



3-1-1942

Contributors to the March Issue/Notes

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Recommended Citation

Robert E. Richardson, Bernard F. Grainey, Leo L. Linck & Joseph J. Miller, *Contributors to the March Issue/Notes*, 17 Notre Dame L. Rev. 228 (1942).

Available at: <http://scholarship.law.nd.edu/ndlr/vol17/iss3/3>

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NOTES

A STUDY OF THE NATURE OF SUBSTANTIAL EVIDENCE BEFORE THE NATIONAL LABOR RELATIONS BOARD AS LITIGATED IN THE UNITED STATES SUPREME COURT AND IN THE FEDERAL CIRCUIT COURTS OF APPEALS.

Introduction

The problem with which this note is to deal is an investigation of the more recent cases of the National Labor Relations Board as decided by the Supreme Court of the United States and certain of the Federal Circuit Courts of Appeals, considering only evidence before the Board and what evidence there must be before a court will reverse the findings by the Board.

Much has been written on the *Wagner Act* and the National Labor Relations Board in a general way with an attempt to deal completely with the subject by covering the general background of the *Wagner Act* and the scope of the Board. One of the most recent and most complete works is *The Wagner Act, Employee and Employer Relations* (January, 1941) by Charles M. Bufford of the San Francisco and California Bars. The exact manner in which the Board has developed its program and the extent to which the Board has secured enforcement thereof appears in detail in this book. It purports to give a bird's-eye view of the operation of the Act and in the Table of Cases includes a complete history of the National Labor Relations Board

cases showing their progress through the courts. Extensive reference has been made to this work, but treatment here attempts to be more inclusive regarding the newly developed line of cases in relation to evidence which has qualified or even modified some of the provisions of the National Labor Relations Act.

The *Wagner Act* includes a customary prescription that "The findings of the Board as to the facts, if supported by the evidence, shall be conclusive." The courts, however, have grafted the somewhat anomalous term "substantial" onto the word evidence in an effort to exact a higher degree of care from the administrative board in its task of fact finding. This work will investigate the more important decisions of the courts in an effort to explain and arrive at a fixed conclusion concerning the courts use of the term "substantial evidence." In general, judicial review is an investigation of whether the administrative board had jurisdiction over the case, and secondly, assuming authority, whether or not the facts found by the Board were supported by the evidence. Our study here is principally concerned with the latter phase of judicial review.

No attempt will be made to treat of the constitutional questions involved in the Act, persons subject, employer-employee relationships, unfair practices, coercion of employees, collective bargaining under the Act, nor to consider in detail the routine nature of cases coming before the Courts involving decisions of the Board.

This work will investigate decisions of the Court, the opinions of the Courts and development therein regarding the rules of evidence applicable before the Board, to what extent incompetent evidence may be introduced, the effect of findings of fact by the Board based on incompetent evidence when enforcement of the Board's findings is sought before the Circuit Court of Appeals, and since the Courts interpret the word evidence as contained in Section 10e of the Act to mean "substantial" evidence, what constitutes "substantial" evidence.

The Nature of the National Labor Relations Board

The National Labor Relations Board is not a radically new body, since it has its procedural counterpart in the methods of the Federal Trade Commission and the body of law dealt with is that inherited to a certain degree from the Railway Labor Act. It is all important to remember that the orders of the Labor Board are not self-enforcing. To secure enforcement of its orders, the Board must petition the proper Circuit Court of Appeals for an enforcement order or for other appropriate relief.¹ The review of National Labor Relations Board orders, as with those of the Federal Trade Commission, is the province of the Circuit Court of Appeals, either upon petition by the Board for en-

¹ 29 U. S. Code, § 160 (e).

forcement of its order, or by a person petitioning for a court review of an order of the Board. Since the orders of the Board have no legal effect except where the courts grant a decree enforcing the order, the Board is necessarily dependent to a great degree upon the Courts. Whenever, therefore, an employer disregards an order of the Board the Court must review the case before the Board's action can have any force. The result of this is an overwhelming large body of decisions handed down under the Act. The National Labor Relations Board is a body set up to function in situations wherein government is seeking to adjust individual controversies because of some strong social policy involved. It has large judicial functions. Here the purpose is not to determine controversies between the sovereign and the citizen, nor to establish rules or rates or standards of a legislative nature, but rather to determine controversies between third parties, or to punish for violation of the law, or otherwise to exercise judicial functions.²

The provision in the National Labor Relations Act for judicial review of orders of the National Labor Relations Board is another manifestation of the general faith in the competency of courts to decide the legal rights of parties, and at the same time perhaps evidence of a hesitancy to allow the administrative to go completely unchecked.³ The field of administrative law is over-run with discussions of the scope of judicial review. As previously mentioned, judicial review is an investigation first of whether the administrative board had jurisdiction over the case, and secondly, assuming authority, whether or not the facts found by the Board were supported by evidence. The power of the Board to function is delimited by the enabling statute. Since all orders are subject to attack if the jurisdiction of the Board is questioned, while we are not primarily concerned with the jurisdiction of the Board and how its orders have fared when questioned, at least mere mention of it should be made here.

Briefly, the jurisdiction of the Board revolves about unfair labor practices "affecting commerce," the latter being defined to mean ". . . burdening or obstructing commerce or the free flow of commerce." It is apparent that this grant is wide in its scope, even though necessarily confined to the flow of goods in interstate commerce. At present the emphasis on the jurisdictional issue is beginning to fade, and the uniform success enjoyed by the National Labor Relations Board before the Courts on that phase of the Act has begun to have its effect. The opinions in the *Santa Cruz Fruit Packing Company* case⁴ and the *Consolidated Edison Company* case⁵ have done much to halt litigation on the question of the jurisdiction of the Board. On April 12, 1937, by a

² 25 American Bar Association Journal, p. 851.

³ 87 Penn. Law Rev., pp. 716-27 (1939).

⁴ *N. L. R. B. v. Santa Cruz Fruit Packing Co.*, 91 F. 2d 790 (1937).

⁵ *Consolidated Edison Co. v. N. L. R. B.*, 95 F. 2d 390 (1938).

five-to-four decision the Supreme Court of the United States held the National Labor Relations Act constitutional. The majority opinion was delivered by Chief Justice Hughes and the dissenting opinion by Justice McReynolds. In the dissenting opinion, Justice Van Devanter, Sutherland and Butler concurred.⁶ Previous to this, six United States District Courts and four Circuit Courts of Appeal had declared this Act unconstitutional on the authority of the Schechter decision which declared the National Industrial Recovery Act unconstitutional.⁷

Section 10b of the Act⁸ gives the procedure for the hearing of complaints before the Board (or any agent or agency designated by the Board). The last sentence reads: "... in any such proceeding the rules of evidence prevailing in courts of law and equity shall not be controlling," and this language has been adopted word for word in Article II, Section 26 of the Rules and Regulations of the National Labor Relations Board. A reasonable conclusion to draw from the identical language used in these sections would seem to be that the ordinary rules of evidence applicable in courts of law and equity are relaxed in hearings before the Board, and evidence which might be legally inadmissible in such courts might be proper in a hearing before the Board. After an investigation a complaint is issued,⁹ the respondent is permitted to file an answer,¹⁰ motions may be filed,¹¹ and certain interested parties may intervene.¹² The hearings are open to the public,¹³ witnesses are sworn,¹⁴ counsel may appear on both sides,¹⁵ witnesses may be cross examined,¹⁶ and the trial examiner has the right to interrogate witnesses.¹⁷

Stipulations of fact may be introduced,¹⁸ there are oral arguments at the conclusion of the testimony and briefs may be filed.¹⁹ A report of the Board makes this statement:²⁰ "Every effort is made by the Board and its trial examiners to conduct hearings with all the dignity and impartiality of court proceedings without at the same time creating

⁶ *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937).

⁷ 16 N. D. L., p. 175 (1941).

⁸ 29 U. S. Code, § 160 (b).

⁹ Rules and Regulations of the N. L. R. B., Art. II, § 5.

¹⁰ Rules and Regulations of the N. L. R. B., Art. II, § 10.

¹¹ Rules and Regulations of the N. L. R. B., Art. XIV, § 18.

¹² Rules and Regulations of the N. L. R. B., § 19.

¹³ Rules and Regulations of the N. L. R. B., Art. II, § 23.

¹⁴ Rules and Regulations of the N. L. R. B., Art. II, § 20.

¹⁵ Rules and Regulations of the N. L. R. B., Art. II, § 25.

¹⁶ Rules and Regulations of the N. L. R. B., Art. II, § 24.

¹⁷ Rules and Regulations of the N. L. R. B., Art. II, § 24.

¹⁸ Rules and Regulations of the N. L. R. B., Art. II, § 24.

¹⁹ Rules and Regulations of the N. L. R. B., Art. II, § 29.

²⁰ First Annual Report of the N. L. R. B., p. 24.

an atmosphere which is so formal as to inhibit participation by workers and others involved in the proceedings.”

It is contended that administrative boards violate the doctrine of separation of powers by exercising judicial power. Such criticism, however, is unfounded. Boards and commissions are merely fact-finding bodies and not courts. They do not possess judicial power. They cannot punish for contempt nor can they enforce their own orders. The issuing of a notice of a hearing, issuing of subpoenas for witnesses, the examination of witnesses, the finding of facts and conclusions are not the exercise of judicial power. If that be so, then notaries public, commissioners, referees, prothonotaries are exercising judicial powers.²¹ It should be recognized that such duties are ministerial in nature and involve only administrative power.

Rules of Evidence Before the Board

Fact finding is one of the principal functions of an administrative board. It is a sphere of quasi-judicial activity which caused much criticism to be directed against such bodies. Opponents of the administrative have long objected that the same governmental organ should not have the power to decide the facts of the controversies which it is called upon to decide. It is said the capacity to find the facts can become the capacity to reach a conclusion. This has been the argument used by those who fought the National Labor Relations Board in an effort to bring about a revision of the Act. The Courts, however, have long upheld the finality of the facts found by the administrative where in reviewing cases it has been found that there was substantial evidence to sustain the findings. This is a well established rule reaffirmed in all cases in which Courts have reviewed orders of the National Labor Relations Board, objected to on the score that the Board's findings were questionable or faulty.

The Board's own interpretation of Section 10b having relation to rules of evidence does not interpret this provision to mean that rules of evidence are to be disregarded in entirety but rather there should be a liberal application. But to be conclusive findings before the Board must be supported. They must have a foundation. Charles M. Bufford says evidence denotes facts, marshalled and presented, by word of mouth, writing, or other display to the senses, such as render probable the existence or non-existence of ultimate facts.²² Because procedure before the Board is closely paralleled to that before the Federal Trade Commission, the Board in its First Annual Report has stated the

²¹ N. L. R. B. v. Jones & Laughlin Steel Co., 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937).

²² Charles M. Bufford, *The Wagner Act, Employer and Employee Relations*, Art. 462, p. 973 (1941).

language of the Circuit Court of Appeals used in the case of *John Bene and Sons v. Federal Trade Commission*²³ should aid to guide the admissibility of evidence before the Board.²⁴

The Court in discussing the question of rules of evidence in an administrative tribunal in that case said: “. . . evidence or testimony, even though regularly incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered, but it should be fairly done.” It must be recognized that due to the nature of the cases involved there must be an understanding of plant management, labor economics, union theory and practice in the determination of the kind of evidence admissible.

Evidence before the Board, however, must not only support the findings, but must be real evidence worthy of being considered substantial evidence. The Supreme Court of the United States in the case of *Washington, Virginia, & Maryland Coach Company v. National Labor Relations Board*²⁵ said: “The complaint is merely of error in appreciating and weighing evidence. In the case of statutory provisions like Section 10(e), applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by evidence. The contentions respecting the rejecting of evidence are not well founded.” The Court also said that they would not review the facts if there was substantial evidence to support the findings, indicating that if the evidence supporting the findings were substantial, that evidence would not be reviewed nor would the Court seek to determine if other evidence to support a contrary view was stronger.

One of the more important and leading decisions in holding that the findings of the Board when supported by evidence which is substantial, are conclusive and not subject to judicial review even though some of the facts may be disputed is the case of *National Labor Relations Board v. Waterman Steamship Corporation*,²⁶ decided by the Supreme Court, February 12, 1940. The Court below, upon petition of respondent to set aside an order of the Board, decided that the Board's order was not supported by substantial evidence, said the order was based on mere suspicion and declined to enforce it. Whether that was the proper conclusion was the question before the Supreme Court.

The Board found: Respondent, Waterman Steamship Corporation is engaged in maritime transportation between the United States, Eu-

²³ 299 F. 2d 468 (1924).

²⁴ First Annual Report of the N. L. R. B., p. 23.

