unions and the ultimate policy of the Taft-Hartley Act were left to the vagaries of over forty-eight jurisdictions,[67] it would be at least equally anomalous if no agency had authority to regulate activity which violated the clearly enunciated policy of the Act.[68]

Consistency with the underlying policy of the Act and desirable uniformity of administration could both be attained if Section 8(b)(1)(A) were used to regulate stranger picketing. It has already been urged that the NLRB's interpretation of that section is not so settled as to preclude its use for such a purpose. If, however, the NLRB does not change what appears to be its present interpretation of Section 8(b)(1)(A), amendment of the Taft-Hartley Act would be the proper way to achieve uniform policing of stranger picketing. Meanwhile, though the cases may cast substantial theoretical doubt on the states' jurisdiction to regulate stranger picketing for organization and recognition, pre-emption arguments will be unlikely to commend themselves to state courts impressed with the coercive nature of such picketing.[69]

THE ASSIGNMENT OF CLAIMS ACT OF 1940
ASSIGNEE v. SURETY

The Assignment of Claims Act of 1940[1] was passed for the purpose of giving protection to banks, trust companies and other lending institutions engaged in the financing of defense contracts. Formerly, assignment of claims against the government had been barred.[2] The Act of 1940 enabled lenders to accept as security assignments by contractors of payments due and to become due under such contracts. Banking interests attribute the success of the World War II V-loan program to the liberalizing effect of the 1940 Act.[3]

[67] Ibid., at 228–30.

[68] Petro, State Jurisdiction to Control Recognition Picketing, 2 Lab. L.J. 883 (1951).

[69] See, e.g., State v. Dobson, 245 P. 2d 903, 923 (1952).

[1] 54 Stat. 1029 (1940), as amended, 31 U.S.C.A. § 203 (Supp., 1951).

[2] 9 Stat. 41 (1846), 31 U.S.C.A. § 203 (1927); 12 Stat. 596 (1862), 41 U.S.C.A. § 15 (1952).

[3] See Kupfer, The Federal Assignment of Claims Act Comes of Age, 125 N.Y.B.J., Nos. 107, 108 and 109 (1951). In 1951, the Act of 1940 was reconsidered by Congress in the light of the new financing made necessary by the Korean situation. Under the impact of two "adverse" opinions by the Comptroller General, the Act of 1940 was amended, 31 U.S.C.A. § 203 (Supp., 1951). The Comptroller had advised that the government could recapture payments made to an assignee-bank if the contractor failed to pay withholding taxes or make social security contributions, or in case of price revision under the contract. Although in no single reported case had the government made such recapture from a financing institution, and in spite of the questionable validity of the Comptroller's opinion (cf. United States v. Hadden, 192 F. 2d 327 [C.A. 6th, 1951]), it was feared that the effect of these rulings might be to deter lenders from participating in the current mobilization program. Accordingly, the Act of 1940 was amended so as to overcome the Comptroller's decisions. The Amendment of 1951 provides, in effect, that the government may not recover any part of payments made to an assignee-lender after July 1, 1950, for debts of the contractor arising from or independently of contracts awarded by certain government agencies to be designated by the President in time of emergency. See Cable, 1951 Assignment of Claims Amendment; Boon to Government Contract Financing, 68 Banking L.J. 437 (1951).

In at least one area, however, the Act has been and remains a substantial source of uncertainty. Increasingly before the courts is the question of the relative rights of assignee and surety under a defaulted contract. The fact situation is constant. Public building contracts awarded by the government commonly call for progress payments based on periodic estimates of the value of work done and for retained percentages (10% of each payment) to be held back by the government for its own protection in case of default. The Miller Act of 1947[4] provides that all contractors dealing with the government shall post two surety bonds, one guarantying the cost of performance, the other guarantying payment of laborers and materialmen. In the ordinary case, the contractor, having posted his bonds, arranges with a bank for the financing of the contract, assigning to the latter all claims due or to become due under the contract. Thereafter, having performed a part of the work, the contractor abandons the project, or, having otherwise fully performed, is unable to meet the claims of laborers and suppliers. The surety then fulfills the contractor's obligations. Subsequently, the assignee and surety each claims such funds as are in the hands of the government and are due the contractor for work performed. When the funds held by the United States are not adequate to satisfy the claims of both, a controversy arises as to the priority of the claims.

