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NOTES

COMPLAINANT'S LIABILITY ON BOND UNDER NORRIS-LA GUARDIA ACT OF 1932

A recent case, *McNamara v. Calvin et al.*[1], raises some interesting problems in connection with the Norris Anti-Injunction Act of 1932.[2] A bill for temporary restraining order and for injunctions, dated March 9, 1932, alleges that complainant, a citizen of Michigan, was engaged in interstate trucking between points in Michigan, Illinois, and Wisconsin; that he made local deliveries and pick-ups of interstate shipments directly with the interstate trucks, without

[1] U.S. D.C., N. D. Ill., E. D., No. 11524, unreported (1932).

[2] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115 (1932).

using terminal facilities in Chicago; that defendants, citizens of Illinois and officers of the Chicago Teamsters' Union and of a company which operated a trucking-delivery terminal in Chicago, desired that complainant stop local deliveries and pick-ups and make use of the Chicago terminal at the usual charges; that, in order to compel complainant to do this, defendants by threats and other intimidation interfered with complainant's employees, and threatened complainant with physical violence and with material damage to his business; that complainant therefore stopped his local operations and was prevented from fulfilling certain contracts, thereby suffering damage in excess of $3,000.00.

A temporary order restrained defendants from (1) interfering with complainant's business or property or his contracts, employees, or equipment. (2) preventing local deliveries and pick-ups without the use of the Chicago terminal, (3) interfering even by persuasion, with complainant's employees in the performance of their duties in complainant's interstate business, or (4) interfering in any way with complainant's handling of goods in interstate commerce.

Under the requirement of Section 16 of the Clayton Act, complainant filed a bond (with surety) in the sum of $1000.00, conditioned upon payment to defendants of

> all damages which may be sustained . . . . by reason of the wrongful issuance of . . . . restraining order and/or injunction, and also such costs and damages as shall be awarded against the said complainant in case said restraining order and/or injunction shall be dissolved.

On April 1, 1932, no answer having been filed, a preliminary injunction in substantially the same terms as those of the order was issued, and the bond was continued without change. Defendants thereafter filed separate answers (one for the union group and one for the terminal group), and afterward moved dissolution of the temporary injunction. After several continuances the injunction was dissolved and the bill was dismissed on November 4, 1932, *upon motion of complainant.* Shortly thereafter, the terminal group of defendants filed a suggestion of damages, claiming attorney's fees as damages under the bond, because of the provision of Section 7 of the Norris Act of March 23, 1932.[3] Demurrer to the suggestion was sustained as to fees earned prior to March 23rd, and overruled as to fees earned after that date to November 4th, and upon hearing judgment was given for defendants in the sum of $1000.00 for fees incurred between March 23rd and November 4th, the court refusing to admit proffered evidence as to the reasons for the dismissal of the bill on complainant's motion.

1. Even though the temporary order and/or the preliminary injunction had been erroneously issued, no action would lie in the federal courts by a defendant

[3] "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court."

in an injunction proceeding, independent of a bond or other specific undertaking, for damages resulting from such wrongful issuance.[4]

2. Even though the preliminary injunction of April 1st had been erroneously issued, complainant could not be held liable under the bond of March 9th and apart from the Norris Act, for attorney fees as damages, so far as such fees were incurred in seeking dissolution of the preliminary injunction (of April 1st).[5]

3. Even though the restraining order of March 9th had been erroneously issued, complainant could not be held liable for attorney fees as damages, under the bond of that date.[6]

4. The terms of the Norris Act do not in any way affect the liability of complainant under the bond of March 9th. (1) Although the bond of March 9th was renewed on April 1st, no change was made in it: the provisions of Sec. 7 of the Norris Act were not put into the bond.[7] (2) The McNamara case is not within the scope of the terms of the Norris Act.[8]

[4] Meyers et al, v. Block, 120 U.S. 206, 7 Sup. Ct. 525 (1887); Tenth Ward Road District, etc. v. T. & P. Ry. et al., 12 F. (2d) 245 (C.C.A. 5th 1926).

