UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 25 | Number 2 Article 3

2-1-1947

Notes and Comments

North Carolina Law Review

The
North Carolina
Law Review

VOLUME 25 FEBRUARY, 1947 NUMBER 2

NOTES AND COMMENTS

Divorce—Substituted Service of Summons—Suggested Statutory Reforms

A recent North Carolina case[1] reveals certain undesirable aspects of our procedural divorce law, particularly the service of summons by publication in divorce cases, which, it is believed, might well be corrected.

Plaintiff brought an action for divorce on grounds of two years' separation in the Superior Court of Martin County. At the time, plain-

[1] Smith v. Smith, 226 N. C. 506, 39 S.E. (2d) 391 (1946). Criticisms in this note are definitely not directed at the granting of the divorce decree on its merits. Rather they are directed at the process by which jurisdiction was obtained. Whatever the particular merits of the case, it is felt that such process is definitely not sufficient in cases where the serious question of the advisability of destroying the marital relationship is under consideration.

tiff was a resident of Hertford County and his wife was a non-resident of the state. They had never lived together in either Martin or Hertford County, having been residents of Warren County until the time of their separation two years before. An order for service of summons by publication was issued by the clerk of court based upon an affidavit of the plaintiff which conformed to the essential statutory requirement[2] in that it specified that "after due diligence . . . [the defendant] cannot be found within the State of North Carolina." The order directed that "summons be served by publication in some newspaper published in Martin County as required by law." Notice of the summons was published in due conformity to the statutory requirements[3] in *The Enterprise,* a newspaper published in Williamston, Martin County. The defendant failed to make appearance. After the submission of issues to the jury, a decree of absolute divorce was entered on the verdict rendered. Plaintiff died some five months later; and seven months after his death defendant appeared by motion in the cause to have the decree set aside. At that time the court, on motion of the plaintiff's executor, allowed an amendment *nunc pro tunc* of the original order by inserting the name of the newspaper therein. Defendant alleged no actual notice of the pending action. The attack on the validity of process was directed primarily at showing that the statutory requirement that, "The order must direct the publication in one or more newspapers *to be designated* as most likely to give notice to the person to be served . . . ,"[4] had not been complied with (italics ours). Defendant contended that this clause of the statute makes mandatory a specific recitation in the clerk's order that the newspaper to be used is the one most likely to give notice. Defendant further argued that the clerk obviously could not have made such a recitation in this order, because the newspaper was published in a locality one hundred miles from Warren County where defendant's North Carolina residence had been, and defendant had no contacts in the locality where publication was made. Defendant contended that this constituted such a defect in the service of summons as to justify setting aside the decree. *Held:* G. S. 1-99 does not specifically require that an order for the publication of notice of summons *state* that the newspaper is the one "most likely to give notice to the person to be served." The court, citing one previous North Carolina case,[5] based this construction of the statute on the proposition that when an order for publication of notice of summons is made by a court of record, there is a presumption of the rightfulness of its decrees and that the newspaper specified *is* the one most likely to give notice.

[2] N. C. GEN. STAT. (1943) §1-98. [3] N. C. GEN. STAT. (1943) §1-99.
[4] *Ibid.*
[5] Elias v. Comm'r's. of Buncombe, 198 N. C. 733, 153 S. E. 323 (1930).

The upshot of this construction of G. S. 1-99 is that insofar as a defendant who has had no actual notice via the publication is concerned, the legislature might as well have omitted the phrase, "to be designated as most likely to give notice . . . ," from the statute. The words may serve to bring the legislative mandate to the clerk's attention, but if he fails to obey the mandate, as it appears he did in the principal case, his failure is not subject to attack by the prejudiced defendant. A New York provision[6] is not so dissimilar from our G. S. 1-99 as to demand an exactly opposite construction; but that is just what occurred in that jurisdiction. The pertinent phraseology of that statute, "The order . . . must direct that such service be made by publication thereof in two newspapers . . . , *designated in the order as most likely to give notice to the defendant to be served* . . . ," was construed by a New York supreme court to require that the order expressly provide that the newspapers are the ones most likely to give notice; and the court held that failure to do so constituted a fatal defect in process. The court also pointed out that the newspapers named in the order attacked were obviously not papers most likely to give notice, also a fatal defect.[7]

The construction announced by our court leads to an incongruous result when it is considered that for defects in service by publication less serious to the defendant, our court is quick to set aside the decree of divorce. Thus, where the plaintiff's affidavit alleged that his wife was a non-resident of the state, or that she was keeping herself concealed within the state, but failed to allege that "after due diligence the defendant cannot be found within the State of North Carolina," the court set aside the decree.[8] In another divorce case where the summons, as published, stated that the action was pending in a different county from the one in which it was actually pending, but *did* require the defendant to appear at the office of the clerk of the court of the *correct* county, the decree was set aside.[9] Again, where the affidavit set forth that a summons had been issued to the sheriff and had been returned indorsed: "The defendant, . . . , cannot, after due diligence, be found in Mecklenburg County or in the State of North Carolina"; and further specified that the plaintiff, after due diligence, had been unable to locate the defendant and her whereabouts were unknown to the plaintiff; the court set aside the decree because the affidavit, outside the quoted sheriff's indorsement, failed to make the essential recitation.[9a] Can it be seriously contended that a defendant is more prejudiced by the above noted defects in process than he would be by the fact that the

[6] N. Y. Rules of Civil Practice, Rule 50.
[7] Glinski v. Glinski, 131 Misc. 1, 225 N. Y. Supp. 505 (1927).
[8] Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315 (1925).
[9] Guerin v. Guerin, 208 N. C. 457, 181 S. E. 274 (1935).
[9a] Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901 (1944).

publication was made in a newspaper which had only the remotest possibility of ever conveying notice to him?

The opportunity for taking advantage of this loophole in the procedural safeguards incident to divorce actions is enhanced by another statute. As pointed out by the court in the principal case, G. S. 50-3, which provides that in proceedings for divorce the summons shall be returnable to the court of the county in which either plaintiff or defendant resides, is not jurisdictional, but relates to venue, and may be waived by failure of the defendant to demand in writing before answering that the trial be had in the proper county. This statute then provides a perfect inducement to a plaintiff seeking a divorce to institute proceedings in a county where the newspaper used for publication is definitely not likely to give actual notice, knowing that these facts alone will not subject the proceedings to possible invalidation.[10]

It is realized that everything said to this point is as applicable to other actions where service is allowed by publication as it is to divorce actions. However, it is believed that on grounds both of public policy and of the legal considerations involved, criticism of the state of our law on this subject is especially pertinent to divorce actions. It is perhaps trite to say that every thinking citizen is appalled by the number of divorce decrees now granted by our courts, and at the apparent ease with which they are obtained. Our recently much-publicized "divorce mill"[11] verifies the justification for this feeling. The high proportion of divorce actions where service is made by publication may perhaps partially explain the large number of decrees granted.[12] Is it illogical to suppose that the statutory defects noted may be conducive to the

[10] It is gratifying to learn from a superior court clerk that some of our superior court judges, taking cognizance of these abuses possible under G. S. 50-3, are refusing to try divorce actions where the plaintiff is a non-resident of the county where the action is instituted, if the service has been made by publication. This procedure by the judges is commendable as preventing the abuses noted, but at least one authority has questioned the legality of such action by a judge without demand by the defendant. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929 ed.) §295.

[11] Burke Davis, *Divorce,* Charlotte *News,* Nov. 18, 1946; Nov. 19, 1946; Nov. 20, 1946.

[12] Upon written inquiry to the clerks of the superior courts, the following excerpts from letters received in reply from three geographically representative counties should serve as a fairly accurate cross-section view: (1) ". . . within the last three years the average yearly divorces exceed 200 in number. I would say that at least 50 per cent of these are cases in which the defendant is served by publication of summons." (2) "We average around 350 divorce cases in this county each year. Of this number, perhaps one-half are served by publication on the defendants who are alleged not to be residents of the State of North Carolina or of [this] county." (3) "During the year 1943 there were two hundred ninety-one (291) divorce cases tried in [this] county. In 1944 there were three hundred twenty-three (323), in 1945 there were four hundred sixty-eight (468) and while I do not have the complete record for 1946, there has been a sharp increase in the divorces granted. . . . I estimate that service of summons is made by publication in thirty per cent (30%) of these cases."

widespread practice of making service by publication in these actions? Would not more contested divorces lower the number of decrees granted? If our procedure were tightened up, parties might think more seriously before entering into the marital relationship in the first place.

These features of our procedural divorce law are also susceptible to criticism on a purely legal basis. Our statute, G. S. 1-98, makes no distinction between the procedure to be employed in obtaining service by publication in divorce actions and in the other types of action where it is allowed; they are all listed together, all to be governed by the same procedure outlined in G. S. 1-99. The classification of these actions is made on the basis that they are all actions *in rem* or *quasi in rem,* where this form of substituted service constitutes due process of law; as distinguished from *in personam* actions where it does not, the defendant being a non-resident of the state. To bring divorce actions within this classification, the questionable doctrine of considering the marriage relationship itself the *res,* is invoked. The idea then is that over this relationship the state has control, and may dissolve it even where one of the two parties concerned has not been actually notified of the pending proceedings. The inclusion of divorce actions within this classification leads to certain incongruities which are strikingly presented by Mr. Justice Jackson, dissenting in the famous case of *Williams v. North Carolina*[13] on its first trip to the Supreme Court of the United States. One of the results, he says, is that, ". . . settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Justice Jackson proceeds to question the advisability of allowing any form of substituted service in divorce actions. Admitting, however, that they must be allowed to prevent a party who is guilty of conduct which would justify a divorce in North Carolina from going to a state where it would not, and thus evading our law,[14] this criticism of the whole doctrine should serve to indicate that divorce actions are *not* of the same nature as the other actions with which they are classified. Certainly they are entitled to special consideration in this respect, even if they are allowed to remain in the general classification of actions where service by publication may be made. This special consideration should take form in such stringent safeguarding, by statutes and judicial construction, of the whole substituted service process in divorce actions as to insure the best chance possible of giving actual notice to the defendant. In North Carolina, statutes and judicial construction of these statutes do not afford these safeguards. It would certainly appear that personal service on a de-

[13] 317 U. S. 287, 316 (1942). This case, in all its stages, is discussed at length in Baer, *So Your Client Wants a Divorce!* (1945) 24 N. C. L. REV. 1.

[14] Pennoyer v. Neff, 95 U. S. 714, 735 (1877).

fendant, whose residence out of state is known, by an officer of the county of his out of state residence, is a device more apt to give actual notice than is service by publication. Yet our statute[15] which provides for such service states that it may be used *in lieu* of publication; and the statute has been construed to mean that this form is optional and not exclusive of service by publication in newspapers.[16] Why, if it is consonant with our conception of natural justice that a defendant should have actual notice if at all possible, should not this more certain form be employed *exclusively* when available?

To summarize the state of our law on the subject of substituted service of summons in divorce actions: Service by publication, the most haphazard method, is elevated to a position of equality with a more certain form by G. S. 1-104. G. S. 50-3 makes it possible for a plaintiff to bring his action for divorce in any county, subject only to the defendant's demand in writing that it be removed to another county before answering.[17] This demand will probably not be forthcoming if service is made by publication in a newspaper of the county where the action is commenced and that county is one wherein the absent defendant has no contact with persons who might see the notice. The fact that publication is made in a newspaper which had only the barest mathematical chance of giving actual notice to the defendant is not a basis for attack on the validity of a decree rendered in the action, due to our court's construction of G. S. 1-99 in the principal case.

In order to eliminate these defects, it is submitted that North Carolina should pass legislation designed to provide an entirely separate procedure for substituted service of summons in divorce actions. Such legislation should have two main objectives: *First,* to make service by publication strictly a last-resort process; and *second,* to insure, insofar as is possible, that when publication is used it has the best chance possible of giving actual notice.

A review of the statutes of all the states revealed one state which, it is believed, has legislation more nearly capable than any other of achieving the first objective. The Colorado Statutes[18] provide in sub-

[15] N. C. GEN. STAT. (1943) §1-104.
[16] Mullen v. Norfolk & Carolina Canal Co., 114 N. C. 8, 19 S. E. 106 (1894).
[17] And possibly by the court *ex mero motu,* see note 10 *supra.*
[18] COLORADO STATUTES ANNOTATED (1935) c. 56, §§4 and 5.
Section 4: "In every action for divorce, except where defendant is without the United States, personal service of the summons and a copy of the complaint shall be made on the defendant, except as provided in the next succeeding section, or as hereafter provided. If such service be made within the state of Colorado, then the defendant shall have thirty days thereafter within which to plead to said complaint; if the defendant is not within the state of Colorado, then personal service of the summons and a copy of the complaint may be made by the sheriff of the county in any state in which such defendant is found, or by a United States marshal if the defendant is found in a United States territory or district, and the return of such officer showing such personal service shall be held sufficient service to give

stance: (1) That in every action for divorce, except where the defendant is without the United States, personal service of the summons and a copy of the complaint shall be made on the defendant, except as hereafter provided. (The form for return of summons specified in our G. S. 1-104 might very well be incorporated in this section.) (2) When it is ascertained that personal service is absolutely impossible, then, and then only will service by publication be ordered. This is ascertained from an affidavit by the plaintiff showing in detail all the efforts made by plaintiff to procure personal service, and all the facts which plaintiff has of defendant's location, and all the facts within plaintiff's knowledge which might help in locating defendant; and from a personal examination of the plaintiff relative to these facts by the court or judge in vacation. (The Colorado courts, in construing earlier similar statutes, have insisted upon a strict compliance with all of the requirements therein, and demand that such compliance be made a matter of record, parol evidence being inadmissible to prove it.)[19]

To attain the second objective, a statute such as follows is suggested, such statute to immediately succeed those modeled after the Colorado statutes: **In every action for divorce where service of summons by publication is ordered the order shall direct the publication in one or two newspapers of general circulation in the county where it or they are published; and the order shall contain an express statement that**

---

the court jurisdiction of such defendant; and in case of such service outside of the state of Colorado the defendant shall have fifty days from the date of such service within which to plead to such complaint, and in all cases the time within which the defendant must appear and plead shall be stated in the summons. Service of summons by a sheriff may be made through an undersheriff, or deputy sheriff in the name of the sheriff, and service by a United States marshal may be made through a deputy marshal in the name of the marshal. If the defendant is without the United States such defendant shall be served by publication in the manner provided in the next succeeding section."

Section 5: "In any case where the defendant is without the state of Colorado and his or her location is unknown to the plaintiff, or where the defendant conceals himself or herself in Colorado so that summons cannot be personally served on him or her, or where the plaintiff has no knowledge or notice, direct or indirect, of where the defendant can be found, within or without the state of Colorado, the palintiff may make an application to the court for an order to make service of the summons on the defendant by publication; such application shall be made under oath and shall state fully and in detail all of the efforts made by the plaintiff to procure personal service of the summons on the defendant, and all of the knowledge of the plaintiff concerning the location of the defendant and shall state all the facts within the knowledge of the plaintiff which might assist in learning the address of the defendant. The court, or the judge thereof, in vacation, shall, upon the hearing of said application, carefully examine the plaintiff and such other witnesses as shall be produced, in order to determine what steps shall be taken to notify such absent defendant of the pendency of the action. The court or the judge thereof shall, if satisfied of the good faith of the plaintiff cause the summons to be published in the same manner and with like effect as is now provided by law for publication of summons in cases of attachment." (This last sentence, for our purposes, should read, ". . . cause the summons to be published as provided in the next succeeding section.")

