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> Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 New Voices) 49 (2014).
>
> Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 J. In-Chambers Prac.) 19 (2016).
>
> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 5 Rapp no. 5 (1849) (Grier, J., in chambers), 1 J. In-Chambers Practice 282 (2016).

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• JOURNAL OF IN-CHAMBERS PRACTICE •

OPENING REMARKS

EVARTS ACT DAY

THE BIRTH OF THE U.S. CIRCUIT COURTS OF APPEALS

Ross E. Davies[†]

This installment of "Opening Remarks" is an odd example of the *Journal of Law*'s pursuit of its main mission – to be an incubator for "unconventional ideas."[1] Our publisher (the *Green Bag*) has stumbled upon an unconventional project of its own: printing legal scholarship on big pieces of paper. It is a convenient way to present some material – big maps, for example. But it is not so convenient for putting citeable scholarship on bookshelves (libraries, law offices, etc.) and in databases (Westlaw, HeinOnline, etc.). So, we are going to try to convert a "Single Sheet Classic" (that is what the *Green Bag* calls its big-sheet publications) into several smaller sheets, sequenced and bound in a law review. If this works well, the *Green Bag* might be able to attract "Single Sheet Classic" contributors other (and perhaps better) than its own staffers.

We have sliced the 18-by-25.5-inch Single Sheet Classic No. 4, *Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals*, into four parts:

First, on pages 252-253, an unreadably small reproduction of both sides of the original work, just to give you a sense of its shape and layout.

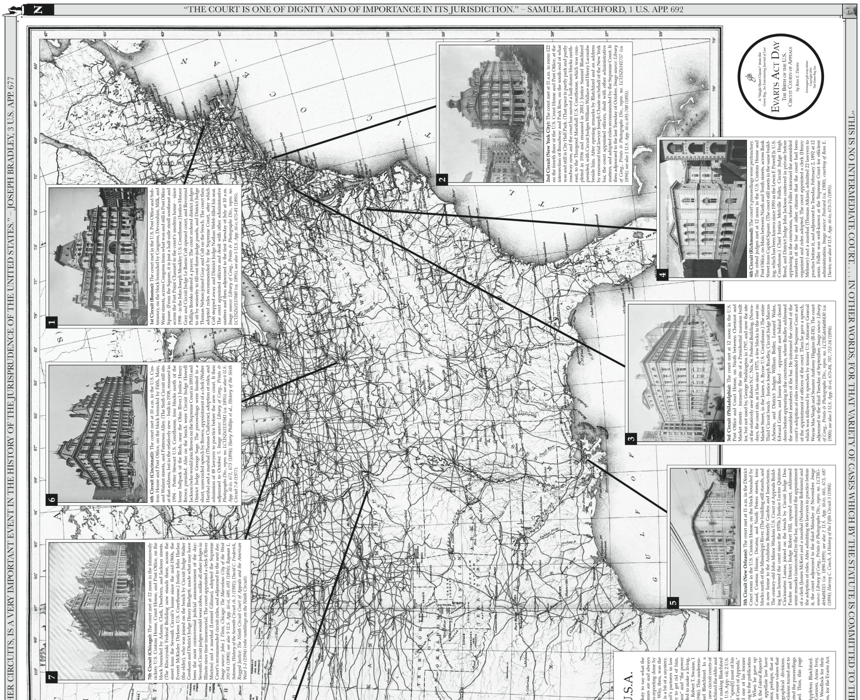
Second, on pages 254-256, the main block of text from the original, with slight revisions for easier reading in this regular law review format.

Third, on pages 257-266, the pictures (with captions) from the original, with slight revisions of the captions, again for easier reading in this format.

Fourth, on pages 267-273, the text on the back of the original: the complete Evarts Act of 1891, including the associated joint resolution.

[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] Ross E. Davies, *Like Water for Law Reviews: An Introduction to the Journal of Law*, 1 J.L. 1, 1 (2011).


"THE COURT IS ONE OF DIGNITY AND OF IMPORTANCE IN ITS JURISDICTION." – SAMUEL BLATCHFORD, 1 U.S. APP. 692
"THIS IS NO INTERMEDIATE COURT . . . IN OTHER WORDS, FOR THAT VARIETY OF CASES WHICH BY THE STATUTE IS COMMITTED TO THIS COURT THIS IS THE SUPREME COURT OF THE UNITED STATES" – DAVID BREWER, 4 U.S. APP. 699
"THUS WILL BE EFFECTED A GREAT IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE." – STEPHEN FIELD, 7 U.S. APP 682
"IT MUST BE CONCEDED THAT THE ORGANIZATION OF THIS COURT, AND SIMILAR COURTS IN THE OTHER CIRCUITS, IS A VERY IMPORTANT EVENT IN THE HISTORY OF THE JURISPRUDENCE OF THE UNITED STATES." – JOSEPH BRADLEY, 3 U.S. APP. 677
June 16, 1891: A Bright New Day for Appellate Litigation Across the U.S.A.
UNITED STATES NINTH CIRCUIT COURT OF APPEALS

CHAP. 517. — An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have. Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court. The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. Sec. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: Provided, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts[.] Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same. Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases. Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States citizens or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws as in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed. Sec. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal. Sec. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States. Sec. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, however, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts. Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ or error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination. Sec. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided[,] however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively. Sec. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States. Sec. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act. Sec. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed. Sec. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits. Approved, March 3, 1891. Joint Resolution to provide for the organization of the circuit courts of appeals. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: And be it further resolved, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one. Approved, March 3, 1891. [26 Statutes at Large 826-830 & 1115-1116]

JUNE 16, 1891: A BRIGHT NEW DAY FOR APPELLATE LITIGATION ACROSS THE U.S.A.

The Evarts Act[2] altered the federal courts more extensively than any statute since the Judiciary Act of 1789,[3] which set up the Supreme Court and the subordinate federal courts. The new law created an intermediate federal appellate court system (the circuit courts of appeals profiled here) and rejiggered the relationships and jurisdictions of the various parts of the new system. For full details, see pages 267-273 below, where the entire Evarts Act is reproduced.

The new law was also amusingly defective – seemingly dead on arrival. Enacted on March 3, 1891, it declared: "The first terms of said [new] courts shall be held on the second Monday in January, eighteen hundred and ninety-one." The deadline for opening the new courts was in the past before the act creating them was passed. Congress's recovery from this stumble provides a nice example of how easy it is – as a technical matter, at least – for federal legislators to fix their own mistakes. Later in the day on March 3, it passed a joint resolution moving the circuit courts' opening day to

> the third Tuesday in June, A.D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct.[4]

(You can find that gem on page 273 below as well.)

In truth, Congress probably could have ignored the dating defect and relied on the Supreme Court to interpret away the error. After all, the Justices serving in 1891 were the same crowd that would interpret the Alien Contract Labor Law[5] in Church of the *Holy Trinity v. United States*,[6] to comport with Congress's spirit, rather than its words. And if anyone

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[2] 26 Stat. 826.
[3] 1 Stat. 73.
[4] 26 Stat. 1115.
[5] 23 Stat. 332.
[6] 143 U.S. 457 (1892).

wanted the Evarts Act more than Congress did, it was the Supreme Court, for obvious reasons: it meant less work for the Justices and speedier justice for the citizenry.

During their first century as a nation, the people of the United States had multiplied, and so had their conflicts and transgressions, and therefore so had the dockets of their courts. Justice Stephen Field explained the Act crisply in his address to the crowd attending the opening of the U.S. Circuit Court of Appeals for the Ninth Circuit on June 16, 1891 (he and the other eight members of the Supreme Court did in fact manage to open all nine of the new courts on the third Tuesday in June):

> Its object is to relieve the Supreme Court of the United States from the vast accumulation of business which now crowds its docket, and at the same time to bring nearer to suitors the judicial force required for the disposition of a portion of such business. . . . The present increase of cases has arisen from the changed condition of the country, of its commerce, of its industries, and of the habits of its people. . . . So it has happened that the court has not been able to keep up with its constantly increasing business. The delays thus ensuing have often amounted to a denial of justice.[7]

Field's explanation for the Evarts Act also explains the choice of map for the backdrop of the original "Single Sheet Classic" version of this paper. (It is visible in miniature on page 252 above.) It is a map of "Railroad Systems of the United States: 1890," as reported in the Department of the Interior's *Statistical Analysis of the United States, Based Upon Results of the Eleventh Census*.[8] The density and reach of the rail networks in 1890 provide a nice visual metaphor for the density and pervasiveness of litigation in the United States in 1891. It is also a nice reminder of the logistics, and time and distance, involved in riding circuit by riding the rails in those days – a burden the Act lifted from the Justices.

Finally, a word about citations. Why are the footnotes in this paper infested with references to "U.S. App."? Because they direct readers to the official (yes, official) volumes of reports of decisions of the federal courts of appeals: the *United States Courts of Appeals Reports*. Those books are unknown to many modern lawyers, maybe because (1) "U.S. App." is not

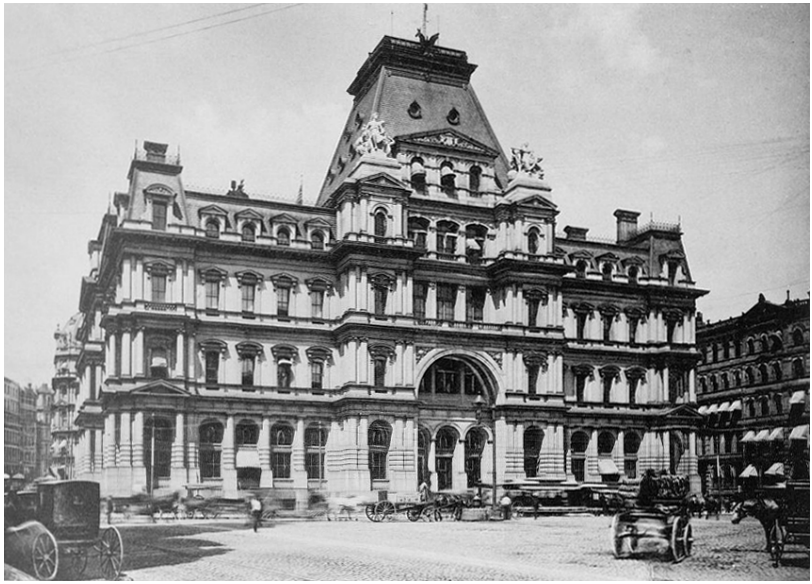
[7] 7 U.S. App. 679, 680, 681.
[8] 1898.

listed in *The Bluebook* – the citation tool on which future judges and their law clerks have long been trained – and therefore the set of reports to which "U.S. App." points does not exist in the consciousness of today's judiciary (have the courts inadvertently delegated to the editors of *The Bluebook* the duty to say what the citeable law is?); and (2) the "U.S. App." volumes are and always were unnecessary duplications of the decision-reporting done by West Publishing in its *Federal Reporter* series. Why, then, was the "U.S. App." series started in the first place?