Present uncertainty regarding the respective rights of surety and assignee in this situation is attributable largely to a conflict of opinion between the Fifth Circuit Court of Appeals and the United States Court of Claims. The disagreement, as it appears, is over the effect of the Act of 1940 on these competing claims.

I

In 1896, the Supreme Court held, in *Prairie State Bank* v. *United States*,[5] that the equitable claim of a surety to percentages retained by the government was superior to that of an assignee-lender. It was said, following a familiar suretyship principle,[6] that the surety's equity arose when it gave its bond and was therefore prior in time to that of the assignee. Nevertheless, the decisions of the Fifth Circuit have been uniformly favorable to assignees.[7] Most of the cases involved payments due rather than retained percentages and the court has consistently distinguished the older cases on this ground.[8]

[4] 49 Stat. 793 (1935), 40 U.S.C.A. § 270a (1952).

[5] 164 U.S. 227 (1896).

[6] 2 Williston, Contracts § 483 (1936).

[7] General Casualty Co. v. Second Nat'l Bank of Houston, 178 F. 2d 679 (C.A. 5th, 1949); Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F. 2d 73 (C.A. 5th, 1945); River Junction v. Maryland Casualty Co., 133 F. 2d 57 (C.A. 5th, 1943), noted in 56 Harv. L. Rev. 1168 (1943); River Junction v. Maryland Casualty Co., 110 F. 2d 278 (C.A. 5th, 1940), cert. denied, 310 U.S. 634 (1940). Cf. First Nat'l Bank of Seattle v. City Trust, Safe Deposit & Surety Co., 114 Fed. 529, 534 (C.A. 9th, 1902) (dissenting opinion).

[8] E.g., General Casualty Co. v. Second Nat'l Bank of Houston, 178 F. 2d 679 (C.A. 5th 1949); Kane v. First Nat'l Bank of El Paso, 56 F. 2d 534, 536 (C.A. 5th, 1932).

In a case arising prior to the 1940 Act, and involving payments due, the court held that the assignee-bank, not the surety, should properly be *subrogated* to the rights of the owner.[9] The court found that the funds loaned by the bank had been used by the contractor for discharging debts arising out of his performance of the contract. Anticipating the objection that the bank was a mere volunteer lender and hence not entitled to subrogation,[10] the court reasoned that, since the application of these loans had been beneficial to the surety in relieving it from obligations which it would otherwise have been required to assume, the bank was entitled to be subrogated even though such subrogation was admittedly "unconventional."

Later, in *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*,[11] the Fifth Circuit in effect held that the Act of 1940 had codified the doctrine of "unconventional subrogation." The contest was for payments due. The contractor, having defaulted in his performance, had also failed to pay laborers and suppliers. Both obligations had been met by the surety. Initially, the surety claimed to be subrogated to the rights possessed by laborers and suppliers in the funds held by the United States. Counsel pointed out that under the rule of *Henningsen* v. *United States Fidelity & Guaranty Co.*,[12] laborers and suppliers have an equitable priority over all other claimants to funds due the contractor. The court did not deny the validity of this contention. It answered, however, that the Assignment of Claims Act of 1940 had materially, if "incidentally," altered the rights of the parties. In the court's view, the effect of the Act was to transfer the entire value of the contract, immune to priorities, into the hands of the assignee-bank. The court pointed to the language of the Act of 1940:

> Notwithstanding any law to the contrary governing the validity of assignments, any assignment made pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes.[13]

"Notwithstanding any law to the contrary" was held to refer to all prior existing rules defining the subordinate right of assignee-banks, while "valid for all purposes" was interpreted to mean that such assignments should be superior to competing equities. Therefore, where payments due are concerned, the 1940 Act had the incidental effect of abrogating the equitable priority of laborers and materialmen as against assignees.[14] Although able to find reason for this result,

[9] River Junction v. Maryland Casualty Co., 133 F. 2d 57 (C.A. 5th, 1943).

[10] Prairie State Bank v. United States, 164 U.S. 227 (1896); Aetna Life Insurance Co. v. Middleport, 124 U.S. 534 (1888); Simpson, Suretyship 209 (1950).

