RECENT CASES

Constitutional Law—Constitutionality of Political Expenditures Prohibition of Taft-Hartley Act—An editorial endorsing a Congressional candidate was published by the defendant CIO in its regularly-circulated newspaper, with the intention of expressly violating for test purposes § 304 of the Taft-Hartley Act.[1] One thousand extra copies were distributed free in the election district. In quashing the indictment against the CIO and its president, Murray, the court held that § 304 was an unconstitutional abridgement of freedom of speech and of the press insofar as it prohibited expenditures by labor organizations in connection with federal elections. *United States v. Congress of Industrial Organizations,* 3 CCH LAB. LAW SERV. ¶ 64,384 (D. D. C. 1948), *probable jurisdiction noted,* 16 U. S. L. WEEK 3294 (U. S. March 30, 1948).

In extending the scope of the Corrupt Practices Act of 1925[2] to prohibit political "expenditures" as well as "contributions" by corporations and labor unions, Congress clearly intended to forbid expressions of editorial opinion aimed at influencing the electorate, so long as the medium was supported by union dues or corporate funds, as distinguished from a publication which "sold for its worth."[3] It was this broad construction that the court applied in striking down the statute, despite the fact that free distribution of additional copies might have justified a narrower interpretation.[4] If it is possible to distinguish what may be termed pamphleteering[5] from the publication of a newspaper, a decision that the former may be constitutionally prohibited would not necessarily involve consideration of the broader issue. The distinction would hinge upon the assumption that there is no constitutional obstacle to a statute which makes corporate or union political *contributions* unlawful.[6]

Implicit in the terms of § 304 is the thesis that political activity is not properly the function of a labor organization, a position which lacks candor so long as legislation—a political product—shapes the pattern of labor activity. The avowed intention of Congress to protect union minorities against the use of their dues payments for political causes to which they may be opposed[7] grates harshly upon democratic reverence for

1. 61 STAT. 159, 29 U. S. C. A. § 251 (Supp. 1947).

2. 43 STAT. 1074 (1925), 2 U. S. C. § 251 (1940), as amended, 57 STAT. 167 (1943), 50 U. S. C. App. § 1509 (Supp. 1947).

3. 93 Cong. Rec. 6593-6595 (June 5, 1947).

4. A court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Alabama State Fed. of Labor v. McAdory, 325 U. S. 450, 461 (1944) and cases there cited.

5. 93 CONG. REC. 6594, 6595 (June 5, 1947); SEN. REP. No. 101, 79th Cong., 1st Sess. 57-59 (1944).

6. Although political contributions by corporations have been unlawful since 1907, 34 STAT. 863 (1907), as amended, 2 U. S. C. § 251 (1940), the constitutionality of the provision has been challenged only once, and that in a district court. United States v. Brewers' Ass'n, 239 Fed. 163 (D. C. Pa. 1916). A similar provision, however, in the Public Utility Holding Co. Act of 1935, 49 STAT. 838 (1935), 15 U. S. C. § 791(h) (1940), was upheld in Egan v. United States, 137 F. 2d 369 (C. C. A. 8th 1943), *cert. denied,* 320 U. S. 788 (1943). Such paucity of litigation might indicate either unquestioned acceptance of the provision's constitutionality or attest to the ease with which it could be circumvented One technique for circumvention which suggests itself is the use of contributions by individual officers and shareholders, rather than by the corporation.

7. 93 CONG. REC. 6598 (June 5, 1947).

majority rule as well as upon other provisions of the Taft-Hartley Act itself,[8] which vest in majority-chosen representatives functions far more personal and important to the workman than the use of union funds for political purposes. If these are the evils which § 304 sought to remedy, evils which constitute no clear and present danger to free and unfettered elections, then there can be no justification for the slightest abridgement[9] of the rights protected by the First Amendment.[10] The sweeping language of that constitutional command[11] makes irrelevant an inquiry as to whether or not a union is such a "citizen" or "person" as can lay claim to its protection; those considerations are not so material as they would be if the Fourteenth Amendment[12] were involved. Moreover, a broad construction of § 304 would go beyond mere abridgement to eliminate entirely all expression of labor's political viewpoint. Unless the right of free speech can be conceived as existing in a vacuum, there must be a correlative right of communication,[13] which to be effective necessarily involves expenditures. The blanketing effect of the statute upon free speech, and the fact that every union activity, to some degree at least, involves an expenditure, sufficiently justify bold treatment of the provision's broadest possible application,[14] leading to the result reached here by the District Court. By no means does it follow that the door has been shut to legislative regulation of campaign expenditures. If we keep in mind that the prohibition against contributions has been noted more for its circuitous breach than for its observance,[15] and that a provision forbidding expenditures is certain to meet a similar fate, there is logic and seasoned political judgment[16] supporting the principle that elections can best be guarded against corruptive influences by legislation which would establish means for giving the widest publicity to all political expenditures, no matter what the source.

Constitutional Law—Due Process—State Criminal Statute Banning Publications Exploiting Accounts of Violent Crime Void for Indefiniteness—A New York bookseller, convicted under a statute making it a misdemeanor to deal in printed matter "devoted to the publication . . . of criminal news, . . . or stories of deeds of bloodshed, lust, or

8. Sec. 1 provides for the designation by workers of *"representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Sec. 9(a) provides for the designation of exclusive collective bargaining representatives "by the *majority* of the employees." (Emphasis added.)

9. Some abridgment by § 304 of the rights protected by the First Amendment is apparently conceded by the Government. See Brief for Government, pp. 38-40.

10. ". . . any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Rutledge, J., in Thomas v. Collins, 323 U. S. 516, 530 (1944).

11. U. S. CONST. AMEND. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

12. U. S. CONST. AMEND. XIV § 1: ". . . No *State* shall make or enforce any law which shall abridge the privileges or immunities of *citizens* . . ." (emphasis added).

13. NLRB v. Ford, 114 F. 2d 905, 913 (C. C. A. 6th 1940), *cert. denied,* 312 U. S. 689.

14. Thomas v. Collins, 323 U. S. 516, 535 (1944).

15. *Supra* note 5. See also SEN. REP. No. 101, 79th Cong., 1st Sess., *Tabulation of contributions by prominent family groups* 140 (1944).

16. *Id.* at 6-7, 80-84.

crime . . . ," [1] appealed, alleging that the statute violates free expression and that by indefiniteness it denies due process. In upholding the conviction [2] the New York Court of Appeals construed the statute as applicable only to materials "so massed as to become vehicles for inciting violent and depraved crimes against the person." [3] On appeal, the United States Supreme Court, after three arguments, reversed (three justices dissenting), because the statute is so indefinite as to be applicable to innocent acts and render it impossible for the individual to know what constitutes violation, and thus violates the due process clause. *Winters v. People,* 68 Sup. Ct. 665 (1948).

In drafting a penal statute the need for a standard of illegality intelligible to the public must be balanced against the need for generality of wording sufficient to prevent easy evasion.[4] What balance will afford due process is difficult to ascertain from Supreme Court decisions; the criteria they afford are themselves indefinite.[5] The standard is usually phrased as a requirement that the statute give notice of what is prohibited to those of ordinary intelligence affected by it.[6] An alternative test, equivalent in significance and effect, is whether the statute leaves overly wide discretion to court and jury.[7] The common law definitions of offenses have, in effect, been exempted from the requirement of definiteness by the theory that judicial interpretation has cured their vagueness.[8] That it has not made them intelligible to the layman is clear.[9] The standards noted above are applied where, as here, the statute creates a new offense. A synthesis of decisions reveals scant basis for predicting what language will be satisfactory. "Unreasonable restraint of trade" is definite,[10] while "unreasonable rate or charge" is indefinite,[11] but "reasonable allowance for salaries" is sufficiently informative.[12] While the Court has approved a statute requiring people to judge correctly a matter of degree to determine the limits of criminality,[13] it has disapproved where the basis for judgment is too conjectural.[14] Broadly general terms have been found

1. NEW YORK PENAL LAW § 1141(2).

2. People v. Winters, 294 N. Y. 545, 63 N. E. 2d 98 (1945).

3. *Id.* at 550, 63 N. E. 2d at 100. "This construction fixes the meaning of the statute for this case." Winters v. People, 68 Sup. Ct. 665, 669 (1948), citing Hebert v. Louisiana, 272 U. S. 312, 317 (1926); Skiriotes v. Florida, 313 U. S. 69, 79 (1941). This was despite the absence of any language in the opinion of the New York court indicating an intent to construe the statute or limit its applicability by the words quoted.

4. *See* Winters v. People, 68 Sup. Ct. 665, 675 (1948) (dissenting opinion).

5. Note, 45 HARV. L. REV. 160 (1931).

6. Connally v. General Construction Co., 269 U. S. 385 (1926); Whitney v. California, 274 U. S. 357 (1927); United States v. Petrillo, 332 U. S. 1 (1947).