It is a bit of a mystery. But consider this. Samuel Appleton Blatchford's partners in law practice dissolved their firm in 1885 in order to get rid of him, because he was short on both "business acumen" and "the power of cold legal analysis." Of course, he still needed to make a living, but he had only "modest" success on his own.[9] This underemployed lawyer was the son of Justice Samuel Blatchford. In a striking series of coincidences, each of the nine new circuit courts of appeals, operating under the leadership of Blatchford the elder and his Supreme Court colleagues, issued an order making Blatchford the younger its official reporter of decisions.[10] Thereafter, the junior Blatchford "spen[t] most of his time as a Reporter for the United States Circuit Court of Appeals," and apparently prospered. He even retained one of his former partners to represent him in negotiations relating to the publication of his "U.S. App." volumes.[11] When he gave up reporting in 1899, the "U.S. App." series ended, the *Federal Reporter* occupied the field, and lawyers and federal appellate law have gotten along just fine ever since. A nice indicator, perhaps, that at the highest levels of national leadership there are some values that transcend constitutional, political, and geographical divisions. Nevertheless, junior's work as a reporter of decisions turned out to be useful in one respect. He, unlike West, reported the proceedings at which the courts of appeals were launched. Thus, this paper could not have been produced without him.

So, thank you for your service, Samuel Appleton Blatchford. Thanks also to Cattleya Concepcion, Curtis Gannon, Anna Ivey, Robert A. James, Sarah Nash, and Douglas P. Woodlock for their judicious flyspecking. And thank you, Congress, for the Evarts Act.

[9] Robert T. Swaine, 1 The Cravath Firm and Its Predecessors 366-368 (1946).
[10] 1 U.S. App. vii; 2 U.S. App. viii; etc.
[11] Swaine at 368.



The U.S. Post Office and Sub-treasury, Boston, Massachusetts. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ62137040 (ca. 1895).

FIRST CIRCUIT (BOSTON)

The court met in the U.S. Post Office and Sub-treasury, on the block bounded by Congress, Devonshire, Milk, and Water streets, across Congress from what was and still is Post Office Square. (From the Square, it is just a half-mile stroll southeast and across the Fort Point Channel to the court's modern home – since 1998 – in the John Joseph Moakley U.S. Courthouse.)

Justice Horace Gray and Circuit Judge Le Baron Colt opened court, and Reverend Phillips Brooks offered a prayer. The court ordered district judges to sit by seniority to fill-out three-judge panels, and District Judge Thomas Nelson joined Gray and Colt on the bench. The court then adopted rules recommended by the Supreme Court, after which Colt stepped away and District Judge Nathan Webb filled his seat. The court appointed officers and dealt with other administrative matters and then adjourned to the first Tuesday of July at 10 a.m.[12]

[12] See 5 U.S. App. iii-v, 675-81 (1895).

The U.S. Court House and Post Office, New York, New York. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ6241757 (ca. 1894).

SECOND CIRCUIT (NEW YORK)

The court met at 11 a.m. in room 122 on the fourth floor of the U.S. Court House and Post Office, at the intersection of Broadway and Park Row, on the south end of what was and still is City Hall Park. (That space is partly park and partly roadway now, and the court has moved a half-dozen blocks northeast, to the Thurgood Marshall U.S. Courthouse, which was completed in 1936 and renamed in 2001.)

Justice Samuel Blatchford presided, with Circuit Judges William Wallace and Henry Lacombe beside him. After opening remarks by Blatchford and an address by renowned trial lawyer Joseph Choate on behalf of the New York bar, the court appointed officers, dealt with other administrative matters, and adopted rules recommended by the Supreme Court. It then adjourned to the last Tuesday of October.[13]

[13] See 1 U.S. App. iii-v, 691-700 (1893).

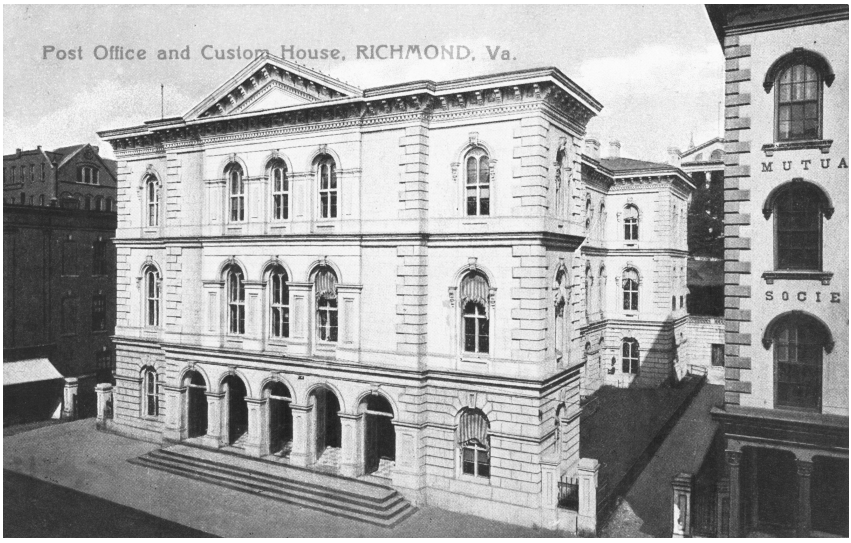
U.S. Post Office and Court House, Philadelphia, Pennsylvania. Source: Library of Congress, Prints & Photographs Division, repro. no. LCDIGdet4a08430 (ca. 1900).

THIRD CIRCUIT (PHILADELPHIA)

The court met at 12 noon in the U.S. Post Office and Court House, on Ninth between Chestnut and Market streets – formerly the site of a Presidential mansion built for, but not used by, George Washington in 1797, and now the site of the relatively new Robert N.C. Nix, Sr. Federal Building. (Nowadays, the court sits, as it has since 1975, a few blocks to the east on Market Street, in the James A. Byrne U.S. Courthouse.)

The entire Third Circuit bench – Justice Joseph Bradley, Circuit Judge Marcus Acheson, and District Judges William Butler, Leonard Wales, Edward Green, and James Reed – apparently met behind closed doors before appearing in the courtroom, where Bradley addressed the assembled members of the bar. He informed the crowd of the court's adoption of rules recommended by the Supreme Court and of the appointment of officers of the court. Then he gave a speech, which was followed by speeches by former U.S. Attorney General Wayne MacVeagh and Senator Anthony Higgins (R-DE). The court adjourned to the third Tuesday of September.[14]

[14] See 3 U.S. App. iii-vi, 675-84, 707, 722-24 (1894).



The U.S. Custom House and Post Office, Richmond, Virginia. Source: Postcard (ca. 1900), courtesy of Ross E. Davies.

FOURTH CIRCUIT (RICHMOND)

The court's proceedings were perfunctory. The robed judges met at 12 noon in the U.S. Custom House and Post Office, on Main between Ninth and Tenth streets, across Bank Street from Capitol Square. (The court still meets in the same building, which has been known since 1993 as the Lewis F. Powell Jr. U.S. Courthouse.)

Chief Justice Melville Fuller, Circuit Judge Hugh Bond, and District Judge John Jackson conferred in private before appearing in the courtroom, where Fuller informed the assembled members of the bar and other citizens that the court had been organized and rules adopted. The court appointed a clerk (Henry Meloney) and a marshal (Thomas Atkins), admitted 22 lawyers to practice before it, and adjourned to Tuesday, February 2, 1892 at 12 noon.[15] Fuller was well-known at the Supreme Court for efficient administration.

[15] See 8 U.S. App. iii-iv, 673-75 (1895).

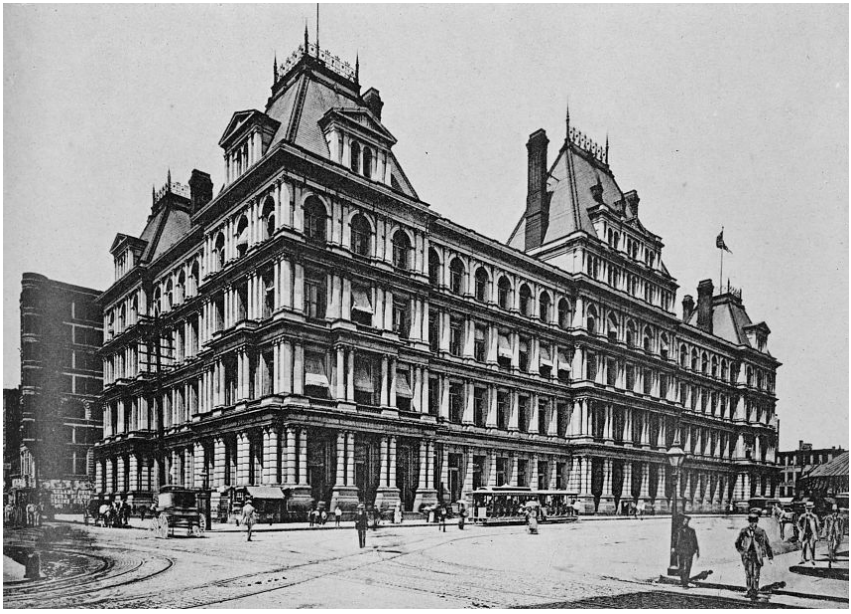
The U.S. Custom House, New Orleans, Louisiana. Source: Library of Congress, Prints & Photographs Division, repro. no. LCDIGdet4a04315 (ca. 1890-1899).

FIFTH CIRCUIT (NEW ORLEANS)

The court met at 11 a.m. in the District Court room in the U.S. Custom House, on the block bounded by Canal, Custom House, Decatur, and North Peters streets, four blocks north of the Mississippi River. (The building still stands, and is now home to the Audubon Butterfly Garden and Insectarium. The century-old John Minor Wisdom U.S. Court of Appeals Building has housed the court since the 1970s.)

Justice Lucius Quintus Cincinnatus Lamar, joined on the bench by Circuit Judge Don Pardee and District Judge Robert Hill, opened court, addressed some remarks (unrecorded) to the bar, announced the appointment of a clerk (James McKee) and a marshal (Norborne Robinson) and the adoption of rules. After admitting 66 lawyers to practice before it, the court adjourned to the third Monday of November.[16]

[16] See 2 U.S. App. iii-iv, 665, 673, 687 (1894); Harvey C. Couch, A History of the Fifth Circuit 3 (1984).