[11] 149 F. 2d 73 (C.A. 5th, 1945).

[12] 208 U.S. 404 (1908). Cf. Belknap Hardware & Mfg. Co. v. Ohio River Contract Co., 271 Fed. 144 (C.A. 6th, 1921).

[13] 54 Stat. 1029 (1940), as amended, 31 U.S.C.A. § 203 (Supp., 1951).

[14] But see McKenzie Trust v. Irving Trust Co., 323 U.S. 365 (1944), where it was broadly implied that the Act of 1940 was purposed solely for the benefit of the government and was not intended to affect the relations of private parties. See also, expressing a similar interpretation of the older statutes (supra note 2), Martin v. Nat'l Surety Co., 300 U.S. 588 (1937); Buffalo Bayou R. Co. v. United States, 16 Ct. Cl. 238, 247–48 (1880).

the court in the *Coconut Grove Bank* case nevertheless conceded that the surety, having itself completed the contract, might under some circumstances possess a claim to payments due superior to that of the assignee. This would be so if the surety could prove that the bank's loans had not been used by the contractor in fulfilling his contractual obligations. The surety having failed to make such proof in the instant case, judgment for the bank was affirmed.

In the light of these decisions, the effect of the Act of 1940 is to restrict to retained percentages the fund out of which the surety may compensate itself,[15] unless the surety can prove that the assignee's loans were diverted by the contractor.[16] If such proof is made, the surety may compensate itself out of payments due as well.[17]

The United States Court of Claims has also spoken to these questions on two recent occasions. The first, *Hardin County Savings Bank* v. *United States*,[18] was a contest between assignee-bank and surety for payments due a defaulting contractor. The court held, on the authority of *Prairie State Bank* v. *United States*,[19] that the surety's equity was superior to that of the assignee. No importance was seen in the distinction between payments due and retained percentages; nor did the court advert to the effect of the Act of 1940. In *Royal Indemnity Co.* v. *United States*,[20] however, the *Coconut Grove Bank* case[21] was called to the court's attention and the problems raised by the Act of 1940 were directly considered. The contractor had failed to pay laborers and materialmen and the surety had satisfied this obligation. The government held a small balance of retained percentages to which the surety and the assignee-bank advanced competing claims. Judgment was given for the surety, again on the authority of *Prairie State Bank*

[15] General Casualty Co. v. Second Nat'l Bank of Houston, 178 F. 2d 679 (C.A. 5th, 1949). Cf. Rosenbaum v. Century Indemnity Co., 168 F. 2d 917, 918–19 (C.A. 2d, 1948), cert. denied, 335 U.S. 885 (1948). Contra: Henningsen v. United States Fidelity & Guaranty Co.. 208 U.S. 404 (1908); In re Cummins Construction Co., 81 F. Supp. 193, 196–97 (D. Md., 1948).

[16] Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F. 2d 73 (C.A, 5th, 1945).

[17] Doubt has also been raised by a Supreme Court case as to whether the surety has any right at all to be subrogated to the claims of laborers and materialmen. Such subrogation "runs into logical difficulties. . . . Once the laborers and materialmen are paid, either by contractor or surety, they have no rights in the fund. If before they are paid, the fund to which they are said to be entitled to look is unavailable for the very reason that they are unpaid, the surety relies on nothing when it relies on those non-existent 'rights.'" United States v. Munsey Trust Co., 332 U.S. 234, 241–42 (1947). The Court's reasoning is puzzling. It seems to be saying that laborers and materialmen have rights only to such funds as are otherwise available to the contractor; that these funds are not available to the contractor as long as laborers and materialmen remain unpaid; that therefore these funds are not available to laborers and materialmen; and that hence there exist no rights to which the surety may claim to be subrogated. This argument runs counter to the general proposition that the surety's right arises as soon as it has entered into the relation of suretyship; authorities cited note 10 supra.

[18] 65 F. Supp. 1017 (Ct. Cl., 1946).

[19] 164 U.S. 227 (1896).

[20] 93 F. Supp. 891 (Ct. Cl., 1950).