²⁵ 301 U. S. 142, 81 L. ed. 965, 57 S. Ct. 112 (1937).

²⁶ 309 U. S. 206, 84 L. ed. 704, 60 S. Ct. 493 (1940).

rope, and the West Indies. Upon complaint made by the National Maritime Union, in affiliation with the C. I. O., the Board found that respondent had laid up the ships "Bienville" (27 days) and "Fairland" (7 days) for dry-docking and repairs and had in violation of the National Labor Relations Act:

(1) Discharged and refused to reinstate because of membership in the N. M. U. the entire unlicensed crew and chief steward of the Steamship "Bienville" and all but three of the crew of the Steamship "Fairland";

(2) Discharged the second assistant engineer of the "Azalea City" because of his representative activities of the Marine Engineers Beneficial Association, a labor organization of licensed ship personnel affiliated with the C. I. O.;

(3) And pending an election directed by the Board to permit the ships' crews to select their bargaining agencies, had interfered with its employees' free right to select a union of their own choosing under Section 7 of the Act by refusing to grant ships' passes to representatives of the C. I. O. affiliate, while at the same time issuing passes to representatives of the International Seamen's Union, an A. F. of L. affiliate.

The Court below was obliged to enforce the Board's order if there was substantial evidence for the findings that these crews had a continuing right to and customary tenure, term or condition of employment within the purview of the Act even though their ships were temporarily laid up, and that this relationship was terminated by the Company because of C. I. O. affiliation.

Veteran seamen testified that a seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles when his ship lays up in dry dock or for repairs and that the Waterman Steamship Corp. along with maritime people generally have recognized and followed this custom. The Company itself could cite only one isolated departure from this custom.

The Board based its order on evidence of (1) the continuing tenure and conditions and relation of employment; (2) evidence of discrimination because of C. I. O. affiliation; (3) evidence of discrimination in allotment of work; (4) evidence of discrimination as ships' passes.

In reversing and remanding the case to the Court of Appeals to enforce the Board's order in entirety, the Court concluded: "All of this is not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers. We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings, far from resting on mere suspicion, are supported by

evidence which is substantial. The Circuit Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment — and power to do that has been denied the courts by Congress. Whether the Court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the Court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress."

The power of the courts to reserve or modify findings of the Board is discussed by Biggs, C. J., in the case of *National Labor Relations Board v. Pennsylvania Greyhound Lines, Incorporated*,²⁷ who said that that Court may reserve or modify the findings of the National Labor Relations Board only if they are found to be improper or are made without sufficient supporting evidence. Many other Circuit Courts of Appeals have considered this problem. The Court said in the case of *National Labor Relations Board v. Bell Oil and Gas Company*,²⁸ "If the facts found by the Board support its order, and the evidence supports the findings, and if the order is within the scope of the regulatory provisions of the Act, the court will enforce it. If otherwise, it will not do so."

While the Board is not a Court, it is a quasi-judicial, fact finding tribunal with inquisitorial powers in labor controversies, similar to those of a grand jury in criminal cases. In the discretion of the Board any person may intervene and present testimony. Even though incompetent evidence may be heard in a hearing before the Board it does not invalidate its order, provided the findings upon which the order is based are supported by competent, relevant, and material evidence. In a petition for a rehearing of the above case, denied, September 13, 1938,²⁹ Holmes, Circuit Judge, said:

"The provision in paragraph (b), Section 10, with reference to the rules of evidence prevailing in courts of law and equity not being controlling, means that it is not error for the Board to hear incompetent evidence. It does not mean that a finding of fact may rest solely upon such evidence. Whether there be any competent evidence to support the findings of the Board is a question of law; whether it is sufficient is a question of fact. The decision of law is not conclusive in this court.

"In one instance, in the case under review, the sole evidence to support an essential finding of the Board was the incompetent evidence quoted in our opinion. In the others, there was no substantial evidence to support essential findings. Therefore, as a matter of law the order was deemed valid."

²⁷ 91 F. 2d 178 (1937).

²⁸ 91 F. 2d 509 (1937).

²⁹ *N. L. R. B. v. Bell Oil and Gas Co.*, 98 F. 2d 870 (1938).

The identical provisions of the same section with reference to the rules of evidence not being controlling were discussed by Chief Justice Hughes in *Consolidated Edison Company v. National Labor Relations Board*.³⁰ In that case the Court stated in part: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial procedure would not invalidate the administrative order." Therefore, it is not error for the Board to hear incompetent evidence,³¹ and evidence of an incompetent nature will not be excluded merely because it is incompetent,³² but this does not signify that all restraint is lifted. Rules of evidence are not abolished, but are merely "not controlling" before this administrative. In the discretion of the trial examiner, incompetent evidence may be received and may aid in determining a finding of fact.

As has been mentioned previously, however, the United States Supreme Court has declared that something over and above mere evidence is necessary to make the findings of fact by the Board conclusive. In *Washington, Virginia and Maryland Coach Company v. National Labor Relations Board*,³³ in speaking for the Court, Mr. Justice Roberts said: "In the case of statutory provisions like Section 10e, applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence."

Similar limitations have uniformly been expressed on the effect of Section 10e by other Courts which collectively interpret the word evidence to mean "substantial" evidence. Some of the Circuit Courts have declared that there is a very definite test to be applied in determining whether or not substantial evidence supports the findings of the Board. This question was discussed in *Appalachian Electric Power Company v. National Labor Relations Board*³⁴ on a petition to review an order of the Board. The Board's findings were reversed because they were not supported by substantial evidence. The Court said: "We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. . . . The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right of a directed

³⁰ 6 U. S. Law Week 425.

³¹ N. L. R. B. v. Bell Oil and Gas Co., 98 F. 2d 870 (1938).

³² Arkansas Wholesale Grocers Assoc. v. Federal Trade Commission, 18 F. 2d 866 (1927).

³³ N. L. R. B. v. Waterman Steamship Corp., 309 U. S. 206, 84 L. ed. 704, 60 S. Ct. 493 (1940).

³⁴ 93 F. 2d 985 (1938).

verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which gives equal support to inconsistent inferences. . . . If the case had been tried at law we should unhesitatingly hold that the verdict should have been directed against a finding of discrimination or interference on the ground that no sufficient evidence to that effect had been produced; and for the same reason we must set aside the order of the Board based on such a finding." This directed verdict test seems reasonable if properly and rightly applied, but the Courts must follow the rule that they will not substitute their own conclusions or inferences for those of the Board. Also Courts must not pass upon conflicting claims nor the credibility of witnesses whose testimony conflicts, unless there are facts which provide no reasonable basis for the inference or conclusion.

In the case of *National Labor Relations Board v. A. S. Abell Company*,³⁵ the Court weighed the evidence and found it unsubstantial in accordance with the direction of verdict test as set forth in the *Appalachian Coal Company* case.³⁶ In so following that case the Court said: ". . . The rule is settled for the federal courts and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'given scientific certainty to the law in its application to the facts and promotes the ends of justice.'" Also in that case the Court declared that the scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned.

The nature of substantial evidence and what it constitutes was also raised and discussed in the case of *National Labor Relations Board v. Thompson Products Company*.³⁷ The Court refused to enforce the Board's order on a petition to the Court because the facts were not supported by substantial evidence. The Court said: "'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions, and conclusions to be drawn therefrom, and considering them in their entirety and relation to each other, ar-

³⁵ 97 F. 2d 951 (1938).

³⁶ 93 F. 2d 985 (1938).

³⁷ 97 F. 2d 13 (1938).

rives at a fixed conviction. The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

The more recent case of *National Labor Relations Board v. Link Belt Company*³⁸ cited the *Waterman Steamship Company* case³⁹ with approval in holding that a Circuit Court of Appeals which is called on to review an order of the Board may not substitute its judgment on disputed facts for the judgment of the board. It is the Board and not the reviewing court which has the power to draw inferences from the facts and to appraise conflicting and circumstantial evidence and the weight and credibility of testimony. In this case the Supreme Court held that the Board was entitled to appraise all factors in determining whether the employer had dominated or interfered with the organization of a company union.

Toward the end of the year the case of *National Labor Relations Board v. Virginia Electric Power & Light Company*⁴⁰ reached the Supreme Court and the court reversed the Circuit Court of Appeals which has completely set aside the Board's order and held that the provision of the Act that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, precludes an independent consideration of the facts.

Again, the *Waterman Steamship Company* case⁴¹ and that of *Link Belt Company*⁴² were cited with approval in the case of *National Labor Relations Board v. United States Truck Company*,⁴³ the Circuit Court of Appeals holding that the Board alone has the right to draw inferences from the evidence and on a petition for the enforcement of an order of the Board, the Circuit Court of Appeals has no power to review those inferences.

As to hearsay evidence before the Board, in the *National Labor Relations Board v. Bell Oil and Gas Company*,⁴⁴ the Court would not enforce the Board's finding when some findings of fact were entirely based on hearsay evidence, the Court admitting that while there is no limitation as to the precise character of evidence necessary to support findings of fact, the evidence must not be irrelevant or immaterial. In a discussion of the provisions of Section 10e relating to application to

³⁸ 311 U. S. 584, 85 L. ed. 368, 61 S. Ct. 358 (1941).

³⁹ *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 84 L. ed. 704, 60 S. Ct. 493 (1940).

⁴⁰ 62 S. Ct. 344 (1941).

⁴¹ *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 84 L. ed. 704, 60 S. Ct. 493 (1940).

⁴² *N. L. R. B. v. Link Belt Co.*, 311 U. S. 584, 85 L. ed. 368, 61 S. Ct. 358 (1941).

⁴³ 124 F. 2d 887 (1942).

⁴⁴ 98 F. 2d 406 (1938).

the Circuit Court of Appeals for leave to adduce additional evidence, the Court declared that such application must be accompanied by a showing that the evidence is material. The Court stated: "The conclusion is irresistible that, unless supported by relevant and material evidence, the findings of the Board as to the facts are not conclusive." While it was acknowledged by the Court that Congress had the intention that hearings before the Board were to be free from the ordinary rules of evidence, the Court concluded that when a case came before the Circuit Court of Appeals on petition, the proceeding became judicial in nature and the Court should not consider evidence that is "irrelevant, immaterial, or incompetent."

This case again came up before the Court on a rehearing.⁴⁵ The petition was denied and the Court more emphatically restated that the rules of evidence prevailing in law and in equity were not abolished by the National Labor Relations Act, provisions of Section 10b notwithstanding. Merely because incompetent evidence is heard, an order of the Board will not be invalidated if its findings which give rise to the order are based on competent, relevant and material evidence. Whether or not there is such competent evidence is a question of law for the Court's determination. Speaking of Section 10e the Court said: "The statute says that the findings shall be conclusive if supported by evidence, but this is in paragraph (e), Section 10, which is dealing with the controversy after it has reached the judicial stage. The word "evidence" in this connection refers to the means by which an alleged matter of fact is established or disproved in a court of justice. That the evidence must be material is indicated in the very next sentence; that it must also be competent and relevant is the general rule which remains in effect in the absence of a legislative intent to the contrary. There is nothing in the act to indicate that the conclusion of the Board as to the fit and appropriate proof in the particular case should be conclusive."

Conclusions

Certain general conclusions may reasonably be deduced from the material presented in the body of this investigation:

First. Rules of evidence prevailing in Courts of law and equity were not abolished by the National Labor Relations Act but were relaxed for the purposes of hearings before the Board. As a matter of law, evidence legally inadmissible will not be excluded. Even though it is not error to admit incompetent evidence, if an order of the Board is based upon such evidence alone it will not be enforced.

Second. Findings of fact will only be found conclusive by the Courts when they are supported by "substantial" evidence. Substantial

⁴⁵ 98 F. 2d 870 (1938).

evidence is that which affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It has been described as enough to justify, if the trial were to a jury, a refusal to direct a verdict. It is substantial if reasonable and impartial minds could, upon the evidence, have reached the same conclusion as that of the Board. Likened to motions before a Court, the test of substantiality is the same as that presented on a motion for a directed verdict in a trial at law. It is also similar to that presented on a motion to set aside a verdict on the ground of insufficiency of the evidence to support the same.

Substantial evidence is more than scintilla. It must not only create a suspicion of the existence of the fact to be established. At the same time it excludes vague, uncertain or irrelevant matter. Rumor, guesswork and mere suspicion is not evidence and cannot serve to support a finding of the Board. But incompetent evidence before the Board will not make an order invalid if there is evidence that is competent, relevant and material. Proof of mere sequence of evidentiary facts is not sufficient to establish casual sequence and relationship.

