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Use of Mandamus to Expunge Discretionary Order of Federal District Court Judge

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becoming aware that this element of damage was assuming a more important position on the legal scene. Then the courts began awarding damages for mental suffering where it could be easily seen that a breach of contract would cause such damage. Finally, the necessity for wilful and wanton conduct was done away with by the impact and concurrent injury rules. It was thought that these were the solutions. However, it is now apparent that there are definite flaws in these theories. Of course, these developments did not appear in the neat chronological pattern as set forth. They have come to be, as Mr. Justice Holmes contended all law should be made, by the gradual accumulation of decisions on each side of the case.

But we are not yet at the solution. Surely, the decision of whether recovery should be given when there is apparent mental suffering, should not depend upon the chance occurrence of getting dust in the eye as has happened under the impact theory,[76] or the element of inhaling smoke which has been a basis of recovery under the concurrent injury theory.[77] Nor should recovery be granted for the humiliation of being a victim of a practical joke because the defendant's actions were deemed wilful and wanton[78] and be denied where the plaintiff is forced to watch his brother die because the conduct of the defendant can only be considered negligent.[79]

There would seem to be no good reason to deny recovery for mental suffering, where it would be allowed if the injury were physical. The general rule barring an action for mental injury, with its numerous exceptions, serves to place the recovery on a fictional basis without regard to the justice of the cause. The difficulty of proving the actual amount of damage should not bar the cause of action.

[76] Porter v. Delaware L. &W.R. Co., 73 N.J.L. 405, 63 Atl. 860 (S. Ct., 1906).

[77] Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

[78] Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[79] St. Louis & S.F. Ry. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026 (1915).

USE OF MANDAMUS TO EXPUNGE DISCRETIONARY ORDER OF FEDERAL DISTRICT COURT JUDGE

A problem has recently arisen in the federal courts that has lain dormant for a number of years. This problem concerns the power of an appellate court to issue a writ of mandamus on a matter which is purely discretionary and unappealable before final judgment, and by so doing overrule a district court judge's exercise of discretion. The power to issue a writ of mandamus comes from the All Writs Act of the United States Code[1] which allows writs to be issued at the discretion of the court. This power, however, has in some instances been used to overrule the discretion of a lower court judge, forcing

[1] 63 Stat. 102 (1949), 28 U.S.C.A. § 1651(a) (1950).

him to acquire counsel for himself in order to defend his exercise of judgment and discretion before the appellate tribunal. The situation arises when a district court judge enters an interlocutory order, and one side feels that the judge has erred. The appellate tribunal is then petitioned for a writ of mandamus to expunge the order complained of. The order cannot be appealed, since interlocutory orders cannot be appealed unless they fall under Section 1292 of the United States Judicial Code,[2] and therefore, during the trial, all evidence and argument must cease while one party attempts to force the court to change the interlocutory order unfavorable to his side. The trial judge then, in order to protect his decision based on his own deliberations and conclusions from the facts presented, must either look for competent counsel to represent him in the mandamus action before the appellate tribunal, or appeal to the party opposed to the writ to defend him.

A recent case raised the question of the availability of the writ of mandamus for this purpose. This issue was raised in the case of *Mikesell v. Chicago, R.I. & P.R. Co.*,[3] where the action was brought initially in the Superior Court of Cook County, Illinois. The facts showed that the plaintiff's decedent was killed by a Rock Island train in a grade-crossing accident at Avoca, Iowa. The plaintiff thereupon received letters of administration from a county court in Iowa and began her action of wrongful death in Chicago. The defendant railroad had the case removed into the United States District Court for the Northern District of Illinois on a diversity of citizenship petition which averred the plaintiff's Iowa residence and its own Delaware incorporation. Four days after the case came into the district court, the defendant railroad moved for a transfer under Section 1404(a) of the Judicial Code[4] to the United States District Court for the Southern District of Iowa, on the ground that the plaintiff's residence, the site of the accident, and the witnesses are all located in this Iowa district.

