

The Problem of Substantial Evidence in Administrative Hearings and Departmental Trials

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The ruling authorizing deferred compensation plans will be appreciated by business. It is hoped that the plans adopted will be bona fide arrangements to provide benefits on retirement, death, or disability.



THE PROBLEM OF SUBSTANTIAL EVIDENCE IN ADMINISTRATIVE HEARINGS AND DEPARTMENTAL TRIALS

Both the federal and New York jurisdictions agree that the findings of fact made by a quasi-judicial administrative board are subject to judicial scrutiny in that the reviewing court must determine whether the facts found are supported in the record by "substantial evidence." The concept of substantial evidence, referred to by Mr. Justice Frankfurter as an "undefined defining"¹ term, is of necessity and of legislative design an elastic one. After a preliminary consideration of the general scope of the substantial evidence rule, this note will concern itself with the extent to which this elastic concept of review encompasses an examination of the credibility of the witnesses before the board.

The Federal Concept

The federal statute generally determinative of the scope of judicial review of administrative findings of fact is Section 10(e) of the Administrative Procedure Act.² This section reads in pertinent part:

Except so far as as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

.....

(e) *Scope of Review.* . . . [T]he reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements

¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 747, 489 (1951).

² 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). In rare instances, judicial review of an administrative finding of fact includes a determination *de novo* of the disputed fact. For cases involving a "jurisdictional" fact, where the Supreme Court held that protection of a constitutional right necessitated court determination of the facts, see *Crowell v. Benson*, 285 U.S. 22 (1932) (whether, in a claim under the Longshoremen's and Harbor Workers' Compensation Act, the injury occurred upon the navigable waters of the United States and whether the relationship of master and servant existed in the maritime employment); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (whether a person under order of deportation is a citizen).

of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The rule of substantial evidence remains uniform in the federal area,³ for the regulatory statutes which, in establishing a quasi-judicial procedure for a particular agency and in providing for judicial review of substantial evidence, have an "identity of aim" with the Administrative Procedure Act regarding the proof which must support a decision.⁴

It is well to notice at this early point that "substantiality" is the sole ordeal which the evidence adduced before the board need survive. There is no statutory requirement,⁵ nor has decisional law demanded,⁶ that any or all of the evidence be of a kind that would be admissible before the courts, so long as the respondent before the board has received a hearing which was adequate and fair.⁷

Of dubious assistance in pinning down the elusive concept of that evidence which is substantial are the numerous decisions devoted to a review of the particular evidence and an adjudgment whether it is substantial. The Supreme Court, however, has spoken in a conceptual vein, delineating in so far as it felt was possible the nature and scope of substantial evidence. A leading decision is *Universal Camera Corp. v. NLRB*,⁸ in which Mr. Justice Frankfurter crystallized the judicial attitude which prevails today.

In part, the *Universal Camera* case held that the statutory phrases "as considered on the record as a whole"⁹ and the "whole record"¹⁰ mandate the reviewing court to scrutinize the evidence which supports the administrative finding in the light of whatever opposing evidence "fairly detracts from its weight."¹¹ This holding

³ See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) (review of findings made under the Longshoremen's and Harbor Workers' Compensation Act); *American Airlines, Inc. v. CAB*, 192 F.2d 417 (D.C. Cir. 1951) (review of findings made by the Civil Aeronautics Board); *Ellers v. Railroad Retirement Bd.*, 132 F.2d 636 (2d Cir. 1943) (review of findings made under the Railroad Retirement Act).

⁴ See, e.g., *Universal Camera Corp. v. NLRB*, *supra* note 1.

⁵ See *Universal Camera Corp. v. NLRB*, *supra* note 1, at 482-83 n.15.

⁶ *Ellers v. Railroad Retirement Bd.*, *supra* note 3; *International Ass'n of Machinists v. NLRB*, 110 F.2d 29 (D.C. Cir. 1939), *aff'd*, 311 U.S. 72 (1940).

⁷ See *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 91 (1913).

⁸ 340 U.S. 474 (1951).

