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RECENT CASES

Antitrust—FTC Proceeding Will Not Toll the Statute of Limitations in an Action Under Section 4(b) of the Clayton Act

Plaintiff sued for treble damages, alleging violation of the anti-trust laws by defendants attempting to monopolize the interstate trade in wooden skewers.[1] The specific acts charged commenced in May, 1954, and culminated on February 28, 1958, when plaintiff was forced out of business. Defendant contended that any causes of action prior to February 23, 1958, were barred by the four year statute of limitations in section 4(b)[2] of the Clayton Act, and defendant's motion for summary judgment with respect to these was granted. Plaintiff argued that the statute of limitations was tolled by section 5(b)[3] of the Clayton Act during the pendency of a Federal Trade Commission proceeding.[4] Defendant maintained that section 5(b) applies only to "any civil or criminal proceeding" and that a Federal Trade Commission proceeding did not come within this statutory language.[5] Plaintiff moved to amend the court order so as to deny defendant's motion for summary judgment. *Held,* amendment denied. Under section 5(b) of the Clayton Act, a Federal Trade Commission proceeding is not a "civil or criminal proceeding" which will toll the statute of limitations in section 4(b) of the Clayton Act. *Farmington Dowell Products Co. v. Forster Mfg. Co.,* 223 F. Supp. 967 (S.D. Me. 1963).

Section 5(b) of the Clayton Act implements enforcement of the anti-trust laws by providing private treble damage claimants with the

1. "This is a private action brought pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, to recover treble damages for alleged violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) . . . ." Farmington Dowell Prod. Co. v. Forster Mfg. Co., 223 F. Supp. 967, 968 (S.D. Me. 1963).

2. 38 Stat. 731, (1914), 15 U.S.C. § 15(b) (1958).

3. Section 16(b) of title 15, U.S.C. provides that: "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . ." 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1958).

4. A Federal Trade Commission proceeding was instituted by a commission complaint filed on July 23, 1958, charging defendants with substantially the same violations of section 2(a) of the Clayton Act as charged in the present action. Farmington Dowell Prod. Co. v. Forster Mfg. Co., *supra* note 1.

5. *Id.* at 969.

opportunity to sue "after the government litigation is concluded, even though, but for section 5, suit would have been barred by the statute of limitations."[6] As a result of the Federal Trade Commission's broad power[7] to enforce the anti-trust laws concurrently[8] with the Justice Department, the courts have been confronted for the first time[9] with the question whether this "government litigation" which bars the running of the statute of limitations[10] under section 5(b) includes an FTC proceeding. Two district courts[11] have considered this question and reached conflicting results. In *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*,[12] the court held that an FTC proceeding tolls the statute of limitations under section 5(b). The court maintained that the legislative policy behind section 5(b) is to allow litigants to take advantage of facts uncovered in related government proceedings otherwise barred by the statute of limitations.[13] Since the FTC and the Justice Department have concurrent jurisdiction over violations of the Clayton Act, it would not seem to have been the congressional intent to have "the plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action."[14] In *Highland Supply Corp. v. Reynolds Metals Co.*,[15] the court left this argument unanswered in holding that the statute of limitations in section 5(b) is not tolled by an FTC proceeding. The *Highland* court followed the majority of the courts which have almost[16] uniformly held that an FTC proceeding is not within the

6. Butler, *Application and Constitutionality of Tolling of Statute of Limitations Provision of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction*, ABA ANTITRUST SECTION REP. 42, 52 (1956).

7. For an informative discussion of the broad authority of the FTC, see Clark, *The Judicial Functions of The Federal Trade Commission Should Be Transferred To The District Courts*, ABA ANTITRUST SECTION REP. 51 (1957).

8. See United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950) (No difference in substantive antitrust law applied by the Commission and that applied by the court).

9. Farmington Dowell Prod. Co. v. Forster Mfg. Co. *supra* note 1, at 969.

10. For a general discussion of problems involving the application of the statute of limitations to antitrust treble damage suits, see Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Handles*, 57 NW. U.L. REV. 29 (1962).

11. For a recent decision that follows *Highland Supply Corp.*, *infra* note 15, in holding that § 5(b) does not apply to the FTC, see Volasco Prod. Co. v. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963).

12. 216 F. Supp. 507 (D.N.J. 1963).

13. See S. REP. No. 619, 84th Cong., 1st Sess. (1955); *U.S. Code Cong. & Admin. News* 2332 (1955).

14. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., *supra* note 12, at 510.

15. 221 F. Supp. 15 (E.D. Mo. 1963), *aff'd*, 32 U.S.L. Week 2421 (8th Cir. Feb. 13, 1964).

16. See Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 150 F.2d 69 (2d Cir. 1945).

statutory scope of "government litigation" as defined in the Clayton Act.[17] The basis for these decisions has been the contention that the legislative history[18] indicates that Congress did not intend for FTC proceedings to come within the purview of section 5.

In the instant case, the court followed the legislative history approach of *Highland*.[19] Although the court alluded to the opposing rationale of the *New Jersey*[20] case, it neglected to rebut that argument. The court concerned itself exclusively with a strict interpretation of the legislative and judicial history of section 5 of the Clayton Act.[21] At the base of the court's reasoning was the proposition that section 5(b) must be construed in context with the companion provision of section 5(a).[22] This thesis is based on the contention

17. Until 1955, the pertinent language in § 5(b) was: "Whenever any suit or proceeding in equity or criminal prosecution . . . ." These words were deleted in the 1955 amendment and replaced by the words "any civil or criminal proceeding." 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1955). From the relevant legislative history there is no basis for reasoning that Congress intended any substantive change. Note 13 *supra*. The probable reason for the change was to secure conformity with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Butler, *supra* note 6, at 46. Thus the crux of the problem is the courts' interpretation of the words "suit or proceeding in equity" and "criminal prosecution" in Section 5 of the original Clayton Act. With regard to the "suit or proceeding in equity" the Supreme Court held in FTC v. Eastman Kodak Co., 274 U.S. 619 (1927), that "the Commission exercises only the administrative functions delegated to it by the act, not judicial powers . . . . It has not been delegated the authority of a court of equity." *Id.* at 623. This holding is further substantiated by Proper v. John Bene & Sons, 295 Fed. 729 (E.D.N.Y. 1923), where the court held in a case involving section 5(a) that "there is grave doubt whether the proceeding before the commission is a proceeding in equity." *Id.* at 732. The Supreme Court in FTC v. Cement Institute, 333 U.S. 683 (1948), emphatically endorses the principle that an FTC proceeding is not a criminal proceeding. The court emphasized that "rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings . . . where the effect of the Commission's order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future." *Id.* at 706. Butler explains why the term "civil proceeding" does not encompass the FTC proceeding when he says that "it might not be so farfetched to construe the term 'civil proceeding,' standing alone, to include FTC proceedings, if it were not for the fact that the Administrative Procedure Act (5 U.S.C. § 1001(g)), has more aptly designated them as 'agency proceedings,' and that is their proper classification." Butler, *supra* note 6, at 46.

18. See H.R. REP. No. 627, 63rd Cong. 2d Sess. (1914); S. REP. No. 698, 63rd Cong. 2d Sess. (1914); 51 CONG. REC. 9073, 9079, 9198 (1914).

19. *Supra* note 15.

20. *Supra* note 12.

21. Farmington Dowell Prod. Co. v. Forster Mfg. Co. *supra* note 1, at 970.

22. "[T]hat subsection [5(b)] must be construed in context with the companion provision of section 5(a), 15 U.S.C. § 16(a) by which a 'final judgment or decree . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws' is admissable as prima facie evidence in a private treble damage action." *Ibid.* See also Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 569 (10th Cir. 1961); Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 290 (7th Cir. 1954).

that the subsections are substantially identical[23] and that they must be applied consistently to carry out the purpose of the statute.[24] Major emphasis was given to the fact that section 5 has been in effect forty-nine years, and before 1963 it had never been applied to the FTC.[25] The court substantiated this argument by citing the findings of a number of courts which have held in related litigation that an FTC proceeding is neither a "criminal proceeding" nor a "suit or proceeding in equity" nor a "civil prosecution" under either the original or the amended Clayton Act.[26]

Although the view espoused by the *Farmington* court is logically based on the legislative and judicial history, the implementation of this view will result in illogical and discriminatory results. Since the FTC and the Department of Justice have concurrent jurisdiction[27] over anti-trust violations, under the holding of the instant case the plaintiff's rights are determined by the circumstance of which agency initiates the action. Where the FTC takes jurisdiction the suit is barred when the statutory period has run; if the Justice Department takes jurisdiction in the same action the statute of limitations is tolled under section 5(b), and plaintiff is allowed to bring his private action with the further advantage of facts uncovered by the Justice Department litigation. It is illogical to allow a plaintiff to utilize facts procured as a result of a Department of Justice proceeding, but not as a result of an FTC proceeding brought under the same statute. Butler argues that "this . . . is a gross discrimination which under the circumstances is so unjustifiable as to amount to a denial of due process in violation of the Fifth Amendment."[28] If the *Farmington* court had more closely scrutinized the obvious results of this decision, the lustre of the judicial and legislative history of section 5 might have dimmed when compared to the consistent and congruous results where the statute of limitations is tolled under section 5(b) regardless of the government agency which brings the action.

23. Butler, *supra* note 6, at 47.
24. See Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 218 (D. Minn. 1957), *aff'd*, 289 F.2d 418 (8th Cir. 1961).
25. Farmington Dowell Prod. Co. v. Forster Mfg. Co., *supra* note 1, at 973.
26. *Id.* at 972-73.
27. *Supra* note 8.
28. Butler, *supra* note 6, at 52.

Conflict of Laws—Where None of the Beneficiaries Reside in Forum State, Limitation on Amount of Recovery Imposed by State Where Tort Occurred Governs.

Gordon Dean was killed when the Northeast Airlines plane on which he was a passenger crashed on Nantucket, Massachusetts. The deceased, who purchased his ticket and boarded the plane in New York, was a resident of New York and lived there with his wife and two of his children. Two children of a prior marriage resided in California. About a month after the crash the widow and children moved from New York. They have lived in Maryland for the last five years. The defendant, Northeast Airlines, is a Massachusetts corporation doing business in New York. The executor of decedent's estate brought suit in a New York court, subsequently removed to the federal district court, for wrongful death against the Massachusetts corporation. The plaintiff moved to strike the affirmative defense that the Massachusetts wrongful death statute[1] pursuant to which the action was brought limits the recoverable damages to fifteen-thousand dollars. On motion to strike, *held,* denied. Even though the rule that the law of the place of the tort governs was abandoned in New York cases for wrongful death growing out of this same crash, the Massachusetts limitation will apply here because none of the beneficiaries were New York residents when the suit was commenced. *Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D.N.Y. 1963).

In a companion case arising out of the same crash, *Kilberg v. Northeast Airlines, Inc.*,[2] the New York Court of Appeals announced that the plaintiff would have to sue on the Massachusetts wrongful death statute, but that the Massachusetts provision limiting the amount of recovery should not be applied. A concurring opinion recognized that the court was laying down a new rule of law "undermining the accepted pattern of conflict of law rules, in effect overruling numerous decisions of this court, and completely disregarding the overwhelming weight of authority in this country."[3] The court, resting its ruling on the state's strong public policy prohibiting the imposition of such limitations and on a policy decision that the result should not depend on the fortuity of the place of the tort, held that it would treat the measure of damages as a procedural rather than a substantive question and apply New York law.[4] After *Kilberg*, another wrongful death case

1. MASS. ANN. LAWS ch. 229, § 2 (1955). The statute has since been amended raising the upper limit of recovery to $30,000. MASS. ANN. LAWS ch. 229, § 2 (Supp. 1963).

2. 9 N.Y.2d 34, 172 N.E.2d 526 (1961), 15 VAND. L. REV. 271 (1961).

3. *Id.* at 46, 172 N.E.2d at 532.

4. The ground of the opinion in *Kilberg* was modified by a later case and no longer should be considered as depending on a distinction between substantive and procedural

arising out of the same accident, *Pearson v. Northeast Airlines, Inc.*,[5] brought by the New York beneficiary of the New York decedent in New York was removed to federal district court. Obligated to apply New York law, the court, relying on *Kilberg*, held that the Massachusetts statute would not limit the beneficiary's recovery to fifteen-thousand dollars. Going one step further, the court held that the New York standard of recovery measured by the degree of pecuniary damage resulting from the decedent's death to the person or persons for whose benefit the action is brought, rather than the Massachusetts standard measured by the degree of culpability of the defendant, would apply. The federal court thus fully implemented the *Kilberg* ruling.

Then the New York Court of Appeals spoke again. In *Babcock v. Jackson*,[6] in clear, unmistakeable terms, it repudiated the traditional rule and held that the law of the place of the tort will not "*invariably* govern the availability of relief for the tort . . . ."[7] It held that the applicable choice of law rule should "reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy . . . ."[8] *Babcock* presented the court with a strong fact situation on which to repudiate the old rule. Babcock, a guest passenger, was seriously injured in an automobile accident in Ontario while on a weekend excursion into Canada. An Ontario statute provided that the owner or driver of a vehicle would not be liable to guest passengers. The guest passenger on her return to New York brought suit to recover for her injuries. The court noted that "the present action involves injuries sustained by a New York guest as a result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there."[9] The irrelevance of Ontario law in such a situation was striking. Holding that the Ontario guest statute would not apply, the court cited three closely related reasons. First, the court recognized New York's policy of re-

questions. It "must be held merely to express this State's strong policy with respect to *limitations* in wrongful death actions." Davenport v. Webb, 11 N.Y.2d 392, 395, 183 N.E.2d 902, 904 (1962).