Third. The determination that there is competent evidence to support the fact findings by the National Labor Relations Board is a question of law; its sufficiency is a question of fact. The general attitude of the Courts relative to evidence before the Board may be generalized in this statement from the case of *National Labor Relations Board v. Bell Oil and Gas Company*,⁴⁶ "While technical rules of evidence should be abolished, it would be impossible for courts to function if all limitations upon the scope of evidence were removed. To stop needless delays, expedite business and keep prejudice from creeping into the trial, it is necessary for the courts to stay within the bounds of relevance. Fair rules of evidence are essential in a judicial hearing. Without them, the proceeding is more or less of an inquisition."

The National Labor Relations Board is broad in its scope, far too broad to consider more than one phase of its operation at one time. The aim of this study has been to investigate the meaning of the term "substantial" evidence as generally used by the United States Supreme Court and the Federal Circuit Courts of Appeals when orders of the Board have come before them for enforcement or review. Evidence before the Board is a broad and unique field in itself for investigation without consideration of the other aspects of the Board. This work, therefore, has been restricted to an investigation of one particular phase of the law of evidence before the administrative. The problem has been to investigate the more important decisions in cases with an attempt to arrive at a determination and conclusion with respect to the law of evidence before the Board.

Robert E. Richardson.

⁴⁶ 98 F. 2d 406 (1938).

ATTEMPT AS A CRIME IN MONTANA.—A study of Montana statutes and decisions on attempt discloses several divergencies from the general holdings on this subject.

Attempt is defined as an act done with intent to commit a crime and tending but failing to effect its commission.¹ In this definition the statute follows the general rule as stated in *People v. Lardner*² that attempt has two elements: (1) an intent to commit the crime, and (2) a direct but ineffectual act done towards its performance.

The Montana statute goes beyond this, however, and states further that any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime. Thus while the opening sentence prescribes failure in the effort as one of the prerequisites of attempt, the second sentence states that a party can be convicted of mere attempt even though he succeeded in committing the intended act.

In *State v. Benson*³ a case in which the defendant was charged with attempt to maim an animal the evidence showed that the defendant had shot at two horses with a shotgun from a distance of ten feet and had succeeded in maiming the animals. In this case the court ruled that the defendant could be convicted of attempt even though the evidence showed that the crime of maiming was complete.

In this respect the court in following this statute departed from the general rule stated in *Broadhead v. State*⁴ that when a crime is actually consummated there can be no prosecution for an attempt.

Just how far the actor must go to be guilty of attempt cannot be definitely determined. Mere intent, however, is not sufficient. In *State v. Rains*,⁵ a case in which the defendant armed with loaded rifle, a loaded revolver, and a bottle of laudanum, threatened to murder his wife and then locked her in a house while he went for a pail of water and she escaped during his absence, the court ruled that there was not a sufficient overt act directed toward the completion of the crime to constitute an attempt.

In *State v. Hanson*⁶ where the defendant struck and knocked a person down but made no other attempt to rob his victim he could not be convicted of attempt to rob merely because he had intended six days

¹ Mont. Rev. Codes, § 11590.

² 300 Ill. 264, 133 N. E. 375, 19 A. L. R. 721 (1921).

³ 91 Mont. 21, 5 P. 2d 223 (1931).

⁴ 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731 (1899).

⁵ 53 Mont. 424, 164 P. 540 (1917).

⁶ 49 Mont. 361, 141 P. 669 (1914).

prior to commit a robbery, particularly when the prior intent was not directed toward any particular person.

The fact that the defendant was attempting to commit a particular crime is not a defense to charges of committing another crime arising out of the action. Thus in *State v. Reagin*⁷ where the defendant in attempting to commit robbery murdered a deputy sheriff the plea that there was no intent to murder and that the defendant should have been charged with attempted robbery was not sustained.

In *State v. Hennessy*,⁸ a case in which the defendant was charged with attempted rape, the court stated that the evidence must be sufficient to establish in the mind of an impartial, deliberate and intelligent person beyond reasonable doubt, the fact that the defendant assaulted the prosecutrix with intent to commit rape at all events, notwithstanding resistance.

In order for a person to be guilty of attempt to commit a crime therefore, it is necessary that he have the intent to commit that crime,⁹ that he goes beyond mere preparation¹⁰ and that there be an overt act directed specifically toward the performance of the crime.¹¹

An attempt to commit a crime was at common law a misdemeanor.¹² In Montana by statute¹³ the gravity of the offense depends upon the crime attempted.

The Montana statute¹⁴ states that every person who attempts to commit any crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

⁷ 64 Mont. 481, 210 P. 86 (1922).

⁸ 73 Mont. 21, 234 P. 1094 (1925).

⁹ 49 Mont. 361, 141 P. 669 (1914).

¹⁰ 53 Mont. 424, 164 P. 540 (1917).

¹¹ 53 Mont. 424, 164 P. 540 (1917).

¹² Clark & Marshall, Crimes, 4th Ed., p. 154.

¹³ Mont. Rev. Codes, 1935 § 11591.

¹⁴ Mont. Rev. Codes, 1935 § 11591.

3. If the offense so attempted is punishable by a fine, the offender convicted of such an attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

4. If the offense so attempted is punishable by a fine and imprisonment, the offender convicted of such attempt may be punished by both such imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

In *State v. Stone*¹⁵ the defendant questioned the right of the court to sentence him to fifteen years under paragraph 1 of Section 11591 on the grounds that one-half of a life sentence was an indeterminate period. The court found, however, that as the defendant could have been sentenced for a period of thirty years had the crime attempted been completed, he could be sentenced to fifteen years for the attempt. Thus we see that the statute changes attempt from a misdemeanor to a crime the punishment for which is dependent upon the punishment for the attempted crime and which has a maximum penalty which is equal to one-half the maximum penalty for the attempted crime.

Bernard F. Graine.

COMPULSORY SUBJECTION TO PHYSICAL EXAMINATION BY A DOCTOR AS VIOLATING THE PRIVILEGE AGAINST SELF-INCRIMINATION. — There are numerous instances these days, nation-wide in scope, of compulsory subjection to physical examination by a doctor. There is no differentiation, no class distinction or discrimination in this regard, so that no one can make claim to the privilege who is subject to the examination. In the field of the law, however, such privilege is often claimed on the ground of its incriminating the defendant. There is no privilege against military induction these days; there is against self-incrimination.

To what extent may such privilege be applied? The Fifth Amendment of the Constitution of the United States provides that no one shall be compelled in any criminal case to be a witness against himself. The constitutions in forty-six of the states have adopted similar provisions.¹ In the application of the principle some attempt has been

¹⁵ 40 Mont. 88, 105 P. 89 (1909).

¹ Iowa and New Jersey are the only two states that do not have constitutional provisions looking to the privilege against self-incrimination. However they have enacted statutes looking to the preservation of the privilege. For instance the Iowa statute reads as follows: 1935 Iowa Code Section 13890; "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but can-

made to extend it to compulsory external physical tests as well as compulsory testimony by word of mouth. It has been claimed in instances ranging from compulsory surrendering of one's shoes² to being compelled to put on a hat.³ Generally the privilege so claimed has been denied, on the ground that the defendant is not forced to speak, but others argue that the facts speak for themselves.⁴

However we are not properly concerned with such external physical tests in this note. We have limited ourselves, as inferred from the introductory paragraph, to those cases where a defendant is subjected to a physical medical examination by a doctor to determine a condition of the defendant's body which may have a bearing on his guilt or innocence. More particularly are we interested in those compulsory examinations, the results of which reveal an internal condition of the human organism as the existence of a venereal disease or a state of intoxication as tending to influence conviction or acquittal. Doctor's physical examinations as to external conditions, *e. g.* to detect the presence of scars,⁵ cause little concern. In such cases the facts speak for themselves. They are generally admissible, along with the results of other external physical tests not violative of the claimed privilege.

The science of medico-chemics has taken us into a new field, whose study concerns the subtle chemicals whose influence in the human system may vitalize or degenerate the body of man. Such field is new, and therefore the results of such scientific investigation were unknown to the first detectors of crime and consequently formed no part of criminal evidence. Today the reliability of such tests is recognized in criminal circles.⁶

The question arises whether a defendant's privilege against self-incrimination is violated, when for instance he is compelled to take the

not be called as witnesses by the state." This provision differs in wording somewhat but is not materially different from the Fifth Amendment of the Federal Constitution, which provides that no person "shall be compelled in any criminal case to be a witness against himself."

² *Biggs v. State*, 201 Ind. 200, 167 N. E. 129, 64 A. L. R. 1085 (1929).

³ *State v. Bazemore*, 193 N. C. 336, 337, 137 S. E. 172 (1927).

⁴ For a thorough treatment and instances in which the privilege has been claimed, Cf. *Wigmore*, 3rd Ed., § 2265 and 64 A. L. R. 1089.

⁵ *Gordon v. State*, 68 Ga. 814 (Ga. 1882). *O'Brien v. State*, 125 Ind. 38, 42, 25 N. E. 137 (1890).

⁶ For an excellent treatise and exposition of results of experiments conducted in this regard, cf. 24 *Ia. Law Review* 191 (1939). Thus blood grouping tests to negative paternity have received full acceptance in both the medical and legal spheres. *State v. Damm*, 64 S. D. 309, 266 N. W. 667 (1936). *Arais v. Kalensnikoff*, 67 P. 2d 1058 (Cal. 1937). *State v. Wright*, 17 N. E. 2d 428 (Ohio, 1938). The results of examinations for venereal diseases have been held sufficient evidence of adultery and intercourse. *U. S. v. Tan Teng*, 23 P. 1, 145, 153 (1912). *Sheffield v. Beckwith*, 90 Conn. 93, 96 Atl. 316 (1916). *Riley v. State*, 111 S. E. 729 (1922).

Wasserman test to detect the presence of a venereal disease, a blood count to ascertain one's blood grouping or a "sobriety test" to determine the alcoholic content of his body. In further referring to these tests we shall speak of them as examinations, in order not to confuse them with the external physical tests we mentioned earlier, such as surrendering one's shoes.

We must note that such question arises only when the defendant is *compelled* to submit to the examination. Cases have arisen in which the defendant *voluntarily* submitted.⁷ In such cases the question as to there being a privilege was not raised; since the privilege, if there were any, was waived by the defendant's consent. However the courts may be very liberal in inferring consent from a defendant's failure to object or his non-resistance as the Arizona court did in the case of *State v. Duguid*⁸ where a defendant's failure to object constituted consent. In this case the defendant was prosecuted for driving an automobile on the public highways while under the influence of intoxicating liquor. The court in this case was inclined to follow the same line of reasoning as is generally adopted in the external physical test cases and adopted the language of a North Carolina court in the case of *State v. Graham*,⁹ where the defendant was compelled to put his foot in a track found at the scene of the crime, the court saying: "The tendency of the more modern cases is to restrict the constitutional privilege against compulsory self-incrimination to confessions and admissions proceeding from the accused, and to open the door to all kinds of real evidence or proof of physical facts, which speak for themselves."

In the cases of examinations given to detect the presence of venereal disease the defendant has more often been accorded the privilege. In *State v. Height*¹⁰ where the defendant, accused of the crime of statutory rape, was compelled to submit to a physical examination to determine whether he was afflicted with a similar venereal disease as the prosecutrix, the Iowa court held that it was an unlawful search and seizure as being contrary to due process of law¹¹ as well as being a violation of the privilege against self-incrimination. Perhaps it is a social reason that inclines the courts to be liberal with a defendant in not compelling him to be so embarrassed by submitting to such an examination. This is indicated in a ruling of a later Iowa court, in *Wragg v. Griffin*,¹² where the results of an examination for venereal disease were held not

⁷ *People v. Corder*, 244 Mich. 274, 221 N. W. 309 (1928). *Garcia v. State*, 35 Ariz. 35, 274 P. 166 (1929). *People v. Bundy*, 168 Cal. 777, 145 P. 537 (1915).

⁸ 72 P. 2d. 435 (Ariz. 1937).

⁹ 74 N. C. 646 s. c., 21 Am. Rep. 493, 1 Hawley's Am. Cr. Rep. 182 (1876).

¹⁰ 117 Ia. 650, 91 N. W. 935, 59 L. R. A. 437 (1902).

¹¹ As regards due process, the Supreme Court in the case of *Twining v. New Jersey*, 211 U. S. 78 (1908), said that due process can not include the privilege against self-incrimination.

¹² 185 Ia. 243, 170 N. W. 400 (1919).

admissible; "because," the court said, "it subjects him (defendant) to ignominious restraint and public ostracism." This was the view in New York for some time after the case of *People v. McCoy*,¹³ where, in a bastardy proceeding the results of a compulsory examination as to defendant's recent delivery were held inadmissible. The court in the later New York case of *People v Sallow*¹⁴ overruled the holding in *People v. McCoy*¹⁵ thus indicating a step in the right direction. The court in *People v. Sallow*¹⁶ ruled thus: "The ruling of *People v. McCoy*,¹⁷ insofar as it held the evidence as to the condition discovered by compulsory physical examination of the defendant was not admissible in evidence, must be overruled."