7. United States v. Cohen Grocery Co., 255 U. S. 81 (1921); *see* Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 109 (1909).

8. *See* Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 242 (1932); Connally v. General Construction Co., 269 U. S. 385, 391 (1926); Note, 45 HARV. L. REV. 160 (1931).

9. Note, 45 HARV. L. REV. 160 (1931).

10. Nash v. United States, 229 U. S. 373 (1913).

11. United States v. Cohen Grocery Co., 255 U. S. 81 (1921).

12. United States v. Ragen, 314 U. S. 513 (1941).

13. Nash v. United States, 229 U. S. 373 (1913); United States v. Wurzbach, 280 U. S. 396 (1930).

14. International Harvester Co. v. Kentucky, 234 U. S. 216 (1914).

sufficient,[15] detailed language indefinite.[16] No trends or factors common to decisions either way are discoverable. The standard obviously varies considerably with the area of conduct regulated.

The statute involved here, as enacted, was worded so as to be applicable to much literature that could not have offended the legislature, and it is clearly void for indefiniteness.[17] As interpreted it merely sets forth the psychological judgment that gave rise to the legislature's action, leaving to the public and the court and jury the scientific evaluation necessary in every instance of possible violation, an evaluation which they can not be properly called on to make without more definite guidance. The Court judged this to be the basic failing of the statute. In addition, the fact that the statute limits free speech with questionable justification [18] was doubtless persuasive.

The theory that literature can incite to crime may be sufficiently established to warrant the legislature's exercise of the police power.[19] However, there are so many variable elements, many not part of the book, that determine whether a particular book will incite to crime, that it appears impossible to embody in one statute an accurate scientific appraisal of what publications present the danger and under what conditions they do so. Though the Supreme Court will not carry the requirement of definiteness so far as to render impossible the formulation of needed statutes,[20] the obstacles confronting efforts to devise a workable and definite statute in this field indicate that the legislature might better strike deeper at the roots of crime rather than attempt to suppress this one among many superficial aggravating influences.

Constitutional Law—Repeal of Legislative Pardon Held Not Ex Post Facto Although Affecting a Prior Conviction—When the relator, an alien named Forino, was convicted of second degree murder in Pennsylvania, a state statute provided that endurance of his punishment would operate as a pardon.[1] On the authority of a previous decision,[2] this would have exempted him from deportation, which otherwise

15. Omaechevarria v. Idaho, 246 U. S. 343 (1918) (priority of possessory right between cattle and sheep owners to any "range" determined by the priority in the "usual and customary use" of it as a cattle or sheep range); Nash v. United States, 229 U. S. 373 (1913) ("unreasonable restraint").

16. Lanzetta v. New Jersey, 306 U. S. 451 (1939) (law making it an offense to be a "gangster" defined "gangster" as "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State . . ."); Connally v. General Construction Co., 269 U. S. 385 (1926) (law prohibiting payment of wages less than the "current rate of per diem wages in the locality where the work is performed").

17. *See* Winters v. People, 68 Sup. Ct. 665, 668 (1948).

18. The free speech issue attracted briefs from the American Civil Liberties Union and the Authors' League of America, Inc. as amici curiae. A decision of the question was rendered unnecessary by the finding of indefiniteness. The dissent determines that the constitutional right is not infringed, but the question remains highly controversial.

19. Although this conclusion is rendered questionable by the apparent "dead-letter" nature of this statute. *See* Winters v. People, 68 Sup. Ct. 665, 668 (1948). *But see* Winters v. People, *supra* at 673, n. 2 (1948) (dissenting opinion).

20. United States v. Petrillo, 332 U. S. 1 (1947); *see* Winters v. People, 68 Sup. Ct. 665, 672 (1948).

1. PA. STAT. ANN., tit. 19, § 893 (Purdon, 1941).

2. Perkins v. United States, 99 F. 2d 255 (C. C. A. 3d 1938).

would follow conviction under § 19 of the immigration Act.[3] While he was in prison, however, the state statute was repealed,[4] and immigration authorities arrested him. Suing out a writ of habeas corpus, Forino contended that the repeal was ex post facto and void, as applied to him, under state and federal constitutions.[5] Rejecting this argument, the Circuit Court denied the writ. *United States* ex rel. *Forino v. Garfinkel,* 166 F. 2d 887 (C. C. A. 3d 1948).

A law which increases the punishment for a crime after it has been committed is ex post facto.[6] In the instant case, the court reasoned that since a pardon is an "act of grace," withdrawal of access thereto by the body which originally conferred it, did not increase punishment. Such a description of pardon seems to require this conclusion. However, "act of grace" is properly applicable to pardons bestowed at the discretion of the executive,[7] from which this legislative pardon is validly distinguishable on the ground that it would have followed, indiscriminately and automatically, on the passage of time.[8] It is at least arguable that, before repeal, it set a definite limit on the consequences to flow from the commission of a crime, in that a pardon effects a restoration to the criminal of such civil rights as are lost by conviction.[9] If we accept this distinction, then if the loss of civil rights, such as the right to practice a profession, can be considered punishment within the ex post facto clause, the repeal of the legislative pardon did increase Forino's punishment. Decisions dealing with the clause are inconsistent as to whether civil disabilities consequent on a crime are to be termed punishment.[10] Generally, if courts have felt it relevant to the protection of society that individuals be deprived of certain civil rights for certain offenses, they have held that such deprivation was not punishment; if irrelevant, punishment, and ex post facto if retroactive.[11] The first position, although reaching a desirable result, delimits somewhat illogically the definition of punishment.

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3. 39 STAT. 889 (1917), 8 U. S. C. § 155 (1940). This section expressly exempts pardoned criminals.

4. PA. STAT. ANN., tit. 18, § 5201 (Purdon, 1941).

5. U. S. CONST. Art. I, § 10; PA. CONST. Art I, § 17.

6. This appeared as dictum in an early Supreme Court decision. *See* Calder v. Bull, 3 Dall. 386, 390 (U. S. 1798). It has been exclusively followed. Commonwealth v. Smith, 345 Pa. 512, 29 A. 2d 912 (1942); Lindsey v. Washington, 301 U. S. 397 (1937).

7. Cases used by the Circuit Court as authority for the term "act of grace" relate entirely to executive pardons. United States v. Wilson, 7 Pet. 150 (U. S. 1833); Commonwealth v. Holloway, 44 Pa. 210 (1863); Commonwealth v. Ahl, 43 Pa. 53 (1863).

8. The pardon accrued unconditionally upon completion of punishment for all crimes except first degree murder and perjury. See note 1 *supra.*

9. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Commonwealth v. Quaranta, 295 Pa. 264, 145 Atl. 89 (1928). The legislative pardon had the same effect. Perkins v. United States, 99 F. 2d 255 (C. C. A. 3d 1938). Historical Note, 19 Purdon § 893 indicates that the legislative intention was the automatic restoration of civil rights to reformed convicts (in part, at least, to reestablish them as competent witnesses). For a consideration of civil disabilities and pardon, see Weihofen, *The Effect of a Pardon,* 88 U. OF PA. L. REV. 177 (1939).

10. Typically inconsistent are: Hawker v. New York, 170 U. S. 189 (1898) (civil disability held not punishment); Cummings v. Missouri, 4 Wall. 277, 320-22 (U. S. 1866) (civil disability held punishment).

11. Cases in accord with *Hawker v. New York, supra* note 10, adopt the theory that relevant disabilities are qualifications requisite to the enjoyment of certain civil rights, rather than added punishment (*e. g.,* public protection may require that felons be retroactively disqualified from practicing law). A greater proportion of these decisions are relatively recent, perhaps a recognition of the necessity for public control of admission to many occupations. Cases v. United States, 131 F. 2d 916 (C. C. A. 1st 1942).

Civil disabilities serve, as does punishment, to incapacitate. Indeed, if irrelevant to protection, such disabilities are punishment only in the retributive sense. One purpose of the ex post facto clause is to prevent retroactive criminal legislation formulated to serve personal or political ends.[12] This is fully accomplished only if it includes in its prohibitions the imposition of punishment in the form of civil disabilities.[13]

To preclude all possibility of such arbitrary governmental action, the clause has been interpreted as absolute; the test of unconstitutionality is not unreasonableness, but mere retroactivity.[14] As a result it may invalidate necessary alterations in the criminal law which do not in fact injure any interest that the Constitution was designed to safeguard.[15] Judicial efforts to avoid this have occasioned such inconsistencies as noted above, and, perhaps, also prompted the decision in the instant case. Such decisions seem to indicate that the pressures which originally demanded an unequivocal definition of ex post facto law have yielded in some measure to the need for reasonable retroactivity in the exercise of the police power.