The U.S. Custom House and Post Office, Cincinnati, Ohio. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ62137041 (ca. 1895).

SIXTH CIRCUIT (CINCINNATI)

The court met at 10 a.m. in the U.S. Custom House and Post Office, on the block bounded by Fifth, Main, and Walnut streets, and Patterson Alley. (The Sixth Circuit still sits at that address, but in the relatively new – built in 1938, renamed in 1994 – Potter Stewart U.S. Courthouse, four blocks north of the home ballpark of the Reds, near the Ohio River.)

Justice Henry Brown presided. Also on the bench were Circuit Judge Howell Jackson (who would join Brown on the Supreme Court in 1893) and District Judge George Sage. The proceedings were limited to a short, unrecorded speech by Brown, appointment of a clerk (Walter Harsha) and a marshal (Thomas Claiborne), adoption of rules, and admission of 48 lawyers to practice before the new court. It then adjourned to October 5.[17]

[17] See 6 U.S. App. iii-iv, 671, 673 (1894); Harry Phillips et al., History of the Sixth Circuit 7-8 (1977).

The U.S. Custom House, Court House, and Post Office, Chicago, Illinois. Source: John J. Flinn, Chicago: The Marvelous City of the West 292-93 (1890).

SEVENTH CIRCUIT (CHICAGO)

The court met at 12 noon in the infamously rickety U.S. Custom House, Court House, and Post Office, on the block bounded by Adams, Clark, Dearborn, and Jackson streets. (The Kluczynski Federal Building now stands there, across the street from the Seventh Circuit's home since the mid-1960s, the Everett McKinley Dirksen U.S. Courthouse.)

Justice John Harlan (the elder), who was joined on the bench by Circuit Judge Walter Gresham and District Judge Henry Blodgett, made what may have been the most controversial judicial announcement of the day: Seventh Circuit judges would wear robes, unlike all other judges in Illinois since time immemorial. The court appointed a clerk (Oliver Morton) and a marshal (Lemuel Gilman), adopted the Supreme Court's recommended circuit rules, and adjourned to the next day.[18]

[18] See 9 U.S. App. iii-vi, 689, 691 (1894); Rayman L. Solomon, History of the Seventh Circuit ch. 2 (1981); David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West 1-2 (1994) (robe rumblings on the Ninth Circuit).

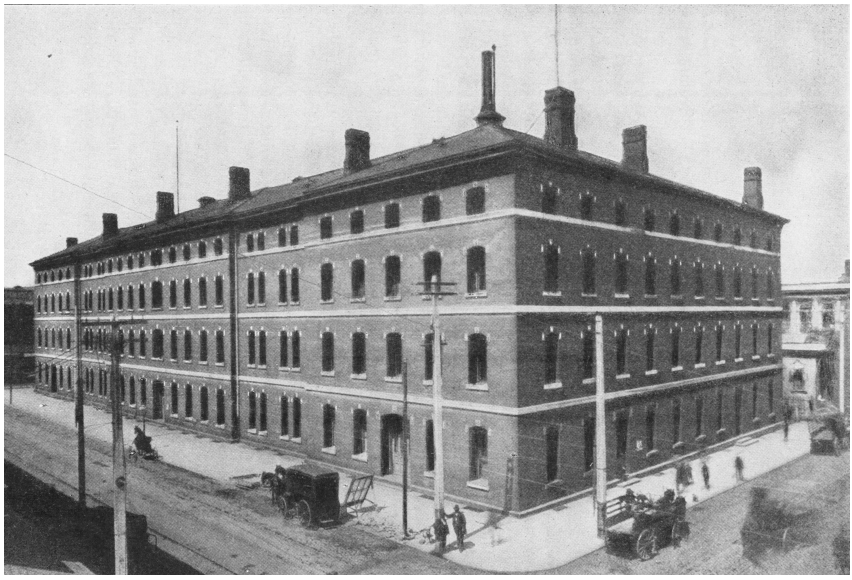
The U.S. Custom House and Post Office, St. Louis, Missouri. Source: A History of Public Buildings Under the Control of the Treasury Department 346-47 (1901).

EIGHTH CIRCUIT (ST. LOUIS)

The court met at 11 a.m. in the Custom House and Post Office, on the block bounded by Eighth, Ninth, Locust, and Olive streets, eight blocks east of the Mississippi River. (The building, which is now in private hands, counts the Missouri Court of Appeals, Eastern District, among its tenants. The Eighth Circuit now sits five blocks to the south, in the Thomas F. Eagleton U.S. Courthouse, as it has since 2000.)

Justice David Brewer presided, with Circuit Judge Henry Caldwell beside him. Arthur Selby, clerk of the Circuit Court of the U.S. for the Eastern Division of the Eastern District of Missouri, served as crier pro tem: "The Honorable Circuit Court of Appeals of the Eighth United States Judicial Circuit has now convened for the purpose of organization." The court

appointed a clerk (John Jordan), a marshal (William Hodges), and three bailiffs (John Bertram, Walter Atkinson, and George Hazlett), and designated District Judge Amos Thayer to join the panel (which he did). Brewer then delivered a long speech to a crowd consisting of "a large number of prominent members of the St. Louis bar, and other well known men, together with a number of ladies." After a recess, the court heard argument on a motion for leave to file a transcript of record. Brewer announced the decision to grant the motion. The court then adjourned until the next day.[19]



The U.S. Appraisers' Stores building, San Francisco, California. Source: A History of Public Buildings Under the Control of the Treasury Department 38-39 (1901).

NINTH CIRCUIT (SAN FRANCISCO)

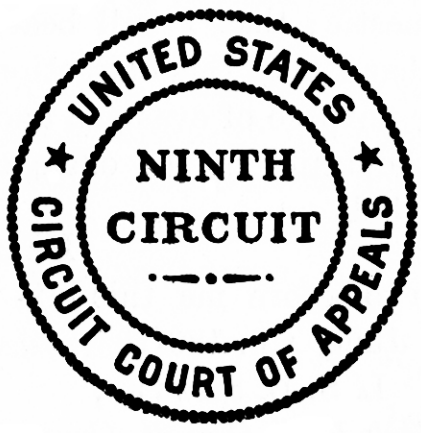
The court met in the Northern District of California's courtroom in the Appraisers' Stores building, on Sansome Street between Jackson and Washington streets. (A newer building for Appraisers, and Immigration officials, now stands there, about 1.5 miles northwest of the impressively

[19] See 4 U.S. App. iii-v, 697-708 (1893); Atchison, Topeka & Santa Fé Railroad Company v. Wilson, 4 U.S. App. 703 (1891).

durable James R. Browning U.S. Court of Appeals Building – completed in 1905, renamed in 2005 – where the Ninth Circuit now sits.)

Justice Stephen Field presided, with Circuit Judge Lorenzo Sawyer also on the bench. Field opened the proceedings with a short speech to a crowd that included many prominent members of the bar. The court appointed a clerk (Frank Monckton), adopted a seal, and postponed other business pending the arrival of District Judge Matthew Deady to fill (by designation) the third seat on the bench. (The seal, which is reproduced elsewhere on this page, was just like the seals adopted by the other circuit courts, except that each featured a different ordinal number, of course.)

Notably – given his historical identity as a domineering, even arbitrary, judge – Field proceeded to solicit advice: he "stated that the court would be glad to hear any suggestions from members of the bar respecting the rules which the Justices of the Supreme Court had recommended should be adopted by the various Circuit Courts of Appeals." Edward Taylor, a leading local lawyer and future mayor of San Francisco, delivered some friendly remarks about the court, after which it adjourned to June 22 at 11 a.m.[20]



Seal of the U.S. Court of Appeals for the Ninth Circuit.
Source: 7 U.S. Courts of Appeals Reports 716 (1894).

[20] See 7 U.S. App. iii-v, 679-83, 713-16 (1894).

THE EVARTS ACT

26 Statutes at Large 826-830 & 1115-1116
(March 3, 1891)

CHAP. 517. – An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts[.]

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise,

from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States citizens or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws as in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that

court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however*, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

SEC. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ or error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided[,] however*, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such ap-

peals and writs of error, and any judge of the circuit courts of appeals, in respect of cases to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SEC. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.

[No. 17] Joint Resolution to provide for the organization of the circuit courts of appeals.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present

session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: *And be it further resolved*, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one.

Approved, March 3, 1891.

THE JOURNAL OF IN-CHAMBERS PRACTICE

INCLUDING RAPP'S REPORTS

VOLUME ONE — NUMBER TWO
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• Article •

• Rapp's Reports •

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INTRODUCTION

THE CONTINUING SEARCH

Ira Brad Matetsky[†]

It is now almost two decades since Cynthia Rapp began collecting the in-chambers opinions (ICOs) by the Justices of the Supreme Court of the United States, and about 15 years since Ross Davies made the collection available to lower courts, law libraries, practitioners, and the general public. To date, the *In Chambers Opinions* series and its periodic supplements – now continued in *The Journal of Law* under the designation of *Rapp's Reports* – have comprised 525 opinions. Copies of these opinions have been located in a variety of sources, but the most common locations have been the files of the Supreme Court itself, the Records of the Supreme Court held at the National Archives, and the personal papers of individual justices in the Library of Congress and other repositories throughout the country.[1]

The issue of *Rapp's Reports* that comprises this issue of the *Journal of In-Chambers Practice* includes six more opinions. The first of these was authored by Justice Robert Grier in 1849 and addressed an application for injunctive relief in the *Wheeling Bridge* case. The editors are indebted to John D. Gordan, III, a member of the New York Bar and a trustee emeritus of the Supreme Court Historical Society, for bringing this historically significant opinion to our attention and sharing a copy of the now-rare pamphlet reprinting the opinion with us.[2]

[†] Partner, Ganfer & Shore, LLP, New York, N.Y.

[1] *See* Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp supp. 2 at vi, xiv-xix (2005) (discussing the most common locations where previously published in-chambers opinions can be found).