⁹ 61 Stat. 136 (1947), 29 U.S.C. § 160(e) (1958). This section of the Taft-Hartley Act provides for review of orders of the National Labor Relations Board. "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Ibid.*

¹⁰ 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1952). For the full wording see text following note 2 *supra*.

¹¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

was elicited by a desire to dispel a view considered too prevalent, *i.e.*, substantial evidence existed when the record yielded *any* evidence in support of the board's determination.¹² Concerning the nature of that evidence which thereafter was to be subjected to the debilitating effects of opposing testimony, the Court reaffirmed the definition of substantial evidence pronounced in *Consolidated Edison Co. v. NLRB*,¹³ where it was said that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁴

The Court seemed to find that a further particularization of substantial evidence would be unfruitful. Characterizations such as "the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review,"¹⁵ "a mood . . . [which] can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application,"¹⁶ and "a standard leaving an unavoidable margin for individual judgment,"¹⁷ result, as Professor Jaffe points out, in an appeal to the judicial conscience.¹⁸

The New York Concept

It should first be observed that the New York certiorari statute,¹⁹ Section 1296 of the Civil Practice Act, poses two standards for the evidence upon which a finding must be based in a hearing required by statute. Quantitatively, that evidence must be substantial; qualitatively, that evidence must, at least in part, be legally competent.

The qualitative *sine qua non* of the supporting evidence is a "legal residuum." Original enunciation of the idea that the acceptability to a reviewing court of evidence supporting an administrative finding depends upon its correspondence, at least in minimal part, with the quality of evidence admissible in a court of law, was made

¹² *Id.* at 477-78. Professor Jaffe of Harvard illustrates the then-existing confusion about the scope of review when he points out that in the *Universal Camera* case the government argued that review had always been on the record as a whole, while the Court in holding that the record must be so considered asserted that the law has been changed. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233-36 (1951).

¹³ 305 U.S. 197 (1938).

¹⁴ *Id.* at 229.

¹⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

¹⁶ *Id.* at 487.

¹⁷ *Id.* at 489.

¹⁸ Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1239 (1951).

¹⁹ Article 78 of the Civil Practice Act abolishes, among other common-law prerogative writs, the writ of certiorari, and establishes in their stead an exclusive statutory proceeding against a body or an officer. N.Y. CIV. PRAC. ACT § 1283. This statute, while effecting a procedural change, did not alter

in *Carroll v. Knickerbocker Ice Co.*²⁰ Although reviewed by way of appeal under the Workmen's Compensation Law, the *Carroll* decision, which reversed the Board's finding because the only evidence probative of that finding was hearsay, became the accepted interpretation of the certiorari statute.²¹ Section 1296(6) embodies the *Carroll* doctrine in its provision that one question determinable in an article 78 proceeding in the nature of certiorari is "whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination."²²

Undoubtedly the *Carroll* doctrine of "legal residuum" has been weakened. It has on occasion been ignored,²³ distinguished,²⁴ and held inapplicable.²⁵ Perhaps the most that can be said is that both the statute and the rule, though long unwielded, remain at the judicial fingertips for application to a particularly flimsy administrative finding which outrages the reviewing court. Resort to the legal residuum rule in such an instance is improbable, however, since the other standard for reviewing the probative basis of an administrative order, the substantial evidence test, is both the current avenue of review and an adequate challenge to the validity of an unfounded order. There is distinguished support for the view that it would be preferable to have a single standard, that of substantial evidence, excluding from the present dichotomy the requirement of a residuum of legally competent evidence. In this manner administrative agencies could enter orders, otherwise sustainable, where no technically competent evidence is available on some fact in issue and where, technically incompetent evidence alone is available, that evidence is completely convincing.²⁶ It may be that judicial lip service to the existence of the legal residuum rule in cases where the basis of decision is the substantial evidence test indicates that this single standard has in fact been accomplished by an absorption of the independent existence of a legal residuum requirement into the elastic area of substantial evidence. Thereby the quality of the evidence is but one

the substantive elements of the writ of certiorari. *Newbrand v. City of Yonkers*, 285 N.Y. 164, 33 N.E.2d 75 (1941).

