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The Opinions of United States Supreme Court for the 1934 Term--General Issues

Osmond K. Fraenkel
THE SUPREME COURT
FOR THE 1934 TERM—GENERAL ISSUES
OSMOND K. FRAENKEL

THE Supreme Court is concerned not only with problems of constitutional interpretation but also with the interpretation of federal statutes and, occasionally, with the determination of questions of ordinary law. Most of these cases arise on appeals from federal courts, some of them, however, on appeal from the decisions of state courts. Naturally, the Supreme Court is also concerned with problems of federal practice.

Criminal Law

The conception of fair trial, at least for the federal system, has now been extended so as to be the same in criminal as in civil cases and a conviction has been reversed because of improper summation. In distinguished terms Justice Sutherland defined the duties of the prosecuting attorney: "He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The conduct of the prosecutor in the instant case was condemned on account of his use of improper suggestions in questions, statements concerning his personal knowledge of some of the facts, bullying of witnesses and a misleading summation. It was not enough that the trial court had sustained objections and instructed the jury to disregard the improper questions: "the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial."

Other federal criminal questions decided by the Court were relatively unimportant. The Court held that in a proceeding brought to test the removal order of a commissioner the evidence must be examined to determine "whether it was sufficient to require a finding that there was no substantial ground for bringing the petitioner to trial on any charge specified in the indictment." While the commissioner was not to pass

† Member of the New York Bar.
3. Id. at 88.
4. Id. at 85.
on controverted issues, Justice Butler declared that "Arbitrary or capricious appraisal of evidence or disregard of facts indubitably established is in legal effect failure to consider, the equivalent of the exclusion that we have condemned, and denial of the right to be heard before removal." 

Because the plain requirement of the statute had been violated a writ of habeas corpus was granted to a petitioner who, having broken the conditions of a suspended sentence, was taken to jail without first having been brought before the court. As Justice Cardozo said, the right so to appear consisted in this: that "he shall have a chance to say his say before the word of his pursuers is received to his undoing. . . . The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender." 

A writ was denied which sought to set aside a conviction under one count while petitioner was still in lawful custody under another count. The writ had been sued out to establish petitioner's right to parole. This, said Justice Stone, after a historical survey of the writ of habeas corpus, was not a proper use thereof. Mandamus was suggested as an appropriate remedy. An indictment against the president of a corporation for evading a tax by making a false return was upheld although it did not allege that defendant was under a duty to make the return.

While criminal prosecutions under the Prohibition Act ended with the adoption of the Twenty-first Amendment the government was held entitled thereafter to prosecute an action on a bond given to secure the release of a vessel used in violation of that Act. Since the obligation arose upon contract and the condition had been broken before the adoption, the government, said Justice Cardozo, should not be penalized for the owner's delay in compliance. The argument to the contrary would destroy the obligation "by force of the very contingency against which it was designed to give protection. We find no adequate reason for thus rewarding an offender." He considered the analogy of bail urged by defendant and concluded that this became forfeited at the time of the principal's default regardless of what thereafter occurred; subsequent remission was but an act of grace. The extent of recovery, the right to prove innocent use, these questions were left open.

6. Id. at 783.
8. Id. at 820.
The Court considered a miscellany of bankruptcy questions. An automobile dealer, borrowing money to enable himself to buy cars, executed both a chattel mortgage and a trust receipt in which he declared that the car was the property of the lender and not to be sold without his express consent. Cars were in fact sold in ordinary course of business, notice being given to the lender afterwards and the proceeds accounted for. After failure to account in one instance the dealer filed a petition and was discharged. Judgment was then obtained by the lender for conversion, but the state court had found that the conversion had not been wilful. Therefore the Supreme Court held the claim barred by the discharge. Nor was the dealer a trustee, despite the “multiplicity of documents.” Justice Cardozo pointed out that the transaction was essentially a loan and pledge, that “a mortgagor in possession before condition broken is not a trustee for the mortgagee within the meaning of this statute, though he has charged himself with a duty to keep the security intact.”

The Court resolved the question reserved in Manhattan Properties v. Irving Trust Co. as to the effect of a clause in a lease giving the landlord a claim for damages on the filing of a bankruptcy petition in amount equal to the difference between the rent and the fair rental value for the residue of the term. Justice Roberts held in Irving Trust Company v. Perry that the claim was provable as upon an independent express contract, because neither lessor nor lessee had any election, the mere filing of the petition constituting, by its terms, a breach of the lease. The contract was construed to mean that the present fair value of the remaining rent was the basis for the determination of damages, and was

15. Davis v. Aetna Acceptance Co., 293 U. S. 328 (1934); (1935) 23 Geo. L. J. 540. The Bankruptcy Act, § 17(4), 11 U. S. C. A. § 35 (1926), prevents the discharge of debts created by the fraud or embezzlement of a person acting “in any fiduciary capacity.” As the Court points out in the principal decision, the statute speaks “of technical trusts, and not those which the law implies from the contract.”


17. 291 U. S. 320 (1934).

18. 293 U. S. 307 (1934); Comment (1935) 44 Yale L. J. 670. The amendments of June 7th and 18th, 1934 were not involved in this case. Under the law, as thus amended (Bankruptcy Act, § 63 [a] [7], 11 U. S. C. A. § 103 [a] [7] [Supp. 1934]) claims for future rent may be proved. The damages, however, are limited to one year's rent after surrender of possession, allowing, of course, any rent unpaid to the time of possession. The Court is also given the right to scrutinize assignments of future rent claims and the consideration paid for same.
A reasonable formula; the contract was not, therefore, void as imposing a penalty.

A number of problems relating to priorities were decided. A collecting bank failed before it paid the proceeds of a check received as the result of offsets through a local clearing house. The Supreme Court held that having finished the business of collection the bankrupt bank was a debtor, so the holder of the check had no claim to priority. Justice Cardozo said that in the absence of a res there could be no trust relationship: "A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence." The Bank Collection Code § 13, which expressly gives a preference in such a case, was held inapplicable to national banks because inconsistent with the system of equal distribution of the federal law.

The same result as the foregoing was reached where the bank failed after it had charged a depositor with the amount of a note received for collection and before it had remitted the proceeds. The conclusion was not affected by knowledge of the bank and of the maker of the note that the bank was insolvent, since the cause of action arising therefrom was entitled to no preference.

In a third case the trustee of a bankrupt creditor of a bank sued to set aside transfers as voidable preferences. Before judgment the bank failed. The Supreme Court held the trustee not entitled to priority as to certain items because at the time the bank received them it had a right to do so, and even at the time the collateral was sold, no demand had been made by the trustee for its return. Justice Cardozo said that it was for these reasons impossible to trace the proceeds of the sale into moneys mingled with the general assets (in the instant case the purchase was not for cash, but by charging a deposit). Only as to the item for

19. Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216 (1935); (1935) 35 Col. L. Rev. 416; (1935) 23 Geo. L. J. 534; (1935) 48 Harv. L. Rev. 1431; (1935) 83 U. or Pa. L. Rev. 791; Comment (1934) 44 Yale L. J. 341. It should be borne in mind that priorities of the character discussed in the principal case, as well as in the cases cited in notes 22 and 23, infra are not specifically mentioned in the Bankruptcy Act. They arise from the provision in that Act (§ 64 [7], 11 U. S. C. A. § 104 [1926]) giving priority when the same is authorized by the laws of the states or the United States. This has been construed to permit priority when equitable considerations, such as the creation of an implied trust, so require. Situations of this kind are sometimes spoken of not as creating priorities but as impressing trusts and so Mr. Justice Cardozo described the situation in all of these cases.


which payment was received after suit by the trustee was priority allowed by concession.

Problems with regard to the liability of distributees of deceased stockholders of national banks were considered in two cases. In one, a son in possession of property of his father, was held not liable for an assessment on bank shares registered in the father's name, because under Utah law claims not asserted before the estate is closed are barred. Matteson v. Dent was distinguished on the ground that the state law there under consideration made next of kin liable for debts to the extent of property received. In the other case, because in South Carolina there was no statute barring collection of claims asserted after administration was completed, the inheritors were held responsible to the extent of the property inherited.

The Court construed the Bankruptcy Law as giving to a district court jurisdiction to try adverse title, regardless of diversity of citizenship, but only where the defendant consents, except where the suit is one to avoid a preference or a fraud. The Supreme Court declared that a bankruptcy court had power to direct a state receiver and his attorney to turn over moneys retained because allowed them by the state court as fees, on the ground that the order was entered after the filing of the petition in bankruptcy and the control of the state court had ended. The district court has no power, since the amendment of the rules, to permit a creditor opposing discharge time to file his specifications later than the day when the order to show cause was returnable. The amendment was especially designed, said the Court, to prevent a creditor from getting special consideration from the bankrupt by threatening delay. The only power remaining with the Court is that of postponing the application and thus the time for filing.

The compensation of a referee was limited to the market value of bonds extended by a composition. His claim to par value was denied on the ground that "common sense revolts at the suggestion that creditors have been paid for this purpose or for any other when all that has happened is that they have been left in possession of the old promises of the debtor, reduced in amount and extended as to time."
In *Ivanhoe Bldg. & Loan Ass'n v. Orr* there was presented for the Court's decision the question to what extent a partially paid secured creditor could file a claim for the amount of the original debt. In this case the obligor on a mortgage bond went bankrupt after having sold the mortgaged premises. The mortgagee foreclosed and bought in the property. The district court reduced the claim by the value of the property. This determination was reversed by an unanimous Court. Justice Roberts held that the mortgagee was not a secured creditor within the meaning of the Bankruptcy Act because the property on which he held security was not, at the time of the bankruptcy, property of the bankrupt as specified in the law. Nor could the provision with regard to mutual debts be applied, as had been done by the circuit court: "A creditor holding security who realizes upon it, does not 'owe' his debtor the amount realized."

