Co.*, 284 F. 446 (1922), particularly p. 464-5.

²⁴ 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963 (1925).

²⁵ 268 U. S. 295 at 310, 45 S. Ct. 551, 69 L. Ed. 963 at 970.

While the second Coronado case laid down a rule as to the extent of restraint necessary where commodities in interstate commerce were involved, it made no ruling on the question as to what might be necessary where the restraint was imposed on labor itself. In fact, that question had never been raised prior thereto since in all the earlier cases the alleged violation of the Sherman Act had concerned commodities moving in interstate commerce. It required the case of *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association of North America*²⁶ to bring up that aspect of the problem. There the plaintiff, a nonunion producer of quarried limestone shipped in interstate commerce, sought to enjoin the defendants from preventing laborers in other states from working on the stones so shipped. Interference by the union officials was directed against the work on so-called "unfair" stones in an effort to compel unionization of the plant as its product competed with artificial stones produced elsewhere in the country in unionized shops. Injunction was granted by the majority on the authority of the Duplex and the second Coronado cases, Justice Sutherland saying: "Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-trust Act as interpreted by this court."²⁷

The concept that there was no distinction between commodities and labor where interstate commerce was concerned met with sharp disagreement on the part of Justice Brandeis. In a vigorous dissenting opinion, he stated: "The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 62 L. Ed. 968, 38 Sup. Ct. Rep. 473, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny to members of a small craft of workmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so."²⁸

²⁶ 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927). Brandeis, J., wrote a dissenting opinion concurred in by Holmes, J.

²⁷ 274 U. S. 37 at 54, 47 S. Ct. 522, 71 L. Ed. 916 at 923.

²⁸ 274 U. S. 37 at 65, 47 S. Ct. 522, 71 L. Ed. 916 at 928.

Extremes to which the absurdity of the argument that restraint on labor is an interference with interstate commerce might be carried is well illustrated by the case of *Levering & Garrigues Company v. Morrin*.²⁹ The plaintiff there had imported fabricated steel and iron for use in building construction in New York. Defendants, attempting to unionize plaintiff's plant, prevented employees from working on the imported material. Injunction against such interference was sought on the theory that a violation of the antitrust laws had occurred, but relief was denied on the ground that the activity was purely local. In that regard, Justice Sutherland quoted with approval from *Industrial Association of San Francisco v. United States*³⁰ by saying: "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."³¹

With the enactment of the Norris-LaGuardia Act,³² dealing as it does with limitations on the power of federal courts to grant injunctions in labor disputes, and the subsequent enactment of the Wagner Act,³³ partisans of labor could well hope that the law laid down in the Danbury Hatters' cases and in the Duplex case had been nullified as it applied to them. Further support for that view was found in the decision in *Apex Hosiery Company v. Leader*³⁴ in which case plaintiff sought damages under the Sherman Act when defendants, attempting to unionize the plant, caused a sit-down strike therein and prevented shipment of merchandise valued at \$800,000, the greater part of which was designed for interstate shipment. Judgment for plaintiff in the trial court was reversed on the ground that the statute did not extend to the point of penalizing a blockage of production and shipment of goods designed for interstate commerce.

Speaking on behalf of the majority, Justice Stone said: "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce."³⁵ He also added: "... the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are

²⁹ 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933).

³⁰ 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849 (1925).

³¹ 289 U. S. 103 at 108, 53 S. Ct. 549, 77 L. Ed. 1062 at 1066.

³² 47 Stat. at L. 70, 29 U. S. C. A. § 101 et seq.

³³ 49 Stat. at L. 449, 29 U. S. C. A. § 151 et seq.

³⁴ 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940). Hughes, Ch. J., wrote a dissenting opinion concurred in by McReynolds and Roberts, JJ.

³⁵ 310 U. S. 469 at 489, 60 S. Ct. 982, 84 L. Ed. 1311 at 1320.

actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.'"³⁶

Although the decision regarded the Danbury Hatters' cases, as well as the Duplex and Bedford cases, to be sound law and also reiterated the doctrine of the second Coronado case, it marked a definite advance for labor unions by deciding that interference by them at point of shipment as well as at place of manufacture did not come under the prohibition of the Sherman Act. Labor was also to receive some latitude in its activities for the "rule of reason" laid down in *Standard Oil Company v. United States*³⁷ required it. Said Justice Stone: "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act . . . Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from nonunion made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."³⁸

It remained for the decision in *United States v. Hutcheson*,³⁹ however, to completely eliminate the Duplex and Bedford cases from the labor scene. There the defendants, because of the unwillingness of a brewery to assist them in a jurisdictional dispute with another trade union growing out of a construction contract for a building for the brewery, brought a nation-wide boycott against the brewery's products even though it was not a party to the dispute. Criminal prosecution under the Sherman Act followed but a demurrer to the indictment was sustained when the court held that such statute had to be read together with the Clayton Act and the Norris-LaGuardia Act and, from such reading, the congressional intent was seen to be to effectively nullify the Duplex and Bedford cases.

³⁶ 310 U. S. 469 at 512, 60 S. Ct. 982, 84 L. Ed. 1311 at 1333.

³⁷ 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

³⁸ 310 U. S. 469 at 503, 60 S. Ct. 982, 84 L. Ed. 1311 at 1328.

³⁹ 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941). Roberts, J., wrote a dissenting opinion concurred in by Hughes, Ch. J.

In that regard Justice Frankfurter stated: "The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex Printing Press Co. Case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct . . . Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt . . . Such a dispute § 13(c) provides, 'includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee . . .' But to argue, as it was urged before us, that the Duplex Printing Press Co. Case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison."⁴⁰

The Hutcheson case expressly overruled the Duplex and Bedford cases and, as a consequence, has recognized that a secondary boycott cannot be enjoined. By not mentioning the Danbury Hatters' cases or the Coronado cases, the court has, however, left it conjecturable as to just how far labor unions will be permitted to go. It may have been the intention of the court, to be inferred from its silence thereon, that all such activities named in the Norris-LaGuardia Act be freed from injunctive restraint regardless of the effect on the market. The secondary boycott applied in the Hutcheson case, however, seems to have been sufficiently extensive to have fallen within the scope of the second Coronado case and hence would seem to warrant the imposition of damages under the Sherman Act. Denial of injunctive relief does not necessarily pre-suppose that there is no ground for the imposition of damages for, as a matter of fact, the contrary is often true. Justice Stone, in his concurring opinion therein, would seem to think differently for he said: "Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies have been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act."⁴¹

If, as a result of the Hutcheson case, labor unions and their officials are to be free from injunctive restraints and immune from crimi-

⁴⁰ 312 U. S. 219 at 231 and 234, 61 S. Ct. 463, 85 L. Ed. 788 at 792 and 795.

⁴¹ 312 U. S. 219 at 239, 61 S. Ct. 463, 85 L. Ed. 788 at 797.

nal prosecution under the Sherman Act regardless of the effect of their acts upon the interstate market, and if the sole penalty for such conduct is to be the mere imposition of damages, then Congress ought certainly to take steps to require labor unions to become responsible bodies. An excellent working model for any such legislation may be found in the British "Trade Disputes and Trade Unions Act of 1927."⁴² Its provisions would bear careful study and the enactment of its main features would help fill a gap which will be created by the expiration of the War Labor Disputes Act.

M. S. MARKS

CIVIL PRACTICE ACT CASES

GARNISHMENT—PERSONS AND PROPERTY SUBJECT TO GARNISHMENT—WHETHER OR NOT CONTENTS OF SAFETY DEPOSIT BOXES MAY BE REACHED BY GARNISHMENT PROCEEDINGS—In the recent case of *Morris v. Beatty*,¹ after judgment against the principal debtor and return of execution unsatisfied, plaintiff commenced garnishment proceedings against a bank. The latter answered by stating that, at the time of service of summons upon it, it had a small balance in an account which it had set-off against a note owed to it by the principal debtor and that it had also rented a safe deposit box in its vaults to such judgment debtor although it claimed to have no control over the contents thereof. Before hearing on the answer was possible, an order in bankruptcy restrained the plaintiff from prosecuting his garnishment action. Subsequent thereto, the garnishee permitted the principal defendant to have access to the safety deposit box on several occasions. When the injunction order was eventually vacated, the plaintiff caused the garnishment proceeding to be set for hearing² but the trial court discharged the garnishee. On appeal, such decision was reversed by the Appellate Court for the First District on the ground that the safety deposit box and its contents were subject to garnishment as property in the hands of a bailee and the conduct of the garnishee in permitting the principal defendant to have access to the same placed upon it the burden of proving that none of the contents had been removed therefrom or else to suffer judgment for the amount of the plaintiff's claim.³

Although the principal question involved in the instant case has never been passed upon before in the reviewing courts of this state, the holding could be said to be foreshadowed by the decision in *National Safe Deposit Company v. Stead*,⁴ which had held the provi-

⁴² 17 Geo. V, c. 23

¹ 323 Ill. App. 390, 55 N. E. (2d) 830 (1944).