[19] Roberts v. Roberts, 3 Colo. App. 6, 31 Pac. 941 (1892).

the newspaper or newspapers specified therein have been determined from the application and examination required by law to be that or those most likely to give notice to the person to be served. Provided; that if it be shown that such statement did not appear in said order, or that the information given in the application and examination required by the immediately preceding section was so false and misleading as to cause the newspaper or newspapers specified not to be that or those most likely to give notice to the person to be served, or that from the information given in such application and examination the newspaper or newspapers specified could not reasonably have been determined to be those most likely to give such notice, then the service of summons is to be void and of no effect.[20]

J. DICKSON PHILLIPS, JR.

Evidence—Opinion Rule—Estimate of Speed from Mark on Road

In *Tyndall v. Hines Co.*[1] plaintiff was struck by defendant's truck while walking on the shoulder of the road. A highway patrolman testified as to the presence of marks on the grass and shoulder. He testified that they were not brake marks, but were marks made when the truck made a sudden turn, thus shifting the weight to one side or the other. The trial court allowed him to give his opinion as to the speed of the vehicle, based upon such physical data. On appeal, questioning the admissibility of the evidence and alleging its admission was prejudicial to the defendant, the Supreme Court *Held:* That the witness not having seen the truck in motion would not be permitted to give an opinion as to its speed. "The opinion must be of facts observed. The witness must speak of facts within his knowledge. He cannot under the guise of an opinion give his deductive conclusion from what he saw and knew."[2] Finding the evidence prejudicial, the court awarded the defendant a new trial.

Instances where the court will allow the witness to express himself in terms of inferences drawn from facts observed may be divided in two classes, which are subject to separate and distinct rules of admissibility: (1) Where the witness is specially qualified and by virtue of such may aid the jury. (2) Where the witness is unable otherwise to present the facts to the jury.[3] The former which is most commonly characterized as expert opinion is received because the witness' skill in

[20] The provisions for length and cost of publication could be inserted after the portion set out above.

[1] 226 N. C. 620, 39 S. E. (2d) 828 (1940).

[2] *Id.* at 623, 39 S. E. (2d) at 830.

[3] It is recognized that these classifications are but broad general divisions of admissible opinion, and that there are some admissible opinions that cannot be easily placed in one or the other class but exist in the twilight zone of both.

drawing the proper inference from the observed or assumed facts is greater than the jury's; while the latter is a rule of necessity or convenience adopted to provide for the situation where the facts cannot be so told by the witness as to make the jury as able as he to draw the proper inference.[4]

Though the opinion is one that is inadmissible from a witness not specially qualified, if it be proper from one who is, an objection that the witness is not specially qualified must be taken at the trial;[5] and when this is not done it is too late upon appeal to object that the witness did not qualify as an expert.[6] Whether a particular witness is an expert or not is a preliminary question of fact to be determined by the court below.[7] That once determined, as it necessarily is determined, if the testimony is admitted, the appellate court ordinarily accepts the lower court's determination.[8] It follows that where an opinion is admitted without objection as to the special qualifications of the witness the appellate court should test the competency of the evidence according to the rules applicable to both classes of opinion mentioned above.

Was the opinion in the principal case competent because the witness was unable otherwise to present the facts to the jury? The observation by the court that: "He (the witness) gave a plain, clear, and distinct description of the signs, marks, and conditions he found at the scene of the collision so that ordinary jurymen could readily understand and appreciate just what he saw," would indicate the statement as to the speed of the truck, based upon these observations, was not admissible as this class of opinion. The opinion here was not a substitute method of presenting the facts observed, but was an inference or conclusion drawn from them.

Was the evidence competent as expert opinion? The failure to state the question calling for the opinion in hypothetical form would not be objectionable, where the expert is speaking from personal observations.[9] Since the requirement that the witness be shown to be better

[4] WIGMORE, EVIDENCE (3rd ed. 1940) §§557, 1917; STANSBURY, NORTH CAROLINA EVIDENCE (1946 ed.) §132.

[5] Summerlin v. Railroad, 133 N. C. 550, 45 S. E. 898 (1903); Britt v. North Carolina R. R., 148 N. C. 37, 61 S. E. 601 (1908); *but see* Bivings v. Gosnell, 141 N. C. 341, 53 S. E. 861 (1906).

[6] State v. Corriher, 196 N. C. 397, 145 S. E. 773 (1928); Ramsey v. Standard Oil Co., 186 N. C. 739, 120 S. E. 331 (1923); Vann v. Atlantic Coast Line R. R., 182 N. C. 567, 109 S. E. 556 (1921).

[7] LaVecchia v. Land Bank, 218 N. C. 35, 9 S. E. (2d) 489 (1940); State v. Cafer, 205 N. C. 653, 172 S. E. 176 (1934); State v. Combs, 200 N. C. 671, 158 S. E. 252 (1931); State v. Cole, 94 N. C. 958 (1886). *But cf.* Pridgen v. Gibson, 194 N. C. 289, 139 S. E. 443 (1927) (a finding by the trial court as a matter of law that a witness was not an expert was reviewed and reversed).

[8] State v. Gray, 180 N. C. 697, 104 S. E. 647 (1920); Jones v. Norfolk Southern R. R., 176 N. C. 260, 97 S. E. 48 (1916); Lumber Co. v. Atlantic Coast Line R. R., 151 N. C. 217, 65 S. E. 920 (1909).

[9] Dulin v. Henderson-Gilmer Co., 192 N. C. 638, 135 S. E. 614, 49 A. L. R. 663 (1926); WIGMORE, EVIDENCE (3rd ed. 1940) §675; Anno 82 A. L. R. 1338 (1931).

qualified than the jury to draw such an inference had been waived in the principal case, the answer to the above question should depend on whether any inference stronger than a remote speculative guess could be drawn from the observed facts.[10] Notwithstanding his qualifications, even the expert must base his opinion upon data adequate to authorize an opinion.[11] The principle is well established that when an expert gives an opinion based upon supposed facts the facts assumed must be legally sufficient to support the opinion.[12] The principle should be equally applicable when the opinion is based on the personal observations of the witness.[13] Most courts recognize that an expert can base an opinion as to the speed of a vehicle upon the length of brake skid marks, if given the weight of the vehicle, condition of the tires and other physical conditions.[14] Similarly experts given the weight, speed, conditions of the road, and other pertinent physical conditions have been allowed to state an opinion as to the distance within which a vehicle could have been stopped.[15] Generally the courts have refused to allow

[10] Everart v. Fischer, 75 Ore. 321, 147 Pac. 189 (1915); Reall v. Deirizzi, 127 W. Va. 662, 34 S. E. (2d) 253 (1945); WIGMORE, EVIDENCE (3rd ed. 1940) §959; compare McCarthy v. Souther, 83 N. H. 29, 137 Atl. 445 (1927) (fact that impact broke handle on door basis for opinion of speed).

[11] Shams v. Saportas, 152 Fla. 48, 10 So. (2d) 715 (1942) (proper to exclude opinion based upon two patrolmen's observations after the collision).

[12] Hobbs v. Union Pacific R. R., 62 Idaho 58, 108 P. (2d) 841 (1940) (error to admit an opinion of an expert as to the speed of a train based alone on the distance it had traveled after the collision); Bazeman v. State, 177 Md. 151, 9 A. (2d) 60 (1940) (error to admit opinion as to possible stopping of car, without stating condition of tires, surface of road, etc.); Bryant v. Stone, 178 N. C. 291, 100 S. E. 578 (1919) (proper to exclude opinion as to cause of boat overturning based upon appearances next morning); Thomas v. Inland Motor Freight Co., 190 Wash. 428, 68 P. (2d) 603 (1937) (error to admit opinion that truck with adequate braking power could have slowed sufficiently to have rounded curve, when the speed of the truck was not shown); Boyd v. Virginian Ry., 123 W. Va. 47, 13 S. E. (2d) 273 (1941) (error to admit opinion as to possible stopping distance of train without including speed as a part of the basic data).

[13] Union Bus Lines v. Maulder, 180 S. W. (2d) 509 (Tex. Civ. App. 1944) (error to admit opinion of speed based alone on damaged condition of vehicles); Hobbs v. Union Pacific R. R., cited *supra* note 12; Bryant v. Stone, cited *supra* note 12; Shams v. Saportas, cited *supra* note 11.

[14] Jackson v. Vaughn, 204 Ala. 543, 66 So. 469 (1920); McKenney v. Wintersteen, 122 Neb. 679, 241 N. W. 112 (1932) (expert had specially qualified himself by experiments under the same physical conditions). *Contra:* Young v. Swartz, 34 N. E. (2d) 795 (Ohio Ct. of App. 1941); Heidner v. Germschied, 41 S. D. 439, 171 N. W. 208 (1919) (witness was allowed to state opinion after he was shown to know the kind of car, condition of roadbed, and length of skid mark); Rankin v. Hughes, 161 S. W. (2d) 883 (Tex. Civ. App. 1942); Luethe v. Schmidt-Gaertner Co., 170 Wis. 590, 176 N. W. 63 (1920). In *Savadow v. Keystone Transportation Co.*, 241 App. Div. 161, 271 N. Y. Supp. 293 (1934) the court held it reversible error to exclude expert opinion that skid marks of length shown could not have been made except by car exceeding the legal speed limit. Compare Cheek v. Brokerage Co., 209 N. C. 569, 183 S. E. 729 (1936) where an opinion as to which side of the center line an accident occurred based upon data observed after the collision was excluded because it invaded the province of the jury.

[15] This is but an application of the same principle with variables and unknowns changed. Berkowitz v. American River Gravel Co., 191 Cal. 195, 215 Pac. 675 (1923); Birdsong v. Meyers, 141 Kan. 140, 40 P. (2d) 430 (1935); State v. Gray, 180 N. C. 697, 104 S. E. 647 (1920).

a witness to give an opinion as to the speed of a vehicle based alone on its sound in motion,[16] or the sound of a collision.[17] However, the Missouri court has held it proper to allow an expert to give an opinion as to the speed of an automobile based upon such data.[18]

No general determination can be made as to the minimum sufficiency of data necessary to support an opinion. This question must be passed upon first by the trial court in the light of the circumstances of each case and is reviewable as a question of law. No case has been found which upholds the admissibility of an opinion based upon data so scant as that in the principal case.

Sometime in the future there may be developed a scientific technique which can provide a method for the estimation of speed based upon data even as meager as that used in the principal case. When this is done it will be time enough to re-examine the rule of evidence which now excludes such estimations.

CYRUS F. LEE.

Federal Jurisdiction—Removal of Suits Instituted in State Courts Under the Fair Labor Standards Act

Section 16(b) of the Fair Labor Standards Act, hereinafter abbreviated as F. L. S. A., provides that employee suits for the recovery of unpaid minimum wages or overtime compensation "may be maintained in any court of competent jurisdiction."[1] Section 24(8) of the Judicial Code provides that regardless of diversity of citizenship or the sum in controversy the district courts of the United States shall have jurisdiction over "all suits . . . arising under any law regulating commerce."[2] Section 28 of the Judicial Code provides that "Any suit of a civil nature . . . arising under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . may be removed by the defendant . . . to the district courts."[3]

In *Swettman et al. v. Remington Rand*[4] plaintiff employee brought action to recover alleged overtime compensation, liquidated damages, reasonable attorneys' fees and costs under the F. L. S. A. Action was removed from the state court in which it was commenced. Plaintiff moves to remand on ground that Congress intended to amend the Re-

[16] Law v. Gallegher, 9 Harr. (Del.) 189, 197 Atl. 479 (1938); Challinor v. Axton, 246 Ky. 76, 54 S. W. (2d) 600 (1932); Park v. Gandio, 286 Mich. 133, 281 N. W. 565 (1935); Lambach v. Colley, 283 Pa. 366, 129 Atl. 88 (1925).

[17] Knoche v. Pease Seed and Grain Co., 134 Neb. 130, 277 N. W. 798 (1938); Mierendorf v. Soalfeld, 138 Neb. 876, 295 N. W. 901 (1941).

[18] Murphy v. Cole. 338 Mo. 13, 88 S. W. (2d) 1023 (1935).

[1] 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b).

[2] 36 STAT. 1092 (1913), 28 U. S. C. A. §41(8).

[3] 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

[4] 65 F. Supp. 940 (S. D. Ill. 1946).

moval Statute[5] by excepting from the provisions thereof any case by employees against their employers which arise under the F. L. S. A. *Held,* motion denied. In a similar action the court in *Young v. Arbyrd Compress Co.*[6] granted the motion.

While it is well established that original jurisdiction of cases arising under the F. L. S. A. is concurrent in both federal and state courts,[7] the question whether an action once commenced in the state court may be removed to a federal district court has been decided both ways as the two principle cases illustrate. There are no decisions on the point by either the Supreme Court or the circuit courts of appeal.[8] In Volume 65 of the Federal Supplement there are four cases denying a motion to remand and five granting such a motion.[9]

The confusion stems from the unfortunate wording of the Act providing that an employee's action "may be *maintained*[10] in any court of competent jurisdiction." While some of the early cases remanding the suit to the state courts were decided on the ground that a suit does not "arise under a law of the United States" within the meaning of the Removal Statute unless the construction or effect of the law is in dispute;[11] *i.e.,* no federal question presented, the more recent decisions denying removal refute this view.[12] These latter decisions along with

[5] See note 3 *supra.*

[6] 66 F. Supp. 241 (E. D. Mo. 1946).

[7] Robertson v. Argus Hosiery Mills, 121 F. (2d) 285 (C. C. A. 6th, 1941), *cert. denied,* 314 U. S. 681 (1941); Hart v. Gregory, 218 N. C. 184, 10 S. E. (2d) 644 (1940).

[8] An appeal from an order remanding a suit to the state court in which it was instituted is denied by the Removal Statute, 28 U. S. C. A. §71.

[9] Cases cited, note 13 *infra.*

[10] Italics author's.

[11] Unreported decisions are not listed in this note. For a partial list see *Swettman et al. v. Remington Rand,* 65 F. Supp. 940 (S. D. Ill. 1946).

Stewart v. Hickman, 36 F. Supp. 861 (W. D. Mo. 1941) (Reeves, J.), noted (1941) 6 Mo. L. Rev. 519; 9 Kan. City L. Rev. 227; Kuligowski v. Hart, 43 F. Supp. 207 (N. D. Ohio 1941); Phillips v. Pucci, 43 F. Supp. 253 (W. D. Mo. 1942) (Reeves, J.), noted (1942) 9 U. of Chi. L. Rev. 742; Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (D. Neb. 1942) (in part only; also relies on construction of the word "maintained," see note 13 *infra*); Brockway v. Long, 55 F. Supp. 79 (W. D. Mo. 1944) (Reeves, J.); Adams v. Long *et al.,* 65 F. Supp. 310 (W. D. Mo. 1943 (Reeves, J.). This position is based upon Justice Cardozo's statement in *Gully v. First National Bank,* 299 U. S. 109, 114 (1936) where he stated: "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." An excellent discussion criticizing the application of this rule in cases where the action arises only because of a right granted by a federal law will be found in (1942) 9 U. of Chi. L. Rev. 742 commenting on the rule's application in *Phillips v. Pucci, supra,* and will not be dealt with here.