**Federal Income Tax**

Growing divergence among the lower courts has induced the Supreme Court to grant *certiorari* in many cases. Consequently the area of unsettled points is gradually being narrowed. At the 1934 Term the following questions were decided:

1. Capital gains may be considered in determining the amount of deductible gifts to charity. In reaching this conclusion Justice Roberts analyzed the statute, pointed out that the exemption of charitable gifts was based on public policy and decided that it should be liberally construed. He also referred to the re-enactment by Congress of existing provisions while rulings of the Department favorable to the taxpayer had been outstanding.

2. Interest paid by the government on a tax refund is taxable to a non-resident. Counsel for the taxpayer argued that the obligation to

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Note: The text includes several references to statutes and court cases, which are not included here for brevity. The references are as follows:

37. Whenever the opinion states the reason for the granting of the writ appropriate statement is made in the notes which follow. See Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933* (1934) 43 Harv. L. Rev. 238, 262-276.
refund was not, within the *ejusdem generis* rule, similar to the “note or bond” referred to in the statute. Justice Sutherland referred to the express exception of bank deposits as an indication that Congress understood “obligation” in its most general sense. In discussing the question whether the United States came within the term “resident corporation” Justice Sutherland sought refuge in legal fiction, a device appropriate, he said, as in the tax cases, when required “by the demands of convenience and justice.” The rule of strict construction was found not violated because the obvious intention of Congress—to collect taxes to the fullest extent—was upheld.

3. A corporation which has in one year, because of affiliation made two returns, may offset the loss sustained in the first year thereafter against profits made in the second.40

4. The Statute of Limitations runs from the filing of the original return, whether a supplementary return required by a law having retroactive effect was filed or not.41

5. The Court held that the trustees of the Boston Elevated Company, appointed by the Governor of Massachusetts, who managed the property during a limited period of public operation, were not entitled to exemption as state officials because the federal taxing power extends to all state activities “which constitute a departure from usual governmental functions”; the form of organization was immaterial and employees, however described or selected, were bound to pay an income tax upon their compensation.

6. Discount and commissions on bonds may be amortized by a corporation keeping its books on an accrual basis, but not when the bonds are those of an affiliate.42

7. A corporation may not deduct contributions to charity either as such or as an expense, unless such contributions involve a benefit to its business or are in connection with services to its employees.43

43. Zellerbach Paper Co. v. Helvering, 293 U. S. 172 (1934) (in this, as well as the other two cases cited in the previous note, *certiorari* was granted because of conflicting decisions of circuit courts); (1935) 48 Harv. L. Rev. 858.
45. Helvering v. Union Pac. R. Co., 293 U. S. 282 (1934) (*certiorari* granted because of conflicts claimed to exist by the Commissioner of Internal Revenue).
8. Depletion on oil and gas wells must be apportioned between lessor and lessee—the royalties paid being a proper measure of the lessor's interest, to be deducted from the lessee’s. The Court held without significance the fact that the law had been amended to embody the questioned ruling of the Department; this amendment, it said, was intended to clarify, not to change, the law.

9. The owner of land who receives a bonus for an oil or gas well in advance of its drilling is entitled to depletion allowance even though the well was not drilled during the year.

10. To enable a corporation to write off investment in a subsidiary, and indebtedness owing by it, it must prove that these items do not duplicate losses of the subsidiary taken in the consolidated returns of earlier years.

11. A reorganization to result in the avoiding of taxes must fill a business need and may not be a mere shell created to evade taxes. The taxpayer claimed that since the forms of law had been compiled with her motive was immaterial. Justice Sutherland conceded the point but held it inapplicable because the only purpose of the claimed reorganization was to transfer shares to the taxpayer. To hold otherwise, he said, "would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."

12. When the circuit court has found a deficiency assessment erroneous it may order a new trial before the Board of Tax Appeals, although the taxpayer failed to prove facts from which the correct liability could be determined.

13. A life insurance company which has outstanding matured coupons may not include these in its reserves for the purposes of the statutory 4% deduction since they are debts, not contingencies.

14. A guardian may not deduct attorneys' fees from his ward's in-
come, though incurred on behalf of the estate, when the ward is not engaged in business.  

15. Securities sold by an estate are valued as of the date of death, not as of the time of acquisition by decedent. Justice Stone pointed out that any other decision would include the increment accruing before death both as part of the corpus in the estate tax return and as income for the year in which the securities were sold. The fact that the law had been amended to embody the questioned ruling of the Department, the Court held no indication that its original meaning was otherwise, since the amendment was intended to clarify, not to change, the law.  

16. Profits payable to the estate of a deceased partner during a continuation period provided for in the partnership agreement, are income when the partner had no capital invested, otherwise such profits are part of the corpus for estate tax purposes. They can not be taxed in both categories. The executors paid an estate tax on the profits earned in the continuation period at the insistence of the Commissioner. Afterwards he insisted that the same profits should have been reported as income by the testator. The executors sued for the return of the income tax, or in the alternative, for the return of the overpayment of the estate tax. The Court of Claims ruled that the income tax had been properly assessed and refused to pass on the estate tax question because the period of limitations had expired within which the taxpayer might have recovered that payment. The Supreme Court determined that the estate tax had been improperly assessed; it overcame the procedural obstacle by ingenious reasoning. Justice Roberts pointed out that where capital is invested in a partnership the transaction between the survivors and the executors of a deceased partner is a sale by the latter to the former of the deceased partner’s share, which would include, as part of the corpus, any profits of a continuation period. In such case the profits were

59. Bull v. United States, 295 U. S. 247 (1935). On the theory that if the government had sued to recover the income tax the taxpayer could have obtained credit for the overpayment of the estate tax, notwithstanding the Statute of Limitations, citing Williams v. Neely, 134 Fed. 1 (C. C. A. 8th, 1904) and cases from the states. The taxpayer should not be penalized, said Justice Roberts, because administrative procedure required the taxpayer to pay the tax without being sued. So, by subtle reasoning, the suit in the Court of Claims was treated as though it were an offset, as in another case an equitable defense had been treated as though it were a bill for an injunction so as to justify an appeal. See Enelow v. New York Life Ins. Co., 293 U. S. 379 (1935).
taxable as income to the surviving partners only. Where there is no capital there is no "sale"; consequently the profits paid are income to the estate. An attempt to justify the inclusion of the same item in both taxes was made by the Commissioner on the theory that under the Income Tax Law there was taxed a right to receive, and under the Estate Tax Law, the actual receipt. This was concededly proper in the instant case as to the undistributed income for the period prior to death, income which might have been spent by decedent during his lifetime and so taken out of the category of the estate tax. The Court concluded that as to the profits earned after death there was no distinction possible between the right to receive and the actual receipt, and that the Commissioner was attempting to tax twice "the identical money." The right to earn money in the future could not be deemed capital to the living partner; it could not, therefore, be capital to his estate.

17. A person who at different times has purchased lots of the same stock may select which of these lots to apply to a particular sale, even though he is unable to identify any particular certificate of stock because the stock is being carried for him by brokers and the certificates are all in street names, if at the time of sale he has communicated his intention to the brokers, but not if he has failed to do so.

18. Income of an Indian from investments made out of surplus profits accumulated from his allotted and exempt homestead is taxable.

_Estate Tax_

In _Helvering v. Grinnell_ decedent had exercised a power of disposition in favor of persons who, in default of any exercise of the power

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60. _Helvering v. Rankin_, 295 U. S. 123 (1935). _Certiorari_ was granted in this and the case cited in the next note to determine questions concerning the effect, validity and applicability of the questioned regulation. Justice Stone disagreed with this doctrine, concurring in the result only. The Court remanded the case to the circuit court because the facts found by the Board of Tax Appeals were susceptible of an interpretation less favorable to the taxpayer than the circuit court had supposed.

61. _Snyder v. Commissioner of Internal Revenue_, 295 U. S. 134, 141 (1935). The taxpayer made the further claim that only the purchases and sales of each year were to be considered in arriving at his income on the theory that his extensive operations constituted a trade or business. The contention was rejected, partly because there was no sufficient proof of the amount of time devoted to the trading, partly because it was "too well settled for argument" that all sales must be considered, regardless of when the purchases were made and that Snyder could not value earlier purchases on an inventory basis, as he was not a "dealer." See _Seely v. Helvering_, 77 F. (2d) 323 (C. C. A. 2d, 1935).


63. 294 U. S. 153 (1935) (_certiorari_ granted on account of conflicts between the circuits); (1935) 23 Geo. L. J. 565.
would have received the property anyway. Since these persons had renounced the right to take under the power the Supreme Court held the property not taxable. Justice Sutherland ruled that the property had not "passed" under the power as the statute specified. He characterized the argument of the government as involving "the obviously self-destructive conclusion that an unsuccessful attempt to effectuate a thing required by the statute is the same as its consummation," and as depriving of all meaning the crucial word "passing" of the statute.

