RECENT CASES

Antitrust Law—

MANUFACTURER SELLING TO INDEPENDENT DISTRIBUTOR HAS STANDING UNDER CLAYTON ACT TO RECOVER LOST PROFITS DUE TO ILLEGAL RESTRAINT AT RETAIL LEVEL

Karseal markets the wax it manufactures through independent distributors who resell to independent service station operators from whom the public purchases at retail. Defendant, a producer and distributor of petroleum products, had exclusive dealing arrangements with nearly three thousand independent service station operators requiring that, as retailers of defendant's petroleum products, they handle only automotive accessories sponsored by defendant. Karseal's wax was not included. Karseal sought treble damages under section 4 of the Clayton Act [1] for diminution in sales due to loss of prospective customers. These same dealer contracts had already been held to violate section 1 of the Sherman Act [2] and section 3 of the Clayton Act [3] in an injunction action by the Government.[4] A motion to dismiss the complaint was sustained by the trial court on the ground that there was insufficient causal relationship between the claimed injury and the alleged antitrust violation; [5] the circuit court reversed. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

Section 4 of the Clayton Act states in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ." To state a cause of action in a private suit for treble damages under this section a complaint must allege (1) a violation by defendant of antitrust law [6] and (2) damage to plaintiff's

1. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 (1952).

3. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

4. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952).

5. The trial court's decision is unreported.

6. Where a private party is alleging the same violation of the antitrust laws as previously proven by the Government, a final criminal judgment or equity decree rendered in the action by the Government is prima facie evidence of the antitrust violation in a subsequent private antitrust action against the same defendant. Clayton Act § 5, 38 STAT. 731 (1914), 15 U.S.C. § 16 (1952); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 570-71 (1951). Thus, in the instant case Karseal satisfied the required allegation of violation by pleading the *Richfield* decree. See note 4 *supra*.

business or property by reason of the violation.[7] The controversy of the instant case focuses on the second requirement. The language of section 4 indicates that the only limitation is that the injury must be to one's "business or property" and that it must have been caused "by reason of" the antitrust violation. It is clear that the injury alleged by Karseal is to its business. The potential scope of the language "by reason of" is almost unlimited. For example, in the instant case, if the sales of a supplier of raw materials to Karseal were decreased due to Karseal's diminished business resulting from Richfield's illegal practices and, as a result, the supplier were unable to purchase the usual number of machines used in his production, there is no reason why the resulting injury to the machine producer would not be sufficient to give him standing to sue under the wording of section 4.[8] Though there is nothing in the legislative history of section 4 to indicate what Congress meant the scope of this language to be,[9] the courts have read in the limitation that the injury must have resulted "proximately" from the antitrust violation.[10] In some specific areas the question of what constitutes a "proximate" injury seems well settled,[11] but generally the cases present an unclear picture. For example, where the lessor of a building sues for damages suffered as a result of an antitrust violation affecting his lessee's business some cases hold that the lessor was injured "proxi-

7. Shotkin v. General Electric Co., 172 F.2d 236 (10th Cir. 1948); Ruddy Brook Clothes, Inc. v. British Foreign & Marine Ins. Co., 103 F. Supp. 290 (N.D. Ill. 1951), *aff'd*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952).

8. See text at note 19 *infra*.

9. See H.R. REP. No. 627, 63d Cong., 2d Sess. (1914); S. REP. No. 698, 63d Cong., 2d Sess. (1914); S. Doc. No. 583, 63d Cong., 2d Sess. (1914) (withdrawn); S. Doc. No. 585, 63d Cong., 2d Sess. (1914); H.R. CONF. REP. No. 1168, 63d Cong., 2d Sess. (1914). Section 4 (originally numbered § 5) is referred to in debate at 51 CONG. REC. 9073, 9079, 9486-87, 13849, 16274 (1914).

Section 7 of the Sherman Act, 26 STAT. 210 (1890), replaced by § 4 of the Clayton Act, was similarly worded. See H.R. REP. No. 1707, 51st Cong., 1st Sess. (1890); REPORT OF SENATE JUDICIARY COMMITTEE, 21 CONG. REC. 2901 (1890). Section 7 is referred to in debate at 21 CONG. REC. 3146-53, 4091, 4099 (1890). See, generally, WALKER, HISTORY OF THE SHERMAN ACT (1910).

10. *E.g.*, Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 887 (4th Cir. 1934); National & Transcontinental Trading Corp. v. International General Electric Co., 15 F.R.D. 379 (S.D.N.Y. 1954); Fedderson Motors, Inc. v. Ward, 180 F.2d 519, 522 (10th Cir. 1950) (dictum).

11. For example, standing to sue is uniformly denied to shareholders and creditors of corporations injured by antitrust violations. *E.g.*, Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953); United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574 (2d Cir. 1916); Loeb v. Eastman Kodak Co., 183 Fed. 704 (3d Cir. 1910); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929). Commission salesmen, whose opportunity to make sales has been reduced as a result of an illegal contract or conspiracy, are held to have been injured within the meaning of § 4 of the Clayton Act. *E.g.*, Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Klein v. Sales Builders, Inc., 1950-51 Trade Cas. ¶ 62600 (N.D. Ill. 1950); *cf.* McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456 (W.D. Mo. 1948). Similarly, a purchaser who has to buy at an artificially high price maintained by the defendant's illegal monopolistic practices is also "proximately" injured. *E.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Peto v. Howell, 101 F. 2d 353 (7th Cir. 1938); *cf.* Moore v. Backus, 78 F.2d 571 (7th Cir. 1935).

mately," [12] while others consider the lessor's injury "too remote." [13] Because of such conflicting decisions, it is necessary to determine what factors should influence the courts in deciding whether the injury is "proximate."

Any justifiable determination of who may sue under section 4 must be based on fulfilling the purposes of that section. One major purpose is to deter violation of the antitrust laws by giving agencies other than the Government the power to prosecute.[14] Although under existing law both the retailers and independent distributors in the instant case clearly have standing under section 4,[15] it is doubtful whether, in fact, they will bring suit. From a loss of profits point of view an antitrust suit may be unwarranted. The retail service stations have been prohibited only from selling certain brands and, therefore, have lost profits only to the extent that the prohibited brands may have been more profitable; and this loss most likely will have been minimized by the ability of the service stations to pass it along to the consumer. The same can be said for an independent distributor who often handles many products and whose loss of profits from the product restrained consequently may be too insignificant in terms of his overall business to cause him to sue. Both retailers and distributors are also likely to be deterred by the expense of antitrust suits [16] and by a reluctance to become involved in litigation which often extends over a number of years. There is the further possibility that they may even settle with the violator for an agreement not to sue.[17] Because of these considerations it seems improbable that the retailers and distributors will fill the

12. Camrel Co. v. Paramount Film Distributing Corp., 1944-45 Trade Cas. ¶ 57233 (S.D.N.Y. 1944); East Orange Amusement Co. v. Vitagraph, Inc., 1940-43 Trade Cas. ¶ 52965 (D.N.J. 1943).

13. Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa.), *aff'd per curiam*, 211 F.2d 405 (3d Cir. 1953), *cert. denied*, 348 U.S. 828 (1954); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940); Melrose Realty Co. v. Loew's, Inc., CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68150 (E.D. Pa. Sept. 12, 1955). *Compare* Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *with* I.P.C. Distributors v. Local 110, Chicago Moving Picture Mach. Operators, 132 F. Supp. 294 (N.D. Ill. 1955).

14. See Maltz v. Sax, 134 F.2d 2, 4 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84, 88 (S.D. Cal. 1951), *aff'd*, 215 F.2d 167 (9th Cir. 1952), *cert. denied*, 345 U.S. 964 (1953); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176, 182 (E.D. Tenn. 1940), *aff'd per curiam*, 123 F.2d 1016 (6th Cir. 1941).

It has been suggested that the purpose of inducing agencies other than the Government to institute the initial action against a violator has not been realized since few private parties have ventured to sue a violator until the Government has successfully prosecuted a suit against him. H. Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954).

15. *E.g.*, William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945), 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948) (exhibitor); I.P.C. Distributors v. Local 110, Chicago Moving Picture Mach. Operators, 132 F. Supp. 294 (N.D. Ill. 1955) (distributor).

16. "I tell them [prospective suitors] that if they do not have $25,000 for the taking of depositions under the Federal rules, at least $25,000, just for costs and transcripts and traveling expenses, that they had better drop the suit. . . ." Testimony of Thurman Arnold, *Hearings before a Subcommittee on S. 1910 of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. 3 (1949).

17. It was alleged that the tenant in the following case had made such an agreement: Brief for Appellant, p. 21, Harrison v. Paramount Pictures, Inc., 211 F.2d 405 (3d Cir. 1953).

need for private antitrust plaintiffs. The threat of recovery by the manufacturer may be necessary to provide any real deterrence of antitrust violations where such a distribution pattern exists. The manufacturer is more likely to institute litigation because, in comparison to the retailers and distributors, his loss of profits probably will be greater, especially if he makes only a few products. By giving the manufacturer standing to sue in such a case, a second purpose of section 4 may be effectuated—that of compensating a party injured by an antitrust violation.[18]

Counterbalanced against the need for deterrence and compensation are the consequences of imposing treble damage liability for injuries incurred in a kind of chain reaction from the initial injury.[19] If Karseal is a proper party plaintiff, it can be argued logically that those who supply Karseal with raw materials should also be allowed to sue. The suppliers have lost business for which they merit compensation, and their suits will operate as a further deterrent to antitrust violators. Clearly, some limit must be set if the violator is not to be subjected to ruinous liability.[20] As a practical matter, persons less directly affected are not apt to bring suit because they have little knowledge of the restraint, are not likely to be significantly injured, and are less able to substantiate a claim for damages. Nevertheless, a rule must define the limit of liability. One solution might be to deny standing to any potential claimant who is farther down the chain of reaction than the person most likely to sue, *i.e.*, the one most affected by the restraint.[21] In the instant case that would be Karseal. Such a limitation is consistent with the deterrent purpose underlying private antitrust suits, although it does not afford complete compensation. Perhaps in that respect it must be analogized to the cases in tort law where the courts have denied liability even though it is clear that the defendant's negligence was the proximate cause of plaintiff's injury.[22]

A more serious danger presented by the instant case is that, by permitting Karseal to sue, the way has been opened for the manufacturers of all the other restrained products to bring suit. Normally because of the expense of bringing suit and the difficulty of proving an antitrust violation this danger is not particularly acute. But since the successful government prosecution has materially lessened the burden of proof on private plaintiffs,[23] these other manufacturers may well sue. In light of the trebling

18. See Atlanta v. Chattanooga Foundry & Pipe Works, 127 Fed. 23, 29 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906); Electric Theatre Co. v. Twentieth Century-Fox Film Corp., 133 F. Supp. 937, 942 (W.D. Mo. 1953).

19. See text at note 8 *supra*.

20. In this situation, even if the violator successfully defends by proving that the suppliers did not suffer damages, the time and expense of defending many actions will be extremely burdensome. If the violator loses, the treble damages and costs to which the successful suppliers are entitled may be so great as to practically bankrupt the violator.

21. *Compare* Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946), *with* American Power and Light Co. v. SEC, 325 U.S. 385 (1945).

22. *E.g.*, Ultramares Corp. v. Touche, 225 N.Y. 170, 174 N.E. 441 (1931); Stevinson v. East Ohio Gas Co., 47 Ohio Law Abs. 586, 73 N.E.2d 200 (Ct. App. 1946); see MORRIS, TORTS 207-08 (1953).