[5] The bond of March 9th was conditioned upon payment of "damages . . . . sustained . . . . by reason of the wrongful issuance of the said restraining order and/or injunction." The statement has been made that damages on injunction bonds include "counsel fees incurred in procuring the dissolution of an injunction improperly or wrongfully issued . . . . if it appears that this expense was occasioned by reason of the issuance of the injunction." 55 A.L.R. 454, citing 14 R.C.L. 486. This rule, however, is not followed in the federal courts, in the absence of a specific statutory provision. The latest case is Local Union No. 368, Brotherhood of Painters, etc., v. Barker Painting Co., 24 F. (2d) 879 (1928), citing Oelrichs v. Williams, 82 U.S. 211 (1872), Tullock v. Mulvane, 184 U.S. 497, 22 Sup. Ct. 372 (1902), Missouri etc., R. Co. v. Elliott, 184 U.S. 530, 22 Sup. Ct. 446 (1902), and Lindeberg v. Howard, 146 Fed. 467 (C.C.A. 9th 1906). In the Tullock case recovery of attorney fees was permissible by the law of Kansas where the suit on the bond was first brought, though the bond was given in a federal court.

[6] Note 4, *supra*, and cases there cited. The points numbered 2 and 3 herein are not very important, however, because there is practically no solid ground for the assumption (so far made) that the restraining order and the injunction were erroneously issued. See discussion of points 5, 6 and 7, *infra*.

[7] Section 7 of the Norris Act requires a bond with an obligation of complainant (and of his surety) substantially different from the obligation of the bond of March 9th. The issuance of the preliminary injunction of April 1st, after the passage of the act and without the exaction of a bond of the new type, was, therefore, error, *provided*, of course, that the court was dealing with a labor case which was within the terms of Section 7. But see note 8(a), *infra*.

[8] See discussion of point 6, *infra*. Had the act applied to this case, certain other issues would have arisen, which, for the sake of completeness, we may examine for a moment.

(a) If the Norris Act imposes upon the principle of an injunction bond an obligation broader than the obligation of his bond posted before the adoption of the Act, the provision of the Act would not apply to complainant's obligation in this case. That obligation should be measured by the terms of the bond required by the court. That bond was on file when the Act was passed and it was subsequently continued without change. The Act would not be retrospective as to complainant, even if it did apply to this case.

(b) If the Act had increased complainant's liability, it would have increased the probability that he could not pay, and, therefore, it would have increased the risk of the surety. The record does not show any specific assent of the surety to the continuance of the bond; and

5. The temporary restraining order of March 9th was issued in accordance with established law. The bill alleges diversity of citizenship and conspiracy between officers of the terminal company and of the union; and it alleges that the purpose and effect of the combination are to interfere with interstate commerce, with intent to compel complainant to make use of the Chicago terminal, and that defendants sought to make the combination effective through threats and violence. With jurisdiction of parties and subject matter the general equity powers of the federal courts enable them to enjoin not only conduct in violation of the common law,[9] but also conduct in violation of the anti-trust laws of the United States, even when the statute is not mentioned in the bill.[10] And even though this had been a labor case, the Clayton Act, which was in effect when the order was issued, does not forbid the issuance of an injunction to restrain violence or threats of violence in furtherance of a combination or conspiracy in restraint of interstate commerce. All requirements of the statute for the issuance of restraining orders without hearing were met, and bond was filed as required by Section 16 of the Clayton Act.

6. The preliminary injunction of April 1st was issued in accordance with established law, so far as the Norris Act is concerned. In the first place, Sections 4 and 5 do not forbid the issuance of injunctions in such a case as the McNamara case.[11] The language which defines the kinds of cases to which the sections are to apply is found in Section 13 of the Act, which, in the interest of clarity, is set out in the form employed in the note.[12] A careful reading of this section, as it is here set out, indicates that the meaning of paragraphs (a) and (b) depends wholly upon the definition of "labor disputes" in paragraph (c).