Interstate Carriers

There were several cases which reviewed orders of the Interstate Commerce Commission. The Court held void a direction that railroads replace hand-operated reverse gear by air-operated power gear on locomotives, not, as urged by the carriers, for lack of power to make the order nor because it had been initiated by the Commission at the instance of the Railway Brotherhoods, but solely for lack of sufficient finding that the change was necessary to avoid peril to life or limb. Justice Brandeis was of the opinion that a conclusion in the Commission's report to that, to a certain extent, the change should be made, left the essential finding solely to inference.

A controversy arose between a number of roads using a joint terminal at Kansas City pursuant to agreement, because after one of them went bankrupt, the reorganized road rejected the contract and sought from the I.C.C. the right to use the terminal upon payment proportioned to use. One of the smaller users, a party to the agreement, then applied for like relief, which was denied by the Commission because of lack of power. An attempt by mandamus to compel it to hear the case failed because the law was not so clear that the Court could say the Commission was palpably wrong. That no other remedy existed made no difference, said Justice Roberts. He pointed to the careful consideration of the
matter by the Commission and the fact that some of its members had
dissent, as indication that "the matter is not beyond peradventure
clear."

The Commission rejected reduced rates proposed for coal from Indiana
to northern Illinois, not on the ground that the new rates were unreasonable,
but that they might precipitate a rate war. The Court in United
States v. Chicago M. St. P. & P. R. Co. held this stand to be beyond
the power of the Commission, especially because it conceded that the
existing rate structure was unsound. We quote Justice Cardozo: "The
point of the decision is not that present rates are sound, but that they
must be maintained, even if unsound, for fear of a rate war which might
spread beyond control. The danger is illusory. The whole situation is
subject to the power of the Commission, which may keep the changes
within bounds." The Commission was criticized for having approached
the problem in a piecemeal fashion. And intimations in its report that
the new rates were actually unfair and a conclusion to that effect were
alike disregarded as not sufficiently precise or clear: "We must know
what a decision means before the duty becomes ours to say whether it
is right or wrong."

A shipper brought suit to set aside an order of the Commission fixing
minimum rates for coal shipped from Ohio mines partly by water. While
conceding plaintiff's right to sue as a party interested, the Court upheld
the order as based upon a finding that the existing rate structure was
reasonable and should therefore not be disturbed by lower rates proposed
by certain carriers. Justice Roberts distinguished United States v.
Chicago M. St. P. & P. R. Co. because of the difference in record and
findings.

Another shipper complained to the Commission of a combination rate
from Canada solely on the ground that the American portion of the rate
was unreasonable and procured an order for the repayment of the excess.
Justice Butler concluded there could be no recovery in the absence of
proof that the entire rate was unreasonable, that in effect the rate was
"joint" and that the shipper was not concerned with the division of such
rates between the connecting roads.

70. 294 U.S. 499 (1935); (1935) 35 Col. L. Rev. 619; Comment (1935) 48 Harv. L. Rev.
1382.
72. Id. at 511.
75. Id. at 461, citing Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., 269
In a brief memorandum the Court refused to review an order because it was sustained by findings which were supported by adequate evidence and the subject was within the Commission's authority.\[^76\]

The members of the Court divided in their review of an order dealing with switching charges in the Chicago stockyards.\[^77\] The precise question was whether charges for the use of pens in the yards under certain circumstances came within the jurisdiction of the Commission or of the Secretary of Agriculture, in whom was vested control of the yards. The majority were of the opinion that the Commission had jurisdiction only over transportation and had not made a sufficiently definite finding that transportation had not ended. Justice Stone, speaking also for Justices Brandeis and Cardozo, concluded that the Commission had jurisdiction over all terminals\[^78\] and that the section of the Interstate Commerce Act which forbade charges for delivery into pens\[^79\] also forbade charges for removal therefrom.

The jurisdiction of the Commission was indirectly involved in Central Vermont Trans. Co. v. Durnng.\[^80\] Suit was brought by a subsidiary of the Central Vermont Railway, Inc. (itself wholly owned by the Canadian Railway Company) to restrain the seizure of merchandise carried in its vessels in coastwise traffic, allegedly in violation of law, because these vessels were not American owned. The carrier claimed it was exempt under the language of the law because the transportation was "over" a through Canadian route approved by the Commission. This argument was rejected by Justice Stone, who construed the law as requiring transportation over the entire route, not merely a domestic segment of it, holding that any other construction would open the door to evasion and permit foreign owned vessels to ply in coastwise traffic by the expedient of filing through tariffs. The broad language conferring jurisdiction over the I.C.C. was held not intended to remove the prohibition which had been the policy of the government since 1817. The carrier challenged the constitutionality of the statute (as amended to make it applicable to its corporate status) as a taking of property without due process. But the Court called it no more than a proper regulation. "There has been no taking of petitioner's property. It established its business under foreign domination, subject to the power of Congress to regulate it, and

\[^78\] Id. at 205, citing Adams v. Mills, 286 U. S. 397, 409-415 (1932).
\[^80\] 294 U. S. 33 (1935).
in the face of a long established national policy to restrict such foreign control of coastwise shipping.\textsuperscript{181}

An order of the Commissioner raising certain state freight rates on the ground that they discriminated against interstate commerce had been declared void, because the facts supporting the conclusions of the Commission had not been embodied in its findings.\textsuperscript{82} The state and other shippers who had paid the higher rates thereafter sued to recover the difference and obtained judgment for an amount in excess of rates the lower court thought reasonable. In the meantime the Commission, upon new evidence and new findings, again set up the same rate schedule as was contained in its first order; this time its determination was confirmed.\textsuperscript{83} Then, in \textit{Atlantic Coast Line R. Co. v. Florida}\textsuperscript{84} the Supreme Court by a five-to-four vote dismissed the shippers' claims for restitution.

Justice Cardozo, for the majority, concluded that claims such as these rested on equitable principles, that the objection to the first order of the Commission had been merely technical, and therefore the second order could be considered as having cured the defects of the first: "During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure."\textsuperscript{85}

While not declaring the rates originally established by the Commission to have been validated by the new order, he said the Court would, because of equitable considerations, "stay its hand and leave the parties where it finds them." The carrier, he pointed out, was entitled to consideration; it had suffered in the past from the unreasonably low rates imposed by authority of the state; unless protected by the Court the carrier was without remedy: "A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need."\textsuperscript{86}

The minority, consisting of the Chief Justice and Justices Brandeis, Stone and Roberts, considered these shippers entitled to recover the entire excess above the rates originally fixed by the state. Justice Roberts regarded the first order of the Commission as wholly void; therefore the state rates were the only lawful ones obtaining during the period

\textsuperscript{81} \textit{Id.} at 41.
\textsuperscript{82} \textit{Florida v. United States}, 282 U. S. 194 (1931).
\textsuperscript{83} \textit{Florida v. United States}, 292 U. S. 1 (1934).
\textsuperscript{85} 295 U. S. 301, 311 (1935).
\textsuperscript{86} \textit{Id.} at 316.
prior to the second order and anything paid in excess was thus exacted under cover of the illegal first order and should be repaid. He insisted that the new order was not a mere curing of the technical defects of the earlier one, but that it rested on new evidence relative to conditions existing at the later time and not to those of four years earlier. Justice Roberts answered the plea made by the majority on behalf of the carrier by pointing out that it could have instituted proceedings to attack the lower state rates had they been confiscatory, that it had never done so and that the court in the restitution action had no jurisdiction to pass on such a claim. Equitable considerations, he said, were irrelevant: "If, as must be conceded, the carrier took, under and by force of that order, money to which it was not in law entitled, the conclusion necessarily follows, that it must restore what was so taken." The result, he maintained, was said to permit "a federal court to ignore and nullify action in a field within the state's sovereign power," namely, the fixation of state rates.

It is difficult to comment on this decision. Undoubtedly, as was stated by the minority, the first void order was not technically any justification for retention of the moneys; but it is equally true that the higher rate was justified by the facts as ultimately established. Solution depends entirely upon the point of view. It is strange that in this case the four conservatives took the broader view. That Justice Cardozo, of all nine Judges the only one to have had extensive judicial service elsewhere, should have joined them, gives added significance to their decision.

These public service decisions call attention again to the unsatisfactory nature of court review, not only because of the great expense and the long delay it involves, but also on account of the uncertainty of the outcome. That after the many years of experience, orders of the Interstate Commerce Commission are still being set aside because they are improper in form is, to say the least, astounding. Civilized practice should permit the Supreme Court in cases such as these to remit the proceedings to the Commission for the correction of its order; better still would it be, were Congress to direct that no order of the Commission should be set aside on the ground of technical defects.

Admiralty

Admiralty, one of the more specialized federal subjects, often presents delicate problems in conflict of jurisdiction, problems so subtle that not infrequently a litigant, at the long and weary end of his appeal to the Supreme Court, finds he has been all along in the wrong forum. Among

87. Id. at 329.
the cases in admiralty recently decided few announced any new principles, but many of them illustrate familiar principles in novel ways.

In *McCrea v. United States* the Court construed various laws applicable to seamen. Plaintiff claimed he was entitled to additional wages because the master had failed to divide the ship's crew into three watches, and to double pay because he had refused to pay him upon arrival in London. The Supreme Court denied both claims, the first because the law requires a seaman on arrival in a foreign port to have his claim certified by the consul there, and the consul in London had refused to certify for this plaintiff; the second, because plaintiff had failed to keep an appointment with the master to discuss his claim and had then left the ship. There could be no claim to double pay unless the refusal to pay was "in some sense arbitrary, wilful or unreasonable."