²⁰ 218 N.Y. 435, 113 N.E.2d 504 (1916).

²¹ 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 184 (1942).

²² *Id.* at 182-83.

²³ *Id.* at 186-87, citing *Heaney v. McGoldrick*, 286 N.Y. 38, 35 N.E.2d 641 (1941) (basis of finding was an official report of investigation, technically incompetent as hearsay); *Roge v. Valentine*, 280 N.Y. 268, 20 N.E.2d 751 (1939) (basis of finding was an inference from equivocal facts).

²⁴ *Altschuller v. Bressler*, 289 N.Y. 463, 46 N.E.2d 886 (1943); *Beckley v. Pyrke*, 218 App. Div. 352, 218 N.Y. Supp. 329 (4th Dep't 1926) (*per curiam*).

²⁵ *Doca v. Federal Stevedoring Co.*, 308 N.Y. 44, 123 N.E.2d 632 (1954); *Kopec v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works*, 304 N.Y. 65, 106 N.E.2d 12 (1952).

²⁶ 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 190 (1942).

subsidiary factor in determining the presence of evidence which reasonably supports a finding.

What the *Universal Camera*²⁷ case is to the federal area, *Stork Restaurant, Inc. v. Boland*²⁸ is to the New York law of substantial evidence review. After a hearing in which the State Labor Relations Board found that the Stork Club was dominating a "company union" and had fired nine waiters for engaging in union activity, the Board entered an order that the restaurant cease these unfair labor practices. The statute providing for the scope of review of State Labor Relations Board orders states that "the findings of the board as to the facts, if supported by evidence, shall be conclusive."²⁹ Speaking for a unanimous court in upholding the Board's order, Chief Judge Lehman held that a finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. That the whole record of the hearing be considered is necessary because "evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony."³⁰

In addition to Section 707 of the Labor Law, the many New York statutes which create administrative agencies and provide for review of the agencies' quasi-judicial order, either directly or by reference to an article 78 proceeding, are interpreted to require substantial evidence as the criterion for review of the findings of fact.³¹

²⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See text following note 8 *supra*.

²⁸ 282 N.Y. 256, 26 N.E.2d 247 (1940).

²⁹ N.Y. LABOR LAW § 707(2). The authority for judicial review is found in § 707(4) of the Labor Law.

³⁰ *Stork Restaurant, Inc. v. Boland*, 282 N.Y. 256, 274, 26 N.E.2d 247, 255 (1940).

³¹ Section 624 of the Labor Law, part of the Unemployment Insurance Law, gives to a party aggrieved by an order of the appeal board the right to appeal to the Appellate Division, Third Department, on questions of law. The scope of appeal is defined in § 623 of that law: "A decision of the appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law." This provision has been held to mean that the determination of the appeal board, if sustained by substantial evidence, is conclusive upon the courts. *Matter of Cassaretakis*, 289 N.Y. 119, 44 N.E.2d 391 (1932), *aff'd on other grounds sub nom. Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943).

Section 23 of the Workmen's Compensation Law authorizes an appeal to the Appellate Division, Third Department, from an order of the Board. Section 20 provides that "the decision of the board shall be final as to all questions of fact." The statutory "finality" means "final" only when the questions of fact are supported by substantial evidence. See *McCormack v. National City Bank*, 303 N.Y. 5, 99 N.E.2d 887 (1951).