5. 309 F.2d 553 (2d Cir.), *cert. denied*, 372 U.S. 912 (1962). The court sitting en banc held that the district court decision implementing the *Kilberg* decision was not unconstitutional. "[A] state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law." 309 F.2d at 559. That the United States Supreme Court would sanction this view is indicated in the dictum of an earlier federal tort claims case. Richards v. United States, 369 U.S. 1, 12 (1962), 15 VAND. L. REV. 1322 (1962).

6. 12 N.Y.2d 473, 191 N.E.2d 279 (1963). Several authorities give complete treatment to this case in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963). See also 17 VAND. L. REV. 283 (1963).

7. *Supra* note 6 at 477, 191 N.E.2d at 280-81.

8. *Ibid.*

9. *Id.* at 482, 191 N.E.2d at 284.

quiring a tort-feasor to compensate his guest for injuries caused by his negligence saying "our courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents . . . happened beyond its borders."[10] Secondly, the court, comparing the relative interest of New York and Ontario in the application of the Ontario guest statute, found that "Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law."[11] Thirdly, the court said that the "center of gravity" or "grouping of contracts" doctrine adopted by the court in conflicts cases involving contracts likewise afforded an "appropriate approach for accommodating the competing interests in tort cases with multi-State contacts."[12]

Notwithstanding the similarity of the instant case to *Kilberg* and *Pearson*, the court held that the Massachusetts limitation on the amount recoverable in a death action would apply because the status of the beneficiaries was different. In both *Kilberg* and *Pearson* the sole beneficiary was a New York domiciliary at the time of decedent's death and when the suit was commenced. In this case two children of a prior marriage were living at the time of decedent's death in California. About a month after the crash, the decedent's widow and her two children moved from New York and for the last five years have lived in Maryland. Referring to *Kilberg* the court said: "[I]t is clear from its reference to the history of the development of the State's strong public policy on the subject that the court's concern was to serve those who are, practically, the only appropriate objects of that policy, namely, the deceased's surviving dependents who are domiciled in New York. . . ."[13] Thus the court found no New York public policy to secure full compensation to beneficiaries who are at the time of death foreign domiciliaries. As to Mrs. Dean and her children who were New York domiciliaries at the time of the death, the court concluded that Maryland, their home for the last five years, was the jurisdiction with the strongest interest[14] in them now and that since Maryland would have applied Massachusetts law, the limitation should be applied.

The swift changes in the conflict of laws rules as to torts are made vivid by the recent cases in the state and federal courts in New York.

10. *Ibid.*
11. *Ibid.*
12. *Id.* at 481, 191 N.E.2d at 283. The court in the instant case does not refer to this concept.
13. Gore v. Northeast Airlines, Inc., 222 F. Supp. 50, 53 (S.D.N.Y. 1963).
14. Almost certainly the *Babcock* court meant by this term the governmental interest in whether the policy behind a particular law was implemented or subverted. There is a real danger in using the term as a catchword without identifying explicitly the policy considerations involved. In the instant case one can only guess at the considerations which lead the court to conclude that Maryland has the strongest interest.

An old and established rule has been repudiated and the arduous task of formulating new rules to conform to new considerations has begun. In choosing the law to be applied, the federal judge, in line with *Kilberg* and *Babcock*, attempted to take into account the public policy and interest of the states involved. The difficulties of employing these considerations is made graphic by the present case. For example, identifying public policy is not without difficulty. In *Babcock*, for instance, the court had no statutory law on which to rely as a pronouncement of New York's public policy. On the contrary, the New York court relied on the absence of a law. "New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases . . . ."[15] Nevertheless, the statutory law of a state would presumably be one of the best indications of that state's public policy. In *Davenport v. Webb*,[16] however, the plaintiff, relying on *Kilberg*, asked for prejudgment interest. The New York court denied addition of prejudgment interest to the verdicts for the wrongful death of New York decedents killed in Maryland, a state which does not provide for such interest. The only substantial reason was that " 'the Legislature had no intention to make it reach so far . . . .' "[17] Chief Judge Desmond concurred in the result "since there is no New York public policy . . . ."[18] Yet New York law expressly provides for such interest.[19] In the light of *Babcock*, *Davenport* appears to be an anomaly. In the instant case, likewise, the court found no public policy that would warrant securing full compensation to the California beneficiaries "because they are the children of a New York domiciliary who, after they had established their foreign domicile, was killed in a foreign state which by statute limits the amount of damages . . . ."[20] Obviously New York could have developed no public policy in this particular situation because the question would never have arisen under the traditional choice of law rule. It should be noted, however, that the New York wrongful death statute[21] makes no distinction between New York and foreign beneficiaries—even aliens are allowed to recover.[22] It is not difficult to find a "policy" in this, whether or not articulated. That

15. Babcock v. Jackson, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284 (1963).
16. 11 N.Y.2d 392, 183 N.E.2d 902 (1962).
17. *Id.* at 394, 183 N.E.2d at 904.
18. *Id.* at 395, 183 N.E.2d at 905.
19. N.Y. DECEDENT ESTATE LAW § 132.
20. *Supra* note 13 at 53. One important question is whether the constitutional mandate on privileges and immunities is satisfied. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2(1).
21. N.Y. DECEDENT ESTATE LAW § 130.
22. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N.Y.S. 1053 (1903).

New York allows foreign beneficiaries to recover would seem to indicate a policy of not limiting recovery under the wrongful death statute to domiciliaries. Decedent's wife and her two children come within the ambit of this court's narrow interpretation of New York public policy; nevertheless, they too are denied recovery, because Maryland has the strongest interest.[23] The court reasons that Maryland has the strongest interest in the decedent's wife and her children, and that, since Maryland would have applied Massachusetts law, the New York court should exercise restraint[24] and "not subordinate the interest of Massachusetts."[25] This certainly seems inadequate in light of the New York court's statement of its interest in this occurrence:

> The emphasis in *Kilberg* was plainly that the merely fortuitous circumstance that the wrong and injury occurred in Massachusetts did not give that State a controlling concern or interest in the amount of the tort recovery as against the competing interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death.[26]

Clearly this expresses a broad New York interest in protecting not only New York beneficiaries, but New York decedents[27] as well. Even if New York has no interest at all in the beneficiaries, recovery for the decedent's wife and her children should still be allowed. Considering prior New York holdings that in an action for wrongful death the distributees of the decedent receive vested property from the moment the cause of action accrues,[28] any other decision seems arbitrary. Ac-

23. Exactly what interest Maryland has in the rights and liabilities arising out of this occurrence that happened while plaintiff was a citizen of New York is not clear. If a state's interest is to be attributed to residence, the converse of the fact situation in *Gore* is especially interesting. What if decedent had been a New York resident whose only beneficiaries lived in Maryland and immediately after the crash they moved to New York? Would New York then be the state with the strongest interest?

24. In this regard the court relies on Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902 (1962), as an indication that the New York court would exercise restraint "in applying New York's own policies." That case disclaimed any finding of a public policy. Furthermore, though the case is post-*Kilberg*, it is pre-*Babcock* and was, therefore, decided before New York's unequivocal break with the traditional choice of law rule.

25. *Supra* note 13, at 54. The defendant is a Massachusetts corporation and an intended beneficiary of Massachusetts' policy of limiting recovery in death actions. In *Kilberg*, the New York court indicated that it would subordinate Massachusetts' interest; *Pearson* did. For an argument that the forum state should not subordinate its interest when its interest conflicts with another state see Currie, *The Constitution and the Choice of Law: Government Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958).

26. Babcock v. Jackson, 12 N.Y.2d 473, 480, 191 N.E.2d 279, 282 (1963).

27. The wrongful death statute has been compared to an insurance policy affording protection to the deceased resident. Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 46-47 (1959).

28. *In re* Thompson's Estate, 36 Misc. 2d 604, 231 N.Y.S.2d 718 (1962) (the rights are descendible and transferable); Kohn v. Bates, 194 Misc. 833, 87 N.Y.S.2d 537, *rev'd on other grounds*, 275 App. Div. 431, 90 N.Y.S.2d 391, (1949), *aff'd*, 300 N.Y. 722, 92 N.E.2d 60 (1950).

cording to the holding of this court, Dean's wife and children lost a right simply because they moved (deprived of decedent's income, perhaps they were forced to move) from New York. Interest is a many-faceted criterion which should have been dealt with less generally. Writing on an essentially clean slate, the courts should be particularly careful to explicitly identify the considerations of public policy and interest on which they base their determination, for they are essentially promulgating a new set of rules on choice of law. In determining public policy, the courts should recognize that much public policy is implicit in the law—not having demanded expression until now. In an applicable case, this public policy too should be expressly identified and explicitly considered.

Criminal Law—Double Jeopardy—Conviction of Greatcr Degree of Offense on Retrial

Defendant, after pleading not guilty to murder, moved that his counsel be discharged, changed his plea to guilty, and waived his right to trial by jury. The court found defendant guilty of murder in the first degree and sentenced him to life imprisonment.[1] The District Court of Appeals reversed on the grounds that the defendant was improperly allowed to withdraw his not guilty plea after his counsel had been ordered discharged.[2] The case was remanded for a new trial. In the second trial defendant pleaded not guilty, and the prosecution introduced evidence which had been withheld because of the waiver and guilty plea in the first trial.[3] The court found the defendant guilty of murder in the first degree and sentenced him to death. On appeal the California Supreme Court *held,* reversed. The character of the sentence establishes, for that degree of crime, the grade of punishment above which the defendant may not be sentenced upon subsequent retrial.[4] *People v. Henderson,* 35 Cal. Rptr. 77, 386 P.2d 677 (Sup. Ct. 1963).

Concerning the issue in the instant case, the vast majority of courts have followed the view that on appeal from a conviction of first degree murder and a sentence of life imprisonment, the defendant could be given the death sentence without violating the various double jeopardy provisions

1. People v. Henderson, 35 Cal. Rptr. 77, 386 P.2d 677 (Sup. Ct. 1963); Brief for Appellee, pp. 1-5.
2. People v. Henderson, *supra* note 1.
3. *Id.* at 86, 386 P.2d at 686 (dissenting opinion).
4. *Ibid.*

of the United States Constitution,[5] state constitutions, statutes, and the common law.[6] The reasoning of these courts is based on the idea that in such cases there was only one degree of the crime involved and the only controversy was over the punishment to be inflicted. Therefore, the reasoning continues, the determination of such penalty had nothing to with the guilt or innocence of the defendant for the degree of crime charged.[7] In support of this position, courts have pointed out that the protection afforded by the Constitution is only against a second trial for the same offence.[8] The ground work for the decision in the instant case was laid by *Green v. United States*,[9] in which the Supreme Court of the United States held that a man convicted of second degree murder cannot be convicted of first degree murder when granted a new trial.[10] Prior to that decision, there were opposing views on that particular issue.[11] The basis of the decisions allowing a conviction for a greater degree of murder on appeal from a lesser degree seems to be that when the defendant by his own motion asks for a new trial, he waives his objection to the second prosecution.[12] Courts supporting this view urge that the verdict of conviction should be treated as a single entity, that the new trial necessarily reopens the whole proceeding, and that the defendant cannot stand on part of the verdict and repudiate the rest.[13] A contrary result has been reached by many courts which reason that conviction of a lesser degree of an offense charged is tantamount to and operates as an acquittal of the greater offense, and that therefore the new trial must be for no greater degree than

5. Stroud v. United States, 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920); see also Murphy v. Massachusetts, 177 U.S. 155 (1900).

6. People v. Grill, 151 Cal. 592, 91 Pac. 515 (1907) (CAL. CONST. art I, § 13 (1879), incorporates the doctrine of double jeopardy into California law); State v. Kneeskern, 203 Iowa 929, 210 N.W. 465 (1926) (double jeopardy protection eminated from IOWA CODE §§ 4728-31 (1897); Greer v. State, 62 Tenn. 321 (1854) (this case demonstrates that double jeopardy is incorporated in the law of Tennessee through the common law); MASS. ANN. LAWS ch. 263, §§ 7-8A (1956). *But see* 38 DICK. L. REV. 276 (1934).

7. Stroud v. United States, *supra* note 5; State v. Kneeskern, *supra* note 6; 24 MINN. L. REV. 522, 537 (1940). *But see* 38 DICK. L. REV. *supra* note 6.

8. Stroud v. United States, *supra* note 5; *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

9. 355 U.S. 184 (1957).

10. *Id.* at 198 (of course, this is only highly persuasive authority as far as state courts are concerned).

11. People v. Henderson, *supra* note 1, at 686; 36 N.C.L. REV. 485, 488 (1958) (citing sixteen states that hold in accord with the *Green* case and sixteen states that hold opposite).