Two damage claims by shippers were adjudicated in their favor. The first related to onions shipped from Spain which decayed because of lack of ventilation. To some extent this had happened on account of bad weather, a cause, which, under the bill of lading, excused the vessel; partly it was due to failure on the part of the crew to open hatches in good weather at night. The proof presented left it impossible to determine how much of the damage was due to the latter cause. The question, therefore, was, on whom lay the burden of proof? The Supreme Court placed this on the shipowner on grounds of general policy. He was liable for the whole damage sustained, said Justice Stone, because he was unable to show that the dangers of the sea had caused the loss or any specific part of it. In the other case which involved cherries shipped from Italy, there was no dispute about the damages—part of the cargo had been destroyed. But the shipowner claimed the cargo-owner was entitled to no damages, because the value of the cargo when delivered exceeded the value stated in the bill of lading, plus the freight, and there was a provision in the contract which exempted the vessel in such event. Justice Roberts held a provision such as this void as

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88. 294 U. S. 23 (1935), rearg. denied, id. at 382 (1935).
94. The contract required that the damage be determined on the basis of the value of the "entire" shipment; it was the inclusion of this word which led to the interpretation deemed objectionable.
against public policy because it relieved a carrier from the consequences of its own negligence. He pointed out that the clause was neither a true limitation agreement, which fixes the maximum value recoverable and which is valid provided the shipper has the choice of a contract without limitation on paying a higher rate nor a true valuation clause, which permits valuation as of the time and place of shipment, and the validity of which remains in doubt.

A strange situation arose in Aktieselskabet Cusco v. The Sucarseco. The defendant ship collided with the Toluma; both vessels were at fault. Owners of cargo shipped on the Toluma, on account of a "Jason" clause in their bills of lading, were required to contribute to the owners of that ship, by way of "general average," part of the cost of the repairs occasioned by the collision. They then sued the Sucarseco for the damage sustained by their property, including the amount of this general average. As the entire loss, including damage to cargo, was to be shared equally by both ships, it made no difference to the defendant whether the general average paid by the cargo-owners was recovered by them or was claimed by the other ship; the total would be the same in either event, and its one half share the same. Therefore the defendant in no way objected. The Toluma did object, on the theory that the general average payments by the cargo-owners were not payments due to loss of, or damage to, the cargo. The motive for the objection was, of course, that the Toluma would have to give back half of the general average it had received. The Court held that since the innocent cargo-owner could recover from the non-carrying vessel all damages sustained by the collision, the general average payment must be included, since it was due to the collision. The Chief Justice commented: "We have the anomalous

98. 294 U. S. 394 (1935).
99. This clause in substance requires cargo-owners to share with the shipowner any losses sustained from a disaster resulting from negligence in navigation, from latent defects or from any unseaworthiness not discovered by the exercise of due diligence. It takes its name from the case which first upheld it, The Jason, 225 U. S. 32 (1912). The Court there held that the Harter Act, 27 Stat. 445, 46 U. S. C. A. § 192 (1926), had relieved a diligent owner from liability for a negligent crew and had thus opened a way to agreements to limiting liability.
100. The North Star, 106 U. S. 17 (1882); The Chattahoochee, 173 U. S. 540 (1899).
situation that it is Toluma that is opposing the cargo owners' claim against Sucarseco, while Toluma has collected from cargo its share of the general average expenses on the ground that they were incurred on cargo's behalf and were due to the collision.\textsuperscript{102}

Two cases decided on the last day of the term illustrate the difficulties of determining whether jurisdiction lies in admiralty or with the states. In the one a longshoreman, working on a vessel, was hit by a crane and thrown to the wharf; in the other, a passenger was injured by a fall to the dock as she was stepping off the gangway. The longshoreman's claim for compensation under a state law was upheld at the trial but dismissed by the state appellate court on the ground that his claim was in admiralty;\textsuperscript{103} the passenger's suit was dismissed on the ground that her injury had been sustained on the land.\textsuperscript{104} The United States Supreme Court unanimously held that both cases were subject to admiralty jurisdiction. As to the longshoreman this was so, said the Chief Justice, because the injury was due to a blow received while on the vessel from the swinging crane.\textsuperscript{105} He called attention to a decision in a converse situation: while on the dock a longshoreman was hit by cargo being lowered from the vessel and was thrown into the water; that was an injury arising on land.\textsuperscript{106} In the case of the female passenger the Chief Justice said: "The basic fact in the instant case is that the gang-plank was part of the vessel."\textsuperscript{107}

\textit{Patents and Copyrights}

In this field of the law the decisions of the Court dealt mostly with narrow points. The cases covered a wide range of subjects: the incubation of eggs;\textsuperscript{108} excavating machinery;\textsuperscript{109} combined sound and picture films;\textsuperscript{110} improvements in phonographic sound reproduction;\textsuperscript{111} a needle for repairing knitted fabrics.\textsuperscript{112}

\textsuperscript{102} Aktieselskabet Curzo v. The Sucarseco, 294 U. S. 394, 405 (1935).
\textsuperscript{103} Minnie v. Port Huron Terminal Co., 269 Mich. 295, 257 N. W. 831 (1934).
\textsuperscript{104} The Admiral Peoples, 73 F. (2d) 170 (C. C. A. 9th, 1934).
\textsuperscript{105} Minnie v. Port Huron Terminal Co., 294 U. S. 704 (1935).
\textsuperscript{106} T. Smith & Son v. Taylor, 276 U. S. 179 (1928).
\textsuperscript{107} Kenward v. The Admiral Peoples, 55 Sup. Ct. 885 (1935).
\textsuperscript{111} Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 477 (1935) (in this and the preceding case patents held by Fox were declared invalid; see N. Y. Times, March 5, 1935, at 14).
\textsuperscript{112} Stelos Co. v. Hosery Motor Mend Co., 295 U. S. 237 (1935). This was the case in which a presentable young woman showed the working of the patent in Court (see
These cases were decided on familiar lines, either the principle that the patent failed to disclose the real invention, as in the needle case, or that the novelty of the device consisted of the application of mechanical skill rather than of invention, as in the excavator and film cases. In the film cases it was argued that the success of the device was proof of its inventive quality. The Court pointed out that this was true only when an old and recognized want was satisfied, not, as here, when the commercial demand and the new device were practically born together.

Only the egg patent was held valid and infringed. Justice Stone reviewed the history of incubation. He pointed out that it had been known to the Egyptians and the Chinese two thousand years ago, but that until Samuel B. Smith made his particular invention it had never been possible artificially to incubate eggs by a continuous, convenient and economical process. Of the validity of his patent there was no question; the problem was whether it had been infringed. The essential element of the patent was the introduction of air mechanically circulated into a box containing eggs in different stages of development; defendant's machine differed from Smith's only in that here the eggs were not arranged in any particular order. This fact, said the Court, was immaterial; Smith's patent did not require a particular order, his invention was broad, "its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made." The Court accordingly affirmed one decision in Smith's favor and reversed one which had been adverse.

The single copyright case grew out of a story published in The American Mercury which was turned into an article and published in the Boston Post. Plaintiff was unable to prove actual damage and the publisher and author of the article proved their good faith. The circuit court reduced to $250 the award of $5,000 made by the trial judge. The Supreme Court held that the discretion of the trial court could not be reviewed on appeal, since he had not awarded more than the

N. Y. Times, April 5, 1935, at 1), her picturesque efforts doing her side no good. The opinion of Justice Roberts contains a learned and solemn description of knitting, of ladders in silk stockings and the methods available for their repair.

113. See notes 110 and 111, supra.
115. Id. at 14.
statute provided for cases in which no damage could be proved. Justice Roberts said that in view of the language of the statute there was no right to review for abuse of discretion.

The Court decided that a suit could not be continued when different people owned the right to the patent and the claim against the defendant, a receiver of the original plaintiff having been appointed who sold the claim but kept the patent. In consequence a review on the merits of an adverse decision of the circuit court was lost.

**Indians**

As the result of a surveyor's error lands belonging to the Creek Nation were allotted by the United States to other Indians and to settlers. There was no question about the government's liability; the problem was the date as of which the lands were to be valued. The Indians sought the value as of the time suit was brought in 1926, the government insisted the value should be taken either as of the time the error was committed in 1873, or when the lands were sold in 1891. The Court of Claims accepted the plaintiff's contention. The Supreme Court, after disposing of certain technical arguments made by the government, contended that the wrong had been done in 1891, that the value of the lands at that time constituted the basis for recovery, but that there should be added such sum "as may be required to produce the present full equivalent of that value," in other words interest at a reasonable rate, or, under the circumstances, five per cent.