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there appears to be no basis for an assumption that, if the surety did assent to the continuance, he did so with knowledge of the extension of the complainant's liability (if such had been the case). If complainant's liability had been increased, therefore, the surety's risk would have been increased without his knowledge or consent, and the surety would have been discharged.

[9] Duplex Co. v. Deering, 254 U.S. 443, 41 Sup. Ct. 172 (1921), a leading authority. This principle was applied to the Sherman Act in Anderson v. Shipowner's Ass'n., 272 U.S. 359, 47 Sup. Ct. 125 (1926). See also VI Journal of Business of the University of Chicago (April, 1933).

[10] The federal courts take judicial notice of the statutes of the United States. See Matter of Dunn, 212 U.S. 374, 29 Sup. Ct. 299 (1909) where it was held that a federal court will judicially notice that a corporate defendant was incorporated by an act of Congress, without any averment of the fact in the petition.

[11] Section 4 provides that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of a labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing certain acts." Section 5 makes use of the same language, "persons participating or interested in a labor dispute."

[12] (a) A case shall be held to involve or to grow out of a labor dispute
[Either] when the case involves [:]
persons who are engaged in the same industry, trade, craft or occupation; or
[persons who] have direct or indirect interests therein; or
[persons] who are employees of the same employer; or

The latter presents two fields of controversy, each defined as labor disputes. The McNamara case falls within neither field. The bill discloses no controversy concerning terms or conditions of employment or any controversy related in any way thereto. The controversy arose from an attempt to compel complainant to use the terminal facilities, and not because of terms or conditions of employment. Our case, then, is not one within the provisions of Sections 4 and 5 of the Norris Act.

In the second place, even if Section 4 did apply to our case, the section would not forbid the restraint of any of the acts which were enjoined in the McNamara case.[13]

[persons] who are members of the same or an affiliated organization of employers or employees;

WHETHER *such dispute* is [:]

between one or more employers, and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees, and one or more employees or associations of employees; or when the case involves any conflicting or competing interest in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute,
  (1) if relief is sought against him or it, and
  (2) if he or it is engaged in the same industry, trade, craft or occupation in which *such dispute* occurs, or
    [if he or it] has a direct or indirect interest therein, or
    [if he or it] is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(Italics, small capitals, and matter in brackets supplied for purposes of clarification.)

[13] Acts which may not be restrained under the Norris Act are:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;
(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertakings or promise as is described in Section 3 of this Act;
(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance or other moneys or things of value;
(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any state;
(e) Giving publicity to the existence of, or the facts involved in, any labor dispute;
(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
(i) Advising, urging, or otherwise causing or inducing without threat, fraud, or violence the acts theretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

In the third place, Section 7 of the Norris Act is applicable only to "any case involving or growing out of a labor dispute, as herein defined"; so that, even if it should be thought that the section required, in some cases, the filing of a bond in terms different than the bond of March 9th, it does not require any such bond in the McNamara case. It was not error, therefore, to issue the preliminary injunction without requiring alterations in the bond.

7. The preliminary injunction was issued in accordance with established law, apart from the provisions of the Norris Act. The McNamara case is not a labor case within the meaning of the Clayton Act,[14] and no acts are enjoined which are enumerated in Section 20 of the Clayton Act, as acts which are not to be enjoined.[15] We are therefore confronted with the ultimate question of the propriety of the issuance of the preliminary injunction under the law as established either by common law decisions or by the interpretation and application of the Sherman Anti-Trust Act of 1890.[16] Defendants and those conspiring with them are restrained

[a] from interfering with complainant's business and/or . . . . property;
[b] from interfering with complainant's trucks, customers [*et cetera*];
[c] from interfering with complainant's business in the transportation of goods [in interstate commerce];
[d] from interfering with or damaging complainant's property or business . . . . ;
[e] from preventing complainant from using [terminals other than those of the defendants];
[f] from doing . . . . or causing anything to be done that will prevent [the conduct of complainant's transportation business over the streets and highways of Illinois];

[14] "No . . . . injunction shall be granted . . . . in any case between an employer and employee, or between employees, or persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment. . . . . " The McNamara case was not a case between persons of any of the classes mentioned. See Duplex Co. v. Deering, 254 U.S. 443, 41 Sup. Ct. 172 (1821); nor was there any dispute concerning terms or conditions of employment.

