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Miscellaneous—Non-Resident Admissions to the Bar

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A closely related problem was considered in the same term by the Court in *Daniel Morris Co. v. Glens Falls Indemnity Co.*[3] There a supplier of materials to a contractor sued to recover on a payment bond executed by the defendant as surety, the subcontractor as principal and in favor of the general contractor as obligee. A separate performance bond was also executed between the parties. The Court held that the plaintiff had a cause of action on the common law payment bond. "The inference is irresistable that the parties intended to benefit unpaid materialmen." The fact that separate performance and payment bonds were given, together with the language used in both the payment bond and underlying contract, that the contractor agreed to furnish materials and labor "free of the lien of any third party," the Court felt evidenced an intent to benefit the plaintiff.

Whether third party suppliers of labor or materials have a good cause of action on a payment bond appears to turn on whether the parties in executing the bond intended to benefit them,[4] and whether they relied on such bond in extending credit.[5] In determining intent to benefit, the courts rely on a number of factors including the precise wording of the bond itself,[6] the wording of the underlying contract between the principal and obligee (where the contract is made part of the bond to explain it[7] or even where the contract is not expressly made part of the bond),[8] the public policy behind a statute the bond was given to satisfy,[9] and whether or not performance and payment provisions are contained in the same or separate bonds.[10] If one bond contains both performance and payment provisions, it will be held to be for the purpose of protecting the obligee only, on the theory that any payment made to creditors of the principal will tend to exhaust the penalty named in the bond, to the detriment of the bond's performance provisions.[11] Where there are separate performance and payment bonds, the instant cases indicate that third party suppliers will be able to sue on the payment bond unless there is another apparent purpose for having separate bonds.

Non Resident Admissions to the Bar

Petitioner in *Application of Harvey*[12] applied to the Appellate Division under former Rule II of the Court of Appeals for admission to the New York Bar without examination, on the ground that he had been admitted to and practiced

4. *Ibid.*
5. *Buffalo Cement Co. v. McNaughton,* 156 N. Y. 702, 51 N. E. 1089 (1895).
6. *McClare v. Massachusetts Bonding and Insurance Co.,* 266 N. Y. 371, 195 N. E. 15 (1935).
7. *Duffy Co. v. Board of Education,* 280 N. Y. 773, 21 N. E. 2d 527 (1939).
8. See note 3 *supra.*
9. *Fosmire v. National Surety Co.,* 229 N. Y. 44, 127 N. E. 472 (1920).
10. *Ibid.*
11. *Ibid.*
12. 309 N. Y. 46, 127 N. E. 2d 801 (1955).

in the highest court of Georgia for five years. His application was refused, as it appeared that at least half of his five years of practice in Georgia had been spent working and living outside of that state. Upon appeal the Court of Appeals affirmed, holding that the Appellate Division acted within its discretionary powers in ruling that petitioner did not show compliance with the residence requirements as laid down in *Matter of Lerch.*[13]

"The period of five years, during which the applicant must have practiced in another state, assumes the fact that he also resided there during that time."[14] Applying this rule in the instant case the court felt that one who seeks admission to the New York Bar without examination because he has been a member of the Bar of another State must have resided, continuously or substantially so, in that other jurisdiction for five years. The Court further implied that it was within the discretionary powers of the Appellate Division to determine if this provision had been complied with.

The new Court of Appeals Rule, which embodies this residence requirement, states that "in its discretion, the Appellate Division may admit to the Bar and license to practice without examination a person who . . . while residing in such other state . . . has actually practiced for a period of at least five years in its highest court . . ."[15] This new rule is intended to have the same meaning and effect as former rule II as heretofore construed and applied.[16] Thus it appears that the present state of law in this area is as it was under the former rule II as construed by the *Lerch* dicta.

Peaceful Picketing

The perennial problem of peaceful picketing found its way to the Court of Appeals under rather unusual circumstances in *Wood v. O'Grady,*[17] where a union had been picketing a retail liquor store for almost two years. In spite of the length of time involved, and the wording of the signs carried by the pickets,[18] the Court found that this was organizational picketing and thus not subject to injunction.[19]

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13. 280 N. Y. 74, 19 N. E. 2d 788 (1939).
14. *Id.* at 75, 19 N. E. 2d at 789.
15. Court of Appeals Rule VII-1 (eff. June 15, 1955).
16. 309 N. Y. at 47, 127 N. E. 2d at 801.
17. 307 N. Y. 532, 122 N. E. 2d 386 (1954).
18. "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the A. F. of L., Local 122 of AFL."
19. The Appellate Division was reversed; 283 App. Div. 83, 126 N. Y. S. 2d 408 (1st Dep't 1954).