In another case a Creek Indian sued to recover an interest in land which had been sold by a guardian appointed on the ground that he was incompetent. He claimed the guardianship was invalid and that the sale violated federal law. Defendant set up the state Statute of Limitations and won. The Supreme Court refused to pass upon the validity of the guardianship proceedings, as that was wholly a question of state law; it ruled against the claim that the sale violated federal law, because it had been approved by a court, as required by that law and as decided

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123. See note 62, supra for tax case.
124. 77 Ct. Cl. 159 (1935).
by an earlier case.\textsuperscript{127} An Act of Congress, relied upon to prevent the bar of the state statute from being effective,\textsuperscript{128} was held unconstitutional as "an attempt arbitrarily to take property from one having a perfect title and to subject it to an extinguished claim of another."\textsuperscript{129}

\textit{Veterans}

War Risk Insurance was the subject of four opinions of the last term. One case involved the distribution of moneys received after the death of the assured and both beneficiaries. The Supreme Court held that benefits due during the insured's life and after the death of the beneficiaries belong to the estate of the insured; those due during the lifetime of the beneficiaries belonged to their estates.\textsuperscript{130} In another case the question was whether the insured had become wholly and permanently disabled while the policy was in force. He so testified, and supported his own statement by the opinions of medical experts; the jury believed him. The government contended that his statement could not be so, since he was found fit for service as an air pilot after the policy lapsed and worked for nearly eight years in various capacities. Justice Butler concluded that the evidence was insufficient to permit submission to a jury; a verdict should have been directed for the government. He ruled also that the experts should not have been allowed to express an opinion on the issue which was for the jury to determine.\textsuperscript{131}

An unfortunate situation is disclosed by \textit{Wilber Nat. Bank v. United States}.\textsuperscript{132} A $5,000 policy was reinstated on July 1st under circumstances which required a further premium payment of $1.30 in September and $3.95 monthly thereafter. Payments were made in November and December, after the assured had become disabled, but no payment was made in October. The assured died in December. The Court held that the policy had lapsed, that nothing had been done by the War Risk Bureau which might have misled the assured, and that the acceptance of the last two payments did not revive the policy, since the assured's condition at the time precluded reinstatement. The Court therefore passed by the problem whether the government was bound by the rules of estoppel applicable to private insurance companies.

\begin{itemize}
\item \textsuperscript{127} Harris v. Bell, 254 U. S. 103, 112, 113 (1920).
\item \textsuperscript{128} 44 Stat. 239 (1926).
\item \textsuperscript{129} Stewart v. Keyes, 55 Sup. Ct. 807, 813 (1935).
\item \textsuperscript{130} McCullough v. Smith, 293 U. S. 228 (1934), following Singleton v. Cheek, 284 U. S. 493 (1932).
\item \textsuperscript{131} United States v. Spaulding, 293 U. S. 498 (1935).
\item \textsuperscript{132} 294 U. S. 120 (1935).
\end{itemize}
The fourth case presented an attempt to revive a policy twelve years after it had lapsed, on the ground that a recent regulation made by the Director of the Bureau established for the assured the status of being disabled. The Court rejected the contention, holding that the regulation was inapplicable and invalid; inapplicable, because it was not intended to revive policies already lapsed, invalid, because it defined disability in terms not permitted by the statute. On the facts the Court ruled that disability had not been established, because plaintiff had been able to find work as a salesman but had made no effort to fit himself for that work; the long delay in bringing suit was cited against him.

Original Jurisdiction

Two suits between states were decided: Nebraska v. Wyoming and Wisconsin v. Michigan and both, of course, original suits filed with the Supreme Court. The first had to do with water rights in the North Platte River; the second, with fishing rights in Green Bay. The latter is a boundary case; the former not. The Court did not pass on the merits of the water dispute, but considered only a motion to dismiss based on the absence from the suit of parties said to be necessary: the State of Colorado, because the river originated there; the Secretary of the Interior, because he had constructed reservoirs in Wyoming. The Court ruled that neither party was essential; Colorado was not because no relief had been asked against it; the Secretary of the Interior was not because whatever rights he might acquire would be derived from the state so that a judgment against the state would be as binding on him as on residents of the state. The Court ruled also that the bill set forth a cause of action. Considering the fishing rights, it determined that justice would be done by an equal division of the waters of the bay, rather than by the division usual in cases of navigable waters, that along the main channel or the “thalweg”.

Three suits were filed by the government against states. The most interesting one involved the government’s right to erect the Parker Dam on the Colorado River in Arizona. This dam had been planned by the Hoover administration; it was continued as one of the projects of the New Deal. The state called out its troops to stop the work. Suit was

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134. The ruling was that loss of an arm and an eye constituted disability; this was proper as to compensation, not as to insurance.
136. 55 Sup. Ct. 786 (1935).
137. Iowa v. Illinois, 147 U. S. 1, 7 (1893).
then filed in the Supreme Court for an injunction. The Court dismissed the complaint on the ground that the erection of the dam had never been authorized by law. Justice Butler pointed out that Congress had forbidden the erection of dams on navigable rivers without its consent; he held that the prohibition applied as well to federal officials as to private persons; he could find no legislation approving the erection of this dam. He called attention, further, to the statutory requirement that no reclamation project such as this could be commenced without direct Presidential approval, and ruled that the Executive Order relied on by the government was not the equivalent of such approval, partly because the contract for the erection of the dam had been executed before the adoption of the law under which the order was issued, partly because the President had not specifically referred to this project even in the order. Moreover, the NIRA required recommendation by the Chief of Engineers. This had not been given until long after the work was started, and was insufficient because not in the manner specified by numerous Rivers and Harbor Acts, namely, by a report to Congress based upon examinations and surveys made by the Engineer.

In United States v. Oregon the lands involved lay within a hundred mile long meander-line running through several lakes and their connecting waters. (A meander line marks the mean high water mark.) At the time of the admission of Oregon to the Union in 1859 this land was all part of the public domain and it has never been included in any grant made by the United States. Since 1908 it has been set aside as a bird reserve, known as the Lake Malheur Reservation. Oregon claimed title on the ground that the waters were navigable and because the title went with the uplands granted in part to private persons, in part to the state. It was conceded that if the waters were navigable title had vested in the state upon admission as an incident of its sovereignty. The master found the waters non-navigable; his findings were accepted by the Court after a thorough review of the evidence. Justice Stone pointed out that boats were seldom used, that trappers generally waded, that the few motor boats employed often got stuck, and that in many cases which had come up the state courts had declared the waters non-navigable. The Court ruled that even if title vested in the private owners of the uplands, possession had for so long been enjoyed by the United States that it had the right to bring a suit to determine whether the state had

141. 295 U. S. 1 (1935).
142. See United States v. Utah, 283 U. S. 64 (1931).
The further claim of the state, that its own laws vested it with title to land between high and low water mark of all private land granted to upland owners was rejected on the ground that title to lands of the United States could not be affected by state laws without the consent of the government. Here, said Justice Stone, was no basis for implying any intention to convey title to the state. The contentions of the government were, except as to certain minor particulars, sustained.

In United States v. West Virginia the government attempted in an original suit to enjoin the state and private corporations from constructing the proposed Hawks Nest Dam on the ground that it would obstruct interstate commerce. The Court decided that no case had been made out against the state, since it had done no more than issue a permit for the erection of the dam, and that the original jurisdiction conferred by the Constitution does not include suits against private persons alone. Since, therefore, no controversy with the state existed, the action could not be maintained. Justice Stone pointed out that there was merely a difference of opinion as to the navigability of the river, without any actual interference by state authority with rights claimed by the United States: "Until the right asserted is threatened with invasion by acts of the state, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court." Cases were distinguished in which the claim of adverse interest related to specific property. Justice Stone added that the Declaratory Judgment Act gave no greater rights, for it was not applicable unless an actual controversy existed. Justice Brandeis dissented, solely because he believed the government should have an opportunity of amending its bill.

National Banks

The Court held that a national bank was prohibited by law from agreeing to repurchase securities it had sold. The words of the statute

144. 55 Sup. Ct. 789 (1935).
145. Id. at 793.
149. For insolvency problems see page 418.
limited the banks to “buying and selling without recourse.” Justice Stone ruled that the law was intended to protect depositors from losses resulting from depreciation in securities which had been sold by reason of some agreement either of guaranty or of repurchase; this meaning was reasonable because as applied to bonds, the restricted meaning, that of endorsement, would be wholly inapplicable. The Court held that estoppel could create no obligation where the law forbade one and that the law also prohibited suit to recover the price paid as for failure of consideration: “The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them.”

Arbitration

Ever since compulsory arbitration has become possible in the United States doubt has been expressed about the right of a court to compel arbitration when the agreement provided for arbitration in a different jurisdiction. And, as a corollary, courts have differed as to their right nevertheless to stay an action brought in violation of an agreement containing such an arbitration clause. The Supreme Court has now held that, at least in the federal system, such stay is properly granted. Justice Brandeis maintained also that an order denying a stay was sufficiently like an order denying an injunction to be appealable under the Judicial Code; a question which had to be considered although not raised by counsel. He said as to the merits: “there is no reason to imply that the power to grant a stay is conditioned upon the existence of power

261. N. Y. 175, 184 N. E. 750 (1933); Hellawell v. Town of Hempstead, 10 F. Supp. 771 (E. D. N. Y. 1935).
to compel arbitration."\textsuperscript{158} Delay in demanding arbitration was found no bar on the grounds set forth in the opinion below.\textsuperscript{159}

But the Court refused to apply the rule as to appealability to an admiralty action; injunctions are no part of that court's ordinary process. Hence the stay was deemed a non-appealable interlocutory order of the usual kind, reviewable only after final judgment.\textsuperscript{160} This decision, while doubtless correct on technical grounds, is on practical grounds very unfortunate. There is no reason why any distinction should exist between arbitrations in admiralty and arbitrations in other fields. In both it is desirable that the parties know whether the issues are to be arbitrated or tried; in both it would be unfortunate for them to have to go through with a trial when stay has been refused, or with an arbitration when it has been granted, only to find out after years of litigation that the claim must be determined by the other method. Congress should, therefore, enact the necessary legislation to permit appeals in all cases from orders granting or denying stays in connection with demands for arbitration, as also, of course, from the orders granting or refusing to grant the application to compel arbitration.