12. Ball v. United States, 163 U.S. 662 (1896); Miller v. United States, 224 F.2d 561 (5th Cir. 1955); Morgan v. State, 35 Tenn. 475 (1856); 1 BISHOP, CRIMINAL LAW § 998 (9th ed. 1923); 1 WHARTON, CRIMINAL LAW § 396 (12th ed. 1932); 24 MINN. L. REV. *supra* note 7, at 534.

13. Trono v. United States, 199 U.S. 521, 531, 534 (1905) (when defendant at his own request "has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case."); Brantley v. State, 132 Ga. 573, 575, 64 S.E. 676, 677 (1909); State v. Correll, 229 N.C. 640, 50 S.E.2d 717 (1948).

that for which defendant was convicted at the first trial.[14] Thus, they reason, the defendant does not waive his right to be secure against a second prosecution.[15] The Supreme Court, by a five to four decision, in the *Green* case accepted the latter reasoning. The Court expressed the opinion that the defendant does not have to barter his constitutional protection against a second prosecution for a higher offense in order to appeal from a conviction of a lesser offense. The Court then ruled that a defendant should not be forced into the dilemma of accepting a verdict he feels to be erroneous or risking an appeal on which he could be convicted of a greater crime. Following from this reasoning is the conclusion that, while the defendant may voluntarily waive his right not be retried for the charge for which he was convicted, it is erroneous to think that the defendant voluntarily waives the right not to be retried on the degree of crime for which he was acquitted.[16]

In the instant case, Judge Traynor extends the reasoning of the Court in the *Green* case to cover situations where, on retrial, a greater punishment is imposed for the same conviction. The court reasoned that "it is immaterial to the basic purpose of the constitutional provisions against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime."[17] The result seems to be the same in both types of cases. If, on appeal from an erroneous judgment and life imprisonment sentence, the defendant can be sentenced to death he may be forced by such risk to allow the erroneous judgment to stand. The court emphasized that the decision in the *Green* case destroyed the basis on which most courts had allowed the imposition of a greater sentence at a second trial for the same offence.[18] Judge Traynor's *ratio decidendi* seems to have been the public policy consideration that a defendant should not have to face any risk in appealing a conviction which he feels is erroneous.[19]

There are technical reasons for extending the holding of the *Green* case to the facts involved in the instant case: a man tried and convicted of first degree murder and sentenced to life imprisonment is acquitted of the capital grade of the crime;[20] and a man does put his life in jeopardy by appealing from a murder conviction with a life sentence if, at the new trial, he can be sentenced to death. However, the great body of case law

14. People v. Gilmore, 4 Cal. 376 (1854); Slaughter v. State, 25 Tenn. 410 (1846); Jones v. State, 13 Tex. 168 (1854).

15. 24 MINN. L. REV., *supra* note 7, at 537.

16. Green v. United States, *supra* note 9, at 197.

17. People v. Henderson, *supra* note 1, at 86, 386 P.2d at 686.

18. *Ibid.*

19. *Ibid.*

20. But the Supreme Court in the *Green* case stated that such a case as the instant one is distinguishable from their decision. Green v. United States, *supra* note 9, at 195.

pointing clearly the other way indicates that the reasons for a holding opposite that of the instant case have been highly persuasive to many courts.[21] Supporting this large body of case law are sound public policy reasons which oppose the result reached in this case. One of the greatest effects of this decision, if extended to all types of sentences, would be to make appeal virtually automatic, thus clogging the already over-burdened appellate courts.[22] A further result of the decision would be to force prosecuting attorneys to be more assiduous when prosecuting a case where a defendant who deserved the death penalty[23] had pleaded guilty and waived jury trial than is now the practice.[24] Also the trial courts would have to take more time when determining sentence and would possibly have to be stricter in such cases, rather than giving a more lenient sentence in exchange for a short trial.[25] Another argument against the instant decision is that here a savage murder was comitted by the defendant, and he escaped the death penalty, not because of any mitigating circumstances, but by outwitting the trial court.[26] Perhaps this decision is best justified when limited to cases involving capital punishment. If so limited, the clog on our court system will not be as burdensome, and the decision of the instant case will not bear so greatly against precedent. Justification becomes more difficult if the instant decision is extended to crimes involving less than capital punishment, for an extra year, or even five years, is not such an inhibition of appeal as is the chance of receiving the death penalty. This question is not specifically treated by the instant case, and whether it can be said that a man sentenced to fifteen to twenty years has been acquitted of a sentence of twenty to twenty-five years still seems to be an open question.[27]

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21. See notes 5 and 6 *supra*.

22. 24 MINN. L. REV., *supra* note 7, at 562.

23. The word "deserve" is used in light of the assumption that the death penalty is in effect and justifiable. The debate as to its justification is beyond the scope of this article.

24. For discussion of public prosecutor's discretion see SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND ADMINISTRATION OF CRIMINAL JUSTICE 10-20 (1961).

25. *Id.*

26. For detail of the crime for which appellant was convicted, see Brief for Appellee pp. 5-20, People v. Henderson, *supra* note 1.

27. For a basis of such a limitation, the instant case should be compared with Hicks v. Commonwealth, 185 N.E.2d 739 (Mass. 1962) (where the court distinguishes the *Green* decision and allows on retrial a sentence of three to seven years when the original sentence had been two to seven years).

Federal Rules of Civil Procedure—No Requirement that Agent Appointed To Receive Service of Process be Expressly Bound To Give Notice to Principal

Plaintiff, a Delaware corporation with its principal place of business in New York City, was engaged in a nationwide business of equipment rentals. Defendants, two Michigan farmers, leased two incubators from plaintiff. The lease agreement, a standard printed form used extensively by plaintiff, was slightly less than one and one-half pages long and consisted of eighteen numbered paragraphs. The last of these designated Florence Weinberg as defendant's agent to receive service of process in New York State.[1] Plaintiff subsequently instituted suit in the federal district court in New York on the basis of diversity of citizenship, alleging that defendants had breached the lease agreement. Personal service was made on Mrs. Weinberg as the appointed agent of the defendants within Rule 4(d)(1) of the Federal Rules of Civil Procedure.[2] Mrs. Weinberg promptly sent notice of the impending litigation to the defendants. Defendants' attorney appeared specially and moved that the summons be quashed, urging (1) that the service was insufficient because Mrs. Weinberg was not required by the contract to give defendants notice of any service made on her as their agent; and (2) that the agency was invalid because Mrs. Weinberg had a conflict of interest.[3] The district court sustained defendants' motion,[4] and the court of appeals affirmed.[5] On certiorari in the United States Supreme Court, *held*, reversed. In private contracts appointing an agent to receive service of process within Rule 4(d)(1), there is no requirement, under either federal or New York law, that the agent expressly be bound to give notice of the service to the defendants. *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

1. The last paragraph read as follows:
"This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first street, Long Island City, N.Y., as agent for the purpose of accepting service of any process within the State of New York."

2. "(d) Summons: Personal Service. The summons and complaint shall be served together. . . . Service shall be made as follows:
"(1) Upon an individual other than an infant or an incompetent person . . . by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4.

3. Defendants contended that the conflict of interest arose from the fact that Mrs. Weinberg was the wife of an officer of the plaintiff corporation and was not personally known to them.

4. National Equip. Rental, Ltd. v. Szukhent, 30 F.R.D. 3 (E.D.N.Y. 1962).

5. National Equip. Rental, Ltd. v. Szukhent, 311 F.2d 79 (2d Cir. 1962). Noted in 40 U. DET. L.J. 543 (1963); 65 W. VA. L. REV. 338 (1963).

Since 1789, when the First Congress passed the Judiciary Act[6] establishing our system of federal courts, there has been a continuing debate over what law they will apply.[7] *Swift v. Tyson*,[8] the Supreme Court's first real attempt to solve this problem, said that a federal court trying a diversity suit must apply federal substantive law and state procedural rules. In 1937 and 1938, the whole body of law that had developed around *Swift v. Tyson* was reversed. The Federal Rules of Civil Procedure[9] were passed, making federal procedure operative in all federal courts.[10] On April 25, 1938, *Erie R.R. v. Tompkins*,[11] expressly overruled *Swift v. Tyson* and held that state substantive law and federal procedural rules were to be applied by federal courts in diversity cases.[12] The practice of some federal courts of making formalistic distinctions between procedural matters and substantive law was disapproved by the Court's holding in *Guaranty Trust Co. v. York*.[13] If a state rule, even though classified as procedural, would determine the outcome of the suit, it should be considered as state substantive law[14] and must be followed.[15] The *Erie* doctrine, as it was clarified by

6. 1 Stat. 73 (1789).

7. Section 34 of the Judiciary Act of 1789, the Rules of Decision Act, provided that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trial at common law in the courts of the United States in cases where they apply." 1 Stat. 92 (1789).

8. 41 U.S. (16 Pet.) 1 (1842).

9. The Federal Rules were promulgated on December 20, 1937, and became effective on September 16, 1938. It is interesting to note that the decision of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), came in between these two dates, being decided on April 25, 1938.

10. The Enabling Act, 28 U.S.C. § 2072 (1959).

11. 304 U.S. 64 (1938).

The writings on *Erie* are voluminous. See, *e.g.*, Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957).

12. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law." Erie R.R. v. Tompkins, *supra* note 9, at 78 (Brandeis, J.). See WRIGHT, FEDERAL COURTS § 60 (1963), for a discussion of the present day validity of this statement.

13. 326 U.S. 99 (1945).

14. "If the law does 'significantly affect the result of a litigation' and 'the outcome of the litigation,' it constitutes the substantive law of the State and should be followed. However, if it 'concerns merely the manner and the means by which the rights of the parties are determined, it is the procedural or adjective law of the State and need not be followed.'" Occidental Life Ins. Co. v. Kielhorn, 98 F. Supp. 288, 293 (W.D. Mich. 1951). See also Dam v. General Elec. Co., 144 F. Supp. 175, 179 (E.D. Wash. 1956).

15. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (federal courts bound in a diversity suit to follow old Vermont authorities refusing to honor arbitration clauses in contracts between litigating parties); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (state law held to control when it was in conflict with rule 3);

Guaranty Trust,[16] was again recast by the Court's holding in *Byrd v. Blue Ridge Rural Elec. Co-op.*[17] that, if there was a prevailing federal policy supporting the use of a federal rule (and to follow a state rule would disrupt the federal policy), then the federal policy must govern.[18] The *Erie* doctrine, as it has subsequently been defined and clarified, has had a profound effect upon the application and operation of the Federal Rules of Civil Procedure.[19] The Federal Rules were conceived with the intention of promoting uniformity of procedure among the federal courts,[20] but with the advent of *Erie* this idea of uniformity has disappeared in many instances—notably, in situations where the federal jurisdiction is based on diversity of citizenship.[21] This problem arises from the fundamental conflict between the underlying policy of the Federal Rules and the goal sought to be attained by *Erie*. The policy of the Federal Rules is to strive for uniformity within all federal district courts, while the *Erie* decision sought to bring about uniformity of all courts sitting within the same state.[22] The cases of *Guaranty Trust*[23] and *Byrd*[24] were attempts by the Supreme Court to adjust the two views, reduce the conflict to a minimum, and still attain these two different types of uniformity. Thus, the test has evolved into

Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) ("Where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court."); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (held state rule superior when it was in conflict with rule 23).

16. *Supra* note 13.

17. 356 U.S. 525 (1958).

18. In Byrd v. Blue Ridge Elec. Co-op., *id.* at 537-38, the Court found the controlling federal policy to be that of "allocating functions between judge and jury." See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 513 (2d Cir. 1960) (the court found the federal policy to be "that they [the parties] are entitled to the essentials of a trial according to federal standards"); Monarch Ins. Co. v. Spach, 281 F.2d 401, 407-08 (5th Cir. 1960) (Federal Rules and policy of uniformity within federal courts); Odedirk v. Sears Roebuck & Co., 274 F.2d 441 (7th Cir.), *cert. denied*, 362 U.S. 974 (1960); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

19. Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946); see also cases cited *supra* note 15.

Most commentators have felt that the *Erie* doctrine has seriously impaired the Federal Rule's policy of uniformity within all federal courts. See Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950).

20. United States v. Schine Chain Theatres, 1 F.R.D. 295, 307 (W.D.N.Y. 1940); "These rules govern the procedure in the United States district courts in all suits of a civil nature. . . ." FED. R. CIV. P. 1.

21. Note 19 *supra*.

22. The fundamental purpose underlying diversity jurisdiction was to insure a non-resident a fair trial, free from local bias, Guaranty Trust Co. v. York, *supra* note 13, at 111-12; Bank of the United States v. Deveaux, 9 U.S. (5 Cranch.) 61, 87 (1809), while *Erie* sought to protect the local resident from "forum shopping" by the non-resident—the result should be the same whether the suit is in a state court or a federal court.

23. *Supra* note 13.