[15] The acts so enumerated are:

[*a*] terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do;
[*b*] or attending at any place where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working;
[*c*] or ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do;
[*d*] paying or giving, or withholding from, any person engaged in such disputes, any strike benefits or other moneys or things of value;
[*e*] or peaceably assembling in a lawful manner, and for lawful purposes;
[*f*] or doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto;

[16] The only parties to the suggestion of damages were officers or representatives of the Terminal company; so that we are concerned with the propriety of the injunction *only as it affected those parties.*

[g] from compelling, or inducing, or attempting to compel, or induce by threats, intimidation, persuasion, force, or violence [any of complainant's employees to fail, or refuse to perform any of their duties in connection with complainant's business of transportation];

[h] from doing any act whatever in furtherance of any combination or conspiracy to restrain the complainant [in carrying on the business of transportation; and]

[i] from ordering, directing, aiding, abetting, or assisting in any manner whatever any person or persons to commit any or all of the acts aforesaid, until the further order of this court.

The court was vested with general jurisdiction over the parties.[17] Such jurisdiction empowers the court to restrain acts in violation of the principles of general equity[18] as well as to restrain violations of the anti-trust laws; apart from the anti-trust laws, injunctions may properly restrain the commission of unlawful acts, regardless of whether such acts are threatened singly or in concert;[19] and, finally, among the several categories specified by the injunction, there is not one for which we cannot find sufficient precedent in the decisions of the federal courts, including even the persuasion of [g] and the general language of [h].[20] The decision of the District Court in awarding damages would seem, therefore, to have been erroneous.[21]

JAY FINLEY CHRIST*

[17] Diversity of citizenship, and allegation of damage of $200 per day from Feb. 15, to March 9.

[18] Federal courts, once they have jurisdiction, exercise a general equity jurisdiction, under which they may enjoin acts which are threatened either contrary to the principles of common law, or contrary to the provisions of federal statutes or to the provisions of the statutes of states, where there is no adequate remedy at law, etc. For example, in American Steel Foundries v. Tri-Cities Trades Council et al., 257 U.S. 184, 42 Sup. Ct. 72 (1921) and Duplex Co. v. Deering, 254 U.S. 443, 41 Sup. Ct. 172 (1921) and in many other labor cases, this principle has been applied.

[19] Hitchman C. & C. Co. v. Mitchell, 245 U.S. 229, 38 Sup. Ct. 65 (1917). See also III Journal of Business of the University of Chicago, 461–471 (October, 1930), and cases there cited.

[20] As to [g] see Southern R. v. Machinists' Union, 3 Fed. 49 (1901); and the implications of Sou. Calif. Ry. v. Rutherford, 62 Fed. 796 (1894).

As to [h] if the acts restrained are unlawful, "any act in furtherance of a combination or conspiracy" to do those acts is enjoinable. Old. Dom. S.S. Co. v. McKenna 30 Fed. 48, 50 (1887). The applications of general equity powers are so well established that nothing less than brief-making seems to warrant further citations of authority.

[21] In view of the conclusions reached herein, it seems unnecessary to examine two other issues: (a) whether it was material that the injunction was dissolved upon motion of complainant, and (b) whether or not damages were properly measured by reference to statements of attorneys for defendants. It seems unnecessary, too, to inquire into the interpretation of the language of the condition of the bond, which was *inter alia* payment of damages awarded if the order and/or the injunction should be dissolved. (a) It seems fairly obvious that this can scarcely mean dissolution on motion of the complainant; and (b) the court did not rely upon any such meaning, which is clear from the fact that the line between liability and non-liability was drawn at the passing of the Norris Act, although the bond was not altered at that time nor subsequently.