23. See note 6 *supra*.

of damages and the cost of defending multiple suits, Richfield may be exposed to the same type of ruinous liability it would be if the suppliers of Karseal were permitted to sue. In order to eliminate this possibility while still effectuating the purposes of section 4 by letting the manufacturers sue, it is suggested that legislation be enacted to provide that, after the Government has successfully prosecuted an antitrust suit, all injured parties be limited in their recovery to the amount of their actual damages [24] and that all claims be litigated in one proceeding similar to that utilized in bankruptcy.[25]

Constitutional Law—

ACTION OF MUNICIPAL TRUST NOT STATE ACTION WITHIN MEANING OF FOURTEENTH AMENDMENT

Having been denied admission to a school operated by the Board of Directors of City Trusts of the City of Philadelphia with funds of a testamentary trust created in 1831 by Stephen Girard for the education of "poor white male orphans," [1] two otherwise qualified Negro children petitioned the Philadelphia Orphans Court [2] to direct the Board to show cause why these applicants should not be admitted to the school.[3] Petitioners urged that the Board's administration of a charitable trust which restricts admission to a school because of race or color violates the fourteenth

24. See L. B. Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 55 (1955).

25. In the instant case, since Karseal has alleged only loss of prospective customers, it may have some difficulty in proving the extent of the damages to its business. However, where it is clear that the injury alleged resulted from the antitrust violation, as it is in the instant case, uncertainty of the amount of damages is not a ground for denying standing to the injured party. At trial, it is sufficient if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931); see Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946). In the instant case one method of proof would be to show what percentage Karseal's sales of wax were to the total sales of car wax made over the period in question to all other service stations in the market area in which the service stations under contract with Richfield were located. The profit Karseal would have made if its distributors had sold these latter stations the same percent of the total amount of car wax bought by them seems to be a reasonable approximation of the damages to Karseal.

1. The estate was willed in trust to the City of Philadelphia. Instant case at 5. (All page references to instant case refer to unreported mimeographed copy.)

2. The orphans courts have jurisdiction over trustees of testamentary trusts. PA. STAT. ANN. tit. 20, § 2242 (Purdon 1950).

3. This prayer was joined by separate petitions of city and of state officials. The Mayor and the Director of the Commission on Human Relations appeared pursuant to a resolution of City Council. The Attorney General of Pennsylvania entered the case as *parens patriae* to fulfill his duty of enforcing the trust and to represent the Commonwealth's possible interest in the remainder. Instant case at 1-3.

amendment. Affirming the refusal of the Board, the court held, *inter alia,* that actions of the Board are not state actions within the meaning of the fourteenth amendment. *In re Estate of Stephen Girard,* 24 U.S.L. WEEK 1021, 2068 (Phila. County, Pa., Orphans Ct. July 29, 1955), *aff'd en banc,* 24 U.S.L. WEEK 2311 (Phila. County, Pa., Orphans Ct. Jan. 6, 1956).

The Girard trust was originally administered by the legislative branch of the Philadelphia city government. In 1861 the state legislature placed administration of charitable trusts vested in the City of Philadelphia under the Board of Directors of City Trusts, which consists of the Mayor and President of City Council, both ex-officio, and twelve other members appointed by the judges of the courts of common pleas of the county.[4] The members of the Board serve without compensation for life or during good behavior;[5] the city treasurer serves as treasurer for the Board without compensation.[6] Though the members of the Board are appointed by the common pleas judges, the Philadelphia Orphans Court, by virtue of its jurisdiction over testamentary trusts,[7] has exclusive control over members of the Board in conduct of testamentary trusts.[8] The Board today administers eighty-nine separate trusts valued at approximately one hundred million dollars.[9] The largest of these trusts is that of the Girard estate, amounting to ninety-five million dollars,[10] the bulk of which is devoted to support of the instant school. The Board's operations, including administration of the school, are conducted completely independently of control or connection with any city or state agency other than the Orphans Court. These operations are financed solely from the proceeds of trust property.[11]

In the instant case petitioners contended that the discriminatory action of the Board was state action[12] because the Board's authority is derived from a statute, which provides that most of the Board's membership is to be selected by elected public officials while two of the Board's members and its treasurer serve as such by virtue of their status as city officials.[13] Peti-

4. PA. STAT. ANN. tit. 53, §§ 6481 to 86 (Purdon 1931).

5. *Ibid.*

6. *Id.* § 6483.

7. See note 2 *supra.*

8. Wilson v. Board of Directors of City Trusts, 324 Pa. 545, 188 Atl. 588 (1936).

9. BOARD OF DIRECTORS OF CITY TRUSTS, REPORT 30 (1954).

10. *Ibid.*

11. *Id.* at 6-30.

12. The due process clause of the fourteenth amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. State action includes the acts of a state's legislative (Nixon v. Herndon, 273 U.S. 536 (1927)), executive (Screws v. United States, 325 U.S. 91 (1945)), and judicial departments (Bridges v. California, 314 U.S. 252 (1941)), as well as those of its administrative agencies (Union Light, Heat & Power Co. v. Railroad Comm'n of Kentucky, 17 F.2d 143 (E.D. Ky. 1926)). Local governments as well as the central state governments are subject to the prohibitions of the amendment. Lovell v. City of Griffin, 303 U.S. 444 (1938); North American Storage Co. v. Chicago, 211 U.S. 306 (1908); *Ex parte* Virginia, 100 U.S. 339 (1879).

13. Brief for City of Philadelphia, p. 9.

tioners' contention that the Board is a state agency because of its statutory connection with the state[14] presents serious practical difficulties. In the instant case, for example, the legislative act creating the Board varies only slightly from that regularly used to endow groups like corporations, labor unions and redevelopment builders with other than common-law rights.[15] Likewise, the method of judicial appointment of the Board does not differ significantly from that which is employed when a trust is created and the deceased settlor has failed to designate a trustee or the designated trustee is unwilling or unable to act.[16] Following the petitioners' contention to its logical conclusion, it would appear that all associations enjoying privileges of any kind under statutory arrangements, and all trustees appointed or otherwise approved by the courts, must be regarded as capable of exercising state power for the purposes of the fourteenth amendment. Such an extension of the amendment would substantially lessen significant limitations on the power of the judiciary to review matters traditionally subjects of private choice and judgment.

Recent cases indicate that the factor of statutory authority by itself has not been sufficient to imbue the actions of an otherwise private group with the quality of the state.[17] However, the courts seem to look for some statutory connection with the state in order to avoid conflict with the doctrine that a private wrong does not offend the due process and equal protection clauses of the Constitution.[18] Besides some statutory connection, a prime factor seems to be that the nominally private group which is discriminating must have attained such a position of authority within the area in which it operates that its acts and practices necessarily have a widespread impact on the interests of a substantial number of people within that area. In

14. Findings of state action have ordinarily involved a combination of additional considerations, including direct and continuing political control over the instrumentality in question by the voters or their representatives (*e.g., Ex parte* Virginia, 100 U.S. 339 (1879)), use of governmental property by the otherwise private group (*e.g.,* Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948)), and financial aid to the agency in question supplied by the state, even absent a showing of control (*e.g.,* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied,* 326 U.S. 721 (1945)).

15. Despite statutory connection with the state, no state action was found in the following cases: National Federation of Ry. Workers v. National Mediation Bd., 110 F.2d 529 (D.C. Cir.), *cert. denied,* 310 U.S. 628 (1940) (union certified as exclusive bargaining agent under Railway Labor Act denied membership in main lodge to Negroes); Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948) (art school specially chartered by the state denied admission to Negroes); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950) (Negroes denied tenancy by privately financed housing corporation which, pursuant to statute, had bought at cost property assembled for it by the city through the power of eminent domain, had closed off and acquired public streets, and had gained tax exemptions on the improvements for a twenty-five year period).

16. *Cf.* Ross v. Crockett, 14 La. Ann. 811 (1859); Mears's Estate, 299 Pa. 217, 149 Atl. 157 (1930); Taylor v. Salvation Army, 49 R.I. 316, 142 Atl. 335 (1928); 3 SCOTT, TRUSTS § 388 (1939).

17. See, *e.g.,* cases cited in note 15 *supra.*

18. See, *e.g.,* concurring opinion by Justice Clark which strains to find some statutory connection with the state. Terry v. Adams, 345 U.S. 461, 477 (1953).

some cases this power position is directly attributable to the rights and powers granted to the discriminating agency by the state.[19] For example, under the Railway Labor Act or the Labor-Management Relations Act of 1947, once a union is certified as the bargaining agent for a given bargaining unit, it represents the interests of all workers in that unit whether or not they are union members. In reading into the acts the duty not to discriminate on racial grounds in collective bargaining proceedings, the Supreme Court has implied that the acts of a union certified under these federal acts constitute federal action within the meaning of the fifth amendment.[20] In other cases, the discriminating agency's power position is not directly attributable to its statutory connection with the state, but rather to a position which the agency through its own resources has in fact achieved within its community. In *Marsh v. Alabama*[21] a corporation chartered by the state owned and operated a company town which it effectively policed. When the distribution of religious literature was prohibited from its streets, the Supreme Court, discussing the corporation's ability to control the access of the inhabitants of the company town to religious ideas,[22] held that this action was state action. Similarly, where political parties have achieved such a powerful position that a pre-primary[23] or primary vote[24] effectively determines who will be the successful candidates in the final election, the acts of these parties in setting the qualifications of voters in the primary elections constitute state action. Because of the fact that in both the *Marsh* case and the primary cases the nominally private parties were performing functions ordinarily performed by the state government, the finding of state action may have been based partially upon the state's acquiescence in the private parties' assumption of power and performance of these functions. But even if a discriminating agency has some statutory connection with the state and is in such a position that its acts have widespread impact on the community, comparison of some cases in which state action was found with some other cases possessing similar factual characteristics in which state action was not found, indicates that a determinative factor in these decisions may have been the relative significance of the civil and property rights in question, and the extent to which protection of one would result in depriva-

19. See Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

20. For cases involving the Railway Labor Act, see Steele v. Louisville & N.R.R., *supra* note 19 (the Court indicated that absent such a condition grave constitutional questions would arise); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952). For a case involving the Labor-Management Relations Act of 1947, see Syers v. Oil Workers Int'l Union, 350 U.S. 892 (1955).

21. 326 U.S. 501 (1946).

22. *Id.* at 508.

23. Terry v. Adams, 345 U.S. 461 (1953).

24. Smith v. Allwright, 321 U.S. 649 (1944). Although this case involved state action within the fifteenth amendment rather than the fourteenth, its usefulness for analogy is probably not thereby limited since the Court in *Allwright* appeared to regard the fifteenth amendment as but a special example of the rights protected by the equal protection clause of the fourteenth. *Id.* at 657.

tion of the other.[25] For example, in the *Marsh* case the importance of freedom of religion was balanced against the importance of freedom from annoyance by solicitors.[26] Since the Court considered religious freedom more important, and since protection of it promised little damage to the latter interest, the action of the company town was held to constitute state action.

In the instant case, although the Board controls access to a school with an enrollment of about 1100 boys,[27] it is questionable whether the Board's acts have a widespread impact on the Philadelphia community which has over 250,000 students.[28] But even if the Board is assumed to occupy such a position, a finding of state action seems unwarranted because the public interest in unrestricted access to extra-ordinary educational opportunities does not manifestly outweigh the public interest in unrestricted disposition of one's property. Moreover, in view of the availability and comparable quality of alternative unsegregated educational facilities, from the standpoint of the petitioning children, protection of the property right in question does not result in a deprivation of their interests as keen as, for example, loss of the right to vote.[29] Accordingly, the instant decision was probably consistent with prior case law when it found that the Board is for the purposes of the fourteenth amendment essentially a private rather than a state agency.

