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Twenty-Nine Distinct Damnations of the Federal Practice -- And a National Ministry of Justice

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TWENTY-NINE DISTINCT DAMNATIONS OF THE FEDERAL PRACTICE—AND A NATIONAL MINISTRY OF JUSTICE

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There's a great text in Galatians,
Once you trip on it, entails
Twenty-nine distinct damnations,
One sure, if another fails:

Browning, *Soliloquy of the Spanish Cloister*

There are certain fundamental truths.

Neither the practicing lawyer nor the best judge has the requisite time to worry about the "why" of a rule of law. And this is true whether the point be one of substantive or adjective law although, as we know, the two are inter-mixed and one.

If the day's work be done, the bar and the judiciary must take the law as they find it, right or wrong, sensible or nonsensical, and do the best they can. Theirs is not to reason why.

I do not mean to deny that now and then a court or a judge will wage and even accomplish a needed reform. Or that from time to time great contributions are made by this bar association committee or that. But these contributions are sporadic, and unorganized, and even when made in many instances are not followed through.

Neither the best judge or the best lawyer has the time to do this kind of thing. Neither is paid for it and the most fundamental truth of all is that we get what we pay for.

The task of steering the law along the right course is a job for "eggheads," the law "perfessors" of America. From my point of view we have been doing our job magnificently. The law reviews are filled with excellent suggestions for this reform or that. But at the present time these pieces float out into the air. No one reads them, let alone acts upon them because no one is paid to do so as a job. No one is to blame for this. When the hard work of the day is done, few of us want to sit down at home to read law reviews. Most of us prefer to read a book or look at "Dragnet" or Murrow on T.V. I have heard Harold Medina describe how when he became a judge, he polished and re-polished his first opinion and after its publication mailed copies and walked down the street expecting to be congratulated only to discover not even his best friend had read it. And when he finally in desperation set Mrs. Medina down to read it to her, she objected, saying "Harold, don't be so judgy."

All of us who write for law reviews have the same experience.

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Neither our wives nor our best friends can be made to read our stuff. Why should they?

For the third time,[1] I say that above every other reform we need a National Ministry of Justice composed of practicing lawyers and law professors paid to do reform on a part-time basis. Such a body could present to the Judiciary Committees of the House and Senate needed changes of outmoded and rotten rules of law, in much the same manner as the Lord Chancellor in England as a cabinet member can do with Parliament.

It would be my view that the chairman should be a lawyer or an outstanding state judge like Vanderbilt and the majority should be lawyers. At a minimum there should be five ministers; at a maximum eleven, and a maximum minority should be law professors. No sitting federal judge should be a member, perhaps not even the Chief Justice ex officio. Nor the Attorney-General either.

Keeping the ministers on a part-time though salaried basis has distinct advantages. It insures their working. It keeps them from becoming experts, and there is less danger that a huge bureaucracy will be built up around the Ministry with too many permanent Government employees.

The time is ripe because the American Bar Association, alive to the need, is establishing a Law Center at Chicago where legal research can be collected and catalogued. There must be a national body paid to read the important suggestions for reform of law and transmit them to the chairmen of the House and Senate Judiciary Committees for appropriate legislative action. Only a National Ministry of Justice can do such a job.

There is real need of federal law reform despite the fact that within the past fifteen years we have had new federal rules, civil and criminal, and a revision of the judicial code. The sad truth is that much remains to be done. Of course a National Ministry of Justice would be concerned with all law, and as to court rules it would aid and be aided by the Supreme Court Advisory Committees. The big advantage the Ministry would have is in approaching the Congressional Judiciary Committees in matters now beyond the rule making powers of the Supreme Court.

Nine times out of ten, a law suit turns on a procedural point. To the practicing lawyer and the procedure professor, ninety per cent of the time of a National Ministry of Justice could be devoted to

1. See also Keeffe, Landis, Jr. and Shaad, *Sense and Nonsense about Judicial Notice*, 2 STAN. L. REV. 664, 688 (1950); Keeffe, Thaler, Bernstein, Wright and Gillmer, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 570, 613 (1952). Another article "A National Ministry of Justice," to be published in the American Bar Association Journal in November, 1954, suggests the pressing need for such reform.

reform of federal practice. Serious faults clamor for correction. Here are merely 29.

DAMNATION ONE

In Our Large Metropolitan Centers Trial Calendars Are Disgracefully Behind

Despite the new rules and the revision of the judicial code, in New York and other large centers the federal trial calendar, civil and criminal, has been allowed to slip badly behind. Henry P. Chandler, Director of the Administrative Office of the United States, reports: "[T]he inflow of civil cases, in every recent year but one, has been greater than the number terminated. . . . The number at the end of 1953, 66,873, was much the highest in the history of the Administrative Office. . . . In 1953 the 233 civil cases terminated per judge compared with 261 filed. . . . The median period from filing to disposition of normal civil cases terminated by trial in the 86 districts, increased from 12.1 months in 1952 to 12.4 months in 1953. The periods for the Southern and Eastern Districts of New York in Manhattan and Brooklyn were respectively 47.3 months and 32.6 months in 1953. Thence the periods ranged downward among 20 other districts generally in metropolitan areas which had a time above the national median of 12.4 months.[2] . . . The backlog of pending criminal cases continued to rise in 1953, going up from 8,794 to 9,518, an increase of 8 percent."[3] The Southern District of New York still has criminal cases three years old to try.

This is a very dangerous condition for the public and our profession. Mr. Chandler agrees:

> "What this means to litigants in reparation for wrongs delayed, in unjust settlements which are practically compulsory for parties who cannot afford to wait for the process of the courts, and in legal rights left in doubt because the courts have not been able to reach the questions involved, need not be elaborated. Certainly a great country like the United States owes it to its people to provide for its courts in a way that will enable them to administer justice promptly and effectively."[4]

Speaking of a similar delay in New York City where the jury calendar was then 46 months behind, David Peck, the presiding justice of the Appellate Division, First Department, in 1952 said:

> "This is a shocking statistic. But to the people of this city it is much more than a statistic. It is a measure of court failure in one important field

2. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 50 (1953).
3. *Id.* at 53.
4. *Id.* at 50.

> of litigation and of public suffering. A shaming and explosive document could be written, but it should not require a recording of case histories to impress upon our minds the human tragedy of families . . . denied recourse to the courts for the redress of their wrongs for four long years. There is the stark demonstration that justice delayed is justice denied and it should hang heavy on the conscience of every one of us."[5]

A problem that merits careful study is how our courts should handle personal injury actions. In 1953 there was a 19% (almost one fifth) increase in such actions.[6] Peck's studies in New York show only 6% of the negligence cases that block our calendars are ever actually tried. 94% are there for the haggle. England long ago abolished jury trial in most civil cases and Peck suggests we do likewise and allow the trial judge to use comparative negligence to permit recovery in cases now defeated because of contributory negligence. Bills to abolish jury trial have been introduced into the New York legislature and the whole matter there is under study by the Temporary Commission on the Courts, of which Harrison Tweed is Chairman.[7] Let the law courts lose the negligence business and a body blow will be struck against lawyers. But lose it I fear we will, unless we handle it more efficiently.

A National Ministry of Justice would look into this condition on a day-to-day basis. Probably, it would never have allowed the federal calendar in New York and other metropolitan centers to get so far behind.

There undoubtedly is much also, that the Chief Justice of the United States, as chairman of the Judicial Conference in co-operation with the Attorney-General of the United States, can do to clear these metropolitan calendars but let's recognize there are real limits to what they can do if they attend to their principal duties, and matters now are going from bad to worse. *Intake exceeds outgo.*

No one can underestimate the value of the annual reports of the Administrative Office, but as Harold Medina pointed out as long ago as April 19, 1951:

> "[T]*he Administrative Office has no control over the judge.* It makes reports, it prepares a budget which first must be approved by the Judicial Conference of the United States before it is presented to Congress, it audits accounts, it pays out money, and it provides service. But *not one*

5. PECK, REPORTS TO THE PUBLIC (N.Y. Jan. 14, 1950; Feb. 5, 1953).

6. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 53 (1953).

7. Tweed, a two-term president of the Association of the Bar of the City of New York, is now president of the American Law Institute. Judge Learned Hand once at a Legal Aid banquet declared that if Tweed had lived at the time he would have been a Musketeer. He'll need to be a merry musketeer to reform the antiquated procedure of New York. It is in the ice age with respect to court administration.