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THE RIGHT OF A FEDERAL JUDGE TO COMMENT ON THE EVIDENCE

A trial judge's charge in the federal court called the jury's attention to the fact that the defendant had wiped his hands during the testimony and stated, "It is rather a curious thing, but that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the government's testimony, was a lie."

Defendant was convicted of violating the Narcotic Act, and the conviction was affirmed by the Circuit Court of Appeals. The Supreme Court reversed the decision, holding that the trial judge's charge was prejudicial error and that it added to the evidence.[1]

In England[2] and in our Federal Courts[3] it has long been recognized that, in charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province whenever he thinks it necessary to assist the jury in arriving at just conclusions by expressing his opinion upon the evidence, provided he separates the law from the facts and makes clear to the jury that his opinion as to the facts is merely advisory, and that they are free to exercise their independent judgment and may totally disregard his opinion. Sir Mathew Hale thus described the function of the trial judge at common law:

> Herein he is able in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact; which is a great advantage and light to laymen.[4]

This rule prevails in the courts of some of the eastern states,[5] but in most of the states the privilege has been denied by statute.

In charging the jury, the trial judge, not being limited to instructions of an abstract sort, can express his opinion in strong terms.[6] The privilege of com-

[1] Quercia v. United States, 53 Sup. Ct. 698 (1933), reversing 62 F. (2d) 746 (C.C.A. 1st 1933).

[2] Belcher v. Prittie, 4 Moore and Scott 295, 3 L.J.C. 85 (1834); Foster v. Steele, 5 Scott 28, 6 L.J.C. 265 (1833); Davidson v. Stanley, 2 Mann. and G. 721, 3 Scott (NR) 49 (1841).

[3] Carver v. Jackson, 29 U.S. 1, 7 L.Ed. 761 (1830); Magiac v. Thompson, 7 Pet. 348, 8 L.Ed. 709 (1833); Vicksburg and Meridian R. R. Co. v. Putnam, 118 U.S. 545, 7 Sup. Ct. 1, 30 L.Ed. 1161 (1886); Herron v. Southern Pacific Co., 283 U.S. 95, 51 Sup. Ct. 383, 75 L. Ed. 857 (1930).

[4] Hale, History of the Common Law (1793) 291, 292.

[5] Houghton v. City of New Haven, 79 Conn. 659, 66 Atl. 509 (1907); Mansfield v. Corbin, 4 Cush. 213 (Mass. 1849); Ware v. Ware, 8 Me. 59 (1831); Flanders v. Colby, 28 N.H. 34, 39 (1853); State v. Hummer, 73 N.J.L. 714, 65 Atl. 249 (1906); Hurlburt v. Hurlburt, 128 N.Y. 420, 28 N.E. 651 (1891); Ditmar v. Com., 47 Pa. St. 335 (1864); Rowell v. Fuller's Estate 59 Vt. 688, 10 Atl. 853 (1887).

[6] Lovejoy v. United States, 128 U.S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389 (1888). "— I think you may have some difficulty in finding that it was a forgery."

Simmons v. United States, 142 U.S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (1891). The judge

menting on the evidence, however, has its limitations inherent in and implied from the very nature of the judicial office. The comments should not be in the nature of an argument; rather they should be a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts.[7] To assume the rôle of an advocate rather than an impartial judge is error as established by repeated decisions.[8] The judge, however has been permitted to stress "the importance of the case because of the letting 'down of the bars' protecting property rights and the lowering of the standards of honesty"[9] provided that the duty of law enforcement was coupled with the duty of seeing that no innocent man was convicted.