24. *Supra* note 17.

following a valid state policy[25] unless there is a prevailing federal policy, at which time the state policy must yield to the federal rule.[26] Consequently, it has been held that the basis of the federal courts' jurisdiction is to be decided by federal law,[27] while state law controls any question of the amenability of a defendant to service of process in a diversity suit.[28] After this issue is decided, there remains the further question of the sufficiency of the service of process. Although this question has never been squarely decided by a federal court, it has usually been said that it should be governed by standards of federal law because of the superiority of the federal policy of uniform procedural rules among federal courts over any state service-of-process rule.[29] Although it is well settled that a person may consent to the jurisdiction of a court and thereby waive any objections to that court's lack of jurisdiction or to his own amenability to suit therein,[30] such consent to jurisdiction does not constitute a waiver of objections addressed to the validity of the service of process. It is submitted that a person could consent to jurisdiction and make himself amenable to suit by appointing an agent to receive service of process, yet the service on his agent could still be invalid because of improper service or a defect in the agency appointment.

In the instant case, the Court disposed of the defendant's allegation of invalidity of the agency appointment on the grounds of conflict of interest by holding that, where, as here, the scope of the agent's authority is so limited, it can not be seriously contended that it is in conflict with the defendant's interest in prompt notification.[31] The Court further held that, in private contracts appointing an agent to receive service of process within Rule 4(d)(1), there is no require-

25. See cases cited *supra* note 15.

26. See cases cited *supra* note 18.

27. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941); Kresberg v. International Paper Co., 149 F.2d 911, *cert. denied*, 326 U.S. 764 (1945) (classifying jurisdiction as a federal question).

28. The states have a valid policy in determining what persons are amenable to suit within their jurisdictions which they have expressed in their statutes. "[W]e find no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule. State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations. . . ." Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963). See cases cited in *Arrowsmith*, at 223, for other authorities on this issue; and for cases *contra*, see citations in Justice Clark's dissent at 234, 242-44.

Federal law is important on one aspect of the question of amenability to suit in a diversity case, for it places a constitutional limitation on the state's exercise of its jurisdictional power. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE 695-96 (Wright rev. 1960).

29. 1 BARRON & HOLTZOFF, *op. cit. supra* note 28, at 697, 701 and cases cited therein.

30. Kenny Constr. Co. v. Allen, 248 F.2d 298 (2d Cir. 1956).

31. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 317-18 (1964).

ment that the agent expressly be bound to give notice of the service to the defendants.[32] Where the requirement of notice is absent from such a contract, the agent's acceptance of the summons and his prompt notification of the principal will validate the authorization.[33] The Court stated that even if the qualifications of an "agent" within Rule 4(d)(1) should be determined by applicable state law, the appointment would still be valid[34] because the New York statute authorizing appointment of an agent does not mention a notice requirement.[35] By such a rationale, the Court avoided resolving the question of whether state or federal law was determinative—a consideration the dissenting opinions felt controlling. By way of dissent,[36] Mr. Justice Black urged that New York law was determinative because there was no federal policy to be promoted, and also because that was the law the parties had designated to govern the contract.[37] Basing his decision on New York law, as interpreted by *Rosenthal v. United Transport Co.*,[38] he felt that the agency authorization would have been invalid.[39] Mr. Justice Brennan also dissented[40] but favored the formulation of a uniform federal standard which would define "agent" within Rule 4(d)(1). He would invalidate the appointment where the agent was not required by the contract to give prompt notice[41] and where there was a conflict of interest.[42]

In making a determination of the law applicable to a particular issue in a diversity case, the federal courts are often confused and uncertain. Especially is this uncertainty present when the issue involves the Federal Rules. How can the courts promote the policy of uni-

32. *Id.* at 316.
33. *Ibid.* See also 2 WILLISTON, CONTRACTS § 274 (3d ed. 1959).
34. National Equip. Rental, Ltd. v. Szukhent, *supra* note 31, at 316-17.
There is a conflict of opinion whether the appointment would be valid under New York law. See *infra* note 39 for a discussion of this question.
35. N.Y. GEN. BUS. LAW § 220.
36. 375 U.S. at 318.
37. *Id.* 321-22. See also the contract clause quoted note 1 *supra.*
38. 196 App. Div. 540, 188 N.Y.S. 154 (1921).
39. The *Rosenthal* case was based on the forerunner of § 227 of the Civil Practice Act which sets forth the procedure by which a resident of New York may appoint an agent to reeeive serviee of process. *Rosenthal* held that it applied only to residents of the state who have subsequently left the state, and then only when the designation had bcen filed as required by the statute. Mr. Justice Black construed the case as holding that a non-resident could not appoint an agent in New York to receive service of process. See the majority's answer to Mr. Justice Black's argument at 317 n.8. See also National Equip. Rental, Ltd. v. Graphic Art Designers, Inc., 36 Misc. 2d 442, 234 N.Y.S.2d 61 (1962), which held valid in that case the very same contract clause that is in issue in the instant case, and Phillips v. Garramore, 36 Misc. 2d 1041, 233 N.Y.S. 2d 842 (1962), which upheld an agency authorization by a non-resident very similar to the one in the instant case.
40. 375 U.S. at 333.
41. *Ibid.*
42. *Ibid.*

formity sought by the Federal Rules without infringing upon the *Erie-Guaranty Trust-Byrd* doctrine? The decision can no longer rest upon the drawing of an imaginary line between those things which are "procedural" and those which are "substantive", as *Erie* drew it, but must be decided by the application of the definition of substantive law as promulgated by *Guaranty Trust*[43] and affirmed and qualified by *Byrd*.[44] The Federal Rules represent a valid federal policy and they should be followed whenever they will not interfere with the enforcement of a state-created right. Rule 4 sets out in detail the method by which service is to be made. This function should be governed by a federal standard so as to achieve the uniformity sought by the Federal Rules.[45] The definition of who may qualify as an appointed agent to receive service should also be a part of this federal standard since it bears directly on the sufficiency of the service. If the process is served on a person not the properly appointed agent, the service is incomplete, and the court cannot properly function to enforce the rights of the parties. The decision in the instant case was, unquestionably, correct; however, the Supreme Court could have removed some of the confusion in this area by making a definite statement as to the applicability of the federal standard.

Labor Law—NLRA—Union's Duty To Represent Fairly

The plaintiff's employer, Dealers Transport, absorbed the Louisville operation of defendant's employer, E. & L. Transport. Plaintiff lost his job when the seniority lists of the two firms were dovetailed by a decision of the Automobile Transporters Joint Conference Committee.[1] The collective bargaining agreement provided that the Joint Committee was the apex of the joint grievance procedure,[2] and that

43. *Supra* note 13.

44. *Supra* note 17.

45. It will be noted that Rule 4(d)(7) provides for the service of process to be made in any matter authorized by the state. When service is made under that section, it is without question that state standards as to the sufficiency of the service should be controlling.

1. The Automobile Transporters Joint Conference is composed of representatives of the union and management. The former is represented on the Joint Committee by the National Truckaway and Driveaway Conference and the latter by the Automobile Transporters Labor Division.

2. The following is the collective bargaining agreement between the Automobile Transporters Labor Division and National Truckaway and Driveaway Conference, article 7, section 2(d), as quoted at 375 U.S. 335, 338 (1964). "It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony on both sides, shall make a decision."

its decision was final and binding.[3] Plaintiff argued that Dealers had not absorbed E. & L. within the meaning of article 4 of the collective bargaining agreement[4] and that the Joint Committee was delegated only the authority to determine seniority, not jobs.[5] Plaintiff further argued that, because the settlement was beyond the Joint Committee's power, his discharge was a violation of the collective bargaining agreement.[6] Moreover, plaintiff alleged that the union breached its duty of fair representation,[7] because the local union president had deceitfully represented to plaintiff that his job was secure but had subsequently recommended to the Joint Committee that the seniority lists be dovetailed, thereby causing plaintiff to lose his job. The union president had assured plaintiff that his job was not in jeopardy but later learned that the transaction between Dealers and E. & L. was an absorption within the collective bargaining agreement, and that dovetailing seniority lists was therefore required. Since E. & L. was an older company whose employees, including defendant, had more seniority than those of Dealers, plaintiff and other employees of Dealers were laid off. Plaintiff sued, alleging a violation of the collective bargaining agreement, in a Kentucky state court, and was granted an injunction[8] preventing the union and the company from carrying out the decision of the Joint Committee. The Supreme Court of Kentucky affirmed. On appeal to the Supreme Court of the United States, *held*, reversed. Federal

3. An award by a grievance committee, which is final and binding under the terms of the collective bargaining agreement, will be enforced by the court. Local 89, General Drivers v. Riss & Co., Inc., 372 U.S. 517 (1963).

4. Article 4, section 5, reads as follows: "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure." As quoted at 375 U.S. 335, 338 (1964).

5. "[S]eniority rights for employees shall prevail" and "any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure. . . ." Article 4, section 1. As quoted at 375 U.S. 335, 337-38 (1964).

6. Section 301(a) of the Labor Management Relations Act, or Taft-Hartley Act, as it is commonly called, states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

7. "By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). The Union must make an effort to serve the interests of its membership with "complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

8. The state court was not pre-empted from enjoining the union and the employer

law, controlling an action in state courts arising under section 301 of the Labor Management Relations Act, gives wide discretion and latitude to the parties when they interpret their own collective bargaining agreement; plaintiff stated a cause of action under section 301 of the LMRA but failed to prove his claim that he had not been fairly represented. *Humphrey v. Moore,* 375 U.S. 335 (1964).

Section 301 of the LMRA[9] is the basis for concurrent federal and state court jurisdiction[10] in cases of an alleged breach of the collective bargaining agreement. A federal common law[11] has developed to fulfill the congressional mandate of judicial enforcement of such agreements.[12] An individual or a union has a cause of action under section 301 of the LMRA even though the facts would also support an action for unfair labor practice within the National Labor Relations Board's primary jurisdiction.[13] A recent Supreme Court decision clearly enunciated the background of the court's opinion in the instant case.

> The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievanee and arbitration machinery, are to a large degree inevitably intertwined with union interests, and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.[14]

An individual employee must be fairly represented by the exclusive bargaining agent and must be given an opportunity to be heard when he has a grievance. The union's duty fairly to represent its members has been found in several different situations under federal statutes; the instant case finding such a duty under section 301 of the LMRA and deciding that if the obligation is not met, then the collective bargaining agreement cannot be enforced to curtail the individual employee's rights. The duty of fair representation is also required under the Railway Labor Act and the National Labor Relations Act, and it is concommitant with the

by the doctrine of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

9. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

10. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

11. "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). See also Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301,* 66 YALE L.J. 167 (1956).

12. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). See also Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327 (1958).

13. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). See 16 VAND. L. REV. 1252 (1963).

14. Smith v. Evening News Ass'n, *supra* note 13, at 200.

authority to negotiate concerning the rights of workers. Although these statutes established administrative agencies to deal with many labor matters, *Steele v. Louisville & N.R.R.*[15] held that an individual worker had a cause of action arising under the federal statute enforceable in a state or federal court, when he was discriminated against by the bargaining representative.[16] However, a breach of the union's duty of fair representation may be imputed to the employer as an unfair labor practice if the breach is related to union membership, loyalty, the acknowledgement of union authority or the performance of union obligations, in violation of section 8 of the NLRA. Such a violation would be an act committed by either the union or the employer, the natural and forseeable consequence of which would be beneficial or detrimental to the union.[17] A collective bargaining agent has broad statutory authority,[18] and so long as he acts reasonably and fairly there are no grounds for a charge that a union committed an unfair labor practice coming within the initial jurisdiction of the NLRB.[19] In *Ford Motor Co. v. Huffman*,[20] the Court set out the bargaining agent's authority as contained in sections seven and nine of the NLRA.[21] The Court noted that Congress had expressed its faith in "free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees."[22]

A bargaining representative does not have absolute authority. A union must honestly and without hostility serve the interests of all

15. 323 U.S. 192 (1944).

16. "The duties of a bargaining agent selected under the terms of the Act [NLRA] extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944).

17. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). Although this case was decided under the Railway Labor Act, it is cited by the Court as an example of the requirement for fair representation in cases under the NLRA. Therefore, the same requirement is present in both acts. See, *e.g.*, Syres v. Oil Workers Union, Local 23, 350 U.S. 892 (1955). See also Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952).

18. "Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). See also Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 606 (1955). NLRA Section 8(d): "For the purpose of this section, to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . ." 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

19. Ford Motor Co. v. Huffman, 345 U.S. 330 (1952).

20. *Ibid.*

21. *Ibid.*

22. *Id.* at 337. See also note 18 *supra*.

its members.[23] An employee has a federal right to fair representation, a right derived from the bargaining representative's duty and implied from the statute and its underlying policy.[24] The duty of fair representation implicit in section nine is breached by a union's unfairness to an employee acquiesced in by the employer, but this is not an unfair labor practice under section 8, unless it tends to encourage union membership.[25] Not all personal rights may be vindicated through a lawsuit or proceedings before the NLRB. Section 203(d) of the LMRA states, "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . ."[26] The individual stating a cause of action under section 301 may sue, but when his bargaining unit has provided either for negotiations that have finality or for conclusion by an arbitrator, the contract is specifically enforceable. The congressional policy of section 203(d) can be carried to fruition only by allowing the parties a broad interpretation of their agreement.[27] It is inevitable that the terms of a negotiated agreement will affect individual employees differently, but this alone does not make an agreement invalid, since it would be unrealistic to expect each individual represented by a bargaining agent to be completely satisfied with each agreement. Therefore, "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[28]

23. *Id.* at 337.