The opinion in *In re McGee*¹⁸ seems also a progressive step and a just criticism of the squeamish attitude that may be adopted by courts in cases involving venereal diseases. In the *Wragg*¹⁹ case the defendant had been subjected to a physical examination for venereal disease at the insistence of a board of health, and was considered to be privileged because of the possible social embarrassment. The court in *In re McGee*²⁰ expressed what seems a wholesome and sane attitude, in commenting thus: "It may be observed that while provisions relating to discovery and examination cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril."

The *Wragg*²¹ case also indicated that the courts would not exercise such power over the individual unless clearly authorized by a legislative enactment. In some instances therefore boards of health have been granted greater power by statutes permitting examination of anyone reasonably suspected of having a venereal disease.²²

The so-called "sobriety-test" is often administered to reveal the presence or absence of alcohol in a person's body. An example of a very liberal interpretation of the constitutional privilege against self incrimination, respecting such examinations, is found in a late case from

¹³ 45 How. Pr. 216 (N. Y. 1873).

¹⁴ 100 Misc. 447, 458, 165 N. Y. Supp. 915, 921, 36 N. Y. Crim. 27, 37 (1917).

¹⁵ 45 How. Pr. 216 (N. Y. 1873).

¹⁶ 100 Misc. 447, 458, 165 N. Y. Supp. 915, 921, 36 N. Y. Crim. 27, 37 (1917).

¹⁷ 45 How. Pr. 216 (N. Y. 1873).

¹⁸ 105 Kan. 574, 580, 185 P. 14, 16 (1919).

¹⁹ 185 Ia. 243, 170 N. W. 400 (1919).

²⁰ 105 Kan. 574, 580, 185 P. 14, 16 (1919).

²¹ 185 Ia. 243, 170 N. W. 400 (1919).

²² *McBride v. Superior Court*, 103 Wash. 409, 174 P. 973 (1918). *Ex parte Brooks*, 85 Tex. Crim. Rep. 397, 212 S. W. 956 (1919). *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798 (1921).

Texas, *Apodaca v. State*.²³ In this case the defendant was indicted for manslaughter as a result of driving while under the influence of intoxicating liquor. It was held that it was error to receive such testimony and the conviction was therefore reversed on the ground that defendant had been unconstitutionally compelled to give incriminating evidence against himself. At common law the principle prevailed that no one is forced to accuse himself — *Nemo tenetur seipsum accusare*. The Texas court construed both the federal and state constitutions to be as broad as the ancient common law privilege. The court is inclined to regard with too much sacredness the individual's personal rights, failing to recognize the public's right to the prosecution of crime and the conviction of the criminal.

A much sounder view is that represented by the ruling of the Ohio court in the case of *State v. Gatton*.²⁴ This involves a circumstance similar to that in *Apodaca v. State*,²⁵ and a defendant was also compelled to submit to an examination for the purpose of determining the presence of alcohol in his body. Contrary to the Texas rule however, the evidence was held to be admissible, and not violative of the constitutional privilege against self-incrimination. This case held that the constitutional privilege against self-incrimination does not apply so broadly as to bring physical examination of the defendant within the privilege, but applies only to disclosure by utterance. The court referred to the lenient and liberal attitude obtaining in some jurisdictions where a false and sentimental tenderness for the guilty accused has created a tendency to extend the privilege in ways unimagined by those who laid its foundations. The evident purpose of the privilege, in history and principle, was to extend to compulsory incriminating matter gained by word of mouth. The examination of physical conditions does not come within the privilege, even though they be compulsory. The court in the Ohio case cited the sage authority of Wigmore: "Compulsion alone is not the component idea of the privilege, but testimonial compulsion. Unless some attempt is made to secure a communication, written or oral upon which reliance is to be placed as involving the consciousness of the defendant of the facts and the operations of his mind in expressing it, the demand upon him is a testimonial one."²⁶ Therefore an examination of bodily conditions ought not to violate the privilege because it does not compel the defendant in a *testimonial* capacity.

²³ 146 S. W. 2d 381 (Texas 1941).

²⁴ 20 N. E. 2d 265 (Ohio App. 1938).

²⁵ 146 S. W. 2d 381 (Texas 1941).

²⁶ 4 Wigmore Evidence 2d., § 2265.

We may say therefore that the science of "medico-chemics," although a comparatively new field, has already gained a general acceptance in criminal circles and should be of invaluable aid in crime detection and the advancement of criminal evidence.

Leo L. Linck.

LIFE INSURANCE AS A PRODUCT OF INTERSTATE COMMERCE.—Interstate commerce has been repeatedly defined as that trade or commerce which flows across state lines and boundaries. Such aspects can be seen as the basic principle established in the decision of *Gibbons v. Ogden*,¹ in which, steamboat navigation from the shores of one state to that of another was held to be the subject of federal regulation under the authority of the Commerce power. This feature of actual, physical commerce has developed to the point where it includes the many attitudes and attributes of commerce and places them in the same category. This is prevalent in the case of *The Pensacola Telegraph Company v. The Western Union Telegraph Company*² wherein the use of the telegraph was declared to be a subject of interstate commerce. The adoption of the telegraph as an instrument of commerce has led to the advancement of the theory of the instrumentalities of commerce as being a subject of federal regulation.

Can a mere contract between two individuals or entities, one generally a large corporation, be held to be the proper subject matter for regulation by virtue of the contract being within the bounds of interstate commerce? This is distinctly the problem in the matter of insurance as interstate commerce.

An earlier consideration of the type and nature of insurance would, in all probability, certainly bar the above consideration. The characteristics of insurance, which has thus far avoided a determination as interstate commerce, can best be stated in the words of Lord Mansfield, "This policy of insurance is a strange instrument, as we all know and feel."³ This theory and an idealistic method of approach developed an attitude of allowing the practices of insurance, some cruel in their effect, to develop before the definite formation of insurance principles and practices was ordained. This procedure led to the abusive characteristics of which the early insurance policies were fully calibrated. Thus the evident possible remedy was a governmental regulation of insurance companies and their policies. The untold hardships that were worked upon the insureds and their beneficiaries in effect paved the way for

¹ 9 Wheat. 1 (1824).

² 96 U. S. 1, 24 L. ed. 708 (1877).

³ *LeCheminant v. Pearson*, 4 Taunt. 380 (1881).

state regulation and control as well as statutory restrictions upon insurance contracts.⁴ Such regulation of insurance agencies and companies by the state has generally been based upon the reserved power of the legislature in the creation of such corporations as well as the police power of the state.⁵ However, this regulation has also been advanced upon the theory that insurance and related matters is a business affected with a public interest and the public welfare demands such regulation,⁶ if there can be a tangible distinction drawn between police power and the promotion of the general welfare in the provinces of the authority of the state.

Three cases definitely hold that the matter of regulation of insurance contracts is purely a matter of state jurisdiction and are so adamant that they admit no argument from any other view. "Insurance contracts are not subjects of trade and barter offered in the markets as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale-insurance but is a contract between persons, the insurer and the insured."⁷ Thus insurance, in principle, is not commerce,⁸ and failing in this requirement, it is not within the Commerce power of the federal government and not subject to its regulation.⁹

Similarly this theory is reiterated in the case of *Herbring v. Lee*¹⁰ wherein the court stated, "the insurance business so directly affects the well being and interest of the public as to make it a proper subject for regulation and control by the state." Thus it is now generally recognized that the business of insurance is one that is affected with a public interest and it is a proper subject of the exercise of the police power.¹¹

Therefore we have the status of the insurance business to-day and its subjectivity to such governmental regulation. However, we might excuse, at this point, entire federal regulation on the theory of the state's assumption of control and regulation until action by the federal government is taken to which the state government will be subordinate when and if such action is taken. However, there are certain elements

⁴ *DeLancey v. Insurance Co.*, 52 N. H. 581 (1873).

⁵ 233 U. S. 389 (1913).

⁶ 19 Misc. N. Y. 248 (1904).

⁷ *Paul v. Virginia*, 8 Wall. 168 (1869).

⁸ *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495 (1913).

⁹ *Nutting v. Mass.*, 183 U. S. 553 (1902).

¹⁰ 269 P. 236, 60 A. L. R. 1165 (1928); *German Alliance Inc. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011 (1913); *Northwestern National Ins. Co. v. Fishback*, 228 P. 516, 36 A. L. R. 1507 (1924).

¹¹ *People of the State of Illinois ex rel American Bankers Ins. Co. v. Palmer*, 363 Ill. 499, 2 N. E. 2d 728 (1936); *State of Ohio ex rel. Duffy v. Western Auto Supply Co.*, 134 U. S. 163, 16 N. E. 2d 256 (1938); *Herbring v. Lee*, 126 Ore. 588, 269 P. 236, 60 A. L. R. 1165 (1928).

in the matter of insurance and the related commercial dealings which can and possibly will justify the federal regulation of the future as a product of interstate commerce.

In one respect, insurance has grown to the extent wherein it is national and international in scope; a development which has increased ten-fold the problems of proper regulation of the numerous forms of insurance and their ramifications. This expansion has led to situations in which the central and home offices are located cross-continent from many of the states in which its insurance is in force and the insured or the insured property is located. This is a definite aspect of interstate commerce.

Again, the many divergent and directly opposite (in some respect) state laws create somewhat of a situation which is most confusing and difficult of interpretation. It can be safely said that a complete federal regulation of "interstate insurance" would, in the least, promote a greater degree of efficiency and a consolidation of the law of insurance which will prove concise in its application.

Also, a federal regulation under the interstate commerce clause of the federal Constitution will give a regulation which can and will be strict in its fulfillment by the insurance companies and which can promote safeguards and policies which will be nation wide in its economies and requirements. However, of course, those firms which solely operate in a purely local nature would be exempt from federal regulation and would remain subject to the existent state laws.

Opponents of the above propositions advance the theory that insurance is not a commodity to be bargained in and that insurance is a sacred contract between the insured and the insurer. We can counteract this advancement by pointing out that many other contracts of the same nature between individuals are already the subject of federal regulation under the interstate commerce power. In effect, insurance is merely the purchase of safety; a release of a peril to which the insured may be subject; or a payment in installments to merely aid others in the event of the death of the insured. Reducing this to its base elements we find nothing more than a purchase and a sale of an unstable factor or to be definitely stated, the purchase and the sale of the commodity of protection and safety.

This is a commodity as vital as many of the products of a more physical nature now subject to the regulation of the federal government. Yet, the clinging to the sacred theory of the contract may well refute any of the arguments advanced here, however, can it not be said that the federal regulation of insurance will create and hold the same atmosphere?

Consider now the effect of the Social Security Act which involves the Federal Old Age Benefit Insurance and Federal Unemployment

Compensation which is principally regulated by the Federal Government. Are not they forms of insurance soundly and well regulated by the Federal Government?

Thus, with the above arguments pro and con kept firmly in mind, one can state that the local regulation of insurance remains as such because of the absence of federal regulation up to the present time.

Joseph J. Miller, Jr.

SUMMARY JUDGMENTS IN ILLINOIS AND PROCEDURE BY WHICH OBTAINED. — Provision for summary judgments in Illinois is made in the Illinois *Civil Practice Act*.¹ The Act reads: "Subject to rules, if the plaintiff, in any action upon a contract, express or implied, or upon a judgment or decree for the payment of money, or in any action to recover possession of land, with or without rent or mesne profits, or in any action to recover possession of specific chattels, shall file an affidavit or affidavits, on the affiant's personal knowledge, of the truth of the facts upon which his complaint is based and the amount claimed (if any) over above all just deductions, credits and set-offs (if any), the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded, unless the defendant shall, by affidavit of merits filed prior to or at time of the hearing on said motion, show that he has a sufficiently good defense on the merits to all or some part of the plaintiff's claim to entitle him to defend the action. If the defense is to a part only of the plaintiff's demand a judgment may be entered, and an execution or other suitable writ issued, for the balance of the demand and the case shall thereafter proceed as to the portion of the plaintiff's demand in dispute as though the action had been originally brought; and in such case the court may make such order as to the costs of the suit as may be equitable."²

The affidavits must be made on the personal knowledge of the one making the affidavit, the affiant, and the affidavit must set forth the facts upon which the plaintiff's action lies. Attached to the affidavit must be sworn or certified copies of all papers upon which the plaintiff relies. The affidavit must contain no conclusions — only facts, and it must show that the affiant can testify to the facts set forth if the affiant is called as a witness.³

The affidavit of merits of the defendant to prevent the entry of the summary judgment is to be drawn up in the same manner as described above.