[2] For a detailed treatment of the *Wheeling Bridge Case*, see ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY (Northeastern University Press 1992). For an earlier treatment, see James Morton Callahan, *Semi-Centennial History of West Virginia*, App. A (1913), *available at* www.ohiocountylibrary.org/wheeling-history/5279. For some non-legal background, see Francis W. Nash, "A Glance at the Wheeling Bridge Case," *availa-*

The other five offerings in this issue are short twentieth-century in-chambers opinions – two each by Justices Harlan Fiske Stone and Felix Frankfurter and one by Justice Stanley Reed – located in the editors' searches through the libraries and archives. These are all relatively brief opinions and some are in the form of letters or orders, though containing enough reasoning for the justices' decisions to warrant inclusion in these reports. None were published in any form when they were issued or disseminated to anyone other than the parties or their counsel. In two of these opinions (*Solovay* and *Murphy*), the circuit justice denied applications for leave to appeal, under a now-obsolete aspect of Supreme Court practice, on the ground that no constitutional or other federal question had been presented below. In two others (*Brotherhood of Locomotive Firemen* and *U.S. Overseas Airlines*), the justice denied applications for stays of lower-court rulings pending the Supreme Court's consideration of certiorari petitions. In the fifth opinion, Justice Frankfurter reiterated his aversion to extending the statutory period for filing a certiorari petition.[3]

The editors' search for ICOs that have not previously been published – or at least have not been reprinted since their original publication long ago – is ongoing. But within the next year or so, the editors will finish searching through the most likely locations for newfound ICOs. We increasingly rely on our readers – academics, practitioners, court personnel, lawbook collectors, or anyone else who can understand the thrill of this particular hunt[4] – to bring us opinions they are aware of, or potential leads to such opinions. All are invited to thumb through their old law books and files and correspondence with an eye to turning up ICOs that the world ought

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ble at georgetownsteamboats.com/gs/2010/02/06/a-glance-at-the-wheeling-bridge-case/. Allegations that Justice Grier acted improperly during this litigation (he was exonerated by the House Judiciary Committee) are discussed in Daniel J. Wisniewski, *Heating Up a Case Gone Cold: Revisiting the Charges of Bribery and Official Misconduct Made Against Supreme Court Justice Robert Cooper Grier in 1854-55*, 38 J. Sup. Ct. Hist. 1 (Spring 2013).

[3] *See also, e.g., Brody v. United States*, 1 Rapp 198 (1957) (Frankfurter, J., in chambers) (granting only two-day extension); *Carter v. United States*, 1 Rapp 142 (1955) (Frankfurter, J., in chambers) (denying extension); *Mackay v. Boyd*, 4 Rapp 1841 (1955) (Frankfurter, J., in chambers) (denying extension); *Goldman v. Fogarty*, 1 Rapp 123 (1954) (Frankfurter, J., in chambers) (denying extension); *McHugh v. Massachusetts*, 5 Rapp No. 2, 1 J. In-Chambers Practice 40, 36 A.B.A. J. 899 (Frankfurter, J., in chambers) (1950) (granting less than 15 days of requested extension).

[4] *Cf.* Arthur Conan Doyle, "The Adventure of the Bruce-Partington Plans" (1908), *reprinted in* HIS LAST BOW: SOME LATER REMINISCENCES OF SHERLOCK HOLMES (1917) ("I play the game for the game's own sake.").

to know about, or at least have access to when the need arises. If you discover an ICO or a reference to an ICO – or a writing that might reasonably be characterized as an ICO – please let us know.

We also welcome leads to sources on the procedures and practices used for in-chambers applications in bygone days, which were enormously different from those in use today – a topic that will be the subject of a forthcoming issue of this *Journal*. The editors can be reached by e-mailing imatetsky@ganfershore.com.

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

5 Rapp no. 5 (1849)

THE STATE OF PENNSYLVANIA V. THE WHEELING AND BELMONT BRIDGE COMPANY, AND OTHERS

HEADNOTE

by Ross E. Davies

Source: Private pamphlet, Philadelphia, Pa., 1849.

Opinion by: Robert Cooper Grier (stated in source).

Opinion date: August 16, 1849 (stated in source).

Citation: Pennsylvania v. Wheeling & Belmont Bridge Co., 5 Rapp no. 5 (1849) (Grier, J., in chambers), 1 J. In-Chambers Practice 282 (2016).

Additional information: This opinion, together with the arguments of counsel and some exhibits, was privately published in a pamphlet in Philadelphia in 1849 and is reproduced in its entirety here. We are grateful to John D. Gordan, III of New York City for bringing this opinion to our attention and sharing his copy with us. The first page of the pamphlet is a cover of a sort, with the caption in large and elaborate type, and a set of headnotes in small type. This is followed by a lengthy report by an unnamed reporter that includes the posture of the case, arguments of counsel – by two pillars of the bar, Edwin M. Stanton for Pennsylvania and John Cadwalader (a name sometimes also spelled "Cadwallader," as it is in this report) for the Wheeling and Belmont Bridge Co. – and a variety of documents (or excerpts of them) relating to the case. The pamphlet concludes with Justice Grier's opinion, which opens with headnotes worded slightly significantly from those on the cover. *See* ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY 50-55 & 196 n.65 (Northeastern University Press 1992); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 4 Rapp 1565 (1854) (Grier, J., in chambers). For ease of reading, some typograph-

ical flourishes and other design features of the pamphlet not related to the content of the reported materials have not been re-created here.

OPINION

In the Supreme Court of the United States, in vacation.

THE STATE OF PENNSYLVANIA

vs.

THE WHEELING AND BELMONT BRIDGE COMPANY AND OTHERS.

Motion for Injunction before Mr. Justice Grier.

On the sixteenth of August, at the Court Room of the Circuit Court of the United States, in the City of Philadelphia, before Mr. Justice Grier, one of the Judges of the Supreme Court of the United States, Mr. Stanton appeared to move for an injunction in behalf of the State of Pennsylvania, at the instance of her Attorney General, against the Wheeling and Belmont Bridge Company, and their agents, William Ottison and George Crofts.

Notice of the motion was given on the 28th of July. At the same time a copy of the Bill was served upon the defendants. The Bill stated, among other things, –

"That the Ohio river being one of the navigable waters leading into the Mississippi, is, and for a long time hath been, an ancient navigable public river, and common highway, free to be navigated by the citizens of the state of Pennsylvania, as well as by all other citizens of the United States. That heading at Pittsburgh, in the state of Pennsylvania, and running through that state for the distance of fifty miles, navigable for its whole extent from Pittsburgh to its mouth, many citizens of that state long have been, and of right were, and still are accustomed to navigate said river, to pass and repass along its course and channel unobstructed, and at pleasure, with their steamboats transporting passengers in great numbers, carrying large quantities of freight, and conducting a valuable trade and commerce between the city of Pittsburgh, in the state of Pennsylvania, and the ports of Cincinnati, Louisville, St. Louis, New Orleans, and many other places on the Ohio and Mississippi rivers and their branches.

"That the defendants are erecting a bridge one hundred miles below Pittsburgh, across the channel of the Ohio river, between Zane's island

and the main Virginia shore or bank at Wheeling. That this bridge will hinder and prevent the passage of citizens of the state of Pennsylvania along said river under said bridge, with their steamboats, as they are commonly accustomed to do, and will obstruct navigation of the Ohio river. That it will interrupt, hinder, and disturb the citizens of the state of Pennsylvania in their lawful use and enjoyment of the Ohio river as a common highway in passing and repassing the same, will increase the difficulty, hazard, and expense of navigating it with their steamboats carrying passengers and freight as they have been accustomed, and are now doing, and have right to do; and will interrupt, diminish, and greatly disturb the trade, commerce, and business of the citizens of Pennsylvania over and upon said river, and between the city of Pittsburgh, and other ports on the Ohio and Mississippi rivers and their branches; to the great damage and common nuisance of the citizens of Pennsylvania, as well as of other citizens of the United States, and to their irreparable injury."

It also stated that the bridge was erected under colour of an Act of the Virginia General Assembly, which provides, "If the said bridge, mentioned in the eight section of this act, shall be so erected as to obstruct the navigation of the Ohio river in the usual manner, by such steamboats and other crafts, as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance and abated accordingly." That steamboats were accustomed to navigate the river requiring a space of eighty feet above the water surface, and that the flood of 1832 was 44½ feet above low water level, usual spring floods being 35 feet, and that the bridge was to be only 93½ feet above low water level at its eastern end, and 62 feet at the west end.

It was also stated, by way of amendment, that the State of Pennsylvania owned and possessed certain valuable public improvements of canals and railways for the transportation of passengers and goods, constructed at great expense, for channels of commerce, to connect the waters of the Delaware river with the Ohio at Pittsburgh, and the waters of Lake Erie with the Ohio at Beaver. That from the transportation of passengers and goods along these works, she was accustomed to receive large tolls and revenue. That these works terminated at and are constructed with direct

reference to the free navigation of the Ohio river. That the goods and passengers transported to and from those ports upon her improvements, were accustomed to arrive and depart in steamboats along the Ohio river; and that the Wheeling Bridge would so obstruct navigation of the river as to cut off the trade and business along the public works of Pennsylvania, impair and diminish her tolls and revenue, and render her improvements useless.

The bill prayed injunction and general relief.

With the bill were filed exhibits, viz.:

1. The Act of incorporation by the General Assembly of Virginia, under which defendants claim right to erect the bridge.

The charter contains this clause.

"If the said bridge mentioned in the eight section of this act, shall be so erected as to obstruct the navigation of the Ohio river in the usual manner by such steamboats, and other crafts as are now commonly accustomed to navigate the same *when the river shall be as high as the highest floods heretofore known*, then unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance and abated accordingly. [Editor's note: There should be quotation marks here.]

2. A Report of the engineer of the Bridge Company.

According to this report the bridge is to be constructed as represented in the annexed diagram. The bridge is represented to be 92 feet at the water's edge, above the low water line, on the Wheeling side, and on the island side 62 feet, deflecting from the water's edge at Wheeling to the island at the rate of 4 feet in 100.

The report also states that the flood of 1832, was 44½ feet above the low water level.

A supplemental bill was also exhibited by Complainant's counsel, setting forth that since the preparation of the original bill and service of notice, the defendants had proceeded with their work, and had stretched iron cables across the channel of the river so as to obstruct navigation. It prayed that these might be abated, and for relief, as in original bill.

Mr. Cadwallader, for defendants, objected to the supplemental bill being read, on the ground that notice of it had not been given, nor copy served.

EXPLANATION.

The above diagram taken from the Engineer's report, exhibits, on a reduced scale, the elevation of the Wheeling Bridge. The line A represents the high water mark of 1832. A line drawn points bb will represent the height of water at usual Spring floods, 35 feet. The summit of the eastern tower is 21¾ feet above the western tower.—*Engineer's Report*, 9. The average heig Louis steamboats is 65 feet. The packets 80 feet high, 60 feet broad.