The following sections of the Education Law authorize an Article 78 proceeding to review a determination of the Board of Regents revoking, suspending, or annulling the license of a professional person: § 6515(5) (physician); § 6613(5) (dentist); § 6911(4) (nurse); § 7011(5) (podiatrist); § 7406(6) (certified public accountant). Section 22 of the Civil Service Law provides for Article 78 review of a removal from a civil service position, and

Telescoping all the instances where an administrative hearing is required by statute, Article 78 of the Civil Practice Act, specifically subdivision 7 of section 1296, empowers the Appellate Division to reverse a finding of the board when there is "such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, . . . would be set aside by the court as against the weight of evidence." The Court of Appeals narrowed the scope of this review explicitly, after indications to that effect,³² when it held in *Weber v. Town of Cheektowaga*³³ that there was not a sufficiently substantial quantum of evidence to sustain the quasi-judicial finding of fact only when a jury verdict founded on that evidence would necessarily be set aside as against the weight of evidence. Although the statute makes a jury-verdict analogy, in reviewing under the authority of section 1296 the courts speak almost exclusively in the idiom of "substantial evidence."³⁴

The Issue of Credibility

The substantial evidence rule does not contemplate a reversal of the agency's finding of fact merely because the inference drawn by the agency is not the inference the reviewing court itself would have drawn. In the words of the *Universal Camera* case, a court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."³⁵ The *Stork Restaurant* case propounds the same limitation thus: "Choice lies with the

§ 121 of the Alcoholic Beverage Control Law authorizes a like review for determinations of the State Liquor Authority refusing to issue a license and revoking, cancelling, and suspending a license. For the substantial evidence aspects of an article 78 proceeding to review, see text *infra*; *Lynch's Builders Restaurant, Inc. v. O'Connell*, 303 N.Y. 408, 103 N.E.2d 531 (1952) (per curiam) (State Liquor Authority hearing); *Miller v. Kling*, 291 N.Y. 65, 50 N.E.2d 546 (1943) (per curiam) (civil service hearing).

³² Prior to the *Weber* case, the Court of Appeals had at least twice reversed an order of the Appellate Division annulling a quasi-judicial determination of fact and reinstated the determination of the agency. *Roge v. Valentine*, 280 N.Y. 268, 20 N.E.2d 751 (1939); *People ex rel. Guiney v. Valentine*, 274 N.Y. 331, 8 N.E.2d 880 (1937). Since the Court of Appeals has jurisdiction only to review questions of law, with a few exceptions not pertinent here, it must have considered that the Appellate Division was deciding a question of law in annulling the administrative finding, *i.e.*, whether a jury verdict would be set aside as a matter of law. 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 331-32 (1942).

³³ 284 N.Y. 377, 31 N.E.2d 495 (1940).

³⁴ See, *e.g.*, *Lynch's Builders Restaurant, Inc. v. O'Connell*, *supra* note 31; *Avon Bar & Grill, Inc. v. O'Connell*, 301 N.Y. 150, 93 N.E.2d 573 (1950); *Burke v. Bromberger*, 300 N.Y. 248, 90 N.E.2d 61 (1949); *Miller v. Kling*, *supra* note 31; *Murphy v. Valentine*, 284 N.Y. 524, 32 N.E.2d 537 (1940); *Weber v. Town of Cheektowaga*, 284 N.Y. 377, 31 N.E.2d 495 (1940).

³⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice."³⁶ Thus the reviewing court must take into consideration the opposing inferences in the entire record in questioning the rationality of the factual inference actually drawn from the evidence, but never either weigh that evidence nor indulge in personal inference-drawing. It is small wonder that Professor Jaffe remarks that this distinction "requires subtle, disciplined intellectual discrimination."³⁷

Lurking in the background of any evaluation of inferences is the issue of credibility. The credibility of the testimony which gives rise to an inference is an essential element in the validity of that inference. How far, then, into the veracity and reliability of oral testimony may the reviewing court inquire in testing the durability of the inference finally drawn against the possible opposing inferences?