> *of these functions involves making a policy.* The policy is made by the Board of Directors which consists of the members of the Judicial Conference of the United States; that is, the Chief Judge from the Court of Appeals of each of the eleven Circuits, plus the Chief Justice of the United States, who is the Chairman of the Conference. . . . However, *it was the thought of Congress that in creating an Administrative Office which would perform these functions, it should also give power to somebody to do something about conditions where that was needed as shown by the reports.* Therefore, as a part of the Administrative Office Act it constituted the Judicial Councils in each Circuit with power to act."[8] (italics added)

The recommendation of the Judicial Conference for calendar delay has been the appointment of 3 additional circuit judges and 28 district judges, 6 on a temporary basis. Congress has granted the request to the extent of 3 Circuit Judges, 21 permanent and 6 temporary District Judges.[9]

Granted that statistics establish that when our population was less and our case load lighter, there were more judges in proportion, does it necessarily follow that the remedy is to add more judges? Would not our profession command more respect were it to streamline its court operations to meet the increased load and dispose of its work by more efficient means with the same number of judges? More especially is this so when the addition of judges in the past did not do the trick and there is every indication that our metropolitan calendars will be farther behind this time next year than they are today. Two new judges in the southern district of New York will not bring that calendar up to date.

The worst fault in judicial procedure the country over is the failure of judges to read the papers and briefs on file before hearing oral argument. This destroys the value of motion and pre-trial proceedings.

It was my recent pleasure to observe Judge Seymour H. Lynne in the United States District Court for the Northern District of Alabama. In a short space of time he demolishes a long motion calendar. He begins by announcing,

> "I have read all the motion papers and briefs on file and my tentative rulings are as follows. Those lawyers who are dissatisfied I will briefly hear, but I fear argument will not dissuade me from my view."

He then states that certain motions he finds unable to decide on the papers and on those he requests oral argument.

So far as I could observe there is not a lawyer in Birmingham who

8. Medina, *The Work of the Administrative Office of the Administrative Courts*, 11 F.R.D. 353, 357 (1952).
9. See 28 U.S.C.A. §§ 44, 133 (Supp. March 1954).

does not admire and respect the man. My own admiration and respect are great, despite the fact that on most of my motions his rulings were against me. I have learned to value the opinion of the student with the low grade, if you know what I mean.

It is this very reform in motion and appellate practice that has speeded things in New Jersey under Vanderbilt. It is bound to do so. Judges should not hear argument of counsel before they have read the briefs. It is an imposition to oblige counsel to educate them as to facts that are set forth far more completely and accurately in the papers on file.

In his speech at Dallas Judge Medina said:

> "It is my judgment that the most pressing need in judicial administration today, all over the United States, is that of an integrated court system and the adoption of some sort of efficient business organization in every system of courts, state and federal."[10]

As we know, with fewer judges than when he took office, Arthur Vanderbilt as Chief Justice of New Jersey brought the trial calendar of that state up to date. At Dallas, Medina said of Vanderbilt's accomplishment:

> "The results have been really extraordinary. . . . Cases are decided promptly and judges are moved around from one place to another in the state with great effectiveness."[11]

He summarized Vanderbilt's reforms as five: assignment of judges where there is judicial work to do; insisting on a fair division of work among all the judges; using live statistics published weekly, monthly, quarterly and annually rather than dead statistics published after the horse is out of barn; frequent conferences by Chief Justice Vanderbilt with the bar and the judges formally and informally; and finally, a *sine qua non* of successful judicial administration—the appointment by the chief justice of "an administrative director of the courts who may be his *alter ego* in attending to the multitudinous details of running" a court system efficiency.[12]

In his Dallas speech, Judge Medina put the plight of the Federal courts well when he said:

> "[T]here is no doubt that there has been well founded criticism of the courts for their failure to adopt business-like methods. There has been far too much delay, too much inefficiency and too little self-criticism and search for improvement. We hear it said on every side by well informed

10. Medina, *supra* note 8, at 353.
11. *Id.* at 358.
12. *Id.* at 359-61.

> persons whose good will and whose motives are above reproach that the law has not kept abreast of modern conditions to the same extent as have medicine and the sciences. There is a good deal of claptrap connected with the insistence that new techniques be developed for the ready and infallible winnowing of the true from the false; *but on the subject of the business administration of the courts the case is really too clear for reasonable debate.*"[13]

If this be so, then the job of improvement should be given to a National Ministry of Justice which can develop new methods in much the same way as Vanderbilt did in New Jersey. Unlike the busy judges of the Judicial Conferences who meet infrequently, it will be the day by day job of the National Ministry of Justice whose members will be paid to do it, and who will be in contact with the legislature and able to obtain readily any needed legislation.

The midget would not have sat on Morgan's lap nor would Truman have proposed his health bill if the Stock Exchange had cleaned its own house and the medical profession had urged instead of opposed private insurance plans, such as Blue Cross. For the good of our profession, a National Ministry of Justice would see to it that our federal court calendars are up to date before the lawyer loses more business to accountants, arbitrators and administrators.

DAMNATION TWO

The Salaries of Federal Judges are a National Shame

Among the uncandled eggs in the hen coop where unread law review articles nestle, is a piece by A. Aldrich Mooney with respect to the compensation of federal judges.[14]

As of 1926 Supreme Court Justices were paid $20,000, circuit court judges $12,500 and district court judges $10,000. In 1946 there was a $5,000 increase across the board making the three salaries what they are today: $25,000, $17,500 and $15,000.

In other words the "glaring fact to be deduced . . . is that the $5,000 increase since 1926 has hardly met the ever rising cost of living."[15]

Moreover, since in 1926 judicial salaries were tax exempt, the 1946 raise in pay is illusory. Take-home pay for Supreme Court Justices is $17,866.36, for circuit court judges $14,266.36 and for district court judges $12,266.40. On top of this the judges pay state taxes.

On the basis of the consumer price index figures, Mr. Mooney believes the three salaries after taxes in terms of purchasing power

13. *Id.* at 354. (italics added)
14. Mooney, *Federal Judges Compensation—Proposed Legislation*, 27 N.Y.U.L. REV. 457 (1952). All salary quotations and figures are from the Mooney piece unless otherwise noted.
15. *Id.* at 458.

are respectively $9,451.11, $7,548.14 and $6,489.94 and substantially below what the three classes of judges were paid in 1939.

The Chief Judge of the Court of Appeals in New York receives $35,000 and his associate judges $32,500 plus $3,000 expenses. New York's appellate division presiding justices receive $32,500 and their associate justices $31,000 plus certain expense moneys. An ordinary New York supreme court judge gets $29,000. Judicial pay in Pennsylvania, New Jersey, Massachusetts, Illinois and California is more or less similar to New York, and Mooney concludes, "The comparison cogently demonstrates the parsimonius behavior of the Federal Government in this respect."[16]

Since the judiciary must be drawn from the ranks of the legal profession and the salaries are below what most potential occupants of the bench could obtain in private practice, therein lies the evil as "Men of high calibre are reluctant to serve in a position which results in a drastic reduction of their standard of living."[17] As matters stand, it is possible that "future judges will have to be drawn from one of two groups—men of independent means, or men who will use the office as a stepping stone for something else"[18] whereas the pay should be such not only to attract men of competence and integrity but to keep them there. As Mr. Mooney says, considering the poor pay, we have indeed been fortunate that so few charges of abuse of office have been made and we ought to take a leaf out of the British book and shield our judges from temptation by compensating them well.

In the 82d Congress there were three bills for salary increases but none passed.

In the 83rd Congress, there were many bills to increase federal judicial salaries. Pursuant to a judiciary committee report, a commission was appointed in July of 1953 to report as to judicial salaries by January 15, 1954, on the understanding that Congress would act within 60 days after the report was filed. The report has been filed but Congress has not yet acted. In accordance with the report a bill is pending to increase federal judicial salaries as follows: Chief Justice of the Supreme Court, $40,000 and associate justices, $39,500; circuit court judges, $30,000; and district court judges, $27,500. We can hope the increase is voted effective January 1, 1955, but the passage is fraught with difficulty as so many other salaries are included in the pending bill.[19]

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16. *Id.* at 460.
17. *Id.* at 461.
18. *Id.* at 462.
19. For the creation of the Commission on Judicial and Congressional Salaries, see 67 STAT. 485 (1953) (the bill, S.2417, was introduced by Dirksen of Illinois). For reports on the bill, see SEN. REP. No. 609, 83d Cong., 1st Sess.

What better argument could one make for a National Ministry of Justice? You can be sure such a body would have long ago prepared the necessary legislation for the judiciary committees if we had only had the good sense to create it. And if we had such a Ministry now, there would be a better chance that these proposed salary increases would be voted.