The height of river at Wheeling, above low water level, as sworn to by the Wharf Master, is thus stated:

1828.	May, 31 feet.	1844.	March, 20 a 30 feet.
1839.	May, 20 a 30 feet.	1845.	March, 35 feet.
1840.	February, 38 feet.	1846.	March, 30 feet.
1841.	March, 31 feet.	1847.	Nov. and Dec., 30 a 35 feet.
1842.	March, 20 a 35 feet.	1848.	30 feet.
1843.	March, 20 a 30 feet.	**1849.**	**May, 31 feet.**

Mr. Stanton replied, that notice and service of copy was unnecessary. Copy of the original bill was furnished ex gratia, being required by no rule. He cited the Cherokee case.

Mr. Justice Grier. The supplemental bill may be read.

The Complainant's counsel then offered to read affidavits in support of the bill, to which defendants' counsel objected on the ground that they were now ready to file their answer, and that it could not be contradicted by affidavits.

This objection was overruled on the ground that, although the statute required notice to be given to the defendants of the application for an injunction, yet the proceeding before a single judge was in its nature ex parte, and the complainant has a right to proceed in the usual way, and the defendants would afterwards be permitted to read their answer, which should then have its due and legal effect, valeat quantum valeat; that the answer not being actually on file, the judge was not bound officially to know that there was one, especially as the subpoena had not yet issued; and although it is the universal practice in the English courts of chancery to dissolve and to refuse to renew an injunction which has been granted ex parte on the coming in of the answer, provided the answer denies the circumstances on which the equity of the bill is founded, and not to receive affidavits to contradict the answer; yet the judge did not think it proper to receive the answer in that state of the proceedings to anticipate the complainants' case, in a proceeding in its nature ex parte, saying, to the counsel, if, when your turn comes to be heard, you read your answer, and it is found to deny the facts alleged in the bill, we will then decide whether it shall be received as conclusive, or only, (as is the practice in the circuit court in patent cases,) as an affidavit of the defendants. As yet, we do not know that the affidavits will contradict the answer.

The Complainant's counsel then read affidavits to show among other things:

1. The amount of steamboat trade and commerce of the Ohio, between Pittsburgh and the ports of Cincinnati, Louisville, St. Louis, New Orleans and other places on the Ohio and Mississippi rivers.

2. That a large portion of the steamboats engaged in this trade are owned and navigated in whole or in part by citizens of Pennsylvania.

3. That the principal steamboats engaged in this trade require for free passage from 60 to 80 feet space above the water surface, and as now con-

structed, cannot, on high water, pass the bridge at Wheeling.

4. That the present diameter and height of their chimneys has been found by experience to be essential to their speed and capacity, and cannot be reduced without impairing the fitness of the boats for profitable and useful trade and commerce.

5. That their chimneys cannot be lowered so as to pass the bridge at Wheeling on high water, without changing their construction, at a great expense; and the process of lowering and hoisting will always be attended with expense, delay and imminent hazard to the safety of the boat, its crew and passengers, – chimneys being 6 feet in diameter and over 40 feet above the hurricane deck.

6. That the Pittsburgh packets, and other boats of the largest class have been accustomed to navigate the river to and from Pittsburgh, at their present height, and no boats lower their chimneys except when compelled by the state of water in the river to pass through the canal around the falls at Louisville.

7. That the boats accustomed to lower at Louisville are built with reference to passing through the canal, and are much smaller in size and capacity then the Pittsburgh packets, and other boats accustomed to navigate the rivers in high waters.

8. That in the opinion of many practical men it is impossible to reduce or lower the chimneys of such boats as are engaged in the packet trade. And that the bridge at Wheeling will so obstruct their navigation at high water, for which they are specially adapted, as in a great measure to exclude them from business and diminish their value – there being seven packets costing each from thirty to forty thousand dollars.

9. That the bridge at Wheeling will so obstruct navigation that a large portion of trade hitherto accustomed to pass and repass to and from Pittsburgh will be excluded from that port and other ports of Ohio and Pennsylvania above Wheeling.

10. That in the opinion of competent engineers, a bridge might be so erected as not to obstruct navigation.

Mr. Stanton, in support of the motion, claimed –

1. That any unauthorized obstruction to navigation of the Ohio, it being a public navigable river and common highway, is a public nuisance that may be enjoined by a court of equity having jurisdiction.

2. That the Wheeling bridge is an unauthorized obstruction to naviga-

tion of the Ohio river. Being erected by a private company over a public navigable river and common highway, the presumption is that it is a nuisance, and the burden is on the defendants to show that it is no impediment to navigation. That if the Virginia Charter authorizes the erection of the bridge, affecting as it does navigation of the Ohio, it is *a regulation of commerce;* that it operates to give a preference, by a regulation of commerce, to the ports of one state over another, and is therefore void on both grounds, being against these provisions of the Constitution of the United States: – Congress shall have power to regulate commerce. Article I, sec. 88, 4th clause. No preference shall be given by any regulation of commerce to the ports of one state over those of another. Article 1, sec. 9, 5th clause. That the bridge now erecting is not in compliance with the terms, and is, therefore, unauthorized by the Charter granted by the Virginia General Assembly. Although the charter does not prescribe the height of the bridge by specific number of feet, it refers to a well ascertained mark, known and recognized by the Company "the highest flood heretofore known," admitted by the Company, to be 44½ feet above low water level. It directs the bridge to be erected so as not to obstruct navigation by steamboats at that height. That direction is an imperative condition. *Drew. Inj.* 295. The Company cannot enlarge their franchise on the ground that this was an extraordinary flood, and may never again happen. They must come up to the standard prescribed by their charter or lose its protection.

They took the charter *cum onere*, and as was said by Story, *J. in Charles River Bridge* v. *The Warren Bridge,* 11 *Peters*, 613 – "The moment the charter was accepted, the proprietors were bound to all the obligations of their contract on their part. The proprietors took the charter and must abide by their choice."

3. That free navigation of the Ohio river being a right belonging to citizens of Pennsylvania, she may sue in the Supreme Court of the United States to restrain an infringement of that right by citizens of another state, and any Judge of that Court may grant an injunction. The party complaining being a State, sueing citizens of another State, the Supreme Court of the United States has original jurisdiction. *Cons. Art.* 3, *Sec.* 7 – *Judicial Act,* 1787, *Sec.* 13 – 1 *Statutes at Large,* 80.

In vacation, an injunction may be granted by any Judge of the Supreme Court. *Judicial Act*, *March* 2, 1793, *Sec.* 5 – *Conkling's Treatise*, 12 – 1 *Stat-*

utes at Large, 333 – *Livingston* v. *Van Ingen*, 4 *Hall's American Law Journal*, 457 – 2 *Pet. U.S. Dig.* 457.

To these points numerous authorities were cited.

The defendants then filed to the original bill their answer, in which it was set forth,

That by the statutes of Virginia, referred to in the bill, the defendants are the delegates and trustees of certain franchises, part of the eminent domain of that state, exercisable within her territory.

That the sovereignty of Virginia over the place in which this erection is to be made, has never been ceded or surrendered. That the clause of the ordinance of 1787 which declared that,

"The navigable waters leading into the Mississippi and St. Lawrence, &c., shall be common highways, and for ever free to the citizens of the United States," &c., was not intended to operate within the reserved territory and sovereignty of Virginia.

That a free navigation is not to be understood as one free from such partial or incidental obstacles, as the best interests of society may render necessary, and does not prevent states from constructing in or over such rivers, such beneficial bridges or useful improvements of navigation, as may not materially obstruct them as highways.

That congress, in 1806, ordered a road to be constructed from Cumberland to the Ohio, and afterwards for its continuation from the western bank of Ohio, to the Muskingum river and Zanesville, and so on through the states of Ohio, Indiana, and Illinois. That this road was afterwards surrendered to the states through which it passed.

That the passage by ferry between Wheeling and Zane's island, was found dilatory and precarious by day, and ordinarily useless by night, being frequently impassable on account of ice, &c.

That a bridge being much desired by the people of Ohio and Virginia – acts were passed in 1816 by those states, authorizing a bridge across the river at Wheeling, but which provided that if such bridge should be so constructed as to injure the navigation of the said river, it should be treated as a public nuisance, and be liable to abatement as other public nuisances. And ten years were allowed for completion of the bridge.

That by an act of Virginia of 1836, certain facilities for the reorganization of the said company were conferred, and the time, by consent of Ohio, extended ten years longer – that this company constructed a bridge

from Zane's island to the Ohio, or western shore.

That on the 14th March, 1847, the legislature of Virginia passed an act reviving and continuing certain parts of the former acts, and providing for the reorganization of the corporation "with power to erect and keep a wire suspension toll bridge on and from Zane's island, to and upon the main Virginia shore or bank at the city of Wheeling."

That this act had the following proviso – "That if the said bridge shall be so erected as to obstruct the navigation of the Ohio river in the usual manner by such steamboats and other crafts as are now accustomed to navigate the same when the river shall be as high as the highest flood therein heretofore known, then, unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance, and abated accordingly."

That respondents were organized under this act in May, 1847, and an engineer appointed in July, 1847, who reported a plan which was published, and extensively circulated, and made contracts for its erection in September, 1847.

That the elevation of the bridge at the highest point over the channel is over 93½ feet above low water surface.

That for 18 months past it has been "steadily and notoriously progressed with;" that the persons at whose suggestion these proceeding are instituted, must have known it, and yet while all this expensive work was being done, no objections were made, but the work quietly permitted to progress, until nearly the whole cost of the bridge was expended, the first wires drawn over, and the bridge on the eve of completion.

The answer insists on the following grounds of objection to the proceedings.

1st. That if the evils imputed to this bridge were true, the persons injured might have remedy in the courts of Virginia, and her Attorney General is ready to institute proceedings by quo warranto or indictment.

2d. That the complainant has no corporate capacity to become a party to a suit in the supreme court, to protect or vindicate the rights of her citizens: and prays that this part of their answer may stand for a demurrer or plea, as well as answer.

3d. The defendants admit that the citizens of Pennsylvania in common with the citizens of the whole United States, are entitled to the use of the

Ohio as a common or public highway, but claim that their bridge is not an obstruction, and is itself a connecting line of a great public highway, as important, as a means of inter-communication, as the navigation of the Ohio, and "claim the principle of concession and compromise, which enters so largely into the structure of our government." That this bridge will be very beneficial to the people of the neighboring states.

4th. That the State of Pennsylvania herself has set the example of authorizing bridges to be constructed across this stream no higher than this.

5th. That the report of certain engineers of the U.S. to Congress, in 1848, recommended a wire bridge, and gave as their opinion that "by an elevation of ninety feet, every imaginable danger of obstruction or endangering the navigation would be avoided."

Also, That certain reports of committees in Congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation, stating that a bridge *can be erected that will not offer the slightest obstruction to the navigation*.