² The garnishee had, in the meantime, moved for discharge on the ground that, by failure to traverse the answer, the same stood as admitted to be true. Such point was deemed waived, by reason of the fact that the garnishee had introduced evidence to sustain the answer, on the authority of *Pink v. Chinskey*, 303 Ill. App. 55, 24 N. E. (2d) 585 (1939), abst. opin.

³ *Framheim v. Miller*, 241 Ill. App. 328 (1926), was distinguished on the ground that the attempt there had been to punish the garnishee for contempt for refusal to comply with an order to open a safety deposit box.

⁴ 250 Ill. 584, 95 N. E. 973 (1911).

sions of the Inheritance Tax Act constitutional as applied to proprietors of safety deposit vaults on the theory that the relationship between the proprietor and customer was intrinsically that of bailor and bailee rather than landlord and tenant, as well as by subsequent cases in which the degree of duty owed by the proprietor for the care of the customer's valuables had been enunciated.⁵ If such persons are bailees, there can be no question but what they are subject to the provisions of the Garnishment Act for the same applies not only to money but also to "goods, chattels, choses in action or effects other than money" belonging to the judgment debtor.⁶ Proprietors of similar vaults in other states have been held to be subject to garnishment process under somewhat similar statutes,⁷ so the application of the statute in the instant case seems warranted.

More momentous, however, is the matter of the action which should be taken after the service of garnishment process. The garnishee is required, by Section 5 of the statute, to file a "full, direct and true" answer to all interrogatories submitted by the judgment creditor,⁸ and is also obliged to deliver up possession of any goods, chattels, etc., to the proper officer.⁹ From the very nature of the garnishee's business, it is impossible to give an accurate list of the contents of a locked safety deposit-box to which the garnishee has no unaided power of access, or to surrender the possession thereof. For that reason it was argued that because no independent control could be exercised over the contents of the box, the same were not in the "possession, custody or charge" of the garnishee.¹⁰ The fact remains, however, that the judgment debtor could have no access to the property either, unless with the consent of the garnishee, so it is obvious that the latter is in a position to exert some control over the same.

It has been held that upon service of garnishment process, a lien is impressed upon any goods, chattels or possessions in the hands of the garnishee.¹¹ It would, perhaps, be more nearly the case to say that, if the garnishee fails or neglects to surrender such goods or to preserve the same for subsequent delivery upon order of court, he subjects him-

⁵ See, for example, *Hauck v. First Nat. Bank of Highland Park*, 323 Ill. App. 300, 55 N. E. (2d) 565 (1944).

⁶ Ill. Rev. Stat. 1943, Ch. 62, § 20.

⁷ *Washington Loan & Trust Co. v. Susquehanna Coal Co.*, 26 App. D. C. 149 (1905); *Lockwood v. Manhattan Storage & Warehouse Co.*, 50 N. Y. S. 974, 50 App. Div. 68 (1898); *Tillinghast v. Johnson*, 34 R. I. 136, 82 A. 788, 41 L. R. A. (N.S.) 764 (1912); *West Cache Sugar Co. v. Hendrickson*, 56 Utah 327, 190 P. 946, 11 A. L. R. 216 (1920); *Trowbridge v. Spinning*, 23 Wash. 48, 62 P. 125, 54 L. R. A. 204 (1900).

⁸ Ill. Rev. Stat. 1943, Ch. 62, § 5.

⁹ *Ibid.*, Ch. 62, § 20.

¹⁰ *Ibid.*, Ch. 62, § 5.

¹¹ *Fornoff v. Smith*, 281 Ill. App. 232 (1935); *Buckingham v. Shoyer*, 86 Ill. App. 364 (1900); *Ham v. Peery*, 39 Ill. App. 341 (1891); *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572 (1883).

self to possible contempt proceedings¹² and may suffer personal judgment for the amount of the plaintiff's original judgment.¹³ In the light thereof, it clearly becomes incumbent on the garnishee in a case like the instant one, for his own protection, to prevent the judgment debtor from having access to the safety deposit box or at least to insure that none of the contents are removed from the same. By reason of failure to observe that duty, he would come within the penalty provisions of the statute.¹⁴

Had the garnishee performed its duty and denied access to the box in the instant case, the property would have been preserved intact but it would still not have been available for the satisfaction of the creditor's judgment as the garnishee, alone, was in no position to surrender the same. The court intimated, in the instant case, that under the equitable powers conferred on it by the Garnishment Act¹⁵ it had the power to compel the opening of the box in question upon application for an order to that end. Any such statement was purely dictum for no request of that nature was ever made, but support for that view may be found in the case of *West Cache Sugar Company v. Hendrickson*¹⁶ where the proper procedure to be taken is outlined and follows closely the procedure taken when an inventory for inheritance tax purposes is taken of the contents of a box owned by a deceased person where the key is lost or mislaid. Any expense attendant thereon was treated as a proper item of costs to be charged against the plaintiff. If property possibly belonging to others than the judgment debtor be found therein, the potential owners thereof can be summoned to make known their interest.¹⁷ For the protection of the garnishee, a complete inventory of the contents should be made in the presence of its officials, and final judgment should be obtained to absolve it from any liability to the judgment debtor.¹⁸ In that fashion, the vault proprietor may avoid such liability as was imposed in the instant case.

R. BURDETT

¹² See *Framheim v. Miller*, 241 Ill. App. 328 (1926).

¹³ Ill. Rev. Stat. 1943, Ch. 62, § 25. See also in re *Marsters*, 101 F. (2d) 365 (1939); *London Guarantee & Accident Co. v. Mossness*, 108 Ill. App. 440 (1903); *McElwee v. Wilce*, 80 Ill. App. 338 (1899); *Gregg v. Savage*, 51 Ill. App. 281 (1894); *McCoy v. Williams*, 6 Ill. (1 Gil.) 584 (1844).

¹⁴ The argument that the burden of proof was on the judgment creditor to show that the garnishee had possession of property belonging to the judgment debtor was dismissed when the court said that the conduct of the garnishee in granting access to the box to the judgment debtor required the garnishee to assume the burden of proving the opposite: 323 Ill. App. 390 at 402, 55 N. E. (2d) 830 at 835.

¹⁵ Ill. Rev. Stat. 1943, Ch. 62, § 24.

¹⁶ 56 Utah 327, 190 P. 946, 11 A. L. R. 216 (1920). Accord: *Trainer v. Saunders*, 270 Pa. 451, 113 A. 681, 19 A. L. R. 861 (1921); *Carples v. Cumberland Coal & Iron Co.*, 240 N. Y. 187, 148 N. E. 185, 39 A. L. R. 1211 (1925). Contra: *Tow v. Evans*, 194 Ga. 160, 20 S. E. (2d) 922 (1942); *Medlyn v. Ananieff*, 126 Conn. 169, 10 A. (2d) 367 (1939); *Williams v. Ricca*, 324 Pa. 33, 187 A. 722 (1936).

¹⁷ Ill. Rev. Stat. 1943, Ch. 62, §§ 11-2.

¹⁸ Ill. Rev. Stat. 1943, Ch. 62, § 16. See also *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636 (1895); *Ippoliti v. Puglisi*, 241 Ill. App. 494 (1926).

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price, \$2.00 per year Single copies, 75c Foreign subscription, \$2.50

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VOLUME 23

MARCH, 1945

NUMBER 2

DISCUSSION OF RECENT DECISIONS

CORPORATIONS — CORPORATE POWERS AND LIABILITIES — WHETHER “NO-ACTION” CLAUSE IN CORPORATE BOND PREVENTS SUIT AT LAW AFTER MATURITY BY HOLDER UNABLE TO SECURE SUFFICIENT PERCENTAGE OF HOLDERS TO JOIN IN DEMAND ON TRUSTEE—In *Gordon v. Conlon Corporation*,¹ the holder of two corporate bonds, part of a large issue, sued at law in his own name to recover the amount due thereon at maturity. Judgment in his favor was granted over objection that all right of action upon such bonds, whether by reason of default prior to maturity or for any other reason, was vested in the trustee named in the trust agreement securing such issue unless upon failure of the trustee to act after demand made by a specified percentage of the holders of such bonds. It appeared that the greater proportion of such holders had consented to an extension of the maturity date, and it was impossible by reason thereof for the plaintiff to procure enough other uncommitted holders to join in a sufficient demand. On appeal, such judgment was reversed when the Appellate Court for the First Dis-

¹ 323 Ill. App. 380, 55 N. E. (2d) 821 (1944).

strict found that the limitation of the trust agreement, suitably incorporated in the bonds themselves, prevented any action whatever except in the name of the trustee.