24. *Supra* note 19. The union's broad power as exclusive bargaining agent is equalled in scope by its responsibility and duty to represent fairly all those affected by the collective bargaining agreement.

25. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

26. "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator . . . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is . . . particular language in the written instrument which will support the claim." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); General Drivers Union, Local 89 v. Riss & Co., 372 U.S. 517 (1963); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247 (1958).

27. Both the individual worker and his employer are bound, even though they prefer a different arrangement. Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850 (1957). A bargaining representative has the quasi-legislative power to restrict the rights of those whom it represents. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

28. NLRA section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958). NLRA section 9(a): "Representatives designated or selected

In the instant case the Court found that plaintiff alleged a violation of the collective bargaining agreement under section 301(a) of the LMRA[29] within the cognizance of federal and state courts. The Court found that plaintiff failed to prove dishonesty and breach of duty by the union that would invalidate the decision of the Joint Committee. The basis of the finding of no dishonesty was that three shop stewards had represented the employees of Dealers before the Joint Committee, thus protecting plaintiff's right to be heard and to be represented fairly. The Court took the position that the collective bargaining agreement was fixed as it was written, subject to reasonable interpretation, but not modification, by the Joint Committee, even though the parties to the agreement composed the Joint Committee. The Court restricted the Joint Committee in the same manner as it would have restricted the authority of an impartial third party, an arbitrator, who was called upon to interpret the collective bargaining agreement. The Court concluded that the Joint Committee did not act beyond its authority because power over seniority[30] gave it power over jobs and also authority to dovetail the seniority lists on a rational basis, such as length of service at either company. This solution was neither unique nor arbitrary, but one familiar and frequently used when an absorption or merger precipitates conflicting interests among employees.[31] Mr. Justice Goldberg, concurring in the judgment, did not agree that plaintiff stated a cause of action arising under section 301(a) of the LMRA. He said that Moore's claim must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived from the NLRA, not from the collective bargaining contract.[32] Goldberg continued that, when an employer and a union reach a mutually acceptable grievance settlement as was done by the Joint Committee, an individual employee may not dissent under section 301(a) "on the ground that the parties exceeded their contractual powers in making the settlement," because the parties may modify, amend and

for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

29. *Supra* note 13.

30. *Supra* note 4.

31. Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962). "Integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer . . . ." Kahn, *Seniority Problems in Business Mergers*, 8 IND. & LAB. REL. REV. 361, 378 (1955). NLRB v. Whelan Co., 271 F.2d 122 (6th Cir. 1959); Kent v. Civil Aeronautics Bd. 204 F.2d 263 (2d Cir. 1953).

32. 375 U.S. at 351 (concurring opinion).

supplement their agreement.[33] Moreover, he said, "the grievance procedure is . . . a part of the continuous collective bargaining process."[34] Mr. Justice Goldberg concluded that federal common law will not reflect the realities of industrial life if the parties' power to settle grievances is limited to the confines of the existing labor agreement and the parties may not make a settlement that goes "beyond the strict terms of the existing contract."[35]

A union must be able to enforce the collective bargaining agreement against the employer and also have the power to bind its members to the agreement and to subsequent adjustments of grievances thereunder. This does not prevent an individual employee from bringing a grievance before his employer directly or from suing for breach of the collective bargaining agreement as an individual plaintiff. Individual presentation of grievances facilitates good industrial relations, but suits by single union members should be reserved for personal claims where there is a great danger of unfairness to the individual.[36] This follows from the union's duty and authority to represent the individual workers in a particular industry. Only when the union fails to discharge this duty is individual action proper. The standard of fairness to be applied is a product of the collective bargaining process. The development of the collective bargaining agreement gradually fills gaps unforeseen at its inception in a manner contrary to the notion that a relationship has a constant legal meaning which may be ascertained by interpreting the already existing collective bargaining agreement. When an agreement is static, the validity or impropriety of a particular claim can be applied to a fixed standard for final determination. Where a collective bargaining agreement is involved, however, the major premise to which all disputes are referred is subject to constant change, because the parties involved may renegotiate their agreement. It is not difficult to ascertain whether a compromise was reached through a fair bargaining procedure, but as long as there is negotiation in which individual substantive rights are subject to the interest of the group as a whole, the question of whether or not an individual has been treated fairly may be difficult to determine. There is no problem in ascertaining whether the standard of fairness was met in a *Steele*[37] type fact situation, but when the inevitable compromise of grievances is made by the collective bargaining representative, individual rights are necessarily affected.

33. 375 U.S. at 352 (concurring opinion).
34. 375 U.S. at 355, quoting United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960).
35. 375 U.S. at 355 (concurring opinion).
36. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).
37. See note 15 *supra*.

The union must balance group interests against the claims of an individual. In the instant case the claim may have been sufficiently personal to warrant an individual suit by the employee under the NLRA as suggested in Goldberg's concurrence as well as a suit under section 301(a) as held by the majority. The practical value of the right to fair representation or the right to bring an action to enforce the collective bargaining agreement under section 301(a) is, however, weakened by the individual's lack of financial strength. This weakness directly affects his ability to obtain skilled legal services and to sustain a successful court action. Furthermore, "the aggrieved employee's ability to proceed in court against the employer is seriously limited by the usual arbitration provisions which only the union can enforce . . . and an action by him against either the employer or the union is likely to encounter the primary jurisdiction and 'arguably subject' doctrines so that he must make an excursion to the Board in any event" to exhaust his administrative remedies.[38] The individual might worsen his position, rather than advance it, even though he has a bona fide action. Another possible side effect of individual suits is a subsequent shirking of responsibility by union officials. They might fail to advance worthy claims under the guise of legal remedies readily available to the employee in lieu of the grievance procedure. On the other hand they might fail to discountenance unworthy claims because they lack power to effectuate their decisions.[39] The ultimate problem of establishing a well coordinated, just, and efficient means of redressing grievances is best resolved by the full development of the collective bargaining process. This requires that settlements reached betwcen an employer and a union have finality at the earliest practical stage of the grievance procedure. It is axiomatic that reliance on law-suit protection of employees' rights is futile without an effective grievance procedure. If the rights of individual employees are held to be vested after the collective bargaining contract has been negotiated, and such rights may not be altered by the employer and the bargaining representative, then the effectiveness of the grievance procedure has been impaired.

38. NLRB v. Miranda Fuel Co., 326 F.2d 172, 186, n.7 (2d Cir. 1963) (Friendly, J., dissenting).

39. See text preceding note 35 *supra*.

Labor Law—Walsh-Healey Act—Secretary of Labor Not Authorized To Set More Than One Prevailing Wage

The Secretary of Labor gave notice[1] that a hearing was to be held to determine the prevailing wages in the machine tools industry under section 1(b)[2] of the Walsh-Healey Act.[3] The Secretary determined one prevailing wage for one occupation within the industry and another[4] for all other "covered workers."[5] Plaintiffs, eleven manufacturers of machine tools, brought an action to void this determination on the grounds that the Secretary of Labor was not authorized by section 1(b) of the Walsh-Healey Act to set different prevailing wages on an occupational basis. On plaintiffs' motion for summary judgment, *held*, granted. The Secretary of Labor is not authorized under section 1(b) of the Walsh-Healey Act to set more than one prevailing wage for covered workers in an industry contracting with the United States Government. *Barber-Colman Co. v. Wirtz*, 224 F. Supp. 137 (D.D.C. 1963).

After the Supreme Court invalidated the National Industrial Recovery Act in 1935,[6] Congress immediately began the consideration of proposals that ultimately resulted in the Walsh-Healey Act. The same year, the Davis-Bacon Act, which regulated wages paid to workers engaged in construction for the government, was amended to provide for the fixing of minimum wages for the "*various classes* of laborers and mechanics" which wages are "to be prevailing for the corresponding *classes* of laborers and mechanics employed on projects of a character similar to the contract work." (Emphasis added.)[7] Also in 1935, the Senate passed a bill[8] to regulate suppliers of goods to the government, which used language very similar to

1. 26 Fed. Reg. 7550 (1961).
2. Walsh-Healey Act § 1(b), 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958).
3. Walsh-Healey Act, 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958).
4. The Secretary determined that the prevailing wage for employees' engaged in the occupations of blueprint machine operator and draftsman to be $1.65 an hour and set a wage of $1.80 an hour for all other occupations. 41 C.F.R. § 50-202.28 (1963).
5. "[T]he Act covers those employees, regardless of location of factories or departments, whose tasks are a part of and normally associated with the production of the contracted articles." Perkins v. Endicott Johnson Corp., 40 F. Supp. 254 (N.D.N.Y. 1941), *rev'd on other grounds*, 128 F.2d 208, (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943). The trend has been toward broadening the scope of coverage. At first, it was restricted to those workers engaged directly in production, but now it is being applied to those who are connected less with actual production.
6. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).
7. Davis-Bacon Act, 46 Stat. 1494 (1931), as amended, 49 Stat. 1011 (1935), 40 U.S.C. § 276(a) (1958).

the Davis-Bacon Act. The bill would clearly have allowed the Secretary of Labor to set multiple minimum wage rates by occupation. The House rejected this bill in committee and favorably reported a bill[9] whose wage provisions are identical with that of the Walsh-Healey Act as finally adopted. The Act provides "that all persons employed by the contractor . . . will be paid . . . not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries. . . ."[10] Since the Davis-Bacon Act is generally conceded to be the precedent for Walsh-Healey, it is significant that Congress rejected the language of Davis-Bacon presented to it by the Senate bill. The stable construction industry with its well-defined strata of employment is much more susceptible to multiple occupational minimum wages than are the more diversified industries engaged in supplying goods to the government.[11]

The Davis-Bacon Act has been consistently interpreted to allow

8. "All persons employed . . . *in classes of employment* . . . [shall be paid] not less than sueh minimum *rates of pay* . . . as shall be designated specifically or by reference in the invitation to bid." (Emphasis added.) S. 3055, 74th Cong., 1st Sess. § 1 (1935).

9. H.R. REP. No. 2946, 74th Cong., 2d Sess. (1936).

At the hearings, Mr. John Gall for the National Association of Manufacturers opposed the Senate bill because of its wage provisions: "I think it clear from what the Secretary of Labor said here that she contemplates . . . the fixing of wages above the minimum, that is, in all classes of labor in a plant. . . . I submit [that] this bill should be confined to the prevention of sweatshop conditions by attention only to the minimum wage for the lowest paid class of labor. . . ." *Hearings on H.R. 11554 and S. 3055 Before the House Committee on the Judiciary*, 74th Cong., 2d Scss. 456 (1936).

Congressman Healey explained on the floor that the Act would not provide for establishing different minimum wages for different occupational classes of employees within an industry. "This bill does not set the standard for minimum wages by reference to the codes that obtained under N.R.A., but definitely sets it as *the prevailing wage* for similar work or in the industries operating in the locality in which the contract is to be performed. The bill merely provides for a proper determination by the Secretary of Labor with respect to *such prevailing wage.*" (Emphasis added.) 80 CONG. REC. 10002 (1936) (remarks of Congressman Healey).

10. Walsh-Healey Act § 1(b), 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958).

11. The argument is that to allow the establishment of occupational minima in the many industries supplying goods to the government would further complicate an already complex field. This argument loses some of its force when one considers that this plea for administrative simplicity is being made by the industry and not by the administrator.

In opposing Senator Fulbright's proposed amendment to § 1(b), which would have allowed the Secretary to establish different minima for each town or city, Senator Lodge made a similar argument. "The proposal to fix wages on a local basis, where the Secretary of Labor presently reaches a single minimum wage decision for an entire industry, would require the Secretary to make literally thousands of decisions in one industry alone. Multiply that by the number of industries covered by the Walsh-Healey Act and the number of individual decisions required of the Secretary

the setting of occupational minimum wages in the construction industry. However, the Secretary has, up until the instant case, consistently refused to set multiple occupational wages under section 1(b) of Walsh-Healey.[12] The first case to come before the Secretary of Labor after the adoption of the Act involved the problem of setting multiple minima for different occupations. There, Secretary of Labor Frances Perkins stated "that the act authorizes the fixing of only one minimum wage in an industry and does not permit the establishment of occupational minima."[13] However, under section 1(b) there have been established (1) different minima for different products or branches of an industry;[14] and (2) different minima for different geographical areas of an industry.[15] But this is different from setting occupational wages. Section 6, which the Secretary contends supports his action, provides in pertinent part that "the Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any and all provisions of . . . [this Act] respecting minimum rates of pay. . . ."[16] Under this language, tolerances in wages have been allowed for probationary workers,[17] learners and beginners,[18] and auxiliary workers or helpers.[19] But these situations are quite different from setting multiple minima by occupation for regular, experienced, covered workers.[20]

The court's reasoning in the instant case is based on the legislative

of Labor would run into astronomical figures. To attempt to fix wages on a city, town or village basis is simply an administrative absurdity." *Hearings on S. 2594 and S. 2645 Before the Senate Committee on Banking and Currency,* 82d Cong., 2d Sess. 2791 (1952).