Damages—Measure of Damages in Survival Actions in Pennsylvania—A child aged two years and nine months died almost instantly when struck by defendant's streetcar. In the action brought by his administrator,[1] the court charged, as to the count under the Survival Act, that if the jury found for plaintiff, recovery for loss of earnings should equal the present value of deceased's probable *gross* earnings[2] from age twenty-one through his life expectancy. On appeal, *held* that the proper measure of damages in a survival action is the deceased infant's probable

12. *See* Calder v. Bull, 3 Dall. 386, 389 (U. S. 1798).

13. There seems little doubt that civil disabilities constitute punishment when prospectively imposed. 4 BL. COMM. *377; HENTIG, PUNISHMENT 230 (1937).

14. See McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269, 276-77 (1927); Lindsey v. Washington, 301 U. S. 397 (1937).

15. Regardless of the need or the purpose behind the change, even slight increases in punishment are void. Extraordinary frustrations of the criminal law have resulted. *E. g.*, Hartung v. People, 22 N. Y. 95 (1860) (convicted murderess released because the new penal statute, having repealed the old, made an insignificant change in punishment).

1. Pennsylvania statutes provide for three kinds of actions where the death of the injured person is involved. If the action has been commenced during deceased's lifetime, his personal representative may be substituted to prosecute the action after the death. PA. STAT. ANN., tit. 20, § 771 (Purdon, 1931). If the injured person dies without having brought an action, his personal representative may bring a "survival" action in his stead. PA. STAT. ANN., tit. 20, § 772 (Purdon, Supp. 1947). In addition to an action under § 772 for the benefit of deceased's estate, the personal representative may bring a "wrongful death" action for the benefit of surviving spouse, parents, or children. PA. STAT. ANN., tit. 12, § 1601 (Purdon, 1931), § 1602 (Purdon, Supp. 1947); PA. R. CIV. P., 2202. See also, Note, *Damages for Wrongful Death in Pennsylvania*, 91 U. OF PA. L. REV. 68 (1942).

2. Gross earnings are those ". . . which deceased would have made . . . without deduction for any expenses whatsoever." Net earnings are ". . . what the deceased would have earned, less what it would have cost *him* to live." (emphasis added). MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 96 (1935). Pezzulli v. D'Ambrosia, 344 Pa. 643, 26 A. 2d 659 (1942), involved a third possible measure of damages, accumulations, defined by McCormick, *ibid.*, as ". . . the amount that the deceased by his own efforts would probably have saved and retained during the period of life of which he has been deprived."

net earnings from age twenty-one projected over his life expectancy, reduced to present value[3] (one justice dissenting[4]). *Murray v. Philadelphia Transportation Co.*, 359 Pa. 69 (1948).

In *Pezzulli v. D'Ambrosia*,[5] the only similar case arising under the Survival Act previously considered by the Supreme Court of Pennsylvania, a verdict based on net earnings was allowed to stand because plaintiff had not objected to a charge directing the jury to compute damages on that basis, but the court clearly indicated that it would otherwise have adopted the gross earnings rule.[6] In the instant case, the court refused to follow this dictum; instead, it adopted the net earnings rule,[7] and although the issue was not before it, intimated that it would likewise apply that rule where the personal representative was merely substituted for the deceased,[8] a course which would overturn the precedents of nearly a century.[9]

If we accept as a premise the orthodox view that the function of tort law with respect to negligently-caused injuries is to compensate for economic loss therefrom but not to punish, the gross earnings rule can be supported only by highly conceptual reasoning. It is said that a totally disabled plaintiff may recover his gross earnings; the administrator's survival action is the same action that the injured person might have brought; therefore, the administrator's recovery should be based on the same *measure of damages* as would have been applied had the injured person survived. The argument ignores the fact that damages computed on the gross earnings basis include sums which deceased would necessarily have expended for his personal maintenance and which therefore could not have become part of his estate. It may plausibly be argued, however, that man is more than a mere money-making machine, and that accordingly damages for the destruction of human life should not be confined to economic loss. This principle has been recognized since 1937 in England, where "loss of expectation of life" is a proper element of damages re-

3. Pennsylvania, by thus permitting the inclusion of loss of prospective earnings as an element of damages in a survival action, is an exception to the general rule as stated by McCormick, *op cit. supra* note 2, § 94: where recovery may be had under both a Survival and a Death Act, ". . . the damages recovered under the Survival Act are . . . the loss of earnings, the expenses of medical care, and the pain and suffering sustained by the injured person *while he lived.*" (emphasis added). The general rule, under which lost earnings would not be recoverable in case of instantaneous death, was followed in earlier decisions of lower Pennsylvania courts: *see, e. g.*, Glaesser v. Evans, 36 Pa. D. & C. 68 (1939); Gannon v. Lawler, 34 Pa. D. & C. 571 (1939).

4. Stern, J.

5. See note 2, *supra.*

6. *Id.* at 648, 26 A. 2d at 661-662.

7. If this rule is conscientiously applied by juries, damages awarded may conceivably shrink to the vanishing point, as in Voelkel v. Bennett, 115 F. 2d 102 (C. C. A. 3d 1940). In that case, a federal court was called upon to lay down the measure of damages in a survival action under § 772 (*supra* note 1) before the state's court of last resort had construed that section. A charge in terms of the net earnings rule resulted in the jury finding against defendant but awarding no damages.

8. "But if such a plaintiff dies, and his action is brought to trial by his administrator, . . . [the latter] should receive only the loss of earning power less cost of maintenance." Instant case at 73. The court did not, however, make clear how late in the proceedings the injured party's death will change the measure of damages; whether the net earnings rule will be applied where the injured plaintiff dies while the action is being tried, or after trial but before final judgment on appeal is entered, are still unanswered questions.

9. Dissenting opinion, instant case at 76, citing authorities.

coverable for the benefit of deceased's estate.[10] The customary allowance by American courts of recovery for deceased's pain and suffering may reflect something of the same feeling, since rationally the right to recover for injuries of such a highly personal nature should perish with the victim, as is the case in defamation and seduction actions.[11] Perhaps the dissenting opinion's advocacy of the gross earnings rule springs from a similar urge to permit an extra-economic recovery; if so, it might have been preferable to articulate it so as to focus attention on this element of damages and thus pave the way for its possible acceptance by American jurisdictions. Admittedly the increment representing deceased's probable personal maintenance expenditures is an imperfect measure of the non-commercial value of his life, yet it bears some relation to his prospect of a happy life had death not supervened, and offers the only relatively certain yardstick[12] thus far suggested.

Evidence—Blood Grouping Tests—Use and Weight as Evidence of Non-Paternity—In a bastardy action, complainant introduced evidence that she and defendant had sexual intercourse on a certain date and that a child was born within the normal period of gestation thereafter. Defendant neither denied her story nor attempted to show that any one other than himself could have been responsible for her pregnancy, but relied solely on the results of blood grouping tests made of himself, the complainant and the child. These tests proved, from a medical standpoint, that the defendant could not possibly be the father of the child. The jury, relying on complainant's testimony rather than the scientific evidence, rendered a verdict for the complainant. A motion for a new trial, on defendant's contention that the results of the blood grouping tests should be conclusive, was denied. *Jordan v. Davis,* 57 A. 2d 209 (Me. 1948).

The basis for determining non-paternity by blood grouping tests was the discovery that readily distinguishable qualities of the blood[1] are inherited in accordance with definite laws.[2] These laws reveal that certain

10. As stated in Benham v. Gambling, [1941] A. C. 157 (1940) at 166-167, this item of damages is intended to compensate ". . . for loss of a measure of prospective happiness . . .", not for ". . . loss of future pecuniary prospects." No clear guide to determination of the award has yet been enunciated, and because of the arbitrary assessments of damages bearing little relation to deceased's age or station in life which have resulted the "loss of expectation of life" basis has aroused considerable adverse criticism. Compare *Loss of Expectation of Life,* 91 L. J. 34-35, 46-47 (1941) (reviewing decisions and proposing abolition of this basis) with Goodhart, *Damages for Loss of Life Under American Law,* 82 L. J. 293-294, 311-312 (1936) (favorable comment).

11. See, *e. g.,* PA. STAT. ANN., tit. 20, § 771 (Purdon, 1931), § 772 (Purdon, Supp. 1947) (actions for slander or libel may not be revived or continued by personal representative); Law Reform (Misc. Provisions) Act, 24 & 25 Geo. V, c. 41, § 1(1) (". . . causes of action for defamation, seduction or inducing one spouse to leave or remain apart from the other . . ." do not survive).

12. As compared with the English rule, expressed in Benham v. Gambling, *supra* note 10.

1. These are serological differences in human blood designated as groups A, B, AB and O and types M, N, and MN. For a scientific analysis of these properties, see WEINER, BLOOD GROUPS AND TRANSFUSIONS cc. II, XIII (3d ed. 1946); 1 WIGMORE, EVIDENCE §§ 165a, 165b (3d ed. 1940); Hooker and Boyd, *Blood Grouping as a Test for Non-Paternity,* 25 J. CRIM. L. & CRIMINOLOGY 187 (1934).