DAMNATION THREE

The Retirement Method for Federal Judges is Thoroughly Unsound

Granted there is a long-standing policy that federal judges can serve for life, as sure as death and taxes, after 70 or 80 or 90 a judge cannot pull his oar in the boat. There is much to be said for not forcing a judge to retire at 70. In fact the whole retirement age requirement needs re-examination in the light of medical progress that is resulting in longer life for all of us.

But since the statute as now drawn permits a judge retiring at 70 to continue to serve and to draw his full salary, why not force every federal judge reaching 70 to retire on this basis? Then the President could immediately appoint a new judge. The retired judge could continue to serve as long as he was able and there would not be any increase in the load of younger judges by the slowing up of the older ones.

Whatever the outcome, the present law makes no sense, and a National Ministry of Justice should study the problem and at least make the above sensible change. Its study should include statistics that detail the work load of each judge of age 70 or over now in the federal system. Consideration should also be given to the right of the Chief Justice to relieve judges at any age who are unable for physical reasons to do a full day's work. Moreover, other civil servants can retire before 70. Why should not judges have equal rights?

DAMNATION FOUR

It Is Harsh and Unfair to Deny to Widows and Minor Children of Federal Judges a Pension

The recent publication of the will and estate of Chief Justice Vinson has brought to light the absence of any death benefit provision for federal judges.

This is a common fault of retirement plans. And the low salary of our federal judges is such that they cannot insure against it.

The military, optimistically believing they will live forever, concentrate on their right to retire at the highest pay possible and leave their widows without adequate pension.

Certainly this thing can with study be done more intelligently.

Many of our states such as New York have pension plans for everyone to which all contribute. This would seem to be the best way to do it if it could be worked out.

In January, 1953, there were three bills introduced to accomplish this reform.[20] None was passed and meanwhile the chief justice died without any statutory provision for his widow.

Mooney tells us that the Congress has not provided annuities for dependents of judges as it has for most other public servants. This is wrong.

But until there can be a complete revision of federal retirement and pension provisions, immediate provision should be made for widows and minor children of federal judges. Perhaps, these benefits could be tied to the needed salary increase so that the cost can be lessened on a compulsory group insurance basis.

No one can state precisely what should be done without careful study. Another and very important task for our National Ministry of Justice.

DAMNATION FIVE

Neither the Law Schools nor the State Bar Examiners are Preparing Young Men for Federal Practice as They Should and Could.

I would be the last to deny that law schools and law students are better than ever today. Despite the great improvement in law school training, there is still not the preparation for federal practice that we need. Many a lawyer spends fifty per cent or more of his professional days in federal court, yet few take federal courses in law school.

The deficiencies of the law school in legal accounting and government control of business and the like are being recognized and such courses are now widely offered in law schools. But there is a wide difference between courses listed in a law school catalogue and courses that the majority of law students study.

The law student takes the so-called "bread-and-butter" courses,

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(1953), and H.R. REP. No. 1057, 83d Cong., 1st Sess. (1953). The bill to effectuate the Commission's recommendations is H.R. 7510, 83d Cong., 2d Sess. (1954). It also provides for an increase in the salary of the Chief Judge of the District of Columbia to $28,000, the chief and assistant judges of the Court of Claims to $30,500, and the judges of the Court of Customs and Patent Appeals to $30,500, the judges of the Customs Court to $27,500, the judges of the Court of Military Appeals to $30,500 plus travel up to $15 per day, the Tax Court judges to $27,500, the Alaska and Virgin Island district court judges to $27,500, the Vice-President of the United States to $40,000 plus $20,000 expenses, senators and representatives to $25,000 plus actual expenses of five additional round trips to his locality and an increase in salary and expense to the Speaker of the House to match the Vice-President. The delegates from the territories and the resident commissioner in Puerto Rico would receive the same salary as members of Congress.

20. H.R. 396, H.R. 1281, H.R. 1556, 83d Cong., 1st Sess. (1953).

and those are the ones that are featured prominently on his state bar examination.

Dean George Neff Stevens of Washington Law School tells us that the bar examiners of only fifteen states cover taxation, eleven states, federal procedure, twelve bankruptcy, two labor law and none anti-trust, legal accounting, jurisprudence, international or comparative law.[21] Think what failure to examine in these subjects does to the development of a well-trained federal bar!

The truth is that state bar examiners have been slow to progress with their examinations and although excellent suggestions have been made for one national bar examination, nothing is done about it. As long as things remain as they stand, so long will law schools be unable to prepare their students for law practice before our federal courts and administrative bodies. Even when such courses are offered, law students will be reluctant to take them unless they are on the bar.

It has always seemed queer to me that in certain federal district courts, examinations are given before a state lawyer is admitted to practice. The wisdom of one district's requiring such an examination when another does not seems questionable. But it must be that federal judges everywhere find that lawyers are ignorant of elementary federal rules and laws and some feel so violently they require an examination in their district. I don't blame them.

The greatest good for the law school world and the profession would come from a national bar examination on federal law. Law school graduates ought to be made to take such an examination before engaging in practice in our federal courts. The fact that it was to be given would in turn stop our law schools from becoming so provincial and prevent students from taking every state course in our law schools and ignoring every federal.

Also, law schools that do not now have federal courses that they should have will be induced to establish such courses. This will give schools that need it a shot in the arm.[22]

There may be good reasons why each state must give its own bar examination but the establishment of a national examination for the federal courts ought to improve the tone of the state examination. Moreover it should result in state examiners cooperating with the national, perhaps in a single examination, in such a way as to accomplish many needed reforms in state bar examinations that

21. Stevens' report is contained in Clark, *Bar Examinations: Should They Be Nationally Administered?*, 36 A.B.A.J. 986, 988-89 (1950).

22. See HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953); Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954) (cites the many recent articles on improvements that can be made in legal education).

inquire into endless details of state law by means of unanswerable yes-no questions.

The body to achieve such a beneficial reform is a National Ministry of Justice. If it did nothing but this its creation would be well worth the effort.

DAMNATION SIX

Federal Venue in Diversity Cases is in the Horse and Buggy Stage

Granted federal courts are to continue to entertain actions between citizens of different states, as the constitutional fathers provided in Article III of the United States Constitution, there seems no excuse for the venue requirement of Section 1391a of the Judicial Code under which suit must be brought in the district of *all* plaintiffs or *all* defendants.

What this amounts to is a statutory requirement that prevents suit for diversity in a federal court against two defendants who reside in different districts. It also forces plural plaintiffs to bring several suits if they and the defendants are not all in one district.

If there has been any progress in court procedure, and sometimes, you wonder, it has been in trying causes of action involving multiple parties in one law suit instead of many. The object of Section 1391a seems to be to require a plaintiff to bring two or more federal suits when he could just as well bring one. In these days of overcrowded calendars this seems most unwise.

Our National Ministry of Justice will, I am sure, once it studies the situation, abolish the venue requirement as outmoded in our modern world and let venue be in the discretion of the Court based on solid reasons of convenience for courts, parties and witnesses. The sad truth is that with business and transportation what it is, the venue concept is moribund.[23]

One can argue that diversity jurisdiction is bad but if so, the way to get rid of it is to abolish it, not to hamstring it with a venue provision as stupid as Section 1391a.

DAMNATION SEVEN

Whatever Justification for Venue Limitations in Diversity Cases, It Is Absurd and Ridiculous in Federal Question Cases to Force Suit in the District Where the Defendant Resides

If a man from Mars were to have you tell him that whenever you start an action in a federal court involving a federal question, you must sue in the district where the defendant resides, he'd doubt-

23. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 586-88 (1952).

less rush to his space ship and leave so crazy a planet. Personally I would not blame him.

If I have a claim against you based on a federal question, why do I have to sue you in the district in which you reside? More particularly when all the witnesses might be found and the event have taken place elsewhere. It seldom happens today that people do all their business in the district in which they reside.

Also there may be other defendants. Just as in diversity cases Section 1391b does not take into account that there may be plural defendants residing in different districts so that venue forces several suits instead of encouraging the bringing of one.

Nothing, I submit, could be more absurd. Nothing needs the attention of a National Ministry of Justice more urgently.

DAMNATION EIGHT

The Venue Section 1400 for Patent Actions Should Also Be Repealed. It Makes No Sense

Just as in federal question jurisdiction so in patent cases, the litigation's being peculiarly the responsibility of the federal courts, it may be very desirable to sue elsewhere than the place where the infringement took place or where the defendant resides or does business. Why impose a rigid venue requirement?