One answer, perhaps the strictly logical conclusion if the court is to test the validity of inferences on a consideration of all the testimony, is to open the question of credibility completely. Such an approach, however, would be neither acceptable to the courts nor desirable. The New York courts, having held that "it is axiomatic that where there is a conflict in the evidence as to the issues controverted, matters of credibility and weight are for the jury to determine or, if the trial be without a jury, for the trier of the facts,"³⁸ also declare that it is for the administrative board alone to pass on the veracity of opposing witnesses.³⁹ Likewise, the federal courts will not inquire into the credibility of witnesses before a court⁴⁰ or administrative hearing.⁴¹

A modification on the approach that the reviewing court may not question the credibility of witnesses at an administrative hearing has been suggested in a few decisions involving the scope of substantial evidence, although never utilized as the basis of overturning an order. In the federal area, the Court of Appeals for the Fifth Circuit introduced the idea that testimony which is incredible as a matter of law could not be the foundation of the board's finding of fact.⁴² Granting the NLRB's petition for enforcement of its order over the employer's objection that the Board was biased in that it uniformly credited its own witnesses and has uniformly discredited his witnesses, the court wrote:

³⁶ *Stork Restaurant, Inc. v. Boland*, 282 N.Y. 256, 274, 26 N.E.2d 247, 255 (1940).

³⁷ Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1028 (1956).

³⁸ *Kelly v. Watson Elevator Co.*, 309 N.Y. 49, 51, 127 N.E.2d 802, 803 (1955).

³⁹ See *Avon Bar & Grill, Inc. v. O'Connell*, 301 N.Y. 150, 93 N.E.2d 573 (1950).

⁴⁰ See *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952).

⁴¹ See *Eastern Coal Corp. v. NLRB*, 176 F.2d 131 (4th Cir. 1949).

⁴² *NLRB v. Robbins Tire & Rubber Co.*, 161 F.2d 798 (5th Cir. 1947).

Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias.⁴³

The Supreme Court seized upon this language in *NLRB v. Pittsburgh Steamship Co.*,⁴⁴ reversing a Court of Appeals decision that the Board's findings and order were invalidated by the trial examiner's bias as disclosed by his crediting the Board's witnesses and discrediting witnesses for the employer. The Court held that the findings were supported by substantial evidence as required by the Wagner Act and that the trial examiner credited no testimony which "carries its own death wound" nor discredited any which "carries its own irrefutable truth."⁴⁵

In New York, there is an indication that testimony which is "impossible or incredible"⁴⁶ will not constitute substantial evidence. Reversing the Appellate Division's annulment of the determination of the Chief Magistrate dismissing a court employee, the Court of Appeals disagreed with the view that complainant's testimony was "unsupported, confused, contradictory, and incredible."⁴⁷ Although there were contradictions and confusion in the testimony, the court held it was not impossible or incredible, and in refusing to give effect to testimony not thus tainted, the Appellate Division erred in substituting its views on a question of fact.

Although refusal to surrender the evaluation of testimony completely to the agency is desirable, the above approach lacks subtlety. It does not take into account the nature of the process which the reviewing court undertakes, that of testing inference against inference; it looks only to excise from the sum total of evidence that rare piece of testimony which is so unbelievable that it cries to heaven for vengeance.

A third method of treating credibility⁴⁸ is premised on the proposition that the judge must pass on the rationality of one inference drawn from facts on the record which are susceptible of different inferences. Testing the inference drawn against the opposite inferences possible, the court considers as tending to vitiate the fact found only that evidence of extrinsic circumstances which would tend to lessen the probability of the existence of the fact found, and not that testimony which denies the existence of the fact found. For example, the National Labor Relations Board might have before it a charge

⁴³ *Id.* at 800.

⁴⁴ 337 U.S. 656 (1949).

⁴⁵ *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 660 (1949).

⁴⁶ *Burke v. Bromberger*, 300 N.Y. 248, 250, 90 N.E.2d 61, 62 (1949).

⁴⁷ *Ibid.*

⁴⁸ See Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1031-35 (1956).

that an employer wrongfully discharged an employee because of the employee's union activities. The employer introduces evidence that the employee had seriously insulted a patron, and argues that the proper inference is that the discharge was made for misconduct. If the employee admits his misconduct but introduces evidence of the employer's hostility to unionism, a finding that the discharge was for the employee's union activities would be weakened in the eyes of the reviewing court by the evidence of the admitted misconduct. If, however, the employee denies the misconduct charged, thus creating a direct contradiction in testimony, and introduces evidence of the employer's hostility to unionism, a finding that the discharge was for the employee's union activities would not be weakened by the employer's testimony of the employee's misconduct; the credibility of the employer's testimony of misconduct has been rationally reduced by the evidence of his hostility to labor organizations.