It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf.[10] The court cannot use such language in his charge to the jury that he leaves with them the impression that they will be held up to ridicule, or be deceived if they render a verdict contrary to the views expressed in the charge.[11]

The comments upon the evidence must be limited to facts which have actually been brought out by evidence in the case and not to a conjectural state of facts of which no evidence has been offered.[12] The Supreme Court seemed to believe the principal case fell within this objection, the trial judge having added to the evidence by commenting upon the defendant's demeanor while testifying.

This view of the court would infer that the defendant's demeanor while on the stand was not evidence. The authorities contradict any such inference. The cases uniformly sanction the proposition that the jury may properly take into consideration the demeanor of the witness in determining his credibility.[13] If the

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refused jury's request to be discharged on failing to agree saying that he regarded the testimony as convincing.

Dillon v. United States, 279 Fed. 639 (C.C.A. 2d 1921). " . . . . the court's opinion is that the defendant is guilty of the crime charged."

United States v. Philadelphia and Reading Rd. Co., 123 U.S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138 (1887). "In other words, while the court does not desire to control your finding, but submits the question to you, it is of the opinion that you should not, under the circumstances, find for the plaintiff."

[7] Hickory v. United States, 160 U.S. 408, 16 Sup. Ct. 327, 38 L. Ed. 474 (1896).

[8] Weare v. United States, 1 F. (2d) 617 (C.C.A. 8th 1924); O'Shaughnessy v. United States, 17 F. (2d) 225 (C.C.A. 5th 1927); Sunderland v. United States, 19 F. (2d) 202 (C.C.A. 8th 1927); Hunter v. United States, 62 F. (2d) 217 (C.C.A. 5th 1932).

[9] United States v. Freedman, 268 Fed. 655 (D.C.E.D. Pa. 1920).

[10] Hickory v. United States, *supra*, note 7; O'Shaughnessy v. United States, *supra*, note 7; Malaga v. United States, 57 F. (2d) 822 (C.C.A. 1st 1932).

[11] Rudd v. United States, 173 Fed. 912 (C.C.A. 8th 1909); Carney v. United States, 295 Fed. 606 (C.C.A. 9th 1924).

[12] United States v. Breitling, 20 How. 252 (U.S. 1857); Mullen v. United States, 106 Fed. 892 (C.C.A. 6th 1901).

[13] "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in

jury may consider the demeanor of the witness, it would seem to be a variety of real evidence and to be the proper subject of comment by the judge. If the judge added to the evidence it was by his statement that certain behavior was nearly always an indication of lying. The significance of nervous behavior is a matter of experience as to which the jury should have been left free to form their own judgment. The positive and unqualified statement by the judge apparently foreclosed the matter.[14]

Since the witness's demeanor upon the stand is to be observed and taken into consideration by the jury it is a part of the evidence, and so it is within the province of the trial judge to comment upon this particular evidence as well as any other type of evidence and subject only to the same limitations. For these reasons it seems the Supreme Court stated the rule too broadly and the trial judge's comment did not *add* to the evidence, though it may have exceeded the bounds of fair comment in being highly prejudicial.

LAWRENCE WOLFF GIDWITZ

ANALYSIS OF "APPARENT AUTHORITY" IN PRINCIPAL AND AGENT

In the recent case of *Berryhill v. Ellett*[1] plaintiff bought a policy from the defendant insurance company through Ellett, the district agent. The policy stated that the district agent should collect only the first premium, the other premiums being payable only at the home office or to an "authorized" agent upon delivery of a receipt signed in a specified way. Despite the fact the general agent had refused upon plaintiff's request to allow a discount on premiums paid in advance, plaintiff nevertheless began paying his premiums in advance to Ellett. The latter allowed plaintiff discounts on the 1927, 1930, and 1931 premiums, which were not paid directly to the specified agents of the company as required by the wording of the policy. The general agent and the home office had no knowledge of these transactions. When Ellett was unable to perform his agreement with plaintiff by paying the premiums to the company as they fell due, the plaintiff brought an action against the company, the general agent, and Ellett, alleging "that the insurance company . . . . by their acts, conduct, and

generals or particulars, their directness or evasiveness, are soon detected . . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted, and weighed by the jury." Chief Justice Appleton, Evidence (1860), 220.