Judge Igoe, sitting in the district court in Illinois, refused to order this transfer stating that the motion was denied:

> . . . On the general proposition that the place where this accident occurred is about as close to Chicago as to Des Moines where you want to have the case tried, and this case was started in the State court and you folks transferred it over to the Federal Building evidently for the purpose of having a trial, and as soon as it got here, the only trial you wanted was to ship it out to Iowa. I don't think Section 1404(a) was ever established or enacted for that reason. . . .[5]

[2] 65 Stat. 726 (1951), 28 U.S.C.A. § 1292 (Supp., 1954).

[3] United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 52 C 2124 (1952).

[4] 62 Stat. 937 (1948), 28 U.S.C.A. § 1404(a) (1950): "For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." On the application of this section in regard to the "forum non conveniens" doctrine, see Norwood v. Kirkpatrick, 75 S. Ct. 544 (1955), where the Court expressly avoided ruling on whether mandamus or prohibition were proper remedies.

[5] Chicago, R.I. & P.R. Co. v. Igoe, 212 F. 2d 378, 382 (C.A. 7th, 1954).

The defendant railroad petitioned the United States Court of Appeals, Seventh Circuit, for a writ of mandamus ordering Judge Igoe to expunge his order and transfer the cause to the Iowa district. Upon reading of briefs and hearing of oral arguments, the Court of Appeals panel of three judges concluded that possibly Judge Igoe had made a mistake, because he apparently did not consider the requisites set forth under Section 1404(a) in making his decision denying the transfer. For this reason, following Seventh Circuit precedent,[6] the appellate tribunal by Lindley, J. stated:

> We . . . remand the cause to the District Court with directions to vacate the order denying the transfer and to reconsider petitioner's motion. . . .[7]

Throughout the body of this unanimous opinion, the court discussed the power to issue a writ of mandamus and finally concluded that in this particular case, such a writ would not issue since the decision on the motion to transfer is wholly within the discretion of the district court.

> Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court.[8]

Upon remand to Judge Igoe in the district court, he reconsidered his ruling on the motion, taking into consideration all of the requisites of Section 1404(a), and arrived at the same conclusion as previously announced. His second decision was worded in a manner following the requirements of the statute:

> In compliance with the mandate of the Circuit Court of Appeals . . . the order heretofore entered in this manner . . . has been vacated and further consideration has been given to the petition for transfer . . . as well as to all of the pleadings in the above matter. . . . Upon consideration of all of the papers now on file in this case, I have reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interest of justice to transfer this case to . . . Iowa. . . .[9]

In the answer to the petitioner's request for the writ, Judge Igoe also stated that he had exercised and faithfully discharged the discretion which the orderly administration of justice requires.

The defendant railroad again proceeded against Judge Igoe and petitioned the Court of Appeals for a writ of mandamus. Apparently because the court saw that there was a very important issue raised as to the power of the appellate tribunal to overrule a lower court's discretionary order, the court voted to sit *en banc* on this petition.

The Court of Appeals handed down a five-to-one opinion holding that Judge Igoe had abused his discretion, and issued the writ of mandamus directing the district court to vacate its order denying the transfer, and to enter an order transferring the cause to the Southern District of Iowa for trial on the merits.

[6] Dairy Industries Supply Ass'n v. La Buy, 207 F. 2d 554 (C.A. 7th, 1953).

[7] Chicago, R.I. & P.R. Co. v. Igoe, 212 F. 2d 378, 382 (C.A. 7th, 1954).

[8] Ibid.

[9] Chicago, R.I. & P.R. Co. v. Igoe, 220 F. 2d 299 (C.A. 7th, 1955) (quotation from slip opinion case No. 11247 at 10).

The majority opinion, as delivered by Duffy, C.J., went into a minute analysis of the factors mentioned in Section 1404(a) discussing why the cause should be transferred. The appellate tribunal was of the opinion that it was for the convenience of the parties and witnesses, and in the best interest of justice that the cause should be heard in Iowa, and therefore, although Judge Igoe exercised his legally authorized discretion in the district court, the Court of Appeals substituted its discretion for his and ordered the transfer. Thus, the Court of Appeals of the Seventh Circuit has gone on record as issuing a writ of mandamus to expunge a purely discretionary interlocutory order of a district court judge, although, in the first attempt at a writ by the railroad petitioner, the same court held that it could not issue such a writ.