12. Men's Hat and Cap Indus., 2 Fed. Reg. 1335 (1937). See also Comment, 48 YALE L.J. 610, 626 (1939).

13. Men's Hat and Cap Indus., *supra* Note 12.

14. Paper and Paperboard Containers and Packaging Prod. Indus., 28 Fed. Reg. 9048 (1963); Battery Indus., 28 Fed. Reg. 3071 (1963); Woolen and Worsted Indus., 19 Fed. Reg. 1930 (1954); Chemical and Related Prod. Indus., 15 Fed. Reg. 9238 (1950), Cotton Garment and Allied Indus. to the Manufacture of Wool and Wool-lined Jackets, 3 Fed. Reg. 896 (1938); Fireworks Indus., 3 Fed. Reg. 2370 (1938).

15. Bituminous Coal Indus., 28 Fed. Reg. 8044 (1963); Dimension Cranite Indus., 9 Fed. Reg. 6888, 6889 (1944); Evaporated Milk Indus., 6 Fed. Reg. 5074 (1941); Luggage and Saddlery Indus., 3 Fed. Reg. 1733 (1938). That the whole nation can be the "locality" see, Mitchell v. Covington Mills, 229 F.2d 506 (D.C. Cir. 1953), *cert. denied,* 350 U.S. 1002 (1956).

16. Walsh-Healey Act § 6, 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 40 (1958).

17. Evaporated Milk Indus., 6 Fed. Reg. 5074 (1941).

18. Woolen and Worsted Indus., *supra* note 14.

19. Bituminous Coal Indus., *supra* note 15; Uniform and Clothing Indus., 6 Fed. Reg. 646 (1941).

20. Obviously, learners, beginners, probationary and auxiliary workers are not the workers on which a prevailing wage in an industry is based. Generally, this type of worker is paid below the minimum wage, and they are considered as "sub-minimum" or "sub-normal" workers. See note 22 *infra.*

history and administrative practice concerning section 1(b) of the Walsh-Healey Act. The court accepts plaintiffs' contention that all previous cases in which the Secretary set multiple minima were decided under section 6 which provides for tolerances and variations from the prescribed minimum in certain unusual situations. The court reasoned that since the action was unauthorized under section 1(b), and the notice of hearing announced that the prevailing wage would be determined under section 1(b), the Secretary's action was unauthorized. The opinion does not answer plaintiffs' contention that the action could not be authorized under either section 1(b) or section 6, or both.

Although the court decided that section 1(b), independent of section 6, does not authorize the setting of multiple minima,[21] it may have decided that section 6 would have authorized the action taken.[22] If this is the case, the Secretary had the authority to set multiple minima, but merely went about it the wrong way. If this is the view of the court, the only infirmity in the Secretary's action was his failure to give proper notice under the Administrative Procedure Act,[23] which is made applicable by section 10 of the Walsh-Healey Act.[24] The Administrative Procedure Act requires that the notice include "reference to the authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[25] The court stated: "The fact is that at no time did the Secretary purport to be acting under the provisions of section 6 of the Act."[26] The plaintiffs claim that their rights to notice and a hearing under section 10 of the Walsh-Healey Act[27] were violated because the issue of occupational wages was not described in the Secretary's notice.[28] Therefore, there was

21. "[A]s a matter of law . . . the determination by the Secretary is not authorized by Section 1(b) of the Act under which the Secretary acted." 224 F. Supp. at 142.

22. The Plaintiffs' argue that section 6 was designed for the exceptional, "subnormal" wage situation. The cases so far have been limited to what is considered in industry as the "sub-minimum wage" workers such as learners and beginners and this justifies excluding them from the workers who go together to make up the "prevailing wage." The Seeretary argues, on the other hand, that he is authorized by the Act to make any exclusion or exemption which he sees fit. Excluding the lower paid workers from consideration in deciding the median wage has the effect of raising the "prevailing wage" for all the other workers.

23. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

24. 66 Stat. 308 (1952), 41 U.S.C. § 432 (1958).

25. Administrative Procedure Act § 4(a), 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1958).

26. 224 F. Supp. at 141.

27. 66 Stat. 308 (1952), 41 U.S.C. 43a (1958).

28. The notice of hearing stated the following issues: (1) the definition of the industry; (2) "what are the prevailing minimum wages in the industry"; (3) whether there should be an industry-wide wage determination or separate deter-

no opportunity to present evidence or to address argument to the legal grounds or reasons of the Secretary's action.[29] If the court meant by its decision that the action was authorized under section 6, it is submitted that the court was correct in holding the action invalid for failure to give notice of consideration under section 6.[30] The question remains, however, whether the Secretary could have done this under section 6. It is submitted that section 6 would not have supported the action taken by the Secretary. The Secretary's power to set occupational wages has always been used only for the exceptional situation. The court's decision may mean, as plaintiffs contend, that setting separate minima for regular covered workers is outside the scope of authority given in either section 1(b) or section 6. This argument is supported by the legislative history.[31] Since the occupational wage grouping language of Davis-Bacon[32] was expressly rejected by Congress and the single wage language of section 1(b) of Walsh-Healey[33] put in its place, Congress must have meant to establish only a single minimum wage for an industry. Section 6 has been interpreted to give certain limited exceptions to the general rule of section 1(b) for "sub-normal" workers in situations where industry usually provides for so-called "sub-minimum wages."[34] The consistent administrative practice of setting only one prevailing wage in an industry, with only limited exceptions permitted by section 6, has gone unchallenged by Congress even though it has considered proposals to amend the Act at virtually every session.[35] The basic purpose of the Act is "to use the leverage of the Government's

mination for separate geographic areas; (4) whether any determination should provide "for the employment of beginners or probationary workers at wages lower than the prevailing minimum wages." 26 Fed. Reg. 7550 (1961).

29. Since the notice stated that consideration was to be under section 1(b) and occupational wage determinations was not one of the issues, the industry was not prepared to argue occupational wages.

30. "This is not merely a matter of form, but is one of substance. . . . Under the notice of hearing given in this case, the industry was entitled to proceed on the assumption that the hearing would relate to all covered workers and that the evidence was to be presented on that basis." 224 F. Supp. at 142.

31. See notes 7, 8, 9, 10 *supra* and accompanying text.

32. Davis-Bacon Act, 46 Stat. 1494 (1931), as amended, 49 Stat. 1011 (1935), 40 U.S.C. § 276(a) (1958).

33. See text accompanying note 10 *supra*.

34. See notes 17, 18, & 19 *supra*.

35. The Portal to Portal Act, 61 Stat. 84 (1947), 29 U.S.C. §§ 251-62 (1959), was enacted in 1947 to supplement the wage provisions of the Walsh-Healey Act, the Davis-Bacon Act, and the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-219 (1958). Senator Fulbright's amendment in 1952 became section 10 of the Walsh-Healey Act, 66 Stat. 308 (1952), 41 U.S.C. § 43a (1958). Another amendment proposed at the same time by Senator Fulbright would have changed the language of section 1(b). It would have substituted for the word "locality" parallel language from Davis-Bacon. 98 CONG. REC. 4128 (1952).

immense purchasing power to raise labor standards."[36] Flexibility in determining the wages to be paid could, arguably, better enable the Secretary to fulfill the purpose of the Act by preventing "wage-chiseling" in the higher paid brackets. On the other hand, to deal with the many different industries ranging from manufacturers of soap to grenades and sheep-lined jackets to bituminous coal, with their thousands of ill-defined crafts and wage brackets, on an occupational basis could become so tedious and complex as to lead to injustice. In any case, occupational minima are unnecessary.[37] If the minimum wage is set at a certain level, all of the other wages are rated by long settled practices of seniority and collective bargaining agreements.[38] If this decision means that the action was authorized by section 6, it will have the effect of broadening the power of the Secretary to establish a tolerance or exception for the lower paid, regular, experienced workers, and thus take them out of the consideration in determining the prevailing wage. This would result in a higher minimum being set, making it even more costly to contract with the government.[39] If this decision means that the action here, as plaintiffs contend, was not authorized by any part of the Walsh-Healey Act, the effect is that the Secretary will have to set only one minimum wage for all covered workers and section 6 will continue to be limited to the exceptional sub-minimum wage situation.

36. Ruth Elkhorn Coals, Inc. v. Mitchell, 248 F.2d 635 (D.D.C. 1957), *cert. denied*, 355 U.S. 953 (1958), quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 (1943).

37. See note 11 *supra*.

38. Congressman Duffy of New York stated that it is "usually understood that the minimum wage, like the bottom rung of a ladder, affects all of the rates above it.... Men coming into a community want to know the wage for labor, and they know from that the upper scale." *Hearings on H.R. 11554 and S. 3055 Before House Committee on the Judiciary*, 74th Cong., 2d Sess. 456 (1936).

39. "It is clear that the final determination in this case was based upon evideuce which did not include all covercd workers. This failure to include . . . [all] covered workers in determining the prevailing wage was prejudicial to the industry and of necessity had the effcct of establishing a higher minimum wage. . . ." 224 F. Supp. at 142.

Torts–Right of Privacy–Reasonableness of Investigation of Personal Injury Claimant

Two recent decisions concerned alleged invasions of the privacy of personal injury claimants by investigators retained on behalf of the defendants in the personal injury actions. In Case 1, plaintiff sought injunctive relief and money damages for an invasion of privacy resulting from defendant's surveillance of her, during which plaintiff's activities were filmed by motion picture cameras.[1] The lower court denied plaintiff's claim for recovery. On appeal to the Supreme Court of Pennsylvania, *held*, affirmed. No action will lie for invasion of the right of privacy based on a reasonable investigation made in public areas. *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963).

Case 2 was an action for damages for an invasion of plaintiff's privacy based on defendant's constant shadowing at all hours of the day and night over a four-month period.[2] The trial court overruled defendant's demurrers and on appeal to the Court of Appeals of Georgia, *held*, affirmed. Plaintiff has an action for invasion of privacy where the conduct of the surveillance exceeds that which is necessary for the purpose intended and would be offensive to a person with normal reactions. *Pinkerton National Detective Agency, Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

The right of privacy—recognized in a majority of jurisdictions[3]—is divided by Dean Prosser into four distinct wrongs.[4] The two instant cases illustrate the first of these wrongs, "the intrusion upon the plaintiff's physical solitude or seclusion."[5] This invasion or intrusion

1. The motion pictures were taken of plaintiff on four separate occasions while she was driving on a public street. Defendant was a private detective employed by an insurer for a party against whom plaintiff had filed a complaint for injuries suffered in an automobile accident.

2. This shadowing included eavesdropping around plaintiff's home, cutting a hole through her hedge and observing her through said opening, calling at her home under the pretense of being salesmen, and following her closely in other public places. This surveillance was a result of plaintiff's filing a personal injury action against defendant's employer. The privacy action was also brought against the insurance company which represented the defendant in the personal injury action, but the appeal is basically concerned with the action against the defendant detective agency who investigated the plaintiff's activities.

3. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960). For other detailed accounts of the history and development of this right, see Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Hamilton v. Lumbermen's Mut. Cas. Co., 226 La. 644, 76 So. 2d 916 (1954); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

4. These four wrongs are: (1) "the intrusion upon the plaintiff's physical solitude or seclusion," (2) "publicity which violates the ordinary decencies," (3) "putting the plaintiff in a false but not necessarily defamatory position in the public eye," (4) "the appropriation of some element of the plaintiff's personality for a commercial use." PROSSER, TORTS § 97 (2d ed. 1955).

5. *Ibid.*

has taken its form primarily in several different methods of eavesdropping.[6] Mechanical devices have often been the means used to effect this eavesdropping.[7] Wiretapping—where the defendant taps the telephone line of another—is one of the most often used devices and gives rise to an action for invasion of privacy.[8] However, the right to converse privately is not absolute, for in one case the telephone company was allowed to monitor conversations where the monitoring was done in furtherance of a valid investigation of an obvious misuse of the service.[9] Nor will the invasion be actionable if the listener is the subscriber to one of the "tapped" phones and he eavesdrops on a person using that phone.[10] Receiving sets and listening devices are another source of invasion of the right of privacy. It was held to be an actionable invasion where defendant, acting pursuant to a valid investigation of the plaintiff's personal injury claim, eavesdropped on her private conversations, by means of a listening device located in plaintiff's hospital room.[11] The court held that proof of publication or commercialization of the conversations was unnecessary; these two elements only serving to increase the damages by aggravating the injury.[12] There is no requirement that special damages be proved or that the results of the investigation be made public.[13] Movie cameras provide another mode of invasion. The only case on this particular point has indicated that the same tests of reasonableness that are applied to similar mechanical devices will be followed.[14]

6. Prosser, *Privacy, supra* note 3, at 390.

7. This problem of mechanical devices was indicated as early as 1890. "[N]umerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'" Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). For an excellent article on the practical uses of such devices, see, Time, March 4, 1964, pp. 55-56.

8. "Whenever a telephone line is tapped the privacy of those talking over the line is invaded . . . ." Rhodes v. Graham, 238 Ky. 225, 229, 37 S.W.2d 46, 47 (1931).