One earlier Illinois case might seem to oppose the holding in the instant case, for the reported headnote to the abstract opinion therein suggests that limitations of the type in question do not apply to suits at law after maturity.² Examination of the record therein, however, discloses that the precise question here involved was given little attention and the case was settled on other points. The instant case, therefore, marks the first time the issue has been squarely decided in this state.

In the absence of suitable limitation in the bond, it is fundamental law that the holder of a bond secured by a mortgage or a trust indenture has, after maturity, the right to sue at law to recover the amount promised independently of any restriction contained in the mortgage or trust indenture with reference to its foreclosure, for he is the holder of two separate and distinct rights.³ His right to enforce the bond independently of the mortgage may, however, be limited by suitable provisions particularly if such provisions be reasonable ones.⁴ But such restrictions are generally subject to strict construction for they derogate against the common-law rights of creditors⁵ and will not be enforced unless there is not only reference to the same but also suitable limitation on the face of the bond itself showing that the rights of the holder are qualified rather than absolute.⁶ Tested in that light, the qualification on the face of the bonds involved in the instant case was clearly sufficient to warn the holder that he possessed no unqualified promise.

The principal ground relied on, however, was that the acts of the corporate debtor and of the trustee, acting in conjunction with the greater percentage of the bondholders, in extending the maturity date of all bonds owned by such persons had rendered it impossible for the plaintiff to comply with such restrictions, hence he was entitled to be relieved therefrom. Inability to obtain joint action from a sufficient percentage of other holders has been held no excuse for not complying with the requirement of such restrictive clauses in cases involving almost identical facts to the instant case⁷ and it has even been held that such restriction cannot be avoided by showing that the greater percentage of holders were acting collusively to defeat the rights of the

² *Kaletka v. Archer Coal & Material Co.*, 287 Ill. App. 631, 5 N. E. (2d) 879 (1936).

³ *Rohrer v. Deatherage*, 336 Ill. 450, 168 N. E. 266 (1929); *Rogers v. Meyers*, 68 Ill. 92 (1873).

⁴ See annotation in 108 A. L. R. 88, particularly p. 90, and cases there cited.

⁵ *Boley v. Lake Street Elev. R. Co.*, 64 Ill. App. 305 (1896).

⁶ *Oswianza v. Wengler & Mandell*, 358 Ill. 302, 193 N. E. 123 (1934), affirming 273 Ill. App. 239 (1934).

⁷ See, for example, *Crothwaite v. Moline Plow Co.*, 298 F. 466 (1924).

minority.⁸ It has also been held that, for purpose of computation, the required percentage must be calculated on the total amount of outstanding bonds and not just a percentage of those which have not been extended or committed to a reorganization.⁹ So essential would seem compliance with such restrictions that in *Central States Life Insurance Company v. Kopljar Company*¹⁰ recovery was denied, in the absence of demand on the trustee, even though the holder was said to possess "almost all the bonds."¹¹

More equitable would seem the holdings in other cases which have permitted suit, even though plaintiff lacked sufficient holdings to warrant demand on the trustee, when it appeared that the majority holder was an operating company which deliberately withheld the payment of interest at a time when, by reason of its large holdings, it could postpone action as long as it pleased¹² or where the balance of the issue was in the hands of one holder who had refused to give consent.¹³ Courts have even gone so far as to construe such restrictions narrowly so as not to defeat a suit at law after maturity at the instance of a minority holder,¹⁴ such restraint being limited to apply only to equitable actions designed to reach the security pledged for the collective benefit of all holders.¹⁵

While there may be valid reason for clauses of this type where joint action is desirable, as in case of an election to declare the entire issue due and to foreclose in case of an interim default, there seems a certain injustice in denying to the creditor, no matter how small, his right to any action after maturity particularly where he cannot, by reason of means beyond his control, muster sufficient strength to compel action in his behalf. Under the rule of the instant case, such denial might even result in loss of the total claim by lapse of time for unless he joins in the extension and obtains the benefits thereof his claim might eventually be outlawed although, through no fault of his own, he cannot prosecute suit. It would seem more just to permit recovery or else to require, in the interest of reasonableness, that clauses of this nature should provide that upon approval of a sufficient percentage of holders all bonds of the same issue should be extended so as to mature at the same time.

P. MORAN

⁸ *Florida Nat. Bank v. Jefferson Standard L. Ins. Co.*, 123 Fla. 525, 167 So. 378 (1936), rehearing denied 125 Fla. 386, 169 So. 729 (1936).

⁹ *Varner v. Atlanta Laundries*, 182 Ga. 148, 184 S. E. 877 (1936).

¹⁰ 80 F. (2d) 754 (1936).

¹¹ In *Southern National Bank v. Germania Mfg. Co.*, 176 N. C. 318, 97 S. E. 1 (1918), however, action was not denied when it appeared that plaintiff held the entire issue.

¹² *Linder v. Hartwell R. Co.*, 73 F. 320 (1896).

¹³ *Weir v. Bauer*, 75 Utah 498, 286 P. 936 (1930).

¹⁴ *Bullowa v. Thermoid Co.*, 114 N. J. L. 205, 176 A. 596 (1935).

¹⁵ *Hoyt v. E. I. DuPont DeNemours Powder Co.*, 88 N. J. Eq. 196, 102 A. 666 (1917).

CORPORATIONS—PUBLIC REGULATION AND SUPERVISION—WHETHER OR NOT PUBLIC OFFERING OF UNQUALIFIED STOCK BY OWNER THEREOF THROUGH LICENSED BROKERS OPERATING ON A COMMISSION BASIS CONSTITUTES A VIOLATION OF SECURITIES LAW SO AS TO ENTITLE PURCHASER TO RECOVER PURCHASE PRICE—In *Scully v. DeMet*,¹ the Appellate Court for the First District was asked to interpret and apply Section 5 of the so-called "Blue Sky Law"² which deals with the exemption which may be granted to the sale of securities not registered under the Securities Law. The facts therein disclosed that at the time of incorporation in Delaware of the company concerned the defendants received some twenty thousand shares in a voting trust covering the common stock thereof for their minority interest in the enterprise so incorporated. These shares were held by the defendants as their individual property until 1936 when a block of fifteen thousand of such voting trust shares was sold to the public through a firm of licensed brokers. Plaintiffs, who had held preferred shares of the corporation, were induced by the salesmen of such brokerage firm to sell the preferred stock and to buy shares in the voting trust so offered and they acquired an aggregate of two hundred and forty of the shares so sold. Upon learning that the stock was not qualified under the Securities Act, the plaintiffs tendered return of the stock so purchased and sued for the return of the purchase price. Judgment for the plaintiff in the trial court upon summary proceedings was affirmed when the Appellate Court held that the sales were not exempt as claimed by the defendants.

The prime defense to the action was that the sale fell within an exemption which declares that any security sold "by or on behalf of a vendor who is not an issuer, or underwriter or promoter of the issuer, or a dealer or broker; and who, being a bona fide owner of such security, disposes of his own property for his own account"³ shall be treated as a sale of class "B" securities and, as a consequence, the right of rescission granted by the statute⁴ was unavailable. It was also argued that, inasmuch as the securities were sold through a broker "on behalf of a vendor" in the aforementioned category, the fact that

¹ 323 Ill. App. 74, 55 N. E. (2d) 101 (1944). It is understood that leave to appeal was sought and denied. Thereafter, a petition was presented by a number of attorneys customarily representing security dealers for leave to appear as *amici curiae*. They sought to have the Illinois Supreme Court reconsider its action and grant leave to appeal. Such request has apparently been denied. The reported decision of the Appellate Court states that judgments totalling in excess of the jurisdictional amount were granted the several plaintiffs, but it does not reveal if any single plaintiff recovered more than \$1500.00. If not, there is doubt that the Illinois Supreme Court would have jurisdiction to review in the absence of a certificate of importance: Ill. Rev. Stat. 1943, Ch. 110, § 199(2). See also *Antosz v. Goss Motors, Inc.*, 378 Ill. 608, 39 N. E. (2d) 322 (1942), and *Martin v. Martin's Estate*, 377 Ill. 392, 36 N. E. (2d) 742 (1941), both noted in 20 CHICAGO-KENT LAW REVIEW 174.