2. WEINER, *op cit. supra,* note 1, cc. XI, XIV; writings cited in note 1, and Galton, *Blood Grouping Tests and Their Relationship to the Law,* 17 ORE. L. REV. 177 (1938).

combinations of blood characteristics in the parents can produce only certain combinations in the child.[3] Conversely, if the bloods of the mother and child are known, there are certain groups to which the blood of the father cannot belong. It is to be noted that the test cannot prove paternity; it is a test of exclusion only.

Although the European courts admitted the results of blood grouping tests as evidence in filiation proceedings almost simultaneously with their acceptance by the medical profession,[4] the United States tribunals were slower to recognize their evidentiary value.[5] The first reported recognition was by an inferior Pennsylvania court which granted full value to the blood grouping test.[6] Thereafter, a struggle developed around a court's power to compel recalcitrant individuals to submit to the tests. For varied reasons, many courts felt that they did not have such power.[7] Other courts found no difficulty in granting defendant's request for an order that a blood test be made.[8] A minority of courts further vexed the problem by holding it error to admit as evidence the results of blood grouping tests.[9] Several enlightened legislatures have resolved both problems by enacting statutes granting courts the power to compel parties to filiation proceedings to submit to blood grouping tests and directing that the results of such tests shall be admissible as evidence where exclusion is established.[10]

Courts, however, which admit the results of blood grouping tests have doggedly refused to give them more weight than other types of evidence.[11] In the light of the empirical knowledge medical science has ob-

3. See WEINER, *op. cit. supra,* note 1, c. XXI for a simple and graphic description of the operation of these laws.

4. Medical confirmation of the principles involved was unreservedly granted by 1924 or 1925. Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence,* 16 So. CALIF. L. REV. 161, 164 (1934). The test was first used as evidence in Germany in 1924. Schoch, *Determination of Paternity by Blood-Grouping Tests: The European Experience,* 16 So. CALIF. L. REV. 177, 178 (1943).

5. The reluctance of the judiciary to accept established medical facts as a facet of the "cultural lag" problem is pointedly analyzed in Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671 (1937), and Britt, *Blood-Grouping Tests and More "Cultural Lag,"* 22 MINN. L. REV. 836 (1938). The law's tardiness occurs more in according adequate weight to scientific evidence than in the admission of such evidence. Courts have admitted as evidence ballistics reports, fingerprints, X-rays, sound motion pictures, phonograph records and dictaphone discs. Comment, 4 WASH. & LEE L. REV. 199, 200 (1947).

6. Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931) (evidence of a blood grouping test having been introduced and a contrary verdict returned, a new trial was granted because the verdict was against the evidence).

7. Bednarik v. Bednarik, 18 N. J. 633, 16 A. 2d 80 (Ch. 1940) (the order would violate the privilege against self-incrimination and right to personal privacy). *Contra:* Shanks v. State, 185 Md. 437, 444, 45 A. 2d 85, 88 (1945).

8. State v. Welling, 6 Ohio Opins. 371, 22 Ohio L. Abs. 448 (1936); Beuschel v. Manowitz, 151 Misc. 899, 271 N. Y. Supp. 277 (King's Cty. 1934), *rev'd,* 241 App. Div. 888, 272 N. Y. Supp. 165 (2d Dep't 1934).

9. Commonwealth v. Krutsick, 151 Pa. Super. 164, 32 A. 2d 325 (1943); Ketcham's Appeal, 254 App. Div. 776, 4 N. Y. S. 2d 786 (2d Dep't 1938).

10. ME. REV. STAT., c. 153, § 34 (1944); MD. ANN. CODE, Art. 12, § 17 (Cum. Supp. 1947); N. J. STAT. ANN. § 2:99-3,-4 (Supp. 1947); N. Y. DOM. RELATIONS COURT ACT, tit. 1, art. 2, § 34 (1942); N. C. GEN. STAT. § 49-7 (Supp. 1945); OHIO GEN. CODE ANN. § 12122-1,-2 (Supp. 1947); S. D. CODE § 36.0602 (1939); Wis. Stat. §§ 166.105 & 325-23 (1943). A federal court has found the authority under Rule 35(a) of the Rules of Civil Procedure, Beach v. Beach, 114 F. 2d 479 (App. D. C. 1940).

11. Berry v. Chaplin, 74 Cal. 2d 652, 169 P. 2d 442 (1946); Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P. 2d 1043 (1937).

tained in support of the principles here involved,[12] there seems to be little justification for this attitude.[13] As in the instant case, the right of the jury to determine that there had been faulty laboratory technique which would invalidate the test may be given as the reason for failing to accord the test full value. But if there are any doubts on such grounds, the proper course is to order a new test made. Nor can it be denied that the relationship of the courts to the community occasionally requires them to go logically wrong and they might possibly be justified in refusing to transfer the determination of such important issues as legitimacy or the right of inheritance from the courtroom to the laboratory.[14] With advancing education, however, the pressures compelling substitution of sentiment for reason in the administration of justice should have practically disappeared. Several courts have shown encouraging tendencies toward future reform[15] but the judicial process corrects slowly. Members of the medical and legal professions should bring pressure to bear upon legislatures to provide not only that parties to filiation proceedings submit to blood grouping tests but also that negation of paternity by such a test shall be a complete defense. Only then will the creation of fathers by operation of law be checked.

Federal Jurisdiction—Appointment of an Out-of-State Administratrix to Gain Diversity Jurisdiction—A citizen of New Jersey was appointed administratrix of an estate for the sole purpose of obtaining federal jurisdiction through diversity of citizenship for a tort claim to be brought under wrongful death and survival statutes. The decedent and the beneficiaries of the estate were citizens of Pennsylvania, and the defendant was a Pennsylvania corporation. By state law an administratrix is a real party in interest for procedural purposes[1] so that her citizenship would be the criterion for federal jurisdiction based on diversity. There was a motion to dismiss on the ground that the administratrix was improperly and collusively made party plaintiff to gain federal jurisdiction. The motion was denied. *Jaffe, Administratrix v. Philadelphia and Western Ry.*, 68 LEGAL INTELLIGENCER 219 (E. D. Pa. Jan. 26, 1948).

The federal statute requiring District Courts to dismiss suits where the parties "have been improperly or collusively made" to create federal jurisdiction,[2] has been applied frequently against "collusion" on the part

12. For data on the results of studies made in this field see WEINER, *op. cit. supra* note 1 at 176, 232 *et seq.* and 108 A. M. A. J. 2138 (1937).

13. An example of how the courts have strained in seeking justification for refusing to hold the test conclusive is seen in an Ohio case where it is said, *inter alia*, "It may brand many honest women, who have committed one indiscretion, with promiscuity and as liars." State v. Holod, 63 Ohio App. 16, 20, 24 N. E. 2d 962, 963 (1939).

14. In Bednarik v. Bednarik, 18 N. J. 633, 16 A. 2d 80 (Ch. 1940) the court disregarded a blood test statute apparently to avoid stamping an innocent child with illegitimacy.

15. Schulze v. Schulze, 35 N. Y. S. 2d 218 (1942) (blood test is sufficient to overcome strong presumption of legitimacy of child born in wedlock). A federal court while deciding that the parties could be compelled to submit to blood tests under the authority of federal rules of procedure has expressed a favorable attitude. Beach v. Beach, 114 F. 2d 479, 480 (App. D. C. 1940).

1. PA. R. CIV. P., 2202. By federal rules an administrator is on a par with real parties in interest. FED. R. CIV. P., 17(a).

2. 36 STAT. 1098 (1911), 28 U. S. C. § 80 (1940).

of those on only one side of the controversy.[3] The refusal to apply the statute in the instant case is based chiefly on language used in the Supreme Court case of *Mecom v. Fitzsimmons Drilling Co.*[4] to the effect that the creation of a party to the suit by the act of a state court in granting letters of administration bars inquiry into the purposes and motives of those obtaining the appointment. The *Mecom* case, however, is distinguishable in that the parties were there trying to avoid rather than gain federal jurisdiction.[5] The distinction is important because the statute against gaining federal diversity jurisdiction by collusion is part of a Congressional policy to limit the jurisdiction of federal courts.[6] There seems to be no federal policy against avoiding such jurisdiction.[7] Thus, although the *Mecom* case has been cited by two federal courts as authority for allowing parties to gain jurisdiction by such appointment,[8] it is possible that these cases gave too broad an interpretation to that Supreme Court decision. An earlier decision where a district court refused to take jurisdiction under facts similar to those of the principal case[9] was urged as persuasive authority for dismissal.

Although it is probable that no injustice was done by allowing the parties to proceed to trial in the federal court, a stricter application of limitations on federal jurisdiction would be more in accord with the policy behind the statutes and the trend towards further limitation of federal diversity jurisdiction.[10] Viewed in this light the artificial distinction made by the court between ordinary collusion, which would presumably lead to dismissal, and collusion wherein a state court has played a minor and unknowing role, has little in its favor.