6th. That the objections to the bridge are only to the insufficiency of headway for steamboats, and they aver that the headway left is amply sufficient; that the highest usual rise of the river Ohio does not exceed thirty-eight and a half feet, but will not average thirty-five feet for spring floods, nor much exceed twenty-nine feet; that the flood of 1832 was an extraordinary flood which rose forty-four and a half feet above low water at Wheeling, on the 11th February, 1832; that landings and warehouses were under water, and the river too high for navigation – or if navigated, that boats might have passed over Zane's island.

7th. That for all useful purposes the pipes of steamboats need not exceed forty-seven feet above the water, and if the draft should not be sufficient at that height, that blowers might be added.

That chimneys might have hinges on them so that they could be lowered without much inconvenience.

That the bridge over the canal at Louisville does not give a headway of over fifty-six feet, and chimneys of greater height usually have hinges to accommodate themselves to it, and steamboats made with high chimneys and without hinges, should conform, "because the height of chimneys of steamboats above a certain limit involves secondary considerations of contingent and relative expediency or convenience rather than such as are of absolute importance or necessity in connexion with the material or indis-

pensable purposes of navigation."

8th. That the bridge will not be an *appreciable* inconvenience to boats of the *average class*, whose height, they aver, will not average over fifty-two feet, and not sixty-five feet as stated in the bill: but it is admitted that there are boats whose chimneys are of greater height, which is asserted to be unnecessary; or if necessary, they should be provided with hinges; that these high chimneys have been but lately brought into use, are of "*extravagant and unnecessary*" height, and "got up" by commercial rivals who promote these proceedings "in the name of a sovereign state, to destroy a useful and necessary work."

9th and lastly. That the bridge will not diminish or destroy trade between Pittsburgh and other ports, or do *irreparable* injury to the citizens of Pennsylvania.

Affidavits were also read to support the answer.

Mr. Cadwallader, for defendants, made the following points in argument, and cited authorities to sustain them: –

1. The State of Virginia had a right to construct this bridge through the agency of the defendants, as they were authorized to construct it by their charters.

2. The plan of construction adopted by the defendants in 1847, and since carried into effect, involves no obstruction of navigation as secured by the Federal constitution and legislation.

3. Navigators ought to adapt to the headway of a bridge so constructed such variable appliances as those by which the length of chimneys beyond a certain length may be regulated.

4. As the State of Pennsylvania gave her cotemporaneous sanction to a bridge of less headway over the same river, she, as complainant, would have had no standing in a Court of Equity to complain of its construction if her bill had been filed in proper season.

5. The present proceeding is too late, as well in reference to the effect of delay on the alleged equity of the bill as to the inappropriateness of an injunction to restrain a party from doing that which *is in a relative sense executed*.

6. The case is not between proper parties, or in the proper court. The only party entitled in right of sovereignty to proceed to try the question is the United States. If citizens of Pennsylvania were damnified, they, and not the State, should have been plaintiff. If the proceeding were otherwise

proper, the State of Virginia should be a party.

4. [Editor's note: The "4" should be a "7".] If the points in question involve subjects of known unsettled differences of opinion on the bench, which the Court would not decide on an interlocutory motion, a single judge will not do so.

8. The original bill and answer alone are properly before the judge. If the supplemental bill is to be regarded an opportunity will be given to make further answer.

9. The defendants having answered, affidavits will not be taken into consideration. If they should be considered, time will be given to obtain counter affidavits.

Mr. STANTON, *in reply*.

The right of the State of Virginia to construct a bridge will not protect the defendants, for she has required them so to erect their bridge as not to obstruct navigation. The plan recommended to Congress was rejected, and hence the greater wrong of defendants in adopting it, if theirs be the same. The defendants' charter does not compel boats to adapt their headway to the bridge, but commands that the bridge be adapted to the boats. If Pennsylvania has obstructed navigation by her bridges, that furnishes no excuse to these defendants, as she has not authorized them to do so.

No laches can be imputed to the State.

"No length of time will render a nuisance lawful, and therefore an acquiescence of twenty years, on the part of the public, in an interruption of their rights, will not divest those rights nor prevent the community from proceeding to abate or prosecute for the nuisance to which they have been subject." *Angell on Water Courses*, 213.

Even between individuals or private companies, delay while the acts done are only preliminary to the acts against which the plaintiff claims relief will not deprive the plaintiff of the benefit of his equity. *Drewry on Injunction*, 294. 1 *Railway Cases*, 653.

The charter provides that WHENEVER the bridge shall be found to obstruct navigation, it shall be abated as a common nuisance. 14 Sec. *Charter*.

The State of Virginia is not a necessary party. She has nothing to do with the bridge. Bonaparte *v*. Camden & Amboy Railroad, I Baldwin, 205. United States *v*. Osborn, 12 Peters, 265.

The State of Pennsylvania is properly complainant. By virtue of her sovereignty as a State, she is bound to protect her citizens in their com-

mon rights of trade, commerce and navigation. She may do it by forcibly abating the nuisance *à fortiori*, she may prosecute a peaceful remedy. Besides, as a mere corporation she is injured in her public works, and on that ground alone might sue in this court. There is no unsettled question in the case; it is a simple question of nuisance. The carter pronounces the penalty of abatement if it be a nuisance.

Nor need there by any question concerning the reading of affidavits against the answer, for the answer admits all the complainant's claim; it confesses the obstruction, and the defendants have proved, by their own engineer, that he knew before hand in adopting his plan that it would obstruct the packets in passing, and compel them to lower their chimneys.

OPINION BY MR. JUSTICE GRIER.

That the Wheeling Suspension Bridge is not such as was authorized by its charter, it will obstruct navigation of the Ohio river, and is a public nuisance.

That the Bridge Company are bound strictly by their charter, and cannot subject navigators to trouble, expense or delay. It is no excuse that the encroachment upon navigation is a small encroachment, or a little nuisance, nor is the additional cost and expense of properly constructing the bridge any excuse.

That as the State of Virginia has not authorized this bridge, she is not a necessary party to this proceeding.

That the present application is not too late, because there was no reason to anticipate that the defendants would violate their charter.

That the right of the State of Pennsylvania to proceed for an injunction against a nuisance to her citizens without her own territory, is a new question; but if she could not, on that ground, yet by reason of the injury to her own public works, it is probable that she may proceed in this Court.

The defendants are ordered to answer in thirty days; the cause will have precedence on the list, and on the first day of the next term of the Supreme Court of the United States the complainant has leave to move for an injunction as prayed for.

The owner of every boat which may be hindered or delayed in the meantime from passing along the river by the obstruction of the bridge, will have a clear remedy at law to recover damages against the Company, and the individuals engaged in its erection.

If the defendants proceed in the meantime to complete the bridge, they will gain no equity thereby; but if judgment be obtained against them, they will be compelled to abate the nuisance at their own expense.

By the fifth section of the Act of Congress, 7th of March, 1793, it is enacted, "that writs of ne exeat and injunction may be granted by any judge of the Supreme Court in cases where they might be granted by a Supreme Court or a Circuit Court;" and the second section of the third article of the Constitution of the United States gives original jurisdiction to the Supreme Court in cases in which a State shall be a party.

We shall not attempt to state the many facts brought to our notice by the very numerous depositions which have been read on both sides, or to determine their relative credibility in matters wherein they differ. It will be sufficient for the purposes of the present investigation to say, that the following facts are admitted or not denied by the answer, and are fully established by the affidavits.

1st. That the Ohio is a public navigable river and common highway, from its head at Pittsburgh to its mouth; and the citizens of Pennsylvania, and of the United States, have a right to navigate the same, and have carried on a valuable trade and commerce on the same with steamboats and other vessels.

2d. That the defendants, a private corporation, are constructing a bridge across the same, from Wheeling to Zane's Island.

3d. That this corporation is forbidden, by the law which created it, from erecting their bridge, "so as to obstruct the navigation of the Ohio river in the usual manner by such steamboats and other crafts as are now (in 1847) commonly accustomed to navigate the same, when the river shall be as high as the highest flood heretofore known," under the penalty of being treated as a common nuisance, and of being abated accordingly.

4th. That the bridge about to be erected will *not* suffer a large class of steamboats to pass down the usual channel of the river, in the highest flood heretofore known, (to wit., that of 1832.) Moreover that the daily packets from Pittsburgh to Cincinnati could not pass under it in the usual high floods of the spring, which rise from 30 to 35 feet, unless at considerable loss and expense in making hinges, or other contrivances, to lower their chimneys; – that these packets generally pass at night, and would incur, not only great trouble, but risk of property and lives, in *thus passing an inclined plane thirty feet lower at one end than the other*.

Now it is not my intention to give any opinion on the points which have been discussed with so much learning and ability by the counsel, as to the right of Virginia, or any other of the states of the Union, to erect bridges over navigable waters, the great highways of the commerce of the Union, which are open to all the citizens.

That such bridges have been erected by the authority of the states heretofore, is well-known; and being furnished with a drawbridge which permits vessels to pass without obstruction at a certain point, have been suffered to stand without complaint, notwithstanding that the passage along the greater portion of the channel has been obstructed, and the navigation of the whole channel has not been left open and free.

In these cases when a bridge cannot be erected at all, without in some measure affecting the freedom of navigation, it often becomes a matter of necessity that the franchise of navigation should be constrained and straightened to meet the exigency, and yield some of its rights for the sake of works of great public utility. How far the State which authorises such erections is to judge of this necessity, or whether the mere convenience of building a cheaper bridge would authorise such an obstruction to navigable waters, are questions of very great importance, but which we are not called upon here to decide, as they do not necessarily arise on this motion in the case.

If the State of Virginia had authorised the erection of a bridge 62 feet high at one end and 93 at the other, such as is now about to be erected, these questions might have risen. But she has not assumed to exercise any such authority over this stream. She has authorised a company to erect a toll bridge over the river Ohio, if it did not interfere with the navigation. She has made provisions in the act of incorporation to save this right of navigation free and full as it has ever existed, and if these directions had been complied with, or were intended to be observed by the Company, there would have been no ground of complaint. But the Company assume that this requisition of their charter is unreasonable and not binding on them, because such a flood as that of 1832 is not likely to occur soon again, and if it did, that boats could not run in such a flood. This may all be true, but not to the purpose in a question of authority. They assume also that they have a right to compel the navigation to yield to their convenience, and because steamboats, in order to enjoy the convenience of the Louisville canal, are compelled to have machinery to lower their

chimneys, that therefore the bridge company may compel all boats to undergo the same expense and trouble for the *sake of the navigation of the channel*.