² Ill. Rev. Stat. 1943, Ch. 121½, § 100.

³ *Ibid.*, § 100(1).

⁴ *Ibid.*, § 132.

intermediaries were used in the transaction was of no legal significance.

Little was said in the opinion on the last point, for the court decided the case on the major issue, but there is occasion to doubt that the sale was "on behalf of the vendor" as the defendants gave the brokerage firm unrestricted power to sell to whom it pleased at any price it pleased so long as the defendants received a net sum fixed by them. Any amount realized over that figure was to be retained by the brokerage firm as a commission. It would appear from the facts of the case, however, that the sales made did net the brokers an unusual profit⁵ so as to give the impression that the brokers were more than just intermediaries in the transaction. While the statute fixes no limit to the broker's compensation⁶ and there is nothing in the general law which prevents an agent from being compensated on the basis of whatever he may procure over a given figure,⁷ the policy behind the Securities Act would seem to dictate that the intermediary conducting a sale "on behalf of" a vendor should be limited to reasonable compensation so as not to be tempted, by his own cupidity, to take advantage of unwary purchasers.

Of principal significance, though, is the holding on the major issue, i.e. whether or not the sales came within the statutory exemption. No precedent exists on this point for the instant case represents the first time the question has been posed since the statute was amended in 1933. Prior to that time only an isolated transaction could be classed as exempt⁸ and the law then clearly did not contemplate an indiscriminate public offering of securities.⁹ That limitation was not carried over into the present statute so it would seem, on the surface, from the fact of such deletion, that the legislature intended that a vendor selling on his own account should be free to dispose of his holdings in a block or peddle the same to many purchasers if he so saw fit. It might be, if the vendor's holding was extensive, that sale thereof could only be accomplished in the last mentioned way so that change in the statute could be said to reflect legislative recognition of that possibility. When it is also noticed that the phrase "on behalf

⁵ The shares appear to have cost plaintiffs \$7.00 each, while the defendants received \$4.375 thereof. Maximum commissions for odd-lot sales of stocks registered on the New York Stock Exchange selling below \$10.00 per share would be approximately twelve cents per share as contrasted with the \$2.625 per share received as "commission" by the brokers in the instant case.

⁶ Ill. Rev. Stat. 1943, Ch. 121½, § 118e(p), indicates that taking a "grossly unfair advantage" of a customer is ground for revoking the dealer's license.

⁷ *Hutton v. Renner*, 74 Ill. App. 124 (1897); *Apple-Cole Co. v. Maibohm*, 295 Ill. App. 613, 15 N. E. (2d) 61 (1938).

⁸ *Laws 1921*, p. 360. The 1919 statute had contained the limitation that such sales were exempt only "when not made in the course of continued and repeated transactions of a similar nature." See *Laws 1919*, p. 355.

⁹ *Hudson v. Silver*, 273 Ill. App. 40 (1933); *People v. Weese*, 225 Mich. 480, 196 N. W. 516 (1923).

of" a vendor was likewise inserted into the original act,¹⁰ further strength is given to the defendants' argument that the legislature not only realized the necessity of giving the vendor the right to make many piecemeal sales of his holdings, if necessary, but also considered that it might, because of the multiplicity thereof, be practical to use the services of a skilled organization such as is possessed by the average licensed brokerage firm.

Plausible as such argument might seem, the Appellate Court went deeper into the problem of ascertaining the legislative intent than can be done just by drawing inferences from changes in language or grammatical context. It observed that the prime purpose of the whole statutory scheme was to shield the public at large, particularly those members thereof apt to invest in stocks, from the dishonesty or irresponsibility of persons engaged in the business of disposing of securities of uncertain value.¹¹ Individual buyers who lacked the means of investigation, it found, were to be protected by the statute from the usual consequences of the doctrine of *caveat emptor*.¹² When such fundamental purposes were borne in mind, it was seen that offerings such as were made in the instant case would be the very sort of thing most apt to mislead members of the investing public. Such persons would be the ones most likely to draw assurance, from the fact of a public offering through a licensed broker, that the securities purchased were suitable for investment. It was also deemed unlikely that any significance would be given to the statement, if made, that the broker was making the offering on behalf of a vendor of unregistered securities. For these reasons, the court concluded that the transaction was contrary to the spirit of the whole act in question as well as not permitted by the letter of the specific provision relied on by the defendants.

There is some doubt as to the correctness of the court's conclusion that the transaction violated the letter of the law, for, as has been pointed out, the sales measured up to the apparent standard laid down in that (1) they were made on behalf of a vendor who was not an issuer, and (2) were superficially, at least, made for his own account. If the court were limited to applying the law as it is written, the action taken would then be clearly improper and should call for reversal. But ambiguity and doubt may exist not alone over the letter but also as to the spirit of a statute. In such a case it is as much the

¹⁰ The present phraseology first appeared in the 1931 revision: Laws 1931, p. 820. Prior thereto the law had permitted sales by the owner's representative: Laws 1921, p. 360.

¹¹ *Stewart v. Brady*, 300 Ill. 425, 133 N. E. 310 (1921); *Brannan, Beckham & Co. v. Ramsaur*, 41 Ga. App. 166, 152 S. E. 282 (1930); *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937 (1920).

¹² *Douthit v. Swiney*, 310 Ill. 180, 141 N. E. 535 (1923).

duty of the court to resolve the ambiguity or doubt¹³ as it would be to construe a conflict in language.¹⁴ No better solution for a difficulty of that nature can be had than to ascertain the fundamental legislative purpose and seek to effectuate it. There being a conflict between the letter and the spirit of the exemption here involved, the court acted properly in endeavoring to resolve the same and it would seem to have correctly interpreted the legislative objective.

It might be urged that the Securities Law, being opposed to common law principles, should be strictly construed. Such at least has been the intimation in cases dealing with penalty provisions of other statutes.¹⁵ But if the fundamental purpose of the Securities Law is to protect the investing public rather than to facilitate the disposition of securities owned, so narrow an attitude could well be dispensed with.¹⁶

W. A. McCLINTOCK, JR.

LANDLORD AND TENANT—TERMINATION OF AN ESTATE FOR YEARS—LIABILITY OF TENANT AFTER TENANCY HAS BEEN TERMINATED BY LEGAL PROCEEDINGS FOR RENT ALREADY ACCRUED—An unusual point of law was presented to the Appellate Court for the First District in the recent case of *Metropolitan Trust Company v. Fishman*¹ where it appeared that the defendant had entered into a lease with a receiver of an apartment hotel building but subsequently defaulted in the payment of rent and taxes. The plaintiff, a successor-receiver, upon such default, petitioned the court for a writ of assistance which was granted. The order, however, not only directed plaintiff to resume possession but also directed that "the lease . . . be . . . cancelled."² Thereafter, within ten years from the date of such order, the present action was brought to recover the amount of unpaid rent and taxes due under the lease and accrued prior to its termination. Defense to such suit was based on the contention that the cancellation of the lease made it null and void *ab initio* extinguishing all liability thereunder, or if not, that as the action was commenced more than five years

¹³ It is a fundamental principle of statutory construction that courts are governed by the legislative intention rather than by the exact words used: *Burke v. Industrial Commission*, 368 Ill. 554, 15 N. E. (2d) 305, 119, A. L. R. 1152 (1938); *Smith v. Logan County*, 284 Ill. 163, 119 N. E. 932 (1918); *Hoyne v. Danisch*, 264 Ill. 467, 106 N. E. 341 (1914). When so construing, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention: *People v. Wallace*, 291 Ill. 465, 126 N. E. 175 (1920); *Furlong v. South Park Commissioners*, 320 Ill. 507, 151 N. E. 510 (1926).

¹⁴ *Baker & Conrad v. Chicago Heights Const. Co.*, 364 Ill. 386, 4 N. E. (2d) 953 (1936).

¹⁵ See, for example, *C., R. I. & P. Ry. Co. v. People*, 217 Ill. 164, 75 N. E. 368 (1905).

¹⁶ *Sutherland, Statutes and Statutory Construction* (Callaghan & Co., Chicago, 1943), 3rd Ed., Vol. 3, p. 391.

¹ 323 Ill. App. 413, 55 N. E. (2d) 837 (1944). Leave to appeal has been denied.

² 323 Ill. App. 413 at 414, 55 N. E. (2d) 837.

after the date of the order, the action was barred.³ Judgment for plaintiff in the trial court was affirmed when the Appellate Court held that the word "cancelled" as used in the order was used inadvertently; that the effect of such cancellation was merely to terminate the relationship of landlord and tenant but not the express agreement to pay rent and taxes which had accrued; and that defendant's liability was not barred.