9. Schmukler v. Ohio-Bell Tel. Co., 116 N.E.2d 819 (Ohio Ct. Com. Pl. 1953).

10. The person uses the phone with the "presumed understanding that his otherwise inviolate right of privacy to that extent must be invaded." People v. Appelbaum, 277 App. Div. 43, 97 N.Y.S.2d 807, (1950).

11. "[T]he individual's right to privacy is invaded and violated nevertheless in the original act of intrusion." McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 102, 2 S.E.2d 810, 817 (1939). (opinion was based on Georgia's "Peeping Tom" statute, GA. CODE ANN. §§ 26-2001 to -2004 (1953)).

12. *Ibid.*

13. Roach v. Harper, 143 W. Va. 869, 877, 105 S.E.2d 564, 568 (1958); 61 W. VA L. REV. 230 (1959). "There has been no inclination to import into privacy the distinction between slander *per se* and slander which requires proof of special damages." Wade, *supra* note 3, at 112. See also, Prosser, *supra* note 3, at 409 where it is stated that the action for invasion of privacy resembles libel or slander per se in that no special damages need be proved. (Special damages are only necessary to enhance recovery, and actual physical or mental impairment is not necessary to maintain the action.)

14. Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962).

It held that the taking of motion pictures of an employee at work will not be actionable unless the plaintiff can show an improper or unwarranted use[15] of the photographs. It should be noted, however, that in this case the photographs were taken pursuant to a valid study to increase the efficiency and safety of the manufacturing operations.[16] Close physical surveillance is another technique used in eavesdropping. In *Souder v. Pendleton Detectives, Inc.*,[17] an investigation which included trespassing and window-peeping was held actionable. Although recognizing a strong public policy in favor of such investigations to prevent the fabrication of personal injury claims, the court found civil liability based on defendant's violation of a criminal "Peeping Tom" statute.[18] The methods used in an allegedly valid surveillance must bear a close relationship to the motive and purpose of the investigation, and a surveillance for a legitimate purpose does not justify the use of unreasonable methods.[19] Although none of the cases directly concerned with eavesdropping have specifically discussed malice,[20] it has been indicated in an analogous type of invasion (debt collection methods of a creditor in obtaining repayment) that, for an action to lie, there is no requirement of malice so long as the defendant's efforts are made with a "reckless disregard of the plaintiff's welfare."[21] The standard or test of reasonableness to be applied "must depend largely on the facts of the particular case."[22]

In *Forster*, the court is explicit in distinguishing between the extent of the interest to be protected and the reasonableness of the defendant's conduct. It is indicated that a person who files a personal injury claim falls within the rationale of the "public figure doctrine,"[23] and

15. An improper use is indicated to be an embarrassing or libelous publication of the photographs. Thomas v. Ceneral Elec. Co., *supra* note 14, at 799.

16. It should also be noted that plaintiff failed to prove any physical, or mental impairment, nor that any embarrassment or undue criticism resulted from the taking of the motion pictures. *Id.* at 799.

17. 88 So. 2d 716 (La. App. 1956).

18. LA. REV. STAT. § 14:284 (Supp. 1952). Souder v. Pendleton Detectives, *supra* note 17, at 718.

19. Schultz v. Frankfort Marine Acc. and Plant Glass Ins. Co., 151 Wis. 537, 139 N.W. 386, 390 (1913).

20. Malice is defined by these cases as a motive to cause plaintiff mental or emotional harm.

21. Western Guar. Loan Co. v. Dean, 309 S.W.2d 857, 860 (Tex. App. 1958).

22. Norris v. Moskins Stores, Inc., 272 Ala. 174, 177, 132 So. 2d 321, 323 (1961) (creditor's agent's three calls to other members of debtor's family alleging illicit relationships with debtor without referring to the debt held to be an actionable invasion).

23. This doctrine is based on the concept that entertainers, public officials, heroes and celebrities who place themselves in the public eye have lost to a great extent their right of privacy. Publicity concerning their private lives does not give rise to a cause of action. For good discussions on the "public figure doctrine," see Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 90, 125 A.2d 644, 650 (1956); Prosser, *Privacy*, *supra* note 3, at 410; Note, 28 IND. L.J. 179 (1953).

that once the claim is filed, the plaintiff's right of privacy is circumscribed to the extent of a reasonable investigation of him, and he is not entitled to the same degree of privacy in a public area as he would be within the confines of his home. Real significance is also placed on the social utility of such investigations in detecting fabricated personal injury claims. The court molds a test for determining the reasonableness of the methods used by comparing them to the investigatory methods authorized by the legislature under the Private Detective Act of 1953.[24] Other factors indicating reasonableness were: no trespassing, or window peeping, or any intent to cause plaintiff emotional distress;[25] nor was there any evidence that the film was shown to others. The basis for the opinion seems to be the social utility of such investigations and the authorization of such methods by the legislature.

In *Pinkerton*, the court discussed the history of the right of privacy and demonstrated a well established recognition of that right in Georgia. The case of *Forster v. Manchester*[26] was distinguished from the instant case on the facts, and the court pointed out that the methods used by the defendants here were not "reasonably unobstrusive"[27] but constituted "conduct beyond what would be sufficient for the purpose intended" and would disturb an "ordinary person without hyper-sensitive reactions."[28] The court also stated that in the absence of willful or malicious intent, actual physical or mental impairment is a prerequisite to a cause of action. Since electric shock therapy was required in treating the plaintiff for emotional distress caused by defendant's constant surveillance and "*injuria* in its legal sense"[29] was alleged, the plaintiff did not need to prove willful or malicious intent. The holding seems to be based on the unreasonableness of defendant's actions and the extent of plaintiff's actual mental and emotional distress.

More important than the results reached in these cases (both of which are obviously correct on their particular facts) are the standards used in determining liability. Basically, the problem must be

24. Pennsylvania Private Detective Act, PA. STAT. ANN. tit. 22, § 12(b)(2) (1953). The business of a private detective can include investigations of the "identity, habits, conduct, movements, whereabouts . . . of any person," and authorizes "the securing of evidence to be used . . . in the trial of civil . . . cases." PA. STAT. ANN. tit. 22, § 12 (1953). See also PA. STAT. ANN. tit. 22, § 26 (1953).

25. This intent to cause emotional distress is a requirement to the action based on the theory of causing plaintiff emotional distress which is found in RESTATEMENT, TORTS § 46, comments *a, g* (1939). There is a distinction between this action of intentionally causing emotional distress and for an action for the invasion of the right of privacy under RESTATEMENT, TORTS § 867 (1939).

26. 410 Pa. 192, 189 A.2d 147 (1963).

27. 108 Ga. App. 159, 166, 132 S.E.2d 119, 125 (1963).

28. *Ibid.*

29. *Ibid.*

viewed in terms of a two-step analysis. First, to what extent is a person's right of privacy limited when he files a personal injury claim? This limitation is primarily centered around the public policy concept of allowing investigations to detect and prevent the fabrication of personal injury claims. *Forster* applies the rationale of the "public figure doctrine" to personal injury claimants. This is a useful general analogy; but without some definite qualifications on this rationale, problem areas in the future will undoubtedly develop, for it seems obvious that the "public figure doctrine" per se is not wholly applicable to a personal injury claimant.[30] The problem is one of balancing the interests of the plaintiff and those of the public. If frivolous and fabricated claims reach a jury without the insurance company being allowed to investigate the extent of such alleged injuries and to present contrary evidence, the public as a whole will suffer the cost of increased insurance premiums. Such potential fabricated claims are in opposition to our legal concepts of fair play and justice, and would burden the courts with a multiplicity of suits. The second step of the analysis concerns what the courts will consider a reasonable investigation after they have concluded that the plaintiff's right of privacy is circumscribed to a certain degree. A case by case determination of reasonableness is not sufficiently informative for either the courts or the public. The *Forster* opinion provides a more definite standard by comparing the methods of investigation used by the defendant to the methods authorized by the legislature in its "Private Detective Act."[31] The use of a criminal "Peeping Tom" statute[32] to find civil liability is another definite standard, and it is quite surprising that the decision in *Pinkerton* was not based on Georgia's "Peeping Tom" statute.[33] It has also been held that the Communications Act of 1934[34] (a criminal statute) created a coextensive civil action for intercepting intrastate messages if they were sent over interstate wires.[35] In the future, courts will probably rely on such statutes, when available. Investigators and insurance companies would be advised to check their state statutes on this point

30. The personal injury claimant like the public figure has lost, to some extent his right of privacy but, it can hardly be contended that he surrenders his right of privacy to the extent of having his image projected on newsreels, or his private life disseminated to the public through books, broadcasts, articles, etc. In construing the rights of the personal injury claimant, the court must be much more conservative than they would be with the "public figure."

31. Pennsylvania Private Detective Act, PA. STAT. ANN. tit. 22, § 12(b)(2) (1953).

32. GA. CODE ANN. §§ 26-2001 through -2004 (1953); LA. REV. STAT. § 14.284 (Supp. 1952).

33. GA. CODE ANN. §§ 26-2001 to -2004 (1953). For an article contending that the court in *Pinkerton* did rely on this Georgia statute, see 26 GA. B.J. 326, 328 (1954).

34. Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).

35. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

and be certain that their methods neither exceed the authorization of such acts nor fall within the reach of any criminal legislation. The fact remains that civil liability for invasions of privacy has not received the recognition it deserves. The limited number of cases in this area could partly result from the lack of knowledge of the investigations or the fear of potential plaintiffs that if a suit is brought, the action will only magnify the personal information obtained by the illegal methods. If this right is given complete recognition by the courts, the person under investigation will have a more effective recourse against the investigator than merely the exclusion of the evidence obtained by the unreasonable investigation[36] or a possible criminal prosecution of the investigator,[37] and this should provide a very real deterrent against unreasonable investigations.

Unemployment Compensation–Interstate Agreements Permitting Legislative Bodies of Other States To Determine Qualifying Procedures

A Kentucky enabling act[1] authorized the Commissioner of Economic Security to enter into reciprocal agreements with other states or with the Federal Government for combining wages to determine unemployment benefit rights. In an agreed test case,[2] the act was challenged as being unconstitutional.[3] The plan[4] to be adopted by

36. For excellent articles on the admissibility of wiretapping and other illegally obtained evidence see, *Symposium, The Wiretapping– Eavesdropping Problem: Reflections on the Eavesdroppers,* 44 MINN. L. REV. 813 (1960); Brown & Pier, *The Wiretapping Entanglement: How to Strengthen Law Enforcement and Preserve Privacy,* 44 CORNELL L.Q. 175 (1959).

37. See New York's Anti-Wiretapping Statute, N.Y. PEN. LAW § 1423.

1. "(3)(a) Any provisions of this chapter to the contrary notwithstanding, the Commissioner is hereby authorized to enter into reciprocal arrangements with duly authorized agencies of other states or of the Federal Government, or both, whereby workers with potential rights to benefits in this and another state or other states or the Federal Government may have such rights determined upon the basis of his combined potential rights in such jurisdictions. . . ." KY. REV. STAT. § 341.145 (3)(a) (1963).

2. Jurisdiction is based upon the fact that the question involved might become the subject of a civil action by way of injunction against the commissioner. KY. REV. STAT. § 418.020 (1963).

3. KY. CONST. § 29: "The legislative power shall be vested in a house of representatives and a senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" A secondary issue of whether the taxes collected to pay unemployment benefits would be unconstitutionally diverted from their original purpose by this plan was briefly resolved in favor of constitutionality.

4. There are two possible plans, one of which is simply an expansion of the coverage of the other: the Basic Interstate Agreement for Combining Wages and the Extended Plan for Combining Wages, detailed officially in U.S. DEP'T OF LABOR,

the commissioner would allow a worker to collect unemployment insurance payments based on the wages received and time worked in every participating state in which he was employed, such payments to be made under the provisions of the law of the state in which the claim was made;[5] the other states in which the worker had been employed would be required to reimburse the paying state for their proportion of the liability. This was alleged to be a delegation of legislative power to legislatures of other states and the Federal Government, and therefore, violative of the Kentucky Constitution. The trial court held the act unconstitutional. On appeal to the Court of Appeals of Kentucky, *held*, reversed. The legislature may authorize interstate agreements allowing the legislative bodies of other states to determine qualifying procedures for unemployment compensation to which Kentucky must ultimately contribute. *Commonwealth ex rel. Powell v. Associated Industries of Kentucky*, 370 S.W.2d 584 (Ky. 1963).

The doctrine that legislative power cannot be delegated had its origin in the theories of separation of powers and, more specifically, in the vesting of legislative powers in a single representative body.[6] The decentralizing of modern government, however, often requires that adequate lawmaking include statutory interpretation, rule-making and, in fact, bald legislation by executive agencies, even at lower levels in the federal system. Basically, where the legislature has set up adequate standards to be followed and lacks the time or expertise to detail the law, delegation to non-legislative bodies will be upheld.[7] There is, however, another area in which the doctrine of non-delegability has been applied. This area does not involve the separation of powers theory and the conventional problem of dele-

INTERSTATE UNEMPLOYMENT INSURANCE ARRANGEMENTS §§ 2.0, 2.1, 2.11 (1955), and unofficially in Conner & Cosner, *Interstate Aspects of Unemployment Insurance*, 8 VAND. L. REV. 478, 486-88 (1955). The Basic Interstate Agreement allows a claimant to combine his wage credits only from those states in which he is unable to qualify for compensation. The Extended Plan allows a worker to add credits sufficient to qualify in one state, but for less than maximum benefits, with wage credits insufficient to qualify in other states. On October 15, 1963, four days after the final ruling in the instant case, Kentucky adopted both of these plans.