Judge Finnegan, the lone dissenter in this decision, delivered a learned opinion in which he points out quite forcefully the fact that the district court judge was given a second chance to deliver the "correct" order. Where the order was returned in the same manner as previously, the appellate tribunal then went into an analysis concluding with an opinion that the dissent thought was ". . . not a demonstration of discretion abused below, but rather a sliding scale of judgment values between reviewing tribunal and trial court."[10]

Where the majority opinion seems to hedge concerning their first opinion, by interposing the expressions, "all we intended to say,"[11] and "thought we clearly delineated,"[12] the dissenting opinion states quite clearly that the final statement of the court as delivered by Lindley, J., and concurred in by the other two judges, must be taken at face value and that the impact of this final passage cannot be so easily diluted.[13] Judge Finnegan also states that the core issue is the absence or presence of abuse of discretion and in his judgment such abuse was not shown. The majority merely balanced convenience of the parties and speculated upon their motivations, factors which were within the province of the discretion vested in the district court judge, and were absolutely no business of the reviewing tribunal.

Judge Finnegan's dissent closely follows his concurring opinion in an earlier Seventh Circuit case. He did not refer to this prior decision in his opinion, but the reasoning behind both opinions is identical.

This was the case of *Radio Corp. of America v. Zenith*,[14] wherein a motion to stay proceedings was denied by Judge Igoe in the exercise of his judicial discretion, and a petition for a writ of mandamus was taken by RCA to the Court of Appeals.[15] The court, in a unanimous panel decision, arrived at a conclusion

[10] Ibid., at slip opinion 12.

[11] Ibid., at slip opinion 4.

[12] Ibid.

[13] See quote on page 281, n. 8.

[14] United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 48 C 1818 (1948).

[15] Radio Corporation of America v. Igoe, 217 F. 2d 218 (C.A. 7th, 1954).

diametrically opposite to the majority holding in the second *Rock Island* case. The majority in the *RCA* case held:

> The order having resulted from an exercise of his discretion, where he undoubtedly had the power, we can find no authority for reviewing his action by interlocutory appeal in the guise of a writ of mandamus or other extraordinary remedy.[16]

It is believed that a more complete explanation of the background of the *RCA* case will be helpful in explaining just how similar the cases are and yet how completely the decisions diverge. The case of *Zenith v. R.C.A.*[17] was first begun in the United States District Court for the District of Delaware. A discretionary order was entered against Zenith, and upon their petition for mandamus, RCA argued successfully that such a remedy will not lie to contravene an interlocutory discretionary order. In the Seventh Circuit, the parties are reversed, and the ruling is against RCA rather than against Zenith. RCA petitioned for a writ, but the court held that it would not issue. It is seen, therefore, that the Third and Seventh Circuits were consistent in disallowing a writ of mandamus to expunge the district court judge's discretionary interlocutory order, and that RCA completely reversed their position, as pointed out by Finnegan, J. in his concurring opinion.

The ruling on a motion to stay proceedings is discretionary with the trial judge as much as the ruling on a motion to transfer. Therefore, although these two cases were raised on factual differences, the basic issue common to both is the petition for a writ of mandamus to expunge the discretionary orders that were unappealable. Thus the Court of Appeals in one case[18] held that they were without power to issue a writ unless there was a clear abuse of discretion, while in the second case[19] the court held that there was an abuse of discretion while not actually setting out this abuse.

Judge Finnegan, in his concurring opinion in the *RCA* case, went into somewhat more detail in regard to the position of the parties if the writ of mandamus was indiscriminately issued whenever one party believed that the trial judge had erred. It was his opinion that the trial judge would then become a litigant instead of a trier of the cause in question, and would be forced to seek competent counsel to defend himself before the appellate tribunal in the mandamus action. This possibility was also raised in a 1947 case before the United States Supreme Court where a petition for a writ of mandamus was denied on the ground that such should be issued only in extraordinary cases.[20]

Judge Finnegan's opinion seemed to anticipate and recollect the holdings in

[16] Ibid., at 221.

[17] United States District Court for the District of Delaware, Civil Action No. 1247 (1949).

[18] Radio Corporation of America v. Igoe, 217 F. 2d 218 (C.A. 7th, 1954).

[19] Chicago, R.I. & P.R. Co. v. Igoe, 212 F. 2d 378 (C.A. 7th, 1954).

