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Trials and Tribulations of an Intermediate Appellate Court

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THE TRIALS AND TRIBULATIONS OF AN INTERMEDIATE APPELLATE COURT*

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As so often happens in lectures like this, Dean Thoron asked me, for publicity purposes, to send him a title to my remarks before I had written down a word, or even before I had begun to organize my thoughts. I obliged him at that point and sent him the title, "The Trials and Tribulations of an Intermediate Appellate Court." From this it follows that if there proves to be any correspondence between what I shall say and the announced title, that will be "purely coincidental."

In fact, the title implies that my court has had a rather rough time of it. But membership on the court of appeals has seemed to me to be a rather nice position, and certainly you can see for yourself that the job has hardly worn me down, whatever might have been its trials and tribulations.

Of course the functions of an appellate judge differ from those of a trial judge. When I was appointed, one of my two elderly colleagues was Judge James M. Morton. He had been for years a very successful and able United States District Judge in the trial court of the federal system. He regarded his so-called "promotion" to the court of appeals as a sort of dignified retirement merited by his age and infirmities. The story is told that Judge Morton once made a statement, at some bar association gathering, to the effect that "any solemn chump can get away with being an appellate judge, but it takes an honest-to-God he-man to be a good trial judge." My comment on that differentiation would be that it was not quite fair to the appellate judge. I would agree that it is easier for any "solemn chump" to "get away" with being an appellate judge than to "get away" with being a trial judge. But merely "getting away" with something, of course, is not the whole story. I would contend that one needs to be much more than a "solemn chump" to deserve the accolade of being a *good* appellate judge.

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† See Contributors' Section, Masthead, p. 74, for biographical data.

The circuit judge does share with the district judge the common factor that we are both judges, and therefore it becomes important to observe our relationships as judges with the lawyers. As you are aware, there are certain amenities which the lawyer customarily observes. Whatever may be his private opinion of the judge, the lawyer maintains what sometimes may seem to be an obsequious and exaggerated deference to "his Honor," who may be wrong in the particular instance, or who may be making an ass of himself—only the lawyer does not say so, openly and bluntly, in so many words.

But these amenities which lead the lawyer to refrain from showing the judge up are, or ought to be, a two-way street. It would be hitting below the belt for a judge, secure in the immunity with which he is cloaked by the courtesy of lawyers, to bawl him out when he knows the lawyer will feel a reluctance to answer back. The judge needs to be, on his part, respectful to the feelings of the lawyer and should refrain from the temptation, sometimes prompted by arrogance, to humiliate the lawyer before his client or before the public.

Of course, judges are recruited from the ranks of the lawyers, and wrapping a black robe around a lawyer does not invest him with any more wisdom or legal competence than he had before. The judge's aura of immunity resulting from the exercise by lawyers of these professional amenities certainly has some aspect of fraud and fakery, so that perhaps it may be wondered why such customs have been accepted tacitly as the proper professional practice.

The answer is, I suppose, that this is but a phase of institutional prestige that envelops all public officials, not only judges—a prestige that tends to condition the uninstructed general public more readily to accept as binding what the public official may do. When one has done his best to perform a public task, it is always comforting to be buttressed by a little prestige, meretricious or otherwise. A public official, even on occasions the President of the United States, may give utterance to some banality, some truism, which the ordinary man in the street would not have the nerve to say, because of its transparent emptiness. But coming from the public official, such a comment may be quoted with the utmost solemnity by the press, as implying that the trite remark constitutes the very embodiment of prescience and wisdom. This all contributes to building up the prestige of the office, and renders the acts of the official more readily acceptable to the general public.

This institutional prestige, therefore, serves a useful purpose, and is not a thing lightly to be cast into the discard by the protected official. Public officials, judges included, must not, then, be too frank in "letting down

their hair" in public. The important caution is that the public official must not let himself be deceived, by this deference and prestige that surround him, into thinking that he is any better than he really is.

In an intermediate appellate court, such as mine, the maintenance of this institutional prestige of the courts imposes upon us a certain judicial etiquette in our dealing with judges lower in the federal system, whose acts we are called upon to review on appeal. We also have imposed upon us certain amenities in our dealings with the Supreme Court of the United States, which of course has the final say, and which may, and often does, say that we were wrong.