\textit{Injured Workers' Rights}

A number of cases indicate a liberal attitude on the part of the Supreme Court in interpreting compensation and similar statutes affecting employees. \textit{Warner v. Goltra}\textsuperscript{161} involved the interpretation of the Merchant Marine Act of 1920;\textsuperscript{162} the Court held that the master of a river tug-boat came within the definition of "seaman", and that therefore his administrator could recover damages for his death. Justice Cardozo pointed out that the statute was designed to abolish the old illiberal law which limited actions for damages at sea to unseaworthiness or defects in equipment, that the benefit had been extended to stevedores\textsuperscript{163} and should be further extended to include all who work on ships: "An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibres still clinging to the soil."\textsuperscript{164} The provisions of law\textsuperscript{165} relied on by the state court\textsuperscript{166} were held inapplicable, partly because not intended to

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\item \textsuperscript{158} Shanferoke Co. v. Westchester Co., 293 U. S. 449, 453 (1935).
\item \textsuperscript{159} Shanferoke Co. v. Westchester Co., 70 F. (2d) 297 (C. C. A. 2d, 1934) (that there had been no earlier necessity).
\item \textsuperscript{160} Schoenamsgruber v. Hamburg American Line, 294 U. S. 454 (1935).
\item \textsuperscript{161} 293 U. S. 155 (1934); (1935) 23 Geo. L. J. 336.
\item \textsuperscript{162} 41 Stat. 1007 (1920); 46 U. S. C. A. § 688 (1926).
\item \textsuperscript{163} International Stevedoring Co. v. Haverty, 272 U. S. 50, 52 (1926).
\item \textsuperscript{164} Warner v. Goltra, 293 U. S. 155, 159 (1934).
\item \textsuperscript{165} 38 Stat. 1168 (1915), 46 U. S. C. A. § 713 (1926).
\item \textsuperscript{166} Warner v. Goltra, 334 Mo. 396, 67 S. W. (2d) 47 (1933).
\end{itemize}
be restrictive, partly because not originally related to the Merchant Marine Act. The compilers of the Code, by juxtaposition of sections, could accomplish no changes in the law. A brakeman fell because, in order to release a hand brake, he exerted pressure with his foot on a grabiron, or handhold, which pulled away from the car. Although the proof showed the grabiron was defective, both lower courts held for the railroad on the ground that the iron was not intended for the use to which it had been put. Justice Brandeis reversed, holding that there was evidence from which the jury might have found that the use put did not subject the iron to a greater strain than should, for its intended uses, have been anticipated.

A question arose under the Longshoreman's and Harbor Workers' Compensation Act on account of a provision in it that the employer obtains the right to sue the wrongdoer when the person entitled to take compensation elects to do so. In *Doleman v. Levine* two persons were so entitled, one elected to take compensation, the other to sue for damages as administrator; the employer also sued under the statutory assignment. The Court held that the employer could sue only when all the persons entitled to do so elected to take compensation, that otherwise he could only share in such recovery as might be had by the administrator.

**Miscellaneous Statutes**

A variation of the old problem concerning interstate commerce was presented by the publisher of an Indiana farm paper. He claimed that a number of other publishers had conspired to obtain a monopoly of farm advertising and, in order to destroy competition, had agreed upon a combination rate much lower than the aggregate separate rates. While these papers were circulated in interstate commerce the trial judge ruled that the business of obtaining advertising was local only. The Circuit Court disagreed, but concluded that the influence of defendants in the field was not sufficiently great to justify application of the Sherman

173. Relying on Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436 (1920) (Court ruled against jurisdiction because it found that the circulation of the papers did not depend upon the obtaining of the advertising involved).
Act. And Justice Butler held that both courts were wrong, the lower, because advertising constituted an essential element of the business, the higher court, because it had not limited its consideration to the section of the country affected by the conspiracy.

The Court held that federal land banks, although performing governmental functions, were subject to attachment and execution in state courts because, by express provision of the law creating them, they were subject to suits as would be natural persons; and there was no exception as in other laws.

The government declared void certain mining claims on the ground that the annual work required by law had not been performed by the operators. The Court held that this failure worked no forfeiture but merely gave the government the right to institute proceedings of relocation while the default continued; and that there was nothing in the new policy inaugurated by the Leasing Act of 1920 which affected claims previously established and thereafter maintained in compliance with law; resumption of work constituted such maintenance.

In a suit between private parties the Court was called upon to determine whether a homestead patent carried with it riparian rights and if so, whether a state could, in the interest of the general welfare, modify the privilege. The lower courts had answered both questions in the affirmative; the Supreme Court in California Oregon Power Co. v. Beaver Portland C. Co. affirmed the result, but since it took the opposite view as to the first question it refrained from considering the second. The decision rested upon the interpretation of various acts of Congress, especially the Desert Land Act of 1877. Justice Sutherland described as follows the conditions which led to this enactment:

"For the light which it will reflect upon the meaning and scope of that

184. 295 U. S. 142 (1935).
provision and its bearing upon the present question, it is well to pause at this point to consider the then-existing situation with respect to land and water rights in the states and territories named. These states and territories comprised the western third of the United States—a vast empire in extent, but still sparsely settled. From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the boundary of Mexico—an area greater than that of the original thirteen states—the lands capable of redemption, in the main, constituted a desert, impossible of agricultural use without artificial irrigation.

"In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards. In the success of that effort, the general government itself was greatly concerned—not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable.

"To these ends, prior to the summer of 1877, Congress had passed the mining laws, the homestead and preemption laws, and finally, the Desert Land Act. It had encouraged and assisted, by making large land grants to aid the building of the Pacific railroads and in many other ways, the redemption of this immense landed estate. That body thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert,' which was spread in large letters across the face of the old maps of the far west."\(^{186}\)

The Federal "Common Law"

The cases heretofore discussed have all involved problems essentially federal, of either constitutional or statutory interpretation, or those in fields exclusively committed to the central government. But the federal courts are frequently called upon in cases involving diversity of citizenship to pass upon questions which ordinarily would be left to the state courts. Sometimes, as when interpretation of statutes is involved, the state law is followed; sometimes, however, there have been no state adjudications, and the federal court must give its own interpretation. In some kinds of cases the federal courts feel free to develop the law according to their own ideas. There has consequently grown up a body of law in the federal system which in many respects differs from the law of the state in which the case is brought, and often does not follow the rule accepted by the majority of the states. For the most part this law develops independently of the Supreme Court, since the Court will review on certiorari only to a limited extent; and the only other way such cases reach it is when the circuit court of appeals certifies to the Supreme Court a question for that Court to answer.


189. The rule laid down in Swift v. Tyson, 41 U. S. 1 (1842), that in matters of general law the federal courts were free to exercise their own independent judgment has been generally followed. See Black & White T. & T. Co. v. Brown & Yellow T. & T. Co., 276 U. S. 518, 530 (1928); Comment (1928) 38 YALE L. J. 88; Comment (1928) 77 U. or PA. L. Rev. 105. In that case Justice Holmes, Brandeis and Stone dissented. Justice Holmes said (supra at p. 534): "If within the limits of the Constitution a state should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all courts to bow, whatever their private opinions might be . . . I see no reason why it should have less effect when it speaks by its other voice." (i.e., by the local courts). The extent to which the older rule will be followed is limited by Mutual Life Ins. Co. v. Johnson, 293 U. S. 335 (1934), discussed at p. 446, infra.

190. See Railroad Co. v. Lockwood, 84 U. S. 357, 368 (1873); Hough v. Railway Co., 100 U. S. 213, 226 (1878); Beutler v. Grand Trunk Ry., 224 U. S. 85, 88 (1912); Black and White Taxi Co. v. Black & Yellow Taxi Co., 276 U. S. 518, 530 (1928). For the extent to which, for this reason, federal courts have been resorted to in labor cases see Frankfurter and Greene, The Labor Injunction (1930) 13-17; Aeolian Co. v. Fischer, 40 F. (2d) 189 (C. C. A. 2d, 1930). See also Frankfurter, Distribution of Judicial Power between United States and State Courts (1928) 13 CORR. L. Q. 499, 524 et seq.


192. Frankfurter and Hart, loc. cit. supra, note 37 (discussing the grounds on which certiorari will be granted).

193. Even then the Supreme Court often refuses to do so, as when the question is not sufficiently definite. Pflueger v. Sherman, 293 U. S. 55 (1934), discussed note 240, infra.
Many cases such as these arise in connection with life insurance policies. In *Mutual Life Ins. Co. v. Johnson* the policy contained a provision waiving premium payments if the company was notified that the insured was totally and permanently disabled. This assured died after a default without having given the required notice; his administrator contended that the giving of notice was to be excused because of the insured's insanity. On this question the courts of the country have differed widely. The Supreme Court was faced with the choice of deciding the question for itself on independent grounds or of accepting the solution of the highest court in Virginia, where the insured had lived and the policy had been delivered to him. The Court chose the latter course on the ground that the contract was subject to the laws of that state. Justice Cardozo pointed out that there was not involved here any general principle of insurance law or of the law merchant which, under earlier precedent, might have required an independent consideration of the question. He said: "The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance." Accordingly the case was sent to trial to give plaintiff an opportunity of proving his contentions.