[20] Ex Parte Fahey, 332 U.S. 258 (1947).

the two *Rock Island* cases; the first coming before and the second after this decision in the *RCA* case. The threat mentioned in the concurring opinion in the *RCA* case "—rule sympathetically, else plead forthwith as a respondent—"[21] apparently was carried out to its bitter end. The court, the first time, remanded to the district court judge with an apparent threat to rule sympathetically (the other way) or obtain an attorney and defend against a petition for a writ to expunge his order.

In the Delaware *RCA* action, the district court judge ordered a stay of proceedings until the result of the Illinois action was determined. Judge Igoe's refusal to grant a stay in the Illinois action and the subsequent refusal of the Court of Appeals to issue a writ ordering the stay was before the United States Supreme Court on a petition for a writ of certiorari, which was denied.[21a] The granting of the writ of mandamus in the *Rock Island* case has also been disputed, and a stay of the mandate having been obtained, it too is before the Supreme Court on a petition for certiorari. Thus the Court of Appeals for the Seventh Circuit found their decisions on the granting of a writ of mandamus in two cases, decisions diametrically opposite, up before the Supreme Court at one and the same time.

Within the purview of this question are two very recent cases, both of which were involved with the transfer of a case to another district court in another circuit, a situation similar to that in the *Rock Island* case. The first of these, *All States Freight v. Modarelli*,[22] set down the rule that where a federal district court judge duly exercised the discretion with which he was empowered, and considered all of the factors required by the transfer section, then the appellate tribunal will not issue a writ of mandamus to expunge this denial. This Third Circuit Court of Appeals case again raised such an important issue that the court voted (as in the second *Rock Island* case) to sit *en banc* on the hearing of the petition and delivered a unanimous opinion refusing to issue the writ.

The second of these cases arose in the First Circuit. The case of *In re Josephson*[23] was a suit by minority stockholders in Massachusetts against a New Mexico corporation. The board of directors of the corporation petitioned the district court for a transfer to the United States District Court for the District of New Mexico under Section 1404(a), and the judge thereupon ordered the transfer under his discretionary powers to do so. The minority stockholders petitioned the First Circuit Court of Appeals for a writ of mandamus to expunge this order and deny the motion for transfer. A lengthy opinion delivered for the unanimous panel by Magruder, C. J., rejected this petition and noted the increasing tendency to use the writ of mandamus to expunge unappealable dis-

[21] Radio Corporation of America v. Igoe, 217 F. 2d 218, 223 (C.A. 7th, 1954).

[21a] Radio Corporation of America v. Igoe, 75 S. Ct. 533 (1955). A collateral motion for leave to file a petition for a writ of mandamus was also denied; 75 S. Ct. 543 (1955).

[22] 196 F. 2d 1010 (C.A. 3d, 1952).

[23] 218 F. 2d 174 (C.A. 1st, 1954).

cretionary orders of district court judges. The court surmised that whenever a party has an adverse ruling entered against him, he believes that the judge has erred, but the court states that this is not and should not be considered adequate grounds for approving such a petition nor for the issuance of a writ of mandamus. The court added that this case will be used to set the First Circuit's policy as to use of the writ and stated:

> Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus.[24]

The above quotation appears to be diametrically opposed to the majority opinion of the second *Rock Island* case wherein the court was not nearly as forceful nor as sure of its ground, and where nothing *extraordinary* was called for.

A petition for a writ of mandamus was made in the case of *Dairy Industries Supply Ass'n v. La Buy*[25] to expunge the district court judge's order refusing a transfer under 1404(a). The Court of Appeals of the Seventh Circuit set a precedent which was followed by the first *Rock Island* case. Judge La Buy, in his memorandum opinion denying the motion for transfer, stated that after balancing the relative conveniences, he found no indication that the present forum was oppressive, harassing, or vexatious, and therefore denied the motion. The appellate tribunal referred to the wording of Section 1404(a) and stated that determination by the trial court judge on a motion for transfer must be based solely upon the three factors therein specified. The court then denied the petition for a writ, but remanded the cause to Judge La Buy for further deliberation in the light of the factors stated in 1404(a); the same decision that was made in the first *Rock Island* case. However, the parties then settled out of court and the case was dismissed, thus preventing Judge La Buy from again ruling on the motion.