[12] Young v. Arbyrd Compress Co., 66 F. Supp. 241, 242 (E. D. Mo. 1946) ("Some of the cases hold that there is no real question involving interpretation of a Federal Statute. With these we are not in accord. Unless the language of the Fair Labor Standards Act prevents removal, we think such cases would be removable as cases arising under a law regulating interstate commerce."). Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943).

all the cases granting removal base their conclusions upon the judge's interpretation of the word "maintained."[13]

Two Supreme Court decisions[14] in another connection defined the word: "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun."[15] These decisions have been heavily relied on by district courts denying removal[16] despite the fact that in neither case was the Supreme Court construing the word in relation to an implied amendment of the Removal Statute. Judge Hulen in *Young*

[13] *Decisions denying removal due to construction of word "maintained":*
Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo. 1941) (Otis, J.), noted (1942) 55 HARV. L. REV. 541, 36 ILL. L. REV. 787, (1941) 26 MINN. L. REV. 134; Booth v. Montgomery Ward & Co., 44 F. Supp. 253 (D. Neb. 1942); Duval v. Protes, 51 F. Supp. 967 (E. D. N. Y. 1943) (Campbell, J.); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943); Sheridan v. Leitner (S. D. N. Y. 1944) (Bondy, J.) (case reversed *Sheridan v. Leitner,* 44 N. Y. S. (2d) 570 (1943) and did not mention *contra* opinion of Judge Hulbert in *McCarrigle v. 11 W. Forty Second St. Corp.,* 48 F. Supp. 710 (S. D. N. Y. 1942) upon which the New York trial judge based his decision allowing removal); Steiner v. Pleasantville Construction, Inc., 59 F. Supp. 1011 (S. D. N. Y. 1944) (Goddard, J.); Tobin v. Hercules Powder Co., 63 F. Supp. 434 (D. Del. 1945); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S. D. Iowa 1946); Wright v. Long *et al.,* 65 F. Supp. 279 (W. D. Mo. 1944) (Otis, J.); Apple v. Shulman Publications, Inc., 65 F. Supp. 677 (D. N. J. 1943) (Smith, J.) (no mention whatsoever made of Judge Fake's strong often quoted *dicta* in favor of removal in *Ricciardi v. Lazzara Baking Corp.,* 32 F. Supp. 956 (D. N. J. 1940); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E. D. Mo. 1946); McLendon v. Beddingfield, 38 S. E. (2d) 66 (Ga. App. 1946).
Decisions granting removal:
Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D. N. J. 1940) (really *dicta* as case remanded due to failure of defendant to file removal petition within time specified for filing answer by New Jersey statute); Owens v. Greenville News-Piedmont Corp., 43 F. Supp. 785 (W. D. S. C. 1942); McCarrigle v. 11 W. Forty Second St. Corp., 48 F. Supp. 710 (S. D. N. Y. 1942) (Hulbert, J.); Harris v. Reno Oil Co., 48 F. Supp. 908 (N. D. Tex. 1943); Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E. D. Ky. 1943), noted (1944) 7 U. OF DET. L. J. 96 and 42 MICH. L. REV. 1138, *aff'd but question of removal not raised,* 142 F. (2d) 876 (1944); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944) (Joyce, J.), noted in (1945) 43 MICH. L. REV. 814; Koskala v. Butler Bros., 65 F. Supp. 276 (D. Minn. 1946) (Donovan, J.); Johnson v. Butler Bros., 65 F. Supp. 277 (D. Minn. 1946); Ellems v. Helmers, Inc. *et al.,* 65 F. Supp. 566 (E. D. N. Y. 1944) (Abruzzo, J.) ("Whatever discretion there might be . . . lies with the court to whom the petition for removal is presented."); Swettman *et al.* v. Remington Rand, 65 F. Supp. 940 (S. D. Ill. 1946); Mengel v. Ishee, 192 Miss. 366, 4 So. (2d) 878 (1941); Sheridan v. Leitner, 44 N. Y. S. (2d) 570 (1943); *rev'd,* Sheridan v. Leitner, 59 F. Supp. 1011 (S. D. N. Y. 1944).
One case fits in neither category. Garner v. Mengel Co., 50 F. Supp. 794, 796 (W. D. Ky. 1943) (remanded because of the rule "that where the question of remand is doubtful the doubt should be resolved in favor of remanding the action to the state court"). *Contra,* Cox v. Gatliff Coal Co., 52 F. Supp. 482, 485 (E. D. Ky. 1943) (the rule "not applicable where decision upon motion to remand requires interpretation of an act of Congress").

[14] Smallwood *et al.* v. Gallardo, 275 U. S. 56 (1927) (construction of 1927 amendment to act providing civil government for Puerto Rico which provided "that no suit for purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the district court of the United States for Puerto Rico." 48 U. S. C. A. §872); Moore Ice Cream Co. v. Rose, 289 U. S. 373 (1933) (suit to recover taxes under statute authorizing taxpayer to maintain a suit to recover tax, irrespective of protest. REV. ACT 1924 §1014. 43 STAT. 343). Neither involved any question pertaining to removal.

[15] Smallwood *et al.* v. Gallardo, 275 U. S. 56, 61 (1927); Moore Ice Cream Co. v. Rose, 289 U. S. 373, 377 (1933).

v. Arbyrd Compress Co. states: "If we consider the definition of the term given in Webster[17] and the opinions of the Supreme Court, we cannot give it such a restricted meaning as only 'to commence.' "[18]

This point is partially parried by district courts allowing removal by citing 36 *Corpus Juris* 336[19] containing decisions "holding that maintained is synonymous with 'commenced.' In fact so many different and conflicting constrictions appear to have been given the word . . . that its character for exactitude of meaning is badly damaged."[20]

Another way of arguing that maintain means to uphold, etc., is to state that since the state courts, in the absence of an express prohibition by Congress, are already courts of competent jurisdiction wherein the suit could be commenced, the use of "maintained" is meaningless unless it be interpreted to mean "carried through to final judgment."[21] However, Judge Briggle believes that Congress meant by Section 16(b) not to fix the place *where* the suit might be brought but to provide *who* might bring it.[22] Thus he concludes "A construction denying removal

[16] Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (D. Neb. 1942); Garner v. Mengel Co., 50 F. Supp. 794 (W. D. Ky. 1943); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943); Sheridan v. Leitner, 59 F. Supp. 1011 (S. D. N. Y. 1944); Steiner v. Pleasantville Construction, Inc., 59 F. Supp. 1011 (S. D. N. Y. 1944); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E. D. Mo. 1946).

[17] Young v. Arbyrd Compress Co., 66 F. Supp. 241, 242 (E. D. Mo. 1946) ("To continue or persevere in or with; to carry on; as to maintain an attack, a correspondence, a legal action.").

[18] *Id.* at 243.

[19] For many other conflicting definitions of the word "maintained" see 26 WORDS & PHRASES, PERM. ED. 58 to 60, and 1946 SUPP. 8 to 10. See also (1942) 14 MISS. L. J. 157.

[20] Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956, 958 (D. N. J. 1940).

[21] This was the first point plaintiff relied on in support of his motion to remand in *Swettman v. Remington Rand,* cited *supra* note 4. This view was adopted in: Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo. 1941); Fredman v. Foley Bros., 50 F. Supp. 161 (W. D. Mo. 1943); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943); Sheridan v. Leitner, 59 F. Supp. 1011 (S. D. N. Y. 1944); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S. D. Iowa 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E. D. Mo. 1946). *Contra:* Cox v. Gatliff Coal Co., 52 F. Supp. 482, 484 (E. D. Ky. 1943) ("Argument . . . is not impressive." Judge Ford states that since the Act provides for recovery not only of unpaid wages but also an additional equal amount plus reasonable attorneys' fees and Section 256 of the Judicial Code, 28 U. S. C. A. §371, vests exclusive jurisdiction in the courts of the United States "of all suits for penalties and forfeitures incurred under the laws of the United States" "it was obviously the purpose of Congress to dissipate any doubts as to the right and duty of state courts to entertain jurisdiction of suits arising under the Act, even though the extra recovery authorized should be judicially determined to be in the nature of a penalty or forfeiture within the meaning of Section 256 of the Judicial Code."). While this allowance under the Act for extra recovery was construed in *Robertson v. Argus Hosiery Mills,* 121 F. (2d) 285 (C. C. A. 6th, 1941) not to be a penalty, see *Mengel Co. v. Ishee,* 192 Miss. 366, 4 So. (2d) 878 (1941), where the dissenting judge entertained just such a fear. See also (1941) 19 N. C. L. REV. 251, 258.

[22] Swettman *et al.* v. Remington Rand, 65 F. Supp. 940, 944 (S. D. Ill. 1946) ("From such examination of the legislative history and from an examination of the Statute as finally enacted it is not reasonable to suppose that Congress had any intention of amending the Removal Act. A reading of the entire Section 16(b)

gives undue prominence to the word 'maintained' and accords to it a strained meaning not intended by the lawmakers and requiring an implied amendment of the Removal Act. I conclude that the Fair Labor Standards Act neither amends the Removal Act nor excepts therefrom cases arising under the Fair Labor Standards Act."[23]

A supporting point advanced in *Young v Arbyrd Compress Co.* is that the "trend of recent decisions is to reduce federal jurisdiction by a strict construction of the Removal Statute.[24]

A collateral point used in granting removal by way of rebuttal to the above is that Congress has specifically amended the Removal Act[25] when such action was the Congressional intent.

Congressional intent to aid the employees by passage of the F. L. S. A. is invoked by district courts denying removal on the basis that employee interest is best served if cases are completely disposed of in conveniently located state courts.[26] The court in the *Swettman* case, however, after carefully considering the legislative history of the Act states: "Nothing

clearly shows that in inserting this section Congress was not intending to fix the place *where* such a suit could be brought or prosecuted to a final judgment but was concerned only with providing *who* might prosecute the suit and in what name the suit would be brought.). See note (1941) 19 N. C. L. REV. 251 for a discussion of the legislative history of the Act.

[23] Swettman *et al.* v. Remington Rand, 65 F. Supp. 940, 944 (S. D. Ill. 1946).

[24] *See also* Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943). But see Swettman *et al.* v. Remington Rand, 65 F. Supp. 940, 943 (S. D. Ill. 1946) ("It must be conceded [that such a policy to limit jurisdiction] set forth sound reasons why perhaps Congress *should have* excepted these cases from the Removal Act. But the question . . . is solely what Congress did actually do.").

[25] Federal Employers Liability Act, 52 STAT. 1404 (1939), 45 U. S. C. A. §56 provides: "The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States and no case arising under this chapter and brought in any State court . . . shall be removed to any court of the United States." Removal Statute was also amended to conform. This viewpoint adopted in: Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D. N. J. 1940); Owens v. Greenville News-Piedmont Corp., 43 F. Supp. 785 (W. D. S. C. 1942); Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E. D. Ky. 1943); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Swettman *et al.* v. Remington Rand, 65 F. Supp. 940, 942 (S. D. Ill. 1946) ("In the past, in every case it has been the policy of Congress when it intended to amend or make exceptions to the Removal Act to do so by express words. . . . There is no apparent reason why Congress should have adopted a new and different course in the passage of the Fair Labor Standards Act if it intended to preclude removal of cases under that Act."). *Contra:* Fredman Bros., Inc., 50 F. Supp. 161, 163 (W. D. Mo. 1943) ("But Congress is bound by no formula. If the meaning is clear. . . ."). *But see* Young & Jones v. Hiawatha Gin & Mfg. Co., 17 F. (2d) 193, 195 (S. D. Miss. 1927). For decision on the Jones Act, 46 U. S. C. A. §688 see Beckwith v. American President Lines, Ltd., 66 F. Supp. 353 (N. D. Cal. 1946).

[26] Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo. 1941) (to hold otherwise would defeat the purpose of the Act to give workingmen a remedy in a court easily accessible to them). Case criticized in (1942) 55 HARV. L. REV. 541 stating that no such contention can be found in the Congressional debates on the Act; Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (D. Neb. 1942); Fredman v. Foley Bros., 50 F. Supp. 161 (W. D.. Mo. 1943); Tobin v. Hercules Powder Co., 63 F. Supp. 434 (D. Del. 1945); Smith v. Day & Zimmerman. Inc., 65 F. Supp. 209 (S. D. Iowa 1946).

in the report[27] which indicates any intention to do anything other than permit an employee's suit."[28]

Closely interwoven with this argument is the desire of the federal judges to avoid crowding the federal docket with many small claims.[29] However, a survey of the cases reveals that the amount in controversy has been deemed important in only two decisions.[30] Furthermore many cases denying removal have involved amounts over $3,000,[31] while in others the amount is not deemed of sufficient importance to even be mentioned in the opinion.[32] Judge Briggle states that these ideas are reasons perhaps why Congress "should have excepted these cases" from the Removal Statute, but the question is what Congress actually did.[33]

The other companion reason in this line of analogy by district courts remanding suits under the F. L. S. A. to the state courts in which they were started is the avoidance of expensive litigation by the employee.

[27] H. R. REP. No. 2738, 75th Cong., 3rd Sess. (1938).

[28] Swettman *et al.* v. Remington Rand, 65 Supp. 940, 944 (S. D. Ill. 1946) ("The situation before the conference committee of the two Houses was thus: The Senate Bill provided for suits by employees and gave concurrent jurisdiction to State and Federal Courts; the House Bill contained no provision for employees' suits but conferred jurisdiction on the Federal Courts to enjoin violations of the Act. On June 14, 1938, the conference committee presented a report which contained Sections 16 and 17 of the Act as subsequently enacted. . . . In the conference committee's report to the House recommending the enactment of the Act in its final form appears the following comment regarding Section 16: '. . . This section also provides for civil reparations for violations of the wages and hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received.' . . . Nothing appears in the report which indicates an intention to do anything other than permit an employee's suit. The conference committee merely adopted the Senate's view with respect to the allowance of such employee's suit and also the Senate's view as to concurrent jurisdiction as to both State and Federal Courts by using the words 'any court of competent jurisdiction'"). See note 22 *supra*.

[29] See note 26 *supra* as the cases discuss these two arguments together.

[30] Harris v. Reno Oil Co., 48 F. Supp. 908 (N. D. Tex. 1943) (judge emphasized fact that the district court was in the same city as the state court where action started plus fact that the amount in controversy was $4,000 and diversity of citizenship was present); Wright v. Long *et al.*, 65 F. Supp. 279 (W. D. Mo. 1944).

[31] Fredman v. Foley Bros., 50 F. Supp. 161 (W. D. Mo. 1943) ($19,200 and diversity of citizenship); Garner v. Mengel Co., 50 F. Supp. 794 (W. D. Ky. 1943) ($4,889 and diversity of citizenship; however, see comment on this case note 13 *supra*); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943) (over $3,000, but no diversity of citizenship); Steiner v. Pleasantville Construction, Inc., 59 F. Supp. 1011 (S. D. N. Y. 1944) (over $3,000 and diversity of citizenship).

[32] Kuligowski v. Hart, 43 F. Supp. 207 (N. D. Ohio 1941); Duval v. Protes, 51 F. Supp. 967 (E. D. N. Y. 1943); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S. D. Iowa 1946); Apple v. Shulman Publications, 65 F. Supp. 677 (D. N. J. 1943).