Examination of the decisions under Section 1400 will show that the statute has not worked well and a change is in order.

This again, is an important task for our National Ministry of Justice and one long overdue.[24]

DAMNATION NINE

Along With Sections 1400, 1391a and b of Title 28, the New Venue Sections 1404 and 1406 Enacted in 1948 Should be Torn Out by the Roots as Productive of More Litigation Than They Avoided

In the morning of his days when Eddie Morgan studied the deadman's statute for the Commonwealth Fund, he pointed out a funda-

24. For a general discussion see *id.* at 573-74, 573 n.11. The opportunity to clear up the existing confusion on patent venue was presented to the Supreme Court in the two cases, Gulf Research & Development Co. v. Leahy, 193 F.2d 302 (3d Cir. 1951), *aff'd mem.*, 344 U.S. 861 (1952), and C-O Two Fire Equipment Co. v. Barnes, 194 F.2d 410 (7th Cir.), *aff'd mem. sub nom.* Cardox Corp. v. C-O Two Fire Equipment Co., 344 U.S. 861 (1952). Each case was affirmed in a memorandum decision by a divided court. Seidel, *Venue in Patent Litigation*, 22 GEO. WASH. L. REV. 682 (1954).

mental truth. Whenever a statute breeds litigation as to its meaning, you can depend upon its being rotten to the core. Courageous judicial legislation might, perhaps, have saved Sections 1404 and 1406 of Title 28 under which a federal court can change the venue of a lawsuit to a district "where it could have been brought." Chances are slim indeed now as most decisions confine the right to change to where federal process and venue would have permitted suit in the first place and since the orders are not appealable neither the Supreme Court nor the circuits are going to be able to consider district court rulings to make them uniform.

The weasel words in Sections 1404 and 1406 of Title 28 destroyed the noble intent of the draftsmen and made a bad muddle worse.[25]

A National Ministry of Justice would instantly tear these terrible statutes out by the roots along with Sections 1391a and 1391b and draw a simple, clear statute stating that once it has jurisdiction a federal court shall have the right in its discretion to transfer trial within the federal system wherever it pleases in the interests of justice and fairness to all concerned.

Or is it too much to hope that lawyers will ever be so sensible?

DAMNATION TEN

Perhaps the Worst Venue Defect of All is That the Order Granting or Denying a Change of Venue is an Intermediate One and Not Subject to Appeal. After Trial the Motion is Moot so That a Right to Appeal the Order Should be Given

One of the virtues of the federal system is that intermediate orders are not appealable. When orders for examination before trial or inspection and the like are involved, the rule works well and avoids the endless delays that ensue in states like New York where the opposite rule obtains and every intermediate order is appealable.

But if the particular motion draws into question the place where the trial is to be held, it would seem desirable that such an order be appealable so as to obtain more or less uniform rules as to when venue can be changed. Such an appeal would also represent a desirable check on the unlimited right of a district judge to change the place of trial in his discretion to any place in the federal system that he thought most desirable (assuming, of course, this right be granted). Provisions could be drawn to compel a prompt appeal on the original papers.

The venue cases disclose there is a real need for this appeal right.[26]

25. Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 23.
26. See *id.* at 574.

Should we not have our National Ministry of Justice study the problem and if I am right as I believe I am, provide for an appeal?

DAMNATION ELEVEN

Giving a Venue Objection to a Nonresident Motorist Who is Suable in State Court is Without Justification. The same is True of Any Other Nonresident Forced to Designate an Agent for the Service of Process in the Forum

Down to the decision in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*,[27] whenever a nonresident sued for diversity or federal question, a foreign corporation had a venue objection. As a practical matter the objection was ridiculous because by becoming authorized to do business in the state, Bethlehem Steel or any foreign corporation designated an agent for the service of process. The dismissed plaintiff would be vexed by federal court costs and forced to sue over again in the state court. Like as not, to vex him further, the foreign corporation defendant might then remove to federal court.

This nonsense ended in 1939 with the decision in *Neirbo* which is one of the first and finest of Mr. Justice Frankfurter's decisions, and was in 1948 codified as Section 1391c of Title 28, under which any foreign corporation that is either licensed to do business or *actually does business in a state is robbed* of a venue objection. This goes beyond *Neirbo* but is as it should be and as any court would decide even if there were no venue statute.

Until 1954 those of us who have read and studied *Neirbo* thought the rule would logically be extended to a myriad of other cases where a state requires a nonresident for one reason or another to designate an agent for service of process. Not so, Mr. Justice Frankfurter, the author of *Neirbo* says recently in *Olberding v. Illinois Central R.R.*,[28] over the dissent of Justices Reed and Burton. There a nonresident motorist was involved. This means the old one-two-three of pre-*Neirbo* days is to be repeated. Plaintiff pays his costs, sues over in state court and the foreigner removes to federal court. Why?

And why should a federal court give a venue objection to any nonresident, who by virtue of a statutory designation is suable in the state court where the federal court sits? There is no reason for it.

A National Ministry of Justice would, I am sure, solve this venue problem as well as those of Sections 1391 and 1400 by permitting

27. 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).
28. 346 U.S. 338, 74 Sup. Ct. 83 (1953). The *Olberding* decision approved, McCoy v. Siler, 205 F.2d 498 (3d Cir. 1953), and Martin v. Fischbach Trucking Co., 183 F.2d 53 (1st Cir. 1950).

suit any place in the federal system which under all the circumstances is fair and just.[29] Let's do it and not persecute American business with these antiquated technicalities.

DAMNATION TWELVE

The Special Venue Statutes for Stockholders' Suits Are Poorly Drawn and Should Be Repealed. One General Venue Statute Vesting Discretion in the Court Ought to Suffice for all Actions.

In stockholders' actions the corporation is an indispensable party. To prevent dismissal for failure to serve the corporation, old Section 51 of the Judicial Code was amended to permit the corporation to be served outside the district where the stockholder was bringing a suit providing the suit was one the corporation could have brought.

Were the corporation to sue, it would have venue and jurisdictional problems. What old 51 did was to impose on the stockholder these limitations as the price of serving the corporation outside the district.[30]

For fuzzy thinking this stupid solution of a real difficulty takes the cake.

Why our profession, courts, lawyers and eggheads, have been so primitive in our corporate thinking, I will never know and I plead guilty with my brethren. We are not too bright with business problems.[31]

The finest thinking about the true position of the corporation in the stockholders' suit was done by George Washington, now a federal circuit judge in the District of Columbia. He tells us that in the typical derivative stockholders' suit, the corporation must be a neutral or nominal party. And the more you think of it, the more right he becomes.[32]

If this be so, then why draft the stockholders' venue statutes (now Sections 1401 and 1695 of Title 28 substantially without change from old 51) so as to confine the right of the stockholder to sue to a

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29. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 23, at 581-89, and Peterfreund, *Federal Jurisdiction and Practice,* 1953 ANNUAL SURV. AM. L.

30. *Id.* at 571-72, 571 n.5. See also Keeffe and Cotter, *Service of Process in Suits against Directors: A Barrier to Justice,* 27 CORNELL L.Q. 74 (1941).

31. Consider the business wisdom of decisions like Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953), 63 YALE L.J. 253; and Gordon v. Elliman, 280 App. Div. 655, 116 N.Y.S.2d 671 (1st Dep't 1952), 38 Cornell L.Q. 244 (1953). The *Gordon* case is bitterly criticized in de Capriles and Prunty, Jr., *Corporations,* N.Y.U.L. REV. 1429 (1953).

32. Washington, *Stockholders' Derivative Suits: The Company's Role, and A Suggestion,* 25 CORNELL L.Q. 361 (1940). Contrast Doctor v. Harrington, 196 U.S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606 (1905), regarded by the profession as the correct rule. See also Smith v. Sperling, 117 F. Supp. 781 (S. D. Cal. 1953), 54 COL. L. REV. 629 (1954), which refuses to follow *Doctor v. Harrington.*

place where the corporation—a nominal, neutral, disinterested party —could sue?

Consider the absurd result. Those of us who have studied this problem all agree that by and large stockholders' suits should be conducted in either the state of incorporation or in the state where the corporation does its principal business. Most people seem to prefer the state of incorporation as that state's law invariably governs the outcome of the case.

Certainly, as a general rule all stockholders cases would be more efficiently and intelligently handled were they forced into the state of incorporation and heard by courts, state or federal, there. Those judges and lawyers will be better versed in their state's corporation laws and the litigation ought to be the more readily resolved. But it is a new and different way for lawyers to plan. They have harassed business so long.