As to the trial judges, we must always bear in mind that they may be as good lawyers as we are, or better. They are under the disadvantage of often having to make rulings off the cuff, so to speak, in the press and urgency of a trial proceeding, and the main reason we on appeal may have a better chance of being right is that we have more time for reflection and study. Hence, we should approach our task of judicial review with a certain genuine humility. We should never unnecessarily try to make a monkey of the judge in the court below, or to trespass on his feelings or dignity and self-respect. Sometimes we may have contributed to an erroneous ruling below by an incautious statement made by us in an earlier opinion, in which case we should take care to point out that this is so, and that we may have been to blame for misleading the district court, which was only trying to follow us.[1] Sometimes we may have occasion to reverse a judge of the district court on a ground not presented to it, or considered below. If so, we should be at pains to point that out.[2] And if the district court has written a careful and full opinion, with which we agree, and which we feel unable to improve upon, we should affirm on the opinion of the court below.[3]

In recent years we have been somewhat embarrassed by appeals, in criminal as well as in civil cases, where the main point raised by appellant was that biased and partial actions by the trial judge so outrageously interfered with the orderly development of the case by counsel as to deny to appellant the essence of a fair trial before an impartial tribunal. If we think that appellant's point is well taken, we have no escape but to say so, however much this determination is inevitably a slap in the face of the district judge.[4] But we have assured the bar of our reluctance to accept as true such a serious charge without the court's being thoroughly acquainted with the whole atmosphere of the trial, which can only be

1 See Workingmen's Loan Ass'n v. United States, 142 F.2d 359, 360 (1st Cir. 1944).
2 See Keene Lumber Co. v. Leventhal, 165 F.2d 815, 823 (1st Cir. 1948).
3 See Norton v. Equitable Life Assurance Society, 219 F.2d 706 (1st Cir. 1955).
4 See Crowe v. Di Manno, 225 F.2d 652 (1st Cir. 1955).

achieved by a careful reading of the trial transcript from beginning to end.[5]

Now as to our relations with our superior tribunal, the Supreme Court of the United States. Here too, we have to play the game according to certain well-accepted rules, and it makes no difference what our private opinion might be as to whether certain justices of the Supreme Court know more, or less, than we do about the law. We should always express a respectful deference to controlling decisions of the Supreme Court, and do our best to follow them. We should leave it to the Supreme Court to overrule its own cases.

I have always thought that the prevailing majority of our court did the right thing in *United States v. Girouard*,[6] where we accepted a never-overruled precedent in the Supreme Court, though we got reversed for doing so. Of course the Supreme Court, in reversing our judgment, pursuant to the institutional obligation it owed to us, was careful to point out that we had merely followed an undistinguishable and never-overruled precedent by the Supreme Court, which that Court then proceeded to overrule.[7] On the other hand, it appears to me that the three-judge court in the fourth circuit, in the second *Flag Salute* case, did an unseemly thing in counting noses, so as to speculate as to whether the Supreme Court, as reconstructed, would be likely to adhere to its ruling in the first *Flag Salute* case, decided only a few years earlier.[8] It was no less unseemly, though in the result Judge Parker guessed right as to what the Supreme Court would ultimately do.[9] Statistics will show that in these two cases the Court of Appeals for the First Circuit got itself reversed whereas the Fourth Circuit got affirmed. But that ouly goes to show that statistics do not necessarily tell the full story.

But what are we supposed to do when we have no controlling precedent in the Supreme Court on all fours with our case, as the saying goes, but where we find expressions in previous opinions which may serve to indicate the slant which the justices might have as to the particular problem?

Well, there are at least two ways in which we could deal with a situation like that, and we have tried both of them. Just why, in a particular case, we may have chosen to follow one rather than the other course, may indeed be difficult to determine.

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[5] See Melori Shoe Corp. v. Pierce & Stevens, 249 F.2d 305 (1st Cir. 1957); Daley v. United States, 231 F.2d 123, 128 (1st Cir. 1956).

[6] 149 F.2d 760 (1st Cir. 1945).

[7] Girouard v. United States, 328 U.S. 61 (1946). See also, State Tax Commission v. Aldrich, 316 U.S. 174, 176 (1942).

[8] See Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (S.D. W. Va. 1942).