"There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness." 3 Wigmore, Evidence (2nd ed. 1923), § 1395, 96.

[14] Allis v. Leonard, 58 N.Y. 288 (1874).

[1] 64 F. (2d) 253 (1933).

acquiescence had held Ellett out as authorized to receive such premiums before due and allow a discount therefor, and had thereby clothed him with apparent authority to collect such premiums." The circuit court of appeals, affirming the district court, denied any relief against the insurance company and the general agent, on the ground that Ellett had neither authority nor apparent authority to accept payment of premiums before they were due nor to allow a discount for such payment.

The court, in arriving at its decision, makes an attempt to define and standardize the meaning of two legal terms which have caused much confusion in the law of agency, namely: "authority" and "apparent authority." In so doing, it makes use of the Restatement of the Law of Agency (Tentative Draft No. 1), going so far as to accept the definition of "authority" and "apparent authority" adopted by the Restatement. It should be pointed out that the language of that early draft is not the same in these respects as the language used in the restatement "as adopted and promulgated" by the Institute on May 4, 1933.

"Apparent authority" has been given many different meanings, sometimes contradictory, and by the same court.[2] The court in the principal case falls into the same error.

Thus it states:

> Apparent authority may result from a manifestation of consent made to a third person or to third persons, by inference from words or conduct which, ordinarily indicate such consent. . . . . This is sometimes referred to as implied authority.

In the next paragraph the court states:

> Apparent authority may result from a manifestation of consent made to a third person or to third persons and inferred from words or conduct which, although ordinarily not indicating such consent, cause the third person because of facts known to both parties reasonably to believe that such consent exists, either where the apparent principal intended to cause such belief on the part of the third person, or where he ought to have anticipated that such belief would be caused. . . . . This is sometimes referred to as agency by estoppel.

Hence, "apparent authority" is capable of definition both as implied authority and authority by estoppel. But the court fails to point out that the definitions given, although common, are obviously contradictory in terms. Implied authority, it is submitted, is actual authority which, not being expressed, must be inferred from the conduct of the principal.[3] Then the court itself points

[2] When a court holds a principal liable because his agent had "apparent authority" to deal with the third person, the court may mean authority by estoppel, implied authority, "secret instructions," the principle involved in such cases as North River Bank v. Aymar, 3 Hill 262 (N.Y. 1842), the objective theory of contracts, or a combination of some of these notions. General Motors Truck Co. v. Texas Supply Co. 64 F. (2d) 527 (1933); Three States Lumber Co. v. Moore, 132 Ark. 371, 201 S.W. 508 (1918); Gilmore Portland Cement Corp. v. Leinard, 9 S.W. (2d) 862 (Mo. 1928); Castonguay v. Acme Knitting Co., 83 N.H. 1, 136 Atl. 702 (1927); N.Y. City Car Advertising Co. v. Greenberger, 142 N.Y.S. 226 (1913); National Surety Co. v. Miozrany, 53 Okla. 332, 156 Pac. 651 (1916); Bentley v. Daggett, 51 Wis. 224, 8 N.W. 155 (1881); Mechem, Agency (2nd ed. 1914), § 720.

[3] Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925); Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Nertney v. National Fire Ins. Co., 199 Ia. 1358, 203 N.W. 826 (1925); Johnson v. Evans, 134 Minn. 43, 158 N.W. 823 (1916); Columbia Mill Co. v. National Bank,

out a distinction between estoppel and implied authority by stating that in the latter, being circumstantially proven from other facts, it is not essential that the third person seeking to establish the authority should have known and relied upon the circumstances from which the inference of authority is drawn. Obviously, if the agent has actual authority, even though it be not express, the third person need not know the source of the agent's authority in order to bind the principal.[4] But where reliance is upon agency by estoppel, the principal is not bound because his agent had actual authority to deal with the third person, but because the principal has made a representation of such authority to a third person upon which the latter reasonably relied to his detriment.[5]