The finding is significant, nevertheless, because, with the progressive weakening of the separate but equal doctrine, it may be expected that techniques which avoid the fourteenth amendment's prohibitions will be increasingly used.[30] The *Girard* finding does not necessarily enlarge the roster of these techniques. If effect on the interests of a large part of the community, and extent of deprivation to the individuals concerned are operative factors in determining state action, then a different decision from the present one may be predicted in those situations differing from the

25. *E.g., compare* Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948), *with* Sweeney v. Louisville, 102 F. Supp. 525, 531 (W.D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953); *compare* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied,* 326 U.S. 721 (1945), *with* Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948); *compare* Marsh v. Alabama, 326 U.S. 501 (1946), *with* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950); *compare* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), *with* National Federation of Ry. Workers v. National Mediation Bd., 110 F.2d 529, 537 (D.C. Cir.), *cert. denied,* 310 U.S. 628 (1940).

26. 326 U.S. at 509.

27. BOARD OF DIRECTORS OF CITY TRUSTS, REPORT 6 (1954).

28. This figure represents only public school students. BULLETIN ALMANAC 343 (1954).

29. See cases cited in notes 23 and 24 *supra;* Nixon v. Condon, 286 U.S. 73 (1932).

30. *Cf.* repeal by General Assembly and people of South Carolina of parts of that section of their constitution which required public education for children six to twenty-one years old. S.C. CONST. art. XI, § 5, as amended, S.C. Acts & Joint Res. 1951, No. 24. Governor Byrnes had said, "If that [segregation] is not possible, reluctantly, we will abandon the public school system." Editorial, Richmond News Leader, May 30, 1951.

present one in the inferiority of alternative unsegregated educational opportunities. It may be anticipated that application of the amendment will then be grounded on a theory of state acquiescence which is buttressed by the consideration that free education is a function traditionally fulfilled primarily by government.[31]

Criminal Procedure—

TRANSCRIPT OF RECORD AT GOVERNMENT EXPENSE DENIED TO ONE MOVING TO VACATE SENTENCE IN FORMA PAUPERIS

Defendant was sentenced in a federal district court for a felony. Shortly thereafter, in order to obtain information upon which to base a motion to vacate sentence,[1] he filed a motion in forma pauperis[2] to secure a transcript of the trial proceedings at government expense. The trial court denied this motion and the court of appeals affirmed, holding that a motion to vacate sentence is a collateral attack rather than an appeal, and, therefore, does not come within the purview of the applicable statute which provides: "Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend or appeal in forma pauperis shall be paid by the United States. . . ."[3] *United States v. Stevens*, 224 F.2d 866 (3d Cir. 1955).

The instant court is the first circuit court which has denied a free transcript to a movant proceeding in forma pauperis on a motion to vacate. Three district courts which have denied a free transcript in this situation also focus their attention on the word "appeal" in interpreting the applicable statute.[4] The validity of these decisions, however, is open to serious doubt.

31. Even if the Board were to be regarded as a state agency, the instant court indicated that the Board's role in enforcing the discriminatory will of Girard is too indirect to be regarded as state action. The court advanced the general proposition that actions of the state in a "fiduciary," as distinguished from a "governmental," capacity are not subject to the amendment. Instant case at 30, 37. The words of the amendment itself do not provide any basis for this dichotomy, but authority for a comparable distinction can be derived by analogy to state court holdings that when a court enforces discriminatory private agreements, the discrimination does not result from state but rather from private action. See cases collected in Note, 48 COLUM. L. REV. 1241 n.14 (1948). Such analogy is inappropriate in the instant case for two reasons. First, these cases have been substantially limited by Shelley v. Kraemer, 334 U.S. 1 (1948). Second, behind the exemption of judicial activity in these cases was the courts' unexpressed reluctance to expand judicial review of the validity of private arrangements, and their fear that short of exemption of all such acts, no line could be drawn; but in the instant case, private trustees would not have been affected by a finding that an admittedly state trustee exercises state action for the purposes of the fourteenth amendment.

1. 28 U.S.C. § 2255 (1952).

2. One who moves in forma pauperis can proceed without paying fees and costs into the court. 28 U.S.C. § 1915(a) (1952).

3. 28 U.S.C. § 753(f) (1952).

4. Cohen v. United States, 123 F. Supp. 717 (E.D. Mich. 1954); United States v. Bernett, 92 F. Supp. 26 (D. Md. 1950); United States v. Carter, 88 F. Supp. 88 (D.D.C. 1950).

While it is true that a motion to vacate is a collateral attack rather than an appeal,[5] the words of the statute, "sue, defend or appeal," indicate that Congress simply intended to describe the entire range of litigious activity.[6] Therefore, it would seem that a motion to vacate surely must come within its purview. If the courts felt compelled to designate into which of the three categories a motion to vacate falls, then it is suggested that this motion can be considered a suit. Since the courts have not questioned,[7] nor does there seem any reason to question, that a motion to vacate is a criminal proceeding within the words of the statute, and since one can proceed in forma pauperis on a motion to vacate,[8] all the requisites of the free transcript statute have been met, and there is no justification for denying the transcript.

Even if the court rejects the argument that a motion to vacate comes within the express terms of the statute, there is another reason for granting a transcript in the instant case. It is clear from the express language of the statute that a person proceeding in forma pauperis on a writ of habeas corpus is entitled to the free transcript as a matter of right.[9] The motion to vacate statute was enacted in order to lessen the work load of those federal district courts nearest federal places of incarceration whose duty it is to hear the numerous habeas corpus petitions.[10] This was accomplished by permitting habeas corpus to be sought only after the motion to vacate, handled by the original trial court, is shown to be inadequate to protect the movant's rights.[11] However, since a motion to vacate will only be granted

5. United States v. Hayman, 342 U.S. 205 (1951); Bruno v. United States, 180 F.2d 393 (D.C. Cir. 1950). In the former case the motion to vacate statute was held constitutional.

6. The legislative history neither supports nor contradicts this interpretation of the statute. See 89 CONG. REC. 447, 9171, 9486, 9624, 10317, 10339, 10488, 10489, 10645, 10687, 10782, 10871-73 (1943); H.R. REP. No. 868, 78th Cong., 1st Sess. (1943); H.R. REP. No. 962, 78th Cong., 1st Sess. (1943); S. REP. No. 533, 78th Cong., 1st Sess. (1943); *Hearings Before a Subcommittee on a Bill to Authorize the Appointment of Court Reporters in the District Courts of the United States of the Senate Committee on the Judiciary*, 78th Cong., 1st Sess. (1943); *Hearings Before a Subcommittee on a Bill to Authorize the Appointment of Court Reporters in the District Courts of the United States of the House Committee on the Judiciary*, 78th Cong., 1st Sess. (1943). REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 9 (1940); *id.* at 7 (1941).

7. See cases cited in note 4 *supra*.

8. United States v. Bernett, 92 F. Supp. 26 (D. Md. 1950).

9. See text at note 3 *supra*; letter from the Clerk of the Eastern District Court of Pennsylvania, to the *University of Pennsylvania Law Review*, Dec. 5, 1955, on file in the Biddle Law Library, University of Pennsylvania Law School, stating that in such cases a free transcript can be granted.

10. See Note, 59 YALE L.J. 1183-90 (1950); 66 HARV. L. REV. 167 (1952); 64 HARV. L. REV. 856 (1950); 27 NOTRE DAME LAW. 465 (1952); 37 VA. L. REV. 1001 (1951).

11. The statute provides: "An application for a writ of habeas corpus . . . shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 (1952).

on grounds which would justify the issuance of a writ of habeas corpus,[12] the former motion has virtually replaced the latter.[13] Furthermore, since the free transcript statute was enacted four years prior to the motion to vacate statute[14] and was geared to handle the then prevalent habeas corpus motion, the fact that the free transcript statute does not mention a motion to vacate is not significant. Therefore, it is suggested that the court, for the purpose of granting a free transcript, should treat the motion to vacate as though it were habeas corpus.

Not only is there statutory justification for granting a free transcript in the instant case, but the very purpose of the act calls for this result. Congress, in enacting the free transcript statute, recognized the marked importance of a transcript of the trial proceeding to a prisoner seeking his release.[15] The transcript will be granted only after the judge, in considering whether or not to grant a hearing on the motion to vacate, finds merit in the movant's contention;[16] possession of the transcript then will enable the movant, or his court-appointed attorney,[17] to present with particularity the alleged constitutional deprivation[18] in order to persuade the

12. Higgins v. Steele, 195 F.2d 366, 368 (8th Cir. 1952); Meyers v. Welch, 179 F.2d 707, 708 (4th Cir. 1950); Pulliam v. United States, 178 F.2d 777, 778 (10th Cir. 1949); Hahn v. United States, 178 F.2d 11, 12 (10th Cir. 1949); Hurst v. United States, 177 F.2d 894, 895 (10th Cir. 1949); Taylor v. United States, 177 F.2d 194, 195 (4th Cir. 1949); Note, 59 YALE L.J. 1183, 1184-85 (1950). *Compare* 28 U.S.C. § 2241(c) (1952) (habeas corpus), *with id.* § 2255 (motion to vacate).

13. See Note, 59 YALE L.J. 1183, 1185-87 & nn. 10 & 11 (1950), in which the writer states that from two months prior to the effective date of the motion to vacate statute until the end of 1949 slightly over 700 requests for habeas corpus were made and that from September 1, 1948, when the motion to vacate statute was effective, only three cases allowed a writ of habeas corpus up to the time of the writing. In St. Clair v. Hiatt, 83 F. Supp. 585 (N.D. Ga. 1949), *aff'd*, 177 F.2d 374 (5th Cir.), *cert. denied*, 339 U.S. 967 (1950), a writ was granted only perfunctorily and, at the hearing it was dismissed. A similar development occurred in Higgins v. Steele, 195 F.2d 366 (8th Cir. 1952).

14. While the free transcript statute became effective in 1944, the motion to vacate provision became operative in 1948. See notes 1 & 3 *supra*.

15. H.R. REP. No. 868, 78th Cong., 1st Sess. 1 (1951).

16. The trial judge must make his decision whether to grant the person the right to proceed in forma pauperis from an examination of the court files, records and transcript. Under the motion to vacate a hearing will be held unless the record on its face conclusively shows that the prisoner is not entitled to a hearing on his contention. In effect, the test is the same; merit shown by the record will gain both a hearing on the motion to vacate and a right to proceed in forma pauperis if the prisoner also shows he is indigent. 28 U.S.C. § 1915(d) (1952).

17. The court may appoint counsel for a party proceeding in forma pauperis. 28 U.S.C. § 1915(d) (1952). However, in Davis v. United States, 214 F.2d 594, 596 (7th Cir. 1954), the court stated that the prisoner was sufficiently capable to handle his own appeal. In the instant case the prisoner has shown such familiarity with court procedure that he should be able to take advantage of the transcript. See instant case at 866-67.