[9] See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

(1) The first method is perhaps the more modest one. Since we are only a half-way house of judicial review, it might be said that we should focus on previous cases in the Supreme Court to see what consequences would flow from them as a matter of logic, and examine the dicta in that Court, all with the purpose of concluding, if possible, how the Supreme Court would probably deal with the problem. That course I chose in the famous, or notorious, case of *Sampson v. Channell,*[10] where I concluded that, from the logic and reasoning of the Supreme Court in *Erie Railroad Co. v. Tompkins,*[11] it would follow that in a diversity case the federal district court should apply, as part of the substantive law of the state wherein the district court sits, the local rules of conflict of laws as understood and applied in the state tribunals.

(2) The second method is to assume that the Supreme Court, in a matter on which it has not specifically ruled, is entitled to the benefit of whatever illumination the court of appeals may be able to throw upon the question of what ought to be the law, untrammeled by dicta or logic-chopping from previous opinions of the Supreme Court which might point to the opposite conclusion. That method we pursued in *McClennen v. Commissioner.*[12] We thought the Court was shaky in some of the things it said in *Bull v. United States,*[13] but in any event we thought the case could be distinguished. Treating the case with the utmost respect as a "peculiar case on its facts and in the way the case came up,"[14] we even professed to find, perhaps with tongue in cheek, that there were implications in *Bull v. United States* pointing to the conclusion we were inclined to reach in the case then before us.

It may be that a bit of psychiatric introspection would disclose why I chose to follow one method in *Sampson v. Channell* and a different method in *McClennen v. Commissioner.* I do not tax my brain too much with such speculations, because whatever conclusion one might come up with would be suspect as a mere rationalization. All too often we have to realize that the case might be written up either way, in a lawyer-like opinion. The judge may not recoguize that this is so, or even be conscious of the inner springs which lead him to choose one result rather than the other. Perhaps here effective advocacy does its more subtle work in persuading the judge that he wants the case to come out one way rather than the other.

In the case of *Sampson v. Channell,* subsequent events proved that I had guessed right as to what the Supreme Court would do, both on the

[10] 110 F.2d 754 (1st Cir. 1940).
[11] 304 U.S. 64 (1938).
[12] 131 F.2d 165 (1st Cir. 1942).
[13] 295 U.S. 247 (1935).
[14] McClennen v. Commissioner, 131 F.2d 165, 169 (1st Cir. 1942).

conflicts point and on the question whether the rule as to burden of proof was to be treated as a matter of substance or procedure for the particular purpose at hand.[15] But of course that does not prove that I chose the right method in *Sampson v. Channell.* If the conclusion reached in that case is as wrong and unfortunate as I understand they now say it is in the class on federal jurisdiction at Harvard Law School, assuming I was competent to write a persuasive opinion the other way, who knows but that I might have succeeded in persuading even the Supreme Court to take that view, in a matter which, after all, they had never focused on before.

For what it is worth, and maybe it is worth nothing, I submit this ex post facto rationalization of why I did what I did in these two cases.

Perhaps I liked the result which I arrived at, following the method I chose in *Sampson v. Channell.* When I was law clerk to Justice Brandeis, he said, speaking for the Court in *Kryger v. Wilson*:[16]

> It is apparent from the above statement that there has been no lack of due process. . . . The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned.

I have always thought that proposition was pretty good, for the Supreme Court of the United States has too much other essential work to do to become also the final arbiter in conflicts questions. Its necessarily episodic dealing with conflicts problems is not likely to contribute helpfully to the development of the subject. And if the Supreme Court was to become the final arbiter of conflicts problems only in diversity cases, then its influence on the state courts in non-diversity cases, in the direction of developing a uniform law, would likely be nil, as was proved by the broader experience under *Swift v. Tyson.*[17] While the prescription that one must follow the substantive law of the state in diversity cases would seem to take lots of fun out of the federal judge's function in diversity cases, yet this is perhaps so only theoretically. For the federal judge, if he professes solemnly to be seeking out the rule that is applicable in the state tribunal, can usually reach the result he thinks ought to be reached, since more likely than not he will find the state law pronouncements on the particular point to be ambiguous or inconclusive.[18]

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[15] Klaxon v. Stentor Co., 313 U.S. 487 (1941); Palmer v. Hoffman, 318 U.S. 109 (1943). (1941).

[16] 242 U.S. 171, 176 (1916).

[17] See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 74 (1938).