The proponent of this approach, Professor Jaffe, writes that seldom if at all will credibility be a crucial factor in the review of administrative orders.⁴⁹ It is true that physical, extrinsic evidence to rebut opposing evidence is the usual method of proof in labor disputes, compensation claims, and the issuing of licenses. However, while not appearing in the federal area, there is a class of cases in New York State wherein credibility, the naked word of one man against another, is often determinative of the outcome of an administrative adjudication. Specifically, these cases are reviews of administrative trials at which a member of the police force is adjudged guilty by the Commissioner of infractions, criminal in nature, of departmental rules.

Departmental Trials

When a police officer is charged with committing a wrongful act which is of its nature covert and shielded from the eyes of possible witnesses, *e.g.*, accepting bribes, using his authority to extort, failing to make an arrest, moral misconduct, the departmental trial on such charges often resolves itself into an oral accusation by the complainant, at times a disreputable person, and a denial by the accused. How will an administrative adjudication of guilt, premised on a resolution of the credibility of either the accuser or the accused, be reviewed within the scope of the substantial evidence rule?

It seems that the New York courts, stitch by stitch, have to some degree hemmed in the vague outer edges of the substantial evidence rule when the question of credibility is so crucial in protecting the integrity of the police force, the rights of one criminally accused, and the reputation and livelihood of a civil servant. The approach utilized is neither of those discussed above—a heavy-handed refusing to credit

⁴⁹ *Id.* at 1035.

an accusation which "carries its own death wound," nor the mechanistic pitting of uncontradicted inference against contradicted inference. What appears to have happened is that the theory and experience of the criminal law has been brought to bear upon that quantum of evidence called substantial in order to insure its reliability. In this approach, the dominant characteristic of substantial evidence is its power to "command the judicial confidence."⁵⁰

An early indication of the special treatment accorded the review of departmental trials is seen in *People ex rel. Kelly v. Waldo*,⁵¹ where the Appellate Division granted on application of the relator-policeman a writ of certiorari to the Police Commissioner. Although the scope of review under the writ⁵² was broader than the present article 78 substantial evidence review, it is noteworthy that the court held that relator was entitled to the presumption of innocence since the act alleged, taking money from the occupant of a home he was inspecting, was a misdemeanor. The court then spoke in the language of corroboration, stating that the proof was not balanced evenly in that there was no reason to credit the accuser's testimony.⁵³ In another certiorari proceeding, the Appellate Division reviewed a determination of the Commissioner adjudging a police officer guilty of making an arrest without sufficient evidence and of falsely reporting the name of a person present at the arrest.⁵⁴ The sole witness in support of the charges was the person present at the arrest, a man of "most unsavory reputation," whose credibility had been the subject of many decisions in the Appellate Division and the Court of Appeals. The notorious mendacity of this informer appears to have led the court to a holding that his testimony, in and of itself without regard to impeaching circumstances, was incredible.

Since the advent of an article 78 proceeding in the nature of certiorari, two leading cases evaluate the testimony of a complainant in terms of substantial evidence. Viewing substantial evidence as evidence which is entitled to carry conviction, the Appellate Division

⁵⁰ *Evans v. Monaghan*, 306 N.Y. 312, 320, 118 N.E.2d 452, 455 (1954).

⁵¹ 161 App. Div. 731, 146 N.Y. Supp. 581 (2d Dep't 1914).

⁵² On certiorari to review the determination of the Police Commissioner the reviewing court passed on whether the facts involved in the determination were satisfactorily supported by the evidence so that the verdict of a jury would not be set aside as against the weight of evidence. See *People ex rel. Flanagan v. Board of Police Comm'rs*, 93 N.Y. 97 (1883). Certiorari under § 1304 of the Civil Practice Act contemplated the same review. See *People ex rel. Guiney v. Valentine*, 274 N.Y. 331, 8 N.E.2d 880 (1937).