[21] Op. cit. supra note 16.

v. *United States*. The court made a careful examination of the effect of the Act of 1940 and rejected the interpretation put forward in the *Coconut Grove Bank* case. The language relied on by the Fifth Circuit ("Notwithstanding any law to the contrary") was said to refer only to the Statutes of 1846 and 1862[22] which had banned the assignment of government contracts. The court said:

The Coconut Grove Bank case is necessarily based upon the assumption that the Assignment of Claims Act of 1940 provides for the assignment of the contract fund rather than for the more modest result of removing the bans set up by (the prior statutes).... The long-established principle that an assignee with notice of a prior equity takes only the interest of the assignor was not legislated away by the 1940 Act.[23]

The dissenting members of the court raised the question of "beneficial application" (which had not been considered by the majority), and, making the assumption that the assignee's loans had in fact been beneficially applied, contended that the surety possessed no prior equity. They urged further that the doctrine of the *Coconut Grove Bank* case be extended to cover retained percentages, a construction even broader than that advanced by the Fifth Circuit.[24] In the reasoning of the majority the dissenting members saw a "substantial frustration of the purpose of the Assignment of Claims Act."[25]

II

In evaluating the conflicting authorities, it must first be considered whether the "beneficial application" doctrine, as established in the Fifth Circuit, is a "necessary" test of the surety's equity. It has been suggested[26] that the doctrine of "beneficial application" had its birth in *National Surety Co.* v. *Berggren*,[27] a Minnesota decision. In attempting to restate the holding of *Prairie State Bank* v. *United States*, the Minnesota court said:

[I]t was held that the equity of the surety who had been compelled to pay, and who had paid, claims against the principal was superior to that of one who loaned money to the contractor *to be by him used as he saw fit, either in the performance of his contract or any other way*. (Emphasis added.)[28]

This restatement does not seem accurate, although it is true that the point was considered generally in the *Prairie State Bank* case. There the plaintiff-bank argued that, since the funds loaned to the contractor had been used in the con-

[22] Op. cit. supra note 2.

[23] Op. cit. supra note 20, at 895.

[24] "In . . . retained percentages, the contractor could give no one a right superior to that of the owner and the surety." General Casualty Co. v. Second Nat'l Bank of Houston, 178 F. 2d 679, 680 (C.A. 5th, 1949).

[25] Op. cit. supra note 20, at 899 (dissenting opinion).

[26] Seaboard Surety Co. v. North Dakota, 94 F. Supp. 177, 182 (D. N.D., 1950); Seaboard Surety Co. v. First Nat'l Bank & Trust Co., 121 F. 2d 288, 292 (C.A. 8th, 1941). The "Minnesota rule" was rejected in both cases, see note 27 infra.

[27] 126 Minn. 188, 148 N.W. 55 (1914). See Audrain County v. Walker, 155 S.W. 2d 251, 264 (Mo. App., 1941).

[28] Nat'l Surety Co. v. Berggren, 126 Minn. 188, 148 N.W. 55, 56 (1914).

struction of the building, and had thus inured to the benefit of the surety by releasing it from a potential obligation, the equity of the bank must be superior to that of the surety. The Supreme Court chose to dispose of this contention by pointing out that if these loans were held to be advances made to the contractor in aid of his performance, they would constitute a variance of the payment provisions of the contract, and would therefore operate to discharge the surety entirely. However indirect this refutation, the Court gave no color to the "beneficial application" doctrine. But the Fifth Circuit, in its original statement of the doctrine, held that if the bank could show a beneficial application of the loans, the surety could make no claim to a superior equity.[29] Further, the burden of showing that such application has *not* been made rests on the surety, although surely the burden of showing the state of the contractor's account is hard for others to carry.