¹ Smith-Hurd, Illinois Revised Statutes, par. 181 (1941).

² Illinois Civil Practice Act, § 57.

³ Edmunds, Civil Practice Forms.

If the affidavit of either plaintiff or the defendant contains a statement that any of the facts which ought to appear are known only to persons whose affidavits the affiant is unable to obtain because of hostility or otherwise, the affiant is to name the persons and state why the affidavits can not be procured and also state what the affiant thinks they would testify to if sworn, with reasons for such belief. The court may then make such decision as may be just; either granting or refusing to grant the summary judgment. The court may order a continuance to permit affidavits to be obtained, or submit interrogatories to or take deposition of any persons so named or to produce papers or documents in possession of such persons or to furnish sworn copies thereof. All these above mentioned items shall then be considered as part of the affidavit in support of the plaintiff's claim or of affidavit of merits as the case may be.⁴

Looking at some of the cases involving summary judgments that have been decided under this section since the passage of the act in 1933, it is seen, the primary purpose of summary judgment provision as incorporated in the 1907 *Civil Practice Act* was to allow a disclosure to the plaintiff of the nature of the defense to be interposed. Under the 1933 act⁵ the former remedy of summary judgment has been greatly extended, and its purpose as defined in *Chicago Title and Trust Company v. Cohen*⁶ is to enable the court to determine whether there is an issue of fact to be tried. Or, as the court put it in *Diversey Liquidating Corporation v. Neunkirchen*⁷ and *Barrett v. Shanks*,⁸ the purpose is to determine whether a defense exists. It is a device to accelerate proceedings.

Where a defense raises an issue of fact as to plaintiff's right to recover, a summary judgment must be denied. A trial of an issue of fact by affidavits on a motion for summary judgment would deprive the parties to the suit of the right of trial by jury. Neither can the court determine the truth of the defendant's affidavit of merits. Truth of legal defenses must be decided by jury. Thus, where, in an action on a guaranty, the defendant alleged that the plaintiff was not the *bona fide* holder of the instrument; and the principal debtor collusively made certain misrepresentations as to its financial status, and that collateral security was not properly collected and applied by the creditors, the court erred in granting a summary judgment and refusing to permit the defendant to prove the above mentioned facts.⁹

⁴ Edmunds, Civil Practice Forms.

⁵ Illinois Civil Practice Act, § 57.

⁶ 284 Ill. App. 181, 1 N. E. 2d 717 (1936).

⁷ 370 Illinois 523, 19 N. E. 2d 363 (1939).

⁸ 300 Ill. App. 119 20 N. E. 2d 799 (1939).

⁹ Barrett v. Shanks, 300 Ill. App. 119, 20 N. E. 2d 799 (1939).

When will a summary judgment be granted? As pointed out above it will be granted where the affidavit of merits raises no issue of fact and the affidavit for judgment of the plaintiff is in the eyes of the court not overshadowed by the defendant's affidavit of merits.¹⁰ The court properly entered a summary judgment on plaintiff's motion for amount due them under an unambiguous contract where the defendant's affidavit raised no triable issue for the jury, as the sole question was the construction or interpretation of the contract by the court. In the latter case it said that since no triable issue was raised by the affidavit of the defendant the court was justified in granting the judgment.

Another case of note with reference to the granting of summary judgments is *Roberts v. Sauerman Brothers*.¹¹ This case held that in an action upon a foreign judgment where the affidavit for summary judgment was in substantial compliance with the *Civil Practice Act*, there can be no dispute as to the essential facts and therefore no issue of fact to be tried, and an affidavit of merits failed to set out a defense, the summary judgment was properly entered for the plaintiff. Thus, if an Indiana person had a judgment against another Indiana man and both parties moved to Illinois, one could get a summary judgment as long as one complied with all the rules and regulations set out in the Civil Code.

In *Ratner v. Bartholomee*,¹² the jurisdiction of municipal courts to grant summary judgments was questioned. The case held that the provision of the *Civil Practice Act* was applicable to municipal courts so long as it was not contrary to the express rules of the municipal court. It further stated that the action of a municipal court was subject to review only in case the judgment was unjust.

Forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained.¹³ *Wainscott v. Penikoff*¹⁴ held, properly, that the section providing for summary judgment was applicable to forcible entry.

The affidavit for summary judgment must set forth evidentiary facts from which the conclusion of law follows that plaintiff has a valid claim. On the other side, it was held in *Roberts v. Sauerman Brothers*,¹⁵ that an affidavit of merits to avoid a summary judgment which was based upon information and belief, and contained conclusions and did not give

¹⁰ *Chicago Title and Trust Company v. Cohen*, 284 Ill. App. 181, 1 N. E. 2d 717 (1936); *Spry v. Chicago Railway Equipment*, 298 Ill. App. 471, 19 N. E. 2d 122 (1939); *Graziani v. City of Chicago*, 303 Ill. App. 499, 25 N. E. 2d 607 (1940).

¹¹ 300 Ill. App. 298, 20 N. E. 2d 999 (1939).

¹² 282 Ill. App. 298 (1935).

¹³ *Black's Law Dictionary*, 3rd Edition.

¹⁴ 287 Ill. App. 78, 4 N. E. 2d 511 (1936).

¹⁵ 300 Ill. App. 298, 20 N. E. 2d 999 (1939).

facts, was entirely inadequate. Thus, from these two examples it is shown that both affidavits, the plaintiff's and the defendant's, must contain facts and facts alone. Conclusions of law are to be omitted entirely. The affidavit of defense is designed primarily to advise the party of his adversary's claim of defense.¹⁶ For this reason, if for no other, the affidavit should contain only those facts which may be proven.

Let us suppose that on filing the affidavits one is insufficient. What is the remedy, or what is the correct procedure? This is decided by two leading cases in Illinois. The first of these, *People v. Sawyer*,¹⁷ held that the proper procedure to test the sufficiency of the defendant's affidavit of merits would be to file a motion to strike. The other case, *Wainscott v. Penikoff*,¹⁸ held that the defendant may properly test the sufficiency of the plaintiff's affidavit and motion for summary judgment by a motion to strike.

As to the dismissal of the suit after striking the affidavit it was held in *People v. Sawyer*¹⁹ that the trial court would be unauthorized to dismiss the suit from the files after striking plaintiff's affidavit in absence of a motion for dismissal. In other words, the only time the court could dismiss the suit would be after the defendant made a motion for the dismissal.

It might be well to note here that in the *Chicago Title and Trust Company* case²⁰ it was held that the fact that the cause was at issue and had been noticed for trial was not to preclude the trial court from striking the affidavit of merits prior to the entry of final judgment.

In what way does the affidavit restrict the defense of the defendant? The defendant is restricted in the presentation of his defense to the proof of matters which he has notified the plaintiff in his affidavit of merits that would constitute his defense.²¹ In other words, he is not permitted to give in evidence any matter of evidence that was not stated in his affidavit. He is restricted to the proof of defenses pleaded.

The defendant must show in his affidavit a *bona fide* defense to the action. He can not find shelter behind general denials. For example, in *Ballard v. Trainor*,²² the defense of want of consideration is not available under the general issue but must be pleaded specially.

In conclusion, there seems to be no set rule as to the number of affidavits of merit the defendant is to be allowed. The only ruling in

¹⁶ *Mee v Marks*, 304 Ill. App. 463, 26 N. E. 2d 516 (1940).

¹⁷ 284 Ill. App. 463, 2 N. E. 2d 343 (1936).

¹⁸ 287 Ill. App. 78, 4 N. E. 2d 511 (1936).

¹⁹ 284 Ill. App. 463, 2 N. E. 2d 343 (1936).

²⁰ 284 Ill. App. 181, 1 N. E. 2d 717 (1936).

²¹ *Ballard v. Trainor*, 285 Ill. App. 509, 2 N. E. 2d 375 (1936).

²² 285 Ill. App. 509, 2 N. E. 2d 375 (1936).

Illinois on this matter is found in *Chicago Title and Trust Company v. Cohen*.²³ The trial court in a suit on guaranty was held not to have abused its discretion in refusing leave to the defendant to file a third affidavit of merits.

James E. Diver.

SURETYSHIP AND GOVERNMENT CONTRACTS.—Contractors doing business with the Federal Government are confronted with three types of bonds — a bid bond, a performance bond and a payment bond. Any one transaction with the government may require all or none. A bid bond is designed to assure the government of the reliability of the bidder. A performance bond is designed to guarantee the government that work contracted for will be completed. A payment bond assures that the contractor will make payments to all persons supplying labor and material in the prosecution of a government contract. It is the purpose of this note to consider the latter two bonds and to digest some of the most recent cases in which the Miller Act, requiring these bonds, is interpreted.

History

The *Heard Act*,¹ which immediately preceded the *Miller Act*,² was passed in 1894 in recognition of the inability of subcontractors to take liens upon the public property of the United States. Its practical effect was to substitute the required bond in place of the building on which the lien, in the case of non-public property, would attach. In 1935 the *Miller Act* was passed for the purpose of enlarging the protection to subcontractors and supplymen by relieving certain procedural trouble found to exist under the old act and to shorten the period when, under that act, suits might be instituted against the surety. To this end, the *Miller Act* provides a separate and direct line of action upon a payment bond, to be taken exclusively for the protection of laborers and material men, whereas the *Heard Act* required only one bond, primarily for the protection of the United States and secondarily for the protection of laborers and material men. The reason and purpose of the change was stated by Congressman *Dockweiler* ^{2a} during the Congressional debates preceding the passage of the *Miller Act* as follows: "The *Heard Act* as it stands today permits very substantial injustices to be done to laborers, material men and subcontractors. There is only one bond written under that Act and it enures, respectively, to the benefit of the

²³ 284 Ill. App. 181, 1 N. E. 2d 717 (1936).

¹ 28 Stat. 278.

² 40 U. S. C. A., § 270a.

^{2a} H. R. 5040.

government on the faithful performance of the contract and to the benefit of the laborers, material men and subcontractors. But the right of laborers, material men and subcontractors is postponed to an unreasonable length of time. Action under it by the Federal Government must be awaited, on the faithful-performance bond, which action can be brought at any time after the full and final completion of the contract; and only after the end of that time can laborers, subcontractors and material men have any relief under the bond. All that the material men, subcontractors and laborers desire is a separate and direct line of action upon a separate bond.”

The pertinent provisions of the *Miller Act*³ requiring performance and payment bonds on construction contracts are reproduced below:

Sec. 1. (a) That before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as “contractor”:

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or

³ 40 U. S. C. A., § 270a.

other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date

upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Sec. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C., title 40, Sec. 270) is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts."

Recent Decisions

Although the *Miller Act* provides new procedural facilities for suppliers and material men, the existence of a special equity in material men and laborers on government contracts has long been recognized. Such equity cannot be defeated by technical rules of suretyship. This traditional attitude has found consistent judicial expression since the passage of the *Heard Act*, and conforms with the intent of the legislators. For example, in the case of *Illinois Surety Company v. John Davis Company*⁴ a contractor who was heavily indebted entered into a contract to perform a public work, and his business was being conducted under the supervision of a creditor's committee. Later, his business was transferred to a corporation, and still later was handled by a receiver in bankruptcy. Material men furnishing material and services under the public works contract brought an action against the surety. The surety defended upon the ground that change in the identity of the principal releases the surety. The Supreme Court rejected this defense with the quotation "Technical rules otherwise protecting sureties from liability have never been applied."

In a more recent case,⁵ the court again clearly expressed the theory and importance of the material man's equity in contracts with the Federal Government. This is a case where a contractor was under contract with the Federal Government to build conservation camps in Michigan and Illinois. This company had executed a power of attorney to its surety authorizing it to receive, endorse and collect checks drawn on the

⁴ 37 Sup. Ct. 614 (1916).

⁵ *Seaboard Surety Company v. Spear*, 119 F. 2d 849 (1941).

Treasury of the United States. This power of collection was given to the surety pursuant to an indemnity covenant between the contractor and surety. The Federal Government made earmarked payments to the surety who set up a special fund for these payments. Two sets of material men have sought recovery against the surety. The first had a claim for a larger amount than was covered by the amount paid by the United States Treasury to the surety for that purpose, but the surety paid that claimant an amount sufficient to completely discharge the claim. The second claimant brings this suit in equity to enforce an equitable lien against all funds paid by the government to the surety. The court decided that "the plaintiffs are entitled to a lien upon the fund remaining in the surety's possession in the special account." By its suretyship contract, agrees absolutely to pay all just claims for materials and services against the public contractor, and "obviously this statute-given equity of the suppliers to moneys due upon the contract is not lost where the surety obtains possession by scheming with the contractor, since it has not discharged the full condition of its bond. Nor would the equitable right against the surety be lost through disbursement of the money to a claimant on an entirely different contract since the statute operates in conjunction with each separate bond to create a particular equity in the moneys payable in relation to the contract for which the bond was given."