In the first place, the corporation could be subject to service in any state where a stockholder sues a director because the stockholder merely is claiming an asset for the corporation. Of course, there is no asset and no *res* unless the stockholder collects. In this there is an analogy to the inchoate levy of an attachment, for collection there depends upon the success of the attaching creditor. But this theory, though suggested, has been consistently rejected and as a result state court service of process on a corporation becomes impossible in the stockholder's action if brought against the most culpable director in a state where the corporation is not incorporated or in which it does not do business.[33]

Since state after state regards the corporation as an indispensable party, the most culpable director, not suable elsewhere can move to dismiss. Why? If the corporation is a neutral, why do we need it present to give it money in the event the stockholder wins? For the life of me, the rule seems devoid of reason. Such is the feebleness of our reasoning in the corporation field!

The cure of Sections 1401 and 1695 was to permit federal service of process outside the state in stockholders' actions. And this was

33. See the study by Walter Pond for the Law Revision Commission of the State of New York, N.Y. LEG. DOC. No. 65(I) (1941), and Note, 50 YALE L.J. 1261 (1941). Pond's proposal to permit service outside New York was rejected by the Law Revision Commission for solid reasons. Should New York or any other state facilitate suit against the director of a corporation resident there when the corporation will not sue? Recovery might well result in the New Yorker's footing the bill for all directors but in any event the heavy cash outlay for defense would unfairly fall on him instead of on all directors pro rata. Of course with the protection of paying only his aliquot share the New York director ought to be suable some place. That place is the state of incorporation. For analogous difficulties in bondholders suits, due to the poor draftsmanship of FED. R. CIV. P. 23, see Keeffe, Levy and Donavan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948).

suggested because there is no constitutional objection to coast-to-coast service in federal courts when the Congress has the good sense to provide for it.

But apart from the awful draftsmanship which as we see limits the stockholder to serving the corporation in the few districts where the corporation can sue, the whole idea is half-cocked. Why not say that wherever a stockholder sues a director, he must sue in the district of the state of incorporation and if he does, then, he can not only serve officers and directors outside the state but he can also join as defendants directors and officers of the same citizenship as himself providing only there be one or more citizens of a different state? In other words apply the same statutory technique as the interpleader statute with coast-to-coast service, free from the silly requirement of complete diversity of citizenship.[34]

There is as much need for a stockholders' statute of this type as there was for the interpleader act. And it is a disgrace that nothing has been done about it. Frank Cotter and I pointed out the problem long ago[35] but no one read our piece or cared. It is the profession that suffers, not us.

State stockholders' suits, as we see, cannot be brought against any officer or director who does not happen to reside in the state where the corporation can be served.

Federal stockholders' suits fail for the same reason when the state of suit is not the residence of either the corporation or of all the defendants. The venue requirement of Section 1391a permits suit only in the district of *all* plaintiffs or *all* defendants. Under Sections 1401 and 1695 of Title 28 unless the stockholder sues where the corporation can, he cannot serve the corporation outside the district and the defendants have both a venue and process objection. Just as does Section 1391a of Title 28 where there are plural defendants (and in what stockholders' suit are there not?), Sections 1401 and 1695 require several suits where one would suffice. And invariably this results in one or two directors paying the shot, whereas the suit burden should be shared pro rata by all. What a waste of time and money!

But worse, under Sections 1401 and 1695, the stockholder can never sue in the state of incorporation free from a jurisdictional objection. The reason? Why, you see, there is always one or more resident defendants so that the corporation can never sue there.[36]

There would never be complete diversity as between the corpora-

34. See note 30 *supra.*
35. Keeffe and Cotter, *supra* note 30.
36. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 571 n.5 (1952); Lavin v. Lavin, 182 F.2d 870 (2d Cir. 1950) (opinion by Learned Hand).

tion and resident defendants under Section 1391a. This means the stockholder free from objection, can never sue in the state of incorporation, the one place he ought to sue.

Stockholders' actions are thus forced either into state courts where few defendants can be served in the state of incorporation or elsewhere or into federal courts distant from the state of incorporation against few defendants.

In either case the result is most unsatisfactory and the whole thing is unnecessary. Our National Ministry of Justice would no doubt tackle the problem and resolve it along the lines I have indicated. It might even provide that no federal court need entertain a stockholders' action providing the state of incorporation permitted service out of the state on any officer and director so that all defendants could be served in the state court. While personally I would not like to see diversity jurisdiction declined, still we might better decline it than continue it in its maimed state. It does not do the job that ought to be done by a modern court procedure in these actions. Declining any jurisdiction on terms that would force the states to provide a decent machinery makes sense.

A National Ministry of Justice can work this out, as part of a larger program for revision of the outmoded process requirements of our federal courts. Sections 1401 and 1695 make precisely the wrong disposition.

DAMNATION THIRTEEN

The Rule of Strawbridge v. Curtis *Requiring Complete Diversity Should Be Repealed.*

When Mitchell of Oregon, sues Neff of California, there is diversity of citizenship, but let Mitchell join as a defendant in the same action Pennoyer of Oregon, and diversity is destroyed.

This should never have been and comes from Marshall's decision in *Strawbridge v. Curtiss*[37] so defining the phrase "citizens of different states."

The same phrase in the constitution has been defined in the interpleader act as permitting a suit by Mitchell of Oregon against Neff of California and Pennoyer of Oregon.[38]

Take the stockholder's action we just discussed. It is difficult in many cases to obtain an out of state stockholder to sue the corporation at its place of incorporation and have the stockholder's citizenship different from every defendant. Yet it is highly desirable that stock-

37. 3 Cranch 267, 2 L. Ed. 435 (U.S. 1806).
38. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 600 *et seq.*; Keeffe and Cotter, *supra* note 30 at 80 *et seq.*

holders be allowed to sue in federal court and serve process on all defendants the country over. This results in one suit instead of many and it anchors the suit where it ought to be.

This same thing is true in many another case and consideration should be given to repealing the rule of *Strawbridge v. Curtiss* as productive of more harm than good. The case for repeal in stockholders' suits is unanswerable. But an equally good case can be made in many another situation. I'd like to see the rule repealed in all cases but I recognize that no change of this sort should be made without study. We need a National Ministry of Justice to do it.

DAMNATION FOURTEEN

Attacks Upon Diversity Jurisdiction Are Ill-Considered

To my way of thinking there has been a great deal of loose, unreliable talk about the undesirability of diversity jurisdiction. Certain people have made the matter a party line.[39]

Statistics show there was a substantial increase in diversity cases in federal courts in 1953. Mr. Chandler reports 17,383 cases "more than 14 per cent greater than the number the year before . . . only 4,916, or less than one-third, were removed from state courts, leaving 12,467, or well over two-thirds which were brought in the federal courts by the plaintiffs."[40]

17,383 cases represent well over one-third of the 60,000 civil cases in the federal courts. It is a sizable figure.

But there are several important problems to be faced before we destroy diversity jurisdiction.

Why is diversity jurisdiction undesirable?

Has it worked well or badly?

If the federal courts were to send the pending 17,383 diversity cases back to the state courts, could the states handle them? Would they like the increase in cost?

The burden of establishing the undesirability of diversity jurisdiction seems to me to be on the ones who want it destroyed.

From my study of diversity cases I would say that not only has diversity jurisdiction by and large been good, it has served as a stimulus, and a needed one, to state law development.

Without diversity jurisdiction the federal courts might not have developed equity receivership to reorganize our railroads and national corporations. Without it, under *Swift v. Tyson,* many a rotten rule

39. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 602-03 *et seq.*

40. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 53 (1953).

of state law would have remained unchanged. Even under *Erie*, bad state law is criticized.

There may be some limitations we should place on diversity jurisdiction but if we are to develop as a nation, it would seem to me that far from destroying diversity jurisdiction we should broaden and extend it. National businesses need it. As Professor Herbert Peterfreund points out there is need for a broader diversity jurisdiction in cases of multiple corporations, as it is absurd to say that the torts of such a corporation are all committed by the domestic part.[40a]

Its historical foundation has been the subject of recent study by William Crosskey[41] and our National Ministry of Justice will want to examine the history as well as the practical operation of the jurisdiction down through the years. Definitely we need a National Ministry of Justice to study this whole subject so as to avoid crackpot diversity destruction.

DAMNATION FIFTEEN

Limitations Upon Service of Federal Court Process Are Too Narrow

Notably, except for interpleader, anti-trust, securities actions and a few others, process in federal court must be made within the state.

This results in great injustice.

How far and to what cases we should extend permission to serve outside the state deserves careful study.