⁵³ Another case which seems to turn on the presumption of innocence is *People ex rel. Burke v. Waldo*, 163 App. Div. 28, 147 N.Y. Supp. 1092 (2d Dep't 1914). There the determination of the Police Commissioner was affirmed only because the relator's veracity was impeached by his admissions that at a prior investigation he had denied knowledge of the incident involved. Otherwise, the court stated, it would be inclined to reverse.

⁵⁴ *Reger v. Mulrooney*, 241 App. Div. 38, 271 N.Y. Supp. 20 (1st Dep't 1934).

for the First Department held in *DiNardo v. Monaghan*⁵⁵ that the principle of the criminal law which requires corroboration of the complainant in a rape case is pertinent to an evaluation of the evidence claimed to be sufficiently substantial to prevail against all reasonable probabilities. The dismissal of petitioner from the police force on the charge of rape was annulled because complainant's testimony, considering the alleged place and time of the crime as well as the lack of physical evidence concerning her person and clothing, was incredible.

In *Evans v. Monaghan*,⁵⁶ decided by the Court of Appeals in 1954, the *DiNardo* view that "the substantiality of evidence is related to the nature of the charge"⁵⁷ is apparently adopted, and the same phenomenon of insinuating the spirit of a criminal law rule into the corpus of substantial evidence is achieved. On findings made at a hearing, the Police Commissioner dismissed five members of his department for conspiring with Harry Gross to promote the business of bookmaking. In the lower appellate court⁵⁸ the dismissals were sustained on the grounds that Gross' testimony, on the credibility of which "in the end all the specifications of the charges depend,"⁵⁹ was not incredible as a matter of law and if believed was a reasonable basis for a finding of fact. The dissent in the Appellate Division, citing the *Reger*,⁶⁰ *Kelly*,⁶¹ and *DiNardo*⁶² decisions, felt that "the basic reason for its salutary purpose [Section 399 of the Code of Criminal Procedure]⁶³ should in fairness and justice be not lost sight of in police trials upon charges involving criminality."⁶⁴ The Court of Appeals, with Judge Van Voorhis speaking for a unanimous court, affirmed the order of the Appellate Division sustaining the dismissals.⁶⁵ In so far as the present treatment of the credibility problem is concerned, the importance of the highest court's affirmation of the lower court order lies in its reliance upon the reasoning of the dissent in the Appellate Division. Judge Van Voorhis wrote

⁵⁵ 282 App. Div. 5, 121 N.Y.S.2d 119 (1st Dep't 1953) (per curiam).

⁵⁶ 306 N.Y. 312, 118 N.E.2d 452 (1954).

⁵⁷ *DiNardo v. Monaghan*, *supra* note 55, at 7, 121 N.Y.S.2d at 121.

⁵⁸ *Evans v. Monaghan*, 282 App. Div. 382, 123 N.Y.S.2d 662 (1st Dep't 1953).

⁵⁹ *Id.* at 390, 123 N.Y.S.2d at 669.

⁶⁰ *Reger v. Mulrooney*, 241 App. Div. 38, 271 N.Y. Supp. 20 (1st Dep't 1934).

⁶¹ *People ex rel. Kelly v. Waldo*, 161 App. Div. 731, 146 N.Y. Supp. 581 (2d Dep't 1914).

⁶² *DiNardo v. Monaghan*, 282 App. Div. 5, 121 N.Y.S.2d 119 (1st Dep't 1953) (per curiam).

⁶³ Section 399 reads: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

⁶⁴ *Evans v. Monaghan*, 282 App. Div. 382, 396, 123 N.Y.S.2d 662, 675 (1st Dep't 1953).