Yet this court, despite its professed desire to reach a standard definition, is perfectly willing to allow "apparent authority" to stand for either implied authority or authority by estoppel. In a draft of the restatement, subsequent to the one relied upon by the court, it is stated that implied or inferred authority, i.e., "authorization created otherwise than by express language," should be distinguished from "apparent authority" which is synonymous with "ostensible authority."[6] But, while the restatement will not grant that "apparent authority" means implied or inferred authority, neither will it allow "apparent authority" to be synonymous with estoppel. In both the proposed final draft and the final draft of the restatement, a vital distinction is made between "apparent authority" and authority by estoppel. It is stated that where there is "apparent authority," the principal may be bound irrespective of a detrimental change of position by the third party in reliance upon the appearance of authority.[7] It may well be questioned whether the restatement's distinction between "apparent authority" and authority by estoppel is justified by either precedent or necessity.[8]

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52 Minn. 224, 53 N.W. 1061 (1893); Austin-Western Co. v. Commercial Bank, 255 S.W. 585 (Mo. 1923); Shippers' Compress Co. v. Northern Assur. Co., 208 S.W. 939 (Tex. Civ. App. 1919); Mechem, *op. cit., supra*, note 1, § 723.

[4] North Ala. Grocery v. Lysle Milling Co., 205 Ala. 484, 88 So. 590 (1921); Austin-Western Co. v. Commercial Bank, 255 S.W. 585 (Mo. 1923); Continental Oil Co. v. Baxter, 59 S.W. (2d) 463 (Tex. Civ. App. 1933); Mechem, *op. cit., supra*, note 1, § 717; 2 C.J. 444, § 42; 35 Harv. L. Rev. 201 (1921).

[5] Birmingham News Co. v. Birmingham Printing Co., 213 Ala. 256, 104 So. 506 (1925); Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Ferguson v. Majestic Amusement Co., 171 N.C. 663, 89 S.W. 45 (1916); Shippers' Compress Co. v. Northern Assur. Co., 208 S.W. 939 (Tex. Civ. App. 1919); Guaranty Bank v. Beaumont Cadillac Co., 218 S.W. 638 (Tex. Civ. App. 1920); Mechem, *op. cit., supra*, note 1, §§ 245, 724, 725.

[6] Restatement of Agency (Proposed Final Draft), special note, part II, 39.

[7] Restatement (May, 1933, Final), § 8 Comment (c), § 159 Comment (e); Proposed Final Draft, part II, 38.

[8] See Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925); Continental Oil Co. v. Baxter, 59 S.W. (2d) 463 (Tex. Civ. App. 1933); Hobby v. King Trailer Co., 273 S.W. 650 (Tex. Civ. App. 1925); Guaranty Bank v. Beaumont Co., 218 S.W. 638 (Tex. Civ. App. 1920); Mechem, *op. cit., supra*, note 1, §§ 244, 721, 723, 722, 729.

The court in the case under review also seems to contradict itself by saying that evidence that defendant Ellett received premiums and allowed a discount on payments before they were due was not relevant because this was not known to the insurance company. Under the court's definition of implied authority it is conceivable that Ellett might have implied authority to receive the premiums in advance and give a discount thereon, despite the fact that his principal did not have actual knowledge of the transaction. If it had been the general custom for an insurance agent to give discounts upon receipt of advance payments of premiums, the failure of the principal to be cognizant of the general custom would not have made it less liable to the third persons.[9] Whether the insurance company would be liable under such a general custom despite the clause in the insurance policy concerning the method of payment is another and distinct question.

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[9] Cawthon v. Lusk, 97 Ala. 674, 11 So. 731 (1892); Wind v. Bank of Maplewood, 58 S.W. (2d) 332 (Mo. App. 1933); Carver Bros. v. Merrett, 184 S.W. 741 (Tex. Civ. App. 1916); Mechem, *op. cit., supra,* note 1, § 716.