[33] See comment on *Swettman* case note 24 *supra*. McCarrigle v. 11 Forty Second St. Corp., 48 F. Supp. 710, 711 (S. D. N. Y. 1942) ("While I realize" that such a decision "is likely to bring to this court a considerable number of cases, many of which could be brought and disposed of in local courts with less inconvenience to the litigants . . . until Congress shall amend the statute . . . I feel constrained to follow" the cases granting removal.).

However, this point is weakened by the provision of the Act which allows the employee to recover, in addition to double his unpaid minimum wages, a reasonable attorney's fee.[34]

Other miscellaneous points considered include the recitations of the rule that courts should not interpret a statute so as to make parts of it surplusage unless no other construction is available.[35] *Contra* decisions counter with the rule that a partial repeal of the Removal Statute by implication is not favored.[36]

One excellent argument for the state court's retention of the suit once it is commenced in that court which has not been heavily seized upon is the fact that in the same sentence with the much discussed "may be maintained in any court of competent jurisdiction" is a provision that "employees may designate an agent or a representative to *maintain*[37] such an action." As obviously Congress meant that the designated representative might continue the suit to completion, these decisions believe that the same interpretation should be given the word "maintain" throughout, thereby attaching continuity.[38]

Since the point is very close there are naturally excellent arguments on both sides of the question. However, it is submitted despite the numerical weight of the decision *contra* that the better reasoned decisions are those granting removal. In view of the lack of any express evidence of a Congressional intent that the multi-meaning word "maintained" did in the F. L. S. A. mean to carry the suit through to completion[39] the more reasonable view is that no amendment to the Removal Statute was meant or implied.

Yet, due to the lack of uniformity in the decisions within the same state[40] and even within the same federal district,[41] in order to preserve

[34] Fair Labor Standards Act, 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b). "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action."

[35] Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S. D. Iowa 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E. D. Mo. 1946).

[36] Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956, 958 (D. N. J. 1940); Owens v. Greenville News-Piedmont Corp., 43 F. Supp. 785 (W. D. S. C. 1942); Garner v. Mengel Co., 50 F. Supp. 794 (W. D. Ky. 1943); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Swettman *et al* v. Remington Rand, 65 F. Supp. 940 (S. D. Ill. 1946). *Contra:* Fredman v. Foley Bros., 50 F. Supp. 161 (W. D. Mo. 1943) (see comment on case in note 25 *supra*); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S. D. Iowa 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241, 243 (E. D. Mo. 1946) ("The removal statute has not been repealed. It still stands. We simply hold it not applicable to cases of the character (F. L. S. A.) before the court.").

[37] Italics author's. 52 STAT. 1069 (1938), 28 U. S. C. A. §216(b).

[38] Fredman v. Foley Bros., 50 F. Supp. 161 (W. D. Mo. 1943); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S. D. Ga. 1943); Steiner v. Pleasantville Construction, Inc., 59 F. Supp. 1011 (S. D. N. Y. 1944).

[39] See notes 22, 25, and 28 *supra*.

[40] Cases denying removal are listed first. Garner v. Mengel Co., 50 F. Supp. 161 (W. D. Ky. 1943). *Contra:* Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E. D.

needed order and respect for the judicial system, Congressional action seems imperative. It is submitted that Congress should, in addition to scrupulously abstaining from the future use of the word "maintained" without a clear cut definition, reword Section 16(b) of the Fair Labor Standards Act to dispel all of the current confusion which has attached to the problem of whether suits brought in state courts under the F. L. S. A. are removable to federal district courts or not. The F. L. S. A. is certain to come under Congressional scrutiny in connection with the now famous portal to portal question[42] and such a rewording of Section 16(b) could be advantageously accomplished at the same time. A workable standard may be found in the eighth sentence of Section 28 of the Judicial Code[43] which permits removal of suits against common carriers under the Interstate Commerce Act[44] only when they involve more than $3,000. This would provide sufficient federal decisions to which state courts could look for guidance thereby avoiding too many jurisdictional inconsistencies.

NOEL R. S. WOODHOUSE.

Insurance—Extension of Coverage by Waiver or Estoppel

Plaintiff insurer sought a declaratory judgment to determine its liability on an automobile liability policy. The policy contained the following: "This policy does not apply: (a) while the automobile is used as a public or livery conveyance. . . ." There was also a clause limiting the agent's power with respect to waiver and estoppel. Answering two issues submitted to it, the jury found (1) the automobile was used as a public conveyance, and (2) the agent knew it was to be so used when he issued the policy. Defendant abandoned a plea for reformation. The trial court disregarded the second issue and gave judgment for plaintiff. On appeal the Supreme Court affirmed, holding the submission of the second issue was inadvertent as it rested upon parol evidence which

Ky. 1943). See comment note 13 *supra* on these two cases. Barron v. F. H. E. Oil Co., 4 Wage & Hour Rep. 551 (W. D. Tex. 1941). *Contra:* Harris v. Reno Oil Co., 48 F. Supp. 908 (N. D. Tex. 1943). See also cases listed in note 41 *infra.*

[41] Cases denying removal are listed first. Apple v. Shulman Publications, 65 F. Supp. 677 (D. N. J. 1943). *Contra:* Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D. N. J. 1940) (really a dictum, however, cited both pro and con often). Duval v. Protes, 51 F. Supp. 967 (E. D. N. Y. 1943). *Contra:* Ellems v. Helmers, Inc., 65 F. Supp. 566 (E. D. N. Y. 1944). Sheridan v. Leitner, 59 F. Supp. 1011 (S. D. N. Y. 1944). *Contra:* McCarrigle v. 11 W. Forty Second St. Corp., 48 F. Supp. 710 (S. D. N. Y. 1942). In each of these cases the judges were different and in the later of the two in each district the judge did not bother to distinguish or overrule the previous *contra* decisions.

[42] N. Y. *Times,* Dec. 29, 1946, §E, p. 3, col. 3.

[43] 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

[44] 41 STAT. 474 (1920), 49 U. S. C. A. §1 *et seq.*

varies the terms of the written agreement; and the first issue established exclusion from liability.[1]

This case raises several questions of interest, an exhaustive analysis of which is beyond the scope of this note. They may, however, be briefly reckoned with. The first question is, What effect does a clause against waiver of policy provisions have on waivers which otherwise would result from that which leads to the issuance of a policy?

Provisions in an insurance policy which restrict the power of an agent relative to waiver do not become operative until the policy is issued.[2] Such provisions are a part of the contract, and it logically follows that they can have no operative effect until the policy issues. Thus, they can only apply to something which comes into existence after the inception of the contract. Restrictive provisions in the policy can have no effect upon what took place before the policy issued.[3] The cases supporting these rules are, for the most part, cases involving waiver of conditions, the breach or nonexistence of which would forfeit the policy. There is a dearth of cases applying these rules to situations where an insurer issues a policy with knowlodge of conditions which would render the policy merely ineffective for the purpose intended, rather than forfeited. But certainly no one could reasonably contend that the announced rules do not apply to the latter situation. To do so would be to assume that the insurer did not intend to execute a valid, effective contract embodying the intentions of the parties.[4] Also, failure to apply the rules to such situations would give the insurer a legal license to perpetrate fraud on the insured, in view of the known fact that few persons read their policies.

The second question to be briefly examined is, Should the parol evidence rule operate to preclude the admission of evidence of the negotiations preceding issuance of a policy? Parol evidence is admissible where it is sought to reform an instrument,[5] or to show fraud in connection therewith.[6] Insurance policies can be reformed by parol evidence for mistake of one superinduced by fraud or *inequitable* conduct of the other.[7] The argument in the foregoing paragraph is equally

[1] Insurance Co. v. Wells, 226 N. C. 574, 39 S. E. (2d) 741 (1946).

[2] Smith v. Insurance Co., 208 N. C. 99, 179 S. E. 457 (1935); Case v. Ewbanks, 194 N. C. 775, 140 S. E. 709 (1927); Aldridge v. Insurance Co., 194 N. C. 683, 140 S. E. 706 (1927); Bullard v. Insurance Co., 189 N. C. 34, 126 S. E. 179 (1925); Johnson v. Insurance Co., 172 N. C. 142, 90 S. E. 124 (1916); VANCE, INSURANCE (2d ed. 1930) §126 (". . . limitations contained in the policy could have no effect as to transactions prior to the delivery of the policy . . .").

[3] 16 APPLEMAN, INSURANCE LAW AND PRACTICE (1944) §9101; VANCE, INSURANCE (2d ed. 1930) §126.

[4] English v. Casualty Co., 138 Ohio St. 166, 34 N. E. (2d) 31 (1941).

[5] Hubbard v. Horne, 203 N. C. 205, 163 S. E. 347 (1932) (mistake, fraud, surprise and accident furnish exceptions to the general rule).

[6] Trust Co. v. Knight, 160 N. C. 592, 76 S. E. 623 (1912).

[7] Williams v. Insurance Co., 209 N. C. 765, 185 S. E. 21 (1936).

applicable here; *i.e.*, to allow an insurer to issue a policy with knowledge of facts rendering it ineffective for the purpose intended works a fraud on the insured. Since this is, in effect, a fraud on the insured, or at all events the evidence of estoppel in such a situation is evidence of inequitable conduct, and parol evidence is admissible where reformation is sought, such evidence should be allowed to show the insurer's knowledge when the policy was issued.[8] And this should be, even though the plea for reformation is abandoned, as in the principal case, because the court may grant any relief consistent with the facts pleaded.[9] Further, estoppel serves the same purpose in law as reformation does in equity. Since law and equity are combined under the code, there can be no valid reason to exclude parol evidence. The decision in the principal case places the insurer in an advantageous position. An unscrupulous company may issue a policy which it knows will not cover the risk intended. When loss occurs, it can bring suit for declaratory judgment on the policy, and if the insured does not ask for reformation, the company escapes all liability. It retains the premiums for which it has given no consideration. And this is the result even though an equitable remedy, declaratory judgment, is sought.

The final question, and the principal one to be considered is, Should the law allow the coverage of an insurance policy to be extended by waiver or estoppel? By waiver is meant implied waiver; it is assumed that express waiver upon consideration is a contract itself and presents no problem. The problem of extension of risk comes before the court when there is involved in a suit an insurance policy containing conditions and/or exceptions. The distinction between conditions and exceptions is not always clear. A provision is clearly a condition when it provides that upon a certain occurrence the policy will be void. An exception withdraws from coverage a risk which the insurer does not wish to assume. An exception always involves a risk while a condition may or may not involve a risk.[10]

According to some authorities, the general rule in the United States is that neither waiver nor estoppel can create a contract of insurance or so apply as to bring within the coverage of the policy property or a loss or risk, which by the terms of the policy is excepted or otherwise excluded.[11] An examination of the cases cited by these authorities in

[8] Midkiff and Brannock v. Insurance Co., 197 N. C. 139, 147 S. E. 812 (1929); Gerringer v. Insurance Co., 133 N. C. 407, 45 S. E. 773 (1903); Strause v. Insurance Co., 128 N. C. 64, 38 S. E. 256 (1901); *see* Johnson and Stroud v. Insurance Co., 172 N. C. 142, 90 S. E. 124 (1916); VANCE, INSURANCE (2d ed. 1930) §136, note 86.

[9] MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §401.

[10] VANCE, INSURANCE (2d ed. 1930) §116 (distinction drawn between warranties, conditions and exceptions, and illustrated).

[11] RICHARDS, THE LAW OF INSURANCE (4th ed. 1932) §115; 29 Am. Jur., Insurance §801 ("However, the doctrine of implied waiver or of estoppel is not

support of the proposition discloses the inherent weakness of the generalization.[12] Still, many cases have quoted this "general rule" with approval.[13] But these cases reveal only the instability of the doctrine and a considerable amount of confusion attending it.[14] And the conclusion is warranted that the cases do not support the doctrine that insurance coverage is not to be extended by waiver or estoppel. In fact, analysis of the cases supports the opposite conclusion as to estoppel.

Although it is apparent that whether extension will be allowed is largely dependent upon the facts of each case, some reasonably accurate generalizations may be made. Those cases which declare that waiver or estoppel will not extend coverage ordinarily are those in which the insurance policy has a field of operation beyond the risk not covered, and conditions occur which render the policy merely inoperative as distinguished from void or a nullity.[15] This result is supportable on the

available to bring within the coverage of a policy risks not covered by its terms or risks expressly excluded therefrom.); *id.* §903; 45 C. J. S., Insurance §674; note (1939) 38 MICH. L. REV. 104 (1939).

[12] To illustrate, the following cases are cited in 29 Am. Jur., Insurance §903, footnote 2: Miller v. Banker's Life Ass'n, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919) (elements of wiaver not present); Norton v. Catholic Order of Foresters, 138 Iowa 464, 114 N. W. 893, 24 L. R. A. (N.S.) 1030 (1908) (elements of waiver not present, estoppel not considered); Ridgeway v. Modern Woodmen, 98 Kan. 240, 157 Pac. 1191, L. R. A. 1917A, 1062 (1916) (facts did not constitute waiver, general rule supported only by inference); Bower & Kaufman v. Bothwell, 152 Md. 392, 136 Atl. 892, 52 A. L. R. 158 (1927) (general rule supported only as to estoppel, waiver must have consideration); Washington Nat. Ins. Co. v. Craddock, 130 Tex. 251, 109 S. W. (2d) 165, 113 A. L. R. 854 (1937) (supports general rule as to waiver, not clear on estoppel); Rosenthal v. Insurance Co., 158 Wis. 550, 149 N. W. 155, L. R. A. 1915B 361, Ann. Cas. 1916E 395 (1914) (supports general rule as to waiver but by dictum, evidence of waiver weak); McCoy v. Northwestern Ass'n, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896) (supports general rule).

[13] Carnes v. Assurance Corp., 101 F. (2d) 739 (C. C. A. 5th, 1939); Insurance Co. v. Roberts, 132 F. (2d) 798 (C. C. A. 8th, 1939); Insurance Co. v. Raper, 242 Ala. 440, 6 So. (2d) 513 (1941); Assurance Soc. v. Langford, 234 Ala. 681, 176 So. 609 (1937); Insurance Co. v. Motor Co., 227 Ala. 449, 150 So. 486 (1933); Insurance Co. v. Smith, 200 Ark. 508, 139 So. (2d) 411 (1940); Quillion v. Assurance Soc., 61 Ga. App. 138, 6 S. E. (2d) 108 (1939); Insurance Co. v. Eviston, 110 Ind. App. 143, 37 N. E. (2d) 310 (1941); Richardson v. Traveling Men's Ass'n, 228 Iowa 319, 291 N. W. 408 (1940); Pierce v. Life Ass'n, 223 Iowa 211, 272 N. W. 543 (1937); Insurance Co. v. Brookman, 167 Md. 616, 175 Atl. 838 (1934); Carew v. Casualty Co., 189 Wash. 329, 65 P. (2d) 689 (1939); McCoy v. Northwestern Ass'n, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896).