Perhaps the way to handle the matter would be to have a general statute which permits service of process outside the state where the action involves acts committed in the state.

There could also be a special corporation section providing that in any action involving a corporation, process can be served outside the state on any director, officer or employee of the corporation whether now in the employ of the corporation or not, providing only the suit has been instituted in the federal court of the state of incorporation. This could be made even broader so as to include others who have dealt with the corporation at its domicile.

Action in the state by itself ought to furnish a constitutional basis for service of process outside the state by the state legislatures without burdening their secretaries of state as is done by the nonresident motorist acts.[42] But fortunately, we do not need to worry about the

40a. Peterfreund, *Federal Jurisdiction and Practice*, 1952 ANNUAL SURV. AM. L. 681, 681-82. Professor Peterfreund calls attention to the conflict between the First Circuit in Seavey v. Boston & Maine R.R., 197 F. 2d 485 (1st Cir. 1952) and Gavin v. Hudson & Manhattan R.R., 185 F. 2d 104 (3d Cir. 1950), 9 WASH. & LEE L. REV. 96 (1952).

41. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

42. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 589 *et seq.*

right of the federal government to serve process outside the state.[43]

Still another way to handle the matter is merely to provide that in such cases as the court in its discretion deems in the public interest, it can on application permit service of process outside the state. Theoretically I like this method best as the courts could then work out the problem case by case. But old lawyers don't change. And refusal to serve would have to be appealable.

Federal decisions that grant immunity from service of process are every which way and make no sense. They should be overhauled.[44]

Our National Ministry of Justice should study the matter and propose the needed changes.

DAMNATION SIXTEEN

Impleader is a Mess

I cannot begin to describe the difficulties we are having with impleader.[45]

Mitchell of Oregon sues Neff of California who when sued in Oregon federal court wants to implead Pennoyer of Oregon and Smith of California.

Will the impleader of Pennoyer destroy diversity?

Will the impleader of Smith give him a venue objection inasmuch as neither Neff nor Smith is an Oregonian?

How can process be served on Smith?

These are the vexing problems that have worried many a federal court and made federal impleader difficult and in many instances impossible.

What is desirable is that we have an impleader statute along the lines of the interpleader statute so as to permit impleader to accomplish its noble goal of trying as many matters as convenient in one suit instead of several without being hampered by outmoded concepts of jurisdiction, process and venue.

It is an important job for our National Ministry of Justice.

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43. See Robertson v. Railroad Labor Board, 268 U.S. 619, 622, 45 Sup. Ct. 621, 69 L. Ed. 1119 (1925). The *Robertson* case is discussed in Keeffe and Cotter, *Service of Process in Suits against Directors: A Barrier to Justice,* 27 CORNELL L.Q. 74, 78 (1941).

44. See the absurd hypothetical case put in Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 590. See also Keeffe and Roscia, *Immunity and Sentimentality,* 32 CORNELL L.Q. 471 (1947).

45. Fortunately the trouble with federal impleader and a suggested remedy have been detailed in a superlative article. See Landis and Landis, *Federal Impleader,* 34 CORNELL L.Q. 403 (1949). To date their call for reform remains unheeded and so it will until we get a National Ministry of Justice.

DAMNATION SEVENTEEN

A Trustee in Bankruptcy Cannot Obtain Service of Process Any Place in the United States in Preference and Fraudulent Transfer Cases. He Is Forced to Travel and Sue Where the Accused Resides

Although the point can be won by decision and I hope when it reaches it the Supreme Court will so decide, our National Ministry of Justice should provide by statute for the Trustee in Bankruptcy to sue any place in the United States. The need for this reform is very great. The trustee ought to be able to sue in the United States District Court of the bankrupt to set aside all his transfers and have the right to serve process any place and not be confined to the state. There is no sense in any other rule. The trustee is a court officer. If he sees fit to accuse a person of having received a avoidable preference or fraudulent transfer, the accused should come to the trustee. The trustee should not be forced to use the bankrupt's assets to travel to the accused.[46]

Our National Ministry of Justice would see to this, I am sure. Delay in accomplishing this urgently needed reform costs bankrupt estates thousands of dollars every year. Again we hurt business.

DAMNATION EIGHTEEN

An Action by Attachment Cannot be Instituted in Federal Court

From time immemorial we have not been able to start a lawsuit by attachment in federal court.

The reason?

There is none except that the federal court requires that there be a valid service of the process before an attachment can be had. Why, no one knows. But the rule is that attachment is ancillary to suit. But of course it is a rare case where you can both serve process and attach. Attachment is used most against nonresidents who cannot be served in the state but have assets there subject to levy. And it is a very important, beneficial remedy. There is no better example in all federal practice of a rule without a reason.

There are those, and I am one, who believe that under Federal Rule 64 you can now start an action by attachment in federal court; the law is against us on the point, however, and in the nature of things lawyers will not risk an attachment to raise the question. I don't blame them. It is doubtful that the Supreme Court will ever have a chance to pass on the point because no one will risk raising it.

46. After the decision in Williams v. Austrian, 331 U.S. 642, 67 Sup. Ct. 1443, 91 L. Ed. 1718 (1947), this reform was called for in vain in an unread and uncited and now molding piece. See Keeffe, Horey, Jolly and Conable, Jr., *Where There's a Will There's a Way: Some Reflections on Nation-Wide Service of Bankruptcy Process,* 33 CORNELL L.Q. 248 (1947).

The National Ministry of Justice should clear up the doubt and permit suits by attachment.[47]

DAMNATION NINETEEN

Federal Question Jurisdiction, Both Original and on Removal Is a Mess.

Anyone who has ever studied the bringing or removing of a federal question case has lived to regret it. The pitfalls are many. The technicalities, absurd and endless. It would seem very much in the public interest that a National Ministry of Justice study the field to see if legislation cannot be drafted to clarify and simplify the rules.[48]

DAMNATION TWENTY

Removal for Separable Controversy Is Virtually Impossible

As part of the revision of the Judicial Code, changes were made in the provision under which cases can be removed to federal court from state courts because of the existence of a separable controversy.[49]

Under the statute as amended removal for separable controversy seems virtually impossible.

This seems unwise and the statute ought to be revised so that it takes its old form.

The revisers were determined to destroy diversity jurisdiction and the changes in removal for separable controversy were part and parcel of that intent.

Whether diversity jurisdiction should be retained or destroyed is not pertinent to this removal statute. So long as we have diversity jurisdiction, it ought to be equally available to all and it seems unconscionable to allow a plaintiff to defeat a nonresident defendant's right to remove to federal court merely by joining a phony resident defendant, like a Pullman porter. Law should not lend itself to such tricks.

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47. See Note, 34 CORNELL L.Q. 103 (1948).

48. By far the finest attempt to make sense out of the welter of inconsistent cases is the unheeded study of Professor Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COL. L. REV. 157 (1953).

49. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 598 *et seq.* for a collection and discussion of the cases in light of § 1441(c) of the Judicial Code, and American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702 (1951) (destroys the liberal interpretation of the new section). See also Keeffe and Lacey, *The Separable Controvery—A Federal Concept*, 33 CORNELL L.Q. 261 (1947), which was written before § 1441(c) was enacted in 1948 and which pointed out the unwise language therein when the section was being drafted. Peterfreund stated in 1952 that comment on the *Finn* case "has been largely unfavorable". 1952 ANNUAL SURV. AM. L. 681, 685. Why not? The removing insurance company after losing on trial, appeals and gets a reversal because its own removal was improper! A few more decisions like this and Jeremy Bentham and W. S. Gilbert will return from their graves to liquidate all lawyers.

Our National Ministry needs to rid this statute of the 1948 changes and make it fair and clear.

DAMNATION TWENTY-ONE

There Is No Right to Appeal an Order Remanding a Case to State Court After Removal and Lawyers Do Not Have Enough Time to Remove

For reasons given with respect to the nonappealability of venue orders, I believe that it is highly desirable to relax the otherwise desirable federal rule that prevents appeals of intermediate orders, so as to permit a prompt appeal on the original papers of an order remanding a removed case to state court. If the district judge be in error, there is no chance to correct him after trial. His decision should not be final. Not only for justice between the parties but to obtain definitive decisions clarifying the rules we ought to permit appeal of the remand order in removal cases.

Also, the change in the 1948 Judicial Code compelling a lawyer to decide whether to remove within twenty days provides too short a time and will result in great injustice. This and other changes designed to prevent removal in my opinion are wrong.