Labor Law—Refusal to Bargain—Inappropriateness of Previously Certified Bargaining Unit as a Defense in Complaint Proceeding Before the National Labor Relations Board—Workers of the men's and boys' alteration shop of a retail department store organized as a unit of a CIO local and were certified by the National Labor Relations

3. Gilbert v. David, 235 U. S. 561 (1915); Southern Realty Inv. Co. v. Walker, 211 U. S. 603 (1909); Detroit v. Dean, 106 U. S. 537 (1882).

4. 284 U. S. 183 (1931), 45 HARV. L. REV. 743 (1932).

5. See 2 MOORE, FEDERAL PRACTICE 2011, 2017 (1938).

6. 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1940) (setting jurisdictional amount and limiting jurisdiction where an assignment is involved); 43 STAT. 941 (1923), 28 U. S. C. § 42 (1940) (limiting jurisdiction based on federal incorporation); DOBIE, FEDERAL PROCEDURE 25 (1928).

7. *See* Oakley v. Goodnow, 118 U. S. 43, 45 (1886), and Provident Savings Life Assurance Society of New York v. Ford, 114 U. S. 635, 641 (1885) where it is implied that federal courts do not take notice of "collusive" avoidance of federal jurisdiction.

8. Harrison v. Love, 81 F. 2d 115 (C. C. A. 6th 1936); Stewart v. Patton, 32 F. Supp. 675 (W. D. Tenn. 1940). *But cf.* Thames v. Mississippi, 117 F. 2d 949 (C. C. A. 5th 1941). In this case state law provided that an administrator is not a necessary or "real" party, and so the court dismissed for want of jurisdiction. In the principal case and in all other cases cited in this note applicable state statutes provided that an administrator is the proper party to bring suit.

9. Cerri v. Akron-People's Telephone Co., 219 Fed. 285 (N. D. Ohio 1914).

10. See legislation listed *supra* note 6. There is a bill (H. R. 4168) now pending before Congress to do away with federal jurisdiction based on diversity of citizenship. For a collection of opinions on this bill expressed by various members of the bar see *Shall Federal Diversity of Citizenship Jurisdiction Be Abolished or Modified?*, 30 J. AM. JUD. SOC'Y 169 (1947). See also Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. OF PA. L. REV. 869 (1931), and Frankfurter, *A Note on Diversity Jurisdiction in Reply to Professor Yntema*, 79 U. OF PA. L. REV. 1097 (1931).

Board in October 1945.[1] The employees of this unit later voted to disaffiliate with the CIO and to affiliate with the AFL and were certified by the Board in August 1946.[2] After each certification, employer admittedly refused to bargain. In November 1946, unfair labor practice charges based on such refusal were filed by the AFL union and the Board issued its complaint against the employer. In the complaint proceedings employer set up as a defense the inappropriateness of the unit,[3] but raised no issue that had not been considered in the representation proceedings. In dismissing the complaint and reversing the Trial Examiner, the Board held that the unit previously found appropriate was "an unduly artificial and impractical grouping" because it excluded employees' doing similar work in other sections of the store and in the women's alteration shop with which there was considerable interchange of personnel and merchandise; and that the inappropriateness of the unit absolved the employer from his duty to bargain under the National Labor Relations Act.[4] *Carson Pirie Scott & Co.*, 76 N. L. R. B. No. 148 (Feb. 5, 1948).

Certification of a bargaining unit by the Board is not directly reviewable by the courts,[5] and is subject to an employer's challenge only when a complaint of unfair labor practices is predicated on such ruling. In addition, the courts have held that such determination is binding on them if the Board has exercised reasonable discretion[6] and if the finding is consonant with the policy of promoting efficient collective bargaining.[7] These well-rooted principles along with the general policy of the Board itself to refuse to permit attacks on the appropriateness of the unit in a complaint proceeding[8] have afforded some measure of stability to the Board's decisions. It is true that the instant case exemplifies the lessening degree of importance accorded to the extent-of-organization doctrine as a criterion for determining the appropriate bargaining unit.[9] Yet it

1. Carson Pirie Scott & Co., 63 N. L. R. B. 1096 (1945). Before an employer is required to bargain with a unit it must be certified as appropriate by the Board.

2. Carson Pirie Scott & Co., 69 N. L. R. B. 935 (1946). At the time of this proceeding a refusal to bargain charge filed by the CIO union was pending.

3. Employer contended that only a store wide unit would constitute an appropriate bargaining unit, and that the "very smallest unit which has any color of propriety would be a unit of all employees in the store possessing similar skills and doing similar work."

4. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940), as amended, 61 STAT. 136 (1947), 29 U. S. C. A. § 141 (Supp. 1947).

5. American Federation of Labor v. N. L. R. B., 308 U. S. 401 (1940). It has been so held because a certification is not a "final order" of the Board necessary to obtain judicial review under the Wagner Act, § 10(f), 49 STAT. 449, 455 (1935), and by the Taft-Hartley Act, § 10(f), 61 STAT. 136, 146 (1947), 29 U. S. C. A. § 160(f) (Supp. 1947).

6. Allis-Chalmers Mfg. Co. v. N. L. R. B., 162 F. 2d 435 (C. C. A. 7th 1947).

7. Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146 (1940).

8. 12 NLRB ANN. REP. 34 (1947).

9. This doctrine considers the extent to which employees are organized at the particular time into a distinct, homogeneous and identifiable unit, on the theory that such a unit should be found appropriate in order that collective bargaining for these employees need not be delayed until a larger and possibly more appropriate unit could be formed. May Dept. Stores Co. v. N. L. R. B., 326 U. S. 376 (1945). Apparently dissatisfied with the Board's recognition of the doctrine under the Wagner Act, Congress enacted that the ". . . extent to which employees have organized shall not be controlling." 61 STAT. 136 (1947), 29 U. S. C. A. § 159 (Supp. 1947), amending National Labor Relations Act, 49 STAT. 449, 453 (1935). Although the Board in the instant case asserted that the unit ". . . should have been found inappropriate for bargaining purposes even before the Act was amended to limit the Board's application" of the doctrine, this case is indicative of the trend which is evident in Delaware Knitting Co., 75 N. L. R. B. No. 27 (Nov. 14, 1947) and Duluth Glass Block Store Co., 76 N. L. R. B. No. 156 (April 2, 1948).

also constitutes a departure from the Board's policy in a complaint proceeding to refuse to examine *de novo* a contention that the unit is not appropriate unless evidence is submitted that was not considered in the previous representation proceeding or unless some material change has been made.[10] Full justification for the retention of such a policy is evident once an examination is made of the difficulties and delays encountered in obtaining enforcement of Board determinations.[11] Deviation from such a policy will render unit determinations less significant inasmuch as an employer may refuse to bargain knowing that he may set up the inappropriateness of the unit as a defense in a subsequent complaint proceeding. Furthermore, it may result in the Board's duplicating its own efforts, and place a considerable burden on the complainant in a refusal to bargain case by requiring him to be prepared to justify the unit *de novo* in every instance where the issue is raised.

Although it is conceded that Congress in the changes made in the Taft-Hartley Act [12] intended that only slight weight should be given to the extent-of-organization principle, the wisdom of permitting an employer to disregard a certification made prior to such Congressional mandate, refuse to bargain, and then be exonerated by the Board on the basis of his original defense is questionable. If the statutory purpose of stability in bargaining relations is to be achieved, the Board must grant a degree of permanence to its own determinations.

Labor Law—Taft-Hartley Act—Issuance of Labor Injunctions by Federal District Courts on Petition of Private Parties—A union threatened to picket a bus terminal which serviced several bus companies unless the terminal discontinued servicing the busses of a company with which the union was engaged in a labor dispute. Although members of a different union, the terminal employees stated that they would not cross the picket line, whereupon the terminal sought and obtained a permanent injunction against the picketing from a federal district court, the court deriving its power to issue the injunction from the Taft-Hartley Act.[1] *Dixie Motor Coach v. Amalgamated Association,* 74 F. Supp. 952 (W. D. Ark. 1947). In another case, an employer refused to bargain with the union upon the expiration of the collective bargaining contract. The

10. The Board has recently reiterated this policy in Plankinton Packing Co., 75 N. L. R. B. No. 32 (Nov. 19, 1947); *accord,* J. L. Hudson Co., 54 N. L. R. B. 855 (1944); Botany Worsted Mills, 41 N. L. R. B. 218 (1942), *enforcement granted,* 133 F. 2d 876 (C. C. A. 3d 1943), *cert. denied,* 319 U. S. 751 (1943). *But cf.* Potomac Electric Power Co., 73 N. L. R. B. 1291 (1947) in which the Board reexamined the record in the representation proceeding and found that the unit previously determined appropriate improperly included certain categories of employees, but since it was a minor modification, the Board held that it was insufficient to require a dismissal of an unfair labor practice charge based on refusal to bargain. See 12 NLRB ANN. REP. 34 (1947).