[14] Referring to the cases cited *supra* note 13:

In *Insurance Co. v. Raper*, the court cited the case of *Insurance Co. v. Scharnagel*, 227 Ala. 60, 148 So. 596 (1933) which held that denial of liability on another ground estops the company from setting up exception as defense. In *Assurance Soc. v. Langford*, the court said, ". . . a ground on which payment may be resisted may be waived." In *Insurance Co. v. Motor Co., Insurance Co. v. Scharnagel, supra*, is again cited. In *Insurance Co. v. Smith*, elements of estoppel were lacking. In *Richardson v. Trav. Men's Ass'n*, the question of estoppel was not involved. In *Carew v. Casualty Co.*, support of the rule was by dictum. In *McCoy v. Northwestern Ass'n*, a weak case of estoppel is made out.

[15] Fidelity & Guar. Corp. v. Bilquist, 99 F. (2d) 333 (C. C. A. 9th, 1938); Insurance Co. v. Raper, 242 Ala. 440, 6 So. (2d) 513 (1941); Insurance Co. v. Smith, 200 Ark. 508, 139 S. W. (2d) 411 (1940); Quillion v. Assurance Soc., 61 Ga. App. 138, 6 S. E. (2d) 108 (1939); Ridgeway v. Modern Woodmen, 98 Kan.

ground that the insured received some protection as consideration for his premiums since the policy was merely suspended during the occurrence of the excluded risk, and would become effective again upon cessation of that condition. However, in the cases so holding, elements of estoppel have been totally lacking or very weak. Therefore, in most of the cases where the courts have said coverage cannot be extended by waiver or estoppel, the word "estoppel" has been dictum.

Undoubtedly a majority of the courts will allow extension of coverage by estoppel.[16] Most of the cases deal with a situation where, under a policy of liability insurance, the insurer defends the action against the insured and is thereafter held estopped to deny liability on the policy. Although the courts do not mention extending the coverage, it is nonetheless true that that is the result accomplished.

This note is not concerned with the technical distinctions between waiver and estoppel, but with extension by one or the other or both.

240, 157 Pac. 1191, L. R. A. 1917A 1062 (1916); Lumber Co. v. Insurance Co., 179 La. 779, 155 So. 22 (1934); *cf.* Quinones v. Life and Cas. Co., 209 La. 76, 24 So. (2d) 270 (1945); Insurance Co. v. Brookman, 167 Md. 616, 175 Atl. 838 (1934); Ruddock v. Insurance Co., 209 Mich. 638, 177 N. W. 242 (1920); Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931); Rosenberg v. Assurance Co., 246 S. W. 1009 (Mo. App. 1922); Craddock v. Insurance Co., 130 Tex. 251, 109 S. W. (2d) 165; 113 A. L. R. 854 (1937); Two Rivers Co. v. Casualty Co., 168 Wis. 96, 169 N. W. 291 (1918); McCoy v. Northwestern Ass'n, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896); anno. 113 A. L. R. 857.

[16] Claverie v. Casualty Co., 76 F. (2d) 570 (C. C. A. 4th, 1935); Assurance Corp. v. Chicago and B. M. Co., 141 Fed. 965 (C. C. A. 7th, 1905); Assurance Soc. v. Langford, 242 Ala. 440, 176 So. 609 (1937); Indemnity Ass'n v. Supply Co., 211 Ala. 84, 99 So. 787 (1924); Knights v. Shoaf, 166 Ind. 367, 77 N. E. 738 (1906); Conner v. Insurance Co., 122 Cal. App. 105, 9 P. (2d) 863 (1932); Insurance Co. v. White, 106 Ind. App. 530, 19 N. E. (2d) 872 (1939); Palumbro v. Insurance Co., 293 Mass. 35, 199 N. E. 335 (1935); Lunt v. Insurance Co., 261 Mass. 469, 159 N. E. 461 (1928) (by implication); Leverett v. Casualty Co., 247 Mich. 172, 225 N. W. 515 (1929) (distinguished from *Ruddock v. Insurance Co.*, 209 Mich. 638, 177 N. W. 242 (1920) on ground that estoppel occurred before loss); Humphrey v. Polski, 161 Minn. 61, 200 N. W. 812 (1924) (by implication); Mann v. Assurance Corp., 123 Minn. 305, 143 N. W. 794 (1913); Tozer v. Accident and Guar. Co., 94 Minn. 478, 103 N. W. 509 (1905), *aff'd on appeal*, 99 Minn. 290, 109 N. W. 410 (1906); Cowell v. Indemnity Corp., 326 Mo. 1103, 34 S. W. (2d) 705 (1930); Keck v. Insurance Co., 237 Mo. App. 308, 167 S. W. (2d) 664 (1942); Rieger v. Guaranty and Acc. Co., 202 Mo. App. 184, 215 S. W. 920 (1919); Royle v. Casualty Co., 161 Mo. App. 185, 142 S. W. 438 (1912), *former appeal*, 126 Mo. App. 104, 103 S. W. 1098 (1907); Fairbanks v. Guaranty and Acc. Co., 154 Mo. App. 327, 133 S. W. 664 (1911); Lipe v. Insurance Co., 142 Neb. 22, 5 N. W. (2d) 95 (1942); Moore v. Fidelity and Guar. Co., 293 N. Y. 119, 56 N. E. (2d) 74 (1944); Gerka v. Fidelity and Cas. Co., 251 N. Y. 51, 167 N. E. 169 (1929); Draper v. Relief Ass'n, 190 N. Y. 12, 82 N. E. 755 (1907); Early v. Insurance Co., 224 N. C. 172, 29 S. E. (2d) 558 (1944); Fidelity and Cas. Co. v. Blausey, 49 Ohio App. 556, 197 N. E. 385 (1934); Humes Const. Co. v. Casualty Co., 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906 (1911); Ellis v. Casualty Co., 187 S. C. 162, 197 S. E. 510 (1938); Ziegler v. Ryan, 66 S. D. 491, 285 N. W. 875 (1939); Mancini v. Thomas, 113 Vt. 317, 34 A. (2d) 105 (1943); Beatty v. Assurance Corp., 106 Vt. 216, 168 Atl. 919 (1933); Lumber Co. v. Insurance Co., 159 Wis. 627, 150 N. W. 991 (1915) (by implication); *see* Hargett v. Insurance Co., 12 Cal. App. (2d) 449, 55 P. (2d) 1258, 1261 (1938). 16 APPLEMAN, INSURANCE LAW AND PRACTICE (1944) §9090, note 35; COOLEY'S BRIEFS ON INSURANCE (2d ed. 1927) Vol. 5, p. 393.

However, it may be pointed out that there are cases which declare that extension is not to be accomplished by waiver while it may be by estoppel.[17] On the other hand, there are cases which declare that either or both waiver and estoppel may be invoked to prevent injustice.[18] In *Fairbanks Canning Co. v. London Guar. and Acc. Co.*,[19] where the insurer defended an action against the insured, pursuant to a clause in a liability policy, with full knowledge of facts upon which it could deny coverage, the court said: "Such action is sometimes said to constitute estoppel *in pais;* sometimes it is denominated an election of position which cannot afterwards be changed; sometimes it is said to be a contemporaneous construction of the contract by the party claimed to be bound; and yet again it is called a waiver. But in whatever way it may be designated it is such conduct on the part of the insurer as will cut him out of a defense he might have made. . . ." And in *Delaware Ins. Co. v. Wallace,*[20] where the policy contained a provision limiting coverage to property only while in a specified place, the court said: "There may be waiver of such provision, estoppel to assert it, or agreements affecting it. . . ." Further, there are those cases where waiver alone has been pleaded and coverage has been extended.[21] Cases often arise where the policy sued on contains a provision relating to coverage as distinguished from cases where the policy in question, by necessary inference only, does not cover the particular loss. To avoid an inequitable and obviously unjust result which would occur if extension were not allowed, but confronted with the contention that coverage may not be extended by waiver or estoppel, the courts call such provisions, provisions for the benefit of the insurer which may be waived,[22] an accepted

[17] Claverie v. Casualty Co., 76 F. (2d) 570 (C. C. A. 4th, 1935); Indemnity Ass'n v. Supply Co., 211 Ala. 84, 99 So. 787 (1924); Conner v. Insurance Co., 122 Cal. App. 105, 9 P. (2d) 863 (1932); Knights v. Shoaf, 166 Ind. 367, 77 N. E. 738 (1906); Insurance Co. v. White, 106 Ind. App. 530, 19 N. E. (2d) 872 (1939); Palumbro v. Insurance Co., 293 Mass. 35, 199 N. E. 335 (1935); Keck v. Insurance Co., 237 Mo. App. 308, 167 S. W. (2d) 664 (1942); Draper v. Relief Ass'n, 190 N. Y. 12, 82 N. E. 755 (1907); Mancini v. Thomas, 113 Vt. 317, 34 A. (2d) 105 (1943); Beatty v. Assurance Corp., 106 Vt. 216, 168 Atl. 919 (1933).

[18] Insurance Co. v. Scharnagel, 227 Ala. 60, 148 So. 596 (1933); Leverett v. Casualty Co., 247 Mich. 172, 225 N. W. 515 (1929); Rieger v. Guaranty and Acc. Co., 202 Mo. App. 184, 215 S. W. 920 (1919); Fairbanks v. Guaranty and Acc. Co., 154 Mo. App. 327, 133 S. W. 664 (1911); Royle v. Casualty Co., 126 Mo. App. 104, 103 S. W. 1098 (1907), *aff'd on appeal,* 161 Mo. App. 185, 142 S. W. 438 (1912); Myton v. Casualty Co., 117 Mo. App. 442, 92 S. W. 1194 (1906); Lipe v. Insurance Co., 142 Neb. 22, 5 N. W. (2d) 95 (1942) (action was to recover premiums paid on policy which excluded from coverage any one over 65, recovery denied because insurer waived age requirement and "waiver" ripened into "estoppel").

[19] 154 Mo. App. 327, 133 S. W. 664 (1911).

[20] 160 S. W. 1130 (Tex. Civ. App. 1913).

[21] Casualty Co. v. Aarons, 85 Colo. 591, 277 Pac. 811 (1929); Insurance Co. v. Ransdell, 259 Ky. 559, 82 S. W. (2d) 820 (1935); Barker v. Insurance Co., 52 S. W. (2d) 285 (Tex. Civ. App. 1932).

[22] Quinones v. Insurance Co., 209 La. 76, 24 So. (2d) 270 (1945) (military clause).

risk subject to a condition subsequent,[23] a promissory warranty.[24] By so doing, each court has extended coverage without discussing the issue or even mentioning it.

Turning now to North Carolina, in *Johnson and Stroud v. R. I. Insurance Co.*,[25] a policy was issued on a building in process of erection. The policy excepted liability if the building was not enclosed and under roof. The court said, by way of dictum, that if the insurer issued the policy knowing of conditions existing at the time, it could not thereafter avoid liability on account of those conditions. Thus, had loss occurred before the building was enclosed, coverage would be extended. In *Midkiff and Brannock v. Insurance Co.*[26] a fire policy excepted liability while explosives were kept on the premises. Loss occurred while explosives were kept. The court said: "Conditions with respect to the property insured . . . existing at the time the policy was issued, . . . cannot be relied upon to defeat liability under the policy. When the policy was issued with such knowledge, it will be held that the company has waived the breach of the stipulations and provisions contained therein, which would otherwise render the policy void at its inception." The provision was not a condition working a forfeiture, as the court seemed to consider it, but was clearly an exception to liability. The keeping of explosives was material to the risk. So here extension was allowed. In *Early v. Insurance Co.*[27] it was said, by way of dictum, that the objection that liability is not within the terms of the policy may be waived. The case of *Royle Mining Co. v. Fidelity and Cas. Co.*[28] was cited which held that defense by the insurer of an action brought against the insured, by a third party, constituted waiver of an exception and estopped the insurer from thereafter asserting it. In *McCabe et al. v. Casualty Co.*[29] it was held that a provision in an accident policy limiting coverage to persons 18 to 65 years could not be waived. However, in that case the policy provided for a return of premiums to persons over 65, and this undoubtedly influenced the court's decision. Thus, it is seen that in North Carolina extension of coverage by waiver or estoppel is possible and has been allowed.

Extension of insurance coverage by waiver and/or estoppel should be allowed in proper cases. To do so merely accomplishes the purpose for which these doctrines were introduced into the law.[30]

CLAUDE F. SEILA.

[23] Keistler Co. v. Insurance Co., 124 S. C. 32, 117 S. E. 70 (1923) (clause providing for non-liability if building collapses except as result of fire).
[24] Colby v. Insurance Co., 134 Me. 18, 181 Atl. 13 (1935) (clause providing for non-liability if car used without permission).
[25] 172 N. C. 142, 90 S. E. 124 (1916).
[26] 197 N. C. 139, 147 S. E. 812 (1929).
[27] 224 N. C. 172, 29 S. E. (2d) 558 (1944).
[28] 126 Mo. App. 104, 103 S. W. 1098 (1907).
[29] 209 N. C. 577, 183 S. E. 743 (1936).
[30] Humes Const. Co. v. Philadelphia Cas. Co., 32 R. I. 246, 79 Atl. 1, Ann. Cas.

Labor Law—Employer's Freedom of Speech—
The Captive Audience[1]

To what extent and under what circumstances the employer may speak to his employees concerning labor matters arises in connection with that prohibition of the Wagner Act[2] which provides that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees"[3] in the exercise of the "right to self-organization, to form, join, or assist labor organizations . . . and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[4]

The constitutional issue of freedom of speech under the Act is usually raised in one of two ways: (1) where a certain utterance by the employer is alleged to be coercive *per se*,[5] or (2) where a certain utterance, possibly innocent standing alone, is elevated to the position of coercion when viewed against a background of anti-union conduct.[6] The National Labor Relations Board often describes the utterance as "inextricably intertwined" with other unfair practices.

The recent Board decision of In re *Clark Brothers*[7] raises the freedom of speech issue in still another situation;[8] namely, where an admit-

1912D, 906 (1911) (the nature of the doctrine of estoppel is to extend liability; it is not invoked for the purpose of enforcing a true obligation or one clearly defined by the terms of a contract).

[1] The scope of this note does not purport to cover the general problem of the employer's freedom of speech under the Wagner Act. Recent articles and notes on the broad question are the following: Daykin, *The Employer's Right of Free Speech in Industry Under the National Labor Relations Act* (1945) 40 ILL. L. REV.; Howard, *Freedom of Speech and Labor Controversies* (1943) 8 MO. L. REV. 25; Notes (1946) 34 CALIF. L. REV. 415; (1945) 14 FORDHAM L. REV. 59.

[2] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §151-166 (1940 ed.).

[3] *Id.* §158(1).

[4] *Id.* §157.

[5] The National Labor Relations Board's view of this type utterance is shown in the TENTH ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1945) 37: "It is well established that free speech does not privilege statements which coerce employees in the exercise of their rights to self-organization. In many instances, the coercive element is inherent in the statement itself. . . . Typical of this class of statments, which are *per se* violative of Section 8(I), are those containing actual, implied, or veiled threats of economic reprisal." An example of this type of case is the following: Threat to move the plant. *In re* New Era Die Co., 19 N. L. R. B. 227 (1940), *affirmed as modified*, 118 F. (2d) 500 (C. C. A. 3rd, 1941).

[6] ". . . the Board has continued to hold that anti-union statements by an employer when an integral phrase of other anti-union conduct constitutes interference, restraint and coercion within the meaning of the Act." EIGHTH ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1943) 29.