⁶⁵ *Evans v. Monaghan*, 306 N.Y. 312, 118 N.E.2d 452 (1954).

that the court has "not lost sight of the statement made by the dissenting justices at the Appellate Division"⁶⁶ which argues that the reason for requiring corroboration of an accomplice's testimony at a criminal trial should pervade a departmental trial on criminal charges. Concerning the corroboration aspect of section 399, the *Reger, Kelly*, and *DiNardo* cases, and those divorce cases involving the testimony of private detectives and prostitutes, the court stated that "it is relevant to what is required to ascribe veracity to the testimony of a convicted professional gambler such as Harry Gross."⁶⁷ This corroboration the court found to exist in various circumstances: the magnitude of Gross' operations within the jurisdiction of the dismissed police officers and the lack of action taken by them; the consistency, interior cohesion, and multiplicity of detail of the 450 page testimony given by a man of unsystematic mind; the failure of the policemen to offer any rebutting evidence.

The Court of Appeals has not further discussed the corroboration requirement it imposed in the *Evans* case. It is probable, however, that the *Evans* rationale is responsible for that court's recent reversal without opinion⁶⁸ of an Appellate Division order which affirmed the Commissioner's dismissal of two police officers.⁶⁹ The majority opinion in the Appellate Division, holding the dismissal supported by substantial evidence, found the "internal confirmatory facts"⁷⁰ required by *Evans* to be that the persons charging the policemen with extorting money from them, although of "obvious anti-police bias,"⁷¹ told essentially the same story and made an immediate complaint; the dissent there concluded that the identification of the petitioners, resting ultimately on the credibility of only one disreputable informer, was not enough. It seems that the facts are similar enough to those of the *Evans* case to conclude that the court applied the *Evans* requirement of corroboration for the testimony given by a person of dubious veracity, and found the corroborating circumstances insubstantial.⁷²

⁶⁶ *Id.* at 319, 118 N.E.2d at 455.

⁶⁷ *Id.* at 320, 118 N.E.2d at 455.

⁶⁸ *La Forge v. Kennedy*, 143 N.Y.L.J. 13, (1960) (memorandum opinion). On appeal to the Court of Appeals, counsel for the dismissed policemen strongly urged the corroboration theory. See brief for Petitioners-Appellants, pp. 17-23.

⁶⁹ *La Forge v. Kennedy*, 8 App. Div.2d 143, 186 N.Y.S.2d 478 (1st Dep't 1959).

⁷⁰ *Id.* at 149, 186 N.Y.S.2d at 484.

⁷¹ *Id.* at 148, 186 N.Y.S.2d at 483.

⁷² In another recent memorandum decision, four judges of the Court of Appeals concurred in affirming the Appellate Division's confirming of the Police Commissioner's determination. The Chief Judge and another judge voted to reverse upon the ground that the evidence did not meet the standard prescribed by the *Evans* decision. *Centner v. Monaghan*, 7 N.Y.2d 877, 164 N.E.2d 874, 196 N.Y.S.2d 1005 (1959).

Conclusion

The cases discussed above are perhaps not so numerous as to be collectively termed a trend. As an approach to the problem of credibility, however, there is much to recommend a court review which evinces an awareness of the problem and suggests guideposts from other areas of judicial experience. Premising by case law a requirement of corroboration drawn from the analogous principle of the criminal law on the proposition that "the substantiality of the evidence is related to the nature of the charge"⁷³ is surely justified in the light of the consequences attending the dismissal of a policeman on a criminal charge. Additional justification for restricting the generality and elasticity of the substantial evidence rule is found in the fact that the administrative expertise sought to be protected on review is non-existent in departmental trials. That the issue of credibility be singled out in this particular area of administrative proceedings is likewise desirable, for the rationality of the inference drawn from facts susceptible of different inferences is not easily tested when both the accusation and the denial are perfectly consistent with reason. Finally, it is desirable that an administrative adjudication "of unusual importance to petitioners and to organized society"⁷⁴ be subject to a more pin-pointed definition of "substantial evidence," a formula whose patness ought not to dull the judicial sensitivity in this significant area.

⁷³ DiNardo v. Monaghan, 282 App. Div. 5, 7, 121 N.Y.S.2d 119, 121 (1st Dep't 1953) (per curiam).

⁷⁴ Evans v. Monaghan, 306 N.Y. 312, 322, 118 N.E.2d 452, 456 (1954).