18. Some errors on which collateral attack can be taken, such as mob violence unduly influencing the trial (Moore v. Dempsey, 261 U.S. 86 (1923)) or perjured testimony knowingly used by the prosecuting attorney (Mooney v. Holohan, 294 U.S. 103 (1935)), may not appear on the face of the transcript, but in the latter case the transcript is needed to show just what the testimony was. In the instant case the prisoner intended to claim that he was not adequately represented at trial by his court appointed lawyer, (instant case at 867), thus showing a violation of the sixth amendment; the transcript would show where, if at all, the lawyer neglected his duty.

judge that the motion should be granted.[19] While it might be argued that the cost to the Government of presenting transcripts to movants whose appeals are frivolous would be prohibitive,[20] there is an adequate safeguard against such a practice, since the judge, before permitting the movant to proceed in forma pauperis, must be satisfied not only that the movant is destitute, but that his claim has some merit.[21] Thus, the court can assure that the government's money will be spent only for good cause and, at the same time, follow the express desire of Congress and protect the rights of indigent prisoners.[22]

Federal Jurisdiction—

GOVERNMENT AGENTS ESTOPPED FROM DENYING JURISDICTION OF COURT IN DISTRICT WHERE ACTS COMPLAINED OF OCCURRED

Plaintiff was given a hearing in Philadelphia before the Eastern Industrial Personnel Security Board,[1] culminating in an order that he be denied access to classified material. Thereupon, he was discharged by Radio Corporation of America where he had been employed in work on government contracts. He brought suit in the federal district court in Pennsylvania to get rescission of the Board's order, or, alternatively, a fair hearing. The individual members of the Board were served in New York City, where they had their offices.[2] The Government moved to dismiss the suit on the ground that service of process was improper because it was had outside the state in which the court had jurisdiction. The court denied this motion, holding that since the Board had committed the acts complained of while sitting in Philadelphia, it would not now be heard to question the

19. The indigent prisoner will not be seriously hampered by not having a transcript prior to his motion to vacate being considered for a hearing because the transcript will be scrutinized by the judge in determining if the contention is meritorious.

20. The cost for transcripts of the usual criminal case will probably be moderate. Rule 16 of the Federal District Court of Connecticut established a per page cost of fifty-five cents for the original and twenty-five cents per copy. 19 FED. RULES SERV. 1039 (1953). However, this expense multiplied by the undoubtedly numerous requests would greatly increase the cost of criminal administration.

21. See note 16 *supra.*

22. In the instant case the defendant tried, but unsuccessfully, to gain a free transcript without presenting a motion to vacate sentence. Instant case at 867. Procedurally, this is impossible for on any motion in forma pauperis the court must pass on the merits of the contention.

1. The Board was created by DEP'T OF DEFENSE DIRECTIVE No. 5220.6 (1955) pursuant to authority found in 61 STAT. 500 (1947), as amended, 5 U.S.C. § 171a (b) (1952); REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952); Exec. Order No. 10501, § 7(b), 3 C.F.R. 119-20 (Supp. 1953).

2. Brief for Defendant, p. 1.

jurisdiction of the court. *Cohen v. Leone,* Civil No. 19152, E.D. Pa. October 28, 1955.[3]

Rule 4(f) of the Federal Rules of Civil Procedure provides: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. . . ." There is no relevant statutory provision which governs service of process in the instant case; nor does rule 4(d)(5) of the Federal Rules,[4] relating to the method of serving process on a government agency, alter the necessity of complying with rule 4(f), since the courts uniformly have held that rule 4(d)(5) does not change in any way the requirements of rule 4(f).[5] Since service of process was had on defendants in New York and the instant court sits in Pennsylvania, the service clearly violates the express requirements of rule 4(f).

Not only was the service of process in the instant case unprecedented, but the venue of the court, had it been attacked,[6] was equally questionable. The Judicial Code provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside. . . ."[7] A suit questioning the fairness of a federal board's proceeding presents a federal question, so jurisdiction would not be founded solely on diversity of citizenship grounds. A government agent sued in his official capacity is amenable to suit only in the district where he has his official residence.[8] Since the Board's offices in the instant case were in New York City, it is apparent that the only proper venue was the Southern District of New York.

While the instant court alluded briefly to the propriety of the service under rule 4(f), it appears that the real basis for its decision was that a United States agency, which had held hearings in a particular district, was estopped from challenging the jurisdiction of the federal court of that district to review the fairness of those proceedings. Here, too, the court takes a novel and apparently unwarranted position. Traditionally, estoppel will only be used against a party who by his words or conduct has caused

3. The court retained jurisdiction, but stayed the proceeding pending an appeal to the Director of the Office of Industrial Personnel Security Review. Instant case at 3 (mimeo.).

4. FED. R. CIV. P. 4(d)(5) provides: "Service shall be made as follows: Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. . . ."

5. Noreen v. Van Dyke, 133 F. Supp. 142 (D. Minn. 1955); Henry L. Crowley & Co. v. RFC, 14 F.R.D. 460 (D.N.J. 1953); see also 2 MOORE, FEDERAL PRACTICE § 4.29 n.14 (2d ed. 1948).

6. Venue objections are waived if not raised in timely fashion. FED. R. CIV. P. 12(h), (b)(3). The United States may waive venue requirement, just as any other litigant. Hoiness v. United States, 335 U.S. 297, 301 (1948); Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313-14 (1945).

7. 28 U.S.C. § 1391(b) (1952).

8. Scientific Mfg. Co. v. Walker, 40 F. Supp. 465 (M.D. Pa. 1941); Smith v. Farley, 38 F. Supp. 1012 (S.D.N.Y. 1936); 2 MOORE, FEDERAL PRACTICE § 4.29 n.15 (2d ed. 1948).

another party to act in reliance thereon to his detriment.[9] Applied to the instant case, estoppel can be attacked on several grounds. First, there is no evidence that plaintiff changed his position in any manner in reliance on the Board's hearing. Second, the plaintiff suffered no harm by the Board's meeting in Philadelphia. On the contrary, since the Board could have made him appear in New York, its hearing in Philadelphia saved plaintiff's time and money.

The instant case reflects the dissatisfaction that others have felt with the service of process and venue requirements in the federal courts,[10] especially in suits against a government agency. While various agencies conduct local administrative hearings for the convenience of affected parties, many suits brought to review their action must be brought in a forum which is both inconvenient and expensive for the plaintiff.[11] If the United States were compelled to defend the suit in the place where the hearing occurred, no like hardship would be placed on the members of the agency since their action is defended by the appropriate United States attorney, and they might not even be required to appear as witnesses.[12] Therefore, some ameliorative legislation appears necessary. One writer has suggested that, in all cases, venue be proper in any district in which the wrongful act, or part thereof, occurred, as well as in the district where the defendant, or defendants, or any of them resides; this provision would be supplemented by a nation-wide service of process rule.[13] The Advisory Committee to the United States Supreme Court on Rules of Civil Procedure has recommended that service of process other than subpoena be permitted within one hundred miles of the court house as well as within the territorial limits of the state.[14] Such a provision, however, would not remedy problems like that presented in the instant case, because the jurisdiction of the court would still be open to attack on the ground of improper venue. In any

9. See, *e.g.*, Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 218 F.2d 831 (10th Cir. 1955); John Paul Lumber Co. v. Agnew, 125 Cal. App. 2d 613, 270 P.2d 1044 (1954); Atlas Coal Co. v. Jones, 245 Iowa 506, 61 N.W.2d 663 (1953); Holt v. Stofflet, 338 Mich. 115, 61 N.W.2d 28 (1953); Jessen v. Blackard, 159 Neb. 103, 65 N.W.2d 345 (1954); Hawkins v. M & J Finance Corp., 238 N.C. 174, 77 S.E.2d 669 (1953); 3 POMEROY, EQUITY JURISPRUDENCE §§ 805, 812 (5th ed. 1941).

10. Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 29-40 (1949).

11. Note, 103 U. PA. L. REV. 238, 239 (1954); 32 ILL. L. REV. 99 (1937); *cf.* Davis, *Government Officers as Defendants: Two Troublesome Problems*, 104 U. PA. L. REV. 69, 77 (1955).

12. Review of administrative proceedings in most cases is on a record, and involves legal rather than factual questions which would not call for the presence of the administrator. See Note, 103 U. PA. L. REV. 238, 255-57 (1954).

13. Barrett, *supra* note 10, at 628-30; see also suggestion in Note, 103 U. PA. L. REV. 238, 261 (1954) that suit be permitted to be brought in judicial district where party seeking review resides or where the administrative hearing was held.

14. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 5, 6 (1954).

event, the instant court should have refrained from using doubtful principles of law to make changes properly the subject of consideration of Congress in legislation and the Supreme Court in rule making.[15] They are the bodies responsible for the determination of what the federal service of process and venue requirements will be.

Judgments—

ATTACHMENT STATUTE INTERPRETED TO ALLOW JUDGMENT AND EXECUTION ON UNMATURED DEBT

Plaintiff sold an auto parts business to defendant, the purchase price to be paid by deferred payments. At a time when none of these payments were due, plaintiff began proceedings to attach the business assets and to collect the purchase price because defendant had fraudulently conveyed some of the assets to a relative. The applicable Indiana statute [1] sanctions the commencement of attachment in cases of fraud regardless of whether the debt is due. The trial court interpreted this statute as authorizing not only attachment to secure an unmatured debt but also acceleration of the due date of the debt sued upon. Accordingly it gave plaintiff judgment for the purchase price which was not then due, and ordered the attached property sold to satisfy the judgment. The appellate court affirmed stating that, though there was no Indiana authority for this interpretation, the statute should be liberally construed because of its remedial nature.[2] *Brockhaus v. Allen,* 127 N.E.2d 344 (Ind. App. Ct. 1955).

The writ of attachment, unknown at common law, is a statutory remedy having only the scope that the various legislatures have chosen to accord it.[3] Thus, in the absence of express statutory authority attach-

15. 28 U.S.C. § 2072 (1952).

1. IND. ANN. STAT. § 3-501 (Burns 1946) provides: "The plaintiff . . . may have an attachment against the property of the defendant, in the cases and in the manner hereinafter stated, where the action is for the recovery of money: . . . Fifth. [Where the defendant] has sold, conveyed or otherwise disposed of his property . . . with the fraudulent intent to cheat, hinder or delay his creditors . . . Provided, that the plaintiff shall be entitled to an attachment for the causes mentioned in the . . . fifth specification of this section whether his cause of action be due or not."

2. See Dodgen Corp. v. D. D. Murphy Shows, Inc., 96 Ind. App. 325, 338, 183 N.E. 699, 703 (1932). The court also relied on certain language used in Trent v Edmonds, 32 Ind. App. 432, 435, 70 N.E. 169, 170 (1904). In that case the appellate court had refused to go into the question of whether a judgment could be given on an unmatured debt, saying that though the judgment was probably not technically correct, the appellant had no standing to raise the question. The appellate court had stated in its opinion that an attaching plaintiff may prosecute his action whether his debt is due or not. In the principal case, "the right to prosecute" was interpreted to mean the right to prosecute to final judgment. Instant case at 346.

3. See, *e.g.,* Posonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, 291 Pac. 167 (1930); J. S. Cruce Realty Co. v. Infeld, 204 Ind. 419, 184 N.E. 407 (1932); Delung v. Baer, 118 W. Va. 147, 189 S.E. 94 (1936).

ment cannot be obtained to secure an unmatured debt. There is no doubt, however, that attachment before maturity of the debt is authorized by the applicable Indiana statute.[4] The unique problem presented by the instant case is whether, in the absence of an acceleration clause in the contract of sale, the court can accelerate the due dates of the installment payments. It is well settled that, where the parties have contracted for acceleration in the event of a material breach by the vendee, the courts will enforce such a provision.[5] However, absent such an acceleration clause, the great majority of the courts hold that where the contract provides for payment of the price in installments a suit upon such contract may be maintained only for the amount of those installments which were due at the institution of the suit.[6] In some factual situations a few courts have accelerated the due date of a debt. Thus, it has been held that where there is an installment sale with security and the vendee does not give the required security, an immediate breach occurs which authorizes recovery of the entire purchase price.[7] Also, where goods are sold on credit extended in reliance on fraudulent misrepresentations made by the purchaser, the seller may waive the tort and sue for the purchase price before the term of credit has expired.[8] In the only case found involving the question of the effect of a fraudulent conveyance upon the acceleration of a debt not due, the court did not accelerate the debt.[9] In three jurisdictions statutes specifically provide that a debt becomes due when it is proved that the debtor has or is about to convey his property fraudulently.[10] Absent such a statute, the

4. See note 1 *supra.*

5. The general rule is that the courts will enforce an acceleration clause unless that clause is found to be oppressive or unconscionable or outlawed by public policy. Greene v. Richards, 244 Mass. 495, 139 N.E. 175 (1923); Rathje v. Siegel, 243 Mich. 376, 220 N.W. 658 (1928); Graf v. Hope Building Corp., 254 N.Y. 1, 171 N.E. 884 (1930); WILLISTON, CONTRACTS § 787 (1938).