11. The history of the instant case is indicative of such difficulties inasmuch as the original certification was made in October 1945 and this complaint was filed in November 1946. Throughout this period employer refused to bargain; and even had the Board issued an order to "cease and desist" the employer could have delayed further since such orders are not self-enforcing and the Board would have been required to petition the appropriate circuit court of appeals for enforcement.

12. See note 9 *supra.*

1. 61 STAT. 136, 29 U. S. C. A. § 141 (Supp. 1947). Officially cited as the Labor-Management Relations Act, 1947. Hereinafter cited by section only.

union struck, and when the employer attempted to induce the employees to return, filed a complaint with the National Labor Relations Board. While the complaint was still pending, the union obtained a temporary injunction from a federal district court restraining the employer from his unfair labor practices. This court also derived its injunctive power from the Taft-Hartley Act. *Textile Workers v. Amazon Cotton Mill,* 76 F. Supp. 159 (D. N. C. 1947).

The Norris-LaGuardia Act [2] substantially eliminated the use of the injunction in labor disputes affecting interstate commerce.[3] It is apparent from the foregoing decisions that the Taft-Hartley Act, which amends the Norris-LaGuardia Act to the extent of giving the NLRB the power to seek injunctions,[4] may be the inspiration for judicial attempts to revive the use of the labor injunction at the request of private parties. The Act makes an inducement to strike for the purpose of forcing employer A to cease dealing with employer B an unlawful act for which employer A can sue for damages,[5] and an unfair labor practice [6] against which the Board must seek an injunction.[7] If picketing is to be construed as an inducement to strike, as in the *Dixie* case, this section negates previous decisions [8] which have held "secondary picketing" [9] not subject to injunction.[10] Since it is mandatory for the Board to seek such an injunction,[11] both the company and the court appear to have been over-eager in the *Dixie* case. Indeed, the language of the Act,[12] the Congressional debates preceding its passage,[13] and the defeat of the Ball amendment which would have expressly allowed private parties

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2. 47 STAT. 70 (1932), 29 U. S. C. § 101 (1940).

3. GREGORY, LABOR AND THE LAW 184-199 (1946); Witte, *The Federal Anti-Injunction Act,* 16 MINN. L. REV. 638 (1932); Riddlesbarger, *The Federal Anti-Injunction Act,* 14 ORE. L. REV. 242 (1935).

4. Sec. 10(j) and 10(l). Sec. 208(a) gives the Attorney-General authority to petition for an injunction in national emergencies.

5. Sec. 303.

6. "It shall be an unfair labor practice for a labor organization . . . to induce . . . the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to join any labor organization . . . or to cease . . . doing business with any other person, . . ." Sec. 8(b)4.

7. Sec. 10(l) states that if the regional attorney or officer of the Board "has reasonable cause to believe" that a secondary boycott or jurisdictional strike exists, "he *shall,* on behalf of the Board, petition" for an injunction (emphasis added).

8. Bakery Drivers v. Wohl, 315 U. S. 769 (1942); AFL v. Swing, 312 U. S. 321 (1941). *But cf.* Carpenters Union v. Ritter's Cafe, 315 U. S. 722 (1942).

9. For analyses of the general problem of secondary boycotts, see Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 YALE L. J. 341 (1938); Barnard and Graham, *Labor and the Secondary Boycott,* 15 WASH. L. REV. 137 (1940).

10. Prior to AFL v. Swing, 312 U. S. 321 (1941), the legality of injunctions against picketing was determined, in part at least, by the judicial finding of a "labor dispute" within the Norris-La Guardia Act. The *Swing* case, however, was decided on the basis of the right of free speech. Consequently, if §§ 8(b)4A and 303(a) are construed, as in the instant case, to include picketing, there is a serious doubt as to their constitutionality. See Note, *Labor's Economic Weapons and the Taft-Hartley Act,* 96 U. OF PA. L. REV. 85, 89 (1947).

11. Note 7 *supra.*

12. "It shall be unlawful, *for the purpose of this section only*" to engage in a secondary boycott. Sec. 303(a). (emphasis added). See also note 7 *supra.*

13. When Senator Morse suggested that the use of the word "unlawful" in § 303(a) might be construed as restoring the right of seeking an injunction, Senator Taft vigorously denied that such was his intent and replied, "I do not believe that any court would [so] construe the amendment." 93 CONG. REC. 4872 (May 9, 1947).

to seek injunctions directly [14] make it clear that this power to seek injunctions against unfair labor practices has been restored for the use of the Board only and not for the private parties.[15]

Since it is only discretionary for the Board to seek an injunction against an *employer's* unfair labor practices,[16] the action of the union in the *Textile Workers* case is perhaps more justifiable, but equally unsound. Prior to the Wagner Act,[17] a union could not have obtained relief from an employer's refusal to bargain or from his interfering with the employees in the selection of their own union under the circumstances of the instant case. The Wagner Act, in designating these as unfair labor practices,[18] gave the NLRB the sole power to institute proceedings to prevent the practices or enforce the remedies.[19] While the Taft-Hartley Act removes this exclusive jurisdiction of the Board, the change is probably to be construed to go no further than to allow damage suits by the private parties.[20] Since the use of the injunction by labor unions has been infrequent in the past,[21] it would be an ironic result if the Taft-Hartley Act were to be responsible for stimulating the use of this potent weapon by unions.

The historic misuse of the labor injunction [22] forced the adoption of the Norris-LaGuardia Act. The readiness with which courts seem to be re-appropriating the injunctive power is disconcerting. Because of the highly complex nature of labor problems and the peculiar qualifications of the NLRB to solve them, the circumvention of the Board, either by employers or unions, is unwise and unwarranted. Courts should discourage this circumvention and should refrain from using the Act as a springboard for returning to rule by injunction.

Railroads—Federal Transportation Act—Federal and Not State Law Governs Liability of Railroad for Wrongful Death of Employee Riding on Free Pass—Decedent was killed in a railroad collision in Utah while riding as a passenger in a train of the respondent. Though he was an employee of respondent, at the time of his death he was returning from a vacation, travelling on a free pass which contained the provision that the user assumed all risk of injury to person or property, whether by negligence or otherwise. Suit was brought in the Federal District Court

14. 93 CONG. REC. 4847 (May 9, 1947).

15. Bakery Union v. Wagshal, 68 Sup. Ct. 630, 632 (1948) per Frankfurter, J., "The short answer to the argument that the . . . Act . . . has removed the limitations of the Norris-La Guardia Act against what are known as secondary boycotts is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where the proceedings are instituted by a private party."

16. "The Board shall have power, upon issuance of a complaint . . . to petition any District Court . . . for appropriate temporary relief or restraining order." Sec. 10(j).

17. 49 STAT. 449 (1935).

18. Sec. 8(1) and (5).

19. Amalgamated Utility v. Consolidated Edison Co., 309 U. S. 261 (1940); Blankenship v. Kurfman, 96 F. 2d 450 (C. C. A. 7th 1938).

20. Sec. 303(b). The fact that the Board considers the injunction request while the private parties may sue directly in the court leads to difficult problems of dual jurisdiction. See Note, *Labor's Economic Weapons and the Taft-Hartley Act,* 96 U. OF PA. L. REV. 85, 97 (1947).

21. Mason, *Organized Labor as Party Plaintiff in Injunction Cases,* 30 COL. L. REV. 466 (1930); Witte, *Labor's Resort to the Injunction,* 39 YALE L. J. 374 (1930).

22. FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930); GREGORY, LABOR AND THE LAW, 95-104 (1946). See also the famous opinion of Judge Amidon in Great Northern Railway v. Brosseau, 286 Fed. 414 (D. N. D. 1923).

in Utah by the minor children of the deceased under the Utah death statute, jurisdiction of the federal court being founded on diversity of citizenship. Judgment for defendant was affirmed by the Supreme Court (3 justices dissenting) which held that the Transportation Act and not state law controlled, and that under the federal law the carrier is not liable for ordinary negligence resulting in death of its employee riding on a free pass containing provisions designed to discharge the carrier from liability. *Francis v. Southern Pac. Co.*, 68 Sup. Ct. 611 (1948).