The argument against the issuance of the writ of mandamus was strengthened by the majority opinion in *Bankers Life and Casualty Co. v. Holland*,[26] where Mr. Justice Clark, speaking for the Supreme Court, reaffirmed the case of *Ex Parte Fahey*,[27] and stated that the writ of mandamus should issue only under drastic and extraordinary circumstances. The Court also referred to a case where the issuance of the writ was proper,[28] but distinguished this from their instant case on the basis that there was no evidence of a clear abuse of discretion and/or usurpation of judicial power, either of which must be present before the writ will lie.

Delay in adjudication of the issue raised in the mandamus petition until after

[24] Ibid., at 183.

[25] 207 F. 2d 554 (C.A. 7th, 1953).

[26] 346 U.S. 379 (1953).

[27] 332 U.S. 258 (1947).

[28] De Beers Consolidated Mines v. United States, 325 U.S. 212 (1945).

final judgment on the merits has been held not to be a sufficient hardship on the parties to allow the issuance of the writ.[29] The Supreme Court has also stated that the writ of mandamus should not be substituted for an appeal,[30] since the issue raised in the petition for mandamus could easily be disposed of as an error on the part of the trial judge on appeal after final judgment.

The case of *Comfort Mfg. Co. v. Steckler*[31] was decided by the Seventh Circuit Court of Appeals immediately preceding the first *Rock Island* case, with the panel holding that no writ of mandamus would issue. The major bases for this decision were the appealability of the issue raised after final judgment and the fact that the trial judge had held long hearings before making his decision on the motion involved. Lindley, J., in the *Rock Island* opinion, refers to this refusal to issue the writ in the case immediately preceding and states that there is no conflict in the two decisions since it was stated that in the first case there was adequate remedy for appeal after final judgment. Basically, there is no conflict in the two decisions, but for a different reason it seems. In the first case the writ was denied, while in the second it was stated that final determination of the motion of transfer was the function of the trial judge, thus implying again that the writ cannot issue. Therefore, both of these cases, in effect, hold that the writ of mandamus cannot issue.

In the case of *Roche v. Evaporated Milk Ass'n*,[32] the traditional use of the writ of mandamus was mentioned by the Court as going back to the nineteenth century.[33] This traditional use was to either confine an inferior court to the lawful exercise of its jurisdiction or to compel it to exercise its lawful authority when it is its duty to do so. In the recent cases in question, the writ is attempted to be used in a larger scope than this, in that the only duty the trial court judge has is to exercise discretion. When the judge does so, it does not seem logical that the appellate tribunal can overrule his lawful exercise of discretion and issue a writ expunging the order entered.

Writs can also issue to aid the appellate tribunal's jurisdiction.[34] This, in effect, means that where it would be to the advantage of an appellate tribunal, it will issue a writ, thereby making it easier for the question to come before it on appeal after final judgment. Thus, where an interlocutory order is entered, if the issuance of a writ of mandamus will aid the court's appellate jurisdiction, it is permissible to issue the writ of mandamus. Where, however, there is a situation similar to the *Rock Island* case where the issuance of the writ will defeat the court's appellate jurisdiction, and transfer the case from the Seventh

[29] United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

[30] Ex Parte Fahey, 332 U.S. 258 (1947).

[31] 212 F. 2d 371 (C.A. 7th, 1954). [32] 319 U.S. 21 (1943).

[33] Ex Parte Sawyer, 21 Wall. 235 (U.S., 1874); Ex Parte Newman, 14 Wall. 152 (U.S., 1871). See also Ex Parte Peru, 318 U.S. 578 (1943).

[34] 63 Stat. 102 (1949), 28 U.S.C.A. § 1651(a) (1950).

Circuit to the Eighth Circuit, the writ should not issue. Where an order of transfer to another circuit is first denied, it appears difficult to determine in what manner the issuance of writ of mandamus ordering this transfer will aid the appellate jurisdiction of the court issuing the writ. It would appear more logical for the writ to issue if the order were one of transfer rather than denial of transfer since then the appellate tribunal would keep jurisdiction over the appeal after final judgment. This was the situation in the *Josephson* case, but the court disallowed the petition for the writ on the question of the power of the appellate tribunal to overrule or supplant the trial court judge's discretion.