Often utterances are considered by the Board merely as evidence of the employer's intent: "The First Amendment to the United States Constitution does not preclude a fact-finding body from making an evidentiary use of speech any more than the Fifth Amendment prohibits it from weighing 'authority or power,' 'relation or opportunity,' inclination, motive, or non-verbal conduct." *In re* Dow Chemical Co., 13 N. L. R. B. 993, 1015 (1939).

[7] 70 N. L. R. B. No. 60, 18 LAB. REL. REP. 1360 (1946).

[8] Chairman Herzog of the National Labor Relations Board, in an address be-

tedly privileged speech[9] concerning the employees' organizational affairs is delivered by the employer (or associates) to his assembled employees on company premises during working hours, *i.e.*, to a "captive audience." For the first time the Board held that such a speech under these circumstances constituted an unfair practice, "wholly apart from the fact that the speech itself may be privileged under the Constitution."[10] The Board found that the respondent had projected himself into the run-off election between the CIO and the Association (independent union) by mailing anti-CIO bulletins to the employees, inserting paid advertisements in the local newspaper, and delivering two anti-union speeches to its assembled employees, on company premises and during working hours, one of the speeches being delivered by the company president an hour before the election.[11] The speeches explicitly stated that each employee would be "absolutely free to vote in accordance with [his] . . . own desire. . . . That there will be no retaliation or discrimination. . . ." And further (company president's speech) that "Nobody in this plant, as long as I am running it, will be discriminated against because of the way he votes or . . . thinks." The president's speech expressed praise over the "honorable and straight-forward way" of improving conditions in the plant by the cooperation of the independent union, and stated concern over the "possibility of disturbing the peaceful progress. . . ."[12]

fore the Annual Convention of Industrial Relations Sections of the Printing Industry of America, 18 LAB. REL. REP. 338 (1946), lists four ways in which the issue of freedom of speech arises under the Act: First, *privileged statements:* "The Board has stated repeatedly in its recent decisions that an employer's right to express his opinion to employees in respect to labor issues is secured by the First Amendment *if* it falls short of being coercive. The statement must appeal to the employee's reason, not to fear . . . or merely corrects misstatements of fact in a union campaign. . . ." Second, *coercive utterances:* "When to persuasion other elements are added which bring coercion, or give it that character . . . 'the limit of right has been passed.' . . . Sound policy dictates, and the Wagner Act assumes, that employers should not intrude upon the choice, subject always to their constitutional right to express an opinion." Third, *utterances which are an integral part of an anti-union course of conduct:* "'. . . in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways'" (citing National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469, 471 (1942)). Fourth, *speeches delivered to a captive audience.*

[9] Although the principal decision is not clear as to whether the Board in the absence of a captive audience would have held the speech privileged or as part of the complex of anti-union conduct, the fact is unimportant for our purposes, since the majority reached the result that the speech in its setting was coercive regardless of its constitutionally privileged character standing alone.

[10] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[11] The Board affirmed the trial examiner's finding of (1) surveillance by the company's labor relations director over the union's activities; (2) discrimination against the CIO by unfair enforcement of a company rule prohibiting union solicitation on company premises during non-working hours; and (3) a determined campaign of literature and speeches by the company designed to insure the defeat of the CIO and the victory of the inside association.

[12] The specific points made in the vice-president's speech were: (1) The employees were free to join any organization they desired; (2) the company's war

The Board found, even though there were other unfair practices upon which to base its "cease and desist" order, that the "conduct of the respondent in compelling its employees to listen to a speech on self-organization under the circumstances . . . *independently* constitutes interference, restraint and coercion within the meaning of the Act."[13] The reasons given are these:

1. Rights guaranteed to employees by the Act include "full freedom to receive aid, advice and information for others" concerning these rights. Such freedom is meaningless when they are forced to receive such aid, advice, etc.

2. The employer's economic control during working hours gave him exclusive and assured access to his employees in the matter of their organizational activities.[14]

3. The compulsory assembly was not a necessary part of the speech. "The law may and does prevent such use of force without denying the right to speak."

4. The use of the employer's economic power to compel his employees to listen to such speeches independently violated Section 8(1) of the Act.[15]

5. The *American Tube Bending* case[16] did not decide the issue involved here—whether a privileged speech to a captive audience thereby ceases to be privileged—for although the facts were similar in that case (pre-election speech to a captive audience) the Board at that time had never considered the question independently.

Board Member Reilly vigorously dissented on these grounds:

1. The case of *National Labor Relations Board v. Virginia Electric*

record was a "shining light" against the background of strife in plants where outside unions were in charge; (3) the management believed that successful operation of the plant could best be achieved by an inside union; (4) the outside union was mainly interested in the dues it would collect from the employees; and (5) it would be extremely "difficult to maintain the same harmonious relationship which now exists should an outside organization inject itself into ours."

The president's speech specifically stated: (1) Company wages were considerably higher than wages in CIO plants. (2) The company and its employees would not be making the most of its opportunities were an outside union voted in. (3) Each employee was free to vote as he desired without fear of any discrimination.

[13] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion; italics added.

[14] The Board's emphasis on the employer's economic control is expressed in THIRD ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD (1938) 125: "Activities, innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees. See National Labor Relations Board v. Falk Co., 102 F. (2d) 383 (C. C. A. 7th, 1939) . *Contra:* National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940); *cert. denied,* 312 U. S. 689 (1941).

[15] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §158 (1) (1940 ed.).

[16] National Labor Relations Board v. American Tube Bending Co., 134 F. (2d) 993 (C. C. A. 2d, 1943), *cert. denied,* 320 U. S. 768 (1943).

and Power Co.[17] definitely affirmed the employer's constitutional right to express his opinion on labor matters when such utterances fall short of coercion, either standing alone or when viewed in the totality of the employer's conduct. Expressly relying on this decision, Judge Learned Hand of the Second Circuit Court of Appeals in the case of *American Tube Bending Co.*[18] reversed the Board's finding of unfair labor practice under Section 8, Subsection 1[19] where the facts were practically identical with those of the principal case.[20] The Board's petition for *certiorari,* "advancing many of the identical arguments advanced in this case"[21] was denied.

2. Admitting that the denial of *certiorari* was not necessarily conclusive, he argued that all doubt on the point was dissipated when in the next term in the case of *Thomas v. Collins,*[22] the Supreme Court, noting with approval the *American Tube Bending* ruling, held unconstitutional a state statute requiring registration by union organizers, and "made it clear that the right to make arguments for or against unions was fully privileged by the First Amendment, and that it applied to employers as well as to employees and union organizers."[23]

3. Recently there has been a "disturbing tendency of the Board to

[17] 314 U. S. 469 (1941) (remanded for further finding); 319 U. S. 533 (1943) (Board order affirmed).

[18] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16.

[19] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §158 (1) (1940 ed.).

[20] Board Member Reilly dissenting in the principal case, *In re* Clark Bros., 70 N. L. R. B. No. 60 (1946), at p. 9 of the opinion, discusses the American Tube Bending case with these words: "In this case an employer on the eve of an election had assembled his employees during working hours to listen to a paper which he read advising them against voting for a union in the coming election. The text of this speech contained arguments implying that outside organizers were insincere in their expressed solicitude for the welfare of the employees. It is implied that the company would never sign a closed-shop agreement, and appealed to the employees who wished to continue the friendly relationship which existed between themselves and the company to vote for the employer (that is, vote 'NO') rather than for the union."

[21] *Id.* at p. 9 of the opinion Board Member Reilly dissenting: "For example, the compulsory audience feature and the superior economic power feature were points (1) and (2) in the Board's brief."

[22] 323 U. S. 516 (1945). Mr. Justice Rutledge, speaking for the majority, says: ". . . Short of that limit [coercion] the employer's freedom cannot be impaired. . . . Of course the espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." 323 U. S. 516, 538 (1945). Mr. Justice Black and Mr. Justice Murphy joined Mr. Justice Douglas in a concurring opinion emphasizing that the court's previous cases dealing with the employer's freedom of speech were in harmony with those concerning labor's right of free speech. 323 U. S. 516, 543 (1945). Mr. Justice Jackson in a separate concurring opinion stated: "Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. . . . We are applying to Thomas a rule the benefit of which in all its breadth and vigor this Court denies to employers in the National Labor Relations Board cases." 323 U. S. 516, 547 (1945).

[23] *In re* Clark Bros., cited *supra* note 7, at p. 9 of the opinion, Board Member Reilly dissenting.

return to its old line of decisions on the theory that because there is some minor aspect of interference, a speech should be viewed as part of a 'pattern of coercive conduct.' . . ."[24]

4. While the courts, in the *Virginia Electric* and *American Tube Bending Co.* cases,[25] repudiated the earlier Board doctrine of employer neutrality, they did not repudiate any doctrine that the employer "did not have access to public media of expression," for no prior Board decision had dealt with the captive audience situation.

5. "Granted that this company, like most industrial concerns, has greater economic power than its own employees, such an analogy, when referring to an election contest undertaken by one of the most powerful CIO unions, is fallacious."[26]

Before analyzing the merits of the contentions of the majority and dissenting Board members in the principal case, it will prove of value to note the only federal court decision in point at the date of this writing: *National Labor Relations Board v. Montgomery Ward and Co.*[27] decided in October, 1946, two months *after* the *Clark Brothers* case. This case disagrees with the result reached in the principal case. The facts were these: The Board petitioned the court for enforcement of an order[28] entered by it requiring the company to cease and desist from alleged unfair labor practices, to offer reinstatement with back pay to certain discharged employees, and to post appropriate notices. The Board found that the respondent had violated Section 8(1) of the Act[29] by (a) certain discriminatory discharges, (b) by certain anti-union isolated remarks made by minor supervisory employees over a fifteen months period, and (c) by speeches delivered a week before the election by the company's Labor Relations Manager to captive audiences on respondent's time and property. The speaker stated that a libel suit had recently been filed by the company against the CIO for certain false propaganda; that the company was unalterably opposed to the closed shop; that each employee was free to join the union; and that the respondent "stands ready at all times to bargain collectively with any union which has been selected by a majority of the employees in any bargaining unit."[30]

[24] *Id.* at p. 10 of the opinion, Board Member Reilly dissenting, citing *In re* Goodall Company, 68 N. L. R. B. 31 (1946); and *In re* Monumental Life Insurance Co., 67 N. L. R. B. 35 (1946).

[25] N. L. R. B. v. Virginia Electric and Power Co., and N. L. R. B. v. American Tube Bending Co., cited *supra* notes 17 and 16 respectively.

[26] *In re* Clark Bros., cited *supra* note 7, at p. 11 of the opinion, Board Member Reilly dissenting.

[27] 157 F. (2d) 486 (C. C. A. 8th, 1946).

[28] *In re* Montgomery Ward and Co., Inc., 64 N. L. R. B. 80 (1945).

[29] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §158 (1).

[30] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27 at 498. The full text of the speech is not appended to the opinion, but may be found more fully set out in the report of the Board, cited *supra* note 28.

The court found (1) that the discharges were for good cause and not discriminatory;[31] (2) that the remarks of the supervisory employees were to be regarded as their individual views " 'when, as here, an employer has clearly defined his attitude of noninterference . . . ,' "[32] and (3) that, therefore, the speech was to be considered only in the light of the captive audience situation, and when so considered it was constitutionally privileged by the First Amendment. The Board's argument that compulsory attendance at the meetings was a species of coercion was rejected by the court with these observations: (1) The employer certainly has the "right to meet . . . employees for discussion and presentation of matters of policy of mutual interest";[33] (2) the First Amendment is concerned with the freedom of thought and expression of the speaker or writer, not with the condition under which the auditor receives the message. Thus, the permission of the audience is not a condition precedent to the right of free speech under the First Amendment; (3) "speech is very frequently invoked as a means to persuade those who do not agree with the speaker and may not even wish to hear him";[34] (4) respondent employed a convenient means of communicating with its employees; the employees were paid and not "inconvenienced in the least"; (5) "free speech is not limited to ineffective speech"; (6) the occasion on which the employer elects to utter his thoughts is not to be considered as an element of coercion."[35]

It is submitted that the court's second statement as listed above makes an unwarranted assumption. That is, that the speech in its full setting is privileged and that the desire of the listeners to receive the information is of no importance. Thus, a speech privileged in the theater does not lose that protection because the audience desires not to hear certain remarks. But before we may reach this conclusion as to the constitutional protection of the speech we must first consider the conditions under which the auditor hears the speech as an element in determining its constitutional protection.[36] If "interference, restraint or

[31] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27, at 496.

[32] *Id.* at 501, quoting National Labor Relations Board v. Brandeis and Sons, 145 F. (2d) 556, 567 (C. C. A. 8th, 1944).

[33] *Id.* at 499. *Cf.* Texas and New Orleans R. R. v. Brotherhood of Railway Clerks, 281 U. S. 548, 568 (1930), where the court said: "The meaning of the word 'influence' [replaced in the Wagner Act by the word "interference"] . . . is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee."

[34] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27, at 499.

[35] *Id.* at 499. Certainly the Board interpretation that the privilege of an utterance is to be determined in its context would refute this conclusion. See note 6 *supra*. So likewise would the reasoning of the court in the *Virginia Electric* case, cited *supra* note 20.

[36] See the statement of Judge Learned Hand in *National Labor Relations Board v. Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2d, 1941) where it is said: "Words are not pebbles in alien juxtaposition; they have only a communal existence, and not only does the meaning of each impenetrate the other, but all in

coercion"[37] of employees is forbidden by the Act[38] and if the courts hold that coercion, whether by acts, utterances or a combination of both, is not privileged[39] by the First Amendment, then the question becomes, Is the captive audience labor speech a form of coercion? To use this factual approach to the problem would seem preferable to the doctrinaire approach used by the court in the *Ward* case.[40]

Reverting to the *Clark Brothers* decision[41] let us examine the several arguments there advanced by the Board.

First, the argument of the majority in the *Clark* case that the *American Tube Bending*[42] decision did not decide this particular issue concerning a captive audience appears to be inaccurate. In that case Judge Learned Hand, speaking for the court, held that a letter sent to the employees a few days before an election and a speech[43] delivered to a captive audience the night before the election in which the employer expressed his favoritism for an open shop, and appealed to the workers to support the management's policies did not constitute interference, restraint, and coercion in light of the *Virginia Electric* case.[44] It may be true, that, as the Board says, the question of the employer's captive audience speech was not presented to the court as an independent finding of the Board; yet, in harmony with the Board's own views that utterances do not stand alone but must be considered in their context, the court evidently viewed the question of the constitutionality in its whole setting, captive audience and all: ". . . it is necessary also to give the setting in which they [the speech and letter] were uttered. . . . The speech . . . was read by the president . . . on the eve of the election to three shifts of employees assembled in the factory. . . ."[45] Then, so as to leave no doubt, the court states: "The question may be divided into two parts: first, whether the statements in the letter and the speech uttered *at that time and under those circumstances* could be regarded as coercive at all [and if coercive were they privileged under the First Amendment]."[46] The effect of the captive audience upon the question

their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part."

[37] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §158(1) (1940 ed.).

[38] *Id.* §151-166 (1940 ed.).

[39] National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469 (1941).

[40] N. L. R. B. v. Montgomery Ward and Co., cited *supra* note 27.