Definitions of the word "cancel," found in other contract cases, suggest a purpose to annul and destroy, and necessarily imply a waiver of all rights thereunder.⁴ For that reason, after a contract is discharged either by rescission or by substitution of a new contract, no action can be maintained upon the original contract but any benefits accruing to either party by a part performance, unless expressly released, must be recovered in an action on *quantum meruit* or *quantum valebant*.⁵ That word also possesses the meaning to make void or invalid.⁶ When one party rescinds or repudiates a contract, he merely gives notice to the other party that he does not propose to be bound thereby. If a court of equity, however, grants rescission or cancellation it destroys the contract and renders it as though it had never existed.⁷ On the surface, therefore, it would appear that the defendant's contention was sound and plaintiff's right to recover could rest only upon an implied agreement for use and occupation. But a closer examination of such cases reveals that they are not in point with the instant problem either because the cancellation was mutually agreed upon or because it was ordered by a court upon proper complaint setting forth fraud or other equitable ground for nullification.

Inadvertent action by the court in the original proceeding herein, when it declared the lease "cancelled," ought not serve to destroy the plaintiff's right to rent accrued for any of several reasons. In the first place, that court had no right, under the facts, to cancel the lease for plaintiff had not requested such action and the exercise of any such power would not only amount to a taking of property without

³ Ill. Rev. Stat. 1943, Ch. 83, § 16. The theory underlying that part of the defense was that, as the suit was one for use and occupation upon an implied agreement, substituted for the cancelled express agreement, the five-year rather than the ten-year statute applied.

⁴ Whedon v. Lancaster County, 80 Neb. 682, 114 N. W. 1102 (1908); Capital City Mutual Fire Ins. Co. v. Detwiler, 23 Ill. App. 656 (1887).

⁵ Lipschutz v. Weatherly & Twiddy, 140 N. C. 365, 53 S. E. 132 (1906), citing Drefus v. Columbian Exposition Salvage Co., 194 Pa. 475, 45 A. 370, 75 Am. St. Rep. 704 (1900).

⁶ Clegg v. Schvaneveldt, 79 Utah 195, 8 P. (2d) 620 (1932).

⁷ United Wool Dyeing & Finishing Co. v. Werner & Co., 102 N. J. Eq. 322, 140 A. 465 (1928).

due process of law,⁸ but would make the order void at least to the extent that it was without foundation under the issues raised.⁹

Even though a valid termination of the lease had occurred through proper legal proceedings, such termination could have only prospective effect. That, at least, is the tenor of analogous cases where leases have been terminated as the result of legal action. Thus the majority view, in condemnation proceedings, is that a taking of the whole of the demised premises under the power of eminent domain terminates the lease and relieves the tenant of liability to pay rent accruing after the event but not before.¹⁰ Eviction by title paramount will discharge the lessee from the obligation to pay rent which may fall due, by the terms of the lease, after eviction.¹¹ In foreclosure suits, a lease made subsequent to the mortgage may be terminated provided the lessee is made a party to the suit.¹² If so, the lessee is discharged from liability for future rent due thereunder¹³ but would not be absolved from accumulated past due rent. It should follow, therefore, that the termination of the defendant's right to further possession of the demised premises involved in the instant case should have no bearing on his liability for rent accrued. It is true that one authority purports to lay down the rule that "after the cancellation of a lease in legal proceedings, liability for rent thereunder is extinguished,"¹⁴ but such statement is misleading and an examination of the cases cited in support thereof discloses that the only question involved therein was a right to rent which had accrued after the order of termination.¹⁵

When it is remembered that every lease possesses a double aspect,

⁸ U. S. Const., Fifth Amend.

⁹ See, for example, *Holmstedt v. Holmstedt*, 383 Ill. 290, 49 N. E. (2d) 25 (1943), and *Kaifer v. Kaifer*, 286 Ill. App. 433, 3 N. E. (2d) 886 (1936), noted in 15 CHICAGO-KENT REVIEW 72.

¹⁰ *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839 (1891). That result may be achieved by statute in some jurisdictions: *Hinrichs v. New Orleans*, 50 La. Ann. 1214, 24 So. 224 (1898); *Spence v. Charrot*, 137 App. Div. 882, 121 N. Y. S. 519 (1910).

¹¹ *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 (1893).

¹² *Richardson v. Hadsall*, 106 Ill. 476 (1883); *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382 (1864); *Reichert v. Bankson*, 199 Ill. App. 95 (1916); *Gale v. Carter*, 154 Ill. App. 478 (1910); *Runner v. White*, 60 Ill. App. 247 (1895).

¹³ *Jetzinger v. Consumers Sanitary, etc., Stores*, 268 Ill. App. 482 (1932); *Bartlett v. Hitchcock*, 10 Ill. App. 87 (1882); *Reed v. Bartlett*, 9 Ill. App. 267 (1881). See also *Stein v. Midway Chevrolet Co.*, 315 Ill. App. 105, 42 N. E. (2d) 125 (1942).

¹⁴ 36 C. J., *Landlord and Tenant*, § 1143, p. 336.

¹⁵ In *Sigur v. Lloyd*, 1 La. Ann. 421 (1846), for example, it was held that where the lessor sought judgment for rent due and to become due and for a dissolution of the lease, and defendant acquiesced in the prayer for dissolution, the lessee could not be ordered to pay rent falling due after the dissolution. In *Ernst v. Zeltner Brewing Co.*, 117 N. Y. S. 922 (1909), lessee, who had been made a party to a foreclosure proceeding which had terminated the lease, was held not liable on the lease itself even though he had continued in possession.

being both a conveyance and a contract,¹⁶ a ready explanation may be found for the view that a lease may cease being operative as to the right of future possession yet remain effective as to past obligations for rent. The grant may expire or be nullified, but the contract can survive. Moreover, as a lease is usually a divisible contract, calling for performance and payment in successive divisions, receipt of a part performance should create an obligation to pay for that benefit in spite of a subsequent breach.¹⁷ As there was no evidence in the instant case of an intention to release the tenant from the consequence of his default except for the unfortunate word "cancelled," nor proof of consideration furnished to support the idea of an accord and satisfaction, the result achieved in the instant case seems to be eminently just as well as legally sound.

H. H. FLENTYE

SALES — CONDITIONAL SALES — WHETHER OR NOT TRANSACTION IN FORM OF CONDITIONAL SALE BUT IN FACT ONE OF LENDING AND BORROWING IS EFFECTIVE AGAINST RIGHTS OF SUBSEQUENT JUDGMENT CREDITOR OF PURPORTED CONDITIONAL VENDEE—In *Raymond v. Horan, Bailiff of Municipal Court of Chicago*,¹ an action to determine plaintiff's right to certain personal property, it was necessary to ascertain what legal effect was to be given to a contract which in form and by the intention of the parties thereto was a conditional sales contract. The facts were these: One Coburn, desirous of engaging in business, found a likely location in which were installed suitable fixtures and equipment owned by a finance company. Coburn borrowed funds from plaintiff and with this money purchased the fixtures and equipment. On the same day he executed and delivered to plaintiff a bill of sale covering the property and as part of the same transaction plaintiff purportedly sold the goods back to Coburn under a conditional sales contract providing for semi-annual payments. The testimony showed that the absolute sale to plaintiff and his re-sale to Coburn under the conditional sales contract had only one purpose, to-wit: that of securing plaintiff's loan. Subsequently, one of the defendants sold supplies to Coburn and, upon his failure to pay, procured judgment. Execution and levy on the fixtures and equipment involved was made by the other defendant. Plaintiff thereupon challenged the right of the judgment creditor, claiming title under the conditional sales contract. The trial court decided in favor of plaintiff, but on appeal the judgment was reversed, the court finding that the purported sale and conditional resale were but subterfuges and that, in legal effect, the transaction

¹⁶ *University Club v. Deakin*, 265 Ill. 257, 106 N. E. 790 (1914).

¹⁷ See Williston, *Contracts*, Rev. Ed., Vol. III, § 861.