[18] See Mason v. The American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957); Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

On the other hand, when it came to *McClennen v. Commissioner,* I thought I knew something about the law of partnership, and I felt pretty confident as to what the tax consequences should be in that estate tax case. To reach the result I thought ought to be reached, it was necessary to deal somewhat roughly, though very respectfully, of course, with the Supreme Court case of *Bull v. United States,* which was the main reliance of the taxpayer. Certiorari was not applied for by the losing taxpayer in the *McClennen* case.

We cannot adopt the easy, slap-dash view that what the court of appeals does is really not important, because the Supreme Court has the last word. When Congress created the system of intermediate courts of appeals, in 1891, it was with the idea of taking a load off the Supreme Court of the United States, so that that Court might perform better its primary function of mediator in the federal system. The Supreme Court retains a discretionary power of ultimate review, upon certiorari, but as you well know the Supreme Court is just too busy to grant a writ of certiorari in all cases. Therefore, we have to do our job thoroughly and well, in order to fulfill what is expected of us. It is obvious that if we get too bad, the Supreme Court will have to load itself up with routine cases, to the detriment of its more important business.

I don't think we have become too bad, and the result is that in the vast majority of cases that are brought to us, what we say becomes the final word on appeal. If I may quote briefly from some statistics: in the five-year period from October 1951 to September 1956, inclusive, out of a total of 570 cases docketed in our court, the Supreme Court was applied to for a writ of certiorari in only 110, and the number of certiorari petitions which the Supreme Court granted was only 12. As a result of review by the Supreme Court of our work during this five-year period, seven of our judgments were affirmed, and five were reversed, which made an average reversal of only one case per year over the five-year period.

It is probably only a coincidence that three of the five opinions of ours which were reversed were written by me on behalf of the court. Now, I don't enjoy getting reversed any more than any other judge, and when that happens, my first impulse is to repair to the nearest tavern and "cuss out" the Supreme Court. Sometimes, after we have given long study to a case and written a careful opinion, we find ourselves reversed by the Supreme Court in an opinion that strikes us as superficial and hastily prepared. We eventually cool off, when we come to realize that the opinion may indeed be superficial and hastily drawn from the very necessities and pressures under which the Supreme Court has to do its

work. Another thing that tends to cool us off is the realization that, were our positions reversed, and were we required to perform our work in the environment and under the pressures prevailing in the Supreme Court, we probably could not do so good a job as they do.

I do say without hesitation that where a court of appeals has written a full opinion which evidences a careful and painstaking study of the case, the Supreme Court of the United States owes it an institutional obligation not to reverse us except upon filing a reasoned opinion undertaking to show that our conclusion was mistaken. The only exceptions to this proposition that I can think of at the moment are two: (1) Where the Supreme Court can cite, and rely upon, a supervening decision of its own in another case, which obviously covers our case and which serves well enough to indicate why it thinks we went wrong; (2) where the court of appeals has lost the confidence of the Supreme Court, which wishes curtly to manifest that lack of confidence to the world.

In this connection one case that still burns me up is *Pino v. Nicolls*.[19] The question there was the validity of an order for the deportation of an alien, on the statutory ground that the deportee at some time after his entry into the United States had been "convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." There was no issue as to one of the two offenses, namely, carnal abuse of a female child. The only question presented to us on appeal was whether, as the records stood in the Third District Court of Eastern Middlesex, Massachusetts, it could be said that the alien stood convicted of the crime of petit larceny. It was not suggested to us that the crime of petit larceny was not a crime involving moral turpitude, within the meaning of the federal statute. We held, in a lengthy opinion, which after all turned upon the niceties of local Massachusetts law, that the alien did stand convicted in the Third District Court of Eastern Middlesex of the crime of petit larceny.

The Supreme Court in its wisdom granted a writ of certiorari. Upon review, the Supreme Court unanimously reversed our judgment, in a five-line per curiam opinion that magisterially stated: "On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed."[20]

Now, why were we treated that way by the Supreme Court? There was no question of a controlling supervening decision of the Supreme

[19] 215 F.2d 237 (1st Cir. 1954).
[20] Pino v. Landon, 349 U.S. 901 (1955).

Court. And I am sure that as a court we had not forfeited the confidence of the Supreme Court; so we have not believed, even for a moment, that the Supreme Court was taking an occasion to manifest sharply its lack of confidence in us.