[41] *In re* Clark Bros. Co., Inc., 70 N. L. R. B. No. 60, 18, 1360 LAB. REL. REP. (1946).

[42] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16.

[43] The speech is discussed in footnote 20 *supra.*

[44] N. L. R. B. v. Virginia Electric and Power Co., cited *supra* note 17.

[45] N. L. R. B. v. American Tube Bending Co., cited *supra* note 16, at 994.

[46] *Ibid.*

of the coercive nature of the speech surely seems to have been considered by the court as a part of the "time and circumstances."

Another theory that the Board applies in the principal case, namely, that by the use of compulsion the employer obtained "exclusive access to its employees"[47] during working hours, may actually have been true. However, its significance must be measured in the light of the opportunities that organized labor has to present its case to the employees. For example, the employer is forbidden to prohibit union solicitation and activities on company property during non-working hours.[48] And as Board Member Reilly points out in his dissent, a powerful industrial union, as was there involved, has as much if not more ecnoomic power to influence the election than does the average industrial concern.[49]

One of the Board's principal justifications for finding interference, restraint, and coercion in the captive-audience speech is that the captive aspect of the audience was separable from the speech as such.[50] This idea is found in the concurring opinion of Mr. Justice Jackson in *Thomas v. Collins*[51] where he said:

"And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication."[52]

The Board's conclusion on this point is in accord with the rule of *Budd Mfg. Co. v. National Labor Relations Board*[53] where a prior anti-labor attitude once purged was not allowed to subsequently form the context for an anti-labor speech.

[47] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[48] Republic Aviation Corp. v. National Labor Relations Board, 142 F. (2d) 193 (C. C. A. 2d, 1944), *affirmed*, 324 U. S. 793 (1945); National Labor Relations Board v. Le Tourneau Co. of Georgia, 143 F. (2d) 67 (C. C. A. 5th, 1944), *reversed*, 324 U. S. 793 (1945).

[49] *In re* Clark Bros., cited *supra* note 7, at p. 11 of the opinion.

[50] *In re* Clark Bros., cited *supra* note 7, at p. 3 of the opinion.

[51] 323 U. S. 516 (1945).

[52] *Id.* at 547. *Cf.* Milk Wagon Drivers Unions of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287, 132 A. L. R. 1200 (1940); Nann v. Raimist, 255 N. Y. 307, 147 N. E. 690, 73 A. L. R. 669 (1931) (opinion by Judge Cardozo).

[53] 142 F. (2d) 922 (C. C. A. 3d, 1944). *Cf.* National Labor Relations Board v. Reliance Mfg. Co., 143 F. (2d) 761 (C. C. A. 7th, 1944); National Labor Relations Board v. American Laundry Machinery Co., 152 F. (2d) 400 (C. C. A. 2d, 1945); National Labor Relations Board v. American Manufacturing Co., 132 F. (2d) 740 (C. C. A. 5th, 1943); National Labor Relations Board v. M. E. Blatt Co., 143 F. (2d) 268 (C. C. A. 3d, 1944), *cert. denied*, 323 U. S. 744 (1944). See also 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (supplement 1946) §252, n. 60j.

For a discussion of the rule against prior restraint of freedom of speech as decided in the leading case of *Near v. Minnesota*, see Notes (1931) 31 COL. L. REV. 1148; 17 CORN. L. Q. 126; 40 YALE L. Q. 967, 968.

Previous to the *Clark Brothers* case numerous captive audience situations came before the Board and courts, but the issue of captive audience plus an otherwise privileged speech was never independently dealt with. They are valuable, however, to show the Board's reasoning on the captive audience situation. The results reached, in general, were that the speeches were either (1) coercive and unprivileged *per se*,[54] (2) coercive because of a background of other unfair practices,[55] or (3) privileged.[56] The first classification, coercive *per se*, is illustrated by the case of In re *Twin City Milk Producers Association*[57] where the Board found the employer's speech coercive on its face, and said:

"Delivered in a setting where the listeners were economically dependent upon, and compelled to give heed to, the speaker, the whole tenor of the speech [was coercive]."[58]

The case of In re *Thompson Products, Inc.*,[59] illustrates the Board's view where a speech is delivered to a captive audience and raised to the position of coercion by other conduct. The Board in that case said:

"In view of the economic dependence of the listeners upon [the company] . . . and in view of the compulsion upon the listeners to give heed, the adjurations . . . passed from the realm of free competition of ideas envisaged by the First Amendment. When viewed against the general atmosphere of hostility to outside unions engendered by publications, [the speeches] were bound . . . to interfere with the free choice of the employees."[60] The election was set aside.

The case of In re *Oval Wood Corp.*[61] illustrates the third holding of the Board in the past captive audience cases. Here the employer on the eve of the election contrasted the negative aspects of union membership with the company's past generosity, and questioned the assistance of "total strangers." The Board concluded that the speech was privileged, saying:

[54] Cases in this category are: *In re* Pioneer Electric Co., 70 N. L. R. B. 59 (1946); *In re* Van Raalte, Inc., 69 N. L. R. B. 1326 (1946); *In re* Twin City Milk Producers Association, 61 N. L. R. B. 69 (1945); National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106 (C. C. A. 2d, 1941). See note 5 *supra*.

[55] *In re* Jordanoff Aviation Corp., 69 N. L. R. B. 1189 (1946); *In re* Monumental Life Ins. Co., 67 N. L. R. B. 244 (1946); *In re* Winona Knitting Mills, Inc., 67 N. L. R. B. 1 (1946); *In re* Grove Regulator Co., 66 N. L. R. B. No. 135 (1946); *In re* H. Linsh and Co., 62 N. L. R. B. 276 (1945); *In re* Thompson Products, Inc., 60 N. L. R. B. 1381 (1945); National Labor Relations Board v. Quality Service Laundry Co., 131 F. (2d) 182 (C. C. A. 4th, 1942), *cert. denied*, 318 U. S. 775 (1943); National Labor Relations Board v. Sunbeam Electric Mfg. Co., 133 F. (2d) 856 (C. C. A. 7th, 1943). See note 6 *supra*.

[56] Cases in this category are: *In re* Republic Drill and Tool Co., 66 N. L. R. B. No. 96 (1946); *In re* Oval Wood Dish Corp., 62 N. L. R. B. 1129 (1945); Diamond T Motor Car Co. v. National Labor Relations Board, 119 F. (2d) 978 (C. C. A. 7th, 1941). See note 11 *supra*.

[57] 61 N. L. R. B. 69 (1945).

[58] *Id.* at 83.

[59] *In re* Thompson Products, Inc., 60 N. L. R. B. 1381 (1945).

[60] *Id.* at 1386.

[61] 62 N. L. R. B. 1129 (1945).

". . . the respondent made no threat . . . and coupled its statement of preference with clear expressions assuring the employees that [he] would not resort to reprisal to retaliate against any exercise of any right guaranteed in the Act. Under the doctrine of the *American Tube Bending* case, such conduct fell within the guaranty of free speech and is not a violation of the Act."[62] From a reading of the previous captive audience cases this conclusion seems warranted: The significance attached by the Board to the coercive element in the captive audience situation has thus run the whole gamut. The reasoning of the *Clark Brothers* case[63] is at best difficult to reconcile with that of a case like *Thompson Products* decision[64] and is completely at odds with such a view as taken in the *Oval Wood Corp.* case.[65]

The Board's finding that the captive audience as a fact added the element of coercion to an otherwise presumably privileged speech would not seem in keeping with (1) the extent to which Congress apparently intended that the employer should be allowed to speak to his employees on organizational matters, and (2) extensive constitutional protection to language given by the First Amendment. As to (1), above, it clearly appears that Congress was aware of the judicial interpretation of the Railway Labor Act (the legislative forerunner of the Wagner Act), as to the clause used therein "interference, influence, and coercion,"[66] and being cognizant of such interpretation intended to extend its liberal application even further in the Wagner Act as regard to the employer's right to speak on labor matters.[67] As to (2), above, the recent Supreme

[62] *Id.* at 1138.
[63] Cited *supra* note 7.
[64] Cited *supra* note 59.
[65] Cited *supra* note 61.
[66] RAILWAY LABOR ACT, 44 STAT. 577 (1926), 45 U. S. C. §152 (1940).
[67] The Supreme Court in *Texas and New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930), had interpreted the Railway Labor Act Section, which stated: "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence or coercion exercised by either party over the self-organization of representatives by the other," (RAILWAY LABOR ACT OF 1926, 44 STAT. 577 §2(3) (1926), 45 U. S. C. §152 (1940)), as meaning: ". . . 'Interference' with freedom of action and 'coercion' refer to well understood concepts of law. . . . 'Influence' in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to *corrupt or override the will*. . . ." Texas and New Orleans R. R. v. Brotherhood, *supra* at 568, italics added.

Before the Senate Committee on Education and Labor on S. 1958 (SEN. REP. No. 573, 74th Cong., 1st Sess. (1935)) which eventually became the National Labor Relations Act, Senator Walsh, its Chairman, explained the omission of the word "influence": "I do not think there is anything in this bill to prevent an employer . . . from posting a notice, or writing . . . or personally stating to each [employee] that he thinks their best interest is to form a company union . . . that he is violently opposed to [some organizer] who is attempting to organize a union . . . that is why we struck out the word 'influence.'"

See Salny, *"Free Speech" Under the National Labor Relations Act* (1940-1941) LAW SOC. JOURNAL, 414, 425. See also note: (1945) 14 FORDHAM LAW REV. 59, 78.

Court decisions of *Thomas v. Collins*[68] and *Thornhill v. Alabama*[69] on the closely parallel situation of the employee's freedom of speech in picketing and other labor matters would seem to indicate that the Board's narrow construction of what constitutes coercive speech in the principal case is not in harmony with the constitutional protection extended labor's activities.[70]

Admittedly, the constitutional protection to speech is not an absolute one.[71] One may not under the guise of free speech falsely shout fire in a theater.[72] Nor may one speak or publish obscene matter where prohibited by statute.[73] The advocacy of violence or unlawful means to accomplish a political result may be constitutionally prevented.[74] Likewise, in the field of economic competition Congress may impose limitations upon utterances which by their coercive nature actually deprive employees of their right of collective bargaining. But it is submitted that the definition of interference, restraint or coercion[75] can only be

[68] 323 U. S. 516 (1945).

[69] 310 U. S. 88 (1940). The court has used language in this case and the *Thornhill* case, cited *supra* note 68, which might indicate an unwillingness to follow the Board's restricted interpretation of the constitutional protection extended the employer's speech in the *Clark Brothers* case, cited note 7 *supra*. For example consider these statements:

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity.

". . . in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected . . . as part of free speech. . . .

". . . whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is, therefore, in our tradition to allow the widest room for discussion, the narrowest range for restriction." Thomas v. Collins, 323 U. S. 516, 530-532 (1945).

"Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." Thornhill v. Alabama, 310 U. S. 88, 104 (1940).

[70] Other cases giving extensive protection to picketing under the First Amendment are: American Federation of Labor v. Swing, 312 U. S. 321 (1941); Carlson v. California, 310 U. S. 106 (1940). *Cf.* Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U. S. 722 (1940); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941).

See Teller, *Picketing and Free Speech* (1942-43) 56 HARV. L. REV. 180, for an excellent argument opposing the inclusion of picketing under the protection of the First Amendment. The opposite view is taken in an able presentation by Dodd, *Picketing and Free Speech: A Dissent* (1942-43) 56 HARV. L. REV. 513.

[71] Frohwerk v. United States, 249 U. S. 204 (1919), where the statement is made that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."

[72] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Schenck v. United States, 249 U. S. 47, 52 (1919).

[73] Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

[74] Gitlow v. People of State of New York, 268 U. S. 652 (1925).

[75] NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935) 29 U. S. C. §158(1) (1940 ed.).

extended to the point, as applied to utterances, where there is clear and present danger[76] that such utterances unless restrained will deny the employees rights guaranteed by the Act.[77] From the words of one court it would appear that all speech by the employer is protected "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[78]

Undoubtedly, a privileged speech delivered to a captive audience under certain unusual circumstances and over objections of the employees might clearly constitute coercion and thereby lose its constitutional protection. But the Board's finding as a fact that a speech, regardless of its privileged nature standing alone, delivered to a captive audience thereby becomes coercive and ceases to be privileged seems an unwarranted denial of freedom of speech and a departure from the traditional interpretation of the First Amendment.

LENNOX P. MCLENDON, JR.

Federal Income Taxation—Dividend Income—Accrual Accounting

In July, 1946, the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner of Internal Revenue v. American Light and Traction Company*[1] held that a dividend declared in 1937 to stockholders of record at specified date in December, 1937, and payable in January, 1938, was taxable as income in 1938, when paid in 1938, *regardless of whether the stockholder was on an "accrual basis" or on a "cash basis."* The court concluded that the date of actual receipt, and not the date of declaration, determined the taxability of the income. The commissioner's contention throughout that the "record date" should be controlling brought no comment from the court other than that this was the first time such a theory had been urged.

The cases on this precise point are few. The decision in the principal case followed primarily that of *Tar Products Corp. v. Commissioner*[2] decided in September, 1942, which had overruled a Board of Tax

[76] The "clear and present danger" test as generally applied by the courts in freedom of speech cases was first used by Mr. Justice Holmes speaking for a unanimous court in *Schenck v. United States*, 249 U. S. 47 (1919). It has since been used in a series of important cases: Abrams v. United States, 250 U. S. 616 (1919) (Holmes, J., dissenting); Schaefer v. United States, 251 U. S. 466 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U. S. 239 (1920) (Brandeis, J., dissenting); Gitlow v. People of New York, 268 U. S. 625 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U. S. 357 (1927) (concurring opinion by Brandeis, J.); People v. Garcia, 37 Cal. App. (2d) 753, 98 P. (2d) 265 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940). For more recent cases see note 70 *supra*.

[77] 49 STAT. 449 (1935) 29 U. S. C. §151-166 (1940 ed.).

[78] Mr. Justice Brandeis in Whitney v. California, 274 U. S. 357, 377 (1927).

[1] 156 F. (2d) 398 (C. C. A. 7th, 1946).

[2] 130 F. (2d) 866 (C. C. A. 3rd, 1942).

Appeals decision standing since 1927.[3] Because of the *Tar Products* decision, when the principal case arose in the Tax Court,[4] that court merely yielded to the decision of the circuit court of appeals and held contrary to its former views, refusing to discuss the relative merits of its own views and those of the circuit court of appeals.

In the two decisions placing all stockholders on the "cash basis" of accounting with respect to dividend income for tax purposes,[5] the courts relied heavily on the commissioner's interpretation of Code Section 115(a),[6] which is set out in Regulation 111[7] as follows: "A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands." This regulation was interpreted by both courts to apply alike to "cash basis" and "accrual basis" stockholders for two reasons. First, because it had for many years made no distinction between the two;[8] and second, because of the commissioner's non-acquiescence in the Board of Tax Appeals decision in 1927[9] which had allowed accrual of a dividend in the year of declaration.