5. The claimant's benefit year, base period, qualifying wages, benefit amount and duration are determined according to the laws of the paying state. Conner & Cosner, *supra* note 4, at 487.

6. U.S. CONST. art. I, § 1; 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. Carrington 1927). See generally Duff & Whiteside, *Delegata Protestas Non Potest Delegari*, 14 CORNELL L.Q. 168 (1928), for history and development of the non-delegability doctrine; LOCKE, CIVIL GOVERNMENT § 142 (1690).

7. Yakus v. United States, 321 U.S. 414 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hampton & Co. v. United States, 276 U.S. 394 (1928); Young v. Willis, 305 Ky. 201, 203 S.W.2d 5 (1947); *In re* Fisher, 344 Pa. 96, 23 A.2d 878 (1942).

gation to an administrative agent: the problem of whether legislatures can delegate power to other legislatures outside of their jurisdictions. It is a maxim of statutory interpretation that when a legislature adopts by specific reference the statute of another state, it adopts it only as it then exists, and a repeal of the adopted act, or any future change of the act, does not affect the adopting act.[8] However, if there is a general reference to a system or body of laws covering the subject at hand, the adopting statute takes laws as they shall be changed, and any repeal of the adopted act would repeal the adopting act.[9] Thus, for example, a state that, prior to 1933, pronounced that its laws defining and controlling the sale of intoxicating liquors would be the same as those of the Federal Government found its laws of no effect when the Eighteenth Amendment was repealed. No problem exists when the legislature attempts to adopt laws of other legislatures specifically as they stand at the time of adoption.[10] But to allow a domestic act to become subject to the future whims and alterations of a foreign jurisdiction's legislature, say a majority of courts, offends the traditional doctrine that legislative power cannot be delegated.[11] The trend among academicians[12] is to make the rule the exception.[13] As in the case of delegation to administrative agencies, so long as adequate standards are set up, a legislature should be able to enact by reference both the existing text of the adopted act and any future

8. Palermo v. Stockton Theatres, 32 Cal. 2d 53, 195 P.2d 1 (1948); Kloss v. Suburban Cook County Tuberculosis Sanitarium Dist., 404 Ill. 87, 88 N.E.2d 89 (1949); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5208 (3d ed. Horack 1943).

9. *Ibid.*

10. Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958); Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202 (1922).

11. Wylie v. Phoenix Assur. Co., 42 Ariz. 133, 22 P.2d 845 (1933); Florida Indus. Comm'n v. State *ex. rel.* Orange State Oil Co., 155 Fla. 772, 21 So. 2d 599 (1945); State v. Intoxicating Liquors, 121 Me. 438, 117 Atl. 588 (1922); *In re* Opinion of Justices, 239 Mass. 606, 133 N.E. 453 (1921); Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935); Seale v. McKennon, 215 Ore. 562, 336 P.2d 340 (1959); Holgate Bros. v. Bashore, 331 Pa. 255, 200 Atl. 672 (1938); State *ex rel.* Kirschner v. Urquhart, 50 Wash. 2d 131, 310 P.2d (1957).

12. 1 SUTHERLAND, *op. cit. supra* note 8, § 310; Edelman, *Interstate Arrangement for the Determination and Payment of Interstate Claims—An Experiment in Interstate Cooperation*, 10 OHIO ST. L.J. 127, 135-40 (1949); Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 YALE L.J. 1 (1947).

13. A few state courts have, like the case now under consideration, allowed statutes contemplating future legislation in other states or the Federal Government: Head v. McKenney, 61 Ga. App. 552, 6 S.E.2d 405 (1939) (no mention of future changes); People *ex rel.* Pratt v. Goldfogle, 242 N.Y. 277, 151 N.E. 452 (1926) (no foreseeable injustice to those affected by the act); Commonwealth v. Warner Bros. Theatres, Inc., 345 Pa. 270, 27 A.2d 62 (1942).

amendments.[14] It has been argued in support of this point of view that prospective laws in the other jurisdiction, if they are the objectives of reciprocal agreements, are mere contingencies, or more properly, conditions, the existence or non-existence of which determines circumstances in which the adopting act will apply. Thus, the adopting act is not subject to "change" by the will of a "foreign" legislature.[15] The advantage gained by uniformity of law among the states[16] has been cited as another argument against the extension of the non-delegability doctrine. Also where a state statute attempts to adopt federal laws in an area in which the state and Federal Governments exercise concurrent authority, even if the adoption is so general as to be an approval of any future change, there is essentially no delegation, as federal legislation is controlling under the supremacy clause.[17] Finally, a violation of the state constitution cannot be asserted when the delegation culminates in the execution of an interstate agreement.[18] An interstate compact has constitutional preference over any state law forbidding the compact or any state action that seeks to nullify the agreement.[19]

The court here questions whether the doctrine of non-delegability has *any* worthwhile use.[20] There is no provision in the Constitution of Kentucky, or in that of the United States, saying that legislative power may not be delegated. The court reasons that the legislative power is merely stated to be "vested" in a legislative body, and the word "vested" certainly does not mean absolutely inalienable, since other provisions in the Kentucky Constitution allow delegation of power to such bodies as municipalities.[21] Since legislative

14. This argument would appear to be pertinent only on the general fact situation of the instant case, where an administrative agent in the adopting state is allowed to use his discretion in making agreements with officials in other states, but confined to the use of the other state's procedures. The administrative agent must follow the standards in his discretionary dealings with out-of-state officials. Brock v. Superior Court, 9 Cal. 2d 291, 71 P.2d 209 (1937); Mermin, *supra* note 12, at 7.

15. Nilva v. United States, 212 F.2d 115 (8th Cir. 1954); Home Ins. Co. v. Swigert, 104 Ill. 653 (1882). For instance, a federal law prohibiting the transportation of gambling devices in interstate commerce may depend for its existence and enforcement in one state on the contingency that that state has not passed a law exempting itself from the act. Or the tax liability of an out-of-state corporation which does business in the taxing state may depend on what rate that corporation's home state charges against the taxing state's corporations.

16. 1 SUTHERLAND, *op. cit. supra* note 8, § 310.

17. People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945).

18. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951).

19. Kentucky v. Indiana, 281 U.S. 163 (1930).

20. Commonwealth *ex rel.* Powell v. Associated Indus., 370 S.W.2d 584, 586 (Ky. 1963). In Dawson v. Hamilton, *supra* note 10, the court reached a contrary decision on the same problem, but the court here makes no effort to distinguish the two cases.

21. 370 S.W.2d at 587.

power is being delegated more and more according to the exigencies of modern government, there is no reason to say that it is *exclusively* the province of the legislature. The court assumes that were John Locke living today he would certainly have agreed that the doctrine must be abandoned.[22] The question of future changes in the unemployment compensation laws of other states which are parties to the agreement is not regarded as determining the constitutionality of the Kentucky act in question. The court assumes that the Commissioner of Economic Security will have such discretion as is necessary to deal with these future changes,[23] but it does not discuss what standards he must follow in exercising his discretion. Though this is not the customary problem of delegation to an administrative agency,[24] the court in the instant case substantially relies on the fact that the Commissioner of Economic Security is to administer the reciprocal agreements. But rather than the Commissioner's safeguarding rights of Kentucky citizens against changes in the laws of other states, the other states' laws are assumed to safeguard Kentuckians against the acts of their own administrative agent.[25]

The court in the instant case could conceivably have considered four questions basic to the constitutionality of an act enabling interstate unemployment claims agreements, though perhaps these questions were not so obvious owing to the dearth of authority on the question.[26] The first question to be asked, if the sole issue concerned delegation of legislative authority to an administrative officer's discretion, is whether the legislature set up adequate standards in the enabling act, by which standards the commissioner must test every adopted present and future procedure in the other jurisdiction. The Commissioner's discretion, when used to administer interstate arrangements involving the laws of other states, may still require consideration of the rules of statutory construction concerning legislation by reference.[27] If the sole issue, on the other hand, concerned

22. *Id.* at 588. The court reasons that even Locke, who originated the idea that legislative power is non-delegable, would, in light of the experience of the last several centuries, have abandoned his idea.

23. *Id.* at 589.

24. "We considered this problem (which is not the customary one of delegation of powers to administrative agencies) in Dawson v. Hamilton . . . ." *Id.* at 586.

25. "We find the acceptance of the laws of other states or of the federal government to be a sufficient and effective safeguard to the exercise of power by the commissioner—so much more than if the commissioner were handed the power without limitation." *Id.* at 589.

26. No background decisions on this problem, such as would help the court in defining the issues, have been forthcoming from those states which have approved plans for interstate nnemployment claims. As of December 1, 1961, ouly Alaska and Mississippi had incorporated neither the Basic Agreement for Combining Wages nor the Extended Plan; Nebraska, New Jersey, North Carolina, and Virginia use the former but not the latter.

27. See note 8 *supra* and accompanying text.

a simple delegation of power to another jurisdiction, the court should have asked a second question: what effect would future changes in the laws of the other jurisdiction have on the law of the adopting state? Moreover, if this question is to be considered, the reasoning of the court should not have been aimed at disparaging a non-delegability theory based on separation of powers. Any attempt to abrogate an established principle such as the doctrine against non-delegability of legislative power from one jurisdiction to another, though perhaps the constitutional test is misplaced, requires thorough consideration of existing case law[28] and adequate, unambiguous explanation.

A third question which the court failed to consider would have prompted a stronger argument against the constitutionality of interstate delegation of legislative authority. That question is whether the Kentucky legislature violated fourteenth amendment due process by giving up its sovereignty to another state. In essence, the argument is that Kentucky unemployment taxpayers will have been deprived of the right to have their own state decide how these tax funds will be expended; this right will be left to legislators whom they have no voice in electing. The due process contention may, however, be effective only against delegation to another state; if there were delegation to the Federal Government, the "supreme law of the land" argument would obviate loss of due process.[29] Nevertheless, as between states, the due process argument is valid and may acquire even more force when, as in the instant case, an administrative official is given the power to delegate the power of the legislature to the legislature of another state, especially if the result is an irrevocable interstate compact which is more forceful law than that of a state constitution.[30] This consideration should bring the court to a fourth, and perhaps the most important, question of whether a legislature can allow its hands to be inescapably tied by the execution of an interstate agreement. Should the "adopted" laws of the other state be changed to the disfavor of Kentucky, it could not repudiate the change without breaching the interstate compact.[31]

28. Dawson v. Hamilton, *supra* note 10; see also note 11 *supra*.

29. See note 17 *supra* and accompanying text. *But see* City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

30. West Virginia *ex rel.* Dyer v. Sims, *supra* note 18, noting the favored treatment to be given interstate compacts, held that no state could unilaterally nullify the compact even though it involved a delegation of the state's legislative power.

31. There is some authority for drawing a distinction between an "agreement" and a "compact." The distinction basically is that (1) a compact, unlike an agreement, is formally ratified by the respective parties and becomes embodied thereby in the state statutes; and (2) a compact usually receives the express consent of Congress, whereas an agreement is usually never submitted for congressional ratification or

The result in the instant case may be supported, however, by its practical effect on the efficiency of handling the rising unemployment claims of those workers who are forced to move interstate in search of jobs. Should the arrangements between the Commissioner of Economic Security and similar officials in other states stipulate requirements for renegotiation if the law in the other states changes, the constitutional barrier of due process may be avoided. Also renegotiation stipulations in the terms of the interstate agreement, or at least a provision for mutual rescission of the agreement should the laws of either state change, would lessen the danger of breach by a dissatisfied state. If it had inquired into and found the existence of such arrangements, then the court's decision would have become stronger precedent for upholding interstate operations for unemployment compensation.

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rejection. ZIMMERMAN & WENDELL, THE INTERSTATE COMPACT SINCE 1925 30-42 (1951). Practically, the distinction may result in the enforceability of the compact only. However, the authors do submit that in the case of administrative agreements "pursuant to specific authority conferred upon [the administrative agent] by statute, the state is probably bound." *Id.* at 44. But in reference to statutes of the ordinary kind which authorize reciprocal agreements for interstate unemployment claims, the authors note that the legislative direction has not been detailed enough to make this interstate agreement a compact. Whether the agreement would be enforceable nevertheless is left unanswered. But see Virginia v. Tennessee, 148 U.S. 503, 520 (1893): "Compacts or agreements—and we do not perceive any difference in the meaning, except that the word compact is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement' . . . ." Even if not enforceable under the "compact clause" of the Constitution, there is still the risk of having the agreement enforced otherwise under the Supreme Court's general power to settle disputes between states. West Virginia *ex rel.* Dyer v. Sims, *supra* note 18, at 28 (dictum).