Congress passed the Hepburn Act[1] in 1906 as an answer to widespread discriminations of the railroads and, as part thereof, to put a stop to their practice of issuing free passes as a means of influencing public officials. Certain classes of persons, among them employees, were specifically exempted from the free pass prohibition of the Act.[2] In 1940 Congress passed the Transportation Act[3] incorporating in it, without material changes, the pass provisions of the Hepburn Act.[4] In 1923 the Supreme Court in the case of *Kansas City Southern Ry. v. Van Zant*[5] had decided that an interstate carrier was not liable for injuries suffered by an employee holding a free pass which contained the exonerating clause.[6] The Court rested its decision in that case on the premise that the liability of the carrier was a question of "federal law." The decision in the instant case follows necessarily from an acceptance of this premise. It is significant to observe, however, that there is nothing in the Hepburn Act itself, or the Congressional hearings that preceded its passage, which makes any reference whatever to the privilege of carriers to stipulate for limitation of liability in the case of free passes issued to employees or to any other user.[7] To understand, therefore, how the court arrived at its decision in the *Van Zant* case, it is necessary to go back to the rule of *Northern Pacific Ry. v. Adams*[8] decided prior to the passage of the Hepburn Act. There, in the case of a passenger killed while riding free, the Supreme Court held that a railroad could successfully limit its liability by making the appropriate provision on the pass.[9] This rule was announced at a time when the federal courts could declare "general law" for the states.[10] The decision of the *Van Zant* case therefore, did not necessarily follow from the application of the Hepburn Act; it more probably followed from application of the *Adams* rule. Contrasted with the federal rule the states' attitude has been hostile with respect to stipu-

1. 34 STAT. 584 (1906), 49 U. S. C. § 1(7) (1940).

2. Sec. 1(7) of the Hepburn Act provides: "No common carrier subject to the provisions of this chapter shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, . . ."

3. 54 STAT. 899, 49 U. S. C. § 1(7) (1940).

4. Sec. 1(7) of the Transportation Act simply expands the groups eligible to ride on free passes.

5. 260 U. S. 459 (1923), *reversing* 289 Mo. 163, 232 S. W. 696 (1921).

6. The Court relied on Charleston and W. C. Ry. v. Thompson, 234 U. S. 576 (1914). Here the Court held that the pass on which the injured wife of the employee had ridden "was free under the statute." Then it went on and upheld the pass stipulations for railroad exemption from liability for negligence. *Cf.* Norfolk Southern R. R. v. Chatman, 244 U. S. 276 (1917); Grand Trunk Ry. v. Stevens, 95 U. S. 655 (1877).

7. See 40 CONG. REC. 7741, 7851-7852, 7920-7940, 7978-7998 (1906).

8. 192 U. S. 440 (1904).

9. *See* to the same effect Boering v. Chesapeake Beach Ry., 193 U. S. 442 (1904).

10. Under the rule of Swift v. Tyson, 41 U. S. 1 (1842) the federal courts exercising jurisdiction on the ground of diversity of citizenship were free, in matters of general jurisprudence, to exercise an independent judgment as to what the common law of the State was, or should be.

lations by carriers against liability for negligence in the case of free passes[11] and petitioners might well have recovered under Utah law.[12] Therefore, had the question of a carrier's liability to the user of a free pass arisen after *Erie R. R. v. Tompkins*[13] was decided, without the pronouncement of the *Adams* case, it is safe to say that the rule of the *Van Zant* case would not have followed by a mere application and construction of the Act.

Even if we accept the carrier's liability as a question to be decided by "federal law," whether the result is necessary or desirable, and whether Congress ever intended to perpetuate it can best be approached from an analysis of the "free pass" concept. The granting of such passes may well be a provision of the work contract between railroads and their employees, or it may be the practice of railroads to allow free passes as an incentive to their employees. The Congressional hearings reveal that employees were excluded from the provision of the Act prohibiting the issuance of free passes because they were thought to be entitled to them.[14] Therefore, a contrary result might have been reached in these cases by a recognition that such passes are not really "free" inasmuch as they are part of the employee's compensation. In this light it would have been desirable to reverse the archaic *Adams* rule and adopt one more in accord with the social philosophy of other current legislation.[15]

Trade Regulation—Pricing to Meet Competition as Defense under the Robinson-Patman Act—Charged by the Federal Trade Commission with selling automatic controls for heating plants at discriminatory prices in violation of § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act,[1] respondent was unable to show that the discounts

11. *See* Clark v. Southern Ry., 69 Ind. App. 697, 199 N. E. 539 (1918); St. Louis, I. M. & S. Ry. v. Pitcock, 82 Ark. 441, 101 S. W. 725 (1907); Galveston, H. & S. A. Ry. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721 (1907); Norfolk & W. Ry. v. Tanner, 100 Va. 379, 41 S. E. 721 (1902). All the states today have wrongful death statutes. See TIFFANY, DEATH BY WRONGFUL ACT § 19 *et seq.* (2d ed. 1913); Schumacher, *Rights of Action Under Death and Survival Statutes,* 23 MICH. L. REV. 114 (1924). There is no federal death statute because no need was ever felt for one, since state legislation met the problem adequately.

12. UTAH CODE ANN. § 104-3-11 (1943). *See* Hansen v. Oregon Short Line R. R., 55 Utah 577, 188 Pac. 852 (1920); Williams v. Oregon Short Line R. R., 18 Utah 210, 54 Pac. 991 (1898).

13. 304 U. S. 64 (1938). Here the doctrine of *Swift v. Tyson* was repudiated, the Court declaring (p. 78), "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."

14. See 40 CONG. REC. 7852 (1906).

15. Compensation acts, Employers' Liability acts, and other social insurance legislation all reflect the public concern over the status of the accidentally injured. The Federal Employers' Liability Act, 34 STAT. 232 (1906), 45 U. S. C. § 55 (1940) provides "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common law carrier to exempt itself from any liability . . . shall to that extent be void . . ."

1. 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13(a) (1940). "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

which it accorded large-volume purchasers were justified by savings in cost resulting from quantity sales. Respondent, long a dominant figure in the heat control industry, showed however that all of its prices were higher than those of competitors to whom it had steadily been losing business. *Ordered,* one Commissioner dissenting, that respondent cease and desist from selling controls at different prices to competing oil burner manufacturers when the differences in price are not justified by savings in distribution costs resulting from volume sales; such practice tends substantially to injure competition among respondent's customers and between respondent and its competitors. Respondent's asserted defense under § 2(b) of the Act[2] is rejected on the basis of a finding that in several instances the price differentials bore no relation to the meeting of competition and a holding that, even if they did, § 2(b) could not be construed to sanction a discriminatory pricing *system.*[3] *Minneapolis-Honeywell Regulator Co.,* Dkt. No. 4920, FTC, Jan. 14, 1948.[4]

Although the Commission's treatment of the issue raised by the § 2(b) defense involves a measure of circuitous reasoning,[5] it is apparent that it is relying on a reading of *FTC v. A. E. Staley Mfg. Co.*[6] as a declaration that pricing systems are *ipso facto* not to be considered as having been established in "good faith" within the meaning of that section.[7] This position has been substantiated by the subsequent Supreme Court decision in *FTC v. Cement Institute.*[8] However, the desirability of fostering the use of pricing as a competitive device[9] dictates careful consideration of the consequences of imposing a rule which may seriously deter its use. This factor may suggest that a distinction be drawn between systematic discriminations practiced by a *group* of sellers all of whom are charged with violations of the Act,[10] and a system employed by a single

2. 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13(b) (1940). "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . ., the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section . . .: *Provided, however,* That nothing . . . shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

3. By considering evidence under § 2(b) in the instant case after a finding that injury to competition had been affirmatively shown, the Commission is apparently receding from its position that this defense is available only to rebut a prima facie case made by showing a price *difference* and is not a substantive justification in those cases where the Commission assumes and sustains the burden of showing injury to competition. Standard Oil Co. of Ind., 3 CCH TRADE REG. SERV. (9th ed.) ¶ 13,295 (FTC 1945), *order modified,* 3 *id.* ¶ 13,447 (FTC 1946), *review pend'g,* 3 *id.* ¶ 13,492. For a full discussion of this question, see Austern, *Required Competitive Injury and Permitted Meeting of Competition,* N. Y. BAR ASS'N, ROBINSON-PATMAN ACT SYMPOSIUM 63, 70-77 (1947).

4. Reported in 3 CCH TRADE REG. SERV. (9th ed.) ¶ 13,675 (FTC 1948).

5. [Findings, pp. 14-16; Opinion, pp. 5-6.]

6. 324 U. S. 746 (1945).

7. *Id.* at 753. But see the Court's further discussion, *id.* at 754-755.

8. 16 U. S. L. WEEK 4359 (U. S. April 27, 1948).

9. For a discussion of pricing, as compared with other competitive devices, see NELSON AND KEIM, PRICE BEHAVIOR AND BUSINESS POLICY 101-108 (TNEC Monograph 1, 1941).