As to the first reason, it appears that the regulation, in addition to having no binding effect,[10] is more susceptible to the interpretation that it applies only to a "cash basis" shareholder in order to prevent his turning his back on income available to him so as to postpone its receipt until the next year.[11] Moreover, the Revenue Act of 1921, Section 201(e), itself contained a similar provision, which was dropped from the 1924 Act, and upon a review of the legislative history of Section 201(e) it was determined that it in effect was to prevent a "cash basis" taxpayer from failing to report income unqualifiedly available to him, though not actually received. But since it was thought this was the rule which would be applied even in the absence of a statutory provision it was stricken from the Act.[12] It was thought, and reasonably so, that this provision in Section 201(e) inspired the above regulation.[13]

[3] The circuit court of appeals decision in the *Tar Products* case reversed the decision of the Board of Tax Appeals in 45 B. T. A. 1033 (1941), which had followed its earlier decision on the same point in *Campbell v. Commissioner*, 6 B. T. A. 60 (1927).

[4] 3 T. C. 1048 (1944).

[5] Cited *supra* notes 1 and 2.

[6] INTERNAL REVENUE CODE, §115(a), 26 U. S. C. A. §115(a).

[7] INCOME TAX REGULATIONS 111, §29.115-1.

[8] The Regulations have used substantially identical language since 1921.

[9] Campbell v. Commissioner, cited *supra* note 3.

[10] However, its long standing without any change by Congress might be deemed to give it the force and effect of law. See Helvering v. Reynolds Tobacco Co., 306 U. S. 110 (1939); Brown, *Regulations, Reenactment, and the Revenue Acts* (1941) 54 HARV. L. REV. 377.

[11] See John A. Brander, 3 B. T. A. 231 (1925).

[12] Cecil Q. Adams, 20 B. T. A. 243, 245 (1930); see also Mary Miller Braxton, 22 B. T. A. 128 (1931).

[13] 45 B. T. A. 1033, 1034, see note 3 *supra*.

In relying on the second reason the courts are holding the commissioner to his contention made nineteen years earlier, and in effect are giving more weight to the commissioner's opinion in the 1927 case than to that of the Board of Tax Appeals. Consequently the courts are reversing the authority which taxpayers have been following (or should have been), and are holding in accordance with the commissioner's former view, which he is here, in both cases, denouncing by asserting his belief to be in accord with the former authority which held that the dividend should be accrued by a shareholder properly reporting on the "accrual basis". Accordingly it seems that the second reason given by the court for its interpretation of the regulation is unsound.

In the application of the "single rule" the court in the principal case *(Commissioner v. American Light & Traction Co.)* states additional reasons. It says that it makes possible the checking of taxpayers' returns against the corporation record of disbursement. It must be conceded that the information return required by Code Section 148(a)[14] serves the practical purpose of aiding the commissioner to check the accuracy of shareholders' returns, but having the dividends reported on the information return included by "accrual basis" shareholders in one year and by "cash basis" shareholders in the next would not render the information worthless—at most it would merely require the commissioner to use each information return partly for one year and partly for the next.

Another reason given by the court is that application of the "single rule" will prevent variations in the tax paid where dividends are paid in kind and the value of the property fluctuates. However, it seems that there should be no substantial objection to such a situation; but on the contrary, it seems more desirable for the shareholder to report it in the manner in which he reports the rest of his income and disbursements, whether on the "cash basis" or "accrual basis," in order that the return will more properly reflect his gains for the period. Practically speaking, the tax paid by two shareholders on any particular dividend distribution would probably not be the same even though they reported the income in the same taxable year, and were holders of identical amounts of the stock, because they would be in different income brackets and would be affected differently by the same amount. But assuming for the sake of example that their total taxable net incomes are the same, that they are holders of an equal number of shares, and that tax rates applicable to the two years are the same, then the "accrual basis" shareholder would pay the same amount of tax on the dividend as the "cash basis"

[14] "Every corporation shall, when required by the Commissioner, render a correct return, duly verified under oath, of its payments of dividends, stating the name and address of each shareholder, the number of shares owned by him, and the amount of dividends paid to him." 26 U. S. C. A. 148 (a).

shareholder, except where the value of the stock distributed as a dividend fluctuated between the record date and the date of receipt. But in view of the fact that the "acquisition value" to each shareholder would be the market value upon which he had paid tax, and that this value is the one upon which each would compute a gain or loss upon selling or otherwise disposing of the stock, the objection to the difference in the tax paid on the distribution would seem to lose much of its force.[15]

Another reason given by the court is that a dividend is not taxable unless paid out of earnings and the proportion of earnings to capital used in paying cannot be determined until the date of payment in many cases. As to this argument, it seems that it would be a rare situation indeed in which the proportion of earnings to capital would not be known by the paying corporation fairly close to the end of its operating year (whether calendar or fiscal), and in consequence that information would usually be available to the shareholders in ample time to record as non-taxable income that portion of their dividend income attributable to non-taxable distributions.[16]

Finally the court reasoned that the dividend might be subject to double taxation in the case of transfer of the stock from an "accrual

[15] Suppose that a dividend in the stock of another company is declared Decem-1, 1946, to stockholders of record December 15, 1946, payable January 10, 1947. Suppose that on the record date (December 15) the market value of the stock was $50, and by the payment date (January 10) the market value had fallen to $45. Under these conditions the shareholder on the "accrual basis" would be taxed on $50 and the shareholder on the "cash basis" on $45. Then suppose that both sold these stocks on February 15, 1947, at which time they received the current market value of $55 per share. Here the "accrual basis" shareholder who had been taxed on $50 would have a taxable short term capital gain of only $5, where the "cash basis" shareholder would have a taxable short term capital gain of $10. Thus it can be seen that the total tax to each shareholder would tend to equalize, and at the same time consistency in reporting income for tax purposes would be preserved.

It is conceivable that this equalization would not foliow as closely in the case of a loss due to the sale in the example above, because of the maximum allowable deduction for a short term capital loss (INTERNAL REVENUE CODE §117(d)). But, conceding that in such cases the total tax of the two shareholders would not precisely equalize, nevertheless each taxpayer will more properly reflect his total taxable gains if he is required to report all income (and expense) in a consistent manner.

[16] Assuming for the sake of example that the declaring corporation operates on the basis of the calendar year, the shareholders would normally have until March 15 to file their returns, and certainly by the end of January the declaring corporation will have been able to determine the proportion.

If the declaring corporation and the shareholder were operating on years ending at different dates (say June 30, and December 31), the situation would be worse. However, the "single rule" cannot cure this situation because the shareholder's income will be taxable long before the end of the declaring corporation's year.

But in view of the state statutes requiring that dividends may be declared only from earnings (see 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5329, and cases cited there in note 56) except in cases of liquidation, the likelihood that the determination of the taxable proportion of a dividend will present a major problem seems relatively slight.

basis" to a "cash basis" taxpayer between the record date and the date of payment. Here it seems that since the stockholder of record, who is the "accrual basis" stockholder in the court's example, would be the one to whom the dividend check would be sent, that the sale subsequent to the record date would have no effect, since this would ordinarily be an ex-dividend transfer. Of course, where the sale, by agreement of the parties, also transfers or assigns the dividend, the "accrual basis" stockholder would be taxed on the dividend which he had assigned to his vendee, but he would have received something by virtue of the sale in consideration of the assignment of the dividend, and the difference between the amount he received as consideration for the assignment and the amount of the dividend would be reported as interest expense (normally the dividend would be discounted); and the loss or gain on the stock itself would be reported as a capital gain or loss. The vendee "cash basis" stockholder should not be taxed because the dividend was not income to him, but merely the consideration moving to him in the contract, and for which he paid. Probably some small part of it would be interest income (in the same amount as the vendor's interest expense) and should be so reported. And so it can be seen that the courts' example of double taxation of one dividend would not materialize.

In the *Tar Products* case[17] upon which the decision of the principal case is based, the facts were for practical purposes the same; however, in that case the commissioner was contending that the dividend should constitute taxable income to the distributee on the "accrual basis" in the year of declaration; without mention of record date. In dealing with the question as placed before it, the court, it is submitted, properly held that the date of declaration of a dividend would not be a convenient date on which to compel a taxpayer to accrue it. However, the court went on to say "for he will never receive it unless he is also a shareholder upon the date when the books close, and that date is wholly subject to the corporation's convenience, not that of either the government or taxpayer." Such reasoning overlooks the effect of a record date. Once the record date is stated, and known, then the distributee can be determined regardless of when the corporation closes its books, or whether it closes them at all. Had the commissioner urged upon the court in that case that the dividend should be accrued by the "accrual basis" stockholder on the *record* date, it seems that the court's reasoning would have been more clearly shown to be unsound.

It is a fundamental concept in accounting that in order to accurately reflect the position of a business, the income must be allocated to the period when earned.[18] It would seem to follow that where a definite

[17] Cited *supra* note 2.
[18] See KESTER, ADVANCED ACCOUNTING (3d rev. ed. 1933), p. 183.

debtor-creditor relationship arises conclusively, the period when earned would be determined for purposes of accruing. The courts have divided on the question of whether a corporate debt arises upon declaration of a dividend or whether it arises upon the record date.[19] The federal courts seem to favor the latter.[20] Under either view it can be seen that the debtor-creditor relationship does arise, with an absolute right in the shareholder-creditor, at the latest, no later than the record date; and it seems that under any view it would be proper to accrue dividend income as of the record date.[21]

It must be admitted that under the decision of the principal case, there would be no accounting burden placed upon the "accrual basis" shareholder in compelling him for tax purposes to report dividend income on a "cash basis"; it would merely be an item of an accounting adjustment for purposes of filing the tax return. And it may be argued that once this procedure is established that each year will balance out the next in as far as the tax burden itself is concerned. However, it is nevertheless true that in order to accurately and properly reflect the income for a period, each item of income must be placed where the right to it arose, and not the time of actual receipt.[22] The basic idea under the accrual system is that the books shall immediately reflect obligations and expenses definitely incurred and income definitely earned, regardless of whether payment has been made or is due. The word "accrue" does not mean that the item is due in the sense of being then payable. The accrual system wholly disregards due dates.[23]

It has been argued that it would be impossible for stockholders to accrue dividend income in the year of declaration, because very few stockholders have reliable information as to when the declaration is made.[24] This argument is based on an excerpt from an accounting handbook published in 1920,[25] and it should be called to mind that such information is much more readily available in 1946 than in 1920.[26] Also

[19] *Declaration date:* Ford v. Snook, 240 N. Y. 624, 148 N. E. 732; Beattie v. Gidney, 99 N. J. Eq. 207, 132 Atl. 652; Western Securities Co. v. Silver King Mining Co., 57 Utah 88, 113, 192 Pac. 664; Notes (1938) 27 GEORGETOWN L. J. 74; Notes (1924) 38 HARV. L. REV. 245.

Record date: Smith v. Tacker, 133 Cal. App. 351, 24 P. (2d) 182; Richter & Co. v. Light, 97 Conn. 364, 116 Atl. 600; Ford v. Ford Manufacturing Co., 222 Ill. App. 76, 84; Nutter v. Andrews, 246 Mass. 224, 142 N. E. 67.

See also Annotation 72 A. L. R. 982.

[20] Sharp v. Commissioner, 91 F. (2d) 802 (C. C. A. 3d, 1937); Buchanan v. National Savings & Trust Co., 23 F. (2d) 994 (App. D. C. 1928).

[21] See PATON, ADVANCED ACCOUNTING (1941), p. 193.

[22] Spring City Foundry Co. v. Commissioner, 292 U. S. 182 (1934).

[23] Brown Co., 8 B. T. A. 112 (1927); *see also* Patrick McGuirl, Inc. v. Commissioner, 74 F. (2d) 729 (C. C. A. 2d, 1935).

[24] See dissenting opinion of Smith, Tar Products Corp. v. Commissioner, cited *supra* note 3.

[25] MONTGOMERY'S INCOME TAX PROCEDURE (1920), p. 450.

[26] The larger newspapers devote whole sections to stock reports, and declarations of dividends with the record dates are quoted therein. The declarations of divi-

it should be noted that this argument is aimed at not requiring an accrual of the dividend income as of the *date of declaration*—a proposition with which the writer here agrees—but they are not considering the accrual as of the *record date.* And in support of this very proposition the accounting authority referred to above as supporting the compulsory "cash basis" view,[27] in commenting upon the 1927 decision,[28] recognizes the record date as controlling.[29] It should be further noted that, assuming the information is not always immediately available, it is not necessary to know of the directors' action at once in order to accrue the income. Certainly the sooner the better, but it is simple and common to accrue items long after they have arisen, but in time to get them in the financial statements for the period.

A somewhat analogous situation to that in issue here, is the problem arising upon the death of a stockholder, i.e., *is the dividend income taxable as income to the decedent or to his estate?* In discussing the proper accounting procedure applicable to this situation Professor Finney says, "dividends declared prior to decedents death are part of the corpus, even though not collected, and those declared afterwards are income to the estate."[30] This accounting authority is placing the emphasis upon the declaration date which is earlier than the accrual date urged in this article (except where declaration date and record date are the same day), but the same principle is involved—that of allocating the income to the proper period. The United States Supreme Court recently partially settled this question by determining that the date of accrual of the dividend income was not the declaration date.[31] The court there expressly[32] did not decide whether the controlling date should be the record date or the payment date; however, its clear analysis of the situation placed the record date as the date at which all elements were present which are necessary for a propr accrual, *i.e.,* the payor, the amount, and the payee. With this view of the arising of a complete debtor-creditor relationship, it seems highly probable that the Supreme Court would hold the record date to be the proper date for recognition of dividend income by a shareholder on the "accrual basis." Considering that possibility, it is regrettable that the commissioner did not ask for *certiorari* in the principal case.

---

dends by the more closely held corporations may never reach newsprint, but there the shareholders are practically in constant touch with the corporation and would normally be well informed. Also, any shareholder whose business enterprise is large enough to justify accounting on the "accrual basis" (normally an individual would be on the "cash basis") will easily be able to make it a point to know the declaration and record dates of dividends on the stock he holds.

[27] See note 24 *supra.* [28] See note 3 *supra.*

[29] MONTGOMERY'S INCOME TAX PROCEDURE (1920), p. 294.

[30] H. A. FINNEY, PRINCIPLES OF ADVANCED ACCOUNTING (1946), p. 474.

[31] Estate of Putnam v. Commissioner of Internal Revenue, 324 U. S. 393 (1945).

[32] *Id.* at 398.

It appears from a practical point of view, and from the standpoint of making the law follow a natural course in allowing proper accounting procedure, that the record date should control the point at which an "accrual basis" shareholder must accrue his dividend income. A shareholder reporting all other income, and all disbursements, on an "accrual basis" cannot, even for tax purposes, properly and accurately reflect his income for a period so long as his dividend income is taxable as though he were on the "cash basis."

It might be noted in closing that the holding in the principal case is not objectionable to "accrual basis" shareholders having dividends declared to stockholders of record on a date in 1946 and to be paid in 1947. With the "prospects" of lowered taxes for 1947, it is highly desirable for everyone to postpone income until 1947, while at the same time accruing as many expenses as possible for 1946. Should the tax reductions not materialize for 1947, it would seem safe to say that at least they will not be higher. However, this holding, though causing possible bright outlooks for the present, may conceivably, when the situation is reversed, cause an equal amount of hardship.

But under either situation, it is the consistency and logic of properly reflecting income that is to be desired, and it is submitted that the holding of the principal case denies both when it places an "accrual basis" shareholder, for tax purposes, partially upon a "cash basis."

WALTER E. BROCK, JR.