6. See, *e.g.*, Tatum v. Ackerman, 148 Cal. 357, 83 Pac. 151 (1905); Ramsey v. Langley, 86 Ga. App. 544, 71 S.E.2d 863 (1952); McDonald v. Rimes, 137 Ga. 732, 74 S.E. 266 (1912); Gorman v. Fried, 35 N.Y.S.2d 441 (Sup. Ct., App. T. 1942); Jones & Co. v. Brown, 167 Pa. 395, 31 Atl. 647 (1895); Dudzig v. Degrenia, 48 R.I. 430, 138 Atl. 57 (1927); MECHEM, SALES §§ 1410, 1411 (1901); WILLISTON, SALES §§ 561, 593 (1948). Apparently Indiana follows this majority rule: Binford v. Willson, 65 Ind. 70 (1878); Skelton v. Ward, 51 Ind. 46 (1875).

7. See Smith v. Aldrich, 180 Mass. 367, 62 N.E. 381 (1902); Precision Developing Co. v. Fast Bearing Co., 183 Md. 399, 37 A.2d 905 (1944); Cook v. Stevenson, 30 Mich. 242 (1874); Wheeler v. Harrah, 14 Ore. 325, 12 Pac. 500 (1886); Morgan v. Turner, 4 Tex. Civ. App. 192, 23 S.W. 284 (1893); Foster & Jacquith v. Adams, 60 Vt. 392, 15 Atl. 169 (1888); WILLISTON, SALES §§ 561, 593 (1948); WILLISTON, CONTRACTS § 1411 (1938). The contract in the principal case had no clause that the business assets were to stand as security, the only provision being that the vendee agreed not to remove the buildings from the premises so long as the purchase price remained unpaid. Brief for Appellant, pp. 9-13; Brief for Appellee, pp. 8-12.

8. Dietz v. Sutcliffe, 80 Ky. 650 (1883); Heilbronn v. Herzog, 165 N.Y. 98, 58 N.E. 759 (1900); Crossman v. Rubber Co., 127 N.Y. 34, 27 N.E. 400 (1890).

9. Jaseph v. Kronenberger, 120 Ind. 495, 22 N.E. 301 (1889), *overruled on other points,* Jaseph v. The People's Savings Bank, 132 Ind. 39, 31 N.E. 524 (1892).

10. COLO. STAT. ANN. c. 96, § 62 (1935); FLA. STAT. § 76.06 (1943), Caldwell v. Peoples Bank of Sanford, 73 Fla. 1165, 1182, 75 So. 848, 854 (1917); MISS. CODE ANN. § 2721 (1942). Section 76.06 of the Florida statute, for example, provides: "In cases of attachment for debt not due, . . . the existence of one or

instant case is the first case to accelerate the due date of a debt because of a fraudulent conveyance on the part of the debtor.

In interpreting the attachment statute so as to accelerate the due date of the debt the court has given an unusual remedy to the creditor-plaintiff. When an attachment is allowed on an unmatured debt, the creditor is assured that all attached property stands ready as security in case his loan is not paid at maturity.[11] The debtor can obtain possession of the attached property or have the attachment discharged only by executing a surety bond payable to the creditor,[12] so theoretically it is possible for the debtor to make use of the property during the time between attachment and the maturity of the debt. But it is extremely doubtful that a debtor who has engaged in fraudulent practices will be able to raise the money necessary to post a bond or obtain the services of a surety company. Thus, under existing law the attached property would be tied up until maturity of the last installment.[13] Acceleration avoids this wasteful freezing of the business assets and has the effect of immediately winding up the transaction between the two parties. Furthermore, acceleration constitutes an additional civil sanction against fraud and seems to be a remedy consistent with the broad discretionary powers to deal with frauds upon creditors which have been conferred upon the courts by the Uniform Fraudulent Conveyances Act.[14] But against these considerations must be weighed the possible effect of acceleration on third parties. A creditor may extend credit on the basis of the borrower's current and future business expectations. Thus, in the principal case it is possible that though a subsequent creditor knew of the terms of the contract of sale of the business and its assets, he well might have extended credit to the defendant relying on the fact that defendant had a business potential because he was to have the use of the premises and its assets over a four year period. Despite the reasonableness of such a business calculation, the instant decision would operate to deprive this hypothetical creditor of repayment since most likely acceleration of the debt will deprive the debtor of any further use of the business assets and thus eliminate his income potential. But this possible prejudice to other creditors is minimized by their ability to set the judgment aside as a voidable preference in bankruptcy.[15] However, in

more of the special grounds assigned . . . shall cause the debt to become due, and the plaintiff in attachment may proceed [as] upon a debt falling due upon a day before the institution of the suit."

11. *E.g.*, IND. ANN. STAT. §§ 3-509, 3-513 (Burns 1946).

12. *E.g., id.* §§ 3-516, 3-519. Liability on the bond cannot exceed the amount of any judgment which may be entered against the debtor.

13. *E.g.*, IND. ANN. STAT. § 3-539 (Burns 1946).

14. Section 10 provides: "Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may . . . (d) *Make any order which the circumstances of the case may require.*" (Emphasis added.) Twenty states have adopted this act, but this number does not include Indiana.

15. 30 STAT. 562 (1898), as amended, 11 U.S.C. § 96 (1952). Section 60(a)(1) allows the trustee in bankruptcy to recover "transfers" made for an antecedent debt within four months prior to bankruptcy and while the debtor was insolvent, to

order to do this, the debtor must be insolvent in the bankruptcy sense and the creditors must act to commence proceedings within four months after the judgment.[16] In balancing these considerations it seems that acceleration's efficacy as a deterrent against fraud and its effect of quickly winding up a cumbersome situation outweigh the potential harm to other creditors.

Jurisdiction—

SUBSTITUTED SERVICE OF PROCESS VALID UPON UNLICENSED FOREIGN GROUP INSURER

A resident of the District of Columbia was beneficiary of her husband's life insurance. The policy was part of a group plan established by the nationwide trade association to which her husband's employer belonged. The insurer, a Missouri corporation, which neither maintained an office nor employed agents in the District, had issued and delivered the group policy in St. Louis to an officer of the association who received no compensation or commission from the insurer for his work administering the policy. All billings for premiums were sent to the association office in the District of Columbia; the officer received premium payments from employees and sent a consolidated payment to the insurer. The average coverage under the group plan was $1000, and the group comprised nationally between sixty and seventy-five workmen from year to year; the insured was the only resident of the District of Columbia covered by the group policy.[1] The insurance company's only direct contact with participants under the policy was through individual certificates which it sent to each of them to indicate their coverage. After the insured's death, his widow brought an action in the District of Columbia to recover the proceeds of the policy.

creditors who had reasonable cause to believe the debtor was insolvent. Section 1(30) includes within the definition of transfer ". . . fixing a lien upon property . . . voluntarily or involuntarily by or without judicial proceedings." 30 STAT. 545, as amended, 11 U.S.C. § 1(30) (1952). This obviously would include the creditor's judgment in the instant case.

16. Also, the creditors would have to meet the following requirement. If the bankrupt has twelve or more creditors, § 59(b) of the Bankruptcy Act, 30 STAT. 561 (1898), as amended, 11 U.S.C. § 95(b) (1952), provides that at least three creditors, having combined claims of at least $500 in excess of the value of securities, if any, must join in the involuntary petition. If there are less than twelve creditors, a single creditor, having the proper statutory minimum, may file an involuntary petition under the terms of § 59(b). However, under the facts of the instant case the creditors in bringing suit would be aided by an important shift in the burden of proof. Under § 3(a), 30 STAT. 546 (1898), as amended, 11 U.S.C. § 21(a) (1952), a fraudulent transfer committed by the debtor within four months prior to the filing of the petition is an act of bankruptcy and the burden of proof under § 3(c) is upon the debtor to prove his solvency at the date the petition is filed. See THE COLLIER BANKRUPTCY MANUAL § 3.01 (Kelliher ed. 1948).

1. Letter from Carroll F. Genovese, Executive Secretary of the Movers' & Warehousemen's Ass'n of America, to the *University of Pennsylvania Law Review*, Sept. 8, 1955, on file in Biddle Law Library, University of Pennsylvania Law School.

Service of process was made upon the Superintendent of Insurance in accordance with the D.C. Code, which allows substituted service when a foreign insurer is "soliciting, selling or writing" insurance on a resident by means of the United States mails.[2] The Municipal Court of Appeals, affirming a verdict for the plaintiff, held that mailing the individual certificate, which constituted "evidence of the insurance," [3] was "writing" insurance within the meaning of the statute, and that nothing in the statute was repugnant to the due process clause. *Security National Life Ins. Co. v. Washington,* 113 A.2d 749 (Mun. Ct. App. D.C.), *petition for appeal denied,* 226 F.2d 251 (D.C. Cir. 1955).

The exercise of in personam jurisdiction over a foreign corporation satisfies the requirements of due process if the corporation has had such contacts with the state of the forum as to make it reasonable that it defend the particular suit which is brought there.[4] When suit is brought on a contract of insurance, few contacts with the state may be adequate to meet this requirement. Solicitation or other activities by company agents within the jurisdiction will suffice,[5] and the use of an independent broker has been held satisfactory.[6] However, the few past decisions based on the activities of a group policy-holder have denied jurisdiction.[7] Subsequent to these cases, *Travelers Health Ass'n v. Virginia* [8] liberalized the requirements of due process in insurance cases. In that case the United States Supreme Court held that an insurer conducting all its business with residents of the state through the mails was subject to suit by the state to enforce compliance with the statute regulating foreign insurers. The instant case, the first decision involving group insurance since *Travelers Health,* seems to base the exercise of jurisdiction solely upon the delivery to a resident of a single certificate under a group policy which had been delivered in another state.[9]

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2. D.C. CODE ANN. § 35-423 (1951).

3. See Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196, 203 (1937); Collier v. Metropolitan Life Ins. Co., 82 F. Supp. 529 (D.D.C. 1949). See also VANCE, INSURANCE 1042 (3d ed. 1951).

4. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Notes, 104 U. PA. L. REV. 381, 389, 393-94 (1955); 16 U. CHI. L. REV. 523 (1949).

5. *Cf.* Commerical Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Connecticut Mutual Life Ins. Co. v. Sprately, 172 U.S. 602 (1899); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856).

6. See Firemen's Ins. Co. v. Thompson, 155 Ill. 204, 40 N.E. 488 (1895); McCord v. Illinois Nat'l Fire Ins. Co., 47 Ind. App. 602, 94 N.E. 1053 (1911).

7. Connecticut Gen. Life Ins. Co. v. Speer, 185 Ark. 615, 48 S.W.2d 553 (1932); State *ex rel.* Kerns v. Connecticut Gen. Life Ins. Co., 168 S.C. 516, 167 S.E. 833 (1933).