A mere statement that a district court judge has abused his discretion is insufficient to uphold a reversal of his order; the abuse of discretion necessary must be a clear abuse,[35] so that there could be no question that the decision was incorrect under the facts. When the appellate court goes over the same materials that the district court judge went over and comes to a different conclusion, can they state that lower court discretion was abused and reverse its ruling? So long as there is a question of fact to be considered in arriving at a conclusion, reasonable minds may differ, and the fact that these minds did differ does not show an abuse of discretion, let alone such a clear abuse necessary for an appellate reversal.

Now that the United States Supreme Court has this matter squarely before it in the *Rock Island* case for final determination of policy, an ironical situation has been created. The Supreme Court must exercise its discretion in determining whether or not certiorari shall be granted. If certiorari is granted, the Court will then investigate the discretion of the Court of Appeals in ruling on the granting or refusal of the writ of mandamus; the Court of Appeals having previously investigated the district court's discretion in granting or denying the original motion. Thus, we have exercise of discretion being investigated by exercise of giscretion, being further investigated by exercise of discretion. This is a situation which in itself does not appear healthy for the judicial system.

If courts of appeals are indiscriminately given the power to issue writs of mandamus expunging district court judges' discretionary interlocutory orders, our entire judicial system may suffer a setback. It is in the interest of justice to maintain speedy trials wherever possible, and the possibility of stopping the proceedings while a party proceeds to appeal for writs of mandamus and certiorari, will most assuredly postpone the litigation on the merits until some later time when the litigation on the interlocutory order has been completed. As the court in the *Modarelli* case stated:

> . . . But the risk of a party being injured either by the granting or refusal of [an] . . . order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review. . . .[36]

[35] Bankers Life and Casualty Co. v. Holland, 346 U.S. 379 (1953); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); In re Josephson, 218 F. 2d 174 (C.A. 1st, 1954).

[36] All States Freight v. Modarelli, 196 F. 2d 1010 (C.A. 3d, 1952).

It seems quite unjust that one of the two litigants in an action should be required to sit back and wait for the other litigant and the trial court judge to "fight it out" in the appellate court over the issuance of the writ of mandamus to expunge the judge's order on a particular motion, but such will be the case unless the Supreme Court's ruling is to reverse the Court of Appeals in the second *Rock Island* case.

As was said in the dissenting opinion in the second *Rock Island* case:

> Our mandamus power is not a muscle which requires exercise to maintain its vitality. More slides into abdication, today, than a mere order of transfer finally wrested from our court.[37]

[37] Chicago, R.I. & P.R. Co. v. Igoe, 220 F. 2d 299 (C.A. 7th, 1955) (quotation from slip opinion case No. 11247 at 13).

EMPLOYER FREE SPEECH UNDER THE TAFT-HARTLEY ACT

As the law of labor relations has grown since the original National Labor Relations Act[1] (Wagner Act) and the volumes of decisions have evolved on the subject, the conflict between the right of employer free speech and the right of employee self-organization has also grown.[2]

The right of employer free speech has been specifically recognized in Section 8(c)[3] of the National Labor Relations Act,[4] as amended by the Labor Management Relations Act (Taft-Hartley Act). However, the efficacy of this right is offset by Sec. 7 of the LMRA,[5] which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .[6]

The problem most frequently arises prior to a representation election when an employer speaks to his employees on the premises during working hours and refuses representatives of the union an equal opportunity to reply under the same conditions. Assuming that the union loses the election, it then becomes necessary to determine if the employer has been guilty of an unfair labor practice, which would be grounds for setting aside the election. In the decisions handed down by the National Labor Relations Board[7] and the courts on this

[1] 49 Stat. 449 (1935), as amended, 29 U.S.C.A. § 151 (1947).

[2] See for an appraisal, Kovar, Reappraisal of Employer Free Speech: The Livingston Shirt and Peerless Plywood Cases, 3 De Paul L. Rev. 184 (1954).

[3] "The expressing of any views, agreement, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[4] Labor Management Relations Act, 1947, 61 Stat. 136 (1947), 29 U.S.C.A. § 151 (1947).

[5] Hereinafter referred to as the Act.

[6] 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (1947).

[7] Hereinafter referred to as the Board.