They undertake to decide that high chimneys are not beneficial, though the experience of others has found that the speed of their boats has been greatly improved thereby; they allege also that other contrivances might be used to supersede their necessity. If a bridge could not be built unless by compelling the navigators to make this change in their vessels, and the State of Virginia had authorised a bridge that would require them, these allegations might possibly have availed the defendants as a justification or excuse – notwithstanding they have proceeded without the leave of Congress.

But the fact that it would require some thirty thousand dollars more capital to build the bridge of the height required by their act of incorporation, and that the capital of the company is not sufficient for the purpose cannot justify these claims of the company or authorise them to compel the navigators of the Ohio to incur expense and undergo trouble and danger to accommodate the small capital of the company, or their mere convenience. All grants of exclusive privileges being in derogation of public rights must be construed strictly. Those who claim a right to narrow the channel or obstruct the navigation of a great public highway must be held to strict and clear proof of their authority so to do.

"An act of Parliament," says Lord Eldon, "vesting in a company power for carrying into effect some public work is a contract of a peculiar character between the public and the individuals in whom powers are vested by the act." (1 *Swanst*. 250.) And in Blakemore *v*. Glamorganshire Canal Co. (1 *Myln* v. *Keen*, 164,) the same learned judge said, "if individuals go to Parliament and Parliament being satisfied that the railway or canal can be made at an expense of say £100,000, closes with their application and forms them into a company with power to raise money to that amount, that authority is given them in full confidence that the sum which they have asked and obtained powers to raise will enable them to execute the work. There is an agreement on the part of those who satisfy Parliament that they can and will do such a work for such a sum of money, and upon the faith of that understanding they get the authority to begin the work. But if they deceive Parliament, what right have they to complain if courts

of justice will not allow them to go on with the deception?"

"These acts of Parliament," says Baron Alderson, (2 *Young* & *Collier*, 611), "have been called parliamentary bargains made with each of the land owners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed.

"Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that not variation shall be made to his prejudice."

The same principle will certainly apply to those who claim franchises from the legislature which are derogatory to the public rights of free navigation. The Wheeling Bridge Company has contracted with the legislature of Virginia that they can build a bridge over the Ohio river with the sum of $200,000, which will not obstruct the navigation of the Ohio in the usual manner by steam boats, &c., when the river shall be as high as the highest flood therein heretofore known. If they cannot perform this contract to the letter they cannot allege such inability as a justification for building a lower bridge than they contracted or were authorized to build, or to compel the public to accommodate their steamboats to a necessity created by their own wrong. Nor can they vary the conditions upon which they have obtained a grant of their franchise to suit their own convenience or the amount of their funds. It is no justification of a purpresture or nuisance to a public navigable river, that it is but a *small* encroachment or a *little* nuisance, and not a total obstruction to the navigation, and only at particular seasons, or to vessels of a certain class that may get round, under, or over it by expenditure of money to accommodate themselves to the exigency without any great danger to persons or property.

The defendants by their answer admit that the bridge will obstruct the navigation by some boats. Their own witness, the engineer, swears that in adopting the plan he knew it would compel the packets "to bend their chimneys." No obstruction being authorized by the charter, the bridge is, upon their own showing, clearly a public nuisance.

The objection that the State of Virginia should have been made a party cannot be taken at this stage of the proceedings.

Nor is it perceived why the State should be made a party to proceedings against a nuisance not erected by her own officers or servants, or in pursuance of any authority granted by her. She might well answer: "you

have no right to call on me to defend or abate a nuisance whose erection I have not authorized [Editor's note: There should be a period here.] I have conferred no power on this corporation to impose conditions on those who navigate the Ohio, as to the construction of their steamboats or to compel them to the expensive and perhaps dangerous labor of lowering their chimneys in certain stages of water, nor to make an inclined plane across the river 30 feet lower at one end than at the other. I have recognised the right of all the citizens of the United States to navigate the river as well at high as at low stages of water, and have admonished the company that if they infringe upon these rights, it will be under the penalty of having their bridge abated as a nuisance."

On such a suggestion, as she might well make, she would be entitled to go out of court without further answer.

The objection "that the present proceeding is too late, and that plaintiffs are estopped in equity from complaining because they did not do it sooner" cannot be sustained – as the citizens of Pennsylvania had no right to presume from the preparations made by the company that they intended to erect their bridge in any other manner than that authorised by their charter, till their acts clearly indicated such an intention.

Nor do I think that the citizens of the State of Pennsylvania are barred from making this complaint, by the fact that the Legislature of Pennsylvania at one time authorised the erection of bridges over the mouths of the Alleghany and Monongahela at the head of the Ohio river, of no greater height than that now about to be erected by the defendants. These erections have been entirely abandoned probably for no other reason than because they would obstruct the navigation. Such an intention unexecuted cannot serve as a justification to others to erect obstructions to the navigation of the Ohio, without authority.

We come now to the objection "that this case is not between proper parties, or in the proper court; that the only party entitled in right of sovereignty to proceed to try the question, is the United States; and if citizens of Pennsylvania were damnified, they and not the State should have been plaintiff."

This objection certainly presents a question of no little difficulty, being without any precedent in point. "In case of purpresture the remedy for the crown is either by an information of intrusion at the common law, or by information at the suit of the Attorney General in Equity. In the case of a

judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture without being at the same time a nuisance, the court may direct an inquiry to be made whether it is most beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done; for the crown cannot sanction a public nuisance." (2 Story, Eq. 251.)

A court of equity will interfere in cases of nuisance, not only on the information of the attorney-general, but also upon the application of private parties directly affected by the nuisance. When private individuals suffer an injury, quite distinct from that of the public in consequence of a public nuisance, they will be entitled to an injunction and relief in equity.

Now, it is no doubt true, that the State of Pennsylvania cannot sue in the supreme court of the United States, by her attorney-general, as representing the crown, by virtue of her sovereignty. It may well be doubted also whether she can come into court, to complain for a nuisance to her citizens erected without her territory. The citizens of Pennsylvania are also citizens of the United States, and each one may sue in her courts where he suffers an injury distinct from the public in general, in consequence of a public nuisance erected without of the limits of Pennsylvania. In the case of The City of Georgetown *v*. The Alexandria Canal Company, (12 Peters, 92,) it was decided, that the Potomac river was a navigable stream, and part of the jus publicum, and any obstruction to its navigation would be a public nuisance; that a court of equity may take jurisdiction, in cases of public nuisance by an information filed by the attorney-general, and any individual who has suffered special damage from the erection, may maintain a private action, but that the corporation of the city of Georgetown had no power by their charter to protect and vindicate, in a court of justice, the rights of the citizens of the town in the enjoyment of their property, or in removing or preventing an annoyance to it.

I am not prepared to say that one of the states of this union has no more power to vindicate the right of her citizens than a borough corporation. If the states were entirely separate and independent, the sovereign alone could complain and obtain redress for a nuisance without her limits, kept up on a public river, contrary to compact or the law of nations. How far a state has lost this right by becoming a member of the union, which

has established courts where the citizens of each state, as citizens of the union, may obtain redress for such grievances, has not been decided, nor do I think it necessary to express any opinion on the point. It is true, also, that congress may be said to have more especial jurisdiction over the waters of the Potomac, within the District of Columbia, than over the other public rivers of the union, and that, therefore, the case just quoted is no authority for saying, that the proper proceeding in the present case, would have been by information in the name of the Attorney General: how far the United States may assume to be the trustee, and seized with all the rights of the crown on these great public highways, for the purpose of vindicating the rights of the citizens of the whole union, is a question, perhaps, not fully settled, but I am disposed to concur with my brother McLean, (in Spooner *v*. McConnel, 1 McLean, 359,) "that the United States through her law officer might well ask to have this nuisance abated," and that an information through her Attorney General in the circuit court would be sustained.

But assuming that the state of Pennsylvania cannot come into this court to complain of a nuisance erected without her borders, which is peculiarly injurious to her citizens and her commerce, (a doctrine which I am not prepared to assert or deny), she complains not only of injury to her citizens, but she alleges a peculiar injury to herself in her corporate capacity as a state. She is owner of immense and extensive improvements by canals and railroads, from which she receives a large income, which she alleges will be greatly injured by the erection of this nuisance. On this ground, if not on the other, she may probably be able to support her complaint, and give jurisdiction to the supreme court.

Having thus, in somewhat tedious detail, noticed the principal points of law so ably discussed by the learned counsel, I come now to the consideration of the question proposed by this motion. Has the complainant made out such a case, as will justify me, in assuming the responsibility of wielding the power of the whole court, in granting the injunction prayed for in this preliminary state of the proceedings?

"The issuing of an injunction is perhaps the highest, most delicate, and dangerous power, which can be confided to any judicial tribunal." The erroneous exercise of this power may operate to the irretrievable injury of the party enjoined, and for which he can have no legal redress in damages. "It is, therefore, never exercised in a doubtful case, or in a *new* one, which

does not come within the established rules of equity."

If a public nuisance is also a specific injury to the property of an individual, he has his remedy in equity, not because the act complained of is a nuisance, but on account of the irremediable injury to his private right of property. An injunction will not be granted in favor of an individual who claims only a common right in a highway in which he can have no private property, unless it is accompanied with an obstruction or destruction of a private right. No instance can be found, (says Lord Brougham, 3 Milne and Keene, 169,) of the interposition by injunction in the case of merely eventual or contingent nuisance.

Lord Eldon appeared at one time (Attorney General *v*. Cleaver, 16 Veasy, 238,) to think that there was no instance of an injunction to restrain nuisance *without a trial*, but though this cannot be maintained, yet no instance can be found where it has been ordered *on a motion exparte*, in case of a private individual, unless *where he was about to suffer some irremediable injury before the cause could be brought to a hearing, and for which he could have no sufficient remedy by action at law*.

In the application of these principles, the complainant must in this court be considered as a mere corporation or private person, even supposing she may represent her own citizens, and must show that unless the special injunction be granted before this cause can be brought to a hearing, or before she can have an opportunity of making an application to the court, she will suffer some irremediable injury; otherwise, a single judge will not be justifiable in exercising this delicate and dangerous power which has been confided to *the court*.

While I will not *evade* responsibility, when it is clearly my duty to assume it, I will decline the exercise of doubtful or dangerous powers, unless in a case of absolute necessity. While a complainant has a right to demand a fearless performance of duty, the defendants have an equal right to protest against a rash exercise of power.

The application of the principles I have stated to the facts of this case, will result in refusing without prejudice an injunction before the sitting of the Supreme Court, for the following reasons –

1st. Because the question of the plaintiff's right to prosecute this suit is *new*, and involves the jurisdiction of the court. For if the state of Pennsylvania is not entitled to prosecute such an action, the supreme court can have no original jurisdiction in the case.