Similarly, in *Manufacturers' Finance Co. v. McKey* the Supreme Court decided that federal courts could not refuse to enforce contracts valid according to the law of the state in which they were made. The Grigsby-Grunow Company had entered into an agreement for the financing of its accounts which was attacked by the circuit court as "preposterous". The demand of the Finance Company for counsel fees and

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194. 293 U. S. 335 (1934).
195. For a collection of cases, see *id.* at 338.
interest, which, for a short period following the appointment of equity receivers, amounted to 28% per annum of the balance still due, that court characterized as the "exaction of the pound of flesh". But, since such an agreement was valid in the state in which it had been made, the Supreme Court reversed. Justice Sutherland said that the courts were concerned neither with the harshness of the contract nor with equitable considerations, because, although the proceedings were in a court of equity, claimant was seeking no relief peculiar to that court. He sought no favors, but merely the enforcement of his legal rights. The Court expressly refused to consider whether actual insolvency might have affected differently the solution of the problem. The case was remanded so that proof of the amount of attorney's fees and of any other factors which might affect the extent of the recovery might be taken.

The law of a state laid down by its highest court must be applied by the federal courts also, whenever statutory construction is involved, even though the statute was intended merely to be declaratory of the common law, and the law had not been settled at the time the transaction occurred. Here the question was whether bonds issued in Wisconsin were negotiable and had been purchased in good faith. The Wisconsin Supreme Court had interpreted the statute contrary to the weight of authority in such a way as to favor the holder of the bonds. Justice Cardozo pointed out that when a statute is interpreted by the courts that construction is read into the law as if it had always been there in contradistinction to a situation where no statute is involved.

When there has been no binding interpretation of a statute by the state courts the federal courts may give it such meaning as they think proper. So the Supreme Court decided in Hallenbeck v. Leimert. Checks deposited with the Ashland Bank in Chicago, drawn on the Central Bank in the same city, were settled through the Clearing House. Several hours later Central Bank discovered that its depositor had in-

206. See cases cited by the Circuit Court in In re Hackett, etc., 70 F. (2d) 815, 817 (C. C. A. 7th, 1934).
sufficient funds with which to meet the checks. Under a rule of the Clearing House it might have withdrawn the settlement before two-thirty that afternoon; it did not do so. The lower court\textsuperscript{210} held that since the Ashland Bank was not a member of the Clearing House it could not benefit by its rules, and that demand made upon it by the Central Bank early the next morning was sufficient under the Illinois Negotiable Instruments Law.\textsuperscript{211} With this conclusion Justice McReynolds disagreed on the ground that the Central Bank had irrevocably paid the checks; that the rules of the Clearing House were pertinent in determining the question of payment and that the Negotiable Instruments Law dealt only with actual non-payment, not with overdrafts.

A case illustrating how the Court will apply its own view of the law when there is involved neither interpretation of statute nor of contract, is that of \textit{Mobley v. New York Life Ins. Co.}\textsuperscript{212} The insured, claiming he was entitled to monthly payments on account of disability and that the company had repudiated its agreement, sued to recover, in addition to the face of the policies, the present value of the aggregate monthly payments based upon his expectancy of life. The Supreme Court upheld a dismissal of his complaint\textsuperscript{213} on the ground that there had been no repudiation. Justice Butler held there was no proof that the company's failure to make the disability payment on which plaintiff relied was in bad faith, but that, on the contrary, the failure grew out of its uncertainty as to his condition. Even though there had been repeated refusals to pay, followed each time by payment after investigation, the insured had not the right to treat another such refusal as an "unqualified refusal or declaration of inability substantially to perform according to the terms of his obligation," such as would permit suit as for a total breach.\textsuperscript{214}

The Court, therefore, refused to pass on the question whether the doctrine of anticipatory breach was at all applicable.\textsuperscript{215}

An interesting problem in conflict of laws was presented in \textit{United States v. Guaranty Trust Co.}\textsuperscript{216} The government sued the bank, claiming it had improperly obtained the proceeds of a check mailed to a veteran in Jugoslavia, since he had never received it; in other words, that the endorsement was a forgery, by which no title passed under the law of

\textsuperscript{210} Hallenback v. Leimert, 72 F. (2d) 480 (C. C. A. 7th, 1934).
\textsuperscript{211} ILL. REV. STAT. (Smith-Hurd, 1933) c. 98, § 124.
\textsuperscript{212} 295 U. S. —— (1935).
\textsuperscript{213} In 74 F. (2d) 588 (C. C. A. 5th, 1935). Review was granted because of conflict with Federal Life Ins. Co. v. Rascoe, 12 F. (2d) 693 (C. C. A. 6th, 1926).
\textsuperscript{214} Roehm v. Horst, 178 U. S. 1, 14 (1900).
\textsuperscript{215} Citing Dingley v. Oler, 117 U. S. 490 (1886).
the District of Columbia where the check was issued and was payable.217 The bank contended that the validity of its title must be determined by the law of Jugoslavia, where the endorsement was made, that under the law of that country forgery of an endorsement does not affect the title of a subsequent holder in due course, and that accordingly it had acquired good title. The Supreme Court ruled that, since the check had been sent by the government to the foreign country, the transfer of the check was governed by the laws of that country.218 The Court also overruled the argument made by the government that the bank, even if it had title to the check, could not enforce it in a manner inconsistent with the laws of the place where it had been issued. Justice Brandeis pointed out that enforcement violated no public policy either of the District of Columbia, where the check had been issued, or of New York, where the suit had been brought.219

**Practice and Procedure**

There remain certain cases dealing with questions of practice: jurisdiction to hear appeals in federal cases, matters of pleading, and similar subjects, all often characterized by the term “technicalities”. Frequently reasons not apparent to the affronted layman underlie decisions so based; often, however, the only apology the lawyers can offer for some particularly harsh decision is that things have always been so, that the litigant is suffering from the mistakes of his particular lawyer, or, when no mistake exists, from the lawyer’s bad guess. It is high time, however, that those technical requirements, which experience has shown tend to become traps for the unwary, were removed. Some of the decisions made by the Supreme Court during the term just ended bear witness that too many still exist. Today there is an opportunity to remedy these conditions, for the Court has taken advantage of a recent Act of Congress220 to revise completely the rules of practice in the federal courts, both at law and in equity.221

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219. The Court also overruled other more special arguments the government advanced. 220. 48 Stat. 1064, 28 U. S. C. A. § 723 (b), (c) (1934).
Federal Jurisdiction

At any stage of the case, a federal court must consider its own jurisdiction, whether asked to or not; indeed, it should do so, even if asked not to. Acting on this principle the Supreme Court dismissed a bill in an action for the appointment of ancillary receivers on the ground that the parties were citizens of the same state.222 The Court disregarded the fact that the nominal plaintiff was a resident of a different state since the suit had really been brought by the primary receivers, the non-resident's name having been used because she was the plaintiff in the suit in which the receivers had been appointed. Answering the argument that diversity of citizenship was not necessary in an ancillary suit, Justice Brandeis said that this suit was not really ancillary, since the primary receivers had been appointed by a state court; such a suit was independent and could be maintained only if diversity of citizenship existed. He expressed doubt whether there might even be such a thing as an ancillary suit in one federal district to a suit pending elsewhere.223

Another aspect of the ancillary receiver problem resulted in a different ruling. After his appointment, such a receiver brought suit; and his right to do so was denied on appeal.224 This, said Justice Brandeis, was not a jurisdictional question, but referred merely to the legal capacity of the plaintiff to sue.225 The Court refused to pass on his capacity to sue and held that the circuit court had erred in so doing, because the issue had not been properly raised.226 The attack on the standing of the receiver was based on the fact that no independent bill had been filed in the district in which the ancillary receiver had been appointed. This, said Justice Brandeis, was not the case of a receiver attempting to sue in a district other than the one in which he had been appointed,227 because a “foreign” receiver acquires no title to assets in other jurisdictions.228

Jurisdiction, however, is lacking, if there is stated no cause of action

223. Id. at 243, citing Raphael v. Trask, 194 U. S. 272, 278 (1904).
226. A mere denial of due appointment in the answer was insufficient; there should have been in the answer a plea in abatement or a specific claim, since the defect could have been remedied if it had been called to the attention of the plaintiff.
228. Justice Brandeis, however, noted that many states now permit foreign receivers to sue, and that when, by statute, a foreign receiver acquires title, he cannot be denied the right to sue, citing Clark v. Williard, 292 U. S. 112 (1934). McCandless v. Furland, 293 U. S. 67, 76 (1934).
of which the court may take cognizance. In Spielman Motor Sales Co. v. Dodge,\(^{229}\) an action was brought to enjoin the District Attorney of New York County from enforcing the provisions of the Retail Motor Code. No facts were alleged from which it was to be inferred that the code provisions objected to were likely to cause serious interference with plaintiff's business. Since ample opportunity for raising the constitutional issues existed in the threatened criminal prosecution, there was no reason, said the Chief Justice, for interference by equity. He held, however, that a county official is a state officer within the meaning of the Judicial Code\(^{230}\) when he acts to enforce a statewide policy.