In the case of *United States v. Fleisher Engineering and Construction Company*⁶ it was held that this act and the bonds given under it should be construed liberally in order to effectuate the purpose of Congress. In this case notice of claim was served on the plaintiff by unregistered mail and contrary to the statute, but the notice was complete in every other detail and was received by the plaintiff within the statutory period. It was held that such service is sufficient. "Nothing better settled than the doctrine that statutes should receive a sensible construction such as will effectuate the legislative intentions. . . ." This opinion was expressly affirmed and the principle elaborated upon in *United States for Use of Birmingham Slag Company v. Perry*.⁷ Since no contractual relationship existed between the Slag Company, material man for subcontractor, and the prime contractor, it is clear that it has no right of action against him and his surety as a matter of common right. But the *Miller Act* vests a right of action upon the contractor's payment bond in material men who deal only with the subcontractor under government contracts, provided the prime contractor is given written notice within a limited time. The question is whether or not actual notice by ordinary mail is sufficient, and it was decided affirmatively.

⁶ 60 S. Ct. 886 (1940).

⁷ 115 F. 2d 724 (1940).

The object of requiring notice to the principal contractor is to enable him to withhold payments from a subcontractor until the latter should pay his own men who have worked on the job.

This attitude was further emphasized in the case of *United States ex rel. and for Use and Benefit of Korosh v. Otis Williams and Company*⁸ where the court said that "the Act should be liberally construed from the interests of material men and laborers since its purpose is to provide security for all such persons." In the *Korosh* case⁹ the plaintiff was employed by the prime contractor to furnish all necessary labor and to do all the necessary work to complete a partially performed construction contract. The plaintiff did so and now seeks to recover the compensation therefor. The defense claims that the plaintiffs did not bring their claim within the one year prescribed by statute. There was a difference in opinion as to the completion date. The Comptroller General decided in favor of the plaintiff, and his ruling in such controversies is final. The co-defendant, surety on the price contract, defended on the grounds that the ninety-day notice was not given to it as required by statute, but the court held that this provision applies only "to the contractor and not to the surety whose liability is coextensive with the original contractor." Here the contractor told the subcontractor that any change in the contract would be adjusted in an equitable manner. A change occurred involving an increase in quantities and difficulties in handling the work, and the subcontractor was allowed to recover on the contractor's bond for reasonable value of the work under the changed conditions.

The term "public work," as used in this act, includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. It includes work done on property belonging to the United States and all fixed works constructed for public use at the expense of the United States. *Peterson v. United States for Use of Marsh Lumber Company*.¹⁰

Section 2 of the *Miller Act* was interpreted in a very interesting case of *United States for the Use and Benefit of Dorjman v. Standard Surety and Casualty Company*.¹¹ It was an action upon a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work . . .", specified in a contract entered into by the contractor with the United States Government for work done on a United States Government building. The plaintiffs are two painters who assert that they were subcontractors as to all exterior painting, and that they are entitled to recover an alleged unpaid balance owing to them under the said subcontract. But the court found that they were

⁸ 30 F. Supp. 590 (1941).

⁹ U. S. ex rel. and for use and Benefit of Korosh v. Otis Williams and Co., 30 F. Supp. 590 (1941).

¹⁰ 119 F. 2d 145 (1941).

¹¹ 37 F. Supp. 323 (1941).

not subcontractors but merely employees and were entitled to recovery only on *quantum meruit* and not according to the terms of their alleged subcontract. A further issue in the case arises from the fact that a third person furnished money to the contractor to be applied toward the payrolls of their laborers. This plaintiff seeks judgment against the defendant's surety company for the amount loaned. But the court held that "the contractor's creditor who furnished money to meet payrolls on a government construction job could not recover on a contractor's bond, since the credit had not 'furnished labor or material' in the prosecution of the works within the meaning of the statute."

Another very interesting problem arises where the subcontractor provides a bond indemnifying the prime contractors against loss because of the subcontractor's failure to perform the subcontract free of all liens for labor and materials. In the case of *United States for the Use of W. E. Foley and Brothers, Incorporated v. United States Fidelity and Guaranty Company*¹² such a situation arose. The prime contractor had furnished a payment bond for the benefit of all those who supplied labor and material in the prosecution of the work. A corporation contracting with the government subcontractor to supply material for work with the prime contractor, after failing in its effort to recover from the subcontractor, sought to recover from the prime contractor on the payment bond. The subcontractor had furnished a bond to the prime contractor indemnifying the latter for any loss caused by the subcontractor's failure to perform the subcontract free of all liens for labor and materials. The prime contractor paid the corporation furnishing materials and now seeks reimbursement from the subcontractor's surety under the indemnity bond. The court held that such recovery was allowable. "A government contractor's payment of money to a corporation in satisfaction of its judgment on contractor's guaranty of subcontractor's account for materials furnished, extinguished contractor's liability on a statutory bond to United States, and hence constituted 'loss' within subcontractor's bond to indemnify contractor against all loss caused by subcontractor's failure to perform subcontract free of all liens for labor and materials."

A subcontractor is not entitled to protection under the prime contractor's performance bond which is required for the exclusive protection of the United States. Such was the holding of the court in *United States for the Use of Lichter v. Henke Construction Company*¹³ where a subcontractor suffered damages because of delay in the completion of the prime contract. The subcontractor was denied recovery in an action against the prime contractor and surety on the performance bond. The subcontractor is entitled only to that degree of protection specified in the payment bond.

¹² 28 F. Supp. 443 (1940).

¹³ 35 F. Supp. 388 (1940).

But where it is customary for the subcontractor to present certifications of payment to the material men, such certifications must be valid before the prime contractor becomes liable on the payment bond. *United States for the Use of Noland Company v. Maryland Casualty Company*.¹⁴ "Where material man, in accordance with custom to certify payment for materials furnished to a public works subcontractor at the end of each month, executed a false certificate for a certain month, (the subcontractor had merely promised to give a note for materials furnished) and prime contractor relied on this certificate when paying the subcontractor, the material man was 'estopped' from recovering on contractor's payment bond for those materials, payment for which had been falsely certified." The prime contractor paid the subcontractor an amount which included the false certificate. The subcontractor went into bankruptcy before paying the material man. The latter then sought recovery from the prime contractor and surety on the payment bond for this amount. The court denied recovery.

The case of *United States for Use of Foster Wheeler Corporation v. American Surety Company of New York*¹⁵ involves the application of the Rules of Civil Procedure for District Courts, the proper tribunal for government contract suits. The United States had contracted for the installation of new boilers on the Army troop transport "Republic" part of which was subcontracted to the plaintiff. The plaintiff brings this action against the prime contractor's surety on a payment bond for services and materials furnished by the plaintiff to the prime contractor. The court allowed the prime contractor to intervene and assert new counter claims. Permission for such intervention was granted on the grounds that the prime contractor, in view of the surety's right to indemnification, would ultimately be liable if recovery were had against the surety. The first counter claim was against the United States for improper operation of the boat. The attorney for the government denied the contractor's right to bring such a motion. As to this the court said, "While the United States may not be sued without its consent, it may be subjected to suit where Congress has granted permission." The claim which this intervening defendant seeks to assert against the United States falls within the permission granted by the "Title 28 U. S. C. A. Sec. 40 (20) which allows suit to be brought against the United States for all claims not exceeding \$10,000 . . . upon any contract, express or implied, with the government of the United States. . . ." The court went on to say that, "the new rules of procedure are designed to enable the disposition of a whole controversy such as this at one time and in one action provided all parties can be brought before the court and the matter decided without prejudicing the rights of any of the parties." The intervening prime con-

¹⁴ 38 F. Supp. 479 (1941).

¹⁵ 25 F. Supp. 700 (1938).

tractor entered two counter claims in his defense. The first was a motion to make the United States a party to the action on the grounds of improper operation of the boat by the government. The second was a counter claim against the subcontractor alleging non-liability on the grounds that the material and services furnished by the subcontractor were defective.

*United States for Use of P. A. Bourquin and Company v. Chester Construction Company*¹⁶ presents a further interpretation as to what constitutes a person "who has furnished labor or materials in the prosecution of the work" within the meaning of the *Miller Act*. In that case the question arose as to whether a claim for rental of equipment to a subcontractor is covered by the *Miller Act*. The court decided that the lessor had a good cause of action under the *Miller Act* on the general contractor's bond. But the *Miller Act* cannot be invoked by one having merely a cause of action for breach of contract to take and pay rent for equipment never received or used by the contractor in connection with the work.

An action was brought by a corporation which furnished materials to a subcontractor against the contractor's surety on the payment bond. The plaintiff admits that it did not give notice until long after the expiration of the required 90 days but claims that it is accepted from the notice requirement. The complaint alleged that the subcontractor issued instructions to the prime contractor that the said prime contractor should retain from payment such sums of money as were necessary to pay subcontractor's creditors. The prime contractor accepted these instructions, and the plaintiff claims that this acceptance gives rise to an implied contractual relationship between the plaintiff, the subcontractor's creditor, and the prime contractor such as would render unnecessary the ordinary notice requirements. But the court refused to accept this line of reasoning. "The language of the Act shows its purpose was to benefit the material man and at the same time protect the contractor by requiring notice of the nature of the claim. Under the plaintiff's theory the way would be opened to every material man to sue the contractor based on the claim that the contractor had agreed with the subcontractor to pay all subcontractor's bills out of the income from the contract." *United States for Use of Kewaunee Manufacturing Company v. United States Guaranty Company*.¹⁷ "This section is without ambiguity and requires notice as a jurisdictional prerequisite to an action for the use and benefit of a subcontractor against the principal contractor and his surety." So said the case of *United States for Use of John A. Denie's Sons Company v. Bass*.¹⁸

¹⁶ 104 F. 2d 648 (1939).

¹⁷ 37 F. Supp. 561 (1939).

¹⁸ 111 F. 2d 965 (1940).

Where a contractor engaged in work on a government building was proceeding satisfactorily with work schedule, with non-union labor, and where by reason of sympathetic strike by union employees of other contractors engaged on the same project, all work thereon was suspended, and after conferences with government representatives the contractor met the union demands, and thereby incurred additional expense the contractor was entitled to recover from the government.¹⁹

In another case a subcontractor was informed by the prime contractor that the roof of a post office was practically finished and whose contract was prepared on that basis but who found upon arriving on the job that the roof had not been constructed, and was induced by the foreman or the contractor to build up the roof, was entitled to recover on the payment bond for completion of the roof in addition to compensation provided in the contract, notwithstanding a provision therein against modification, since upon discovery that the work had not progressed as understood, the matter was open for further consideration. However, the subcontractor was not entitled to profit in recovery on the payment bond, but could recover thereon only for labor and materials furnished. *United States for Use of Helie v. Great American Indemnity Company*.²⁰

Surety companies in offering their services to government contractors must be aware that in so doing they are accepting greater responsibilities and are entitled to fewer defenses than when bonding private contractors. These facts are reflected in the thoroughness with which public contractors are investigated and in the higher suretyship rates charges to public contractors. Contractors themselves, furthermore, when dealing with the government, assume greater responsibilities and are charged with a greater degree of diligence when operating under government contracts. Thus, in *Kemp v. United States*²¹ the court points out that in the matter of specifications "private persons or corporations when contracting with the government are held to more strict requirements than is usually the case with respect to private contracts, since such requirements obtain the force of law by reason of regulations of the various executive departments of the government passed pursuant to the statute." But, "the government must be held to the same general principles of equity and fair play in dealing with those who contract with it as are the contractors themselves."

William B. Mooney.

¹⁹ *Virginia Engineering Company v. United States*, 89 Ct. Cl. 457 (1939).

²⁰ 30 F. Supp. 561 (1939).

²¹ 38 F. Supp. 568 (1941).