Of course, it is possible that the members of the Supreme Court, for one reason or another, wanted to save the alien from deportation, but that no extensive opinion supporting that conclusion could obtain acceptance by a majority of the justices. That possibility I can understand, for the justices of the Supreme Court, like the rest of us, are only human. Maybe the justices felt that they could not avoid doing what they did. Whether there were other available ways of handling the situation I don't know. Oftentimes the Supreme Court announces two or more opinions by minority groups on the Court, no one opinion commanding the support of a majority, though a majority do concur in the announced judgment. Perhaps something like that might have been done in this case. However that may be, it is certainly true that the Supreme Court owed the court of appeals the obligation of furnishing a reasoned statement for reversing us, and whatever might have been the explanation of why the justices did not fulfill that obligation, it is still true that the Supreme Court must be charged with an institutional failure in its summary treatment of the court of appeals in that case.

Realistically, we must recognize that there are certain types of cases in which, if we dare to "stick our necks out," we are pretty sure to get reversed.

One such case is where a fellow claims to be a seaman. Because seamen as a class are supposed to be defenseless and unable to look out for themselves, the expression has grown up that "seamen are wards of the admiralty." But I wouldn't suppose that a man is entitled to this special protecting arm of the judiciary merely on his claim to be a seaman. At all events, in *Grimes v. Raymond Concrete Pile Co.*,[21] a plaintiff had claimed to be entitled, as a seaman, to sue for damages under the Jones Act. If he were not a seaman he could not maintain such an action, and his exclusive remedy would have been a claim for workmen's compensation under the Longshoremen's and Harbor Workers' Compensation Act, as provided by Congress in the Defense Bases Act. We held, as a matter of law, that the man could not, on the proven facts, reasonably be found to be a seaman, and so we affirmed the judgment of the district court. The Supreme Court granted certiorari, and reversed us on April 7, 1958, in a per curiam opinion informing us briefly:

> We hold, in agreement with the Court of Appeals, that 42 U.S.C. § 1654 saves the remedy under the Jones Act created for a member of a crew of

[21] 245 F.2d 437 (1st Cir. 1957).

> any vessel. We hold further, however, in disagreement with the Court of Appeals, that the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel.[22]

This time we picked up a few dissents.

If, upon retrial of the case, a jury holds that the plaintiff *was* a seaman, we shall have to accept that determination of fact under the Jones Act, unless, of course, the record contains different evidence, because the Supreme Court has told us that whether the man was, or was not, a seaman, constituted, on the evidence presented, a factual issue which had to be submitted to the jury. We always try faithfully to follow a decision of our superiors. But if another case comes up, where a party's claim to be a seaman seems to us to be as preposterous as in the *Grimes* case, as in our humble view the dissenting opinion by Mr. Justice Harlan in the latter case well demonstrated, I am afraid that we shall again "stick our necks out" and say, as a matter of law, that the man is not a seaman, thereby courting another probable reversal by the Supreme Court.

Another familiar situation where we are pretty likely to get reversed is where, in a case under the Federal Employers' Liability Act, we either affirm the trial court in giving judgment for the railroad, pursuant to a verdict directed for the defendant, or reverse a judgment for the plaintiff on the ground that the district court committed error in submitting the issues of negligence or causation to the jury. In *New York, New Haven & Hartford Railroad Co. v. Dox*[23] we explained what we have to do in cases of this sort, as long as the Supreme Court continues to tell us that the plaintiff has the burden of establishing negligence and causation in suits under the Federal Employers' Liability Act. Pointing out, what cannot be denied, that a "plaintiff's right to a jury trial, as guaranteed by the Seventh Amendment to the Federal Constitution, is not an unqualified right to have the jury pass on issues of negligence and proximate cause in all cases . . . ,"[24] we said that in such cases an intermediate appellate court has an inescapable function to perform in deciding whether the plaintiff proved enough to get his case to the jury. "We have to perform that function honestly and conscientiously, let the chips fall where they may, in so far as possible further appellate review is concerned."[25]

We are not obliged, as part of our institutional obligation to the

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[22] 356 U.S. 252, 253 (1958).
[23] 249 F.2d 572 (1st Cir. 1957).
[24] Id. at 573.
[25] Id. at 574.