In order to ascertain whether the amount involved exceeds the necessary $3,000, the Court must consider plaintiff's entire interest in the fund, not merely the amount to which he might be immediately entitled. In Brotherhood of Locomotive E. & E. v. Pinkston,\(^{231}\) a widow sued for herself and others to preserve a pension fund. Although she was entitled to only $35 per month, Justice Sutherland upheld her right to sue, because her expectancy of life was such that the present value of her aggregate pension instalments exceeded $3,000.\(^{232}\) The fact that she might lose her pension if she remarried, he held immaterial; besides, proof had been made on the trial that this contingency also was capable of actuarial determination, and that it did not affect the result.

**Trial Practice**

In suits brought upon insurance policies, defendant claimed fraudulent concealment of illnesses, and sought separate trials in equity of the issues so raised. The Chief Justice ruled that this was improper; in one case\(^{233}\) the Court reversed an order directing such a trial; in another,\(^{234}\) it reversed a judgment obtained by the defendant after such a trial. The rulings rested on the fact that the defenses were fully available to the insurance company in the actions at law. The situations were not like those in which actions in equity were necessary to enable the company to raise the questions of fraud before the policies became incontestable.\(^{235}\)

\(^{229}\) 295 U. S. 89 (1935).


\(^{231}\) 293 U. S. 96 (1934).

\(^{232}\) Id. at 102, citing Thompson v. Thompson, 226 U. S. 551 (1913).


\(^{235}\) Because no action had been brought on them before the time had elapsed in which such contest might be raised, as in Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 177 (1923).
Federal Appeals

The extent to which stay orders in arbitration proceedings are appealable has already been discussed. The Court held appealable as being, in effect, an injunction, an order directing the prior trial of equitable issues. As, however, the time in which an appeal may be taken from an interlocutory order granting an injunction is less than that allowed for appeal from a final order, it may be vital to know whether a particular decree is final or not. This question has been productive of a great deal of litigation. In George v. Victor Talking Machine Co., the Supreme Court reached a conclusion different from that of the circuit court. In a suit brought for the infringement of the common law right of property in the song "The Wreck of Old 97," a decree was entered in plaintiff's favor, granting an injunction and appointing a master to report on the profits made by defendant. The decree was labeled as "final," and was so signed. On an appeal taken within the longer time allowed for appeals from final judgments, the circuit court ruled that plaintiff was estopped from now claiming that the decree was interlocutory, and that, in fact, it was final. The court then reviewed the merits and reversed. The Supreme Court directed a dismissal of the appeal, holding the decree merely interlocutory. It discussed neither the claim of estoppel nor the merits of the controversy. Here very substantial rights may have been lost by reliance upon appearances. Such problems should not be allowed to exist.

Questions are often certified to the Supreme Court by the circuit courts. They will not be entertained unless distinct and definite. Nor will the Court, upon such a question, decide the constitutional validity of a statute, especially when the matter is presented on motion to dismiss the complaint, since the result would only delay the final determination. A seemingly pointless question was presented by certificate in E. R. Squibb & Sons v. Mallinckrodt Chemical Works: if assignments of error are

236. See p. 440, supra.
238. 293 U. S. 377 (1934).
240. Pfleuger v. Sherman, 293 U. S. 55 (1934); Wilshire Oil Co. v. United States, 295 U. S. 100 (1935). In the first of these cases was involved the very technical question of appeal from a joint decree without proper severance of non-appealing parties. See action taken after the Supreme Court decision in 75 F. (2d) 84 (C. C. A. 9th, 1935). See also United States v. Fidelity & Dep't Co. of Baltimore, 295 U. S. —— (1935); Texas Land & Cattle Co. v. City of Fort Worth, 55 Sup. Ct. 658 (1935).
241. Wilshire Oil Co. v. United States, 295 U. S. 100 (1935) (this was an attempt to obtain a ruling on the petroleum code).
242. 293 U. S. 190 (1934). The technical requirements as to assignments of error have
abandoned, is the judgment to be affirmed or the appeal dismissed? The
former should be the case, said the Court, unless no proper assignments
were ever filed. And in one case the Court held that the circuit court
had erred in dismissing an appeal. The defendant had procured the
removal of a case to the federal court by bringing in a nonresident party;
the federal court, at plaintiff's instance, dismissed the cross-complaint
against that party and then remanded the case to the state court. De-
fendant appealed from the dismissal, not from the order remanding,
which is not appealable. The Supreme Court directed the circuit court
to pass on the merits of the dismissal of the cross-claim, pointing out,
however, that a reversal would not affect the order of remand. Here
again form was exalted above substance, for, if the dismissal was im-
proper, then the case should have been in the federal court; yet this
cannot be accomplished in any way. On the other hand, serious obstacles
exist to permitting appeals from remand orders. Perhaps the solution
would be to permit an appeal from a remand order only when it rests
upon the decision of some other question as to which appeal is possible,
as in the instant case.

A strange result followed affirmances at the 1933 term by an evenly
divided Court when, only a few months later, the identical tax ques-
tion was decided the opposite way by a unanimous bench. The
government, which had lost the first cases and won the last one, then
sought reargument. This was refused on the ground that the power
of the Court to grant reargument had been lost because more than thirty
days had elapsed since its mandate had issued. It is, of course, essen-
tial that there be an end to every litigation; yet those were fortunate
taxpayers, who had succeeded in persuading four members of the Court
that they were right when, a few months later, all four took the oppo-
site position.

While this article has not considered rulings of the Court on applica-
tions for certiorari, there is one case to which attention should be called,
especially in view of the pending plans to reform federal procedure. A


245. Whether waivers given after the expiration of the period of limitation were valid.
248. By reason of Revenue Act of 1926, § 1005 (a), which makes the order of the Board of Tax Appeals final after such period. 44 Stat. 9, 110, 111, 26 U. S. C. A. § 640 (1926).
bank sued husband and wife on a note said to have been signed by both. There was no proof that the wife had signed, or had authorized any one to sign for her. The trial judge, sitting without a jury, decided for the plaintiff. Defendant's attorney did not formally note an exception, but he noted an appeal. The Court of Appeals for the District of Columbia, although unanimous in holding that the bank was not entitled to recover, affirmed the decision on the ground that, in the absence of an exception, there was nothing to review. Two of the judges, on rehearing, filed strong dissents: "The lasting humility imposed upon defendant and her innocent children by a criminal husband and father imposes sufficient burden upon them without adding to their total impoverishment through his criminal act. Can it be that justice is so blind that an insignificant technical error estops a court of justice from extending the relief here so convincingly demanded?"—"And the denial of a review here of a judgment acknowledged to be wrong here, because the trial court and counsel, in a common effort to dispatch business, omitted a futile formula of words, is to sacrifice the substance of justice to the shadow. The majority felt bound by decisions of the Supreme Court to the effect that, in a trial without a jury, there is nothing for an appellate court to review unless there has been a motion for judgment followed by an exception; otherwise it would be assumed that the facts justified the result. The Supreme Court refused to hear the case. It is understandable that a trial judge be not found in error on some matter not called to his attention. But when there is no basis at all for the decision it should not be necessary to employ any form of words whatever to preserve the right of appeal. It is time this particular trap were removed from federal practice.

**Conclusion**

Two points suggest themselves after a study of these cases: What can be done to lessen the number of problems of statutory interpretation? How can the consequences of some of the decisions be avoided for the future? The first problem is largely one of legislative draftsmanship, the second is one of reform. A solution of both might be facilitated if there were, in the vast agglomerate of our federal government, any agency which concerned itself with such things; Justice Cardozo's proposal of a "Ministry of Justice" comes to mind.

In some states an approximation has been made toward the accomplishment of this suggestion. There are now many Judicial Councils concerned with the improvement of the administration of the law, with procedure and mechanics. New York has recently established a Commission on Law Revision whose function it is to suggest changes in the substantive law. The members of these bodies, however, usually devote but a small portion of their time to their extensive tasks. Many states also have law drafting committees supposed to control the wording of statutes, but too often their efforts are thwarted by last minute changes in the legislative halls.

The federal system derives some benefit from the annual conference of judges, and at the moment there exists an advisory committee for the purpose of creating new rules of practice. Presumably, too, the Attorney General from time to time suggests changes in the law. But these efforts are too haphazard, too discontinuous. What is really needed is a single agency continuously functioning in an endeavor to simplify the law applicable to the federal courts in all its phases. It would be the duty of such agency to edit proposed legislation, and to scrutinize enacted laws in order to minimize the possibilities of misunderstanding. It would also propose new legislation designed to correct infirmities in the law as disclosed by decisions.

While congressional inertia is likely to retard the adoption of most of the suggestions made by such a body, much good would nevertheless result from its existence. If it performs its duties conscientiously it will provide a mass of well documented and reasoned material available to students of legal reform and to the occasional forceful member of Congress intent on bringing reforms to pass. That much can be accomplished by an energetic individual is shown by the ultimate success of Senator Norris' long fight to abolish the "lame duck" Congress. Surely the less spectacular, but none the less important, problem of law reform should also find its determined champions. Much work lies ahead in order to make our federal law a more understandable and a juster working system. It is time a concerted effort were made to commence this task.


25. New York Legislative Law (1934) §§ 70-72. The purposes of this Commission generally are to recommend changes in order "to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions." It is composed of seven members, two of whom are the respective chairmen of the Senate and Assembly Judiciary Committees, and the others are appointed by the Governor with the provision that at least two of the five be law professors and at least four of the five be attorneys.
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