¹ Sub nom. *Appeal of Continental Distributing Co.*, 323 Ill. App. 120, 55 N. E. (2d) 99 (1944).

amounted to an unrecorded chattel mortgage which could not be set up against the rights of the judgment creditor.²

The determination of whether a particular transaction shall have the legal effect of a conditional sales contract or of a chattel mortgage is a matter which has caused the courts considerable difficulty. This, no doubt, is due to the fact that both are in important aspects governed by the same principles and the relationship of the parties in each case bears a striking similarity.³ There are differences, however, the most important of which is that under a conditional sales contract the vendor remains owner, subject, to the vendee's right to acquire title by fulfilling the specified conditions, while in the case of an absolute sale with a mortgage back the vendee acquires title subject to a lien brought into existence by the mortgage.⁴

A sales transaction wherein by the contract of the parties, the seller then being the unquestioned owner of the chattels involved, it is expressly provided that the title to the property shall remain in the vendor until the purchase money is fully paid and by which there is no reservation of a lien will be, without question, denominated a conditional sale and not a mortgage.⁵ It will also not be disputed that a transaction wherein the owner of chattels, wishing to borrow money, effects a loan and pledges the title to the property as security for the borrowed money is properly classified as a chattel mortgage.⁶ But between these two extreme types of transactions there exist numerous business dealings which can be classified as one or the other only after considerable study and then sometimes with grave doubt as to whether the proper classification has been made. It will also be found that what may be deemed a conditional sale when only the rights of the vendor and vendee are being adjudicated by the courts may, chameleon-like, change its nature and legal effect to a chattel mortgage when the rights of a third party are involved.⁷

² While the Illinois law makes no provision for recording conditional sales contracts, chattel mortgages, to be binding on third parties, must be recorded: Ill. Rev. Stat. 1943, Ch. 95, § 4.

³ General Motors Acceptance Corp. v. Baker, 291 N. Y. S. 1015 (1936).

⁴ Stroup v. Meyers, 106 Ind. App. 538, 21 N. E. (2d) 75 (1939); Mondie v. General Motors Acceptance Corp., 178 Okl. 584, 63 P. (2d) 708, (1937).

⁵ Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925); Conner v. Borland-Grannis Co., 294 Ill. 58, 128 N. E. 317 (1920); Leopold v. Universal Credit Co., 290 Ill. App. 305, 8 N. E. (2d) 727 (1937); Sears, Roebuck & Co. v. Piasa Bldg. & Loan Ass'n. 276 Ill. App. 389 (1934); Horvitz v. Leibowitz, 274 Ill. App. 196 (1934).

⁶ Conard v. The Atlantic Insurance Company of New York, 26 U. S. (1 Pet.) 386, 7 L. Ed. 189 (1828); Southern Surety Co. v. People's State Bank of Astoria, 332 Ill. 362, 163 N. E. 659 (1928); Ehrlich v. Chapple, 311 Ill. 467, 143 N. E. 61, 32 A. L. R. 989 (1924); Citizens State Bank of Manteno v. Senesac, 267 Ill. App. 288 (1932).

⁷ Pietrantonio v. Scalo, 120 Conn. 524, 181 A. 628 (1935).

Where the nature of the transaction is doubtful, courts have sought to classify it principally on the basis of the intention of the parties as disclosed by the entire contract,⁸ though minor elements such as the adequacy of the consideration have thrown what otherwise might have been termed a conditional sale into the category of a chattel mortgage.⁹ In that regard it may be noted that contracts in which the vendor has sought a purposeful ambiguity, with a view to a construction as a conditional sale or a chattel mortgage as may best fit the vendor's situation when litigation does arise, will in general be construed and the doubt resolved against the vendor.¹⁰ It has even been said that the conditional sales contract is not favored in the law and consequently where the legal nature of the transaction is at all questionable, it is likely to be construed as a chattel mortgage.¹¹ When, however, from a consideration of the entire contract, it clearly appears that it was the intention of the parties that the transaction was in its nature a conditional sale, that construction may be placed upon it by the courts.¹²

If this rule of intention had been adopted by the court in the instant case, the contract between plaintiff and his vendee would have been upheld as a valid conditional sale for it was clearly the intention of the parties that it was to be so regarded. But the court, favoring the view of the Washington case of *Hughbanks, Inc. v. Gourley*,¹³ expressly repudiated the rule of intention for it said, using the words of that case, that the problem is "not one of determining whether the parties intended to mould their transaction into the form of a conditional sale rather than that of a chattel mortgage, but of deciding whether in a pure financing arrangement the conditional sale can ever be adopted as a means of securing a loan. And the answer is that the contract of conditional sale may be used only by an actual vendor in the economic sense, and not by one who in a particular transaction occupies the status of a financier or lender of money, even though the latter may go through the form of taking title and possession of the chattel which he purports to sell."¹⁴

⁸ *Keystone Finance Corp. v. Krueger*, 17 F. (2d) 904 (1927); *Southern Surety Co. v. People's State Bank of Astoria*, 332 Ill. 362, 163 N. E. 659 (1928); *J. H. Gerlach Co. v. Noyes*, 251 Mass. 558, 147 N. E. 24, 45 A. L. R. 961 (1925).

⁹ *Guilford-Chester Water Co. v. Town of Guilford*, 107 Conn. 519, 141 A. 880 (1928); *Cary & Co. v. Hyer*, 91 Fla. 322, 107 So. 684 (1926).

¹⁰ *Mills Novelty Co. v. Morett*, 266 Mich. 451, 254 N. W. 163 (1934).

¹¹ *Weaver v. Lapsley*, 42 Ala. 601, 94 Am. Dec. 671 (1868); *Schneider v. Daniel*, 191 Ind. 59, 131 N. E. 816, 17 A. L. R. 1410 (1921); *Low v. Colby*, 137 Wash. 476, 243 P. 18 (1926); *Hughbanks, Inc. v. Gourley*, 12 Wash. (2d) 44, 120 P. (2d) 523, 138 A. L. R. 658 (1941).

¹² *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 36 S. Ct. 50, 60 L. Ed. 275 (1915).

¹³ 12 Wash. (2d) 44, 120 P. (2d) 523, 138 A. L. R. 658 (1941).

¹⁴ 323 Ill. App. 120 at 123, 55 N. E. (2d) 99 at 100, quoting from *Hughbanks v. Gourley*, 12 Wash. (2d) 44, 120 P. (2d) 523 at 526, 138 A. L. R. 658 at 662.

Although the court did not cite that case, there is some precedent for such view in the prior Illinois case of *First State Bank v. Harter*.¹⁵ There the alleged conditional vendor never had title and consequently could reserve none as security, hence its rights under a purported conditional sales contract were subordinated to those of a judgment creditor of the supposed conditional vendee. In the instant case the alleged vendor held title for but a fleeting moment. Even so, the court disregarded that fact on the ground that reality, not the form of the instrument, should govern in determining whether the contract was a conditional sales contract or a chattel mortgage.¹⁶

Illinois and Washington are not alone in holding that the conditional sales contract, with its harsh remedial incidents, must be restricted in its use to bona fide sales transactions between vendor and vendee and should not be extended to transactions where the true relationship between the parties is that of creditor and debtor, for at least six other jurisdictions have adopted the same view.¹⁷ In the light of such holdings, it would seem that one planning to advance money so as to enable another to purchase some wanted chattel but anxious to obtain the security of a conditional sales contract must first, as a middleman, purchase that chattel himself, taking all the risks of ownership, and then convey it to his "borrower" with an appropriate reservation of title. Only if he has acquired a full legal and equitable title thereto can he be treated as a vendor entitled to the benefits accruing to an unpaid seller upon a resale.¹⁸

T. F. BAYER

WILLS — RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES — WHETHER ELECTION TO RENOUNCE PROVISIONS OF WILL OF DECEASED HUSBAND MAY BE MADE BY CONSULAR OFFICER ON BEHALF OF NONRESIDENT ALIEN WIDOW IN ABSENCE OF EXPRESS POWER OF ATTORNEY FROM

¹⁵ 301 Ill. App. 234, 22 N. E. (2d) 393 (1939). The court therein stated that the Uniform Sales Act, Ill. Rev. Stat. 1943, Ch. 121½, § 1, particularly with reference to conditional sales contracts, "clearly indicates that it is intended to operate as between the seller and buyer of goods. . . . It is not within the intent or contemplation of the act that such contracts shall supplant or assume the legal identity of chattel mortgages. They are separate and distinct instruments and governed by separate and distinct acts." 301 Ill. App. 234 at 236, 22 N. E. (2d) 393 at 394.

¹⁶ *Gray v. Brasee*, 14 N. Y. S. (2d) 687 (1939).

¹⁷ *In re James, Inc.*, 30 F. (2d) 555 (1929); *Pietrantonio v. Scalo*, 120 Conn. 524, 181 A. 628 (1935); *Schneider v. Daniel*, 191 Ind. 59, 131 N. E. 816, 17 A. L. R. 1410 (1921); *Southern Finance Co. v. Mercantile Discount Corp.*, 80 Ind. App. 436, 141 N. E. 250 (1923); *Acme Feeds, Inc. v. Berg*, 231 Iowa 1271, 4 N. W. (2d) 430 (1942); *Payne v. Parker*, 95 Miss. 375, 48 So. 835 (1909); *First Nat'l Bank v. Marlowe*, 71 Mont. 461, 230 P. 374 (1924).