8. 339 U.S. 643 (1950), 99 U. PA. L. REV. 245.

9. The court might have relied upon analogy to individual policy litigation following *Travelers Health.* In these cases the claimant's policy had been delivered within the state of the forum. *E.g.,* Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir. 1953). At least one case has indicated that due process requirements are satisfied even if the delivery of plaintiff's policy is the only contact of the insurer with the state of the forum. Zacharakis v. Bunker Hill Mutual Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953). See text at and following note 17 *infra.*

Whether the exercise of jurisdiction is reasonable depends in part on the inconvenience which suit would impose on the corporation,[10] but this must be balanced against the extent to which the corporation's contacts with the state benefit the corporation and create a risk of harm to state residents.[11] The special nature of insurance may permit a state to exercise jurisdiction on the basis of fewer contacts than are required in other business transactions.[12] Unlike the sale of most goods and services, a contract of insurance involves long-term, continuing relationships and obligations between the resident insured and the foreign insurer. At some time during the life of the policy it is highly likely that the insured will have a claim against the insurer, but in many cases the costs and inconveniences of litigation in a foreign forum may make the claimant's use of judicial process to enforce his claim impracticable. Such circumstances provide the foreign insurer with a distinct advantage in forcing a settlement, and occasionally might operate to afford the insurer complete immunity from suit. The state has a legitimate interest in protecting its residents from this risk of economic harm,[13] but in some instances it may be unreasonable to force the foreign insurer to defend in the claimant's district. Although most of the witnesses may reside in the jurisdiction of the insured,[14] the added costs of hiring local counsel and transporting even largely documentary evidence into the jurisdiction may be a substantial burden to the insurer. At some point, however, the exercise of the privilege of extending its activities into a state provides sufficient benefit to the insurer to make it reasonable for the state to protect its residents by forcing the insurer to bear this added cost burden in return for the benefits it receives. Although these benefits may take the form of sales to state residents, the performance of business activities other than sales within the state may be sufficient to subject the corporation to jurisdiction.[15] The emphasis in *Travelers Health,* however, on the large volume of sales to state residents seems to indicate that the sale of a single policy within the state would not in itself be sufficient to support the exercise of jurisdiction.[16]

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10. See International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

11. See Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647-48 (1950).

12. *Compare* Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909), *with* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923). See Note, 104 U. PA. L. REV. 381, 389, 393-94 (1955).

13. See Travelers Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950).

14. *Ibid.*

15. *Cf.* Consolidated Cosmetics v. D-A Publishing Co., 186 F.2d 906 (7th Cir. 1951); LaBonte v. American Mercury Magazine, Inc., 98 N.H. 163, 96 A.2d 200 (1953).

16. 339 U.S. at 646, 648. This analysis seems to have been followed in the recent case of Schutt v. Commercial Travelers Mutual Accident Ass'n, 24 U.S.L. WEEK 2320 (2d Cir. Jan. 17, 1956). There an individual policy was delivered in Kentucky, but plaintiff brought suit in Tennessee after establishing domicile and paying premiums from that state for three years. Substituted service was made and a default judgment entered against the New York insurer. The court of appeals reversed dismissal of an action brought in New York to enforce the judgment, holding that the insurer's contacts with the state were sufficient to support jurisdiction in Tennessee. The court directed that if there were any doubt of the sufficiency of the insurer's activities,

The instant case might be interpreted as holding that the participation by one resident in a group insurance plan is adequate basis for jurisdiction in the District of Columbia. Such a conclusion seems open to serious question because of the requirements of due process. The insurer is probably not realizing sufficient gain from one or a few insureds to compensate for the burden of litigating claims in the plaintiff's forum; nor is there in this activity significant danger of harm to residents of the District of Columbia. Although recent uniform statutes by their terms allow jurisdiction based upon the sale of a single policy to a resident by means of the mails,[17] these statutes generally have been held constitutional in cases in which the insurer's contacts with the state involved more than a single sale.[18] In these cases no analysis of the total activities of the insurer within the state of the forum was required because of the controlling language of the statute. Since contacts other than a mere sale existed in these cases, it is difficult to tell whether a court would uphold the constitutionality of such statutes if applied to a situation where the only contact with the state of the forum was a single sale to one resident.[19] The insurer in the instant case might have been receiving other benefits or creating additional risk of loss in the District of Columbia, but the court did not rely upon any other activities in its opinion.

The instant case may not be based entirely on the extent to which the insurer has contacted residents of the District of Columbia. There is the further fact, perhaps fortuitous for this plaintiff, that the association officer administered the group policy from the District. Through his activities, the insurer was able to engage in solicitation of a large group of persons employed by the association's members. Although only sixty to seventy-five workers were actually participating in the group policy at the time of suit, they represented two per cent of the total number of employees. The insurer benefited by this potential for increased participation in the group plan, as well as by the natural interest of employers in promoting group

the plaintiff should be afforded the opportunity to supplement allegations in his affidavit. *But see* Zacharakis v. Bunker Hill Mutual Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953).

17. The Unauthorized Insurers Act requires that the company be transacting business *and* issuing or delivering a policy to a resident. UNIFORM UNAUTHORIZED INSURERS ACT § 5 (Emphasis added.) The Uniform Unauthorized Insurers Process Act, recommended by the National Association of Insurance Commissioners and adopted in eighteen states (1 RICHARDS, INSURANCE § 55 (5th ed. 1952)), allows substituted service when the company, by mail or otherwise, has issued a policy, solicited applications for policies, or collected premiums from residents. *E.g.*, FLA. STAT. ANN. § 625.30 (Supp. 1954).

18. See Ace Grain Co. v. American Eagle Fire Ins. Co., 95 F. Supp. 784 (S.D.N.Y. 1951); *cf.* Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518, 520-21 (5th Cir. 1953).

19. See Parmalee v. Commercial Travelers Mutual Accident Ass'n, 206 F.2d 523 (5th Cir. 1953), in which the plaintiff sought to base jurisdiction solely on the payment of premiums for three years on a policy issued to the insured in another state, the court avoided the constitutional issue by construing the statute as requiring that the policy be issued and maintained in the state where suit is brought. *But see* Zacharakis v. Bunker Hill Mutual Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953); *cf.* Schutt v. Commercial Travelers Mutual Accident Ass'n, 24 U.S.L. WEEK 2320 (2d Cir. Jan. 17, 1956).

insurance recommended by their trade association. Furthermore, the association officer was responsible for seeing that a minimum number of employees was covered so that low-cost insurance would be economically feasible for the insurer. Also, administration of the policy by the official lowered the insurer's operating costs. Had these activities been performed by an employee of the insurer, the exercise of jurisdiction probably would have been upheld.[20] While the officer was undoubtedly not as effective a producer of business as a regular corporate agent, the beneficial results of his activity should not be overlooked. On the other hand, it must be recognized that there is not necessarily any risk of harm to local residents caused by these activities of the group policy-holder. Nevertheless, the advantages to the insurer may be great enough to afford a sound constitutional basis for the assertion of jurisdiction. The instant court may be criticized for what appears to be a mechanical application of the statute governing substituted service. The suggested analysis would certainly afford a more realistic resolution of the vexing problem of the proper scope of jurisdiction over foreign insurers.

Labor Law—

COURT WITHHOLDS ENFORCEMENT OF UNFAIR LABOR PRACTICE ORDER BECAUSE NON-COMMUNIST AFFIDAVIT FILED BY UNION PRESIDENT IS FALSE AS A MATTER OF LAW

Section 9(h) of the Taft-Hartley Act requires a union to file non-communist affidavits signed by each of its officers with the National Labor Relations Board before the Board may take action on an unfair labor practice charge brought by that union.[1] Ben Gold, president of the International Fur & Leather Workers Union, filed the required affidavits in 1950 and 1951. In 1952, the Board, in reliance on the second affidavit, ruled that the union had complied with section 9(h) and issued a complaint against an employer, culminating in an unfair labor practice order. In April 1954, Gold was convicted of perjury for falsifying his first affidavit.[2] Immediately thereafter, the Board issued an order revoking the union's

20. See note 5 *supra.*

1. 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (1952): "No investigation shall be made . . . and no complaint shall be issued . . . unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization . . . that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. . . ."

2. The appeal from this conviction is still pending. Instant case at 195. Gold was, nevertheless, re-elected president of the union in May 1954. *Id.* at 196.

compliance status;[3] however, the federal district court for the District of Columbia, affirmed by the circuit court, enjoined the Board from enforcing the order or taking any action against the union based on Gold's conviction.[4] In September 1954, when the employer refused to obey the unfair labor practice order, the Board petitioned the Sixth Circuit for enforcement. The court sustained the employer's motion to dismiss. It held that, as a result of Gold's perjury conviction on the first affidavit, the second was false as a matter of law.[5] Consequently, the union had not been in compliance when the complaint was issued, and the court would not enforce the Board's order.[6] *NLRB v. Lannom Mfg. Co.*, 226 F.2d 194 (6th Cir. 1955).

Before issuing a complaint on an unfair labor practice charge, the Board first must determine whether the charging union is in compliance with section 9(h).[7] In making this decision, the Board has been restricted to a determination of whether the required persons[8] have filed affidavits. The District of Columbia courts and early Board rulings held that the Board may not investigate the verity of these affidavits, either at the time of filing or after the union has been deemed in compliance;[9] nor may it

3. Compliance Status of Int'l Fur & Leather Workers, 108 N.L.R.B. 1190 (1954).

4. Farmer v. International Fur & Leather Workers, 221 F.2d 862 (D.C. Cir. 1955).

5. Judge Stewart, in his dissenting opinion, points out that although Gold's conviction conclusively showed that he was a communist on August 30, 1950, it does not necessarily follow that he was a communist when he filed the 1951 affidavit. Instant case at 200. The majority opinion answers this argument by holding that in the absence of a showing to the contrary, a continuing membership will be presumed. Instant case at 198. The legislative history of the act would support such a presumption. See H.R. REP. No. 510, 80th Cong., 1st Sess. 49 (1947). However, it has been stated that a disavowal of previous Communist Party membership can rebut this presumption. American Communications Ass'n v. Douds, 339 U.S. 382, 414 (1950). It is arguable, therefore, that a reasonable opportunity should have been given to Gold or the union to rebut this presumption. Such an opportunity does not appear to have been given. For purposes of this Comment, however, the issue of the "continuing membership presumption" will be assumed to have been correctly decided.

6. The instant court relied on NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1950), where the Supreme Court held that a court could review a ruling of the Board on compliance when it involved a question of law rather than fact. See also Goodman Mfg. Co. v. NLRB, 6 CCH LAB. L. REP. (29 Lab. Cas.) ¶ 69545 (7th Cir. Nov. 10, 1955); NLRB v. Coca-Cola Bottling Co., 219 F.2d 441 (6th Cir. 1955), *cert. granted*, 24 U. S. L. WEEK 3093 (U.S. Oct. 10, 1955) (No. 79). Compare American Rubber Products Corp. v. NLRB, 214 F.2d 47 (7th Cir. 1954) where the court held that the issue of whether or not a particular person was an "officer" within the meaning of the act was up to the Board's exclusive determination because it involved the "fact" of compliance rather than the "necessity" of compliance which was the issue in the *Highland Park* case.