Our National Ministry of Justice will do well to study this problem, consider the wisdom of permitting appeal, extending the time to remove, and the desirability of other changes in the removal procedure.[50]

DAMNATION TWENTY-TWO

The Rule That a Federal Court Will Apply the Statute of Limitations of the Forum Instead of the One Where the Wrong Took Place Is Unconstitutional and Unjust

When Mitchell of Oregon sues Neff of California in the United States District Court of the Northern District of California for a wrong committed in Oregon, under the present law the statute of limitations of the forum applies.

Unless it be corporate litigation, perhaps, no field of the law has had a poorer grade thinking than the law pertaining to the statute of limitations.

It seems to me all the so-called state borrowing statutes are unconstitutional.

Why should a California state court in the suit described, for instance, say that if Oregon has a shorter limitation that Mitchell is bound by it, but a California citizen is not?

50. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 593 *et seq.*, 613.

Obviously, if the wrong took place in Oregon and gives rise to a suit there under a one year limitation, the right to sue ought to end in one year not only for Mitchell as an Oregonian but also as a Californian or an Hindu.

Yet most of our states allow their residents an infinite time to sue nonresidents and the whole approach seems wrong, mutton-headed and unconstitutional.

By a very close vote the Supreme Court recently applied the limitation of the forum.[51] Justice Clark did not vote and meanwhile Chief Justice Warren has succeeded Vinson. Justices Jackson, Black and Minton believe as I do. If Clark and Warren were to join them, we might see this unjust rule overruled by decision. Here's hoping.

But the point has been a long time coming to the Court and rather than wait, our National Ministry of Justice should tackle the problem and change the rule by statute.[52]

DAMNATION TWENTY-THREE

The Decision in Klaxon v. Stentor Electric *Anchoring Federal Courts to the Substantive Law of the Forum in Conflicts Cases Rather Than the Place of the Wrong Is Bad Law*

In the *Klaxon*[53] case the Supreme Court applied the rule of *Erie R.R. v. Tompkins* to require a federal district court to follow the conflicts law of the forum rather than the law of the place of the transaction. A more absurd or unjust result cannot be imagined.

The law should be changed and it is a good job for our National Ministry of Justice to do.[54]

DAMNATION TWENTY-FOUR

The Rule that the Federal Court in Diversity Cases Must Follow the State Decisional Law of the Intermediate State Court in the Absence of a Ruling by the Highest State Court Is Clearly Wrong

If the Supreme Court deals with a state statute, it follows the interpretation given the statute by the state's highest court. In the

51. Wells v. Simonds Abrasive Co., 345 U.S. 514, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953).

52. See Keeffe, Thaler, Bernstein, Wright and Gillmer, *supra* note 36, at 575-81, where First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952), and Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951), are analyzed in the light of the full faith and credit clause of the Constitution and § 1738 of the Judicial Code. See also Austrian v. Williams, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952); Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. OF CHI. L. REV. 24 (1953).

53. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941).

54. See Keeffe, Gilhooley, Bailey and Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949); see also note 52 *supra*.

absence of such a decision, the Court feels free to interpret the statute itself. But when under the *Erie* rule the Court had a similar point of state decisional law, it decided that in the absence of a decision by the higher state courts, the federal courts were bound to follow the decision of a lower state court. This is bound to result in confusion because the state's highest court may not follow either the lower court's decisions or the federal court's. In the absence of a decision by the state's highest court, the federal district court should be free to determine the state decision law itself.[55]

Our National Ministry of Justice would see to this.

DAMNATION TWENTY-FIVE

The Erie Rule Is Unwise and Confusing

In my opinion the most unwise decision made in our generation by the Supreme Court of the United States was *Erie R.R. v. Tompkins.* It was decided with an improper view of the history of the Rules of Decision Act. The research of Warren that so influenced the Court and which was cited by Brandeis was gravely questioned by Justice Roberts at the time and most recently by William Crosskey. Decided in an effort to reduce federal litigation it has increased litigation as to its meaning and application. Under *Swift v. Tyson* the federal courts gave good example to the states which resulted in many a change for the good. Analysis of the cases cited by Felix Frankfurter in his *Cornell Law Quarterly* article relied on by Brandeis in his *Erie* opinion shows that in case after case, the states reversed themselves and followed the contrary but fair Supreme Court decision. Just recently Kentucky reversed itself to follow the much misrepresented *Black and White Taxicab*[56] decision of the Supreme Court. It was naive to believe that the Supreme Court of the United States would ever refuse to follow a state decision unless it believed the rule of law was unsound. Examination of the cases shows the power was wisely exercised by the Supreme Court and there were only about 1000 cases in over 150 years of *Swift v. Tyson* where general law was applied. *Erie R.R. v. Tompkins* has caused many thousands of unnecessary cases already. By state statute the states under

55. See notes 52 and 54 *supra.*

56. Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 48 Sup. Ct. 404, 72 L. Ed. 681 (1928). The Supreme Court refused to follow as unwise and unjust McConnell v. Pedigo, 92 Ky. 465, 18 S.W. 15 (1892). The *Pedigo* case was itself reversed in Yellow Cab Co. of Ashland v. Murphy, 243 S.W.2d 42 (Ky. 1951). In the *Murphy* case Stewart, J., remarked: "When we now re-examine the reasons this Court has advanced and stood by for almost sixty years for denying a railroad company the privilege of making an exclusive grant such as the one in question we are persuaded that neither logic or justice will sustain our doctrine. Admittedly, if a principle of law is fallacious and inequitable, it should be abandoned." *Id.* at 44. See "Weary Erie" *supra* note 54.

Swift v. Tyson, if they disliked a federal decision, were free to embalm their rule in a state statute which the federal courts were bound to follow, right or wrong, if constitutional. For this reason there was a desirable flexibility in *Swift v. Tyson* instead of the undesirable rigidity of *Erie* under which a federal court must follow an unjust state decision. It makes Charlie McCarthys of our federal judges.[57]

Nothing could be finer than to have the *Erie* case studied by our National Ministry of Justice. As Cardozo once pointed out it is a great advantage for the Ministry to observe a rule in its working over a period rather than on a case-by-case basis as the Court does. Never was any study more needed. If Brandeis had lived to see the confusion of *Erie,* he would have been the first to confess his error.

DAMNATION TWENTY-SIX

Judicial Notice the Country Over Is a Mess. We Ought to Have a National Statute to Clarify the Federal Rules and Aid the States.

Under the full faith and credit clause the Congress has the power to determine how the states shall judicially notice the laws of each other. It was long ago brilliantly suggested by Lawrence Hartwig[58] that the Congress should pass a judicial notice statute requiring each state to take judicial notice of the laws of each other. By a great mistake of Lord Ellenborough[59] foreign law has been treated as fact in our courts instead of the law it is and this has compounded the confusion. Most states have very unsatisfactory laws pertaining to judicial notice and it looks like a long wait before every state adopts the proposed uniform law of the National Commissioners on Uniform Laws. A national statute is therefore calculated to accomplish more and quickly.[60] This is a very great need but unless we have a National Ministry of Justice, it is a reform we are not likely to see in our generation.

DAMNATION TWENTY-SEVEN

Our Large Anti-Trust Cases Take Up Too Much Judicial Time

At the present time the Attorney General's committee consisting of S. Chesterfield Oppenheim and Stanley G. Barnes as co-chairmen and a distinguished group of economists and lawyers are engaged in a serious study of reform in anti-trust procedures. It is probable they will have siguificant suggestions for change, but that committee

57. See notes 41, 52, 54 *supra.*
58. Hartwig, *Congressional Enactment of Uniform Judicial Notice Act,* 40 MICH. L. REV. 174 (1941).
59. Bilbie v. Lumley, 2 East 469, 103 Eng. Rep. 448 (K.B. 1802).
60. See Keeffe, Landis, Jr. and Shaad, *Sense and Nonsense about Judicial Notice,* 2 STAN. L. REV. 664 (1950) (model statute proposed).

is an *ad hoc* affair. Here today; gone tomorrow. Our National Ministry of Justice is needed to keep the good work going and to follow up the fate of the suggestions made. There is great need to reduce the trial time of large anti-trust cases.[61] Some method ought to be devised that would more quickly decide[62] the basic questions presented by such cases without hearing so much evidence. In retrospect I am impressed with the simple law points so many of these big cases turn upon. The size of the records has been prodigous. No one could read all the stuff and it is a travesty on justice to have it printed into long court volumes that are never opened. The whole subject of less expensive court records needs study. With trial calendars badly behind these cases tie up a Judge for days on end.[63] We need the "new look" to deal with these cases.[64]