¹⁸ A close analogy can be found in the case of purchase money mortgages of real estate where the benefit of that type of security can inure only to the grantor and cannot aid the lender who advances funds to be used to purchase land: *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045, 21 L. R. A. (N.S.) 843 (1909).

HER AUTHORIZING SUCH ACTION—An important question affecting the rights of nationals in occupied countries was presented in the recent New York case of *In re Zalewski's Estate*¹ wherein the deceased testator gave to his widow,² resident and national of Poland, a nominal legacy although he left a large estate. After his will had been admitted to probate, the Consul General of the Republic of Poland served an instrument on the administrator with the will annexed stating that he, acting on behalf of the widow under power given him by the treaty between his country and the United States,³ was exercising the personal right of election given by the statute⁴ to take her share of the estate as in case of intestacy rather than to accept the provision of the will. The administrator with the will annexed refused to recognize such election and his act was upheld by the Surrogate's Court.⁵ That decision was affirmed in the Appellate Division of the New York Supreme Court.⁶ Upon appeal granted by permission, the New York Court of Appeals reversed such decision when it held that the written notice of such election could be made by the Consul General as the widow's attorney in fact, even though he lacked express authority from her, as the agency granted by the treaty was not to be construed to defeat its purpose and the right to "appear" and to "represent" assigned thereby permitted the official to perform useful duties and was not limited to the mere collection of property devised or bequeathed.⁷

The significance of the instant case lies in the fact that it appears to be the first of its kind wherein a consular officer of a foreign nation

¹ 292 N. Y. 332, 55 N. E. (2d) 184 (1944). Lehman, C. J., wrote a dissenting opinion in which Rippey, J., and Lewis J., concurred.

² The testator left his widow in Poland some forty years ago. Whether she was in fact alive was impossible to determine, but the court relied on the presumption of a continuance of a condition demonstrated to have been in existence at a previous time: *Whiting v. Nicholl*, 46 Ill. 230 (1867). But see *Keystone Steel & Wire Co. v. Industrial Commission*, 289 Ill. 587, 124 N. E. 542 (1919), to the effect that such presumption may not hold true as to persons living in war zones.

³ Section 24 of the Treaty of 1931 states: "A consular officer . . . shall . . . have the right to appear personally or by delegate in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities for all such heirs or legatees in said estate, either minors or adults, as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them unless such heirs or legatees themselves have appeared either in person or by duly authorized representative." See Marcellus Donald A. R. von Redlich, *The Law of Nations* (World League for Permanent Peace, 1937), 2d Ed., p. 603.

⁴ Cahill's Cons. Laws N. Y. 1930, Ch. 13, § 18.

⁵ 30 N. Y. S. (2d) 658, 177 Misc. 384 (1941).

⁶ 38 N. Y. S. (2d) 37, 265 App. Div. 878 (1942).

⁷ Payment to nationals of occupied countries has been temporarily suspended, under 12 U. S. C. A. § 95a, by Executive Orders 8389, 8785, and 8832. See also general order of the Probate Court of Cook County, Illinois, under date of August 6, 1941.

has been found to have the right to make an election to take against the will of the testator without any express direction whatsoever from the widow of the latter. That the right of election is personal to the widow seems to be well established, at least to the extent that it does not survive her death so cannot thereafter be exercised by her heirs,⁸ her legal representatives,⁹ or her creditors,¹⁰ unless so authorized by statutory provision.¹¹ Courts have even held that, where the surviving spouse is insane or incompetent, her committee or conservator cannot make the election for her,¹² unless expressly authorized by proper court order.¹³ Such decisions would seem to limit the right of election to the surviving spouse only as "a personal right . . . inherent in the particular individual to whom it is given, as distinguished from a right which might be exercised by any other person whomsoever."¹⁴

Of course, the right is not so personal that the surviving spouse must execute the essential papers personally as she may act through a resident attorney in fact. Thus, a widow residing abroad once executed a power of attorney giving her agent general powers to act for her in connection with the estate of her deceased husband, and it was held that the agent could elect to take against the will although no specific authorization to make such election was designated.¹⁵ Such right may be delegated to a third person who may act independently at his discretion,¹⁶ even though the election is to be manifested by a writing "signed by her."¹⁷ Had the consul in the instant case pos-

⁸ *Sippel v. Wolff*, 333 Ill. 284, 164 N. E. 678 (1928); *Welch v. Anderson*, 28 Mo. 293 (1859); *Matter of Muhlman*, 251 N. Y. S. 147, 140 Misc. 535 (1931); *Crozier's Appeal*, 90 Pa. 384, 35 Am. Rep. 666 (1879).

⁹ *Donald v. Portis*, 42 Ala. 29 (1868); *Matter of Ackler*, 6 N. Y. S. (2d) 128, 168 Misc. 623 (1938); *Matter of Brill*, 22 N. Y. S. (2d) 966, 175 Misc. 236 (1940); *Matter of Youngs*, 25 N. Y. S. (2d) 811, 175 Misc. 716 (1940).

¹⁰ *Eltzroth v. Binford*, 71 Ind. 455 (1880).

¹¹ See, for example, *Hamilton Nat. Bank v. Haynes*, 180 Tenn. 247, 174 S. W. (2d) 39 (1943).

¹² *Heavenridge v. Nelson*, 56 Ind. 90 (1877); *Pinkerton v. Sargent*, 102 Mass. 568 (1869).

¹³ *Davis v. Mather*, 309 Ill. 284, 141, N. E. 209 (1923); *Andrews v. Bassett*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296 (1892); *Hardy v. Richards*, 98 Miss. 625, 54 So. 76, 35 L. R. A. (N.S.) 1210 (1911); *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289, 48 Am. Rep. 532 (1883). In *Matter of Donnelly*, 14 N. Y. S. (2d) 700, 172 Misc. 107 (1939), it was held that a special guardian appointed to protect the rights of absent heirs could not elect to take against the will to the extent of having a portion of the testator's estate impounded, because the right was purely personal to the wards and, being adults, they were in no sense wards of the court.

¹⁴ *Matter of Muhlman*, 251 N. Y. S. 147 at 149, 140 Misc. 535 (1931).

¹⁵ *In re Celenza's Estate*, 308 Pa. St. 186, 162 A. 456, 85 A. L. R. 851 (1932). See also *In re Minnich's Estate*, 288 Pa. 354, 136 A. 236 (1927).

¹⁶ *Page*, *The Law of Wills* (W. H. Anderson Co., Cincinnati, 1941), 3d Ed., Vol. 4, § 1361, p. 32. See also note in 85 A. L. R. 859.

¹⁷ *In re Celenza's Estate*, 308 Pa. St. 186, 162 A. 456, 85 A. L. R. 851 (1932). Ill. Rev. Stat. 1943, Ch. 3, § 169, provides for a written instrument "signed by the surviving spouse."

essed such a power of attorney there would be no problem. But if it could be said that he possessed such power by virtue of his office, then his action on behalf of his national should be upheld.

In that regard, it was decided as early as 1821 that a consul had the right to "assert or defend the rights of property of the individuals of his nation,"¹⁸ even in the absence of express treaty provision. Such power has been held, in some instances, to extend to maintaining affirmatively the rights of his countrymen as by collecting a distributive share due from an estate,¹⁹ though in others he has been limited to maintaining action but not personally collecting the proceeds thereof.²⁰ Absent special authority by treaty or executed power of attorney, it has been held that he could collect workmen's compensation for the benefit of the alien widow and child since the consul has been said to be the "standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country . . . having any interest to be cared for within the consular district."²¹ The breadth of such decisions would seem to suggest that the consul enjoys powers not necessarily confined to the treaty or any written instrument of appointment but which emanate from the very position itself.

Aside from general powers, the consul in the instant case relied upon a provision of the treaty that stipulated that the sphere of his authority to act for his nationals should be "as if he held their power of attorney."²² Had he actually possessed personal authorization, which he probably would have in normal times, there would be no doubt of his right to make the election. It would not seem as though a different result should be achieved merely because the authority was conferred by a treaty promulgated by the sovereign on behalf of its nationals, for such treaty would be binding on the latter as well as on the citizens of this country.²³ Although the scope of the implied power of attorney is not expressed in the treaty, it would seem to intend a general one as no limitation is found thereon. While powers of attorney are subject to strict construction, the same include not only expressly specified powers but also such other powers as are essential in effectuating the expressed ones.²⁴ When it is remembered that the rule of strict construction should not be applied with such rigor as to "destroy the very purpose of the power or to preclude the ascertainment in a proper way of what the language was meant to

¹⁸ *The Bello Corrunes*, 6 Wheat. (U.S.) 152 at 162, 5 L. Ed. 229 at 233 (1821).