THE CONSTITUTIONALITY OF THE WISCONSIN ANTI-INJUNCTION ACT.—In 1914 Congress passed a law commonly known as the Clayton Act,¹ sections six and twenty of which pertained to labor. This legislation being the first of any real significance, was intended to be a definite step in favor of labor. Section six in substance says that no labor organization shall be deemed an illegal combination of conspiracy in restraint of trade, as defined by the anti-trust laws. In other words labor groups were not subject to anti-trust legislation. Section twenty says in part: "No restraining order or injunction shall be granted by any court of the United States . . . in any case between employers and employees or between employees or persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, of the party making the application, for which injury there is no adequate remedy at law."²

Several cases have been decided pursuant to the labor provisions of the Clayton Act. In *Truax v. Corrigan*³ the United States Supreme Court construed an Arizona Statute modeled after and similar to the Clayton Act. Truax operated a restaurant in which the defendants had been employees; a strike arose over the failure of plaintiff to comply with certain demands of the defendants. In conducting the strike defendants induced many of the plaintiff's customers to cease doing business with the plaintiff, and the plaintiff, therefore sought to enjoin this activity. The court granted an injunction saying: "It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences, illegally inflicted, to his reputation and to his standing in the community. Violence could not have been more effective. It was moral coercion by illegal annoyance and it thus was plainly a conspiracy."

Wisconsin in 1919 enacted legislation similar to the Clayton Act, which act was construed in the case of *Monday v. Automobile Workers*.⁴ The court held that the act was not applicable to strikes in which a closed shop was being sought by the striker and therefore such a strike was deemed illegal. Justice Rosenbury in rendering the opinion of the court said that the rights of an employer to pick his employees was a constitutional one, totally recognized by the State of Wisconsin. He further said that Chapter 211, Section 1 (which was part of the statutes

¹ 15 U. S. C. A. § 12.

² 15 U. S. C. A. § 12.

³ 257 U. S. 312, 42 S. Ct. 124 (1921).

⁴ 177 Wis. 532, 177 N. W. 867 (1920).

passed pursuant to the Clayton Act) only reiterated the law as it existed prior to the passage of the section. An observation similar to this last was made in a federal case decided also subsequent to the passage of the Clayton Act.⁵ The court interpreted the Act as merely restating common law principles.

Thus we see that though the passage of the Clayton Act was received by labor with great rejoicing, and though many states passed laws patterned after the Clayton Act, the goals which labor expected were not reached. In fact labor conditions were not substantially changed from labor conditions prior to its passage. Either because our courts could not see any legal changes by the passage of the Act to what had previously been established, or because of constitutional reasons, namely "due process" and "equal protection," injunctions against strikers did not cease to issue. Practically every man's business was considered a property right, and our judges refused to be restrained in the issuance of injunctions where they considered these property rights in danger.

Due to the apparent failure of the Clayton Act, in 1932 Congress passed a law known as the Norris-LaGuardia Act⁶ which was intended to really give labor its back-bone. Substantially, the Act sets out at the beginning the policy of the government in regard to labor, then the act sets out numerous acts against which an injunction cannot be issued by a federal court. Next the act enumerates the conditions which first must be met before the courts will enjoin the conduct of employees. In addition to these just mentioned there are a few other provisions which are of lesser significance and for our purposes need not be explained. It goes without saying that with the passage of this act the cause of labor was greatly promoted, and the federal courts have been quite scrupulous in construing the act, and in carrying out the intentions of the legislators as is shown by the *New Negro Alliance v. Sanitary Grocery Company* case,⁷ wherein the court refused to enjoin picketing conducted for the purpose of getting the defendant to hire negro clerks.

At this point we shall turn to the more direct problems concerning this paper. First let us determine what is considered a labor dispute in Wisconsin. According to the Wisconsin Statutes for 1941 a labor dispute is in substance any disagreement between an employer or a group of employers and an employee or a group of employees, between an employer or group of employers and another employer or group of employers, between one employee or more and a group of employees, or any disagreement which is of interest to labor.⁸ In the case of *American Furniture Company v. I. B. of T. C. and H. of A., Chauffeurs, Team-*

⁵ *American Steel Foundries v. Tri City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921).

⁶ 29 U. S. C. A. § 101.

⁷ 303 U. S. 552, 58 S. Ct. 703 (1938).

⁸ Wisconsin Statutes, 103.62 (1941).

sters and Helpers General Local No. 200 of Milwaukee, the Wisconsin Supreme Court in referring to a labor dispute and its meaning according to the above statute said:

"In spite of the authority of these cases it is our view that the language of the labor code is plain and unambiguous and does not exact as a prerequisite to a labor dispute that there be a controversy between an employer and his employees. Subsection (3) makes the scope of a controversy broad enough to include questions relating to association or representation of persons relative to conditions of employment or industrial relations, and this regardless of whether or not the disputants stand in the proximate relation of employer and employee."⁹

That the doctrine set out in the definition and in the above cited case is an extremely liberal one seems almost useless to mention, but it well serves as a hint as to what is the nature of other Wisconsin laws on labor.

Secondly let us consider the Wisconsin anti-injunction statute entitled, Injunction: Conditions of Issuance. The statute reads as follows:

"(1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute as defined in section 103.62 except after hearing the testimony of witness in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered, and except after findings of all of the following facts by the court or judge or judges thereof.

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted.

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof.

(d) That the relief to be granted does not violate provisions relating to lawful conduct in labor disputes set forth in the statute.

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection."

Sections (2), (3), (4), (5) and (6) pertain to procedural matters with reference to the Act.¹⁰

⁹ 222 Wis. 338, 268 N. W. 250 (1936).

¹⁰ Wisconsin Statutes, 103.56 (1941).

This act was a forerunner of the Norris-LaGuardia Act,¹¹ having been passed in 1931. Both acts, however, are for the most part similar, with the Wisconsin Act probably a little broader than the Federal Act.

The sweeping broadness of the act has given rise to the usual objection under such circumstances, namely that it is unconstitutional. Is not the prohibition to issue injunctions, which power has specifically been granted to the courts of Wisconsin by the Wisconsin Constitution, a violation of that Constitution? Article VII of the Wisconsin Constitution in section 3 specifically confers upon the supreme court the power to issue injunctions, and in section 8 makes the same grant to the circuit courts of the state. The objection might, therefore, be raised that the passage of the anti-injunction statute is unconstitutional in that it takes away from the state courts a power specially granted to them by the Wisconsin Constitution. This very issue was brought up in the *American Furniture Company v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee* case,¹² where the supreme court in dismissing this contention said: "It is beyond question that the Legislature may change the substantive law and in doing so increase or reduce the subject matter upon which the jurisdiction of the courts operates. . . . When the Legislature makes peaceful picketing valid under certain prescribed circumstances, it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character." Thus, in clear, concise words the court has shown that the question above proposed cannot be a valid objection.

The two main federal constitutional objections are that the act violates the "due process clause" and the "equal protection of the laws" clauses of the fourteenth amendment. The main case in this regard is the *Senn v. Tile Layers Protective Union Local No. 5* case.¹³ Plaintiff was engaged at Milwaukee in the tile contracting business. He employed a few journeymen tile layers, but neither he nor any of his employees were members of defendant union. Most tile layers, however, were members of the union. The union tried to get Senn to become a union contractor and to negotiate a collective bargaining agreement. He refused, whereupon his place of business was peacefully picketed. Senn, thereupon sought an injunction. The United States Supreme Court affirmed the decision of the Wisconsin Court which had denied the injunction. Regarding the constitutional aspects the majority of the court speaking through Justice Brandeis said: "There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in

¹¹ 29 U. S. C. A. § 101.

¹² 222 Wis. 338, 268 N. W. 250 (1936).

¹³ 301 U. S. 468, 57 S. Ct. 857 (1937).

the press, by circulars or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combinations. . . . To win patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the constitution. . . . It is true, also that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for-job is not property guaranteed by the constitution and the diversion of it to a competitor is not an invasion of a constitutional right. It is contended that in prohibiting an injunction the statutes denied to Senn equal protection of the laws. . . . But the issue suggested by plaintiff does not arise. For we hold that the provisions of the Wisconsin statute which authorized such conduct of the unions are constitutional. One has no constitutional right to a 'remedy' against the lawful conduct of another." Consequently, we see that in this important case the constitutionality of the Wisconsin Act is upheld. The far reaching effects of this decision cannot be underestimated. It means that an employer must conduct his business subject to the strict rights of labor, that he must recognize the rules and regulations set down by labor unions; that he cannot employ non-union men even if his employees do not seek to be members of the union; and yes, that even the employer's activities as a laborer in his own craft are subject to regulation by the union or labor. This case demonstrates that constitutional objections are not as potent as they were formerly, that the time worn "due process" and "equal protection of the laws" clauses have been somewhat devitalized of the reverence with which the Supreme Court previously held them.

A rather recent case should be mentioned here to show what is the United States Supreme Court's view on anti-picketing statutes as being violative of the freedom of speech and press section of the first amendment. In *Thornhill v. State of Alabama*¹⁴ the court was called upon to determine the validity of an Alabama statute which in substance prohibited picketing. The plaintiff had been convicted under this statute and thereupon appealed to the Supreme Court. The court in branding the Alabama statute as unconstitutional said: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . .

¹⁴ 310 U. S. 88, 60 S. Ct. 736 (1940).

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Still another case, though decided prior to the one mentioned above, is somewhat similar to it, but presents "freedom of speech and press" from another viewpoint. In the *Associated Press v. National Labor Relations Board* case¹⁵ an employee of the plaintiff was dismissed by the plaintiff in violation of section seven of the National Labor Relations Act. The plaintiff set up the first amendment as allowing it the privilege of discharging the employee in question and that the Act as applied to it was in violation thereof. In other words, the plaintiff, due to the nature of its business, due to its being required to present unbiased news, due also to the fact that in order to do this it must have complete charge over its employees, as it said, maintains that to require its subjection to the act would take from it a guaranteed freedom. Justice Roberts in speaking for the court, which decided against the plaintiff, said that these facts were not material to the case and were "an unsound generalization" as well. In the *Thornhill* case¹⁶ the "freedom of speech and press" clause was used to defend the rights of labor; in the *Associated Press* case¹⁷ it was used to defend the rights of capital. So different are these two approaches as to seem unreconcilable. Yet in both cases, regardless of the approach, the rights of labor prevailed. From the decisions handed down in these two cases it can be safely said that this third popular objection is also practically powerless in curbing the rights of labor given it by modern labor statutes and by their judicial interpretation.

By way of summation, the conclusion is one, not only for the State of Wisconsin, but for the United States in general, labor has achieved the goal for which it has been fighting through many years past. It is enjoying its greatest era, and from a social standpoint this may be desirable.

John M. Speca.

THE SIGNATURE OF WILLS IN MICHIGAN. INTERPRETATION OF "AT THE END." — Chief among the requirements for the validity of a will, such as to admit it to probate after the death of the testator, is that the instrument be signed by the testator. As to the location in the instrument of such signature, either of two rules may apply. According to the English *Wills Act* of 1837 the signature of the testator is required to be at the end of the instrument; but, by the provisions of the earlier

¹⁵ 301 U. S. 103, 57 S. Ct. 650 (1937).

¹⁶ 310 U. S. 88, 60 S. Ct. 736 (1940).

¹⁷ 301 U. S. 103, 57 S. Ct. 650 (1937).

English *Statute of Frauds* of 1677 the signature might appear at any place in the instrument, not necessarily at the end, without invalidating the will so long as the testator intended his name as written to be his signature.

The older states of this country, among which is Michigan, have followed the *Statute of Frauds*. The statute in Michigan, regarding the signing of wills, reads as follows: "No will made within this state, except such nuncupative wills are mentioned in the following section, shall be effectual to pass any estate, whether real or personal nor to charge or in any way affect the same, unless it be in writing and signed by the testator or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two (2) or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved." ¹

The history of this statute goes back to an early date, indicating the *Statute of Frauds* was its prototype. Another indication of its relative antiquity and strong evidence of its following the *Statute of Frauds* is the wording of the statute itself where it says that the instrument must be "signed by the testator or by some person in his presence and by his *express* direction." This is the same as the "express direction" required of the testator by the *Statute of Frauds*. Similarly, the word "presence" appears twice in this statute just as in the *Statute of Frauds*. Moreover, the cases show that Michigan does not follow the stricter requirement of the *Wills Act* that the signature be at the end. A leading case on this point is *In re Estate of Thomas*,² an instance of an holographic will beginning "The will of Augusta M. Thomas." The will consisted of only one sheet and was not signed at the end. The will was admitted to probate, having been considered by the court to have been signed within the meaning of the section of the statute mentioned, although there was no signature at the bottom or end of the writing. The court adopted the rule that the signature may be placed anywhere provided there was an intent to adopt the name so written as the signature of the testator.

In *In re Norris Estate*³ the court commented on the similarity between the statute and the *Statute of Frauds* and said that it was immaterial where the testator's signature was placed so long as it was placed there with the intention of authenticating the instrument.

¹ Mich. Ann. Stats., Section 26.1065; C. L. '29, Section 13482; C. L. '15, Section 11821; How. Section 5789; C. L. '97, Section 9266; C. L. '71, Section 4326; C. L. '57, Section 2839.

² 243 Mich. 566, 220 N. W. 764 (1928).