Under ordinary equity principles, the doctrine of "beneficial application" appears questionable for two reasons. First, it is difficult logically to reconcile the operation of the doctrine with the position of the lender as assignee. Since the contractor cannot himself enjoy the fruits of "beneficial application," "he cannot by assigning the claim to another, give that other the right"[30] to enjoy them. Second, the "beneficial application" doctrine is inconsistent with the settled rule of *Prairie State Bank* v. *United States*, i.e., that the equity of a surety is superior to that of a "volunteer lender." The assignee is under no compulsion to lend or to see that its loans are applied on the contract.[31]

Finally, an examination of the history of the Act of 1940 supports the construction placed upon it by the majority of the Court of Claims in *Royal Indemnity Co.* v. *United States*.[32] The purpose underlying the Act was to encourage lending institutions to participate in financing the unprecedented materiel production of World War II. The Act establishes limited safeguards for lenders by providing that payments to an assignee shall "not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of (the) contract."[33] The Amendment of 1951 adds to these safeguards by barring the government from recapturing payments made to an assignee under the Act.[34] It may be said that such protection takes "the assignee out of the shoes of his assignor and (gives) him a limited independent status,"[35] but there is nothing in the history of the Act or its Amendment indicating that Congress intended to abrogate the common law of suretyship.[36] Comments made

[29] River Junction v. Maryland Casualty Co., 110 F. 2d 278 (C.A. 5th, 1940).

[30] Ibid., at 285 (dissenting opinion).

[31] Farmers' Bank v. Hayes, 58 F. 2d 34, 37 (C.A. 6th, 1932).

[32] 93 F. Supp. 891 (Ct. Cl., 1950).

[33] Op. cit. supra note 1.

[34] Kupfer, op. cit. supra note 3.

[35] United States v. Hadden, 192 F. 2d 327, 329 (C.A. 6th, 1951).

[36] H.R. Rep. No. 376, 82d Cong. 1st Sess. 1 (1951); Sen. Rep. No. 217, 82d Cong. 1st Sess. 1 (1951).

by persons[37] who aided in drafting the Amendment of 1951 support this conclusion and indicate that the "notwithstanding" clause refers to the predecessor statutes which barred assignment of claims against the government.[38]

In view of the foregoing, it is submitted that the well-settled rule establishing the superiority of the surety's right over that of the assignee should be controlling,[39] and that the decision of the Court of Claims in *Royal Indemnity Co.* v. *United States*[40] is eminently proper. The purpose of the Act of 1940, as amended, is to modify the protection formerly accorded to the government. The Act was not otherwise intended to inure to the benefit of private parties or to affect their relations inter sese.[41]

PROOF OF NON-CONFORMITY IN SALES CASES

This note states the present law on the burden of proof of non-conformity in sales cases as it appears in several factual situations. It compares the usual test for allocating this burden with one based on opportunity for inspection and cites the operation of the Perishable Agricultural Commodities Act[1] in conjunction with the Uniform Sales Act in order to indicate that while the latter Act does not preclude the use of third party inspection to determine the facts quickly and avoid litigation, it does not provide, as does the Uniform Commercial Code, for agreement that the findings of such inspection shall be binding in any subsequent litigation or adjustment.

As a general rule, the party pleading affirmatively has the burden of proof.[2] That is, such party has what may be called the risk of non-production of evidence, and also, the risk of non-persuasion.[3] Thus the seller suing for price, absent acceptance, under Section 63[4] of the Uniform Sales Act or for damages

[37] Kupfer, op. cit. supra note 3.

[38] Op. cit. supra note 2.

[39] Prairie State Bank v. United States, 164 U.S. 227 (1896).

[40] 93 F. Supp. 891 (Ct. Cl., 1950).

[41] Authorities cited note 14 supra.

[1] Perishable Agricultural Commodities Act of 1930, 46 Stat. 531 (1930), as amended, 7 U.S.C.A. §§ 499 et seq. (1939).

[2] Three forms of this rule are: (1) "The burden of proof is upon the party asserting the affirmative of the issue, using the latter term in the larger sense and as including any negative proposition which such party might have to show." (2) "It means only that each party must establish his own case." (3) "[It] depends entirely on whether the claim . . . made by the defendant, is or is not an affirmative defense." Morgan and Maguire, Cases and Materials on Evidence 55 (3d ed., 1951).

[3] For an analysis of these terms, see ibid., at 47.

[4] Uniform Sales Act § 63. Before the Uniform Sales Act, a seller could sue for the price on the buyer's wrongful refusal to accept the goods, even before the property in them had passed, in the majority of American jurisdictions. However, B. J. Shelton v. Theo Muckle Engineering Co., 121 Colo. 509, 218 P. 2d 1057 (1950) is noted in 99 Pa. L. Rev. 109, at 110 (1950) as