¹⁹ *In re Tartaglio's Estate*, 33 N. Y. S. 1121, 12 Misc. 245 (1895).

²⁰ *Lachowicz v. Lechowicz*, 181 Md. 478, 30 A. (2d) 793 (1943).

²¹ *Vujic v. Youngstown Sheet & Tube Co.*, 220 F. 390 at 392 (1914).

²² See text of treaty in note 3, ante.

²³ U. S. Const., Art. VI.

²⁴ 2 Am. Jur., Agency, § 31.

accomplish,"²⁵ it would seem that the treaty language here concerned is broad enough to warrant the making of an election of the type here involved. If it were not, the rights of the absent spouse might well be lost by default through no fault of her own.²⁶

EDITH H. VAUGHAN

²⁵ 2 C. J. S. Agency, § 98c(3), p. 1223-4.

²⁶ Cahill's Cons. Laws N. Y. 1930, Ch. 13, § 18(7), permits the Surrogate to enlarge the time for making the election, provided application is made before its expiration, for a period of not exceeding six months upon any one application. The provision in Ill. Rev. Stat. 1943, Ch. 3, § 169, is limited to cases where litigation is pending that affects the share of the surviving spouse in the estate.

BOOK REVIEWS

INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS. Samuel B. Horovitz. Boston: Wright & Potter Printing Co., 1944. Pp. xxxii, 486.

Here is a clear, concise, and abbreviated discourse on the history and development of workmen's compensation laws together with a considerable amount of precatory invitation to see that such laws are enlarged in scope and application and that the administration of such acts be further humanized in accordance with a social conscience. Written partly so that the layman might read and understand, compressed so that the price of the book would be within the reach of all, the author admits that it was partly his desire to point out a lack of liberality in the interpretation of workmen's compensation acts and to point the way toward more social thinking over the problems of industry sought to be solved thereby. It may be said that he is fairly successful in the discharge of his aims.

The inability of practicing attorneys to make a living out of cases under workmen's compensation, except for a relatively small number who constantly represent large employers or their underwriters, has resulted in disinterest in that practice. In some states, the practice has been maintained by persons not admitted to practice law and often no better qualified than by reason of their ability to attract a sufficient volume of cases to warrant concentration upon them as a business rather than as a profession. In any event, the social implications of workmen's compensation are too often hurriedly recognized and then forgotten. More lucrative returns are to be had in other fields by competent lawyers. Quite generally, also, the qualifications of arbitrators or commissioners are found in political connections rather than based on competency, honesty, or intelligence. These and similar propositions are readily gathered from every chapter of the book. They are all too true.

Constructively speaking, the volume should be valuable to the law student or the beginning attorney, as well as to persons interested in the social sciences. A brief view or even a reference to workmen's compensation acts is too often omitted in the law school. A suggestion that there is such a law may be thrown out in the classes in Agency, in Administrative or in Constitutional Law, but the student is usually left to his own devices to enlarge upon the suggestion. He may, in fact, never consider the matter further until he is asked to advise an injured employee as to his rights and the method of their enforcement.

For that reason, Horovitz's volume should be available to the law student. To it he may go and, with hurried reading, grasp the essen-

tial scheme and comprehension of workmen's compensation acts. The cases discussed and cited in the foot-notes will permit him to go as far as he may desire. In this respect the book is not without value to the lawyer of general experience or practice who rarely has a case in compensation. He, too, can at least refresh his recollection and start a search from one of the cases suggested in the foot-notes.

The book, of course, cannot compete, nor does it purport to compete, with standard and comprehensive encyclopedias or treatises. However, the standard digests do not make clear nor usually even differentiate, except for purposes of separation, the cases arising in Admiralty, under the Jones Act, the Longshoremen and Harbor Workers Act, and other situations which fall in the twilight zone of competing state and federal law. True, the questions arising thereunder cannot be fully explained or resolved in the few pages of this work, but they are mentioned and further reading is suggested.

The value of such a work to persons interested in the social sciences should be apparent, for statistics and forward-looking suggestions are sprinkled throughout the book.

D. CAMPBELL

CRIME AND THE HUMAN MIND. David Abrahamsen, M. D. New York: Columbia University Press, 1944. Pp. xiv, 244.

The ravages of war despoil an occupied country of more than physical goods and treasures, for from time immemorial the trained intellects of the desolated community have been forced to seek more favored climes to carry on their work. Once again this country has been enriched in that fashion, for the sanctuary it provided Dr. Abrahamsen after the German invasion of Norway gave him the opportunity to enlarge upon an already long list of writings on psychiatry and the dynamic connection that exists between crime and personality. Let it not be thought that the author abandoned his country at the moment of her peril, for the fact is that he was in the midst of the fighting, established a field hospital, and stayed to the end of organized resistance. But when that end came, it was fortunate for the cause of civilization that Dr. Abrahamsen lived on to fight in a different way than on the field of battle. Evidence of that fight may be found within the pages of this book.

Crime has been called one of the most urgent problems of our society. Just as some single individual may be labelled Public Enemy No. 1, so might the whole subject of crime be regarded. Medical science and skill have removed or allayed the great scourges against bodily health; the physical sciences have gone far toward the elimination of those uncertainties which affect life in the material sense;

but, in the field of mental health and ill-health, the thickets are tough and strong and the ground far from cleared, much less made to bear fruit. Comprehension of the problem of the distorted, erotic drives which lead to anti-social behavior is but a step in the direction of removing this last great enemy of mankind. Yet, only as we can perceive the problem and the roots from which it springs, are we able to fashion thought as to the means whereby it can be eradicated. As soon as research in a scientific manner has demonstrated the facts, it is likely that informed public demands will insist upon the production of a remedy. This book serves to concentrate those facts which have been ascertained to date and should orient the reader who might otherwise be forced to gather them from many scattered sources.

In interesting fashion, the author presents not only a historical review of the development of the science of criminology but also elaborates upon such matters as the relation of mind to crime, of hereditary and environment as causes for crime, of juvenile and war delinquency, and of the psychiatric-psychological background for crimes of violence. It is only when he touches on the relation between the psychiatrist and the criminal law that he embarks on dangerous ground. His criticism of the legal standard for insanity when offered as a defense in a criminal prosecution is not unwarranted, but the proposed remedy fails to recognize an important legal fact, to-wit: under present constitutions, juries are judges of the facts in criminal cases and no one, not even the most competent psychiatrist, may usurp that function. Advise the jury as to the facts so far as is legally possible, yes. Determine the ultimate fact itself, no. The proposed remedy is not unwise, but it is, at present, legally unsound. Thought should be given and energy directed to the task of revising constitutional restraints so that suggestions such as these might be made available. Direct assault upon the fundamental right of trial by jury will not be easy, but it will, in this respect, be necessary if society is to deal with the problem of crime in an enlightened fashion.

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CHICAGO-KENT LAW REVIEW

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VOLUME 23

JUNE, 1945

NUMBER 3

APPELLATE PROCEDURE IN WORKMEN'S COMPENSATION CASES

George W. Angerstein *

IN STATEMENTS of the theory and purpose, as well as in definitions of workmen's compensation, reference frequently has been made to the matter of litigation. Beyond question, one of the fundamental purposes of workmen's compensation, including that which underlies the Workmen's Compensation Act of Illinois, was to devise a method of providing prompt benefits according to a fixed schedule with as little litigation as possible. Recognition of that purpose was given quite early in Illinois when the Supreme Court of this state declared ". . . the tendency . . . in following out the spirit of the act has been to permit the hearing and adjudication of claims with as little delay and formality as is consistent with orderly procedure."¹ Again, when upholding the compulsory application of the statute as provided in the 1917 amendment,² the court said: "The theory and purpose of workmen's compensation acts are to provide speedy and equitable relief in case of injury to those exposed to the peculiar hazards of certain businesses and enterprises generally known to be hazardous. . . ."³ In still another case, the court has indicated that the purpose of the law was to

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¹ *Oriental Laundry Co. v. Industrial Commission*, 293 Ill. 539 at 544, 127 N. E. 676 at 677 (1920).

² *Laws 1917*, p. 507, § 3. As subsequently modified, such provision appears in *Ill. Rev. Stat. 1943*, Ch. 48, § 139.

³ *Illinois Publishing & Printing Co. v. Industrial Com'n*, 299 Ill. 189 at 196, 132 N. E. 511 at 514 (1921).