7. NLRB v. Dant, 344 U.S. 375 (1953); see note 1 *supra*.

8. See NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1950) (Officers of parent union required to file); Goodman Mfg. Co. v. NLRB, 6 CCH LAB. L. REP. (29 Lab. Cas.) ¶ 69545 (7th Cir. Nov. 10, 1955) (De facto officers also must file although not necessarily designated as such by the union); NLRB v. Coca-Cola Bottling Co., 219 F.2d 441 (6th Cir. 1955), *cert. granted*, 24 U. S. L. WEEK 3093 (U.S. Oct. 10, 1955) (No. 79); see also 29 C.F.R. 102.13(b)(3) (Supp. 1955).

9. United Electrical Workers v. Herzog, 110 F. Supp. 220 (D.D.C.), *aff'd sub nom.* Farmer v. United Electrical Workers, 221 F.2d 36 (D.C. Cir. 1953); see Alpert & Alpert, 92 N.L.R.B. 806 (1950); American Seating Co., 85 N.L.R.B. 269

revoke the union's status even if the affidavit has been proven false by a perjury conviction.[10] Moreover, it has been held that an employer may not raise falsity as a defense to an unfair labor practice charge before the Board[11] or in a proceeding before the court to enforce an unfair labor practice order.[12] In the instant case the Sixth Circuit has refused to follow the District of Columbia Circuit, but rather has allowed an employer to defend successfully on the theory that the union, by filing a false affidavit, was not in compliance with section 9(h).

By requiring union officers to file non-communist affidavits, Congress sought to eradicate communists from positions of leadership in the American labor movement.[13] While the act specifically provides that union officers who have falsified affidavits filed pursuant to section 9(h) can be prosecuted for perjury,[14] the instant case presents the problem of whether an officer's falsification can be the basis for implying in the section an additional sanction by depriving a union of benefits under the act. The District of Columbia Circuit has held that only the perjury sanction should be imposed on the ground that there is no authority in the act for an additional penalty to be visited upon the union.[15] On the other hand, the Board[16]

(1949); Craddock-Terry Shoe Corp., 76 N.L.R.B. 842 (1948). *Contra,* Compliance Status of Local 80A, United Packinghouse Workers, CIO, 101 N.L.R.B. 1253 (1952); see NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369, 371-72 (5th Cir. 1954); NLRB v. Sharples Chemical Co., 209 F.2d 645, 650-51 (6th Cir. 1954). The latter two cases state that the Board should have the power to investigate in an independent proceeding. These circuits, however, are limited to obiter disagreement since the District of Columbia courts have exclusive venue of prohibitory suits against the Board; see NLRB v. Vulcan Furniture Mfg. Corp., *supra* at 371.

10. Farmer v. International Fur & Leather Workers, 221 F.2d 862 (D.C. Cir. 1955), *affirming* 117 F. Supp. 35 (D.D.C. 1953). *Contra,* International Union of Mine, Mill & Smelter Workers v. Farmer, 33 L.R.R.M. 2777 (D.D.C.), *aff'd on other grounds,* 218 F.2d 42 (D.C. Cir. 1954). However, the subsequent history of the *Mine, Mill* case brought it into line with the *Fur* case; see, Compliance Status of Mine, Mill & Smelters Workers, 111 N.L.R.B. 422 (1955) (order ruling that the union was no longer in compliance), *order enjoined,* International Union of Mine, Mill & Smelter Workers v. Farmer, 6 CCH LAB. L. REP. (29 Lab. Cas.) ¶ 69 547 (D.C. Cir. Nov. 10, 1955)).

11. NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369 (5th Cir. 1954); NLRB v. Sharples Chemical Co., 209 F.2d 645 (6th Cir. 1954).

12. Aerovox Corp. v. NLRB, 211 F.2d 640 (D.C. Cir.), *cert. denied,* 347 U.S. 968 (1954). In refusing to consider falsity as a defense in an enforcement proceeding, the court relied on United Electrical Workers v. Herzog, 110 F. Supp. 220 (D.D.C.), *aff'd sub nom.* Farmer v. United Electrical Workers, 221 F.2d 36 (D.C. Cir. 1953), which held that the Board could not conduct an inquiry into the affidavits.

13. H.R. REP. No. 245, 80th Cong., 1st Sess. 4 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 49 (1947); NLRB v. Dant, 344 U.S. 375 (1953); NLRB v Highland Park Mfg. Co., 341 U.S. 322 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

14. 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (1952): "The provisions of Section 35A of the Criminal Code [relating to perjury] shall be applicable in respect to such affidavits."

15. International Union of Mine, Mill & Smelter Workers v. Farmer, 6 CCH LAB. L. REP. (29 Lab. Cas.) ¶ 69547 (D.C. Cir. Nov. 10, 1955); Farmer v. International Fur & Leather Workers, 221 F.2d 862 (D.C. Cir. 1955); NLRB v. Aerovox Corp., 211 F.2d 640 (D.C. Cir. 1954); Farmer v. United Electrical Workers, 211 F.2d 36 (D.C. Cir. 1953).

16. See Brief for Petitioner, pp. 5-7: Compliance Status of Int'l Fur & Leather Workers, 108 N.L.R.B. 1190 (1954); Compliance Status of Local 214, Int'l Fur & Leather Workers, 106 N.L.R.B. 1265 (1953); Compliance Status of Local 80A, United Packinghouse Workers, CIO, 101 N.L.R.B. 1253 (1952).

and the Fifth [17] and Sixth [18] Circuits previously have indicated that unions should not have benefits when an affidavit is false on the theory that such a document would not be an "affidavit" as contemplated by the act. Unquestionably, the latter view is the more desirable one, for it promotes the ultimate purpose of the act by compelling unions to purge themselves of communist officers or lose compliance status. However, such a theory should be subject to several qualifications. The legislative history of section 9(h) clearly shows that Congress did not intend that the merits of an unfair labor practice charge or the granting of compliance status should be delayed by protracted investigations and hearings.[19] Therefore, the application of the above rule must avoid the necessity of the Board's having to conduct investigations or hold hearings to determine whether the affidavits are false. The instant case has obviated the need for these objectionable investigations by making truth or falsity depend upon a rule of law. But, if falsity of affidavits is made relevant, the unions will then have the burden of discovering whether their candidates are communists—a task which they are not equipped to perform. Furthermore, the unions will be in a precarious position because, even if they do screen all their candidates, it is possible that a diligent investigation might prove defective and a communist find his way into office. Then the innocent union would lose its benefits despite a good faith investigation and election. Such a result might compel unions to reject all doubtful candidates with "liberal" or "progressive" proclivities, thus eliminating a large portion of labor's most capable potential leaders—a result certainly not contemplated by section 9(h) of the Taft-Hartley Act. Therefore, a second qualification should be imposed upon the view adopted in the instant case; only in situations where union awareness of an officers' communist affiliation can be conclusively established without the need for union investigation, should the unions be deprived of the benefits of compliance status.[20] Here too, of course, it should be required that the Board establish this fact without holding hearings or investigations. Such a rule might apply to affidavits filed by an officer with union acquiescence immediately after he had been convicted of filing a false 9(h) affidavit,[21] or had been shown to be a communist by a conviction unrelated to the Taft-Hartley Act,[22] or had stated under oath that he is a communist, or had made public pronouncements to that effect.[23] In these

17. NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369, 371-72 (5th Cir. 1954) (dictum).

18. NLRB v. Sharples Chemical Co., 209 F.2d 645, 650-51 (6th Cir. 1954) (dictum).

19. See 93 CONG. REC. 6444, 6447, 6860 (1947).

20. *Compare* International Fur & Leather Workers v. Farmer, 221 F.2d 862 (D.C. Cir. 1955), *with* International Union of Mine, Mill & Smelter Workers, 33 L.R.R.M. 2777 (D.D.C.), *aff'd on other grounds*, 218 F.2d 42 (D.C. Cir. 1954).

21. See Compliance Status of Local 80A, United Packinghouse Workers, CIO, 101 N.L.R.B. 1253 (1952); see also text at note 2 and note 2 *supra*.

22. *E.g.*, under the Smith Act, 18 U.S.C. § 2385 (1952).

23. See Compliance Status of Int'l Union of Mine, Mill & Smelter Workers, 111 N.L.R.B. 422 (1955).

situations it would be unrealistic to entertain any doubts that the union was unaware of the communist affiliations of this officer. The holding in the instant case has avoided the policy against investigations, but by not expressly requiring union awareness as part of its test, has created the possibility that a union might be penalized even though it did not have such knowledge. In spite of this, the court probably reached the proper result, because, on the facts, there is no doubt that the union did know that Gold was a communist at the time he filed.[24]

The difference of opinion between the Sixth Circuit and the District of Columbia Circuit as to whether a union can be denied the benefits of compliance status in the event of a false affidavit may lead to a serious perversion of the administration of the Taft-Hartley Act. Since the Board's actions can be challenged only in the District of Columbia,[25] that court, on the basis of its prior decisions, would refuse to give effect to the Board's ruling that a union complaining of unfair labor practices had not complied with section 9(h); yet, the courts of appeals of other circuits, before which the Board might have to seek enforcement of its orders, could, following the instant decision, turn the Board's processes into wasted motion by withholding enforcement. Therefore, it would seem appropriate that the Supreme Court grant certiorari and settle this dispute, the solution of which is basic to the efficient enforcement of the Taft-Hartley Act.

Workmen's Compensation—

EMPLOYEE DENIED RECOVERY FOR LOSS OF COMPENSATION CLAIM THROUGH EMPLOYER'S DECEIT

Plaintiff employee suffered an injury in the course of employment which resulted in total and permanent disability. He filled out a claim form which his employer led him to believe was to be forwarded to the state workmen's compensation commission by the employer. Thereafter, the employer, a self-insurer,[1] provided medical treatment and paid the employee weekly compensation for two years. At the end of two years, these weekly payments were discontinued, and the employee discovered that the employer had never filed the claim. The applicable workmen's compensa-

24. Gold made a public statement to the press at the time of filing that his filing was only for "technical compliance" with the act and that he had not abandoned his proscribed affiliation. N.Y. Times, Aug. 29, 1950, p. 10, col. 4.

25. See NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369, 371 (5th Cir. 1954).

1. The Ohio workmen's compensation law provides that an employer may become a self-insurer upon a showing that he is financially able to make the compensation payments himself. A bond may be required. OHIO REV. CODE § 4123.35 (Anderson 1953).

tion act requires that a claim be filed with the commission within two years after the injury.[2] The employee immediately attempted to file a claim but the commission ruled that the statute of limitations for filing had run[3] and refused jurisdiction, whereupon this action for deceit was instituted against the employer for loss of compensation as a result of the employer's misrepresentations. The Ohio Supreme Court, affirming a demurrer to the petition, held that an employer who complies with the provisions of the workmen's compensation act is free from liability for common-law actions based upon injuries occurring to employees in the course of employment,[4] and that this action was an action arising out of such an injury and therefore was barred.[5] *Greenwalt v. Goodyear Tire & Rubber Co.*, 126 N.E.2d 116 (Ohio 1955) (4-3).

In addition to shifting the primary responsibility for costs of industrial injuries from employees to industry,[6] one of the main purposes of workmen's compensation acts is to provide employees with an added degree of security by assuring them that, regardless of fault, they will receive compensation payments upon the occurrence of a disabling injury in the course of their employment.[7] In return for this assured compensation, the employee gives up his common-law right of action against the employer; thus, workmen's compensation acts generally provide that an employee's remedies for injuries incurred in the course of employment are limited to those provided by the act.[8] Correspondingly, employers complying with the act are exempted from common-law liability for any such injuries.[9] The majority of courts have construed these statutory "exclusive remedy" provisions as not barring the employee's common-law action against the em-

2. OHIO REV. CODE § 4123.84 (Anderson 1953). Although there is no mention of exhaustion of administrative remedies as a ground for the decision, it may have been possible that, under OHIO REV. CODE § 4123.51 (Anderson 1953), the plaintiff could have either appealed this ruling or applied for a rehearing.