10. The *Staley* case involved the use of a single basing point system, and the companion case of Corn Products Refining Co. v. FTC, 324 U. S. 726 (1945), affirmed an order directed at the use of the same system by Staley's competitor; the *Cement Institute* case involved the use of a multiple basing point system by a large number of producers, all of whom were joined as respondents.

respondent. Even if a respondent's competitors are in fact using similar policies,[11] a cease and desist order places the respondent at a serious disadvantage when competitors are not similarly restricted. If this distinction is accepted, the result in the instant case cannot be justified unless the "good faith" qualification of § 2(b) is interpreted as requiring that the tribunal probe into the corporate mind of the respondent to determine whether its prices were motivated by an honest effort to compete rather than to monopolize;[12] a finding of intent to monopolize might be supported in the instant case on the ground that respondent was charged with other practices,[13] the aggregate effect of which indicated an overly aggressive sales policy.[14]

Viewed in the light of a national policy committed to the stimulation of competitive enterprise, the Robinson-Patman Act presents the formidable task of balancing the conflict between fostering competition between a seller and his competitors on the one hand, and preserving competitive opportunities to the seller's customers on the other hand. As a consequence, constructive administration of the Act requires that the zeal to prosecute for a violation be tempered by a recognition of this conflict and a careful appraisal of the deterrent effect on first line competition of a cease and desist order, not only as applicable to an individual respondent, but also as a precedent which must guide the conduct of businessmen. In view of the disposition of the courts to place strong reliance on administrative interpretations in this field,[15] the responsibility of the Federal Trade Commission becomes a heavy one.

Unemployment Compensation—Voluntarily Leaving Employment in the Face of Lay-off to Form Own Business Is Without Good Cause—Claimant, fearing discharge because of advanced age, quit his job for the purpose of forming his own business, which failed in three months due to material shortages. He was subsequently declared eligible for benefits pursuant to the Pennsylvania Unemployment Compensation Law,[1] on the grounds that his employment terminated when his business failed. After exhausting his administrative remedies, the employer appealed. The Supreme Court reversed the Superior Court's affirmation of the Unemployment Compensation Bureau, holding: (1) The claimant lost his status as an employee when entering his own business, and upon its failure became an unemployed business man, ineligible for benefits. (2) He is disqualified under § 402 of the Act, which bars benefits for unem-

11. It is indicated that competitors of respondent in the instant case were following the same practices. [Dissenting Opinion, p. 4.]

12. See McCollester, *Section 2(b)*, N. Y. BAR ASS'N, ROBINSON-PATMAN ACT SYMPOSIUM 23, 30 (1946).

13. It was found that some customers had been granted "off-scale" prices, *i. e.*, prices for a bracket to which the volume of their actual purchases did not entitle them, and that respondent had entered into sales contracts which contained tying clauses and which limited the extent to which the purchaser could buy controls from respondent's competitors.

14. In any case a respondent must show that he was acting defensively in order to avail himself of the § 2(b) proviso. See ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 129 (1937).

15. *See, e. g.*, FTC v. Cement Institute, 16 U. S. L. WEEK 4359 (U. S. April 27, 1948).

1. PA. STAT. ANN., tit. 43, c. 14 (Purdon, Supp. 1946).

ployment ". . . due to voluntarily leaving work without good cause." [2] *Sun Shipbuilding and Drydock Co. v. Unemployment Compensation Board of Review,* 56 A. 2d 254 (1948).

The Superior Court opinion was in large measure devoted to an ingenious but unproductive bending of the statute to establish that claimant remained an employee while engaged in his own business.[3] The Supreme Court likewise concentrated on this argument in disposing of the case, but properly rejected it. The crux of the case, however, is the interpretation of "good cause." This is the second decision of the court of last resort on this question,[4] but the Superior Court has delivered several seemingly inconsistent opinions apparently because of slight factual variations.[5] Although the statutory wording on this point bears a marked similarity in most states,[6] decisions of the courts are far from uniform.[7] The only case involving quitting one job to take another held against the claimant, but the pertinent statute required ". . . good cause attributable to the employer." [8] Administrative adjudications are more numerous and uniform. The vast majority hold that where the quitting employee is reasonably certain of other adequate employment, whether a new job or business of his own, he has left work with "good cause." [9]

The Pennsylvania court in the instant case has rejected the "general welfare" approach, which tests the claimant by his attachment to the labor market and sincere desire and readiness to work, and has chosen a course bordering on the restrictive "employer fault" theory. This theory judges the employee by his readiness to continue in his last job, and searches for some fault on the part of the employer.[10] In so doing the

2. "An employee shall be ineligible for compensation for any week—(b) In which his unemployment is due to voluntarily leaving work without good cause." PA. STAT. ANN., tit. 43, § 802 (Purdon, Supp. 1946).

3. Dawkins Unemployment Compensation Case, 160 Pa. Super. 501, 504, 52 A. 2d 362, 363 (1947).

4. Barclay White Co. v. Unemployment Compensation Board of Review, 356 Pa. 43, 50 A. 2d 336 (1947), 95 U. OF PA. L. REV. 686. (This case, however involved "good cause" for refusing new employment, § 802(a) of the Act.)

5. *In re* Dames Unemployment Compensation Case, 158 Pa. Super. 564, 45 A. 2d 909 (1946) (woman who left her employment to marry left voluntarily without good cause); *In re* Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 45 A. 2d 898 (1946) (woman who left her employment to join her husband left work voluntarily with good cause).

6. As of the close of 1943, 32 states had unlimited "good cause" provisions. Ten others restricted it to "good cause attributable to the employer," and six to "causes connected with the individual's work." Kempher, *Disqualification for Voluntary Leaving and Misconduct,* 55 YALE L. J. 147, 150 n. 5 (1945).

7. Sickness: *Compare* Brown-Brockmeyer Co. v. Board of Review, 70 Ohio App. 370, 45 N. E. 2d 152 (1942) (woman who quit draughty employment because susceptible to colds, not available for work), *with* Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N. W. 2d 249 (1945) (Quitting because of an allergy to the material worked with is involuntary and with good cause attributable to the employer).

Change of residence: *Compare* Woodmen of World Life Insurance Society v. Olsen, 141 Neb. 776, 4 N. W. 2d 923 (1942) (woman leaving employment for the sole purpose of being with husband is not good cause), *with In re* Teicher Unemployment Compensation Case, 154 Pa. Super. 250, 35 A. 2d 739 (1943) (woman leaving employment to be with husband is good cause).

8. Iowa Public Service Co. v. Rhode, 230 Iowa 751, 298 N. W. 794 (1941).

9. 2317—Idaho A. Ben. Ser. Vol. 2 No. 12 (1939); 1505—Ind. A. Ben. Ser. Vol. 2 No. 5 (1938); 5822—Nebr. R. Ben. Ser. Vol. 4 No. 5 (1940); 10928—S. Dak. A. Ben. Ser. Vol. 9 No. 10 (1946); 2212—Tenn. A. Ben. Ser. Vol. 2 No. 11 (1939). *Contra:* 3988—Ga. R. Ben. Ser. Vol. 3 No. 7 (1940).

10. Simrell, *Employer Fault v. General Welfare as the Basis of Unemployment Compensation,* 55 YALE L. J. 181 (1945).

court was palpably influenced by the determination of "experience rating," [11] whereby the tax rates of the employer vary with the percentage of his employees compensated in relation to the state percentage, and the fear of "compensated rest." It is submitted that these considerations should carry little weight here. The courts with unanimity proclaim that the compensation statutes are to be construed liberally [12] and that the alleviation of the unemployed workers' distress should not be prejudiced by the secondary consideration of experience rating.[13] The "vacation" problem will be present in any compensation case. The tendency here may be to influence the employee to stick to his job, permitting change to better employment only at the risk of disqualification for benefits. It seems unfortunate that the court has chosen to restrict unnecessarily the liberal words of the statute,[14] particularly in view of Pennsylvania's harsh disqualification procedure.[15] The purpose of benefits in normal periods, alleviation of distress and the bolstering of purchasing power [16] are not served, and are indeed frustrated by such narrow reading of "good cause." The test adhered to by the administrative bodies is more consonant with the objectives of compensation. In the light of the varied and difficult fact situations which preclude an inflexible approach, the most desirable solution seems to be a recognition of the experience of the administrator, making the decision of the Bureau final, if it has warrant on the record and a reasonable basis in law.[17]

11. PA. STAT. ANN., tit. 43, § 781 (Purdon, Supp. 1946).

12. Rochester Dairy Co. v. Christgau, 217 Minn. 460, 14 N. W. 2d 780 (1944); MacFarland v. Unemployment Compensation Board of Review, 158 Pa. Super. 418, 45 A. 2d 423 (1946).

13. *In re* Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 562, 45 A. 2d 898, 906 (1946).

14. The statute originally disqualified for ". . . voluntarily leaving work." PA. STAT. ANN., tit. 43, § 802(b) (Purdon, 1941).

15. Most states provide for disqualification for a certain number of weeks, but Pennsylvania is one of the few states which totally disqualifies the employee for voluntarily leaving work without good cause. PA. STAT. ANN., tit. 43, § 802 (Purdon, Supp. 1946).

16. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L. J. 1, 12 (1945); Clayne, *The Economics of Unemployment Compensation*, 55 YALE L. J. 53, 68 (1945).

17. NLRB v. Hearst Publications, Inc., 322 U. S. 111 (1944).