2d. The injury threatened is not imminent and certain, but contingent. It may or may not happen before the final hearing of this cause, or before this application may be renewed before the court. In the meanwhile, this cause may be brought to a final hearing, the cause being now at issue, and having preference on the list. And on the first Monday of December next, the plaintiff will have an opportunity of moving the court for an injunction on the bill and answer, when the question of jurisdiction can be finally decided. Nor is there any evidence to justify the supposition, that in the meantime the income of the Pennsylvania improvements will be materially affected.

3d. The injury will not be irremediable, if any should occur; as the owner of every boat which may be hindered or delayed in the meantime from passing along the river by this obstruction, will have a clear remedy at law, to recover damages against the company and the individuals engaged in its erection.

4th. If the defendants proceed in the mean time to complete the bridge, they will gain no equity thereby; but if judgment be obtained against them, they will be compelled to abate the nuisance at their own expense.

It is therefore ordered, That said bill and supplemental bill, answers, and exhibits here read, be filed in the Clerk's Office of the Supreme Court of the United States, and that the defendants answer the amendment and supplemental bill within thirty days, and that on the first day of the next term of the Supreme Court of the United States, the complainant have leave to move for an injunction as prayed for in said original and supplemental bills, and that this order and notice be entered by the clerk on the docket of said court.

Having examined the foregoing report, I find the same to be correct.

R.C. GRIER.

Philadelphia, *Sept*. 1, 1849.

5 Rapp no. 6 (1934)

SOLOVAY V. BONVILLE REALTY CO.

HEADNOTE

by Ira Brad Matetsky

Source: Papers of Harlan Fiske Stone, Box 78, Manuscript Division, Library of Congress, Washington, D.C.

Opinion by: Harlan Fiske Stone (stated in source).

Opinion date: January 5, 1934 (stated in source).

Citation: Solovay v. Bonville Realty Co., 5 Rapp no. 6 (1934) (Stone, J., in chambers), 1 J. In-Chambers Practice 305 (2016).

Additional information: This opinion was typed in letter form on a sheet of plain paper. The copy in the file does not bear a signature, although the original presumably had one.

OPINION

January 5, 1934

Benjamin Solovay, Esq.,
16 Court Street,
Brooklyn, New York. Solovay et al. v. Bonville Realty Co., Inc. et al.

Dear Sir:

I have examined your petition for the allowance of an appeal in the above case. The record does not disclose that at any stage of the proceedings you raised or presented to the court for decision any question arising under the laws and Constitution of the United States. I am, therefore, constrained to deny your application because the record shows a want of any properly presented federal question.

All papers are returned herewith.

Yours very truly,

Harlan F. Stone

5 Rapp no. 7 (1938)

MURPHY V. NEW YORK

HEADNOTE

by Ira Brad Matetsky

Source: Papers of Harlan Fiske Stone, Box 79, Manuscript Division, Library of Congress, Washington, D.C.

Opinion by: Harlan Fiske Stone (stated in source).

Opinion date: March 29, 1938 (stated in source).

Citation: Murphy v. New York, 5 Rapp no. 7 (1938) (Stone, J., in chambers), 1 J. In-Chambers Practice 306 (2016).

Additional information: This opinion was typewritten on a plain sheet of paper. It does not bear a caption, but the name of the case is given in a letter from counsel for the petitioner, located in the same folder.

OPINION

In this case I do not find that the record shows that the action of the trial court in denying the motions made at the close of the state's case, and at the close of the whole case, necessarily involved any ruling on the constitutional question. For all that appears, the denial of the motions may have been on the ground that there was sufficient evidence to go to the jury without the aid of the statutory presumption. There seems to be no specific exception to the court's charge to the jury that it should consider the presumption, and no request on constitutional grounds to charge otherwise.

I deny the application for leave to appeal, without prejudice to appellant's application to another Justice.

Harlan F. Stone
Associate Justice, Supreme
Court of the United States

Washington, D.C.
March 29, 1938

5 Rapp no. 8 (1952)

BROTHERHOOD OF LOCOMOTIVE FIREMEN V. UNITED STATES

HEADNOTE

by Ira Brad Matetsky

Source: Papers of Stanley Forman Reed, Box 175, Public Policy Archives, Special Collections and Digital Programs, University of Kentucky Libraries, Lexington, Ky.

Opinion by: Stanley Forman Reed (collection in which source was found).

Opinion date: May or June 1952.

Citation: Brotherhood of Locomotive Firemen v. United States, 5 Rapp no. 8 (1952) (Reed, J., in chambers), 1 J. In-Chambers Practice 307 (2016).

Additional information: This opinion was typed on a sheet of plain paper, with no signature or space for one. It is captioned as an "Order," but contains a sufficiently reasoned explanation of Justice Reed's reasons for his decision as to qualify as an in-chambers opinion by the standards of these volumes. The opinion is undated, but must have been issued between May 9, 1952, when a stay was denied by the court below, and June 9, 1952, when the Supreme Court granted the petition for certiorari and vacated the District Court's orders as moot. *Brotherhood of Locomotive Firemen v. United States*, 343 U.S. 971 (1952).

OPINION

ORDER

The application for stay of the preliminary injunction issued by the United States District Court for the Northern District of Ohio in the above case was presented to me as a Justice of this Court.

The preliminary injunction enjoined the Brotherhood from continuing or resuming the strike then in existence on March 11, 1952, against which the complaint was filed. The District Judge entered his temporary injunc-

tion after a balancing of the damage or injury which would be suffered by the United States by denial of its application for injunction against the damage or injury to the Brotherhoods by entering the temporary injunction. He looked beyond the existing strike against the Terminal Railroad Association of St. Louis and the New York Central lines west of Buffalo to the possible effect of a general railroad strike and determined that it was evidence that such eventual strike was contemplated. After this weighing of the equities, the judge entered the preliminary injunction.

I am advised that a stay of the injunction was refused on May 9, 1952, by a circuit judge of the Sixth Circuit.

An appeal was taken to the 6th Circuit from the order of the District Judge and a petition for certiorari has been filed in this Court under §1254(1) to bring the cause here for determination prior to the determination of the issue by the Court of Appeals.

On consideration of the issues and the present status of the case, I do not think a temporary injunction should be stayed and decline the application for a stay.

5 Rapp no. 9 (1957)

UNITED STATES OVERSEAS AIRLINES, INC. v. COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A.

HEADNOTE

by Ira Brad Matetsky

Source: Papers of Felix Frankfurter, Box 220, Manuscript Division, Library of Congress, Washington, D.C.

Opinion by: Felix Frankfurter (stated in source).

Opinion date: September 9, 1957 (stated in source).

Citation: United States Overseas Airlines, Inc. v. Compania Aerea Viajes Expresos de Venezuela, S.A., 5 Rapp no. 9 (1957) (Frankfurter, J., in chambers), 1 J. In-Chambers Practice 309 (2016).

Additional information: This opinion was typed on a sheet of plain paper. The copy in the file bears a typewritten signature.

OPINION

SUPREME COURT OF THE UNITED STATES

No. _____, Oct. Term 1957

UNITED STATES OVERSEAS AIRLINES, INC., ET AL.,
Petitioners,
vs.
COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A.,

ET AL.

If this Court grants review by way of writ of certiorari of a lower court, it may become appropriate, by means of auxiliary relief, to maintain things in status quo in order to avoid frustration of a potential reversal of such a judgment. In view of this, the moving papers before me would justify a stay of the mandate from issuing from the Court of Appeals if I

had a warranted belief in the likelihood of the contemplated petition for certiorari being granted when it can come before the Court. I am duly mindful that varying views not infrequently guide individual members of the Court in passing upon such petitions. Being so mindful, I think the widest toleration for the possible views of others should be indulged. But I cannot ultimately escape responsibility for determining whether any of the issues involved in this litigation lay bare any of the considerations which would warrant the granting of a petition for certiorari under our Rule 19. Since I cannot remotely believe that any such consideration is presented by this litigation, I do not feel justified in overriding denial of application for a stay of mandate by the Court of Appeals for the Second Circuit.

Although I must act on my convictions, I do so without prejudice to an application to another of the Justices.

/S/ Felix Frankfurter
Associate Justice of the Supreme Court of the United States

Dated this ninth day of September, 1957

5 Rapp no. 10 (1958)

VIGDOR V. YOUNG

HEADNOTE

by Ira Brad Matetsky

Source: Papers of Felix Frankfurter, Box 220, Manuscript Division, Library of Congress, Washington, D.C.

Opinion by: Felix Frankfurter (stated in source).

Opinion date: July 1958.

Citation: Vigdor v. Young, 5 Rapp no. 10 (1958) (Frankfurter, J., in chambers), 1 J. In-Chambers Practice 311 (2016).

Additional information: This opinion was typed on a sheet of plain paper. It is undated, but bears a stamp stating "OCT. TERM 1958 U.S. Supreme Court" at the top. It must have been issued sometime between approximately July 25, 1958 – 90 days after the D.C. Circuit issued its denial of rehearing decision in *Vigdor v. Young*, 254 F.2d 333 (D.C. Cir. Mar. 13, 1958), *rehearing denied* (D.C. Cir. Apr. 25, 1958) – and August 4, 1958, a future date mentioned in the opinion. The petitioner's name at the top of the opinion is cut off in the file copy, but the full name of the case is clear given the D.C. Circuit's opinion and the Supreme Court's denial of certiorari in *Vigdor v. Young*, 358 U.S. 854 (Oct. 13, 1958).

OPINION

[Blossom Vigdor v.] Phillip Young, Chairman, et al., Members, U.S. Civil Service Comm., and H.V. Higley, Administrator of Veterans Affairs.

Considering the generous time – ninety days – that Congress has allowed for petitioning for a writ of certiorari in a case like this it seems to me inexcusable to wait till the eve of the very last day before expiration of the ninety days to ask for an extension of time. The petition for certiorari, one cannot too often repeat, does not call for and indeed precludes extended arguments on the issues affording "special and important reasons" for bringing a case here. The fact of the matter is that in the application for

extension of time the essence of the claim on which petitioner seeks a writ to review the judgment of the Court of Appeals for the District of Columbia is set forth. Accordingly, I shall treat this application for an extension of time as though it were the petition for certiorari, with leave to the applicant to file a formal petition setting forth a brief elaboration of the claim that he makes in his application for extension, provided such formal petition will be filed not later than Monday, August 4.

[signed] Felix Frankfurter
Associate Justice, Supreme Court of the United States