3. OHIO REV. CODE § 4123.84 (Anderson 1953).

4. OHIO REV. CODE § 4123.74 (Anderson 1953).

5. See note 23 *infra*.

6. See HOROVITZ, WORKMEN'S COMPENSATION 7, 8 (1944); 1 LARSON, WORKMEN'S COMPENSATION § 2.20 (1952); SOMERS, WORKMEN'S COMPENSATION 15, 16, 281-82 (1954).

7. See, *e.g.*, N.J. REV. STAT. § 34:15-7 (1937); N.Y. WORKMEN'S COMP. LAW § 10; PA. STAT. ANN. tit. 77, § 431 (Purdon 1952). Self-inflicted injuries and injuries incurred while intoxicated are generally excepted.

8. *E.g.*, GA. CODE ANN. § 114-103 (1935); IOWA CODE ANN. § 85.20 (1949); N.Y. WORKMEN'S COMP. LAW § 11; TENN. CODE ANN. § 6859 (Williams 1941).

9. *E.g.*, CAL. LAB. CODE ANN. § 3601 (West 1955); MICH. STAT. ANN. § 17.144 (1950); MINN. STAT. ANN. § 176.031 (Supp. 1954); W. VA. CODE ANN. § 2516 (1955). Most acts provide for an election by the employer concerning his desire to participate in the workmen's compensation program. These acts, however, generally deprive non-participating employers of the defenses of fellow-servant, assumption of risk and contributory negligence. LA. REV. STAT. § 23.1042 (1950), NEV. COMP. LAWS § 2680.35(a) (Supp. 1949) and UTAH CODE ANN. § 35-1-57 (1953), for example, create a presumption of employer negligence. MASS. GEN. LAWS c. 152, § 66 (1932) in effect makes non-participating employers liable at common law without fault.

ployer for injuries not covered by the act.[10] One of the most difficult problems which has arisen under workmen's compensation laws has been the determination of whether a cause of action, which ostensibly is not based upon an injury sustained in the course of employment, should be classified as an action "arising out of an injury in the course of employment" so as to be barred by the "exclusive remedy" provision. This problem has arisen predominantly in claims instituted by members of the injured employee's family suing in their own right. Where the employee's injury is compensable under the workmen's compensation act, spouses' suits for loss of consortium [11] and parents' suits for loss of services [12] are barred by "exclusive remedy" provisions. In the absence of specific provisions in the act, employees' suits based upon non-disabling injuries are similarly barred.[13] On the other hand, courts have found independent causes of action which were not barred when the employer's acts aggravate or compound the injury. Thus a tort recovery was allowed when the employer sent the employee's mutilated corpse to his home, thereby causing shock to the pregnant widow,[14] and when the employer negligently allowed the employee's body to be mutilated and destroyed.[15] Similarly, when the

10. Boal v. Electric Storage Battery Co., 98 F.2d 815 (3d Cir. 1938); Kane v. Federal Match Corp., 5 F. Supp. 507 (M.D. Pa. 1934); Gentry v. Swann Chemical Co., 234 Ala. 313, 174 So. 530 (1937); Covington v. Berkeley Granite Corp., 182 Ga. 235, 184 S.E. 871 (1936); Peerless Woolen Mills v. Pharr, 74 Ga. App. 459, 40 S.E.2d 106 (1946); Clark v. M. W. Leahy Co., 300 Mass. 565, 16 N.E.2d 57 (1938); Pershing Quicksilver Co. v. Thiers, 62 Nev. 382, 152 P.2d 432 (1944); Billo v. Allegheny Steel Co., 328 Pa. 97, 195 Atl. 110 (1937). *Contra,* Thomas v. Parker Rust Proof Co., 284 Mich. 260, 279 N.W. 504 (1938); Del Busto v. E. I. Dupont de Nemours & Co., 167 Misc. 920, 5 N.Y.S.2d 174 (Sup. Ct. 1938); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937).

11. Josewski v. Midland Constructors, Inc., 117 F. Supp. 681 (D.S.D. 1953); Danek v. Hommer, 9 N.J. 56, 87 A.2d 5 (1952); Bevis v. Armco Steel Corp., 156 Ohio St. 295, 102 N.E.2d 444 (1951), 21 U. CIN. L. REV. 214 (1952); Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954); Guse v. A. O. Smith Corp., 260 Wis. 403, 51 N.W.2d 24 (1952). *Contra,* Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950).

12. Leong v. Postal & Telegraph-Cable Co., 66 Cal. App. 2d 849, 153 P.2d 204 (1944); Howze v. Lykes Bros., Inc., 64 So. 2d 277 (Fla. 1953); Griggs v. Zimmerman, 50 Ga. App. 24, 177 S.E. 86 (1934); Hilsinger v. Zimmerman Steel Co., 193 Iowa 708, 187 N.W. 493 (1922); Wall v. Studebaker Corp., 219 Mich. 434, 189 N.W. 58 (1922); Novack v. Montgomery Ward & Co., 158 Minn. 505, 198 N.W. 294 (1924); Wilson v. Newark Smelting & Refining Co., 26 N.J. Misc. 51, 56 A.2d 619 (C.P. 1945); Houston Pipe Line Co. v. Beasley, 49 S.W.2d 95 (Tex. Civ. App. 1932); Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449, 94 S.E. 506 (1917). *Contra,* Green v. Anwyll, 86 Pittsburgh L.J. 543 (Allegheny County, Pa., C.P. 1938); Silurian Oil Co. v. White, 252 S.W. 569 (Tex. Civ. App. 1923).

13. See, *e.g.,* Morgan v. Ray L. Smith & Son, 79 F. Supp. 971 (D. Kan. 1948) (disfigurement). However, thirty-one jurisdictions now have specific coverage for disfigurement whether or not accompanied by a disability. See, *e.g.,* N.Y. WORKMEN'S COMP. LAW § 15(3)(t); N.C. GEN. STAT. § 97-31(u),(w) (1950). See also 34 MINN. L. REV. 172 (1950). Pain and suffering remains neither compensable nor actionable. See, *e.g.,* Shaw v. Salt River Valley Water Users Ass'n, 69 Ariz. 309, 213 P.2d 378 (1950); Odom v. Arkansas Pipe & Scrap Material Co., 208 Ark. 678, 187 S.W.2d 320 (1945); Zeigale's Case, 325 Mass. 128, 89 N.E.2d 264 (1949).

14. Price v. Yellow Pine Paper Mill Co., 240 S.W. 588 (Tex. Civ. App. 1922).

15. Diebler v. American Radiator & Standard Sanitary Corp., 196 Misc. 618, 92 N.Y.S.2d 356 (Sup. Ct. 1949).

injury was inflicted intentionally by the employer, some states have allowed the employee's common-law action.[16] In others, however, even such actions are barred by the workmen's compensation statutes; but where barred, the acts generally provide that the employer pay a penalty in addition to the regular compensation.[17] Such statutes and cases seem to indicate that the legislatures and courts are disposed to interpret "exclusive remedy" provisions so as to allow recovery by employees in excess of the ordinary statutory allowance if the basis of the claim is extraordinary injury caused by the especially grievous fault of the employer, unless the act itself provides a remedy for such acts.

The soundness of the decision in the instant case is questionable as to both law and policy. The main case upon which the court relied was *Bevis v. Armco Steel Corp.*[18] There, an employee was informed by his employer that a medical examination showed him to be in good health, although the employer knew that the examination actually had revealed a lung disorder. Relying on the employer's misrepresentation, the employee continued working without treatment and subsequently became totally and permanently disabled due to aggravation of the undisclosed infirmity. Although awarded compensation payments under the act,[19] which also contains provision for penalty payments,[20] the employee brought an action for deceit against the employer. The court properly held that the action was barred by the "exclusive remedy" clause. The situation in *Bevis* is clearly different from the instant case, for there the total injury, including the employer's special wrong, was compensable under the compensation act. Here the court is faced with a claimant who has just been denied any remedy under the compensation act. The employee's action for deceit appears not to be based upon his physical injury, which the employer's act in no way affected, but rather upon the non-compensable "injury" of loss of remedy under the act as a result of the employer's deception.[21] The

16. 2 LARSON, WORKMEN'S COMPENSATION § 68.10 (1952). This right is reserved, in some instances, by a provision in the act, *e.g.*, KY. REV. STAT. § 342.015 (1953); MD. ANN. CODE art. 101, § 44 (1951); N.H. REV. LAWS c. 216, § 11 (1942); ORE. REV. STAT. § 656.156(2) (1953); WASH. REV. CODE § 51.24.020 (1951); W. VA. CODE ANN. § 2527 (1955).

17. *E.g.*, CAL. LAB. CODE ANN. § 4553 (West 1955) (maximum penalty: $2500); MASS. GEN. LAWS c. 152, § 28 (1932) (double compensation); MO. ANN. STAT. § 287.120 (1949) (15% penalty); N.M. STAT. ANN. § 59-10-7 (Supp. 1955) (50% penalty); N.C. GEN. STAT. § 97-12 (1950) (10% penalty); OHIO CONST. art. II, § 35 (15-50% penalty in discretion of board); WIS. STAT. § 102.57 (1953) (15% penalty).

18. 86 Ohio App. 525, 93 N.E.2d 33 (1949).

19. *Id.* at 534, 93 N.E.2d at 37 (concurring opinion).

20. OHIO CONST. art. II, § 35. From the opinion of the *Bevis* case it is not possible to ascertain whether the Industrial Commission had awarded Bevis an additional sum as a penalty payment for the employer's deceit. However, it would seem that Bevis was entitled to such an additional payment.

21. The court took note, however, that the measure of damages in the deceit action would be the same as the amount of compensation the employee would have been entitled to under the act. Instant case at 120. This similarity should not operate to conceal the distinctive characteristics of the two separate injuries.

employee's action would not seem to be one arising out of an "injury in the course of employment," and, furthermore, he cannot receive a penalty payment under the act since such a payment is dependent upon recovery on the underlying physical injury which has been denied. Therefore, under existing law, and considering the predilection of the courts and legislatures to penalize special fault on the part of errant employers, this plaintiff should have been held to have a common-law right of action against the employer. In making what seems to be a mechanical application of the "exclusive remedy" provision, the court has utilized that clause to deprive the employee of any and all opportunity to be compensated for his injury. Unlike the *Bevis* situation, the court has permitted an employer to reap the benefits of a seemingly calculated plan to avoid his legal obligations under the workmen's compensation act.[22] The court has not only stripped the employee of the protection which the act was promulgated to provide, but has left him with substantially less protection than he had at common law.[23]

22. See Bevis v. Armco Steel Corp., 86 Ohio App. 525, 534, 93 N.E.2d 33, 38 (1949), where it is stated in the concurring opinion that an employee should not lose his common-law right of action when he is made to forego his statutory remedy by reason of his employer's fraud.

23. The court's treatment of the plaintiff's allegations is confusing. At the outset of the opinion the court quite properly stated that for purposes of a demurrer the allegations in the petition must be accepted as true. The court also stipulated that since all the necessary components of a deceit action were alleged, the plaintiff had a good cause of action unless barred by the "exclusive remedy" provision. Instant case at 119. Subsequently, however, the court stated that it was the employee's "duty to see that the requisite application was properly filed. . . ." and also that the employer was under no "legal obligation" to perform his "gratuitous promise." Instant case at 120. The court's remarks appear to be a ruling on the merits of the plaintiff's deceit action, although plaintiff had had no opportunity to present evidence in support of his allegations.