³ 221 Mich. 430, 191 N. W. 238, 29 A. L. R. 884 (1922).

When may such intention of authentication be presumed? The court in *Stone v. Holden*⁴ ruled that in addition to publication by the testator a request that the witnesses sign the attestation clause in which the testator has himself written his name, establishes, at least *prima facie*, the intention to adopt such name so written as his signature to the will.

There are very few cases in Michigan dealing specifically with the place of the signature of the testator. The few that do and which interpret the statute regarding signing show that Michigan, which is among the older states of this country, follows the *Statute of Frauds*; according to which it is immaterial where the signature of the testator is placed so long as there was an intent thereby to authenticate the instrument.

Leo L. Linck.

TORTS—LIABILITY OF A CHARITABLE HOSPITAL FOR INJURIES CAUSED BY X-RAY BURNS.—Notwithstanding the fact that much litigation has arisen from injuries caused by x-ray burns,¹ the actions in almost all of the cases have been directed against the immediate operator of the machine causing the injury.² Research reveals relatively few cases concerning the liability of a charitable hospital for such injuries and the cases are not uniform in their result.³

Liability to a doctor, an invitee: The Supreme Court of Nebraska in *Marble v. Nicholas Senn Hospital Association of Omaha*⁴ held that a charitable hospital was liable to a doctor, injured in a fall occasioned by a shock due to a defective x-ray machine, while holding an infant patient so that its head could be x-rayed. The court in affirming its judgment for the plaintiff said that a charitable hospital conducted for

⁴ 221 Mich. 430, 191 N. W. 238 (1922).

¹ Burns here will cover only those directly caused by the negligent use of the x-ray. For related subject where plaintiff was burned when a defective fluoroscope emitted sparks igniting vapors and gases, see *Walsh v. Sisters of Charity of St. Vincent's Hospital*, 14 Ohio App. 228, 191 N. E. 791 (1933). In this case it was held that a hospital operated as a public charitable institution is not liable for a negligent injury to a patient.

² In *Vigneault v. Dr. Hewson Dental Co.*, Mass., 15 N. E. 2d 185, 129 A. L. R. 95 (1938), a dentist was held liable for injuries arising out of his negligent use of the x-ray machine. Where a doctor was held liable for the injuries caused by his negligence in operating an x-ray machine, the court said, "it is immaterial in determining the degree of care and skill required, whether the person operating an x-ray machine is a physician or a lay expert." *Holt v. Ten Broeck*, 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E, 256 (1918).

³ Due to the fact that the several courts cited have relied on *stare decisis* in the principal cases, the reasons for the opinions are found in the cited cases supporting the principal ones.

⁴ 102 Neb. 343, 167 N. W. 208, 13 A. L. R. 1418 (1918).

philanthropic and benevolent purposes was not liable to inmates for the negligence of its servants but this immunity does not extend to a physician who by invitation enters the hospital with a patient to procure an x-ray for the patient and is injured through the negligence of the x-ray operator.⁵

Liability to a patient, a beneficiary of the charity: In *Ritchie v. Long Beach Community Hospital Association*,⁶ the deceased, x-rayed for an injury, died a year and a half later during an operation to remove an ulcer caused by an x-ray burn resulting from the negligence of the operator. In holding the hospital not liable the court said that where a hospital is supported in part from voluntary contributions and proceeds of a trust fund, and incorporated as a non-profit association, it was a charitable institution in an action for the patient's death. The court further stated that an x-ray department which earned a slight profit should not be considered apart from the hospital itself in determining whether the hospital was a charitable institution. Immunity from liability here was predicated upon the theory that a charitable hospital was not liable if it exercised due care in the selection of its employees.⁷ In dismissing an action for damages due to injuries incurred by the plaintiff from the negligent use of an x-ray machine in *Berkowitz v. City of New York*,⁸ the court based its opinion on the rule handed down in *Schloendorff v. Society of New York*⁹ and *Phillips v. Buffalo General Hospital*.¹⁰ The former held that the implied waiver doctrine is the foundation of exemption from liability of a charitable hospital for the negligence of its doctors in the treatment of patients who are regarded as the beneficiaries of a charitable trust. In the latter case, the court reluctantly affirmed the theory of exemption on the implied waiver doctrine but was inclined to place more weight on the fact that the relation of a hospital and a physician is not that of master and servant but that the physician occupies the position of an independent contractor, following a separate calling, liable of course for his own wrongs to the person he undertakes to serve, but involving the hospital in no liability if due care has been taken in his selection. The hospital under-

⁵ One, who at the request of a patient about to enter a charitable hospital accompanies him to render reasonably necessary assistance, is an invitee of the hospital, to whom it owes the duty of exercising ordinary care to have the premises reasonably safe. *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025 (.....).

⁶ 139 Cal. App. 688, 34 Pac. 2d 771 (1934).

⁷ *Withington v. Jennings*, Mass., 149 N. E. 201 (1925); A prescribing physician was not liable for the negligence of an x-ray technician in a charitable hospital since the technician was not an agent or servant of the doctor, but a fellow employee at the hospital and was out of the doctor's control.

⁸ 13 N. Y. S. 2d 864 (1939).

⁹ 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581 (1914).

¹⁰ 239 N. Y. 188, 146 N. E. 199 (1924).

took not to heal or attempt to heal through the agency of others but merely to supply others who will heal or attempt to heal on their own responsibility.

It is to be noted that in the reported cases, the courts have never considered the assumption of risk of a burn of such nature as the grounds for the immunity of the charitable hospital. While in *Ballance v. Dunnington*,¹¹ the court by way of explanation said that x-ray burns do occasionally occur in the ordinary course of exposure and in spite of the highest diligence and skill to prevent them, because persons of a certain type and temperament are susceptible to a burn while persons of a different type under the same circumstances will not suffer a burn. It appears that this idiosyncrasy cannot be determined before or during the time of the exposure but this is manifested only by subsequent developments. However, when the plaintiff was warned of the danger of such a burn and agreed to assume the risk, the court in *Hales v. Raines*¹² said that he did not assume the risk of the operator's negligence in placing the x-ray tubes too near the plaintiff's hand whereby he sustained the injury complained of.

Inasmuch as there is a divergence in the opinions of the courts concerning the liability of charitable hospitals, it is impossible to state with certitude that any one theory is controlling. The theories of immunity of a charitable hospital from liability on the ground of public policy and the trust fund doctrine have in some instances been rejected, and the doctrine of implied waiver being applicable only to beneficiaries of the hospital's charities, there is a general tendency that the law should be the rule of responsibility for the negligence of its servants and agents as in the cases of ordinary business corporations. This may be effected, however, only through the combined efforts of the courts and the legislatures. It is obvious that this problem is sufficiently universal to merit their attention and action.

Timothy M. Green.

WRIT OF CORAM NOBIS — ITS USE AND THE REASONS WHY HABEAS CORPUS CANNOT BE SUBSTITUTED. — The old common law writ of *coram nobis* or *coram vobis* was (At common law in England a writ of error *coram nobis* issued from the court of King's Bench to a judgment of that court; and a writ of error *coram vobis* issued from the court of King's Bench to a judgment of the court of Common Pleas.)¹ a species of writ of error though of somewhat peculiar nature. Under

¹¹ 241 Mich. 383, 217 N. W. 329, 57 A. L. R. 262 (1928).

¹² 162 Mo. App. 46, 141 S. W. 917 (1911).

¹ *Lamb v. State*, 91 Fla. 396, 107 So. 535, 537 (1926).

it, in appropriate cases, a judgment could be set aside by the court that entered it for material errors of fact, but not of law, affecting its validity, and unknown to the court when it was entered.²

The writ of *coram nobis*, enabled the courts to correct their errors subsequently discovered, but only permitted the correction of errors in fact which did not appear on the record and which affected the validity or regularity of the proceedings, and the writ was not granted to relieve defendant from consequences which arose subsequent to the judgment, nor did it lie to determine a question of fact which had already been adjudicated even though the question might have been decided wrongly.³

This writ of error *coram nobis*, extends only to a question of fact, as distinguished from a writ of error which is based on an error of law.⁴ And an action in the nature of writ of error *coram nobis* is an independent suit wherein one must state a cause of action.⁵ It is in the nature of a motion for a new trial and if granted has the same effect.⁶ This writ will not be granted where the complaining party knew of an error of fact affecting the validity of the judgment at the time of the trial, or by exercise of reasonable diligence might have known it.⁷ But is merely an authorization to the court to recall some adjudication made while some fact existed which if before the court would have prevented the rendition of the judgment and which without any fault or negligence of the party was not presented to the court.

The writ is now limited to those cases where some matter of fact exists which was not an issue at the trial, and if it had been would have changed the judgment.⁸ And if the judgment is actually wrong on its merits the writ will lie although it should not be extended so as to materially modify statutory rules as to motions for new trials. A good example of this is the case of *George v. State*.⁹ The prisoner was found guilty of larceny and sentenced for from one to five years. An appeal was made but the judgment was affirmed. Later, a man named Eli Slabaugh confessed to the crime and before this the defendant had not known of Slabaugh's guilt. There was a provision in the statute for a motion for a new trial within thirty days if one was to be granted. This new fact, however, was after the statutory period and the court

² *Smulski v. H. Feinberg Furniture Co.*, 193 A. 585 (1937).

³ *Fine v. United States*, 292 U. S. 622, 54 Sup. Ct. 632, 67 F. 2d 591, 78 L. ed. 1478 (1934).

⁴ *Ledbetter v. State*, 213 Ind. 152, 12 N. E. 2d 120 (1938).

⁵ *State, ex rel. Bank of Skidmore v. Roberts*, 116 S. W. 2d 166 (1938).

⁶ *Hicks v. State*, 213 Ind. 277, 12 N. E. 2d 501 (1938).

⁷ *Kings Lake Drainage Dist. v. Winkelmyer*, 228 Mo. App. 1102, 62 S. W. 2d 1101 (1933).

⁸ *Carmen v. State*, 208 Ind. 297, 196 N. E. 78 (1935).

⁹ *George v. State*, 211 Ind. 429, 6 N. E. 2d 336 (1937).

refused to grant a writ of *coram nobis* saying that to do so would rob the court of its finality and put it in a shambles.

Coram nobis brought to the attention of the court and asked for the relief from error of, death of either party pending the suit and before judgment, infancy where the party was not properly represented by guardian, coverture, where the common law disability still exists, insanity at the time of the trial, or a valid defense existing in the facts of the case, which without negligence on the part of the defendant was not made, either through duress, fraud, or excusable mistake, the facts not appearing on the face of the record and being such as if known in time would have prevented the rendition and entry of the judgment. To explain by the case of *People v. Ogbin*, Kenneth Ogbin was indicted in the Circuit Court of Sangamon County for the crime of robbing, while armed. The man was tried, convicted and sentenced. Then a motion was filed to set aside the conviction on the grounds that he was in another jail at the time of the robbery. The motion was not granted on the ground that the defendant had negligently failed to take advantage of his defense.¹⁰

The sole function of the prerogative writ of *habeas corpus* is to release one from unlawful imprisonment.¹¹ And it is an extraordinary remedy only, and cannot be employed as an appellate remedy.¹² Its purpose is to test the validity of process on which a person is restrained and the jurisdiction of the issuing court over him.¹³ This writ does not aid in determining the innocence or guilt of the prisoner but determines if the prisoner is restrained without due process of the law.¹⁴

It is clearly seen that the main difference between *coram nobis* and *habeas corpus* is that the first is more of an appellate remedy, stating a cause of action and based on an error of fact, while the latter is a prerogative writ, civil in form and interested only in the release of persons from unlawful imprisonment, with no thought of another trial on the facts. In other words in *coram nobis* one predicates a change or unveiling of facts while in *habeas corpus* one merely determines whether the prisoner is restrained without due process of law.

Coram nobis is more like a blanket which stretches to meet each discovery of facts while *habeas corpus* is merely an inspector of the court's jurisdiction and the process of law to see if "it will hold water." In the case of *Anderson v. Chapman*, the plaintiff came into court and pleaded guilty to a robbery charge. The judge in dealing with the case did not clearly adjudicate his guilt. Now, the prisoner is attempting

¹⁰ *People v. Ogbin*, 368 Ill. 173, 13 N. E. 2d 162 (1938).

¹¹ *Luciana v. Murphy*, 296 N. Y. S. 1011 (1936).

¹² *Bean v. State*, 58 Idaho 797, 79 P. 2d 540 (1938).

¹³ *Ex parte Jacinto*, 8 Cal. App. 2d 275, 47 P. 2d 300 (1935).

¹⁴ *Ex parte Davis*, 550 Okl. Crim. Rep. 380, 31 P. 2d 623 (1934).