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61. "A few sample cases and the material involved are: the Hartford-Empire (glass container) case (46 F. Supp. 541, (N.D. Ohio 1942)), in which 3,300 exhibits were considered and 18,000 pages of record made; the *Libbey-Owens-Ford* (flat glass) case (Civil No. 5239, N.D. Ohio), in which 6,000 exhibits were proposed to be offered and 900 were eventually received; the *A. & P.* case (67 F. Sup. 626 (E.D. Ill. 1946)), which involved 7,000 exhibits and 45,000 pages of testimony; the *United Shoe Machinery* case (Civil No. 7198, Mass.), in which the Government offered 4,600 exhibits at one time; the *Alcoa* case (44 F. Supp. 97 (S.D.N.Y. 1941), 91 F. Supp. 333 (S.D.N.Y. 1950)) involved 15,000 pages of record; the *National Lead* case (63 F. Supp. 513 (S.D.N.Y. 1945)) 1,400 exhibits and 5,000 pages of record; there were 3,700 exhibits in the *Imperial Chemical Industries* case (Civil No. 24-13, S.D.N.Y.), and 10,600 were processed in the *Investment Bankers* case (Civil No. 43-757, S.D.N.Y.); in the *American Can Company* case (87 F. Supp. 18 (N.D. Cal. 1949)) 1,773 exhibits were offered, and in the *Food and Grocery Company* case (41 F. Supp. 884 (S.D. Cal. 1941), 43 F. Supp. 974 (S.D. Cal. 1942)) 1,407; *Ferguson v. Ford and Dearborn* (Civil No. 44-482, S.D.N.Y.) contains 27,000 exhibits and 70,000 pages of record." REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (1951).

But despite this, the travesty goes merrily on. The Investment Bankers case went over 6 years, the trial over 2½ years taking 309 court room days with a transcript between 5,000,000 and 6,000,000 words forcing Judge Medina to read 105,000 pages. Completed, the government did not appeal the dismissal. Something is odoriferous in Cophenhagen.

62. "The median time for antitrust cases in 1946-48 was about 22-23 months, whereas the median for all civil cases was about 9 months. But, in view of the complexity of these cases and the extent of the necessary preparation and preliminary proceedings, a median time of less than two years to judgment is not considered undue or subject to criticism." REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (1951). Another way to look at this is to say an anti-trust case takes about 2½ times as much time as a civil case.

63. "From 1890 to 1925 the average number of anti-trust cases instituted each year by the Government was about eight, and for the years 1938 through 1950 the average was about fifty. As of April, 1951, a total of 145 Government-instituted antitrust cases were pending in the District Courts." REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (1951). From recent public statements of the present Trust Buster, Stanley N. Barnes, the number of pending cases is about the same today.

64. "The principal factors causing unnecessary delay, volume and expense in these cases are (1) vagueness of the issues, (2) proffers of masses of unnecessary evidence, and (3) lack of organization of material and personnel. The principal available remedial means is the informal conference between judge and counsel prior to the trial." REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3-4 (1951). This suggested 1951 remedy of the Judicial Conference is really no remedy at all. And if anything, in 1954 there is a

Perhaps the National Ministry could use the atom bomb.

As we all know the delay and confusion is but part of anti-trust reform. Abuses in treble damage suits rival the former abuses in stockholders' suits and a bill is pending[65] to make the award of three-fold damages discretionary instead of obligatory. There are great inconsistencies in the laws, and in the basing point controversy we saw the Attorney-General taking one position and the Federal Trade Commission another.

The National Ministry could well devote the better part of a year to anti-trust reform alone.

DAMNATION TWENTY-EIGHT

It Is a National Disgrace That a United States Attorney Cannot Take Depositions in Criminal Cases

How a United States attorney can convict criminals with the legal handicaps under which he works is a mystery to me.

The worst obstacle he has is that his witnesses have to be alive and in the courtroom. Let the criminal bump off the witnesses and he goes free. The United States Attorney cannot take their testimony by deposition.

Such a limitation should not be.

We need a National Ministry of Justice to effect this reform which is years and years overdue.

DAMNATION TWENTY-NINE

The Rule Against Self-Incrimination Too Often Impedes Criminal Justice

The Fifth Amendment has been much in the press. Too much. Convictions because of it are very difficult. Its protection is illusory however. On arrest at the station house or in the office of the District Attorney, where is the privilege? Is the accused told to get a lawyer? Or is it the aim of every policeman and District Attorney to get a statement from the accused in writing before he hires a lawyer?

The truth is that where we need the privilege, at the station house and in the District Attorney's office an accused does not have it.

Where he has the court to protect him and the jury to hear him, in the courtroom he gets the privilege he does not then need and should not have.

Because we will not call an accused to the stand, we use stool

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more "acute major problem in the current administration of justice" and continued "unnecessary consumption of time and energy, delay and enormous expenditures of money." *Ibid.*

65. H.R. 4597, 83d Cong., 1st Sess. (1953).

pigeons. For his own evidence, the best, we substitute accomplice testimony, the worst.[66]

And when the case ends we do not even let the District Attorney comment about the failure of the accused to take the stand.

How silly and stupid can we be?

Wire-tapping should be permitted under court order as in New York and perhaps the current Congress will so provide.

Also a United States Attorney should be able to give immunity but the grant should be broad enough to protect against state prosecution as well as federal. Vice versa, if a state gives immunity, it should have effect in federal court.[67]

In a memorandum opinion in the *Rosenberg* case, Mr. Justice Frankfurter called attention to the fact that federal capital cases used to be appealable to the Supreme Court.[68] They are not many and it would seem desirable that such cases be heard in an unlimited appeal on the law and facts by the Supreme Court in the manner of the court of appeals in New York, direct from trial court.[69]

In any event it is a matter for the careful consideration of our Ministry of Justice. Otherwise the suggestion of Justice Frankfurter will go unheeded.

The American Bar Association has asked Mr. Justice Jackson to

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66. The maxim *nemo tenetur seipsum accusare* (no man is bound to accuse himself), Bentham tells us, is generally given in Latin because it has "its source rather in the affections than in the understanding, has more of rhetoric in it than of logic." 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 207 (1827). Bentham, severely critical of the rule, lists several pretences for the exclusion of such evidence: "the old sophism, the well-worn artifice, sometimes called *petitio principii* . . . the assumption of the propriety of the rule, as a proposition too plainly true to admit of dispute" (5 *id.* at 229); the "old woman's reason . . . 'tis hard upon a man to be obliged to criminate himself" (5 *id.* at 230); the "fox-hunter's reason . . . the idea of fairness . . . leave to run a certain length of way, for the express purpose of giving him a chance for escape" (5 *id.* at 238); "[c]onfounding interrogation with torture . . . the application of physical suffering . . . till testimony is given to a particular effect required" (5 *id.* at 240); and "[r]eference to unpopular institutions . . . the Court of Star-chamber . . . the High Commission Court . . . The Inquisition" (5 *id.* at 241). See also Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 CALIF. L. REV. 672 (1953). For evidence in the federal courts see FED. R. CIV. P. 43 and Note, *Federal Rule 43(A)—A Decadent Decade,* 34 CORNELL L.Q. 238 (1948). See also Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury,* 21 U. OF CHI. L. REV. 317 (1954); Paulsen, *The Fourteenth Amendment and the Third Degree,* 6 STAN. L. REV. 411 (1954).

67. See Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination,* 28 TULANE L. REV. 1 (1953) (*re* bills pending in 83d Congress). See also Adams v. Maryland, 347 U.S. 179, 74 Sup. Ct. 442 (1954), 7 VAND. L. REV. 000; Feldman v. United States, 332 U.S. 487, 64 Sup. Ct. 1082, 88 L. Ed. 1408 (1944).

68. Rosenberg v. United States, 344 U.S. 889, 73 Sup. Ct. 134, 97 L. Ed. 687 (1952).

69. Harper and Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term,* 102 U. OF PA. L. REV. 427 (1954).

make recommendations for criminal law reform, and we do have new criminal rules. And evidence generally needs reform.[70]

But there is need for constant study of these methods and the ideal body to push through the Congress the reforms urged by the Jackson Committee or the Advisory Rules Committee is our National Ministry of Justice, as it will be in daily contact with the Judiciary Committees of the House and Senate who make the laws.

In the words of Cardozo, let's gather up the driftwood and leave the waters pure.[71]

The one to do the gathering is the National Ministry of Justice.

70. See Keeffe, Brooks and Greer, *86 or 1100,* 32 CORNELL L.Q. 253 (1954).
71. Cardozo, *A Ministry of Justice,* 35 HARV. L. REV. 113 (1921).