Supreme Court, to express agreement with everything the Supreme Court may choose to do. It is true, the Supreme Court has the final word, so far as the disposition of the particular case is concerned. That is indeed an awesome power, though it is unavoidable, for there needs be some ultimate tribunal; and in one sense it is no doubt true, as Stone, J., dissenting, said of the Supreme Court in *United States v. Butler,* that "the only check upon our own exercise of power is our own sense of self-restraint."[26]

But the Supreme Court, though there is no appeal to any other tribunal from its decisions, surely must desire that its decisions meet with the approval of an enlightened bar. And the Supreme Court must know that, if it pushes its exercise of power too far, it will inevitably generate corrective measures, for in the long run the people in a democracy cannot afford to allow their ultimate destiny to be determined by the naked will of a majority of nine justices appointed to the Supreme Court for life. How far the Court should go in a particular case necessarily involves an exercise of judgment. Over the long years the Supreme Court, because of changes in its membership, has oscillated between the right and the left. Historically, as one group or another in the country has been displeased with something the Supreme Court has done, loud squawks and demands for "curbing the power of the Supreme Court" have been heard. But you don't shoot the umpire just because you don't like his decision, even where you believed he called the decision wrong. That path is the way of chaos and anarchy. Strident voices in our midst conveniently overlook the kind of value judgments the Supreme Court has to make in resolving conflicts between the states and nation in a federal system; in deciding concretely whether certain conduct involves an "unreasonable" search and seizure within the prohibition of the fourth amendment, or whether there has been "excessive bail" or "cruel and unusual punishments" within the prohibition of the eighth amendment, or a denial of "due process of law" within the prohibition of the fifth and fourteenth amendments, or a denial of the "equal protection of the laws" within the prohibition of the fourteenth amendment.

One may think that the judgment exercised by the Supreme Court in one or another of these difficult situations is unfortunate and indeed unstatesmanlike, but it must never be forgotten that the answers to questions of this sort are not to be derived from a simple reading of some constitutional text.

Therefore I think it is our institutional obligation, as it is the obligation of all good citizens, to rally to the defense of the Supreme Court as

[26] 297 U.S. 1, 79 (1936).

against such crackpot legislation as has been proposed, for instance, by Senator Jenner in S. 2646. That bill is framed as an exercise of the legislative power of Congress under section 2 of Article III of the Constitution to regulate the appellate jurisdiction of the Supreme Court of the United States. The bill proposes to take away from the Supreme Court the jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any of five described types of cases in which the Supreme Court has recently rendered decisions displeasing to Senator Jenner. As was well said by Dean Griswold in a recent statement in opposition to S. 2646:

> It is the American tradition to criticize court decisions freely, and that is as it should be. No one thinks that courts are inevitably right; but they are the institutions which are established in our system to make decisions in justiciable controversies, to resolve the difficult questions where there are conflicting claims of right. Decisional law has always grown and developed by a process of trial and error. Where a case has been found to have gone too far, it is later qualified or distinguished, or even overruled. This is the function of courts. It is through this process, as the future Lord Mansfield said more than 200 years ago, that decisional law "works itself pure." There is no doubt that this process will continue in decisions of the Supreme Court. No possible good that I can see will be served by taking away from the Supreme Court power to perform this judicial function in the types of cases specified in the pending Bill.

The Jenner Bill does not purport to disturb the jurisdiction of the lower federal courts; so, how does the bill tend to promote decisions in those lower federal courts more to the Senator's liking? Would not a lower federal court, in applying the law to a particular case, feel bound to give effect to a decision rendered by the Supreme Court at a time when that Court undoubtedly had final jurisdiction to pass upon the subject matter? And of course, as Dean Griswold pointed out, if there were conflicting decisions in various courts of appeals, there would be no tribunal empowered to resolve the conflicts if the Supreme Court were bereft of jurisdiction in such cases.

I don't suppose that the Jenner Bill is to be taken too seriously. I should be greatly surprised if the Congress enacted the bill, or anything like it. I should be even more surprised if the President should sign such a bill, if enacted.

With all the perplexities one has to face in the capacity of judge, it is soothing and comforting to return from time to time to the classroom, where the law professor does not have the burden of coming down off the fence and deciding the case, but may pitch his difficulties to the students,

with discussion of the considerations on the one hand and on the other, and an adjuration to the students to make up their own minds. Despite my appointment to the court in 1939, I have clung tenaciously at least to the shadow of my former vocation, for I have continued to teach a section of Torts at the Harvard Law School. If it may be said that I am thus leading a sort of a double life, I must plead guilty. I can only say that that is the hand of cards dealt to me by an inscrutable Providence, and I have liked the hand too much to toss it in.